



# WHY SEX WORK SHOULD BE DECRIMINALISED IN SOUTH AFRICA

HUMAN  
RIGHTS  
WATCH

**sweat**  
Sex Workers Education & Advocacy Taskforce





# **Why Sex Work Should be Decriminalised in South Africa**

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Printed in the United States of America

ISBN: 978-1-6231-37533

Cover design by Rafael Jimenez

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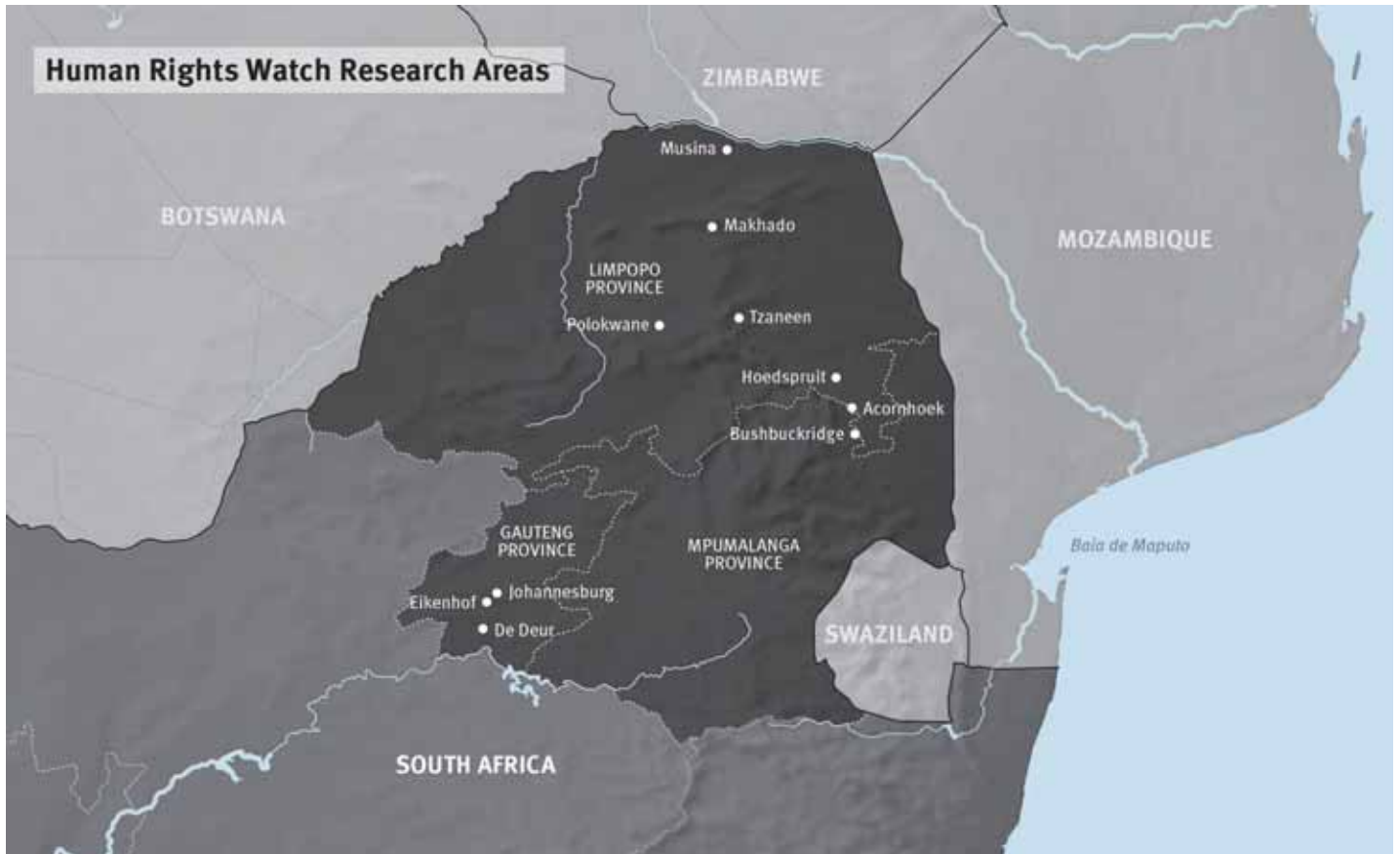


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# Map





## Summary

Selling sex has been illegal in South Africa since at least the early 1900s and buying sex was criminalised in 2007. South African laws also prohibit other aspects of sex work, including running or owning a brothel, living off the earnings of “prostitution,” and enticing a woman into “prostitution.”

The criminalisation of sex work has not deterred people from selling sex to make a living. Criminalisation has, however, made sex work less safe. It undermines sex workers’ access to justice for crimes committed against them and exposes them to unchecked abuse and exploitation by law enforcement officials, including police officers. And although the Department of Health’s National Strategic Plan on HIV for Sex Workers is grounded in respect for the human rights of sex workers, outreach, and nondiscrimination, criminalisation hinders sex workers’ efforts to access health care, including HIV prevention, treatment, care and support.

Most sex workers in South Africa are poor, black, and female, and sell sex primarily in order to support their children, as well as other dependents. This report attempts to represent some of the fear, emotional pain, and frustration that South African sex workers experience because the work they do to try to ensure a better life for their children is criminalised. The report calls for law reforms including the decriminalisation of sex work in South Africa and encourages the Department of Justice and Constitutional Development to take up this task now with seriousness and urgency after years of debate on the issue.

Rofhiwa Mlilo (a pseudonym) is a 40-year-old sex worker and a single mother of two children. She grew up in rural Limpopo, South Africa’s most northern province, where she still lives. Almost none of the 46 women interviewed for this report matriculated from school; Rofhiwa Mlilo did not go at all. She sees sex work as one of the very few options available to earn an income to keep a roof over the heads of her children, for her, preferable to backbreaking farm work that brings in less money. Rofhiwa Mlilo described the sometimes dangerous contradictions inherent in selling sex in South Africa: her relationship with the police is characterized by arbitrary arrests, lack of due process, and abusive policing practices. One policeman “arrested” her and tried to make her have sex



with him. When she was raped by a man who threatened her with a broken bottle, she didn't report because she could not see the police taking her seriously.

This report is based on research conducted between May and June 2018 by Human Rights Watch in four provinces of South Africa. Interviews were conducted with female sex workers, including three transgender women, in ten sites in three provinces. Around 40 government and nongovernmental experts in health, law, and provision of services for sex workers and were also interviewed. The report documents how the criminalisation of sex work fuels human rights violations against sex workers, including by police officers, and undermines their right to health. The report provides recommendations to reform the legal system to provide protection for sex workers.

Almost three-quarters of the sex workers Human Rights Watch interviewed have been arrested multiple times, some as often as two or three times per month. Sex workers who worked indoors were less vulnerable to arrests but were also targeted from time to time.

The pattern of arrests described to Human Rights Watch suggest that sex workers are targeted for arrest because the police either know them from previous contact, or believe they match the profile of a sex worker, and not because they have been seen to engage in illegal activities. Every sex worker interviewed for this report with a history of arrest had been arrested or detained by police for apparently nothing more than standing or sitting where sex workers were known to wait for clients, or because they were already known to the arresting officers.

Sex workers believed that their arrests were part of a wider pattern of police harassment that includes extortion, coercive sex, and insulting language. Academics and nongovernmental organizations (NGOs) have often in the past reported rape by police and abusive use of pepper spray. Interviewees often reported confusion about why they had been arrested, and charges were often not explained or seemed random or obscure, such as "prostitution/loitering." South Africa's Criminal Procedure Act specifies that the police must clearly explain to people being arrested and detained the reason for the arrest, but some sex workers Human Rights Watch spoke to said this was often not the case. Others said police sometimes asked them to sign documents that they didn't understand, including "admission of guilt" slips.

Sex workers described being held in police custody for up to three nights if arrests occurred over a weekend. Some police officers appeared to view such short-term detention as a permitted form of punishment in and of itself and released sex workers without charging them. Others demanded sex or a bribe in exchange for release or issued fines in the police station that, in at least some cases appeared to be simply extortion. In a few cases, women were taken to the magistrates' courts and then released after paying a fine.

Sex workers told Human Rights Watch they believed that legalising sex work would be the only way to end police harassment against them. They also called on the South African government to help them find safer ways and places to work.

Sex workers described often falling victim of crimes, including rape and armed robbery, as a result of engaging in sex work in a criminalised context. Few, however, were willing to report these crimes to the police, including because they feared that they themselves would be arrested or because they did not believe that their cases would be taken seriously. Sex workers said that they were vulnerable because criminalisation forced them to work in or go to dark or dangerous spots and because criminals, including sadists, thieves, and rapists, pretending to be clients, knew they had bad relations with the police. Sex workers described being laughed at by police when they tried to report rapes, or being told that as sex workers, they could not be raped.

The experiences with seeking health care that sex workers reported to Human Rights Watch stand in sharp contrast to their reports of treatment by the criminal justice system. Rofhiwa Mlilo and all of the other sex workers interviewed for this report did not face discrimination in accessing health care and most described having access to health settings where they could safely disclose what they did for a living and receive access to useful and relevant health-related information, services and commodities. However, it should be noted that many interviewees were identified with the assistance of health care NGOs that ran clinics and outreach services for sex workers, which may make their experiences with access to health care different from other sex workers (see methodology for more on this). While many of these services are funded by international donors and provided by NGOs, this work has been rolled out under the auspices of the Department of Health, an active partner in promoting sex workers' right to health. The Department of Health's public plans to end HIV have included calling for law reform and decriminalisation of sex work since at least 2007.

However, despite the explicit support of the Department of Health, including the minister, for sex workers' health rights, criminalisation obstructs access to health care for sex workers and hinders efforts to combat South Africa's grave HIV epidemic. Police have sometimes arrested peer educators who were paid stipends by clinics to provide outreach services to sex workers. Police reliance on the carrying of condoms as evidence of criminal activity has discouraged sex workers from carrying, and therefore using condoms. Health officials interviewed for this report expressed frustration and concern at how criminalisation of sex work undermined access to health care and efforts to prevent new HIV infections amongst sex workers, their clients, and sexual partners.

Arrests and detentions were particularly concerning for sex workers living with HIV on antiretroviral treatment. Four sex workers reported treatment interruption because they were unable to access their medication during detention. Others reported missing clinic or hospital appointments. Arrests also got in the way of pre-exposure prophylaxis (PrEP, against HIV infection) treatments.

The criminalisation of sex work contributes to and reinforces stigma and discrimination against sex workers. Many of those interviewed for this report described multiple experiences of stigma and discrimination, ranging from being denied access to housing to verbal abuse by members of the public. Sex workers were particularly concerned about protecting their children from knowing that they were sex workers. Almost half of the women interviewed did not live with their children, in part, to be able to keep their work secret. Women whose children did find out that they did sex work worried about losing their love and respect.

Although sex work is illegal in South Africa, people who engage in sex work are entitled to the same rights and freedoms as other people, including the rights to equality and privacy, security of person, freedom from arbitrary detention, equality before the law, due process of law, health, and the right to a remedy when their rights are violated.

The criminalisation of voluntary, consensual sex between adults violates several internationally recognized human rights, including the rights to personal autonomy and privacy. Human Rights Watch takes the position that this is also true with respect to voluntary adult commercial sex work, and that respecting consenting adults' autonomy to

choose to engage in voluntary sex work is consistent with respect for their human rights. In many countries, Human Rights Watch has found that criminalisation of sex work creates barriers for those engaged in sex work to exercise basic rights such as availing themselves of government protection from violence, access to justice for abuses, access to essential health services as an element of the right to health, and other available services.

Sex workers interviewed for this report described how poverty, lack of education and severely limited economic opportunities, amongst other factors, made sex work one of the only viable options for supporting themselves and their families. Many were single mothers, often supporting children of siblings as well as their own, and many said they were proud to be able to provide for their families. While many expressed sadness and frustration at the lack of opportunities that would allow them to leave sex work, most were clear-eyed and pragmatic about their desire, in the near future at least, to undertake sex work more safely and without fear of police abuse or being arrested and detained.

A discussion about the legal status of sex work has been ongoing in South Africa for almost three decades. There is significant support for decriminalisation, including from various government ministries and institutions, trade unions, public health officials, civil society, and most importantly, sex workers themselves. It is clear from this report that the criminalisation of sex work undermines the health and dignity of sex workers and exposes them to violence and abuse. The South African government should act urgently to end criminalisation of sex work and work with sex workers to protect their rights.

## Recommendations

### To the Department of Justice and Constitutional Development:

- Undertake an extensive consultation period with working sex workers across South Africa to hear their grievances and needs with respect to legislation related to sex work in the country.
- Introduce a new law to parliament that removes criminal and administrative sanctions against consensual adult sex work and related offences, such as solicitation, and current prohibited practices such as “living off the earnings” of prostitution or brothel-keeping.
- Recommend municipal governments reform or repeal overly broad by-laws prohibiting vague offences such as loitering and being a “public nuisance” so they can no longer be used to target vulnerable groups, including sex workers.

### To the South African Police Service:

- Implement an immediate moratorium on arrests for consensual adult sex work, including arbitrary arrests on the grounds of loitering, indecent exposure, and other related misdemeanours.
- Publicly commit to strict nationwide enforcement of provisions that prohibit torture, arbitrary arrests and detentions, police brutality, coerced confessions, or telling detainees to sign “admissions of guilt” paperwork without fully explaining the content.
- Publicly commit to ending police stigma and discrimination against sex workers and actively seek to partner with sex worker and health organizations supporting sex workers to help protect sex workers from criminality.
- Conduct regular and rigorous police training on human rights and sex worker rights under international and South African law, and on nondiscriminatory policing. This training should include information on the correct protocol of arrest and police detention and on nondiscrimination concerning crimes reported by sex workers.
- In advance of decriminalisation, design and implement a framework for national policing of sex work and standard operating procedures that are informed by

human rights and international best practices to guide the operational policing of sex workers as a vulnerable group.

- Cease using possession of condoms as evidence to arrest or bring charges against persons suspected of sex work.
- Ensure that all persons in police detention can access medications.

### **To the Civilian Secretariat of Police and the Independent Police Investigative Directorate:**

- Investigate allegations of abuse by the South African Police Service (SAPS) officers against sex workers, including rape and sexual exploitation, arbitrary arrests and detentions and harassment and ensure prosecutions and other sanctions against perpetrators commensurate to the abuse.
- Provide a cost-benefit analysis of current practices with regard to arrests and detentions in South Africa by the SAPS.
- Review the current SAPS complaint procedure, including by asking sex workers, to make sure it is accessible for sex workers.

### **To the Department of Health, the South African National AIDS Commission and the Commission on Gender Equality:**

- Engage actively in political processes and consultations on the future of sex work in South Africa and actively press for decriminalisation. Contribute resources to ensure sex workers' voices are heard.

### **To the South African Human Rights Commission:**

- Investigate allegations of abuses against sex workers by the SAPS and publicly encourage reporting by sex workers of abuse or discrimination.
- Provide clear recommendations on how the safety of sex workers in South Africa could be improved, including through decriminalisation of sex work.

## To the Committee on Multiparty Women’s Caucus, Parliament of South Africa:

- Release a report on findings after the March 2018 consultation on the future of sex work and responses to the South African Law Review Commission’s report and recommendations.

## Methodology

This report is based on research conducted by a Human Rights Watch researcher in the cities of Johannesburg, Gauteng province, and Cape Town, Western Cape province; Masina, Makhado, Tzaneen, Hoedspruit towns, all Limpopo province; Bushbuckridge town, Mpumalanga province; and De Deur and Eikenhof towns, Gauteng province. The research took place in April, May, and June 2018, during two trips to South Africa.

Human Rights Watch interviewed 46 women currently working as sex workers in semi-structured interviews that generally lasted 45 minutes to an hour. Three sex workers were trans women, six of the interviewees worked in a building and the rest found customers in bars or on a street. All these interviews were conducted in person and all were conducted in English except two interviews, conducted in Xitsonga with the assistance of peer educator activist. Six sex workers were interviewed in Musina town, four in Makhado and five in Tzaneen and four in Hoedspruit. Six sex workers were interviewed in Bush Buck Ridge, seven in De Deur and Eikenhof towns and fourteen in downtown Johannesburg. In one case, two sex workers chose to be interviewed together but all other interviews were conducted individually. Privacy for interviews was provided in the offices of NGOs or where the sex worker was working, except for some interviews in Johannesburg where sex workers expressed a preference to do the interview on the streets where they were working.

Human Rights Watch identified interviewees through the assistance of organizations or individuals working with sex workers, which were either sex worker rights organisations or health care NGOs that ran clinics and outreach services for sex workers (see Acknowledgements for details). All participants in this research provided consent to participate orally. All participants were informed of the purpose of the interview, its voluntary nature, and the ways the data would be collected and used. Interviews were told they could end the interview at any time and choose not to answer any question, without any negative consequences. All sex worker participants were assured that a pseudonym would be used when documenting their experiences in this report.

No interviewee received compensation for providing information but sex workers who travelled to interview sites in Limpopo and Mpumalanga provinces were provided with



compensation for transport expenses. Staff members in the health NGOs that helped coordinate the interviews provided guidance on how much compensation should be provided for transport. Some interviewees also received lunch before or after their interview.

There are several limitations to this report's findings. First, we chose to narrow our focus to the experiences of female sex workers, and almost all women interviewed were cisgender, meaning their gender identity matches their sex as assigned at birth. Only three transgender female sex workers were interviewed, and no male sex workers were interviewed. The Sex Worker Education and Advocacy Taskforce (SWEAT), an organisation that addresses the health and human rights of sex workers in South Africa, estimated in 2013 that 90 percent of sex workers in South Africa are cisgender females, while 5 percent are transgender females and 4 percent are males. Given that sex workers in South Africa are overwhelmingly female, and also given our research team's focus on women's rights and violence against women, we were specifically interested in the experiences of this subsection of the sex worker population. We recognize the limitations of this focus, in that our findings cannot be generalized to male and trans female sex workers, although it is clear from the work of other organizations that male and trans female sex workers also experience violence and discrimination in South Africa. Further research on these abuses through an intersectional lens, looking at the particular ways in which violence and discrimination impact sex workers who are marginalized on the basis of their race, sexual orientation, or gender identity, as well as their profession, is warranted. We believe, however, that decriminalisation of consensual adult sex work would benefit all sex workers, not only women.

A second limitation of our research stems from the fact that most sex workers we interviewed were already in contact with sex workers rights organizations or health organizations that provided services to sex workers, meaning that our interviewees were more likely to have access to nondiscriminatory health care than sex workers who are unconnected to such services. In addition, sex workers in Johannesburg probably have better access to health care, on the whole, compared to other parts of South Africa, especially rural areas. Sex work in South Africa is enormously varied and not all women who sell sex self-identify as sex workers, as our interviewees do. Attempts were made to speak to women working on streets and indoors, in small towns and in Johannesburg, but

it is inevitable that the experiences and perceptions represented here do not speak to those of all South African sex workers.

Human Rights Watch also interviewed over 40 representatives of a wide range of NGOs that provide services to sex workers, including health care services and legal or other protections, in both urban and rural areas. Human Rights Watch also interviewed five government officials for this report, including officials from the Department of Justice and Constitutional Development, the Department of Health, the Commission for Gender Equality, and the South African HIV/AIDS Commission. Multiple phone and emailed requests for an interview with officials from the South African Police Service (SAPS) were unsuccessful. Human Rights Watch also sent the SAPS a formal letter requesting information on arrest numbers and standard operating procedures among other issues but received no reply.

