



South African Institute of Race Relations
The power of ideas

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TO: Chief Directorate: Legislative Development, Department of
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To whom it may concern,

**DRAFT CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT BILL,
2022**

1 Introduction

The Chief Directorate: Legislative Development of the Department of Justice and Correctional Services (**the directorate**) has invited public input on the draft Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2022 (**the Amendment Bill**) by 31 January 2023.

This submission is made by the South African Institute of Race Relations NPC (**the IRR**), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

2 Support for the Amendment Bill

The IRR wholeheartedly approves of and supports the initiative and the form of the Amendment Bill.

The Amendment Bill does three things. It decriminalises the sale and purchase of sexual services – sex work or prostitution – between consenting adults,¹ it expunges the criminal records of any consenting adult who has been convicted of sex work, and it ends any active criminal proceedings involving adult sex workers.

The IRR has throughout its history consistently advocated for the civil liberties of legal subjects to be respected and advanced. This is the primary role of a government

¹ By repealing the legislation that criminalised it.

according to the liberal worldview. The decriminalisation of sex work fits neatly into this imperative by undoing a pre-existing government infringement of civil liberty. As a general principle of public policy, peaceful individuals engaged in voluntary, consensual activities with one another must not be exposed to criminal jeopardy. Decriminalising sex work therefore increases freedom of interaction between consenting adults.

In a 2013 article for the *Georgetown Journal of International Law* motivating the decriminalisation of sex work in South Africa, experts from Fordham Law School point to New Zealand as the only country at the time to have fully decriminalised the profession.

The authors found, among other things, that decriminalisation in New Zealand resulted in sex workers being empowered to refuse service to specific clients and refuse to perform certain practices; that working conditions improved; better access to healthcare resulted; and sex workers had better access to justice when crimes were committed against them. It was also found that decriminalisation had not led to an increase in human trafficking, youth prostitution, or increased popularity of the profession.²

There nonetheless remain many considered views on the social harms of a permissive approach to sex work. Where sex work does pose harm, it is the IRR's view that this harm is better addressed through social pressure and light-touch regulation than by criminalisation and persecution.

In a 2019 report, Human Rights Watch and the Sex Workers Education & Advocacy Taskforce (SWEAT) found that there were no available national numbers for arrested or fined sex workers in South Africa. Nonetheless, surveys conducted in 2016/17 by civil society groups found that most sex workers had been arrested at least once, with the average being four times. SWEAT estimated in 2013 that there were between 132,000 and 182,000 sex workers active in South Africa. This number is likely to be significantly higher today.

Little over half of arrested sex workers have been required to pay a fine, about 12% were required to appear in court, and the remaining 31% were not charged, fined, or appeared in court after arrest. SWEAT and Sonke Gender Justice additionally found in 2018 that 33% of survey respondents had been sexually assaulted or raped by police officers.³

Sex work should properly have been decriminalised at the adoption of the current Constitution in 1996. Section 22 of the Constitution provides:

² Mgbako CA and Bass KG *et al.* 'The case for decriminalization of sex work in South Africa'. (2013). 44: *Georgetown Journal of International Law*. 1423-1454.

³ Wheeler S *et al.* 'Why sex work should be decriminalised in South Africa'. (2019). *Human Rights Watch*. <https://www.hrw.org/report/2019/08/07/why-sex-work-should-be-decriminalised-south-africa>.

“Every citizen has the right to choose their trade, occupation, or profession freely. The practice⁴ of a trade, occupation or profession may be regulated⁵ by law.”

This provision has remained unchanged despite the error of the Constitutional Court in *S v Jordan*,⁶ the 2002 judgment that upheld the ostensible constitutionality of the legal prohibition of sex work. The Amendment Bill represents the righting of this error.

The IRR also wishes to draw attention to the commendable brevity of the Amendment Bill. Government has exhibited a tendency in recent decades to publish legislation that often runs into the tens or even hundreds of pages. This has been a symptom of governments generally overextending themselves outside of their primary roles into ancillary areas of regulation best left to civil society to regulate itself. The Amendment Bill is a breath of fresh air in this regard.

3 Sex work and the existing legal framework

The decriminalisation of a hitherto unlawful profession entails (and might entail) significant legal consequences. These could be beneficial or deleterious.

The decriminalisation of sex work should be undertaken sensitively. In particular, the legal framework in which sex workers must henceforth operate must not be of such a nature that it makes practicing this trade excessively difficult or impossible. For example, if in future government introduces burdensome regulations or taxes on a now ‘regulated’ but not ‘prohibited’ profession, and these interventions have the effect of imposing a significantly higher burden of compliance on sex workers, the result might be that many choose to remain in the underground, informal and unmonitored market. Government should strive to make the transition from unlawful to lawful profession as seamless and painless as possible.

The fewer legal obstacles are interposed between a person wanting to work and a person wanting to hire someone to work, the better – for employment, for growth, and ultimately for human dignity.

As such, it is recommended that the legal regime that will follow the Amendment Bill be one of mere decriminalisation, rather than legalisation.

While sex work is regarded as a legitimate form of labour, the intimate and personal nature of sexual intercourse cannot be ignored. As such, it would be inappropriate, in our view, to bring to bear the whole host of labour restrictions, regulations, and institutions upon this profession. The Amendment Bill, as it stands, is a decriminalisation bill, and we propose the ensuing legal regime retain this character.

Mere decriminalisation would entail that while laws of general application would be applicable to the sex work profession, special or *ad hoc* laws for this profession in particular would not be. Therefore, sex workers will pay income and value-added

⁴ *The practice*, but not the *choice*. Any professional choice that does not necessarily involve the infringement of a constitutional right is a constitutionally protected choice.

⁵ *Regulated*, but not *prohibited*.

⁶ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 CC.

taxes, however there will be no new regime, for instance, an excise (or 'sin') tax, imposed on this profession. Additionally, the common law rule that a service provider may not recklessly endanger their clients will apply to sex workers, but there will be no additional 'health and safety' regulations that will burden the profession.

Nonetheless, it might be prudent to create exceptions for sex work in current or future law that might be inappropriately applied to this profession.

4 Public participation and SEIA

The Constitutional Court has held that citizens must be given 'a meaningful opportunity to be heard in the making of laws that will govern them'.⁷

A proper socio-economic impact assessment (SEIA) report on a proposed bill, as required by the SEIA system introduced by the Department of Planning, Monitoring, and Evaluation in 2015, offers a particularly important way of helping the public to be heard and engage in the law-making process, as the Constitution requires.

The Amendment Bill was not accompanied by a SEIA. The decriminalisation of sex work will have both social and economic consequences, and if only for record's sake, these must be quantified. Such a record will also allow the public to make more informed comments on the proposal.

As the Amendment Bill is still a draft, there remains time for the directorate to commission a SEIA and have it ready by the time the proposal is laid before the relevant parliamentary committee.

5 Recommendations

The IRR recommends that:

- the Amendment Bill must retain its brief and to-the-point character;
- the Amendment Bill must retain its character as a decriminalisation bill and not become a legalisation bill;
- no future legal provisions be adopted that render the decriminalisation of sex work into a legalisation of sex work – in other words, sex workers must not be burdened by *ad hoc* regulation;
- the Amendment Bill must be promulgated by the President at his earliest convenience to limit any further harm being done in terms of the old, repealed laws; and
- a socio-economic impact assessment must be drawn up on the Amendment Bill.

⁷ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 145.