

**SOUTH AFRICAN LAW REFORM COMMISSION**

**REPORT**

**Project 107**

**SEXUAL OFFENCES**

**ADULT PROSTITUTION**

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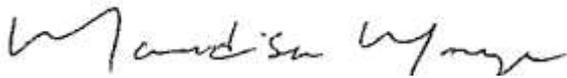
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To Mr TM Masutha (Adv), MP, Minister of Justice and Correctional Services<sup>1</sup>

I am honoured to submit to you in terms of section 7(1) of the South African Law Reform Commission Act 19 of 1973 (as amended), for your consideration, the Commission's Report on Sexual Offences: Adult Prostitution



Madam Justice M Maya

Chairperson: South African Law Reform Commission

Date: 6 June 2015

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<sup>1</sup> On 25 May 2014 President Zuma announced the new administration following the fifth national general elections. Any reference in this Report to the name of a Ministry, government department or office bearer which has since changed has been amended to reflect the correct name. The substantive content of the Report was approved by the Commission on 11 May 2014 subject to amendments. The Commission Working Committee appointed on 5 July 2014 approved the amendments to the Report on 16 August 2014.

## **South African Law Reform Commission**

The South African Law Reform Commission was established by the South African Law Reform Commission Act 19 of 1973.

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### **ACKNOWLEDGEMENT**

The Commission wishes to acknowledge Ms T Madonsela (Adv) and Profesor C Albertyn, former project leaders to the investigation, and Ms C Pienaar, former researcher at the SA Law Reform Commission, for their substantial contribution towards the Discussion Paper and active involvement in the workshop phase. Ms Pienaar's ordering of a part of the many submissions received and significant preparatory contribution to a chapter in this Report is valued.

# Summary of the Report

## A Introduction and background

1. The Report on Sexual Offences: Adult Prostitution published by the South African Law Reform Commission (the Commission) has sought to explore the need for law reform in relation to adult prostitution against the backdrop of some of the complex realities South Africans face. Within the current South African context the debate around adult prostitution has been complicated by the global economic downturn, high levels of unemployment, crippling poverty, burgeoning numbers of migrant and illegal foreign job seekers, high levels of violence (particularly sexual violence) against women, the HIV/AIDS epidemic, drug or substance abuse, and the targeted exploitation of women engaging in prostitution by third parties, unethical authorities and buyers.<sup>2</sup>

2. The aim of this Report, as was the aim of the Issue Paper<sup>3</sup> and Discussion Paper<sup>4</sup> which preceded this Report, is to review the fragmented legislative framework that currently regulates adult prostitution within the larger framework of all statutory and common law sexual offences. The statutory provisions under review are contained in the Sexual Offences Act 23 of 1957 (the Sexual Offences Act). The secondary aim is to consider the need for law reform in relation to adult prostitution and to identify alternative policy and legislative responses that might regulate, prevent, deter or reduce prostitution. As there are a range of legal responses to prostitution in “open and democratic societies”<sup>5</sup> it is essentially a matter of policy to decide which legislative model accords with governments’ goals and strategies (see para 2.493).

3. The investigation into the legal position relating to adult prostitution constitutes the third leg of the larger Commission project on Sexual Offences (Project 107). The investigation was de-linked by the Commission from the larger project that has delivered,

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<sup>2</sup> Kelly L, Coy M, Davenport R “*Shifting Sands: A Comparison of Prostitution Regimes Across Nine Countries*” (London Metropolitan University 2009) at 5.

<sup>3</sup> South African Law Commission *Sexual Offences: Adult Prostitution* (Project 107) Issue Paper 19 (2002).

<sup>4</sup> South African Law Reform Commission *Sexual Offences: Adult Prostitution* (Project 107) Discussion Paper 1 (2009).

<sup>5</sup> Meyerson Denise Does the Constitutional Court of South Africa take rights seriously? The case of *S v Jordan* 2004 Acta Juridica 138 at 153.

among others, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Amendment Act). The delinking was intended to give the issue of adult prostitution focused attention. As the law currently stands in South Africa, adult prostitution (i.e. selling of sexual services, buying of voluntary adult sexual services, and all prostitution related acts) are criminal offences.<sup>6</sup>

4. The Report is made up of four chapters. The first chapter covers an overview of the investigation, followed by three chapters covering aspects relating to the prostitute, the client and third parties. The Report is accompanied by two draft amendment Bills as options which contain the repeal of the Sexual Offences Act and amendments to the Sexual Offences Amendment Act, essentially consolidating all matters relating to sexual offences in one Act. The Report contains legislative and non-legislative recommendations.

5. The Report gives an overview (South African and comparative) of the legislative and regulatory context pertaining to adult prostitution, including a discussion of the different models used in different jurisdictions, namely total criminalisation, partial criminalisation, regulation and non-criminalisation; and reflects recent developments in the debate on adult prostitution, including an exposition of the South African National AIDS Council's (SANAC) National Strategic Plan for HIV, STIs and TB 2012 – 2016, the COSATU Gender Conference 2012, the ANC Gender Discussion Document 2012, the FEDUSA Policy and Resolution on Prostitution at its 58<sup>th</sup> National Executive Committee meeting, and the National Sex Work Symposium hosted by the Sex Workers Education and Advocacy Taskforce (SWEAT), the South African National AIDS Council and the Department of Health. Each chapter exposits relevant research and salient submissions made by respondents to the questions posed in the Discussion Paper and in questionnaires distributed at workshops (submissions were received from a combined 1761 individuals and organisations. These submissions were endorsed by a further 889 individuals or organisations bringing the total number of submissions to 2650. The submissions are listed under Annexure B of the Report). Each Chapter contains an evaluation and discussion of the research and submissions relevant to that chapter and concludes with a recommendation by the Commission accompanied by an option for draft legislation where applicable.

6. In considering the aims of the Report the Commission has been mindful that the state is called to promote the values of "human dignity, the achievement of equality and the

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<sup>6</sup> Sexual Offences Act 23 of 1957 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

advancement of human rights and freedoms”, and to recognise individual rights, freedoms and responsibilities and the collective rights and responsibilities for the well-being of all people. In making its recommendations the Commission has also been mindful of the imperatives set by South Africa’s constitutional democracy and the aims of key policy documents, such as the National Development Plan 2030, the New Growth Path, the Medium Term Strategic Framework and SANAC’s National Strategic Plan for HIV, STIs and TB 2012 - 2016. The Commission has furthermore considered the obligations placed on the Republic of South Africa by several international legal instruments, including the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, 1979 towards the combating and, ultimately, eradication of violence against women.

7. The Commission has sought to move beyond popular rhetoric to give a clearly reasoned investigation that is based on an analysis of local and international legal principle, precedent and experience. In the course of this investigation the Commission has identified three central themes to the debate aimed at legislative reform on adult prostitution, namely whether prostitution is work or exploitation; access to health and prevention of the transmission of HIV; and addressing arbitrary arrest and exploitation.<sup>7</sup> The Commission has found that prostitution in South Africa is driven by a complex intersection of social and economic factors in which poverty, unemployment and inequality are key drivers and has thus been mindful that our Constitution requires that the law be a means to achieve social justice.

8. The Commission is of the view that exploitation, particularly of women in prostitution, seems inherent in prostitution and depends on the external factors of gender violence, inequality and poverty and is not caused by the legislative framework in which it finds itself.<sup>8</sup> The Commission has concluded that changing the legislative framework could create an extremely dangerous cultural shift juxtaposed against the high numbers of sexual crimes already committed against women. Women would be considered even more expendable than at present. The Commission has noted that the prevalence of prostitution in our society and the inherent exploitation associated with it is primarily a social phenomenon, which is reflective of deep-seated, economic and sexual inequality, and that legal mechanisms to address this social phenomenon are limited and are reactive in nature, but nonetheless

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<sup>7</sup> These themes are similarly identified in the Commission for Gender Equality Policy Brief Position Paper on Sex Work (2013) available at [www.cge.org.za](http://www.cge.org.za).

<sup>8</sup> South African National AIDS Council “National Strategic Plan on HIV, STIs and TB 2012 - 2016” at 36.

necessary. For this reason and as stated above the Report contains legislative and non-legislative recommendations.

9. On the legislative front, the Report inter alia recommends as the Commission's preferred option the repeal of the Sexual Offences Act and the amendment of the Sexual Offences Amendment Act by the inclusion of offences which criminalise prostitution and prostitution related activities, coupled with an option for people in prostitution to divert out of the criminal justice system so that they can access supportive resources and systems in order to exit prostitution if they should choose to do so. The Commission is of the view that diversion presents an opportunity in line with the commitment expressed by the National Planning Commission to address the vulnerability and marginalisation of people through skilling and education.

10. On the non-legislative front, the Commission has found that despite isolated cases of private and state run and funded programmes there is no national strategy to deal with prostitution. The Commission recommends that irrespective of the policy option chosen, a national strategy should be implemented to deal with prostitution. It further recommends that this national strategy should do the following: seek to implement the proposed legislation or policy; offer viable alternatives to prostitution; assist a person to exit prostitution should he or she express a willingness to do so; support reskilling, health and education initiatives for prostitutes; promote economic independence; and promote sexual health and safer sexual practices (para 1.17).

11. The Report endorses and builds on the following non-legislative recommendations contained in the joint Women's Legal Centre<sup>9</sup> and SWEAT project,<sup>10</sup> specifically that:

1. The Commission on Gender Equality and the Human Rights Commission should investigate the human rights violations that prostitutes experience;
2. The police and the Independent Police Investigative Directorate should investigate reports of prostitution related violence and unlawful conduct by officers;
3. The police should establish guidelines for police conduct when dealing with prostitutes and instructions should be issued in this regard;

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<sup>9</sup> WLC and SWEAT joint report "Every sex worker a human rights defender" (2012).

<sup>10</sup> SWEAT National Sex Work Symposium: Best practices in HIV prevention, care and treatment for sex workers in South Africa (22 – 23 AUGUST 2012) Presentation titled "Create an enabling environment for sex workers: Police harassment and abuse of sex workers: 3 years of documenting sex workers' human rights violations" Stacey-Leigh Manoek.

4. Administrative mechanisms for monitoring and responding to reports of police violence and unlawful conduct should be developed to help minimise such occurrences, to enable effective responses, and to ensure that complainants are protected from further victimisation (para 2.455);
5. The South African Police Service should consider specialisation to deal with prostitution (para 4.276);
6. The police should establish guidelines for correct conduct when dealing with prostitutes and instructions should be issued in this regard. This should include prohibiting police from confiscating condoms and from interfering or harassing health or outreach workers who distribute condoms (para 2.468);
7. The behaviour of health care workers should be addressed through internal complaints mechanisms or equality legislation;<sup>11</sup>
8. Guidelines for health care workers should be established for interacting with people from vulnerable groups, including prostitutes (para 2.467);
9. Implementing and achieving the SANAC National Strategic Plan for HIV, STIs and TB 2012 -2016 (NSP) objectives would significantly improve the use of health services. These objectives can be implemented independently of the legislative framework governing prostitution. Their implementation would improve people's understanding of, access to, and uptake of health services; in turn, this may significantly reduce the spread of sexually transmitted infections (STIs) and HIV. The Commission states that these recommendations do not preclude the Department of Health from being tasked with the phasing in of accessible health services for vulnerable groups such as prostitutes (eg health services available in the evenings) or to address discrimination and prejudice towards this vulnerable group;
10. The Department of Social Development and the Ministry of Women should be mandated to engage with prostitutes on issues of social security and poverty alleviation, including reskilling and alternative income generating projects (para 4.286);
11. Substance abuse in the context of prostitution deserves further attention and intervention (para 2.480); and
12. Transactional relationships, as a growing social phenomenon, be further investigated from a social and gender-based violence intervention perspective (para 1.76).

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<sup>11</sup> More specifically the Promotion of Equality & Prevention of Unfair Discrimination Act 4 of 2000.

12. It is necessary to point out that the Sexual Offences Amendment Act contains a potential anomaly. Although a child is legally allowed to consent to a sexual act (which includes touching or penetration) from the age of 16, a consensual sexual act with a child is criminalised as exploitation of the child where such an act is accompanied by a reward or payment. The aim seems clearly to protect this category of children from sexual exploitation. This Report in no way derogates from the criminalisation of under-aged prostitution (younger than 18 years).<sup>12</sup> The Commission endorses section 17 of the Sexual Offences Amendment Act and the use of 18 years as a defining line between child and adult prostitution. The added protection is justified due to the vulnerability of children. Anyone paying a consenting child between 16 and 18 for sexual services could be charged with committing the offence of sexual exploitation of a child (child prostitution). A charge of statutory rape or rape of the child could be considered only if the child was between 12 and 16<sup>13</sup> or under the age of 12.<sup>14</sup>

13. All the proposed recommendations contained in this Report presuppose the criminalisation of under-aged (under 18)<sup>15</sup> and coerced prostitution and trafficking of people for the purpose of prostitution. Such activities are all subject to regulation and criminalisation, as appropriate, under other laws and law reform processes. From the outset the Commission confirms its view that these activities must remain criminalised.

## **B Recommendations**

14. The recommendations contained in the Report are reflected in sequence below.

### **1 Definitions and terminology**

15. The Commission is aware that the terminology used in the prostitution debate is integral to the larger debate on preferred legislative models. Although the Commission has attempted to keep gender identification neutral in this Report, in several instances we have used feminine pronouns to refer to people who provide sexual services for payment and masculine pronouns for buyers of sexual services. Available evidence and research has shown that most prostitutes are women and most buyers are men. However, we recognise

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<sup>12</sup> See Chapter 2 for elucidation on this point.

<sup>13</sup> Statutory rape or statutory sexual violation.

<sup>14</sup> Rape or sexual assault.

<sup>15</sup> See Chapter 2 for elucidation on this point.

that a number of men and transgendered or transsexual people provide sexual services for reward and that a minority of female buyers exists (para 1.33).

16. In this Report the Commission uses “choose” or “choice” to mean the choice made at the time of a specific transaction, in contrast with the reason for entering prostitution (which may not have been a voluntary choice) (para 1.35). The Report adopts the definition of “sexual act” as defined in the Sexual Offences Act to replace the terminology “unlawful carnal intercourse” and “act of indecency”. The Commission believes that the term “carnal intercourse” is restrictive, vague and outdated. Consequently the Commission is not convinced that the above term should be retained (para 1.40). “Sexual services” is used in this Report as a collective term to describe sexual acts of a penetrative and non-penetrative nature as contemplated in the Sexual Offences Act, and is in line with the definition of “sexual act” in the Sexual Offences Amendment Act (para 1.41).

17. In the Discussion Paper<sup>16</sup> the Commission proposed the continued use of the words “prostitution” and “prostitute”. The Commission has decided to retain the term “prostitution” when referring to the selling and buying of sexual acts and related activities. For the sake of consistency, the Commission elects to refer to an adult person (older than 18 years) who voluntarily offers or provides sexual services for financial or other reward, favour or compensation, irrespective of whether the sexual act occurs or not as a prostitute (para 2.3).

18. The Commission has in the course of its research found that the words “buyer”, “client”, “johns”, “users of prostitutes”, “prostitutors”, “abusers”, “tricks”, “kerb-crawlers” and “customers” – to name a few – are used in various forums to refer to people who pay for or give a reward to a prostitute for sexual services (para 3.5). The Commission realises that some people believe that describing a person who pays for sexual services as a “client” or “customer” lends credibility to such actions, essentially legitimising the act of paying for sex, or that such terminology might even condone the commodification of the prostitute’s body as an object that can be bought. Certain terms such as “buyer” and “client” are colloquially used in South Africa and in this context generally mean people who buy or pay for a sexual service. For this reason the Commission has decided to use the relatively neutral term “buyer” in this Report (para 3.6).

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<sup>16</sup> At 6.

19. For the definition of “prostitution”, the Commission was asked to list various methods of payment, such as food, accommodation, protection and drugs.<sup>17</sup> Although most respondents felt that in practice cash is the preferred method of payment, other payments range from a plate of food<sup>18</sup> to mobile phone airtime. The Commission believes that listing specific methods of payment may be restrictive. It therefore recommends retaining the inclusive reference to payment as being “any financial or other reward, favour or compensation”, which currently appears in the Sexual Offences Amendment Act (para 1.69).

20. The Commission is of the opinion that the definition proposed in the Discussion Paper covered only a small portion of what may be considered prostitution and was therefore too restrictive. It recommends that for the purpose of this Report, adult prostitution should be inclusively defined to include prostitution related activities as described in the Sexual Offences Amendment Act (para 1.74).

21. The Commission maintains that true transactional relationships should not be confused with adult prostitution. Although transactional relationships do not form part of this investigation, preliminary research has uncovered troubling trends that require attention. The Commission therefore recommends that relationships of this nature, as a growing social phenomenon, be further investigated from a social and gender-based violence intervention perspective (in contrast with the need for legal intervention or law reform) (para 1.76).

22. In this Report, the introductory chapter is followed by chapters on the phenomena of people providing sexual services for payment (Chapter 2), people paying for sexual services (Chapter 3), and third parties (Chapter 4).

23. In Chapter 2 the Commission examines the definition of a person who provides sexual services for payment within the context of voluntary prostitution as well as various legal approaches in respect of prostitutes. In this chapter the Commission evaluates the submissions made to it on these issues. The chapter starts with a brief discussion of terminology. It then provides an overview of selected theoretical approaches to prostitutes, which underpin the legal models identified in the Discussion Paper. The overview is followed by an exposition of the current legal position in South Africa and an updated comparative summary of the law as it relates to prostitutes. The discussion portion of the chapter concludes with an exposition of submissions made in response to questions posed in the

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<sup>17</sup> S Goddard, Bet Sheekom; L Sete UNISA; Fred Williams.

<sup>18</sup> Interview at a safe-house during a police guided tour facilitated by Rocking Chair in Sunnyside, Pretoria on 22 September 2009.

Discussion Paper,<sup>19</sup> as follows: – how to reduce harm and vulnerability to abuse and exploitation of prostitutes; how prostitutes can be assisted to enforce their rights to equality and access to health care; how stigma and discrimination against prostitutes can be avoided; how concerns regarding prostitution and crime should be addressed; how concerns regarding public health and HIV should be addressed; how an environment can be created for prostitutes to exit prostitution; and finally, how the issue of a criminal record for selling sex for reward should be addressed when a person leaves prostitution to seek other employment. This section is followed by an evaluation of the chapter and the Commission’s recommendations on what the most suitable legal response should be in respect of people who provide sexual services for payment.

24. In Chapter 3 the Commission examines the definition of a buyer of sexual services. The Commission also discusses the legal approaches used in respect of buyers, and evaluates the submissions made to the Commission to arrive at a suitable legal approach for South Africa. The chapter starts with a brief discussion on relevant terminology. It then provides an overview of selected theoretical approaches to buyers of sexual services, which underpin the legal models identified in the Discussion Paper.<sup>20</sup> The overview is followed by an exposition of the current legal position in South Africa and a comparative summary of the law as it relates to buyers of sexual services. The Commission then identifies a number of contextual issues to assist in understanding the role of the law in addressing this aspect of prostitution, as follows: understanding the demand for prostitution, and who the purchasers are and why they pay for sexual services; the impact on and attitude of people paying for sexual services; the impact on society and the impact of criminalising people for paying for sexual services. The chapter concludes with an exposition of pertinent submissions made on the Discussion Paper, followed by an evaluation of the chapter and the Commission’s recommendations on what the most suitable legal response should be in respect of people who pay for sexual services.

25. In Chapter 4, an overview is given of the current law relating to third parties and beneficiaries of prostitution. The category of third parties benefiting from the proceeds of prostitution spans a wide range of people. Such people may or may not be aware of the source of the benefit they receive, and may or may not be actively involved in acquiring such benefit. Beneficiaries include minor dependants and siblings; major dependants such as parents, grandparents and siblings; partners including husbands, spouses, cohabitees, and boyfriends; pimps and other business partners; brothel owners; managers; landlords; escort

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<sup>19</sup> SALRC *Sexual Offences: Adult Prostitution* Discussion Paper 2009.  
<sup>20</sup> Ibid.

agencies, massage parlours, strip clubs or “hotels”; corrupt police officials or other officials who abuse their positions or abuse prostitutes; and traffickers, transporters or smugglers. This list is not exhaustive. Thereafter the chapter gives an exposition of submissions made in response to questions posed in the Discussion Paper<sup>21</sup> on the legislative options, namely partial criminalisation, regulation, and non-criminalisation. With regard to partial criminalisation and regulation, attention is given to aspects of prostitution that should remain criminalised. Some possibilities include the following: engaging in outdoor sexual intercourse with persons 18 years and over for reward outside a brothel; having outdoor sexual intercourse for reward with persons 18 years and over; procurement of unlawful carnal intercourse prostitution; living on earnings of unlawful prostitution; assistance for purposes of unlawful prostitution; enticing, soliciting or importuning unlawful prostitution; and coerced prostitution. The responses to questions such as whether safe sex practices, sex education and advertising of prostitution should be regulated are also presented. With respect to the option of non-criminalisation, the Commission explores the question of whether persons who are convicted of specific offences should be excluded from running a prostitution business. This chapter concludes with a summary and evaluation, followed by the Commission’s recommendations for a suitable legal response in respect of third parties or beneficiaries of prostitution.

26. The final section of the Report presents the Commission’s legislative proposals on adult prostitution. The provisions relate primarily to the repeal of the Sexual Offences Act, the enactment of new provisions in the Sexual Offences Amendment Act, and some consequential amendments relevant to the Criminal Procedure Act. The recommendations are reflected under the headings of each relevant chapter.

## **2 People Who Offer Sexual Services for Payment: The Prostitute**

27. Internationally the main factor used to determine how the law should respond to adult prostitution is whether prostitution is viewed predominantly as work or exploitation (para 2.7). This is a controversial matter.

28. There is general consensus from respondents to the Discussion Paper that the practice of selling sexual services is often the result of a choice made in severely limiting socio-economic circumstances, and in a context of social inequality. It is not disputed that

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<sup>21</sup> Ibid.

most women and even girls enter prostitution due to tragic circumstances such as family breakdown, sexual abuse, rape, and poverty, and for economic survival (para 2.437).<sup>22</sup>

29. Although the Commission expected the debate to be laden with moral and religious rhetoric it found that it transcended ideological divides. Despite the fact that most submissions came from religious institutions and people from a range of religions, the views in these submissions have not clashed nor sought harsh retribution against the prostitute.<sup>23</sup> In general the submissions acknowledged the harm of prostitution and the vulnerable position of people who provide sexual services, and the need to extend a compassionate hand to them by assisting them to exit from prostitution – albeit through retaining a criminalised system. The remainder of the submissions also acknowledged the vulnerable position of prostitutes but advocated for non-criminalisation as the solution. Essentially the debate has fallen along the lines of those who view prostitution as work and those who view it as exploitation (para 2.442).

30. Given the nature of the service provided through prostitution, the core question seems to be whether prostitution should be considered to be work and more specifically decent work in the context of an employment relationship. The aim of the International Labour Office (ILO) Decent Work Agenda and the Decent Work Programme for South Africa is to promote opportunities for people to obtain decent and productive work.<sup>24</sup> Similarly, the aim of the New Growth Path is to create decent work that will contribute to reducing inequality and defeating poverty. Together with the 2009–2014 Medium Term Strategic Framework and the National Planning Commission, the focus is on addressing major developmental challenges in South Africa. Many of these challenges are listed as reasons for entering prostitution. Decent employment undergirded by quality basic education and a skilled and capable workforce is the ultimate goal. Job creation and skills development targets are crucial elements of The New Growth Path (para 2.451).

31. Neither the ILO nor the above South African policy documents have promoted legalising prostitution as a solution to poverty; nor have they identified prostitution as an employment option for poor or marginalised people. Prostitution does not fit comfortably into the international definition of “decent work”. To the contrary, although prostitution may seem

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<sup>22</sup> Family Policy Institute.

<sup>23</sup> This finding stands in contrast to the view in the Commission for Gender Equality Position Paper on Sex Work that ‘very often societal perceptions of sex work are informed by religious opinion that views sex work as “sin” and sex workers as “fallen or sinful” women’ at 3.

<sup>24</sup> International Labour Organization (ILO) International Labour Office “Decent Work Country Profile South Africa” Geneva Switzerland (2011) available at [www.ilo.org](http://www.ilo.org) 7.

to provide superficially attractive short-term financial benefits, it has not been shown to lift women out of a lifetime of poverty and economic inequality. The reason for this may lie in the very personal and private nature of the service provided, which heightens a prostitute's vulnerability to exploitation (para 2.452).<sup>25</sup>

32. The Commission believes that despite arguments in favour of non-criminalisation and recognition of prostitution as work, or its inclusion in the reach of labour legislation, non-criminalisation would not automatically give prostitutes labour or work-related benefits (para 2.444).

33. The Commission further believes that any effort to integrate prostitution into formal employment laws and structures would encounter inherent difficulties. It is particularly mindful of the challenges experienced in comparative jurisdictions in this regard. The Commission recommends that prostitution should not be recognised as a reasonable means to secure a person's living in South Africa, and from a formal labour perspective should not be considered to be work or decent work. This stance aligns with the partial criminalisation model found in the Nordic countries and Canada and the total criminalisation model currently in place in South Africa (para 2.452).

34. The Commission concludes that within the South African context of high levels of gender violence and inequality coupled with the challenge of poverty, women are particularly vulnerable to being exploited in prostitution. Exploitation, particularly of women in prostitution, seems inherent in prostitution and depends on the external factors of gender violence, inequality and poverty. Whichever way it is argued, there is no justification for this exploitation, including the abuse of power by officers of the law. The Commission agrees with respondents that acts of violence, abuse and exploitation by police officers need to be addressed in the strongest terms. The Commission endorses and builds on the following non-legislative recommendations contained in the joint Women's Legal Centre<sup>26</sup> and Sex Workers Education and Advocacy Taskforce (SWEAT) project,<sup>27</sup> specifically that:

1. The Commission for Gender Equality and the Human Rights Commission should investigate the human rights violations that prostitutes experience;

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<sup>25</sup> Raymond JG "Legitimizing Prostitution as Sex Work: UN Labour Organisation (ILO) Calls for Recognition of the Sex Industry" available at <http://action.web.ca>.

<sup>26</sup> WLC and SWEAT joint report "Every sex worker a human rights defender" (2012).

<sup>27</sup> SWEAT National Sex Work Symposium: Best practices in HIV prevention, care and treatment for sex workers in South Africa (22 – 23 AUGUST 2012) Presentation titled "Create an enabling environment for sex workers: Police harassment and abuse of sex workers: 3 years of documenting sex workers' human rights violations" Stacey-Leigh Manoeek.

2. The police and the Independent Police Investigative Directorate should investigate reports of prostitution related violence and unlawful conduct by officers;
3. The police should establish guidelines for police conduct when dealing with prostitutes and instructions should be issued in this regard;
4. Administrative mechanisms for monitoring and responding to reports of police violence and unlawful conduct should be developed to help minimise such occurrences, to enable effective responses, and to ensure that complainants are protected from further victimisation (para 2.455).

35. The Commission believes that evidence has shown that prostitution in South Africa is exploitative and that a significant number of women coerced into a lifestyle of prostitution through economic marginalisation (resulting from poverty, lack of education and inequality) are harmed by it. The Commission is alarmed by first-hand reports of the nature and extent of the physical and psychological harm that prostitutes are exposed to. **Although a partially criminalised approach may recognise the exploitation of the prostitute the Commission for Gender Equality avers that the Nordic approach has impacted negatively on prostitutes.<sup>28</sup> The Commission is also mindful of the legislative shift in Canada away from a partially criminalised system where the prostitute and buyer are non-criminalised to a system where only the prostitute is non-criminalised in an attempt to protect prostitutes from violence and exploitation. However it is too early to ascertain the effect of the change in the law although concerns have been expressed in this regard.<sup>29</sup> The Commission is therefore of the opinion that a change in the current legislative framework would not significantly alter this scenario, and may even expose prostitutes to further harm.** (para 2.460)

36. The Commission agrees with the submission made by SWEAT that there are a range of existing laws to deal with crimes associated with prostitution and prostitution related activities; these include money laundering, drug dealing, sexual violence, assault, extortion and blackmail. The Commission also finds merit in the submission by the Centre for Justice and Crime Prevention that prostitution often takes place in parts of communities where urban decay has set in, resulting in a lack of social cohesion and a general neglect of the environment. However, it believes that it would be naïve to think that prostitution could be neatly excised from the above activities through non-criminalisation. Prostitution would continue to be shaped by the same socio-economic factors that concentrate crime in areas

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<sup>28</sup> Commission for Gender Equality Position Paper on Sex Work at 6.

<sup>29</sup> Coutts Matthew, "What is and is not legal under Canada's new prostitution laws" Dec 8 2014 available at <https://ca/news.yahoo.com>.

plagued by poverty, inequality and unemployment. Country reports from Australia and the Netherlands confirm this pattern. Violence perpetrated by buyers and other role players apparently continue unabated in non-criminalised settings (para 2.457).

37. The Commission shares the concern that a shift away from criminalisation would cause an increase in child prostitution. Although illegal and met with severe penalties, the preference of some buyers for younger girls has repeatedly been brought to the Commission's attention. The Commission believes that child and adult prostitution cannot be strictly compartmentalised; many adult prostitutes started out selling sexual services when they were children and most vulnerable (para 2.458).

38. The Commission believes that, based on current indicators, the legislative options of partial- and non-criminalisation across the board might well encourage an increase in both legal and illegal migration, and possibly trafficking, for the purpose of prostitution. The Commission recommends retaining a criminalised framework in respect of immigrants. The Commission notes that changing the legislative framework on prostitution might set up an undesirable dual system of legal versus illegal prostitution (para 2.463).

39. The Commission notes that correcting the behaviour of health care workers who discriminate against prostitutes or behave condescendingly towards them, by means of criminal law, would only be counterproductive. It believes that such behaviour would be better addressed through internal complaints mechanisms or equality legislation.<sup>30</sup> It also believes that implementing and achieving the South African National AIDS Council National Strategic Plan for HIV, STIs and TB 2012 -2016 (NSP) objectives would significantly improve the use of health services. These objectives can be implemented independently of the legislative framework governing prostitution. Their implementation would improve people's understanding of, access to, and uptake of health services; in turn, this may significantly reduce the spread of sexually transmitted infections (STIs) and HIV. The Commission is mindful that reform of the legislative framework in other countries<sup>31</sup> has not proved to be an effective method for changing the stigma attached to prostitution.<sup>32</sup> Legalisation has not

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<sup>30</sup> More specifically the Promotion of Equality & Prevention of Unfair Discrimination Act 4 of 2000.

<sup>31</sup> In Malawi where prostitution is decriminalised the country's sex workers are often arrested by police and charged with minor offences, such as loitering and disorderly conduct. Three years ago - 14 sex workers who were detained by police and forced to undergo HIV tests sued the government for violating their privacy in a case that has yet to be heard by the High Court. "Malawi sex workers unite against harassment" *Legalbrief Today*- General Issue No: 3162 (13 November 2012).

<sup>32</sup> 'We asked Amy whether decriminalising prostitution would make it easier for women to report

been found to erase the stigma of prostitution, but makes women even more vulnerable because they must sacrifice their anonymity to be recognised as legal prostitutes.<sup>33</sup> **The Commission for Gender Equality also reports that partial criminalisation results in a significant increase in stigma and discrimination<sup>34</sup> (although from the exposition above<sup>35</sup> it would seem to be more the experience of buyers than prostitutes).** For this reason the Commission recommends that guidelines for health care workers should be established for interacting with people from vulnerable groups, including prostitutes. The abuse of power by police officials is already illegal and should not be tolerated (para 2.467).

40. The Commission agrees with Ms Fudge and the Family Policy Institute that the solution is to be found in training and institutional discipline. As recommended above, the police should establish guidelines for correct conduct when dealing with prostitutes and instructions should be issued in this regard. This should include prohibiting police from confiscating condoms and from interfering or harassing health or outreach workers who distribute condoms. Discrimination affecting a prostitute's access to health care or equality can be dealt with through the equality courts (para 2.468).

41. The Commission does not support the call for mandatory health checks and certification of prostitutes. The Commission believes that "women only" health checks do not make sense for public health because monitoring prostituted women would not protect them from HIV/AIDS or STIs. This is because male "clients" can and do originally transmit such diseases to the women (para 2.469).<sup>36</sup>

42. The Commission notes with concern that the vulnerability of prostitutes is exacerbated by substance abuse. The question of whether substance abuse drives women into prostitution or is introduced afterwards seems academic. The Commission believes that substance abuse in the context of prostitution deserves further attention and intervention (para 2.480).

43. The Commission believes that in South Africa, prostitution in its many guises – albeit "voluntary" – clearly exploits women and men who provide sexual services. Even ostensibly

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such abuses. "Oh please. No. It's like a child who gets abused by her father. She seldom tells anyone. Why? Because of the shame. Changing the law won't take away the shame."  
Rocking Chair submission at 7.

<sup>33</sup> Family Policy Institute.

<sup>34</sup> Commission for Gender Equality Position Paper on Sex Work at 7.

<sup>35</sup> See paragraph 2.138 and further.

<sup>36</sup> (Raymond:2003) as quoted in the Family Policy Institute submission; endorsed by the Christian Lawyers Association of South Africa.

self-chosen or self-initiated involvement in prostitution is a symptom of the inequality and marginalisation that are a daily experience of many impoverished people, especially women. The exploitation of a person's lack of alternatives does not amount to a considered exercise of that person's own choice. Prostitution in South Africa can also be viewed as an aspect of male violence against women and children. South Africa is grappling with high levels of violence against women, with sexual assault and intimate partner violence contributing to increased risks for HIV infection.<sup>37</sup> Changing the legislative framework could create an extremely dangerous cultural shift juxtaposed against the high numbers of sexual crimes already committed against women. Women would be considered even more expendable than at present. Furthermore, the Commission believes that legalising prostitution would increase the demand, locally and internationally, for more prostituted persons, and would foster a culture that normalises prostitution and sexual coercion. Overall, the Commission believes that due to the systemic inequality between men and women in South Africa, any form of legalisation will not magically address the power imbalance between the buyer and the prostitute, or the demand by buyers for unsafe or high-risk sex (para 2.496).

44. Some people may (even if subconsciously) consider prostitution a fair choice for a particular sector or class of women. In this light, prostitution might be considered somehow acceptable for poor women, vulnerable women, and women of colour, instead of being seen as sexual exploitation and a human rights violation. If this notion is supported then our society is effectively tolerating the creation of a separate, expendable, throwaway class of women. Research discussed in this Report and submissions (written and oral) made to the Commission have shown that intrinsic to prostitution are numerous violations of human rights: sexual harassment, economic servitude, educational deprivation, job discrimination, partner and family violence, racism, classism, vulnerability to frequent physical and sexual assault, and being subjected to body invasions that are equivalent to torture. By legalising prostitution, society would fail to acknowledge that prostitution preys particularly on women who are vulnerable and choose prostitution as a last resort.<sup>38</sup> The Commission is not convinced that changing the legal framework to one of non-criminalisation would address the violations or vulnerability experienced by prostitutes. Essentially it would seem that two legislative options remain, i.e. that of total criminalisation or that of partial criminalisation such as is found in the Nordic countries and Canada. Although the partial criminalisation model recognises the invidious position prostitutes find themselves in and it is reported by Max Waltman<sup>39</sup> to have

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<sup>37</sup> South African National AIDS Council "National Strategic Plan on HIV, STIs and TB 2012 - 2016" at 36.

<sup>38</sup> RUHAMA's position, endorsed by the FPI and supported by the South African Christian Lawyers Association and Doctors for Life International.