In this report, the word “child” refers to anyone under the age of 18 years, and “girl” to a female child. The term “sex worker” refers to adult women and men who provide sexual services in exchange for money. The term excludes child sex work and other forms of coercive sexual exploitation such as sex trafficking, both strictly prohibited under international law. Human Rights Watch prefers the terms “sex worker/sex work” to “prostitute/prostitution” as the latter is considered inherently degrading by many sex worker organizations.

The exchange rate at the time of the publication was approximately US\$1 = R14 South African Rand; this rate has been used for conversions in the text, which have generally been rounded to the nearest dollar.

# Background

South Africa has a population of approximately 55 million people, with black South Africans accounting for just over 80 percent of the population.<sup>1</sup> South Africa's success at ending apartheid and reaching middle-income country status is marred by dramatic inequality between the rich and poor; the World Bank named it the world's most unequal country in the world in 2018.<sup>2</sup> Poverty is highly racialised and feminised. In 2016, when the unemployment rate was 27.7 percent, black women accounted for 49.1 percent of unemployed people.<sup>3</sup> For many poor black women with limited formal education, selling sex is a viable means of making a living and supporting their children and other dependents. Sex workers with a primary school education can earn nearly six times more than the typical income from formal employment, such as domestic work.<sup>4</sup>

The legal status of sex work is currently a subject of debate in South Africa and some pressure exists for legislative change. What that change should look like is deeply contested. Sex worker organizations and movements such as the Sisonke National Sex Worker Movement, SWEAT, and the Asijiki Coalition, together with women's rights, legal and health NGOs, have campaigned for years for decriminalisation of the sale and purchase of sex, citing the need for authorities to recognize bodily autonomy and other human rights protected under the post-apartheid constitution.<sup>5</sup> Decriminalisation proponents point to widespread harassment and abuse of sex workers under the current legal regime. Organizations and individuals within South Africa's public health community

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<sup>1</sup> Statistics South Africa, *Community Survey 2016*, (Pretoria: Statistics South Africa, 2016), p.21, <http://cs2016.statssa.gov.za/> (accessed June 11, 2018).

<sup>2</sup> Victor Sulla and Precious Zikhali, *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (Washington, DC: World Bank Group, 2018), pp. xiv-xxvi, <http://documents.worldbank.org/curated/en/530481521735906534/Overcoming-Poverty-and-Inequality-in-South-Africa-An-Assessment-of-Drivers-Constraints-and-Opportunities>. The report found that the top 1 percent of South Africans own 70.9 percent of the nation's wealth. The bottom 60 percent of South Africans collectively control only 7 percent of the country's assets.

<sup>3</sup> Global Alliance Against Traffic in Women (GAATW), *Collateral Damage*, (Bangkok: GAATW, 2007), p. 197. As of May 2018, the unemployment rate for the entire population is approximately 26.7 percent. See Statistics South Africa, "Quarterly Labour Force Survey: QFLS Q1:2018," May 15, 2018, <http://www.statssa.gov.za/?p=11139> (accessed June 19, 2018).

<sup>4</sup> M Richter et. al, "Characteristics, Sexual Behaviour and Risk Factors of Female, Male and Transgender Sex Workers in South Africa" *South African Medical Journal* (103: 2013): 4, pp. 246-251, accessed July 11, 2019, doi: [10.7196/sami.6170](https://doi.org/10.7196/sami.6170).

<sup>5</sup> See, for example: Sisonke, "What is Sisonke?" <http://www.sweat.org.za/what-we-do/sisonke/> (accessed July 5, 2018); Asijiki, "About Us," <https://asijiki.org.za/about-us/> (accessed July 5, 2018).

who are engaged in ending the HIV pandemic have, for the most part, also taken up the call in support of decriminalisation.

Another segment of civil society, including some religious and anti-trafficking organizations, maintain that while current laws may need to be reformed, full criminalisation should be retained to protect morality or society as well as vulnerable women from the harms of sex work.<sup>6</sup>

A third group of advocates, organizations like Embrace Dignity, made up in part of former and exiting sex workers, have called for the government to legislate for partial criminalisation, using the ‘Nordic’ or ‘abolitionist’ model used in Sweden, Norway, and Canada (amongst others) as inspiration. This model decriminalises the selling of sex (proponents see sex work as inherently exploitative, harmful, and undeserving of the term “work,” and generally use the term “prostitution” instead) but makes buying sex or “pimping” a criminal offence. Like full criminalisation, this model seeks an end to “prostitution,” but sees women in the sex industry as victims that should not be further harmed by authorities.

## **Sex work Under Current South African Law and the Potential for Reform**

South Africa currently uses a model of total criminalisation or prohibition of sex work, which means that the conduct of an estimated 132,000 to 182,000 sex workers is subject to criminal sanction.<sup>7</sup> The purchase, as well as the sale of sex, is illegal, as is any activity connected with “prostitution” such as owning or running a brothel or “enticing” a woman to work in a brothel.<sup>8</sup>

Prostitution was specifically criminalised by the Sexual Offences Act of 1957 (the Sexual Offences Act).<sup>9</sup> This law also banned brothels or making any money or living off the

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<sup>6</sup> For example, the Coalition to End Sexual Exploitation in South Africa made an oral statement at a March 2018 Multi Party Women’s Caucus meeting in South Africa’s parliament opposing decriminalisation because sex work entails the “commodification of both male and female sexuality” and because of “moral values.”

<sup>7</sup> SWEAT, “Estimating the Number of SW in SA,” 2013, <http://www.sweat.org.za/wp-content/uploads/2016/02/Sex-Workers-Size-Estimation-Study-2013.pdf> (accessed July 5, 2018), p. 4.

<sup>8</sup> Sexual Offences Act, No. 23 of 1957, ss. 2, 10, 12, 12A, 19, 20; Criminal Procedure Act, No. 51 of 1977, s. 268(c); Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007, s. 11.

<sup>9</sup> Sexual Offences Act, No. 23 of 1957, ss. 2, 10, 12, 19, and 20. The Sexual Offences Act was originally titled the Immorality Act, 1957; the Immorality Amendment Act, 1988 (No. 2 of 1988) renamed the Immorality Act to the Sexual Offences Act and

proceeds of sex work (for example, a spouse of a brothel owner may face prosecution, or the owner of a house rented out as a brothel). The law also broadly bans solicitation or enticing a customer. The Sexual Offences Amendment Act, passed in 2007, also makes buying sex criminal and specifically criminalises all those involved in the prostitution of children (persons below the age of 18).<sup>10</sup> Children involved in prostitution are considered victims of exploitation and cannot be charged with prostitution-related offences.

In 2002, brothel keepers and sex workers challenged the laws on prostitution in South Africa's Constitutional Court, but the challenge was dismissed.<sup>11</sup>

In 2013, anti-trafficking legislation was signed into law.<sup>12</sup> The Prevention and Combating of Trafficking in Persons Act (PACOTIP) defines trafficking broadly and punishes trafficking and related crimes with significant prison terms, including up to life imprisonment.<sup>13</sup>

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made the provisions of the Act gender neutral. The original Immorality Act also criminalised interracial sex (s. 16). These restrictions were later repealed by the Immorality and Prohibition of Mixed Marriages Amendment Act, No. 72 of 1985.

<sup>10</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007, s. 11.

<sup>11</sup> *S. v. Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)*, Constitutional Court of South Africa, Case No. CCT31/01, [2002] ZACC 22, 2002 (6) SA 642, 2002 (11) BCLR 1117 (9 October 2002). The appellants, including a brothel owner who was also a sex worker, claimed that the Sexual Offences Act violated their rights to equality (until 2007, only the sale of sex, not buying sex with criminalised), privacy, human dignity, economic activity to pursue a livelihood, as well as freedom and security of person. The court upheld the constitutionality of criminalising unlawful sexual intercourse for reward under section 20(1) of the Sexual Offences Act as well as the brothel keeping provisions. Some commentators have suggested the ruling was primarily based on the judges' views on morality. The judges found that the act did not discriminate because it applied to both male and female sex workers and was therefore gender neutral. For more on this see Charlene May, "Substantive Gender Equality, Sex Work and the Assumptions of *S v Jordan*," Legal Resources Centre, Johannesburg, South Africa, <http://resources.lrc.org.za/substantive-gender-equality-sex-work-and-the-assumptions-of-s-v-jordan/> (accessed July 23, 2018).

<sup>12</sup> Other laws used to prosecute traffickers include the Children's Act of 2005, which provides for the criminalisation of the trafficking of children, and the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (No. 32 of 2007), which contains provisions that criminalise trafficking in persons for sexual purposes. Criminal organisations involved in trafficking have been prosecuted under racketeering offences in the Prevention of Organised Crime Act, 1998 (No. 121 of 1998). Those involved in acts of trafficking in persons may also be prosecuted using other acts, including the Immigration Act, 2002 (No. 13 of 2002), the Basic Conditions of Employment Act, 1997 (No. 75 of 1997), the Intimidation Act, 1982 (No. 72 of 1982), the Domestic Violence Act of 1998 (No. 116 of 1998), and the Films and Publications Act, 1996 (No. 65 of 1996). Finally, under the common law and depending on the circumstances of the case, persons suspected of trafficking can be charged with kidnapping, common assault, assault with intent to do grievous bodily harm, extortion, attempted murder, and/or murder. See US Department of State, "Trafficking in Persons Report 2017," June 27, 2017, <https://www.state.gov/documents/organization/271339.pdf> (accessed June 4, 2018), p. 363. For a complete overview of South African law applicable to trafficking offences, see: H.B. Kruger and H. Oosthuizen, "South Africa: Safe Haven for Human Traffickers? Employing the Arsenal of Existing Law to Combat Human Trafficking," *Potchefstroom Electronic Law Journal*, vol. 15, no. 1 (2012), doi: 10.17159/1727-3781/2012/v15i1a2466; Charlene May and Mandivavarira Mudarikwa, "Trafficking of Persons: A South African Legislative Perspective," Legal Resources Centre, October 2012, [http://www.probono.org.za/Manuals/Refugee-Manual/2011\\_12\\_14\\_LRC\\_HumanTrafficking.pdf](http://www.probono.org.za/Manuals/Refugee-Manual/2011_12_14_LRC_HumanTrafficking.pdf) (accessed June 29, 2018).

<sup>13</sup> Prevention and Combating of Trafficking in Persons Act, No. 7 of 2013, s. 13(a) and (b).

<http://www.justice.gov.za/legislation/acts/2013-007.pdf>. The Act defines trafficking to include the recruitment,

Although the law was enacted in 2013, South Africa did not begin implementing it until late 2015, and progress has been slow and uneven across government departments.<sup>14</sup> The implementing regulations for PACOTIP's immigration provisions have still not been promulgated. As a result, officials lack adequate training on identifying potential trafficking victims, which occasionally leads the government to arrest, detain, and deport victims.<sup>15</sup>

Advocates for decriminalisation, academic researchers, and health workers working with sex workers complained to Human Rights Watch that politicians, police, and journalists commonly conflate trafficking and sex work, assuming everyone who sells sex is a victim of trafficking. The US Department of State, which tracks global efforts to end trafficking by state, has also heard reports that police often fail to identify (and refer to appropriate services) victims of trafficking and instead sometimes charge them with prostitution-related offences and other violations.<sup>16</sup> Municipal bylaws play a significant role in police control of "prostitution." As proving the "crime" of prostitution is difficult (a sex worker would have to be caught in the act of providing sex for remuneration), sex workers are most often harassed, arrested, and detained by police using local bylaws, for example for solicitation, being a public nuisance, or loitering.

Decriminalisation of sex work has been under discussion since shortly after the end of apartheid. In 2009, the South African Law Reform Commission (SALRC), an independent statutory body that investigates the state of law in South Africa under the auspices of the Department of Justice and Constitutional Development and makes recommendations for reform, issued a discussion paper on "adult prostitution" and whether South African law needed to change in this regard.<sup>17</sup> The commission offered four proposals for how sex work could be addressed: total criminalisation, partial decriminalisation, non-criminalisation, and regulation and proposed more research to be able to decide.<sup>18</sup>

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transportation, sale, or harbor of people by means of force, deceit, abuse of vulnerability, and abuse of power for exploitation. Related offences include debt bondage; the possession, destruction, and tampering with travel documents; and using the services of victims of trafficking.

<sup>14</sup> US Department of State, "Trafficking in Persons Report 2018," June 2018, <https://www.state.gov/documents/organization/282803.pdf> (accessed July 2, 2018), p. 388.

<sup>15</sup> *Ibid.*

<sup>16</sup> US Department of State, "Trafficking in Persons Report 2017," p. 364.

<sup>17</sup> South African Law Reform Commission (SALRC), "Sexual Offences: Adult Prostitution," Discussion Paper 0001/2009, Project 107, 2009, [http://www.justice.gov.za/salrc/dpapers/dp0001-2009\\_prj107\\_2009.pdf](http://www.justice.gov.za/salrc/dpapers/dp0001-2009_prj107_2009.pdf) (accessed July 5, 2018).

<sup>18</sup> *Ibid.*, pp. 12-14.

Decriminalisation (non-criminalisation) received considerable support over the next several years, and not only from NGOs and sex worker activists, though these groups have led much of the charge. The Women's League of South Africa's leading political party, the African National Congress (ANC), called for decriminalisation in 2012.<sup>19</sup> In 2017, the ANC as a whole supported decriminalisation, according to news reports following the 54<sup>th</sup> party conference that year.<sup>20</sup> A final report that followed the conference some months later put forward a considerably more cautious party position, calling for more consultation on the issue including to "determine the social norm" and noting that "sex workers must be protected."<sup>21</sup> Large and powerful labour unions, such as the Congress of South African Trade Unions (COSATU), have also supported decriminalisation, as has the constitutionally created Commission on Gender Equality.<sup>22</sup>

However, in 2017 a long-awaited follow up report by the SALRC recommended that the current law be modified and updated but that criminalisation of both the sale and purchase of sex be retained.<sup>23</sup> As a second choice the report recommended that sex work should be decriminalised but that buying sex and third-party involvement remain illegal.<sup>24</sup> Criminalisation, the report suggested, should be "coupled with an option for people in

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<sup>19</sup> Rebecca Davis, "The ANC Women's League and the world's oldest profession," *Daily Maverick*, March 27, 2012, <https://www.dailymaverick.co.za/article/2012-03-27-the-anc-womens-league-and-the-worlds-oldest-profession/#.WzKWSqdKiUk> (accessed June 26, 2018).

<sup>20</sup> "ANC resolves to decriminalise sex work," *eNCA.com*, December 20, 2017, <https://www.enca.com/south-africa/anc-resolves-to-decriminalise-sex-work> (accessed July 5, 2018).

<sup>21</sup> African National Congress (ANC), "54th National Conference: Report and Resolutions," March 2018, [http://joeslovo.anc.org.za/sites/default/files/docs/ANC%2054th\\_National\\_Conference\\_Report%20and%20Resolutions.pdf](http://joeslovo.anc.org.za/sites/default/files/docs/ANC%2054th_National_Conference_Report%20and%20Resolutions.pdf) (accessed July 5, 2018), p. 67.

<sup>22</sup> Matthew Park, "COSATU to make Sex Work Decriminalisation Submissions in Parliament at 12pm today," COSATU Press Alerts, March 5, 2018, <https://www.politicsweb.co.za/news-and-analysis/sex-work-decriminalisation-submissions-to-be-made-> (accessed July 5, 2018); Commission for Gender Equality, "Decriminalising Sex Work in South Africa: Official Position of the Commission for Gender Equality," 2013, <http://www.cge.org.za/wp-content/uploads/2014/05/CEG-Decr.pdf> (accessed July 5, 2018).

<sup>23</sup> South African Law Reform Commission, "Report on Sexual Offences: Adult Prostitution," Project 107, June 2015, <http://www.justice.gov.za/salrc/reports/r-pr107-SXO-AdultProstitution-2017-Sum.pdf> (accessed May 22, 2018), p. 5, "...the Report inter alia recommends as the Commission's preferred option the repeal of the Sexual Offences Act and the amendment of the Sexual Offences Amendment Act by the inclusion of offences which criminalise prostitution and prostitution related activities." The report also recommends that laws against "solicitation" be retained (p. 19), that the "prostitute's" criminal records should be expunged after successful diversion and rehabilitation.

<sup>24</sup> *Ibid.*, p. 31-40. The SALRC report contains, in an annex, a possible draft law for this option. It makes "engaging the sexual services of persons 18 years or older" an offence, as is enticing or advertising for sexual services, knowingly owning a property used for "prostitution-related activities," knowingly living off the "proceeds of prostitution," exhibiting in view of the public to intentionally sell sexual services and performing a sexual act in public for reward or compensation.

prostitution to divert out of the criminal justice system so that they can access supportive resources and systems in order to exit prostitution if they should choose to do so.”<sup>25</sup>

The SALRC position frustrated decriminalisation proponents who have said the report writers failed to consult widely enough with sex workers and that, because the writers took a prima facie moral position from the start that sex work is harmful, no other option but abolition was properly considered.<sup>26</sup> The report’s reasoning includes the contention that “exploitation, particularly of women in prostitution, is inherent in prostitution” and that decriminalizing sex work would make women who already face high levels of interpersonal violence in South Africa “even more expendable.”<sup>27</sup>

The report also makes a series of non-legislative recommendations, including the development of a national strategy to tackle “prostitution” (the term used throughout the report rather than the more neutral term “sex work”). The SALRC also suggests that abuses against sex workers should be investigated (by the Commission on Gender Equality and the Human Rights Commission), as should abuses by the South African Police Service (by police and the Independent Police Investigative Directorate). Finally, the report recommends better practices and guidelines for police to end long-running abuse of sex workers and investigate police crimes against sex workers.<sup>28</sup>

The South African parliament’s Multi-Party Women’s Caucus held a meeting for stakeholders in March 2018 to hear responses from NGOs, academics, and others on the report. The body called for public submissions but has yet to make a formal statement on the SALRC report.

## **Violence against Women in South Africa**

Attacks on female sex workers by clients, persons pretending to be clients, police, partners, and others should be understood within the context of a country suffering an

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<sup>25</sup> Ibid., p. 5.

<sup>26</sup> South African Law Reform Commission Report: Adult Prostitution: Response by Stakeholders, meeting report, March 5, 2018 on file with HRW.

<sup>27</sup> South African Law Reform Commission, “Report on Sexual Offences: Adult Prostitution,” p. 4.

<sup>28</sup> Ibid., pp. 5-7.



epidemic of violence against women and girls.<sup>29</sup> South Africa has developed a strong legal and policy framework to address gender-based violence. A progressive constitution, targeted legislation such as the Domestic Violence Act and the Sexual Offences Act, and government policies designed to prevent, respond to, and eventually eradicate gender-based violence all exist.<sup>30</sup> South Africa has also ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), its optional protocol, and regional instruments such as the Maputo Protocol.

Despite this legislative and policy framework, violence against women remains pervasive and, although such violence is believed to be underreported, statistics paint a disturbing picture.<sup>31</sup> There are no centralized statistics on incidents and types of violence against women, beyond the recording of sexual offences crimes under the Sexual Offences Act released annually by the South African Police Services (SAPS). In 2016-2017, 39,828 rapes (71 per 100,000 population) were reported to the police, down from 41,503 (77 per 100,000 population) in 2015-2016.<sup>32</sup> However, studies have suggested that, depending on the locality, as few as one in thirteen rapes are reported to the police.<sup>33</sup> The problem of

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<sup>29</sup> “Ramaphosa: ‘Violence against women and children has become an epidemic,’” video report, *News24*, July 31, 2017, <https://www.news24.com/Video/SouthAfrica/News/ramaphosa-violence-against-women-and-children-has-become-an-epidemic-20170731> (accessed July 11, 2019).

