

“They should protect us because that is their job”:

A preliminary assessment of sex workers' experiences of police abuse in Lusaka, Zambia





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SALC REPORT

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About the Southern Africa Litigation Centre

The Southern Africa Litigation Centre (SALC), established in 2005, aims to provide support to human rights and public interest initiatives undertaken by domestic lawyers in Southern Africa. SALC works in Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Zambia and Zimbabwe. Its model is to work in each jurisdiction in conjunction with domestic lawyers who are litigating public interest cases involving human rights or the rule of law. SALC supports these lawyers in a variety of ways, as appropriate, including providing legal research and drafting, training and mentoring, and also monetary support. SALC's objectives include the provision of training and the facilitation of legal networks within the region.

Authorship and acknowledgement

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Acronyms and abbreviations

African Commission	African Commission on Human and Peoples' Rights
BSS	Behavioural Surveillance Survey
FSW	Female Sex Worker
HIV	Human Immunodeficiency Virus
HRC	Human Rights Commission
ICCPR	International Covenant on Civil and Political Rights
OSISA	Open Society Initiative of Southern Africa
PPCA	Police Public Complaints Authority of Zambia
SADC	Southern Africa Development Community
SALC	Southern Africa Litigation Centre
STI	Sexually Transmitted Infection
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
ZDHS	Zambia Demographic and Health Survey

Executive summary

Throughout the world, sex workers are vulnerable to and experience discrimination, stigma and violence in all spheres of their daily lives – including at work, public institutions, and facilities, and even amongst their families. In many instances, police officials perpetrate violence and abuse against sex workers and target them with the arbitrary and subjective enforcement of laws. However, sex workers in Zambia are entitled to protection of their fundamental rights and freedoms. This preliminary report aims to get a better understanding of the experiences of sex workers and their vulnerability in terms of discrimination, harassment and physical and sexual abuse by police officials.

Research findings

Sex workers are human beings and are fully entitled to the rights and freedoms enshrined in the Constitution of Zambia, which expressly imposes an obligation on police officials to uphold the fundamental rights and freedoms of all persons – including freedom from unfair discrimination, freedom of security of the person, and the right to be treated with respect and dignity. Sex workers who participated in this research, however, related experiences of pervasive abuse:

- Ninety one percent (91%) of participants indicated they had a bad experience with the police and that they were often not treated well during arrest and detention.
- Ninety percent (90%) of participants reported that they have experienced violence from police or other men during their time as sex workers.
- Eighty seven percent (87%) of participants reported that the police have harassed them because they engage in sex work.
- Sixty one percent (61%) of participants said they would be unwilling to lay a complaint against the police because they fear further abuse, that the complaint will not change anything, that the police think they are “above the law”; and because they are unfamiliar with all the complaints options available to them.

It is not a crime to be a sex worker in Zambia – but certain activities around sex work are criminalised. The act of selling sex for reward is not criminalised in the country, and yet sex workers remain a target of police enforcement. Police officials often use the vagrancy and nuisance provisions in the Zambian Penal Code to arbitrarily arrest and detain sex workers. These offences are over-broad and are subjectively and arbitrarily applied by police officials. The subjective application of these offences by police officials creates a culture of impunity – in which both the clients and police officials can abuse sex workers.

Key recommendations

From the preliminary research findings in this report, several recommendations are made for further follow-up:

Legislative reform

The Zambian Penal Code should be reviewed in order to ensure that police officials do not unlawfully and unfairly target sex workers and other poor and vulnerable groups. There should also be adequate guidelines for the exercise of police discretion.

Training of police officials

The training of police officers on human rights concepts and principles such as equal protection of the law, non-discrimination, ethics, social justice and fairness, should be prioritised. In addition, there is a need to consider the reform of current practices in the police force, to ensure that arrests are affected as a last resort and that effective monitoring of police is in place to ensure that arrests are carried out within the boundaries of the law. There should be appropriate disciplinary action when police officers flout the law.

Empowering sex workers

Non-governmental organisations can play a crucial role in training sex workers on their rights and freedoms – as well as being a strong voice to speak on behalf of vulnerable sex workers. In addition, civil society organisations can also play an important role by documenting patterns of police abuse and violations.

Training sex workers about their basic human rights could possibly reduce unlawful arrest, detention and police abuse. It can also play a crucial role in holding the State accountable for a specific violation.

Improving accessibility of complaints mechanisms

Participants' responses indicate that much remains to be done to improve the accessibility of complaints mechanisms. This would include providing information and education materials to the public on the different complaints bodies, and ensuring that there are posters in accessible language at police stations that explain internal and external complaints processes for cases of police abuse and bribery. Officers in the various complaints bodies should be sensitised to the fact that sex workers are a group which are particularly vulnerable to police abuse, and they are entitled to take action against police abuse, and their rights should be respected throughout the complaints process. This would include developing processes at the complaints bodies to ensure that confidentiality of complaints is maintained and that victims can be protected from reprisals by police.

Introduction

Background and purpose of the study

Sex workers are vulnerable to, and experience discrimination, stigma and violence in all spheres of their daily lives. Often the perpetrators of physical and sexual violence against sex workers are police officials. The situation is no different for sex workers in Lusaka, Zambia. The acts of violence and discrimination deny sex workers their fundamental rights and freedoms – including their right to equality, protection from cruel, inhuman and degrading treatment, and to be free from arbitrary arrest and detention.

This research aims to understand the experiences of sex workers and their vulnerability in terms of discrimination, harassment and physical and sexual abuse by police officials. In particular, the research aims to establish from sex workers in Lusaka, Zambia, how police abuse has affected them. This is a preliminary assessment, which is primarily aimed at assisting the Southern Africa Litigation Centre (SALC) to develop relevant advocacy and litigation strategies to address the systemic abuse of sex workers by the police in Lusaka, Zambia. The assessment will provide SALC with a better understanding of the challenges faced by sex workers in relation to the police – which will form the basis for future engagement with the police.

Methodology

This report is based on a combination of desktop research and limited qualitative research, in Lusaka, Zambia. The desktop research focused on the legal framework within which the police interact with sex workers in Zambia.

The quantitative research took place on 23 May 2016, when SALC, together with Engender Rights, convened a workshop with self-identified sex workers over the age of 18 in Lusaka. At the workshop, questionnaires were distributed to thirty nine (39) sex workers. The purpose of the questionnaires was to develop a preliminary understanding of the relationship between sex workers and police authorities in Lusaka – and the extent of police abuse and arbitrary arrest of sex workers. The questionnaires were translated into Nyanja and Bemba for the sex workers, depending on their preference, and questions were explained to them before they completed the questionnaires. The workshop and completion of questionnaires were facilitated by two Zambian nationals, who have gained the trust of the participants.

Participants were informed that questions could be sensitive, and that they were at liberty to ignore questions if they felt uncomfortable in answering them. Participants were informed that all information would be kept confidential, and that no identifying information would be retained in

the final report. We obtained informed consent from all the participants, and explained to them the purpose of the study in detail, before they signed the consent forms. During the data analysis and writing process, the participants' personal details were withheld – so that it is impossible for readers to attribute views or statements to specific individuals.

Sex workers who attended the workshop and completed the questionnaires, were drawn from different areas in Lusaka: Matero (1), Kaunda Square (3), Kabanana (4), Garden compound (10), and Chipata compound (21).

Limitations

The research focuses on police abuse, and the harassment and extortion of sex workers in some areas of Lusaka, Zambia, and how these police actions affect sex workers. The research is preliminary and does not claim to be representative of the experiences of sex workers throughout Lusaka or Zambia. Notably, no police officers were interviewed at this stage of the assessment, and it is envisaged that the next step would be to engage the police about the challenges faced by sex workers – and the extent to which this can be ameliorated. At the end of this report, some reference is made to possible complaints mechanisms that sex workers can access in cases of police abuse. These mechanisms were not investigated at this stage of the assessment, and will be engaged further to determine the extent to which complaints can be referred to them. By focusing on sex workers' experiences first – we will be better equipped to bring to the fore the voices and experiences of sex workers, when engaging the police and complaints mechanisms.

The questionnaires were in English, and while facilitators endeavoured to ensure the accuracy of translations and explanations to participants, a margin for possible error is noted.

It was difficult to obtain quantitative data on the actual number of instances when participants were sexually assaulted by the police. We observed that several participants had a very narrow definition of “rape”, and even though they indicated that the police had non-consensual or “forced” sex with them in exchange for not being arrested or detained, they did not always classify it as “rape”.

Any numerical indications in the study are intended solely to emphasise observations. There is no assertion intended, or made, that any of the qualitative or quantitative data in the study are appropriate for statistical extrapolation or generalisations.

Zambia is a landlocked country bordering the Democratic Republic of Congo, Tanzania, Malawi, Mozambique, Zimbabwe, Botswana, Namibia and Angola. We acknowledge that sex workers who are not Zambian might be at increased risk of police harassment, abuse and violence, as a result of their migrant status in Zambia. Participants were, however, not asked about their residence status in Zambia, and how that affected their relationship with police. The issue of cross-border migration for sex work purposes, exposes such sex workers to increased abuse from a range of actors, which requires further research and specific support measures.

Our sample of participants may under-represent the most vulnerable sex workers who may be less willing to participate in a workshop or which may be harder to reach.

In general, there is very little information on the needs and experiences of sex workers and other marginalised groups – especially in the context where such groups are stigmatised and at risk of arrest. Whilst this report seeks to contribute to our knowledge of sex workers’ experiences, the above limitations limit the extent to which these experiences can be generalised.

Sex work in Zambia

The Joint United Nations Programme on HIV (UNAIDS) defines sex workers¹ as female, male and transgender adults, who receive money or goods in exchange for sexual services – either regularly or occasionally, and even if they do not self-identify as sex workers.² UNAIDS explains that:

*“A number of complex factors may also contribute to entry into sex work. For sex workers, these factors range along a continuum that extends from free choice to forced sex work and trafficking ... Trafficking into sex work is a profound human rights violation that demands effective and comprehensive international action. Some individuals freely choose to engage in sex work. Others enter into sex work as a result of conditions that, while deplorable, do not involve direct coercion and/or deceit by another; such conditions include poverty, gender inequality, indebtedness, low levels of education, lack of employment opportunities, family breakdown and abuse, dependent drug use, humanitarian emergencies and post conflict situations.”*³

Current information about the nature of sex work in Zambia is limited. The extent of sex work must be understood within the broader socio-economic context in Zambia. The 2010 Population and Household Census estimated that Zambia has a population of 13.1 million people.⁴ The Living Conditions Monitoring Survey of 2010, estimated that sixty percent (60%) of Zambians can be classified as poor – with lack of access to income, employment opportunities, shelter, and other basic needs.⁵ Life expectancy at birth was estimated in 2010 to be 49.2 years for men and 53.4 years for women.⁶

The Zambia Demographic and Health Survey (ZDHS) estimates that thirteen percent (13%) of men have paid for sexual intercourse.⁷ Female sex workers (FSW) in Zambia generally operate without intermediaries and negotiate directly with potential clients.⁸ Experiences of violence and threats are common among sex workers.⁹

¹ This Report refers to “sex work” and “sex workers” out of respect for the dignity of people involved in sex work. The term “prostitution” is also referred to where appropriate, since this is the legal term used in many countries, including Zambia. The term “prostitution” is often stigmatised within society, and instead this document prefers to use the term “sex work” when referring to commercial sexual activities taking place between consenting adults.

² UNAIDS *Guidance Note on HIV and Sex Work*, 2012, at p 3, available at http://files.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf (accessed 16 July 2016).

³ UNAIDS *Guidance Note on HIV and Sex Work*, 2012, at p 5-6, available at http://files.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf (accessed 16 July 2016).

⁴ *Zambia Demographic and Health Survey 2013-14*, Central Statistical Office, Lusaka, March 2015 at p 2, available at <https://www.dhsprogram.com/pubs/pdf/FR304/FR304.pdf> (accessed 22 July 2016).

