



Submission to the National Council of Provinces (“NCOP”)
Select Committee on Security and Justice
on the
Criminal Law (Sexual Offences and Related Matters) Amendment
Act Amendment Bill [B 16B 2020]

By Triangle Project
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Contents

Introduction	3
Submissions on the Bill	3
Definition of “Sexual Offence”	3
Definition of “Person who is Vulnerable”	4
Conclusion.....	6

Introduction

Triangle Project refers to the call for comment¹ on the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B 16B 2020] (“the Bill”).² We welcome the opportunity to engage with the NCOP Select Committee on Security and Justice (the Committee) on the Bill.

Triangle Project³ is a non-profit human rights organisation offering professional services to ensure the full realisation of constitutional and human rights for lesbian, gay, bisexual, transgender, queer, intersex, plus (LGBTQI+) persons, their partners and families.

Our three-core services centre around Health and Support, Community Engagement and Empowerment, and Research and Advocacy. We offer a wide range of services to LGBTQI+ communities. These include health services related to general and sexual health, counselling, support groups, a helpline, public education and training services, advocacy, community outreach, and court support to survivors of hate crimes.

This submission falls within our Research, Advocacy and Policy Programme that works to advance the inclusion, protection and realisation of the human rights of LGBTQI+ people, as well as access to socio-economic justice for LGBTQI+ people, which include LGBTQI+ sex workers, and in particular, transgender sex workers.

Submissions on the Bill

Triangle Project acknowledges the goal of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B 16B 2020] is to consolidate the regulation of sexual offences and extend protections to various vulnerable groups. However, we would like to raise two matters of concern:

Definition of “Sexual Offence”

We are deeply concerned about the potential harmful impact that aspects of the Bill may have on sex workers if the language around what constitutes a “sexual offence” is not tightened.

We would like to bring to your attention the Sunflower Promise made by President Cyril Ramaphosa to stand in solidarity with sex workers by committing to decriminalising sex work and safeguarding sex workers’ human rights.^{4 5}

¹ <https://pmg.org.za/call-for-comment/1070/>

² https://static.pmg.org.za/B16B-2020_Sexual_Offences.pdf

³ <https://triangle.org.za/>

⁴ <https://www.news24.com/w24/SelfCare/Wellness/Mind/sex-work-is-work-why-this-woman-chose-to-sell-sex-20190702>

⁵ <https://www.groundup.org.za/article/sex-workers-thank-ramaphosa/>

We also want to emphasise the ongoing systemic injustices, gross human rights violations, violence, exclusion and denial of services experienced by sex workers in South Africa, including LGBTQI+ sex workers. Transgender sex workers,⁶ in particular, face multiple intersectional forms of exclusion and violence from society, including on the basis of engaging in sex work for their livelihoods, on the basis of their gender identity and gender expression, and frequently also on the basis of living with HIV and TB,⁷ and being unhoused. The continued gross injustice of the criminalisation of sex work turns their lives into a daily struggle and contribute to pushing them to the outer margins as one of the most vulnerable and oppressed populations in the country.

We therefore note with great concern that there is confusion and vagueness in the Bill's definition of "**sexual offence**" and reference in Section 50 of the Bill to "**A person who in terms of this Act or any other law— (i) has been convicted of a sexual offence**".

It is unclear whether these existing formulations in the Bill could be interpreted or misinterpreted to include sex work in the ambit of "sexual offence", which would cause sex workers convicted of sex work to be placed on the National Register for Sex Offenders (NSRO), further severely restricting their employment opportunities, denying them the right to foster children, adopt children, be a caregiver or a safe caregiver, and exacerbating the stigmatisation and marginalisation of sex workers.

At all costs, a situation must be prevented whereby the Bill could be interpreted or misinterpreted to include sex work as a "sexual offence". **We therefore ask that the definition and language in the Bill be improved and tightened to make clear that sex work is not included within the ambit of "sexual offence"**.

We also urge the Committee to help end the injustices to which sex workers are subjected by the State and society – this requires supporting the full decriminalisation of sex work through the removal of sex work from sexual offences legislation⁸ that currently criminalises it.

