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Mrs Marna Lourens

LLD student: University of Stellenbosch

[marna@urbanlife.co.za](mailto:marna@urbanlife.co.za)

0723368719

For Attention: Mr Bryan Mantyi

Per email: bmantyi@parliament.gov.za

Dear Mr Mantyi

**WRITTEN SUBMISSIONS ON THE SOUTH AFRICAN LAW REFORM COMMISSION’S (SALRC) REPORT 107 0N ADULT PROSTITUTION**

I am writing in my private capacity, as an enrolled LLD student at the Law Faculty of the University of Stellenbosch; and as a social justice feminist that wants to bridge the gap between different feminisms in this country and find a third way that is not just focused on whether “prostitution” is sex as work or violence against women; but with a focus on transformative justice, structural inequality, issues of development, recognition and redistribution and underlying gendered dynamics.

**What are my concerns?**

* The lens through which lawmakers legislate determines how well we treat the most marginalized and stigmatized in our communities, now and in the past, before the advent of democracy.
* Prostitution is a so-called “feminine crime”. This type of crime censures women and defines appropriate forms of morality and behavior. It seeks to render invisible, and shift the burden of social problems by criminalizing women.
* We have a Constitution with values that are supposed to transform/ translate into social justice. The state has a positive duty to take action to address the needs of those who live in a state of poverty and neglect. Yet, despite our transformative constitution and our international obligations pertaining to the protection of women against violence and exploitation, criminalization of a very marginalized segment of our society remains the first choice of the SALRC. Such a framework does not address the interlocking oppressions caused by the socio-economic, political and cultural marginalisation of South African women and the HIV/AIDS pandemic.
* This reflects the discriminatory and gendered nature of the law’s treatment of consensual adult sex workers as offenders under the criminal law.
* The nature of the criminalization of sex work is deeply entrenched in unequal gender relations, patriarchy and conservative moralities. A legal framework that endorses continued criminalization will not ensure the improvement of many women’s positions in society and will serve to perpetuate the human rights abuses suffered by sex workers, including high incidences of sexual violence, stigmatization and discrimination by public health and government officials, as well as the general public.
* Criminalization will persist in silencing the voices of the most oppressed. The constraints implicit in sex workers’ lived experiences are overlooked in the process. As a consequence, their full identity, their position in society and the complexity of their lives go unrecognized.
* Moreover, the Constitution contains a pervasive and overriding commitment to equality, specifically a substantive (redistributive) conception of equality. The disjuncture between the promise and the reality of the equality guarantee under a transformative constitution was highlighted in the case of *S v Jordan.* The majority’s finding denies the inter-relationship between individual freedom, the role of law and social attitudes. By not placing the enquiry within a broader context of systemic gender discrimination, the underlying relations of inequality that is deeply entrenched in past patterns of disadvantage was not addressed and disclosed a certain judicial bias against sex as work. The majority judgment did not refer to context or international law; there was no in-depth discussion of constitutional values, no mention of vulnerable sectors of the community; and no reference to any of the court’s own jurisprudence on unfair discrimination.
* **Underlined par stating the problems that I have with the bill and proposed solutions or recommendations:**

Option 2: Total criminalisation (with diversion)

* This option is a perpetuation of the criminal laws’ marginalization and control of women as offenders under the criminal law.
* It frames involvement in “prostitution” as an issue of personal responsibility.
* The unequal power relationships that currently exist in relation to sex workers will remain in place with this option.
* Victimization and stigmatization by the police, health workers and the general public will continue as sex workers will be branded as criminals under the law. There is a close link between violence and oppression and continued criminalization highlights the systemic discrimination and violence directed at sex workers as members of a specific group. This is contrary to the spirit of our Constitution.
* Continued lip service will be paid to this law with no resultant protection for sex workers.
* Until the law acknowledges the reasons for women entering the sex trade, it will continue to treat them in a manner that is ostensibly for their protection, while simultaneously rendering them vulnerable to being penalized and unprotected when they need it. For example, a sex worker who is raped will not be taken quite as seriously as a virgin who is raped. Why? Because the law will be concerned about the morality of the survivor. The law punishes those women who step out of line.
* How will we reach any type of success in persuading judges, lawyers, law enforcement officers and legislators to accept and understand the nature and scope of gender inequality and oppression in and beyond the law if we continue to use the criminal law indiscriminately to punish?
* When the legislature applies criminal sanction indiscriminately as a censuring device of deviant conduct or as a disciplinary tool to secure obedience of all social ills, the criminal law becomes a “blunt instrument” and overcriminalisation ensues.
* It thus becomes important to question the legislature’s commitment to considering relevant criteria before declaring certain conduct criminal; it has to be asked whether the legislature understands the purpose of the criminal law and the nature of the criminal sanction; thus what is the purpose/aim of the prohibition and its potential effectiveness?
* With this law we are not addressing the more subtle, insidious and systemic forms of racism and inequality in which social, cultural, political and economic inequalities are played out, entrenched and reinforced in the laws, ideologies and institutions of criminal justice.

