



DISCUSSION DOCUMENT

SEX WORK

27 – 29 MARCH 2012



Developed with the support of Solidarity Center (AFL-CIO) South Africa

We would like to thank the COSATU Affiliates and Provinces for their contribution towards the development of this booklet.

Special appreciation goes to the members of the COSATU National Gender Coordinating Committee (NGCC) and National Office Bearers designated to gender for their unwavering support towards the production of this booklet.

Also our special gratitude goes to the following organisations who contributed towards compiling and development of the booklet:-

- Sex Workers Education Advocacy Task force(SWEAT)
- SISONKE (movement for sex workers by sex workers)
- Open Society Initiative for Southern Africa(OSISA)
- African Diaspora Women Workers Network(ADWWN)

SEX WORK DISCUSSION DOCUMENT

Introduction

The aim of this paper is to resuscitate the debate on the need for decriminalization of sex work and ensure that COSATU and its affiliates further engage within structures, alliance, non-governmental organizations and with the Government in terms of the need for law reform and identify alternative policy framework. However, whatever outcome of the legal processes pertaining to sex work, should be abide by the spirit of the Constitution which is committed to advancing human rights and social justice.

Sex work in South Africa is currently criminalised and is restricted by the Sexual Offences Act of 1957 (an un-amended apartheid-era law) which prohibits all activities associated with it. The criminal offences related to sex work include amongst them the keeping or participating in the management of a brothel, procuring someone to become a sex worker, soliciting or selling sex or living of the earnings of a sex worker. In 2007 through the Sexual Offences Act their clients were also criminalised. In 2007, the Act was amended to criminalise buyers of sexual services too (SALRC 2009). We therefore argue that the existing laws on sex work are nothing but hypocrisy of the conservatives and elites. They do not improve the conditions of women; instead they worsen the miserable conditions that women in the sex trade already find themselves in. The missing fact is that sex work is a by-product of our patriarchal capitalist society-not something created by some “immoral prostitute”

The current oppressive legislation on sex work has stimulated a lot of debates and has led to an upsurge in advocacy work by individuals and organizations around the need to either legalise or decriminalize sex work. Likewise, Cosatu as a key civil society player has also played a leading role in its endeavor to unite the working class and to defend workers from exploitation as well as finding workable solutions to the plight of the most vulnerable people in our society who find themselves with no choice but to engage in sex work.

The sex industry is by nature exploitative and inherently dangerous. Women in the industry experience different degrees of abuse, coercion and violence, but all of them are harmed physically and psychologically.

As a trade union movement, COSATU has an interest in the debate about sex work, from the point of view that sex work targets mainly the working class and the poor, predominantly black women. High levels of unemployment, poverty and gender inequality are key factors driving sex work. The global economic crisis has aggravated the situation for the poor majority through job losses, casualisation and ultimately increased feminization of poverty.

Cosatu has already started some debates and campaigns aimed at devising ways of protecting sex workers through collective workers struggles. As such, the sex work discourse and campaign among Cosatu affiliates for decriminalization was tabled at the Federation's 10th Congress though it was deferred because of contestation and opposition amongst delegates. However, affiliates had the responsibility to go back and make further consultations, sensitization with their structures and open up a discussion at the level of the COSATU Central Executive Committee.

Indeed, it is high time that the debate on decriminalization should be concluded and that sex work be recognized as work as Arnott and Crago (2009) argue that:

“The criminalisation of sex work has precluded the enforcement and protection of sex workers’ Labour rights. This disregard for sex workers as workers has left many of those employed in brothels in South Africa vulnerable to labor abuses such as withheld wages, arbitrary fines, restrictions on mobility, and confiscation of belongings including medication. Sex workers on the street or working in brothels and other agencies have no recourse if customers refuse to pay them”¹

The decriminalization of sex work should take the course of a rights-based approach which means that sex workers would be able to enjoy

¹ See Arnott, J. and Crago, A (2009). Rights Not Rescue: A Report on Female, Male, and Trans Sex Workers' Human Rights in Botswana, Namibia and South Africa. Johannesburg : Osisa

their basic human & labour rights and be protected against sexual harassment, violence, rape and unfair working conditions. By so doing, sex workers would be able to access non-discriminatory health care

services, be more empowered and operate within the ambit of protective labour and occupational health & safety laws.

