



Contact persons:

Prof Thuli Madonsela

E-mail: tmadonsela@sun.ac.za

Marna Lourens

E-mail: mlourens@sun.ac.za

31 January 2023

Submitted to the Chief Directorate Legislative Development

Marked for the attention of Tsietsi Sebelemetja

E-mail: BillsI@justice.gov.za

**Comments on The Criminal Law (Sexual Offences and Related Matters)
Amendment Bill of 2022**

I. Purpose

I.1 This submission is presented on behalf of the Centre for Social Justice (CSJ) and the Law Trust Chair at Stellenbosch University (SU). Its contents are influenced by social justice research and engagement with this matter over many years, including a submission made in February 2018 in response to a report of the South African Law Reform Commission (SALRC).

I.2 The purpose of this submission is to present comments on the proposed Criminal Law (Sexual Offences and Related Matters) Amendment Bill of 2022, released by the Department of Justice and Constitutional Development (DOJCD), with a call for public comments no later than 31 January 2023. The invitation stipulates that comments should be

addressed by e-mail to The Director-General: Justice and Constitutional Development, for the attention of Mr Tsietsi Sebelemetja using the e-mail address bills1@justice.gov.za.

1.3 The Bill seeks to decriminalise the adult consensual sale of sexual services as part of a two-staged approach that will be followed by regulation at a later stage (Minister Ronald Lamola's statement on 9 December 2022).

1.4 The Bill states that its purpose is to repeal the Sexual Offences Act (previously Immorality Act) 23 of 1957 (Sexual Offences Act), section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (CLAA), and to decriminalise the sale and purchase of adult sexual service. It further provides for the expungement of criminal records of persons convicted of, engaged in, rendering or receiving sexual services from persons 18 years or older and for transitional matters relating to relevant matters that are currently on court rolls. It further proposes the cessation of incomplete criminal proceedings on such matters.

1.5 The submission seeks to analyse the Bill and its handling of the adult sale and purchasing of sexual services from the perspective of state social justice and related obligations flowing from constitutional fidelity beyond antidiscrimination, applicable international normative standards, particularly stemming from the Convention on the Elimination of All Form of Discrimination Against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (CRPD) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

1.6 At the core of the submission is an analysis of the extent to which the Bill is likely or unlikely to foster fairness to all. At the core of this is equal enjoyment of all human rights for all within the context of the sale and purchase of sex services, considering the positioning of the majority of those who sell sex within the scale of disadvantage and advantage. The submission also considers the genesis of the Sexual Offences Act, an apartheid law whose original title was the Immorality Act of 1957.

2. Background

2.1 The Bill follows a previous call for comments by the DOJCD, to which the CSJ made a submission in February 2018. The comments were on the report of the SALRC on the criminalisation of selling and buying sex services, which the report referred to as prostitution in line with the law.

2.2 The process that culminated in the 2018 SALRC Report commenced under a project committee co-led by Professor Thuli Madonsela, the current Director of the Centre for Social Justice and Law Trust Chair, Professor in Social Justice Studies and Professor Cathy Albertyn who, at the time, was at the Centre for Applied Legal Studies at the University of the Witwatersrand. Both were Commissioners at the SARLC at the time, where in addition to being Co-Project Leader, Madonsela was the Full Time Commissioner. Professor Madonsela was also the project leader of Project 25 on the constitutional alignment of all laws.¹

3. Principles and normative standards that should underpin law reform.

3.1 The premise of this submission is that law reform is duty-bound to foster constitutional fidelity primarily regarding the duty to uphold and advance human rights for all (section 7), including the rights to equality (section 9), human dignity (section 10) and privacy (section 14). The analysis is also concerned with optimising compliance with applicable international human rights obligations while being mindful of the need for proficiency in addressing the ills that laws seek to address in pursuit of societal good taking.

3.2 This takes into account that what was good under apartheid and legalised injustice is not necessarily good under the current Constitution. The Constitution of the Republic of South Africa, 1996 (Constitution) embraces the humanity of all within a transformative blueprint laying the foundation for a social democracy founded on democratic values, social democracy and fundamental human rights where every citizen's life is improved, and every person's potential is freed.²

¹ South African Law Reform Commission "Paper 137 (Project 25) Statutory Law Revision: Legislation administered by the Department of Science and Technology" (13-06-2015) SALRC <<https://www.justice.gov.za/salrc/dpapers/dp137-DST.pdf>> (accessed 01-02-2023)

² Preamble to the Constitution.

