

WOMEN'S LEGAL CENTRE SUBMISSION TO THE UN SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN - PROSTITUTION AND VIOLENCE AGAINST WOMEN AND GIRLS

1. The Women's Legal Centre ("the WLC")¹ welcomes the opportunity to make submissions to the UN Special Rapporteur on Violence Against Women its causes and consequences. These submissions are informed by our technical subject matter expertise on human rights and our intersecting work on sexual reproductive health and rights and women's rights to just and favourable working conditions. The WLC has worked very closely with sex workers² and organisations who advocate for the decriminalisation of sex work in South Africa, the region and internationally over the past twenty years. We provide legal advice, technical legal support and litigate on behalf of sex workers. Through our legal representation we extended legal recognition of sex work as work in South Africa in the case of *Kylie v The CCMA*³.
2. At the outset we need to state our concern for the language used in the background description of this call, which makes several inaccurate statements and perpetuates harmful language and stereotypes in respect of sex workers, the work that they engage in and the rights they are entitled to. The conflation of sex work and human trafficking which has a particular discriminatory historical context is such an example. Sex work in international law has always been regulated through a paradigm of sexual impropriety, morality informed by conceptions of women as property and thus lacking in agency and autonomy⁴. The first recorded consideration and attempts at criminal regulation of the trafficking of women for "immoral purposes" was enacted in 1904 under the Agreement for the Suppression of the "*White Slave Traffic*".
3. Implicitly embedded within the Convention was an understanding that the measures were for the protection of the moral virtue of white women only. The measures were directed towards the protection of women and girls, further, as the title of the Convention indicates, the criminal conduct being targeted was the trafficking in "*white women*". *Allian* notes that "[a]s for the racialized element of the term 'white' slave traffic, it was not happenstance; rather it was evident throughout the deliberation of the 1902 International Conference ...that the harm sought to be addressed was in regard to women of European stock..."⁵ A hallmark of the Convention was its understanding of "prostitution", which it defined as "*bringing women across borders for purposes of prostitution and was enacted into many national systems*". The systemic adoption of the Convention's definitions and understandings of sex work as inherently exploitative into national systems. The Convention has influenced contemporary understandings of sex work as inextricably linked to trafficking. Further it characterised sex work as involuntary

¹ The WLC is an African feminist legal centre that uses intersectionality to advance women's rights through strategic litigation, advocacy, education, and training. The WLC drives a feminist agenda from Cape Town, South Africa that appreciates women in their diversity and the impact that discrimination has on women within their different classes, races, ethnicities, sexual orientations, gender identity and other grounds of discrimination.

² Throughout this submission we will make use of the sex worker as that is what the women who sell sex in South Africa and who advocate for the decriminalisation of sex work call themselves. The term "prostitution" as used in the questionnaire calling for submissions is considered derogatory within the context in which we work.

³ *Kylie v Commission for Conciliation Mediation and Arbitration and Others (CA10/08) [2010] ZALAC 8* <http://www.saflii.org/za/cases/ZALAC/2010/8.html>

⁴ International Agreement for the Suppression of the "White Slave Traffic," 18 May 1904

⁵ Jean Allian "White Slave Traffic in International Law" *Journal of Trafficking and Human Exploitation* Vol 1, 1-40 (2017)

and criminal requiring abolition and sanctioning through heavy state intervention and violence. This approach disregarded sex worker's bodily autonomy and their rights to consent to transactional sex or that sex can be a transactional experience.

