

Christchurch
New Zealand
17 January 2023

To the Chief Directorate: Legislative Development/ for the attention of Tsietsi Sebelemetja

RE: Invitation for public comment on the Criminal Law (Sexual Offences And Related Matters) Amendment Bill, 2022

Dear Minister and Deputy Minister of Justice,

My name is Lavanya Pillay, and I am a South African PhD candidate at the University of Otago, New Zealand. My thesis is about sex workers' experiences during the Covid-19 pandemic, and I am writing to include my comment on the proposed decriminalisation of sex work in South Africa. My doctoral topic directly relates to the legislative environments in which sex work takes place and it is within this context that my commentary is framed. I will begin by thanking you for a bill that prioritises sex workers, includes sex workers in the decision-making process and recognises that sex work is a legitimate economic and occupational choice for many.

It is widely known that in countries where sex work is criminalised, like South Africa, sex workers are more vulnerable to rights' violations, face greater risks and dangers of violence and their exposure to inequality and discrimination is amplified¹. Added to these challenges, sex workers have also had to cope with the Covid-19 pandemic which has magnified the vulnerabilities and struggles for survival they already face². The impact of the Covid-19 pandemic exemplifies how criminalisation excluded sex workers in South Africa during the public health crisis, exacerbating an already problematic situation³. One of the ways in which this unfolded was when sex workers could not access South African government financial, and emergency relief to those in need during

¹ Amnesty International. (2016). Sex workers at risk A research summary on human rights abuses against sex workers. <https://www.amnesty.org/en/documents/pol40/4061/2016/en/> | Mgbako, C., & Smith, L. A. (2010). Sex work and human rights in Africa. *Fordham international law journal*,33(4), 1178. | UNAIDS. (2009-2012). UNAIDS Guidance Note on HIV and Sex Work(UNAIDS/09.09E / JC1696E). https://www.unaids.org/sites/default/files/media_asset/JC2306_UNAIDS-guidance-note-HIV-sex-work_en_0.pdf | Scorgie, F., Chersich, M. F., Ntaganira, I., Gerbase, A., Lule, F., & Lo, Y.-R. (2012). Socio-Demographic Characteristics and Behavioral Risk Factors of Female Sex Workers in Sub-Saharan Africa: A Systematic Review. *AIDS and behavior*,16(4), 920-933. <https://doi.org/10.1007/s10461-011-9985-z> | Gould, C., & Fick, N. (2008). Selling sex in Cape Town: Sex work and human trafficking in a South African city. *Institute for Security Studies, Pretoria/ Tshwane*. | Manoeck, S. (2012). "Stop Harassing US! tackle real crime!" A report on human rights violations by police against sex Workers in South Africa. . <http://www.sweat.org.za/wp-content/uploads/2019/09/Stop-Harrasing-Us-Tackle-Real-Crime.pdf> | Richter, M., Luchters, S., Ndlovu, D., Temmerman, M., & Chersich, M. (2012). Female sex work and international sport events -no major changes in demand orsupply of paid sex during the 2010 Soccer World Cup: a cross-sectional study. *BMC public health*,12, 763. <https://doi.org/10.1186/1471-2458-12-763> | NSWP, (2022). Briefing paper- How Sex Work Laws Are Implemented on the Ground and Their Impact on Sex Workers https://www.nswp.org/sites/default/files/en_regional_briefing_paper_-_legal_case_studies_nswp_-_2022_final.pdf

