

JOURNAL OF ANTI-CORRUPTION LAW

2021 Volume 5 Number 1 Pages 41 - 62

THE SYMBIOSIS BETWEEN THE CRIMINALISATION OF SEX WORK AND CORRUPT POLICING IN SEX WORK IN SOUTH AFRICA

Cherith Sanger*

Abstract

Despite existing studies that prove the prevalence of corrupt policing of sex work in South Africa, corruption continues to be a common feature of sex workers' experiences with police officers. In this article, it is argued that the criminalisation of sex work, which is the current legal model enforced in South Africa, has enabled and cemented corrupt practices in the policing of sex work. Whilst police officers occupy a position of power over all persons living in South Africa, due to their office and authority to enforce the law, it is argued that the police officer/sex worker dichotomy is deepened by the illegal status of the conduct that sex workers engage in. This dichotomy places sex workers in an extremely vulnerable position in relation to police corruption. Criminalisation gives police officers multiple and constant opportunities for corruption. Sex workers face barriers against reporting corrupt police officers because they fear targeted profiling, arrest and prosecution, and because their perceptions and experiences are that their complaints are not taken seriously by the South African Police Service (SAPS). Ultimately, police corruption contributes directly to the realities of abuse and maltreatment that are part of the lived realities of these South Africans. This article argues in favour of the decriminalisation of sex work in South Africa in order to reduce police corruption occasioned by it, and to protect, realise and advance the human rights of sex workers.

* LLB (UWC) LLM (UCLA), Lecturer, Department of Criminal Justice & Procedure, Faculty of Law, University of the Western Cape. E-Mail: csanger@uwc.ac.za. This article is, in part, an adaptation of selected sections of the author's chapters of a PhD dissertation which is currently in progress.

1. INTRODUCTION

Whilst this article acknowledges that other factors contribute to corrupt policing in South Africa,¹ it focuses on the way in which criminalisation enables police corruption in sex work in South Africa. The article sets out the most applicable laws governing sex work and police corruption, and their respective penalties, to provide context to the discussion about sex work and police corruption later in the article. It reviews the dominant research studies that illustrate the forms of police corruption that sex workers often experience, and some of the available literature on the prevalence of this corruption. An analysis of how criminalisation of sex work enables and impacts corrupt policing is then offered. Finally, it is submitted that law reform to remove this criminal status, and the penalties associated with sex work offences, is necessary to reduce police corruption, and to protect, realise and advance sex workers' human rights.²

2. BACKGROUND TO SEX WORK AND THE CORRUPT POLICING OF SEX WORK IN SOUTH AFRICA

Several research studies have revealed that corruption is prevalent in the policing of sex work in South Africa.³ Sex workers experience multiple manifestations of stigma and unfair discrimination in various spheres of their lives. Acts of stigma and unfair discrimination are used against sex workers not only by police officers, but also by clients, intimate partners, family members, managers and members of society.⁴ Sex workers face humiliation and danger to their physical and psychological well-being due to the illegal status of their conduct.⁵ Those who work

¹ Basdeo V (2010) 'The Curse of Corruption in the South African Police: A Rot from Within' 3 *South African Journal of Criminal Justice* 392.

² The author acknowledges that placing this article within an intersectionality framework would enable her to provide an analysis of the impact of the criminalisation of sex work on sex workers that considers the multiple and intersecting identities through which sex workers experience, as well as the intersecting grounds of oppression that contribute to the adverse impact of the criminalisation of sex work on sex workers. The purpose of this article is, however, not to do so, but to provide an analysis of the impact of the laws from a legal, law-enforcement and human rights perspective. The author's ongoing PhD study is focused on providing an intersectionality analysis of the corrupt policing of sex work in South Africa.

³ See review of literature under 'Forms and prevalence of corrupt policing in sex work' below.

⁴ Roundup (2009) 'Criminalisation' 17(34) *Reproductive Health Matters* 192; Mgbako C (2013) 'The Case for Decriminalisation of Sex Work in South Africa' 44(4) *George Town Journal of International Law* at 1431, 1426 and 1429.

⁵ Hendin R (2019) 'Why Sex Work Should be Decriminalized in South Africa' *Human Rights Watch* at 4 and 55.

on the street, are at a greater risk of abuse and maltreatment by police than those who work indoors in brothels, bars and taverns.⁶ Sex work is fully criminalised in South Africa through national legislation and indirectly by provincial by-laws. Criminalisation involves the designation of certain human conduct (in the form of either commissions or omissions) as criminal offences.⁷ When sex workers engage in their work, which is criminalised, they face arrest, prosecution and punishment.⁸

The philosophy that underpins the criminalisation of sex work is predominantly abolitionist in nature.⁹ This means that sex work is criminalised with a view to eradicating it. The majority of sex workers in South Africa are poor, black women,¹⁰ and the criminalisation of sex work has been viewed as an effort by the state to protect women from abuse and exploitation.¹¹ The women's rights counterargument is that criminalisation is, in fact, used as a means of imposing conservative morals on women's sexuality and controlling women's exercise of their sexuality.¹² In reality, as will be seen below from the review of existing literature on the corrupt policing of sex work, the criminalisation of sex work has failed in protecting women, and has instead enabled the abuse and exploitation of women.

The full criminalisation of sex work means that the buying and selling of sex services and all related activities are criminalised in South Africa. This criminalisation frequently puts sex workers in conflict with the law. They are thus compelled to engage with the criminal justice system, and with the South African Police Service (SAPS), which is responsible for law enforcement. For sex workers, the SAPS is the entry pathway into the criminal justice system. Members of the

⁶ Scorgie F, Nakato D, Harper E, et al. (2011) "'I Expect to be Abused and I Have Fear": Sex Workers' Experiences of Human Rights Violations and Barriers to Accessing Healthcare in Four African Countries' at 9, 30, 45 and 60, available at <https://www.academia.edu/2977115/> (visited 1 February 2022); Rangasami J, Konstant T & Manoek S (2016) 'Police Abuse of Sex Workers: Data from Cases Reported to the Women's Legal Centre between 2011 and 2015' at 8.

⁷ Persak N (2007) Criminalising Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts at 6.

⁸ Hoskins Z (2018) 'Criminalization and the Collateral Consequences of Conviction' 12 *Criminal Law and Philosophy* 631.