<sup>39</sup> See paragraph 2.138 and further.

brought about a decrease in street prostitution and trafficking in Sweden, it is too early to report on the position in other Nordic countries or Canada. Furthermore the Commission for Gender Equality<sup>40</sup> contends that prostitutes subject to a partially criminalised legal framework continue to suffer harassment from police and seldom report incidents of violence and coercion; that violence has increased; and that there is greater competition, declining prices and harsher conditions. Another important consideration is that Sweden's reported success is linked to the country being a strong welfare state, which is not the position here. Although this will be reflected as an option the Commission recommends that the selling of sexual services by an adult prostitute should remain criminalised, and that the prohibition in section 20(1)(aA) of the Sexual Offences Act be retained and reworded in line with the recommendations in this Report (para 2.497). The Commission is therefore of the view that the preferred option would be that of total criminalisation (para 2.515). The Commission therefore recommends that sections 19 and 20(1A) of the Sexual Offences Act should be repealed and that provisions criminalising soliciting; the commission of sexual acts in a public place and the making available of sexual services by persons 18 years or older should be criminalised in the Sexual Offences Amendment Act.

45. A reading of section 19 of the Sexual Offences Act shows that its objective is to curb the social nuisance associated with street prostitution, including noise, street congestion, and interference with innocent bystanders (para 2.477). Section 19 prohibits enticing or soliciting for immoral purposes. The Commission believes that this section meets the legislative objective of addressing blatantly visible and harmful aspects of prostitution and thereby discouraging prostitution. The Commission agrees with the ruling in a recent case in Canada<sup>41</sup> that eradicating the nuisances caused by street solicitation is a pressing and substantial concern, and that giving the public a clear message that street solicitation for prostitution will not be tolerated is a valid legislative aim (par 2.478). The Commission recommends retaining this prohibition with the necessary changes in language. This recommendation could be incorporated into either the partial- or total criminalisation option. Section 40(1)(f) of the Criminal Procedure Act<sup>42</sup> would therefore continue to enable a peace officer to arrest a prostitute who is openly soliciting clients (para 2.491).<sup>43</sup>

46. The Commission recommends that the prohibitions contained in sections 19 and 20(1)(aA) of the Sexual Offences Act be retained but that these sections be repealed and re-

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<sup>40</sup> Commission for Gender Equality Position Paper on Sex Work at 7.

<sup>41</sup> *Canada (Attorney General) v Bedford Ontario Court of Appeal* March 26 2012.

<sup>42</sup> Criminal Procedure Act 51 of 1977.

<sup>43</sup> Soliciting is a crime in terms of section 19 of the Sexual Offences Act.

enacted with the necessary changes in language. Many prostitutes find themselves in a vulnerable position before they engage in and during their engagement in prostitution. The Commission has taken note of this and therefore also recommends that these prohibitions be accompanied with an option to divert out of the criminal justice system so that they can access supportive resources and systems in order to exit prostitution. The Commission agrees with Doctors for Life that criminalisation provides a legal mechanism to remove a prostitute from coercive circumstances and to provide her with an opportunity to enter rehabilitation, training and reintegration programmes. The need for access to skills development programmes to enable a gradual exit from prostitution was discussed and supported by POWA, Nation Building, Doctors for Life, the Islamic Unity Convention, the Family Policy Institute, and other respondents. The aims of the 2009–2014 Medium Term Strategic Framework and the National Planning Commission show a political commitment to addressing major developmental challenges in South Africa. Diversion presents an opportunity to address the vulnerability and marginalisation of prostitutes through skilling and education, to enable their inclusion in the formal economy. The Commission believes that a focus outside of the formal criminal justice system will allow South Africa to meet its obligations under the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to take all legal and other measures necessary to provide women with effective protection against gender-based violence and to protect women against all kinds of violence (para 2.501). This approach does not preclude women in this situation from accessing assistance from the Department of Social Development in the form of counselling, skills training and development, family support services and internships as is provided for in its Customer Service Charter.

47. The Commission agrees with Doctors for Life that the welfare of minor dependants of a person entering a diversion programme is critically important for the peace of mind of the person, and consequently for the success of the programme. The Commission recommends that the court, in making an order for diversion, should appoint a social worker or order the Department of Social Development to assess the best options to facilitate the goal of a reintegrated and functioning family. The Commission agrees that successful diversion aimed at exit from prostitution would depend on an integrated approach. It therefore recommends a national strategy on prostitution comprising of regional or district intersectoral task teams representing people from various helping professions, namely police, prosecutors, welfare officers, health care professionals, and NGOs providing exit programmes. Such task teams would be required to coordinate exit strategies (para 2.506).

48. The Commission finds merit in the argument by a number of respondents that following successful diversion, rehabilitation, training and reintegration, a former prostitute's prior criminal record should be expunged.<sup>44</sup> The Commission agrees that the prospect of having a clean record could be used as a factor that motivates women to exit prostitution and begin a new life, fully equipped to integrate into society.<sup>45</sup> The unfortunate circumstances that force women into prostitution should not chain them to their past indefinitely. The Commission recommends that all recorded criminal activity associated with a woman's life in prostitution must be rescinded if and when she agrees to exit, and complies with the assistance offered by state funded exit programs (para 2.507).

49. The retention of the prohibition in section 20(1)(aA) of the Sexual Offences Act also necessitates the retention, with the required grammatical amendments, of section 268 of the Criminal Procedure Act. Section 268 provides for a competent verdict in the event that the evidence on a charge of unlawful carnal intercourse or attempted unlawful carnal intercourse with another person does not prove that offence but the offence of sexual assault, compelled sexual assault or compelled self-sexual assault, as contemplated in sections 5, 6, or 7 of the Sexual Offences Amendment Act (para 2.498).

50. The Commission examined section 277 of the Criminal Procedure Act, which regulates the admission of evidence of character and previous sexual experience in criminal matters. The Commission believes that this section is non-specific in nature and is not dependent on the legislative framework applicable to adult prostitution, and should therefore not be amended (para 2.499).

51. If government elects to enact legislation in line with partial criminalisation the Commission suggests that section 19 of the Sexual Offences Act should be repealed and that provisions criminalising soliciting and committing sexual acts in a public place should be criminalised in the Sexual Offences Amendment Act. It is recommended that where prostitutes find themselves in conflict with the law options for diversion may include those available already for low level crime or that provisions similar to that provided for in the Child Justice Act should be enacted (para 2.512). Although a formal costing has not been done, it is anticipated that diversion will improve the lives of prostitutes who agree to be diverted and will in turn provide cost savings in criminal justice, health and human services systems. As an

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<sup>44</sup> Endorsed by GT Ndlovu, Child of God; SM Hadebe, Child of God; S Tegg, Full Gospel Church; I & B Wilson, Presbyterian Church; Christian Lawyers Association of South Africa; Rocking Chair submission.

<sup>45</sup> Endorsed by Doctors for Life and the Christian Lawyers Association of South Africa.

intervention it has the potential of addressing the root causes of women engaging in prostitution, thereby reducing repetitive arrests. At a prevention level it may offer women with tools to examine future behaviour and provide opportunities for new and different choices in decision making. The Commission then also suggests that section 20(1A) of the Sexual Offences Act should be repealed in so far as the actions of the prostitute are criminalised (para 2.514).

52. A topic often discussed in conjunction with a change in the legislative framework governing prostitution is sex tourism and the benefits thereof. Although legalising prostitution may provide an initial advantage in increased tourism, the experiences of other countries show that this may have an unintended but serious long-term economic consequence. Once the pendulum swings back from the initial upturn in tourists, there is a very real risk of an increased presence of overt prostitution, which is associated with urban decay and a sharp decline in general tourism. When contemplating which employment and tourist market segment one wishes to attract to South Africa, it is doubtful whether this country's large home-based hospitality industry wishes to attract people who have a predisposition to gender-based violence – as research shows is often the case with buyers of sexual services. South Africa has all the appeal necessary to attract high tourist volumes without the need to erode its “brand value” by positioning the country as a sex tourist destination.<sup>46</sup> The Commission cannot see any benefit in re-branding South Africa in this way (para 2.500).

### **3 People Who Pay for Sexual Services: The Client or Buyer**

53. Irrespective of the legal dispensation applied to the buying or selling of prostitution in terms of the existing law, a buyer who engages in violent or harmful behaviour can at present be charged for committing common law crimes such as kidnapping, common assault, assault with intent to cause grievous bodily harm, extortion, attempted murder and murder. Statutory offences are contained in the Sexual Offences Act,<sup>47</sup> the Riotous Assemblies Act,<sup>48</sup> the Immigration Act,<sup>49</sup> the Basic Conditions of Employment Act,<sup>50</sup> the

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<sup>46</sup> Nation Building.

<sup>47</sup> Act 23 of 1957.

<sup>48</sup> Act 17 of 1956.

<sup>49</sup> Act 13 of 2002.

<sup>50</sup> Act 75 of 1997.

Intimidation Act,<sup>51</sup> the Domestic Violence Act<sup>52</sup> and the Prevention of Organised Crime Act (para 3.122).<sup>53</sup>

54. Furthermore, section 7 of the Trafficking in Persons Act 7 of 2013 provides that any person who uses the services of a victim of trafficking, and knows (or ought reasonably to have known) that the person is a victim of trafficking, is guilty of an offence. A fine or imprisonment for a period not exceeding 15 years may be imposed. The buyer would not be held strictly liable and would not therefore be committing an offence in terms of trafficking legislation by virtue of having bought sexual services from a prostitute who had been trafficked. The Commission believes that trafficking people for prostitution will be adequately dealt with in this legislation (para 3.123).

55. There is general consensus from respondents to the Discussion Paper that the practice of selling sexual services often arises out of a choice made in severely limiting socio-economic circumstances, and in a context of social inequality. The Commission believes that criminalising the role of buyers is necessary to address this inequality, which is both economic and sexual. Criminalisation would send out a clear message to society that buying sexual services that are provided largely as a result of the prostitute's poverty, inequality and unemployment is exploitative and therefore illegal. Given the level of inequality between prostitutes and buyers, the Commission doubts that most prostitutes are able to exercise their right to refuse to have sex without a condom. The Commission is aware that criminalising demand will not end prostitution, but believes this step would significantly reduce prostitution because it would target the demand which drives the selling of sexual services (para 3.132).

56. As stated earlier, the Commission believes that legalising or non-criminalising prostitution would increase the demand for prostituted persons, both locally and internationally. This would foster a culture in which prostitution and sexual coercion are normalised. Changing the legislative framework could be a dangerous cultural shift juxtaposed against the high numbers of sexual crimes against women. Women would be considered even more expendable than before. South Africa is grappling with high levels of violence against women, with sexual assault and intimate partner violence contributing to increased risks for HIV infection.<sup>54</sup> The Commission believes that the systemic inequality

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<sup>51</sup> Act 72 of 1982.

<sup>52</sup> Act 116 of 1998.

<sup>53</sup> Act 121 of 1998.

<sup>54</sup> South African National AIDS Council (SANAC) "National Strategic Plan on HIV, STIs and TB 2012 -2016" at 36.

between men and women in South Africa means that non-criminalisation (legalisation) would not be able to magically address the power imbalance between the buyer and the prostitute, or reduce the demand by buyers for unsafe or high-risk sex (para 3.133).

57. The Commission recommends the retention of the prohibition contained in section 11 of the Sexual Offences Amendment Act (para 3.135).

58. Section 54 of the Sexual Offences Amendment Act also extends to potential buyers of sexual services. It places a clear obligation on a person who has knowledge that a sexual offence has been committed against a child to report such knowledge immediately to a police official; this would include child prostitution as contemplated in section 17 of this Act. Non-compliance with this obligation is an offence that on conviction can result in a fine or imprisonment for up to five years. There is no such obligation in respect of adult prostitution. A buyer who reports the commission of an offence against an adult prostitute (eg a suspected victim of trafficking being kept against her will or being subjected to exploitation) may face possible prosecution for his part in the prostitution related activity. The Prevention and Combating of Trafficking in Persons Act<sup>55</sup> provides that a person (which would include a buyer) who on reasonable grounds suspects that an adult person is a victim of trafficking, may, but is not obliged to, report that suspicion to a police official for investigation.<sup>56</sup> No indemnity is granted for reporting under these circumstances in terms of the Act. The Commission notes that a potential buyer might decide not to report abuse or exploitation because he wishes to avoid being prosecuted for engaging the sexual services of an adult prostitute. The Commission recommends that the Act makes express provision that the court has the authority, in terms of section 204 of the Criminal Procedure Act, 51 of 1977, to grant a discharge from prosecution to buyers who find themselves in such a situation. In other words, a buyer who becomes aware of the exploitation or commission of an offence against a prostitute and reports this to the authorities should not be prosecuted for attempting to be involved in a specific prostitution related activity. To reduce the likelihood that buyers may try to circumvent their criminal liability for participating in reported offences by reporting the prostitute's exploitation, the Commission recommends that it be expressly stated that this stay of prosecution does not extend to the buyer's actual participation in the reported offence (para 3.136).

59. The Commission has indicated that where consent is negated in the context of sexual behaviour, such conduct may constitute a sexual offence as provided for in terms of

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<sup>55</sup> Act 7 of 2013.  
<sup>56</sup> Section 19(2).

the Sexual Offences Amendment Act. However, the Commission thinks it prudent to include a specific offence related to engaging the sexual services of a person who has been subjected to force, threats or deception (para 3.137).

60. As one of the aims is to find ways to reduce the demand for adult prostitution, it is recommended that advertising prostitution on radio or television or in the print media should be expressly banned (para 3.138).

## **4 Third Parties**

61. The Commission believes that prostitution is a gendered survival strategy that involves the assumption of unreasonable risk for the person caught up in it. The Commission does not agree that prostitution should be offered as a legal and rational survival and economic choice when it clearly creates difficulties in other respects, such as working under exploitative conditions or risking human rights violations. After reviewing the submissions received and through comparative and local research, the Commission has concluded that the fundamental rights to freedom and security of the person are no better for a prostitute working in a brothel compared with a woman who works alone. The establishment of legal brothels does not ensure the quality of life of people in prostitution. The Commission concludes that there is no reason for legalising brothels. The Commission is of the view that restricting the commercial exploitation of prostitutes by prohibiting such practices is a justifiable limitation on the individual rights of third parties to freedom of trade, occupation and profession (para 4.229).

62. The Commission believes that there is sufficient merit in retaining the offence of knowingly living off the earnings of prostitution. It recommends that this offence should be extended to include the offence of benefiting from the prostitution of another person. In this regard the Commission recommends that the defences available to people who live off the earnings of, or benefit from, the sexual exploitation of a child (as provided for in the Sexual Offences Amendment Act) should be applicable to these offences in respect of adults too. Section 54 of the Sexual Offences Amendment Act provides for a defence in respect of the sexual exploitation of a child or a person with a mental disability. Inter alia, section 54 provides that a person may not be convicted of an offence contemplated in section 17(4) or (5) or section 23(4) or (5) if that person is a child and is not a person contemplated in section 17(1) and (2) or 23(1) and (2). The sections in question are the offence of benefiting from the

sexual exploitation of a child;<sup>57</sup> living from the earnings of the sexual exploitation of a child;<sup>58</sup> benefiting from the sexual exploitation of a person with a mental disability;<sup>59</sup> and living from the earnings of the sexual exploitation of a person with a mental disability.<sup>60</sup> The defence is not valid where the person who benefits from the sexual exploitation of a child or person with a mental disability, or who lives off the earnings from the sexual exploitation of a child or person with a mental disability, is the same person who engages the services of the child for financial or other reward, favour or compensation;<sup>61</sup> offers the service of a child for financial or other reward, favour or compensation;<sup>62</sup> engages the services of a person with a mental disability for financial or other reward, favour or compensation;<sup>63</sup> or offers the service of a person with a mental disability for financial or other reward, favour or compensation (para 4.273).<sup>64</sup>

63. The Commission concedes that various structural factors and the concomitant lack of resources is a sad reality that an impoverished family may have to face. However, the Commission believes that social intervention is more easily accessible and within the reach of an adult than a vulnerable child. The Commission fears that extending the exemption to adults may signal an increase in prostitution by impoverished adults. The Commission therefore recommends that the exemption be put in place for children only (para 4.274).

64. In addition to the recommendations pertaining to the South African Police Service in Chapter 2, the Commission recommends that given the lack of clarity on legislative developments around the remaining provisions of the Sexual Offences Act, the South African Police Service should consider specialisation in this area. One of the clearest findings of the Home Office Study in the United Kingdom is that effective police action is helped by specialisation. The benefits listed are a clear “ownership” of the crime; the building up of specialist knowledge of the relevant legislation; establishing relationships of trust with prostitutes who are likely to be key witnesses; and that specialisation can develop working links with corresponding specialists within the National Prosecuting Authority (eg those who deal with asset forfeiture).<sup>65</sup> Consideration should further be given to the suggestions for

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<sup>57</sup> Section 17(4) of the Sexual Offences Amendment Act.

<sup>58</sup> Section 17(5) of the Sexual Offences Amendment Act.

<sup>59</sup> Section 23(4) of the Sexual Offences Amendment Act.

<sup>60</sup> Section 23(4) of the Sexual Offences Amendment Act.

<sup>61</sup> Section 17(1) of the Sexual Offences Amendment Act.

<sup>62</sup> Section 17(2) of the Sexual Offences Amendment Act.

<sup>63</sup> Section 23(1) of the Sexual Offences Amendment Act.

<sup>64</sup> Section 23(2) of the Sexual Offences Amendment Act.

<sup>65</sup> Home Office (authors May T, Harocopos A, Hough M) “ For Love or Money: Pimps and the management of sex work Police Research Series Paper 134 (2000) Available at <http://www.homeoffice.gov.uk> 40.

good practice on the organisation of vice policing, namely that police officials assigned to specialist vice units should serve a probationary period; investigative training should be given to all officials assigned to specialist vice units; and officials assigned to specialist vice units need training about drug misuse (para 4.276).<sup>66</sup>

65. As stated above the Commission is of the opinion that the eradication of the nuisance-related problems caused by street solicitation is a pressing and substantial concern, and that sending the message that street solicitation for the purposes of prostitution is not to be tolerated constitutes a valid legislative aim. Consequently the Commission recommends that advertising that premises or persons are available for prostitution should also remain prohibited (para 4.280).

66. In the Commission's view selling sex exposes women to risks that can entrap them further into poverty, exacerbate their existing social difficulties and increase their dependence on men. It is a gendered reality that prostitution may be the best of the worst economic options that women have, and it is understandable that women turn to prostitution in these circumstances. The Commission is of the view that their desperate economic plight should not be manipulated against them by institutionalising businesses that specialise in facilitating the sale of sex as a legitimate business. The Commission is further of the view that recognising the legitimacy of the sex sector and prostitution merely as a form of labour would reinforce women's subordination and may lead to the greater objectification and economic inequality of women. In the Commission's view the non-criminalisation and recognition of prostitution as labour, or as the merchandise of a business such as a brothel, would not provide prostitutes with the benefits ascribed to this model. The Commission is of the opinion that non-criminalisation will not foster the achievement of equality between men and women. Attempts to regulate prostitution by non-criminalising it or introducing licences for legal brothels do not address the core problem: the routine abuse and violence that form the prostitution experience (para 4.284).<sup>67</sup>

67. The Commission confirms its finding that neither the ILO nor South African policy documents have promoted legalising prostitution as a solution to poverty or identified prostitution as an employment option for the poor and marginalised. The Commission is of the view that prostitution does not fit comfortably into the international definition of decent work and that there are inherent difficulties in trying to integrate prostitution into formal

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<sup>66</sup> Op cit 41.

<sup>67</sup> US Department of State, Bureau of Public Affairs Global Affairs 11/24/4 "The Link between Prostitution and Sex Trafficking" available at [www.state.gov/g/tip](http://www.state.gov/g/tip).

employment laws and structures. Efforts to treat prostitution as formal employment reveal a host of contradictions which neither law nor policy can resolve. As the Commission has found that prostitution should not be considered a reasonable means to secure a person's living in South Africa and should not from a formal labour perspective be considered work or decent work, there remains no justification for legitimising either brothels and related enterprises based primarily on facilitating prostitution or third parties involved in doing so (para 4.285).

68. The Commission is of the opinion that its recommendations do not preclude the Department of Health from being tasked with the phasing in of accessible health services for vulnerable groups such as prostitutes (eg health services available in the evenings) or to address discrimination and prejudice towards this vulnerable group. There is a high health risk involved in prostitution and access to health services is vital. The Commission is further of the view that the Department of Social Development and the Ministry of Women should be mandated to engage with prostitutes on issues of social security and poverty alleviation, including reskilling and alternative income generating projects. It is instructive to note that according to the Australian Institute of Criminology, the need for women to enter prostitution can only be significantly reduced through long-term economic and social measures. Similarly, the Swedish system has provided women with sufficient economic and social security for them to leave prostitution if they so desire by providing accommodation, money, emotional support and alternative employment (para 4.286).<sup>68</sup>

69. The Commission has in reconsidering the objectives of the Sexual Offences Act given consideration to the current social, political, and economic assumptions that are valid in South Africa today. Its findings resonate with the position taken by Ruhama<sup>69</sup> in that it agrees that the illusion that prostitution is a choice is manipulative and deceptive. This notion allows the buyers and the pimps to obscure the abuse involved and to confer a form of right on the abuser. The fact that money or any other financial or other incentive is exchanged cannot disguise that what occurs in prostitution – the bodily and psychological violations involved – are in fact sexual abuse and harassment, and would be seen as such in any so-called ordinary workplace or social setting. It is clear that the sex industry cannot be left to self-regulate precisely because of the widely documented harms associated with it.<sup>70</sup> The Commission agrees with Ms Bonthuys of WITS that changing the legislative framework

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<sup>68</sup> Australian Institute of Criminology "Trends & Issues in Crime and Criminal Justice" No 22 Prostitution Laws in Australia (May 1990) available at <http://www.aic.gov.au> 8.

<sup>69</sup> A Dublin based voluntary organisation that works with and for women involved in prostitution.

<sup>70</sup> Kelly et al 31.

would not automatically improve a prostitute's working environment or the power relations between a particular prostitute and her buyer or third party manager (para 4.289).

70. The Commission finds that South Africa needs to ensure that we have in place a coherent legal framework and effective tools to tackle abusers and exploiters. We must also ensure that we have the right intelligence-based approach to deal with the stranglehold of pimps and the links with drug markets, trafficking and other areas of organised crime. Systematic abuse, violence and exploitation are endemic (para 4.290).

71. The Commission endorses the finding of the Constitutional Court per Justices O'Regan and Sachs where they held that where the existing Sexual Offences Act opts for prohibition, it is a constitutionally permissible legislative choice.<sup>71</sup> The Court held that there is a strong public interest in the regulation of prostitution in a manner which will foster the achievement of equality between men and women. Furthermore they stated that open and democratic societies generally denounce prostitution.<sup>72</sup> These sentiments were preceded in the matter of *The National Director of Public Prosecutions v Phillips and Others*<sup>73</sup> where the court found that the overthrow of the legislation, while not beyond contemplation, would not be achieved without rejecting weighty considerations of policy and morality. The court was further convinced that prostitution and the related offences under the Sexual Offences Act will survive constitutional scrutiny.

72. In conclusion the Commission recommends the retention of criminal sanctions for brothels and all third party offences. It recommends the repeal of sections 2, 3, 4, 5, 6, 7, 8, 10, 12, 12A, 20(1)(a), 20(1)(c) and 20(2) and the definitions pertinent to these sections of the Sexual Offences Act and the enactment of prohibitions against keeping a brothel, procuring, detaining a person for purposes of prostitution, assisting a person to engage in prostitution and living on the earnings of prostitution or committing or assisting in the commission of sexual acts and the necessary accompanying definitions and provisions in the Sexual Offences Amendment Act (par 4.293).

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<sup>71</sup> *Jordan v the State* 2002 (6) SA 642 (CC) para 92.

<sup>72</sup> *Op cit* para 93.

<sup>73</sup> 2002 (4) SA 122 para 72.

# CHAPTER 1: OVERVIEW OF THE INVESTIGATION

## A Introduction

1.1 Adult prostitution<sup>74</sup> and the question of how the South African legal system should respond to prostitution and prostitution related activities has been the subject of considerable public debate in South Africa. This was particularly the case in the months preceding the FIFA Football World Cup hosted by South Africa in 2010. Although the international spotlight has shifted off our shores the topic remains an emotive one, and opinions on the most suitable legal framework for South Africa are generally strongly polarised. The South African experience aligns with the complexities underlying international debates on prostitution and the diverse remedies that have been employed to address prostitution and prostitution related matters.<sup>75</sup> Within the current South African context the debate on adult prostitution has been complicated by the global economic downturn, high levels of unemployment, crippling poverty, burgeoning numbers of migrant and illegal foreign job seekers, high levels of violence (particularly sexual violence) against women, the HIV/AIDS epidemic, drug or substance abuse, and targeted exploitation of women engaging in prostitution by third parties, unethical authorities and buyers.<sup>76</sup>

1.2 There are generally two poles of thought and very little in between, the first being that prostitution is work and should be non-criminalised and recognised as such, and the second being that prostitution is inherently exploitative and therefore needs to be criminalised (either completely or in respect of all role-players other than the person providing the sexual service). An argument which is often raised is that prostitution is the oldest trade in the world. It is a “necessary evil” and will always be with us. A counter argument is that it is not a “necessary evil”, men do not have a presumed right to sex, and that prostitution demeans women.<sup>77</sup>

1.3 The prostitution debate can be viewed through a range of political and philosophical lenses that highlight key concepts, such as morality, health, social problems, gender orders,

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<sup>74</sup> The term “prostitution” and related terminology are discussed later in this chapter.

<sup>75</sup> Kelly L, Coy M, Davenport R “*Shifting Sands: A Comparison of Prostitution Regimes Across Nine Countries*” (London Metropolitan University 2009) 5.

<sup>76</sup> Ibid.

<sup>77</sup> Op cit 8.

human rights, law and order (including national security), migration, labour and employment, capitalism, and globalisation. Each of these frameworks offers its own understanding of risk, safety, violence and social (dis)order. Certain frameworks lead towards or away from specific policy options and determine which Ministries will have the leading role in policy implementation.<sup>78</sup>

1.4 The South African Law Reform Commission's ("the Commission's") Report on Sexual Offences: Adult Prostitution has sought to explore the need for law reform in relation to adult prostitution against the backdrop of some of the complex realities South Africans face, including the socio-economic marginalisation of women and the impact of the HIV/AIDS pandemic.

1.5 The aim of this Report, as was the aim of the Issue Paper<sup>79</sup> and Discussion Paper<sup>80</sup> which preceded this Report, is to review the fragmented legislative framework which currently regulates adult prostitution within the larger framework of all statutory and common law sexual offences. A secondary aim is to consider the need for law reform in relation to adult prostitution and to identify alternative policy and legislative responses that might regulate, prevent, deter or reduce prostitution.

1.6 In considering these aims the Commission has been mindful that the state is called to promote the values of "human dignity, the achievement of equality and the advancement of human rights and freedoms", to recognise individual rights, freedoms and responsibilities and the collective rights and responsibilities for the well-being of all. In making its recommendations the Commission has also been mindful of the imperatives set by South Africa's constitutional democracy.

1.7 The investigation into the legal position relating to adult prostitution constitutes the third leg of the larger Commission project on Sexual Offences (Project 107). The investigation was delinked by the Commission from the larger project that has delivered, among others, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereafter "the Sexual Offences Amendment Act"), to give the issue of adult prostitution focused attention.

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<sup>78</sup> Kelly et al 6.

<sup>79</sup> SALC *Sexual Offences: Adult Prostitution* (Project 107) Issue Paper 19 (2002).

<sup>80</sup> SALRC *Sexual Offences: Adult Prostitution* (Project 107) Discussion Paper 1 (2009).

1.8 As the law currently stands in South Africa, adult prostitution – that is, selling of adult sexual services, buying of adult sexual services as well as all prostitution related acts – are criminal offences.<sup>81</sup>

1.9 Within this context the Commission posed **four alternative legal options** in its Discussion Paper<sup>82</sup> that might be employed in South Africa in respect of adult prostitution. These are:

- Non-criminalisation;
- Regulation;
- Partial criminalisation; and
- Total criminalisation.

1.10 In respect of all the proposed options the Commission requested the public to comment on how prostitution should be defined, and on how their preferred legislative option would affect the following issues: reduce the demand for prostitution; reduce harm and vulnerability to abuse and exploitation of prostitutes; assist prostitutes to enforce their rights to equality and access to health care; avoid the stigmatisation and discrimination of prostitutes; address concerns regarding prostitution and crime; address concerns regarding public health and HIV; and assist in creating an environment for prostitutes to exit prostitution. Finally, the Commission also requested comment on how the issue of a criminal record for selling sex for reward should be addressed when a person leaves prostitution and seeks alternative employment.

1.11 The Discussion Paper was widely published and distributed. Eight workshops were held throughout South Africa in both urban and rural settings to discuss the content of the Discussion Paper.<sup>83</sup> A number of additional specific meetings were held with adult prostitutes and some significant role-players.<sup>84</sup> The aim of the workshops and meetings was to assist the Commission to arrive at an appropriate legal solution tailored for South Africa. In addition to written and verbal submissions during the workshops and meetings, over 2600 respondents conveyed their views by way of email in response to the Commission's call for submissions. Submissions were received from local and international legal experts,

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<sup>81</sup> Sexual Offences Act 23 of 1957 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

<sup>82</sup> SALRC *Sexual Offences: Adult Prostitution* Discussion Paper 2009 at 226 and further.

<sup>83</sup> Pretoria (19 May 2009); Johannesburg (26 May 2009); Cape Town (28 May 2009); Durban (2 June 2009); Mokopane (11 June 2009); Kimberley (25 June 2009); Port Elizabeth (30 June 2009); Nelspruit (9 July 2009).

<sup>84</sup> Listed under the List of Sources.

prostitutes, ex-prostitutes, brothel keepers, ex-brothel keepers, NGOs (eg those involved in assisting prostitutes to exit prostitution, as well as those involved in making the environment where adult prostitutes sell sexual services safe from abuse and discrimination), health care officials, numerous religious organisations, and last but not least ordinary South Africans wanting to express their views on this matter.<sup>85</sup>

1.12 The purpose of the call for submissions was to elicit responses from as broad a spectrum as possible to serve as a base for the Commission's deliberations. It has also been informative as a tool to gauge public opinion. It would, however, be irresponsible of the Commission to merely tally votes and make a decision based on the number of submissions made in favour of or against a particular legal framework.<sup>86</sup> People's personal views, organisational aspirations or moral standpoints are not the test for legal reform.<sup>87</sup> The Constitution is the standard against which any reform needs to be measured. As particular viewpoints on morality were raised in some of the submissions, it is useful at this point to note the views of the Constitutional Court voiced in the matter of *Jordan v the State*.<sup>88</sup> The applicants argued that it is constitutionally impermissible to attempt to legislate for a particular moral code if this is inconsistent with the Constitution. It was further argued that the state has no business telling people what to do in private or with their bodies or with their money. It should punish crime not sin. The court held<sup>89</sup> that all open and democratic societies are confronted with the need to determine the scope for pluralist tolerance of unpopular forms of behaviour. The court further held that a pluralist constitutional democracy does not banish ideas of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but is not neutral in its value system. The court found that

“[O]ur Constitution certainly does not debar the state from enforcing morality. What is central to the character and functioning of the state is the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself”<sup>90</sup>

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<sup>85</sup> Listed in the Annexure on respondents.

<sup>86</sup> Literally hundreds of identical emails were received in support of the Family Policy Institute's submission, as well as independent submissions endorsing the Family Policy Institute. As such the Family Policy Institute's submission is used in the Report as the primary submission endorsed by the supporting submissions. A few supporting emails were received in favour of the SWEAT submission and these will be dealt with in the same manner. Although it is not feasible to footnote every supporting email, the respondents will be listed under the list or respondents to the Discussion Paper.

<sup>87</sup> The submissions draw together a number of themes, ranging from the constitutional protection of human rights to the question of the role of the law in enforcing moral or religious values.

<sup>88</sup> *Jordan v the State* 2002 (6) SA 642 (CC) para 102.

<sup>89</sup> *Jordan v the State* 2002 supra para 104.

<sup>90</sup> Ibid.

“[T]he question of commercial sex must be looked at not through the lens of certain popular conceptions of morality, but through that of constitutionally articulated values, more particularly those that concern the entitlement of all citizens to live in a state in which gender equality is increasingly made a reality. It is clear that our constitutional framework, not only permits, but requires the Legislature to enact laws which foster morality, but that morality must be one which is founded on our constitutional values.”<sup>91</sup>

1.13 The Commission is mindful that the manner in which a country chooses to legislate in respect of adult prostitution ultimately amounts to the implementation of a policy decision. The initiation of this investigation shows that Government is alive to the fact that the existing laws or implementation of laws regulating sexual offences, including adult prostitution warranted attention. However, it is important to note that in arriving at a solution, Government is not bound by a constitutional imperative to follow a particular model in respect of adult prostitution.

1.14 The Commission holds the view that the ideal would be a transformed society where no person is faced with the option of engaging in prostitution to combat poverty. Unfortunately society is not transformed and the best that can be done is to decide which remedies would be most apposite and which need to be addressed by the law, including non-legislative or practical recommendations. The Commission has decided that the report will not recommend models in contradistinction to one another. It will instead evaluate the different policy options and recommend the policy option considered most suitable for the context in which South Africa currently finds itself.

1.15 The Commission has, based on comparative and local research and evidence presented to it by way of submissions and workshops, made some initial decisions following the review of and consultation on the four options.

1.16 The Commission makes the following recommendations up-front as these matters either do not form part of the content of the Report, or received unanimous support by way of submissions and from the Commission, or are uncontested. **This Report in no way derogates from the criminalisation of under-aged (under 18)<sup>92</sup> and coerced prostitution and trafficking of people for the purpose of prostitution. The Commission confirms its view that the aforementioned must remain criminalised.**

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<sup>91</sup> *Jordan v the State* supra para 105.

<sup>92</sup> See Chapter 2 for elucidation on this point.

1.17 The Commission has found that despite isolated cases of private and state run and funded programmes there is no national strategy to deal with or assist people out of prostitution. **The Commission recommends that irrespective of the policy option chosen, a national strategy should be implemented to deal with prostitution. It is further recommended that this national strategy should seek to implement the legislation or policy; offer viable alternatives to prostitution; assist a person to exit prostitution should he or she express a willingness to do so; support reskilling, health and education initiatives for prostitutes; promote economic independence; and promote sexual health and safer sexual practices.**

1.18 The Commission is mindful that although this Report focuses on adults, the impact of adult prostitution on children and other vulnerable groups and the consequences thereof cannot be excluded or ignored.<sup>93</sup>

1.19 The Commission recognises the serious and concerted effort being made by government to address systemic challenges that have historically faced the criminal justice system. It acknowledges that at the core of many of these challenges is a need for continued and increased fiscal support and that restraint should be exercised before adding to this burden. Although the financial impact of the proposals in this Report are not anticipated to be significant, should the Commission's proposals in this Report be accepted, additional state funding may be needed. A critical step would be to cost the draft legislation flowing from the chosen policy option.<sup>94</sup>

1.20 Determining the financial implications (for the State) of the proposed legislation is a precondition for obtaining Cabinet approval to introduce the draft legislation in Parliament. Such Cabinet approval is sought on the basis of a memorandum setting out the purpose and object of the intended legislation, and importantly, whether the legislation envisaged would have a cost implication and if so, what that would be. It is the responsibility of the Department of Justice and Correctional Services to prepare such a Cabinet memorandum.

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<sup>93</sup> SALC Sexual Offences: Adult Prostitution Issue Paper 2002 at 1.

<sup>94</sup> As is prescribed by section 35 of the Public Finance Management Act 1 of 1999.

