



Commission for Gender Equality

A society free from gender oppression and inequality

DECRIMINALISING SEX WORK IN SOUTH AFRICA:

2013

OFFICIAL POSITION OF THE COMMISSION FOR GENDER EQUALITY

1. INTRODUCTION

All countries struggle with the legal treatment of prostitution or sex work, a practice that is as old as history itself. South Africa is no exception. The current legal situation in South Africa involves the criminalization of sex work with consequences such as the abuse of sex workers' rights, violence against them and abusive treatment by the police. Very often societal perceptions of sex work are informed by religious opinion that views sex work as "sin" and sex workers as "fallen or sinful" women, splitting the world into a dichotomy of good and bad girls/women, and treating it as a moral issue. These views very rarely stigmatize the buyers of sex work who are mostly men. Outshoorn (2001: 475) points to the fact that the moral discourses of the 1890s and 1900s had defined prostitution as immoral and based this on biblical interpretations, therefore viewing the abolition of prostitution as the solution.

2. PERSPECTIVES OF SEX WORK VERSUS PROSTITUTION

Sex work and prostitution are, strictly speaking, not the same concept. Prostitution is viewed as coerced sex work where women have no choice in the matter and is necessarily demeaning and women are victims. Sex work, on the other hand, indicates agency and therefore allows for women's decision making power in capitalist systems. These views have been influenced by feminist thinking on issues of prostitution.

Liberal and radical feminists are divided about the treatment of sex work. Liberal feminists prefer law reform that would lead to the regulation of sex work

¹This Policy Brief is based on a longer position paper developed by the Commission for Gender Equality 'Commission for Gender Equality: position paper on sex work', 2013.

(e.g. registration, mandatory health checks etc) while radical feminists would prefer different solutions for sex work. Some radical feminists view sex work as "an institution of male supremacy" under patriarchal conditions, where in the view of Andrea working (1987), no sexual intercourse, even consensual sex is without coercion because of women's subordinate position in all societies. Others view sex work as a right to self determination and freedom of choice, especially among self-identified feminist sex workers.

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Christine Overall (1992: 707) uses criteria developed by Gale Rubin for a democratic morality (not religious morality) to evaluate sex work. A democratic morality includes the way that partners treat each other, the level of mutual consideration; the presence or absence of coercion; the quantity and quality of pleasures being provided. Applying these criteria to sex work Overall (1992) comes to the conclusion that not all sex work is necessarily dangerous, coerced, without consideration for the sex worker or not providing pleasure for both provider and client. More importantly she points out that a lot of work that is mainly done by women (but that is not sex work) is dangerous, coerced (because many women do not have a choice but to do certain work due to a lack of education), without consideration of the worker's humanity and not providing mutual pleasure such as factory work (that is often linked to very long hours, being tedious and boring, not leading to any personal satisfaction, at much lower pay per hour as sex workers). Yet, this type of work is not as stigmatized as sex work. Clearly something else is problematic about sex work.

“Sex work differs in a crucial way from other forms of labor done by women, because it is predicated on the asymmetrical relationship of economic exchange between men and women”

Overall comes to the conclusion that the criteria are inadequate to evaluate sexual relationships because they do not take into consideration the “politics of human interaction” (1992: 716), such as the structural asymmetry between men and women in capitalist patriarchal systems and the reasons for the existence of sex work. Sex work differs in a crucial way from other forms of labor done by women, because it is predicated on the asymmetrical relationship of economic exchange between men and women, without which it cannot be sex *work*. It is the commoditization of sex involving not only the sexual activity but the buying and selling of the activity – and in this sense it is classist, racist, ageist and sexist. The reason for it being classist is that for the most part it involves the work of poor, disadvantaged and desperate women, ageist because some women are deemed too old to be sex workers and young women are preyed upon, and racist because it often promotes the perception that black and Asian women are “exotic” and “sexually insatiable”. Men are most often the bosses and women the workers – it is women servicing men (Overall 1992: 717). Sex work, involving women, is therefore inherently gendered and a manifestation of a heterosexual, patriarchal institution.

Therefore sex work is very difficult to deal with under legislation that criminalizes it. In cases where trafficking is involved the law often conflates voluntary

and non-voluntary forms of sex work. It may be the case that given the asymmetrical structural nature of the buying and selling of sex work in capitalist patriarchal societies sex work should not have separate legislation, but should be decriminalized and considered *work*, and be regulated by other types of existing legislation, such as legislation dealing with labor related issues, sexual violence, racism etc.

