

“STOP HARASSING US! TACKLE REAL CRIME!”



**A REPORT ON HUMAN RIGHTS VIOLATIONS BY
POLICE AGAINST SEX WORKERS IN SOUTH AFRICA**



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This report is the outcome of a joint project between the Women's Legal Centre (WLC), Sisonke and the Sex Workers Education and Advocacy Taskforce (SWEAT).

By Stacey-Leigh Manoek · August 2012

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WOMEN'S LEGAL CENTRE

7th Floor, Constitution House, 124 Adderley Street, Cape Town, 8000
Tel: 021 424 5660, Fax: 021 424 5206 · www.wlce.co.za

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Abbreviations / Acronyms

DoJ	Department of Justice and Constitutional Development	IPID	Independent Police Investigative Directorate
SOA	Sexual Offences Act 32 of 2007	DCS	Department of Community Safety in the Western Cape
SWEAT	Sex Workers Education and Advocacy Taskforce	ICCPR	International Covenant on Civil and Political Rights
WLC	Women's Legal Centre	SAPA	South African Police Act 68 of 1995
NGO	Non-Governmental Organisation	WHO	World Health Organisation
SALRC	South African Law Reform Commission	CEDAW	Convention on Elimination of Discrimination against Women
SAPS	South African Police Service		

EXECUTIVE SUMMARY

"The coloured police officer grabbed me, and my clothes came off. Then they pepper sprayed me in my mouth and beat me". - Female sex worker, Cape Town

"I was angry that the police mess with us all the time and chase our clients away. So I told the one policeman, "I am going to call the Daily Sun to tell them that the police chase our clients away". Then one of the policemen grabbed me and started beating me. He hit me with his fist in my face. He pepper sprayed me in my face. And they kicked me all over my body. They beat me for about 10 minutes; it felt like a very long time." - Female sex worker, Johannesburg

"Then the policemen told me to go outside and stand in a line with the other women. When we got outside, one of the ladies said that we should run away from them. So we all started running. Then the policemen started shooting at us. They shot me twice with rubber bullets in my shoulder. But I kept running. I did not want to stop. Later I went to the clinic to bandage my wounds." - Female sex worker, Johannesburg

This report draws on the views and voices of more than 300 sex workers in Cape Town, Johannesburg, Pretoria, Durban and Limpopo, all of whom approached the Women's Legal Centre (WLC) for information on their rights or legal assistance between September 2009 and July 2011.

The human rights abuse of sex workers in South Africa is alarming and demands immediate attention. Seven out of 10 sex workers who approached the WLC to report a violation had experienced some form of abuse by the police. Sex workers experience violence during arrest by police officers who routinely beat them, pepper spray them and sexually assault them. Sex workers are also assaulted by clients, particularly with regards to payment and condom negotiation. Unsurprisingly, most sex workers are reluctant to approach the police to report crimes committed against themselves or others. Unreported crimes include verbal abuse, refusal by clients to pay, being robbed, threats of physical assault, physical assault and rape. There is great scepticism about the police as a mechanism for protection or redress, especially in light of the fact that some police officers are themselves perpetrators of these very crimes.

The findings in this report highlight the gap between the rights enshrined in the South African Constitution and treatment meted out to sex workers. Even under the present, imperfect law, there is a stark contradiction between the actions of police and the due process laid out by the law for them to follow. Based on the complaints of 308 sex workers, the WLC found the following:

- Almost one in six of the sex workers who approached the WLC had been sexually or physically assaulted, and one in three had been harassed, by the police;
- Of the 45 percent of sex workers that had been arrested, more than 85 percent of those arrests had been carried out by a police officer who was not wearing proper identification;
- Almost half of those who had been arrested were held beyond the 48 hour maximum permitted by law, and nearly 70 percent had been denied access to food or water whilst in detention;
- Almost half of all sex workers who were arrested and 40 percent of sex workers who were fined, reported that police did not follow the formal procedure required; and
- Almost half of all sex workers who were arrested reported being placed in cells that were dirty, wet and smelled bad, that had toilets that did not work, and/or mattresses and blankets that were dirty.

The patterns of abuse that sex workers experience are the direct result of their criminal status, which increases their vulnerability to violence. The current legal framework forces sex workers to the margins of South African society, where they are easy targets for abuse at the hands of police and clients. The only remedy is to change the way in which the sex work industry in South Africa is viewed under the law and by the institutions responsible for its administration. This will ensure that sex workers are afforded the same rights, in law and in practice, as others in the country are given.

KEY RECOMMENDATIONS

In order to address the serious and widespread human rights violations experienced by sex workers in South Africa that have been documented in this report, the following actions should be taken:

Recommendations to State Actors

• **Legislature**

- Laws prohibiting the selling and buying of sex should be repealed to facilitate sex workers' increased access to health and other social services. The laws criminalising sex work must be repealed in order to honor the international treaties that South Africa has signed and ratified that protect women against violence.

• **Independent Institutions Promoting Democracy**

- The Commission on Gender Equality and the Human Rights Commission should investigate the human rights violations that sex workers experience.

• **Police Authorities**

- Immediately issue directives to staff members prohibiting them from harassing and arresting sex workers for ulterior purposes, and enforcing compliance with the High Court interdict of 2009 which prohibits the arbitrary arrest of sex workers.
- Together with sex workers, establish guidelines for police conduct when interacting with sex workers.
- Develop administrative mechanisms for monitoring and responding to reports of police violence and unlawful conduct to help minimise such occurrences, to enable effective responses, and to ensure the protection of complainants from further victimisation.
- Establish a memorandum of understanding between the police and sex worker rights organizations in which they commit themselves to working together to ensure the protection of sex workers' human rights.

Recommendations to Civil Society Partners

- Support sex workers' call for the decriminalization of sex work in South Africa.
- Meaningfully include sex workers in the conceptualization, design and implementation of all projects targeting them and in broader human rights initiatives to address violence and police misconduct.
- Offer services to sex workers in the form of legal advice, legal representation and health services.

Recommendations to International Human Rights Institutions

- Investigate the South African state's failure to protect the human rights of sex workers and hold the state accountable for violating human rights as protected in the international and regional treaties to which South Africa is a signatory.
- Support sex workers' call for the decriminalization of sex work in South Africa.

SEX WORK IN SOUTH AFRICA

South African law criminalises sex work. In terms of the law both the sex worker and the client commit offences, yet it is overwhelmingly sex workers who bear the consequences of this criminal status. Formal research and the experiences of organisations working in the sector indicate that sex workers routinely experience human rights violations. This report, which draws on interviews with 308 sex workers that had made complaints to the WLC, reinforces these findings.

The Legal Context

Constitutional Rights

South Africa's Constitution, which became law in 1996, is the supreme law of the country, thus any other law or action that conflicts with the Constitution is invalid and unlawful.

The Constitution provides that everyone has inherent **dignity** and the right to have their dignity respected and protected (Section 10). Section 9 provides that "Everyone is **equal before the law** and has the right to equal protection and benefit of the law". Section 9(3) provides that "the state may not **unfairly discriminate** directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth".