⁵ *Zambia Demographic and Health Survey 2013-14*, Central Statistical Office, Lusaka, March 2015 at p 2.

⁶ *Zambia Demographic and Health Survey 2013-14*, Central Statistical Office, Lusaka, March 2015 at p 2.

⁷ *Zambia Demographic and Health Survey 2013-14*, Central Statistical Office, Lusaka, March 2015 at p 215.

⁸ S Abbott et al. “Female sex workers, male circumcision and HIV: A qualitative study of their understanding, experience and HIV risk in Zambia” *PLoS One*, 2013; 8(1).

⁹ S Abbott et al. “Female sex workers, male circumcision and HIV: A qualitative study of their understanding, experience and HIV risk in Zambia” *PLoS One*, 2013; 8(1). “Sex workers ‘raped’ by Zambian police” *BBC News*, 23 April 2002, available at <http://news.bbc.co.uk/2/hi/africa/1946107.stm> (accessed 21 July 2016).

Even though there are no laws in Zambia that criminalise the act of selling or buying sex, activities around sex work are criminalised and sex work, in practice, still takes place in a largely criminalised environment. The experiences of many of the participants demonstrate that police authorities use several nuisance-related offences in the Penal Code to arrest, detain and harass sex workers. This behaviour by the authorities infringes on the basic human rights and freedoms of sex workers in Zambia, and violates international human rights norms and standards.

The legal framework in Zambia

Universality of fundamental rights

“We are of the opinion that the authorities should see to it that sex workers do not face these difficulties as they are also citizens ... and have the same fundamental rights as others.”¹⁰

All persons are entitled to fundamental rights and freedoms, including the right not to be discriminated against, harassed, or abused, and to have freedom from arbitrary arrest and detention.

The fundamental human rights of all persons are protected in regional and international instruments which Zambia has signed and ratified, including: the African Charter on Human and Peoples’ Rights (African Charter) and the International Covenant on Civil and Political Rights (ICCPR).

The principle of universality of rights underlies the application of all fundamental human rights. Article 1 of the Universal Declaration of Human Rights (UDHR) provides that *“all human beings are born free and equal in dignity. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”*.

Similarly, Article 4 of the African Charter on Human and Peoples’ Rights provides that *“human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”* Article 5 continues that *“every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation, and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”*

The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, states that: *“it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms”*.¹¹

¹⁰ *Budhadev Karmaskar v State of West Bengal Criminal Appeal No 135 of 2010* (Supreme Court of India, 2011), available at <http://indiankanoon.org/doc/99194/> (accessed 16 July 2016).

¹¹ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, in Vienna, on 25 June 1993, at para 5.

The duty of courts to use international law as a guide when interpreting constitutional rights, has been confirmed in Zambian courts.¹²

Constitutional protections

“Fundamental freedoms are to be enjoyed by every member of every class of society – the rich, the poor, the disadvantaged, citizens and non-citizens, and even criminals and social outcasts, subject only to the public interest and respect for the rights and freedoms of others.”¹³

The Zambian Constitution was established in 1991, and major amendments came into force in early 2016.¹⁴ The Constitution is the supreme law of the nation, and all other written or customary law is subject to its provisions.¹⁵ The rights contained in the Bill of Rights in the Constitution are universal rights, and apply to all persons equally.

Article 11 of the Constitution provides as follows:

“It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this Part, to each and all of the following, namely:

- a) Life, liberty, security of person and the protection of the law;*
- b) Freedom of conscience, expression, assembly, movement and association;*
- c) Protection of young persons from exploitation;*

¹² In *Michael Sata v Post Newspapers Limited and Another* (HC) (1995) ZLR, 113, Ngulube CJ noted with approval the acceptance of international instruments in the interpretation of domestic law in domestic litigation, and specifically referred to the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples’ Rights. In the High Court case of *Longwe v Inter Continental Hotels* (1993) 4 LRC 221, Musumali J stated: “Ratification of such instruments by a national state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of such (instruments). Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international (instrument), I would take judicial notice of that treaty convention in my resolution of the dispute.” The African Commission on Human and Peoples’ Rights (African Commission), which is responsible for monitoring compliance with regional human rights treaties – in *Legal Resources Foundation v Zambia*, Comm. 211/98, noted that: “International treaties which are not part of domestic law and which may not be directly enforceable in the national courts, nonetheless impose obligations on State Parties.”

¹³ The Court of Appeal of Botswana was interpreting article 3 of the Botswana Constitution, which provides that “every person in Botswana is entitled to the fundamental freedoms” This section is very similar to article 11 of the Constitution of Zambia, which states that “every person in Zambia has been and shall be entitled to the fundamental rights and freedoms of the individual....” *Attorney General of Botswana v Rammoge and Others*, Court of Appeal, CACGB-128-14, 16 March 2016, para 58, available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2016/03/LEGBIBO-CoA-judgment.pdf> (accessed 16 July 2016).

¹⁴ Currently, the Bill of Rights is found in the Constitution of 1991, but further constitutional reform processes are underway – which might herald a new Bill of Rights. The amendment of the Constitution by Act 2 of 2016 replaces parts of the Constitution. The Bill of Rights is contained in Part III of the Constitution, and has not been affected by these amendments. The manner of enforcement has however changed since the amendments to the Constitution introduce a new court structure – including a Constitutional Court. Article 1 of Act 2 of 2016 states that “this Act may be cited as the Constitution of Zambia (Amendment) Act and shall be read as one with the Constitution of Zambia, in this Act referred to as the Constitution.”

¹⁵ Constitution of Zambia Article 1(1).

d) Protection for the privacy of his home and other property and from the deprivation of property without compensation;

And the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in this Part, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

Article 11 is referred to as an umbrella section – with the extent of the various rights elaborated in the provisions that follow. Notably, the Botswana Court of Appeal when interpreting the same provision in the Botswana Constitution, remarked that “*fundamental rights are to be enjoyed by every person. To deny any person his or her humanity is to deny such person human dignity – and the protection and upholding of personal dignity is one of the core objectives ... of the Constitution*”.¹⁶

The Constitution protects the human rights and fundamental freedoms of every person, and this includes sex workers. When interpreting the Constitution, the courts must consider the national values – which include human dignity, social justice, equality, and non-discrimination.¹⁷ “Discrimination” is defined as “*directly or indirectly treating a person differently on the basis of that person’s birth, race, sex, origin, colour, age, disability, religion, conscience, belief, culture, language, tribe, pregnancy, health, or marital, ethnic, social or economic status*”.¹⁸

Article 193(2)(e) of the Constitution, as amended, specifically imposes an obligation on the Police Service to uphold the Bill of Rights, in the enforcement of their duties.

Some of the basic human rights that are important for sex workers include:

Rights	What does this mean for sex workers?	Zambia Constitution
<i>Equality</i> : Everyone is equal before the law and has equal benefit and protection of the law.	Sex workers should be treated equally. Laws that exist to protect all persons, should also protect sex workers.	Article 11
<i>Human dignity</i> : Everyone has inherent dignity and the right to have their dignity respected and protected.	No person or institution may insult you or take away your self-respect by words or actions.	Article 8(d) – human dignity is a national value that should be used to interpret all rights.

¹⁶ *Attorney General of Botswana v Rammoge and Others*, Court of Appeal, CACGB-128-14, 16 March 2016, para 60 (the underlining is by the court), available at <http://www.southernafricalitigationcentre.org/wp-content/uploads/2016/03/LEGBIBO-CoA-judgment.pdf> (accessed 16 July 2016). Notably, as in Zambia, the right to dignity is not a separate right in the Bill of Rights but is used as a basis to give meaning to all other rights.

¹⁷ Article 8(d) of the Constitution, as amended by Act 2 of 2016.

¹⁸ Article 266 of the Constitution (definitions section), as amended by Act 2 of 2016.

<p>Security of the person: This right is closely linked to the right to personal liberty and to be free from inhumane treatment. A person further has the right to make decisions about his/her body.</p>	<p>You have the right to make decisions about your body and your health, and no person may force you to undergo any medical procedures. You also have the right to be protected from violence and abuse.</p>	<p>Article 11(a)</p>
<p>Right to personal liberty: No person may be deprived of their freedom, unless the law allows for this – for example through lawful arrest.</p>	<p>You may not be arrested without a good reason. If you have been arrested, you must be informed about the reasons for the arrest in your language, and must either be released or brought before a court as soon as possible.</p>	<p>Article 13</p>
<p>Freedom from inhuman treatment: Everyone has the right to be protected from torture and cruel, inhuman or degrading treatment or punishment.</p>	<p>You cannot be treated badly by people or the police, simply because you are a sex worker. Service providers must respect your rights and take your complaints seriously. You cannot be treated badly while in police custody.</p>	<p>Article 15</p>
<p>Right to privacy: Everyone has the right to privacy and no person shall be searched or have his/her property searched without their consent – unless this is allowed by the law.</p>	<p>You have the right to keep your health and work information to yourself. You can also not be searched without your consent. If the police want to search you because they suspect you have committed an offence, they must follow the correct procedures.</p>	<p>Article 17</p>
<p>Freedom of expression: Everyone has the right to freedom of expression – which includes the right to give and receive information or ideas.</p>	<p>You have the right to express your views on issues, as long as they do not hurt another person.</p>	<p>Article 20</p>
<p>Freedom of association: Everyone has the right to freedom of association.</p>	<p>You have the right to join clubs, groups or organisations, and to take part in public gatherings.</p>	<p>Article 21</p>
<p>Freedom of movement: Every citizen has the right to move about freely, to live in or leave the country, and to live anywhere within the country.</p>	<p>You may move around the country as you wish, and may not be forced to move to a separate place. If you are detained by the police, this detention must be lawful.</p>	<p>Article 22</p>

<p><i>Rights of accused persons:</i> Every person who has been charged with an offence, is entitled to a fair hearing within a reasonable time, by an impartial court.</p>	<p>Every person who has been charged with an offence should:</p> <ul style="list-style-type: none"> • Be presumed innocent, until proved guilty; • Be informed in detail of the nature of the offence; • Be allowed to ask for an interpreter; • Be given a copy of a judgment; • Not be forced to give evidence. 	<p>Article 18</p>
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Limitation of constitutional rights

As discussed above, fundamental rights are universal and are enjoyed by every member of society – irrespective of *inter alia* race, culture, and social and economic status. In certain circumstances, however, the State may limit the fundamental rights of persons, if it is reasonable to do so.

If the State, however, seeks to limit the rights of any person, it must prove that the limitation of these rights is proportionate and reasonably justifiable in a democratic society. If the State fails to prove this, the limitation is unlawful and unjustifiable.

The State must provide evidence to justify the limitation. This evidence must show that there is no alternative or lesser means to protect the valid State interest – other than the limitation of the right. Bare assertions, suspicions or speculations by the State that a particular act or conduct is contrary to public morality, public interest, or good order, is insufficient to fulfil the requirements necessary for a justified limitation of a constitutional right.

Recent legal developments that protect women’s rights

The **Anti-Gender-Based Violence Act**, was passed in 2011 to protect the victims of gender-based violence. The Act applies in cases where the victim of violence is in a domestic relationship with the perpetrator. A domestic relationship includes a relationship where the victim is in an actual or perceived sexual relationship, of any duration, with the perpetrator. A domestic relationship also relates to instances where family members, parents or a spouse are the perpetrators of violence. A domestic relationship is also present where the victim and perpetrator share the same residence or are co-tenants, and where the victim is a house-helper/keeper in the household of the perpetrator.

Sex workers often experience gender-based violence, which could fall within one of the categories of a domestic relationship. In such cases, they should be able to report the abuse to the police, and should receive assistance.