3.3 The understanding regarding what constitutes constitutional fidelity about upholding and advancing the human rights of all, including the rights to equality and human dignity, mindful of constitutional values, which include advancing equality, human dignity and *ubuntu* is informed by Constitutional Court jurisprudence in cases such as *S v Makwanyane*,³ *Minister of Finance v Van Heerden (Van Heerden)*,⁴ *Brink v Kitshoff (Brink)*,⁵ *Daniels v Scribante (Daniels)*,⁶ and *Mahlangu v Minister of Labour (Mahlangu)*.⁷

3.4 *S v Jordan (Jordan)*,⁸ which was heavily relied on by the SALRC in its final report, has also been taken into account when noting that the Constitutional Court only focussed on the right not to be discriminated against and did not apply its mind to the full constitutional equality duty, which includes the duty to advance equality (*Van Heerden*). In *Jordan* it was held that the criminalisation of sex work did not constitute unfair discrimination. Elsewhere we disagreed with this indifference to disadvantage perspective but still respect the Constitutional Court as the final authority on and ultimate guardian of the Constitution.⁹ It is open, however, that should the Constitutional Court be approached on the basis of the duty to advance equality, it is likely to decide this matter differently.

³ *S v Makwanyane* 1995 3 SA 39 (CC).

⁴ *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC).

⁵ *Brink v Kitshoff NO* 1996 4 SA 197 (CC).

⁶ *Daniels v Scribante* 2017 4 SA 341 (CC).

⁷ *Mahlangu v Minister of Labour* 2021 1 BCLR 1 (CC).

⁸ *S v Jordan* 2002 6 SA 642 (CC).

⁹ Maluleke MJ and Madonsela T *Gender Equality Jurisprudence in Landmark Court Decisions (2004)* Department of Justice and Constitutional Development 3; Madonsela T *Handbook on Gender Management and Leadership: Practical Ideas on Gender Mainstreaming and Other Effective Strategies for Promoting Gender Equality (2002 and 2006)*, Pretoria: Waweth Resources 57-8 and 77.

3.5 Compliance with international normative standards and applicable obligations include obligations under CEDAW,¹⁰ the Maputo Protocol¹¹ and the CRPD,¹² among others, and also include taking measures to reduce vulnerabilities.

3.6 The analysis is mindful of the need not to open floodgates for criminality that would exacerbate harm to those involved in sex services trading.

3.7 Also taken into account is the country's Regulatory Impact Assessment (RIA) obligations under its own Social and Economic Impact Assessment Systems (SEIAS), which we suggest be augmented with the CSJ-designed Social Justice Impact Assessment Matrix (SIAM) to compensate for SEIAS' lack of constitutional governance and social justice grounding.

3.8 The Social Justice Impact Assessment Matrix¹³

The nine-dimensional SIAM is a transformative legislative design tool that seeks to make a social justice impact analysis requirement mandatory before legislation and policies are passed, and programmes or social schemes are approved. Existing laws and legislation may also be assessed for their direct and indirect impact on advancing equality and the related pursuit of social justice using appropriately disaggregated data. The SIAM is meant to be a social impact foresight tool to assist policy- and lawmakers in seeing the future impact of a policy, law, or programme at the point of design. The theory of change is that when policy and lawmakers enjoy social impact foresight, they can adjust intended laws, policies and programmes before adoption to limit unintended deleterious results that exacerbate inequality and poverty, thus undermining fidelity to the constitutional duty to advance equality (equality duty) and the broader social justice commitment articulated in the preamble to the Constitution.

The SIAM has been designed to frame the leveraging of data analytics to enable prospective impact assessment of planned policies, laws and programmes. This can be administered as a decision-making rubric manually or using algorithms. The SIAM design has been liberally enriched by impact assessment tools employed in other countries, the local RIA and the SEIAS.

¹⁰ Convention on the Elimination of all Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

¹¹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 13 September, entered into force 25 November 2005) CAB/LEG/66.6.

¹² Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006, entered into force 3 May 2008) 2518 UNTS 3.