In addition, Section 12 provides that everyone has the right to **freedom and security of the person**, which includes the rights:

- Not to be deprived of freedom arbitrarily or without just cause;
- Not to be detained without trial;
- To be free from all forms of violence from either public or private sources;
- Not to be tortured in any way; and
- Not to be treated or punished in a cruel, inhuman or degrading way.

Section 35 provides for **the rights of arrested, detained and accused persons**, such as:

- The right to be brought to court as soon as reasonably possible, but not later than 48 hours after the arrest;
- The right to be informed of the reason for their arrest and detention; and
- The right to be released from detention if the interest of justice permits.

Sex work is criminalised in South Africa through the Sexual Offences Act of 1957 and the Criminal Law Amendment Act of 2007. At a local level, various municipal by-laws, are also used to police sex work. In Cape Town, a municipal by-law makes it illegal to "importune any person for the purposes of prostitution", which is also used to police sex work.

The Sexual Offences Act 23 of 1957

The primary prohibition against sex work is section 20(1)(aA) of the Sexual Offences Act, which makes it an offence to have unlawful carnal intercourse or commit an act of indecency with any other person for reward.¹ Although this effectively prohibits sex work, it does not penalise "being" a prostitute. A person cannot therefore be arrested for being known to the police as a sex worker – there has to be at least a reasonable suspicion that he or she has engaged in sexual intercourse or has performed an indecent act for reward (at a specified time with a specified person).²

The Act also prohibits:

- Brothel-keeping (section 2);
- Procurement i.e. recruiting a person to work as a sex worker (section 10(a)) or to work in a brothel (section 10(b));
- Facilitating sex work, for example where escort agencies supply escorts knowing that they will supply sex for reward

to their customers (section 12A(1)).

- To knowingly living off the earnings of sex work;
- Soliciting – any person who “entices, solicits or importunes in any public place for immoral purposes” commits an offence (section 19 (a)). This refers to a direct physical invitation through words, gestures, signs or display;
- Indecent exposure in view of the public (section 19(b)) and public indecency (section 20(1)(b)).

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

As a result of the *Jordan* case³, the recently enacted Sexual Offences Amendment Act addresses the criminality of clients. Section 11 makes it an offence to pay or otherwise reward someone over 18 years of age for a sexual act, whether that act is committed or not.⁴

In 2011, the South African Police Service (SAPS) released their national police statistics, which revealed that only 11 clients were convicted for buying sex, but that there were many arrests of sex workers during this period. The rationale for criminalising clients is to reduce demand and to eliminate the discriminatory practice whereby the police target female sex workers while ignoring male clients. However, as the national statistics indicate, these laws are hard to enforce and women continue to bear their brunt. The laws create an environment in which police resort to intrusive or illegal policing practices to make their arrests, severely violating sex workers’ human rights.

Municipal By-Laws

It is not easy to prosecute sex workers and clients under the Sexual Offences Act of 1957 and 2007, because it is not always possible to prove all the elements of the criminal offence, especially where the offender is the client. The only way to convict the client is by entrapment or if the sex worker testifies against him, thereby implicating herself⁵. As a result, municipal by-laws⁶ are often used to arrest sex workers instead of the Sexual Offences Act.

The most common by-laws used are those dealing with loitering, drunken behaviour and soliciting for the purposes of prostitution. In many cases the sex workers have not committed the offence in question. Even where the sex worker is guilty of the offence, immediate arrest and detention is not the appropriate action for police to take since the by-laws set out the following procedures:

1. When a person has violated a by-law, the first step should be to give them a written notice to stop the offending activity. Only if they fail to adhere to the terms of the notice can they be fined or given a notice to appear in court;
2. Where a person has been fined, they should have an opportunity to make representations if they feel the fine was incorrectly levied against them, similar to the current system allowed for traffic fines;
3. Where a fine has not been paid after it becomes due, arrest would be allowed only as a last resort if necessary to secure a person’s attendance in court. In most cases a summons would be sufficient.

The Human Rights Context

Criminalising sex work in South Africa has not eradicated it. Instead, the illegal status of sex work creates conditions in which exploitation and abuse can thrive.⁷ Sex workers suffer systematic and regular violence and rape, and are murdered at rates higher than the general population. Globally, standardised mortality rates for sex workers are six times more than in the general population.⁸

South Africa is no exception. In Cape Town alone:

- Between 1995 and 1996, a serial killer murdered 19 sex workers;
- Towards the end of 1999, a sex worker was killed when a man threw her over the railing at a beach;
- In 2003 a group of male sex workers and brothel owners were murdered by two men.⁹

Even in the context of unacceptably high levels of violence against women in South Africa generally, the levels of violence against sex workers are significantly higher.

Who Are Sex Workers?

This report interviewed 308 sex workers, most of whom are based in Cape Town (see Table 1). An overwhelming majority were female (90 percent) with a small number of males (6 percent) and transgender individuals (4 percent) (see Table 2). Many of the women with whom we consulted with informed us that their clients are predominantly male. Of the sex workers surveyed who were prepared to disclose their age, most were between 18 and 40 years of age (see Table 3).

Table 1. Location of Interviewees

Research Site	Number of Interviews	% of Total
Cape Town	223	72.16%
Johannesburg	77	25%
Limpopo	5	1.6%
Durban	2	0.6%
Pretoria	1	0.3%
TOTAL	308	100%

Table 2: Sex of Interviewees

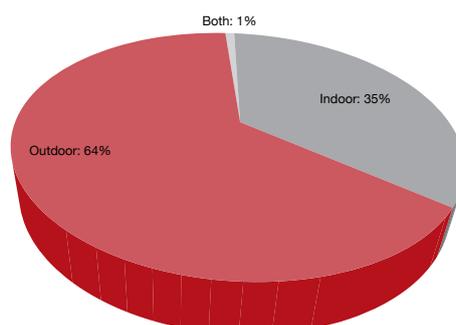
Sex	Number	% of Total
Female	276	89.61%
Male	20	6.49%
Transgender Female	12	3.89%
TOTAL	308	100%

Table 3: Age of Sex Workers

Age	Female	Male	Transgender
18 – 25	34	-	-
26 – 30	45	-	1
31 – 35	34	1	-
36 – 40	19	1	2
41 – 45	9	1	-
46 – 50	6	-	1
50 – 55	5	-	-
55 and over	-	-	-
TOTAL	151	3	4

Roughly two thirds of our respondents work outdoors, finding clients on the street. Among those who work indoors, some work from brothels and others from hotels where they both live and work, renting rooms by the day.