² Burgos, C. R., & Del Pino, F. J. (2021). 'Business can't stop.' Women engaged in prostitution during the COVID-19 pandemic in southern Spain: A qualitative study. . *Women's Studies International Forum*,86. <https://doi.org/https://doi.org/10.1016/j.wsif.2021.102477> | Callander, D., Meunier, E., DeVeau, R., Grov, C., Donovan, B., Minichiello, V., Kim, J., & Duncan, D. (2021). Investigating the effects of COVID-19 on global male sex work populations: a longitudinal study of digital data. *Sexually Transmitted Infections*,97, 93-98. <https://doi.org/10.1136/sextrans-2020-054550> | Dziuban, A., Moźdrzeń, M., & Ratecka, A. (2021). "Very little but a lot." Solidarity within the sex workers' community in Poland during the COVID-19 pandemic. *Gender, Work & Organization*. <https://doi.org/10.1111/gwao.12677> | Fedorkó, B., Stevenson, L., & Macioti, P. G. (2021). Sex workers on the frontline: An abridged version of the original ICRSE report: 'The role of sex worker rights groups in providing support during the COVID-19 crisis in Europe'. *Global Public Health*, 1-10. <https://doi.org/10.1080/17441692.2021.1945124> | Lam, E. (2020). Pandemic sex workers' resilience: COVID-19 crisis met with rapid responses by sex worker communities. *International Social Work*,63, 777-781. <https://doi.org/10.1177/0020872820962202> | Singer, R., Crooks, N., Johnson, A. K., Lutnick, A., & Matthews, A. (2020). COVID-19 prevention and protecting sex workers: a call to action. *Archives of Sexual Behavior*,49, 2739-2741. <https://doi.org/https://doi.org/10.1007/s10508-020-01849-x> | Armstrong, L. (2020). COVID-19 illuminates discriminatory sex work policies. Scotland, Ireland and New Zealand have dealt with sex workers very differently during the pandemic, and the results are telling. Retrieved 9 October 2021, from <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/covid-19-illuminates-discriminatory-sex-work-policies/> | NSWP, (2020). Smart Sex Worker's Guide to Community-led Responses to COVID-19 https://www.nswp.org/sites/default/files/sg_to_community-led_responses_to_covid-19_prf03.pdf

³ Chakvinga, P. (no date). Pamela speaks out on COVID-19. Retrieved 7 October 2021, from <https://aidsfonds.org/pamela-speaks-out-on-covid-19> | Side-lined: Experiences of sex workers throughout the lockdown; | Geldenhuys, K. (2021). Sex workers: the forgotten faces during the COVID-19 lockdown *Servamus Community-based Safety and Security Magazine* Vol. 114, No. 2 | Mlambo & Masuku, (2022). We are human beings: The social support to commercial sex workers during COVID-19 in the criminalised setting at uMhlathuze Local Municipality, KwaZulu-Natal, South Africa. *The Social Science Journal*. DOI: 10.1080/03623319.2022.2126290

the pandemic⁴. This resulted in undermined efforts to curb the spread of the virus because with no government support, many sex workers were forced to continue to work for their survival⁵. Thwale explained that during the pandemic sex workers were “forced to operate on the margins, in dangerous circumstances, without the protections enjoyed by other workers” with loss of income and housing, food scarcity, inability to access healthcare and essential services, violence, and police brutality⁶ reported by many sex workers during this time. Being among the most marginalised of all workers in the country⁷, the Covid-19 pandemic placed a spotlight on the inequities that sex workers face⁸ and, “made an already bad situation, much worse⁹”.

Who did sex workers have to call on during this time of great need? The burden fell to sex worker organisations¹⁰ and their partner organisations who filled the governmental gap and answered their calls...The organisations provided emergency and relief supplies to sex workers¹¹, including food parcels and a range of medications procured from non-governmental stakeholders¹² as well as providing sex workers with COVID-19 hygiene and safety guidelines to reduce infection risks¹³. Crowdfunding was also initiated by the organisations to raise money for sex workers in need¹⁴. It was a dire time, and the aftermath is still very real for many sex workers.