¹³ © Centre for Social Justice Stellenbosch University 2020.

Guidelines on the implementation of section 149 of the United Kingdom Equality Act 2010 have also been useful. Emerging court jurisprudence on equality, particularly cases such as *Van Heerden*,¹⁴ *Brink*,¹⁵ and *Makwanyane*¹⁶ have also enriched the systems thinking and impact conscious reasoning underpinning the SIAM. The nine dimensions of the SIAM are:

1. **Constitutional objectives congruence:** What is the purpose of the planned or existing policy/decision/law, and is it congruent with constitutional objectives and values concerning the achievement of substantive equality or social justice and advancing human rights for all?
2. **Clarification of target beneficiary:** Who or what group is the targeted or main beneficiary of the policy/decision/law?
3. **Fair differentiation:** Does the policy/decision/law differentiate or treat everyone on a one-size-fits-all basis or differentiate responsively?
4. **Disaggregated data:** What data has been relied on, and is it sufficiently disaggregated in terms of the constitutional grounds of prohibited discrimination, including overlaying grounds, and has the data been integrity assured?
5. **Equitable advantage or privilege:** Does the policy/decision/law confer a disproportionate advantage to any group identified in terms of one or more of the grounds in the Constitution (16 listed grounds plus any analogous ground), or does it disproportionately withhold advantage or privilege to any group identified in terms of the constitutional grounds?
6. **Restitution:** Does the policy/decision/law advance or reduce historical disadvantage to advance equality, including equal enjoyment of all human rights and freedoms as envisaged in section 9(2) read with section 7(2) of the Constitution?
7. **Availability of less harmful alternatives:** If the policy/decision/law disproportionately advantages or disadvantages a group or groups identified in terms of constitutional grounds, how important is it, and can its purpose be achieved through less intrusive means?
8. **Compensatory strategies:** If the purpose cannot be achieved through alternative means, what compensation measures have been built in to offset the disproportionate disadvantage to one or more groups or a combination thereof?

¹⁴ 2004 6 SA 121 (CC).

¹⁵ 1996 4 SA 197 (CC).

¹⁶ 1995 3 SA 39 (CC).

9. **Meaningful engagement:** Have all affected groups been consulted or involved in the policy design and afforded opportunities to influence the design and possible rethinking of potentially unduly harmful impact?

Properly understood, the equality duty in the South African Constitution imposes the duty not only to refrain from discrimination but also to advance equality actively. This includes restitution to redressing racial, gender, disability, age, social class, and other imbalances, including imbalances owing to the intersectionality of grounds in addition to accommodating difference. This entails being mindful of and deliberately reducing power imbalances between social groups at different levels of the ladder or scale of societal advantages and disadvantages. The equality duty requires advancing equal enjoyment of all human rights and freedoms with emphasis on the listed grounds or combination of some or all while prioritising areas of acute accumulated disadvantage and advantage owing to past unjust laws and policies. Section 9(3) of the Constitution states that:

“The state may not unfairly **discriminate** directly or indirectly against anyone on one or more **grounds**, including **race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.**” (own emphasis)

It stands to reason that conduct that diminishes the equal enjoyment of any of the rights protected in the Bill of Rights on any of the prohibited grounds, or a combination thereof, violates the equality duty imposed by section 9 of the Constitution, rendering it unconstitutional and invalid. But compliance with the equality duty would entail a higher level of scrutiny that includes the law’s impact on perpetuating or compounding existing inequality due to past injustices. For new laws, the requirement would include compliance with what I call the Van Heerden-principle by tilting the scales in favour of advancing equality. In *Van Heerden*, Moseneke DCJ, further states that:

“The achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights

but also a core and foundational value; **a standard which must inform all law and against which all law must be tested for constitutional consonance.**¹⁷ (our emphasis)

Similar remarks were expressed by O'Regan J in *Brink*, a case that centred on gender equality, where she states:

“Although in our society, discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in the case of black women, as race and gender discrimination overlap. That all such discrimination needs to be eradicated from our society is a key message of the Constitution. The preamble states the need to create a new order in ‘which there is equality between men and women’ as well as equality ‘between people of all races’”.¹⁸

4. Key provisions of the Bill

4.1 The Bill decriminalises the buying and selling of sexual services involving adults through the repeal of laws that criminalise relevant conduct, expungement of records of those already convicted and transitional matters removing from the court roll matters relating to the buying and selling of sexual services.

