

SUBMISSION

TO THE

**PARLIAMENTARY PORTFOLIO COMMITTEE FOR JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

CRIMINAL LAW (SEXUAL OFFENCES) AMENDMENT BILL

(CL SEX 126; CL SEX 127)

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EXECUTIVE SUMMARY:

INTRODUCTION

This brief submission relates to the Parliamentary Portfolio Committee's insertion of Section 7A in the Sexual Offences Bill ('the Bill').

The Sex Worker Education and Advocacy Taskforce (SWEAT) would like to point out that this submission, where the organisation is required to summarise large areas of complex research into a brief document in only a few working days, does not constitute an in depth exposition of either the laws relating to adult sex work or the issues pertaining thereto. This submission does not outline all of SWEAT's concerns regarding the potentially seriously prejudicial consequences of enacting the proposed provision in comprehensive detail. Should the Parliamentary Portfolio Committee require further elucidation in relation to any of the submissions set out herein, SWEAT would be happy to provide the Committee with such further information.

SWEAT urges the Committee not to misinterpret this short submission as evidence that we support a law making procedure that has seen an entirely new area of the law added as an afterthought to the Sexual Offences Bill. This took place long after the official public participation process had closed. Unlike the rest of the Sexual Offences Bill, there has been not been any consultation on this issue whatsoever.

SWEAT is a Cape Town based non-profit organisation that has been working with sex workers around health and human rights for 11 years. SWEAT is involved in direct outreach work with sex workers in Cape Town around health and safety as well as public awareness and advocacy work. SWEAT reaches an average of 60 street based sex workers monthly, distributing condoms, providing safer sex workshops and legal and other advice. We reach an average of 40 sex workers working indoors through conducting safer sex workshops, distributing condoms and discussing working conditions and health and safety in the workplace. We are currently running two groups in Langa and Mfuleni with street based sex workers on an ongoing level. These groups are support based where members set the agenda and cover areas related to health and human rights.

Since 2003 SWEAT has supported the development of a sex worker led movement in South Africa. This movement, called Sisonke, is still in its infancy. At present there is a national core leadership group of sex workers from across the country that meet on a quarterly level. These sex workers are determined to engage in law reform activities. They want sex work to be seen as a form of work.

It is notable that at no point in the last 11 years have any of the sex workers SWEAT works with expressed the desire to see clients criminalised. On the contrary, sex workers disapprove of random increases in police patrols because these repel clients and mean that the sex workers have to work for more hours in less safer places in order to earn the same wage.

PRINCIPAL SUBMISSIONS

SWEAT urges the Committee to remove Section 7A from the Bill, and motivates this on the following three main grounds:

1. Procedural Issues

The insertion of a provision relating to adult sex work in a Bill that is not and has never been intended to deal comprehensively with the laws relating to adult sex work at this late stage of a pre-existing law reform process is completely irregular. This has been done without any regard to due process or the potentially seriously prejudicial consequences for sex workers should the proposed section be enacted. Accordingly, the proposed section and its implications should be afforded a proper and thorough consideration by the South African Law Reform Commission, Civil Society and Parliament in terms of the separate review process already underway in this regard.

2. Adult Sex Work Legislation

In 1996 the South African Law Reform Commission began a separate review of the laws relating to adult sex work. Accordingly, SWEAT submits that the concerns suggested by the proposed section must be considered within the context of the ongoing separate law reform process initiated specifically for this purpose. It should be noted that the South African Law Reform Commission has already released a comprehensive Issue Paper in which the complex legal options available for dealing with adult sex work in a democratic country are set out and considered. Civil society has commented thereon and the subsequent Discussion Paper and draft Bill is awaited.

3. Criminalising the client

The proposed section will not achieve the remedy it seeks to achieve, namely to reduce the exploitation of sex workers or reduce sex work by targeting the demand. Rather, it will cause further harm to sex workers, who are at present criminalised under existing legislation. As clients seek to avoid arrest and prosecution, the working conditions of sex workers (especially the most vulnerable, namely street workers) will become more dangerous. In turn, this will make sex workers even more vulnerable to further violence and exploitation. SWEAT's submission in this regard is supported by international research regarding similar legislative provisions in Sweden, for example.

DETAILED SUBMISSIONS:

1. Procedural Issues

The insertion of section 7A took place long after the official public participation process in relation to the current Sexual Offences Bill had closed. Unlike the rest of the Sexual Offences Bill, there has been not been any discussion or consultation whatsoever on the issue of adult sex work or the plethora of laws relating thereto.