Figure 1: Location of Sex Work



HUMAN RIGHTS VIOLATIONS BY POLICE AGAINST SEX WORKERS

"[A] police officer told all of us to get into the car, and he asked how much I charge my clients. I told the officer that I do not do business with the police. Then [he] said, "open your poesie (vagina), so that I can see it". I told [him] , that I "cannot open my poesie, because I am menstruating". [The] officer then told my friends, to "suck it". He told them to give each other oral sex so they won't get arrested. So my friends gave one another oral sex in front of the police officers. When they were done, [the police] officer said that he is still going to arrest them and he took all of us to the Durbanville Police Station." - Female sex worker, Cape Town

"Then a police officer unzipped his pants and put a condom on. I got a shock. They started speaking to me rudely. They told me that I must give each one of them a blow job (oral sex), which I did. He put me on the floor. The police officer raped me, then the second one, after that the third one did it again. I was crying after the three left without saying anything. Then the first one appeared again... He let me out by the back gate without my property. I was so scared that my family would find out." - Female sex worker, Cape Town

Police abuse of sex workers in South Africa is systemic and widespread. Of the 308 sex workers interviewed for this study, 70 percent experienced some form of abuse at the hands of police. Many reported more than one violation. The most common human rights violations by police against sex workers that we documented were:

- Assault and harassment;
- Arbitrary arrest;
- Violations of procedures and standing orders;
- Inhumane conditions of detention;
- Unlawful profiling;
- Exploitation and bribery; and
- Denial of access to justice.

Assault and Harassment

"The cops approached me and started calling me a moffie (slang for homosexual). The Constable assaulted me; he kicked me in my side, and punched me in the face and in my stomach." - Transgender female sex worker, Cape Town

Sex workers experience high levels of violent assault at the hands of the police. Almost one in six of the sex workers who approached the WLC had been sexually or physically assaulted by police. They often report being pepper sprayed during arrest, assaulted at the police station or when they ask the police officers for reasons for their arrest. Some have reported being assaulted at the police station in full view of other police officers. One female sex worker from Johannesburg was sprayed with pepper spray in the vagina and beaten by police, resulting in physical injuries that the police subsequently also pepper sprayed.

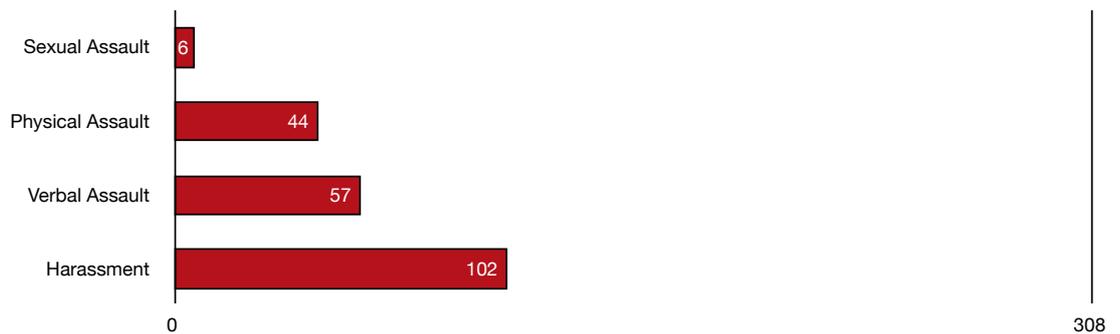
"While I was standing there talking, I saw a group of women, who are my colleagues, running past me, I was not sure why they were running. Then I saw a South African Police vehicle approaching, and one police officer jumped out of the car and he said, "I don't want you here. Move from here". And then the police officer pepper sprayed me in my eyes and in my ear." - Female sex worker, Johannesburg

Police officers commit these crimes with impunity. They remove their name tags so that sex workers are unable to identify them and they instil such fear in the sex workers that they are afraid to report these crimes to the authorities.

"One day I was standing on one of the corners, the police came and ask what I was doing there and who I am waiting for, then they put me in the van and told me that they are taking me to the police station, but instead they took me back off the street and wanted sexual favours, and both of them had no name tags." - Female sex worker, Cape Town

Aside from physical violence, police verbally assault and harass sex workers at high levels (see Figure 2 below). Eighteen percent of sex workers we heard from had been verbally assaulted by police, and one in three had been harassed. We have used the category of “harassment” to capture sex worker complaints that police officers will often park in the areas where they work, then chase them away, threaten to arrest them and/or threaten physical assault. SWEAT has informed us that police officers often sit outside apartment blocks where sex workers work and use dogs to scare off the sex workers and prevent them from going to work. Complaining about a police officer who regularly targets sex workers in Cape Town, one participant said that “when he is there, then nobody can work. We all have to hide ourselves. He picks you up and drops you [on] that side of the town and he says voetsak or fuck off”.

Figure 2: Police Assault and Harassment



“A police officer made us stand along a wall in a line. There were beer bottles around us, and the officer began shooting the beer bottles with rubber bullets in a way that kept making the bullets hit against us. Then they handcuffed us and took us to the police station.” - Female sex worker, Johannesburg



A Johannesburg sex worker who was shot on her leg with rubber bullets. (Photograph taken March 2012)



Two Cape Town sex workers displaying injuries they sustained after being beaten by police on separate incidents (Photographs taken on April 2012 and March 2012 respectively).

Violations of Justice and Due Process

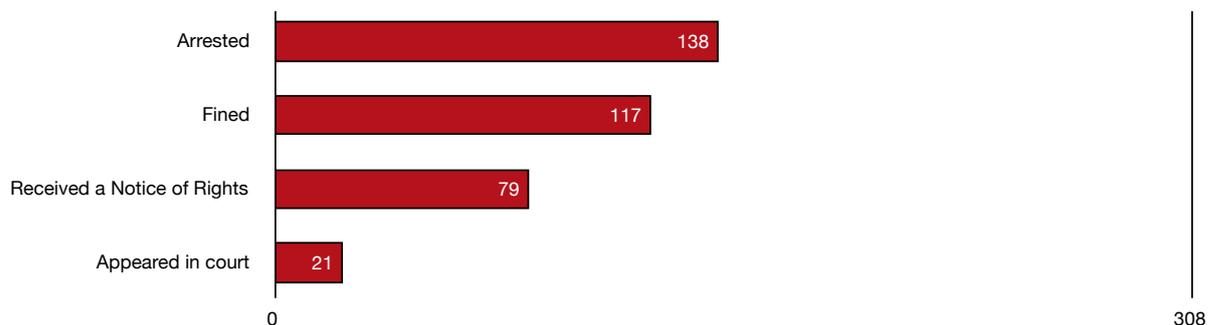
The human rights of sex workers are violated not only through violence, but also commonly through behaviour that denies their right to dignity and fails to treat them in accordance with the law. South Africa's Constitution, the Criminal Procedure Act 51 of 1977 and police Standing Orders specify certain minimum requirements for how people should be treated during police investigations, arrests and while in detention.

Arbitrary Arrest

Section 12 of the Constitution provides that “everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause; and not to be detained without trial.” Many sex workers said that their arrests occurred arbitrarily and without just cause.

Of the 138 sex workers who were arrested, only 21 appeared in court, indicating that the pattern of arresting sex workers without the intention to prosecute is still prevalent (see Figure 3 below). This is a clear violation of the right to defend oneself in court and not to be arbitrarily deprived of one's freedom. This pattern of abuse was challenged by SWEAT in 2009 wherein the court stated that the purpose of the arrest should be to bring the suspect before a court of law to face prosecution (see case study on page 13).