Had sex work not been criminalised in SA, sex workers could have been better protected from a labour, health and human rights perspective during the Covid-19 pandemic. To gain an idea of what these protections could look like, let’s divert our attention to the New Zealand context...In New Zealand, sex work is considered a

⁴ Adebisi et al 2020. Sex Workers Should not Be Forgotten in Africa’s COVID-19 Response. *Am. J. Trop. Med. Hyg.*, 103(5), 2020, pp. 1780–1782 | Chakvinga, P. (no date). Pamela speaks out on COVID-19. Retrieved 7 October 2021, from <https://aidsfonds.org/pamela-speaks-out-on-covid-19> | Geldenhuys, K. (2021). Sex workers: the forgotten faces during the COVID-19 lockdown *Servamus Community-based Safety and Security Magazine* Vol. 114, No. 2 | Mlambo & Masuku, 2022 We are human beings: The social support to commercial sex workers during COVID-19 in the criminalised setting at uMhlathuze Local Municipality, KwaZulu-Natal, South Africa. *The Social Science Journal* DOI: 10.1080/03623319.2022.2126290

⁵ Mlambo & Masuku, (2022). We are human beings: The social support to commercial sex workers during COVID-19 in the criminalised setting at uMhlathuze Local Municipality, KwaZulu-Natal, South Africa. *The Social Science Journal* DOI: 10.1080/03623319.2022.2126290 | Sonke Gender Justice (2021) Side-lined: Experiences of sex workers throughout the lockdown <https://genderjustice.org.za/publication/side-lined-experiences-of-sex-workers-throughout-the-lockdown/> | Geldenhuys, K. (2021). Sex workers : the forgotten faces during the COVID-19 lockdown *Servamus Community-based Safety and Security Magazine* Vol. 114, No. 2

⁶ Heüer, L., Lessing, M., & Luthuli, L. (2020). Human rights organisations call on South African government to address the plight of sex workers during Covid-19 crisis in the interest of all South Africans https://www.chr.up.ac.za/images/centrenews/2020/Human_rights_organisations_call_on_South_African_government_to_address_the_plight_of_sex_workers_during_COVID-19_crisis_in_the_interest_of_all_South_Africans.pdf

⁷ Geldenhuys, 2021- Sex workers : the forgotten faces during the COVID-19 lockdown *Servamus Community-based Safety and Security Magazine* Vol. 114, No. 2

⁸ Armstrong, L. (2020). COVID-19 illuminates discriminatory sex work policies. Scotland, Ireland and New Zealand have dealt with sex workers very differently during the pandemic, and the results are telling. Retrieved 9 October 2021, from <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/covid-19-illuminates-discriminatory-sex-work-policies/> | Amnesty International. (2020). Include sex workers in the Covid-19 response. Retrieved 22 July 2021, from <https://www.amnesty.org/download/Documents/POL3027882020ENGLISH.pdf?fbclid=IwAR0AHL8LUxrP2M4JGfn4Zm8yDaDMIFenwgzi1bN7LFdkgb4H9meV9SeUoo> | Burgos, C. R., & Del Pino, F. J. (2021). ‘Business can’t stop.’ Women engaged in prostitution during the COVID-19 pandemic in southern Spain: A qualitative study. *Women’s Studies International Forum*, 86. <https://doi.org/https://doi.org/10.1016/j.wsif.2021.102477> | Callander, D., Meunier, E., DeVeau, R., Grov, C., Donovan, B., Minichiello, V., Kim, J., & Duncan, D. (2021). Investigating the effects of COVID-19 on global male sex work populations: a longitudinal study of digital data. *Sexually Transmitted Infections*, 97, 93-98. <https://doi.org/10.1136/sextrans-2020-054550> | Lam, E. (2020). Pandemic sex workers’ resilience: COVID-19 crisis met with rapid responses by sex worker communities. *International Social Work*, 63, 777–781. <https://doi.org/10.1177/0020872820962202> | Singer, R., Crooks, N., Johnson, A. K., Lutnick, A., & Matthews, A. (2020). COVID-19 prevention and protecting sex workers: a call to action. *Archives of Sexual Behavior*, 49, 2739–2741. <https://doi.org/https://doi.org/10.1007/s10508-020-01849-x>