SWEAT's three primary concerns in relation to procedural issues:

Firstly, the current process is not open to substantive public submissions and both excludes civil society and the very sex workers whose vulnerable position the Portfolio Committee is purporting to address.

Secondly, only two days have been afforded to prepare a submission on a provision that is likely to have wide-ranging and highly prejudicial consequences including, the entrenchment of the systemic discrimination already experienced by adult sex workers on a daily basis with little regard for their constitutionally entrenched human rights. Not only does this suggest a lack of genuine consideration in inserting the proposed provision in the first place but it suggests too the absence of any genuine intention on the part of the Portfolio Committee to engage with the implications of the proposed section in a comprehensive manner.

Thirdly, Sisonke, the national sex worker movement, established by sex workers for sex workers, has neither been invited to make submissions on the proposed section nor has it been afforded the time necessary to arrange to travel to Cape Town from elsewhere in South Africa to attend at Parliament in order to represent their interests.

It is further submitted that the enactment of the proposed section would be open to constitutional review, inter alia, as, without proper consultation, it would fly in the face of the Constitutional Court's recent declaration of certain provisions of the Choice on Termination of Pregnancy Act unconstitutional for lack of public participation in relation thereto.

2. Adult Sex Work Legislation

The Law Reform Process

SWEAT re-iterates that the current Sexual Offences Bill law reform process has specifically aimed to avoid the issue of adult sex work, since this is under separate review by the South African Law Reform Commission.

In 2002 the South African Law Reform Commission released Issue Paper 19 specifically considering adult sex work and detailing the range of legal options available to a democratic society for dealing therewith.

It should be noted that the Issue Paper states "*the advent of democracy in 1994 appears to have led to a recognition of a need to review the current approach to prostitution*". The Issue Paper then details a plethora of Governmental and other respected civil society initiatives in this regard, noting unequivocal recommendations from both Government (at all levels) and civil society that adult sex work be decriminalised.

The South African Law Reform Commission has in the past confirmed SWEAT's expectations that they will, in due course, release a Discussion Paper together with a Proposed Bill and that a new law around adult sex work will be formulated out of this process.

The Constitutional Court

In *S v Jordan (Sex Worker's Education and Advocacy Taskforce and Others as Amicus Curiae) 2002 (6) SA 642 (CC)*, the Constitutional Court, although failing to declare the provisions of the Sexual Offences Act that criminalise adult sex work unconstitutional, was emphatic that:

- (i) the issue of adult sex work is best determined by Parliament;
- (ii) that no judgment was being passed on the effectiveness or desirability of the present the legislative choice;
- (iii) there are a range of options open to democratic societies to deal with sex work;
- (iv) that decriminalisation is but one of the menu of choices available to the legislature whose decision must be made in accordance with the contextual and constitutional framework that exists in SA

It should be noted that the *Jordan* decision does not require Parliament to enact a law criminalising the clients of sex workers. In fact, the Constitutional Court clearly recognised that the issue of adult sex work is complex and that Parliament needs to be very informed around all aspects thereof in order to review the existing legislation. This implies a proper and thorough consideration following the completion of the South African Law Reform Commission investigation.

The Constitutional Court was also clear that the process of devising a new law to deal with adult sex worker must be based on a process that would include space for public hearings. The minority judgment further identified SWEAT as an organisation that could provide valuable input to this process.

Cognisance should also be taken of the widespread and ongoing criticism of the *Jordan* decision. This criticism tends to support the South African Law Reform Commission's suggestion that indeed a liberalisation of societal attitudes towards adult sex work has taken place.

The implication of this is that although it may be constitutionally permissible to criminalise adult sex work, in a constitutional democracy that seeks to respect the human dignity and equality of all, it is not the most desirable option.

3. Criminalising the client

SWEAT has been working directly with sex workers around health and human rights based issues for over eleven years. SWEAT's position on sex work is directly informed by our daily contact with sex workers. Sex workers and SWEAT view sex work as a form of work and do not view sex workers as necessarily being exploited by clients. The sex worker is selling a service in order to make money - this fact cannot change. No matter the manner in which you wish to view the transaction, it is an economic one. It is the sex worker who actively seeks out business; she/he is not a passive victim awaiting the exploitation of a client.

If we are to deal effectively with exploitation of sex workers, then SWEAT has much evidence that the current criminalisation of sex work provides the conditions for exploitation. Criminalising the client will not address this exploitation. It will make it worse.

