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WOMEN'S LEGAL CENTRE SUBMISSION TO THE CALL FOR COMMENT ON THE PROPOSED CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT BILL, 2002

Introduction and the Women's Legal Centre's interest:

1. The Women's Legal Centre ("the Centre") is an African feminist legal centre that advances women's[1] rights and equality through strategic litigation, advocacy, education and training. Its primary aim is to develop feminist jurisprudence, policy and legislation that recognises and advances women's rights to substantive

[1] Where we refer to women throughout this submission, we do so in an inclusive manner referring to women in their diversity.

equality in South Africa and our key focus and objective is to ensure that women live more equal lives in South Africa.

2. The Centre conducts its work through the utilisation of different methodologies including education and training, a legal advice unit where women can obtain legal advice as well as litigation of strategic cases that have the potential to achieve substantive equality. A key methodology is strategic advocacy and these submissions form part of our strategic advocacy.

3. The Centre has five strategic focus areas which include addressing violence against women, women's rights to land, housing and tenure security, equality in relationships, access to sexual, reproductive health and rights, as well as women's rights to work in just and favourable conditions of work. The work of the Centre is done in an intersectional manner as we recognise that women are not a homogenous group and thus experience intersecting forms of discrimination differently.

4. These submissions form part of the work being undertaken to advance the rights of women to work in just and favourable conditions. The Centre therefore welcomes the opportunity being provided by the Department of Justice and Constitutional Development for public participation into the content of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2022 ("the Bill"). The Centre welcomes the Bill as a critically important piece of legislation that seeks to address discrimination and abuse experienced by women who work as sex workers in South Africa.

5. The Centre has since 2008 worked very closely with sex workers and organisations who provide services and promote human rights for sex workers in South Africa, the African region and internationally. Our expertise on the rights of sex workers includes litigation to recognise the rights of sex workers under our labour law framework in the case of *Kylie v The CCMA*[2] *and* facilitating a law clinic for six years that provided direct legal services to sex workers in Cape Town as well as Johannesburg. We represented individual sex workers in their complaint to the Commission for Gender Equality ("CGE") against the South African Police ("SAPS") on 20 November 2012, which complaint culminated in findings of rights violations against members of the SAPS and recommendations that SAPS members must undergo training to ensure that the uphold the rights of sex workers. In addition, the WLC was a founding member of the Asijiki Coalition and remains a member of that Coalition who has continued to advocate for the rights of sex workers and decriminalisation in South Africa.

6. We have over the years participated in the processes towards law reform through the South African Law Reform Commission's Project 107 on Adult Prostitution putting forward the need to recognise the rights of sex workers and for the full decriminalisation of sex work in South Africa. We have also made submissions to the Multi-party Women's Caucus of Parliament on the need for the decriminalisation of sex work to protect and advance the rights of sex workers.

7. This submission is therefore substantiated by the existing and historical work undertaken advocating and litigating for the recognition of the rights of women in

[2] 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

our society who choose to conduct sex work. The WLCT recognises and seeks to advance women's autonomy in decision making in respect of their bodies and their right to choose a profession of their choice and to work in safe, just and favourable conditions.

8. Our submissions are divided into three parts:

8.1 **First**, we set out a brief historical context of the criminalisation of sex work in South Africa and how this context can no longer justify the continued criminalisation of sex work in our constitutional democracy. We make these submissions to support the position taken by the Department to address the legacy of discrimination;

8.2 **Second**, we highlight the lived reality of sex workers who work and seek to make a livelihood from a profession that is criminalised. We make these submissions to illustrate the importance of adopting a full decriminalisation model;

8.3 **Thirdly**, we will address the content of the proposed legislation as contained in the Bill.

I. *Historical discrimination:*

9. It would first be useful for the purpose of this process to reflect very briefly on the context under which sex work was criminalised in South Africa. We believe that this context is necessary to provide a lens through which the discrimination that was in place at the time must be viewed and illustrates why in our constitutional democracy, the continued discrimination and criminalisation cannot be justified.

10. Sex work/prostitution 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 autonomy[3]. 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".

11. 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…"[4]

12. Understanding the colonial and patriarchal mores within which the Convention was anchored, helps us understand the pervasive prohibitionist and "abolitionist" approach which has since the 1950's filtered into our own legal framework. The Convention influenced contemporary understandings of sex work as inextricably linked to trafficking. Further it characterised sex work as involuntary and criminal requiring abolition and sanctioning through heavy state intervention and violence. This approach disregarded sex worker's bodily autonomy and their

[3] International Agreement for the Suppression of the "White Slave Traffic," 18 May 1904, available at http://hrlibrary.umn.edu/instree/whiteslavetraffic1904.html
[4] Jean Allian "White Slave Traffic in International Law" Journal of Trafficking and Human Exploitation Vol 1, 1-40 (2017), page

rights to consent to transactional sex or that sex can be a transactional experience.