4.2 Repeal of laws

Clause 1(1) of the Sexual Offences Act.

Clause 1(2) repealed section 11 of the CLAA.

4.3 Expungement of criminal records of persons convicted of, engaged in, rendering or receiving sexual services from persons 18 years or older

Clause 2(1) provides for automatic expungement, by the Criminal Records Centre of the South African Police Service, of records where a court has convicted a person of— (a)

¹⁷ 2004 6 SA 121 (CC) para 22.

¹⁸ *Brink v Kitshoff NO* 1996 4 SA 197 (CC) para 44.

rendering; (b) engaging; or (c) receiving, sexual services under the provisions of the Sexual Offences Act and section 11 of the CLAA, from a person 18 years or older.

Clause 2 (2) provides that:

“[W]here the criminal record of a person referred to in subsection (1) has not been expunged automatically as provided for in that subsection, the criminal record of that person must, on their written application to the Director-General of the Department of Justice and Constitutional Development, be expunged in line with the provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).”

4.4 Transitional measures

Clause 3 provides for cessation or withdrawal of all incomplete criminal proceedings relating to sexual services rendered or received by persons 18 years or older, which were instituted prior to the commencement of this Act.

5. Assessment of the Draft Bill Against Constitutional and International Human Rights Norms

5.1 Positive dimensions of the Bill

(1) It is our considered view decriminalising the selling and purchasing of sex services is the best option regarding fidelity to the Constitution, taking into account the equality duty and the duty to uphold and fulfil all human rights, including the right to human dignity.

(2) At the core of the change is reducing vulnerability to abuse and predatory tendencies primarily experienced by those who sell or render sex services, principally because of class, gender and other power asymmetries. While the current law purportedly covers both those who buy or sell/render, the reality is that the power imbalance predominantly favours the buyers, and it is those who sell/render sex services that end up being arrested and mistreated by rogue police in addition to existing at the mercy of predatory pimps and other oppressive players. This was highlighted in the SALRC Reports and other studies.¹⁹

¹⁹ South African Law Reform Commission *Sexual Offences: Adult Prostitution* Project 107 June 2015.

(3) When tested against the nine dimensions of SIAM, the approach checks positively on most of the dimensions aimed at avoiding exacerbating inequality while optimising constitutional fidelity and human rights congruence.

5.2 Concerns regarding the Bill

(1) By-laws

- (a) While the proposed amendment is welcomed, the statement by the Minister of Justice and Correctional Services notes that regulation will follow decriminalisation in due course and that in the interim, municipal by-laws will continue to regulate the public nuisance aspect of sex work in South Africa. This is concerning, particularly as the Minister’s statement specifically makes mention of “municipal by-laws which impact on selling sex, with, for example, certain municipalities using the “nuisance” or “loitering” by-laws to remove or prosecute sex workers.”
- (b) By-laws relating to streets and public spaces contribute to considerable police abuse against sex workers. In practice, regulations around by-laws are rarely followed.²⁰ We, therefore, urge government to reconsider the continued regulation of sex work as a public nuisance. Particularly as it parallels the historical position in South Africa (and elsewhere), where the stigmatisation and criminalisation of sex work have always gone hand in hand with colonial/apartheid regimes of racial segregation, exploitation and spatialisation.

(2) Gender-based violence (GBV) branding

- (a) Proposals listed in the Bill respond to the list of interventions proposed in Pillar 3 of the National Strategic Plan on Gender-based Violence and Femicide (“GBVF-NSP”) 2020 – 2030.²¹ In its conceptualisation of GBV and femicide in South Africa, the GBVF-NSP lists sex workers as particularly vulnerable to violence and

²⁰ IG Thusi “Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa” (2015) *Fordham International Law Journal* 205 238.