Do sex workers have human rights?

Every person is entitled to basic human rights, and all sex workers are entitled to the same rights as anyone else. Yet many individuals and governments ignore the fact that sex workers have the right to equal treatment and that they are often particularly vulnerable to be abused, raped and even murdered, while their dignity is violated on a daily basis.

Even in countries where sex work is considered a crime, such as South Africa, the state may not ignore sex workers' rights. As Charlesworth and Chinkin (2000:214) state "The right of women to equal treatment and non-discrimination on the basis of sex is part of the traditional canon of human rights". In fact, society must find a way of humanizing women in sex work first by recognizing them as human beings with equal rights like anyone else, and secondly by decriminalizing sex work so that they are not viewed and treated as criminals but are assisted to regain their dignity and sense of self worth.

What happens if we do nothing about sex work and human rights?

- Sex workers will continue to suffer violence from clients, their partners and the police.
- Sex workers will continue to work in unsafe and dangerous conditions.
- The stigma around sex work will continue.

- Sex workers will not have easy access to health, social, police, legal and financial services.
- Sex workers will find it hard to protect themselves and their clients from HIV.
- Sex workers will find it hard to get tested for HIV and get treatment for HIV.
- Sex workers will find it difficult to find other jobs.

Rights of sex workers that are violated by the criminalization of sex work:

- The right to dignity
- The right to non-discrimination
- Access to health care, police or social services
- The right to bodily and psychological integrity
- Freedom of thought, belief and opinion
- The right to choose one's trade, occupation or profession freely

If sex workers' human rights are truly respected, consensual adult sex work would not be illegal and sex workers would have the same labour rights as all other workers. The decriminalisation of sex work means that sex workers would be protected against sexual harassment, violence, rape and unfair working conditions. Sex workers would be able to access non-discriminatory health care services, be able to form unions and be assisted by the police and, where it exists, social security.

Why should women's rights advocates support sex work decriminalisation?

There are a number of reasons why people who are committed to women's rights should advocate for sex work decriminalisation:

Sex work is a source of income for women and has a long history of existence

For centuries, societies that have viewed sex work as “wrong” or “sinful” have tried to abolish it by imposing a range of criminal penalties for sex work – from stoning, deportation, flogging to imprisoning women. Despite these brutal sanctions by the state, there is no country in the world where sex work has been eradicated. Sex work is here to stay and for good reasons! The service is a useful and necessary one for many people. The law needs to be responsive to this reality. Support for decriminalisation is support for women's rights.

The laws criminalising sex work are out-dated and patriarchal

Many of the laws that criminalise sex work at present were introduced at a time when men were the law-makers and law-enforcers. These laws embody out-dated and repressive ideas on sexuality, relationships, who owns women's bodies and the position of women in society.

Current laws violate sex workers' rights

Sex workers are entitled to the same human rights as everyone else. Sex workers have the right to bodily integrity, dignity, freedom from violence, the right to a profession of their choice and the right to fair labour practices. The on-going criminalisation of sex work violates all of these human rights.

Violence against women can only be addressed in a fully decriminalised system

Sex workers are often women who may experience violence, including rape and abuse. Laws and strategies that assist women to access restraint orders against abusive men, obtain the necessary treatment and support after rape, and bolster the penalties for abuse make very little difference to the lives of sex workers. In a system where sex work is illegal, sex workers often do not have the means, the knowledge or the power to make use of the remedies that may be available to other women. The single most powerful strategy in reducing violence against sex workers is to recognise sex work as viable work and protect those who are doing it-by decriminalising the sex industry.