## B Background and scope

1.21 This investigation into adult prostitution<sup>95</sup> came about as a result of the extension of the investigation originally entitled “Sexual Offences By and Against Children”. At the request of the then Deputy Minister of Justice Dr Manto Tshabalala-Msimang and the Justice Parliamentary Portfolio Committee to consider the position of adults affected by sexual violence, the Commission decided to expand the scope of the investigation to include all sexual crimes by and against adults. The investigation was renamed “Sexual Offences”. Owing to the vast nature of this investigation, the Commission decided to publish four separate sexual offence papers, with draft legislation where necessary. These dealt with the following areas: first, substantive law; second, the procedural law pertaining to statutory and common law sexual offences, to the exclusion of adult prostitution and pornography in respect of children; third, adult prostitution; and fourth, pornography in respect of children. In brief, the scope of Project 107<sup>96</sup> was reframed to

- codify the substantive law relating to sexual offences in an easily accessible and workable act;
- develop efficient and effective legal provisions for the reporting, management, investigation and prosecution of sexual offences, which will protect the rights of victims as well as ensure the fair management and trial of persons suspected, accused and convicted of committing a sexual offence;
- provide workable legal solutions for the problems surrounding adult prostitution; and
- improve the regulation of pornography, including on the internet.

1.22 The first Discussion Paper, published in September 1999, addressed the substantive law relating to sexual offences and contained a draft Sexual Offences Bill.<sup>97</sup> It had both a child and adult focus, but excluded adult prostitution and pornography. The second Discussion Paper, published in December 2001, dealt with matters concerning process and procedure and also focused on both adults and children, excluding adult prostitution and pornography.<sup>98</sup> The content and recommendations of these discussion papers were drawn together to form the Report on Sexual Offences published in December 2002, together with a consolidated draft Sexual Offences Bill. The Sexual Offences Amendment Act is the outcome of these two legs of the investigation. The third paper, published in May 2009, dealt with adult prostitution

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<sup>95</sup> Prostitution of people over the age of 18.

<sup>96</sup> SALC *Sexual Offences: Adult Prostitution* Issue Paper 2002 at 3.

<sup>97</sup> SALC *Sexual Offences: Substantive Law* (Project 107) Discussion Paper 85 (1999).

<sup>98</sup> SALC *Sexual Offences: Process and Procedure* (Project 107) Discussion Paper 102 (2001).

and is the precursor to this Report. The fourth paper will deal with pornography and the impact and effect of pornography on children. This leg of the investigation is receiving renewed attention following a pre-investigation into pornography and the mass media. On 15 November 2011 the then Minister of Justice and Constitutional Development approved the appointment of an advisory committee member to commence with this paper. Five additional advisory committee members were appointed by the Minister of Justice and Correctional Services on 15 September 2014. An issue paper is being compiled.

1.23 This Report follows the Report on Sexual Offences published in 2002. Child prostitution (as a sexual offence) was comprehensively dealt with in the latter Report, and provisions criminalising it are contained in the promulgated legislation.

1.24 The Commission's investigations into Sexual Offences and the Review of the Child Care Act<sup>99</sup> resulted in child prostitution being addressed in the Children's Act 38 of 2005 (the Children's Act) and the Sexual Offences Amendment Act.<sup>100</sup> This legislation establishes severe criminal sanctions for people who are in any way involved in the prostitution of a child, and aims to provide the affected child with the necessary care and protection. Thus a wide range of people, including pimps, brothel owners, traffickers and travel agents engaged in child prostitution are criminalised in terms of section 17 of the Sexual Offences Amendment Act.<sup>101</sup>

1.25 The Sexual Offences Amendment Act specifically criminalises all role players involved in the prostitution of children, "children" being defined as persons below the age of 18. Child prostitutes cannot be found guilty of being prostitutes or engaging in prostitution – a change from the previous position under the Sexual Offences Act 23 of 1957 (the Sexual Offences Act).

1.26 The Sexual Offences Amendment Act contains a potential anomaly. Although a child is legally allowed to consent to a sexual act (which includes touching or penetration) from the

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<sup>99</sup> SALC *Review of the Child Care Act* (Project 110).

<sup>100</sup> Both pieces of legislation define a child as a person under the age of 18.

<sup>101</sup> For example sec 17(1), which criminalises the clients of child prostitutes, reads as follows: "sexual exploitation of children

17. (1) A person ("A") who unlawfully and intentionally engages the services of a child complainant ("B"), with or without the consent of B, for financial or other reward, favour or compensation to B or to a third person ("C") –  
(a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual acts is committed or not; or  
(b) by committing a sexual act with B,  
is in addition to any other offence which he or she may be convicted of, guilty of the sexual exploitation of a child."

age of 16, a consensual sexual act with a child is criminalised as exploitation of the child where such an act is accompanied by a reward or payment. The aim seems clearly to be an extension of protection for children from exploitation. **This Report in no way derogates from the criminalisation of under-aged (under 18)<sup>102</sup> prostitution. The Commission endorses section 17 of the Sexual Offences Amendment Act and the cutoff of 18 years as a defining line between child and adult prostitution.** The need for added protection is justified by the vulnerability of children. Anyone paying a consenting child older than 16 but younger than 18 for sexual services would, however, be charged only with the sexual exploitation of a child (child prostitution) and not also for the statutory rape or rape of the child, as would be the case if the child was between the ages of 12 and 16<sup>103</sup> or under the age of 12.<sup>104</sup>

1.27 In addition, the Children's Act addresses child prostitution under the definition of commercial sexual exploitation. This definition reads as follows:

'commercial sexual exploitation', in relation to a child, means –

- (a) the procurement of a child to perform sexual activities for financial or other reward, including acts of prostitution or pornography, irrespective of whether that reward is claimed by, payable to or shared with the procurer, the child, the parent or care-giver of the child, or any other person; or
- (b) trafficking in a child for use in sexual activities, including prostitution or pornography[.]

1.28 The Children's Act identifies a child who has been subjected to commercial sexual exploitation as a child in need of care and protection and inter alia provides for different methods of intervention and assistance to such a child.

1.29 The Report makes reference to trafficking in order to contextualize one of the entry points into adult prostitution. However, trafficking in persons for purposes of sexual exploitation has - prior to the enactment of the Trafficking in Persons Act 7 of 2013 - been regulated by the Sexual Offences Amendment Act. Trafficking in persons for all purposes was dealt with comprehensively in the Commission's Report on Trafficking in Persons and the recently enacted Prevention and Combating of Trafficking in Persons Act 7 of 2013. The United Nations Protocol on Trafficking, to which South Africa is a signatory, already acknowledges a clear link between human trafficking and prostitution. People who traffic other people for purposes of prostitution would be prosecuted in terms of the Trafficking in

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<sup>102</sup> See Chapter 2 for elucidation on this point.

<sup>103</sup> Statutory rape or statutory sexual violation.

<sup>104</sup> Rape or sexual assault.

Persons Act. The Commission reiterates that the scope and aim of the Discussion Paper and Report was to consider and recommend appropriate legislative options relevant to adult and un-coerced prostitution. As stated above, **this Report does not extend to prostitution of children (under the age of 18), coerced and involuntary adult prostitution or trafficking for purposes of sexual exploitation, all of which are subject to regulation and criminalisation, as appropriate, in other laws and law reform processes.**

## **C Methodology**

1.30 This Report represents an analysis of the current thinking and opinions on the law relating to adult prostitution as informed by research and consultation at local, national and international levels. It contains an assessment of the impact of current law on adult prostitution on people and society and the extent to which current laws assist the country in meeting its human rights obligations. Particular attention is given to the need for protection from exploitation and violence, as required by the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and other international instruments. Consideration is also given to the health challenges and imperatives, specifically those pertinent to the HIV pandemic, which are relevant to adult prostitution in a South African context.

1.31 The Discussion Paper presented various legal options for dealing with the problem of prostitution, namely, retaining the existing position of total criminalisation, or adopting models that provide for partial criminalisation, non-criminalisation or regulation. The advantages, disadvantages and implications of adopting a particular option are also set out in relation to each option. The Commission received more than 2600 submissions on the Discussion Paper. It held eight public workshops in various provinces around the country and engaged in closed specific workshops with adult prostitutes from the Western Cape, Gauteng and North West Province. A special effort was made to render the debates as inclusive as possible, which included the Commission's researchers embarking on a night tour to interview prostitutes on the street; prostitutes in brothels and brothel owners, and caregivers in a rescue centre for young prostitutes and abused children rescued from the streets of Pretoria. The Commission further engaged with religious and traditional structures. Submissions have been integrated into this Report and some have shaped the preliminary recommendations and legislative proposals contained herein.

1.32 Following the submission of the Report to the Minister of Justice and Correctional Services, it remains the prerogative of the Minister to implement the Commission's recommendations.

## D Terminology

1.33 Although the Commission has attempted to keep gender identification neutral in this Report, there are instances where the Commission uses feminine pronouns when referring to people who sell sexual services and masculine pronouns when referring to buyers of sexual services. Available evidence and research has established that the majority of prostitutes are women and the majority of buyers are men. It is, however, recognised that there are a number of men as well as transgendered and transsexual people who provide sexual services for reward and that a minority of female buyers exists.

1.34 The Commission is alive to the fact that the terminology used in the prostitution debate is integral to the larger debate on the preferred legislative models. To provide clarity certain key terms have been identified and will be defined here for purposes of this Report. As there are specific chapters on providing sexual services for reward, providing a reward for sexual services, and third parties involved in prostitution, terms pertinent to those chapters (such as "prostitute" and "buyer") will be examined in the relevant chapter.

### (a) *Choice*

1.35 The Commission is mindful that even before the term "prostitution" is considered, the use of the word "choice" or "choose" to engage in adult prostitution is contested. **The Commission wishes to clarify that the word "choose" or "choice" is used to reflect the choice exercised at the time of the specific transaction as opposed to the reason for entering prostitution, which may not have been a result of a voluntary choice.** This choice would need to comply with the criteria of consent in the Sexual Offences Amendment Act. This Act clearly provides that in certain circumstances what may seem to be voluntary agreement to engage in sexual acts is in fact not voluntary agreement and is consequently negated. The person inducing the "consent" can be charged with rape or sexual assault depending on the type of sexual act. For example, where "consent" is obtained through the use of force or intimidation, threat of harm against person or property, or where the other person is incapable in law of appreciating the nature of the sexual act, or where he or she is asleep, unconscious, in an altered state of consciousness (which includes being under the

influence of any medicine, drug, alcohol or other substance) to the extent that his or her consciousness or judgement is adversely affected, such “consent” is negated. Such acts will amount to sexual offences in terms of the Sexual Offences Amendment Act.

**(b) Sexual acts**

1.36 The Sexual Offences Act does not define which sexual acts constitute prostitution, but instead makes reference in the definition of “brothel” to “having unlawful sexual intercourse” and “any other lewd or indecent purpose”. “Unlawful sexual intercourse” is vaguely defined as meaning “carnal intercourse other than between husband and wife”. Section 20(1A)(a) of the Sexual Offences Act refers to “unlawful carnal intercourse, or commits an act of indecency”.

1.37 The *Shorter Oxford English Dictionary* defines “carnal knowledge” as “full or partial sexual intercourse” mostly used in respect of the law. “Indecency” is defined as “offending against recognised standards of decency, especially in relation to sexual matters; immodest; suggesting or tending to obscenity”.<sup>105</sup>

1.38 At first glance the wording of section 20(1A)(a) is broad enough to include any person (a spouse or lover) who receives a reward for engaging in sexual intercourse or an indecent act. The minority judgment of *S v Jordan*,<sup>106</sup> as per Justices O’Regan and Sachs, states that given the heading of the section as “Persons living on the earnings of prostitution”, the phrase “unlawful sexual intercourse or indecent act for reward” can only be read to include activity ordinarily understood as prostitution, and should therefore be interpreted restrictively. In summary, the Act does not criminalise all instances of unlawful carnal intercourse or acts of indecency; such intercourse or acts of indecency are only prohibited as a criminal offence when taking place under certain specific circumstances, that is, when performed for reward. Although the Act does not define the term “carnal intercourse”, it is generally understood to mean penetration of the female vagina by a male penis. However, since the Constitutional Court’s<sup>107</sup> acknowledgement of the constitutional rights of gay men to consensual anal sexual intercourse, the term “carnal intercourse” arguably includes vaginal and anal intercourse.

1.39 The words “carnal intercourse” or “carnal knowledge” are infrequently or never used in common parlance. The courts also only refer to “carnal intercourse” when using the wording

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<sup>105</sup> Shorter Oxford English Dictionary 6 ed Oxford University Press CD (2007).

<sup>106</sup> *S v Jordan* 2002 (6) SA 642 (CC).

<sup>107</sup> *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC).

of the Sexual Offences Act, preferring to use words such as “intercourse”,<sup>108</sup> “practiced their calling,”<sup>109</sup> “vleeslike gemeenskap”,<sup>110</sup> “indiscriminate intercourse”,<sup>111</sup> “sexual intercourse” or “for an immoral purpose”.<sup>112</sup> The definition of “unlawful sexual intercourse” is very similar to the definition of the erstwhile crime of adultery,<sup>113</sup> which is defined as “the voluntary sexual intercourse of a married person other than with his or her spouse”.<sup>114</sup>

1.40 Although the words “carnal intercourse” may be open to different interpretations, it would seem that in plain language the intention of the Legislature in using these words and the ensuing euphemistic terminology in the Sexual Offences Act and applicable case law was to refer to penetrative and non-penetrative sexual acts - these acts are described in neutral terms in the Sexual Offences Amendment Act under their respective definitions and are collectively defined as a “sexual act”. **The Commission believes that making reference to a “sexual act” as defined in the Sexual Offences Amendment Act in respect of prostitution instead of the vague and archaic terminology “unlawful carnal intercourse” and “act of indecency” provides greater clarity. The Report will use the term “sexual act” in this context.**

1.41 **The words “sexual services” are used as a collective term in the Report to describe sexual acts of a penetrative and non-penetrative nature as intended in the Sexual Offences Act and this term corresponds with the definition of “sexual act” in the Sexual Offences Amendment Act.**

### **(c) Prostitution**

1.42 The primary prohibition against prostitution is section 20(1)(aA) of the Sexual Offences Act, which provides that any person who has unlawful carnal intercourse or commits an act of indecency with any other person for reward<sup>115</sup> commits an offence.<sup>116</sup> The Sexual Offences Amendment Act criminalises the actions of clients of adult prostitutes by providing

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<sup>108</sup> *S v M and Another* 1977 (4) SA 886 (A).

<sup>109</sup> *S v M and Another* supra.

<sup>110</sup> *S v H* 1988 (3) SA 545 (A), loosely translated as “intercourse of the flesh”

<sup>111</sup> *S v H* 1988 (3) SA 545 (A).

<sup>112</sup> *R v W* 1959(4) SA 477 (A).

<sup>113</sup> However, in 1914 in *Green v Fitzgerald and Others* 1914 AD 88 it was held that, insofar as it made adultery a criminal offence, the Dutch law had become obsolete through disuse in South Africa.

<sup>114</sup> Oxford Dictionary.

<sup>115</sup> The penalty is imprisonment for a period not exceeding three years with or without a fine not exceeding R6000 in addition to such imprisonment.

<sup>116</sup> It should be noted that the Act does not criminalise **all** instances of unlawful carnal intercourse; such intercourse is only prohibited as a criminal offence when taking place under **certain specific circumstances**, i.e. unlawful carnal intercourse when performed for reward.

that a person who engages the services of a person 18 years or older for financial or other reward, favour or compensation for the purpose of engaging in a sexual act, irrespective of whether the act is committed or not; or by committing a sexual act with the person, is guilty of an offence.<sup>117</sup> “Prostitution” is not defined in either Act. As discussed above, the Sexual Offences Act merely defines “unlawful carnal intercourse” as “carnal intercourse otherwise than between husband and wife”.

1.43. Prostitution is generally understood to involve the exchange of sexual acts for a reward or material gain, which is usually monetary. Scholars who have studied irregular sexual unions in non-Western cultures (including African societies) have confronted difficulties in identifying or limiting the boundaries of prostitution.<sup>118</sup> Some authors propose the notion of a “continuum of sexual relations from monogamy to multiple sexual partners”; that is, more permanent and legally sanctioned unions to casual sexual encounters, with varying degrees of remuneration for sexual activity.<sup>119</sup> Current legal definitions of prostitution may therefore be at odds with culture-specific understandings of this notion in the African context.<sup>120</sup> The difficulty of narrowing down the concept of “prostitution” is compounded because people who exchange sexual acts for rewards other than money (eg clothes, food or lodging) may not identify themselves as prostitutes precisely because the transaction does not entail the actual receipt of money.<sup>121</sup>

1.44 Where money is not exchanged, such activity is sometimes referred to as transactional sex. If the exchange of sex for reward or material gain is used in the broadest sense to define prostitution, the term “prostitution” may encompass a range of intimate interactions between consenting adults, on a continuum ranging from indiscriminate encounters for cash to marriages or relationships of convenience. Choosing to engage in acts of sexual expression in intimate relationships is central to human existence; such acts may or may not be preceded, accompanied or followed by the giving of a material item. However, to argue that all such encounters amount to prostitution would be fanciful. The distinction is perhaps that in one instance, a woman engages in sex with various people outside of a relational commitment, with the sole purpose of acquiring or giving material gain; whereas in the other instance, the existence of a perceived or actual exclusive, intimate relationship or commitment between two adults may be accompanied by items of material gain, but does not

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<sup>117</sup> Section 11.

<sup>118</sup> SALC *Sexual Offences: Adult Prostitution* Issue Paper 2002 at 28.

<sup>119</sup> Dirasse L *The Commoditization of Female Sexuality: Prostitution and Socio-Economic Relations in Addis Ababa, Ethiopia* (1991) at 1 – Kempadoo K and Doezema J (eds) *Global Sex Workers: Rights, Resistance, and Redefinition* (1998) New York: Routledge.)

<sup>120</sup> SALC *Sexual Offences: Adult Prostitution* Issue Paper 2002 at 29.

<sup>121</sup> *Ibid.*

depend on this. The difference seems to lie in the intention of the parties: the first scenario requires an exchange of material gain, without which the sexual act will not occur; the second may be an expression of affection or a response to a visible need that the other person might have. In prostitution, obtaining material gain constitutes the purpose of making sexual services available and is not merely a collateral benefit of a mutual arrangement that includes relational interaction. It could be argued that receiving collateral benefits in a relationship does not necessarily amount to prostitution, but where the material gain or benefits solely sustain the relationship and are the only reason for engaging in a sexual act, such material gain might point to prostitution. Broadly speaking, transactional sex differs from transactional relationships in that transactional sex indicates non-committal sex solely for material gain, whereas transactional relationships involve a certain level of exclusive relational commitment, in which material gain plays a role.

1.45 Despite some apparent similarities between having sex with a woman in prostitution and transactional sex, Jewkes et al<sup>122</sup> argues that conflating the two is sociologically inappropriate. Such conflation is especially problematic regarding intervention. Jewkes et al admits that the boundaries may be extremely hazy when acts and context differ little and it may be very hard to distinguish between transactional sex and prostitution. However, usually there is no explicit negotiated exchange in transactional sex. This might make it hard to distinguish transactional sex or transactional relationships from other relationships – in which there is a predominant expectation by both the man and the woman that one partner, usually the man, will fulfil a provider role.<sup>123</sup>

1.46 The Commission notes that, strictly speaking, the “commercial sex industry” extends beyond what is typically referred to as “prostitution” to include, for example, the pornography industry and sex-based entertainment such as “live sex shows”.<sup>124</sup> The Commission suggests that “prostitution” would be a useful phrase to connote a specific subcategory of the overall concept of “the commercial sex industry”.

1.47 In the Discussion Paper,<sup>125</sup> the Commission also suggested that prostitution be defined as “the exchange of any financial or other reward, favour or compensation for the purpose of engaging in a sexual act”. In defining prostitution, the Commission noted that too

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<sup>122</sup> Jewkes R, Morrell R, Sikweyiya Y, Dunkle K, & Penn-Kekana L “Transactional relationships and sex with a woman in prostitution: prevalence and patterns in a representative sample of South African men” as Published in *BMC Public Health* (July 2012).

<sup>123</sup> Ibid.

<sup>124</sup> See Chapter 3 below.

<sup>125</sup> SALRC *Sexual Offences: Adult Prostitution* Discussion Paper 2009 at 10.

narrow a definition such as the exchange of sexual acts for money is not realistic in light of the particular economic dynamics at play in South African society. It also noted that defining prostitution too broadly to include any sexual act accompanied or precipitated by a gift or goods would not be helpful. The Commission invited comment on how prostitution should be defined in a South African context.

#### **(d) Overview of comments**

1.48 A number of respondents agree with the definition of prostitution suggested by the Commission.<sup>126</sup> Some people suggest additions to this definition such as loitering and causing nuisance.<sup>127</sup> One submission suggests that the definition should be expanded to include the pimp, the solicitor and the prostitute.<sup>128</sup>

1.49 The Family Policy Institute and numerous endorsee submissions,<sup>129</sup> however, submit that prostitution should be defined as the “unlawful exchange of sexual favours for financial or

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<sup>126</sup> Nation Building; Robyn Fudge (former Public Prosecutor and Senior State Advocate); Chapman S, God TV; Cornelius M, MEC Ministries; B Jafta, God TV; MD Makumu; A Moukoko, Salvation Army; A Strydom; RM Verreyne, Rev Christian Reformed Church; A Wood, Salvation Army; Adams Priscilla; Adley IJ; Adley SB; Amm Kathryn; Arenz Che; Batchelor Darilyn; Beattie Joseph; Beattie Lisa; Bennet Ross; Bevan Jacqui; Bevan Mike; Bezuidenhout Leona; Bezuidenhout Vanessa; Bothma Dewald; Boyce John; Boyce Sally V; Cassidy DB; Christie G; Christie Grant; Coetzee Niela; Cole Megan; De Kock Tracey; Donald Drew; Donaldson Irene; Donaldson T; Downie Eric; Du Plessis Cindy; Flaum Grant M, Central Parks City Church; Ghignone Giovanni; Goncalves Nuno; Gopal Lionel; Grauls Ingrid, Dr; Gray Susan; Hartog Diane; Holloway Ashleigh; Hutcheson J; Hutcheson JL; Ireland VA, Mrs; Ireland Vicky; Jacklin Allison; Janse van Vuuren Albert; Janse van Vuuren Chantal; Kelbrick Erika; Kenmuir Jann; Kenmuir John; Kenny Shelly; Kirsten Ronel; Kleinhans Alison; Kurien Deepa Mary, Mrs; Lawson Tracy; Lawton Richard; Lillywhite Darren; Lloyd Monica; Lloyd Monica; Long Anita; Macdonald Shelanna; Macdonald, D & S; Maclachlan Belinda; Manson Anthea; Marais Marlene; Marsden, R; Martindale John; Mason Peter; Masuku Lungile; Mathews Miriam; Maxwell J; Maytham Lisa; Moodley Kuben; Morgan DW, Rev; Morgan LA, Mrs; Myburgh M F; Myburgh M J; Nagy Michelle; Nel Kyla; Nieman Charlene; Nyumbu, C; Odendaal Lisa; Persson Gillian; Persson Lorens; Phipson David, Bayside Church; Pinks Chris; Pinks Sally-Anne; Potgieter Dorette; Potgieter Johann; Potgieter Mariaan; Riley Sean Bryan; Sime Schantelle; Skevington Mike (Rev), St Martin in The Fields Church; Spengler J; Stead Pat; Steyn Tarryn; Strugnell Keith D; Tate Peter; Tate Shelley; Thornhill Jenny; Tilbury Glenis G, Mrs; Van Heerden Amanda; Van Heerden Patrick; Van Schalkwyk Marije, Dr, Tygerberg Infectious Diseases Clinic – Adults; Vermaak Patty; Vermeulen Kobus; Wallace-Bradley Jane; Walters Rico; Watts Gwen; Watts Tim; Williams Jenny-Lee; Williams John G; Williamson Christianne; Witten Virginia; Shelanna Macdonald; Shelly Kenny; Johan du Plessis; M Crowe; Dr T Basson, Maranatha Street Workers Trust; A Manson; P van der Merwe; H Muller; Christian Action Network.

<sup>127</sup> MD Makamu.

<sup>128</sup> Carel C Viljoen; ES Rens, member Methodist Church of SA.

<sup>129</sup> Endorsed by World Vision; the Antioch Bible Church; Christian Action Network; Davi S, Pastor Sterling Worship Centre; P Goosen; M Gwele, East Rand Concerned Community Forum; Jacobs; BD & L Lawrence; BE MacGregor; J Makua, Rev Jerusalem Apostolic Faith Christian Mission; RS & T Munnick; E Olivier; ML Rabe, GGN; Vanqa T & Z, Second Chance; P & SD Williams; J Makua, Rev Jerusalem Apostolic Faith Christian Mission; Barkhuizen

material gain”. While essentially supporting this proposal, some respondents substitute the word “gain” with “reward”, explaining that this would include food, accommodation, unlawful enticement, solicitation, permitting, advertisement, protection or encouragement of the exchange of sexual favours by any person for financial or material reward, protection or drugs.<sup>130</sup> Some people state that it is irrelevant if payment is made as long as the sexual service is provided for the gratification of men.<sup>131</sup> Still others wish to clarify that sexual favours are other than those between married partners.<sup>132</sup> One submission suggests including any party involved directly or indirectly in the financial gain from prostitution or promotion or prostitution.<sup>133</sup>

1.50 Doctors for Life International (DFL)<sup>134</sup> recommends that the definition of prostitution should include the following:

- An offer of a reward for sex;
- An offer of sex for a reward;
- All sexual acts (including non-penetrative) that would otherwise be criminal offences under the Sexual Offences Act if not consented to; these should be considered prostitution if a reward is exchanged for engaging in them.

1.51 The reciprocity of the interaction between offering sex and offering reward is endorsed by a few respondents.<sup>135</sup>

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Sonja and Mark; Chetty Elaine, President Women Aglow – Benoni Fellowship; De Haas Sandy, Ebenezer Christian Fellowship; Ellerman A.B; Fourie Eben and Carien; Fourie Heather; Friend Leanne; Gopalan Savy; Gopalan Veni; Govender Derusha; Gregory Chantelle; Hessel Leslie (Pst), Shield Ministries; Jansen van Vuuren Lorraine; Khwethana Wilson and Emily; Lagardien Zarreen; Le Roux Elsabe; Le Roux Jacqui; Louw Melissa; Ludick Daneel, UNISA; Ludick L, UNISA; Malherbe Kobus and Susan; Marnewick Linke; Mathee Anna E; Monsieur Maggie; Moodley Charlene; Mulder Jodine; Naidoo Errol; Porter Beryl; Potgieter Neil; Reddy KM; Rhoda Rayvonne Peter; Scott CTR; Sharp Jean; Smit Joe and Avida; Stenning M; Subroyen Bala; Sutcliffe Michelle Anne, Managing Member: Specialised Online Services cc; Swart Zerda; Theron Irma;Thirboan Inba; Tucker Ockert; Tyhoko welakhe Elliot (Mr); Van Breda Cindy; Van der Merwe Cheryl; Van Dyk Nico, Fatherheart Ministry; Van Dyk; Van Niekerk JP; Van Niekerk Marelize; Van Rooyen Adri; Van Rooyen JN; Venter Johan; Von Breda Cindy; Walker Di; Westley Marie (grandmother); Abrahams Celeste; Robon Tim; Versfeld Rina; Levendal Michelle; Levendal Allen; Kropf Kenneth; Badenhorst JA (Mrs); Karsten Herman; Tyhoko Fikiswa (Mrs); Pluddemann Christof; Malan Waldo Dr; Ken van Staden; Jackie Albert; Patsy Thomas; R Verwey; Z Venter; J Naidu; Anonymous; M Joubert; A Munchton; M MacDonald; M Shearar; N Moodley; N Mshumpela; P Brimelow; L Freitag; C Schonknecht; Y Witthuhn; BE Freitag; C Aveling; J Marius; Church of the Way, Benoni, N Hobo; J Matthew; J Fradd; A Reijnders; Arnold Matthews; Johan Marx.

<sup>130</sup> S Goddard, Bet Sheekom; L Sete UNISA; Fred Williams.

<sup>131</sup> Mrs LA Bedingham.

<sup>132</sup> M Sackman; M Shearar; C Aveling; L Bennett.

<sup>133</sup> L Stansfield, Jesus is Lord Ministries.

<sup>134</sup> An association of more than 1500 medical doctors across South Africa and the world.

<sup>135</sup> M De St Pern, Methodist Church of South Africa; C Porter; P Pretorius; GT Mjuza; E Adams;

1.52 The Islamic Forum Azaadville supports the current definition of prostitution, which in its view allows for the criminalising of prostitutes, clients and other third parties who are involved. The Commission views this comment as an endorsement of the law as it currently stands.<sup>136</sup> This view – including the opinion that the term “unlawful carnal intercourse” should be retained – was endorsed in a number of submissions.<sup>137</sup> One respondent suggests that the words should be clarified as “unlawful carnal sex between all couples of opposite and same sex relations”<sup>138</sup> and another that the words “carnal intercourse” should be expanded to include oral sex, anal sex and “regular” sexual acts.<sup>139</sup>

1.53 The Christian Lawyers Association of South Africa submits that the definition of prostitution should be “the unlawful enticement, solicitation, permitting, advertisement, protection or encouragement of the exchange of sexual favours by any person for financial or material reward.” Some respondents, however, prefer specific reference only to sexual intercourse and money.<sup>140</sup> Yet other respondents prefer to refer to sex slavery, sex trading,<sup>141</sup> or bartering;<sup>142</sup> violence against humanity;<sup>143</sup> or the inhuman, unlawful, mentally and spiritually unhealthy, paid-for sexual act between human beings.<sup>144</sup> Still others suggest framing the definition as a moral indictment, by referring to it as immoral,<sup>145</sup> a sin,<sup>146</sup> unbiblical,<sup>147</sup>

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<sup>136</sup> S Dangor; AJ van Tonder; S Joseph; D Keulder; M Marais-Kotze, Department of Health, Free State; E Russell, Methodist Women’s Auxillary; D Scarborough, Gospel Defence League.  
Islamic Unity Convention.

<sup>137</sup> P Calliz; M Hassim; D Jane, City of JHB Councillor Ward 56; R Leeman; J & D MacTaggart; MG Mampintsha, Rev Ubabalo; Marinda & Cornelius; B Moilwe, Transformation Centre; N Moss NMMU; JM Motshwaneng, Pastor World Harvest Ministries International; A & M Pillay; N Sakhile; I Wiid; Annette Van Schalkwyk, El Muchraka Church; Elixabeth Boshoff, El Muchraka; Roy Pillay; Ronald Pillay; Gabriel Ramsami Pillay; Rebecca Mashishi; Shaun Daly; P Diesel-Reynolds; A Frost, Father’s Heart; A & N Webster; B Bosch; M, D & E Gordon; F & E Galpin; J Knoetsec; R Ramkisson; W van Tonder; L van Aarde; C van der Merwe; H Kapp; V & D Tucker; Y Allen; J Kreeling; G & M Daniel; MA Frans; B Wilson, Presbyterian Church; Bekker S; Billing A & E; Blom C; Bouwer B; Casey P; Chinomona E; Coetzee C & M; Dereck; Durant L; Els D; Fourie V; Hart M; Hawley K; Hoffmann T & N; Schoeman AG; Hurter E; Jacobs M; Josephine; Joubert R; Mabuelo J; Magano N; Marais W; Maritz P; Masango M (Pastor); Berrington E; Mashamente J; Matukan K; Meyer H & S (MCC); Meyer L; Minnie A; Mitchell G; Moodley V & R; Ncanywa S & Z; Ramampa PM; Ras M; Thwala E; Valente N; Van den Heever WC; Van der Vyver I; Mopokeng D; Wandrag A; Andra Botha; Mr FVA Von Reiche, Additonal Magistrate, Civil Section, Pretoria.

<sup>138</sup> S van Niekerk, Ramah Rescue.

<sup>139</sup> Du Plessis A & S, Interfaith – CT and Western Cape Religious Leaders Forum.

<sup>140</sup> L Deighton; Leon van Tonder; Corinne Sandenbergh; K Cousins; D Diesel-Reynolds; DA Johnson; V Nortje; L du Plessis; JP Meyer; DA Johnson; F Sobuza; Martin Clinton Dance.

<sup>141</sup> N Mahlangu; Kathleen Pienaar; P & N Henning.

<sup>142</sup> Ian Wilson, Presbyterian Church;

<sup>143</sup> EJ Bowyer; B Bosch.

<sup>144</sup> H Cronje; N de Waal; A Ferreira; N Guma.

<sup>145</sup> LP Hager; S Shwababa; JP Meyer; A Takane.

<sup>146</sup> Lynette McCosh.

<sup>147</sup> Lizel Nel; H Grobler.

ungodly,<sup>148</sup> or the cause of emotional harm and destruction of the family unit, whether that unit is founded in common law or in any legally recognised form of marriage.<sup>149</sup>

1.54 Some people are of the opinion that prostitution should not be defined and that government should not make laws on morality.<sup>150</sup> Others are unsure whether a definition is useful because there is no distinction between so-called “sex work”, “transactional sex”, “survival sex” or “sugar daddy” relationships.<sup>151</sup> E Bonthuys of WITS comments that the current definition would also cover transactional sex, which is unwise since the issues and regulatory possibilities differ for commercial prostitution versus transactional sex. She suggests that if criminalising adult prostitution is the chosen route to follow then it should be restricted to commercial prostitution, which includes pimps and brothels.

1.55 The Tshwaranang Legal Advocacy Centre submits that the term “sex work” is preferable as it has relatively few derogatory connotations and recognises the right to choose employment. According to Marlise Richter, writing for the Steve Biko Centre of WITS,<sup>152</sup> “sex work” is barely distinguishable from transactional and survival sex. In her submission she uses “sex work” to refer to “adult commercial sex work” as defined by “the exchange of sexual services for reward”. The Centre for Justice and Crime Prevention submits that —

the proposed definition does not distinguish between prostitution and transactional sex, which may be a once off or temporary endeavour and therefore does not take into account the exploitative nature of those that have (resources) as opposed to those that do not have and are forced to barter the only thing that seems valuable at the time: their bodies.<sup>153</sup>

1.56 Another respondent submits that “sex work” should be defined as legal employment.<sup>154</sup> The Sex Workers Education and Advocacy Taskforce (SWEAT)<sup>155</sup> states that

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<sup>148</sup> S van Rooyen; S Shwababa; Janet Williams, Massage Therapist.

<sup>149</sup> WD Horak; D Levenson; Dr Gerhard Smidt.

<sup>150</sup> L Jankelowitz, RHRU; Tshwaranang Legal Advocacy Centre.

<sup>151</sup> M Richter, SA national AIDS Council Women’s Sector.

<sup>152</sup> Endorsed by the AIDS Consortium; AIDS Legal Network; Centre for Applied Legal Studies; OUT LGBT Well-being; Socio Economic Rights Project, Community Law Centre, University of the Western Cape; South African National AIDS Council Women’s Sector; Treatment Action Campaign’s Women’s Rights Campaign and Tshwaranang Legal Advocacy Centre.

<sup>153</sup> Centre for Justice and Crime Prevention.

<sup>154</sup> Sisonke (Johannesburg).

<sup>155</sup> Endorsed by the Legal Resources Centre; Tshwaranang Legal Advocacy Centre; Women’s Legal Centre; Gender DymaniX; Women and HIV/AIDS Gauge, Health Systems Trust; Women’s Net; Joint Working Group (LGBTI Sector); SACCAWU; Centre for the study of violence and reconciliation Gender base-violence program; AIDS Consortium; Good Hope Metropolitan Community Church; World AIDS Campaign; People Opposing Women Abuse; Institute for Security Studies.

it is important that all parties engage with the process by using the same definition of sex work or prostitution. SWEAT adds that it is important that the word “child” is not used and that discussions instead speak of a “sex worker” as “a person above the age of 18 years”. SWEAT comments that this is important as it in no way endorses or sanctions children’s involvement in the sex industry.