4. The Conventions definitions, understanding and moralistic abolitionist approach has seemingly made its way into the background that has informed this call for submissions and the questions being posed. This is unfortunate, because our human rights principles and standards have positively advanced within UN mechanisms and treaty bodies over the past years. International human rights implementation mechanisms have moved towards an implicit recognition that criminal regulation of sex work should be limited to only the exploitative and coercive aspects of the sex industry. In defining the term "*violence against women*", the Beijing Platform for Action 1995 included "*forced prostitution*"⁶. The delinking of consensual sex work away from coercive sex work is a leap forward in acknowledging the right to bodily integrity of women in general and sex workers in particular.
5. We also draw attention to the position held by the United Nations Working Group on discrimination against women and girls. Their reports issued in 2016, 2019⁷, 2020⁸ and recently in 2023⁹ all support the position for decriminalisation and make use of the terms sex work and sex worker to describe the profession and the work being undertaken. Their position is that polarizing debates which ignores the wealth of evidence in support of decriminalisation of sex work lead to direct harm to sex workers, women, and girls.
6. Several other United Nations agencies have publicly called and motivated for decriminalisation of sex work. These include the United Nations Programme on HIV/AIDS, the World Health Organisation, the United Nations Population Fund, and the United Nations Development Programme. These agencies all confirm that in order to give effect to the basic human rights of sex workers decriminalisation of sex work is necessary. In a joint declaration as far back as 2018¹⁰ UNFPA, UNDP and UNAIDS stated that "*Any conflation of voluntary adult sex work with trafficking in persons is an abuse of sex workers' human rights, and generally increases the risk of HIV and violence for both sex workers and trafficked women and girls, by driving it to be further hidden 'underground'.*"
7. Our international human rights framework is based on the principles of equality and non-discrimination and dignity for all. Article 2 of the Universal Declaration of Human Rights, as well as article 2 of the International Covenant on Economic, Social and Cultural (ICESCR) and article 2 of the Convention on the Elimination of all forms of Discrimination against women (CEDAW) entrenches these principles and places the positive obligation on states to respect, protect, promote, and realise the rights. The 2030 Agenda commits itself to universality, human rights and leaving nobody behind, and so there is a legal, and ethical obligation to ensure the decriminalisation of sex work.

⁶ Beijing Platform for Action 1995, para [113(c)].

⁷ <https://www.ohchr.org/en/documents/thematic-reports/ahrc4133-women-deprived-liberty-report-working-group-issue>

⁸ <https://www.ohchr.org/en/documents/thematic-reports/ahrc4451-womens-human-rights-changing-world-work-report-working-group>

⁹ <https://www.ohchr.org/en/documents/thematic-reports/ahrc5339-gendered-inequalities-poverty-feminist-and-human-rights-based>

¹⁰

https://www.ohchr.org/sites/default/files/Documents/HRBodies/CEDAW/Trafficking/UNAIDS_UNDP_UNFPA.docx

8. International Human Rights organisations such as Human Rights Watch, Amnesty International and International Planned Parenthood Federation have all conducted research and analysis and have found that decriminalisation of sex work is the only way to ensure the continued protection and realisation of rights for sex workers. In March 2023¹¹, the International Commission of Jurists have also confirmed an increased backlash against the recognition of human rights of sex workers and highlighted how the failure to uphold human rights and protect people against abuses, including violence and the enforcement of discriminatory laws and practices, violates international human rights law.
9. Within our domestic context we can confirm that the South African government has moved away from a policy position of criminalisation and adopted a position towards the full decriminalisation of sex work¹². Legislative development is now in progress to ensure the repeal of discriminatory criminalisation of sex workers and their profession¹³. The government position has been strengthened by the research and findings of our Commission for Gender Equality's ('the CGE') position calling for the full decriminalisation of sex work in South Africa. The CGE makes the case that given the asymmetrical structural nature of the buying and selling of sex in capitalist patriarchal societies, sex work should not have separate legislation, but should be decriminalized and considered *work*, and be regulated by other types of existing legislation, such as legislation dealing with labour related issues, sexual violence, racism etc.¹⁴
10. Given the limitations set by the call we are not able to respond to all the questions posed:

Add questions 1 and 2: Because of the conflation of terms and the assumptions made in the framing of the call and the question this is difficult to answer, because it presupposes a particular positionality. As stated above it is critically important to draw the distinction between adult consensual sex work and activity that justifiably amounts to a criminal offence such as trafficking of persons for the purpose of sexual abuse and exploitation. Within the South African context these are separate acts and our law deals with them in such a manner. We have the Prevention and Combating of Trafficking in Persons Act 7 of 2013¹⁵ which recognises the offence of trafficking in persons, recognises that trafficking can take different forms and have different justifications and defines the offence. The legislation seeks to meet the state's obligations in terms of international law and to victims of trafficking in persons and does not conflate or confuse the act of trafficking with adult consensual sex work. In the South African context there is an estimated 131 000 – 182 000 adult female sex workers which amounts to 1% of the country's population¹⁶. South Africa is a diverse society with people of many races, cultures, traditions and religions the 1% of adult women who work as sex workers are therefore reflective of this diversity.

¹¹ <https://share-netinternational.org/wp-content/uploads/2023/03/8-MARCH-Principles-FINAL-printer-version-1-MARCH-2023.pdf>

¹² <https://www.dailymaverick.co.za/article/2022-12-09-published-bill-a-win-for-sex-workers-rights/>

¹³ <https://www.dailymaverick.co.za/article/2023-01-24-sex-workers-and-moral-stigmatisation-where-criminal-law-has-no-place/>

¹⁴ Official Position of the Commission for Gender Equality on Sex Work, 2013 <https://cge.org.za/wp-content/uploads/2021/01/CGE-Decr.pdf>

¹⁵ <https://www.gov.za/documents/prevention-and-combating-trafficking-persons-act>

¹⁶ Tracey L Konstant 1, Jerushah Rangasami, Maria J Stacey, Michelle L Stewart, Coceka Nogoduka: Estimating the number of sex workers in South Africa: rapid population size estimation <https://pubmed.ncbi.nlm.nih.gov/25582921/#:~:text=A%20working%20estimate%20was%20reached,educators%20and%20strong%20ethical%20considerations.>

Add question 3: Because of the conflation of terms and the assumptions made in the framing of the call and the question this is difficult to answer, because it presupposes a particular positionality. As stated above South Africa is a diverse society with both adult male and female sex workers and the motivations of engaging in sex work and the services of a sex worker would therefore be much more diverse than the questions presupposition allows us to engage with. The Special Rapporteur on Violence Against Women (Radhika Coomarasamy) noted in her 1994/95 report that *“Prostitutes are a heterogeneous group, with different interests, different understandings of their rights and positions, and different vulnerabilities. ... Some women become prostitutes as a result of coercion through the exercise of “rational choice”; others become prostitutes as a result of coercion, deception or economic enslavement.”*¹⁷ Additionally, the report acknowledged the economic character of sex work stating *“the only common denominator shared by the international community of prostitutes is an economic one: prostitution is an income generating activity...”* Within the South African context it is no different for sex workers.

Add question 4 and 5: Because of the conflation of terms and the assumptions made in the framing of the call and the question this is difficult to answer, because it presupposes a particular positionality. We therefore draw the distinction between adult sex workers who consent to working in the profession and persons who are trafficked for the purposes of sexual abuse and exploitation. In respect of adult sex workers who work under a system of criminalisation it has been well documented that because of the criminalisation associated with the profession they are vulnerable to physical, psychological, and economic abuse. The discrimination that they face is not limited to violence but intersects with other forms of discrimination. Our experience is because of the ongoing criminalisation of sex work in South Africa that sex workers are not able to report abuses of violence which they incur because they would need to report these to the same police and system which criminalises and abuses them¹⁸. This is exactly what has motivated the position of UN Agencies developing their official positions and calling for full decriminalisation of sex work. Where people fall victim to trafficking in persons, they are able to rely on the legislative framework that protects their rights and the South African Police, and the National Prosecuting Authority is tasked with the investigation and prosecution of cases of trafficking in persons. Those who fall victim is therefore more protected in our law than women who work as sex workers.