Figure 3: Arrest Outcomes



It is important to note that in most of these cases, sex workers were arrested merely because police officers knew that they were sex workers and not because they actually found them committing the act of selling sex at the time. One sex worker was arrested while grocery shopping. Seventy nine sex workers said that they received a Notice of Rights during their detention. The Notice of Rights is a document that lists the reason for the person's detention and lists the detainee's section 35 Constitutional rights which relates to arrest and detention. At the bottom of the Notice of Rights, it requires the detainee's signature. Many sex workers said that although they received the Notice of Rights, they were not informed about the reason for the arrest and subsequent detention and police officers demanded that they sign the document without it being read to them". Even though sex workers received and signed the Notice of Rights, it does not make the arrest and detention lawful. The Section 35 of the South African Constitution outlines the rights of arrested and detained persons, yet in our interviews with sex workers many reported that they were granted none of these rights, for example, the right to be informed of the reason for arrest. Further Article 9 of the International Covenant on Civil and Political Rights (ICCPR) states that, "all persons have the rights to liberty and security of the person, and the right not to be subjected to arbitrary arrest or detention".

Many sex workers reported that when they are approached by police officers, they are forced into a police van and transported to the police station where they are thrown into a cell until the following morning, and then they are often released without the opportunity to appear in court. Section 35(2)(a) of the Constitution requires that anyone who is

detained should be informed promptly of the reasons for their detention. This does not occur in practice. One transgender sex worker in Cape Town reported that, *“the policemen refused to provide me with reasons for my arrest, and they forced me into the police van.”*

Sex workers reported that when they ask for reasons why they are being arrested, the police officers respond by either verbally assaulting them or physically assaulting them with pepper spray. A female sex worker from Cape Town told us about her experience when she was arrested by the police:

“The policemen told me to get into the police van. When I asked the policemen why, they told me that I should not ask a lot of questions. I told the police that I was waiting for my boyfriend, but they ignored me and pushed me into the van. When I got into the van, there were a lot of other ladies in the van. We were all talking, and then the van stopped, and a police officer opened up the door and he sprayed pepper spray into the van, because we were talking. I started crying because the spray burned my eyes.”

Violations of Procedures and Standing Orders

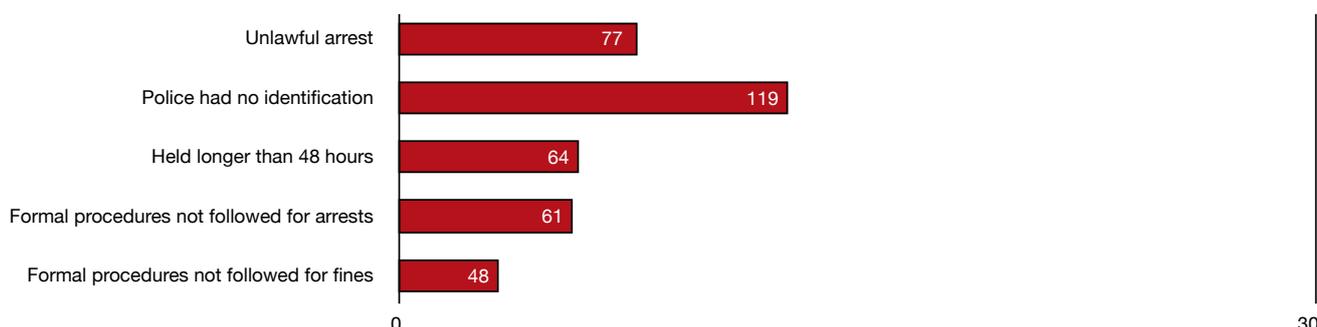
Through our documentation we found that 64 respondents (nearly half of all who reported being arrested) were held longer than the maximum 48 hours – in one case, as long as four days – without being charged. One sex worker from Milnerton told us that she was kept in the police holding cells from Friday until Tuesday morning without charge, when she was released.

Police officers are bound by the Constitution, the South African Police Act 68 of 1995 and they have to abide by the regulations set out in Standing Orders. Standing Orders G 361(1) and (6) of the South African Police Services (SAPS) set out the procedures for lawful arrest. These include entering every arrest into the Occurrence Book and issuing everyone who has been arrested with a Notice of Rights. This includes recording persons who have been detained in the police cells into the Custody Register.

The WLC receives many complaints from sex workers about how the police arrested them, demonstrating that the authorities often violate the procedures and Standing Orders to which they are bound. As Figure 4 below shows, formal procedures were not followed in 61 cases of arrest and 48 cases where fines were issued. By formal procedures we mean informing people that they are under arrest, of the reasons for their arrest, informing them of their rights in terms of section 35 of the Constitution and providing them with a Notice of Rights.

In Figure 4 below, 77 sex workers were unlawfully arrested because the police officers did not inform them that they were under arrest and the police officers did not provide them with reasons for the arrest. Sex workers said that the arrest is used as a means to intimidate and harass them and in the case study on page 13, the court stated that the purpose of the arrest must have a legitimate purpose otherwise the arrest is unlawful.

Figure 4: Violations of Procedure and Standing Orders



On the 9th July 2010, Stacey-Leigh Manoek, an attorney at the WLC, visited the Bellville and Parow Police Station and asked police officers in the Charge Office to view the Occurrence Book and the Custody Register in order to ascertain whether our clients were in fact arrested and detained. Many of them were not recorded. The WLC also filed a number of damages claims against the Minister of Police. When we submitted a Discovery Notice in one of the cases to the State Attorney, the State could not provide any evidence that the person was detained because the police officers failed to record it.

Many sex workers said that when they are arrested, the police officers do not take them to the police station immediately, even though they are required to do so in Section 50(1)(a) of the Criminal Procedure Act 51 of 1977, which states that anybody who is arrested should be taken to a police station “as soon as possible”. Some are driven around out of spitefulness, or to look for other sex workers. Some complained that when they are in the back of the van without access to seat belts, police officers often drive recklessly, resulting in injuries. One outdoor-based female sex worker from Wynberg reported an all-night ordeal she experienced at the hands of the local police:

“He drove around with me until 6am the next morning... we were about three or four in the van. He pepper sprayed into the van. When we asked him why he is like this, he says that “I told you fuck off”. On this night, he dropped me in Mowbray / Observatory and I had to walk back home. The next day... we went to Wynberg Police Station to lay a charge against him. I told them I want to lay a charge against a police officer who keeps on harassing me. And they laughed at me and said that is his job”.

Alarming, more than 85 percent of arrested sex workers (119 of 138) who consulted with the WLC reported that the police officers who carried out the arrest were not wearing identity tags. Without the ability to identify those who violate their rights, sex workers cannot lay charges or get access to justice if they have been assaulted, detained without reason or exploited by police officers.

“I was approached by three policemen from the South African Police Service, two male and one female. I could not identify them because they were not wearing name tags. They told me to get into the police van.” - Female sex worker, Cape Town

Case Study

On 20th April 2009, the Western Cape High Court held that the South African Police Service (SAPS) and the Cape Metropolitan Police were interdicted and restrained from arresting sex workers for any purpose other than prosecution, and in particular while knowing that no prosecution would follow. The court further stated that arrests made without legitimate purpose are unlawful. The court has stated that the purpose of an arrest must be to bring the suspect before a court of law to face prosecution. The burden of proof that the arrest was lawful is with SAPS. The Court held that SAPS knew with a high degree of probability that there would be no prosecution, hence making the arrests unlawful. Since the Western Cape High Court interdict, the WLC has documented numerous cases of continued harassment and arrests for ulterior purposes, which are in contravention of the court order. In response to a legal letter informing the police of the violations, they responded: *“this office is well aware of the settlement order in the matter of SWEAT v Minister of Safety and Security & Others, Case number 3378/07. It deems mentioning that Prostitution is still an offence in terms of the Sexual Offences Act, No 23 of 1957 as amended. This Department will proceed to arrest and charge prostitutes in terms of Section 19 of the Act.”* One of the other police stations confirmed that they have circulated guidelines on how to arrest sex workers.