Given the conceptual dilemmas that different interpretations of sex work create, the type of legal intervention that is needed in South Africa in the context of a developing country, where poverty and economic desperation often fuels sex work (for the sake of survival), and where non-voluntary sex work due to trafficking is on the increase and the risk of contracting the HI virus is high, we will analyse different legal remedies in this paper. In the end we conclude with a CGE position that is feasible in the context of South Africa

3. INTERNATIONAL CONTEXT

The current South African approach to sex work is that of criminalisation and prohibition (i.e. a legislation prohibiting sex work and activities associated with it, and treating it as a criminal offence). Though a number of countries adhere to an approach that is very similar to that of South Africa, other countries approach sex work very differently.

3.1. Criminalisation

Criminalisation is a position that deems sex work illegal. Criminalisation seeks to reduce or eliminate the sex industry and is supported by those who are opposed to sex work on moral, religious or feminist grounds (Mossman 2007, Hughes 2009). Criminalised

jurisdictions are those jurisdictions where it is not legally possible to engage in sex work, because sex work or its associated activities results in contravening some law regardless of the level of tolerance existing.

There are, primarily, two approaches found in jurisdictions that have criminalised sex work. The one approach is referred to as prohibitionism. Jurisdictions within the prohibitionist framework render all forms of sex work unacceptable and therefore illegal (Jordan 2005, Mossman 2007). South Africa, most states of the USA, and most countries in the Middle East fall within the prohibitionist framework.

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The other approach is referred to as abolitionism. Abolitionism is essentially a modified form of prohibitionism. Jurisdictions within this framework allow the sale of sex, but ban all related activities (e.g. soliciting, living off the earnings of sex work, brothel keeping, and procurement) (Hughes 2009). Making these related activities illegal effectively criminalises sex work as it is virtually impossible to carry out sex work without contravening one law or another. An abolitionist approach often focuses on eliminating or reducing the negative impacts of sex work. This approach is currently operational in countries such as England and Canada (Jordan 2005, Mossman 2007).

Sweden has taken a different approach to criminalisation, being the first country to criminalise the *buyers* of sex

rather than sex workers themselves. Sex work is seen as sexual abuse and an act of violence against women (Mossman 2007, Hughes 2009). Proponents of the Swedish legal system hope that by targeting the demand side of the sex industry, they may reduce or eliminate it altogether (Mossman 2007).

3.2. Legalisation

Legalisation is a term used to refer to jurisdictions where sex work is controlled by government and is legal only under certain legal conditions and constraints. Legalisation is also often referred to as regulation.

Legalisation recognises sex work as necessary for a stable social order (Mossman 2007). However controls are considered necessary to protect public order and health. Some jurisdictions opt for legalisation as a means to reduce crimes associated with sex work (e.g. organised crime, police corruption, child sex work, and sex trafficking) (Mossman 2007). A legalised system includes the existence of sex work-specific controls (Mossman 2007) such as licensing, registration and mandatory health checks. Licenses are usually managed by the police, judiciary, elected local authorities or even independent specialist boards that have the authority to impose criminal penalties on workers without the necessary permits (Mossman 2007).

The countries where sex work has been legalised include the Netherlands, Germany, Iceland, Switzerland, Austria, Denmark, Greece, Turkey, Senegal, the USA state of Nevada, and many Australian states (Mossman 2007, Hughes, 2009).

3.3. Decriminalisation

Decriminalisation, also known as non-criminalisation, is a position advancing for the repeal of all laws against sex work and the removal of provisions that criminalise all aspects of sex work (Mossman 2007, Hughes 2009). Decriminalised jurisdictions make a distinction between (i) voluntary sex work and (ii) that involving

either force and coercion or child sex work. The latter are criminal in decriminalisation states (Hughes 2009).

The key difference between legalisation and decriminalisation is that with the latter there are no sex work-specific regulations imposed by the state (Jordan 2005). Rather, any regulation of the industry is predominantly through existing statutes and regulations (Mossman 2007, Jordan 2005). Thus sex work is recognised as a legitimate business and, as such, it comes under conventional employment and health regulations (Mossman 2007, Jordan 2009). Those involved in sex work have the same rights and responsibilities as other workers, such as the right to state protection and the responsibility to pay taxes. The aims of decriminalisation differ from legalisation in their emphasis. The main objective of legalisation is to protect the social order (Mossman 2007). While this is relevant to decriminalisation, the main emphasis here is on the sex worker – respecting their human rights, and improving their health, safety and working conditions (Jordan 2005).

Proponents of decriminalisation argue that the cost of keeping sex work illegal outweighs the gains, and that sex work should essentially be seen as consenting behaviour between adults (Jordan 2005). They also point to potential violation of civil liberties that state-regulated legalisation might involve, through controls such as registration and mandatory health checks (Jordan 2005). In decriminalised regimes, there is typically a shift in power away from the state and clients to sex workers themselves. Decriminalisation is advanced as a way of avoiding the two tier reality of legal and illegal operations where the latter operates underground (Jordan 2005). It also helps avoid the social exclusion that renders sex workers vulnerable to exploitation. Leading countries on decriminalization includes New Zealand and one State in Australia.