13. The convergence of morality, a proprietary construction of womanhood, and disregard of consensual transactional sex resulted in the regulation of sex work through criminalisation. The rights of the women working as sex workers were moved to the side in favour of an approach where they were infantilised, stereotyped and criminalised. Although the Suppression of "White Slave" Traffic was agreed upon before the international recognition of human rights through the Universal Declaration of Human Rights (UDHR), its lack of distinction between consensual and involuntary prostitution and trafficking of women birthed a legacy of regulation through the criminalisation of sex work[5].

14. In South Africa we see the arrival of such legislation criminalising consensual adult sex across racial lines as far back as 1902 in the Cape. Specifically, it was the prohibition of intercourse 'for the purposes of gain' between white women and black men.[6] This law was later extended to the Orange Free State, Transvaal and Natal with the latter two provinces omitting the clause on 'gain'. These laws followed the arrival of British sex workers to the Transvaal mines.

15. In later years we see the morality driven legislation in our context can be found in the Immorality Act of 1927, which expressly sought to prohibit European men from having what was considered illicit carnal intercourse with a native[7] female.

[5] It is our experience that this conflation still occurs today, and we have experienced a heightened form of this conflation where anti-rights actors have sought to purposefully conflate the issues to advance their arguments in opposition to decriminalisation.
[6] J Lewin Politics and Law in South Africa: Essays on Race Relations London (1963) 87
[7] The term native would later be replaced with Non-European in the 1950's

Similarly carnal intercourse between a native male and European females were prohibited at the time. The colonial morality at the time in preserving the clear separation of races cannot be ignored, especially in our current constitutional and democratic framework in which freedom, equality and dignity are underpinning values.

16. Our apartheid history has had a lasting impact on our society but has left its intelligible mark on our legislative framework. We therefore cannot simply ignore that the criminalisation of sex work formed part of our colonial as well as apartheid past and served that purpose. Along with legislation such as The Immorality Act No 5 of 1927 which prohibited extra-marital intercourse between whites and blacks[8]; The Prohibition of Mixed Marriages Act No 55 of 1949 which prohibited marriage between whites and members of other racial groups[9]; The Sexual Offences Act (Immorality Act) No 23 (s 16) of 1957, which made it an offence for a white person to have sexual intercourse with a black person or to commit any 'immoral or indecent act'[10].

17. Prohibitionist legislative frameworks use similar regulatory frameworks. They do not differentiate between forced or coerced sex work additionally they criminalise all aspects of sex work including sex workers themselves. However, prohibitionist/abolitionist legal models are often implemented through two disparate approaches.

[8] From 30 September 1927 and repealed by s 23 of Sexual Offences Act No 23 of 1957
[9] From 8 July 1949 and was repealed by s 7 of the Immorality and Prohibition of Mixed Marriages Amendment Act, No 72 of 1985.
[10] Repealed the Immorality Act of 1927 and the Immorality Amendment Act of 1950 and commenced on 12 April 1957

18. The first is the "*public nuisance*" approach. This approach accepts sex work as a social reality which needs to be regulated and removed from public spaces. Such regulation tolerates sex work provided that it is removed from residential areas, churches, schools and hospitals. This approach understands sex work through the normative framework of heterosexual marital purity. In other words, sex work is understood as undermining the family unit and is therefore undesirable in residential areas. Lastly, this framework assumes that sex work has negative impacts on health. However, this regulatory approach imposes less severe penalties. Within our existing context, we experience the public nuisance approach in our Municipal By-Laws with many municipalities continuing to enforce public nuisance and solicitation offences[11].

19. The second regulatory sex work prohibition legal framework is the "*exploitation*" approach. This approach understands sex work and the sex trade as an unequal power dynamic which is characterised by victims and perpetrators. States which adopt this approach pose severe penalties, particularly to those who have been found to have coerced or forced participants into sex work. This approach understands sex work as a serious form of male violence against women "and that in any context it is a breach of civil and political human rights as either a form of 'modern-day slavery' and/or an institutionalised practice of sexual violence and gender inequality. South Africa has adopted the "exploitation" approach in their

[11] We have noted an increase in many of these false assumptions being stated as facts since the release of the Bill for public comment. We can only encourage the Department to reject submissions and comments which rely on false assumptions about sex workers and sex work to deny their rights.

legislative frameworks criminalising not only sex workers themselves but clients too.[12]

20. This leads us to the foundational framework of our position, which is firmly entrenched within the values and rights set out in our Constitution and ensures compliance with South Africa's regional and international human rights obligations. Our values and rights are tools which place the State in the position of duty bearer in respect of rights. This positive obligation requires that steps are taken to acknowledge rights which are not recognized, realize these rights and promote the enjoyment of such rights in a just and equitable manner. These require proactive action on the part of the State to recognize the inequality and discrimination faced by women and ways of addressing such discrimination. This is the imperative that is placed on the State to achieve substantive equality.