Gender-based violence refers to any physical, mental, social or economic abuse against a person, because of that person's gender. Acts which fall within this definition, include: physical abuse; sexual abuse; emotional, verbal or psychological abuse; economic abuse; intimidation; harassment; stalking; controlling behaviour; malicious damage to property; depriving a person of access to property; trafficking; and conduct that in any way endangers the safety, health or wellbeing of the person, undermines the person's privacy, integrity or security, or detracts from the person's dignity.¹⁹ A single act may amount to gender-based violence.²⁰

If a person has been a victim of gender-based violence from any type of domestic relationship, the Act places specific duties on police officers to assist him or her – including by responding promptly to any request for assistance and offering protection.²¹ Importantly, a sex worker is entitled to the same support if she has experienced gender-based violence, and the police may not discriminate against her because she engages in sex work.

The **Gender Equity and Equality Act** was passed in 2015. Its objectives include the establishment of a Gender Equity and Equality Commission. In terms of section 231 of the Constitution, the Commission shall:

- a) Monitor, investigate, research, educate, advise and report on issues concerning gender equality;
- b) Ensure institutions comply with legal requirements and other standards relating to gender equality; and
- c) Take steps to secure appropriate redress for complaints relating to gender inequality.

The Gender Equity and Equality Act sets out several principles to achieve gender equality and equity including:²²

- Observance of women's rights as an integral part of attaining equity and equality in all spheres of life;
- No exploitation, degrading or undermining of women;
- The elimination of gender bias;
- Justice and fairness for survivors of gender-based violence – to ensure dignity, protection and respect.

Section 15(1) of the Gender Equity and Equality Act provides that a person, public body or private body shall not discriminate against any person based on their sex. Section 16(1) further states that a person, public body or private body have a duty to uphold the rights of both sexes and to respect and safeguard the dignity of both sexes. Section 16(2) provides that a person, public body or private body, shall not exploit or subject any person to abusive, violent or degrading treatment. Any person who violates these provisions is liable for criminal punishment.

¹⁹ See definitions in section 3(1) of Anti-Gender-Based Violence Act, Act 1 of 2011.

²⁰ Section 4.

²¹ Sections 5, 7 and 8.

²² Section 4, Gender Equity and Equality Act, 2015.

The Act specifically protects women's sexual and reproductive rights:

"21(1) A woman has the right to adequate sexual and reproductive health, which includes the right to –

- a) access sexual and reproductive health services;*
- b) access family planning services;*
- c) be protected from sexually transmitted infection;*
- d) self-protection from sexually transmitted infections;*
- e) choose the number of children and when to bear those children;*
- f) control fertility;*
- g) reproductive rights education; and*
- h) choose an appropriate method of contraception."*

Section 32(3) of the Act provides that a health officer shall respect the sexual and reproductive health rights and dignity of every person without discrimination.

Section 39 criminalises the act of sexual harassment. Sexual harassment is defined in the Act, as including *"conduct or contact of a sexual nature, such as the following:*

- a) having physical contact, making advances, comments or innuendos without the consent of a person;*
- b) being offensive, humiliating or intimidating to a person in a suggestive manner; or*
- c) threatening or imposing a condition on a person for doing or undertaking anything or creating a hostile environment for an employee."*

The Criminal Procedure and Evidence Code

The Criminal Procedure Code sets out the procedures to be followed when a person is arrested. Police are obliged to follow the provisions in the Code.

Any police officer may arrest *"any person whom he suspects upon reasonable grounds of having committed a cognisable offence"*²³ or a person found in circumstances where there are reasonable grounds for suspecting the person has, or is, about to commit a serious offence.²⁴

Several conditions must be met when a police officer effects an arrest:

- The person arrested shall not be subjected to more restraint than is necessary to prevent his escape;²⁵
- The police officer must place in safe custody all articles, other than clothes, found upon the person;²⁶
- When a woman is to be searched by the police, the search must be made by another woman, with strict regard to decency.²⁷

²³ Section 26(a)

²⁴ Section 26(f) *"Any person whom he finds in any highway, yard or other place during the night, and whom he suspects upon reasonable grounds of having committed or being about to commit a felony."*

²⁵ Section 21.

²⁶ Section 22.

²⁷ Section 24.

- Once arrested, a person must be brought before a court within 24 hours;²⁸
- Once arrested, a person may apply for bail at any time,²⁹ and the amount of bail shall not be excessive;³⁰

Where people are arrested during sweeping exercises, there must be specific charges relating to the acts of each person and there cannot be a joinder of persons in one charge, unless specific circumstances are met.³¹

These requirements are often not met when police effect arrests, especially when such arrests take place during large-scale operations, and when such arrests target marginalised groups – including sex workers. In a context where there is excessive use of pre-trial detention, it is imperative that consideration is also given to the offences which are used by the police to arrest and detain persons, and whether such detention and offences are indeed necessary.³²

Criminal offences relating to sex work

*“There is very little evidence to suggest that any criminal laws related to sex work stop demand for sex or reduce the number of sex workers”.*³³

The legal framework in Zambia can be described as one of partial criminalisation. Partial criminalisation refers to a situation where only the activities related to sex work are criminalised, and not the actual act of selling or buying sex. Some of the offences criminalising these activities are found in the Penal Code of Zambia, which means that sex work still largely takes place in a criminalised environment in Zambia.

Various studies on the impact of partial criminalisation on sex workers raise the following concerns:³⁴

- It contributes to legal structures that tend to make sex workers responsible for their own victimisation, whereby sex workers are seen to ‘deserve what they get’;
- It makes prostitution part of an illicit market, and creates an environment in which brutal forms of exploitation can take root;
- It encourages the convergence of prostitution with other illicit markets such as the drug market;
- It institutionalises an adversarial relationship between sex workers and police – and thus deprives sex workers of the full protection of criminal law when they are victims of crime;

²⁸ Section 33(1).

²⁹ Section 123(1).

³⁰ Section 126(1).

³¹ Section 136.

³² *Pre-trial detention in Zambia: Understanding caseload management and conditions of incarceration*, OSISA, 2011 at p 2-4.

³³ Annex 1 to the UNAIDS *Guidance Note on HIV and Sex Work*, 2012, at p 4.

³⁴ J Lowman (2000) “Violence and the outlaw status of (street) prostitution in Canada” *Violence Against Women* 2000; 6(9): 987-1011.

- It leads to social and political marginalisation of sex workers, and makes them targets for violence;³⁵ and
- It increases the isolation of street-based sex workers and increases their health and safety risks.

Possible legal approaches to sex work

Total criminalisation – The selling and buying of sexual services and all related activities are criminalised.

Partial criminalisation – Some activities related to sex work are criminalised, but the sex worker is not criminalised.

Non-criminalisation/Decriminalisation – The selling and buying of sexual services and all related activities are decriminalised. Apply existing laws to sex work, including labour laws and business regulations.

Legalisation – The selling and buying of sexual services and some/all related activities are decriminalised under certain conditions – but sex work is subject to state regulation.

Discussions in this report refer to consensual adult sex work, and accordingly do not address issues related to child prostitution and trafficking – for which criminalisation is the only legal option. Child prostitution and trafficking are both coercive and exploitative, which makes them criminal and distinguishes them from consensual adult sex work.

Discussions on laws criminalising sex work are often informed by arguments on morality. Morality is a complex issue and criminal laws are seldom an appropriate avenue for addressing issues relating to sexual morality. The main “morality” arguments in favour of a continued criminalisation of sex work, are that sex work attacks the institution of marriage and encourages extra-marital sex and sex outside relationships. No research substantiates these arguments and sexual relationships outside marriage exist irrespective of sex work. These arguments reflect a particular form of ‘morality’. It can be argued that the denial of basic human rights to a specific group of persons and leaving them vulnerable to exploitation as a result of continued criminalisation of sex work, is also immoral.

³⁵ C Benoit & A Millar (2001) “Dispelling myths and understanding realities: Working conditions, health status and exiting experiences of sex workers” Prostitutes Empowerment, Education and Resource Society (PEERS); F Scorgie et al. (2013) “Human rights abuses and collective resilience among sex workers in four African countries: A qualitative study” *Globalisation and Health* 2013; 9:33.

Offences relating to sex work	Section in Penal Code	Penalty
Procurement: It is an offence to procure any person to become a sex worker or to become an inmate of a brothel.	140	Imprisonment of 20 years to life
Trafficking: It is an offence to sell or traffic any person.	143	Imprisonment for 20 years or more
Detention in a brothel: It is an offence to detain any person in a brothel.	144	Imprisonment for 20 years to life
Living on the earnings of prostitution: It is an offence to knowingly live off the earnings of prostitution. This section applies to people who live in an exploitative manner off the earnings of a sex worker, for their own gain. The section does not criminalise the sex worker herself, and does not prevent her from using her earnings. A person who exercises control over a sex worker is presumed to live off her earnings.	146(1)(a), 147(1)	Imprisonment for up to 15 years
Persistently soliciting in a public place for an immoral purpose: This section was originally aimed at men who solicited other men for sex. The same offence is also in another section of the Penal Code. The term "immoral" is not defined.	146(1)(b) 178(g)	Imprisonment for up to 15 years Imprisonment for one month or a fine
Brothel-keeping: Any person who keeps a room, house or place for the purpose of prostitution.	149	Imprisonment of 15 to 25 years
Obscene matters: Includes the production of obscene materials and the public exhibition of any indecent show or performance "tending to corrupt morals". The terminology in this offence is very vague.	177	Imprisonment for up to 5 years or a fine
Idle and disorderly persons: A number of acts are criminalised under this section, including "every common prostitute behaving in a disorderly or indecent manner in any public place" and "every person who without lawful excuse publicly does any indecent act".	178(a) 178(e)	Imprisonment for one month or a fine

Notably, these provisions are seldom enforced – because they require police officials to investigate and provide evidence of the commission of such offences. Evidence to prove the commission of these offences is usually difficult to obtain, and requires police resources to enforce the provisions. The offences each have several elements that should be proved before a conviction can occur. Instead, police authorities often unlawfully use vagrancy provisions in the Penal Code to arrest and detain sex workers. Sex workers therefore remain a target of police enforcement, abuse, harassment and extortion – even though the substantive offences related to sex work are aimed at those who exploit sex workers.

Offences relating to indecency and vagrancy are vague, over-broad and subjectively and arbitrarily applied by police officials. They are usually enforced against poor and vulnerable groups in violation of their fundamental human rights. The Penal Code contains no guidelines on how police officials should exercise their discretion in the application of these offences – which creates a risk of arbitrary enforcement.

The Human Rights Commission of Zambia (HRC) has emphasised that the subjective and inconsistent application of existing laws in Zambia by police officials, are key issues affecting the enjoyment of fundamental rights.³⁶ The UN Special Rapporteur on Extreme Poverty and Human Rights, has also noted that overly-broad police powers “*increase the exposure of persons living in poverty to abuse, harassment, violence, corruption and extortion by both private individuals and law enforcement officials.*”³⁷

Participants in this study were not always clear about which offence they had been charged with. They mostly reported having been charged with being “idle and disorderly” or “loitering”. In addition, some reported being charged with “common nuisance”, “soliciting”, “touting” and “rogue and vagabond”.

“Idle and disorderly”

Section 178 of the Penal Code deems a person idle and disorderly when:

- Being a ‘common prostitute’, that person behaves in a disorderly or indecent manner in any public place;
- A person without excuse does any indecent act;
- A person publicly conducts him or herself in a manner likely to cause a breach of peace;
- A person in any public place solicits for an immoral purpose.

In the case of a common prostitute behaving in a disorderly or indecent manner

The elements of the offence that need to be proved are that:

- The accused is a “common prostitute”;

³⁶ Human Rights Commission, *The State of Human Rights Report in Zambia* (2014), available at <http://www.hrc.org.zm/index.php/publications/state-of-human-rights/file/59-2014-state-of-human-rights-report> (accessed 16 July 2016).