Given that most sex workers are women we must take into consideration the high prevalence of violence against women being committed in South Africa. The main perpetrators of violence against women in South Africa are men¹⁹. Therefore, regardless of the work that women do they are at high risk to experiencing gender-based violence whether at home, in their community or workplace. Violence against women has been described by the President of the country as a second pandemic and occurs with impunity²⁰. Because of the recognition of the high levels of violence and as part of the State’s recognised obligation to reduce violence against women government has committed itself to the decriminalisation of sex work by 2024 as part of the National Strategic Plan on Gender Based Violence and Femicide²¹.

¹⁷ Radhika Coomarasamy “Special Rapporteur on violence against women, its causes and consequences” 1994/45, [para] 205, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G94/148/72/PDF/G9414872.pdf?OpenElement>

¹⁸ <https://wlce.co.za/wp-content/uploads/2017/02/Police-abuse-of-sex-workers.pdf>

¹⁹ Defining Gender-Based Violence,’ <http://www.health-genderviolence.org/training-programme-for-health-care-providers/facts-on-gbv/defining-gender-based-violence/21>

²⁰ <https://www.aa.com.tr/en/africa/violence-against-women-is-like-second-pandemic-in-south-africa-president/2427879>

²¹ <https://www.justice.gov.za/vg/gbv/nsp-gbv-final-doc-04-05.pdf>

Add questions 6 and 7: Because of the conflation of terms and the assumptions made in the framing of the call and the question this is difficult to answer, because it presupposes a particular positionality. Women in South Africa are at particular risk to experiencing various systemic barriers, discrimination, and violence²². Sex workers because of the criminalisation of their profession, the discrimination that they face because of the work that they do and how its perceived morally and legally are therefore vulnerable to rights violations.

The questions are phrased in a manner that presupposes that sex work and pornography is inherently exploitive and merely seeks to find linkages. This is deeply problematic and offensive to women who work in the sex work industry and who do so with informed consent and bodily autonomy. The phrasing is particularly problematic given the control that has historically²³ been exerted over the bodies of African Black women through colonialism and apartheid. It implies that women working in sex work or who work in the pornography industry do not have the ability or capacity to make informed decisions about the careers that they want to pursue and how they want to use their bodies. This phrasing is reminiscent of the regulation of women's bodies through a paradigm of sexual impropriety, morality informed by conceptions of women as property and thus lacking in agency.

Add question 8 and 9: Because of the conflation of terms and the assumptions made in the framing of the call and the question this is difficult to answer, because it presupposes a particular positionality. This type of question and view of women in society regulates poor, indigenous, Black women to second class citizens under the guise of protection. Through our work as African Black feminists we recognise that the fallacy that sex work is inherently exploitative has strategically fed into many national legal systems and that this has led to stereotypes about sex work and the women that do the work being criminalised through the prism of morality and paternalistic understandings of women's bodies. There is no space for this question or the prism of morality and paternalism that underpins it in our international human rights framework. Criminalisation as a legal framework has historically failed to effectively suppress trafficking and sex work because of its abolitionist perspective and so fails to protect the rights of those who face real exploitation and sexual abuse including trafficking and fails to protect sex workers from systemic discrimination.

11. Although the framing of this consultation is deeply problematic, we are grateful for the opportunity to have been allowed to participate in this process of consultation. We would ask that that the Special Rapporteur engage with her counterparts and those UN mechanisms who have informed positions on the need and call for sex work decriminalisation to ensure an informed report is produced. This report must be informed by the lived experience of women who work in the sex work industry. Should there be any additional questions or clarity needed you are welcome to contact Ms Charlene May (Charlene@wlce.co.za) and Ms Chriscy Blouws (Chriscy@wlce.co.za)

²² <https://www.csvr.org.za/pdf/Gender%20Based%20Violence%20in%20South%20Africa%20-%20A%20Brief%20Review.pdf>

²³ International Agreement for the Suppression of the "White Slave Traffic," 18 May 1904, available at <http://hrlibrary.umn.edu/instreet/whiteslavetraffic1904.html>