21. Non-discrimination and equality are core values entrenched in the preamble of our Constitution and in the Bill of Rights and of course it's critical to the international human rights normative framework. The Universal Declaration of Human Rights in article 2 as well as the International Covenant on Economic Social and Cultural Rights ('ICESCR') in article 2, as well as article 2 of the International Convention on the Elimination of All forms of Discrimination against Women ('CEDAW') speak to these values as rights.

[12] Section 20(1)(aA) of the Sexual offences Act, 1957 makes it a criminal offence to have unlawful carnal intercourse or commit an act of indecency with any the person for reward. The Act further prohibits brothel-keeping, procurement and facilitating sex work, living off the earnings of sex work, soliciting and indecent exposure. In 2007, the Sexual Offences and Related Matters Amendment Act 32 of 2007 criminalised the demand side of sex work, making it illegal to pay/reward another for a sexual act.

22. Considering that the primary objective of the human rights framework is to respect, protect and realize the rights of individuals it is this that must be considered when weighing up the justification for the limitation of rights. We therefore welcome the position taken by the Department that there can be no justification for the limitation of the rights of sex workers to not only work, but also in respect of them being able to access other rights.

23. Our Courts have confirmed very early on in our democratic dispensation that the obligation to respect, protect and fulfil the rights contained in the Bill of Rights is the obligation of the State. The Constitutional Court upheld this position in *Government of the Republic of South Africa and Others v Grootboom and Others*[13] in which the court stated that:

> *"Section 7(2) of the Constitution requires the state "to respect, protect, promote and fulfil the rights in the Bill of Rights" and the courts are constitutionally bound to ensure that they are protected and fulfilled."*

24. Our international obligations under the ICESCR requires that the State in terms of Article 4, which deals with the right to work ensure that individuals have access to their right not to be deprived of work unfairly. This right requires that there is respect for the individual and that their dignity is expressed through the freedom of the individual to choose their work. Work according the ICESCR is important not only for personal development, but also for social and economic inclusion in society.

[13] Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)

II. ***Importance of full decriminalisation to sex workers:***

25. The lived reality of sex workers who work and seek to make a livelihood from a profession that is criminalised in itself best substantiates why full decriminalisation as proposed by the Bill is the only option for South Africa[14]. Sex workers have on numerous occasions over the years sought to draw attention to and advocate for their rights. They have highlighted grave human rights injustices and violations at the hands of service providers such as health officials, SAPS and law enforcement officials as well as at the hands of their clients and ordinary members of the public. All of these violations occur because of their continued criminalisation which creates stigma and discrimination against the sex work profession. While there are male sex workers, the lived reality is that majority of sex workers in South Africa are women, particularly women of colour who come from poor and marginalised backgrounds.

26. Criminalisation has fed harmful gendered stereotypes about sex workers allowing for impunity in respect of the violation of sex workers rights. These rights violations are well documented by sex workers working on collaboration with human rights bodies[15]. These reports present an almost first-hand account of the sex workers lived reality working under criminalisation.

[14] In this regard we align ourselves to the submissions of Sisonke the movement of sex workers in South Africa and the Asijki Coalition for the Decriminalisation of Sex work who have historically shared the lived experiences of sex workers with the Department of Justice and Constitutional Development.

[15] See https://www.groundup.org.za/media/uploads/documents/adobe_scan_12_dec_2022.pdf and https://www.hrw.org/sites/default/files/report_pdf/southafrica0819_web_0.pdf

27. Criminalisation also impacts on how sex workers are able to access socio economic rights such as their right to health. When sex workers try to access health services, they are discriminated against by staff at various health institutions because of their profession. They report facing verbal abuse and ill treatment by nurses and admin staff who call them derogatory terms and blame their need for various medication on their profession.

28. The continued criminalisation of sex work contributes to and enforces stigma and discrimination against sex workers in our everyday society. Many families disown and evict their family members because they choose to conduct sex work and as a result, many sex workers are forced to live on the street to escape the discrimination and stigma of their communities and families. This contributes to the rate of homelessness in South Africa and further compounds the vulnerability of women when they are unhoused.