Definition of "Person who is Vulnerable"

LGBTQI+ populations constitute marginalised and vulnerable groups on the basis of their sexual orientation, gender identity, gender expression and/or sex characteristics (SOGIESC). The vulnerability of LGBTQI+ populations to sexual violence, hate crime and discrimination are already recognised in various government legal and policy documents, including in the Department of Justice and Constitutional Development's National Intervention Strategy for Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Sector,⁹ South African National

⁶ Gulam Petersen, Trans sex workers, 2 July 2021, <https://www.newframe.com/s5-episode-7-edwin-cameron-trans-sex-workers/> (20:35 – 33:22).

⁷ South African National Strategic Plan (NSP) for HIV, TB and STIs 2017 – 2022, https://sanac.org.za/wp-content/uploads/2017/06/NSP_FullDocument_FINAL.pdf

⁸ E.g. the Sexual Offences Act 23 of 1957 and Sexual Offences and Related Matters Amendment Act 32 of 2007.

⁹ <https://www.justice.gov.za/vg/lgbti/NIS-LGBTIProgramme.pdf>

Strategic Plan (NSP) for HIV, TB and STIs 2017 – 2022¹⁰ and South African National LGBTI HIV Plan, 2017-2022.¹¹

An important recent study¹² on experiences of violence, mental health, well-being and access to healthcare among LGBTI people in South Africa found that almost half of participants were survivors of sexual violence and more than half of participants had experienced some form of physical violence at some point in their lives.¹³ These rates are higher than the general population.

The study further found that social exclusion, marginalisation and stigma have a negative impact on the mental health and wellbeing of LGBTI people, and that they have higher levels of depression, anxiety and suicidality than the general population.¹⁴ Almost a quarter of participants had experienced healthcare being denied to them, and almost a third had experienced being called names or being insulted by healthcare staff.¹⁵ Additionally, 44% of participants reported that they had tried to hide a health concern related to their sexual orientation or gender identity from a healthcare provider.¹⁶

We have found similarly concerning patterns among clients of Triangle Project’s Health and Support Services.

We therefore motivate that the Bill’s definition of ‘**person who is vulnerable**’ be expanded to include LGBTQI+ persons through the addition of the category “**persons who are members of social minorities on the basis of their sexual orientation, gender identity, gender expression and/or sex characteristics**” in the definition.

However, we strongly reiterate that this proposed expansion of the definition of vulnerable persons **must go hand in hand with ensuring that sex workers are not adversely impacted by the Bill**, as outlined in the previous section. Otherwise, the unintended effect would be to exclude sex workers convicted of sex work from working with LGBTQI+ persons along with other vulnerable groups as defined in the Bill, despite the fact that working with vulnerable groups are among the few employment opportunities available to sex workers, who are vulnerable persons themselves.

¹⁰ https://sanac.org.za/wp-content/uploads/2017/06/NSP_FullDocument_FINAL.pdf

¹¹ <https://sanac.org.za/wp-content/uploads/2017/06/LGBTI-HIV-Plan-Final.pdf>

¹² Müller, A., Daskilewicz, K. & the Southern and East African Research Collective on Health (2019). *Are we doing alright? Realities of violence, mental health, and access to healthcare related to sexual orientation and gender identity and expression in South Africa: Research report based on a community-led study in nine countries*. Amsterdam: COC Netherlands, http://www.ghju.uct.ac.za/sites/default/files/image_tool/images/242/PDFs/Dynamic_feature/SOGIE%20and%20wellbeing_07_South%20Africa.pdf

¹³ Ibid. pp. 41, 46.

¹⁴ Ibid. p.93.

¹⁵ Ibid. p.38.

¹⁶ Ibid. pp.38-39.

Conclusion

In conclusion, we would like to ask the Committee to help end the injustices against sex workers, as well as recognise the vulnerability of LGBTQI+ persons to sexual offences and increasing their protection by doing the following:

1. Improve and tighten the Bill's definition and language to make clear that sex work is not included within the ambit of "sexual offence".
2. Expand the definition of "person who is vulnerable" to include LGBTQI+ persons through adding the category, "persons who are members of social minorities on the basis of their sexual orientation, gender identity, gender expression and/or sex characteristics".
3. Ensure that the second amendment is implemented hand in hand with the first amendment to prevent a potential adverse impact on sex workers' employment opportunities with vulnerable persons.