Current laws increase women's vulnerability towards HIV/AIDS

The criminalisation of sex work increases sex workers' risk of contracting HIV. It reduces their power in negotiating safer sex, limits access to HIV education, condoms and treatment, and increases their risk of violence and rape. If sex workers are not empowered to prevent the spread of HIV through the creation of safe working and living conditions, it increases the risk to the population as a whole.

The decriminalisation of sex work makes sex workers safer, more empowered and brings them into the ambit of protective labour and occupational health & safety laws, where such laws exist. It is a vital component towards the global affirmation and implementation of women's rights and equality.

Why is sex work a gender issue?

Sex work is essentially a broad word used to describe all forms of activities providing sexual services in exchange for financial gains or to some extent non-financial favours. The term 'sex work' is more specific and useful compared to the stigmatized term: prostitute which is vague and derogatory. The word: prostitute tends to describe a kind of person rather than a service. The reality is that sex workers are different people from different backgrounds who render sexual services in exchange for money for different reasons.

All over the world, the majority of sex work clients are male and the providers of sexual services are female. We estimate that around 90% of sex workers are women, and 10% are men or transgender. The overwhelming majority of clients are men. In a society so challenged by HIV, people able to promote and practice safer sex have a valuable role to play. **In South Africa, there are an estimated 130,000 to 500, 0001 sex workers, 70% engaged in street-based work.** They are engaging in private and consensual activity with other adults.

Gender is relevant to this since it examines the relationships and power between men and women (and intersex and transgender people) and asks important questions about who has access to resources, money and decision-making structures and how people make a living. While acknowledging male sex workers and their own challenges, it is only reasonable to assume that the challenges of male sex workers will be addressed in the course of dealing with conditions of female sex workers – the dominant form of sex work and the one most influenced by patriarchal views.

The Right to Work and Sex Work Decriminalisation

The International Labour Organisation (ILO) was established in 1919 as part of the Versailles Treaty ending World War I, with the principal role of setting international labour standards. The labour standards were designed to eliminate unjust and inhumane labour practices with the main purpose to “promote rights of workers, encourage decent employment opportunities, enhance social protection and strengthen dialogue in handling work-related issues”. In 1946, after the formation of the United Nations, the ILO became a specialised agency of the UN (ILO, 1996-2010). After many years of lobbying from the sex industry, the ILO has begun to indirectly advocate for the legal recognition of sex work by calling on governments for its recognition as an economic sector and “a legal occupation with protection under labour law and social security and health regulations” (Raymond, 1998).

In countries whose legal systems criminalise sex work, despite international labour standards, sex workers are unable to exercise protection from labour laws, occupation laws or health and safety laws. As a result, many sex workers say they feel incapacitated by the state and not respected (Östergren , 2010). They are unable to demand basic working conditions or legal work contracts (SWEAT, 2006).

The case of Kelly, a South African sex worker who went to court over unfair dismissal from the massage parlour where she worked, is an example of this inability to demand basic rights. Even though the lower court agreed that she was an employee in terms of the Labour Relations Act, it found that because she was a sex worker, which is an illegal profession in South Africa, it would not enforce her rights (Sapa, 2008).

Over the past two decades sex workers have begun to unionise (Gall, 2007). Sex worker unions campaign for a variety of human, civil and labour rights for people who work in the sex industry (International Union of Sex Workers, undated). The South African non-profit organisation SWEAT (The Sex Worker Education and Advocacy Taskforce) advocates for decent working conditions for sex workers and decriminalisation of sex work. SWEAT argues that “workers in brothels would also benefit from labour law and would get pensions when they retired. The Department of Labour would also monitor working conditions and the sex workers would be treated with the same dignity afforded to other workers under the Bill of Rights” (SWEAT, 2006).

SWEAT (2006) indicates that the following issues could then be addressed:

- The Labour Relations Act and the Basic Conditions of Employment Act could be applied for sex workers.
- Safer and more hygienic working conditions would be required – most sex workers want to practice safer sex but are unable to enforce it as there is no legal obligation.