1.57 Without expressing a view in its submission on how prostitution should be defined, SWEAT writes of “sex work” as “sex for reward between consenting adults” and also refers to a “consensual sexual contract entered into by two parties.” SWEAT explains that it uses the term “sex worker” because it is relatively neutral and recognises the labour aspect of “sex work”. However, SWEAT states that it recognises that not all “sex workers” use the term “sex worker” to describe themselves, and that many people providing sex for reward do not identify themselves as sex workers. SWEAT defines “sex worker” as “a person who chooses to provide commercial sexual services.”<sup>156</sup>

1.58 Marlise Richter<sup>157</sup> quotes the UNAIDS<sup>158</sup> notes as follows:

Policy and programme development is best served by language that is not stigmatising and recognises that many of those involved in sex work regard it as their source of livelihood. It should be noted, however, that no single term adequately covers the range of transactions taking place worldwide that involve sex work. The appropriate term to use for sex work is best defined relative to the local context. This definition may change over time as attitudes evolve. Priority must be given to reflecting how those involved in sex work perceive themselves in that role. Note, however, that the majority of sex workers do not define themselves as such and consider the work to be a temporary activity. [...]The term sex worker has gained popularity over prostitute because those involved feel that it is less stigmatizing and say that the reference to work better describes their experience.

### **(e) Evaluation and recommendation**

1.59 To establish the parameters of the Commission’s investigation it is necessary to define prostitution. Definitions generally and particularly in legislation primarily aim to remove ambiguity and vagueness in respect of the meaning of a word or concept used in a specific

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<sup>156</sup> SWEAT.

<sup>157</sup> Steve Biko Centre, WITS (endorsed by the AIDS Consortium; AIDS Legal Network; Centre for Applied Legal Studies; OUT LGBT Well-being; Socio Economic Rights Project, Community Law Centre, University of the Western Cape; South African National AIDS Council Women’s Sector; Treatment Action Campaign’s Women’s Rights Campaign and the Tshwaranang Legal Advocacy Centre).

<sup>158</sup> Source given by Richter as UNAIDS 2002.

piece of legislation or body of work. The aim of a definition is not to make a value judgement on whether the conduct described should, for example, be legal or not.

1.60 In an effort not to associate with a particular position with respect to law and policy, the Commission opted in the Discussion Paper to use the words “prostitute” and “prostitution”. It also found that the phrase “prostitution” would be useful to connote a specific subcategory of the overall concept of “the commercial sex industry”, which may include masseurs and lap dancers. From an African perspective it is instructive to note the findings of Van den Borne,<sup>159</sup> quoted in a Ugandan study on Malawian prostitutes, that the use of the term “commercial sex worker” is even worse than “prostitute”.<sup>160</sup> Although SWEAT<sup>161</sup> prefers the use of the term “sex work,” it states that it recognises that not all “sex workers” use the term “sex worker” to describe themselves, and that many people providing sex for reward do not identify themselves as “sex workers”. SWEAT<sup>162</sup> states that it is important that all parties engage with the process through the use of a similar definition of sex work or prostitution. The remainder of the submissions expressed no preference for or against the use of the word “prostitution”.

1.61 Due to the considerations outlined above, the Commission confirms its use of the term “prostitution” for purposes of this Report. As discussed above, the purpose of a definition is to describe the scope of the concept being explained. For this reason, the Commission has disregarded requests to include either a value judgement or the illegality of prostitution as part of the definition.

1.62 Although a number of respondents support the use of the definition proposed in the Discussion Paper, a number of other proposals were also received, the merits of which will be dealt with below.

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<sup>159</sup> Van den Borne, F. *Trying to survive in times of poverty and AIDS: women and multiple partner sex in Malawi* (Her Spinhuis Publishers, Amsterdam 2005).

<sup>160</sup> Zalwango F, Erikson L, Seeley J, Nakamanya S, Vandepitte J & Grosskurth H “Parenting and Money Making: Sex Work and Women’s Choices in Urban Uganda” *Wagadu* Volume 8 (Fall 2010) 72.

<sup>161</sup> Endorsed by the Legal Resources Centre; Tshwaranang Legal Advocacy Centre; Women’s Legal Centre; Gender DymaniX; Women and HIV/AIDS Gauge, Health Systems Trust; Women’s Net; Joint Working Group (LGBTI Sector); SACCAWU; Centre for the study of violence and reconciliation Gender base-violence program; AIDS Consortium; Good Hope Metropolitan Community Church; World AIDS Campaign; People Opposing Women Abuse; Institute for Security Studies and the Commission for Gender Equality in its Policy Brief Position Paper on Sex Work at 9.

<sup>162</sup> Endorsed by the Legal Resources Centre; Tshwaranang Legal Advocacy Centre; Women’s Legal Centre; Gender DymaniX; Women and HIV/AIDS Gauge, Health Systems Trust; Women’s Net; Joint Working Group (LGBTI Sector); SACCAWU; Centre for the study of violence and reconciliation Gender base-violence program; AIDS Consortium; Good Hope Metropolitan community Church; World AIDS Campaign; People Opposing Women Abuse; Institute for Security Studies.

1.63 The definition of prostitution proposed in the Discussion Paper was essentially made up of two parts, as follows:

- **exchange** of financial or other reward, favour or compensation; and
- **to engage** in a **sexual act**.

1.64 Before evaluating the submissions on how prostitution should be defined, it is necessary to reach a common understanding of what was proposed in the Discussion Paper. The word “exchange” is defined in the *Shorter Oxford English Dictionary* as “an act of reciprocal giving and receiving”. The payment element of the Discussion Paper definition is broadly inclusive and therefore self-explanatory as any form of payment, financial or otherwise. The dictionary definition of “engage” is to “enter upon or occupy oneself in an activity”.<sup>163</sup> The meaning of the term “sexual act” has been explained above as referring to both penetrative and non-penetrative sexual acts. The proposed definition of prostitution in the Discussion Paper means a reciprocal act of giving and receiving of any form of payment, financial or otherwise, to enter upon or occupy oneself in a penetrative or non-penetrative sexual act.

1.65 After removing the word “unlawful”, the submissions of the Family Policy Institute and the Steve Biko Centre at WITS<sup>164</sup> appear extremely similar, namely “exchange of sexual favours for financial or material gain” and “exchange of sexual services for reward” respectively. As “exchange” indicates reciprocity, it would seem that payment and provision of the sexual service would need to have occurred for the act to comply with these definitions. Without using the word “exchange”, SWEAT refers to “sex for reward between consenting adults”, which points to reciprocity as a key element of its definition.

1.66 The DFL, however, links the reciprocity to the offer and not to the exchange of sexual acts for reward. The word “offer” is understood as an expression of intention or willingness to give or do something or offering something that can be accepted or refused. SWEAT also refers to a “consensual sexual contract entered into by two parties”, which points to an agreement for the supply of goods or the performance of work at a specified price or rate. Actual payment or provision of the sexual service is not required for the agreement to

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<sup>163</sup> *Oxford Dictionary*.

<sup>164</sup> Marlise Richter, Steve Biko Centre, WITS (endorsed by the AIDS Consortium; AIDS Legal Network; Centre for Applied Legal Studies; OUT LGBT Well-being; Socio Economic Rights Project, Community Law Centre, University of the Western Cape; South African National AIDS Council Women’s Sector; Treatment Action Campaign’s Women’s Rights Campaign and the Tshwaranang Legal Advocacy Centre).

comply with this definition. SWEAT further links the age of consent to enter the sexual contract as 18 for the prostitute. No reference is made to the age of the buyer of the sexual service.

1.67 Across the board there seems to be a basic agreement as to the kind of service to be rendered and the need for payment. The Commission notes the concern<sup>165</sup> that a broad definition of prostitution may include what is termed “transactional sex” and that the conflation of these two scenarios may be sociologically inappropriate.<sup>166</sup> The Commission is of the opinion that linking the reciprocity element to the offer and not to the exchange may address this concern. This approach would also provide a more concrete definition of the point at which an act of prostitution occurs, in contrast with the confusion of whether the sexual act has to have commenced and payment been made or not, or whether the transfer of payment is sufficient. The use of traps by the police to capture participants “in the act” illustrates the challenges faced by police in determining the contravention of section 20(1A)(a) of the Sexual Offences Act. The Sexual Offences Amendment Act makes use of the term “engaging sexual services” and clearly states that it is irrelevant whether the sexual act is committed or not.<sup>167</sup>

1.68 Although some respondents endorse the continued use of the term “carnal intercourse”, it is clear from the submissions that these words do not encompass all aspects covered by the definition of “sexual acts” as defined in the Sexual Offences Amendment Act. The definition in the Act includes oral sex, anal sex and “regular” sexual acts. The definition of “sexual act” is gender neutral, making it unnecessary to specify that it includes hetero- and homosexual sexual acts. **The Commission is of the view that the term “carnal intercourse” is restrictive, vague and archaic. The Commission is not convinced that these words should be retained.**

1.69 Some respondents suggest that non-monetary methods of payment should be listed in the definition, such as food, accommodation, protection and drugs.<sup>168</sup> Although most respondents feel that in practice cash is the preferred method of payment, other methods of payment vary from a plate of food<sup>169</sup> to mobile phone airtime. **The Commission is of the opinion that listing specific methods of payment may be restrictive and therefore recommends retaining the more inclusive reference to payment as “any financial or**

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<sup>165</sup> E Bonthuys & M Richter.

<sup>166</sup> Jewkes et al “Transactional relationships”.

<sup>167</sup> Section 11.

<sup>168</sup> S Goddard, Bet Sheekom; L Sete UNISA; Fred Williams.

<sup>169</sup> Interview at a safe-house during a police guided tour facilitated by Rocking Chair in Sunnyside, Pretoria on 22 September 2009.

**other reward, favour or compensation” as described in the Sexual Offences Amendment Act.**

1.70 The Christian Lawyers Association of South Africa<sup>170</sup> suggested that the definition of prostitution should be extended to include acts of enticement, solicitation, permitting, advertisement, protection or encouragement of the exchange of sexual favours by any person for financial or material gain. One respondent submits that the definition should be expanded to include the pimp, the solicitor and the prostitute.<sup>171</sup> Another suggests including any party involved directly or indirectly in this gain or promotion thereof.<sup>172</sup> Ms Bonthuys states that if commercial prostitution is to be defined it should include pimps and brothels.

1.71 The actions of enticing, soliciting, permitting or advertising by either the prostitute or a brothel or third party, as well as the protection or pimping of the prostitute, could be described as surrounding, enabling or preparatory actions which accompany or precede the entering into of an agreement or exchange of payment and sexual service between the prostitute and the buyer.

1.72 In addition to criminalising the exchange of payment for a sexual act between two people, the Sexual Offences Act refers in various subsections to keeping a brothel;<sup>173</sup> procuring;<sup>174</sup> assisting a person to communicate with a person for the purpose of unlawful carnal intercourse;<sup>175</sup> permitting premises to be used for an offence in the Act;<sup>176</sup> enticing, soliciting, or importuning in a public place for immoral purposes and wilfully and openly exhibiting oneself in indecent dress at any door or window in open view;<sup>177</sup> and living on the earnings of prostitution or assisting in the commission of indecent acts.<sup>178</sup>

1.73 In contrast, section 17 of the Sexual Offences Amendment Act groups the surrounding or preparatory acts and the exchange of sexual acts and payment together in one section, under the heading “Sexual exploitation of children” (child prostitution). In summary, the section includes engaging the services of a child for financial or other reward; favour or compensation to the child or a third person to engage in a sexual act; being

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<sup>170</sup> Endorsed by S Goddard, Bet Sheekom; L Sete UNISA; Fred Williams.

<sup>171</sup> Carel C Viljoen; ES Rens, member Methodist Church of SA.

<sup>172</sup> L Stansfield, Jesus is Lord Ministries.

<sup>173</sup> Sections 2 – 8.

<sup>174</sup> Section 10.

<sup>175</sup> Section 12A.

<sup>176</sup> Section 17.

<sup>177</sup> Section 19.

<sup>178</sup> Section 20.

involved in child prostitution by offering the services of a child for the commission of a sexual act; inviting, persuading or inducing the child to allow the commission of a sexual act; participating, being involved in, promoting, encouraging or facilitating the commission of a sexual act; making available, offering or engaging the child for commission of a sexual act; detaining a child, whether under threat, force, coercion, deception, abuse of power or authority, for commission of a sexual act; furthering child prostitution by intentionally allowing or knowingly permitting the commission of a sexual act by a third person while being a primary care-giver; owning, leasing, renting, managing, occupying or having control of any movable or immovable property to be used for purposes of the commission of a sexual act with a child or a third person; benefiting from the exploitation of a child; living off the earnings of the sexual exploitation of a child; and promoting child sex tours.

**1.74 Having given consideration to the above, the Commission is of the opinion that the definition proposed in the Discussion Paper covered only a small portion of what is considered to be prostitution and was therefore too restrictive. The Commission recommends that for the purpose of this Report, adult prostitution should be inclusively defined, thereby including prostitution related activities as described in the Sexual Offences Amendment Act. The context may however require a narrow definition of “prostitution”. The Commission’s understanding of a more inclusive definition of “prostitution” is as follows:**

**“Prostitution involving a person 18 years or older” in the broader sense means the actions of any person who**

- (a) offers or accepts to engage or provide sexual services with another person for a financial or other reward, favour or compensation irrespective of whether the sexual act occurs or not;**
- (b) offers or accepts to engage or provide the sexual services of a person 18 years or older to a third person for a financial or other reward, favour or compensation –**
  - a. for the purposes of the commission of a sexual act with another person;**
  - b. by inviting, persuading or inducing a person to allow another person to commit a sexual act with him or her;**
  - c. by participating in, being involved in, promoting, encouraging or facilitating the commission of a sexual act with a person by another person; or**
  - d. by making available, offering or engaging a person for purposes of the commission of a sexual act with the person by another person; or**
- (c) owns, leases, rents, manages, occupies or has control of any movable or immovable property and intentionally allows or knowingly permits such movable or immovable property to be used for purposes of the commission of a sexual act with a person by another person;**
- (d) intentionally receives financial or other reward, favour or compensation from the commission of a sexual act with a person, by another person;**

- (e) intentionally lives wholly or in part on rewards, favours or compensation for the commission of a sexual act with a person, by another person;
- (f) including a juristic person, who –
  - a. makes or organises any travel arrangements for or on behalf of a third person, whether that other person is resident within or outside the borders of the Republic, with the intention of facilitating the commission of any sexual act with a person 18 years or older, irrespective of whether that act is committed or not; or
  - b. prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual act with a person.

The Commission believes that narrowly defined “prostitution” means the conduct of any person who engages the sexual services of a person 18 years or older for financial or other reward, favour or compensation or such person 18 years or older who offers or agrees to provide a sexual service for financial or other reward, favour or compensation, irrespective of whether the sexual act occurs or not.

## E A further note on transactional relationships

1.75 Jewkes et al<sup>179</sup> state that women’s involvement in transactional sex has at times been presented by researchers in a positive light, reflecting agency and a challenge to culturally constraining prescriptions about women’s passivity in relationships, the labour market and in sexual relationships. Jewkes et al warn that there are two reasons to be cautious about transactional sex as a way forward for women. The first is that the social conservatism and resources of men largely determine the conditions of the transaction, and perpetuate gender roles that fix women and men in positions that are gender inequitable. The second is that many men who engage in transactional sex do so for instrumental reasons that hold little promise of generous reciprocity and respect, and much danger of violence.<sup>180</sup> A recently published study showed that HIV incidence was relatively high among young rural South African women who had engaged in transactional sex with a casual partner. This finding parallels that of rural-based research in Kenya on HIV incidence and a broad body of evidence on the importance of transactional sex from cross-sectional studies.<sup>181</sup>

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<sup>179</sup> University of Witwatersrand Workshop on “The Role of Men in Transactional Sex – does the law have a role in regulating this behaviour and if so how should it do it?” Discussion round table presentation by Professor Jewkes on research entitled “Men, sex and the provider role: Crime, violence, correlated psychological attributes associated with South African Men’s engagement in prostitution and transactional sex in South Africa” (9 November 2011) at 17-18.

<sup>180</sup> Ibid.

<sup>181</sup> Jewkes R, Dunkel K, Nduna M & Shai NJ “Transactional Sex and HIV incidence in a Cohort of Young Women in the Stepping Stones Trial” *J AIDS Clinic Res*.

Furthermore, young women are vulnerable and much less able to influence their own sexual risk than men of the same age.<sup>182</sup>

**1.76 As stated above, it is the Commission’s view that true transactional relationships should not be conflated with adult prostitution. Although these relationships do not form part of this investigation, the Commission believes that preliminary research has uncovered troubling results that deserve attention. The Commission therefore recommends that relationships of this nature, as a growing social phenomenon, be further investigated from a social and gender-based violence intervention perspective rather than in response to a need for legal intervention or law reform.**

## **F Legislative and regulatory context**

1.77 The Issue Paper provided an historical overview of legal measures used to address adult prostitution, tracing the origins back to Ancient Greece and Rome.<sup>183</sup> That information will not be repeated in this Report, but it is necessary to provide a brief overview of the recent legislative and regulatory context.

1.78 For most of the nineteenth century, prostitution regimes regulated brothels and attempted to control street prostitution. Many women were policed through Vagrancy Acts for selling sex, and some were policed through variants of the Contagious Diseases Acts. These laws gave considerable powers to the police and doctors to arrest women suspected of selling sex, to subject them to mandatory health checks, and to detain anyone found to have a STI; such people were held in a “lock hospital” for involuntary treatment.<sup>184</sup>

1.79 This period was followed by an active resistance to the Contagious Diseases Acts. Activists challenged the reasoning that prostitution was a “necessary evil” and was an institution that would always be around, arguing instead that it demeaned women.<sup>185</sup>

1.80 In the early to mid-twentieth century, the global focus shifted to trafficking, resulting in the 1949 UN Convention on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others. Signatories were expected to abolish brothels and criminalise third

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<sup>182</sup> Jewkes et al “HIV incidence”.

<sup>183</sup> See Chapter 3 and further.

<sup>184</sup> Kelly et al 8.

<sup>185</sup> Ibid.

parties who profited from prostitution.<sup>186</sup> South Africa signed the Convention in 1950 and ratified it in 1951.

1.81 The Preamble to the 1949 Convention sets the normative framework of the document by declaring that the enslavement of women and children subjected to prostitution is incompatible with the dignity and fundamental rights of the human person and endangers the welfare of the individual, the family and the community.

1.82 Without defining “prostitution” or “exploitation”, the 1949 Convention addresses two specific concerns, namely, trafficking in persons for the purposes of prostitution and the exploitation of persons for prostitution. States Parties are required to punish any person who exploits the prostitution of another person or who procures or entices another person into prostitution, even with the consent of that person. States Parties are also required to adopt sanctions against the operation of brothels or places of prostitution. Article 6 of the 1949 Convention enjoins States Parties to take measures to repeal or abolish any existing laws or policies by virtue of which persons who engage in or are suspected of engaging in prostitution are subject either to special registration or to the possession of a special document or to any exceptional requirements for supervision or notification. Article 17 requires States Parties to institute or encourage measures to prevent prostitution and to facilitate the rehabilitation and social adjustment of the victims of prostitution, through public and private educational, health, social, economic and other related services. Article 17 further requires States Parties to undertake, adopt or maintain such measures as required in terms of their obligations under the Convention to monitor the traffic of all people, regardless of gender, for the purpose of prostitution. Article 20 requires States Parties to adopt the necessary measures to supervise employment agencies to prevent persons who are seeking employment – in particular women and children – “from being exposed to the danger of prostitution”.

1.83 The 1979 Convention on the Elimination of Discrimination Against Women (CEDAW) follows this line of thought by calling on state signatories to “suppress all forms of traffic in women and the exploitation of prostitution”.<sup>187</sup> South Africa signed CEDAW in January 1993 and ratified it on 15 December 1995, without reservations.

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<sup>186</sup> Ibid.  
<sup>187</sup> Ibid.

1.84 Article 6 of CEDAW states that States Parties must take all appropriate measures, including legislation, to suppress all forms of trafficking in women and exploitation of prostitution of women.

1.85 Article 21 of CEDAW empowers the UN Committee on CEDAW to make suggestions and general recommendations based on the examination of reports and information received from States Parties. In General Recommendation 19, the Committee addresses the issue of violence against women, and General Recommendation 24 deals with women and health. Both points are relevant to prostitution.

1.86 Paragraph 15 of General Recommendation 19 addresses prostitution in particular, citing its economic determinants and the problem of violence:

Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because of their status, which may be unlawful, tends to marginalise them. They need the equal protection of laws against rape and other forms of violence.

1.87 Paragraph 24 of General Recommendation 19 calls on States Parties to describe in their reports the penal provisions and preventive and rehabilitation measures that have been taken to protect women who are engaged in prostitution or subjected to trafficking and other forms of sexual exploitation.

1.88 In respect of women and health, paragraph 6 of General Recommendation 24 provides that whereas biological differences between women and men may lead to differences in their health status, societal factors partly determine the health status of women and men and may even cause variations among women themselves. The UN Committee recommends that special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, including women in prostitution.

1.89 Paragraph 18 of General Recommendation 24 identifies HIV/AIDS and other sexually transmitted diseases as central to the right to sexual health of women and adolescent girls. Paragraph 18 notes that as a consequence of unequal power relations based on gender, women and adolescent girls are often unable to refuse sex or to insist on safe and responsible sex practices, and are therefore exposed to the risk of contracting HIV/AIDS and other sexually transmitted diseases. Women in prostitution are identified as particularly vulnerable to these diseases. States Parties are called upon to ensure, without prejudice and discrimination, the right to sexual health information, education and services for all women

and girls, including those who have been trafficked, even if they are not legally resident in the country.

1.90 After the widespread international ratification of CEDAW, a discourse emerged on prostitution that sought to locate it as a legitimate form of employment – which some women choose in preference to other options. This shift in discourse led to proposed absolute distinctions between “free” or “voluntary” versus “forced” prostitution.<sup>188</sup> Negotiating these divergent positions on prostitution became part of the process in creating the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, colloquially called the Palermo Protocol. This international convention places responsibilities on States Parties to develop counter-trafficking laws and policies, and includes a requirement to address the issue of demand.<sup>189</sup>

1.91 On a regional level, in 1998 the members of the Southern African Development Community (SADC) signed the Addendum to the 1997 Declaration on Gender and Development by SADC Heads of State or Government, in which violence against women and children in all its forms was strongly condemned. Paragraph 5 of the Addendum refers to forced prostitution. It states that violence against women and children includes physical and sexual violence, and occurs in communities in the form of sexual abuse, sexual harassment and intimidation, trafficking in women and children, and forced prostitution.

1.92 The worldwide drive to address the spread of HIV/AIDS is gaining momentum and the growing awareness has shifted the health of women – especially their sexual health – into the spotlight. In 2006, UNAIDS published the International Guidelines on HIV/AIDS and Human Rights (the Guidelines). In the foreword to that document, reference is made to the growth in HIV prevalence among marginalised groups such as prostitutes.<sup>190</sup> The foreword states that discrimination against women in law and in practice renders them disproportionately vulnerable to HIV and AIDS compared with men; it also states that protecting the sexual rights of women is critical, including the right to control their own sexuality and to decide freely and responsibly on matters related to their sexuality.<sup>191</sup>

1.93 The Guidelines submit that, in the context of HIV, international human rights norms and pragmatic public health goals require states to consider measures that may be

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<sup>188</sup> Kelly et al 8.

<sup>189</sup> Ibid.

<sup>190</sup> UNAIDS “International Guidelines on HIV/AIDS” (2006).

<sup>191</sup> Ibid.

considered controversial, particularly regarding the status of women and children and prostitutes. The Guidelines emphasise that all states are responsible for identifying methods to meet their human rights obligations and protect public health within specific political, cultural and religious contexts.<sup>192</sup> The Guidelines reflect the apparent lack of an integrated and co-ordinated UN policy on prostitution and the fact that various UN instruments and bodies adopt differing ideological stances.<sup>193</sup>

1.94 As stated in the Discussion Paper,<sup>194</sup> South Africa has committed itself to international obligations to realise various rights – such as dignity, security of the person, equality and equal access to the law and to healthcare; and to provide effective remedies for the violations of those rights.

1.95 The current South African legislation on prostitution has largely followed English statutes.<sup>195</sup> In 1957 the various laws regulating sexual acts or relations were repealed<sup>196</sup> and re-enacted in a consolidating Immorality Act.<sup>197</sup> This Act, subsequently renamed the Sexual Offences Act, is still in force. Together with the Sexual Offences Amendment Act, it contains the current provisions regulating various aspects of adult prostitution. The Sexual Offences Act inter alia penalises prostitution, the keeping of brothels, the procurement of women as prostitutes, soliciting by prostitutes, and living off the earnings of prostitution. It is essentially this Act that bears the scrutiny of the current investigation.

## **G Recent developments in the debate on adult prostitution**

1.96 As discussed above, in the current South African context the debate on adult prostitution has been complicated by a number of factors. These include, in particular, high levels of unemployment; crippling poverty; burgeoning numbers of migrant and illegal foreign job seekers; high levels of violence, particularly sexual, against women; the HIV/AIDS epidemic; drug and substance abuse; and the targeted exploitation of women engaging in

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<sup>192</sup> Op cit 16.

<sup>193</sup> Doezema J “Forced to Choose: Beyond the Voluntary v Forced Prostitution Dichotomy” in Kempadoo and Doezema *Global Sex Workers* (1998) at 41 n36.

<sup>194</sup> At 109.

<sup>195</sup> Milton JRL & Cowling MG *South African Criminal Law and Procedure Vol III: Statutory Offences 2<sup>nd</sup> ed* (1988) Revised and updated 2005 Cape Town: Juta & Co (2005) para E3-79.

<sup>196</sup> An overview of the history of these laws is given in SALC *Sexual Offences: Adult Prostitution Issue Paper* 2002.

<sup>197</sup> Act 23 of 1957.

prostitution –by third parties, authorities and buyers.<sup>198</sup> Although the debate on the legal status of adult prostitution has remained vibrant, the following milestones deserve particular mention.

**(a) The National Strategic Plan for HIV, STIs and TB 2012–2016**

1.97 The South African National AIDS Council (SANAC)<sup>199</sup> published “The National Strategic Plan for HIV, STIs and TB 2012 -2016” (NSP) on 1 December 2011. This document provides the strategic guide for the national response to HIV, STIS and TB for the next five years. Using the UNAIDS “Terminology Guidelines” dated October 2011, the NSP includes “key population at higher risk of HIV exposure” in its glossary of terms. The term refers to people most likely to be exposed to HIV or to transmit it. According to the NSP, HIV key populations include prostitutes<sup>200</sup> and buyers of sexual services.<sup>201</sup> Although the NSP reflects a wide variation in HIV prevalence across the variables of age, race, gender, socio-economic status and geographical location,<sup>202</sup> major risk factors for HIV infection show a definite overlap with the global list of key populations.<sup>203</sup>

1.98 The NSP states that poverty is one of the major contributors to poor health through food insecurity, and in turn is linked to HIV and TB acquisition and poor treatment adherence. Therefore, government and its partners will make every effort to ensure food security for all. In this regard the NSP reports that government has already launched an integrated anti-poverty strategy that involves various government departments, which have specific responsibilities to ensure that vulnerable households are identified and supported.<sup>204</sup>

1.99 The NSP contains four strategic objectives. Strategic Objective 1 is focused on addressing the structural, social, economic and behavioural factors that fuel the HIV epidemic. Strategic Objective 2 is focused on primary strategies to prevent sexual and vertical transmission of HIV and STIs using a combination of prevention approaches, including implementing a comprehensive national social and behavioural change communication strategy with a focus on key populations. This aims to increase demand and uptake of services, to promote healthy behaviours, and to address norms and behaviours that put

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<sup>198</sup> Kelly et al 5.

<sup>199</sup> SANAC reports that it has robust multi-sectoral representation from government, civil society organisations, labour and the private sector. SANAC media summary pamphlet 2011/2012.

<sup>200</sup> The NSP lists the acronym SW as “sex worker” without defining such.

<sup>201</sup> SANAC “National Strategic Plan” 2012 -2016 at13.

<sup>202</sup> Ibid.

<sup>203</sup> Op cit 30.

<sup>204</sup> NSP Preface signed by Deputy President Kgalema Motlanthe, Chair, SANAC 9.

people at risk for HIV, STIs and TB. Social interventions include efforts to change cultural and social norms that increase vulnerability to HIV and STI's and to reinforce norms and behaviours that are protective. Some social norms (most notably gender norms) are associated with behaviours that place individuals at increased risk of HIV acquisition, such as multiple partnerships, intimate partner violence and alcohol abuse.<sup>205</sup> Strategic Objective 3 focuses on sustaining the health and wellness of HIV-positive people. Among other things, this objective aims to keep people within the health care system and adherent to treatment to maintain optimum health. To achieve this objective, the aim is to expand operating hours of service delivery points and to ensure a continuum of care across service delivery points.<sup>206</sup> Strategic Objective 4 focuses on ensuring protection of human rights and improving access to justice. It aims to ensure that rights are not violated when interventions are implemented, and that discrimination on the basis of HIV and TB is reduced and ultimately eliminated.<sup>207</sup> While not advocating a specific position on the legal framework within which prostitution operates, the NSP observes that decriminalisation is a matter that has been a subject of debate and it is therefore of the view that society should continue to deliberate on the matter until it is finally resolved.<sup>208</sup>

1.100 In explaining the framework in which it is located, the NSP makes reference to the Constitution, the 2009–2014 Medium Term Strategic Framework, the National Planning Commission, and the Millennium Development Goals.

1.101 It is pertinent to take note of the 2009–2014 Medium Term Strategic Framework (MTSF) as summarised in the NSP, which sets out the strategic mandate of the government. The MTSF identifies strategic priorities and targets that serve as the basis for determining the government's implementation plans for 2009 to 2014. The key targets which intersect with poverty and the lack of which steers many women into engaging in adult prostitution are:<sup>209</sup>

- Quality basic education;
- Decent employment through inclusive economic growth;
- Skilled and capable workforce to support an inclusive growth path;
- Vibrant, equitable, sustainable rural communities contributing towards food security for all; and
- Sustainable human settlements and improved quality of household life.

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<sup>205</sup> SANAC “National Strategic Plan” 2012 -2016 at 39.

<sup>206</sup> Op cit 15.

<sup>207</sup> Ibid.

<sup>208</sup> SANAC “National Strategic Plan” 2012 -2016 at 53.

<sup>209</sup> Op cit 30.

1.102 In addition, the NSP reports that the National Planning Commission is currently developing a broad government framework to address the major developmental challenges in South Africa. These include:<sup>210</sup>

- High rates of unemployment;
- Poor quality of education;
- High rates of domestic and sexual abuse;
- Poorly located and inadequate infrastructure;
- Weak economic growth;
- Spatial challenges that marginalise poor people;
- High burden of disease;
- Uneven public service delivery;
- Corruption and its impact on service delivery; and
- Lack of social cohesion.

1.103 Many of the above challenges and especially a combination thereof are cited as the primary reason for people's entry into prostitution and being unable to exit it. The National Development Plan states that it aims to eliminate poverty and reduce inequality by 2030.<sup>211</sup>

1.104 South Africa's 2010 Country Progress Report on the Declaration of Commitment on HIV/AIDS makes reference to the NSP. It boldly, but without deliberation or explanation, identifies the continued criminalisation of "sex work" as a barrier to HIV prevention and treatment.<sup>212</sup>

### **(b) COSATU Gender Conference**

1.105 The Congress of South African Trade Unions (COSATU) held its Gender Conference from 27 to 29 March 2012.<sup>213</sup> During this conference, COSATU tabled its discussion document on "sex work" (Discussion Document).<sup>214</sup> Although a resolution was taken at the conference to endorse the decriminalisation of "sex work", the content of this Discussion Document does not reflect the official position of COSATU, as the document was not ratified by the parent body or all affiliates as presenting the official COSATU position. Historically, a discourse and campaign among COSATU affiliates to decriminalise prostitution was tabled

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<sup>210</sup> Op cit 31.

<sup>211</sup> National Planning Commission National Development Plan 2030 Our future – make it work Executive Summary 14.

<sup>212</sup> Op cit 31.

<sup>213</sup> COSATU is one of the largest trade union organisations in South Africa.

<sup>214</sup> The use of the terms 'sex work' is not explained.

at the Federation's 10<sup>th</sup> Congress in 2009. However, the campaign was deferred because of contestation and opposition amongst delegates.<sup>215</sup> The aim of the Discussion Document was "to resuscitate the debate and to ensure that COSATU and its affiliates further engage with structures, alliance, non-government organisations and with the government on the decriminalisation of sex work."<sup>216</sup>

1.106 The Discussion Document explains COSATU's interest in the debate on prostitution as stemming from the fact that prostitution affects mainly working class and poor people, and in South Africa, predominantly black women. It identifies high levels of unemployment, poverty and gender inequality as key factors influencing prostitution, with the global economic crisis aggravating the situation for the majority of poor people through job losses, casualization, and ultimately increased feminization of poverty.<sup>217</sup> In COSATU's view this situation has deepened the vulnerability of black working-class women, who find themselves already disadvantaged by unequal life chances and opportunity for income and rewarding work because they lack the educational and job skills required by the labour market. Under conditions of inequality, people engaged in providing sexual services do not enter into free contracts out of their own free will. As breadwinners, they have socio-economic responsibilities to feed their families and send their children to school.

1.107 The Discussion Document aligns itself with the non-governmental organisation SWEAT in advocating for the right to work and to decriminalise prostitution.<sup>218</sup> It supports the decriminalisation of prostitution for the following listed reasons:<sup>219</sup>

- Prostitution is a source of income for women and has a long history of existence;
- The laws criminalising prostitution are out-dated and patriarchal, reflecting repressive ideas on sexuality, relationships, who owns women's bodies, and the position of women in society;
- Current laws violate prostitutes' rights;
- Violence against women can only be addressed in a fully decriminalised system where prostitution is recognised as viable work;
- Current laws increase women's vulnerability to HIV/AIDS. The law reduces women's power to negotiate safer sex; limits their access to HIV education, condoms and treatment; and increases their risk for violence and rape.

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<sup>215</sup> COSATU Discussion Document –Sex Work 2012 at 4.

<sup>216</sup> COSATU Gender Report 68.

<sup>217</sup> COSATU Discussion Document –Sex Work 2012 at 4.

<sup>218</sup> This view is echoed in the Commission for Gender Equality Policy Brief Position Paper on Sex Work at 10.

<sup>219</sup> Op cit 7.

1.108 The Discussion Document reflects the view that the criminalisation of prostitutes gives rise to violence from clients, their partners and the police; exposes them to unsafe and dangerous working conditions; continues the stigma of prostitution; prevents prostitutes from easily accessing health, social, police, legal and financial services; makes it hard to protect themselves and clients from HIV or to be tested for HIV and receive treatment for HIV; makes it difficult to find other jobs; and leaves women unable to access employment benefits such as unemployment or maternity benefits. The Conference hosted a Commission on “Promoting Decent Work & Social Protection for All” at which these challenges were articulated. Although the majority of delegates agreed with the resolution on decriminalisation, some shared the view that the violation of rights seemed to be caused by corrupt officials and not as a result of the law. These delegates felt that decriminalisation would not necessarily reduce the violence meted out by clients, given the nature of the interaction. A concern was raised that decriminalising prostitution would legitimise clients as businessmen who use the bodies of women, and that health issues relating to HIV are too complicated to be solved by decriminalisation. Many clients have an aversion to using condoms and offer to pay more for sexual services without a condom – an offer many prostitutes do not refuse.

1.109 The Discussion Paper advocates that decriminalisation would address the following issues:<sup>220</sup>

- The Labour Relations Act and the Basic Conditions of Employment Act could be applied to prostitutes;
- Safer and more hygienic working conditions would be required;
- Limits for legal working hours would be stipulated;
- Paid vacation time and sick leave;
- The obligation by brothels to display safer sex information, to provide condoms, or to screen clients; and
- Prostitutes in brothels would receive pensions when they retire.<sup>221</sup>

1.110 In the plenary session, SWEAT tabled its intention to partner with COSATU to promote “sex workers” rights. In SWEAT’s view, there can be no right to work without labour rights.<sup>222</sup>

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<sup>220</sup> Op cit 11.