²¹ Anonymous “Minister Joe Phaahla 2022 World AIDS Day commemoration” (01-12-2022) Gov.za <<https://www.gov.za/speeches/statement-cabinet-meeting-30-november-2022-1-dec-2022-0000>> (accessed 27-10-2023); NCOP Security and Justice “Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill: Department briefing on public submissions; with Deputy Minister” *Parliamentary Monitoring Group* (23-07-2022)_ <<https://pmg.org.za/committee-meeting/33314/>> (accessed 27-01-2023).

marginalisation.²² Accordingly, as a strategic area of intervention under pillar 3, dealing with protection, safety and justice, one of the envisioned five-year outcomes of the Plan is to fast-track the finalisation of legislative processes to decriminalise sex work.²³ The GBVF-NSP urges the criminal justice system to provide protection, safety and justice to GBVF survivors while holding perpetrators accountable for their actions.²⁴ This is commendable for obvious reasons.

- (b) However, in the Bill's aim to protect sex workers against abuse and exploitation, sex workers are arguably cast as victims of circumstance to be rescued. Suffice it to say to posit the sex worker only as a victim of violence and circumstance is to deny the complex positionality of sex workers' lives. In addition, with partial criminalisation, the governance of sex work will remain within the domain of criminal law.²⁵
- (c) This will adversely affect the human and constitutional rights of sex workers, as there is a huge human rights distinction between partial criminalisation, which seeks to abolish sex work by targeting "demand," and decriminalisation, where the primary goal is the realisation of sex workers' rights.²⁶

6. A note on defenders of the *status quo*

6.1 Those who defend the *status quo* argue, among others, that decriminalisation will open the floodgates to odious gendered crimes such as human trafficking while being a gateway to serious crimes such as drug peddling and abuse. They also raise concerns about child trafficking and subjection to abuses such as prostitution.

²² Interim Steering Committee on Gender-Based Violence and Femicide *National Strategic Plan on Gender-Based Violence and Femicide* (2020) 23.

²³ 72-73.

²⁴ Anonymous "Minister Joe Phaahla 2022 World AIDS Day commemoration" *South African Government* (01-12-2022) Gov.za; NCOP Security and Justice "Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill: Department briefing on public submissions; with Deputy Minister" (23-07-2022) PMG <<https://pmg.org.za/committee-meeting/33314/>> (accessed 27-01-2023).

²⁵ J Scoular *The Subject of Prostitution: Sex Work, Law and Social Theory* (2015) 151; C Holmstöm & M-L Skilbrei "The Swedish Sex Purchase Act: Where Does it Stand (2017) *Oslo Law Review* 82-104; See the South African Law Reform Commission's Recommendations. SALRC *Discussion Paper 001 Sexual Offences: Adult Prostitution* (2009).

²⁶ CA Mgbako "The Mainstreaming of Sex Workers' Rights as Human Rights" (2020) *Harvard Journal of Law & Gender* 129.

6.2 Such concerns are serious and need not be taken lightly. However, no evidence suggests that the *status quo* in so far as it criminalises voluntary adult sex trading is proficient in addressing these ills. It is also unclear why laws against trafficking, child abuse and anti-drug laws should not be relied on if enforced properly. If there are enforcement lapses, there is no evidence proving that the *status quo* regarding the buying, selling and rendering sex services solves these challenges. What is clear is that those on the supply side operating in streets or brothels suffer abuses from rogue authorities, clients and others.

6.3 In his article in the *Daily Maverick*, retired Constitutional Court Justice Edwin Cameron, reminds us of the genealogy of the Sexual Offences Act in apartheid morality policing and then named the Immorality Act. He supports decriminalisation, pointing out that data from countries such as New Zealand do not support concerns about increased numbers. He also opines that partial criminalisation has not worked.²⁷ His views are supported by Emily Rothman, an associate professor of community health sciences and expert in sexual abuse and violence, who notes that both the criminalisation and legalisation of commercial sex have ethical pitfalls because they can “disempower and burden sellers” and put vulnerable people at increased risk of harm.²⁸

She argues that the so-called “Nordic model,” which criminalises only the buying and brokering of sex, “offers the advantage of eliminating punishment for sellers while potentially preventing the expansion of the commercial sex market and limiting the number of people trafficked.”²⁹

Rothman says that despite global controversy about the regulation of commercial sex, there is widespread agreement that sellers, or sex workers, are at increased risk for a host of negative health and social consequences, including assault, homicide, and sexually transmitted infections. Complicating the debate is a lack of data on the percentage of those engaged in commercial sex who sell sex willingly or who are coerced by force (i.e., trafficked) or by financial pressures.³⁰

²⁷ E Cameron “Sex workers and moral stigmatisation — where criminal law has no place” (24-01-2023) *Daily Maverick* <<https://www.dailymaverick.co.za/article/2023-01-24-sex-workers-and-moral-stigmatisation-where-criminal-law-has-no-place/>> (accessed 25-01-2023).

