

Our ref: Draft SORMAA Bill, 2022

The Director-General
Department of Justice and Constitutional Development
PRETORIA

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And to:

The honourable Minister of Justice and Correctional Services

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The honourable Members of the Portfolio Committee on Justice and Correctional Services (per email)

The honourable Members of the Select Committee on Security and Justice (per email)

Dear Advocate Doctor Mashabane,

IN RE: DRAFT CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT BILL, 2022 – CRITICAL IMPORTANT OF ENSURING ADEQUATE PUBLIC PARTICIPATION

1. We refer to the Notice issued in the Government Gazette of 9 December 2022, inviting interested parties to submit written comments on the Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2022 (the Bill) by 31 January 2023.

CHIEF EXECUTIVE: SA SMIT | NON-EXECUTIVES: EFJ MALHOERBE | NC SNYDERS

THE CENTRE AGAINST SEXUAL EXPLOITATION SOUTH AFRICA WAS DEVELOPED UNDER THE AUSPICES OF CAUSE FOR JUSTICE, A REGISTERED PUBLIC BENEFIT ORGANISATION WITH SECTION 18A APPROVAL FOR SOUTH AFRICAN INCOME TAX PURPOSES. PBO NUMBER 930045148

2. The Centre Against Sexual Exploitation, South Africa (CASE-SA) is an interested party and stakeholder in the prostitution law reform process. We have been actively and extensively involved in matters pertaining to defending the fundamental value of and right to human dignity against sexual abuse and exploitation since 2013, and in the prostitution law reform debate since 2018. An overview of our involvement in these matters, is available on request.

Constitutional obligation to facilitate adequate public participation

3. The Department of Justice and Constitutional Development (the Department) is constitutionally bound to facilitate adequate public participation in the law-making process. Should the Department neglect to do so, the Bill will be open to constitutional challenge on procedural grounds. This would not only undermine the values of our hard-won participatory constitutional democracy, but would arguably also risk wasting a very large amount of state expenditure (and per logical extension, taxpayer money).
4. The legal status of prostitution in South Africa is not only a highly contentious issue but also holds far-reaching ramifications for the socio-economic wellbeing of the Republic and its people, including prostituted persons. The window for the submission of public comments on the Bill is a mere 53 days, and falls over the December/January holiday period.
5. During this period, many South Africans (willingly or compelled to do so by their employer or family obligations) to take annual leave. There are also no less than six public holidays during this period. It is highly probable that by the 9th of December, the day on which the Bill was published, many South Africans already will have been in the process of winding down work operations for the current year and/or will be attending to finalising scheduled outstanding year-end work.
6. The implication is, many South Africans – persons with a direct interest in the Bill – will not have the capacity to properly engage with the content of the Bill during December 2022. This means South Africans, persons whose lives stand to be directly and indirectly affected by the Bill, will not have an adequate opportunity to prepare substantive submissions properly. Given the controversial nature of the Bill, and the far-reaching socio-economic impact it will have on the Republic and its people, a sufficient opportunity to comment on the Bill must be afforded to the public.
7. It is also highly probable that many South Africans will only be returning to work from the second week of January 2023 onwards. From an operational and productivity perspective, January is a disrupted month. It is also likely that many South Africans' work diaries for January 2023 are already filled with necessary beginning-of-the-year work.

8. In addition to such realities affecting capacity, South Africans have been subjected to continuous and ongoing loadshedding – at times stage 5 and 6. The detrimental impact of hours of loadshedding on work productivity, especially in the age of online collaboration and remote working, is self-evident, with issues ranging from device batteries that simply cannot outlast power outages to slow (or no) internet connectivity.
9. The December/January period also coincides with the Parliamentary recess, greatly hindering or likely even precluding many South Africans from engaging with their democratically elected Parliamentary representatives on the content of the Bill, including the opportunity to raise their valid concerns and objections.
10. It is irrelevant that the Bill contains only four clauses. The implications of the four clauses are far-reaching – proposing to decriminalise the entire system of prostitution. We reiterate that this will have a profound impact on the socio-economic wellbeing of South African society and on prostituted person (i.e. the very persons whose constitutional rights and freedoms the Bill ostensibly seeks to defend and advance). We cannot emphasise enough that it is critically important that the South African public is given an adequate opportunity to engage with the Bill.
11. Specifically, interested parties and stakeholders will need to consider very carefully what the impact (and potential detrimental consequences) of repealing every section of the Sexual Offences Act, 1957, and section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, would be.
12. This is especially important given the growing body of scientific research evidence and lived realities of prostituted persons both locally and abroad, that show that prostitution is not work but a system of sexual exploitation that preys on the vulnerable and marginalised, and is rife with racism, class prejudice, inequality, and gender discrimination. More time – sufficient time – is required to ventilate and consider these issues. Failing to do so, will be unconscionably irresponsible and fly in the face of the values of our constitutional dispensation built on human dignity, equality, and freedom.
13. Considering the above, we implore the Department to extend the period for public participation by another calendar month – i.e., allowing interested parties and stakeholders a sufficient and constitutionally defensible opportunity to prepare and submit written comments on the Bill. In this regard, we propose that all members of the public be given from 9 December 2022 until 28 February 2023 to submit commentary.
14. We can think of no rational reason why a one-month extension will do harm to the legislative process, prostituted persons, or the South African public. On the contrary, it will only do the legislative process, prostituted persons and the South African public good – ensuring the Bill receives the attention it deserves.

15. In addition, it will serve to satisfy the constitutional requirements of adequate public participation in the law-making process. It is also prudent to allow interested parties and stakeholders a sufficient opportunity to identify and highlight where the legislative proposals may undermine the human dignity and other fundamental rights of prostituted persons, doing more socio-economic harm than good in the process. This is especially important – and very reasonable – given how highly contentious the subject matter of this Bill is, and the far-reaching impact it will have on South African society.
16. We therefore earnestly request the Department to grant a general extension of the period for submitting written commentary on the Bill, until at least 28 February 2023.
17. Your serious and favourable consideration of our sincere request is highly appreciated.

Yours faithfully,

Centre Against Sexual Exploitation, South Africa