<sup>30</sup> The Constitution of the Republic of South Africa is widely considered to be one of the most progressive in the world. One of its founding provisions is non-sexism (s. 1(b)) and it explicitly enshrines the right “to be free from all forms of violence from either public or private sources” in Section 12. Section 7(2) provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights, enshrined in Chapter 2 of the Constitution. In the case of *S. v. Baloyi*, the Constitutional Court held that “the Constitution imposes a direct obligation on the state to protect the rights of all persons to be free from domestic violence.” See *S. v. Baloyi and others*, 2000 (2) SA 425 (CC), para. 11.

<sup>31</sup> Human Rights Watch, *World Report 2018* (New York: Human Rights Watch, 2018), South Africa chapter, <https://www.hrw.org/world-report/2018/country-chapters/south-africa>. Violence against women in South Africa takes many forms, including domestic violence, femicide, rape, sexual abuse, harassment, and harmful cultural practices such as *ukuthwala* (abduction of girls for marriage). See South African Law Reform Commission, “The Practice of Ukuthwala,” Revised Discussion Paper 138 (2015), <http://www.justice.gov.za/salrc/dpapers/dp132-UkuthwalaRevised.pdf> (accessed May 29, 2018); South African Law Reform Commission, “The Review of the Witchcraft Suppression Act 3 of 1957,” Discussion Paper 139 (2016), <http://www.justice.gov.za/salrc/dpapers/dp139-WitchcraftSuppression.pdf> (accessed May 29, 2018). “Corrective” rape of lesbians is also rampant. See, for example: Lea Mwambene and Maudri Wheal, “Realisation or Oversight of a Constitutional Mandate? Corrective Rape of Black African Lesbians in South Africa,” *African Human Rights Law Journal*, vol. 15 (2015) and Human Rights Watch, *South Africa - “We’ll Show You You’re a Woman,” December 2011*, <https://www.hrw.org/report/2011/12/05/well-show-you-youre-woman/violence-and-discrimination-against-black-lesbians-and>.

<sup>32</sup> Kate Wilkinson, “GUIDE: Rape statistics in South Africa,” Africa Check factsheet, June 22, 2016, <https://africacheck.org/factsheets/guide-rape-statistics-in-south-africa/> (accessed May 22, 2018).

<sup>33</sup> Institute for Security Studies, “FACTSHEET: South Africa’s 2014/15 assault and sexual crime statistics,” Africa Check factsheet, September 29, 2015, <https://africacheck.org/factsheets/factsheet-south-africas-201415-assault-and-sexual-crime-statistics/> (accessed May 22, 2018).

underreporting appears to be worsening—the National Victims of Crime Survey results show that the proportion of rape victims who reported the crime to the police decreased by 21 percent between 2011 and 2014.<sup>34</sup> Studies have found that intimate partner violence affects between 18.13 percent and 28.4 percent of women, depending on the locality.<sup>35</sup> The South African Medical Research Council has estimated that a woman is killed by her partner every eight hours, making intimate partner violence the leading cause of death for female homicide victims.<sup>36</sup>

Certain groups of women face increased vulnerability to violence, including women and girls with disabilities, elderly women, poor women, and lesbian, bisexual, transgender, and gender nonconforming women. Women in sex work also experience disproportionately high levels of physical and sexual violence at the hands of both clients and police officers. Access to justice is particularly elusive for sex workers, for reasons explored in this report in later chapters.<sup>37</sup>

The Department of Social Development, the Department of Justice and Constitutional Development, and the Ministry for Women, Children, and Persons with Disability are the most heavily involved in policymaking related to violence against women. The National Prosecuting Authority (NPA) and the SAPS also play important roles. South Africa’s Department of Health has issued National Directives stating that post-violence health care must be provided to survivors regardless of whether they have laid criminal charges or not.<sup>38</sup> SAPS stations should meet victim-friendly standards to empower more survivors to

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<sup>34</sup> Institute for Security Studies, “FACTSHEET: South Africa’s 2014/15 assault and sexual crime statistics.”

<sup>35</sup> Lisa Vetten, “Domestic violence in South Africa,” Institute for Security Studies (ISS), Policy Brief 71, November 2014, <https://issafrica.s3.amazonaws.com/site/uploads/PolBrief71.pdf> (accessed May 22, 2018); R. Jewkes, L. Penn-Kekana, and J. Levin, “‘He Must Give me Money, He Mustn’t Beat Me’: Violence Against Women in Three South African Provinces,” (Pretoria, South Africa: Medical Research Council, 1999).

<sup>36</sup> Naeemah Abrahams et al., “Every Eight Hours: Intimate femicide in South African 10 years later!” South African Medical Research Council, Research Brief, August 2012, <http://www.mrc.ac.za/sites/default/files/attachments/2016-06-27/everyeighthours.pdf> (accessed May 22, 2018).

<sup>37</sup> Commission for Gender Equality, “Decriminalising Sex Work in South Africa: Official Position of the Commission for Gender Equality,” 2013, <http://www.cge.org.za/wp-content/uploads/2014/05/CEG-Decr.pdf> (accessed July 5, 2018).

<sup>38</sup> Department of Health, “National Directives and Instructions on conducting a Forensic Examination on survivors of Sexual Offence cases in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,” Government Notice No. 223 in Government Gazette No. 31957, March 6, 2009, pp. 7-27, [https://www.gov.za/sites/default/files/31957\\_223.pdf](https://www.gov.za/sites/default/files/31957_223.pdf) (accessed June 29, 2018), p. 19. Section 18(f) of Directive 4 states: “Amongst others, the patient should be offered the following health care services: (i) counselling; (ii) treatment of any physical injuries; (iii) STIs and HIV and AIDS prevention; (iv) in case of female patients of reproductive age, pregnancy risk evaluation and prevention; and (v) other infectious diseases prevention and treatment.” With regard to reporting the case to the police, section 18(g) provides that the patient’s right to decide should always be respected and honored, and section

report sexual offences.<sup>39</sup> The successes and failures of South Africa’s government response to violence against women are beyond this report’s reach. But a critical missing step is a focus on changing the law and police practices on sex work, which is dominated by women. The following chapters provide information based on our interviews with 46 female sex workers in 10 different sites about how criminalisation of sex work is linked to multiple experiences of violence experienced by this especially vulnerable population.

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18(h) provides that patients should never be coerced or forced to report the sexual offence. Where a survivor does not want to report the sexual offence to the police, there is no legal duty on the health care professional to report the offence if the survivor is an adult, unless the survivor is mentally ill as defined in the Mental Health Care Act, 2002 or is an older person in need of care.

<sup>39</sup> SAPS, “Victim Empowerment Service in the South African Police Service,” undated, [https://www.saps.gov.za/resource\\_centre/women\\_children/amended\\_victim\\_empo\\_service.pdf](https://www.saps.gov.za/resource_centre/women_children/amended_victim_empo_service.pdf) (accessed July 5, 2018).

# I. Health Care and “De Facto” Decriminalisation in South Africa

Before when you got a STI (sexually transmitted infection) the nurses would tell you to bring your partner. But now they understand.

– Tanaswa Moyo, Musina-based sex worker, May 2018

Human Rights Watch research in other countries has shown that sex workers’ access to health care, including access to HIV prevention programming, has been obstructed by the criminalisation of sex work.<sup>40</sup> For example, fear of arrest and associated stigma discourages sex workers from telling health workers what they do. Searching suspected sex workers for condoms as evidence of prostitution and similar practices by police can lead sex workers to carry and use fewer of the prophylactics. Unchallenged and exacerbated by criminalisation, stigma from health workers can keep sex workers from seeking health care including, for example, after rape or if a condom breaks during sex.

These problems persist in South Africa, as described below. However, many years of nationally and internationally funded programming and evidence-based approaches to health care, especially in terms of HIV prevention and treatment, have had some positive impacts with regard to sex workers’ access to health care.

All of the sex workers interviewed for this report said they had free, relatively accessible, nondiscriminatory access to health care, including reproductive health care and HIV treatment.<sup>41</sup> Many remarked that they had experienced improved, friendlier services over the past five or six years and they now consider access to appropriate health care as one of their human rights. In most cases, sex workers not only knew clinics (often run by NGOs with international HIV funding) where they could talk openly about sex work but were also

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<sup>40</sup> See, for example: Human Rights Watch, *“Treat Us Like Human Beings”: Discrimination against Sex Workers, Sexual and Gender Minorities, and People Who Use Drugs in Tanzania*, June 2013, <https://www.hrw.org/report/2013/06/18/treat-us-human-beings/discrimination-against-sex-workers-sexual-and-gender>; *Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities*, July 2012, <https://www.hrw.org/report/2012/07/19/sex-workers-risk/condoms-evidence-prostitution-four-us-cities>.

<sup>41</sup> Our interviewees were a convenience sample, and their experiences may not reflect reality for all sex workers in South Africa. The interviewees for this report were identified by health organisations and so represent sex workers who have had contact with health organisations.

often visited by outreach health workers or peer educators on the streets or in brothels who provided them with condoms, lubricants, information and education, and sometimes transport to clinics.

Coverage is not complete, and health workers and government officials both underlined the necessity of ongoing sensitization and the importance of large-scale HIV funding to maintain momentum.<sup>42</sup> But one driving force behind the gains made so far has been South Africa's Department of Health and the South African National AIDS Council (SANAC, which coordinates several government bodies) openly calling for services for sex workers and for decriminalisation, and together with partners encouraging health care professionals to reach out to sex workers including through peer educators and provide judgement-free care.<sup>43</sup> The South African government funds some 80 percent of its national HIV response,<sup>44</sup> including directing millions of South African Rand to sex worker health programming.<sup>45</sup> International donors including the U.S. President's Emergency Plan for AIDS Relief (PEPFAR) program of the US government and the Global Fund to Fight AIDS, Tuberculosis and Malaria grant millions more dollars every year to organizations to conduct HIV outreach to sex workers.<sup>46</sup>

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<sup>42</sup> Human Rights Watch interview with Thato Chidarikire, Director of HIV Prevention, Department of Health, Johannesburg, June 14, 2018.

<sup>43</sup> See, for example: Nelson Dlamini, "SANAC calls for decriminalisation of sex work," *SANAC News*, March 9, 2018, <http://sanac.org.za/2018/03/09/sanac-calls-for-decriminalisation-of-sex-work/> (accessed July 10, 2018); South African Department of Health, "Health Sector HIV Prevention," 2016, <http://www.health.gov.za/index.php/component/phocadownload/category/324-hiv-prevention-strategy?download=1823:hiv-prevention-strategy> (accessed July 10, 2018). The Sex Workers' Programme includes a plan for sex worker community mobilization and engagement, service provision, sensitisation of service providers, advocacy, health systems strengthening, and strategic information. Advocacy efforts include a decriminalisation campaign (see pp. 7-8).

<sup>44</sup> UNAIDS, "South Africa: Overview," undated, <http://www.unaids.org/en/regionscountries/countries/southafrica> (accessed July 10, 2018).

<sup>45</sup> Precise figures and not yet available. The SANAC Secretariat will commission a costed implementation plan and estimate the medium to long term costs for the full scale up of the South African National Sex Worker HIV Plan. One aspect of the Plan is access to Pre-Exposure Prophylaxis (PrEP) and Universal Test and Treat (UTT) for all sex workers in South Africa. Results from a prospective observational demonstration project, intended to inform the delivery design of PrEP and ART rollout, found that the total cost of service delivery was approximately US\$126 for PrEP and \$406 for early ART per person per year. Robyn Eakle, Gabriela B. Gomez, Niven Naicker, Rutendo Bothma, Judie Mbogua, Maria A. Cabrera Escobar, Elaine Saayman, Michelle Moorhouse, W.D. Francois Venter, and Helen Rees, "HIV pre-exposure prophylaxis and early antiretroviral treatment among female sex workers in South Africa: Results from a prospective observational demonstration project," *PLoS Medicine*, vol. 14, no. 11 (2017), p. e1002444, doi: 10.1371/journal.pmed.1002444. For information about the number of people using PrEP in South Africa, see PrEPWatch, "South Africa," undated, <https://www.prepwatch.org/south-africa/> (accessed July 10, 2018).

<sup>46</sup> According to PEPFAR's 2017 Annual Report to Congress, in the 2015 fiscal year (October 2014–September 2015), reported PEPFAR expenditures for core programs in South Africa was \$313,050,000.<sup>46</sup> Of this, \$2,530,000 was allocated to the program area "female sex workers," one of eleven core program areas. Other program areas, such as HIV testing, likely

This approach is in clear contrast to ongoing patterns of arrests and harassment of sex workers by the SAPS described later in this report. The successes of the health sector's pro human rights and pro sex worker approach in improving access to health care should encourage other parts of the government to take a similar position and adopt a more sensible whole-of-government approach. "It's not up to us, it's up to the Department of Justice to decriminalise sex work," one senior government health worker told Human Rights Watch. "But to be honest, we can't believe it hasn't happened already."<sup>47</sup>

## Sex Work and Efforts to End the HIV Pandemic

South Africa has the largest HIV epidemic in the world, with 19 percent of the total number of people living with HIV, 15 percent of global new infections, and 11 percent of AIDS-related deaths, in 2016.<sup>48</sup> South Africa also has the largest treatment program in the world: there were an estimated 7.2 million people living with HIV in 2017, around 61 percent of whom were accessing antiretroviral therapy in the world's largest treatment program.<sup>49</sup> As is the case all over the world, HIV in South Africa affects women and girls more than men (although some groups of men, such as men who have sex with men and intravenous drug users have higher prevalence of HIV than men in the general population). The HIV infection rate for women between 15 and 49 years is 23.7 percent, while only 14.0 percent of men in the same age bracket are living with HIV.<sup>50</sup> As elsewhere in sub-Saharan Africa, young women and adolescent girls are being infected faster than any other population group.<sup>51</sup>

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indirectly support some sex workers as well. Unit expenditures for female sex workers in South Africa was \$59,130,000. See PEPFAR, "2017 Annual Report to Congress," February 2017, <https://www.pepfar.gov/documents/organization/267809.pdf> (accessed July 10, 2018), p. 84. South Africa had the third highest global PEPFAR expenditures, following Kenya (\$412,280,000) and Nigeria (\$341,500,000). According to a 2017 audit report by the Office of the Inspector General of the Global Fund on grants to the Republic of South Africa, South Africa has \$312 million in signed grants for the implementation period April 2016-March 2019. The Global Fund, Office of the Inspector General, "Audit Report: Global Fund Grants to the Republic of South Africa," July 19, 2017, [https://www.theglobalfund.org/media/6586/oig\\_gf-oig-17-014\\_report\\_en.pdf?u=636637835790000000](https://www.theglobalfund.org/media/6586/oig_gf-oig-17-014_report_en.pdf?u=636637835790000000) (accessed July 10, 2018)/

<sup>47</sup> Human Rights Watch interview with senior health official (name and details withheld by Human Rights Watch), June 14, 2018.

<sup>48</sup> UNAIDS, "South Africa: Overview," undated, <http://www.unaids.org/en/regionscountries/countries/southafrica> (accessed July 10, 2019).

<sup>49</sup> Ibid.

<sup>50</sup> UNAIDS, "South Africa: Data," undated, <http://www.unaids.org/en/regionscountries/countries/southafrica> (accessed July 11, 2018).

<sup>51</sup> PEPFAR, "Fact Sheet - Adolescent Girls and Young Women," 2017, <https://www.pepfar.gov/documents/organization/264890.pdf> (accessed July 11, 2018).

International experience has demonstrated that human rights abuses against key populations (i.e., groups that are at an increased risk of HIV infection) such as sex workers undermine their access to HIV prevention, treatment, care and support, and sexual and reproductive health care. Ending the AIDS epidemic will depend on sex workers and other key populations being able to obtain services and confidential information about HIV prevention and health care without fear of harassment or discrimination. The World Health Organization (WHO), the Joint United Nations Programme on HIV/AIDS (UNAIDS), and other international bodies seeking to end the pandemic and improve other health outcomes for key populations have supported decriminalisation of sex work.<sup>52</sup> The medical journal, the *Lancet*, in July 2014 concluded that “[d]ecriminalisation of sex work would have the greatest effect on the course of HIV epidemics across all settings, averting 33-46 percent of HIV infections in the next decade.”<sup>53</sup> Ending discriminatory practices and policies against sex workers is especially important in sub-Saharan Africa as all countries with more than 50 percent HIV prevalence in sex workers are in sub-Saharan Africa.<sup>54</sup>

In South Africa, health statistics suggest that decriminalisation is all the more urgent: HIV prevalence rates amongst female sex workers are thought to be between 40 percent and 88 percent, compared to 14.4 percent among women in the general population.<sup>55</sup> HIV prevalence is as high as 71.8 percent among female sex workers in Johannesburg, one of the highest rates in the world.<sup>56</sup> SANAC has called for decriminalisation of sex work and, as the former head of SANAC, South Africa’s current President Cyril Ramaphosa has also been a vocal supporter of decriminalisation.<sup>57</sup> Important organizations working to end new

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<sup>52</sup> See generally: World Health Organization (WHO), “Sex workers,” undated, [http://www.who.int/hiv/topics/sex\\_work/en/](http://www.who.int/hiv/topics/sex_work/en/) (accessed July 5, 2018); UNAIDS, “The Gap Report 2014: Sex Workers,” September 2014, [http://www.unaids.org/sites/default/files/media\\_asset/o6\\_Sexworkers.pdf](http://www.unaids.org/sites/default/files/media_asset/o6_Sexworkers.pdf) (accessed July 5, 2018).

<sup>53</sup> K. Shannon, et al., “Global epidemiology of HIV among female sex workers: influence of structural determinants,” *The Lancet*, 385, no. 9962 (2010), p. 1.

<sup>54</sup> Chris Beyrer, Anna-Louise Crago, Linda-Gail Bekker, Jenny Butler, Kate Shannon, Deanna Kerrigan, Michele R. Decker, Stefan D. Baral, Tonia Poteat, Andrea L. Wirtz, Brian W. Weir, Françoise Barré-Sinoussi, Michel Kazatchkine, Michel Sidibé, Karl-Lorenz Dehne, Marie-Claude Boily, and Steffanie A. Strathdee, “An action agenda for HIV and sex workers,” *The Lancet*, vol. 385, no. 7 in the *Lancet’s* HIV and Sex Workers series (2015), pp. 287-301, doi: 10.1016/S0140-6736(14)60933-8, p. 289.

<sup>55</sup> South African National AIDS Council (SANAC), “South African National Sex Worker HIV Plan, 2016-2019,” 2016, <https://southafrica.unfpa.org/sites/default/files/pub-pdf/South%20African%20National%20Sex%20Worker%20HIV%20Plan%202016%20-%202019%20FINAL%20Launch%20Copy...%20%282%29%20%281%29.pdf> (accessed July 5, 2018), p. 13.

<sup>56</sup> *Ibid.*, p. 8.

<sup>57</sup> Nelson Dlamini, “SANAC calls for decriminalisation of sex work,” *SANAC News*, March 9, 2018, <https://genderjustice.org.za/news-item/asijiki-coalition-for-the-decriminalisation-of-sex-work-celebrates-president-ramaphosas-commitment-to-decriminalise-sex-work/> (accessed July 5, 2018).

infections in South Africa, like the Desmond Tutu Foundation, the Medical Research Council of South Africa, and the Treatment Action Campaign all support decriminalisation.

Support for sex workers' right to health care, including sexual and reproductive health care, and the importance of easy access to nonjudgmental health care for sex workers to reduce new infections has long been recognized by health activists and mainstream health sector in South Africa. In 2016 the South African government launched the National Sex Worker HIV Plan 2016-2019 (the latest in a series).