<sup>221</sup> Op cit 10.

<sup>222</sup> This view is echoed in the Commission for Gender Equality Policy Brief Position Paper on Sex Work at 10.

1.111 The COSATU Gender Conference concluded with a Resolution on Sex Workers, in which the delegates resolved as follows:<sup>223</sup>

- Support organisations like SWEAT who are trying to educate and organise “sex workers”.
- Put the proliferation of “sex work” as part of the broader campaign of job creation, Basic Income Grant, etc. to alleviate poverty.
- Organise workers who are working in a formal employment relationship (escort agencies, etc.).
- Support and join campaigns to eliminate the trafficking of women, men and children.
- That “sex work” should be decriminalised.
- That COSATU and its affiliates should do education work and raise awareness to do away with stigma and change perceptions about ‘sex workers’.
- In the long term the struggle for socialism to change social and economic conditions as well as mind sets will eliminate the excesses of “sex work” and in the long run eliminate “sex work” in our society.

1.112 In addressing the plenary, Mr Dlamini (NEHAWU shop steward and COSATU President) spoke of taking forward the fight against the triple oppression of women; that is, gender discrimination at work, in the home and by society. He noted that household incomes have been reduced and many people are not employed. He ascribed the occurrence of “sex work” to the current desperate economic situation, and accused men who buy sexual services of not respecting women. He concluded that society needs to build circumstances for women to take their rightful place.

**(c) ANC Gender Policy Discussion Document**

1.113 During her address at the COSATU Gender Conference, the Honourable Angie Motshekga (MP and ANC Women’s League [ANCWL] President) informed delegates that the ANCWL wants to address “sex work” as a human rights issue and not as a moral or religious one. It wishes to lead the discourse on gender relations. She observed that “poverty in South Africa is wearing a woman’s face and that if any progress is to be made against poverty then women are the entry point”.

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<sup>223</sup> Op cit 21 – 22.

1.114 During the COSATU Gender Conference, Ms Nozizwe Madlala-Routledge, representing the ANCWL and the organisation Embrace Dignity, presented the ANC Gender Paper that had been prepared for discussion at the ANC Policy Conference 2012. The issue of prostitution and trafficking were discussed in the ANC Gender Paper under a combined heading “Prostitution and Trafficking of Women”.<sup>224</sup> Without elaborating, the Gender Paper states that the ideal approach for the ANC would be to support a position that embraces the dignity of women.<sup>225</sup> Ms Madlala-Routledge clarified that embracing the dignity of women does not entail total decriminalisation of prostitution but only decriminalising the sale of the woman. This position was aimed at avoiding the revictimisation of women while not allowing exploiters to act with impunity. She argued that the clampdown on demand will positively affect supply and will also impact on trafficking. She informed the Conference that trafficking and prostitution are closely linked and that domestic trafficking of women in prostitution between townships is common practice.

1.115 Ms Madlala-Routledge further strongly stated that prostitution refers to an institution of commercial sexual exploitation, housed in a system of patriarchy where women are a lucrative commodity. In her view the struggle against exploitation of women is divided by talking about women and oppression by men in the same context. In Ms Madlala-Routledge’s view, “if a comrade buys a woman for sex that comrade does not consider that woman a comrade”.

1.116 Ms Madlala-Routledge assured the COSATU Conference that given the legacy of oppression among women in general and black women in particular, the ANC bias towards uplifting working class and rural poor women remains steadfast.

1.117 The ANC Gender Paper recommended that the New Growth Path for economic development must be gender-sensitive to ensure that women will constitute 50% of the beneficiaries of the Job Fund.<sup>226</sup> The Gender Paper further noted that a multifaceted approach is required to address disparities faced by women, through some of the following measures:

- Micro-financing arrangements where the major financial institutions are provided with incentives to provide loans to women entrepreneurs.
- Skills development and training directed at potential women entrepreneurs.

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<sup>224</sup> ANC Gender Paper 2012 presented to the ANC Policy Conference 2012 (Discussion Document 2012) at 27.

<sup>225</sup> Op cit para 133 at 27.

<sup>226</sup> Op cit10.

- Providing mentorship and learnership opportunities for women seeking to become entrepreneurs.
- Encouraging young female learners to take business courses at high school and in their tertiary education.

1.118 The ANC Gender Paper noted that The New Growth Path, as a component of the broader integrated and interrelated policies, holds great promise for the upliftment and economic empowerment of women, provided its approach becomes gender-sensitive.<sup>227</sup> Job creation and skills development targets are crucial elements of The New Growth Path.<sup>228</sup>

**(d) *FEDUSA Policy and Resolution on Prostitution***

1.119 In June 2011 the Federation of Unions of South Africa (FEDUSA) adopted a resolution at its 58<sup>th</sup> National Executive Committee meeting, urging a total ban on prostitution.<sup>229</sup> The aim was to tackle the root causes of prostitution and to see the establishment of decent poverty eradication programmes. FEDUSA argued that it has been proven world-wide that a loosening of sex trade regulation leads to all kinds of social problems. In addition the risk factors directly associated with prostitution will, in FEDUSA's view, ultimately increase South Africa's infection rate for HIV/AIDS and other social and associated lifestyle diseases, already at dangerously high levels in the country.

1.120 FEDUSA supports the International Labour Organisation (ILO) Decent Work Agenda and believes that sex work is not "decent work". Prostitution, due to the abusive nature of the industry, renders women and children open to all forms of serious violent crimes and abuse, which may be directly linked to drug abuse and drug trafficking, human trafficking, theft and child labour.<sup>230</sup>

1.121 In January 2012, FEDUSA wrote to the then Ministry of Justice and Constitutional Development requesting the Ministry to seriously consider a ban on prostitution as an inherently exploitative and perpetual practice, and to investigate the perceived close link between human trafficking and prostitution. FEDUSA noted that the United Nations Protocol

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<sup>227</sup>

Op cit11.

<sup>228</sup>

Op cit12.

<sup>229</sup>

Federation of Unions of South Africa (FEDUSA) 58<sup>th</sup> National Executive Committee Resolution available at <http://www.fedusa.org.za> posted on 29 June 2011 Accessed on 10 May 2012.

<sup>230</sup>

News24 "Union urges total ban of prostitution" 29 June 2011 available at <http://www.news24> Accessed on 10 May 2012.

on Trafficking acknowledges a clear link between human trafficking and prostitution. The Ministry acknowledged, however, that people who traffic persons for purposes of prostitution would be prosecuted in terms of the proposed trafficking legislation (the Prevention and Combating of Trafficking in Persons Bill – Bill 7, 2010; which has subsequently been enacted as the Prevention and Combating of Trafficking in Persons Act 7 of 2013).

### **(e) National Sex Work Symposium**

1.122 SWEAT, assisted by SANAC and the Department of Health, hosted the National Sex Work Symposium in Boksburg from 22 to 23 August 2012. The Symposium was titled “Best practices in HIV prevention, care and treatment for sex workers in South Africa” and covered a broad range of issues, with the NSP and its objectives being highlighted. A number of presenters at this Symposium called for the decriminalisation of prostitution. Despite the criminalised setting in South Africa, innovative service delivery and support initiatives (including exit programmes for prostitutes) were presented by local NGOs and by NGOs from Mumbai, India, where prostitution is also illegal. The Symposium focused on a number of obstacles that prevent access to health care and facilitate exploitation. A study report titled “Stop Harassing Us! Tackle Real Crime! A report on human rights violations by police against sex workers in South Africa” was released at the Symposium. This report was the outcome of a joint study project by SWEAT, Sisonke and the Women’s Legal Centre. It documents widespread abuse by police. During her presentation at the Symposium, the Deputy Police Minister Makhotso Sotyo promised to assist prostitutes in their fight against police harassment, stating that she would take on rogue officers.<sup>231</sup> She also reported that the Western Cape provincial police were required to investigate allegations that officers had physically and sexually assaulted prostitutes, and had to submit their report to the National Department of Police by 31 August 2012. Challenges related to substance abuse and HIV were also voiced. The content of some of these discussions will be included in the relevant sections in Chapter 2.

## **H Outline of the Report**

1.123 The following chapter (Chapter 2) considers the definition of a person who provides sexual services for payment in the context of voluntary prostitution, discusses the various legal approaches used in respect of prostitutes, and evaluates the submissions made to the

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<sup>231</sup> “Police asked for report on sex worker allegations” *Legalbrief Today* General Issue 3106 (24 August 2012).

Commission in this regard. The chapter starts with a brief discussion on terminology. It then provides an overview of selected theoretical approaches to prostitutes, which underpin the legal models identified in the Discussion Paper. The overview is followed by an exposition of the existing legal position in South Africa and an updated comparative summary of the law as it relates to prostitutes. The discussion portion of the chapter concludes with an exposition of pertinent submissions made in response to questions posed in the Discussion Paper,<sup>232</sup> as follows: how to reduce harm and vulnerability to abuse and the exploitation of prostitutes; how prostitutes can be assisted to enforce their rights to equality and access to health care; how stigma and discrimination of prostitutes can be avoided; how concerns regarding prostitution and crime should be addressed; how concerns regarding public health and HIV should be addressed; how an environment can be created for prostitutes to exit prostitution; and finally how the issue of a criminal record for selling sex for reward should be addressed when a person leaves prostitution and seeks alternative employment. This section is followed by an evaluation of the chapter and the Commission's recommendations on what the most suitable legal response should be in respect of people who provide sexual services for payment.

1.124 Chapter 3 considers who the buyer of sexual services is, discusses the different legal approaches used in respect of buyers, and evaluates the submissions made to the Commission in this regard to arrive at a suitable legal approach for South Africa. The chapter starts with a brief discussion on relevant terminology. It then provides an overview of selected theoretical approaches to buyers of sexual services, which underpin the legal models identified in the Discussion Paper. The overview is followed by an exposition of the existing legal position in South Africa and a comparative summary of the law as it relates to buyers of sexual services. The chapter then identifies a number of contextual issues that assist in understanding the role of the law in addressing this aspect of prostitution, as follows: understanding the demand for prostitution; who the purchaser is and why people pay for sexual services; the impact on and attitude of people paying for sexual services; the impact on society; and the impact of criminalising people for paying for sexual services. The chapter concludes with an exposition of pertinent submissions made on the Discussion Paper,<sup>233</sup> followed by an evaluation of the chapter and the Commission's recommendations on what the most suitable legal response should be in respect of people who pay for sexual services.

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<sup>232</sup> SALRC *Sexual Offences: Adult Prostitution* Discussion Paper 2009.  
<sup>233</sup> Ibid.

1.125 Chapter 4 provides an overview of the current law relating to third parties and beneficiaries of prostitution. The category of third parties benefiting from the proceeds of prostitution spans a wide range of people. Such persons may or may not be aware of the source of the benefit they receive, and may or may not be actively involved in acquiring such benefit. Beneficiaries include minor dependants and siblings; major dependants such as parents, grandparents and siblings; partners including husbands, spouses, cohabitees, and boyfriends; pimps and other business partners; brothel owners; managers; landlords; escort agencies, massage parlours, strip clubs or “hotels”; corrupt police officials or other officials who abuse their positions or abuse prostitutes; and traffickers, transporters or smugglers – among others. Thereafter the chapter gives an exposition of pertinent submissions made in response to questions posed in the Discussion Paper<sup>234</sup> on the legislative options, namely partial criminalisation, regulation, and non-criminalisation. With regard to the legislative options of partial criminalisation and regulation, attention is given to aspects of prostitution that should remain criminalised; for example, engaging in outdoor sexual intercourse with persons 18 years or older for reward, outside a brothel; having outdoor sexual intercourse for reward with persons 18 years and over; procurement of unlawful carnal intercourse prostitution; living on earnings of unlawful prostitution; assistance for purposes of unlawful prostitution; enticing, soliciting or importuning unlawful prostitution; and coerced prostitution. The responses to questions such as whether safe sex practices, sex education and advertising of prostitution should be regulated are also reported. With respect to the option of non-criminalisation, the question of whether persons who are convicted of specific offences should be excluded from running a prostitution business is dealt with. Chapter 4 concludes with an evaluation of the chapter, and the Commission’s recommendations on the most suitable legal response in respect of third parties or beneficiaries of prostitution.

1.126 The Report ends with Annexures containing the Commission’s preferred legislative option and a related but alternate legislative option; a list of respondents to the Issue Paper and Discussion Paper and a list of attendees of the workshops held in Pretoria, Johannesburg, Cape Town, Durban, Mokopane, Kimberley, Port Elizabeth and Nelspruit.

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<sup>234</sup> Ibid.

# I Conclusion

1.127 The Commission is aware that in making recommendations on a topic so fraught with complexities and unwavering viewpoints, its recommendations will inevitably not be welcomed in all quarters. The Commission is, however, convinced that the proposals contained in this Report will go a long way to acknowledging and ameliorating some of the complex realities faced by South Africans engaged in prostitution, including the socio-economic marginalisation of women and the impact of the HIV/AIDS pandemic. The Commission hopes that this response will guide and equip functionaries and larger society in a quest to prevent, deter and reduce prostitution. In addition, the Commission believes that by repealing the Sexual Offences Act, these recommendations will address the fragmented legislative framework that currently regulates adult prostitution within the overall framework of statutory and common law sexual offences.

1.128 The Commission has been mindful that the state is called to promote the values of “human dignity, the achievement of equality and the advancement of human rights and freedoms”, and to recognise individual rights, freedoms and responsibilities, and collective rights and responsibilities for the well-being of all. In making its recommendations, the Commission has also been mindful of the imperatives set by South Africa’s constitutional democracy.

# CHAPTER 2: PEOPLE WHO OFFER SEXUAL SERVICES FOR PAYMENT: THE PROSTITUTE

## A Introduction and background

2.1 This chapter covers several focus points, as follows: to consider who provides sexual services for payment within the context of prostitution; to discuss the various legal approaches used in respect of prostitutes; to evaluate the submissions made to the Commission in this regard; and to arrive at a suitable legal approach for South Africa.

2.2 The chapter starts with a brief discussion on terminology. It then provides an overview of selected theoretical approaches to prostitutes, which underpin the legal models identified in the Discussion Paper.<sup>235</sup> The overview is followed by an exposition of the existing legal position in South Africa and an updated comparative summary of the law as it relates to prostitutes. Contextual issues that assist in understanding the role of the law in addressing this aspect of prostitution were dealt with in the Discussion Paper<sup>236</sup> and will not be addressed here in any detail. These issues include understanding the supply element of prostitution; “who is” the prostitute; why people solicit payment for sexual services; the impact on and attitude of people providing sexual services for payment; the impact of prostitution on society; and the impact of criminalising people for providing sexual services. The discussion portion of the chapter concludes with an exposition of pertinent submissions made in response to questions posed in the Discussion Paper<sup>237</sup> on the following matters: how to reduce harm and vulnerability to abuse and exploitation among prostitutes; how prostitutes can be assisted to enforce their rights to equality and access to health care; how stigma and discrimination against prostitutes can be avoided; how concerns regarding prostitution and crime should be addressed; how concerns regarding public health and HIV should be addressed; how an environment can be created for prostitutes to exit prostitution; and finally, how the issue of a criminal record for selling sex for reward should be addressed when a person leaves prostitution and seeks alternative employment. This section is followed by an evaluation of

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<sup>235</sup> SALRC *Sexual Offences: Adult Prostitution* Discussion Paper 2009.

<sup>236</sup> Ibid.

<sup>237</sup> Ibid.

the chapter and the Commission's recommendations on the most suitable legal response in respect of people who provide sexual services for payment.

## **B Defining a person who offers a sexual service and receives payment for it**

2.3 In the Discussion Paper,<sup>238</sup> the Commission endorsed the use of the words "prostitution" and "prostitute". As stated above,<sup>239</sup> the Commission has decided to retain the term "prostitution" to refer to the selling and buying of sexual acts and related activities. For the sake of consistency, the Commission elects to define a prostitute as an adult person (older than 18 years) who offers or provides sexual services for financial or other reward, favour or compensation, irrespective of whether the sexual act occurs or not. The term is not meant to stigmatise or marginalise any person. This definition does not include any under-age and/or coerced prostitute, or a person who has been trafficked for purposes of prostitution.

## **C Theoretical approaches to prostitution in respect of prostitutes**

2.4 The Discussion Paper<sup>240</sup> identified four legal models in order to provide a useful framework for considering an appropriate legislative response for South Africa.<sup>241</sup> The identified models were total criminalisation, partial criminalisation, non-criminalisation, and regulation. These models are briefly summarised as follows:

- Total criminalisation: the conduct of both the prostitute and the buyer is criminalised; such laws currently apply in South Africa, Thailand and the United States of America;
- Partial criminalisation: the conduct of buyers is criminalised but the prostitutes' conduct is non-criminalised; this model applies in Sweden, a growing number of European countries and since November 2014 to Canada; and
- Non-criminalisation and regulation: neither the prostitute nor buyer's conduct is criminalised, but the buyer may be criminalised in certain circumstances if he pays a

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<sup>238</sup>

Op cit 6.

<sup>239</sup>

Para 1.61.

<sup>240</sup>

SALRC *Sexual Offences: Adult Prostitution* Discussion Paper 2009.

<sup>241</sup>

Para 1.9 above.

third party to obtain sexual services from a prostitute, or if a prostitute is subjected to force; this model applies in the United Kingdom and New Zealand.

2.5 Each model and its various permutations are underpinned by one or more theoretical approaches to prostitution. These theoretical approaches are in turn grounded in wider constructions of concepts such as male sexuality, morality, and masculinity, as well as the feminist debate.

2.6 There are divergent views and theories on why prostitution exists, including diverse reasons underlying women's engagement in prostitution. Some views are based on theories of exploitation and others are based on a theory of free market involvement and autonomous agency.<sup>242</sup> Some of the most prominent theories are discussed below. In unpacking theories about prostitutes, it is necessary to acknowledge that people enter prostitution "voluntarily" for diverse reasons. Bromberg<sup>243</sup> lists a few categories of people who enter prostitution, namely:

1. People may inadvertently fall into poverty and turn to prostitution but have the emotional fibre to withstand the hardships until they can find something else to do;
2. People may be born poor into families with a long history of poverty and a lack of education, and engage in prostitution so as to access basic necessities;
3. People may enter into prostitution because of defects in their moral character that allow them to fall into association with violent and exploitative social predators, who, like the prostitute herself, do not wish to follow the rules of any legal or moral system;
4. People may be unable to resist the feigned intimacy of pimps or to avert abusive situations and may be lured into prostitution;
5. People may have low intelligence and physical and/or mental problems;
6. People may have been introduced to prostitution through their family history. They know what they are doing and are confident that they can handle most of the dangers;
7. A small category of people in prostitution are attractive and smart. They place themselves out of danger by associating only with wealthy, influential, and intelligent men who can afford to pay a premium price for sexual services; and
8. Some people in prostitution may have irrepressible personalities and seek challenges in the most dangerous of undertakings, testing the limits of society.

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<sup>242</sup> An overview of the main debates around adult prostitution is given under Chapter 4 of the SALC Sexual Offences: Adult Prostitution Issue Paper 2002.

<sup>243</sup> Bromberg, S "Feminist Issues in Prostitution" at 4. Available at <http://www.feministissues.com/> Accessed on 5 July 2011.

2.7 The debate on whether prostitution should be legalised or criminalised seems to have transcended ideological divides. In this century, one of the main questions determining how the law should respond to adult prostitution is whether prostitution should be viewed as work or exploitation. Theories relevant to these viewpoints are discussed in the next section.

## **1 A theoretical approach to prostitution as an economic contract (work)**

2.8 This theory constructs prostitution as an economic contract based on the exercise of a person's self-determination and human rights. For this reason it is argued that prostitution should be non-criminalised. According to this theory, the majority of prostitutes voluntarily choose prostitution and it should therefore be recognised as a legitimate form of work. Proponents of this theory recognise that for some people the choice may be exercised within a limited range of options. The justification for still seeing the decision as voluntary seems to be that a person who engages in prostitution for fear of not being able to meet her own or her family's needs is a victim of economic and social injustice and the decision is beyond the person's control, but the same constraints affect workers in every field. Some workers choose to accept inequitable and possibly dangerous conditions whereas others do not.<sup>244</sup> It is argued that the solution to this injustice lies beyond the scope of the law alone and falls largely within the domain of economic and social rights.<sup>245</sup> Implicit in this view is the assumption that a regulated or non-criminalised sex industry would limit the growth of the brothel and street trade, reduce organised crime, and end child prostitution and sex trafficking.

2.9 Proponents of the theory that prostitution is an economic contract also argue that laws against prostitution constitute a violation of human rights, whereas prostitution itself does not.<sup>246</sup> These theorists argue that drawing a distinction between prostitutes and other female workers who perform labour that is dangerous or low-status (eg domestic workers, factory workers, or women who work on the land) perpetuates exploitative practices against prostitutes. While exploitation may result from prostitution, it also exists in other fields (eg low-paid manual labour in the agricultural industry) and is therefore not unique to prostitution.<sup>247</sup> If prostitution was recognised as work then prostitutes would be able to access ordinary rights,

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<sup>244</sup> According to Bromberg (op cit), "Liberal feminists who advocate unconditional freedoms state that in all businesses there are degrading aspects that must be overcome. Prostitution is a business."

<sup>245</sup> SALC *Sexual Offences: Adult Prostitution Issue Paper 2002* at 32.

<sup>246</sup> Ibid.

<sup>247</sup> Op cit 33.

such as freedom from violence at work, a fair share of the earnings, or the right to leave one's employer.<sup>248</sup>

2.10 This theory suggests that if prostitution was non-criminalised and recognised as work, labour law benefits and protections granted to other employees (such as basic conditions of employment and compensation for injuries on duty) would accrue to prostitutes. For this reason, some of the legislation and benefits applicable to employees in formal employment in South Africa is described briefly below.

2.11 Section 213 of the Labour Relations Act 66 of 1995 defines "employee" as follows:

'employee' means-

- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
  - (b) any other person who in any manner assists in carrying on or conducting the business of an employer,
- and 'employed' and 'employment' have meanings corresponding to that of 'employee'[,]

2.12 Section 1 of The Labour Relations Act 66 of 1995 states the Act's purpose as follows:

' . . .to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are-

- (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;
- (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
- (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can –
  - (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
  - (ii) formulate industrial policy; and
- (d) to promote –
  - (i) orderly collective bargaining;
  - (ii) collective bargaining at sectoral level;
  - (iii) employee participation in decision-making in the workplace; and
  - (iv) the effective resolution of labour disputes.

2.13 Similarly, The Basic Conditions of Employment Act 75 of 1997 defines employees as persons who work or conduct business for another person or for the state for remuneration.

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<sup>248</sup> SALC *Sexual Offences: Adult Prostitution* Issue Paper 2002 at 33.

The Minister of Labour may make a sectoral determination that sets differing minimum standards for specific sectors and may deem categories of persons to be employees. Employment agreements may be concluded orally or in writing, and expressly or by implication. Employment agreements may be concluded for a definite or an indefinite period, and can provide for full- or part time-work as well as temporary work.<sup>249</sup> The Basic Conditions of Employment Act sets the maximum number of ordinary work hours at 45 hours per week and 9 hours per day, and the maximum number of overtime hours at 10 per week. The clause is not applicable to managers or to people who earn above a certain threshold (eg R115 572 per year in 2011), or to sales staff who travel and regulate their own working hours. The overtime rate is set at one-and-a-half times the normal hourly rate. Higher pay rates are specified for work on Sundays (except for people for whom this is an ordinary workday) and on public holidays.<sup>250</sup> The Act provides for a minimum of 21 consecutive days of annual leave each year on full pay, or one day or hour, respectively, for every 17 days or hours, for employees covered by the Act.<sup>251</sup>

2.14 Compensation for injuries and work-related diseases is provided for by the Compensation for Occupational Injuries and Diseases Act 130 of 1993. Administration of the Act is the responsibility of the Compensation Fund, which falls under the Department of Labour and is funded primarily through levies paid by employers. The levies vary according to the level of risk associated with each workplace. Domestic workers are not covered by the Act.<sup>252</sup>

2.15 If a worker is covered by this Act, compensation is available in cases of injury, disability and death. Medical payments are covered, as are the related transport costs. The Department of Labour bears responsibility for health and safety in the broader economy other than the mines.<sup>253</sup>

2.16 A health and safety issue of particular importance in current-day South Africa is HIV and AIDS. The Code of Good Practice on Key Aspects of HIV and Employment was issued in terms of the Employment Equity Act. The goals of the Code include eliminating unfair discrimination in the workplace based on HIV status; promoting a non-discriminatory workplace in which people living with HIV or AIDS can be open about their HIV status without

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<sup>249</sup> ILO "Country Profile" 5.

<sup>250</sup> Op cit 22.

<sup>251</sup> Op cit 23.

<sup>252</sup> Op cit 41.

<sup>253</sup> Ibid.

fear of stigma or rejection; and promoting appropriate and effective ways of managing HIV in the workplace.<sup>254</sup> The Code includes measures to create a safe working environment for all employees, as well as measures to restrict the spread of HIV.<sup>255</sup>

2.17 There is no national law providing for work-related pension benefits. However, some of the bargaining councils and statutory councils established in terms of the Labour Relations Act have established pension and provident funds.<sup>256</sup>

2.18 The Bill of Rights in the Constitution affords every worker the right to form and join a trade union, to participate in union activities and programmes, and to strike. The Labour Relations Act provides for the registration of trade unions and employers' organisations with the Department of Labour. One of the main purposes of forming a labour union is "to promote the collective development of its members and of their profession." A decision in favour of unionizing prostitutes would inevitably promote the development or expansion of prostitution. This would seem to be contrary to the assertion that non-criminalisation would curb the growth of prostitution.

2.19 The benefits for prostitutes of being recognised as employees and being able to access labour rights and benefits are self-evident. Currently, prostitutes are not able to access these rights and benefits for a number of reasons; however, not all of these reasons are associated with the fact that prostitution is criminalised. For example, very few prostitutes working in brothels have written "employment" contracts. The main reason that was cited by a number of prostitutes and brothel owners was the preference of both the prostitutes and management of such establishments to contract independently.<sup>257</sup> The absence of a contract ensures freedom of movement for the prostitute, but also means that there is no proof of "employment" and therefore no evidence of a claim for non-payment. Another reason for contracting independently and not having a written contract is that a contract could give brothel owners leverage over the prostitute, tying them to an agency and making them even more vulnerable to threatened exposure by brothel owners to family members or significant others.<sup>258</sup> The effect of this preference is that even if prostitution were to be recognised as

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<sup>254</sup> ILO "Country Profile" 45.

<sup>255</sup> Ibid.

<sup>256</sup> Op cit 48.

<sup>257</sup> The owner of one of the brothels in Pretoria informed SALRC research staff during a guided night tour that paying the women their cut of the profit at the end of each shift meant that nothing was owing either way so that if they didn't want to arrive for the next shift or to come back it wouldn't be a problem.

<sup>258</sup> Gould C "Selling Sex in Cape Town, Sex Work and Human Trafficking in a South African City" Institute for Security Studies (2008) at 46.

work, the Labour Relations Act would not be applicable as it does not apply to independent contractors.

2.20 Operating outside of the confines of the law and specifically the labour law means that prostitutes who are “employed” in an adult establishment or brothel generally do not have regular working hours, overtime wages, leave or sick leave. They may even be subjected to fines as “punishment” for not complying with the “employer’s” rules. Against this background, a group of prostitutes working in an escort agency<sup>259</sup> in Cape Town obtained an interdict in the High Court in 1999 against the management of the escort agency to refrain from violating their basic rights.<sup>260</sup> The interdict was based on statements indicating that escorts were forced to work excessive hours (in some cases 19-hour shifts per day), could not leave the premises and were not allowed to have personal visitors. In addition, prostitutes were expected to share their beds with other workers and were threatened that the nature of their work would be revealed to their family members if they did not “toe the line”. The management confiscated and held their identity documents and other personal documents, and often failed to hand over money earned by the prostitutes and due to them. Since the agency was recruiting prostitutes from Gauteng, KwaZulu-Natal and the Eastern Cape, these women had almost no support system based in Cape Town, which made it very difficult for them to leave the agency.<sup>261</sup> The Department of Labour conducted an inspection of the premises and found that prostitutes were not being treated in accordance with common labour practices and that conditions were in contravention of the earlier interdict. After another application to the High Court for the management to be found in contempt of the interdict granted in 1999, the matter was eventually settled and the agreement was made an order of court by Judge Desai. The settlement agreement provided that the agency’s management was to ensure that fair labour practices were adopted and followed in the conduct of the businesses.

2.21 Before the settlement was reached, Judge Desai was reluctant to make an order that included specific labour conditions. He noted that prostitution remains illegal and he therefore could not be asked to regulate an illegal industry.

2.22 Falling outside the scope of labour legislation means that prostitutes are unable to mobilise or otherwise ensure safe working conditions. Brothel owners, in turn, are not and

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<sup>259</sup> See SWEAT Press Release dated 29 November 2000. Note that although it is referred to as an escort agency it appears to be common cause that sexual acts were performed for reward on the premises, which implies that the business complied with the definition of “brothel” rather than an escort agency.

<sup>260</sup> Referred to in the SALC *Sexual Offences: Adult Prostitution* Issue Paper 2002 at 58 and further.

<sup>261</sup> Ibid.

cannot be obliged to comply with labour legislation, and arbitrarily determine the “working” conditions of prostitutes working for them, including the percentage of fees paid by clients that is payable to the prostitute. This position changed to some extent after the Kylie case (described below).<sup>262</sup>

2.23 Kylie, employed as a prostitute by a massage parlour in Cape Town, was summarily dismissed from her employment. Kylie ultimately<sup>263</sup> challenged the dismissal before the Labour Appeal Court. The Labour Appeal Court accepted the Constitution as the starting point and agreed that the illegal nature of a prostitute’s activity does not prevent her from enjoying a range of constitutional rights. The Labour Appeal Court endorsed the Constitutional Court’s comments in *S v Jordan* that prostitutes should not be stripped of their right to be treated with dignity by clients, and concluded that the obligation to treat prostitutes with dignity should apply to employers as well.<sup>264</sup>

2.24 The Labour Appeal Court held that the constitutional right to fair labour practices in section 23 of the Constitution included everyone and is wide enough to include a person employed in an illegal activity. The Labour Appeal Court further held that Kylie was entitled to protection against unfair dismissal in terms of section 185(a) of the Labour Relations Act 66 of 1995 since she was an “employee” as defined in section 213 of the Labour Relations Act, being in employment.<sup>265</sup>

2.25 Following the Kylie case, prostitutes in a similar position to Kylie can now approach the relevant Commission for Conciliation, Mediation and Arbitration (CCMA) or Bargaining Council, or the Labour Court. Whereas the Labour Court held that giving prostitutes a remedy would encourage and sanction illegal activity, the Labour Appeal Court said that the common law principle was not absolute or inflexible and the Court has discretion in its application. An arbiter or judge would then have to consider whether the prostitute had been treated unfairly

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<sup>262</sup> *Kylie v Commission for Conciliation, Mediation and Arbitration and Others* 2010 (10) BCLR 1029 (LAC) para [19].

<sup>263</sup> Kylie challenged the dismissal before the Commission for Conciliation, Mediation and Arbitration (CCMA) on the basis that it was procedurally and substantively unfair. The CCMA said that it did not have jurisdiction over the case since prostitution is illegal in South Africa. Kylie then took the matter to the Labour Court. The Labour Court found that the definition of ‘employee’ in the Labour Relations Act was wide enough to include a prostitute. However, in view of the common law principle that courts ‘ought not to sanction or encourage illegal activity’, the Labour Court ruled that a prostitute is not entitled to protection against unfair dismissal. Kylie’s lawyers then appealed the ruling to the Labour Appeal Court.

<sup>264</sup> *S v Jordan* 2002 (6) SA 642 (CC) para [74]. This comment in the minority judgment was not contradicted in the majority judgment, *Kylie v Commission for Conciliation, Mediation and Arbitration and Others* 2010 (10) BCLR 1029 (LAC) para [19].

<sup>265</sup> 2010 (10) BCLR 1029 (LAC) para [59].

and what an appropriate remedy would be. The full range of remedies under the Labour Relations Act will not necessarily be available in every case<sup>266</sup> and a court or arbiter may refuse reinstatement where it is not reasonably practicable for the employer to reinstate the employee. The remedial issues must be tailored to meet the specific context of each case.<sup>267</sup>

2.26 The Labour Appeal Court also made it clear that although prostitutes would, as employees, be entitled to form and join trade unions, they would not be entitled to participate in any activities, including collective bargaining, that amount to the furthering of the commission of a crime – that is, prostitution.<sup>268</sup> The Labour Appeal Court stated that this ruling does not mean that collective agreements purportedly concluded between brothels and prostitute unions are enforceable under the Labour Relations Act of 1995; nor does it imply that prostitute unions would be entitled to exercise organisational rights.<sup>269</sup>

2.27 Another aspect of determining the viability of the theory that prostitution is an economic contract is whether a prostitute can legally conclude an employment contract with a buyer or a brothel owner to provide sexual services; and if not, what type of contract this would be, and what benefits would accrue in terms of such a contract.

2.28 In terms of the law, for a contract to be valid it must meet certain requirements. Parties who have contractual capacity must intend to conclude a contract which is lawful; the performance of the contract must be possible; and the unique formalities of the contract must be met.<sup>270</sup>

2.29 It is trite that as a result of the unlawfulness of prostitution, the possibility of a legal contract to engage in prostitution is scuppered at the outset. As the lawfulness of prostitution is under consideration it would be apposite to lay this element aside and investigate the other requirements. One of the formalities which must be agreed on between the parties is the terms of the particular type of contract.<sup>271</sup> A contract of sale includes the following terms: agreement to purchase and sell, an object of sale, and a price payable in money.<sup>272</sup> Although the object of sale in prostitution is often referred to as “selling” one’s body, the human body

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<sup>266</sup> 2010 (10) BCLR 1029 (LAC) para [59].

<sup>267</sup> Labourman ARTICLES *The Jurisdiction of the CCMA* 2010.

<sup>268</sup> 2010 (10) BCLR 1029 (LAC) para [60], see also Labourman ARTICLES *The Jurisdiction of the CCMA* 2010.

<sup>269</sup> 2010 (10) BCLR 1029 (LAC) para [60].

<sup>270</sup> *Conradie v Rossouw* 1919 AD 279 320 cited in Smith SR *Locatio Conduction Meretrices: The letting and hiring of sex in South Africa* (2010) 25 SAPL at 716.

<sup>271</sup> Per Smith the *essentialia* of the contract refers to those terms which are necessary for a particular type of contract to exist, such as a contract of sale or a contract of letting and hiring.

<sup>272</sup> Smith 717.

legally falls outside the commercial sphere.<sup>273</sup> It would therefore be illegal for a contract to contain a clause on the “selling” of one’s body. According to Smith, for the same reason it is also debatable whether a contract could contain a clause on “letting” or “hiring” the prostitute’s body for sexual services.<sup>274</sup>

2.30 Three types of letting and hiring contracts are recognised in South Africa. The first is a bilateral contract for the use of an object or the use and enjoyment of the fruits of an object; this type forms the basis for letting and hiring of real property.<sup>275</sup> The second is a contract of service and forms the basis for a contract of employment.<sup>276</sup> This is a consensual contract between two parties who agree on the services to be rendered (without a specific result in mind) and the remuneration that will be paid. These contracts are subject to the obligations and benefits of labour law.<sup>277</sup> In the third type of contract,<sup>278</sup> the object of the contract is a particular achievement or a specified result that needs to be reached. In terms of this contract, a customer commissions the work and a provider produces the specific result. This type of contract forms the basis of independent contracting and falls outside of the obligations and benefits of labour law. A person is contracted to work on a corporeal thing<sup>279</sup> of the customer or the customer’s material must be used in the manufacture of the thing. The work must be performed independently within an agreed or reasonable time period, and remuneration must be paid.<sup>280</sup> Smith states that prostitution does not fit comfortably into any of these three forms of contract.