²⁸ E Rothman “Second Thoughts: Should US Physicians Support the Decriminalization of Commercial Sex?” (2017) *AMA Journal of Ethics* 110 114.

²⁹ 114.

³⁰ 113-114.

Whether people who engage in commercial sex are consenting or non-consenting is important, she says, because supporters of decriminalisation “assume that most paid sexual encounters are entirely consensual.” Problematically, she adds, some accept the argument that people living in dire poverty, with no other options, sell sex with consent.

Rothman argues that biomedical ethics disallows the coercive practice of using financial inducements to compel people to participate in medical research, so it is “logically consistent” to object to using financial incentives to compel people to have sex. She continues:

“There are those who argue that people work at all kinds of jobs that they don’t like because of financial pressure, and that working at sex is no different. But that is not a universally held opinion by the people who have sold sex. Some feel that having their bodies penetrated by customers is fundamentally, qualitatively different than standing behind a cash register. We simply don’t know what percentage of sellers enjoy selling sex, and what percentage are being assaulted or traumatised regularly.”³¹

While criminalisation has the potential to reduce the likelihood that people will be trafficked, arrests can “compound adversity” for sellers, especially those from marginalised populations, and enforcement can be used “selectively” against buyers and brokers, Rothman says. Legalisation, meanwhile, may not stem trafficking and may continue to put sellers at high risk of violence and exploitation.³²

She notes that, counter to expectations, the decriminalisation or legalisation of commercial sex in New Zealand, the Netherlands, and Germany has not resulted in uniformly safer conditions, successful unionisation of sex workers, or destigmatisation. She cites economists’ analyses showing that countries where commercial sex is legal appear to experience higher sex-trafficking inflows.³³

“On the question of decriminalising the form of commercial sex known as ‘prostitution’ in the US, the potential harms to individuals and the public must be considered as carefully as the benefits of the expansion of individual rights,” Rothman says.³⁴

³¹ L Chedekel “Decriminalizing Prostitution Won’t Solve Social, Ethical Problems” (09-01-2017) *School of Public Health* <<https://www.bu.edu/sph/news/articles/2017/decriminalizing-prostitution-wont-solve-social-ethical-problems/>> (accessed 27-01-2023).

³² Rothman (2017) *AMA Journal of Ethics* 113.

³³ 114.

³⁴ 114.

She says that while there is “no perfect solution,” the Nordic model, or any other policy changes, should be rigorously evaluated after being implemented.³⁵

7. Conclusions and recommendations

7.1 As CSJ, we support the removal of criminal and other laws targeting sex workers, buyers, third parties, and sex work-related activities as an important first step in the decriminalisation of sex work.

7.2 We believe this is important, particularly as the context of criminalisation is deeply entrenched in a history of slavery, colonialism, and apartheid. Conservative moralities, restrictive (gender) norms and institutionalised forms of discrimination have ensured a continuum of sanctioned stigmatisation of sex workers.³⁶ They have been excluded from the “circle of moral consideration”, which prevents us from harming those we consider as fully human, yet in harming them, we are all dehumanised, as *ubuntu* teaches us.

7.3 Those on the supply side of selling or rendering sex services are a highly marginalised group, suffering human rights abuses with high incidences of sexual and other violence, unemployment, stigmatisation, discrimination and lack of access to legal and health services. Police violence, harassment and abuse are a constant threat in their lives, with many who supply sex services reporting intensified police abuse and discrimination during the lockdown

³⁵ 114.