⁹ These are the sentiments from many sex workers I am conducting research with

¹⁰ NSWP 2020, Covid-19 Impact Survey- Africa https://www.nswp.org/sites/nswp.org/files/covid-19_impact_report_-_africa_-_nswp_-_2020_.pdf Organisations include SWEAT, Sisonke National Sex Worker Movement in South Africa, Asijiki Coalition

¹¹ Southern Africa Litigation Centre. (2020). The impact of the Covid-19 pandemic on sex workers in Southern Africa. <https://www.southernafricalitigationcentre.org/wp-content/uploads/2021/02/Impact-of-COVID-19.pdf>

¹² Chakvinga, P. (no date). Pamela speaks out on COVID-19. Retrieved 7 October 2021, from <https://aidsfonds.org/pamela-speaks-out-on-covid-19>

¹³ NSWP, (2020). Impact of COVID-19 on Sex Workers in Africa. Retrieved 6 October 2021, from <https://www.nswp.org/news/impact-covid-19-sex-workers-africa>

¹⁴ Heüer, L., Lessing, M., & Luthuli, L. (2020). Human rights organisations call on South African government to address the plight of sex workers during Covid-19 crisis in the interest of all South Africans https://www.chr.up.ac.za/images/centrenews/2020/Human_rights_organisations_call_on_South_African_government_to_address_the_plight_of_sex_workers_during_COVID-19_crisis_in_the_interest_of_all_South_Africans.pdf

legitimate occupational choice. Sex work is decriminalised and the country has adopted policy that supports the integration of sex work into society's social institutions which provide labour and rights protections to sex workers¹⁵.

During the Covid-19 pandemic most¹⁶ sex workers in New Zealand could utilise safeguards to mitigate their income loss, provided by government labour support. Sex workers could apply for a Covid-19 Wage Subsidy benefit that enabled any worker in New Zealand to supplement their income whilst observing social distancing rules¹⁷. This subsidy was available for all those who lost income due to the pandemic and illustrates how sex workers are not treated differently from other occupational groups- and had support to stay safe when the Covid-19 lockdown was initiated¹⁸. Sex workers therefore had the privilege of choice and were not forced to continue working during the health emergency, thereby reducing their and others' risk to health and safety during the Covid-19 pandemic. This was only possible because the labour laws of the country facilitated the conditions for this safety net, which was only possible because sex work is not a criminal offence in New Zealand.

Decriminalisation of sex workers, clients and third parties offer the most protections for sex workers¹⁹ and the best way for sex workers to safely earn a living, which is a fundamental human right. The case for most sex workers in New Zealand during the Covid-19 pandemic has highlighted how legal rights and respect for sex workers are paramount during times of crisis to ensure they are not left behind and this is supported by the compelling evidence demonstrating the effectiveness of decriminalisation²⁰. In New Zealand decriminalisation has helped to increase the health and safety of workers. Sex workers report that their rights have improved and feel empowered to refuse clients since the passing of the Prostitution Reform Act in 2003. Street based sex workers report being more able to ensure their safety on the streets and have better relationships with the local police²¹. They are more likely to involve police when they witness or experience a crime and find it

¹⁵ **Abel, G. T., Doctor of Philosophy. (2010).** Decriminalisation : a harm minimisation and human rights approach to regulating sex work. University of Otago. <http://hdl.handle.net/10523/3362> | **Benoit, C., Smith, M., Jansson, M., Healey, P., & Magnuson, D. (2019).** "The Prostitution Problem": Claims, Evidence, and Policy Outcomes. Archives of Sexual Behavior,48(7), 1905-1923. <https://doi.org/10.1007/s10508-018-1276-6> | **Rottier, J. (2021).** Sex workers in New Zealand amid the Covid-19 crisis. Values and Limitations of a decriminalized sex industry. In D. Siegal (Ed.), Notes from isolation Global criminological perspectives on Coronavirus pandemic. (pp. 187-213). Eleven International Publishing.