2.31 The elements of an employment contract are as follows: it is a voluntary agreement; between two parties; in terms of which the employee places his or her labour potential at the disposal of and under the control of the employer, in exchange for some form of remuneration. Smith contends that the prostitute places her labour potential at the disposal of and under the control of her client, directly or through the agency of the brothel management. Smith poses the question whether this makes the prostitute an employee and the client an employer, and whether the relationship is one of employment.<sup>281</sup> According to Smith, there are several tests to determine whether a specific contract is a contract of employment or not.

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<sup>273</sup> Smith 717.

<sup>274</sup> Ibid.

<sup>275</sup> *Locatio conductio rei*.

<sup>276</sup> *Locatio conductio operarum*.

<sup>277</sup> Smith 717.

<sup>278</sup> *Location conduction operis*.

<sup>279</sup> Smith (at 718) states that contracts between agents and sportsmen or -women are concluded as such and this suggests that the sportman’s body can be considered to be the corporeal thing .

<sup>280</sup> Smith 717.

<sup>281</sup> Op cit 719.

Despite a range of variables being used in such tests, the results reflect that prostitutes should be classed as independent contractors<sup>282</sup> rather than employees.<sup>283</sup> Furthermore, the private nature of the “relationship” and the “once-off” nature of the services rendered suggest that prostitutes and their clients should not be considered as having an employer–employee relationship. In Smith’s view, a correct interpretation of the “relationship” would place it in the category of independent contractors. Smith’s conclusion is that even if prostitution were to be legalised, prostitutes would simply take their place among recognised artisan or trade groups, and would not be protected by labour law.<sup>284</sup>

2.32 A prostitute who operates as an independent contractor in a non-criminalised environment is unable to access the remedies available to employees. Independent contractors operate outside the scope of the protective measures contained in legislation such as the Labour Relations Act of 1995, Basic Conditions of Employment Act of 1997 and the Occupational Health and Safety Act of 1993. Recognising prostitution as work will not change this situation.

2.33 The theory that prostitution should be recognised as work, and the associated argument that prostitution is a choice made within a limited range of employment choices, must be placed in context. It is important to understand the current socio-economic climate as it interfaces with the demographic makeup of South Africa. South Africa's already grave unemployment situation has been made worse by the recent economic recession.<sup>285</sup> Despite signs of economic recovery and growth, hundreds of thousands of workers have fallen victim to retrenchments.<sup>286</sup> Kimani reports that unemployment figures released by Statistics South Africa showed that between December 2008 and 2009, the economy lost a staggering 870 000 jobs, raising the country’s official rate of unemployment to 24.3%.<sup>287</sup> Kimani states that in concrete terms, South Africa officially has roughly 4.2 million unemployed workers, but this figure excluded roughly 1.7 million additional people who were simply too discouraged to look

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<sup>282</sup> Smith 722.

<sup>283</sup> This view is confirmed by the *South African National Defence Union vs Minister of Defence* where Justice O’Regan, CCT 27/98 at paragraph 22, finds that section 23 of the Constitution is primarily concerned with the complementary rights of workers and employers, and trade unions and employer organisations. It is clear from reading section 23 that it uses the term “worker” in the context of employers and employment. It seems therefore from the context of section 23 that the term “worker” refers to those who are working for an employer which would, primarily, be those who have entered into a contract of employment to provide services to such employer.

<sup>284</sup> Smith 723.

<sup>285</sup> Ndungu Kimani “The Economic Crisis and Its Implication for Workers” published on NGO Pulse available at <http://www.ngopulse.org>.

<sup>286</sup> Ibid.

<sup>287</sup> Ibid.

for work because there were no jobs available in their area, or because they had completely lost hope of finding work.<sup>288</sup> Statistics South Africa reports that unemployment during the second quarter of 2013 was between 24.7% and 25.6%.<sup>289</sup>

2.34 The country's social security system has experienced tremendous pressure. Workers who have lost their jobs have been forced to rely on unemployment insurance benefits or on family members who receive a state social grant. The Unemployment Insurance Fund established in terms of the Unemployment Insurance Act of 2001 provides a respite for people in the formal sector who become unemployed. However, it does not reach beyond the formal sector or to formal sector workers who are not registered by their employers, and the period for which benefits are received is limited. These benefits are not available to people who have never been employed or registered with the Fund. Currently over 13 million people receive some form of grant on a monthly basis, and it is widely known that many grants support not just the individual recipient but often a whole family.<sup>290</sup>

2.35 South Africa's social security system offers no form of income support to indigent people between the ages of 17 and 60 years, unless they have a disability. In other words an unemployed able-bodied person between the age of 17 and 60 years gets no income support whatsoever from the state. Their only option is to rely on relatives, family members and friends for survival.<sup>291</sup> The Social Assistance Act 45 of 1994 provides for non-occupational disability through the non-contributory disability grant for people aged 18 to 59 years. The amount is the same as the old-age grant.<sup>292</sup> The trends suggest that HIV/AIDS was a strong contributor to the increase in demand for the grant.<sup>293</sup>

2.36 According to the ANC Gender Paper, women make up 52% of the entire South African population, and 57% of working women are employed in the informal sector.<sup>294</sup> The Paper reported that data contained in the Labour Force Survey conducted by Statistics SA<sup>295</sup> from July to September 2011 showed that 22.5% of men were unemployed, compared with 28% of women, and that poverty in South Africa can therefore be seen as highly gendered.<sup>296</sup> (More

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<sup>288</sup> Ndungu.

<sup>289</sup> Statistics South Africa "Key Indicators" Accessed online December 2013; also *Quarterly Labour Force Survey* Quarter 3, 2013 (PO 2011) at 2. Available at <http://www.statssa.gov.za>.

<sup>290</sup> Ndungu .

<sup>291</sup> Ibid.

<sup>292</sup> ILO "Country Profile" 50.

<sup>293</sup> Ibid.

<sup>294</sup> African National Congress (ANC) Gender Paper prepared for the ANC Policy Conference 2012 – Discussion Document (2012) para 37.

<sup>295</sup> Statistics SA Quarterly Labour Force Survey 2011.

<sup>296</sup> ANC Gender Paper 2012 at par 34.

recent data have shown the same pattern, with only a slight closing of the gap; unemployment among South African women was 26.7% to 28.3% in 2013, compared with 23.1% to 23.4% among men.<sup>297</sup> Lack of employment opportunities and the absence of an independent source of income means that many women are forced to rely on their spouses, immediate family members, relatives or friends for survival.<sup>298</sup> Female-headed households are disproportionately affected by poverty.<sup>299</sup> Minimal support is accessible for women with children or for young women in child-headed households through the Child Support Grant which people can receive from birth to 17 years.<sup>300</sup> Low earning workers who are the primary caregivers of children under 17 years of age are entitled to this grant.<sup>301</sup>

2.37 The means by which poverty-stricken, unemployed and often uneducated women in South Africa try to make a living – including through prostitution – bears stark testimony to the socio-economic realities they face. The ANC Gender Paper reported that the power imbalance through which men dominate women in economic, social, cultural, and sexual matters dooms young women and girls, exposing them to greater chances of contracting HIV and AIDS.<sup>302</sup> The epidemic has impacted negatively on household income security through the loss of income caused by HIV-related death and illnesses.<sup>303</sup> This pattern is especially evident when women engage in prostitution.

2.38 Despite the levels of unemployment in the country, South Africa is still seen by many people in neighbouring countries as a place of economic opportunity. The number of illegal and undocumented immigrants<sup>304</sup> is estimated at between three and six million people, but remains unknown.<sup>305</sup> A large number of the prostitutes from Hillbrow and Rustenburg who participated in Commission workshops were from Zimbabwe or Mozambique. Without residency or work permits they were unable to enter the formal economy or to secure alternative viable employment. The Constitution specifies that “every citizen has the right to

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<sup>297</sup> *Quarterly Labour Force Survey* Quarter 3, 2013 (PO 211) Statistics South Africa. Available online at <http://www.statssa.gov.za> at 2-3.

<sup>298</sup> ANC Gender Paper 2012 at 9.

<sup>299</sup> Op cit 10.

<sup>300</sup> Op cit 17.

<sup>301</sup> This non-contributory grant, which is paid on a monthly basis, has a value of R270 as of October 2011. The means test is set at ten times the amount of the grant, and would thus exclude all those earning more than R2700 in October 2011.

<sup>302</sup> ANC Gender Paper 2012 at 20.

<sup>303</sup> ILO “Country Profile” 2.

<sup>304</sup> The majority are from Zimbabwe, Mozambique and Angola. The Centre for the Study of Violence and Reconciliation (CSVr) ‘Burning the welcome mat’ available at [www.csvr.org.za](http://www.csvr.org.za) (2013).

<sup>305</sup> “Home Affairs in the dark about number of illegal immigrants” *Mail & Guardian* 13 November 2009 available at <http://mg.co.za>.

choose their trade, occupation or profession freely,<sup>306</sup> thereby restricting non-citizens' access to employment in South Africa, especially if they are in the country illegally.

2.39 A country battling economic decline often experiences a burgeoning of prostitution and is also sometimes the origin from which prostitutes migrate in search of higher earnings. This has been the experience in Madagascar, a country currently fighting a rising tide of sex tourism, with many prostitutes aged under 18.<sup>307</sup> Whereas tourism initially attracted women selling sexual services, tourism is now declining because of the widescale prostitution.<sup>308</sup> According to Ratsarazaka Solomandresy of the United Nations Population Fund (UNFPA) youth programme, "sex has become a product, a means to survive."<sup>309</sup> In 2012 it was reported that strict prostitution laws had been introduced into Madagascar to turn the tide of sex tourism.<sup>310</sup>

2.40 This is an important issue in determining the preferred legislative option for South Africa. The legislative stance taken is one of the clearest statements of who we are as a nation.<sup>311</sup> An equally important question is: What employment and tourist market segment does South Africa wish to attract? Would South Africa's large home-based hospitality industry prefer to attract more people to this country who have a predisposition to gender-based violence,<sup>312</sup> as opposed to tourists who visit with a view to appreciating this country and its heritage?

2.41 The IPL 20/20 cricket series and the Confederation Cup that South Africa hosted in the not-so-distant past showed that South Africa has all the appeal necessary to attract high tourist volumes – without the need to erode "brand value" by positioning the country as a sex tourism destination.<sup>313</sup> The recognition of prostitution as an economic contract or work may have the same unintended consequences in South Africa as has been felt in countries such as Madagascar.

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<sup>306</sup>

Section 22.

<sup>307</sup>

IRIN Africa UN Office for the Coordination of Humanitarian Affairs Madagascar: "Fighting a rising tide of sex tourism" 26 November 2010 available at <http://www.irinnews.org/> Accessed on 4 September 2012.

<sup>308</sup>

Ibid.

<sup>309</sup>

IRIN Africa UN Office for the Coordination of Humanitarian Affairs Madagascar: "Sex for survival" 28 August 2012 available at <http://www.irinnews.org/> Accessed on 4 September 2012.

<sup>310</sup>

Worldnomads.com "Local Laws & Customs – Madagascar" available at <http://journals.worldnomads.com> (7 January 2012).

<sup>311</sup>

Nation Building.

<sup>312</sup>

Ibid.

<sup>313</sup>

Ibid.

2.42 As South Africa is a member state of the International Labour Organisation (ILO), it is apposite to determine the ILO's position on prostitution and work, and whether the ILO considers prostitution to be a source of recognised employment. Of particular importance is its stance on decent work.

2.43 In a contested 1998 report, the ILO called for economic recognition of the sex industry. Citing the expanding reach of the industry and its unrecognised contribution to the gross domestic product (GDP) of four countries in Southeast Asia, the ILO urged official recognition of what it termed "the sex sector". The report stated that recognition would include extending "labor rights and benefits to sex workers", improving "working conditions" in the industry, and "extending the taxation net to cover many of the lucrative activities connected with it." Although the ILO report claimed to stop short of advocating the legalisation of prostitution, the economic recognition of the sex sector that it promoted would not be possible without legal acceptance of the industry.<sup>314</sup> Dr JG Raymond contends that the ILO's stance in this report ignores the violence and health consequences experienced by women in prostitution and therefore points to indifference towards the injury and suffering of women in prostitution.<sup>315</sup> Raymond also criticises the ILO's apparent endorsement of third parties as entrepreneurs in the economy of sex and stated that this effectively classifies women as commodities.<sup>316</sup> By contrast, Ditmore<sup>317</sup> found the recognition of the sex industry as labour "refreshing", but criticised the call for governments to create alternative employment, saying that this would only be possible in an ideal world.

2.44 In its 2010 "International Labour Office Recommendation Concerning HIV and AIDS and the World of Work", the ILO notes that its core mandate is to promote decent work and sustainable enterprises. The ILO 2010 recommendation reflects a subtle shift away from the broader economic benefits for the GDP towards the individual needs of people to be engaged in "decent work".<sup>318</sup> It does not make reference to prostitution as decent work or as being covered by the report on the world of work.<sup>319</sup> The ILO defines "decent work" as follows:

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<sup>314</sup> Raymond "Legitimizing Prostitution as Sex Work".

<sup>315</sup> Ibid.

<sup>316</sup> Ibid.

<sup>317</sup> Ditmore M "Addressing Sex Work as Labour" Network of Sex Work Projects (June 1999) Prepared for the Working Group on Contemporary Forms of Slavery Geneva available at <http://www.swimw.org/aslabor.html> Accessed on 2 September 2008.

<sup>318</sup> Nation Building.

<sup>319</sup> International Labour Office "Recommendation Concerning HIV and AIDS and the World of Work" 2010 (No.200) available at <http://www.ilo.org> Accessed on 10 May 2012.

Decent work sums up the aspirations of people in their working lives – their aspirations for opportunity and income; rights, voice and recognition; family stability and personal development; and fairness and gender equality. Ultimately these various dimensions of decent work underpin peace in communities and society. Decent work reflects the concerns of governments, workers and employers, who together provide the ILO with its unique tripartite identity.<sup>320</sup>

2.45 According to the ILO,<sup>321</sup> productive employment and decent work are key elements to achieving the reduction of poverty. Putting the ILO Decent Work Agenda into practice is achieved through four strategic pillars: job creation, right to work, social protection, and social dialogue. Gender equality is seen as a crosscutting objective.<sup>322</sup>

2.46 Similarly, the overall goal of the Decent Work Programme for South Africa is to promote opportunities for people to obtain decent and productive work in conditions of freedom, equity, security and human dignity.<sup>323</sup> The aim of the New Growth Path of 2010 is to create decent work that will contribute to reducing inequality and defeating poverty.<sup>324</sup> This aim augments the National Development Plan 2030, which envisions a country where opportunity is determined not by birth but by ability, education and hard work. To achieve these goals, the plan focuses on better educational and economic opportunities and efforts to eliminate gender inequality.<sup>325</sup>

2.47 The New Growth Path 2010 document presents a vision for the creation of five million new jobs by 2020, which would reduce unemployment to approximately 15%.<sup>326</sup> However, actual unemployment in South Africa rose from just over 22% in 2006–2008 to 24.9% in 2010 (ie 10% higher than the New Growth Path goal).<sup>327</sup> If people who had given up looking for work are included in the unemployment figures for 2010, unemployment was as high as 35.8% that year. Among men, the unemployment rate was 31.5% and among women it was 40.7%.<sup>328</sup> These figures show a substantial difference by gender, with more women than men

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<sup>320</sup>

Nation Building.

<sup>321</sup>

International Labour Organisation (ILO) “Decent Work and the Millennium Development Goals” available at <http://www.ilo.org> Accessed on 10 May 2012.

<sup>322</sup>

Ibid.

<sup>323</sup>

Op cit 7.

<sup>324</sup>

Ibid.

<sup>325</sup>

National Planning Commission (NDP) “Executive Summary” 14.

<sup>326</sup>

ILO “Country Profile” 2011.

<sup>327</sup>

Ibid. South Africa’s unemployment rate remained similar by 2013, ranging from 24.7% to 25.6% during 2013, as reported in *Quarterly Labour Force Survey* Quarter 3,2013 (PO 211) Statistics South Africa. Available online at <http://www.statssa.gov.za> at 2.

<sup>328</sup>

The Commission is aware that unemployment figures are influenced by the definition of “unemployment” on which the calculations are based. Similarly to the New Growth Path 2010, Statistics SA reports that using an “expanded definition” yields substantially higher

being unemployed. There were also stark differences by race group, and substantially higher unemployment rates for youth than for older people.<sup>329</sup>

2.48 The core objective of the government as set out in Vision 2014 and government's Medium Term Strategic Framework and Programme of Action 2009–2014 is to halve poverty and unemployment by 2014, and to ensure a more equitable distribution of the benefits of economic growth.<sup>330</sup> One of the solutions proposed in the ANC Gender Paper to address the inequality in unemployment is to make the New Growth Path for economic development gender-sensitive, to ensure that women constitute 50% of beneficiaries of the Job Fund.<sup>331</sup> These objectives address the core reasons cited by the majority of women involved in prostitution in South Africa, namely poverty, unemployment and the lack of decent equal employment.

2.49 The National Development Plan 2030 identifies a number of direct and immediate measures to address poverty. To reduce the acute effects of poverty on millions of South Africans in the short term, proposals in the plan include the following: introducing active labour market policies and incentives to grow employment; expanding public employment programmes; strengthening primary health-care services and broadening district-based health programmes; expanding welfare services and public employment schemes; introducing a nutrition programme for pregnant women and young children; and improving the quality of education in underperforming schools.<sup>332</sup>

2.50 SWEAT<sup>333</sup> submits that women often enter prostitution to deal with poverty and economic necessity or to escape links with previous violence, or due to a desire for independence or a better life. The counter-argument is that selling sex exposes women to risks that can entrap them further into poverty, exacerbate their existing social difficulties and increase their dependence on men.<sup>334</sup> It is a gendered reality that prostitution may be the best of the worst economic options that many women face, and it is understandable that women turn to prostitution in these circumstances. However, does this mean that because there are often no better job options for women, their desperate economic plight should be

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unemployment figures (35.6% to 36.8% for all South Africans in 2013; women 39.1% - 41.2%; men 32.4% - 32.8%.) Source *Quarterly Labour Force Survey Quarter 3, 2013* at 13 – 14. Regardless of the definition or data source used, it is clear that unemployment levels are extremely high in South Africa, and that more women than men are unemployed.

<sup>329</sup>

ILO "Country Profile" 2011.

<sup>330</sup>

Op cit 1.

<sup>331</sup>

ANC Gender Paper 2012 at 10.

<sup>332</sup>

National Planning Commission "NDP Executive Summary" 18.

<sup>333</sup>

SWEAT.

<sup>334</sup>

Kelly et al 59.

manipulated against them by institutionalising their exploiters as “entrepreneurs”? According to Dr JG Raymond this would mean surrendering the political battle for women’s rights to decent and sustainable work, and tolerating the increasing purchase of women’s bodies for sex or for use as merchandise in the marketplace.<sup>335</sup> Most prostitutes find themselves helplessly and perpetually trapped in a debt maze. They end up less able to cope with economic disadvantage or further impoverished.<sup>336</sup> Using detailed and complex econometric models, Linda De Riviere concludes that the short-term earnings premium that prostitution may provide is offset by the loss of potential future earnings and human capital. She refers to selling sex as a temporary life experience with permanent impacts on lifetime earnings, which increases women’s vulnerability to lifelong poverty.<sup>337</sup>

2.51 According to Matthews<sup>338</sup> the non-criminalisation position is superficially attractive as a legislative option, with its promise to end street prostitution and provide safer managed settings. This view has been given further impetus by the “sex work” discourse, one variant of which has sought to present prostitution as a “job like any other”. An implicit presumption of this position is that sex businesses are interested in entering into the formal economy and/or in promoting dignity at work. However, both of these motivations were found to be lacking in a nine-country study conducted by Kelly, Coy and Davenport. This study found that although some examples of better practice did exist, exploitation remained the order of the day.<sup>339</sup> The study used a comparative methodology and the results showed that attempts to treat prostitution as a “job like any other” met with insuperable obstacles. One of these was the resistance among sex businesses to becoming employers, and their preference to adapt rather than end their exploitative practices. These findings have implications for prostitution policy, as they provide evidence that not only does such policy not “fit” existing employment and health and safety regulations, but that regulatory bodies invariably fail to enforce the powers they have been accorded.<sup>340</sup> Furthermore the very personal and private nature of the service provided through prostitution heightens a prostitute’s vulnerability to exploitation. Recognising the legitimacy of the sex sector and prostitution merely as an economic contract may reinforce women’s subordination and worsen their sexual objectification and economic inequality.<sup>341</sup>

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<sup>335</sup> Raymond “Legitimizing Prostitution as Sex Work”.

<sup>336</sup> Ibid.

<sup>337</sup> As quoted by Kelly et al 59.

<sup>338</sup> Matthews R *Prostitution, Politics & Policy* (2008) Routledge Cavendish 105.

<sup>339</sup> Kelly et al 60.

<sup>340</sup> Ibid.

<sup>341</sup> Raymond “Legitimizing Prostitution as Sex Work”.

## 2 Prostitution in the context of exploitation

2.52 This theory holds that prostitution is inherently exploitative, and that domination and violence are its essential features. According to this perspective, the sexual acts of prostitution per se constitute violence, even where the prostitute “consents” to such acts.<sup>342</sup> Women are said to be essentially coerced or physically forced into a life of prostitution. The coercion may be direct or may be a result of the economic marginalisation of women through educational deprivation and job discrimination, which ultimately renders women vulnerable to recruitment into prostitution.<sup>343</sup> Economic marginalisation can be viewed as a relatively subtle form of coercion, which implies that even if a woman appears to freely choose prostitution (over a life of poverty) as the most lucrative form of employment available to her, this choice is not really made voluntarily.<sup>344</sup>

2.53 This theory holds that essentially prostitution is nothing more than the exploitation by people having social and economic power of other people who are made vulnerable by poverty, inequality, violence and abuse. Prostitution is not work in any conventional sense of the word; it is a survival strategy.<sup>345</sup> Accordingly, Marxist feminists advocate that a prostitute is a victim of the economic system, and that prostitution degrades the dignity of humans caught in involuntary servitude to a system that unconscionably exploits people.<sup>346</sup>

2.54 A desperate need for money – which can be linked to drugs, debt bondage, a controlling pimp, or material needs – places women in contexts where they take decisions that compromise their safety, or which involve accepting exploitative conditions. These women are not “victims” in the narrow sense of the concept (totally powerless); they make active choices. These choices, however, take place in conditions not of the women’s own choosing, and within which there are few if any options that do not include the potential of sustaining harm or of having one’s rights compromised. Some of these dangers are inherent in the institution of prostitution and are thus impervious to change through law or policy.<sup>347</sup> Some data suggest that in formalised or extensive sex industries where most transactions take place indoors, levels of violence are similar to those experienced in street settings. This suggests that there are men (and some women) who buy sex, or who manage and make

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<sup>342</sup> SALC *Sexual Offences: Adult Prostitution* Issue Paper 2002 at 34.

<sup>343</sup> Op cit 35.

<sup>344</sup> Op cit 36.

<sup>345</sup> Family Policy Institute “Legalised Prostitution will Remove Barriers to Sex Traffickers”.

<sup>346</sup> Bromberg.

<sup>347</sup> Kelly et al 59.

profits from sex businesses, who use violence to control women and get what they want, or to express their misogyny. The place in which they enact such violence is a function of the structure of local prostitution regimes.<sup>348</sup> Kelly et al state that the legal framework does not affect the level of this type of violence, merely where it takes place. They also suggest that in certain settings, more prostitutes report violence against them because of the local climate of trust that has been built by state agencies, individuals, or services; in such instances, higher levels of reporting are not the result of the legislative model applied.<sup>349</sup>

2.55 Flowers<sup>350</sup> notes that the majority of female prostitutes entered prostitution as victims of physical or sexual abuse, in other words coming from a background of exploitation. He reports that studies of runaways have shown that more than half had been victims of sexual abuse at home. Sixty per cent had parents who abused alcohol and/or drugs, 25% had been raped, and almost all were from dysfunctional families.<sup>351</sup> Flowers argues that the cause-and-effect relationship between physical and sexual abuse and prostitution is clear. Many such victims leave their abusive homes or are thrown out of them; they inevitably end up on the streets, in a life of prostitution and drugs. In many instances the abuse they escaped numbs them to the abuse they face from pimps, buyers, drug dealers, addicts and even the police.<sup>352</sup>

2.56 As stated above,<sup>353</sup> the counter-argument to the theory that prostitution is inherently exploitative, and that domination and violence are its essential features is that laws criminalising prostitution constitute a violation of human rights which result in exploitation.<sup>354</sup> In South Africa, prostitutes report that they are exploited by police, clients, partners and others.<sup>355</sup> They report that they experience violence, abuse and harassment.<sup>356</sup>

2.57 In 2009, following the exploitation of some prostitutes by certain members of the South African Police in the Cape, the Cape High Court interdicted the South African Police Services and the Cape Metropolitan Police from arresting prostitutes for any purpose other than

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<sup>348</sup> Ibid.

<sup>349</sup> Ibid.

<sup>350</sup> Flowers RB, *The Prostitution of Women and Girls* (1998) at 27.

<sup>351</sup> Endorsed by the submission received from Marge Ballin, Director of Inter Outreach Ministries and the interviews with Noleen and Jody in the Rockingchair submission.

<sup>352</sup> Flowers 28. Supported by Bart Love in the Rockingchair submission in which he states that “another harsh reality for me was how so many of the women we spoke to resort to drugs to cope with the harsh reality of life as a prostitute. That it itself speaks volumes. I don’t have to take drugs to numb myself to do my job.”

<sup>353</sup> See para 2.9 above.

<sup>354</sup> SALC *Sexual Offences: Adult Prostitution* Issue Paper 2002 at 32.

<sup>355</sup> Thandi, Busie, Felicia, Suzan and Muchaneta of Hillbrow all submitted claims of abuse by buyers and that police disregarded their right to report or to investigate crimes against them.

<sup>356</sup> SWEAT/Manoek.

bringing the arrestees before a court of law to face due prosecution.<sup>357</sup> During the same year the Women's Legal Centre (WLC) and SWEAT entered into a joint project titled "Every sex worker a human rights defender", funded by the Open Society Foundation of South Africa.<sup>358</sup>

2.58 This project has reported the following findings: prostitutes are unlawfully arrested and do not appear in court; they are often held for longer than 48 hours; police officers use arrest and harassment to extort and exploit prostitutes, either by sexually or physically assaulting them and/or by bribing them; when arrested and detained, prostitutes are not allowed to make phone calls; they are exposed to terrible conditions in the cells and are denied food, water and medical assistance; and prostitutes are fined when they have not contravened by-laws.<sup>359</sup>

2.59 Based on these findings and to protect the women against violence, the WLC and SWEAT have recommended that laws prohibiting the selling and buying of sex should be repealed, to facilitate prostitutes' increased access to health services.<sup>360</sup> They also make what can be termed non-legislative recommendations within the existing criminalized framework, as follows:

1. The Commission on Gender Equality and the Human Rights Commission should investigate the human rights violations that prostitutes experience.
2. The police should investigate reports of violence and unlawful conduct by officers of its own institution.
3. Together with prostitutes, the police should establish guidelines for police conduct when dealing with prostitutes.
4. Administrative mechanisms for monitoring and responding to reports of police violence and unlawful conduct should be developed to help minimise such occurrences, to enable effective responses, and to ensure the protection of complainants from further victimisation.
5. A memorandum of understanding should be established between the police and prostitute civil rights movements, in which they commit themselves to monitoring reports.

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<sup>357</sup> Legal Resources Centre (LRC) "Court rules in favour of SWEAT" 20 April 2009 available at [www.lrc.org.za](http://www.lrc.org.za).

<sup>358</sup> SWEAT/Manoek.

<sup>359</sup> Ibid.

<sup>360</sup> Ibid.

6. Directives should be issued to their staff prohibiting them from harassing and arresting prostitutes for ulterior purposes, and to comply with the interdict that SWEAT obtained in 2009.<sup>361</sup>

2.60 The WLC and SWEAT call on international human rights institutions to investigate South Africa's failure to protect the human rights of prostitutes, to hold the state accountable for violating their rights (as protected in the international and regional treaties to which South Africa is a signatory), and to support the call for the non-criminalisation of prostitution in South Africa.<sup>362</sup>

2.61 As can be deduced from the discussion above, the relationship between NGOs mobilising to non-criminalise prostitution and the police remains tenuous at best. The relationship has been particularly fragile in the Western Cape since the establishment of the "Vice Squad" in the City of Cape Town's Specialised Law Enforcement Services.<sup>363</sup> The Vice Squad<sup>364</sup> is tasked with actively enforcing the "City's By-law relating to Streets, Public Places and the Prevention of Noise Nuisance"<sup>365</sup> as it relates to prostitution; the Vice Squad also assists the South African Police Service in enforcing contraventions of the Sexual Offences Act and the Sexual Offences Amendment Act.<sup>366</sup> The officers are specially trained to carry out surveillance on prostitutes, to arrest them and to ensure their successful prosecution. As part of the city's new strategy, the Vice Squad reportedly also plans to arrest prostitutes' clients instead of just giving them spot fines as is the current practice.<sup>367</sup> According to the mayoral committee member for safety and security for the city, the main motivation behind the intensification of police activities is that "the areas where sex workers work, slum very badly". In the first week of the Vice Squad's assumption of duty, 84 prostitutes were arrested as habitual criminals and profiled as such.<sup>368</sup> The organisation Embrace Dignity submits<sup>369</sup> that prostitutes welcome the profiling because it is a form of identification and record-keeping. If a transaction goes bad and the prostitute is killed, her family can be informed.

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<sup>361</sup> Ibid.

<sup>362</sup> Ibid.

<sup>363</sup> Western Cape Provincial Government Information on "Vice Squad" available at <http://www.westerncape.gov.za>.

<sup>364</sup> Western Cape Provincial Government "City's Vice Squad takes 17-year old Prostitute off the Streets" (12 October 2009) available at <http://www.westerncape.gov.za>.

<sup>365</sup> Western Cape Provincial Government "City's By-law relating to Streets, Public Places and the Prevention of Noise Nuisance" GN 6469 (28 September 2007).

<sup>366</sup> Western Cape Provincial Government "City's Vice Squad assists SAPS in Brothel Closures" (15 October 2009) available at <http://www.westerncape.gov.za>.

<sup>367</sup> Dr L Agustin "What Vice Squad do to Stop Street Prostitution" Cape Town (2009) available at [www.lauraagustin](http://www.lauraagustin).

<sup>368</sup> "Legal Victory Offers Little Relief for Sex Workers" IPS News (2009).

<sup>369</sup> Meeting between the researcher and Embrace Dignity on 7 December 2012.

2.62 Neil Arendse, spokesperson for the City’s Special Law Enforcement Units cautions of the “constant link between prostitution and the drug trade”.<sup>370</sup> He claims that

[M]any people are forced to prostitute themselves to sustain their drug addiction. Some of them are pimped by husbands or boyfriends, some of whom seem not to be South African. When arrested sex workers are asked to supply phone numbers of family, friends or next of kin, and in the follow-up phone call, the telephone is often answered by men with foreign accents.<sup>371</sup>

2.63 When questioned about the exploitation of prostitutes in the Sunnyside area in Pretoria, the police informed the Commission’s researchers that no-one wants to be arrested and that prostitutes do resist arrest, especially if they are “under the influence”. The Commission’s researchers were also told that “there are bad apples in any bag” and if there is any form of exploitation by police linked to an arrest or threat of arrest, this is unlawful and needs to be reported to the Independent Complaints Directorate<sup>372</sup>(as it was formerly known).<sup>373</sup> As mentioned in Chapter 1, such allegations are said to be viewed in an extremely serious light. The Deputy Minister of Police has expressly committed to take severe steps against any police member who is found guilty of unlawful behaviour towards prostitutes.<sup>374</sup>

2.64 The issue of combating the association between prostitution and criminality was also addressed in the nine-country study by Kelly et al.<sup>375</sup> The study found that none of the regimes of the nine countries studied had addressed or diminished the criminal aspects of prostitution<sup>376</sup> or the exploitation associated with it. The results also showed that in some countries advocating non-criminalisation or legalisation, the result was an unfettered growth of the illegal sector. Legalisation has focussed primarily on brothels resulting in existing policies, licensing and enforcement targeting brothel owners. Although brothel owners may use coercion, it is predominantly exercised by pimps – who are not always visible (and of whose existence brothel owners are not necessarily aware). The number of prostitutes having pimps has not decreased in non-criminalised settings.<sup>377</sup> When coupled with the virtual absence of prosecutions for exploitation of prostitution offences, this finding has profound

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<sup>370</sup> Western Cape Government “17 –year-old Prostitute”.

<sup>371</sup> Ibid.

<sup>372</sup> Owen Musiker.

<sup>373</sup> Renamed the Independent Police Investigative Directorate.

<sup>374</sup> SWEAT National Sex Work Symposium Best practices in HIV prevention, care and treatment for sex workers in South Africa (August 2012) Presentation titled “Sex Work, HIV and Human Rights: the role of the South African Police in reducing stigma among sex workers” by guest speaker: Deputy Minister of Police, Hon. Maggie Makhoso Sotyo.

<sup>375</sup> Kelly et al 59.

<sup>376</sup> Ibid.

<sup>377</sup> Ibid.

implications and appears to challenge the claim that force and coercion have been reduced by non-criminalisation. The model in New Zealand, in which two or three women organise together independently of pimps, brothels or an organised sex business, has been no more effective. Most women selling sexual services lack the capital to buy and convert a property themselves; the majority of prostitutes lack the resources to set up their own business.<sup>378</sup>

2.65 Kelly et al report<sup>379</sup> that a failure across most prostitution regimes has been the underestimation of the structure, power and vested interests of the sex industry, including deeply entrenched exploitative practices. These have proved impervious to change across all regimes and cannot simply be wished away.

2.66 Kelly et al<sup>380</sup> also identify a number of shared policy goals across the regimes they studied, although various legislative routes were used to achieve them. The policy goals were as follows:

- that there are criminal associations which need to be addressed;
- street prostitution cannot be made “safe” and should not be normalised;
- that the exploitation of prostitution by third parties should be prohibited.

2.67 Kelly et al conclude that on the basis of the data examined, the case for legalisation is weak and unsubstantiated.<sup>381</sup> The rationale behind the law in both the Netherlands and Victoria, Australia was to “provide more control over criminal behaviour and to ensure women were protected from violence and exploitation”.<sup>382</sup> Neither of these aims has been achieved, with organised crime – including trafficking – flourishing in both localities, and the illegal layers of the industry continuing to accommodate women who fund drug addictions.<sup>383</sup> Kelly et al state that the legalisation of prostitution carries its own costs. It places significant burdens on police and local authorities to enforce regulations and control the illegal sectors.<sup>384</sup> Non-criminalisation in New Zealand has not led to the kind of unintended consequences associated with legalisation; it has yet to deliver on the hoped-for changes in the organisation of prostitution and to rectify regulation that has consistently been under-enforced. The Swedish model, which non-criminalises women who sell sex, has also not had the unintended consequences which many predicted. There is more than one route to non-criminalising people who sell sex; the first places criminal responsibility on the buyer and the

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<sup>378</sup> Ibid.  
<sup>379</sup> Op cit 61.  
<sup>380</sup> Ibid.  
<sup>381</sup> Ibid.  
<sup>382</sup> Ibid.  
<sup>383</sup> Ibid.  
<sup>384</sup> Op cit 62.

second non-criminalises both the seller and the buyer.<sup>385</sup> Globally policies have shifted, with increasing recognition that much-heralded reforms favouring non-criminalisation have failed to deliver material benefits to women who sell sex, or have had unintended consequences placing women at risk of further exploitation. Kelly et al argue that to be effective, prostitution regimes need to develop holistic responses that encompass women who sell, men who buy, and others who profit simultaneously.<sup>386</sup>

### 3 The theory that legalised prostitution causes an increase in human trafficking

2.68 The theory exists that non-criminalised or legalised prostitution gives rise to an increase in human trafficking. Proponents of this view argue that combating human trafficking requires combating prostitution, and that criminalising prostitution reduces trafficking by removing the demand for women to be used in legal sex industries.<sup>387</sup> Others disagree.<sup>388</sup> They argue that legalising prostitution would improve the safety and working conditions of prostitutes, which would allow sex businesses to recruit from among domestic women – who would freely choose prostitution as an occupation. In turn, this would make the option of trafficking women from other places less attractive.