Increased provision of pre-exposure prophylaxis (PrEP, a treatment wherein HIV antiretrovirals (ARVs) are taken by HIV-negative individuals to help prevent infection) and the "Universal Test and Treat" protocol (where all people living with HIV are provided with medication as early as possible, no matter their CD4 count) are key parts of this three-year plan.<sup>58</sup> The plan aims to reach 70,000 sex workers over three years through a peer educator-led approach and a minimum package of services including HIV prevention and treatment, psychosocial support, legal support, and economic empowerment. The plan sets out ambitious targets, including that at least 95 percent of sex workers use condoms with their clients and partners, that gender-based violence against sex workers falls by 50 percent, and that the global goals of "90-90-90" are met for sex workers.<sup>59</sup> By recruiting 1,000 peer educators, the plan intends to address the multiple drivers of HIV and opportunistic infections.

The plan is expressly supportive of sex workers, bringing its very ethos into contradiction with sex workers' official legal status as criminals. In the Foreword, the now-former Minister of Health Dr. Motsoaledi recognizes the diversity of sex workers' experiences, explaining that the core package of services "has been designed to encompass the multifaceted lives of sex workers and it calls for the national coordination of a range of

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<sup>58</sup> SANAC, "The South African National Sex Worker HIV Plan, 2016-2019." In people living with HIV, the CD4 count is the most important laboratory indicator of immune function and the strongest predictor of HIV progression. It is one of the factors used to determine when to start antiretroviral therapy (ART), and is also used to monitor response to ART. In the past HIV positive patients were provided with medicine when their CD4 count was low, but best practice now is to treat all HIV positive patients. See, generally: AIDSinfo, "HIV/AIDS Glossary: CD4 Count," undated, <https://aidsinfo.nih.gov/understanding-hiv-aids/glossary/822/cd4-count> (accessed July 11, 2018).

<sup>59</sup> SANAC, "National Sex Worker HIV Plan, 2016-2019," p. 8. "90-90-90" refers in this instance to the South African goal that 90 percent of sex workers know their HIV status, 90 percent of those who test positive are on antiretroviral treatment, and 90 percent of those on ARVs are virally suppressed. More generally, the "90-90-90" target as laid out by UNAIDS and to be reached by 2020, is ambitious and global and for everyone, not just sex workers.



diverse responses to the social and structural barriers that confront sex workers on a daily basis.”<sup>60</sup> The plan explicitly recognizes criminalisation of sex work as one of the structural factors that intensify sex workers’ vulnerability to HIV infection.<sup>61</sup>

There are complex relationships between and among factors like poor health, criminalisation of sex work, poverty, and violence against sex workers by police and others who take advantage of their vulnerability.<sup>62</sup> Health advocates and health workers do not think that decriminalizing sex work is sufficient to end higher-than-normal rates of HIV infection in this population, but many consider it necessary. “We need decriminalisation of sex work to end the HIV pandemic,” Anele Yawa, the general secretary of the Treatment Action Campaign, told Human Rights Watch.<sup>63</sup>

### “Things Have Really Improved”

A 40-year-old mother of two, Rofhiwa Mlilo, echoed many other Human Rights Watch interviewees when she said: “In the past, stigma and discrimination used to happen but now sex workers know their rights. Before we were afraid to go [to health clinics] because of stigma, the nurses would call us ‘prostitute,’ but now things are better.”<sup>64</sup>

“Before 2014 we would not get tested because of stigma but now we are all sensitized about our rights and the nurses are better,” another sex worker, a 50-year-old who wanted to be known as “Chief Magosha” in this report, said.<sup>65</sup> “The services have improved over

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<sup>60</sup> Ibid., p. 6.

<sup>61</sup> Ibid., p. 18.

<sup>62</sup> Research has shown sex workers’ increased exposure to violence also makes them more vulnerable to HIV. See, for example: J. Coetzee, G.E. Gray, and R. Jewkes, “Prevalence and patterns of victimization and polyvictimization among female sex workers in Soweto, a South African township: A cross-sectional, respondent-driven sampling study,” *Global Health Action*, vol. 10, no. 1 (2017), doi: 10.1080/16549716.2017.1403815. Other research has examined the links between sex worker rates of HIV and poverty. See, for example: Chaturaka Rodrigo and Senaka Rajapakse, “HIV, poverty and women,” *International Health*, vol. 2 (2010), pp. 9-16, doi: 10.1016/j.inhe.2009.12.003; ILO Programme on HIV/AIDS and the World of Work (ILOAIDS), “HIV/AIDS and poverty: the critical connection,” October 2005, [http://www.ilo.org/wcmsp5/groups/public/-ed\\_protect/---protrav/---ilo\\_aids/documents/publication/wcms\\_120468.pdf](http://www.ilo.org/wcmsp5/groups/public/-ed_protect/---protrav/---ilo_aids/documents/publication/wcms_120468.pdf) (accessed July 11, 2018); Kathryn E. Lancaster, Dana Cernigliaro, Rose Zulliger, and Paul F. Fleming, “HIV care and treatment experiences among female sex workers living with HIV in sub-Saharan Africa: A systemic review,” *African Journal of AIDS Research*, vol. 15, no. 4 (2016), pp. 377-386, doi: 10.2989/16085906.2016.1255652.

<sup>63</sup> Human Rights Watch interview with Anele Yawa, Treatment Action Campaign office, Johannesburg, June 8, 2018.

<sup>64</sup> Human Rights Watch interview with Rofhiwa Mlilo, Makhado, Limpopo Province, May 29, 2018.

<sup>65</sup> Human Rights Watch interview with “Chief Magosha,” Bushbuckridge, Mpumalanga Province, June 1, 2018. “Chief Magosha” translates to “Chief Whore” or “Chief Prostitute,” a term the interviewee said her community had given her, with

the years because of organizations,” she added. The connection between health care services and rights-based organizations was noted by other interviewees; the same sources of funding are sometimes available to both kinds of organizations. Some sex workers said that sex worker rights organizations had complained on sex workers’ behalf if the sex workers were treated in a discriminatory way.

Arrested sex workers can call peer educators or outreach workers with medical NGOs. These staff sometimes visit police stations themselves to advocate for the rights of their clients or patients, and otherwise they call one of the sex workers’ rights organizations like SWEAT or Sisonke.

Even in small towns like De Deur, about 40 kilometres south of Johannesburg, and nearby Eikenhof, sex workers were regularly getting visits from peer educators and health workers. Tash Sithole is just one sex worker who regularly gets check-ins from peer educators. “Nicobilie often comes, she gives us condoms, asks us to go with them to HIV test, counselling, etc., and we can also get our pap smears there,” she said.

In downtown Johannesburg, the Esselen Street Clinic, run by Wits Reproductive Health and HIV Institute, provides comprehensive primary care to sex workers. All of the sex workers interviewed in Johannesburg for this report knew about the clinic, knew they could go there, and expected they would be cared for, for free and with respect. “I always go there because of the treatment, even if I have a cold, they know me there,” one sex worker said.<sup>66</sup> “The service is really good, they even come here [to visit the brothel],” another sex worker said.<sup>67</sup> Our understanding developed over the course of this research through discussions with sex workers about health care is that high-quality and welcoming care had strengthened sex workers’ desire to take care of their health and demand their rights. Many sex workers also feel a sense of sisterhood with others using specialized services and have been empowered by the knowledge at least some in society see them as ordinary people.

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some fondness, in part because of her work as a peer educator. She appeared to have re-appropriated the phrase with complete comfort.

<sup>66</sup> Human Rights Watch interview with Nuza Ndosi, Johannesburg, June 4, 2018.

<sup>67</sup> Human Rights Watch interview with Leo Kabika, Johannesburg, June 4, 2018.

## Criminalisation of Sex Work is Still an Obstacle to Health Care

Despite these positive changes, both sex workers and health workers described how criminalisation continues to obstruct access to health care for sex workers and efforts to end the country's HIV pandemic.

One fundamental obstruction is when police arrest and detain peer educators from key clinics, such as the Esselen Street Clinic. Getting peer educators and sex workers out of detention (often via sex worker organizations like SWEAT or Sisonke), takes up precious time and resources for overstretched clinics and medical NGOs.

Despite frustration from health workers and sensitisation efforts with police officers, another obstacle is that police still sometimes use condoms as evidence of “prostitution,” although some health workers said that they felt the practice had reduced in some areas. “One of our girls, she’s also a peer educator, she was arrested because the cops saw condoms in her bag,” said Babalwa Puthumo, who works with the Perinatal HIV Research Unit (PHRU), a university research centre, as a counsellor. One woman, Mlilo, quoted above, said she had been arrested three times in 2018 alone and always, as far as she could tell, just for standing in a “hot spot” (place where sex workers work). “Not sure what charges,” she said. “When I ask, they do not give a straight answer, sometimes they say they found condoms in my bag.”<sup>68</sup>

Health workers told Human Rights Watch that sex workers are sometimes unwilling to accept large numbers of condoms from them in case this makes them a target for police attention.

Getting patients living with HIV onto ARVs and ensuring daily adherence is important both for the health of individual patients and as part of a comprehensive public health approach to HIV prevention and treatment.<sup>69</sup> Four sex workers reported that they had been unable to access their ARVs in police detention, sometimes for as long as three days. “I felt unwell and I lost weight,” said Yolanda Nkgapele, who works in Tzaneen, Limpopo

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<sup>68</sup> Human Rights Watch interview with Rophiwa Mudaw Makahdo, Limpopo Province, May 29, 2018.

<sup>69</sup> SANAC, “National Sex Worker HIV Plan, 2016-2019,” p. 24.

Province.<sup>70</sup> “I needed to go home and get my ARVs [but] they would not allow me,” said Ranilwe Mola, who also works in Tzaneen.<sup>71</sup> Two sex workers arrested in Johannesburg also reported not having access to ARVs during detention.

In 2005, South Africa began running trials to test the efficacy of PrEP and in June 2016, South Africa became the first African country to make PrEP available outside of a research study or pilot project.<sup>72</sup> The National Sex Worker HIV Plan promises PrEP for uninfected sex workers.<sup>73</sup> However, like patients on ARVs, PrEP patients should receive regular medical check-ups, including to test toxicity in kidneys.<sup>74</sup> Arrests and evading police can lead to missed appointments. “Sometimes our patients don’t turn up when it’s time to see the doctor, get tests or participate in creative spaces (group discussions),” said PHRU counsellor Puthumo. “You call them to find out where they are and they say, ‘I am arrested,’ or you come with the car to take a patient to the clinic and her friends tell you, ‘She was arrested.’”

In addition to creating time-consuming barriers to accessing health workers, the dissonance between practices and approaches from different parts of the government also causes frustration and undermines trust. “We work to reach thousands of sex workers as part of our outreach, which is having a beneficial impact on their access to health and in ending the HIV pandemic,” Dr Thato Chidarikire, Director of HIV Prevention at the Department of Health said. “However, we still hear many anecdotal stories about how policing of sex work is still interfering with health work, for example police seizing or using condoms as evidence or arrests of patients or peer workers.”<sup>75</sup>

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<sup>70</sup> Human Rights Watch interview with “Yolanda Nkgapele,” Tzaneen, Limpopo Province, May 30, 2018.

<sup>71</sup> Human Rights Watch interview with “Ranilwe Mola,” Tzaneen, Limpopo Province, May 30, 2018.

<sup>72</sup> Neeraja Bhavaraju and Daniela Uribe, “Early Lessons from South Africa’s Rollout of Oral PrEP to Sex Workers,” PrEPWatch, n.d., <https://www.prepwatch.org/early-lessons-south-africa-rollout/> (accessed July 11, 2018).

<sup>73</sup> SANAC, “National Sex Worker HIV Plan, 2016-2019,” p. 6.

<sup>74</sup> Lind-Gail Bekker, Kevin Rebe, Francois Venter, Gary Maartens, Michelle Moorhouse, Francesca Conradie, Carole Wallis, Vivian Black, Beth Harley, and Robyn Eakles, “Southern African guidelines on the safe use of pre-exposure prophylaxis in persons at risk of acquiring HIV-1 infection,” *Southern African Journal of HIV Medicine*, vol. 17, no. 1, article no. 455 (2016), doi: 10.4102/sajhivmed.v17i1.455, p. 7

<sup>75</sup> Human Rights Watch interview with Thato Chidarikire, June 14, 2018.

## II. Harassment, Coercion, Extortion: What Criminalisation Looks Like

Frustrating, useless, and frightening: some of the words sex workers interviewed for this report used to describe their treatment by the South African Police Service (SAPS). The SAPS interactions with sex workers varied greatly across the ten interview sites, but only in two towns—Hoedspruit in Limpopo province and Bushbuckridge in Mpumalanga province—did interviewees say that they felt some trust in the police. In both of these towns, unlike in other interview sites, interviewees generally reported few or no arrests and detentions. Elsewhere the police were described negatively.

Poor perceptions are unsurprising. Research over the past 15 years by academic, government and NGO researchers has shown that abuses against sex workers by police in South Africa under criminalisation have been cruel and rampant. Reports have described patterns of arrests that are harassing and abusive rather than useful policing, as well as repeated arbitrary detentions that change nothing and keep sex workers from their families and work. One recent report by the NGOs Sonke Gender Justice and SWEAT found that 33 percent of survey respondents had been sexually assaulted or raped by a police officer and 25 percent had been pepper sprayed by police.<sup>76</sup> National numbers are unavailable, but NGO research suggests most sex workers have had to deal with arrests or fines or other negative interactions with police.<sup>77</sup>

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<sup>76</sup> Donna Evans and Dr. Rebecca Walker, “The Policing of Sex Work in South Africa: A Research Report on the Human Rights Challenges Across Two South Africa Provinces,” Sonke Gender Justice and SWEAT, December 2017, [http://serve.mg.co.za/content/documents/2018/05/15/mX7wwt1NRqqrKg1FOeTO\\_SWEAT-Policing-Sex-Work-SA.pdf](http://serve.mg.co.za/content/documents/2018/05/15/mX7wwt1NRqqrKg1FOeTO_SWEAT-Policing-Sex-Work-SA.pdf) (accessed June 15, 2018), p. 24.

<sup>77</sup> For example, a study by two NGOs conducted in Gauteng and Mpumalanga between February 2016 and May 2017 found that most of the sex workers surveyed had been arrested at least once, with many being arrested four or more times. Of 52 survey respondents, 32 (62 percent) had been arrested at least once. The average number of times each sex worker had been arrested was four times. Most who were arrested paid a fine (53.12 percent). Only 12.5 percent appeared in court following their arrest. The remaining 31.25 percent of sex workers who were arrested were not charged, not fined, and did not appear in court following their arrest (p. 21). Donna Evans and Dr. Rebecca Walker, “The Policing of Sex Work in South Africa: A Research Report on the Human Rights Challenges Across Two South Africa Provinces,” Sonke Gender Justice and SWEAT, December 2017, p. 19-21. Also, the Women’s Legal Centre (WLC), a South African legal NGO, assisted a total of 725 sex workers who had been in conflict with the law between 2011 and 2015. Of all the sex workers whom WLC assisted in this time, 35 percent had received a fine, 32 percent had been arrested, 18 percent had been charged with a crime, and 14 percent had been to court as a defendant. Jerushah Rangasami, Tracey Konstant, and Stacey-Leigh Manoek, “Police Abuse of Sex Workers: Data from cases reported to the Women’s Legal Centre between 2011 and 2015,” Women’s Legal Centre, April 2016,

Human Rights Watch made direct inquiries to the SAPS but has not received any response and has been unable to ascertain whether there has been any action taken by the SAPS to punish police abuse and bring an end to such practices. In the meantime, available data suggests that arrests of female sex workers have been on the rise (national arrest data does not disaggregate different arrest charges under the sexual offences act).<sup>78</sup>

Police treatment did not meet South African arrest protocols as outlined in the Criminal Procedure Act, 1977 which requires that individuals be told why they are being arrested.<sup>79</sup> Sex workers were often unclear as to why they had been arrested and reported use of threats and intimidation by officers. Sex workers were almost always arrested, as far as they could tell, as a result of police profiling, i.e., because they were standing in a “hot spot” or because they were already known as sex workers by the local police. Demands for on-the-spot fines were commonly reported, as were demands for bribes; the line between them, at least in the eyes of sex workers, was sometimes blurry.

Some sex workers reported that police officers sexually exploit them, including coercing them to give them free sex under threat of arrest, a form of rape. “There is no violence from the police, but they just force me to have sex with them or else they say I will arrest you.... six or seven times this has happened,” said Esther Makaza, a Zimbabwean sex worker and single mother of two children. She added that the police officers would typically take her number down, check that it worked and then call her for sex later. “Two years ago, a policeman arrested me, he was alone, and took me somewhere in the town in his car and then told me to give him free services and so I did,” said Ranilwe Mola, a sex worker from

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<http://www.nswp.org/sites/nswp.org/files/Police%20Abuse%20of%20Sex%20Workers%2C%20WLC%20-%202016.PDF> (accessed May 30, 2018), p. 12.

<sup>78</sup> See South African Police Service, “Addendum to the SAPS Annual Report: Annual Crime Report 2016/2017,” 2017, [https://www.saps.gov.za/about/stratframework/annual\\_report/2016\\_2017/gpw\\_crime\\_stats\\_2017.pdf](https://www.saps.gov.za/about/stratframework/annual_report/2016_2017/gpw_crime_stats_2017.pdf) (accessed June 14, 2018), p. 88. According to SAPS annual crime statistics, in 2016-2017 the police recorded 6,164 counts of sexual offences detected as a result of police action, an increase of 5.7 percent or 334 counts compared to 2015-2016. The number of counts of sexual offences detected as a result of police action have increased by 126.1 percent (3,438 counts) since 2011-2012. This crime category includes the production of or dealing in pornography, prostitution, and public indecency. Police analysis of arrest data in the Eastern Cape on the profile of offenders in cases of sexual offences detected as a result of police action found that 82.2 percent of offenders were female, “reflecting the high contribution of sex worker arrests to this crime category.” A police analysis conducted in Gauteng found that most of the arrests (72.6 percent) were in connection with public indecency, indecent behaviour and indecent exposure, followed by tempting, enticing, bothering, or pestering with the purpose to commit an immoral or indecent act at a price (16.0 percent), living on the proceeds of immorality (9.8 percent), possession of or dealing in indecent or pornographic publications, drawings, etc. or the forwarding of indecent content (1.0 percent), and keeping of a brothel or allowing a house to be used for carnal intercourse, including transgressions of municipal regulations in this regard (0.7 percent of the analysed cases).<sup>78</sup>

<sup>79</sup> Criminal Procedure Act, No. 51 of 1977. See especially ss. 39-53.

Tzaneen.<sup>80</sup> Reported arrests were humiliating and reduced working hours for sex workers trying to feed their families, but rarely led to prosecutions or convictions. According to our interviewees, arrests and police detentions, which generally lasted for about a day or one or two nights, do not deter sex workers from working in the industry.

The SAPS practices seem to vary enormously both between towns. Offences that fall under municipal laws such as loitering, public drunkenness, and public urination were sometimes used to detain sex workers, but so was “prostitution,” despite the frequent absence of adequate evidence to prove a prostitution-related charge under the Sexual Offences Act.<sup>81</sup> Unclear charges like simply “sexual offences bill” or “prostitution, local authority” were also written on arrest paperwork (interviewees did not always know what paperwork they had been given but some showed a Human Rights Watch researcher examples of receipts for “admission of guilt” fines, “warning to appear in court” papers and paperwork from a “DNA Reference Sample Collection Kit”).

Our assessment of reported patterns of police arrests and detentions of female sex workers is that they are best understood as a form of police harassment of one of South Africa’s most vulnerable populations.

