

26 February 2018

Social Justice component: Law Faculty, University of Stellenbosch

tmadonsela@sun.ac.za

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 ON ADULT PROSTITUTION

Introduction

Thank you for the opportunity to comment on the South African Law Reform Commission's (SALRC) Report 107 on Adult Prostitution. The Commission and Parliament must be applauded for giving priority to this matter, which affects the most vulnerable segment of our society. The submission seeks to highlight the implications for the Report of the social justice dimensions of the Bill of Rights and to advocate for an approach that resonates with our constitutional values and societal vision of inducing wide-ranging social change through nonviolent political processes grounded in law.

Constitutional context

The Preamble of the Constitution commits South Africa to “recognise” and “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”. This includes the need to protect those who are vulnerable and to “improve the quality of life of all citizens and free the potential of each person”. Equally important is the recognition of the principle of *ubuntu* and our collective responsibility for the wellbeing of all. We want particularly to draw Parliament's attention to the Constitutional Court judgment of *S v Makwanyane & Others* 1995 (3) SA 391 (CC), that recognised that “the right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern”, as well as that “[i]t is only if there is a willingness to protect the worst and weakest amongst us, that all of us can be secure that our own rights will be protected”.

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* 2002 (2) SACR 499 (CC). 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. Social justice is essentially about fairness and justice with regard to treatment by the law and access to justice, to life's opportunities and privileges. Social justice accordingly is essential for transformation, given our nation's inherited inequalities, as are the values of equality, dignity, and the advancement of human rights and freedoms.

Prostitution: status quo

Currently, both prostitution and engaging the sexual services of an (adult) prostitute are criminalised in terms of section 20(1)(aA) of Sexual Offences Act 23 of 1957 and section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 respectively. There is no doubt that the *status quo* is problematic; the SALRC must therefore be applauded for recognising that gender-based violence is a significant problem in the current socio-economic climate, as is trafficking in human beings. The Commission is also correct in acknowledging that sex work in South Africa is driven by a complex intersection of social and economic factors in which poverty, unemployment and inequality are key drivers.

However, research, including the public hearings that preceded this Report, shows that criminalisation has not managed to improve sex workers' position in society and has in fact exacerbated their vulnerability. Current legislation ignores structural inequality, resulting in the poorest sector of our community facing continued discrimination. Criminalisation increases sex workers' vulnerability, especially that of young people who may become sex workers due to their socio-economic, political and cultural marginalisation, including factors such as having been orphaned by HIV/AIDS.¹ In practice, it is primarily poor black street workers who are prosecuted, and not their better-off counterparts working for escort agencies. Clients are also seldom if ever prosecuted. Such unequal treatment emphasises the effect of the law as being anti-poor and anti-black.

Commission's first-choice recommendation

Despite this and notwithstanding the claim of taking into consideration our Constitution's requirement that the law be a means to achieve social justice, the SALRC has reiterated that the full criminalisation of sex work remains their first policy choice. The Commission's point of departure is that sex work inherently amounts to exploitation of women and depends on the external factors of gender violence, inequality and poverty. Furthermore, it is asserted that the legislative framework of criminalisation in which it finds itself currently does not cause this exploitation. The Commission concludes that "changing the legislative framework could create an extremely dangerous cultural shift juxtaposed against the high numbers of sexual crimes already committed against women. Women would be considered even more expendable than at present." The Commission also notes that "the prevalence of prostitution in our society and the inherent exploitation associated with it is primarily a social

¹ We also recognise that it would be artificial to delink child prostitution from adult prostitution, transactional sex and phenomena like "Blessers".

phenomenon, which is reflective of deep-seated, economic and sexual inequality, and that legal mechanisms to address this social phenomenon are limited and are reactive in nature, but nonetheless necessary.” The Report was released in the midst of considerable concern about the high prevalence of gender-based violence against women in this country and commentators perceive this to be the government’s way of being seen to address the issue decisively.