2.69 Despite taking a very firm stance against trafficking in human beings,<sup>389</sup> current international law does not take a specific stance on the preferred legislative framework for dealing with trafficking in persons and adult prostitution. Cho, Dreher and Neumayer<sup>390</sup> point out that on the one hand the UN International Convention for the Suppression of the Traffic in Persons (1949) called on all states to suppress prostitution, but on the other hand the International Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (supplementing the United Nations Convention against Transnational Organized Crime, 2000) does not clearly state its position on prostitution.<sup>391</sup> In terms of article

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<sup>385</sup> Kelly et al 62.

<sup>386</sup> Ibid.

<sup>387</sup> Cho, S.-Y., Dreher, A. and Neumayer, E. *Economics of Security Working Paper 71* “Does Legalized Prostitution Increase Human Trafficking?” Berlin: Economics of Security (2012) at 3.

<sup>388</sup> Op cit 4.

<sup>389</sup> The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, 2000 (Palermo Protocol).

<sup>390</sup> Cho et al “Does Legalized Prostitution Increase Human Trafficking?” 2012 at 3.

<sup>391</sup> It is rumoured that reference to prostitution was omitted so as to ensure more signatories.

9.5 of the Palermo Protocol, to which South Africa is a signatory, States Parties must go further than discouraging the demand for trafficked persons, by taking measures to discourage the demand that fosters all forms of exploitation of persons – especially women and children – and leads to trafficking. Some argue that this would include criminalising prostitution to reduce trafficking.

2.70 A recent study<sup>392</sup> analysed empirical data from 150 countries to determine whether legalising prostitution was associated with a substitution effect causing a reduction in trafficking, or a scale effect in increasing trafficking. The results showed that countries with legalised prostitution had a statistically significant larger reported incidence of human trafficking inflows compared with countries in which prostitution was not legalised.<sup>393</sup> The fact that human trafficking always remains illegal even if prostitution is legal was taken into account. So too was the fact that as with other illegal markets (eg the market for classified drugs or endangered species), illegality does not eradicate the market; there is strong demand from clients on the one hand, and the willingness to supply prostitution services on the other hand.<sup>394</sup>

2.71 Cho et al state that it is commonly recognised that where prostitution is illegal, despite working conditions that many would regard as exploitative, wages are relative to the wages people could earn outside prostitution. There is a wage premium if prostitution is illegal compared to a situation where it is legal.<sup>395</sup> Cho et al suggest that legalising prostitution would invariably increase the demand. In turn, people who were deterred from offering prostitution services – as either prostitutes or pimps – would enter the market if the barrier of prosecution was removed, thereby increasing supply.<sup>396</sup> The authors then pose the question whether “If the scale of prostitution becomes larger once it is rendered legal, will the incidence of human trafficking also increase?”

2.72 Cho et al note that in a legalised setting, sex businesses wishing to take advantage of the legality of prostitution would want to recruit more national citizens or foreigners legally residing with a work permit in the country, since employing trafficked foreign prostitutes would endanger their newly-achieved legal status.<sup>397</sup> However, there may be an insufficient supply of domestic or legally residing foreign individuals. Trafficked persons are also particularly

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<sup>392</sup> Cho et al 5.

<sup>393</sup> Op cit 6.

<sup>394</sup> Op cit 7.

<sup>395</sup> Op cit 8.

<sup>396</sup> Ibid.

<sup>397</sup> Op cit 9.

vulnerable to the demands of their pimps, which can make the option of employing them more attractive. A greater portion of their earnings can be retained, making the business more lucrative.<sup>398</sup> Clients may also have preferences for exotic women from geographically remote places.

2.73 At the 53<sup>rd</sup> National Conference of the African National Congress, it was found that the current skewed economy has created an environment that has influenced the growth of “sex work” and human trafficking. This includes human trafficking from rural to urban areas as well as across the continent. The Conference held that the Sexual Offences Act should be reviewed and more public hearings conducted with people in this sector actively participating, to fast-track legislation in this regard.<sup>399</sup>

2.74 The Kwa-Zulu Natal Human Trafficking Prostitution Brothels and Pornography Task Team (HPPB Task Team)<sup>400</sup> is driven by the Organised Crime Component KZN, the Sexual Offences and Community Affairs Unit KZN, and the National Human Trafficking Programme Co-ordinating Unit. The HPPB Task Team has noted that the majority of the victims dealt with were recruited under false pretenses by traffickers, usually through an offer of a job opportunity, and then forced to become prostitutes. They had no freedom of movement, or if they did it was very limited and always under supervision of guards or escorts. They worked long hours, even when sick, and had no days off. At times they had to work without the use of contraception or condoms, which resulted in their picking up STDs and HIV, which might subsequently be passed onto other clients. Victims received between 5 and 25 clients per day and could not refuse to work. In certain instances where girls refused to work, they were threatened with rape or were gang-raped by the trafficker or his friends, and some were assaulted. Women who ran away were brought back forcibly to the brothel.<sup>401</sup>

2.75 One modus operandi of the traffickers is to provide free drugs to the girls for the first few days; thereafter, once the girls become addicted, they resort to prostitution to feed their drug habit. In cases where girls refused to take the drugs they were forcibly injected with the drugs or assaulted. Some of the girls have been in the brothels for years, unable to get out of the situation.<sup>402</sup>

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<sup>398</sup> Ibid.

<sup>399</sup> Martens Troy “What we achieved at Mangaung ANCWL” Politics Web available at [www.politicsweb.co.za](http://www.politicsweb.co.za) Accessed on 20 December 2012.

<sup>400</sup> The KZN Human Trafficking Prostitution Brothels and Pornography Task Team Progress Report (2009); The HPPB Task Team was established in the Kwazulu Natal Province on 2<sup>nd</sup> October 2008.

<sup>401</sup> Email correspondence with the co-chair of the HPPB, 2013.

<sup>402</sup> Ibid.

2.76 The HPPB Task Team also notes that there are many cases where prostitutes are foreigners and do not speak English. They are forced to have sex with numerous clients per day, and cannot be seen to consent precisely because they do not speak the language. Yet they have to endure sadistic and painful sexual encounters with men who have already paid for their services.<sup>403</sup>

2.77 In the view of the HPPB, legalising prostitution and brothels would only fuel the trafficking of women and this would be done behind the fronts of legitimate businesses.<sup>404</sup> The HPPB recommends the creation of a specialised unit in SAPS dedicated to combatting human trafficking and prostitution.<sup>405</sup>

2.78 As mentioned earlier, Cho et al found that legalising prostitution is associated with a rise in a country's inflow in human trafficking. However, Cho et al caution that authorities in each country should look at the potential benefits of legalising prostitution for people employed in the industry.<sup>406</sup> They identify the improvement of working conditions for legally employed prostitutes as a possible benefit.<sup>407</sup>

2.79 Dr Jo Vearey<sup>408</sup> cautions that migration to South Africa to engage in prostitution should not be conflated with trafficking. She reports that most of the movement of people occurs across provinces and that only 7% is cross-border. In her view the combination of prostitution and migration does not amount to human trafficking. Vearey argues that the choice to migrate to engage in prostitution is made within a limited range of choices and there is a real need for migration-sensitive services for prostitutes. Ms Dumba<sup>409</sup> confirmed that in her situation, trafficking was not linked to her move to South Africa and consequent involvement in prostitution. She stated that she made a choice to leave Zimbabwe to engage in prostitution instead of being a domestic worker or vegetable seller. In her experience,

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<sup>403</sup> Ibid.

<sup>404</sup> Ibid.

<sup>405</sup> Ibid.

<sup>406</sup> Cho et al 26.

<sup>407</sup> Ibid.

<sup>408</sup> SWEAT National Sex Work Symposium Best practices in HIV prevention, care and treatment for sex workers in South Africa (August 2012) Presentation titled "Discourse on Human Trafficking and sex work: Public Health Implications" Dr Jo Vearey: Senior Researcher, African Centre for Migration & Society, Wits University.

<sup>409</sup> SWEAT National Sex Work Symposium Best practices in HIV prevention, care and treatment for sex workers in South Africa (August 2012) Presentation titled "My story: a migrant sex worker" Ms Linda Dumba, Media Liaison Officer, Sisonke/Thohoyandou Victim Empowerment Programme.

prostitutes who have voluntarily migrated to South Africa face a number of challenges. One of the challenges is not being able to attend a clinic without documentation.

#### **4 The theory that prostitution should be seen in the context of gender-based violence**

2.80 The theory that prostitution is gender-based violence is closely associated to the theory on exploitation. Some feminists advocate that the prostitute is a victim of a system of male oppression and that prostitution is not a harmless private transaction. It affects all women. As such, prostitution is degrading to the prostitute and to women in general. Prostitution is equated with rape.<sup>410</sup> Sweden has adopted this theory and criminalises the purchase and attempted purchase of sexual services, thereby clamping down on demand and helping women exit prostitution. This theory includes acknowledging the harmful effect of prostitution on the prostitute herself, which includes physical and psychological harm such as posttraumatic stress disorder (PTSD). Farley et al,<sup>411</sup> however, emphasises that a diagnosis of PTSD does not describe the full extent of psychological harm caused by prostitution. They say that “over time, the constant violence of prostitution, constant humiliation and social indignity and misogyny, result in personality changes.”

#### **5 The theory on selling sexual services as a result of addiction**

2.81 Flowers notes that there are strong ties between substance abuse and prostitution.<sup>412</sup> His view is that most street addicts resort to prostitution to feed their addiction. Many runaways are already addicted to drugs and alcohol and others quickly become addicted after entry into prostitution. Wendy Wechsberg’s view is that prostitutes use drugs to medicate the embarrassment of being “shy”.<sup>413</sup>

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<sup>410</sup> Bromberg.

<sup>411</sup> Farley M, Baral I, Kiremire M, & Sezgin U, "Prostitution in Five Countries: Violence and Posttraumatic Stress Disorder" (1998) *Feminism & Psychology* 8 (4).

<sup>412</sup> Flowers 27.

<sup>413</sup> SWEAT National Sex Work Symposium Best practices in HIV prevention, care and treatment for sex workers in South Africa (August 2012) Presentation titled “Substance Abusing Sex Workers in South Africa: Strategies for Seeking, Testing and Reducing Risk with the Women’s Health Coop” by Wendy Wechsberg, Senior Director of the Substance Abuse Treatment Evaluations and Interventions Research Program, RTI 2012.

2.82 Drug-addicted prostitutes often depend on prostitution to support their habits, using drugs as a secondary practice to prostitution. Women in this position face even greater hazards than non-drug addicted prostitutes, including the risk of drug robberies by other addicts and contracting AIDS from sharing dirty needles. Another hazard identified by Wechsberg<sup>414</sup> is the improper use or non-use of condoms due to the prostitute's drugged state. She noted that a study of prostitutes in Sunnyside revealed that 44% of the prostitutes were too high on drugs to negotiate condom use, and that 64% were HIV-positive. She also reported that some prostitutes have suffered brain damage as a result of inhalation of glue and benzene.

2.83 Most drug-addict prostitutes occupy the lower rungs of the prostitution ladder, but prostitutes of all types notoriously have problems with drug abuse or addictions. Wechsberg refers to research done for the Centres for Diseases Control which shows an alarming relationship between crack-cocaine addiction and prostitution among women. Women crack addicts are sometimes kept at "crack houses" and given the drug in exchange for sex with dealers and buyers. Wechsberg reports the same pattern in Sunnyside, where baseline sex with a main partner reportedly occurs without a condom 80% of the time.<sup>415</sup> The women become virtual slaves to both the drug and the dealer. Flowers<sup>416</sup> estimates that as many as 50% of adult prostitutes use a substance regularly. In a recent study of the social contexts, practices and risks of men who sell sex in Southern and Eastern Africa, it was noteworthy that South African participants identified substance abuse as the largest threat for prostitutes.<sup>417</sup> Boyce and Isaacs ascribe this to the fact that there have been pronounced HIV and AIDS awareness campaigns in South Africa but that drug use in prostitution has been a less explicit public health concern.<sup>418</sup>

## **6 Theories on contagion, combating the spread of STIs and HIV, and access to health care**

2.84 It is said that the HIV pandemic is one of the most significant challenges to health, development, and economic and social progress facing the world today.<sup>419</sup> The fact that the

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<sup>414</sup>

Ibid.

<sup>415</sup>

Ibid.

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Flowers 27.

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Boyce P & Isaacs G "An Exploratory Study of the Social Contexts, Practices and Risks of Men Who Sell Sex in Southern and Eastern Africa" African Sex Worker Alliance (2011).

<sup>418</sup>

Ibid.

<sup>419</sup>

ILO "Recommendation Concerning HIV and AIDS" 2010 (No.200).

pandemic tends to move along the “fault lines” of society,<sup>420</sup> particularly affecting groups that are already disadvantaged or marginalised, exacerbates these challenges.<sup>421</sup>

2.85 Being exposed to or contracting and spreading sexually transmitted infections, including HIV, is closely associated with the nature of prostitution and is generally viewed as par for the course. Whereas one theory labels prostitutes as “vectors of disease” causing a cesspool of iniquity and contagion that should be curbed through criminalisation, another theory argues that criminalisation of prostitution causes the spread of HIV. Some of the factors cited in this second theory are the lack of access to adequate health care, and police confiscating condoms.

2.86 Both of the above theories are countered by the argument that buyers can and do originally transmit a disease to the woman. Furthermore, condom policies aimed at reducing the spread of disease and pregnancy seem ineffective or unenforceable because buyers mostly resist condom use,<sup>422</sup> resorting to financial incentives not to use them or even to trickery where they attempt to discard them before copulation. Regardless of the legal framework, it is widely accepted that many factors militate against condom use. These include women’s need for money; older women’s decline in attractiveness to men; competition from places that do not require condoms; pimp pressure on women to have sex with no condom (for more money); money needed for a drug habit or to pay off the pimp; and the general lack of control that prostituted women have over their bodies in prostitution venues.<sup>423</sup>

2.87 Financial and material exchange as a motivating force underlying sexual relationships is a well-recognised dynamic in the HIV pandemic, particularly in sub-Saharan Africa.<sup>424</sup> It is a motive for women to have sex in situations where they might otherwise refrain, and has been noted as a potential source of women’s vulnerability to gender-based

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<sup>420</sup> Women who engage in sex motivated by economic gain, whether in prostitution or more informal transactional sex, are very vulnerable to sexually transmitted infections, including HIV, as well as rape and intimate partner violence. The high HIV prevalence among women in prostitution, compared with women in the general population has been recognised since the early days of the HIV epidemic and pertains globally. Jewkes et al “HIV incidence”.

<sup>421</sup> ILO “Recommendation Concerning HIV and AIDS”.

<sup>422</sup> Although Shisana et al in the *South African National HIV Prevalence, Incidence and Behavioural Survey 2012* does not specifically include prostitutes in its survey, it is insightful that it found that in the general population “condom use at last sex by both males and females among all age groups decreased in 2012 back to levels similar to those in 2005” and that there is a “problem with both correct and inconsistent condom use” at 127.

<sup>423</sup> CATW quoted in Family Policy Institute “Legalised Prostitution”.

<sup>424</sup> Dunkle et al “Transactional sex and economic exchange with partners among young South African men in the rural Eastern Cape: prevalence, predictors, and associations with gender-based violence” *Soc Sci Med* 2007.

violence and sexual exploitation.<sup>425</sup> Of particular concern is the way in which financial or material need can introduce an explicit power imbalance into sexual relations. In a qualitative study by Dunkle and Jewkes et al, women frequently asserted that accepting financial or material assistance from a man means accepting sex on his terms, which often means without condoms.<sup>426</sup> Women may tolerate physical and sexual violence in order to sustain relationships which provide critical income.<sup>427</sup>

2.88 The findings of the study by Dunkle et al suggest that material transfers may comprise a key strategy by which men secure female partners, a pattern that can well be understood within the broader context of a model of masculinity based centrally on proving heterosexual success with women and asserting control over women, often violently.<sup>428</sup> This behaviour is expected to carry a high HIV risk. These practices seem more common among people of relatively high socio-economic status and those who experienced higher levels of victimisation in childhood.<sup>429</sup>

2.89 Given the above, it is not surprising that the highest prevalence of HIV was found to be in sub-Saharan Africa.<sup>430</sup> Interestingly, but without explanation, a study by Baral et al<sup>431</sup> showed that prostitutes in countries with very low or low HIV prevalence had higher odds of infection than did prostitutes in countries with medium or high HIV prevalence among all women. The same study found consistent evidence of substantially higher levels of HIV among female prostitutes compared with all women of reproductive age in low-income and middle-income countries, for all regions with data.<sup>432</sup> Female prostitutes in low- and middle-income countries are reported to be nearly 14 times more likely to be infected by HIV compared with the country's general population.<sup>433</sup>

2.90 With regard to the epidemiology of HIV, STIs and TB, the SANAC NSP reports that South Africa has a generalised HIV epidemic, which has stabilised over the last few years at a national antenatal prevalence of around 30%.<sup>434</sup> Whereas STIs such as syphilis have decreased in most provinces over the past 10 years, the prevalence of herpes simplex (a co-

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425

Ibid.

426

Ibid.

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Ibid.

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Ibid.

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Ibid.

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Baral et al "Burden of HIV among female sex workers in low-income and middle-income countries: a systematic review and meta-analysis" *Lancet* 2012 [www.thelancet.com/infection](http://www.thelancet.com/infection).

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Ibid.

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Ibid.

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Baral "In Developing Countries, Female Sex Workers 14 Times More Likely to Become Infected by HIV" available at <http://www.jhsph.edu/publichealthnews/>.

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SANAC *National Strategic Plan on HIV, STIs and TB 2012 -2016* at 13.

factor in the acquisition of HIV) is still high in many sectors of the population.<sup>435</sup> SANAC estimates that there are over 132 000<sup>436</sup> female prostitutes in South Africa.<sup>437</sup> Although there is no clear estimate of HIV prevalence among prostitutes, one study estimates the figure at between 44% and 69% of this population.<sup>438</sup> According to SANAC, prostitutes are heavily affected by HIV and other sexually transmitted infections, with infection levels much higher than in other groups. SANAC estimates that 60% of female prostitutes in South Africa are HIV positive.<sup>439</sup> Of the 350 000 new cases of HIV infections per annum, 20% appear to be connected with prostitution, with one case in four being prostitutes and the rest buyers or family members.<sup>440</sup> The burden of STIs is also high among prostitutes. In some areas, between a half and two thirds of prostitutes have a curable STI at any time.<sup>441</sup>

2.91 According to Baral et al,<sup>442</sup> the dynamics of HIV transmission among male and transgender prostitutes could be further complicated by the following factors: the heightened biological risks of anal intercourse, the high prevalence of HIV in some subgroups of men having sex with men (MSM), and the large proportion of male and transgender prostitutes who report bisexual practices. Boyce and Isaacs<sup>443</sup> report that a recent study in Malawi, Namibia and Botswana found that men who have sex with men over the age of 25 were more likely to be HIV positive and to practice unprotected sex compared with younger men in the study cohort.<sup>444</sup> Moreover, with reference to the study by Baral et al, Boyce and Isaacs reported that these men were also more likely to engage in concurrent sexual relationships with men and women, which blurred any meaningful differentiation between homo- and heterosexual lifestyles and HIV epidemiologies.<sup>445</sup> Prostitutes experience high-risk sexual exposures through their high numbers of sexual partners and high concurrency of these partners. Baral et al found that in some settings, protective sexual practices – including

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Ibid.

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According to a recent one month rapid evaluation the national prostitution population is approximately 153 000 people (figures range between 132 000 and 182 000) SANAC News “Special Report How many sex workers in South Africa?” Issue 2 June/July 2013 at 6.

437

SWEAT National Sex Work Symposium Best practices in HIV prevention, care and treatment for sex workers in South Africa (August 2012) Presentation titled “Experiences in facilitating an understanding of sex work industry to police at Inner-City Johannesburg” Maria Sibanyoni, WITS Reproductive Health & HIV institute.

438

Ibid.

439

SANAC News “Special Report - How many sex workers in South Africa?” 7.

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SWEAT/Sibanyoni.

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SANAC News “Special Report - How many sex workers in South Africa?” 7.

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Baral et al “Burden of HIV among female sex workers”.

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Boyce & Isaacs.

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Many respondents in the discussion group in Kenya in this study reported unsafe sex during prostitution, either by choice (at the clients insistence), by force, or in case of inhibition/lack of self-control in scenarios of excessive alcohol or drug consumption. Drinking to excess was commonly reported among many respondents, as a part of the ‘scene’ within which they worked and socialised and as something that made prostitution tolerable.

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Boyce & Isaacs.

consistent condom use and HIV testing – were superior among prostitutes than women in the general population, although the frequency of such practices remained low in many areas.<sup>446</sup> HIV transmission among prostitutes might also be driven or exacerbated by the intersection between injection drug use and prostitution, through factors such as increased parenteral exposure from sharing injection equipment, sex with more HIV-positive partners, low condom use, and increased risk of other STIs (such as syphilis and hepatitis C).<sup>447</sup>

2.92 Structural risk factors are reported to indirectly heighten the risk for HIV infection among prostitutes by restricting their access to preventive health and HIV and STI services and treatment.<sup>448</sup> Structural factors include the limiting influences of poverty, discrimination and gender inequality, as well as the damaging effects of physical and sexual violence, stigma and social exclusion.<sup>449</sup>

2.93 Structural factors such as the organisation and power dynamics of prostitution have also been shown to contribute to prostitutes' increased risk of HIV infection by limiting their ability to negotiate safer sex.<sup>450</sup> Interventions targeting behavioural and structural-level risk factors for HIV among prostitutes have proven successful for increasing protective behaviours and decreasing HIV and STI transmission.<sup>451</sup>

2.94 Baral et al<sup>452</sup> identifies an urgent need to scale up access to quality HIV-prevention programming and services among female prostitutes, because of their heightened burden of disease and likelihood of onward transmission through high numbers of sexual partners (buyers). He notes that the legal and policy environments in which prostitutes operate, as well as the important roles of stigma, discrimination and violence targeting female prostitutes globally will require consideration if the disproportionate disease burden among these women is to be reduced.<sup>453</sup> However, Baral et al concedes that in India there is a disproportionate burden of HIV among prostitutes even in settings where progressive programmes exist. He concludes that this fact emphasises the need to increase the scale of prevention programmes and decrease barriers to accessing them.<sup>454</sup> Similarly, Sibanyoni identifies barriers to health care in inner-city Johannesburg as being caused by insensitive

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<sup>446</sup> Baral et al “Burden of HIV among female sex workers”.

<sup>447</sup> Ibid.

<sup>448</sup> Ibid.

<sup>449</sup> Ibid.

<sup>450</sup> Endorsed by Maria Sibanyoni in SWEAT/Sibanyoni.

<sup>451</sup> Baral et al “Burden of HIV among female sex workers”.

<sup>452</sup> Ibid.

<sup>453</sup> Baral “In Developing Countries, Female Sex Workers”.

<sup>454</sup> Baral et al “Burden of HIV among female sex workers”.

and discriminatory services.<sup>455</sup> This concern has been echoed by Michel Sidibé, Executive Director of UNAIDS. In an open letter,<sup>456</sup> Sidibé stated that HIV has exploited humanity's social and political shortcomings – and has shown again and again that an effective response must span the health sector and go beyond it to address the laws, attitudes and economic injustices that make infection more likely and more lethal. He states that there is a relationship between HIV and the Millennium Development Goals.<sup>457</sup> One of the functions of the Goals is to give a voice to the voiceless. Globally, governments cite stigma as one of the greatest impediments to accelerated progress in the AIDS response. Stigma and discrimination deny people at risk of HIV infection the tools they need to protect themselves and their communities. They also deny care and treatment to people living with HIV. Sidibé observes that more than 100 countries criminalise aspects of prostitution. In settings throughout the world, fear and social disapproval increase the vulnerability of mobile populations, prisoners, adolescents who practice high-risk behaviour, and people in humanitarian settings. Such discrimination deepens social marginalisation, increases the risk of harassment or violence, and inhibits communities from mobilizing to address the epidemic.

2.95 It is important to acknowledge that discrimination and stigma are not wiped away or discarded as a result of legislative intervention. Much of the stigma is internalised and may without any overt external discrimination prevent a prostitute from accessing health care due to feelings of shame and guilt. Although the Constitution<sup>458</sup> provides that everyone may access public health services, these resources are limited. The National Development Plan 2030 confirms that at an institutional level, health care management is in crisis and that South Africa's broken public health system must be fixed.<sup>459</sup> Consequently all South Africans are affected. Prostitutes may experience resistance from health care workers, who may refuse to provide repeat medication for the same strain of STI or ailment if the patient has not followed medical advice on preventing reinfection. Some medical interventions may require that both partners be subjected to an examination before treatment is given. With prostitution, this requirement would present a challenge. These challenges, however, do not stem from the legislative framework governing prostitution, but from policy decisions in the health sector that may need revision; or from health care workers, who may need to be sensitized towards dealing with prostitutes and buyers without passing moral judgement.

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<sup>455</sup> SWEAT/Sibanyoni.

<sup>456</sup> Michel Sidibé, Executive Director, UNAIDS Letter to Partners 2012.

<sup>457</sup> Ibid.

<sup>458</sup> Section 27.

<sup>459</sup> National Planning Commission "NDP Executive Summary" 41.

2.96 Another barrier to prostitutes' ability to protect themselves against the risk of exposure to HIV and other STIs are alleged abuses of power by police. In a small study of prostitutes in South Africa, 85% (17 of 20) of the participants said they always carry condoms<sup>460</sup> and have experienced police abuse of power. In the words of one woman, "[T]hey arrested me because they saw that I had condoms on me, but they didn't take me to court."<sup>461</sup> It could be argued that by hindering prostitutes' ability to carry and use condoms, police actions increase prostitutes' risk of exposure to HIV and other STIs as well as unwanted pregnancies. These consequences compromise prostitutes' health and the health of their sexual partners. Prostitutes whose condoms are taken by police are more likely to have unprotected sex and to be at risk for HIV.<sup>462</sup>

2.97 The Open Society Foundation agrees that legal and regulatory policies on prostitution are among the structural factors that have been shown to contribute to prostitutes' increased risk of HIV infection by limiting their ability to negotiate safer sex.<sup>463</sup> Researchers Kate Shannon and Joanne Csete conclude that "Eliminating law enforcement practices that inhibit condom use (such as using condom possession as grounds for arrest) and protecting sex workers from violence are critical for the prevention of HIV/STI acquisition and transmission."<sup>464</sup>

2.98 It is reported that prostitutes are not alone in feeling constrained by police actions and afraid to be out on the street with condoms. Outreach workers' experiences with police and their fear of police harassment, extortion, or arrest can cause them to change or even stop their outreach work, further reducing prostitutes' already limited access to health services and information.<sup>465</sup> The police practice of shadowing outreach workers in order to target prostitutes for detention and abuse has a chilling effect on the relationship between prostitutes and outreach workers. Police harassment of prostitutes who interact with outreach workers, and their confiscation of the condoms that outreach workers distribute, make outreach ineffective and can lead to situations in which outreach programs actually function to endanger sex workers.<sup>466</sup> Police policies and practices are said to view condoms as contraband and to position law enforcement in opposition to outreach efforts. Prostitutes'

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<sup>460</sup> Open Society Foundation "Criminalizing Condoms: How Policing Practices Put Sex Workers and HIV Services at Risk in Kenya, Namibia, Russia, South Africa, the United States and Zimbabwe" (2011) at 9. Available at <http://www.soros.org/>.

<sup>461</sup> Op cit 14.

<sup>462</sup> Op cit 18.

<sup>463</sup> Op cit 25.

<sup>464</sup> Op cit 26.

<sup>465</sup> Op cit 21.

<sup>466</sup> Op cit 22.

illegal status also creates an environment in which police can act outside the law, abusing their positions of authority in ways that put prostitutes at increased risk for HIV.<sup>467</sup>

2.99 The Open Society Foundation argues that the criminalisation of prostitution establishes an adversarial relationship between the police and prostitutes. The criminal law positions prostitutes as criminals, and therefore as legitimate targets of police attention.<sup>468</sup> Due to the criminal status of prostitution women are reluctant to bring charges for crimes committed against them, such as rape. Consequently the majority of these abuses go unpunished.<sup>469</sup> Fear of the police means that prostitutes are unable to approach the police for protection or even to report crimes that they may have witnessed.<sup>470</sup> However, in many instances the actions ascribed to police officers themselves constitute crimes, including theft, assault, indecent assault and rape. These actions not only threaten a prostitute physically but also put her children at risk if she is unable to make arrangements for their care.<sup>471</sup> Prostitutes are seldom able to lay charges against violent officers. In most cases this would need to be done at the same police station where the perpetrator works, which would mean risking another encounter with the offending party.<sup>472</sup>

2.100 The Open Society Foundation<sup>473</sup> recommends a number of non-legislative interventions:

- The police and prosecutors should be prohibited from using condoms as evidence of prostitution.
- Judges should deem condom possession inadmissible as evidence of a person's engagement or intention to engage in prostitution.
- Internal investigation departments and general prosecutors' offices should investigate and punish police officers who rape or otherwise assault prostitutes.<sup>474</sup>

2.101 Hunter<sup>475</sup> views the rampant spread of HIV particularly in townships where the prevalence is highest through a different lens and seeks to unpack the underlying reasons

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<sup>467</sup> Op cit 22.

<sup>468</sup> Op cit 26.

<sup>469</sup> Op cit 27.

<sup>470</sup> Fick N "Enforcing Fear Police abuse of sex workers when making arrests" *SA Crime Quarterly* No 16 June 2006 at 32.

<sup>471</sup> Ibid.

<sup>472</sup> Ibid.

<sup>473</sup> Open Society Foundation 27.

<sup>474</sup> Ibid.

<sup>475</sup> Hunter M "*Love in the Times of AIDS: Inequality, gender and rights in South Africa*" Indiana Press Pietermaritzburg, University of KwaZulu-Natal Press (2010).

for this burgeoning pandemic. He does not merely conclude that prostitution causes the spread of HIV. The conclusion is drawn that the pandemic of AIDS in townships is caused by massive unemployment and poverty. The people Hunter interviewed, most of whom live in abject poverty, agree.<sup>476</sup>

2.102 Hunter argues that in South Africa, the presence of a combination of severe unemployment, reduced marriage rates and change in patterns of intimacy particularly in response to poverty should be viewed in a serious light. The combination of poverty and low marriage rates are depicted as a predictor of areas with the highest HIV rates in the country. He reports that “in 2008, 39% of women in KZN were HIV positive”.<sup>477</sup> He is of the opinion that “the multiple inequalities that drive AIDS are undeniably a form of structural violence”.<sup>478</sup> He further agrees with the ILO that the country’s new “fault lines” are to be found in the geography of AIDS. Hunter recommends that there should be “a special focus on the materiality of everyday sex in the current era of chronic unemployment and capitalist-led globalisation”.<sup>479</sup>

2.103 Hunter’s research reflects that since 1960 marriage has halved among Africans. The reduction in marriage is juxtaposed against women’s increased mobility in the labour market and rising unemployment.<sup>480</sup> Both material sexual relationships (prostitution) and boyfriend-girlfriend “gift” relationships that involve material benefits for unmarried women are identified as at high risk of contracting HIV.<sup>481</sup> The broad definition of prostitution is justified based on the complex array of types of prostitution in the country today.<sup>482</sup>

2.104 Hunter notes that “gender rights approaches do not always recognise the multiple inequalities with which gender is entangled”. Women in poverty have little bargaining power against men who may not be willing to use condoms.<sup>483</sup> The unpredictable use of condoms added to a woman’s physiological make-up makes her more susceptible to AIDS.<sup>484</sup>

2.105 Education and large investments in schooling for whites; the state’s massive employment of Afrikaners; and promulgation of a series of labour and welfare laws aimed at

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<sup>476</sup> Op cit 18.  
<sup>477</sup> Op cit 3.  
<sup>478</sup> Ibid.  
<sup>479</sup> Ibid.  
<sup>480</sup> Op cit 5.  
<sup>481</sup> Op cit 6.  
<sup>482</sup> Op cit 8.  
<sup>483</sup> Ibid.  
<sup>484</sup> Op cit 7.

promoting white families in the 1940s and 1950s are credited with pulling poor white women out of the sexual economy of prostitution.<sup>485</sup> Today, the legacy of apartheid is still evident in the unequal unemployment figures of white and black South Africans.<sup>486</sup>

2.106 The SANAC NSP contains objectives to address structural barriers associated with the intersection between HIV prevalence and prostitution. Some of the objectives most pertinent to the current discussion are as follows:

1. Addressing challenges posed by certain social, cultural, economic and behavioural drivers of HIV and STIs. These may include socialisation practices, living in informal settlements and rural and hard-to-reach areas, migration and mobility issues, and alcohol and substance abuse.<sup>487</sup>
2. Interventions to address gender norms and gender-based violence. (Girls and women are particularly vulnerable to HIV infection because of biological vulnerability and gender norms, roles and practices. South Africa is grappling with high levels of violence against women, with sexual assault and intimate partner violence contributing to increased risks for HIV infection).<sup>488</sup>
3. Reducing the vulnerability of young people to HIV infection by retaining them in schools and increasing access to post-school education and work opportunities. (As identified by Hunter, ensuring that children complete school constitutes a critical intervention to ensure that learners acquire knowledge and skills to improve their employment opportunities, as well as life skills to safely transition into adulthood. Youth-specific interventions are also critical once learners transition out of school. Evidence has shown that HIV infection levels increase exponentially among school leavers who do not have employment, mentoring or further training opportunities).<sup>489</sup>
4. Reducing HIV-related stigma and discrimination.
5. Strengthening community systems to expand access to services.
6. Supporting efforts aimed at poverty alleviation and enhancing food security programmes.<sup>490</sup> Poverty is one of the major contributors to poor health through food insecurity, which in turn is linked to HIV acquisition and poor treatment adherence;

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<sup>485</sup> Op cit 13; the need for schooling is identified in Strategic Objective 1 of the SANAC NSP.

<sup>486</sup> The 2013 unemployment figures for population groups were reported as follows by Statistics SA: blacks 28.1% - 29.1%; coloureds 23.3% - 25.1%; Indian/Asian 10.8% - 13.4%; whites 6.1% - 7.2%. *Quarterly Labour Force Survey* Quarter 3, 2013 at 4 – 5. Accessed Dec 2013.

<sup>487</sup> Strategic Objective 1 at 36.

<sup>488</sup> Ibid.

<sup>489</sup> Ibid.