South Africa is currently facing high levels of violent crime, including armed robbery and widespread violence against women. Sex workers themselves are often victim of crimes, but (as the next chapter explores) find it difficult or “useless” to report these crimes under a legal system that criminalises them. The SAPS should end arrests and detentions, at least until a decision is made by South Africa’s government regarding the future legal status of sex work. A moratorium could help shift police resources away from these easy arrests for victimless crimes in order to focus on serious crimes. A moratorium could also open a door to improving the poor reputation of the SAPS, in part, a legacy of apartheid, as

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<sup>80</sup> Human Rights Watch interview with Ranilwe Mola, May 30, 2018.

<sup>81</sup> NGO experts told Human Rights Watch that in their understanding sex workers are most frequently arrested and harassed under municipal by-laws, often under nuisance by-laws. See also, for example, Fiona Scorgie et al., “Human rights abuses and collective resilience among sex workers in four African countries: A qualitative study,” *Globalization and Health*, vol. 9, no. 33 (2013), <http://www.globalizationandhealth.com/content/9/1/33> (accessed June 18, 2018). As one example, in the Western Cape, sex workers are often arrested under Section 2(3)(j) of “By-law Relating to Streets, Public Places and the Prevention of Noise Nuisances,” which states, “No person shall in a public place solicit or importune any person for the purpose of prostitution or immorality.” Western Cape, Republic of South Africa, By-law Relating to Streets, Public Places and the Prevention of Noise Nuisances, Province of Western Cape: Provincial Gazette, No. 6469, September 28, 2007, s. 2(3)(j).

an abusive force, including by removing some opportunities for corrupt officers to extort, rape, or otherwise coerce vulnerable and desperate sex workers.

## Under Arrest! But for What?

Usually (the fine is) R100 South African Rand (US\$7) or R200 (\$14). I get a receipt, it would say “gambling” or “being on the streets”, or “urinating on the streets.” But they arrest me because they know I am a sex worker, and because they find me at the hot spot.

- Ranilwe Mola, Tzaneen-based sex worker, May 2018

Of the 45 female sex workers interviewed for this report, only 11 had never been arrested (and these interviewees mostly worked in the towns of Hoedspruit (Limpopo province) or Bushbuckridge (Mpumalanga province)).<sup>82</sup> Several interviewees reported being arrested well over ten times, but three or four arrests was most common.

Arrests are a frequent, even a twice-monthly event for street-based sex workers in De Deur and Eikenhof, two small towns south of Johannesburg. Pride Williams, who is 52 years old, had been arrested, transported in a police van and held overnight in the De Deur police station four times since the beginning of 2018.<sup>83</sup> Tash Sithole, who looks for clients on a road that passes fields and bushy areas of De Deur, said she could not remember how many times she had been arrested this year, but had been arrested twice in May before she was interviewed and then again in mid-June.<sup>84</sup> In Tzaneen, Musina, and Makhado towns, all in the Limpopo province, most of the interviewees had been arrested multiple times in the past year.

Most street-based sex workers in the Johannesburg Central Business District had been arrested once or twice in the year preceding the interview. Sex workers working indoors (paying R200 (\$14) a day for rented rooms) in the city seem more protected. Women working in one “indoor” Hillbrow venue reported that they had not experienced arrests for

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<sup>82</sup> This to indicate only the experiences of interviewees for this report, a convenience sample that may not reflect universal experiences of sex workers in South Africa.

<sup>83</sup> Human Rights Watch interview with Pride Williams, Eikenhof, June 6, 2018.

<sup>84</sup> Human Rights Watch interview with Tash Sithole, De Deur, June 6, 2018.



years until a mass arrest in the early morning of March 18, 2018, when police, shouting and banging on doors, arrested 32 female sex workers and took them in vans to the Johannesburg police station. Of the four women interviewed about the mass arrest, none of them understood the charge laid against them on the paperwork they received: “Prostitution Local Authority.” They were held between 7 a.m. and 3 p.m. and then released. Perhaps because a volunteer at a local sex worker organization asked the police what evidence they had that the women were sex workers, the police told them to tear up the arrest slips given to them. “They said not to bother going to court after all,” one woman said.<sup>85</sup>

Arrests of sex workers appeared to almost always be the result of police profiling, rather than any observed illegal activity. All interviewed sex workers who had been arrested said that they were targeted by the SAPS because they were standing in a location known to be a hot spot, or because police officers already knew them as sex workers. Mondo Adams, an Eikenhof-based sex worker who waits for clients under a roadside gum tree in the small town, described a May 2018 arrest when everyone in the desultory hot spot was arrested and forced to get into a police van:

Last time we were arrested they took this other woman too. She has mental health problems, she sometimes gets bored just sitting at home, and so she comes and sits with us. They only released her when we all told them the same thing: they had the wrong lady.<sup>86</sup>

Several sex workers in smaller towns said that, as far as they could tell, they were also sometimes arrested because their faces were already known. A De Deur sex worker described seeing her friend “Jess” arrested after getting off a bus in April 2018. “She was angry and said, ‘Why? I was just walking like a normal person, I was not even at a hot spot!’” described Sarah Lamini, originally from Newcastle and the mother of a 12-year-old boy. “But when they insisted, she started taking off all her clothes saying: ‘I am going to give you something to arrest me for.’”

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<sup>85</sup> Human Rights Watch interview with Rose Modise, Johannesburg Central Business District (CBD), June 4, 2018.

<sup>86</sup> Human Rights Watch interview with Mondo Adams, Eikenhof, June 5, 2018.

Sex workers often expressed a grim humour when responding to questions about the reasons for their arrests. One interviewee, Thuli Modiselli, last arrested one very early morning in March 2018, snorted before she responded. “It’s just harassment. The charge was public indecency but we (all work) inside a building,” she said. “Some of us were still in our pajamas.”<sup>87</sup>

Interviewees said their requests for more information about why they were arrested, or on what charges, have been met with abusive language or threats. Rofhiwa Mlilo said she has been arrested on a number of different charges over the years including “loitering” and “flashing,” even though the police have never seen her doing anything more than standing at a hot spot. “I heard them say once that the problem was that I was selling sex. I said, ‘You didn’t find me with a client,’ they said, ‘Shut up, we found you on the street.’”<sup>88</sup>

In three towns in Limpopo province, especially Musina (a town close to the border with Zimbabwe), Makhado, and Tzaneen, sex workers reported that police often asked for bribes during arrests. A Musina sex worker said:

They come sometimes one or two times a week.... they pick us up and then drive us around saying “this time you’re going to the cells for two or three days,” then you negotiate with them and then they ask for money and then they release you.... if you don’t have money, they will drive you to a friend’s house to borrow it.<sup>89</sup>

“I have given thousands of rand away in police bribes,” Tanaswa Moyo, a transgender sex worker in Musina said. “They search your coat and find a condom and say that’s why. But really it’s because this is a small town and they know us.”<sup>90</sup> “They often take bribes so you don’t have to go to the police station, R100 [\$7] bribes,” said Anna Matamela, a Makhado sex worker who often finds herself running through the streets and the town’s parks and bushy areas to escape arrest.<sup>91</sup> Few sex workers reported clients being arrested by police;

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<sup>87</sup> Human Rights Watch interview with Thuli Modiselli, Johannesburg CBD, June 4, 2018.

<sup>88</sup> Human Rights Watch interview with Rofhiwa Mudaw, Makhado, May 29, 2018.

<sup>89</sup> Human Rights Watch interview with Lovejoy Moyo, Musina, May 28, 2018.

<sup>90</sup> Human Rights Watch interview with Tanaswa Moyo, Musina, May 28, 2018.

<sup>91</sup> Human Rights Watch interview with Anna Matamela, Makhado, May 29, 2018.

most arrests took place without clients being present. In four cases, however, sex workers reported clients being caught by police with them, but in each case the client was able to evade arrest by paying a (sometimes hefty) bribe.

Verbal harassment and humiliation of sex workers by police was reported frequently and occurred even when they were not working. “I got in [a] truck to show [the driver] the way,” Kim Xitsonga, a 41-year-old sex worker, said. “The police began flashing their lights and told him, this woman is a sex worker, she must get out of the truck. It was embarrassing.” A Makhado sex worker described how a police officer’s harassment almost made her worst nightmare come true: her 12-year-old daughter finding out how she puts food on the table:

I went to the mall ... the police saw me, and one said, ‘What are you doing here, why aren’t you selling?’ My child was asking me what that was all about. She said, ‘What is *Magosha* (“prostitute”) mum?’<sup>92</sup>

## Police Station Detention: the Confusion Deepens

Sex workers interviewed for this report said they were usually detained in police custody for several hours, or most of a day, or for one or two nights. South African law provides that arrested persons can be held for up to 48 hours before they must be seen by a magistrate or judge or released.<sup>93</sup> Occasionally, sex workers said they had been arrested for three or more nights, sometimes including a weekend. However, as with arrest patterns, detention practices varied greatly from place to place. At some police stations, officers seemed to consider that the detention itself served its purpose of punishing sex workers and so released them without a fine or order to go to court; at other stations, officers fined or demanded bribes from sex workers for varying amounts. In other places, officers did not ask for money, but sex workers were taken or told to go to magistrate courts. The Women’s Legal Centre (WLC) has reported that sex workers they have been in contact with have experienced a variety of procedure and due process violations as well as confusion over why they have been arrested.<sup>94</sup>

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<sup>92</sup> Human Rights Watch interview with Ranilwe Mola, May 30, 2018.

<sup>93</sup> Criminal Procedure Act, No. 51 of 1977, s. 50.

<sup>94</sup> J Rangasami; T Konstant, S Manoek, “Police Abuse of Sex Workers: Data from cases reported to the Women’s Legal Centre between 2011 and 2015,” Women’s Legal Centre, 2016, <http://wlce.co.za/wp-content/uploads/2017/02/Police-abuse-of-sex-workers.pdf>, p. 17. About a third of sex workers who approached WLC with cases between 2011 and 2015 reported having

Many interviewees had been arrested repeatedly but had never gone to court. Rofhiwa Mlilo said:

I've been arrested three times this year. The most recent was three weeks ago. Once I was in jail for two days, other times I paid fines or bribes ... once for "flashing" I was held a few hours and then released. (Another time) for "loitering" paid R50 (\$5), got a receipt, never sure what they wrote down about me.<sup>95</sup>

Telling sex workers to sign slips, which are, at least sometimes, admissions of guilt, using threats or without explaining the charges appears to be common practice at police stations. "The new policy is to arrest us and fine us R100 and then let us go," Yolanda Nkgapelem, a 31-year-old sex worker in Tzaneen, said. "They said we weren't wearing proper clothing. It's not clear what is 'proper clothing' but I [signed admission of guilt] as they said that they could make it into another crime with five years."<sup>96</sup> Another sex worker, a 28-year-old transgender woman who looks after seven siblings with her earnings, said she did not understand what the charges against her were. She said the receipts for fines of between R100 and R500 (\$7 and \$36) say "loitering/prostitution", but she always paid just to get out of the police station. Under South African law, the police must clearly explain to people being arrested and detained the reason for the arrest.<sup>97</sup>

Several sex workers told Human Rights Watch that they had no idea what they had signed. "We were just sitting here under the tree, they told us to get into the van and so we did," a 52-year-old sex worker originally from the Orange State said. "They said the arrest was for 'sexual offences act' and then [at the police station] they gave us something to sign, said you have to sign this, they didn't give us time to read what it was."<sup>98</sup>

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experienced violations of procedure and due process. Almost ten percent of sex workers reported being detained for longer than is legally allowed. Moreover, less than half of the sex workers who reported being arrested were charged with any crime. Instead, the WLC found, sex workers are frequently arrested without being given a reason, or charge; without correct procedure being followed; and without being read their rights. There were many reports to WLC of the police exploiting sex workers, demanding free sex or money in exchange for their release.

<sup>95</sup> Human Rights Watch interview with Rofhiwa Mudaw, May 29, 2018.

<sup>96</sup> Human Rights Watch interview with "Yolanda Nkgapelem," May 30, 2018.

<sup>97</sup> Criminal Procedure Act, No. 51 of 1977, s. 39(2). The section reads: "The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant."

<sup>98</sup> Human Rights Watch interview with Rachel Puwo, Eikenhof, June 5, 2018.

Time spent in police stations was sometimes humiliating. One Johannesburg-based sex worker said that when she was arrested in early 2018, police officers took photographs of her breasts, she guessed, to shore up indecency charges.<sup>99</sup> Sex workers have been made to feel embarrassment together with confusion and anger at the arbitrariness of arrests. “Just recently, this year, six police arrested me and they took me to their captain so he could decide if I was dressed well or [if] I should go to the cells. He told me to pay R50 (\$4) and then go home,” a Makhado-based sex worker said.<sup>100</sup>

Several sex workers interviewed in Johannesburg and De Deur complained that police officers have in the past year taken saliva samples from them, a procedure that seemed undignified for the sex worker and also mysterious. “I asked about [the saliva swab] but the guy [the police officer] just said, ‘No, this is my job, don’t question me,’” Mondo Adams, mother of two boys, said.<sup>101</sup> Sex workers more commonly reported that police officers took photographs and their fingerprints.

Police detention was often reported to be uncomfortable, and sex workers said they sometimes did not have access to medications that they were taking. However, the loss of time and income as sex workers are unable to work when detained, was more problematic than any discomfort, sex workers said. Fines and bribes were painful losses to the sex workers we interviewed, who were almost entirely single mothers living on R1,500 (\$108) or R2,000 (\$144) a month, sometimes less. Sometimes detentions also imposed additional childcare costs on sex workers, especially Johannesburg-based sex workers who often use *creches* or daycare centres to take care of small children while they work.

### “I’ve Never Seen a Judge”

Many of the sex workers interviewed said that they had never been brought before a magistrate or judge, despite repeated arrests and police cell detentions. Most of them were released after a day or one or two nights in the police cell, often after paying a fine or a bribe.

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<sup>99</sup> Human Rights Watch interview with Nuza Ndosi, June 6, 2018.

<sup>100</sup> Human Rights Watch interview with Rophiwa Mudaw, May 29, 2018.

<sup>101</sup> Human Rights Watch interview with Mondo Adams, June 5, 2018.

Margaret Sisulu, a Johannesburg sex worker and mother of a 19-year-old, said: “Every time I was arrested, I used to pay R300 for loitering.... At the police station, they would send us to the magistrates, and he would say he didn’t have time to talk to us, that the police didn’t know their job, and we should just go home.”<sup>102</sup>

“We are always sent to court the next day,” a De Deur sex worker said, adding that she had never been inside the actual courtroom. “I have never seen the judge.” A 52-year-old sex worker from Eikenhof, who said she had been arrested six times in the first six months of 2018 alone, said:

On Thursday I have to go to court. Every time I am arrested, I will go. Must be there by 8:30 a.m. and then we leave at 2 p.m. We have to wait even though our names are not on the list. I have never actually got to see a magistrate.<sup>103</sup>

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<sup>102</sup> Human Rights Watch interview with Margaret Sisulu, Downtown Johannesburg, June 6, 2018.

<sup>103</sup> Human Rights Watch interview with Rachel Puwo, June 5, 2018.

### III. Violence Against Sex Workers

Thirty-one-year-old Yolanda Nkgapele still has scars on her head, back, and shoulders from an attack in July 2016. She said:

It happened in Tzaneen near the Fairview Hotel area, by the river. He promised to buy my services for the whole night. But when we got there he stepped on my back, blindfolded me, was choking and cut me with a knife. From 9 p.m. to 3 a.m. he raped me repeatedly with no condom.<sup>104</sup>

Violence and other criminality directed at female sex workers appears to be a major problem in South Africa. By criminalizing sex work, the country's authorities are contributing to, rather than working to address, this form of violence against women.

Roughly one-third of the sex workers interviewed for this report said they had been raped, mostly while at work, and several more than once. Others had experienced brutal physical violence, again, usually when they were working. Interviewees showed scars on their bellies and faces where they had been cut and broken teeth from punches or bottles slammed against their mouths during terrifying abductions. They expressed fears about continuing to do the work and risking exposure to sadists, rapists, and thieves.

Sex workers and those that work with them complained to Human Rights Watch about a widely held perception that sex workers are linked, perhaps even inherently connected, with crime, criminality and criminals, drugs, theft, and other dark happenings in dark corners. This seems a perverted understanding of a more mundane truth. The 46 sex workers we spoke to are *victims* of violent crime, not accomplices or perpetrators. Almost every woman interviewed had been robbed while she was working, often at knife or gunpoint, by men who would demand "their" cash back after sex, and often proceeds from other work as well.

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<sup>104</sup> Human Rights Watch interview with "Yolanda Nkgapele," May 30, 2018.

While some interviewees said they used marijuana or other drugs, none said they sold drugs or knew sex workers who did.

The previous section detailed some of the ways interviewees and other South African sex workers have been victimized by police. South African sex workers are also made more vulnerable to other crimes because the sale and purchase of sex is criminalised. As women described to us, it is humiliating, ‘useless,’ or dangerous to report crimes committed against you to police who regularly hound, arrest, and detain you, who see you as a criminal. Criminalisation pushes sex workers into darker streets, bushy areas empty of other people, and isolated shacks. It is harder for them to protect themselves when working in the streets, especially when getting into strangers’ cars is part of the job. Many interviewees regarded themselves as easy targets—working informally, usually on the streets or from bars—and, as would-be perpetrators know very well, without the protection of the law.

Most of the sex workers interviewed said that they would not report crimes committed against them in the course of their work to the police. Reasons given included mistrust and fear of arrest or ridicule, but also scepticism that anything would come of reporting and fear of others finding out about the interviewee’s work. When it came to other crimes, for example domestic violence not directly linked to work, there was more willingness to report. And unwillingness to report violence to police was not ubiquitous. Some sex workers also did report some crimes, for example, when they knew who the perpetrator was. Some positive experiences of policing were reported. In towns where sex workers interviewed did not fear police arrest, they expressed more confidence in the idea of reporting crimes to the police.

Of the 46 sex workers interviewed only one was a (former) victim of trafficking.<sup>105</sup> Her story of despair, cruelty, and exploitation between 2007 and 2014, described in more detail below, is markedly different from how she describes her current work, and how other interviewees described their situations. Some of the many hardships of sex work are described in the next chapter, but all sex workers interviewed for this report said that they

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<sup>105</sup> Some sex workers had been in relationships with boyfriends or other sex workers, often older and more experienced than they, that were exploitative (for example, being told to hand over money they had earned). These relationships, while clearly miserable, were not characterised by an absence of choice or presence of coercion that forms part of trafficking.



worked for themselves, had no pimps, and worked when and how they wanted to without coercion from any other person.

Levels of perceived safety varied greatly, and while some women said they felt constantly exposed to criminals, others said they were generally safe from abuse because of their (better) circumstances. Experiences described by interviewees here match findings from other research on sex work globally: sex workers who work indoors or from a bar with the oversight of friends or colleagues tend to be safer than “street” workers.<sup>106</sup> Most of the brutal violence described below happened to street workers. Criminalisation of both the sale and the purchase of sex interferes with the ability of sex workers to build physical, financial, civil society and social infrastructure around themselves.<sup>107</sup> The next chapter will discuss a frequent request from interviewees: that the government provide or make room for safer places to work.

## Rape

When I go to the police station they say: you are a sex worker, you can't be raped. Go away.

-Kim Xitsonga, Tzaneen-based sex worker, May 2018

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<sup>106</sup> For example, see Teela Sanders and Rosie Campbell, "Designing out vulnerability, building in respect: violence, safety and sex work policy," *The British Journal of Sociology* 58, no. 1 (2007).