¹⁶ excluding migrants- see section 19 of the PRA. Because of their illegal status, migrants were not able to access the same government subsidies and support during the lockdown as permanent resident sex workers in New Zealand.

¹⁷ **Armstrong, L., & Abel, G. (2020).** Why legal rights and respect for sex workers are paramount during times of crisis. Retrieved 10 October 2021, from <https://www.transformingsociety.co.uk/2020/07/22/why-legal-rights-and-respect-for-sex-workers-are-paramount-during-times-of-crisis/> | **Aroney, E. (2021).** Changing Minds and Changing Laws: How New Zealand Sex Workers and Their Allies Shaped Decriminalisation in New Zealand. Sexuality Research and Social Policy, 1-16. <https://doi.org/https://doi.org/10.1007/s13178-021-00564-z> | **Rottier, J. (2021).** Sex workers in New Zealand amid the Covid-19 crisis. Values and Limitations of a decriminalized sex industry. In D. Siegal (Ed.), Notes from isolation Global criminological perspectives on Coronavirus pandemic. (pp. 187-213). Eleven International Publishing. | **Sussman, A. L. (2020).** "Don't have to fight for pennies": New Zealand safety net helps sex workers in lockdown.The Guardian,1-6. <https://www.theguardian.com/world/2020/apr/28/dont-have-to-fight-for-pennies-new-zealand-safety-net-helps-sexworkers-in-lockdown>

¹⁸ **Aroney, E. (2021).** Changing Minds and Changing Laws: How New Zealand Sex Workers and Their Allies Shaped Decriminalisation in New Zealand. Sexuality Research and Social Policy, 1-16. <https://doi.org/https://doi.org/10.1007/s13178-021-00564-z> | **Rottier, J. (2021).** Sex workers in New Zealand amid the Covid-19 crisis. Values and Limitations of a decriminalized sex industry. In D. Siegal (Ed.), Notes from isolation Global criminological perspectives on Coronavirus pandemic. (pp. 187-213). Eleven International Publishing. | **Sussman, A. L. (2020).** "Don't have to fight for pennies": New Zealand safety net helps sex workers in lockdown.The Guardian,1-6. <https://www.theguardian.com/world/2020/apr/28/dont-have-to-fight-for-pennies-new-zealand-safety-net-helps-sexworkers-in-lockdown> | **Armstrong, L., & Abel, G. (2020).** Why legal rights and respect for sex workers are paramount during times of crisis. Retrieved 10 October 2021, from <https://www.transformingsociety.co.uk/2020/07/22/why-legal-rights-and-respect-for-sex-workers-are-paramount-during-times-of-crisis/>

¹⁹ UNAIDS, Human Rights Watch, Amnesty International; **Abel, G. T., Doctor of Philosophy. (2010).** Decriminalisation : a harm minimisation and human rights approach to regulating sex work. University of Otago. <http://hdl.handle.net/10523/3362> | **Benoit, C., Smith, M., Jansson, M., Healey, P., & Magnuson, D. (2019).** "The Prostitution Problem": Claims, Evidence, and Policy Outcomes. Archives of Sexual Behavior,48(7), 1905-1923. <https://doi.org/10.1007/s10508-018-1276-6> | **Armstrong, L., & Abel, G. (2020).** Why legal rights and respect for sex workers are paramount during times of crisis. Retrieved 10 October 2021, from <https://www.transformingsociety.co.uk/2020/07/22/why-legal-rights-and-respect-for-sex-workers-are-paramount-during-times-of-crisis/>

²⁰ **Harcourt, C., et al. (2010).** "The decriminalisation of prostitution is associated with better coverage of health promotion programs for sex workers. Australian and New Zealand Journal of Public Health, 34(5). <https://doi.org/10.1111/j.1753-6405.2010.00594.x> | **UNSW, 2012.** "The Sex Industry in New South Wales, A Report to the NSW Ministry of Health."