It appears from discussions with some in the Portfolio Committee that there is an assumption that to criminalise the client as well as the sex worker will somehow "level the playing fields" – that the status quo is unfair for the sex workers since they can be charged but their clients cannot. In fact, this is a false assumption and one that does not take into account the views of sex workers. It is illogical to assume that sex workers would want their only source of income to

be criminalised and thus cut off from them. In addition, the practical results of the law criminalising the client in Sweden have been well researched and documented, showing that criminalising the client has a negative impact on the sex worker.

In Sweden, sex work is regarded as an aspect of male violence against women and children. The law that criminalises the client is based on the assumption that clients create the demand for sex workers who are then subjected to ongoing violence from said clients. The logical assumption is that a government enacting such a law is hoping that clients will disappear, that there will be no more work for sex workers and that the sex workers will then find other forms of employment.

None of this has happened in Sweden. As in other attempts to eradicate sex work, the criminalising the client law has failed. Instead sex workers have reported that the law endangers their safety. Sex workers now have to protect their clients in order to keep them. To do this they must take extra precautions to avoid police and so conduct business in the most hidden, underground areas and establishments possible. This makes their working conditions far more dangerous. It also makes it much more difficult for safer sex organisations (like SWEAT) to reach the sex workers to deliver condoms and conduct workshops on safer sex, sexually transmitted infections and HIV/AIDS.

The law has also disrupted the family lives of sex workers in Sweden, many of whom migrate to Norway daily, travelling up to six hours per day to escape the Swedish law. This constitutes a severe disruption to their desire to work a regular eight - hour day like other workers, and maintain a regular family life. In South Africa too, it is inevitable that if sex workers need to spend more time hiding from law enforcement officials, they will need to spend longer hours working to make money, and will have less time for themselves and their families.

In South Africa, SWEAT's research indicates that the biggest problem facing indoor (agency based) sex workers are poor working conditions and exploitative employers; and the biggest problem facing outdoor (street based) sex workers is police harassment (*see Appendix A – Research Report*), abuse and a continuous cycle of weekend arrests which disrupt the possibility to earn a consistent living wage. Abuse of sex workers by clients is reported as a very much smaller problem. In Sweden, one of the unintended consequences of the criminalised client law is that sex workers are reluctant to call the police if they are abused by clients because they are then seen as informers and they lose other clients as a result.¹ SWEAT would hope that in South Africa, we would instead seek to move towards a situation where sex workers are more, and not less, able to access the protective services of the police.

¹ Address by Rosinha Sambo to the Taipei Sex Worker Conference 2001 on the Situation of Sex Workers in Sweden

The Justice Portfolio Committee should also take note that Swedish sex workers joined other sex workers from the Nordic countries in a conference in 2004 convened urgently to address the negative impact of the Swedish “criminalising the client” model. Sex workers said that this model only further stigmatised and endangered sex workers.²

It must be noted that not all sex workers choose sex work because they have no other employment options, but many do, especially in South Africa. Since criminalising the client in Sweden, where the unemployment rate is far lower than that of South Africa, did not result in a mass exodus of sex workers to other professions, there is no reason to think that criminalising the client in South Africa could lead to a different outcome.

SWEAT would further like to direct the Committee towards resolutions passed by sex worker unions and movements against the Swedish model:

“The International Union of Sex Workers and the International Network for Sex Work Projects, passed a resolution against the Swedish law agree:

- that this model of legislation is counterproductive and inhumane.
- that this model increases the vulnerability of sex workers in Sweden and increases levels of violence.
- in addition that the Swedish model and laws on prostitution violate not only the basic human rights of sex workers, but also the basic human rights of their clients.”³

If the ultimate aim of Section 7A is either to eradicate sex work or to provide more protection for sex workers themselves, then this will not be achieved for the reasons outlined above.

Conclusion:

In light of the above, SWEAT strongly urges the Committee to recognise that including Section 7A in the Sexual Offences Bill will result in a well- intentioned law having unintended wide ranging and potentially severely prejudicial consequences which far outweigh any possible benefits. For this reason, we urge the Portfolio Committee to allow the South African Law Reform Commission to complete its ongoing and thorough investigation into adult sex work legislation and recommend that the proposed Section 7 A be removed from the Sexual Offences Bill.

² Press release, Nordic conference for sex workers 27-28 October 2004, Prostitutes Education Network, Oslo, Norway

³ International Sex Workers Meeting, 19th January 2002, Milton Keynes, UK