29. In all these instances of verbal, emotional, psychological and physical abuse; sex workers are unable to access or enforce their basic human rights as contained in the Bill of Rights of our Constitution as their work is criminalised and as a result, they are unable to seek recourse, protection or access to justice. Sex workers therefore experience multiple forms of discrimination and violations of their basic human rights to dignity, equality, freedom of movement, the right to be free from violence and to have bodily autonomy, the freedom to choose their trade and occupation, access to adequate housing and the right to access social security.

30. Given that most sex workers are women, and many identify with diverse sexual orientation gender identity and sexual characteristics, ensuring the protection

and advancement of rights are imperative to the achievement of gender equality. The current discrimination and violence which sex workers face are a direct result of structural inequality, such as the feminisation of poverty, gender and sexual identity-based discrimination, etc.

31. The impact of criminalisation of sex work reinforces heteronormative, homophobic, transphobic and misogynistic patriarchy, rather than promoting gender equality. To this extent, the continued criminalisation of sex workers pushes them deeper into inequality and outside of the ambit of the Constitution.

32. The Centre has also documented how police and law enforcement officials fuel stigma and discrimination against sex workers because of their arbitrary targeting and violation of sex workers basic human rights.[16]

33. Sex workers have taken every opportunity of engagement with the DOJCD to highlight their lived reality and various ways in which they suffer discrimination to motivate for the immediate reform of the law which criminalises their profession. While the experiences and lived reality of sex workers differ from city to city, sex workers experience similar human rights discrimination, societal stigma and ill treatment with basic services across the country.

34. The Centre is therefore encouraged that there is now a commitment at Cabinet level and within government to address the discrimination faced by sex workers and that through the proposed Bill the Department seeks to recognise and protect the rights of sex workers. We are further encouraged that the voices of

[16] Police abuse of sex workers, Women's Legal Centre, 2016

sex workers and their shared experience has enabled the Department to make an informed decision in respect of adopting a full decriminalisation model to ensure substantive equality.

III. ***Commentary on the draft Bill:***

35. The Centre is grateful for the opportunity to provide input into the legislative development process being undertaken by the Department to ensure that it meets its constitutional obligations in respect of sex workers. Public participation in the development of policy and legislation is critical for a healthy democracy.

36. The Centre is also aware that not everyone shares the position that we have adopted in respect of the full decriminalisation in South Africa, and that the Department will receive a number of objections to the proposed legislation as a whole as well as to what is seeks to achieve. We therefore believe that it is important to note the question raised by Chaskalson CJ as he was then in S v Makwanyane[17]:

"…[t]hat South African society does not regard the death sentence for extreme cases of murder as a cruel, inhuman or degrading form of punishment. It was disputed whether public opinion, properly informed of the different considerations, would in fact favour the death penalty. I am, however, prepared to assume that it does and that the majority of South Africans agree that the death sentence should be imposed in extreme cases of murder. The question

[17] S v Makwanyane and Another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995)

before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence."

37. Of course, the judgment from which we quote deals with the abolishment of the death penalty in our country and not sex work, but we believe that in these circumstances the sentiment remains critically relevant. We would submit that women who work as sex workers in South Africa work in precarious circumstances that leave them open to violence and abuse. This violence and abuse has been detailed in the various reports that we draw attention to above. This vulnerability can be placed at the feet of the ongoing criminalisation of their work. They are therefore amongst the weakest and most vulnerable in our society and so require their rights to be realised.

38. That individuals in our society may hold and express their different views as part of this process is part of the rights that they hold. Their views however cannot impugn the rights of others under our Constitution, and they cannot seek to deny rights realisation and enjoyment of the rights enshrined in the Constitution or the values that we seek to build towards as a society.

Section 1

39. The Bill seeks to repeal the Sexual Offences Act 23 of 1957 in its totality. It further seeks to repeal Section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("Act 32 of 2007"). As pointed out in these submissions the Sexual Offences Act 23 of 1957 ("Act 23 of 1957") and Act 32

of 2007 are deeply problematic and have had a devastating impact on the lives of sex workers. The Centre has also previously pointed out to the Department that in order to address the criminalisation of sex work that Act 23 and section 32 of 2007 would need to be repealed from our statutes. We, therefore, welcome the decision that Act 23 be repealed in its totality and that Section 11 of Act 32 of 2007 is being repealed.