³⁷ UN General Assembly Report by Special Rapporteur on Extreme Poverty and Human Rights, 66th session (4 August 2011) A/66/265, 5, available at <http://www.ohchr.org/Documents/Issues/Poverty/A.66.265.pdf> (accessed 22 July 2016). See also, UN General Assembly Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation: Stigma and the Realisation of the Human Rights to Water and Sanitation, 21st Session of Human Rights Council (2012) 11.

- The accused behaved in a disorderly or indecent manner; **and**
- Such behaviour took place in public.

While there is no statutory definition for the term “common prostitute”, the term is understood in other jurisdictions to refer to “persons who habitually ply the trade of a prostitute” – as opposed to those who occasionally engage in prostitution. In order to prove the commission of this offence, police officials should provide evidence or proof that the accused has been found engaging in sex work-related offences in the past and has received warnings for doing so, or proof of previous convictions for sex work-related offences.

The reference to “common prostitute” means that any person arrested under the offence is already tainted by a defamatory label when they appear in court, and are likely to face improper prejudice as a result.

Importantly, a person who sells sex but does not engage in disorderly or indecent conduct in a public place – is not guilty of this offence merely by virtue of being a sex worker.

*King v Attorney General*³⁸

The Irish Supreme Court has held that it was unconstitutional to attribute criminal conduct to a person purely because of their status. The Court found it unconstitutional that the ingredients of an offence and the mode by which its commission might be proved, were related to “rumour or ill-repute or past conduct” and were “indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct when engaged in by another person in similar circumstances would be free of the taint of criminality”.

“Soliciting for immoral purposes”

Section 178(g) of the Penal Code deems a person idle and disorderly when that person, in any public place, solicits for an immoral purpose. The same conduct is also prohibited by section 146(1)(b) of the Penal Code – although that section attracts a different penalty.

These sections are vague and over-broad. They do not define “solicit” or “immoral purposes” and create a risk of arbitrary enforcement by police officials against poor and vulnerable individuals, such as sex workers.

The Zambia High Court has held that each of the three elements of the offence (soliciting, in a public place, for an immoral purpose) must be proved to secure a conviction.³⁹

The English courts have interpreted the word “soliciting” to mean conduct:

- Reflecting more than a mere act of loitering;
- Amounting to an importuning of prospective customers;⁴⁰
- Which requires physical presence on the part of the sex worker;⁴¹

³⁸ [1981] I.R. 233.

³⁹ *People v Kasonkomona*, Lusaka High Court, HPA 53/2014, judgment 15 May 2015.

⁴⁰ JC Smith & B Hogan *Criminal Law* 4 ed (1978) 434.

⁴¹ *Weisz and Another v Monahan* [1962] 1 All ER 664 (holding that soliciting involved the physical presence of the prostitute and

- Extending into a public place;⁴²
- Which is constituent of persistent persuading, begging or entreating.⁴³

The Zambian High Court has similarly held that the element of ‘soliciting’ requires evidence of “persistent importunation”⁴⁴

The phrase “immoral purpose” is vague, since it does not provide sufficient information about the conduct which is prohibited. It provides police officials with undue discretion to determine what would amount to an “immoral purpose” within particular circumstances – without providing guidelines on the exercise of this discretion. In *City of Chicago v Morales*, the United States Supreme Court held that where a law contained no guidelines for the exercise of police discretion, it invited uneven police enforcement.⁴⁵

Kaseka and Others v Republic⁴⁶

In this case, the police visited rest houses where the appellants were found in rooms. Some had male companions, but others were alone. Police assumed they were there for immoral purposes and arrested them on charges of being idle and disorderly, contrary to section 180(1) of the Malawi Penal Code. Each pleaded guilty, was convicted, and fined K20 or two months’ imprisonment with hard labour. Each of the appellants failed to raise K20 – resulting in the prison term being effected.

The Malawi High Court set aside their convictions and sentences. In doing so, the Court criticised the arbitrary manner in which the police effected the arrests. The Court held that it was wrong to think that because the appellants were found in rest houses – that such constituted immoral activity. A rest house is a business premise open for the public to stay during the day or overnight on payment of a prescribed amount. The Court held that both men and women have a right to stay in rest houses, provided that they do not breach the law – and the police cannot simply arrest persons based on assumptions of engagement in “immoral activity”: *“It seems to me that police action was rather discriminatory because only the appellants were arrested leaving their male companions free. Even those who had no male companions were not to be arrested just because they were suspected to be there for purposes of immoral activity.”*

“Rogue and vagabond”

There are various acts in section 181 of the Penal Code, which are used to deem a person rogue and vagabond. A person who is deemed to be rogue and vagabond, is guilty of a misdemeanour and is liable for imprisonment for three months for the first offence, and to one year’s imprisonment for every subsequent offence.

conduct on her part amounting to the importuning of prospective customers).

⁴² *Behrendt v Burridge* [1977] 1 WLR 29 (holding that the conduct of a scantily-clad woman sitting in a window with a red light amounted to soliciting, because, even though she did not actively approach customers, her presence at the window sought to attract prospective clients for the purpose of prostitution).

⁴³ The Canadian Supreme Court has held that to “solicit”, is synonymous with the act of accosting or importuning in a manner that is pressing or persistent. *R v Hutt* (1978) 2 SCR 476 at para 17.

⁴⁴ *People v Kasonkomona*, Lusaka High Court, HPA 53/2014, judgment 15 May 2015.

⁴⁵ 527 US 41 US (1999). See, also, *NAACP Anne Arundel Country Branch v City of Annapolis* 133 F 2nd (D Md 2001).

⁴⁶ [1999] MLR 116 (HC).

Sex workers are commonly arrested under section 181(d) of the Zambian Penal Code. It provides that *“every person found wandering in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose; shall be deemed to be a rogue and vagabond.”*

In order to be found guilty of being rogue and vagabond, the police should provide evidence and the prosecution must prove all the elements of the crime. The Malawi High Court in *Republic v Lawanja* held that *“it is not an offence for any person to enjoy the freedom, peace and calm of the country and walk about in public places be it aimlessly and without a penny in the pocket. One does not commit an offence by simply wandering about.”*⁴⁷

This section is vague and over-broad and likely to be arbitrarily enforced and abused by police officials. In particular, the offence violates criminal law principles, by subjecting someone to arrest without requiring proof of their criminal intent. Several courts in the United States have ruled that certain vagrancy laws are void, because of their vagueness and arbitrary enforcement. In *Papachristou v City of Jacksonville*,⁴⁸ the United States Supreme Court struck down a vagrancy offence as unconstitutionally vague because it did not sufficiently curtail police discretion, which can be easily abused.

Stella Mwanza and 12 Others v Republic⁴⁹

The case concerned 13 women arrested as guests of rest houses during a police sweep. The Malawi High Court held that the convictions were improper, as there had been no indication from the facts that the women were there for a disorderly purpose. The judge noted that the English definition of a rogue is a dishonest or unscrupulous person, while a vagabond is one with no fixed home and living an unsettled and errant life. The Court commented that *“surely the law could not have intended to criminalise mere poverty and homelessness more especially in a free and open society. It could never be a crime for a person to be destitute and homeless. And if a person is homeless he or she is bound to roam around aimlessly. One would have thought it becomes State responsibility to shelter and provide for such persons than condemn them merely on account of their lack of means.”*

“Loitering”

The police sometimes cite offences such as loitering to arrest sex workers. Loitering used to be codified in Zambian law when there was a curfew in force. However, the regulation was removed after 1991.⁵⁰ In 2014, the Director of Public Prosecutions publicly condemned the continued arrest of people at night for “loitering” – emphasising that no such offence exists.⁵¹

⁴⁷ *Republic v Lawanja and Others* [1995] 1 MLR 21.

⁴⁸ (1972) 405 US 156. See, also, *Using the Courts to Protect Vulnerable People: Perspectives from the Judiciary and Legal Profession in Botswana, Malawi, and Zambia* (2015), SALC, at p57, available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/12/Using-the-courts-WEB.pdf> (accessed 16 July 2016).

⁴⁹ [2008] MWHC 228.

⁵⁰ Available at <http://zambiadailynation.com/2014/08/01/police-and-loitering/> (accessed 16 July 2016).

⁵¹ Available at <http://zambiadailynation.com/2014/08/01/police-and-loitering/> (accessed 16 July 2016).

“Living on the earnings of prostitution”

In England, the 1885 prohibition on brothels limited the places where sex workers could work, and increased their reliance on third parties such as pimps and taxi drivers to find customers for them. In turn, third parties increasingly exploited and abused sex workers. Thus, in 1898, an amendment to the English Vagrancy Act was passed that was intended to protect sex workers by criminalising men who made a living off the earnings of a sex worker.⁵² The offence was extended to women who lived off the earnings of sex workers in 1912.⁵³ The application of the living-on-the-earnings offence to women, was premised on stories circulating at the time about women’s involvement in trafficking and procuring other women for the sex trade.⁵⁴ The offence does not prohibit sex workers from earning a living.⁵⁵

Sections 146 and 147 of the Penal Code of Zambia makes it a felony to knowingly live wholly or in part on the earnings of the prostitution of another – or, for the purpose of gain to exercise control, direction or influence over the movements of a prostitute. Initially, section 146 applied to men and section 147 applied to women – but the offences were made gender-neutral through an amendment in 2005.⁵⁶

In many countries, a presumption exists that a person is living on the earnings of prostitution when that person is habitually in the company of, or lives with, a sex worker.

Various courts have consistently sought to align the language of the living-on-the-earnings prohibition with its legislative objective – which was to protect sex workers from exploitation by others. In *R v Downey*,⁵⁷ the Canadian Supreme Court confirmed that the prohibition of living on the earnings of prostitution is aimed at a person who lives parasitically off a sex worker’s earnings.

The Ontario Supreme Court in *Canada v Bedford* considered the extent to which the living-on-the-earnings prohibition played a contributory role in preventing sex workers from taking steps that could reduce the risk of violence from clients.⁵⁸

⁵² Speaking about the object of the 1898 amendment, the Secretary of State for the Home Department, noted that “it was intended for the purpose of bringing under the operation of the Vagrancy Act, 1824, as rogues and vagabonds, those men who lived by the disgraceful earnings of the women whom they consorted with and controlled.” House of Commons Debate on the Vagrancy Act Amendment Bill, 14 March 1898, Hansard, available at <http://hansard.millbanksystems.com/commons/1898/mar/14/vagrancy-act-amendment-bill> (accessed 21 July 2016).

⁵³ Discussions in the House of Lords, at the time, emphasised: “With the immoral man and immoral woman the law is not concerned. But with the procurer, the kidnapper, the souteneur, the trafficker in human life, the person, man or woman, who fattens on the proceeds and earnings of another’s degradation.” House of Lords Debate on the Criminal Law Amendment (White Slave Traffic) Bill, 28 November 1912, Hansard, available at <http://hansard.millbanksystems.com/lords/1912/nov/28/criminal-law-amendment-bill> (accessed 21 July 2016).

⁵⁴ The original rationale for having a different offence for men and women, was that the offence included corporal punishment as a punitive option for men – but not for women. Both sections were eventually repealed in England by the Sexual Offences Act of 2003, and replaced with a single provision dealing with any person exerting control for gain over a prostitute.

⁵⁵ SALC and CHREAA (2013) Memorandum on section 146 of the Malawi Penal Code, <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/08/Memorandum-on-s146-of-Malawi-Penal-Code.pdf> (accessed 21 July 2016).

⁵⁶ SALC and CHREAA (2013) Memorandum on section 146 of the Malawi Penal Code, available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/08/Memorandum-on-s146-of-Malawi-Penal-Code.pdf> (accessed 21 July 2016).

⁵⁷ 1992 2 SCR 10.

⁵⁸ *Canada (Attorney General) v Bedford* [2013] 3 SCR 1101. Available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13389/index.do> (accessed 21 July 2016).