⁹ Vanweesenbeeck I (2017) 'Sex work Criminalisation Is Barking up the Wrong Tree' 46 *Archives of Sexual Behavior* 1631.

¹⁰ Sex Worker Education and Advocacy Taskforce and Impact Consulting (2013) *Sex Workers in South Africa: A Rapid Size Estimation Study* at 2; Hendin (2019) at 1 and 71.

¹¹ Beran K (2012) 'Revisiting the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform' 30(1) *Law & Inequality: A Journal of Theory and Practice* 19 at 22.

¹² Tamale S (2014) 'African Sexualities, Religion, Law and Society' 14 *African Human Rights Law Journal* 152 – 164.

police service frequently interact with sex workers and are often presented with opportunities to engage in corruption. It is the criminalisation of sex work that exposes sex workers to these corrupt practices. Members of the SAPS are representatives of law and order, and as such hold positions of power over both the general public, and sex workers. The latter, though, are designated as 'criminals' who are not only in conflict with the law, but are also stigmatised and treated like social outcasts. The police officer/sex worker dichotomy creates an environment in which sex workers are easy targets for corrupt policing.

Despite the criminalised status of sex work, sex workers are entitled to all of the fundamental rights that all persons living in South Africa are entitled to claim and enforce in terms of the Constitution of South Africa, 1996 (the Constitution). The abuse and maltreatment that sex workers face at the hands of police officers in the current criminalised legal context violates their constitutional rights to equality,¹³ freedom and security of the person, including the rights to be free from all forms of violence from public and private sources, to security in and control over the body,¹⁴ and the right to human dignity.¹⁵ Their right to access justice in terms of section 34 of the Constitution is compromised, as the continued criminalisation of sex work renders sex workers unable and unwilling to report police corruption in order to avoid targeted profiling, arrest, prosecution and punishment.¹⁶

The constitutionality of the criminalisation of sex work was considered by the Constitutional Court in *Jordan and Others v S and Others*¹⁷ (*Jordan*) in 2002. The case has not been overturned to date, and is thus the Court's current position on sex work in South Africa. The Court ruled that the provisions of the Sexual Offences Act 23 of 1957 (1957 SOA), which criminalise sex work (the sex work provisions),¹⁸ were valid and consistent with the Constitution.¹⁹

The Court concluded that the sex work provisions did not infringe on the rights to human dignity or economic activity. In terms of the right to human dignity, the Court concluded that sex workers' human dignity is compromised by the character

¹³ Section 9 of the Constitution.

¹⁴ Section 12 of the Constitution.

¹⁵ Section 10 of the Constitution.

¹⁶ Mgbako (2013) at 1431 and 1438.

¹⁷ 2002 (11) BCLR 1117 (CC).

¹⁸ The Constitutional Court was also required to consider the constitutionality of the brothel-keeping provision in section 2, 3(b) and (c) of the 1957 SOA, but this aspect of the judgment is not dealt with in this article as the focus of this article is on the laws that criminalise the sale of sexual services.

¹⁹ *Jordan and Others v S and Others* 2002 (11) BCLR 1117 (CC) para 31.

of sex work itself and by engaging in sex work, not by the sex work provisions.²⁰ Regarding the right to economic activity,²¹ the Court held that the 'sex work' provisions were designed to protect and improve quality of life. It further held that the 'prostitution' provisions were enacted as an effort on the part of the legislature to combat the social ills associated with commercial sex work.²² The Court's reasoning for its ruling in respect of the rights to economic activity and human dignity comes from the perspective that sex work itself is undignified and compromises sex workers' quality of life. Yet sex workers' choice of this work should be considered in the light of the other available employment options, such as domestic work and farm work for poor black women, which could also be considered undignified. All persons living in South Africa should be given the choice to decide the terms on which they engage in sexual acts irrespective of whether there are rewards for such acts or not. Opinions about sex and sexuality differ. Whilst some may consider certain sexual acts undignified, others may not. In relation to the Court's reasoning regarding the social ills associated with sex work, these ills may be better addressed and alleviated in a context in which sex work is not considered a crime.²³

Regarding the right to privacy, the Court found that the sex work provisions did not limit the right to privacy because of the illegal status of this work. The Court held that the state has an interest in crimes even when they are committed in private.²⁴ The Court further stated that even if the right to privacy was limited by the sex work provisions, such limitation would be justifiable due to the illegality of the sale of sex. Sex workers are permitted to engage in sexual activity and use their bodies in any way they wish, save for the purposes of selling sexual services.²⁵ In its reasoning for its ruling on the right to privacy, the Court again fails to consider sex workers' choices to engage in sex work, and permits the state's interference in sex workers' private lives and choices to engage in sexual intimacy on their terms. Placing a limitation on sex workers' choices to sell their services essentially means that they do not have the right to engage in sexual activity and to use their bodies as they wish.

²⁰ Ibid. at para 74.

²¹ The Interim Constitution Act 200 of 1993 applied in the Jordan case because the proceedings were pending at the time that the final constitution came into operation. *Jordan and Others v S and Others* 2002 (11) BCLR 1117 (CC) paras 2 – 3.

²² *Jordan and Others v S and Others* 2002 (11) BCLR 1117 (CC) paras 25, 26 and 56.

²³ See the section on "Decriminalisation" under "Alternative legal models for sex work in South Africa".

²⁴ *Jordan and Others v S and Others* 2002 (11) BCLR 1117 (CC) paras 28 – 29.

²⁵ Ibid. at para 29.

In terms of the right to equality, the Court found that the effect of the sex work provisions did not amount to discrimination because of their gender-neutral nature,²⁶ and that these provisions serve a legitimate purpose, namely to outlaw commercial sex.²⁷ In this regard, the Court simply failed to acknowledge that the vast majority of sex workers are women, which means that the sex work provisions disproportionately impact women. It further omitted to consider that the majority of sex workers are women because of the levels of poverty, unemployment, and lack of education that they, black women in particular, face.

Finally, in terms of the right to freedom and personal security, the Court held that the sex work provisions did not limit this right, because it is sex workers who make themselves liable for arrest and imprisonment when they violate the law by engaging in sex work.²⁸ Essentially, the Court ruled that any violation of sex workers' freedom and security is occasioned by their own engagement in illegal activity, not by the state's intrusion on these rights.²⁹ The Court has disregarded the fact that if sex work was not criminalised, sex workers would not be liable for arrest, prosecution and punishment. In other words, sex workers' freedom and personal security would not be threatened and violated. Later in this article it will be argued that the criminalisation of sex work facilitates the violation of sex workers' human rights by enabling various forms of violence against them.

From a human rights perspective, the *Jordan* judgment supports the criminalisation of sex work in South Africa. In the Court's analysis of the constitutionality of the criminalisation of sex work in respect of the various human rights considered in the judgment, it failed to consider how criminalisation marginalises sex workers and makes them vulnerable to abuse. It did so by accepting that the state's purpose of criminalising sex work is legitimate, even though that comes at the cost of sacrificing sex workers' human rights.

The central question that needs to be answered is whether the Constitutional Court would reach a different decision if the case were to be heard by the Court now, 20 years later. The Court stated that it was only concerned with the constitutionality of legislation, rather than the content of the law, or whether the current legal model should be criminalisation.³⁰ It stated that the legislature is

²⁶ Ibid. at para 9.

²⁷ Ibid. at para 10.

²⁸ Ibid. at paras 31 and 75.

²⁹ Ibid. at paras 31 and 75.

³⁰ Ibid. at para 30.

responsible for deciding whether the ‘interests of society would be better served by legalising prostitution than by prohibiting it’.³¹ The Court does however have the ability to change the law through its application of the Constitution, as was seen in its ruling in *National Coalition for Gay and Lesbian Equality v Minister of Justice*³² (*National Coalition*), which essentially decriminalised homosexuality in South Africa. A stark contradiction exists in the Court’s rulings in the *Jordan* case versus the *National Coalition* case.

Both cases involved sexual conduct by marginalised groups of persons, yet the Court acknowledged only in the *National Coalition* case that that criminalisation reinforces societal prejudices and severely increases the adverse effects of these prejudices.³³ The Court further reasoned that the criminalisation of sodomy placed gay men at risk of prosecution for conduct that is part of human sexuality.³⁴ The Court did not apply the same reasoning in the *Jordan* case. Irrespective of whether the sexual act is exchanged for reward, the sexual acts that sex workers engage in with clients also constitute part of human behaviour. Undoubtedly, sex workers face societal prejudice, and criminalisation constantly places them at risk of arrest, prosecution and punishment.

Another critical difference between the two judgments is that in the *National Coalition* case the Court found that the impact of the criminalisation of sodomy had no other purpose than to enforce ‘moral or religious views of a section of society’. This finding was made in consideration that sex between two men is a form of private conduct between consenting adults which causes no harm to others. Despite the similarity between the cases in terms of consent, the commission of the offences in private, the offences constituting victimless crimes, and opposing moral views on the sexual conduct, the Court did not apply the same reasoning to the cases. The *Jordan* judgment ultimately deprives sex workers of the choice to engage in sexual acts on their own terms. In effect, the judgment limits sex workers’ sexual freedom. Until legal proceedings are instituted to overturn *Jordan*, the judgment stands and serves as a precedent for South African courts.

Since the *Jordan* judgment was handed down in 2002, the South African Law Reform Commission (SALRC) has investigated various legal models for sex work in

³¹ Ibid. at para 30.

³² 1998 (12) BCLR 1517 (CC).

³³ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC) para 23.

³⁴ Ibid. at para 28.

South Africa. In 2017, it published its report recommending that criminalisation be retained as a first option, or that it should be partially criminalised.³⁵ Prior to the SALRC's investigation and during and after the delivery of its report, civil society had vigorously advocated for the decriminalisation of sex work.³⁶ Institutions such as, inter alia, the Commission for Gender Equality,³⁷ the South African National AIDS Council,³⁸ and Amnesty International³⁹ have publicly announced their support for the decriminalisation of sex work. The latest development regarding sex work and law is the announcement by the Deputy Minister of Justice and Constitutional Development, John Jefferey, on 8 February 2022, that consultative processes would commence with government departments, interest groups and stakeholders about the possibility of decriminalising sex work in South Africa.⁴⁰

3. DEFINING SEX WORK

For the purposes of this article, sex work is defined as the provision of labour or services of a sexual nature including sex or acts of sexuality, in exchange for a negotiated reward.⁴¹ Such reward can be monetary or in kind.⁴² This definition does not extend to transactional sex which involves exchange practices of a non-commercial nature, and which do not explicitly involve sex.⁴³ This definition of sex

³⁵ South African Law Reform Commission (n.d.) 'Report – Project 107 – Sexual Offences', available at <https://www.justice.gov.za/salrc/reports.htm> (visited on 9 February 2022).

³⁶ Available at <https://asijiki.org.za/about-us/>, <https://www.nswp.org/es/news/decriminalisation-sex-work-south-africa> and <https://genderjustice.org.za/article/10-reasons-why-sonke-supports-the-decriminalisation-of-sex-work-in-south-africa/> (visited 9 February 2022).

³⁷ Available at <http://cge.org.za/wp-content/uploads/2021/01/CGE-Decr.pdf> (visited 9 February 2022).

³⁸ Available at <https://sanac.org.za/launch-of-south-africas-national-sex-worker-hiv-tb-sti-plan/> (visited 9 February 2022).

³⁹ Available at <https://www.amnesty.org/en/latest/news/2016/05/amnesty-international-publishes-policy-and-research-on-protection-of-sex-workers-rights/> (visited 9 February 2022).

⁴⁰ Department of Justice and Constitutional Development (8 February 2022) 'Deputy Minister of Justice and Constitutional Development to Start Consultative Meetings Regarding the Possible Decriminalisation of Sex Work', available at https://www.justice.gov.za/m_statements/2022/20220208-Decriminalisation-SexWork-DM.html (visited 9 February 2022).

⁴¹ Gould C & Fick N (2008) 'Selling Sex in Cape Town: Sex Work and Trafficking in a South African City' 34(1) *Agenda* 5; Sanger C (2020) 'S v Mthethwa: Justice for Sex Workers in the Face of Criminalisation' 34(1) *Agenda* 1.

⁴² Gould & Fick (2008) at 5; Sanger (2020) at 1.

⁴³ Joint United Nations Programme on HIV/AIDS and STRIVE (2018) *Transactional Sex and HIV risk: From Analysis to Action* at 4 – 5.

work does not include the adult entertainment industry such as exotic dancers and strippers, or the pornography industry, which operates legally.

Historically, sex work is known as 'prostitution' and the terms 'sex work' and 'prostitution' are at present often colloquially used interchangeably. In case law and statutes, the terms 'prostitute' and 'prostitution' are used predominantly. The 1957 SOA and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (2007 SOA) do not provide definitions of 'prostitution', but they refer to prostitution in the provisions that criminalise sex work.⁴⁴In this article, the terms 'sex work' and 'sex worker' are used, because the terms 'prostitution' and 'prostitute' carry and perpetuate negative stereotypes which contribute to the existing stigmatisation of sex workers. The terms 'prostitute' and 'prostitution' shame sex workers, and constitute offensive language. By contrast, the terms 'sex worker' and 'sex work' carry fewer adverse assumptions and oppressive opinions, and classify sex work as a form of work.⁴⁵ Furthermore, the terms 'prostitute' and 'prostitution' imply that all sex workers have been coerced into their work. It assumes that none of them have made a choice to perform this work, and are victims. In contrast, the terms 'sex worker' and 'sex work' inherently acknowledge some sex workers' agency in choosing this work⁴⁶ in a socio-economic environment in which employment opportunities are limited.⁴⁷

4. THE LEGAL FRAMEWORK CRIMINALISING SEX WORK IN SOUTH AFRICA

This section delves deeper into various aspects of sex work and related activities criminalised in South African law. Additionally, it sets out the sanctions that flow from such criminalised conduct. Only the most applicable criminal offences related to sex work and governing the sale of sexual services are included in this article. Criminal offences such as brothel-keeping and living off the proceeds of sex work will not be explored.⁴⁸ The sale and purchase of sex and soliciting constitute

⁴⁴ See sections 1 (definition of 'brothel'), 2(3), 20, 21 of SOA of 1957; the preamble to SOA of 2007.

⁴⁵ Sanger (2020) at 1–2; Pudifin S & Bosch S (2012) 'Demographic and Social Factors Influencing Public Opinion on Prostitution: An Exploratory Study in Kwazulu-Natal Province, South Africa' 15 *PERJ* 4.

⁴⁶ Commission for Gender Equality (2013) *Decriminalising Sex Work in South Africa: Official Position of the Commission for Gender Equality* at 2.

⁴⁷ Hendin (2019) at 55.

⁴⁸ Only the criminal offences that relate to the criminalisation of the conduct of selling sexual services are included in this article. The relevant legislative provisions that criminalise the

statutory offences. Sexual offences legislation, including the 1957 SOA and 2007 SOA, jointly, directly, and indirectly criminalise the selling and buying of sex services and related activities between consenting adults.⁴⁹ Furthermore, municipal by-laws are used as tools for policing sex work, and indirectly and directly enforce the criminalisation of the sex work.

4.1 The sale of sex

The 1957 SOA (as amended by the 2007 SOA), defines unlawful carnal intercourse as 'carnal intercourse otherwise than between husband and wife ...'.⁵⁰ Section 20(1A)(a) criminalises the sale of sex by providing that '[a]ny person 18 years or older who ... has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward shall be guilty of an offence'.

Upon conviction, an offender will be liable for imprisonment for a period not exceeding three years with or without a fine not exceeding Six Thousand Rand.⁵¹ Whilst the language of section 20(1A)(a) penalises the performance of the central function of a sex workers' work, it does not criminalise sex workers. This means that they cannot simply be arrested on the basis that police officials identify them as sex workers. Police officials must either witness sex workers exchanging

purchase of sexual services have been included because the selling and buying of sexual services are reliant on each other to some extent.

⁴⁹ Other criminal offences in the 1957 and 2007 SOAs which are applicable to sex work include brothel-keeping; living off the proceeds of sex work; when a person found in a brothel refuses to disclose the name and identity of the brothel-keeper or manager; any person whose spouse keeps or resides in or manages or assists in the management of a brothel is deemed to keep a brothel; procuring or enticing or attempting to procure or entice a female to have unlawful carnal intercourse or engage in sex work with the procurer or another person; procuring or enticing or attempting to procure or entice a female to become an inmate in a brothel; applying, administering or causing a female to consume drugs or alcohol to overpower her to have unlawful carnal intercourse with her; detaining a female against her will to a brothel or to have unlawful carnal intercourse with such female; receiving reward for assisting a person to communicate with a female for purposes of unlawful carnal intercourse or an indecent act; indecent exposure in public or within view of the public; and owner or occupier of a dwelling permitting the use of such dwelling for the purposes of an offence in the Sexual Offences Act 23 of 1957. The Businesses Act 71 of 1991 and the Riotous Assemblies Act 17 of 1956 indirectly contribute to the criminalisation of sex work by criminalising activities that flow from or precede engaging in illegal conduct generally.

⁵⁰ Section 1 of the Sexual Offences Act 23 of 1957.

⁵¹ Section 22(a) of the Sexual Offences Act 23 of 1957.

sex services for reward, or must have a reasonable suspicion that they have exchanged sex for reward at a specific time with a particular person.⁵²

4.2 The purchase of sex

Section 11 of the 2007 SOA criminalises the purchase of sexual services. It provides that it is a criminal offence to 'unlawfully and intentionally' engage the sexual services of a person of 18 years of age or older who provides such services in exchange for 'financial reward, favour or compensation'. The 2007 SOA provides that a criminal offence is committed irrespective of whether the reward is paid to the person providing the sexual service or to a third party.⁵³ Such third party could be a brothel-owner, brothel manager, pimp or manager, or any other person. Furthermore, the 2007 SOA provides that a criminal offence is committed regardless of whether the seller and purchaser commit the sexual act or not.⁵⁴ This entails that the purchaser commits a criminal offence by simply engaging with the seller of a sexual service concerning the provision of the sexual service, even if the sexual act is not carried out with the seller of the sexual service. The penalty for committing an offence in terms of section 11 of the 2007 SOA is a fine or imprisonment for a period not exceeding five years.⁵⁵ The 2007 SOA extended the scope of the criminalisation of sex work by making the purchase of sex illegal. Prior to 2007, sex workers' clients did not engage in criminal activity by remunerating sex workers for sexual services or for engaging in sexual act with a sex worker.

4.3 Soliciting

Section 19(1) of the 1957 SOA provides that it is a criminal offence to entice, solicit or importune in any public place with immoral objectives. Upon conviction, an offender will be liable for imprisonment for a period not exceeding 2 years or a fine not exceeding Four Thousand Rand or to both such fine and imprisonment.⁵⁶ By-laws are local level laws passed and managed by municipalities with a view to aiding municipalities in effectively administering local matters in particular subject

⁵² South African Law Commission (2002) 'Sexual Offences: Adult Prostitution' Issue Paper 19 (Project 19) at para 2.116.

⁵³ Section 11(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁵⁴ Section 11(b) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁵⁵ No section number is provided in the penalties section of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁵⁶ Section 22(g) of the Sexual Offences Act 23 of 1957.

areas.⁵⁷ By-laws dealing with loitering, drunken behaviour and soliciting are commonly used against sex workers as a means of controlling sex work. Some of these by-laws apply generally to all persons, whilst others are specific to sex workers. In this section, the various by-laws that apply to sex work in the different provinces in South Africa will not be discussed, but an example of prohibitions and prescribed penalties for contravening by-laws will be offered. In the Western Cape, the Street, Public Places and the Prevention of Noise Nuisances By-Law of 2007 (2007 By-Law) specifically prohibits soliciting or importuning any person for the purpose of sex work or immorality.⁵⁸ The penalty for this offence is a fine or imprisonment not exceeding six months or both a fine and imprisonment. Such penalty cannot, however, be harsher than a penalty prescribed in analogous national legislation such as the 1957 SOA.⁵⁹ Due to the difficulty in producing evidence of the sale of sexual services under sexual offences legislation, police officers resort to arresting sex workers as a way of penalising them. This results in the arrest of sex workers for simply 'standing on the street', where there is little to no evidence against them.⁶⁰

5. DEFINING POLICE CORRUPTION AND THE LAWS GOVERNING POLICE CORRUPTION

In this article, police corruption is defined in accordance with the definition of the offence of 'corrupt activities relating to public officers' in section 4(1) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PCCAA). This offence is applicable to police corruption as a 'public officer' is defined to include police officers in section 1 of the PCCAA.

Section 4(1) defines the offence of corrupt activities relating to public officers as follows:

4(1) Any--

public officer who, directly or indirectly accepts or agrees or offers to accept any gratification from any other person, whether for the benefit

⁵⁷ Open By-Laws South Africa (n.d.) 'About openby-laws.org.za' available at <https://openbylaws.org.za/about.html> (visited 11 April 2021).

⁵⁸ Section 2(3)(j) of the Western Cape Street, Public Places and the Prevention of Noise Nuisances By-Law of 2007.

⁵⁹ Section 23(2) of the Western Cape Street, Public Places and the Prevention of Noise Nuisances By-Law of 2007.

⁶⁰ South African Law Commission (n.d.) at para 5.57.

- (a) of himself or herself or for the benefit of another person . . . in order to act, personally or by influencing another person so to act, in a manner-
- ...
- (i) that amounts to the –
- (aa) illegal, dishonest, unauthorised, incomplete, or biased; or
 - (bb) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
- (ii) that amounts to-
- (aa) the abuse of a position of authority;
 - (bb) a breach of trust; or
 - (cc) the violation of a legal duty or a set of rules;
- (iii) designed to achieve an unjustified result: or
- (iv) that amounts to any other unauthorised or improper inducement to do or not to anything.

In the event of a police officer being found guilty of committing an offence in terms of section 4 of the PCCAA, the prescribed penalty is a fine or imprisonment ranging from five years to life imprisonment, depending on the gravity of the offence.⁶¹

In summary, the key requirements of the criminal offence of corruption are the acceptance of gratification by a police officer (as a public officer) from another person in exchange for conducting her- or himself in a manner that constitutes the unlawful exercise of any duties.⁶² Sayed and Bruce offer a definition of police corruption which considers the police officer's office and the unequal power relations between police officers and members of the public. They define police corruption as 'any illegal conduct or misconduct involving the use of occupational power for personal, group or organisational gain'.⁶³ Whilst the latter summary definition can be considered general, broad and oversimplified, it is useful for this article to the extent that it highlights the key requirements of the offence of corrupt activities relating to public officers as per the PCCAA.

⁶¹ Section 26(1)(a)(i)–(iii) of the PCCAA.

⁶² This definition has been adapted from Snyman's summary definition of the extensive definition of general definition of corruption in the PCCAA. Snyman CR (2020) *Snyman's Criminal Law* 7 ed at 357.

⁶³ Sayed T & Bruce D (1998) 'Police Corruption: Towards a Working Definition' at 12.

6. FORMS AND PREVALENCE OF CORRUPT POLICING IN SEX WORK IN SOUTH AFRICA

In terms of the general prevalence of police corruption, Corruption Watch's 2018 report on corruption in South Africa revealed that 6.3 per cent of 2,469 complaints received about corruption involved corruption by members of the police service; 41.3 per cent of these involved the abuse of power by members of the police service. These statistics represent only the complaints of corruption received by Corruption Watch, and statistics specific to the corrupt policing of sex work are not included in the report.⁶⁴ Several research studies involving interviews and surveys with sex workers indicate that police corruption frequently occurs in the policing of sex work. Police officers target sex workers for their own personal gain, sometimes using extortion to derive a benefit from sex workers.⁶⁵ It is common for police officers to demand sexual or monetary incentives from sex workers in exchange for not arresting them,⁶⁶ or for releasing them from police custody.⁶⁷ Sex workers have also admitted to bribing police officers to avoid sexual violence.⁶⁸

In 2007, the Institute for Security Studies and the Sex Workers Education and Advocacy Taskforce (SWEAT) conducted interviews, surveys and focus group discussions with 164 sex workers in Cape Town. The study revealed that 28 per cent of the interview participants had been asked for sex by policemen in exchange for release from custody.⁶⁹ An analysis of information received from sex workers seeking legal advice from the Women's Legal Centre between 2011 and 2015 showed that, of the 203 sex workers arrested during this period, 6 per cent stated that they had bribed police officers.⁷⁰ In 2016, Hands Off! (a programme of Aidsfonds) conducted 483 surveys, 22 interviews and 12 focus group discussions with 71 sex workers in Cape Town, Johannesburg, Durban and Musina. The study showed that 48 per cent of sex workers surveyed and interviewed had admitted to having sex with a police officer and 60 per cent had paid bribes to avoid arrest. Sex workers also informed researchers that police officers demand bribes from clients in circumstances where clients are caught with sex workers. They further reported that police officers would drive them around in police vans for extended periods of time, and demand money and unpaid sex from them in exchange for their

⁶⁴ Corruption Watch (2018) *It's Time to Act – Act Report 2018 2(2)* (n.d.).

⁶⁵ Hendin (2019); Scorgie et al. (2011) 33.

⁶⁶ Rangasami et al. (2016) at 12; Scorgie et al. (2011) at 33.

⁶⁷ Hendin (2019) 3; Scorgie et al. (2011) 23 and Rangasami et al (2016) 18.

⁶⁸ Scorgie et al. (2011) 8.

⁶⁹ Gould & Fick (2008) at 54.

⁷⁰ Rangasami et al. (2016) at 18.

freedom.⁷¹ A research study conducted by Sonke Gender Justice and SWEAT in 2016 and 2017 involved 120 sex workers in Gauteng and Mpumalanga. The study revealed that 54 per cent of those interviewed had been asked to pay a bribe by police officials.⁷² It further revealed that 52 per cent had paid such bribes.⁷³ The study showed that corruption and bribery were amongst the most serious and frequent criminal offences committed by the police.⁷⁴ Sex workers reported that they felt compelled to submit to paying bribes to avoid arrest, detention and other consequences.⁷⁵ In 2018, Human Rights Watch conducted interviews with 46 female and transgender sex workers in four provinces in South Africa. Sex workers working in Musina, Limpopo Province, reported being bribed by police officers up to twice a week, and paying thousands of rands to these officers.⁷⁶

The matter of police officers arresting sex workers for motives other than pursuing prosecution was decided by the Western Cape High Court in 2009. In *Sex Workers Education and Advocacy Task Force v Minister of Safety and Security & Others*,⁷⁷ the applicant sought a court order interdicting police officers in the Cape Metropolitan area from arresting sex workers for any purpose other than that of arrest with the intent to have them prosecuted. In particular, the applicant asked the court to prohibit police officers from unlawfully arresting sex workers merely to harass, punish or intimidate them, or for any ulterior purpose not sanctioned by law.⁷⁸ The Court found that police officers were arresting sex workers without the intent of pursuing prosecution, and held that the purpose of arrest must be for this purpose. When arrests are made without the intent to pursue prosecution, such arrests amount to an unlawful exercise of a police officer's public power. The Court issued an interdict prohibiting police officers from arresting sex workers unless they had the intent of bringing them before a court of law.⁷⁹ This judgment attests to the frequency of the abuse of power by police officers in their engagements with sex workers. Whilst the judgment does not deal specifically with bribery or extortion, this constitutes conduct which falls within the ambit of 'ulterior motives' for arrests rather than for the intention of prosecution.

⁷¹ Hands Off! (2016) at 20.

⁷² Evans D & Walker R (2017) 'The Policing of Sex Work in South Africa: A Research Report on the Human Rights Challenges Across Two Provinces' (2017) at 24.

⁷³ Ibid.

⁷⁴ Ibid. at 25.

⁷⁵ Ibid. at 36.

⁷⁶ Hendin (2019) at 35.

⁷⁷ SWEAT v Minister of Safety & Security 2009 2 SACR 417 (WCC).

⁷⁸ Ibid. at paras 1, 2 and 23.

⁷⁹ Ibid. at paras 22, 48 and 60.

Despite the existence of the interdict, the research studies set out in this article serve as proof that bribery and extortion remain a common feature of sex workers' experiences with police officers, as most of these studies were conducted after 2009. In theory, it would be preferable for such an interdict to be enforceable against the SAPS in other areas in the Western Cape and across South Africa. However, in practice, as seen from the continuing misconduct by police officers in the Cape Metropole, despite the Western Cape High Court's issue of the interdict, the issuing of further interdicts in other parts of the Western Cape and South Africa is not likely to assist in reducing police corruption in relation to sex work.

7. CRIMINALISATION AS AN ENABLER OF CORRUPT POLICING IN SEX WORK

7.1 Lessons learnt from criminalisation and its impact on marginalised groups of persons

Research studies show that the criminalisation of conduct has historically had an adverse impact on human rights issues that affect marginalised groups of persons. Some examples include the laws criminalising HIV transmission and HIV and AIDS exposure and non-disclosure, same-sex relations, adultery, drug use and termination of pregnancy.⁸⁰ The criminalisation of conduct can cause harm to marginalised groups and should thus not be implemented in ways which are unjust or undermine human rights.⁸¹ Illicit markets, which often involve vulnerable groups, have become known for creating environments where corrupt policing is rife.⁸²

7.2 Sex workers' vulnerability to police corruption and a policing environment conducive to corruption

Whilst there are several enablers or causes of corrupt policing in sex work in South Africa,⁸³ the focus of this article is on the impact of the laws that criminalise sex work on the corrupt policing of sex work. Sex workers work in an illegitimate industry, so they are marginalised, powerless and open to predatory behaviour by

⁸⁰ Birga, Cabal, O'Hanlon et al. (2018) 'Criminal Law and the Risk of Harm: A Commentary on the Impact of Criminal Laws on Sexual and Reproductive Health, Sexual Conduct and Key Populations' 26(52), *Reproductive Health Matters* 35.

⁸¹ Birga, Cabal, O'Hanlon et al. (2018) 33.

⁸² Newman G & Faull (2011) 'A Protector or Predator: Tackling Police Corruption in South Africa' Institute for Security Studies Monograph No. 182 at 17.

⁸³ Basdeo (2010) at 392.

police officers.⁸⁴ They are constantly at risk of abuse and exploitation because criminalisation reinforces stigma and unfair discrimination against them.⁸⁵

The criminalisation of sex work legitimates bribery and the blackmail of sex workers by police officers.⁸⁶ Criminalisation indirectly gives police officers permission to abuse and exploit sex workers in various ways, including through corruption which may be accompanied by violence against these workers. By virtue of the office that police officers hold, they are vested with broad and discretionary powers. These powers frequently create opportunities for corruption and other forms of criminality through the enforcement of the laws that criminalise sex work.⁸⁷ There is a stark contrast between police officers and sex workers' location in society, because the current laws categorise sex workers as criminals and police officers as enforcers of the law tasked with stamping down on crime. This has resulted in an acute power imbalance which creates room and opportunities for police abuse including through corruption.⁸⁸

Because of the current criminalised legal status of sex work, the abuse and exploitation of sex workers, including through police corruption, has become unavoidable for them in their engagements with police officers.⁸⁹ This is a common experience for sex workers in the current criminalised legal context in South Africa.

7.3 Sex workers' omission to report police corruption and a lack of accountability for police corruption

The laws criminalising sex work, the enforcement of these laws and their abuse and exploitation by police officers through police corruption has had an adverse effect on the relationship between sex workers and police officers. Criminalisation has created a culture of fear and abuse, and a lack of trust in police officers by sex workers.⁹⁰ This culture of terror, exploitation and abuse in the policing of sex work has resulted in sex workers avoiding police officers and electing to not report crimes committed against them by police officers for fear of profiling, arrest, prosecution and punishment because of the illegal status of their work.⁹¹ Some sex

⁸⁴ Newman & Faull (2011) at 26; Tamale (2014) at 152 – 158.

⁸⁵ Hendin (2019) at 4; Roundup (2009) 17(34) at 192; Mgbako (2013) at 1431 and 1438.

⁸⁶ Scorgie *et al.* (2011) at 50.

⁸⁷ Faull N (2007) 'Corruption and the South African Police Service: A Review and its Implications' (2007) Institute for Security Studies Paper 150 at 3.

⁸⁸ Mgbako (2013) at 1426; Newman & Faull (2011) at 16 – 17.

⁸⁹ Gould & Fick (2008) at 61.

⁹⁰ Mgbako (2013) at 1429; Gould & Fick (2008) at 61.

⁹¹ Mgbako (2013) at 1431 and 1438.

workers refrain from reporting police corruption for fear of not being taken seriously, or fear of secondary victimisation.⁹² Not reporting police corruption contributes to the lack of accountability for police officers involved. In turn, impunity for police corruption contributes to the continuing high levels of this corruption in sex work in South Africa.

Sex workers' experiences of secondary victimisation, and of not being taken seriously when reporting crimes, can be attributed to the organisational culture within the SAPS. Some of the common features of police culture include a code of silence, solidarity, and suspicion of people who are outsiders to SAPS. These features also serve to promote police corruption and to protect officers from being held accountable.⁹³

8. THE NECESSITY FOR LAW REFORM IN REDUCING POLICE CORRUPTION IN SEX WORK

Based on the existing literature reviewed for purposes of this article, the criminalisation of sex work is undoubtedly an enabler of corrupt policing and other forms of abuse and exploitation against sex workers. Accordingly, there is a need for law reform to remove the laws that criminalise sex work.

8.1 The dominance of criminalisation of sex work across the world

Criminalisation is the dominant legal model for commercial sex work across the world.⁹⁴ Sex work is criminalised or otherwise punished through a variety of laws in more than a hundred countries globally.⁹⁵ Regionally, the sale of sexual services is criminalised in all African countries except for Senegal.⁹⁶

Whilst the criminalisation of sex work is the prevailing legal model applied in most countries, this dominance of the adoption and implementation of a particular legal model should not be viewed as the preferred legal model to protect sex workers from abuse and exploitation, including police corruption. In the current criminalised legal context of sex work in South Africa, sex workers face continuing high levels of abuse and exploitation. The prevalence of the criminalisation of sex

⁹² Mgbako (2013) at 1429; Pudifin & Bosch (2012) at 12.

⁹³ Faull (2007) at 3.

⁹⁴ Vanweesenbeeck (2017) at 1631.

⁹⁵ Britannica ProCon.Org 'Countries and Their Prostitution Policies', available at <https://prostitution.procon.org/countries-and-their-prostitution-policies/> (visited 23 July 2020).

⁹⁶ Tamale S (2014) at 164.

work across the world is deeply rooted in historical European conservative interpretations of sex and sexuality and the forceful application of these interpretations in Africa through colonisation and imperialism.⁹⁷

8.2 Alternative legal models for sex work in South Africa

There are several legal models for sex work that could be put in place to govern and regulate the sector, but only four of these possible models are commonly implemented across the world.⁹⁸ These legal models include full criminalisation, as applied in South Africa; partial criminalisation; legalisation; and decriminalisation. The full criminalisation model will not be dealt with in this section as it has already been covered in the preceding sections of this article. In this section, the other three legal models and their possible impact on corrupt policing in sex work in South Africa will be discussed.

8.2.1 Partial criminalisation

The partial criminalisation model has been in place and applied in Sweden since 1999.⁹⁹ Soon thereafter Iceland and Norway adopted the partial criminalisation model.¹⁰⁰

Partial criminalisation entails that the selling of sexual services is not classified as a criminal offence, but the buying of sexual services is criminalised. The motivation for partial criminalisation is to protect female sex workers from sexual abuse and violence. It hopes to eradicate sex work in its entirety by reducing the demand for commercial sex.¹⁰¹

The relationship between police officers and sex workers remains similar to the relationship that exists in a criminalised legal context, as sex work is still linked to conduct that is criminalised.¹⁰² Sex workers protect their clients from arrest, prosecution and punishment, and avoid police officers as they do in fully criminalised legal contexts.¹⁰³ Sex workers continue to operate on the margins of

⁹⁷ Tamale S (2011) *African Sexualities: A Reader* at 14 – 15.

⁹⁸ Asijiki Coalition to Decriminalise Sex Work in South Africa (2015) 'Sex Work and the Law: Four Possible Legal Options' *Factsheet* at 2.

⁹⁹ Beran K (2012) at 21.

¹⁰⁰ *Ibid.*; Sanders T & Campbell R (2014) 'Criminalisation, Protection and Rights: Global Tensions in the Governance of Commercial Sex' 14(5) *Criminology and Justice* 537.

¹⁰¹ Mossman E (2007) 'International Approaches to Decriminalising or Legalising Prostitution', available at [https://www.nzpc.org.nz/pdfs/Mossman,-\(2007b\),-International-approaches.pdf](https://www.nzpc.org.nz/pdfs/Mossman,-(2007b),-International-approaches.pdf) (visited 3 December 2021).

¹⁰² Vanweesenbeeck (2017) at 1636.

¹⁰³ Beran (2012) at 52.

society and hidden from the public eye, making them vulnerable to all forms of abuse and exploitation including police corruption.¹⁰⁴

8.2.2 Legalisation

Legalisation is also commonly referred to as regulation. Legalisation has been adopted by some countries with a view to protecting social order and public health and reducing crimes such as human trafficking, child prostitution¹⁰⁵ and police corruption.¹⁰⁶ Several countries including Senegal, the Netherlands, Switzerland and Germany have legalised sex work.¹⁰⁷ With legalisation, specific laws are put in place to regulate sex work. Sex workers are often required to work in designated areas, need to register as sex workers, and are compelled to undergo compulsory HIV testing on a regular basis.¹⁰⁸

Even though sex work is generally not classified as a criminal offence under legalisation, sex workers who do not register or submit to HIV tests, and who work outside of the designated areas as prescribed by the state, will be considered as engaging in criminalised conduct similar to working in a criminalised legal context.¹⁰⁹ Many sex workers elect to not register as such for fear of disclosing their identities due to the continued stigmatisation of sex work which has been reported in regulated legal environments.¹¹⁰ The relationship between sex workers who work illegally and police officers can mirror the culture of fear, distrust, abuse and exploitation in the current relationship in the local criminalised legal environment. Sex workers who work illegally in a regulated context continue to be at risk of police abuse.¹¹¹

8.2.3 Decriminalisation

The central objective of decriminalisation is to respect sex workers' human rights, safety and health. It is concerned with the eradication of the social exclusion that

¹⁰⁴ Asijiki Coalition (2018) 'A Touchstone Document of Peer-Reviewed Academic Evidence on the Decriminalisation of Sex Work' (2018) at 21 – 22.

¹⁰⁵ The word 'prostitution' is used in recognition that children can never consent to sex work. For the purposes of this article, a child is defined as a person under the age of 18 years in accordance with the definition of a child in section 28(3) of the Constitution and section 1 of the Children's Act 38 of 2005.

¹⁰⁶ Mossman (2007) at 12.

¹⁰⁷ Ibid.

¹⁰⁸ Vanweesenbeeck (2017) at 1631; Beran (2012) at 21.

¹⁰⁹ Vanweesenbeeck (2017) at 1634.

¹¹⁰ Asijiki Coalition (2018) 23.

¹¹¹ Ibid.

sex workers experience, which creates their vulnerability to abuse and exploitation¹¹²The decriminalisation of sex work entails that the laws criminalising the selling and buying of sexual services and all related criminal offences are removed, and so such conduct is no longer classified as criminal. The decriminalisation and legalisation of sex work differ in that no specific laws are passed that exclusively apply to sex workers in terms of the decriminalisation model. Instead, the laws that are already in place and which apply to all persons living in, for example, South Africa, are applied equally to sex workers.¹¹³

If one assesses the impact of the decriminalisation of sex work and related criminal offences on policing in other countries, it is evident that decriminalisation has directly contributed to reducing corrupt policing in sex work. The decriminalisation of sex work in New Zealand in 2003 is reported to have significantly improved the relationship between sex workers and police officers.¹¹⁴ A 1995 assessment of the impact of decriminalisation in New South Wales in Australia revealed an incremental decline in police corruption.¹¹⁵ This decline in police corruption was attributed to more lenient laws governing sex work, which reduced police officers' power to threaten sex workers with criminal prosecution. Decriminalisation resulted in the creation of effective mechanisms for investigating and prosecuting complaints against police officers, and the imposition of severe penalties when complaints against police officers were proved.¹¹⁶

In March 2022, Belgium became the first European country to decriminalise sex work.¹¹⁷ The impact of decriminalisation on policing and corruption in sex work is yet to be seen.

9. CONCLUSION

The criminalisation of sex work creates and perpetuates sex workers' acute vulnerability to police abuse and exploitation. It enables the corrupt policing of sex work and the continuing prevalence of such policing in sex work. As can be learnt

¹¹² Mossman (2007) at 12 – 13.

¹¹³ Ibid.

¹¹⁴ Mgbako (2013); Vanweesenbeeck (2017) at 1631.

¹¹⁵ Egger S & Harcourt C (1993) 'Prostitution in NSW: The Impact of Deregulation' (1993) at 120.

¹¹⁶ Egger & Harcourt (1993) at 120.

¹¹⁷ Available at <https://reason.com/2022/03/23/belgium-decriminalizes-prostitution/>; <https://www.brusselstimes.com/211351/historic-reform-belgium-first-in-europe-to-officially-decriminalise-sex-work>; and <https://nswp.org/news/sex-workers-belgium-celebrate-historic-vote-decriminalisation-parliament> (visited on 2 April 2022).

from other countries, the removal of the criminal laws and sanctions flowing from sex work offences can reduce police misconduct and criminality. It can improve the current hostile relationship of fear and distrust between sex workers and police officers. Officers will be presented with fewer opportunities for corruption as their engagements with sex workers will be reduced. They will no longer be empowered to enforce national legislation and by-laws against sex workers, which cause the power imbalance between sex workers and police officers. Without the fear of arrest, prosecution and punishment, and maltreatment by police officers, sex workers will be more willing to report police corruption. In turn, more police officers will be held accountable for corrupt policing.

The decriminalisation model is the only legal model that will afford sex workers the same treatment as all other persons living in South Africa in terms of workers' rights and access to services and justice. Decriminalisation can facilitate a shift from stigma and unfair discrimination to a social and legal culture which will promote the treatment of sex workers as human beings worthy of dignity and equality.¹¹⁸ The implementation of a human rights focused legal model such as decriminalisation in South Africa can contribute to a reduction in corrupt policing, as sex workers will be better empowered to claim and enforce their human rights. The decriminalisation of sex work is the best legal model for South Africa. This will realise sex workers' rights to human dignity, equality, and freedom from violence, and will aid the fulfilment of South Africa's constitutional mandate.

¹¹⁸ Mgbako (2013) at 1441.