²¹ **Abel, G., Fitzgerald, L., & Brunton, C. (2009).** The Impact of Decriminalisation on the Number of Sex Workers in New Zealand. Journal of Social Policy,38. <https://doi.org/10.1017/S0047279409003080>

easier to be honest about their work to healthcare providers when accessing treatment²². It has also been shown that decriminalisation does not increase the number of sex workers²³ or incite people into sex work, neither does decriminalisation increase the likelihood of sex trafficking²⁴.

The intersection of race, gender, class, citizenship and social economic positioning makes sex work a very complex and complicated topic. While the debate on regulating sex work is undoubtedly contentious, it must be categorically stated that there exists sufficient evidence showing the Nordic model to be as dangerous as criminalisation²⁵. In no way does the Nordic model promote equality and considering this legal framework for South Africa will be as detrimental to the health and safety of sex workers as criminalisation has proven to be.

My ongoing work is allowing me to hear the in-depth narratives from sex workers which differ between those who are criminalised and who can participate freely in society within a decriminalised legislative environment. For people who choose sex work, be it out of free will or structural, economic and or political limited choice, sex work is a viable means to earn a living and support themselves and their families. Decriminalisation facilitates protective labour conditions for sex workers which is fundamental to rights protections for sex workers. Decriminalisation is a labour, human rights and health issue and the vulnerability of criminalised sex workers in the Covid-19 pandemic amplifies the calls to recognise sex work as an occupational choice so that sex workers' safety, economic stability, and human rights may be protected, especially during public health emergencies.

I hereby submit this commentary in full support of the decriminalisation of sex work in South Africa. I urge for a human rights approach to be applied to the regulation of sex work that is South African context specific and includes sex workers in the decision-making process so that sex workers can have the

- i) freedom and right of choice of work;
- ii) freedom to form unions and challenge unfair labour practices;
- iii) freedom from discrimination;
- iv) the right to the highest attainable standard of health;
- v) freedom and security including the rights to be free from arbitrary arrest and detention, right to be free from violence and the right to bodily and psychological integrity.

The late sex worker, "Chippo" always emphasized to me, "we are people, we are not victims that need to be saved, we choose this work, so treat us with dignity"- Minister and Deputy Minister of Justice, please decriminalise sex work in South Africa and work with sex workers in this process so that sex workers can have **dignity** "to live freely in this world²⁶".

Yours sincerely,



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²² Abel, G., Fitzgerald, L., & Brunton, C. (2009). The Impact of Decriminalisation on the Number of Sex Workers in New Zealand. *Journal of Social Policy*, 38. <https://doi.org/10.1017/S0047279409003080> | Abel, G. T., Doctor of Philosophy. (2010). Decriminalisation : a harm minimisation and human rights approach to regulating sex work. University of Otago. <http://hdl.handle.net/10523/3362> | Benoit, C., Smith, M., Jansson, M., Healey, P., & Magnuson, D. (2019). "The Prostitution Problem": Claims, Evidence, and Policy Outcomes. *Archives of Sexual Behavior*, 48(7), 1905-1923. <https://doi.org/10.1007/s10508-018-1276-6>

²³ UNSW, 2012, "The Sex Industry in New South Wales, A Report to the NSW Ministry of Health."

²⁴ GAATW, 2018 "Sex Workers Organising for Change: Selfrepresentation, community mobilisation, and working condition."

²⁵ Benoit, C., Smith, M., Jansson, M., Healey, P., & Magnuson, D. (2019). "The Prostitution Problem": Claims, Evidence, and Policy Outcomes. *Archives of Sexual Behavior*, 48(7), 1905-1923. <https://doi.org/10.1007/s10508-018-1276-6>

²⁶ Mgbako, C. (2016). To live freely in this world: sex worker activism in Africa. New York and London: New York University Press.