4. COMMON MISCONCEPTIONS ABOUT PROSTITUTION AND SEX WORK

The New Zealand Committee on Prostitution Act Review (2005) examined a number of common assumptions about sex work and the sex industry that are often based on stereotypes and lack of information. Firstly, the committee noted misconceptions about sex work such as coercion, linkages to crime and gangs, drug usage or influence of public perceptions by the media. However, Abel et al (2009) and Donovan et al (2010) argue that decriminalisation of sex work does not lead to increase in sex workers as often feared. Five years after decriminalisation of sex work in New Zealand, no evidence was found of an increase in the number of sex workers.

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To illustrate the point further, a comparative study by Harcourt et al (2010) of three Australian cities with different legal frameworks on sex work found that 52% of sex workers in Sydney (decriminalised sex work) were more likely to approach health care centers as sources of information and training compared to 33% in Melbourne (legalised sex work) and Perth (criminalised sex work). This case of the three Australian cities therefore clearly suggests that the legal environment has an important effect on the rendering of health care services and programmes to sex workers.

Other common misconceptions that have been proved wrong based on the New Zealand case include

decriminalisation leading to greater human trafficking and increase in child sex workers. In cases where brothel owners and clients in New Zealand had hired under age sex workers, prosecutions were imposed.

5. OFFICIAL POSITION OF THE COMMISSION FOR GENDER EQUALITY

The Commission for Gender Equality has conducted a consultative dialogue on legislative reform and concluded that the current legal regime that criminalises sex work in South Africa has failed sex workers. It is not only difficult to implement and enforce but has also failed to reduce the levels of sex work and violence against sex workers. The current legal regime harms the interests of sex workers by denying them their human and constitutional rights to protection as well as preventing access to legal assistance and enjoyment of their labour rights. However the current legal context has led to harassment and abuse of sex workers at the hands of the police.

The position of the Commission for Gender Equality regarding sex work is therefore informed by the research work conducted in New Zealand and parts of the city of Sydney in Australia which focuses on the impact of decriminalization of sex work. Legislation relation to sex work should be based on the principle that sex work is work, and should allow the industry to be subjected to existing labour and business laws aimed at preventing unsafe, exploitative and unfair business practices. Discussions about the decriminalisation of sex work should take place within a broader framework that places it within the same variety of activities falling under adult entertainment including sex work, adult shops, strip clubs, adult film theatres, escort agencies and massage parlours.

The position of the Commission for Gender Equality is based on research focusing on the impact of

decriminalisation of sex work. This includes research conducted in New Zealand and parts of the city of Sydney in Australia. The Commission believes that legislation on sex work should adopt the principle of sex work as ordinary work, and allow the industry to be governed by existing labor and business laws intended to prevent unsafe, exploitative and unfair business practices. The Commission believes that a broader discussion that places sex work within the broader adult entertainment industry which includes adult shops, strip clubs, adult film theatres, escort agencies and massage parlours.

The Commission for Gender Equality notes that five years after sex work law reform in New Zealand, research findings indicates that decriminalisation of sex work has had positive impacts such as empowering sex workers to protect themselves against violence, it improvement in the relationship between sex workers and police, no increase in trafficking or commercial exploitation of women and children as well as no increase in demand for sex. Research findings from the experiences of parts of New South Wales in Australia, where sex work was decriminalised in 1995, also confirm the findings from New Zealand about the positive experiences of decriminalisation.

The Commission for Gender Equality acknowledges every South African has human rights. South Africa has foundational rights expressed with clarity and force in its Constitution.

These rights apply to all who live in the country, and include the key rights of relevance to sex workers as outlined below:

- * **Section 10:** Human dignity - everyone has inherent dignity and the right to have their dignity respected.
- * **Section 12:** Freedom and security of the person - everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body;
- * **Section 22:** Freedom of trade, occupation and profession - every citizen has the right to choose

their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

The Commission hereby argues that these rights also be afforded to sex workers in South Africa. The current law criminalises sex work and most of the alternative legal models also offend against these elements of the constitution. It is in relation to the violation of those rights that we recommend decriminalisation of sex work.

6. A RIGHTS-BASED APPROACH TO SEX WORK: HOW DECRIMINALISATION FULFILLS SOUTH AFRICA'S CONSTITUTIONAL AND HUMAN RIGHTS COMMITMENTS

6.1. *Summary of Arguments*

I. Decriminalisation will deliver sex workers' constitutional and human right to free choice of work

- * Criminalisation violates sex workers' right to free choice of work by making a legitimate form of labour illegal.