Canada v Bedford

Exchanging sex for money is legal in Canada. In 2013, the Supreme Court of Canada struck down the offence of living on the earnings of prostitution as being unconstitutional. The judge found that the offence violated the rights of sex workers under article 7 of the Constitution, which protects the right to life, liberty and security. The Court relied on the doctrine which says that, when limiting a right, a law cannot be arbitrary, over-broad, or have a grossly disproportionate impact compared to the State's objective. The judge ruled that the offence of living on the avails of prostitution was over-broad, and criminalised legitimate business partners of sex workers – when it was originally aimed at pimps and other exploitive relationships.

The above offences stem directly from English law and have often been criticised for being ineffective in curbing sex work. Instead, these laws are being used to stigmatise and unfairly discriminate against sex workers. They leave sex workers vulnerable to extortion, loss of property, and harassment – by both police officials and clients. In addition to the offences' subjective, arbitrary and indiscriminate application by police, they also unreasonably and unjustifiably limit several constitutional rights – including the right to dignity, equal protection under the law, and freedom and security of the person. These offences perpetuate the vulnerability of sex workers to violence, stigmatisation and abuse, and contribute to their marginalisation.

The UNAIDS Advisory Group on HIV and Sex Work noted that:

*“There is very little evidence to suggest that any criminal laws related to sex work reduce demand for sex or the number of sex workers. Rather, all of them create an environment of fear and marginalisation for sex workers, who often have to work in remote and unsafe locations to avoid arrest of themselves or their clients. These laws can undermine sex workers' ability to work together to identify potentially violent clients and their capacity to demand condom use of clients ... Where sex work is criminalised, sex workers are very vulnerable to abuse and extortion by police in detention facilities and elsewhere ...”*⁵⁹

Although the act of selling sex is not criminalised in Zambia, the subjective and arbitrary application of provisions in the Penal Code by police officials, creates a culture of impunity in which sex workers remain a target of police enforcement, harassment and abuse. In this regard, UNAIDS has also noted that the application of vagrancy laws *“give police wide latitude to arrest and detain sex workers. Even if they do not generally result in long periods of detention, they contribute to an atmosphere of fear and marginalisation”*.⁶⁰

⁵⁹ Annex to the UNAIDS *Guidance note on HIV and Sex Work*, April 2012, p4, available at http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306_UNAIDSguidance-note-HIV-sex-work_en.pdf (accessed 16 July 2016). This position was endorsed by the Global Commission on HIV and the Law in July 2012. Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights and Health*, UNDP, July 2012, p36-7, available at <http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf> (accessed 16 July 2016).

⁶⁰ UNAIDS *Guidance Note on HIV and Sex Work* (2012) p3, annexure 4.

Findings on sex workers' interactions with, and experiences of, the police

The participants in this study

Thirty nine (39) sex workers participated in the workshop which was convened on 23 May 2016, and they also completed questionnaires. The participants came from different areas in Lusaka: Matero (1), Kaunda Square (3), Kabanana (4), Garden compound (10), and Chipata compound (21).

All participants were female. The participants' ages ranged from 20 to 40.⁶¹ When they were asked how long they had been a sex worker, it was clear that some started engaging in sex work from a young age.⁶² This is confirmed by a recent survey of sex workers in Zambia, that estimated that the median age at which female sex workers (FSW) first exchanged sex for money was 20 years – with a range of 16 to 25 years.⁶³ The participants' length of experience as a sex worker ranged from a few months to 20 years.⁶⁴

Most participants were single (37), with one participant married and one participant widowed. Eighty nine percent (89%) of participants had children, with half of participants reporting two children.⁶⁵

In Zambia, primary education is from grades 1 to 7 and secondary education from grades 8 to 12. Education from grades 1 to 9 is free but not compulsory.⁶⁶ In a recent survey of sex workers in Zambia, it was estimated that forty percent (40%) were below the age of 25 and the median age of education is 9th grade.⁶⁷ Participants' furthest level of education varied, with all participants having completed lower primary education (grades 1 to 4) and seventy percent (70%) having completed at least primary education.⁶⁸

⁶¹ 39 participants answered this question.

⁶² 38 participants answered this question.

⁶³ *Integrated Biological and Behavioural Surveillance Survey among female sex workers in Zambia*, 2015, USAID, Corridors of Hope, at p 21, available at [http://www.nac.org.zm/sites/default/files/publications/IBBS%202015%20Final%20Report%204%20March%202016%20\(1\).pdf](http://www.nac.org.zm/sites/default/files/publications/IBBS%202015%20Final%20Report%204%20March%202016%20(1).pdf) (accessed 22 July 2016).

⁶⁴ 38 participants answered this question.

⁶⁵ 38 participants answered this question. In general, based on 2010 statistics, women in Zambia have a fertility rate of 5.9 births per woman, *Zambia Demographic and Health Survey 2013-14*, Central Statistical Office, Lusaka, March 2015, at p 3.

⁶⁶ The percentage of girls of primary school age who attend primary school is 85% in Lusaka, but this drops to 53% for girls of secondary school age who attend secondary school. *Zambia Demographic and Health Survey 2013-14*, Central Statistical Office, Lusaka, March 2015 at p 30.

⁶⁷ *Integrated Biological and Behavioural Surveillance Survey among female sex workers in Zambia*, 2015, USAID, Corridors of Hope, at p xv.

⁶⁸ 35 participants answered this question.

Most participants (78%) said they practised sex work indoors, with the remainder (22%) indicating they engaged in sex work both indoors and on the street.⁶⁹ This finding is not representative of the sex trade in Zambia, but it is important to take into account when assessing the participants' experience of violence. Most participants found their clients in bars and clubs.

Participants' number of clients per week varied – with seventy percent (70%) reporting 1 to 3 clients in the preceding week.⁷⁰ Participants often did not receive much money from these clients, with rates varying between K50 and K200.⁷¹

Two thirds of participants (66%) indicated that sex work was their only form of income.⁷² One third of participants (33%) also had some other form of income, including a business, salon, selling rice or clothes, and cross-border trading.⁷³ Seventy seven percent (77%) of participants earned less than K1000 in the previous week.⁷⁴

Despite their low income, participants have many dependents to support – with twenty nine percent (29%) reporting one to three dependents, thirty nine percent (39%) reporting four to five dependents, nineteen percent (19%) reporting six to ten dependents, and thirteen percent (13%) reporting more than 10 dependents.⁷⁵

Experiences of violence

Sex workers are vulnerable to stigma, discrimination and harassment in all areas of their lives – at work, among their family, at home, and when accessing basic services including health services. Many participants reported that their fear of police authorities has prevented them from reporting crimes committed against their person by others, and also by the police themselves. Their fear of the police creates a space in which they are vulnerable to violence and abuse with impunity.

Ninety percent (90%) of participants reported they have experienced violence from police or other men during their work as sex workers.⁷⁶ This is much higher than for the general population. In the ZDHS, forty one percent (41.6%) of women in Lusaka reported having ever experienced physical violence.⁷⁷

⁶⁹ 36 participants answered this question.

⁷⁰ 37 participants answered this question. The information obtained from this research differed from that of a recent survey in which 50% of FSW indicated more than 5 clients in the past 7 days. *Integrated Biological and Behavioural Surveillance Survey among female sex workers in Zambia*, 2015, USAID, Corridors of Hope, at p 23.

⁷¹ 37 participants answered this question.

⁷² 36 participants answered this question.

⁷³ 36 participants answered this question.

⁷⁴ 36 participants answered this question. It is unclear whether this income was from sex work alone – or also from other work.

⁷⁵ 32 participants answered this question.

⁷⁶ 37 participants answered this question.

⁷⁷ *Zambia Demographic and Health Survey 2013-14*, Central Statistical Office, Lusaka, March 2015 at p 276.

Physical assault

"The police beat us up in our spots when they find us and afterward they make us give them money."⁷⁸

Sex workers in Zambia are extremely vulnerable to repeated physical assault from the police and clients. Three participants respectively reported having been beaten by police on 6, 11, and 23 separate occasions in the past year. Assault from clients was also often experienced by participants.

When assessing the perpetrators of physical violence, the ZDHS noted that less than one percent (0.3%) of women reported having experienced physical violence from a police officer.⁷⁹ In this context, it is possible that sex workers are at much higher risk of violence from police, because of their marginalised position in society.

Sexual assault

"The police harass us, sleep with us and even put us in cells if they want us to pay them. If you have worked well they will release you, if not, you end up working for them."⁸⁰

"They make us their sex workers while we are doing our work. They rape us and they insult us a lot. If they want, they put you in the cells and beat you."⁸¹

Sex workers in Zambia are vulnerable to sexual assault and rape by their clients and the police. Often, police officials request sex from sex workers in exchange for them not being unlawfully arrested, detained, or fined.

Sex workers reported frequent rapes from clients – but indicated it was difficult for them to report such cases to the police. Notably, in the ZDHS, six percent (6.2%) of women in Lusaka reported having experienced sexual violence in the past 12 months.⁸²

Loss of property

Many sex workers are vulnerable to theft and extortion at the hands of their clients and the police authorities. Ninety percent (90%) of participants indicated that police had demanded money from them, in exchange for not being arrested or detained.⁸³

The participants reported that the police claimed that sex workers earned a lot of money, and that the police needed the money from the bribes to pay for airtime, food and transport. Of those

⁷⁸ Anonymous participant, Lusaka, Zambia.

⁷⁹ *Zambia Demographic and Health Survey 2013-14*, Central Statistical Office, Lusaka, March 2015 at p 277.

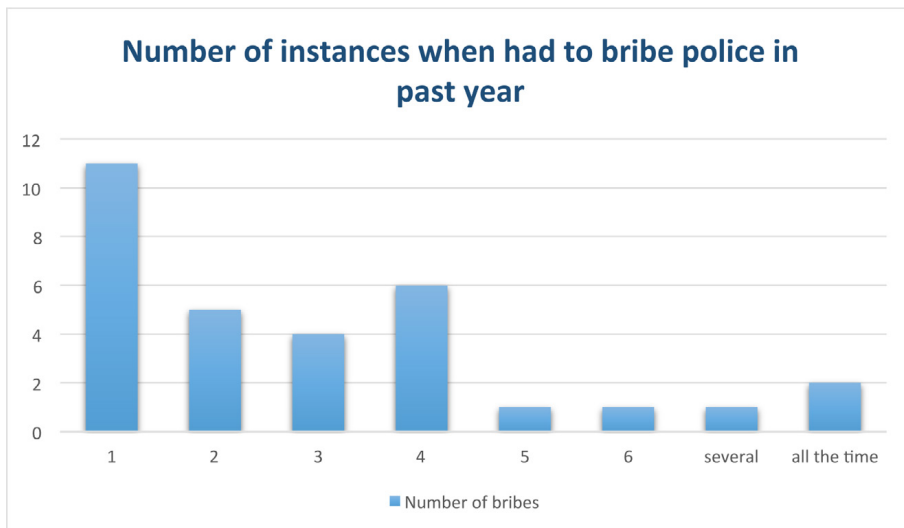
⁸⁰ Anonymous participant, Lusaka, Zambia.

⁸¹ Anonymous participant, Lusaka, Zambia.

⁸² *Zambia Demographic and Health Survey 2013-14*, Central Statistical Office, Lusaka, March 2015 at p 278.

⁸³ 38 participants answered this question.

participants who reported being bribed, most were also asked for bribes in the past year.⁸⁴



There are reports of bribes – even when the sex workers were seeking help from others. One of the participants said that “two months ago my child was raped and the police afterwards demanded that I give them money.”⁸⁵

The Human Rights Commission Chairperson, in her annual address in 2009 on the human rights situation in Zambia, also cautioned against the unnecessary detention of people – and noted that the Commission has “received so many complaints about police violation of rights, illegal detentions, (and) collection of un-receipted penalties”.⁸⁶ One participant noted that “They tell us ‘pay us or you will go to court’ and we pay minus the receipt.”⁸⁷

Health vulnerabilities

The partial criminalisation of sex work has a direct impact on the transmission of HIV, in two ways:

- It impacts on sex workers’ access to health services – including sexual and reproductive health and family planning services;⁸⁸ and
- It creates conditions for increased violence against sex workers and limits their ability to protect themselves from HIV infection.⁸⁹

⁸⁴ 31 of 34 participants who indicated they had ever been bribed.