³⁶ See chapter 2. SALC Discussion Paper: *Sexual Offences: Adult Prostitution* 2.50 & 2.64; S Liebenberg *Socio-Economic Rights. Adjudication under a Transformative Constitution* (2010) 27.

period due to COVID-19.³⁷ This complex intersection of interlocking constraints underpins sex work, structures its demand and shapes the choices that are available to sex workers.³⁸

As Ratele argues, historically, the Immorality Acts not only contributed to how masculinities and femininities were constituted and relations between males and females viewed, but it also simultaneously formed part of the materials and sources that were given to constitute personhood in our country. Relations (including social, psychological, sexual, and racial ones), identities and differences, and sexual morality, all informed the complex justifications that led to the apartheid government's regulation and control of all aspects of South Africans' lives. But these acts were also located within a longer history, as a continuation of and entrenchment of prejudice and discrimination that already developed during colonialism and even earlier.³⁹ Therefore, we urge you to consider that far from being something obvious and an expression of some kind of natural law, the regulation and criminalisation of sex work have always been unstable and contested and have always served larger agendas of colonial and apartheid governments. Let us move away from a framework that seeks to control, punish and police to a broader political project aimed at institutionalising democratic justice across multiple axes of social differentiation.

Submitted with gratitude by:

Professor Thuli Madonsela

Marna Lourens

³⁷ SALC *Discussion Paper: Sexual Offences: Adult Prostitution* 2.47 – 2.61; S Tamale “Exploring the contours of African sexualities: Religion, law and power” (2014) *African Human Rights Law Journal* 165; J Arnott & A Macquene “SWEAT Issue paper 19: Submission to the SALC Project 107 Sexual Offences Act (2002) SWEAT 9-12 <<http://www.sweat.org.za>> (accessed 22 September 2017); N Fick “Police Abuse of Sex Workers when Making Arrests: Enforcing Fear” (2006) 16 *SA Crime Quarterly* 27–34; J Rangasami, T Konstant, S Manoek “Police Abuse of Sex Workers: Data from cases reported to the Women’s Legal Centre between 2011 and 2015” (2016) *Women’s Legal Centre* <wlce.co.za/wp-content/uploads/2017/02/Police-abuse-of-sex-workers.pdf> (accessed on 11 September 2017); SANAC “The South African National Sex Worker HIV Plan: 2016-2019” (2016) Pretoria, South Africa 6-8; C Boudin & M Richter “Adult Consensual Sex Work in South Africa: The Cautionary Message of Criminal Law and Sexual Morality” (2009) 25 *SAJHR* 179-197; SALC *Discussion Paper 001 Sexual Offences: Adult Prostitution* (2009); S Smit “Police treat sex workers like they are ‘nothing’” *Mail and Guardian* (10-06-2020) <mg.co.za/news/2020-06-10-police-treat-sex-workers-like-they-are-nothing> (accessed 27-01-2023) K Mafolo “Covid-19: Some sex workers move online as SA heads into lockdown” *Groundup* (27-03-2020) <www.groundup.org.za/article/some-sex-workers-move-online-sa-heads-lockdown> (accessed 27-01-2023).

³⁸ H Botha “Equality, Plurality and Structural Power” (2002) 25 *SAJHR* 9.

³⁹ K Ratele “Apartheid, anti-apartheid and post-apartheid sexualities” in *The Prize and the Price: Shaping Sexualities in South Africa* M Steyn and M van Zyl (eds) (2009) 302.

Centre For Social Justice, University of Stellenbosch
Incorporating Input from the Thuma Foundation
31 January 2022



Bibliography

- Anonymous “Minister Joe Phaahla 2022 World AIDS Day commemoration” (01-12-2022) *Gov.za* <<https://www.gov.za/speeches/statement-cabinet-meeting-30-november-2022-1-dec-2022-0000>>.
- Arnott J & Macquene A “SWEAT Issue Paper 19: Submission to the SALC Project 107 Sexual Offences Act (2002) SWEAT 9-12 <<http://www.sweat.org.za>>.Botha H “Equality, Plurality and Structural Power” (2002) 25 *South African Journal of Human Rights* 1-37.
- Boudin C & Richter M “Adult Consensual Sex Work in South Africa: The Cautionary Message of Criminal Law and Sexual Morality” (2009) 25 *South African Journal on Human Rights* 179-197.
- Brink v Kitshoff NO* 1996 4 SA 197 (CC).
- Cameron E “Sex workers and moral stigmatisation — where criminal law has no place” *Daily Maverick* (24-01-2023) <<https://www.dailymaverick.co.za/article/2023-01-24-sex-workers-and-moral-stigmatisation-where-criminal-law-has-no-place/>>.
- Chedekel L “Decriminalizing Prostitution Won’t Solve Social, Ethical Problems” (09-01-2017) *School of Public Health* <<https://www.bu.edu/sph/news/articles/2017/decriminalizing-prostitution-wont-solve-social-ethical-problems/>>.
- Constitution of the Republic of South Africa 1996
- Convention on the Elimination of all Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.
- Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006, entered into force 3 May 2008) 2518 UNTS 3.
- Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
- Daniels v Scribante* 2017 4 SA 341 (CC).
- Fick N “Police Abuse of Sex Workers when Making Arrests: Enforcing Fear” (2006) 16 *SA Crime Quarterly* 27–34.