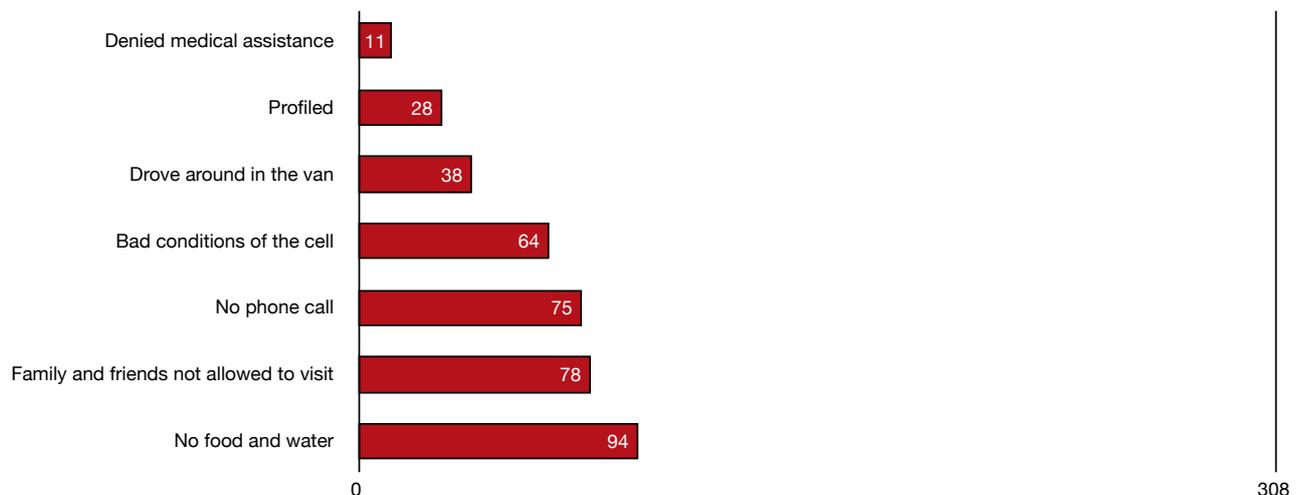
Inhumane Conditions of Detention

Sex workers are often arrested and detained for the maximum period of 48 hours, and when they are detained in the police cells, they are subjected to bad conditions, which affect their health and safety. Nearly half of all sex workers who were arrested (64 out of 138) reported being placed in cells that were dirty, wet and smelled bad, that had toilets that did

not work, and/or mattresses and blankets that were dirty. This is a recurring practice despite the fact that Section 35(2) (e) of the Constitution entrenches a right to humane conditions of detention. SAPS is further bound by this obligation in Standing Order (G) 361 which specifies that cells should not be overcrowded, blankets and mattresses must be provided and cells should be clean. Section 13(2)(c) of the Standing Order provides that:

“Police cells must be equipped with reasonable means of rest such as a chair or a bench, and a person in custody, who is kept in custody overnight, must be provided with a cell mat or mattress and blankets of reasonable standard. The station commissioner must make the necessary arrangements to ensure that the cell mats or mattresses and blankets are in good order when issued and changed often enough to ensure cleanliness.”

Figure 5 : Violations in Detention



Sex workers in South Africa are routinely subjected to treatment in police detention that is in clear violation of their right, according to Section 12 of the Constitution, “not to be treated or punished in a cruel, inhuman or degrading way”. Almost 70 percent of sex workers that were arrested, and who consulted with the WLC, were denied food and water. Eight percent were denied medical attention.

The follow evening, I was still in the police cell, and I informed one of the police officers that I am on ARVs and that I have to take my medication at 8pm otherwise I will get sick. I told the police officer that my medication is in my bag. They refused to give me my medication.” - Transgender sex worker, Cape Town

At the same time, sex workers are routinely denied their right to make a phone call when brought into police custody (54 percent of those who were arrested), and prohibited from access to family and friends (57 percent). The experience of a female sex worker in Cape Town highlights the treatment that sex workers can face when taken into police custody:

“I was taken to Parow Police Station, where I was put into a cell with eight other adult females. The condition of the cell was very bad, and the toilet was not working. The police officers on duty did not provide me with any blankets, food, water and they did not allow me to make a phone call. After much begging, at 03h00, they provided me with a blanket.” - Female sex worker, Cape Town

Unlawful Profiling

During the period leading up to the 2010 World Cup, the City of Cape Town introduced a “clean up the streets” campaign, which included vigorous policing of sex workers and homeless persons. The city established a specialised police unit, which the media dubbed the “Vice Squad”. This unit was the main violator for “profiling” sex workers. Many sex workers reported that the Vice Squad would approach them in a big white Quantum van with tinted windows.

The WLC found that in terms of Sections 77 and 37(1) of the Criminal Procedure Act 51 of 1977 it is unlawful to take pictures and fingerprints of persons before they have been charged. The Police Act prohibits making sketches or photographs of certain persons, and publishing these images, stating that it is a criminal offence if police officers publish pictures of persons without the permission from the National or Provincial Police Commissioner. Despite this, we documented 28 cases where sex workers had been profiled by the police.

One sex worker said that she went to do her grocery shopping, and on her way home, the Quantum van with six police officers approached her, and she was ordered to get inside. She was asked various questions regarding her contact details and family contact details. Before they released her from the van, they took pictures of her face and told her that they needed the pictures to identify her in case she disappeared or was murdered.

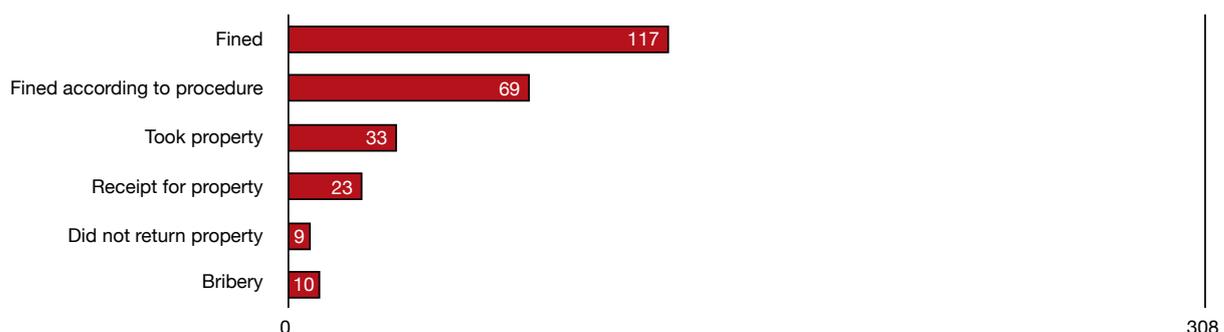
“The police officers asked me a lot of questions: They wanted to know what my full name is, my address, my contact details, my children’s names, and a telephone number for a next of kin, so I gave them the telephone number for my sister. The police officers also wanted to know why I am doing this work, how long I have been a sex worker, what I charge for certain things, and how much money I make every day. I answered all their questions, because it is no use to fight with them. Then they told me that they have to take a picture of me. They took two pictures, one of the front of my face, and the other of the side of my head. They did not take my fingerprints.” - Female sex worker, Cape Town