Comments: Commission’s first-choice recommendation

We would like to express our disquiet with the Report’s first-choice recommendation for the following reasons:

First, total criminalisation (even with the option of diversion) is a continuation of the criminal law’s marginalisation and control of women as offenders, and frames their involvement in “prostitution” as an issue of personal responsibility. As criminals under the law, the unequal power relationships that currently exist will remain in place. This approach 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.

Second, 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 penalised and unprotected when they need it. The law will keep on punishing those women who step out of line.

Third, in line with the view of organisations such as SWEAT, we would like to express our disquiet with the Report’s use of morally-loaded phrases such as “sexual exploitation”, “prostitution is degrading to the prostitute and to women in general”; “prostitution is equated with rape”, “one theory labels prostitutes as “vectors of disease’ causing a cesspool of iniquity and contagion that should be curbed through criminalisation”, and “immoral purposes”. The recommendations are also not in line with the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change.

Commission’s second-choice recommendation

Partial criminalisation, where the client and not the prostitute is criminalised, is the Commission’s second-choice recommendation. It reflects 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). While the Commission is to be commended for considering moving away from criminalising the conduct of sex workers, this approach is not without its problems.

Comments: Commission’s second-choice recommendation

First, criminal justice control is exercised over those individuals who are blamed for being responsible for the harms in prostitution and women are seen as victims that need to be saved through a process of responsabilisation and individual change. Whilst we acknowledge that violence is an endemic aspect of most sex workers lived experience, 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.” What is often identified as harmful in prostitution is a product not of the inherent character of sex work or sexuality, but rather of the specific regimes of criminalisation and denigration that serve to marginalise and oppress sex workers

Second, “exiting” should therefore 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.

General comments

First, 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 those sex workers (especially the most marginalised street sex workers) who continue to practice the world’s oldest profession remain excluded and depicted by the law as antisocial.

Second, 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 demonised and distant organised “sex trade” (tough on crime and the causes of crime) and the increasingly criminalised 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.

Concluding remarks: keeping social justice at the forefront

We submit that it is not a given that merely because a certain approach, namely decriminalisation, has been proposed by the ruling party, it is the correct solution. In evaluating whether to (de)criminalise sex work, we recognise that what is in the best interest of society as a whole needs to be considered.

It thus becomes important to ask whether there is a rational connection between the purpose/aim of criminalising prostitution and its potential effectiveness. If its stated aim is to uplift some of the most marginalised and vulnerable members of the community by seeking to prevent a form of gender-based violence, there are in our view more effective means to achieve this than criminalisation. Criminalisation merely exacerbates the situation of women who sell sex for a living, often under severely “constrained circumstances”, and also forces prostitution underground, thereby potentially exposing sex workers to even greater harm and vulnerability. This cannot be the rational option given our analysis.

For these reasons we submit that the Commission should explore the option of decriminalisation combined with regulation, coupled with strong measures against coerced

sex work and underage sex work.² Such a vision is in line with the transformative Constitution's human rights-based approach, which incorporates within its core both a gender and development perspective.

In practical terms, this could entail Parliament attempting a virtual implementation using available data to test what the likely impact of such measures would be and on this basis, considering whether they will actually achieve the aim of reducing gender violence. In dealing with the issue of sex work, Parliament is constitutionally obliged to use as its yardstick the question of whether its approach enhances or undermines social justice, particularly gender, class and poverty-related social justice. If this is its point of departure, Parliament will be in the best position possible to satisfy itself that any proposed intervention relating to sex work is in line with the vision of our democratic society and the values, rights and protections of our transformative Constitution.

SIGNED:

Prof Thuli Madonsela (Chair: Social Justice, University of Stellenbosch)

Dr Mary Nel (Senior Lecturer: Department of Public Law, University of Stellenbosch)

Ms Marna Lourens (LLD student: University of Stellenbosch)

² We also recognise that it would be artificial to delink child prostitution from adult prostitution, transactional sex and phenomena like "Blessers".