⁸⁵ Anonymous participant, Lusaka, Zambia.

⁸⁶ Pixie Kasonde Yangoulo, Review on the state of human rights in Zambia, 21 January 2010, 8.

⁸⁷ Anonymous participant, Lusaka, Zambia.

⁸⁸ F Scorgi et al. (2012) “We are despised in the hospitals’: Sex workers’ experiences of accessing health care in four African countries” *Culture, Health and Sexuality*, 2012.

⁸⁹ D Kerrigan et al. (2013) *The Global Epidemic Among Sex Workers*, Report by the International Bank for Reconstruction and Development, World Bank; J Okal et al. (2011) “Sexual and physical violence against female sex workers in Kenya: A qualitative

NASTAD, Zambia, has emphasised that criminalisation (of sex work-related activities) drives sex workers underground where interventions cannot reach them, and then unsafe practices are perpetuated.⁹⁰

Guideline 4 of the UNAIDS International Guidelines on HIV/AIDS and Human Rights, 2006, promotes the decriminalisation of voluntary adult prostitution:

“With regard to adult sex work that involves no victimisation, criminal law should be reviewed with the aim of decriminalising, then legally regulating occupational health and safety conditions to protect sex workers and their clients, including support for safe sex during sex work. Criminal law should not impede provision of HIV prevention and care services to sex workers and their clients.”

The National AIDS Strategic Framework 2014-2016 specifically targets sex workers as a key population for the promotion of HIV prevention.⁹¹ The Gender Equity and Equality Act, 2015, further provides, in section 21, that every person has the right to self-protection from sexually transmitted infections.

Police often justify police operations to arrest sex workers, because it is necessary to prevent HIV transmission. Such operations ignore the fact that it is often clients, and not sex workers, who refuse to use a condom.

Most participants reported using condoms all or most of the time.⁹² In comparison, the ZDHS noted that of the men who reported having ever paid for sex, only sixty percent (60%) reported using a condom at the last paid sexual intercourse – with men in Lusaka reporting seventy three percent (73.5%) condom use at the last paid sexual encounter.⁹³ A recent Behavioural Surveillance Survey (BBS) in Zambia noted that seventy eight percent (78%) of sex workers reported using a condom with a client during the last sexual encounter.⁹⁴

Participants reported often buying condoms at a chemist or shop.⁹⁵ Many reported receiving condoms from the clinic – but there were often difficulties associated with this, such as not being

enquiry” AIDS Care, May, 23(5): 612-618.

⁹⁰ M Mwondela et al. “Legal, policy, and socio-cultural barriers to HIV-related prevention, treatment, care and support for key populations in Zambia” *National Alliance of State and Territorial AIDS Directors* (2015), available at https://www.nastad.org/sites/default/files/Zambia_Law_Review.pdf (accessed 22 July 2016).

⁹¹ National AIDS Strategic Framework 2014-2016, at p 33-35.

⁹² Thirty seven (37) participants answered this question. The number of participants who reported using a condom all or most of the time, is higher than the results of a recent survey in Zambia – but the reason might be due to the difference in districts which the survey reported on. In that survey, 35% of FSW reported using it every time, 12% almost every time, 50% sometimes, and 2% never. *Integrated Biological and Behavioural Surveillance Survey among female sex workers in Zambia*, 2015, USAID, Corridors of Hope, at p 31.

⁹³ *Zambia Demographic and Health Survey 2013-14*, Central Statistical Office, Lusaka, March 2015, at p 215.

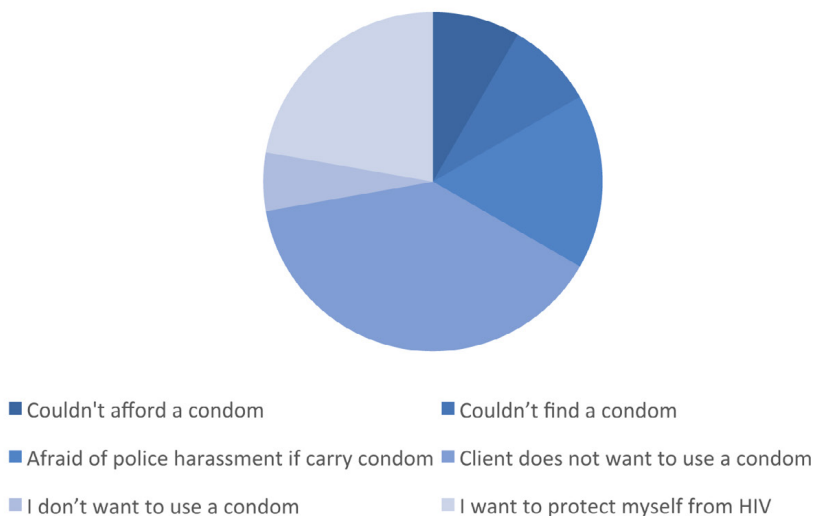
⁹⁴ *Integrated Biological and Behavioural Surveillance Survey among female sex workers in Zambia*, 2015, USAID, Corridors of Hope, at p xiii.

⁹⁵ This was also confirmed in a recent study that showed that 66% of FSW sourced their condoms from shops, *Integrated Biological and Behavioural Surveillance Survey among female sex workers in Zambia*, 2015, USAID, Corridors of Hope, at p 22.

able to access condoms without undergoing voluntary counselling and testing or other treatment. Participants also reported stigmatising attitudes from health workers. While a few participants reported accessing condoms in a bar or club, this was not a main source of obtaining condoms. This is a concern since bars and clubs are the main places where participants find clients. Condom usage could definitely be improved by increasing access to free condoms at different locations.

When asked what influences whether they will use a condom with a client, some participants indicated that if a client does not want to use a condom this would influence whether a condom is used.⁹⁶ However, some participants strongly indicated that nothing would deter them from using a condom, since their main objective was to protect themselves from HIV.⁹⁷

Factors influencing condom use



While the State is actively seeking to increase access to condoms for end users, these measures are thwarted when police take away condoms from sex workers; seven women reported police confiscating their condoms. Some of the participants indicated that they are fearful of police harassment if the police find them in possession of condoms. While most participants (88%) have not had condoms confiscated from them, those who reported police confiscating condoms, indicated that this had happened to them on several occasions.⁹⁸ Three participants indicated

⁹⁶ 36 participants answered this question. This correlates with the finding of a recent survey, which indicated that 55% of FSW who did not use a condom with a client during the last sexual intercourse, indicated that the client objected, *Integrated Biological and Behavioural Surveillance Survey among female sex workers in Zambia*, 2015, USAID, Corridors of Hope, at p 29.

⁹⁷ 36 participants answered this question.

⁹⁸ 38 participants answered this question, and 6 responded they had experience of police confiscating condoms from them. This

that condoms were confiscated from them by police “many times”, one participant indicated that condoms had been confiscated from her on 10 occasions and one participant said that condoms had been confiscated from her on two occasions. Any practice of confiscating condoms has the effect of discouraging condom use and increasing vulnerability to HIV and other STIs; of increasing mistrust and the resentment of police officers; and of violating sex workers’ rights to health and self-protection from HIV.⁹⁹ The issue of condom confiscation by police appears to be less acute in Zambia than in other countries. A possible reason for this, is that in other countries condoms are confiscated for use as evidence in criminal prosecutions, while in Zambia sex workers reported arrests, but no prosecutions.

It is important to also reduce the violence experienced by sex workers – which would in turn have a significant impact on reducing HIV among sex workers.¹⁰⁰ Sex workers’ experiences of police and their willingness to open cases at the police station, often directly affect the extent to which they can access healthcare services post-rape, including post-exposure prophylaxis and emergency contraception.

Sex workers’ vulnerabilities to violence also extend far beyond the risk of HIV infection, and it is important that health programmes don’t just provide services to sex workers in relation to HIV.

Reporting abuse and harassment

Sex workers in Zambia are vulnerable to harassment and abuse – but many feel they have no avenue for recourse as the perpetrators of the harassment and abuse are police officials. **Ninety one percent (91%) of the participants indicated they had a bad relationship with the police, with the remainder being more neutral about their interaction with the police.**¹⁰¹ Two thirds of participants reported they had been stopped and searched by police.¹⁰² Ninety five percent (95%) of participants reported having ever been arrested by police.¹⁰³ Of these, two thirds reported having been arrested on several occasions in the past year.

Participants reported being charged for a range of offences – the most frequent being “idle and happened at various police stations.

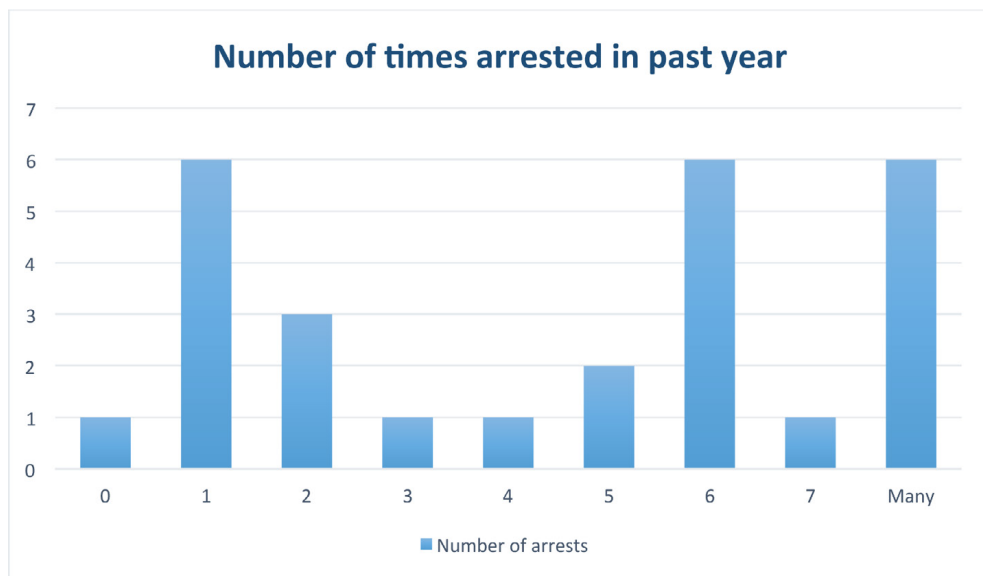
⁹⁹ *Public Health Crisis: The impact of using condoms as evidence of prostitution in New York City*, April 2012, The Pros Network, Sex Workers’ Project, at p 30.

¹⁰⁰ M Decker *et al.* “Estimating the impact of reducing violence against female sex workers on HIV epidemics of Kenya and Ukraine” *American Journal of Reproductive immunology* 2013, 69, 122-132, at p128.

¹⁰¹ 37 participants answered this question.

¹⁰² 36 participants answered this question. In *Floyd and others v the City of New York* [08 Civ. 1034 (SAS), 12 August 2013, Shira Scheindlin, challenged the ‘stop and frisk’ practice of the police, which targeted minority groups, the plaintiffs argued that the current ‘stop and frisk’ practice violated their constitutional rights in two ways: They were stopped without a legal basis in violation of their right to personal security, which includes the right to be protected from unreasonable searches; and they were targeted for stops based on their race in violation of their right to equal protection of the law.

¹⁰³ 37 participants answered this question.



disorderly” and “loitering”.

During arrest, participants complained they were often not treated well. Words used to describe their treatment during arrest included: “bad” (used 17 times) or “beaten” (used 13 times). Other words used to describe their treatment during arrest, included: “rough”, “terrible”, “degrading”, “insulting”, “discriminatory”, “harassing” and “very bad”.