Exploitation and Bribery

“I don’t like the police when they are hunting, they don’t take us as people they take us as a dog. They call us animals and if you are asking [for] your money, if you did make money the night before you locked up, they don’t give you back. They just say get out, prostitute.” - Female sex worker, Bellville

The criminalized status of sex work and the perception that sex workers are powerless to enforce their rights makes them easy targets for economic exploitation by some police. As stated above, municipal by-laws can be used as a mechanism to police sex workers. When an offence is committed under such laws, the proper procedure is for a warning and then fine to be given, with the opportunity for the person fined to contest the charge in a court of law. Of the 117 respondents who were fined by police officers, only 69 were fined according to the correct procedure and received receipts (see Figure 6 below). In other words, more than four out of every 10 instances where a sex worker was fined occurred outside of the parameters of the law, which have been established to ensure police transparency and accountability. If fines have not been officially recorded, there is a clear implication that police officers may be pocketing the income.

Figure 6: Exploitation



“Police if they caught you right with the client, they charge you on the spot, no receipt or anything written that you get from the police.” - Female sex worker, Cape Town

This is in addition to the 10 sex workers who reported that officers accepted bribes or favours in return for releasing or not arresting them. An account by a female sex worker from Cape Town highlights the arbitrary way in which police can use their power over sex workers to extract money for their own financial gain. She reported to the WLC that “police tell us that the fine for the first offence of being a sex worker is R500, the second is R1000, the third is R1500 and then it is prison. It never reaches the last stage because the police ask for a bribe instead”.

“The police came to my flat and demanded money from me. I gave one of them R10 because I knew he was hungry.” - Female sex worker Cape Town

These reports are borne out by the WLC’s experience. When we follow up on fines as legal representatives we often find that there is no record of them, or that police officers have not referred them to court. If we go to court to contest the fine, charges are withdrawn due to insufficient evidence. In some cases, prosecutors inform us that there are errors in the information police officers wrote on the fine.

“They asked one of the girls to trade for sex, they took her away from us and we don’t know what happened to her.”- Female sex worker, Athlone

Denial of Access to Justice

“We went to Wynberg Police Station to lay a charge against him. I told them I want to lay a charge against a police officer who keeps on harassing me. And they laughed at me and said that is his job.” - Female sex worker, Cape Town

All citizens should be treated equally by the law and should have equal benefit of the law; as afforded under Section 9 of the South African Constitution. Further Article 26 of the International Covenant on Civil and Political Rights (ICCPR) states that “all persons have the right to equality before the law and equal protection of the law”. Therefore sex workers should also have the benefit of being assisted when they lodge criminal charges against persons who violated their constitutional rights. This is reiterated in Article 2.3 of ICCPR which provides that, “every person has the right to an effective remedy for violations of rights or freedoms, notwithstanding that the violation has been committed by persons acting in an official capacity”.

Despite this, the WLC documented numerous cases where sex workers were denied access to justice for crimes that had been committed against them, either by police, clients or others. The criminalised and marginalised status of sex work in South Africa can significantly hinder the ability of sex workers to seek recourse through the criminal justice system, as the two examples below illustrate.

“The day they beat my colleague she ran to the taxi rank and all the taxi drivers started laughing and swearing at her. She went to the police station to open up a case and they arrested him. After two days he was let out. The prosecutor said he doesn’t have a crime because we are sex workers and then let him free. When she saw the man again, he said, there is nothing you can do to me, I will beat you all when I see you.” - Female sex worker, Rustenburg

“I told [the police officer] that I was assaulted and they asked me by who, and I told them a police officer. They gave me a J88 form and told me to go to the hospital... I went back to the police station with the completed form and said that I wanted to open a case... they (the police) said that I could not open a case without the station commander and he was not there. When I returned the next day with the Sisonke Coordinator they told me there is no need to speak to the station commander and I can lay a charge. A docket was opened...another policeman wrote down what happened and I signed a statement. One of the officers who was there when I was assaulted called the Sisonke Coordinator on Tuesday evening and said that she must not waste time and money, I will never get a case at the police station.” - Female Sex Worker, Limpopo

OTHER SOUTH AFRICAN RESEARCH

The abuses that the WLC documented are consistent with other recent research on the human rights situation of sex workers in South Africa. A study by Chandre Gould and Nicole Fick in 2008 found that in Cape Town, 37 percent of street-based and 20 percent of brothel-based sex workers experienced violence.¹⁰ Gould and Fick asked street-based sex workers whether they had been raped by a client, meaning being forced to have sex with a client against their will or forced to have sex in a manner which they had not agreed to (such as unprotected sex). One in three sex workers reported having been raped by a client. Most cases of client violence were triggered by the refusal of the sex worker to comply with the client's demands, particularly for anal sex or for unprotected sex.¹¹

More than half the sex workers who were raped by clients believed the police would not help them, or that they did not have sufficient evidence to go to the police.¹² This is part of a consistent pattern: Most sex workers are very reluctant to report crimes committed against them or others to police.¹³ Unreported crimes include verbal abuse, refusal to pay, being robbed, threats of physical assault, physical assault and rape. There is great scepticism about the police as an avenue of redress, because some police officers are themselves perpetrators of abuse against sex workers.¹⁴ Gould and Fick's 2008 study found that 47 percent of sex workers they surveyed had been threatened with violence by police, 12 percent had been raped by police and 28 percent had been asked for sex by police officers in exchange for release from custody. Several previous studies have also shown how street-based sex workers experience various forms of physical abuse, violence and corruption at the hands of police in South Africa.¹⁵

Apart from outright violence, in a separate study conducted by Fick in 2006, Fick found that sex workers faced a cycle of continuous arrest and release that effectively amounted to harassment by police officers. Approximately half of the sex workers who made complaints to SWEAT spoke of being arrested repeatedly. They described high levels of contact with the police and some were arrested as often as four or five times a month.¹⁶ They also were concerned that despite these frequent arrests, they were not charged or brought before a magistrate.

IMPACT OF VIOLENCE AND CRIMINALISATION ON THE HEALTH OF SEX WORKERS

The threat of violence is a clear and ever-present danger to the health of sex workers, not least because violence increases the risk of contracting HIV.¹⁷ The World Health Organisation has identified three key risks:

- Forced sex increases the risk of transmission of HIV due to physical trauma;
- The threat of violence limits the ability of people to negotiate safer sex; and
- Disclosure of HIV test results or the disclosure of a person's HIV status may also entail an increased risk of violence.¹⁸

Furthermore, sex workers have limited access to health and welfare services because they are afraid that if they seek these services and disclose their occupation, they will be arrested or discriminated against. Sex workers have reported situations where health care officials refuse treatment, provide inadequate treatment or make abusive remarks when discovering or even suspecting the person is a sex worker.

