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Submission: South African Law Reform Commission

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**Adult, Consensual Sex Work in South Africa – the cautionary
message of criminal law and sexual morality**

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Introduction

[A] fruitful debate about the morality and legality of prostitution should begin from a twofold starting point: from the broader analysis of our beliefs and practices with regard to taking pay for the use of the body, and a broader awareness of the options and choices available to poor working women.¹

- Martha Nussbaum

My biggest problem during sex work is; other clients want to take you to their places while you are at their places, they take you without giving you money or refuse to use condoms. Others beat you for nothing-others call their friends to rape you b'coz u are a sex worker. They say you deserve to be raped. They think sex workers are not human.²

- Felicia

This submission comments on the SALRC Discussion Paper 0001/2009, Project 107, sexual offences and adult prostitution. This submission contends that continued criminalisation of voluntary sex work is wasteful, harmful and misdirected; it argues in favour of a legal framework recognizing voluntary adult sex workers as legitimate labourers entitled to the full protection of the law. Of course non-voluntary, non-consensual sex work should be criminalised, just as all non-consensual sex is; for the purposes of this paper, references to “sex workers” should be read to mean voluntary sex workers. The Discussion Paper contains a wealth of information on all sides of the topic, including numerous compelling arguments for decriminalisation. Rather than repeating those points or attempting to nuance them here, this submission raises an issue not squarely addressed in the Discussion Paper, namely the need to separate criminal law and sexual morality, particularly in light of South Africa’s fraught history in this field.

The submission is organized as follows. First, we briefly consider the theoretical framework and key antecedents. Second, we highlight historic examples of ways in which the legal system has disempowered women and more specifically attempted to insert the criminal law into sexual morality. We focus on colonial and apartheid era policies, motivated by gender and racial oppression, which wrongly policed sexual or moral behaviour, seeking to impose majoritarian or politically dominant social values on minority or politically marginalized groups. Third, we argue that most, if not all, human relationships involve some degree of contractual or transactional behaviour and that any criminal laws inserted into the fray of complex social and

¹ Martha Nussbaum, “Whether from Reason or Prejudice’ Taking money for bodily services” in *Prostitution and Pornography: Philosophical debate about the sex industry*, 178 (Jessica Spector ed., 2006).

² Felicia, Submission to the South African Law Reform Commission, 23 June 2009. Felicia (not her real name) is a Johannesburg-based sex worker. Available at: <http://www.womensnet.org.za/campaign/decriminalise-sex-work-now> (accessed 24 June 2009).

sexual relations, including those currently in force, are bound to draw arbitrary distinctions and thus create standards which are not judicially manageable. Finally, a review of the evolving moral standards in other areas of criminal law and sexual morality, such as homosexual sex and abortion on demand, underscores the need for Parliament to repeal laws criminalising sex work.

Theoretical Framework

The classic theoretical debate on criminal law and morality was between H.L.A. Hart and Lord Patrick Devlin during the 1960s.³ Briefly, their positions were as follows. Lord Devlin argued that society needs morality and is entitled to defend its moral standards as a form of self-protection by criminalising deviation.⁴ This position derived, in part, from the assumption that every community shares a common moral framework – in his case one derived largely from Christianity. Thus, Devlin wrote, “No society can do without intolerance, indignation and disgust.”⁵ H.L.A. Hart countered that criminal law is less an expression of common morality and more a necessity to prevent harmful acts. If the acts in question are not harmful—are consensual and private—then there should be a default presumption against criminalisation. He further argued that there can be no morality truly common to a society. This argument particularly applies in a pluralistic society like South Africa’s where there are multiple ethnic, racial, religious, and linguistic groups sharing a common legal system. Hart believed that sexual morality differences are not necessarily harmful to society and could actually be beneficial.⁶

This debate, between two of the foremost British legal minds in contemporary law and philosophy, ended in almost universal acceptance of Hart’s view because of the strength of his arguments. Since the Hart-Devlin debate it has been generally acknowledged that there is little room for criminal prescriptions in this area in democratic, pluralistic societies. Today it should be clear that the justification for policing acts in private between consenting adults is sparse indeed. It has often been said that sexual morality should not be legislated under most circumstances.⁷ This is particularly true with crimes in which all participants are fully consenting adults—victimless crimes—of which most sex work is a classic example. It is all the more important to avoid inserting criminal law into sexual morality in the specific context of South Africa’s history.

³ See e.g. Russell Hittinger, “The Hart-Devlin Debate Revisted”, 35 *American Journal of Jurisprudence*, 47 (1990).

⁴ Patrick Devlin, *The Enforcement of Morals*, 11 (1965).

⁵ Id at 17.

⁶ H.L.A. Hart, *Law Liberty and Morality* (1963).

⁷ See, e.g., “Great Britain, Committee on Homosexual Offences and Prostitution,” Report of the Committee on Homosexual Offences and Prostitution 24 (1957) (“There must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.”); Gilbert Geis, *Not The Law’s Business: an Examination of Homosexuality, Abortion, Prostitution, Narcotics, and Gambling in the United States*, X (1979); Karen T. White, “The Court-Created Conflict of the First Amendment: Marginalizing Religion and Undermining the Law”, 6 *J. Law. & Pub. Pol’y* 181, 204 (1994) (reporting Justice Holmes’ statement that “you can’t legislate morality”).

Apartheid Policies – the poor historical precedent of criminalising consensual adult sex

The first attempt to criminalise sex across the colour bar came in the form of a Cape law in 1902 which prohibited intercourse “for the purposes of gain” between white women and black men.⁸ This law was also enacted in the Orange Free State, Transvaal and Natal with the latter two provinces omitting the clause on “gain”. These laws were in direct response to the arrival of British sex workers to the Transvaal mines after the South African War. The laws prohibiting interracial relations were thus from their inception entangled with anxieties surrounding sex work, female sexuality and race.

Apartheid South Africa had a number of laws that prohibited and criminalised relationships across the colour bar. As we will argue, today’s laws criminalising sex work have a common history with many of these apartheid policies which are today universally rejected. The following laws were the most notorious:⁹

- The Immorality Act No 5 of 1927: Prohibited extra-marital intercourse between whites and blacks;¹⁰
- The Prohibition of Mixed Marriages Act No 55 of 1949: prohibited marriage between whites and members of other racial groups;¹¹
- The Immorality Amendment Act No 21 of 1950: extended the Immorality Act of 1927’s prohibition on extra-marital intercourse between blacks and whites to all black people - including coloureds and Asians;¹²
- The Sexual Offences Act (Immorality Act) No 23 (s 16) of 1957: made it an offence for a white person to have sexual intercourse with a black person or to commit any ‘immoral or indecent act’;¹³
- The Prohibition of Mixed Marriages Amendment Act No 21 of 1968: invalidated any marriage entered into outside South Africa between a male citizen and a woman of another racial group;¹⁴

The apartheid state went to great lengths to control South Africans’ sexual behaviour in general and to enforce racial segregation in particular so as to ensure that private relationships reflected the National Party ideal of “separate development”. Indeed, in the period 1950-1980, more than 11 500 people were convicted of contravening the Immorality Act and more than twice that

⁸ Julius Lewin, *Politics and Law in South Africa: Essays on Race Relations* London, 87 (1963).

⁹ Truth & Reconciliation Commission of South Africa, *Truth & Reconciliation Commission of South Africa Report*, 452 (1998).

¹⁰ It commenced on 30 September 1927 and was repealed by s 23 of Sexual Offences Act No 23 of 1957.

¹¹ It commenced on 8 July 1949 and was repealed by s 7 of the Immorality and Prohibition of Mixed Marriages Amendment Act, No 72 of 1985.

¹² It commenced on 12 May 1950 and was repealed by s 23 of the Sexual Offences Act No 23 of 1957.

¹³ This Act repealed the Immorality Act of 1927 and the Immorality Amendment Act of 1950 and commenced on 12 April 1957.

¹⁴ It commenced on 27 March 1968 and was repealed by the Immorality and Prohibition of Mixed Marriages Amendment Act No 72 of 1985.

number were charged.¹⁵ Then, as now with the criminalisation of sex work, the state wasted resources and invaded personal privacy and autonomy by policing consensual adult sexual behaviour.

Many lives were destroyed as a direct result of the apartheid sexual morality laws. Investigating the far-ranging effects of apartheid, the Truth and Reconciliation Commission found the following about the Immorality Act in particular:

The Immorality Act was energetically implemented for some two to three decades, resulting in untold suffering in the form of harassment, public humiliation and the destruction of marriages and family bonds. Suicide by those caught in the web of the provisions of this Act was not unknown.¹⁶

The energetic implementation of these racist, invasive laws and the perverse logic used to justify prosecution under them can be seen in dozens of cases from that period. For example, in 1954, the Appellate Division heard a case that involved the Riotous Assemblies and Criminal Law Amendment Act, No. 27 of 1914 and the Immorality Amendment Act, Act No 21 of 1950.¹⁷ The provisions at issue were sexual relations across the colour bar.¹⁸ The case involved “a ‘European male’, [who] on February 15th, 1954, unlawfully incited a non-European female to permit him to have illicit carnal intercourse with her.” Centlivres CJ summarised the evidence as follows:

The non-European woman referred to in the charge sheet stated that she was a native, that the appellant on the evening of the day alleged in the charge called to her from his motor in a street in a village, told her to get into the car and drove to a spot in the veld outside the village. She gave particulars showing that the appellant incited her to permit him to have carnal intercourse with her. A sergeant of the police said that as a result of complaints which he had received from native women he kept the appellant under observation on the evening in question and posted native constables at spots on three roads leading out of the village. He corroborated the native woman as to her movements on that evening. There was further corroboration by a native constable who had been posted, and concealed himself, at the spot in the veld where the appellant stopped his car.

The magistrate convicted the man and sentenced him to six months' imprisonment with compulsory labour. The appeal centred on whether the accused was indeed a 'European'. The magistrate thought he was as “the accused had seemed in appearance to be obviously a European and accordingly he [the magistrate] had deemed him a European”. It is not clear from the case what the nature of complaints were that the sergeant had received from other women that alerted him to the fact that the appellant was an annoyance. It is not clear whether the women who complained were sexually harassed or possibly raped by the appellant, or whether they themselves felt scandalized by sexual relations across the colour bar. The court did not consider these issues worth exploring.

¹⁵ Roger Omond, *The Apartheid Handbook*, 28 (1985).

¹⁶ Truth & Reconciliation Commission of South Africa, *Truth & Reconciliation Commission of South Africa Report*, 31 (1998).

¹⁷ *R v S* 1954 (3) SA 522 (A).

¹⁸ The Population Registration Act, Number 30 of 1950 classified people as white, Coloured or Native. Additional legislation was later enacted to tighten the racial classification.

Cases like this one fill the law books and demonstrate the absurdity of policing consensual adult sexual behaviour. Historically, in South Africa, attempts to legislate sexual behaviour have been racist and oppressive, and they have led to the unnecessary destruction of lives and waste of public money. They also demean the law, the judiciary, and the police who have no business investigating the sexual practices of consenting adults. The apparently extraordinary policing involved in this case were in fact common practice at the time the laws interracial relations were enforced. Roger Omond provides the following information on techniques used to catch and gather evidence against offenders of the Immorality Act:

Special Force Order 025A/69 detailed the use of binoculars, tape recorders, cameras and two-way radio to trap offenders. It also spelled out how bedsheets should be felt for warmth and examined for stains. Police were also reported to have examined private parts of couples and taken to districts surgeons for examinations.¹⁹

From the vantage point of 21st century democratic South Africa, these laws and enforcement practices are archaic, ethically repugnant and reflect the racism, sexism and heteronormativity of the ruling government of the time.²⁰ Yet, a number of the provisions of the Sexual Offences Act remain on our statute books and give the police and the judiciary the power to interfere in people's private and sexual lives – as 20(1A)(a) of the Sexual Offences Act reflects.

The legacy of colonialism and apartheid in South Africa has contributed to a significant overlap between race, gender and poverty. Poverty and inequality in South Africa today are strongly correlated with race and gender: the most marginalized members of society are black women.²¹ Not surprisingly, the majority of sex workers are black.²² In addition, South African legal institutions have served to perpetuate sexual stereotypes and gender inequality.²³ There is a lamentable history of laws on marriage, divorce, reproductive freedom, rape, and prostitution being used to disempower women.²⁴

Today, as much as a third of South Africa's population lives and struggles to survive in the informal economy.²⁵ Within the informal economy, women are often over represented in the

¹⁹ Roger Omond, *The Apartheid Handbook*, 29 (1985).

²⁰ However these enforcement practices are not a thing of the past. As recently as 1996 an undercover police officer used state funds to pay a woman in a night club for a "pelvic massage" in order to gather evidence of illegal sex work. *S. v Jordan* (CCT31/01) [2002] ZACC 22, para 34.

²¹ Yvonne Mokgoro, "Speech: Constitutional Claims for Gender Equality in South Africa: A Judicial Response", 67 *Albany Law Review* 565, 565 (2003).

²² Reproductive Health Research Unit, Sociology of Work Unit University of the Witwatersrand and Vrije University Amsterdam., *Women at Risk: A Study of sex work in Hillbrow*, (2002); Chandré. Gould and Nicole Fick, *Selling sex in Cape Town: Sex work and human trafficking in a South African city*, (2008).

²³ J. Julyan, "Women, Race and the Law", in *Race and the law in South Africa*, 139 (A. Rycroft ed., 1987).

²⁴ Kenneth L. Karst, "Woman's Constitution", 1984 *Duke Law Journal* 447, 456-57 (1984), cited in Celina Romany, "Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender", 21 *Brooklyn Journal of International Law* 857, 888 (1996).

²⁵ Martha Alter Chen, "Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment", *United Nations Department of Economic and Social Affairs Working Paper*, No. 46, 6 (2007). Available online at http://www.un.org/esa/desa/papers/2007/wp46_2007.pdf, (accessed on 24 June 2009). See also, Mark Hunter, "The changing political economy of sex in South Africa: The Significance of unemployment and inequalities to the scale of the AIDS pandemic", 64 *Social Science & Medicine* 689, 697 (2007).

least lucrative activities.²⁶ Especially for women, there often is no legal or licensed alternative to informal economy work, including sex work.²⁷ Cognizant of this socio-political and historical reality that many advocates of women's rights have argued that voluntary sex work may reflect a woman's considered judgement about the best options available to her.²⁸ Thus, any effort to reduce the prevalence of sex work should focus on providing women with better economic options for survival rather than criminalising what may be their only viable option.

Sex-for-Reward Exchanges

Sex work is a criminal offence under Section 20(1A)(a) of the Sexual Offences Act, Act 23 of 1957, which reads:

“20. Persons living on earnings of prostitution or committing or assisting in commission of indecent acts.

(1A) Any person 18 years or older who —....

(a) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward...shall be guilty of an offence.”

Section 1 of the statute still defines ‘unlawful carnal intercourse’ as ‘carnal intercourse other than between husband and wife.’ What is also notable about the statutory prohibition on sex work is its striking ambit: ‘for reward’ appears to include not merely money but almost any form of transactional inducement (including payment in kind, or other material benefits). In its Discussion Paper, the Commission notes the tension in this formulation. It notes Milton and Cowling’s interpretation of this section: they are convinced that the prohibition is aimed at “professional prostitutes”.²⁹ The Commission is also aware of the literal interpretation of the Section which could mean that Section 20(1A)(a) is “sufficiently broad as to bring within the ambit of the prohibition any person (a lover or companion) who accepts a ‘reward’ for engaging in sexual intercourse”.³⁰

The heart of the discomfort about sex work and the criminalisation of workers’ conduct seems to lie in the financial gain. Yet, as many feminists and social scientists have pointed out, most sexual relations have elements of material or financial gain, while they have also problematised the notion of “reward”, “material gain” and “profit”. It has been argued that the marriage contract - socially the most legitimate institution where within sexual relations may take place – is comparable with the sex worker/client contract and that they are part of a continuum along which no easy distinctions may be made.³¹ Without equating marriage with sex

²⁶ Richard Devey, Caroline Skinner & Imraan Valodia “Second Best? Trends and Linkages in the Informal Economy in South Africa” *Development Policy Research Unit*, Working Paper 06/102, February 2006. Available at http://www.sarpn.org.za/documents/d0002003/Economy_SA_Feb2006.pdf (accessed 24 June 2009).

²⁷ Christopher Roederer, “The Transformation of South African Private Law After Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy”, 37 *Columbia Human Rights Law Review* 447, 472 (2006).

²⁸ Janet Halley, “Related Violence in Positive International Criminal Law”, *University of Michigan Law School*, 5 (2008). Kate Butcher “Confusion between prostitution and sex trafficking” 361 *The Lancet* 1983 (2003); Jillian Gardner “Criminalising the act of sex: Attitudes to adult commercial sex work in South Africa” in *The Prize and The Price: Shaping sexualities in South Africa Pretoria*, 329- 340 (Melissa Steyn & Mikki van Zyl eds., 2009).

²⁹ South African Law Reform Commission, Discussion Paper 0001/2009, 15 (2009). See also, Jonathan Burchell & John Milton *Principles of Criminal Law*, 628 (2d ed. 1997).

³⁰ South African Law Reform Commission, Discussion Paper 0001/2009, 16 (2009).

³¹ See e.g., Carole Patemen, *The Sexual Contract*, 189-218 (1988).

work (which would be absurdly reductionist), there is an important point here – that rewards, inducements and payments lie at the heart of even sexual relationships the law regards as “decent”.

Both marriage and prostitution may be safely reduced to three common elements: 1. Consent; 2. Exchange of goods or services; and 3. Intimacy.³² First, while it is true that some sex-work is non-consensual (so is some marriage) that is not what is being considered here for legalisation or decriminalisation.³³ Moreover, women generally enter both marriage and sex-work contracts at a significant disadvantage socially and economically. Potentially exploitative conditions abound within the field of prostitution, as they do in marriage, and the potential for exploitation and abuse in no way negates the possibility of consent. In both kinds of relationships the ideal and the protected norm is no abuse; abuse represents an aberration in which there is a role for criminal law.³⁴ Arguing to the contrary conflates the fact that sex work is currently criminalised with the activity itself.³⁵

Second, both sex work and marriage involve the exchange of goods and services. Sexual relations may be seen as a central, but not exclusive, part of either or both of these relationships. Wedding rites and vows tend to commit each partner to support the other in specific ways that amount to exchange of services. Meanwhile, sex workers may have repeat customers with whom they exchange goods and services beyond the sexual act.

Third, both sex work and marriage involve intimate acts. The argument that sex work commodifies an otherwise intimate act notwithstanding, both marriage and sex work involve intimacy as well as labour which varies dramatically from one relationship to another. Thus, the marriage contract and the sex work contract have myriad commonalities and few significant substantive differences of relevance to criminal considerations. One of the key surviving distinctions is simply the fact that one of them is prohibited by law.

Martha Nussbaum takes a broader view still and argues that most people are “body sellers”. She writes that

All of us, with the exception of the independently wealthy and unemployed, take money for the use of our body. Professors, factory workers, lawyers, opera singers, prostitutes, doctors, legislators – we all do things with parts of our bodies, for which we receive a wage in return. Some people get good wages and some do not; some have a relatively high degree of control over their working conditions and some have little control; some have many employment options and some have very few. And, some are socially stigmatized and some are not.³⁶

³² Lisa Limor Rabie, “Can You Put on Your Red Light?: Lawrence’s Sexual Citizenship Rights in Terms of International Law”, 43 *Columbia Journal of Transnational Law* 613, 621 (2005).

³³ Nonconsensual sex work and nonconsensual sex in general should always be proscribed. In fact, one of the problems with the current criminalisation of sex work is that it deprives sex workers of the protection of the law when nonconsensual sex is forced upon them. Martha C. Nussbaum, “Whether From Reason Or Prejudice: Taking Money For Bodily Services”, 27 *Journal of Legal Studies* 693, 710-12 (1995); David A. J. Richards, “Commercial Sex And The Rights Of The Person: A Moral Argument For The Decriminalisation Of Prostitution”, 127 *University of Pennsylvania Law Review* 1195, 1215-16 (1979).

³⁴ Margaret A. Baldwin, “Split At the Root: Prostitution and Feminist Discourses of Law Reform”, 5 *Yale Journal of Law & Feminism* 47, 99-100 (1992); Beverly Balos & Mary Louise Fellows, “A Matter of Prostitution: Becoming Respectable”, 74 *New York University Law Review* 1220, 1242 (1999).

³⁵ Susan E. Thompson, “Prostitution - A Choice Ignored”, 21 *Women's Right. Law Report* 217, 232-34 (2000).

³⁶ Martha Nussbaum, “‘Whether from Reason or Prejudice’ Taking money for bodily services” in *Prostitution and Pornography: Philosophical debate about the sex industry*, 175-6 (Jessica Spector ed., 2006).

The poorer and less skilled in every society usually survive by selling their physical labour in industry, mining, construction and other similar areas which tend to be dangerous and taxing on the body and health. As it is more difficult for women to find work in these areas, it should not be surprising or objectionable for some of them to sell their bodies through sex work. Nussbaum concludes that there “is nothing per se wrong with taking money for the use of one’s body”³⁷

The Commission rightly points out that in South Africa a range of sexual relationships exist where there is “an element of material exchange”.³⁸ Indeed, in a context where unemployment has increased, where more women are unemployed than men, and where women are increasingly expected to head up households, it is not surprising that many women engage in transactional sex – be it in the form of survival sex³⁹, “Sugar Daddy” relationships, or sex work.⁴⁰ Research in Hammanskraal and Soweto has revealed that the phenomenon of *ukuphanda* – the Zulu phrase for “trying to get money” – is widespread.⁴¹ Sex-for-reward exchanges are frequent at *shebeens*/taverns and other social establishments where women accept money or drinks in exchange for sex. While commercial sex workers differ from women who informally exchange sex for resources (since most women who frequent taverns experience less shame, do not identify as commercial sex workers and their families are aware of their activities), there is clearly only a thin, perhaps arbitrary, line separating the two. Furthermore as it is culturally expected for a woman to exchange sex if she has been given resources or goods, there may be less stigma associated with these practices in the taverns.⁴² But why should it be that women who exchange sex for drinks or food, or an undetermined cash payment are accepted even as women who prefer a negotiated cash payment for the same services are criminalised?⁴³ Mark Hunter clearly identifies the overlap between “formal” and “informal” sex work, “Transactional sex has a number of similarities to prostitution. In both cases, non-marital sexual relationships, often with multiple partners, are underscored by the giving of gifts or cash”.⁴⁴ It would seem that the main distinguishing quality is whether the woman self-identifies as a “sex worker” or “prostitute” and indeed whether the man views himself as a “client” or a “sugar daddy”.

³⁷ Id. at 207.

³⁸ South African Law Reform Commission, Discussion Paper 0001/2009, 10 (2009).

³⁹ Janet Maia Wojcicki “‘She drank His Money’: Survival sex and the problem of violence in taverns in Gauteng”, 16 *South Africa Medical Anthropology Quarterly* 1, 1 (2002).

⁴⁰ Statistics South Africa, Quarterly Labour Force Survey Quarter 1, 2009, in *Statistics South Africa* (2009); Martha Alter Chen, “Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment”, *United Nations Department of Economic and Social Affairs Working Paper*, No. 46, 6 (2007). Available online at http://www.un.org/esa/desa/papers/2007/wp46_2007.pdf, (accessed on 24 June 2009).

⁴¹ Janet Maia Wojcicki, “Commercial sex work or *ukuphanda*? Sex-for-money exchange in Soweto and Hammanskraal area, South Africa” 26 *Culture Medicine & Psychiatry* 339, 340 (2002).

⁴² Id. At 365.

⁴³ The High Court made this point in *S. v Jordan*: “[i]n principle there is no difference between a prostitute who receives money for her favour and her sister who receives, for rendering a similar service, a benefit or reward of a different kind, such as a paid-for weekend, a free holiday, board and lodging for a shorter or longer period, a night at the opera, or any form of *quid pro quo*” *S v Jordan* (CCT31/01) [2002] ZACC 22 at para 47 cited in Catherine Albertyn, et al. “Women’s freedom and security of the person” in *Gender, Law and Justice*, 354 (Elsje Bonthuys & Catherine Albertyn eds., 2007).

⁴⁴ Mark Hunter, “The materiality of everyday sex: thinking beyond ‘prostitution’”, 61 *African Studies* 99, 100-1 (2002); Mark Hunter, “The changing political economy of sex in South Africa: The significance of unemployment and inequalities to the scale of the AIDS pandemic”, 64 *Social Science & Medicine* 64, 689-700 (2007).

The ambiguity between “formal” or commercial sex work and “informal” or transactional sex is further problematised by the findings of the Reproductive Health Research Unit’s (RHRU) research in Hillbrow, Johannesburg. In 2001, the RHRU and collaborators conducted research among female sex workers and their clients in an attempt to understand sex work as a form of work and to describe working conditions in the area industry.⁴⁵ In that study, 202 female sex workers were interviewed during July and August 2001 about their experience with the pressures of making a living by engaging in sex work, the high level of sexual coercion, and the high level of concurrent sexual partners. The findings on the nature of sex-for-reward relationships were striking: most clients had paid the respondents in money, not kind, and a significant proportion of regular and main partners (or boyfriends)⁴⁶ had also paid for sex with the respondents. Remuneration ranged from R20–R100, while main and regular partners seemed to pay slightly more for sex than the once-off clients.⁴⁷ The obvious question becomes how a client can be neatly distinguished from a regular partner or a main partner and ultimately why that matters to the state.

The common relationships described as *ukuphanda* above would all fall into the definition of sex work as provided in the Discussion Paper: “prostitution [is] defined as the exchange of any financial or other reward, favour or compensation for the purpose of engaging in a sexual act”.⁴⁸ Yet, the women and men exchanging gifts, money, or food and drink for sex may not be seen to be engaging in criminalised sexual behaviour; nor indeed should they be.

Evidence from these studies, as well as the vagueness of legal interpretations of Section 20(1A)(a) of the Sexual Offences Act, provides a strong case that the definition of sex work is impossible to pinpoint. The Commission points to this exact dilemma in its Discussion Paper:

The Commission is of the view that defining prostitution narrowly as the exchange of sexual acts for money is not realistic in light of the particular socioeconomic dynamics at play in South African society. However, it acknowledges that defining prostitution too broadly to include any sexual act accompanied or precipitated by a gift or goods would also not be helpful.⁴⁹

No precise definition of sex work is possible. In the socio-cultural and economic context of 21st century South African society, where sexual relationships are fluid, ambiguous and carry a multitude of cultural meanings, the distinction between “formal” and “informal”, “legitimate” and “illegitimate” sex becomes unmanageable by the police or the judiciary. Applying the criminal law to a practice that cannot be characterized or adequately described has dire

⁴⁵ Reproductive Health Research Unit, Sociology of Work Unit University of the Witwatersrand and Vrije University Amsterdam, *Women at Risk: A Study of sex work in Hillbrow*, (2002).

⁴⁶ The study defined these partnerships as follows: “Respondents who lived with a partner were first asked to nominate if this person was a main or regular partner. A main partner was defined as someone they have sex with most of the time, whilst a regular partner was someone apart from their main partner that they had sex with regularly.” Id. at 11.

⁴⁷ Reproductive Health Research Unit, Sociology of Work Unit University of the Witwatersrand and Vrije University Amsterdam, *Women at Risk: A Study of sex work in Hillbrow*, (2002).

⁴⁸ South African Law Reform Commission, Discussion Paper 0001/2009, 10 (2009).

⁴⁹ Ibid.

consequences for the multitude of women who are currently harassed and marginalised by an outdated legal system, and diminishes the value of other, genuine criminal offences.

Evolving Moral Standards

Criminal laws regulating sexual behaviour between consenting adults have evolved over time, often reflecting dominant moral standards. South Africa has a long, unfortunate and failed history of criminalising an area of sexual morality that is today legal and entirely unregulated: homosexuality. Laws criminalising same-sex male erotic behaviour date back to the colonial period.⁵⁰ These laws criminalising homosexual conduct became even stricter under the apartheid regime.⁵¹ For example, the Criminal Procedure Act allowed a police officer to kill a man suspected of having committed sodomy if he tried to flee.⁵² Most of the provisions, however, came from the 1957 Immorality Act (later renamed the Sexual Offences Act, as noted above). It included a clause which criminalised any “male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or give sexual gratification”.⁵³ The Immorality Act also codified the prohibition on interracial sex and prostitution.⁵⁴ In 1987 the Committee for Social Affairs of the tricameral President’s Council published a Report on the Youth of South Africa which classified homosexuality, prostitution, and other sex out of wedlock as all forming part of the country’s problem of promiscuity.⁵⁵

The 1996 Constitution followed the interim Constitution in barring discrimination based on sexual orientation, thus establishing a framework for undoing the laws that had criminalised homosexual conduct for centuries.⁵⁶ The criminalisation of homosexuality was found unconstitutional in a 1998 case before the Constitutional Court.⁵⁷ In its decision per Ackermann

⁵⁰ See Pierre De Vos, “On the Legal Construction of Gay and Lesbian Identity and South Africa’s Transitional Constitution”, 12 *South African Journal of Human Rights*, 265, 276 (1996) (citing, *inter alia*, Immorality Ordinance 46 of 1903 21(1) (Transvaal)). For modern versions, see, *inter alia*, Criminal Procedure Act 51 of 1977 40, 42, 59; Defence Act 44 of 1957 132(4) cited in Edwin Cameron, *Sexual Orientation and the Constitution: A Test Case for Human Rights*, 110 S. AFR. L.J. 450, 470 (1993).

⁵¹ See Pierre De Vos, “On the Legal Construction of Gay and Lesbian Identity and South Africa’s Transitional Constitution”, 12 *South African Journal of Human Rights*, 265, 278 (1996).

⁵² Section 49(2).

⁵³ Immorality Amendment Act 57 of 1969.

⁵⁴ 19 Sexual Offences Act 23 (1957)(SA), cited in Pierre De Vos, “On the Legal Construction of Gay and Lesbian Identity and South Africa’s Transitional Constitution”, 12 *South African Journal of Human Rights*, 265, 278 (1996). Section 19 of the Act prohibits “enticing to commission of immoral acts”.

⁵⁵ President’s Council, “Report of the Committee for Social Affairs on the Youth of South Africa”, *Government Printer*, Cape Town, 22 May 1987.

⁵⁶ “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”. Section 9(3). See also, Heidi Joy Schmid, “Decriminalisation of Sodomy Under South Africa’s 1996 Constitution: Implications for South African and U.S. Law”, 8 *Cardozo Journal of International & Comparative Law* 163, 165-6 (2000).

⁵⁷ *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and Others*, [1998] ZACC 15 (CC).

J, the Constitutional Court held that the sodomy statute simply “criminalise[d] conduct which fails to conform to the moral or religious views of a section of society.”⁵⁸ Then, on 30 November 2006, the Civil Union Act was enacted to recognize the right of all South Africans to form civil unions regardless of their sexual orientation.

The legal and governmental approach to criminalising homosexuality was paralleled and even codified in the same statute as the criminalisation of sex work. These laws on homosexuality have been recognized as retrograde, in violation of human rights, and discriminatory; they have been overturned or repealed. The ongoing criminalisation of sex work is retrograde, in violation of human rights, and discriminatory; now is the time to decriminalise it. A fundamental flaw with the laws criminalising homosexuality was their attempt to impose majoritarian moral values on society as a whole through a criminal framework. That same problem – held over from the same Immorality Act – can be seen today in the criminalisation of sex work.

A useful parallel can be drawn to law reform on the termination of pregnancy in South Africa in the early 1990s. Anti-abortion organisations formed the National Alliance for Life who advanced religious and moral-based arguments against terminations on demand. These arguments ultimately failed against the material reality of women’s lives - the high mortality rates and psycho-social and economic costs associated with backstreet abortions⁵⁹ – and the advancement of gender equality.⁶⁰ The Choice of Termination of Pregnancy Act of 1996 was enacted and provides women with the right of termination of pregnancy on demand for the first trimester. The law was passed not because society encourages or condones abortion, but as with sex work, because of the recognition that it will occur whether it is criminalised or not and criminalisation makes it less safe and less secure.

The law reform process with both homosexual intercourse and abortion on demand took time and multiple efforts before the laws were finally corrected. The current process at the SALRC is not the first attempt to reconsider South Africa’s laws criminalising sex work. For example, in 1997, the Gauteng Province submitted a proposal to the national government to decriminalise sex work in order to bring about changes to the provisions of the Sexual Offences Act of 1957 that outlawed sex work.⁶¹ The African National Congress, at its national conference in 1997, supported the Gauteng initiative.⁶² The following year, however the government “quietly shelved plans to decriminalise prostitution, fearing a backlash from conservatives”.⁶³ The law currently under review has been criticized as discriminatory because only the sex worker is prosecuted, generally women, while the pimps and customers, generally men, are

⁵⁸ Id. at para 26(b).

⁵⁹ Margaretha Goosen & Barbara Klugman (eds.) *The South African Women’s Health Book*, 326-340 (1996).

⁶⁰ Sally Guttmacher et al., “Abortion Reform in South Africa: A Case Study of the 1996 Choice on Termination of Pregnancy Act”, 24 *International Family Planning Perspectives* 191, 194 (1998).

⁶¹ See Gumisai Mutume, “South Africa: Gauteng Province Decriminalises Prostitution”, *Inter Press Service*, 7 November 1997.

⁶² “Sex Work: Decriminalisation”, March 1998 (SADC conference paper presented by Sylvester Rakgoadi, Secretariat for Safety and Security, Gauteng Province), cited in Deborah Zalesne, “Sexual Harassment Law in the United States and South Africa: Facilitating the Transition from Legal Standards to Social Norms”, 25 *Harvard Women’s Law Journal*, 143, n448 (2002). Wojcicki notes that the ANC decided sex work “was too sensitive an issue, and the public was not educated enough to handle it well” Janet Maia Wojcicki “The movement to decriminalise sex work in Gauteng Province, South Africa, 1994-2002” 46 *African Studies Review*, 83, 90 (2003).

⁶³ “Major News Items in Leading South African Newspapers,” *Xinhua English Newswire*, 21 July 1998.

virtually above the law.⁶⁴ This recognition of the unequal and disproportionate negative impact criminalisation of sex work has on women was also the basis for a constitutional challenge of the current laws. In 2002, in *S. v Jordan*, the Constitutional Court upheld the provisions of the Sexual Offences Act which criminalised commercial sex work on the basis that it provided equally to male or female sex workers.⁶⁵ The Court's findings – and in particular the majority's opinion in this case – has been criticized as disregarding the framework within which sex work takes place, especially the realities of female socio-economic standing, the AIDS epidemic,⁶⁶ sex worker rights and dignity,⁶⁷ and the demographics of the sex industry.⁶⁸ This criticism is clearly valid as was demonstrated by amici briefs to the Court.⁶⁹ Moreover, commonsense and much of human history demonstrates that women are almost always faced with limited employment opportunities and make up a majority of sex workers; this is especially true for poor black women in South Africa.

A secondary issue also raised in *S. v Jordan* is related to separation of powers. Justice Ngcobo wrote in his majority opinion that, "In a democracy those are decisions that must be taken by the Legislature and the government of the day, and not by courts. Courts are concerned with legality, and in dealing with this matter I have had regard only to the constitutionality of the legislation and not to its desirability. Nothing in this judgment should be understood as expressing any opinion on that issue".⁷⁰

Regardless of the appropriate role for the Constitutional Court on this issue, the legislature should act. Through this SALRC process, the legislature is now presented with the opportunity to rethink, reform and modernize South Africa's approach to policing private morality in general and to criminalising sex work in particular. The Constitutional Court has made it clear that this is a legislative decision; now the legislature must take the law reform processes forward.

⁶⁴ "Revolutionary Country; South Africa: Mandela Rule Bans Discrimination--But Will People's Behavior Change?", *Baltimore Sun*, 23 April 1997, at 18A.

⁶⁵ (CCT31/01) [2002] ZACC 22.

⁶⁶ Elsje Bonthuys, "Women's sexuality in the South African Constitutional Court", 14 *Feminist Legal Studies* 391, 406 (2006).

⁶⁷ Rosaan Krüger, "Sex work from a feminist perspective: a visit to the Jordan case", 20 *South African Journal on Human Rights* 138, 150 (2004).

⁶⁸ Yvonne Mokgoro, "Speech: Constitutional Claims for Gender Equality in South Africa: A Judicial Response", 67 *Albany Law Review* 565, 571 (2003). See also, Catherine Albertyn et al., "Women's freedom and security of the person", in *Gender, Law and Justice*, 353-61 (Elsje Bonthuys & Catherine Albertyn, eds., 2007).

⁶⁹ SWEAT (Sex Workers Education and Advocacy Task Force), CALS (Centre for Applied Legal Studies) & RHRU (Reproductive Health Research Unit) (2002) *S v Jordan and others (Sex Workers Education and Advocacy Task Force and others) as Amici Curiae*. Case CCT31/01, 9 October 2002, Constitutional Court of South Africa. The amici set out six arguments on how the criminalisation of sex work harms sex workers. Those arguments were organised under the following themes: i) increased vulnerability to violence; ii) creating and sustaining unsafe, unfair and poor working conditions; iii) increasing the stigmatization of sex workers; iv) restricting access to health, social, police, legal and financial services; v) creating an adverse impact on safer-sex practices; and vi) impact on the ability to find other employment.

⁷⁰ (CCT31/01) [2002] ZACC 22 at para 30.

Conclusion

With this background in mind we respectfully suggest that history, logic and common sense invite opposition to the ongoing criminalisation of sex work. As the legacy of the Hart-Devlin debate reveals there is little place for criminal law in consensual adult sexual behaviour. This is especially true in a pluralistic society like South Africa whose identity and strength comes from the diversity of its peoples and the acceptance of their distinct moral frameworks. The colonial and apartheid legacies have left some of South Africa's citizens at a marked disadvantage: especially black women. Criminalising what is often the only way for women to support themselves or their families further compounds the status quo inequalities and subjects women to a range of institutional and personal abuses. Worse still, the laws criminalising sex work have clear and direct antecedents in the ethically repugnant laws banning miscegenation, same-sex intimacy, abortion, and so on. The racism, sexism, and oppression at the root of these antiquated proscriptions is at the root of today's prohibition on sex work. These laws are particularly unacceptable given the socio-economic and cultural norms in South Africa when it comes to consensual sex. There is no clear distinction between transactional sex which is currently criminalised and that which is currently legal. Creating arbitrary distinctions in the realm of sexual morality demeans the law and is impossible to enforce equitably and sanely.

It is, in part, because of the obvious difficulties with providing sufficient evidence that someone has engaged in a sexual act for reward⁷¹ and the impossibility of meaningful enforcement of laws in the realm of sex work that most sex workers are seldom charged under the Sexual Offences Act. This does not, however, mean that the status quo criminalisation has no impact or is equivalent to decriminalisation. Quite the contrary. The laws criminalising homosexuality were rarely enforced but there were occasional arrests and prosecutions for male on male sex acts.⁷² Lack of rigorous enforcement of criminal laws notwithstanding, the prohibitions have a severe negative effect on the targeted groups, forcing people underground and away from the protection of the law.⁷³ Sex workers themselves are the most powerful voices of reason on this matter, clearly explaining why they need the protection of the police, why they need the SALRC to recommend an immediate decriminalisation of sex work. A woman named Busie who works in Hillbrow, Johannesburg, related the following experience:

I had a problem with the laws and the police before. I was in the hotel where I was staying and found a client from the bar. We went upstairs to do business, and He didn't want a condom so I refused to have sex with him so he started beating me, so badly. I knew him and his place. I went to the police to his place and found him, but the police didn't arrest him because he told them I was a sex worker, so the cops took his side. He started threatening me but the cops didn't say anything. That was when I started to move from that hotel to another one.

One day I found a client who wanted the whole night at his place, so I didn't refuse because of the money he was offering. When we got to his place we had

⁷¹ Marlise Richter, "Sex work, reform initiatives and HIV/AIDS in inner-city Johannesburg" 7 *African Journal of AIDS Research* 323, 333 (2008).

⁷² *R v Curtis* 1926 CPD 385 (masturbation between two consenting male adults is a crime); *Baptie v S* 1963 1 PH H96 (homosexuality as a mental disorder); *S v V* 1967 2 SA 17 (E) (masturbation between two men is still a crime).

⁷³ Edwin Cameron, "'Unapprehended Felons': Gays and Lesbians and the Law in South Africa", in *Defiant Desire: Gay and Lesbian Lives in South Africa*, 92 (Mark Gevisser and Edwin Cameron eds., 1994).

sex afterwards he brought his dog to have sex with me. The following day I went to the police station and the cops recognised me, they didn't take me seriously they just told me I was smelling.⁷⁴

⁷⁴ Busie, Submission to the South African Law Reform Commission, 23 June 2009. Busie (not her real name) is a Johannesburg-based sex worker. Available at: http://www.womensnet.org.za/files/resources/Busis_story.pdf (accessed 24 June 2009).