- Limits to legal working hours – many sex workers in criminalised systems report working days of over 14 hours.
- Paid vacation time and sick leave - sex workers frequently report no paid leave or sick leave.
- Obligation to display safer sex information, to provide condoms, or to screen clients – if international labour standards were applied brothels would be obliged to promote and perform safer sex, helping to alleviate the HIV risk.

HIV, Public Health and Sex Work Decriminalisation

What is the link between sex work and HIV?

Fear of arrest deters sex workers from reporting violence or gaining access to health and other services. Many sex workers report that they feel unwelcome at health care centres and that health care workers have negative or judgmental attitudes towards them. This means that sex workers may not seek health care services when they need medical help and treatment. Untreated sexually transmitted infections (STIs) increase the risk of HIV infection. Health care centres are also the main disseminators of condoms and safer sex information, which means that sex workers are often not reached by their services. All the factors that make sex workers more vulnerable to HIV are aggravated in a context where sex work is illegal. At the same time, it does not mean that all sex workers and their clients are HIV-positive and one should guard against stereotypes.

The 2011 finding that one in five new HIV infections in South Africa was sex worker-related showed the massive human cost of bad law and alienation of sex workers from health services.

The majority of sex workers report such experiences and Sisonke/Tshwaranang/Women's Legal Centre/SWEAT hold records of hundreds of examples; but very few get reported to the police for fear of further victimization. Recently, a public prosecutor threatened a sex worker who came to report a case of rape and robbery by a client that he will prosecute her because she is a sex worker and drop the charges against the accused client against whom she had brought the case. Ultimately he declined to prosecute because she was a sex worker.

Legal Approaches to Sex Work

What is the relationship between sex work and the law?

There are a number of different legal approaches to sex work, and they vary from country to country. Some countries perceive sex work as a crime that should be punished violently, while others recognise it as a legitimate form of work. On the one side of the spectrum, there are countries (particularly those that follow Sharia law) that can impose the death penalty on sex workers; while on the other side of the spectrum one finds New Zealand following a decriminalisation approach, which enables the sex industry to work within mainstream law. There are also countries that do not have explicit laws on sex work, but where sex work is still strongly stigmatised.

What legal models regulate sex work?

Four law reform options have been proposed so far by the South African Law Reform Commission which is as follows:

Total criminalization

All aspects of sex work are illegal (or de facto illegal and therefore criminalised) and carry criminal penalties. It therefore means that the sex worker, the client and a third party such as a brothel-owner could be prosecuted. South Africa and some Muslim countries are examples of this model.

Partial criminalization

This means that certain aspects of sex work are illegal, while others are not. In this model, sex workers are generally viewed as 'victims'; they are generally not criminalised under partial criminalisation laws. For example, in Sweden the buying of sexual services is criminalised, while the selling of sexual services is not. In this case, while the sex worker is not criminalised, the client, brothel-keeper or sex worker manager

could be prosecuted. Sex workers maintain that this model renders them unsafe as they have to protect their clients from being prosecuted. They are also reluctant to report crimes against them, as it can lead to police surveillance to catch their clients (Jacobsson, 2009).

Legalisation/regulation

This means that the state regulates the sex industry and can declare certain kinds of sex work to be legal, under strict conditions. The Netherlands is an example of a country in which sex work is legal under certain circumstances, including location and licensing of individual sex workers. In other countries where sex work is regulated, some of the following conditions have been imposed on sex workers: some sex workers have to carry cards to show that they are sex workers; sex workers have to go for compulsory health checks and are issued with health status cards; sex workers are registered with the authorities and, in very few jurisdictions, specific areas are designated as sex worker business areas – so-called ‘street-walker zones’ – also known sometimes as ‘tolerance zones’ or ‘red light districts’. Under this approach street work is often illegal.

Decriminalisation

This means that all laws that criminalise sex work in a country are removed, and sex work is governed through the same laws that affect other employment, such as health & safety and employment legislation. Decriminalized jurisdictions make a clear distinction between voluntary prostitution and that involving either force and coercion or child prostitution which is deemed as criminal. In this model, sex workers are able to work as independent contractors, or as employees. Sex workers are able to unionise, mostly regulate the industry themselves, and can expect protection from the police. Brothel operators and management are expected to comply with existing employment and health & safety legislation.

In this model, sex workers have a range of options in terms of places to

work. They can work in managed brothels, be street based, on line, or from their own home, or any combination of these. They may choose to work in small collectives with other sex workers, or by themselves. There is a balance of power as managed brothels do not hold a monopoly and sex workers can find a situation that suits their personal circumstances, and ensure they are not in a position where they may be coerced or exploited.

What is the difference between legalisation and decriminalisation of sex work?

Many people assume that the legalisation and decriminalisation of sex work is the same thing. This is incorrect. The main distinction between legalisation and decriminalisation is the degree of state control of the sex industry, whether sex work is treated as something needing special laws or not. In a legalisation model, the state will be the main regulator of the industry and will decide on the conditions under which sex work could take place. With a decriminalisation model, sex workers are more empowered to make decisions about the way they would like to work. Under decriminalisation, consensual activity between an adult sex worker and client would not be illegal; under legalisation it could be.

For example, Victoria, in Australia, legalized sex work, resulting in a model that works against individual sex workers having choices of work places, and favours big business. Street based work is usually outlawed, or unrealistically zoned, rendering these sex workers vulnerable to being ostracized from support. Sex workers are sometimes unable to fit into the onerous “legal” requirements and end up working illegally. On the other hand, New Zealand decriminalized sex work across the board, and uses mainstream law to regulate the sex industry.

Under a legalisation model, sex workers’ position in society does not necessarily improve substantially from a position of total or partial criminalization. If the state decides that a ‘red light district’ should be proclaimed in an area in a city that not many people frequent, sex workers would be forced to move to a more popular area in order to

bring in an adequate income. If a sex worker is caught working in an area that is not designated a 'red light district', she/he will be guilty of an offence and will not receive the benefit of the protection of the law that a decriminalisation model has.

Why decriminalization?

Proponents of decriminalization argue that the cost of keeping prostitution illegal outweighs the gains. Overseas studies show that the legal status of sex work- no matter what it is- has no effect on demand or supply and **incapable of enforcement** (because the exchange of money between client and sex worker is so hard to prove). However, the state tries to enforce the spirit of the law- to punish sex workers and prevent sex work in other ways.

Decriminalization entails a shift in power away from the state and clients to sex workers themselves. In addition, decriminalization would ensure that social exclusion which makes sex workers vulnerable to exploitation and difficulty for them to move out of the industry is eliminated.

However, it should be noted that decriminalization of the sex industry does not guarantee impunity to perpetrators of violence and those who illegally traffic women to coerce them into sex work. In fact, decriminalization does mean that sex workers can make complaints about abuses and any unfair labour practices without fear of being arrested on sex work related charges.

For instance, in New Zealand, decriminalisation has allowed sex workers to negotiate employment contracts, and sex workers are now able to challenge unfair labour practices. Sex workers also have more choice in respect to work place conditions, and are able to work in big or small brothels, with other sex workers in collectives, or by themselves in environments that they control. They have reported that Police have moved from the role of prosecutor to that of protector (Mossman & Mayhew, 2007: 10, 11). Sex workers there in New Zealand now have the same employment rights as other workers, and can no longer be

coerced into doing work they do not want to do (Mossman & Mayhew, 2007: 43)

The campaign for better law

Over the past decade a campaign has built strength, led by SWEAT as the sex worker health and advocacy services organisation, and Sisonke as the organisation of and for sex workers. Today we have a multi-organisational team from across the country. We have tried Constitutional Court challenges, court challenges to police abuse of power, building up our health and advocacy services, and pushing for a South Africa Law Reform Commission recommendation on the law relating to adult prostitution-these have been largely unsuccessful. Now our focus is turning to Government and Parliament directly, as the evidence of sustained and damaging human rights abuses becomes overwhelming and the civil society resources are stretched beyond capacity.

Conclusion

Those who are exploited have the potential to challenge their alienation through collective struggle, which lays bare the hidden realities of how the market dominates our lives and where the real power for change resides. Cosatu has the potential to create a socialist society in which human beings exercise democratic and collective control of all aspects of people's lives, including their sexual relationships. The sex work discourse should be guided by a class perspective as opposed to moral and narrow understanding of the subject. In our view as Cosatu, the only answer to sex work is socialism and under any capitalist state including South Africa, it will always be there and that is why we should call for decriminalization as opposed to legalisation of sex work.

Recommendations

- Cosatu should play an instrumental role in ensuring law reforms i.e. repealing the Sexual Offences Act and advocating for the decriminalisation of sex work.
- According to recommendations from South African Law Reform Commission: there is need to repeal sections 11 of the Sexual Offences Amendment Act.
- Change of terminology from prostitution to sex work which recognizes the service and ultimately regard sex work as work.
- Mass education and sensitization of society on the need to respect sex workers human and labour rights acknowledging the socio-economic determinants of sex work including gender disparities that exist in society



COSATU

Gender Conference

2009 Resolution

COSATU Gender Conference 2009 Resolution

On Sex Workers

Noting:

- The National Gender Conference on 10 & 11 June 2009 at Birchwood Hotel deliberated on the proliferation of sex workers or prostitution as it is commonly known and the devastating impact it has on those sex workers, their families and the community at large.
- Sex work is on the increase due to increasing levels of poverty and other negative socio-economic factors that is prevalent in society. Unemployment and underemployment levels in our country are very high, offering little chance of earning an income to sustain families.
- Women and children are more often forced to engage in this kind of work because they do not have any alternatives. More than often, we witness young girls walking the streets or working in brothels or escort agencies. It is noted a few men are also sex workers.
- Globalisation has resulted in the increase of trafficking of women and children. Globalisation has offered opportunities for unscrupulous businesses to run a slave trade.
- 2010 and financial crises will result in an even greater proliferation of sex work resulting in greater amount of vulnerable workers needing protection.
- We note that sex work is also an organised business and some sex workers are working in a formal employment relationship for example escort agencies, brothels, bars, etc.
- Sex work is illegal and workers are not protected. They are often at the mercy of the police whilst the buyers (men) of their services get away free. Communities look negatively at these workers whilst not

passing judgment on those who buy their services.

- We note that the South African Law Reform Commission has released a Discussion Paper on Adult Prostitution in May 2009.
- Noting that there is a belief that sex workers are to be blamed for drug trafficking, the spread of HIV/Aids and destroying families.

Believing:

- A worrying factor is the increasing use of children in sex work and this has severe implications – these children could be our sisters, daughters and nieces.
- Sex work is dangerous and a high risk activity and these workers suffer from abuses and are vulnerable to HIV/Aids.
- Sex workers are a reality and we cannot wish them away. As concerned citizens, activists and trade unionists, it is our responsibility to act on this.
- Sex workers are marginalized and exploited by clients, the legal system, the community and society in general.
- The struggle for sex workers rights is part of broader worker and gender struggles.

Therefore resolves:

- Support organisations like Sex Workers Education and Advocacy Taskforce (SWEAT) who are trying to educate and organise sex workers.
- Put the proliferation of sex work as part of the broader campaign of job creation, Basic Income Grant, etc. to alleviate poverty.
- Organise workers who are working in a formal employment relationship (escort agencies, etc.)
- Support and join campaigns to eliminate the trafficking of women, men and children.

- That sex work should be decriminalised.
- That COSATU and its affiliates should add their voice to the current Law Reform Commission Discussion Paper and adult prostitution.
- COSATU and its affiliates should do education work and raise awareness to do away with stigma and change perceptions about sex workers.
- In the long term the struggle for socialism to change social and economic conditions as well as mind sets will eliminate the excesses of sex work and in the long run eliminate sex work in our society.