Once detained, participants mostly noted their experiences in the police cells as: “bad” or “very bad”. Other words used to describe their experience in cells include: “tough”, “cold”, “dirty”, “smelly”, “terrible”, “not good”, “hard”, “rape”. These experiences are not unusual, and the conditions of detention in police cells are known to be below international standards.¹⁰⁴

After arrest, participants explained they are usually either released the next day; pay a fine and are then released; or pay a bribe to police and are then released. No participant had the experience of being taken to court.

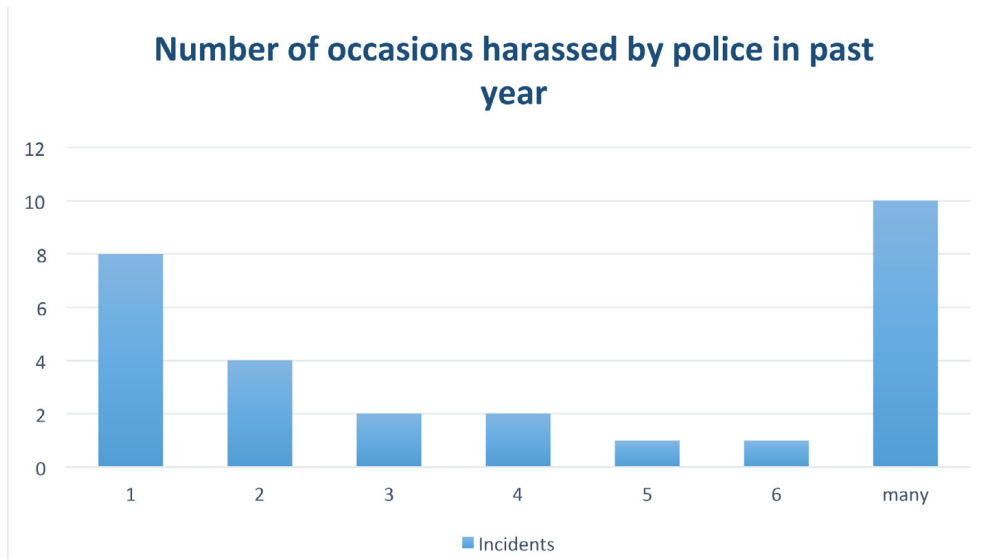
Eighty seven percent (87%) of participants reported that the police have harassed or intimidated them because they engage in sex work.¹⁰⁵

Of participants who reported having been harassed by police previously, some reported frequent abuse in the past year from police.¹⁰⁶ Since the participants came from a number of areas, it is clear that harassment is pervasive – with reports relating to Matero Police Station, Northmead Police Station, Kabanana Police Station, Chipata Compound Police Station, Emmasdale Police Station, Garden Police Station, Chelston Police Station, Central Police Station, and Morapedi Police Station.

¹⁰⁴ *Pre-trial detention in Zambia: Understanding caseload management and conditions of incarceration*, OSISA, 2011, Chapter 7.

¹⁰⁵ 33 participants answered this question.

¹⁰⁶ 28 participants answered this question.



One of the participants remarked that “*the police should stop treating us like animals*”,¹⁰⁷ and another participant stated that “*they should ... protect us because [that] is their job*”.¹⁰⁸

Only thirty eight percent (38%) of participants filed formal complaints against the police.¹⁰⁹ Seventy percent of those who had filed complaints felt the outcome of the complaints was “bad” or “very bad”.

Sixty one percent (61%) of those interviewed said they would not be willing to lay a complaint against the police.¹¹⁰ Their reasons included:

- Fear that they will be further abused.
- A belief that the complaint will not change anything.
- A belief that the police think of themselves as being above the law.
- No knowledge of how to lay a complaint.

One third of participants¹¹¹ said that they were unwilling to report any crimes or abuse committed against their person by clients or any other persons to the police, because:

- The police claim that sex workers brought this kind of treatment on themselves.
- They fear they will be discriminated against.
- There is a belief that the police will never help sex workers because of their profession.
- The police will inflict further abuse and harassment.

¹⁰⁷ Anonymous participant, Lusaka, Zambia.

¹⁰⁸ Anonymous participant, Lusaka, Zambia.

¹⁰⁹ 36 participants answered this question.

¹¹⁰ 36 participants answered this question.

¹¹¹ 38 participants answered this question.

Interestingly, despite their experience of violence from police, participants continued to be more likely to engage the police compared to women in general, who have experienced violence. According to the ZDHS, forty one percent (41.5%) of women who ever experienced violence never sought help and never told anyone.¹¹² Women are, in general, less likely to seek help when they have experienced sexual violence (27.7%) compared to when they have experienced physical violence (39.3%).¹¹³ The ZDHS noted that educational level generally had little impact on the likelihood of reporting violence.¹¹⁴ The ZDHS, however noted that employment did have an impact on whether women sought help. This suggests that the money involved in reporting might affect the extent to which women without an income choose to report.¹¹⁵ Few women who have ever experienced physical violence (6.7%) or sexual violence (2.4%) sought help from the police – as opposed to from family members and other sources.¹¹⁶

¹¹² *Zambia Demographic and Health Survey 2013-14*, Central Statistical Office, Lusaka, March 2015, at p 294.

¹¹³ *Zambia Demographic and Health Survey 2013-14*, Central Statistical Office, Lusaka, March 2015, at p 294.

¹¹⁴ *Zambia Demographic and Health Survey 2013-14*, Central Statistical Office, Lusaka, March 2015, at p 294.

¹¹⁵ *Zambia Demographic and Health Survey 2013-14*, Central Statistical Office, Lusaka, March 2015, at p 294.

¹¹⁶ *Zambia Demographic and Health Survey 2013-14*, Central Statistical Office, Lusaka, March 2015, at p 295.

Holding police officials accountable

The Constitution of Zambia binds all persons, and State organs/institutions in Zambia. Article 193(2)(e) of the Constitution expressly imposes an obligation on the Police Service to uphold the Bill of Rights in the enforcement of their duties. The Constitution of Zambia expressly imposes an obligation on police officials to respect the dignity of all persons and to uphold their rights and freedoms.

In addition, article 2 of the UN General Assembly Code of Conduct for Law Enforcement Officials¹¹⁷ provides that “in the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.”

The Human Rights Commission has emphasised that government has a duty to protect its citizens from abuses that are perpetrated by law-enforcement officers while they conduct their duties. Laws that protect persons should be emphasised as a way of reminding officers to restrain themselves from abusing their positions of power.¹¹⁸ They have advocated a strict adherence to the 24-hour period, within which a person has to be charged or else released. Importantly, the Human Rights Commission recommends that police officials who maliciously detain people should be punished and held accountable.¹¹⁹

*Sex Worker Education and Advocacy Taskforce v Minister of Safety and Security and Others*¹²⁰

In this case, the applicants sought to interdict the police from unlawfully arresting sex workers – in particular arresting sex workers only to harass, punish or intimidate them or for any ulterior purpose. The case arose out of a frustration experienced by the applicants with the high incidence of unlawful police arrests and abuse of sex workers, despite frequent intervention by the applicants to authorities to try to prevent this practice. The case focused on the legal issue of whether sex workers are arrested in circumstances where the arresting officers know with a high degree of probability that no prosecution will result, and, if so, whether this renders the arrests unlawful. The respondents’ own evidence indicated that police dockets are seldom opened when sex workers are arrested.

¹¹⁷ Article 2 of the United Nations General Assembly Code of Conduct for Law Enforcement Officials, Resolution 34/169, 1979.

¹¹⁸ Zambia Human Rights Commission *State of Human Rights Report*, 2014 at p 20, available at <http://www.hrc.org.zm/index.php/publications/state-of-human-rights/file/59-2014-state-of-human-rights-report> (accessed 22 July 2016).

¹¹⁹ Zambia Human Rights Commission *State of Human Rights Report*, 2014 at p 20, available at <http://www.hrc.org.zm/index.php/publications/state-of-human-rights/file/59-2014-state-of-human-rights-report> (accessed 22 July 2016).

¹²⁰ *Sex Worker Education and Advocacy Taskforce v Minister of Safety and Security and Others* (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009).

The South African High Court noted that the general method for dealing with sex workers seems to be that sex workers are arrested and detained overnight in police cells, whereafter they are taken to the magistrates' court cells, detained for a few hours, and then released. The judge concluded that in the circumstances, *“the peace officers, who effected the arrests of the sex workers during the relevant period, did not do so with the required object or purpose of having the sex workers prosecuted. This is so because they knew with a high degree of probability that no prosecutions would follow”*. Fourie J concluded that *“a peace officer who arrests a person, knowing with a high degree of probability that there will not be a prosecution, acts unlawfully even if he or she would have preferred a prosecution to have followed the arrest”*. The judge granted an interdict on the basis that *“the reasonable inference to be drawn from the evidence before the court, is that arrests of sex workers by the SAPS and the City Police, without the required lawful object or purpose, namely to ensure the prosecution of the sex workers, will probably continue in the future”*.

A sex worker in Zambia, who is a victim of assault, abuse, unlawful arrest and detention, or any misconduct by the police, can hold police accountable and has several avenues available for recourse.

Complaints at police-station level

“They are not helpful because of what I am.”¹²¹

“Most of the time when you have a complaint about a police officer they claim they are the government and above the law.”¹²²

“They can be the most useless people when you have a problem and you don't have money. The law is usually good to those who have money, we need help from elsewhere.”¹²³

“They don't take us seriously when we go with complaints or need assistance from them. They don't listen or respect us.”¹²⁴

“We are told mostly that we bring it on ourselves when we try to complain.”¹²⁵

The finding that participants are reluctant to complain to police about police abuse, suggests that reporting at police-station level is not the preferred complaints option. It is, however, the most

¹²¹ Anonymous participant, Lusaka, Zambia.

¹²² Anonymous participant, Lusaka, Zambia.

¹²³ Anonymous participant, Lusaka, Zambia.

¹²⁴ Anonymous participant, Lusaka, Zambia.

¹²⁵ Anonymous participant, Lusaka, Zambia.

accessible complaints process and, accordingly, requires reform to ensure that all persons who have been victims of crime, including physical and sexual assault, can report such cases to the local police station – even if the perpetrator is a police officer.

The European Court of Human Rights has held that the failure by police to investigate cases of police abuse perpetrated against sex workers, amounts to a violation of the right to freedom from discrimination and freedom from inhuman and degrading treatment.¹²⁶

It is worth exploring whether specific units within the police would be more appropriate avenues for the complaints that sex workers have about police abuse. Victim-support units are mandated to focus on rape, domestic violence, sexual abuse, and trafficking. They are based at police stations and their staff have often received more training on handling victims of abuse than police officers at the charge offices. These units might be an appropriate place where sex workers can complain about police abuse and report cases of rape – provided the units are sensitised to deal with sex workers in a respectful and non-discriminatory manner.

The Police Public Complaints Authority of Zambia (PPCA)

The PPCA is a mechanism through which sex workers can hold police officials accountable for the violation of their constitutional rights. The PPCA was established to lodge complaints against the police when there is misconduct, neglect, or behaviour resulting in death or injury. A person has up to two years after the occurrence of an incident to lodge a complaint. The PPCA can hear complaints from individuals, a person acting on behalf of an aggrieved person, or an association acting in the interest of its members.¹²⁷ After a complaint has been lodged, the offending officer must respond in writing, and then, if resources allow, there is a hearing. The hearing operates like a court trial with witnesses and cross examination. Both parties may be represented by legal counsel. If the PPCA finds misconduct by the officer – the case is referred to the Inspector General of Police, who may proceed with disciplinary or other administrative action.¹²⁸

The Gender Equity and Equality Commission

The Gender Equity and Equality Commission is established by article 231 of the Constitution, and is mandated to have offices in the provinces and progressively in districts.¹²⁹ Its purpose is to investigate issues concerning gender equality and to take steps to secure redress for complaints relating to gender equality.¹³⁰

Complaints can relate to any act which is in violation of the Gender Equity and Equality Act, including discrimination from a public body or institution, and discrimination relating to

¹²⁶ *BS v Spain*, 47159/08, 24 July 2012, ECHR.