<sup>107</sup> For example, if sex work is criminalised (or only partly criminalised as per the Nordic model), many aspects of organised, safer sex work might be illegal such as brothels, unionised sex work, running a business, saving and investing money, etc. See: A. Krüsi, K. Pacey, L. Bird, C. Taylor, J. Chettiar, S. Allan, D. Bennett, J.S. Montaner, T. Kerr, and K. Shannon, "Criminalisation of clients: Reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada – a qualitative study," *BMJ Open*, vol. 4 (2014), e005191, doi: 10.1136/bmjopen-2014-005191; Michael W. Ross, Beth R. Crisp, Sven-Axel Månsson, and Sarah Hawkes, "Occupational health and safety among commercial sex workers," *Scandinavian Journal of Work, Environment & Health*, vol. 38, no. 2 (2012), pp. 105-119, doi: 10.5271/sjweh.3184; Lynzi Armstrong, "Screening clients in a decriminalised street-based sex industry: Insights into the experiences of New Zealand sex workers," *Australian & New Zealand Journal of Criminology*, vol. 47, no. 2 (2014), pp. 207-222, doi: 10.1177/0004865813510921; Teela Sanders and Rosie Campbell, "Designing out vulnerability, building in respect: Violence, safety and sex work policy," *British Journal of Sociology*, vol. 58, no. 1 (2007), 10.1111/j.1468-4446.2007.00136.x; Cecilia Benoit and Alison Millar, "Dispelling Myths and Understanding Realities: Working Conditions, Health Status, and Exiting Experiences of Sex Workers," October 2001, <http://www.understandingsexwork.ca/sites/default/files/uploads/10%2026%202012%20DispMyths%20Benoit%20%26%20Millar.pdf> (accessed July 13, 2018); Teela Sanders, "A continuum of risk? The management of health, physical and emotional risks by female sex workers," *Sociology of Health & Illness*, vol. 26, no. 5 (2004), pp. 557-574, doi: 10.1111/j.0141-9889.2004.00405.x; Teela Sanders, "Inevitably violent? Dynamics of space, governance, and stigma in understanding violence against sex workers," *Studies in Law, Politics, and Society*, vol. 71 (2016), pp. 93-114, doi: 10.1108/S1059-433720160000071005.

A terrifying gang rape stopped Margaret Sisulu from working at night, even though she used to charge more after the sun went down on Johannesburg. “Sometime last year, three guys came and took me in a red car, not sure where I was taken,” she said. “They robbed me and beat me and all three of them had sex with me without condoms.”<sup>108</sup>

Sixteen of the forty-six sex workers interviewed reported being raped, mostly when working and mostly in the past five years.<sup>109</sup> A few interviewees had been raped more than once. Pume Mbatha, a Johannesburg-based sex worker for fifteen years and originally from Kwa-Zulu Natal province, described three vicious rapes over the past five years. One attacker broke a tooth when he hit her with a bottle; in another case the rapist held her arm when she was on her knees and then stamped down on it, breaking a bone. She never reported any of the attacks to the police. “The police will say because you are doing sex work, you deserve this,” she said.<sup>110</sup>

Rapists generally did not use condoms in reported incidents. Sometimes an argument between the sex worker and the perpetrator over condom use preceded the rape. “He began slapping me, he took off his condom, he broke a bottle and threatened me and then raped me,” Rofhiwa Mlilo, a 42-year-old mother of two, described. “Later he gave me R20 (\$1.40), said I had to take it.”<sup>111</sup> She did not report the rape to the police. “Even armed robbery ... they will not take you seriously, they’d say you’re just trying to sell.”<sup>112</sup>

Many of the reported rapes also included others forms of violence and seemed to be especially sadistic in nature. Zandile Makuyaa, a mother of two young boys, was raped by a man in 2017 and still has scars on her arms and chest from where he beat her with an electric cable. “If I were not a sex worker, I would have reported,” she said. “They say wherever there are prostitutes there are criminals and violence.”<sup>113</sup>

In several cases, rapists held women for hours before letting them go. A Zimbabwean sex worker, Lucy Kege, who works in the South African border town of Musina to support her

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<sup>108</sup> Human Rights Watch interview with Margaret Sisulu, June 6, 2018.

<sup>109</sup> Our interviewees were a convenience sample; this may not reflect the broader situation for sex workers.

<sup>110</sup> Human Rights Watch interview with Pume Mbatha, Downtown Johannesburg, June 6, 2018.

<sup>111</sup> Human Rights Watch interview with Rofhiwa Mudaw, May 29, 2018.

<sup>112</sup> Ibid.

<sup>113</sup> Human Rights Watch interview with Zandile Makuyaa, Makhado, May 29, 2018.

13-year-old daughter back home, described being held for 6 hours by a man. “I thought he was a customer but when we got [to the bush] he said he would do what he liked with me and for as long as he liked,” she said. “He did everything, he said he would kill me.”<sup>114</sup> Three sex workers said that they felt that guns and knives were becoming more common, leading to more rapes. “Everyone has a story where they were forced to have sex without a condom because the client has a weapon,” said Zandile Makuyaa, a mother of a 7-year-old boy and a 3-year-old boy.<sup>115</sup>

Most of the sex workers who had been raped said that they had chosen to access post-rape care from clinics or hospitals and were satisfied with the treatment they received. However, choosing to report rapes to the police was much rarer. Sisulu, whose rape was described at the beginning of this section, provided a typical explanation as to why she did not report:

I didn’t go to the police, they would laugh at me, they would call over other police officers and all laugh and say look at this “magosha.” That’s how they treat us when they arrest us. They don’t care about us.<sup>116</sup>

Anna Matamela, who is 33 years old and has been selling sex since she was 17 to support a son, was raped by a man who said he wanted to be a client in February 2017. The man then raped her without a condom after seizing her by the throat and threatening her with a gun. She was so depressed and hurt by the attack, she could not get out of bed for a week. When she asked other sex workers about the man, she found out he had raped two other sex workers and “dumped” (a common practice wherein a sex worker will be driven to a distant place and then left to get home by herself) another two. No one had reported these incidents. “If you report a rape, they say you are lying, that you are selling to that person,” she explained.<sup>117</sup>

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<sup>114</sup> Human Rights Watch interview with Lucy Kege, Musina, May 28, 2018.

<sup>115</sup> Human Rights Watch interview with Zandile Makuyaa, May 29, 2018.

<sup>116</sup> Human Rights Watch interview with Margaret Sisulu, June 6, 2018. “Magosha” is a pejorative slang term for “prostitute.”

<sup>117</sup> Human Rights Watch interview with Anna Matamela, May 29, 2018.

Several women said that police arrests made them less safe because they were chased into dangerous areas, or forced to work where they, and criminals, can easily hide. One woman, Kim Xitsonga, was literally run into danger. “I was running scared from the police and came right up onto a guy, with a knife,” she said. “He began forcing me with no condom.”<sup>118</sup>

Four interviewees did report rapes to police, or had the police involved in their case. After Lucy Kege was raped, she called a friend who called the police. They came to the scene but, she felt afterwards, mostly to shout at her. “They said: ‘We warned you, you shouldn't be doing this and now you call us when you are having problems.’”<sup>119</sup> A transgender sex worker who said she shared a “braai” or a barbecue with a man on a farm before the man drugged and raped her also said she reported the case to the police.<sup>120</sup> She said that the police went to the farm but nothing ever happened. “Maybe he bribed them?” she said.<sup>121</sup>

## Physical Violence

Sex workers interviewed for this report said that they had experienced physical violence from clients and men pretending to be clients, ranging in severity from slapping to more extreme beating. Sex workers described perpetrators of serious violence as, like rapists, relatively rare, although always a danger, especially for street workers.

Clients looking for “rough sex,” or drunk, disorderly, or verbally abusive clients, could be “horrible,” but were described as belonging to a different category. “We know how to handle clients who are drunk or rough, but if it gets bad, the security get involved,” said Rose Modise, a 39-year-old from Lesotho who works in a hotel, where sex workers rent rooms to sell sex, in order to send money to her 12-year-old at home.<sup>122</sup> “In this industry you meet men who are angry and everything they do is rough,” said Anna Matamela.<sup>123</sup> “They can have sex with you however they want because they are paying for it ... but serious violence is not common.”

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<sup>118</sup> Human Rights Watch interview with Kim Xitsonga, Tzaneen, May 30, 2018.

<sup>119</sup> Human Rights Watch interview with Lucy Kege, May 28, 2018.

<sup>120</sup> Human Rights Watch interview with Bianca, Tzaneen, May 30, 2018.

<sup>121</sup> Ibid.

<sup>122</sup> Human Rights Watch interview with Rose Modise, June 4, 2018.

<sup>123</sup> Human Rights Watch interview with Anna Matamela, May 29, 2018.

Several sex workers had also experienced domestic violence from husbands and boyfriends. Yolanda Nkgapele did not report a rape to the police but has relied on police assistance to end serious physical abuse from two boyfriends. In one case she successfully managed to get a restraining order.<sup>124</sup> Rose Modise cried as she described her struggles to get rid of a current, physically abusive boyfriend, who regularly both takes her money by force and declares his undying love.<sup>125</sup> The police helped her open a case against him, but she dropped it.

Cindy Khoza said that her boyfriend of three years “feels bitter” about her work.<sup>126</sup> “Sometimes he beats me,” she said. “I’ve never gone to the police; we always resolve it between us.”

Sometimes men inflicted serious violence on female sex workers while robbing them (experiences of theft are described in more detail below). “I found a client and took him to the shack ... he took out a knife and cut me in the belly and then took his money back and other money,” Patricia Mtolo said.<sup>127</sup>

A personal history marked by violence was not uncommon. Other sex workers reported being beaten as children or sexually abused; many suffered from extreme poverty. Two interviewees said they had entered sex work to escape violent husbands.

## Theft

Most of the interviewees said they had been victims of theft, sometimes many times. Women who worked outside—for example, under trees, on streets, or in parks in towns or in downtown Johannesburg—were more likely to be robbed than “indoor” sex workers who had rented accommodation and could rely on security if a “client” turned out to be a thief.

Sex workers reported losing their money to clients who changed their mind after sex and demanded their money back, sometimes with knives, guns, or the threat of physical

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<sup>124</sup> Human Rights Watch interview with “Yolanda Nkgapele,” May 30, 2018.

<sup>125</sup> Human Rights Watch interview with Rose Modise, June 4, 2018.

<sup>126</sup> Human Rights Watch interview with Cindy Khoza, Bushbuckridge, June 1, 2018.

<sup>127</sup> Human Rights Watch interview with Patricia Mtolo, Hoedspruit, May 31, 2018.

violence. Some sex workers only experienced this once or twice; for others with no security or back up, this was a regular occurrence. Theft was sometimes associated with “dumping.” Three sex workers reported a client taking them to a remote spot in a car and then being asked to give the car “a push” after sex.<sup>128</sup> The clients then drove off, leaving them stranded, unpaid and, in one case, naked.

Because of the threat of violence, interviewed sex workers often said that there was little they could do about men demanding their money back or stealing from them. “Some clients take a long time, some take all their money back, one did this just two weeks back,” said Lucy Lesede, a 34-year-old and mother of two who works on the streets of downtown Johannesburg. “I couldn't fight with him, he was drunk.”<sup>129</sup> Another woman working nearby, 39-year-old Prisca Magena, also reported a recent crime. She rents a spot in a broken-down building in downtown Johannesburg for R20 (\$1.40) each time she provides sexual services to a client. Men working in the building will sometimes interfere if there are problems, but often choose not to. “A guy took my money, R250, (\$18) all of it, he got sex first too. The security was there but he was too scared to interfere [because] he had a gun,” she said.<sup>130</sup>

Some women said they had adjusted their ways of working to make them safer and less vulnerable to theft. For example, Esther Makaza, a Musina-based sex worker, said she works mostly on the phone now, taking clients' calls and then meeting with them rather than standing in “hot spots.” Interviewees who worked in taverns to find clients sometimes said that they worked in pairs or groups, giving cash to friends to look after while they had sex or provided other services. Working in taverns is safer than on the streets because of the presence of other sex workers, interviewees said. In taverns, others can see who a sex worker leaves with and a sex worker can leave upfront payment behind with a friend while she has sex with a client.

Aside from men who renege on deals, sex workers also work at the mercy of *tsotsi*, gang members or single criminals who rob, often at knife or gunpoint. Zandiel Mukuyaa, a sex worker in Makhado, said two or three times a year local *tsotsi* steals everything she has, usually at knife point. In general, sex workers said that, even if they would contemplate

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<sup>128</sup> Human Rights Watch interviews with Pride Williams, June 5, 2018; and Tash Sithole, June 5, 2018.

<sup>129</sup> Human Rights Watch interview with Lucy Lesede, Johannesburg CBD, June 6, 2018.

<sup>130</sup> Human Rights Watch interview with Prisca Magena, Johannesburg End Street, June 6, 2018.

reporting violent crimes to police, they saw no point in reporting thefts while working. Mondo Adams, a 39-year-old sex worker in Eikenhof who has two daughters, said: “I went to the police to complain about it but when they saw it was me, they said I am a prostitute and they wouldn't even take my statement.”<sup>131</sup>

## Trafficking

None of the sex workers interviewed were under 18 years of age, although a minority had begun the work at 17 years or younger, usually because of poverty, sexual abuse, or other serious problems at home, or an early pregnancy and single motherhood. Generally, interviewees in towns in Limpopo, in Bushbuckridge town, Mpumalanga, and in De Deur and Eikenhof towns in Gauteng, said that they did not know any underage girls selling sex, although some said they would occasionally spot young-looking girls or women. Underage sex work was more commonly reported in Johannesburg. Interviewees said most girls selling sex appeared to be working alone, sometimes for drug money, and did not appear to be trafficked or controlled. Sex workers working in a brothel (where they rented rooms by the day) in Johannesburg said that underage girls were not allowed to work there. Similarly, sex workers said that taverns where they met clients did not allow underage sex workers.

Several interviewees said that they had reported underage girls selling sex, telling staff working in organizations they see as allies, such as SWEAT and Sisonke. Some said they might report trafficking or exploitative situations to the police, but many said they would not be able to trust police.

A few interviewees reported that their current boyfriends exploited them, or previous boyfriends had done so in the past, including by taking money they earned through sex work. Three sex workers said they had also handed over cash to other, older sex workers who had guided or protected them when they had first begun working. These situations were recognized as exploitative in hindsight, but interviewees were able to leave them. None of the sex workers interviewed for this report said they had a pimp or manager.

One woman, Cindy Khoza, started sex work in 2005 after a friend told her to travel to Nelspruit, Mpumalanga province, promising her a job in a restaurant. When she arrived,

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<sup>131</sup> Human Rights Watch interview with Mondo Adams, June 5, 2018.

the work available turned out to be sex work. “I didn’t have money to get home, I had to pay rent,” Khoza said. “I was not forced exactly but there was no way back, no money and I did not want to go back home empty-handed.”<sup>132</sup>

Now 40 years old and a mother of a 15-year-old boy, Lerato Munarine was trafficked between 2007 and 2015 in Middleburg, Eastern Cape province. She said she earned up to R5,000 (\$350) a week during that time for a Nigerian man who kept her and sometimes as many as 40 other women on drugs and under the watchful eye of his security men in a house. She slept on a sponge mattress and had to pay R100 (\$7) a night to sleep in a room crowded with many other women. She said she was not even able to send money home for her son during this time, and when she finally escaped with the help of a client, she did so empty-handed. “There is more money for unprotected sex, I used to do it in the Nigerian’s place, so I would be able to keep that money at least,” Munarine said.<sup>133</sup>

On June 28, 2018, in its annual Trafficking in Persons (TIP) Report, the US Department of State downgraded South Africa from “Tier 2” (countries whose governments do not fully meet the minimum standards for the elimination of trafficking but are making significant efforts to bring themselves into compliance) to the “Tier 2 Watch List”, which indicates the government’s failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year.<sup>134</sup> South Africa was downgraded because, for the second consecutive year, the government’s lack of sufficient funding for anti-trafficking efforts prevented front line responders from fully implementing the law.<sup>135</sup> The US Department of State heard multiple reports from NGOs of local police stations declining to investigate trafficking cases, even when NGOs conducted preliminary identification

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<sup>132</sup> Human Rights Watch interview with Cindy Khoza, June 1, 2018.

<sup>133</sup> Human Rights Watch interview with Lerato Munarine, Bushbuckridge, June 1, 2018.

<sup>134</sup> US Department of State, “Tier Placements and Regional Maps,” undated, <https://www.state.gov/j/tip/rls/tiprpt/2018/282584.htm> (accessed July 2, 2018).

<sup>135</sup> US Department of State, “Trafficking in Persons Report 2018,” p. 388. This marks the first year since 2008 that South Africa is on the Watch List. On a more positive note, after significant delays, the SAPS) finalised standard operating procedures for implementation of the Prevention and Combating of Trafficking in PACOTIP (US Department of State, “Trafficking in Persons Report 2018,” p. 387). However, a 2017 study conducted in the Limpopo Province, and based on interviews with SAPS officers and various government officials, found that the SAPS lacks the credibility and capacity to effectively enforce PACOTIP. See Paul Oluwatosin Bello and Adewale A. Olutola, “The enforcement of anti-human trafficking law in South Africa: A case of an aircraft without a pilot,” *Police Practice and Research*, vol. 19, no. 3 (2018): pp. 270-283, doi: 10.1080/15614263.2017.1387783.



screenings and provided case information, because of inadequate resources and training on the Prevention and Combating of Trafficking in Persons Act (PACOTIP).<sup>136</sup>

Conflation of trafficking and sex work can be mitigated by protocols and guidelines for law enforcement in their interactions with sex workers and suspected victims of trafficking. For example, KwaZulu-Natal and Western Cape provincial task teams use an interagency protocol to guide law enforcement interactions with female sex workers.<sup>137</sup> The TIP Report 2018 recommends replicating the coordinated anti-trafficking law enforcement and victim referral mechanisms of KwaZulu-Natal and Western Cape in all provinces.<sup>138</sup>

Criminalizing sex work means sex workers and sex worker organizations are generally excluded from anti-trafficking responses.<sup>139</sup> According to the Global Alliance Against Traffic in Women (GAATW), excluding sex workers and sex worker organizations from anti-trafficking responses has a number of negative consequences, including “the diversion of funds away from rights-based approaches that can both reduce vulnerability of sex workers to human rights violations and strengthen their ability to address the issue of persons who have been transported through deception or coercion to work in the sex industry” and “the exclusion of the important insights and knowledge [sex workers] have about the sex work sector from consultations on developing anti-trafficking policies.”<sup>140</sup>

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<sup>136</sup> US Department of State, “Trafficking in Persons Report 2018,” p. 388.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid., p. 388.

<sup>139</sup> The Global Alliance Against Traffic in Women (GAATW), an alliance of more than 80 nongovernmental organisations from around the world, sees the phenomenon of human trafficking as embedded in the context of labour migration. In response, GAATW promotes and defends the human rights of all migrants and their families and calls for safety standards for migrant workers in the process of migration and in the formal and informal work sectors, including sex work, where slavery-like conditions and practices exist. See GAATW, “Who we are,” <http://www.gaatw.org/about-us> (accessed July 3, 2018).

<sup>140</sup> GAATW, “Sex Workers Organising for Change: Self-representation, community mobilization, and working conditions,” GAATW, 2007, <http://www.gaatw.org/publications/SWorganising/SWorganising-complete-web.pdf> (accessed June 11, 2018), p. 9.

## IV. “I Do It for My Kids”

A decision on what laws, if any, should be in place for the sale and purchase of sex should not be based solely on the views of academics, researchers, or non-sex worker “experts,” the media, or general civil society. Any decision should be the result of extensive consultation with the most important constituency: sex workers themselves.