II. Decriminalisation will deliver sex workers' constitutional and human rights to form unions and challenge unfair labour conditions.

- * Criminalisation violates sex workers' right to association because sex workers are effectively barred from unionising and cannot engage in collective bargaining.

III. Decriminalisation will deliver sex workers' constitutional and human rights to freedom from discrimination.

- * Criminalisation of sex work discriminates against women because laws against sex work disproportionately affect women and stigma against sex workers fuels societal discrimination.

IV. Decriminalisation will deliver sex workers' constitutional and human rights to the highest attainable standard of health.

- * Criminalising sex work violates sex workers' right to health because it impedes access to health services and HIV prevention strategies, and increases sex workers' risk of violence.
- * Criminalisation prevents sex workers from participating in health policy decisions, leading to ineffective health interventions.

V. Decriminalisation will deliver sex workers' constitutional and human rights to freedom and security of the person, which includes the right to be free from arbitrary arrest and detention, the right to be free from violence, and the right to bodily and psychological integrity.

- * Criminalisation violates sex workers' right to be free from arbitrary arrest and detention because police use the law to harass and target sex workers.
- * Criminalisation violates sex workers' rights to be free from violence and to bodily and psychological integrity because police physically and sexually abuse sex workers, and sex workers are unable to access justice when they are the victims of violent crime.

VI. Decriminalisation will preserve sex workers' fundamental right to human dignity.

- * Under criminalisation sex workers suffer the

indignity of discrimination, police abuse, health services stigma, and other violations.

7. POLICY IMPLICATIONS OF CGE'S OFFICIAL POSITION ON SEX WORK

A number of policy implications arise out of the formal position adopted by the Commission for Gender Equality on decriminalisation of sex work, as briefly outlined below.

- * Law enforcement policy would need to focus greater attention on the safety, security and protection of sex workers – this would entail shifting policing resources and capacity from policing, harassment and prosecution of sex work towards protection, respect and enforcement of the rights of sex workers.
- * Policy makers would need to allocate resources for training and capacity building within local law enforcement agencies to ensure greater awareness and protection of the rights and safety of sex workers.
- * Resources will be necessary to provide training and improve vital skills (e.g. business skills, negotiation skills, etc.) of sex workers to safeguard their interests and enhance their ability to demand and enforce their rights as workers.
- * Policy makers will have to consider educational awareness campaigns and dissemination of relevant information to the sex work industry in general and sex workers in particular, regarding imminent changes to current sex work laws to ensure greater knowledge and awareness of their rights and privileges as sex

workers – effective dissemination of relevant information on a range of vital services to sex workers such as health care services, legal services and other related support services should be made part of a comprehensive sex work law reform package.

- * A comprehensive review of current labour rights and laws and employment legislation will be necessary to ensure that the rights of sex workers are incorporated into enforcement policies and practices by state agencies, employer and worker organisations. In addition, a thorough review of current labour bargaining mechanisms and practices might also need to be undertaken as part of the law reform process to ensure that sex workers enjoy the same rights of access to labour bargaining practices in the labour market.
- * Policy makers need to review and where necessary strengthen current/existing monitoring mechanisms for monitoring the behaviour of police towards sex workers, ensuring adequate powers of investigation and prosecution against police corruption and harassment of sex workers.
- * The focus of policy should be on effective monitoring by law enforcement agencies to protect minors, eliminate the problems of under-age sex workers, and prosecute the trafficking of women and exploitation and abuse of sex workers.
- * Finally, it is important for government to initiate broader public awareness campaigns to educate and sensitise society in general about the necessary sex work law reforms and associated policy changes. This is crucial to deal with and possibly change the widespread hostile social attitudes towards sex work and sex workers.

8. CONCLUSION AND RECOMMENDATION

The aim of this Policy Brief was to put forward the Commission for Gender Equality's official position on sex work, and provide a brief outline of the arguments, reasons and explanations as to why the Commission has decided to adopt this position.

Based on the experiences of countries such as New Zealand and Australia where experiences of sex work law reform and decriminalisation of sex work has been implemented, and also based on the positive experiences of the impact of decriminalisation, the Commission for Gender Equality is of the view that sufficient evidence exists to support the decriminalisation of sex work in South Africa. The Commission therefore, accordingly, recommends for the government to decriminalise sex work in South Africa.

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MANDATE:

Section 187(1) of the Constitution of South Africa reads: "The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality." The CGE is a catalyst for the attainment of gender equality. Section 187(2) grants the CGE "the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality."