WELL INTENTIONED BUT MISGUIDED?

Criminalising sex workers' clients

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The Portfolio Committee on Justice and Constitutional Development has inserted a new clause in the Sexual Offences Bill that will criminalise the clients of sex workers, with the specific intent to protect women and children from exploitation. In reality it has the potential to cause real harm to the women it aims to protect. Although it is possible that the Committee hoped to level the playing field 'so that women who sell sex are not the only ones guilty of an offence, but also the men who purchase it' (Gould 2006), sex workers will be most affected because they will now have to protect the clients who are their only source of income.

In May this year Parliament finally passed the Criminal Law (Sexual Offences and Related Matters) Amendment Bill (for more on the bill in general, see the article by Lisa Vetten in this issue). The Sex Worker Education and Advocacy Taskforce (SWEAT) has been actively involved in commenting on the Sexual Offences Bill since its inception, and has made four submissions on the Bill since 2002. The Sexual Offences Bill was tabled in parliament in 2003. At this time there were official public hearings on the Bill, which included the opportunity to make both written and oral submissions (Combrinck 2006).

After this, for almost two years, there was very little work done on the Bill, and when it emerged again in 2006, it was with substantial changes. In September 2006 the clause criminalising the clients of sex workers was inserted in the Bill (Combrinck 2006). The exact wording of the clause is that it is an offence to: 'unlawfully and intentionally engage the services of a person 18 years or older, for financial or other reward, favour or compensation' (Criminal Law Amendment Bill 2003).

It is significant to note that, although the rest of the Bill is based on extensive research, no research was done to inform the inclusion of this section. More importantly, the clause criminalising the clients of sex workers was not subject to public participation as was the rest of the Bill (Strachan 2006). Sex workers who are most affected by the new clause had very little opportunity to have their opinions heard on the matter.

In its preamble, the objective of the Bill is stated as such:

> to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic… (Criminal Law Amendment Bill 2003).

Inclusion of the provision that criminalises clients of sex workers is not in agreement with the stated aim of the Bill, which is to provide victims of sexual offences with the maximum protection of the law. In addition to this there is already a separate law review process looking at the issues surrounding adult prostitution. The Constitutional Court has described the issues around adult prostitution as complex and in need of 'serious legislative consideration' (Strachan 2006). The insertion of this clause in the Sexual Offences Bill is contrary to the decision by the South African Law Reform Commission to separate adult prostitution from other sexual offences.

Unlikely to protect women

The Portfolio Committee on Justice and Constitutional Development makes the argument that by criminalising the clients of sex workers they are protecting women from exploitation. This is based to some extent on the assumption that if you eliminate the demand for commercial sex then there would be no need for women to supply sex. However, this ignores the important reality that sex workers actively look for clients. The majority of women enter the industry to support their families or ensure their own survival.

A demographic survey of 200 sex workers done by SWEAT in 2005 found that half of the participants indicated that they started doing sex work because they were not able to find another job (through a lack of training or available job opportunities). Overall, 22 per cent of the participants indicated that they do the work because it allows them to earn more money than they could in any other job. The 200 sex workers interviewed were supporting a total of 405 dependents of which 279 were children and 126 were other adults (Fick 2005).

The other argument made by the Committee in support for the insertion of this clause is that they are not really making any changes to the law. According to them clients are already criminalised under common law provisions, and clients are also seen as an accomplice to a crime under the Riotous Assemblies Act of 1956 (Strachan 2006). The reality is that in practice, clients are rarely arrested. A sex worker had this to say about whether clients are currently being arrested:

> I have been working as a sex worker for about 15 years. I have never experienced the police arresting clients. I have heard from other workers that some police look for people having sex in cars and if they find them they charge the client R400 cash.
>
> Marianne, 42, Kenilworth

When sex workers were asked whether they felt clients should be arrested they said:

> No, clients should not be criminalised. They are adults and they are deciding to buy a service from us.
>
> Sandra, 33, Hillbrow

> I don't think clients should be criminalised… I think that underage sex workers should be protected from clients…
>
> Neo, 38, Carltonville

It is important to note that during 11 years of working with sex workers, SWEAT has never had sex workers express the desire to see clients criminalised. Seeing fewer clients means that sex workers have to work more hours in less safe places to earn the money that they need to survive. When clients are criminalised, the burden of having to protect them falls squarely onto the shoulders of sex workers:

> As we all know, this industry is already undercover and clients don't want to be known. If they are criminalised, it will be worse because if we still manage to get some clients we would try our best to protect them from being arrested… The police themselves are the most bad ones and they would become worse if they have to arrest clients too.
>
> Neo, 38, Carltonville

As was stated earlier, most sex workers are working in order to be able to earn enough money to support themselves and their dependants. Criminalising the clients of sex workers would

negatively affect the earnings of sex workers. When there are fewer clients, sex workers are forced to charge lower prices and there is more competition for clients. To make the same amount of money, sex workers would have to see more clients in one day. This could also lead to an increased willingness on the part of sex workers to accept unsafe sex (as clients offer to pay them more for unsafe sex).