"The nurse raised her voice at me, so that all the other patients could hear that I am a sex worker. She first asked me what I was doing in the clinic. I told her that I am sick. She asked me what the problem is. I told her that I have wounds in my mouth, but before I could finish talking she screamed at me and said you are sick because you suck all the men's penises, can't your vagina be filled by one man. She took my folder and told me to get Panado" - Female sex worker, Rustenburg

This justified fear of abuse means many sex workers have poor access to adequate health services including:

- HIV prevention;
- Post-exposure prophylaxis after rape;

- Emergency contraception;
- Management of sexually transmitted infections; and
- Drug treatment and other harm reduction services.

It is dangerous to focus concern about the health of sex workers only on their sexual health. The view of sex workers as vectors of disease reinforces the stigma attached to this work. In a review of literature on sex work between 1990 and 2000, Vanwesenbeeck (2001)¹⁹ found that most of the current research relating to sex work was very much related to HIV, while Wolffers (1999)²⁰ also pointed to the fact that the focus of most interventions with sex workers had been to address issues around their sexual and reproductive health.

There needs to be a shift in focus towards looking at sex workers and their health more holistically. It is important to examine factors like financial pressures, living circumstances, the illegal nature of the work and vulnerability to violence as factors that influence health.

THE CASE FOR LAW REFORM



In order to address these human rights violations, South Africa should decriminalise the selling and buying of sex because the current legal framework leaves sex workers vulnerable to police violence, harassment and abuse, and does not provide them with the protection that they require. The continued criminalisation of sex work in South Africa has significant implications for sex workers and broader society, in terms of:

- Individual and public health outcomes;
- Association with other crimes;
- South Africa's international obligations;
- Corruption, harassment and unfair discrimination; and
- Inappropriate use of scarce resources.
-

INDIVIDUAL AND PUBLIC HEALTH

The criminalisation of sex work means that sex workers labour in unhealthy and unregulated conditions. There is little or no promotion of safer sex, managers of brothels encourage a high turnover of clients and there is little or no control over clients' behaviour.²¹ All these factors make sex workers extremely vulnerable to HIV/AIDS and other diseases. UNAIDS suggests that the decriminalisation of sex work is a necessary, but preliminary, step to addressing HIV vulnerability amongst sex workers. In addition the Global Commission on HIV and the Law recently found that in order to ensure an effective, sustainable response to HIV, countries must repeal laws that prohibit consenting adults from buying or selling sex.²²

International law

South Africa's current legal position does not comply with the international treaties to which it is a signatory. For this reason, reform of the law in relation to sex work is imperative.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Declaration on the Elimination of Violence Against Women both call for states to eliminate all forms of discrimination and violence that women suffer.²³ South Africa has a duty to honour these treaties so that sex workers will no longer experience discrimination because of their work and they will be able to take action against police officers who regularly abuse them. General Recommendation 19 of CEDAW states that "prostitutes are especially vulnerable to violence because of their status, which may be unlawful, tends to marginalise them. They need the equal protection of laws against rape and other forms of violence".²⁴

The South African Law Reform Commission's Discussion Paper of 2009 stated that, "*the current legal position of prostitution is in need of comprehensive review. It is clear that South Africa's international obligations to realise various rights such as dignity, security of the person, equality and equal access to the law and access to health care, as well as to provide effective remedies for violations of rights, must inform the decisions of the legislature*".²⁵

A 2010 thematic report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health analysed the effects of criminalisation of sex work in relation to violence and harassment and access to health care. The report stated that "Decriminalization, along with the institution of appropriate occupational health and safety regulations, safeguards the rights of sex workers".²⁶ The report also recommended that states "repeal all laws criminalising sex work and practises around it, and [to] establish regulatory frameworks within which sex workers can enjoy the safe working conditions to which they are entitled".²⁷

The 2010 annual report of the United Nations High Commissioner for Human Rights, also analysed the impact of criminalisation of sex work on the rights of women and the right to access health care. The report made the following recommendations: "...Reform and monitor laws that impede effective HIV responses, including removing punitive criminal laws used repressively against sex workers..."²⁸

Corruption, harassment and unfair discrimination

The existing legal framework is unacceptably liable to police discretion and encourages police corruption due to the option of bribes and demands of sex. In its present form, the Sexual Offences Act requires intensive and intrusive police methods such as entrapment in order to prosecute and secure a conviction. The indoor industry is rarely targeted, except when the brothel tends to become too high-profile or there are community complaints. In these instances entrapment procedures are used.²⁹

Most police interventions are in response to public and community complaints. In these instances the targets are the most visible elements, namely street-based or outdoor sex workers, and the majority of arrests are based on municipal by-laws.³⁰

The continued arrest of sex workers, particularly when they have not committed the acts for which they been fined, conveys a deliberate abuse of the law to persecute a specific group of people. This practice violates the right to equality before the law and amounts to unfair discrimination. Sex workers further complain of the violation of their Constitutional rights to be informed promptly of the reason for their detention, to choose and consult with a legal practitioner, to challenge the lawfulness of the detention, and to communicate with or be visited by next of kin or a doctor. Their conditions of detention are often inconsistent with the right to human dignity.

Inappropriate use of scarce resources

Current policing of sex work drains scarce resources away from more effective policing practices. Technikon South Africa's Institute for Human Rights and Criminal Studies, claims that:³¹

- At a minimum, it costs the police close to R14 million a year to prosecute sex workers;
- Police action against sex workers is inconsistent;
- Most cases against sex workers are dropped after coming to court, wasting valuable court time; and
- Sex work is more heavily policed than serious violent crime.³²

The reality is that sex workers are seldom prosecuted, and are more likely to be arrested, harassed and then released (see case study on page 13).

CONCLUSIONS

South Africa's current legal framework on sex work fails to conform to international, regional and domestic law in relation to violence against women and equality. It is conducive to high levels of abuse by law enforcement officials.

The evidence shows that the police and in effect the state are the main violators of the human rights of sex workers. The main types of abuse are:

- Assault and harassment;
- Arbitrary arrest;
- Violations of procedures and standing orders;
- Inhumane conditions of detention;
- Unlawful profiling;
- Exploitation and bribery; and
- Denial of access to justice.

Even as it stands, the law is not being applied properly with regard to sex workers. Inapplicable by-laws are used to arrest sex workers, or they are arrested without following correct procedure. This amounts to systematic state harassment of sex workers.

It is apparent that the current legal system must be reformed to bring the treatment of sex workers in line with our constitutional obligations and reduce police abuse of sex workers. South Africa must shift from approaching sex work through the lens of criminalisation and instead treat sex work as a form of labour that is governed with the same rights and responsibilities as all other forms of work.

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APPENDICES

APPENDIX 1 THE RESEARCH PARTNERS

Women's Legal Centre (WLC)

The WLC is a non-profit, independently funded law centre. Its primary goal is to further women's equality in South Africa, with particular attention to the rights of socially and economically disadvantaged women. The WLC has a vision of women in South Africa living free from violence in safe housing, free to own their share of property, empowered to ensure their reproductive and health rights and able to work in a safe and equal environment. To achieve this goal it conducts litigation, provides free legal advice to women, supports advocacy campaigns and offers training to ensure that people know and understand the impact of court judgments on women's rights.