Interim Steering Committee on Gender-Based Violence and Femicide *National Strategic Plan on Gender-Based Violence and Femicide* (2020).

Liebenberg S *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010), Cape Town: Juta.

Madonsela T *Handbook on Gender Management and Leadership: Practical Ideas on Gender Mainstreaming and Other Effective Strategies for Promoting Gender Equality* (2002 and 2006), Pretoria: Waweth Resources 57-8 and 77

Madonsela T “Taking Social Justice Seriously Through Serious Gaming” *News24*(2023) <https://www.news24.com> >columnists

Madonsela T “Making Social Justice Real: Reflections on Constitutional Fidelity Regarding the Social Justice Commitment and Achievement of Equality in the Transformation of the Judicial System” in ZT Boggenpoel (ed) *Law, justice and transformation* (2022) 161-191.

Maluleke MJ and Madonsela T *Gender Equality Jurisprudence in Landmark Court Decisions* (2004) Department of Justice and Constitutional Development 3

Mafolo K “Covid-19: Some Sex Workers Move Online as SA Heads into Lockdown” (27-03-2020) *Groundup* <www.groundup.org.za/article/some-sex-workers-move-online-sa-heads-lockdown>.

Mahlangu v Minister of Labour 2021 1 BCLR 1 (CC).

Minister of Finance v Van Heerden 2004 6 SA 121 (CC).

NCOP Security and Justice “Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill: Department briefing on public submissions; with Deputy Minister” (23-07-2022) <<https://pmg.org.za/committee-meeting/33314/>>.

Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (adopted 13 September, entered into force 25 November 2005) CAB/LEG/66.6.

Rangasami J, Konstant T, Manoek S “Police Abuse of Sex Workers: Data from cases reported to the Women’s Legal Centre between 2011 and 2015” (2016) *Women’s Legal Centre* <wlce.co.za/wp-content/uploads/2017/02/Police-abuse-of-sex-workers.pdf>.

Ratele K “Apartheid, Anti-Apartheid and Post-Apartheid Sexualities” in M Steyn & M van Zyl (eds) *The Prize and the Price: Shaping Sexualities in South Africa* (2009), HSRC Press.

Rothman E “Second Thoughts: Should US Physicians Support the Decriminalization of Commercial Sex?” (2017) *AMA Journal of Ethics*

S v Jordan 2002 6 SA 642 (CC).

S v Makwanyane 1995 3 SA 39 (CC).

SALC *Discussion Paper 001 Sexual Offences: Adult Prostitution* (2009).

SANAC “The South African National Sex Worker HIV Plan: 2016-2019” (2016), Pretoria, South Africa.

Scoular J *The Subject of Prostitution: Sex Work, Law and Social Theory* (2015) 151; C Holmstöm & M-L Skilbrei “The Swedish Sex Purchase Act: Where Does it Stand (2017) *Oslo Law Review* 82-104
Sexual Offences Act (previously Immorality Act) 23 of 1957.

Smit S “Police treat sex workers like they are ‘nothing’” (10-06-2020) *Mail and Guardian*
<mg.co.za/news/2020-06-10-police-treat-sex-workers-like-they-are-nothing>.

South African Law Reform Commission *Sexual Offences: Adult Prostitution* Project 107 June 2015.

Tamale S “Exploring the Contours of African Sexualities: Religion, Law and Power” (2014) *African Human Rights Law Journal* 150-177.

Thusi IG “Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa” (2015) *Fordham International Law Journal* 205-238

UK Equality Act 2010.