Option 1: Partial criminalisation (Prostitute not criminalised)

* In the first place it is important to note that both proponents for and against criminalization use the so-called “Swedish Sex Puchase Act” to support their arguments. (Since the 1970’s social work initiatives had been implemented to help people selling sexual services in Sweden, which initiatives were key in the successful implementation of this Act).
* The Swedish Act is a combination of welfare provisions and punishment: one party, the seller needs help, whilst the other, the buyer, deserves punishment (the client is also seen as deviant and in need of help to stop buying sex). Criminal justice control is exercised over those individuals who are constructed as responsible for the harms in prostitution and women are seen as victims that need to be saved through a process of responsibilization and individual change.
* “Exiting” should be approached with caution. When the dominant discourse focuses on and interprets prostitution as equivalent to violence and abuse of women, there is often a failure to represent the structural inequalities and exclusions that form part of their daily existence. Whilst violence is an endemic aspect of most sex workers lived experiences, it is not always the case that “prostitution makes victims of many of those involved in it, and of those communities in which it takes place.”
* Exiting becomes a means of facilitating social inclusion, rather than offering recognition, rights or redistribution to sex workers as a group in a way that supports their citizenship.
* Policy makers too often underestimate how much of what they identify as harmful in prostitution is a product, not of the inherent character of sex work or sexuality, but rather of the specific regimes of criminalization and denigration that serve to marginalize and oppress sex workers. ( Zatz 1997: 289 )

**Summation of main points:**

* The criminal law should not be used to punish women for their attempt to earn a living.
* The moral and political components of both proposals highlight an ongoing and entrenched attempt at moral and political regulation of sex workers through the privileging of certain forms of citizenship. Social inclusion is offered to those who exit “responsibly” and resume “normal” lifestyles and continued exclusion to those sex workers (especially street sex workers who are the most marginalized) who remain involved, and who is constructed and reproduced in law as anti-social. This also reinforces the binaries between good and bad and deserving and undeserving women.
* Thus, in the name of “protecting victims and communities”, the state simultaneously removes itself from any role in the processes of social exclusion of women who sell sex while extending its control over subjects. In so doing, it represents itself as not only the protective force against a demonized and distant organized “sextrade” (tough on crime and the causes of crime) and the increasingly criminalized client, but also as the facilitator of exit and support to those reclassified (and not all are) as victims. As a result, the “progressive governance” of sex work then masks the state’s role in structural exclusion and in perpetuating norms of the sex industry.
* We need to move away from the traditional legal approach to sex work that focuses on moralistic and conservative notions of personal choice and individual freedom, with no consideration for the role of law in apportioning blame and in sustaining structural inequality. I thus disagree with the Commission’s view “that exploitation, particularly of women in prostitution, seems inherent in prostitution and depends on the external factors of gender violence, inequality and poverty and is *not caused by the legislative framework in which it finds itself.”*
* In the context of South Africa's equality jurisprudence, a formal understanding of equality that fails to take into account the multi-layered and multifaceted realities of women, in the face of systemic gender inequality and material disadvantage, undermines the constitutional commitment to the right to self-determination, gender equality, non-sexism and fundamental human rights. The lens of equality should be expanded from a narrow focus on legal rules and norms to the wider social, political and economic contexts within which law operates and links gender equality to socio-economic equality.
* The intersection of gender, race and class that shape sex workers’ choices within complex social inequalities should be taken into account. This necessitates engagement with structures, institutions and practices not traditionally regarded as legal.
* The effectiveness of state structures in addressing gender and racial injustices should be questioned, particularly in relation to the disparity between policy and practice. Blueprints for gender transformation in South Africa are in place, but there has generally been a failure on the part of policy-makers, state actors and existing structures and institutions to realise the goals of policies.
* Unequal participation in policy-making, unequal access to social, health and legal services and the disjuncture between laws, policies and their implementation reflects the political failure of not just the women’s movement, but also the state, to offer concrete policy alternatives that take into account the multi-layered and multi-faceted realities of sex workers in South Africa.
* Governments must fulfill their obligations in ensuring reasonable minimum standards of living, providing citizens with a realistic opportunity to be productive, recognizing other forms of paid work (which raises the political question of the status of sex work) and ensuring a reasonable level of equal opportunities for all members.