The WLC works in five key focus areas:

- Gender-based violence;
- Fair access to resources in partnerships;
- Access to housing and land;
- Access to fair labour practices; and
- Access to health care.

WLC's website can be accessed on www.wlce.co.za.

Sex Worker Education and Advocacy Taskforce (SWEAT)

SWEAT is a South African-based NGO, founded in 1996, that addresses the health and human rights of adult sex workers around the country. SWEAT delivers services to sex workers, advocates for their human rights and conducts research. SWEAT has also initiated and nurtured the African Sex Worker Alliance, active in nine African countries, and the Sisonke Sex Worker movement, active in South Africa. Both these networks receive administrative, management and mentoring support from SWEAT.

The organisation has three programmes:

- Development and Outreach;
- Advocacy and Networking; and
- Research and Knowledge Management.

SWEAT's approach emphasises the principles of equality and equity, accountability, empowerment, non-discrimination and participation. The organisation has sex worker representation at all levels including the board, management team, operational support and program delivery.

Sisonke

Sisonke is a sex worker movement run by sex workers, for sex workers. Sisonke was launched in 2003 at a national meeting of sex workers. The movement started with a group of 70 members from across South Africa and chose the name "Sisonke" which means 'we are together'. Sisonke has grown significantly since its inception and remains the only sex worker-led movement in South Africa. It's headquarters are currently based at SWEAT and has members based in partner organisations across the country.

APPENDIX 2 RESEARCH ACTIVITIES

Year One: Interviews

During the first year, the research team surveyed the existing literature to identify the types of human rights abuses to monitor and to develop questionnaires. We identified eight specific areas of abuse which were probed with separate questionnaires, with a ninth questionnaire to capture other matters:

1. **Police abuse and harassment**, including how sex workers are arrested and their treatment while in custody.
2. **Client abuse** including non-payment, physical violence and sexual assault.
3. **Sexual assault** by non-clients.
4. **Family law** matters, with particular regard to divorce and children including child abuse, underage sex workers and custody disagreements.
5. **Domestic abuse**.
6. **Criminal charges**, including that of prostitution in terms of the Sexual Offences Act.
7. **Health**, particularly where health care professionals refuse to treat sex workers.
8. Labour and **unfair labour practices** that a sex worker may experience at a brothel.
9. Other matters such as **eviction** and **disability grants**.

We also developed specific questionnaires on **human trafficking** and on **underage sex workers**, to identify victims and to make the necessary referrals for support, investigation and prosecution.

Having developed detailed questionnaires, we trained paralegals in how to:

- Conduct an interview;
- Use different questionnaires to detect different categories of human rights abuses;
- Advise sex workers on the legal remedies available to them; and
- Draft statements and affidavits.

Interviewing Sex Workers

In **Cape Town**, most of the interviews took place during the Legal Clinic held at SWEAT's office every Wednesday from 11am – 3pm. Sex workers would approach the WLC attorney for legal advice, and the information that was provided during the consultation was collected on a questionnaire. The attorney advised the sex worker of the project and the main use of the information, i.e., to monitor abuse, and to record the consultation notes for legal advice.

Questionnaires were filed at the WLC's offices and were used as a first consultation note. The attorney analysed each questionnaire for the research as well as using the information provided to proceed with a legal remedy, such as letters of complaint or legal representation.

The interviews for **Johannesburg, Durban** and **Limpopo** were conducted during human rights training sessions that were held in Cape Town, and in Johannesburg, hosted by Tswaranang Legal Advocacy Centre (TLAC). During the second year of the project, some of the interviews were conducted by paralegals in the field.

Research Challenges

At the beginning of this project, we expected to be able to make a large number of formal legal complaints. However, we discovered that many sex workers were hesitant to challenge perpetrators and very distrustful of the criminal justice system. Consequently, we recorded fewer complaints than expected.

By employing three paralegals to conduct interviews with sex workers where they worked in the second year, we were successful in increasing the number of interviews, but the reluctance of sex workers to litigate was more difficult to overcome. The WLC responded by increasing the amount of human rights training with sex workers to inform them of their rights and legal remedies available to them. In future, we hope to connect more experienced litigants with new litigants to share their stories and experiences.

ENDNOTES

1. The offence consists of the following elements: having unlawful carnal intercourse (defined as “carnal intercourse otherwise than between husband and wife) or committing an indecent act; a reward and mens rea. The penalty is imprisonment for a period not exceeding three (3) years with or without a fine not exceeding R6000 in addition to such imprisonment.
2. This does not of course preclude the possibility of arrest on other charges related to prostitution, e.g. soliciting in contravention of section 19(1) of the Sexual Offences Act 1957, or in terms of the Municipal By-Laws.
3. *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002)*
4. Section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act provides that , “A person (‘A’) who unlawfully and intentionally engages the services of a person 18 years or older (‘B’), for financial or other reward, favour or compensation to B or to a third person (‘C’) –
 - (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
 - (b) by committing a sexual act with B,
 Is guilty of engaging the sexual services of a person 18 years or older.”
5. In South Africa, clients are almost exclusively men and sex workers predominantly women.
6. Regulation 2 of the Western Cape By-Laws PG 6469 of 28 September 2007 provides that ‘no Person, excluding a peace officer or any other official or person acting in terms of the law, shall –
 - (a) when in a public place –
 - (i) intentionally block or interfere with the safe passage or free passage of a pedestrian or motor vehicle; or
 - (ii) intentionally touch or cause physical contact with another person, or his property, without that person's consent.”
 Regulation 2(3)(f) provides that, “no person shall in a public place , perform any sexual act.
 Regulation 2(3)(j) provides that, “no person shall in a public place, solicit or importune any person for the purpose of position or immorality”.
 Section 12 of the City of Johannesburg Metropolitan Municipality's Road and Miscellaneous By – Laws, states the following in relation to loitering: “No person may –
 - (a) lie, sit stand, congregate, loiter or walk, or otherwise act, on any public road in any manner that may obstruct traffic;
 - (b) jostle or loiter at or within twenty metres of the entrance of any place of public worship during the time of divine service or during an assembly at the place of worship or departure from such place of the congregation so as to obstruct or annoy any person going to, attending at, or leaving such place of worship”
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12. Chandre Gould and Fick, above note 7
13. SWEAT submission, above note 8 , page 27
14. Chandre Gould and Fick, above note 7
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30. SWEAT Submission to the South African Law Reform Commission 2009 page 26
31. Jillian Gardner, above note 9, page 336
32. Jillian Gardner, above note 9. Also states that 91 percent of the 4390 reported prostitution offences in 2000 went to court, with convictions secured 33 percent, while the convictions for carjacking in 2000 stood at 2.3 percent, aggravated robbery at 2.3 percent and rape at 7.56 percent, <http://www.crimeinstitute.ac.za>
33. SWEAT v Minister of Safety & Security & 7 Others 2009 (6) SA 513 WCC



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