This chapter encourages the South African government to conduct such consultations and explores sex workers' answers to questions about why and how they entered sex work. This chapter also describes some of the difficulties reported by sex workers not already covered in earlier chapters. Finally, we provide some of the answers our respondents gave when we asked them near the close of interviews: “If the government wanted to help sex workers, what should it do?”

### Why Sex Work?

I don't know how long I will stay in this work. As long as I am supporting my kids, I guess.

- Rachel Puwo, Eikenhof-based sex worker, June 2018

Of the 45 women interviewed for this research, almost all were single mothers. Most interviewees had one, two, or three children and only six did not have any children at all. Two interviewees were married and twelve of the unmarried interviewees reported that they had a boyfriend or other partner. But in all but a handful of cases, partners did not provide any financial or other regular support to the sex worker's children and did not live in the same place as the interviewee. Only a few of the sex workers interviewed said that the biological fathers of their children were providing any form of support. For reasons described below, many sex workers' children lived elsewhere with other family members who used the sex worker's earnings to support the children.

In short, our interviewees were single mothers with significant responsibilities. Supporting children was the immediate and main reason for choosing and continuing sex work. “It was amazing when I had my first client and he paid me,” Lesedi Botha, a mother of one,

said, recalling her deep relief. “Suddenly, I had money!”<sup>141</sup> Debra Mashego, who lives in Bushbusckridge with her baby boy, 10-year-old son and 12-year-old daughter, echoed many when she mentioned her pride at providing: “I am a proud mother, I put food on the table, the kids have their uniforms.... We have our own place, just one room, but we didn’t even have that when I was a kid.”<sup>142</sup>

Mashego’s feeling that, despite her being a single mother, her children had done better than she had, and because of sex work, was commonly reported. Sex work was sometimes described as not only a way to immediately provide, but also a bridge between the sex worker’s struggles and a potentially better future for her children. One 50-year-old mother of an adult son noted that she had single-handedly got him through schooling, and that he was now studying at university on a government bursary.<sup>143</sup>

For many sex workers, this pride was often mixed with less positive feelings about selling sex. Painfully, these feelings were not just a reflection of wider stigma and the hardships of the work, but also rooted specifically in concerns about how their children might view their work. “It’s difficult, my daughter does not know but because of it she’s getting a better chance than I had when I was her age,” said Johannesburg-based sex worker Immaculate Nyoni.<sup>144</sup> Six women with sons said they feared that their sons would no longer respect them if they found out.

Single parenting is a reality for many in South Africa. According to the South African Institute of Race Relations (SAIRR), only one-third of children in South Africa live with both their parents, with the rest living with single parents, on their own, with relatives, or in foster care.<sup>145</sup> Just over 39 percent of children live with their mothers only.<sup>146</sup> Studies have

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<sup>141</sup> Human Rights Watch interview with “Lesedi Botha,” Bushbuckridge, June 1, 2018.

<sup>142</sup> Human Rights Watch interview with “Debra Mashego,” Bushbuckridge, June 1, 2018.

<sup>143</sup> Human Rights Watch interview with Margaret Sisulu, June 6, 2018.

<sup>144</sup> Human Rights Watch interview with Immaculate Nyoni, Johannesburg CBD, June 6, 2018.

<sup>145</sup> South African Institute of Race Relations, “Only a third of children live with both parents,” March 11, 2013, <https://irr.org.za/media/media-releases/Only%20a%20third%20of%20children%20live%20with%20both%20their%20parents..pdf> (accessed July 6, 2019).

<sup>146</sup> Ibid. Note that this estimate changes for children of different ages. For example, 45.6 percent of children aged 0-6 live with their mothers only. See Statistics South Africa, “Educational article on Early Childhood Development in South Africa, 2016,” Mbalo Brief, Issue 02/2018, March 2018, , <http://www.statssa.gov.za/wp-content/uploads/2018/03/Mbalo-Brief-March-2018.pdf> (accessed July 6, 2018), p. 3.

suggested various drivers of the phenomenon of absent fathers in South Africa; one study found that conceptions of fatherhood centre predominantly on the idea of the father as financial provider, and that the difficulties associated with fulfilling this role in South Africa constitute a major contributing factor to father absence.<sup>147</sup>

Other facts of contemporary South Africa must also give pause to anyone considering a government policy based on ending sex work that does not also address the economic realities of black women. With a gross national income (GNI) per capita of \$5,430 in 2017, South Africa is classified by the World Bank as an upper-middle income country.<sup>148</sup> South Africa is also classified as an upper-middle income country for the purposes of the World Economic Situation and Prospects (WESP) reports.<sup>149</sup> However, the women we interviewed came from the poor side of what is also the world's most unequal country and earned far less than the national average.<sup>150</sup> Unemployment is extremely high, at 27.7 percent in 2017, and black women account for 49.1 percent of unemployed people between the ages of 15 and 34.<sup>151</sup>

The South African government does provide social security support for some of the population, including older people and people with disabilities. Disability grants and

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<sup>147</sup> Mazembo Mavungu Eddy, Hayley Thomson-de Boor, and Karabo Mphaka, "So we are ATM fathers: A study of absent fathers in Johannesburg, South Africa," (Johannesburg: Centre for Social Development in Africa and Sonke Gender Justice Network, 2013), <https://www.uj.ac.za/faculties/humanities/csda/Documents/Absent-fathers-full-report%202013.pdf> (accessed July 9, 2018). Given widespread poverty and unemployment, some fathers may retreat or disengage from active involvement in their children's lives because they are unable to fulfill the role of father-as-provider, and because they see caregiving as the mother's role. Other obstacles to involved fatherhood include cultural factors such as the high cost of *ilobolo* (bride price) and damages (fines or *intlawulo*) in African communities, and dysfunctional and conflict-ridden relationships with the child's mother.

<sup>148</sup> The World Bank, "Data: GNI per capita, Atlas method (current US\$)," undated, <https://data.worldbank.org/indicator/NY.GNP.PCAP.CD> (accessed July 9, 2018).

<sup>149</sup> United Nations, *World Economic Situation and Prospects 2014* (New York: United Nations, 2014), [http://www.un.org/en/development/desa/policy/wesp/wesp\\_current/2014wesp\\_country\\_classification.pdf](http://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf) (accessed July 9, 2018).

<sup>150</sup> Victor Sulla and Precious Zikhali, *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (Washington, DC: World Bank Group, 2018), p. xv, and p. 60. In 2015, South Africa had a Gini coefficient of 0.63, the highest in the world. South Africa is also the most unequal based on wealth distribution. The Gini coefficient is only one measure of inequality, but South Africa does not fare any better according to other popular measures. For instance, the Palma ratio is an alternative to the Gini coefficient, and focuses on the difference between the richest 10 percent and the poorest 40 percent. According to the Palma ratio, South Africa had a Palma ratio of 7.0 in 2015, the highest in the world. See UNDP, "Table 3: Inequality-adjusted Human Development Index," undated, <http://hdr.undp.org/en/composite/IHDI> (accessed July 9, 2018).

<sup>151</sup> GAATW, "Sex Workers Organising for Change," p. 197. As of May 2018, the unemployment rate for the entire population is approximately 26.7 percent. See Statistics South Africa, "Quarterly Labour Force Survey: QFLS Q1:2018," May 2018, <http://www.statssa.gov.za/?p=11139> (accessed June 19, 2018).

pensions were generally not available to the interviewees (one woman interviewed had a disabled child and received some assistance).<sup>152</sup> Some of the interviewees reported receiving monthly child support grants (usually R400 (\$29) per child, for poorer families) but said that these were a help, but not enough.

Most of the interviewees were not doing any other work except for sex work at the time of the interview, although some had worked intermittently in bars, farms, beauty salons, as domestic workers, and as municipal workers. At least some women in all the locations where we conducted interviews said that there were basically no other employment opportunities for them nearby, or nothing that could provide them with a similar income as sex work. This was especially the case because almost none of the women we interviewed had matriculated, and almost all of them said that finding other decent-paying work, such as in a shop or waiting tables, was difficult as a result. Various reasons were provided for low education levels, including lack of funds—including for uniforms, teenage pregnancy, unhappiness at school or truancy, and sexual, emotional or physical abuse at home, or other problems like the early death of one or both parent(s).

Even when other work was available, most sex workers were not confident that these jobs represented a potential path out of poverty for themselves or, most importantly, for their children. Farm work and domestic work, for example, were seen as less likely to bring in the money needed to feed and educate their children on their own (most interviewees' children were able to access non fee paying schools in South Africa's education system, but needed money for uniforms, books, and other schooling essentials).

None of the sex workers interviewed for this report said they were currently earning large amounts of cash each month; even so, they usually earned more than the roughly R1,000 (\$72) or R1,500 (\$108) a month (or less) they said they had earned in the past as farm workers, braiding hair, selling vegetables or as domestic workers. There was huge variety

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<sup>152</sup> The South African state pension system provides a means-tested monthly income of R 1,690 to men and women over the age of 60 (R 1,710 for persons older than 75) and this constitutes the main source of income for 75 percent of the elderly population in retirement. South African Government, "Old age pension," undated, <https://www.gov.za/services/social-benefits-retirement-and-old-age/old-age-pension> (accessed July 9, 2018). South Africans with disabilities whose earnings and assets fall under a certain threshold are eligible for a disability grant. The disability grant is means-tested with a maximum payment of R 1,690 per month. South African Government, "Disability grant," undated, <https://www.gov.za/services/social-benefits/disability-grant> (accessed July 9, 2018). Recipients cannot earn more than R 78,120 if single (R 156,240 if married) and cannot have assets worth more than R 1,115,400 if single (R 2,230,800 if married).

in earnings, but many sex workers estimated that they might earn around R1,500 (\$108) or R2,000 (\$144) a month. Prices for services ranged from as low as R30 (\$2) to around R400 (\$29) for sex. Some women said they earned thousands of rand for a weekend of work with one client. Others found ten or more clients a day at the end of the month (when clients had been paid) but struggled to find two or three clients a day on slower days. Some sex workers said they had money for clothes and nonessentials because of their work; others said they were living hand to mouth.

In 2017, the South African food poverty (or extreme poverty) line was R531 (\$38) per person per month, the national lower bound poverty line was R758 (\$55) per person per month, and the national upper bound poverty line was R1,138 per (\$82) person per month.<sup>153</sup> In 2015, more than half (55 percent) of the population of South Africa was poor at the national upper bound poverty line of R992 (\$71) per person per month in 2015 prices.<sup>154</sup> Few of the women we interviewed said they were thriving economically, but sex work appears to be keeping most of them out of poverty, or at least extreme poverty.

Many interviewees not only supported their own children and the caretakers of their children, but also siblings who were out of work and nieces and nephews, as well as other family members. It was common for sex workers to list six or seven dependents “back home” in Zimbabwe or rural parts of South Africa. Almost none of the interviewees had less than three dependents.

The children of deceased siblings were recipients in several cases. Thuli Modiselle was the only sex worker interviewed for this report who had not only matriculated but had also gone on to further education. She worked for many years as a secretary before starting sex work in 2014 after her sister died. Now 44 years old, her own children are young adults, but her sister left seven children with no other support. Modiselle could only think of one way

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<sup>153</sup> The World Bank, “Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities,” prepared jointly by Statistics South Africa and the World Bank, March 2018, <http://documents.worldbank.org/curated/en/530481521735906534/pdf/124521-REV-OUO-South-Africa-Poverty-and-Inequality-Assessment-Report-2018-FINAL-WEB.pdf> (accessed July 9, 2018), p. 8. The food poverty line (FPL) is the level of consumption below which individuals are unable to purchase sufficient food to provide them with an adequate diet. The lower bound poverty line (LBPL) and upper bound poverty line (UBPL) are computed by including an allowance for non-food consumption; the LBPL is based on households that sacrifice some of their basic food requirements to meet their non-food needs, while the UBPL is computed by adding the average expenditure on non-food items by households whose food expenditure is very close to the food line. The three poverty lines are updated periodically using the Consumer Price Indexes.

<sup>154</sup> *Ibid.*, p. xii.

to earn enough money to support her five nieces and two nephews: she leaves her home every day to sell sex in a room in Hillbrow that she rents for R200 a day. A poster on the back of her door reads: “Never Give Up.” “I just pass on the money to the children. I would die for them,” she said. “I want better things for them.”<sup>155</sup>

One attractive feature of sex work, at least for our interviewees (none of whom had a pimp or worked in a “controlling” brothel), is its flexibility. About half of the Johannesburg-based interviewees had school-age children who lived with them. Being able to leave work when they needed to, including by about 4 p.m. to get home before their children got back from school, was important. This, as well as safety, was often cited as a reason why interviewees preferred working during the day. Others liked the readiness of the cash. Esther Makaza, a bespectacled sex worker from Zimbabwe raising two daughters, commented on the advantages of both a constant source of cash and her connected feeling of independence:

Until I die, I don’t want to be controlled...on the farm I would work so hard and earn almost nothing, I was not managing to get enough food or clothes. Now I can eat, have clothes. I am madam boss...My kids are in private school.<sup>156</sup>

Seven of the interviewed sex workers did not grow up with their mothers, who had either died or abandoned them as babies or young children. Serious troubles in childhood were not uncommon. One interviewee ran away from home because no one would defend her against an uncle who was raping her; another had an aunt who sold her for sex to farm workers; a third was so hungry as a child, she sold sex for food.

How negligence or abuse may have contributed psychologically to the decision to do sex work is beyond the scope of this research. But in one way or another, for our interviewees, a background of poverty or extreme poverty—one sex worker said she didn’t go to school because she didn’t have shoes—features prominently in their stories and decisions to do sex work.

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<sup>155</sup> Human Rights Watch interview with Thuli Modiselle, Johannesburg, June 4, 2018.

<sup>156</sup> Human Rights Watch interview with Esther Makaza, Musina, May 28, 2018.

Choosing to sell sex was usually seen as one choice among poor alternatives, and the sex workers we interviewed were ill-equipped, through no fault of their own, to benefit from a limited job market. With the exception of two or three sex workers who said they enjoyed the work, all the respondents would have preferred another career, but generally not one that was worse-paying, demoralizing, or physically draining.

Most of the interviewees, who ranged in age from 26 to 52 years of age, had been doing sex work for years and had no immediate plans to change their line of work.<sup>157</sup> Several had been doing sex work for over 20 years; only 1 had been working for less than a year.

## Stigma and Struggle

The difficulties that many adult sex workers experience should not impair their right to choose to do the work, but nor should these difficulties be understated.

Every sex worker interviewed had her own views and feelings about her work. Some were proud and felt that they were providing an essential service. Others were nonchalant or realistic. Many sex workers expressed ambiguous and at least some negative feelings. Some hated it and cried during the interview about their work.

“It’s not nice having sex with so many people,” 26-year-old Patience Ozuk, a mother of a 2-year-old and 4-year-old, said simply.<sup>158</sup> Junior Mofokeng, a 27-year-old who has been in sex work since 2009, said something similar. “But to sleep every day with a different penis is not good, two or three clients a day is okay but some days it’s up to six and that feels like too much.”<sup>159</sup>

The dangers of sex work and the humiliation of working outside the law have been described in earlier chapters. But sex workers also must struggle with societal stigma.

Sex workers experience multiple and overlapping forms of stigma and discrimination. Three women reported that they had faced difficulties in renting a room in the past

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<sup>157</sup> The average (mean) age was 41 years.

<sup>158</sup> Human Rights Watch interview with Patience Ozuk, Musina, May 28, 2018.

<sup>159</sup> Human Rights Watch interview with Junior Mofokeng, Makhado, May 29, 2018.



because some landlords did not want “prostitutes” living in their buildings. Name-calling from other community members was a commonly reported experience.

Harassment of sex workers by communities in South Africa can be malicious. Sex workers in Primrose, a neighbourhood in Germiston, Gauteng province, east of Johannesburg, opened a legal case in 2018 after they were attacked by dogs and snakes released into their homes, allegedly by members of the community there.<sup>160</sup> Rachel Puwo used to work in Kibler Park, south of Johannesburg, until she and other sex workers were “chased away” by community members in April 2017. “They demonstrated against us, they came in cars and would park near us and hoot if customers came, or they would take the registration numbers from the cars of clients,” she said. “They told us we were disgusting and that they didn’t want us there.”<sup>161</sup>

For our interviewees, the most emotionally difficult form of stigma appeared to be when unkindness was directed at their children. “There have been people telling my son that his mother is a prostitute,” 29-year-old Yvonne Makeba said, crying. “He’s never talked to me about it, but it disturbs me a lot.”<sup>162</sup> As mentioned above, several sex workers said they worried about their children finding out about their work and losing respect for them. Lovejoy Moyo, a 38-year-old, said:

When I was a house girl, I made R1,000 (\$72) a month, there was nothing by the time I had paid my rent and bought what I needed to eat. Now I am free, no one controls me, everything is for me, and I am even saving for my kids. But I worry, now he is old enough, if my son knew what I do he would be very disappointed in me and not respect me as a mother.<sup>163</sup>

Roughly half of the mothers interviewed kept their children in their home villages under the care of family members, to protect them from witnessing sex or experiencing violence, but also to keep their work a secret. Sex workers almost ubiquitously declined to appear on an

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<sup>160</sup> Bongani Nkosi, “Community, sex workers fight over pavement trading,” *IOLNews*, March 26, 2018, <https://www.iol.co.za/news/south-africa/gauteng/community-sex-workers-fight-over-pavement-trading-14071450> (accessed July 16, 2018).

<sup>161</sup> Human Rights Watch interview with Rachel Puwo, June 5, 2018.

<sup>162</sup> Human Rights Watch interview with Yvonne Makeba, Eikenhof, June 5, 2018.

<sup>163</sup> Human Rights Watch interview with Lovejoy Moyo, May 28, 2018.

Internet video to accompany this report, even anonymously. The reason given was always fear that children or others would spot them on the Internet, not that the authorities would. Several women were hiding their work from boyfriends or their communities. It was not uncommon for sex workers to report that although some members of their family knew what they did to support them, their work was never discussed. Interviewees often said that they dreaded the thought of their children, or nieces, working selling sex. “I pray every night my daughter never does this job,” Lucy Kege said about her 13-year-old.<sup>164</sup>

### **“If the Government Wanted to Help Sex Workers, What Should They Do?”**

Most answers to this question fell into one, two, or all of three categories: (1) end criminalisation, or at least arrests, (2) provide safer places to work, and (3) provide alternative jobs.

As described in the second section, sex workers experienced arrests and other forms of police harassment as confusing, unfair, and damaging. “It would be better if they just legalised [sex work],” Prisca Mangena, a mother to three, said.<sup>165</sup> “The harassment should stop. Just last week on Sunday we had to all run away in different directions because the police arrived.” “I want to be able to do this job, there are no other jobs in South Africa,” Yvonne Makeba, mother to one boy, said.<sup>166</sup> “They should legalise, it’s true that it’s dangerous, but it’s still my choice,” Rose Khoza, who lives in Acornhoek, Mpumalanga province with her three children, said.<sup>167</sup> When asked, interviewees did not think that criminalising only the purchase of sex, but not the sale, would help them. Especially in rural towns, women said it was already difficult to find enough business without placing further disincentives on buyers.

The idea that the government should provide serious alternatives to sex work was attractive to many. Several sex workers remarked that it made no sense to arrest and harass sex workers who had few other appealing options for work. “If they want to keep

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<sup>164</sup> Human Rights Watch interview with Lucy Kege, May 28, 2018.

<sup>165</sup> Human Rights Watch interview with Prisca Mangena, Johannesburg, June 6, 2018.

<sup>166</sup> Human Rights Watch interview with Yvonne Makeba, June 5, 2018.