It is also reasonable to assume that with the criminalisation of the client the 'good' clients, who are not violent and are willing to pay, leave, as they are afraid of being arrested. There is a corresponding increase in dangerous clients who are potentially violent and who are not concerned about being arrested (Ostergren nd).

> If clients are criminalised, most of them will be too scared to come to us and therefore we won't make any money any more.
>
> Marianne, 42, Kenilworth

The nett result of the criminalisation of the client is that the sex work industry would be forced to operate further underground. Sex workers will not just summarily stop working, as this work is often their only source of income. And if the industry is operating more secretively, it makes sex workers harder to reach. This creates particular difficulties for organisations like SWEAT who assist them with human rights infringements and who provide safer sex education and condoms.

Criminalising the client as a strategy to combat trafficking?

The other key argument that is made in favour of this clause is that it would assist in efforts to combat trafficking in human beings. The argument is made that when sex work is tolerated there are higher levels of trafficking. However, the United States Trafficking in Persons Report identifies both Germany and the Netherlands as countries that are dealing well with the problem of trafficking. It is significant to note that both these are countries where sex work is not a crime and the industry is regulated.

Criminalising the client means that clients of sex workers are lost as potential sources of information about the abuse, exploitation or trafficking of people in the industry. Sex workers who are trapped or exploited have regular contact with clients, and these clients are often the only people sex workers can confide in if they are being kept against their will. If clients themselves were considered criminals they would certainly be very reluctant to come forward to assist these women. Sex workers themselves are often experts at identifying sources of exploitation.

Reflections on the criminalisation of clients in Sweden

The clients of sex workers (not sex workers themselves) have been criminalised in Sweden for a number of years. It is important to note that the Swedish government has not been able to demonstrate an overall decrease in the number of sex workers since the criminalisation of clients. What has happened is that more sex workers in Sweden are working indoors and advertising through the Internet or working from their cell phones.

Sex workers in Sweden who do work on the street have less time to negotiate with clients and therefore also less time to assess whether a client is dangerous. They are highly reluctant to go to the police when clients are abusive, despite the fact that an overall increase in violence against sex workers has been reported in Sweden (Ostergren nd).

Another report on the Swedish method of dealing with sex work reflects on the difficulties of prosecuting clients for buying sex. This report found that problems with producing evidence was one of the main reasons given for dropping criminal charges. It is difficult to prove that there has been an agreement about payment for sexual relations, as well as to give evidence that sexual services have been provided. Police have resorted to filming the acts clients engage in with sex workers in order to collect evidence. But even if police officers catch the sex worker and the client in the act, both parties can still deny that payment was given. In Sweden few charges of buying sexual services ever lead to conviction (Purchasing sexual services report 2004).

Unintended consequences of the clause

In addition to the difficulties mentioned above, the wording of this clause could have some unintended consequences. When one criminalises the exchange of sex between adults for financial reward, favour or compensation, it means that government is starting to intrude on the area of consensual sex between adults.

As Gould asserts: 'in an attempt to protect women from sexual violation the Bill, perhaps unintentionally, also removes the right of women (and men) to choose how sexual transactions can take place between consenting adults' (Gould 2006). This has implications for the large number of people in South Africa who engage in transactional sex (exchanging sex for food or a place to stay). Clause 11 also renders 'any sexual exchange between adults (over the age of 18) for financial or other gain unlawful' (Gould 2006).

Conclusion

It would appear that this clause has been inserted in the Bill in a misguided attempt to protect women from being exploited or trafficked. However, it is time to listen not just to the analysts, but to the voices of the women who will be most affected by this clause, and who know better than anyone what would make their work easier – and what would protect them:

> It would improve our work if sex work was decriminalised or if there was a red light zone where we could work in safety. Our lives would also improve if government could instruct the police not to arrest us just because they know our faces.
>
> Samantha, 32, Salt River

> It would improve my life if the police could concentrate on catching murderers, rapists and child killers. The police put a lot of energy, money and time into chasing us around the streets…
>
> Marianne, 42, Kenilworth

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