40. It is critically important to note from the section dealing with the lived realities of sex workers that it is not only the enforcement of national laws that criminalises sex workers. We note that the Minister of Justice has remarked that he is aware that at the local government level, municipal by-laws have been identified as increasingly being utilised by municipal law enforcement officials to violate the rights of sex workers across our country in the different municipal districts. These by-laws need to be urgently addressed as they will continue to perpetuate discrimination and rights abuses.

Section 2

41. We welcome the inclusion of section 2, of the Bill in that it recognises the historic discrimination and impact thereof on the lived reality of sex workers and those who work in the industry. The existence of a criminal record has a lasting impact on the life of the individual who carries it and there should be no reason for sex workers to be burdened with such records for having committed an offence that should never have existed.

42. We anticipate that the expungement of a criminal record in respect of offences which may have been committed in respect of Act 23 and Act 32 of 2007 will greatly assist those who wish to change professions or add to their existing profession, but who have been unable to do so because of their criminal record.

43. We recognise that on the face of it the automatic expungement would rectify a historical injustice. We are however concerned about the automatic nature of the process, and what that in practice would entail. It is unclear whether the South African Police Service is aware of this provision, and whether in consultation with the South African Police Service Management, they will undertake the development of standard operating procedures or standing orders to ensure that the expungements of criminal records do in fact take place timeously to the coming into force of the legislation once passed and singed into law.

44. We raise this concern because we are well aware of the frustration that can be experienced in respect of the formal expungement application process which is set out in s2(2) of the Bill. This formal process in terms of the Criminal Procedure Act, 1977 can take some time and requires not only an awareness of the process, but we anticipate that sex workers may require legal assistance to access the process of submitting an application to the Director General of the Department of Justice.

45. We also note that the provision of Criminal Procedure Act is on application based on criteria that an individual has served their sentence and varying periods of time has passed where such an individual is able to show that they have rehabilitated themselves. The process unlike the provision set out in S2(1) of the Bill is not automatic and in fact discretionary.

46. Here too we would recommend it may be necessary to develop internal standard operating procedure within the Department of Justice to fast-track applications from sex workers so as to ensure the automatic expungement of records where they have not been attended to by the South African Police Service with the coming into force of the Bill once adopted.

Section 3

47. We welcome the inclusion of the transitional provision set out in section 3 of the Bill. This provision will be critical to ensuring that sex worker rights are not further violated through the criminal justice system.

48. The Minister we believe has the authority to place a moratorium on the continued arrest and prosecution of sex workers during the time that the legislative drafting process is underway, and the legislation is adopted and comes into effect. We raise this especially in light of the fact that Cabinet has approved the adoption of a full decriminalisation model. There should therefore while the legislative development process is underway be no reason for the continued enforcement of unjust and unconstitutional laws. We would request that the Minister considers this recommendation.

49. In addition to the above recommendation, we raise the omission of persons who have been convicted and sentenced to a custodial service in terms of the legislation that the Bill seeks to repeal. Although section 3 seeks to address those who have been convicted and not yet sentenced, or those not yet convicted nor sentenced, it does not address the circumstances of those who have been

sentenced to serve terms of imprisonment related to the legislation to be repealed.

50. Further the section does not adequately address the issue of those who have appeared before Court and who have pleaded to the a charge in terms of the legislation sought to be repealed. Such individuals would be entitled to an acquittal of the charges that they have pleaded to ensuring that on the merits they have been vindicated of the charges rather than simply having the cases against them withdrawn by the state.

51. Section 2 similarly seeks to address the expungement of criminal records but does not deal with individuals who at the time of the Bill being enacted and coming into force is serving a prison sentence related to the legislation.

52. Awaiting trial prisoners may also fall into this category of persons where they have been charged and unable to meet the financial bail conditions, and being held in custody awaiting trial. It is our experience that delays in requisitioning of prisoners can impact the efficacy and expediency which the Bill envisages.

53. The above recommendations are technical in nature and therefore would in the ordinary course have been dealt with through regulations. Given the nature of the Bill however we would recommend that the Department ensures the development of adequate standard operating procedures within the department and that the SAPS are advised that they need to develop standing orders so as to ensure that the implementation of the Bill and what it seeks to achieve can in fact be done.

54. We wish to once again express our gratitude to the DOJCD for extending the opportunity to stakeholders such as the Women's Legal Centre to make submissions to the DOJCD at this stage of the legislative development process.

55. Should there be any questions in relation to these submissions please do not hesitate to contact the authors, Charlene May (Charlene@wlce.co.za) and Chriscentia Blouws (Chriscy@wlce.co.za).

Yours faithfully
Women's Legal Centre

Per:
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