<sup>167</sup> Human Rights Watch interview with Rose Khoza, Bushbuckridge, June 1, 2018.

criminalising then they should provide a real alternative,” Chief Magosha said.<sup>168</sup> Pride Williams, who has one grown-up son, said:

Why keep arresting us? If they are so determined for us to stop why don't they give us something else to do? If we had another job we could get off the street. I see no other options.<sup>169</sup>

Lebo Ndomba said:

Give us shops and education so we can continue as we did not have chance to go to school or finish. But sex work must be legal as we can't all have a chance to go to school.<sup>170</sup>

A small number of the interviewees said that they were so desperate to leave sex work that they would take a worse-paying job. Debra Mashego said: “I just want any other job, even if it's no money, I don't want to die a sex worker, for my kids to have that hanging over them.”<sup>171</sup> But few thought that it was realistic to expect that the government would be able to provide equally or better paying work for them. For example, some women had done part-time municipal jobs in the past, such as cleaning streets, but said that the pay was low.

Many interviewees brought up safety as one improvement that the government could perhaps help them with. Esther Makaza, a 33-year-old in Musina, said:

It's a job, I chose it, if we were to get help from the government it would be good to get offices for sex workers, places where we can work and get good services from the police so we are protected from thieves.

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<sup>168</sup> Human Rights Watch interview with Chief Magosha, June 1, 2018.

<sup>169</sup> Human Rights Watch interview with Pride Williams, June 5, 2018.

<sup>170</sup> Human Rights Watch interview with Lebo Ndomba, Johannesburg June 5, 2018.

<sup>171</sup> Human Rights Watch interview with Debra Mashego, June 1, 2018.

“The government should understand that this is just another job, understand work is work, they should build rooms for us with security,” Cindy Khoza, mother of three and Bushbuckridge resident, said.<sup>172</sup> “Criminalisation is a problem, we need to get rooms that are safe, flats where people can come for sex. You can’t end sex work, I will starve,” Kim Xitsonga said.<sup>173</sup> Patience Ozuk, a Zimbabwean sex worker based in Musina town, said: “The government needs to leave us alone to do our job. We should do it in a protected area, when they chase us, we go to dangerous areas.”<sup>174</sup>

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<sup>172</sup> Human Rights Watch interview with Cindy Khoza, June 1, 2018.

<sup>173</sup> Human Rights Watch interview with Kim Xitsonga, May 30, 2018.

<sup>174</sup> Human Rights Watch interview with Patience Ozuk, Tzaneen, May 30, 2018.

## V. Sex Work and Human Rights in International and South African Law

Human Rights Watch opposes the criminalisation of consensual adult sex work. First, criminalisation creates barriers for sex workers to exercise basic rights such as protection from violence, access to justice for abuses, and access to essential health services. This view is informed by research on sex work and consultation with sex workers in several different countries in the world, as well as in South Africa.<sup>175</sup>

Second, criminalisation of the consensual commercial exchange of sexual services is incompatible with respect for several internationally recognised human rights, including the rights to personal autonomy and privacy. Sex trafficking and commercial sexual exploitation of children should be criminalised. Forced prostitution and trafficking in human beings are serious violations of human rights. Under international law, all states have an obligation to take necessary measures to prevent and combat these activities. Human Rights Watch believes that laws which clearly distinguish between voluntary sex work and criminal activities such as trafficking can help protect those engaged in voluntary sex work against violence and exploitation, and that sex workers are more likely to seek protection from the law, and report abuses against others, if they and their work are not treated as criminal. Decriminalisation of sex work would also allow for issues such as health, welfare, and employees' rights and protections to be addressed more appropriately and effectively. Criminalisation impedes sex workers' efforts to organise with peers and law enforcement to combat trafficking or otherwise address unsafe or exploitative working environments.

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<sup>175</sup> See, for example: Human Rights Watch, *"Swept Away": Abuses Against Sex Workers in China*, May 2013, <https://www.hrw.org/report/2013/05/14/swept-away/abuses-against-sex-workers-china>; *Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities*, July 2012, <https://www.hrw.org/report/2012/07/19/sex-workers-risk/condoms-evidence-prostitution-four-us-cities>; *Off the Streets: Arbitrary Detention and Other Abuses against Sex Workers in Cambodia*, July 2010, <https://www.hrw.org/report/2010/07/19/streets/arbitrary-detention-and-other-abuses-against-sex-workers-cambodia>; *Rhetoric and Risk: Human Rights Abuses Impeding Ukraine's Fight Against HIV/AIDS*, March 2006, <https://www.hrw.org/report/2006/03/01/rhetoric-and-risk/human-rights-abuses-impeding-ukraines-fight-against-hiv/aids>.

## Sex Workers' Rights protected by South African Law

The South African Constitution contains an extensive bill of rights affirming the democratic values of human dignity, equality and freedom. Section 7 obliges the state to respect, protect, promote and fulfil the rights conferred by the constitution.<sup>176</sup> South Africa's Commission of Gender Equality has argued that under criminalisation, sex workers suffer the indignity of discrimination, police abuses, stigma from service providers, and other rights violations.<sup>177</sup>

Of particular importance to sex workers is Section 12 of the Constitution, which provides South Africans the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, the right not to be detained without trial, and the right to be free from all forms of violence from either public or private sources. Section 12 also guarantees freedom from torture, and the right not to be treated or punished in a cruel, inhuman or degrading way.<sup>178</sup> In addition, the Prevention and Combating of Torture of Persons Act, 2013 protects human rights and specifically prohibits acts of torture.<sup>179</sup> Under the sentencing provisions of this act, the commission of rape or other sexual assault is considered an aggravating circumstance.<sup>180</sup>

Other important rights include the right to privacy; the right to peacefully assemble, demonstrate, picket, and petition; the right to freedom of association; and the right to freedom of movement.<sup>181</sup> All South Africans have the right to choose their trade, occupation or profession freely, and the right to fair labour practices.<sup>182</sup> The Commission of Gender Equality has noted: "Criminalisation violates sex workers' right to free choice of work by making a legitimate form of labour illegal" and "criminalisation violates sex workers' right to freedom of association because they are effectively barred from unionizing and cannot engage in collective bargaining."<sup>183</sup>

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<sup>176</sup> Constitution of the Republic of South Africa, Act. No. 108 of 1996, s. 7(2).

<sup>177</sup> Commission for Gender Equality, "Decriminalising Sex Work in South Africa: Official Position of the Commission for Gender Equality," 2013, <http://www.cge.org.za/wp-content/uploads/2014/05/CEG-Decr.pdf> (accessed July 5, 2018), p. 7-8.

<sup>178</sup> *Ibid.*, s. 12.

<sup>179</sup> Prevention and Combating of Torture of Persons Act, No. 13 of 2013.

<sup>180</sup> *Ibid.*, s. 5(e).

<sup>181</sup> *Ibid.*, ss. 14, 17, 18, and 21.

<sup>182</sup> *Ibid.*, ss. 22 and 23(1).

<sup>183</sup> Pages cite CGE report.

Section 27 of South Africa's Constitution provides that everyone has the right to access health care services, and the state must take reasonable legislative and other measures to achieve the progressive realisation of this right. Because criminalisation impedes access to health care, it also forms an obstacle to the right to health.

South Africa's Criminal Procedure Act determines that anyone who is arrested should be told what she is being arrested for immediately and should not be held for longer than 48 hours without being taken to court.<sup>184</sup> Section 35 of the Constitution outlines the rights of persons who have been arrested, detained, or accused, including the right to conditions of detention that are consistent with human dignity and the right to a fair trial.<sup>185</sup>

## Sex Workers' Rights under International Law

International law does not prescribe any particular legal framework for the regulation of sex work. However, it is always incumbent upon states, whatever legal framework is adopted, to respect the fundamental rights of individuals engaged in sex work. Sex workers have the right not to be arbitrarily arrested or detained, the right not to be subject to torture and other cruel, inhuman, or degrading punishment, the right to due process, and the right to the highest attainable standard of health. South Africa is obligated under international law to protect the rights of sex workers and prevent human rights violations against them, including by taking steps to eliminate human trafficking and all appropriate measures to prevent sexual exploitation of children.

South Africa is party to the major international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and both Optional Protocols; the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture); and the Convention on the Rights of the Child (CRC) and two of its Optional Protocols.<sup>186</sup> South Africa's Constitution incorporated many of the rights conferred by these treaties.<sup>187</sup>

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<sup>184</sup>Criminal Procedure Act, No. 51 of 1977, ss. 39(2) and 50(1)(c).

<sup>185</sup> Constitution of the Republic of South Africa, s. 35.

<sup>186</sup> ICCPR, adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by South Africa on December 10, 1998; Optional Protocol to the

South Africa is also a party to the African Charter on Human and Peoples' Rights, as well as its Protocol on the Rights of Women in Africa.<sup>188</sup> Article 5 of the African Charter upholds every person's right to dignity and prohibits degrading punishment.<sup>189</sup> The Protocol on the Rights of Women in Africa calls on states parties to take appropriate and effective measures to prevent, punish, and eradicate all forms of violence against women.<sup>190</sup>

South Africa is a member state of the Southern African Development Community (SADC). The SADC Declaration on Gender and Development, signed in 1997, commits member states to "taking urgent measures to prevent and deal with the increasing levels of violence against women and children."<sup>191</sup> SADC member states signed an addendum to the

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International Covenant on Civil and Political Rights, adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976, ratified by South Africa on August 28, 2002; Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted December 15, 1989, G.A. Res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), entered into force July 11, 1991, ratified by South Africa on August 28, 2002; International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976, ratified by South Africa on January 12, 2015; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted December 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force September 3, 1981, ratified by South Africa on December 15, 1995; Optional Protocol to the Convention on the Elimination of Discrimination against Women, adopted October 6, 1999, G.A. Res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000), entered into force December 22, 2000, ratified by South Africa on October 18, 2005; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, ratified by South Africa on December 10, 1998; Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, ratified by South Africa on June 16, 1995; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted May 25, 2000, G.A. Res. 54/263, annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000), entered into force February 12, 2002, ratified by South Africa on September 24, 2009; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted May 25, 2000, G.A. Res. 54/263, annex II, 54 U.N. GAOR Supp. (No. 49) at 6, U.N. Doc. A/54/49, Vol. III (2000), entered into force January 18, 2002, ratified by South Africa on June 30, 2003.

<sup>187</sup> See, for example, John Dugard, "The Influence of International Human Rights Law on the South African Constitution," *Current Legal Problems*, vol. 49, no. 1 (1996), pp. 305-324, doi: 10.1093/clp/49.1.305.

<sup>188</sup> African Charter on Human and Peoples' Rights (African Charter), adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986, ratified by South Africa on July 9, 1996; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, September 13, 2000, CAB/LEG/66.6, entered into force November 25, 2005, ratified by South Africa on December 17, 2004.

<sup>189</sup> African Charter, art. 5.

<sup>190</sup> Protocol on the Rights of Women in Africa, art. 4(2).

<sup>191</sup> Southern African Development Community, Declaration on Gender and Development, September 8, 1997, art. H(ix).



SADC Declaration on Gender and Development in 1998 on the Prevention and Eradication of Violence against Women and Children.<sup>192</sup>

Article 9 of the ICCPR guarantees that: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”<sup>193</sup> Further, upon arrest, everyone “shall be informed, at the time of their arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”<sup>194</sup>

Any person detained on grounds that are not in accordance with the law is detained arbitrarily and therefore unlawfully. Detention can also amount to arbitrary detention, even if it is authorised by law, if it includes “elements of inappropriateness, injustice, lack of predictability and due process of law.”<sup>195</sup> The UN Human Rights Committee has determined that legally authorised detention must be reasonable, necessary, and proportionate, taking into account the specific circumstances of a case.<sup>196</sup>

International law requires states to ensure that necessary procedural guarantees are in place to identify and respond to situations of unlawful or arbitrary deprivation of liberty. Detainees must have a right to challenge their detention in court.<sup>197</sup>

In all situations where people are deprived of their liberty, the ICCPR states that they should still be treated “with humanity and with respect for the inherent dignity of the

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<sup>192</sup> Southern African Development Community, The Prevention and Eradication of Violence against Women and Children, An Addendum to the 1997 Declaration on Gender and Development by SADC Heads of State or Government, A September 14, 1998.

<sup>193</sup> ICCPR, art. 9.

<sup>194</sup> *Ibid.*

<sup>195</sup> Communication No. 458/1991, A. W. Mukong v. Cameroon (Views adopted on 21 July 1994), in U.N. Doc. GAOR, A/49/40 (vol. II), p. 181, para. 9.8.

<sup>196</sup> *Van Alphen v. The Netherlands*, Communication No. 305/1988, adopted 15 Aug. 1990, U.N. GAOR, Hum. Rts. Comm., 39th Sess., para. 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (1990); *A v. Australia*, Communication No. 560/1993, adopted 30 Apr. 1997, U.N. GAOR, Hum. Rts. Comm., 59th Sess., para. 9.2, U.N. Doc. CCPR/C/59/D/560/1993 (1997).

<sup>197</sup> ICCPR, art. 9(4). See also art. 9(5): “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

human person.”<sup>198</sup> The ICCPR also prohibits torture or cruel, inhuman or degrading treatment or punishment.<sup>199</sup>

Rape and sexual assault in detention is a form of torture.<sup>200</sup>

Under the ICCPR, states must provide “adequate medical care during detention.”<sup>201</sup> The UN’s Standard Minimum Rules for the Treatment of Prisoners further clarify that detainees are entitled to see a medical officer for their physical and mental health needs.<sup>202</sup> This includes access to medicines necessary for their survival, such as anti-retroviral treatment (ART).

International treaties on slavery, slavery-like practices, and human trafficking also call upon countries to define specific acts involving forced sex work as crimes and take appropriate steps to address exploitative situations, including protecting the rights of victims of these crimes.<sup>203</sup> South Africa has ratified the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children.<sup>204</sup>

Vague laws such as “loitering” are ripe for abuse and discriminatory application. They enable arbitrary and preemptive arrests on the basis of profile or status, rather than criminal conduct, evidenced by the fact that they are routinely invoked

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<sup>198</sup> ICCPR, art. 10.

<sup>199</sup> *Ibid.*, art. 7.

<sup>200</sup> The UN special rapporteur on torture has stated that “[r]ape and other forms of sexual assault in detention are a particularly despicable violation of the inherent dignity and right to physical integrity of every human being; and accordingly constitute an act of torture.” United Nations Special Rapporteur on Torture, Summary Record of the 21st meeting, U.N. ESCOR, Comm’n Hum. Rts, 48th Sess., para. 35, U.N. Doc. E/CN.4/1992/SR.21 (1992). International tribunals and other bodies have established that rape is covered by international prohibitions on torture or cruel, inhuman or degrading treatment. See, for example, *Aydin v. Turkey*, Eur. Ct. of H.R., Judgment of 25 September 1997, paras. 62-88; *Prosecutor v. Furundija*, ICTY, Case No. IT-95-17/1-T, Judgment of 10 December 1998, paras. 163-86.

<sup>201</sup> *Pinto v. Trinidad and Tobago* (Communication No. 232/1987), Report of the Human Rights Committee, vol. 2, U.N. Doc A/45/40, p. 69.

<sup>202</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules), adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of July 31, 1957, and 2076 (LXII) of May 13, 1977, para. 26.

<sup>203</sup> Protocol amending the Slavery Convention signed at Geneva on 25 September 1926, adopted October 23, 1953, G.A. Res. 794 (VIII), 8 U.N. GAOR Supp. (No. 17) at 50, U.N. Doc. A/2630 (1953), 182 U.N.T.S. 51, entered into force December 7, 1953, signed by South Africa on December 29, 1953; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention on Transnational Organized Crime (Trafficking Protocol), adopted November 15, 2000, G.A. Res. 55/25, annex II, 55 U.N. GAOR Supp. (No. 49) at 60, U.N. Doc. A/45/49 (Vol. I) (2001), entered into force December 25, 2003, ratified by South Africa on February 20, 2004.

<sup>204</sup> Trafficking Protocol.

against individuals who are not actually engaged in offending behaviour at the time of their arrest. Human rights standards require the law to be foreseeable and predictable and states to define precisely and in a foreseeable manner all criminal offences. Failure to do so infringes upon the due process rights of a person accused of the offence.

## Acknowledgements

The summary of this report was written by Liesl Gertholtz, executive director in the Women's Rights Division of Human Rights Watch and the rest by Skye Wheeler, emergencies researcher in the Women's Rights Division. The report is based on research conducted in South Africa by Skye Wheeler. Chelsey Legge, an intern, provided additional desk research, writing, and editorial support. Erika Nguyen and Agnieszka Bielecka, coordinators with the Women's Rights Division provided editorial assistance.

This report was reviewed and edited by Liesl Gertholtz, Diederik Lohman, former director of the Health and Human Rights division, Dewa Mavhinga, Southern Africa director for the Africa division, and Neela Ghoshal, senior researcher in the LGBT Rights division. Tom Porteous, deputy program director, and Aisling Reidy, senior legal advisor, provided program and legal reviews.

Ivana Vasic, graphic designer; Fitzroy Hepkins; and Jose Martinez prepared the report for publication. Multimedia production was coordinated by Pierre Bairin, multimedia director, and Jessie Graham, deputy multimedia director; and Janna Kyllastinen, multimedia producer, who filmed and edited the video in South Africa. Birgit Schwarz, senior press officer, organized the report launch and media release.

Human Rights Watch researched and wrote this report in partnership with SWEAT. The researcher benefited greatly from the support and expertise of other sex worker rights and health rights or service-providing NGOs in South Africa. Sisonke, the national sex workers' movement, the Asijiki Coalition, Sonke Gender Justice, and the Women's Legal Centre all provided key analysis and information, and connections and crucial support.

NACOSA provided logistical support and connections with partner NGOs working with sex workers, including Munna Ndi Nnyi and Hoedspruit Training Trust - Hlokomela Project, who connected Human Rights Watch with interviewees and provided places to do the interviews. We are grateful.

Both sex worker organisations and their allies, including health providers, continue to fight every day for the rights of this vulnerable population.

Logistical, information, and translation support was provided by Linda Dumba in Mpumalanga and Limpopo provinces, and Sibongile Shoba in Gauteng.

Most of all, Human Rights Watch would like to thank the many women who agreed to talk to us about their experiences of sex work and criminalisation of their work in South Africa and who face considerable obstacles in their efforts to support themselves, their families and others.

# WHY SEX WORK SHOULD BE DECRIMINALISED IN SOUTH AFRICA

South African law criminalises both the sale and purchase of sex and other aspects of sex work. These prohibitions have not stopped many thousands of mostly poor and often black women in South Africa choosing sex work as their best available option. But arrests and detentions, fines and sexual exploitation by the South African Police Service make this difficult work harder and more dangerous in a country suffering from high levels of violence against women.

*Why Sex Work Should be Decriminalised in South Africa* describes how criminalisation undermines efforts to end the HIV pandemic and access to healthcare for sex workers, how frequent harassment, arrest, and police detention keeps them from their families and their work, and how these vulnerable women have little access to justice when they experience rape, theft, and other crimes.

Female sex workers in South Africa interviewed for this report, mostly single mothers with sometimes six or seven dependents, want their bodily autonomy and dignity respected, an end to police harassment, and safer places to work.

With South Africa's progressive constitution in hand, sex worker organizations and other civil society groups have campaigned for years for decriminalisation. They have been joined by much of South Africa's health sector that has already taken big steps to address the stigma and abuse as well as improve access to healthcare. Human Rights Watch calls on the South African government to fully decriminalise consensual adult sex work and to adopt an approach towards sex work that respects and protects the rights of this vulnerable group, and responds to their needs.



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