¹²⁷ Available at http://www.homeaffairs.gov.zm/?q=police_public_complaints_authority (accessed 22 July 2016).

¹²⁸ Available at http://www.homeaffairs.gov.zm/?q=police_public_complaints_authority (accessed 22 July 2016).

¹²⁹ Article 231(1) of the Constitution, as amended by Act 2 of 2016.

¹³⁰ Article 231(3).

gender-based violence. Complaints must be lodged with the Commission within two years of the incident.¹³¹ The complainant is entitled to written reasons, if the Commission decides not to investigate the complaint.¹³² A complaint may be lodged by a complainant acting in her own interest; by an association acting in the interests of its members; by a person acting on behalf of the complainant; and by a person acting on behalf of, and in the interest of, a group or class of persons.¹³³ The Commission may not investigate matters that are before court.¹³⁴ The Commission's proceedings are flexible, and it can direct that certain persons are not present at proceedings, and that its documents remain confidential.¹³⁵

Human Rights Commission (HRC)

The Human Rights Commission (HRC) is established under article 230 of the Constitution of Zambia, as amended. It is mandated to have offices in the provinces, and progressively in districts.¹³⁶ The HRC shall investigate and report on the observance of human rights, and conduct civic education on rights.¹³⁷

An aggrieved person, organisations representing the interests of sex workers, or any civil society organisation or a person acting on behalf of the aggrieved person, can lodge a complaint at the HRC.

The HRC is a useful mechanism to publicly hold police officials accountable for violation of the human rights of sex workers, and is in a position to propose effective measures to stop and prevent further human rights violations of sex workers.

Whether the HRC is willing to take on complaints of sex workers, remains to be seen.

Civil claim for damages

The Zambian Constitution protects the rights of all people in Zambia. In particular, it protects the rights of all persons to equal protection under the law, freedom from arbitrary arrest and detention, and to be free from cruel, inhuman and degrading treatment.

Arbitrary arrest or detention is the arrest or detention of an individual in circumstances in which there is no likelihood or evidence they have committed a crime, or in which the proper procedure was not followed. The proper procedure includes informing the accused of their rights, the reason for the arrest, and to detain and charge the accused within a reasonable amount of time.

Article 13(4) of the Constitution of Zambia expressly provides any person who is unlawfully

¹³¹ Section 41 of the Gender Equity and Equality Act, 2015.

¹³² Section 42(3).

¹³³ Section 43(1)(b).

¹³⁴ Section 43(4).

¹³⁵ Section 43.

¹³⁶ Article 230(1) of the Constitution, as amended by Act 2 of 2016.

¹³⁷ Article 230(2).

arrested or detained by any other person to be entitled to compensation. Where police arrest a sex worker without proof of an offence having been committed they effect an unlawful arrest. In those circumstances, a sex worker is entitled to lodge a complaint at the PPCA and HRC and to institute a claim for compensation against the police official and the government.

Article 118(2) of the Constitution provides that, in exercising judicial authority, the courts shall ensure that justice is done without discrimination. In practice, however, courts are often an inaccessible option for persons who seek redress when their rights have been violated.

Conclusion and recommendations

From the preliminary research findings in this study, sex workers are vulnerable to violence, stigma and discrimination and remain a target of police harassment and detainment. The purpose of the report was to provide SALC with a better understanding of the experiences of sex workers to enable it to devise advocacy and litigation strategies. The report, however, suggests that there are a number of areas requiring focus:

Legislative reform

The laws relating to sex work are highly problematic. While some laws specifically target those who exploit sex workers – such as traffickers, procurers and persons who live off the earnings of sex work – the vagueness of some of these laws provides the space for police to apply them against sex workers.

Certain anomalies within the Penal Code further exacerbate this problem. The offence of living off the earnings of prostitution used to be set out in two separate sections – section 146 targeting men who live exploitatively off sex workers' earnings, and section 147 targeting women who live exploitatively off sex workers' earnings. The difference between the sections was the corporal punishment, which was an option for men, but not women. These offences were never aimed at sex workers, and yet section 147 is seen as the offence which criminalises sex work. This is not the case. When these offences were amended to be gender neutral, it resulted in sections 146(1)(a) and 147(1) being the same. Sections 146(1)(b) and 178(g) of the Penal Code similarly both criminalise soliciting in public for an immoral purpose. Both these offences are so vague, that their retention contributes to arbitrary police enforcement.

In practice, sex workers are often arrested under outdated nuisance-related offences. Many of these offences are so vague and overly broad that they require repeal.

The Zambian Penal Code should be reviewed to ensure that police officials do not unlawfully and unfairly target sex workers and other poor and vulnerable groups. There should further be adequate guidelines for the exercise of police discretion.

Training of police officials

The training of police officers on human rights concepts and principles such as equal protection of the law, non-discrimination, ethics, social justice and fairness, should be prioritised. In addition,

there is a need to consider the reform of current practices within the police force. This is to ensure that arrests are effected as a last resort and that effective monitoring of police is in place to ensure that arrests are carried out within the boundaries of the law, with appropriate disciplinary action where police officers flout the law.

Empowering sex workers

Violence and discrimination against sex workers can be reduced if there are more registered civil society organisations in Zambia which advocate the protection of the fundamental rights of sex workers. In many instances, sex workers do not lodge complaints when their rights and interests are effected – for fear of harassment, stigma and further violations. NGOs could play a crucial role in training sex workers on their rights and freedoms and could be a strong voice to speak on behalf of vulnerable sex workers. In addition, civil society organisations can also play an important role by documenting patterns of police abuse and violations.

Many sex workers are unaware of their fundamental human rights and are therefore unaware when a violation occurs – or of the available recourse. Training sex workers about their basic human rights could possibly reduce unlawful arrest, detention and police abuse. It can also play a crucial role in holding the State accountable for a specific violation. Knowing their rights can equip sex workers to identify a specific violation at an early stage and to empower them to document ongoing police abuse of sex workers and build a civil case for damages against police authorities and the State.

The Centre for Human Rights Education, Advice and Assistance (CHREAA) in Malawi, for example, introduced a toll-free number which sex workers can call 24/7 whenever they have been abused by the police in any way – in order to receive assistance. Apart from the number, sex workers were encouraged through training and education materials to report such abuse directly to the nearest magistrate’s court or senior police officer and to CHREAA’s offices – in order to obtain assistance.

Improving accessibility of complaints mechanisms

The complaints mechanisms touched on in this report were internal police complaints mechanisms – including Victim Support Units, the Police Public Complaints Authority, the Gender Equity and Equality Commission, the Human Rights Commission, and the courts. Additional research is needed on the extent to which current complaints mechanisms are available to address police abuse.

Participants’ responses indicate that much remains to be done to improve the accessibility of complaints mechanisms. This would include providing information and education materials to the public on the different complaints bodies, and ensuring there are posters in accessible language at police stations that explain internal and external complaints processes in cases of police abuse and bribery. Officers at the various complaints bodies should be sensitised to the fact that sex workers are a group that are particularly vulnerable to police abuse, that they are entitled to take action

against police abuse, and that their rights should be respected throughout the complaints process. This would include developing processes at the complaints bodies to ensure that confidentiality of complaints is maintained and that victims can be protected from reprisals by police.

Annexure A

Consent to participate in interview on police arresting practices in Zambia

Location: _____

Date: _____

Interviewer: _____

Purpose

SALC is currently conducting research on how the police use nuisance laws to arrest people in Lusaka, Zambia. The purpose of this interview is to find out from people who have traded sexual services for money, how police actions have affected them. If you agree to participate in this research, we will ask you questions about your experiences with police, whether you have ever been arrested, and how the experiences have affected you.

To protect your privacy and safety, we will not use your name or any personal information in our research.

You are free to refuse to answer any question or to stop the interview at any point.

There is no pressure to participate in the research.

The information from this interview might be used in a research report, which will be published. Your name and personal details will not be published, and will not be made available to anyone.

Do you understand the consent form? Yes / No

Are you over the age of 18? Yes / No

Do you agree to participate in the research? Yes / No

Initials

Date

Interviewer name

Interviewer signature

Date

Thank you so much for your courage and time in sharing your experiences with us.

Questionnaire on police arresting practices in Lusaka, Zambia

Questionnaire number: _____

Location: _____

Interviewer's name: _____

Translator's name: _____

Date of interview: _____

Demographics

1. What is your age? _____

2. Which T/A do you come from? _____

3. Where do you live now? _____

4. What is your gender? _____

(Female; Male; Transgender female; Transgender male; Other)

5. What is your marital status? _____

(Single, married, divorced, widowed, co-habiting)

6. Do you have children?

Y/N How many children? _____

7. Finished studying at grade? _____

Work experience

8. How long have you been doing sex work?

_____ years _____ months (if less than a year)

9. Do you work on the street or indoors? _____

10. In the past 6 months, where did you find most of your clients _____

11. How much money did you earn last week? _____

12. How many clients did you have last week? _____

13. Do you have other sources of income?

Y/N What? _____

14. How many people are living off your income? _____

15. Are any organisations helping you?

Y/N Who? _____

Experiences of violence during work

16. Have you experienced violence from police or other men during this work?

Y/N

17. Last year, how many times did you encounter the following experiences? (if none, put 0)

Police officer beat you _____

Police officer demanded money _____

Clients beat you _____

Clients took money _____

Police officer raped you _____

Client raped you _____

Other: _____

Access to condoms and health services

18. How difficult is it for you to get condoms?

- a) Always difficult
- b) Sometimes difficult
- c) Always easy

19. If it is hard, why? _____

20. Where do you get condoms? _____

21. How often do you use condoms when selling or trading sex?

- a) All of the time
- b) Most of the time
- c) About half of the time
- d) Some of the time
- e) Never

22. What influences whether you will use a condom with a client?

- a) Couldn't afford a condom
- b) Couldn't find a condom
- c) Afraid that if I am carrying a condom, police will harass me
- d) Client does not want to use a condom

e) I don't want to use a condom

f) Other: _____

23. Has a police officer ever taken condoms away from you?

Y/N How often in the past year? _____

24. Did it happen during an arrest or without an arrest?

Arrest / Not arrested

25. Did you do sex work the day or night after the officer took your condoms away?

Y/N

26. If yes, did you use a condom?

Y/N

27. Were you ever tested for HIV by police?

Y/N If Yes, explain what happened:

Police interactions

28. How would you describe your relationship with police?

c) Good

c) Bad

c) Neither good nor bad

29. Have police harassed or intimidated you for being a sex worker or for doing prostitution?

a) Yes How often in past year? _____

b) No

c) Don't know/unsure

30. Please describe ways in which police commonly harass or intimidate you?

31. From which police station was the officer who harassed you?

32. Have you ever been stopped or searched by police?

Y/N

33. Have you ever been arrested by police?

Y/N How often in past year? _____

34. On which charges were you mostly arrested:

Common nuisance

Idle and disorderly

Breach of peace

Rogue and vagabond

Spreading disease

Soliciting

Loitering

Touting

Other: _____

35. How did the police treat you during the arrest?

36. What is your experience of police cells?

37. What usually happens after the arrest?

Released same day

Released next day

Taken to court, where plead guilty

Taken to court and go through trial

Pay fine to police and then released

Pay bribe to police and then released

38. Have you ever been asked to give a police officer money (bribe)?

Y/N

39. How often in the past year did you have to bribe police? _____

40. What are the reasons the police typically give for asking you for money? _____

41. Please describe a recent incident when this happened?

42. From which police station was the police officer who asked you for a bribe? _____

43. Have you ever filed a complaint with the police or another agency about police behaviour towards you?

Yes - Outcome of complaint? _____

No - why not? _____

44. Would you go to the police for help if you have been abused or a victim of crime? Y/N

45. If no - why not?

46. Do you have any other comments you want to make about the police?

Thank you so much for participating in this research.