<sup>490</sup> Op cit 14.

every effort must be made by government and its partners to ensure food security for all people.<sup>491</sup>

2.107 Strategic Objective 2 of the NSP<sup>492</sup> is focused on primary strategies to prevent sexual and vertical transmission of HIV and STIs. A combination of prevention approaches is advocated, including implementing a comprehensive national social and behavioural change communication strategy with a focus on key populations (including prostitutes). The NSP relates that specific combinations of interventions – which are not dependent on legislative change – will be designed for various key populations. Some of the sub-objectives include:

1. Maximising opportunities for testing and screening to ensure that everyone in South Africa is tested for HIV at least once a year, and that those who need it are appropriately enrolled in wellness and treatment, care and support programmes.<sup>493</sup>
2. Increasing people's access to a package of sexual and reproductive health services, including prevention activities conducted at non-traditional outlets. The package includes medical male circumcision, emphasis on dual protection, provision of both male and female condoms, termination of pregnancy, and provision of contraception.<sup>494</sup>
3. Implementing a comprehensive national social and behavioural change communication strategy with a focus on key populations. This aims to increase demand and uptake of services, to promote healthy behaviours, and to address norms and behaviours that put people at risk for HIV, STIs and TB. Social interventions include efforts to change cultural and social norms that increase people's vulnerability to HIV and STIs, and to reinforce norms and behaviours that are protective. Some social norms, most notably gender norms, foster behaviours that place individuals at increased risk of HIV acquisition (eg multiple partnerships, intimate partner violence and alcohol abuse).<sup>495</sup>
4. Preparing for the potential implementation of future innovative, scientifically proven HIV, STI and TB prevention strategies, such as pre-exposure prophylaxis, new TB vaccines and microbicides.<sup>496</sup>
5. Addressing sexual abuse and improving services for survivors of sexual assault.<sup>497</sup>

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<sup>491</sup>

Op cit 37.

<sup>492</sup>

Op cit 39.

<sup>493</sup>

Ibid.

<sup>494</sup>

Ibid.

<sup>495</sup>

Strategic Objective 2 at 39.

<sup>496</sup>

Op cit 14.

<sup>497</sup>

Ibid.

2.108 Strategic Objective 3 focuses on sustaining the health and wellness of HIV-positive people.<sup>498</sup> The main objectives are to keep people within the health care system, adherent to treatment and maintaining optimum health. To achieve this objective the aim is to expand the operating hours of service delivery points and to ensure a continuum of care across service delivery points.<sup>499</sup> As prostitutes do not keep traditional working hours, expanded operating hours of service delivery points should enhance the uptake of health services amongst this population.

2.109 Strategic Objective 4 focuses on protecting human rights and improving people's access to justice. It aims to ensure that rights are not violated when interventions are implemented, and that discrimination on the basis of HIV and TB is reduced and ultimately eliminated.<sup>500</sup> Although the WLC and SWEAT promote non-criminalisation within SANAC, this is not the official stance of SANAC. The NSP is non-committal on this point, merely stating that whereas SANAC does not advocate a specific position, the NSP encourages keeping the debate on non-criminalisation alive.

2.110 The NSP includes recommended action on behavioural and social determinants not linked to legislative intervention, as follows:<sup>501</sup>

- **Sexual debut** – Tailored prevention interventions for the youth to facilitate the delay of sexual debut and to sustain protective behaviours.
- **Multiple sexual partners** – Multi-level interventions that focus on sexual, social, cultural and gender norms and values.
- **Condom use** – Interventions to increase the consistent use of condoms, especially among key populations (including people involved in prostitution).
- **Age-disparate sexual (intergenerational) relationships** – Targetted educational strategies for men and women who have partners much younger or older than themselves. Significant age discrepancy in relationships has been associated with an increase in HIV exposure risk compared with people who reported having partners of a similar age.
- **Prevention knowledge and risk perception** – Prevention strategies for people who expose themselves to the risk of HIV infection, including education and addressing perceptions of personal risk.

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<sup>498</sup> SANAC NSP 15.

<sup>499</sup> Strategic Objective 3 at 15.

<sup>500</sup> Ibid.

<sup>501</sup> Op cit 23.

2.111 In respect of biological determinants, the following objectives were identified:<sup>502</sup>

- **Other sexually transmitted infections** – Prevention and early treatment of STIs.
- **Treatment as prevention** – Initiating treatment for all eligible people living with HIV, according to national guidelines to improve their health outcomes and to reduce transmission.

2.112 In respect of structural determinants, the following objectives were identified.<sup>503</sup>

- **Mobility and migration** – The risk of HIV infection is higher among individuals who either have personal migration experience or have sexual partners who are migrants. Appropriately targeted interventions are required.
- **Gender roles and norms** – Challenge the gender roles, norms and inequalities that increase women’s vulnerability to HIV and compromise men’s and women’s health; address the position of women in society, particularly their economic standing; and engage men in changing socialisation practices.
- **Sexual abuse and intimate partner violence** – Implement interventions to prevent gender-based violence as well as intimate partner violence, and educate men about women’s rights.

2.113 It is also pertinent to note that the ILO World AIDS Day campaign for 2011 listed 10 goals for 2015. Relevant goals are:

- To reduce the sexual transmission of HIV by half, including among young people, men who have sex with men, and transmission in the context of sex work;
- To reduce by half the number of countries that have punitive laws and practices around HIV transmission, “sex work”, drug use, or homosexuality – where these block effective responses; and
- Zero tolerance for gender-based violence.<sup>504</sup>

2.114 Unpacking the theories on contagion, combating the spread of STIs and HIV, and access to health care has flayed open the debate on the most appropriate legislative model to address prostitution in South Africa. The realities that drive the HIV pandemic are poverty,

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<sup>502</sup> SANAC NSP 23.

<sup>503</sup> Ibid.

<sup>504</sup> International Labour Organisation (ILO) World AIDS Day campaign for 2011 available at <http://www.ilo.org> Accessed on 10 May 2012.

inequality and the inability to access sustainable employment. Non-criminalisation is hardly the panacea. It would seem that until this complex reality is addressed, irrespective of the legislative model followed, condom usage will not increase and STIs and HIV will continue to spread. However, if the NSP objectives – which stand apart from the need for legislative intervention – are implemented and achieved, that may have a substantial effect on people’s understanding of, access to and uptake of health services. In turn, such improvements might substantially curb the spread of STIs and HIV.

## **D Current law in South Africa: total criminalisation of the sale of sexual services**

2.115 South Africa currently follows the model of total criminalisation of prostitution. The criminal provisions found in the Sexual Offences Act are enforced by police officials, and a person convicted of engaging in prostitution may be punished with a fine or imprisonment or both. Although the focus of this chapter is on the prostitute, it is important to note that the conduct of all persons involved in prostitution (ie the prostitute, buyer, and third parties such as brothel owners) is criminalised in South Africa.

2.116 Section 20(1A)(a) of the Sexual Offences Act<sup>505</sup> provides that *any person* who has *unlawful carnal intercourse* or commits an *act of indecency* with another person for *reward*, commits an offence. Although section 20(1A)(a) effectively prohibits the core function of the prostitute’s work, it does not penalise “being” a prostitute. A person cannot therefore be arrested for being known to the police as a prostitute; there has to be at least a reasonable suspicion that he or she had engaged in sexual intercourse or had performed an indecent act for reward (at a specified time with a specified person).<sup>506</sup>

2.117 In terms of the Sexual Offences Act, a person may be charged with enticing, soliciting, or importuning in a public place for immoral purposes; for wilfully and openly exhibiting him- or herself in indecent dress at a door or window in open view;<sup>507</sup> for procuring;<sup>508</sup> and for residing in a brothel, assisting in the management of a brothel, and/or receiving moneys taken

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<sup>505</sup> Act 23 of 1957.

<sup>506</sup> This does not of course preclude the possibility of arrest on other charges related to prostitution, e.g. soliciting in contravention of sec 20(1A)(a) of the Act, or in terms of municipal by-laws.

<sup>507</sup> Section 19.

<sup>508</sup> Section 10.

in a brothel.<sup>509</sup> The penalty for committing prostitution or these other offences is imprisonment for a period not exceeding three years, with or without a fine not exceeding R6 000 in addition to such imprisonment.

2.118 As stated above<sup>510</sup> the Sexual Offences Amendment Act contains a potential anomaly. Although a child is legally allowed to consent to a sexual act from the age of 16, a consensual sexual act with a child is criminalised as exploitation of the child where such an act is accompanied by a reward. The aim seems clearly to be an extension of protection for children from exploitation. Accordingly, only the person who extends the reward is criminalised in terms of this section; the child is not criminalised. **The Commission reiterates that this Report in no way derogates from the criminalisation of under-aged (under 18) prostitution. The Commission endorses section 17 of the Sexual Offences Amendment Act and the use of 18 years as a defining line between child and adult prostitution.**

2.119 The Criminal Procedure Act 51 of 1977 also contains provisions that are peripherally relevant to the criminalised status of prostitution. In terms of section 40(1)(f)<sup>511</sup> a peace officer who comes upon someone during the night in circumstances which create an objectively reasonable basis for the formation of a suspicion that the person has committed or is about to commit a crime, can arrest such a person without a warrant. This subsection establishes the authority to arrest without warrant in circumstances in which it is required to act expeditiously and to deprive a person of his liberty in the interests of the prevention or combatting of crime. Not only a person suspected of committing an offence, but also someone who prepares to commit a crime, can be arrested – even if his or her activity has not yet reached the stage of completed attempt. The mere fact that someone loiters in a public place is not a sufficient basis for the formation of the requisite suspicion. The suspect first has to do something that indicates he is committing an offence or is about to commit one. Although no examples are given, one example of someone who is liable to be arrested under sub-section (1)(f) would be a prostitute who is openly soliciting clients.<sup>512</sup>

2.120 Section 268 of the Criminal Procedure Act provides for a competent verdict in the event that the evidence on a charge of unlawful carnal intercourse or attempted unlawful carnal intercourse with another person does not prove that offence but the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in

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<sup>509</sup>

Section 3.

<sup>510</sup>

See para 1.26 above.

<sup>511</sup>

Criminal Procedure Act 51 of 1977.

<sup>512</sup>

Soliciting is a crime in terms of section 19 of the Sexual Offences Act.

section 5, 6, or 7 of the Sexual Offences Amendment Act. It also provides for a competent verdict for the offence of common assault, the statutory offence of committing an immoral or indecent act with such other person; soliciting, enticing or importuning such other person to have unlawful carnal intercourse; soliciting, enticing or importuning such other person to commit an immoral or indecent act; or conspiring with such other person to have unlawful carnal intercourse. The person may be found guilty of the offence proved.

2.121 Section 268 was amended by the Sexual Offences Amendment Act by substituting the common law offence of indecent assault with the statutory offences of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6, or 7 of the Sexual Offences Amendment Act. This consequential amendment was necessitated by the enactment of section 68(1)(b) of the Sexual Offences Amendment Act, which repealed the common law offence of indecent assault. While giving effect to this consequential amendment, the then National Assembly Portfolio Committee on Justice and Constitutional Development passed a resolution during its deliberations on the Criminal Law (Sexual Offences and Related Matters) Amendment Bill [Bill50 – 2003] that the Commission should investigate the rationale behind section 268 of the Criminal Procedure Act of 1977. This investigation was to be included on the Commission’s project on adult prostitution and was to determine whether a provision of this nature is still justified.

2.122 The heading “statutory unlawful carnal intercourse” would seem to euphemistically refer to voluntary or consensual sexual intercourse, presumably penetrative sexual conduct which has been rendered unlawful by statute. The element of consent stands juxtaposed to section 261 of the Criminal Procedure Act, which provides (among others) for competent verdicts for the crimes of rape, compelled rape, and offences of non-consensual penetrative sexual conduct. The only remaining sexual offences on the statute book making reference to “unlawful carnal intercourse” or similar language are prostitution-related offences contained in the Sexual Offences Act.<sup>513</sup> Although the Sexual Offences Act had its genesis in the Immorality Act 5 of 1927,<sup>514</sup> which was introduced to prohibit carnal intercourse between “Europeans” and “Natives”, when the name was changed to the Sexual Offences Act, the Act itself was changed and now prohibits only adult prostitution and related acts. It can safely be deduced that the primary offence or charge in question is prostitution related. This section

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<sup>513</sup> Although cases dealing with statutory rape - eg *NDPP v Braun* ano 2009(2)SACR 390 - use terms such as “unlawful sexual intercourse” it is not the charge used and would seem to be more a matter of language use or custom as opposed to a statutory description of a crime. Section 15 of the Sexual Offences Amendment Act clearly describes statutory rape as acts of consensual sexual penetration with certain children (statutory rape).

<sup>514</sup> Jivan U & Perumal D “Let’s talk about sex, baby’ – but not in the Constitutional Court: Some comments on the gendered nature of legal reasoning in the Jordan case” 2004 SACJ 368.

would only be necessary if prostitution and/or prostitution-related offences remain criminalised. If prostitution is non-criminalised there would be no need for competent verdicts for such a charge. **The retention of section 268 is directly linked to whether prostitution should remain criminalised or not, and will be dealt with below.** Depending on the legislative framework chosen, the section would need to be repealed or reworded to adapt to the rephrased offences.

2.123 Section 277 regulates the admission of evidence of character and previous sexual experience in criminal matters. In terms of this section, no evidence as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, may be adduced. Similarly, no evidence or question in cross-examination regarding such sexual experience or conduct may be put to such person, the accused or any other witness at the proceedings pending before the court, unless the court has – on application by any party to the proceedings – granted leave to adduce such evidence or to put such question; or such evidence has been introduced by the prosecution. In determining whether evidence or questioning as contemplated in this section is relevant to the proceedings<sup>515</sup> pending before the court, the court shall take into account whether such evidence or questioning:

- is in the interests of justice, with due regard to the accused's right to a fair trial;
- is in the interests of society in encouraging the reporting of sexual offences;
- relates to a specific instance of sexual activity relevant to a fact in issue;
- is likely to rebut evidence previously adduced by the prosecution;
- is fundamental to the accused's defence;
- is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or
- is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue.

2.124 The court shall not grant an application to adduce such evidence if, in its opinion, such evidence or questioning is sought to be adduced to support an inference that, by reason of the sexual nature of the complainant's experience or conduct, the complainant is more likely to have consented to the offence being tried, or is less worthy of belief. The court must furthermore provide reasons for granting or refusing an application, which reasons shall be entered in the record of the proceedings. Permission may, for example, be given to lead

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<sup>515</sup> Section 277(5).

evidence if it were to show (for example) that a prostitute had previously laid false charges of rape where she had provided consensual sexual services but had not been rewarded as agreed; it would not, however, be allowed as a matter of course. This section of the Criminal Procedure Act is non-specific in nature and is not dependent on the legislative framework applicable to adult prostitution.

2.125 Municipal by-laws in the form of general and prostitution-specific provisions also play an important role in the legal control of prostitution. Municipal by-laws apply to prostitution in brothels in the form of measures relating to business licenses and prostitution conducted from the street.<sup>516</sup> For example, in Cape Town<sup>517</sup> the by-law relating to streets, public places and the prevention of nuisances currently prohibits the following:

2. (1) No person, excluding a peace officer or any other official or person acting in terms of the law, shall-
  - (a) when in a public place-
    - (i) intentionally block or interfere with the safe or free passage of a pedestrian or motor vehicle; or
    - (ii) intentionally touch or cause physical contact with another person, or his or her property, without that person's consent;
  - (2) Any person who blocks, occupies or reserves a public parking space, or begs, stands, sits or lies in a public place shall immediately cease to do so when directed by a peace officer or member of the Cape Town Metropolitan Police Department.
  - (3) No person shall in a public place-
    - (a) ... (e);
    - (f) perform any sexual act;
    - (g) appear in the nude or expose his or her genitalia, except where designated by the City as areas where nudity is permitted, provided that this shall not apply to children below the age of seven;
      - (i) ...;
      - (j) solicit or importune any person for the purpose of prostitution or immorality[.]

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<sup>516</sup> In terms of the Western Cape Standard By-Law relating to Streets published under PN 562 of 2 October 1987, regulation 26 provides as follows: "(2) No person shall - . . . (f) solicit or importune any person for the purpose of prostitution or immorality; . . . in a street or public place."

<sup>517</sup> In Gauteng Province the only reference to prostitution in By-Laws is found in section 88 of the Gauteng Gambling Act 4 of 1995 which provides that "an offence in terms of this Act will be deemed to have been committed under aggravating circumstances if it is proved that, at the time of the offence was committed prostitution, or the solicitation of clients for the purposes of prostitution took place or lewd or incident acts were permitted on such premises; or the premises were within a distance of 500 metres of other premises where persons were available for prostitution or the commission of lewd or incident acts against payment;"

2.126 In recent years, two matters relevant to the legislative framework governing prostitution have been dealt with in South African courts. These were the Constitutional Court case of *S v Jordan*<sup>518</sup> challenging the constitutionality of certain sections of the Sexual Offences Act, and the matter of *Kylie v Commission for Conciliation, Mediation and Arbitration and Others*<sup>519</sup> challenging the dismissal of a woman engaging in prostitution through her employment at a massage parlour.<sup>520</sup>

**(a) *S v Jordan***<sup>521</sup>

2.127 In *S v Jordan*,<sup>522</sup> the Constitutional Court held that section 20(1A)(a) of the Sexual Offences Act is constitutional.<sup>523</sup> It specifically held that section 20(1A)(a) does not unfairly discriminate against women and does not infringe upon the right to privacy,<sup>524</sup> freedom and security, and the right to economic activity.

2.128 The Court did not address the merits of retaining a legislative model which criminalises prostitution, stating that it was rather a matter for the legislature to decide the most effective policy option for prostitution.<sup>525</sup> In this regard the Court referred to the fact that a range of legal responses is possible to address prostitution in “open and democratic societies”.<sup>526</sup>

2.129 Justice Ngcobo held that although the section only criminalises the conduct of the prostitute, it is gender neutral and therefore not directly discriminatory since the conduct of both male and female prostitutes is criminalised. Justice Ngcobo further found that although the section only strikes at the prostitute and not the customer, there was no indirect discrimination. He stated that the purpose of the prohibition is to outlaw commercial sex<sup>527</sup> and not to protect the client of a prostitute. Consequently that even if there was discrimination, it would not be unfair since the Act pursues an important and legitimate

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<sup>518</sup> *S v Jordan* 2002 (6) SA 642 (CC).

<sup>519</sup> 2010 (10) BCLR 1029 (LAC).

<sup>520</sup> Also see the discussion under “The theory of prostitution as an economic contract: work” above.

<sup>521</sup> *S v Jordan* 2002 (6) SA 642 (CC).

<sup>522</sup> *S v Jordan* supra.

<sup>523</sup> The minority judgement found that it is unconstitutional on the basis of gender discrimination.

<sup>524</sup> Meyerson Denise “Does the Constitutional Court of South Africa take rights seriously?” The case of *S v Jordan*.

<sup>525</sup> *S v Jordan* 2002 (6) SA 642 (CC) para 94, Gardner *Criminalising the Act of Sex* at 94.

<sup>526</sup> Meyerson.

<sup>527</sup> This was also accepted in the joint judgment of the Court, at para 10.

constitutional purpose – namely to outlaw commercial sex.<sup>528</sup> Justice Ngcobo said that there is a qualitative difference between the conduct of the prostitute, who is likely to be a repeat offender, and the customer, who may not be a repeat offender. He confirmed that in any event the client of a prostitute may be found guilty of criminal conduct under the common law (as a *socius criminis*) or under section 18 of the Riotous Assemblies Act 7 of 1956, and be liable to the same punishment as the prostitute.

2.130 In the minority judgment, Justices O'Regan and Sachs found that the criminalisation of prostitution, insofar as it renders the conduct of the prostitute criminal but not that of the client, constitutes unfair and discriminatory treatment on the basis of gender.<sup>529</sup> They found that this discrimination was not justifiable.<sup>530</sup>

2.131 Counsel for Jordan further argued that prostitutes' right to economic activity as protected in section 26(1) of the Interim Constitution was infringed by the criminalisation of prostitution. The Court accepted the State's argument that the legislation intends to promote the protection or improvement of the quality of life and human development, and is as such sanctioned by section 26(2) of the Interim Constitution.<sup>531</sup>

2.132 As to the argument that section 20(1A)(a) of the Sexual Offences Act infringes the right to privacy, Justice Ngcobo did not accept that a person who commits a crime in private (the nature of which can only be committed in private) can necessarily claim the protection of the privacy clause. He found that even if that right was limited, the limitation is justified based on the legitimate aim of the State in proscribing prostitution.<sup>532</sup> Although Justices O'Regan and Sachs found in the minority judgment that criminalising prostitution does amount to an infringement of the right to privacy,<sup>533</sup> they concluded that the limitation was justifiable in view of the purpose of the legislation.<sup>534</sup>

2.133 The Court found that section 20(1A)(a) of the Sexual Offences Act does not limit the right to dignity of the prostitute but that the diminution of dignity arises from the character of prostitution itself. The Court pointed out that prostitutes who are arrested and accused by the

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<sup>528</sup> See *S v Jordan* 2002 (6) SA 642 (CC) for a discussion on the Constitutional Court's view on the role of stigma associated with the criminalisation of prostitution in paras 16, 18 and 63 – 73 and further.

<sup>529</sup> *S v Jordan* 2002 (6) SA 642 (CC) para 95.

<sup>530</sup> *Supra* para 98. This discrimination has been expressly remedied by the promulgation of section 11 of the Sexual Offences Amendment Act.

<sup>531</sup> *Supra* para 23 – 26 and 56.

<sup>532</sup> *Supra* para 27 – 29.

<sup>533</sup> *Supra* para 89.

<sup>534</sup> *Supra* para 91 – 94.

police must nevertheless always be treated with dignity because the law must be applied in a constitutional manner, and that prostitutes have the right to be treated with dignity by their customers.<sup>535</sup>

2.134 Similarly, the Court found that section 20(1A)(a) does not infringe the right to freedom of the person, as any invasion of a prostitute's freedom and personal security follows the breach of the law and not an intrusion on her right by the state.<sup>536</sup>

**(b) *Kylie v Commission for Conciliation, Mediation and Arbitration and Others***<sup>537</sup>

2.135 As stated above,<sup>538</sup> the Labour Appeal Court endorsed the Constitutional Court's comments in *S v Jordan* that the illegality of prostitution should not strip prostitutes of their right to be treated with dignity by clients, and concluded that this should apply to employers as well.<sup>539</sup> Although the court found that Kylie was an employee of the massage parlour, the employment contract was illegal, invalid and unenforceable.<sup>540</sup> The result is that a person need not be engaged in legal "work" to fall under the protection of section 23 of the Constitution.<sup>541</sup> Section 23 of the Constitution extends fair labour practice rights to all people and not just employees. This affords all people the right to fair labour practices and the right to organise, strike and to claim for constructive dismissal.<sup>542</sup> The court did not, however, allow for an order of re-employment because in the current legislative environment this would have been seen to encourage participation in criminal activity. The Labour Appeal Court made a clear distinction between illegal "work" and illegal contracts. Kylie merely performed an illegal job, which did not negatively impact on her employment status.<sup>543</sup> The matter was referred back to the Commission for Conciliation, Mediation and Arbitration (CCMA) but a settlement was reached at this point, leaving the matter unresolved in the CCMA.<sup>544</sup>

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<sup>535</sup> Supra para 74.

<sup>536</sup> Supra para 75.

<sup>537</sup> 2010 (10) BCLR 1029 (LAC).

<sup>538</sup> See para 2.133 above.

<sup>539</sup> *S v Jordan* 2002 (6) SA 642 (CC) para 74. This comment in the minority judgment was not contradicted in the majority judgment, *Kylie v Commission for Conciliation, Mediation and Arbitration and Others* 2010 (10) BCLR 1029 (LAC) para 19.

<sup>540</sup> SWEAT National Sex Work Symposium: Best practices in HIV prevention, care and treatment for sex workers in South Africa (August 2012) Presentation by Caren-Lee Small, CCMA Commissioner.

<sup>541</sup> Smit, Adv Denine "'Kylie' and the jurisdiction of the CCMA" Department of Mercantile Law University of Free State presentation dated 17 January 2011.

<sup>542</sup> Ibid.

<sup>543</sup> Ibid.

<sup>544</sup> Ibid.

## **E Comparative law on prostitution with a focus on the prostitute**

2.136 Legislation relating to adult prostitution can loosely be categorised into the four legislative models described by the Commission as follows: 1) total criminalisation (criminalising the prostitute and the buyer, as is currently the case in South Africa);<sup>545</sup> 2) partial criminalisation (criminalising the buyer but not the prostitute, as in Sweden); 3) non-criminalisation (not criminalising the prostitute or the buyer, as in New Zealand); or 4) regulation (where prostitution is allowed subject to regulations). Various permutations of these models are possible, such as criminalising buyers in certain circumstances if they pay a third party for sex with a prostitute or pay for sexual services where a prostitute is subjected to force (eg in the United Kingdom).

2.137 South Africa provides an example of the total criminalisation model, in which the behaviour of prostitutes is criminalised on a number of fronts; thus, the above exposition of the position in South Africa will suffice. However, a number of other countries follow the criminalisation model, including all states in the United States of America, apart from Nevada, and many African countries including Namibia, Botswana, Malawi, Zimbabwe, Zambia, Burundi, Cameroon, Central African Republic, The Gambia, Liberia, Morocco and Sierra Leone. Examples of the other models are described in the following sections.

## **F Other jurisdictions and models**

### **1 Partial criminalisation (Prostitute not criminalised)**

#### Sweden

2.138 The current legal position in Sweden is an example of the partial criminalisation model. The prostitute is not criminalised, but all other role players involved in prostitution, including the buyer, are criminalised. In Sweden, prostitution is regarded as an aspect of male violence against women and children, a form of exploitation of women and children, and as a symptom of the inequality between the sexes. Since 1999 it has been illegal under the

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<sup>545</sup> The reach of section 11 of the Sexual Offences Act has been explained in Chapter 1 above and is dealt with comprehensively in Chapter 3 below.

Swedish Penal Code<sup>546</sup> to buy sexual services. In 2009 both Norway and Iceland enacted similar laws,<sup>547</sup> followed by Finland,<sup>548</sup> Israel, and the United Kingdom. Korea has partly enacted similar laws.<sup>549</sup> France is reported to be considering following suit.<sup>550</sup> In Sweden, the offence of prostitution was originally sanctioned with a fine or imprisonment for up to six months.<sup>551</sup> Effective from 1 July 2011, the maximum penalty was revised upwards to one year's imprisonment, to reflect the heightened priority of the crime.<sup>552</sup> The offence covers all forms of sexual services, whether purchased outdoors, indoors, in saunas or in massage parlours.<sup>553</sup>

2.139 A range of exploitation of prostitution offences – including pimping and profiting – cover any person who promotes or improperly exploits “casual sexual relations for payment”, with a maximum penalty of four years’ imprisonment, increased to six years in cases of “gross” or “aggravated” procuring. Trafficking in persons for the purposes of sexual exploitation<sup>554</sup> was criminalised in July 2002 and the offence was further extended in 2004 to include internal trafficking and other forms of exploitation.<sup>555</sup> The Swedish government, law enforcement agencies and NGOs all claim that there has been far less trafficking and involvement of foreign nationals compared to that of neighbouring countries. A comparative

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<sup>546</sup> The Act Prohibiting the Purchase of Sexual Services 1998:408.

<sup>547</sup> Kajsa Claude “Targeting the Sex Buyer. The Swedish Example: Stopping Prostitution and Trafficking Where it all Begins” *IntellectualInfolog*, Solna, 2010 at 6.

<sup>548</sup> Jordan Ann “The Swedish Law to Criminalize Clients: a Failed Experiment in Social Engineering” Center for Human Rights and Humanitarian Law American University Washington College of Law Issue Paper (4 April 2012) at 2.

<sup>549</sup> Waltman Max “Criminalize Only the Buying of Sex” *New York Times* 19 April 2012 available at <http://www.nytimes.com>.

<sup>550</sup> *The Guardian* Chrisafis Angelique “France may make it illegal to pay for sex” 13 April 2011 available at <http://www.theguardian.co.uk/world/2011/apr/13/france-illegal-pay-sex>.

<sup>551</sup> Sweden's laws are extra-territorial, which means that men who buy or attempt to buy sex in other countries with similar laws can be charged with those offences. Bindel “Briefing on Current Trends within The Sex Industry in Sweden” 2003 report for the Scottish Local Government and Transport Committee accessed on 26 January 2007. The report deals with prostitution and trafficking for sexual purposes at para 2.122. The report notes that although it is difficult to assess the exact extent of human trafficking for sexual purposes in Sweden, this type of crime is considered to be substantially less prevalent in Sweden than in other comparable countries. The report notes that according to the National Criminal Police, “it is clear that the prohibition of the purchase of sexual services acts as a barrier to human traffickers and procurers considering establishing themselves in Sweden.” See also Government Offices of Sweden “Inquiry on the Evaluation of the Prohibition of the Purchase of Sexual Services” 2010 accessed on 12 February 2011.

<sup>552</sup> Waltman M “Women's Studies” *International Forum* 34 (2011) at 465.

<sup>553</sup> Bindel and Kelly “A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden” report for the Scottish Local Government and Transport Committee Evidence Received for Prostitution Tolerance Zones (at para 2525) Accessed on 30 January 2007.

<sup>554</sup> Interpreted to include prostitution.

<sup>555</sup> Kelly et al 31.

study of nine countries by Kelly et al reports that Sweden had the smallest percentage of women selling sex.<sup>556</sup>

2.140 Following an inquiry led by the Chancellor of Justice to evaluate the law in practice over the first 10 years, the government of Sweden published a report<sup>557</sup> in 2010. The report noted that prostitution in Sweden had not increased since the introduction of the prohibition. Particularly, street prostitution had been halved since the prohibition was introduced in 1999, and the reduction was considered to be a direct result of the criminalisation of sex purchases.<sup>558</sup>

2.141 The Swedish government also reported that it had found no evidence of an increased prevalence in indoor prostitution (eg in massage parlours, sex clubs and hotels, and restaurant and nightclub settings) during the same period. There were no signs of former street prostitutes having migrated to indoor prostitution.<sup>559</sup> Whereas prostitution in which the first contact is made via the internet is prevalent in Sweden's neighbouring countries, no indication was found of an increase in prostitution via the internet in Sweden. The report therefore concluded that the prohibition in Sweden had not led to street prostitution simply shifting arenas to the internet.<sup>560</sup> Waltman has endorsed these findings, stating that a number of studies have shown a marked decrease in street prostitution.<sup>561</sup> He considers allegations of so-called "hidden" prostitution venues, as postulated by Jordan,<sup>562</sup> to be baseless rumours.

2.142 The Swedish report proposed that in purchases of sexual services, a person exploited through prostitution may be regarded as the injured party and so be granted compensation as a victim of violence against women. However, the issue must be determined in each individual case.<sup>563</sup> In this regard Waltman<sup>564</sup> has advocated for the use of civil remedies as a

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<sup>556</sup> Op cit 37. A one month rapid study done by SWEAT on behalf of SANAC revealed that the size of the prostitution population nationally is approximately 153 000 (figures range between 132 000 and 182 000). A minimum estimate is 121 000 women, 6000 men and 5000 transgender persons. VCC meeting with SWEAT, WLC and Sisonke on 30 August 2013. The study is contained as a Special Report How many sex workers in South Africa? SANAC News Issue 2: June/July 2013 at 6. See also Abel GM, Fitzgerald, L.J & Brunton C "The Impact of Decriminalisation".

<sup>557</sup> The evaluation reportedly shows that the prohibition of the purchase of sexual services is an important instrument in preventing and combating prostitution (and human trafficking for sexual purposes). Source: Government Offices of Sweden "Inquiry on the Evaluation of the Prohibition of the Purchase of Sexual Services" 2 September 2010.

<sup>558</sup> Government Offices of Sweden.

<sup>559</sup> Ibid.

<sup>560</sup> Ibid.

<sup>561</sup> Waltman M "Prohibiting Sex Purchasing and Ending Trafficking: the Swedish Prostitution Law" *Michigan Journal of International Law* Vol 33:133 (Fall 2011) at 149.

<sup>562</sup> Jordan 12.

<sup>563</sup> Government Offices of Sweden.

support for escape from prostitution. He has argued that civil damages should go directly to the person who was harmed, or to a program for relief or support to persons in prostitution who are in need. It has subsequently been reported<sup>565</sup> that Sweden's 2011 amendment law enables survivors to claim damages from "johns" for violating their equality and dignity, and supports crime victims' social welfare assistance and ability to leave prostitution.

2.143 The Swedish model, as it has colloquially been termed, has been subjected to some criticism. Jordan<sup>566</sup> avers that the Swedish law is an experiment in social engineering to change the behaviour and thoughts of Swedish men. She contends that prostitution is not, per se, violence against women,<sup>567</sup> and that in most countries, laws exist that disempower women who sell sexual services and prevent them from taking reasonable steps to ensure their safety. She explains that if prostitution is ascribed to male violence made possible by unequal power relations between men and women, no distinction can be drawn between voluntary and non-voluntary prostitution.<sup>568</sup> Jordan makes the assumption that relatively few men testify in trafficking and abuse cases because the threat of being prosecuted for soliciting prostitution – and exposing themselves to blackmail and robbery – would be a deterrent.<sup>569</sup>

2.144 According to Jordan, the Swedish laws have a negative health consequence:

As sex workers move further underground, they have less access to health services and are less able to exchange information about risky clients, and health and other issues. It is more likely that clients will refuse to use condoms and that sex workers and brothels will not carry them. This leads to the risk of unsafe sex practices, which in turn leads to more sexually-transmitted infections and HIV.<sup>570</sup>

2.145 The Swedish commentator Petra Östergren's findings parallel the work of other authors who are critical of the Swedish system, such as Jordan. However, it is important to note that Östergren's work has been largely invalidated, because the report that she based her findings on has been removed from the home page of Swedish National Health and Welfare and declared "not valid anymore".<sup>571</sup> Waltman also argues that Östergren's findings are baseless – namely that the law had not reduced prostitution in Sweden, that "hidden"

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<sup>564</sup> Waltman *International Forum* 465.

<sup>565</sup> Waltman "Criminalize Only the Buying of Sex" *New York Times* 19 April 2012.

<sup>566</sup> Jordan 2.

<sup>567</sup> Op cit 3.

<sup>568</sup> Ibid.

<sup>569</sup> Op cit 10.

<sup>570</sup> Op cit 12.

<sup>571</sup> SoS [National Board of Health and Welfare] "Kännedom om Prostitution"(2000) <http://www.socialstyrelsen.se/publikationer2000/2000-3-5> at 151 cited in Waltman M "Prohibiting Sex Purchasing and Ending Trafficking: the Swedish Prostitution Law" *Michigan Journal of International Law* at 465.

prostitution had probably increased, and that there were more demands for unsafe sex and more violent purchasers.<sup>572</sup>

2.146 Waltman<sup>573</sup> concedes that although Östergren may have been correct that some purchasers stopped testifying against traffickers once they were criminalised, the Gothenburg police report having “received anonymous tips from clients who suspect human trafficking”. He states that the increase in convictions and a dramatic increase in crimes that are reported to the police highlight the strong deterrent effect of the law. He reflects that in 2010 alone, 1251 cases of sex purchases were reported to the police, the custom authority, or the prosecution service. Waltman cautions that legalisation tends to increase the demand for more prostituted persons and seems to be associated with cultures in which prostitution and sexual coercion become normalised.<sup>574</sup> He notes that to meet the increased demand for prostitution, there is often a corresponding increase in cross-jurisdictional trafficking.<sup>575</sup>

2.147 Waltman argues that legalisation cannot address the power imbalance between the buyer and the prostituted woman, or (among other things) the demand by buyers for unsafe or high-risk sex. His view is that prostituted persons are in a position of vulnerability, which the interpretative notes to the Palermo Protocol<sup>576</sup> define as “any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved”. The exploitation of such a person’s lack of alternatives is one reason why the Swedish legislature enacted its legislation.

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<sup>572</sup> Op cit 151.

<sup>573</sup> Op cit 152 (refers to SoS [National Board of Health and Welfare] “Prostitution in Sweden 2003” n70 at 48.

<sup>574</sup> Waltman *Michigan Journal of International Law* 148.

<sup>575</sup> Op cit 149.

<sup>576</sup> Report of the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime on the Work of Its First to Eleventh Sessions “Addendum Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto” ¶63, U.N. Doc. A/55/383/Add/1 (Nov. 3, 2000).

## **2 Partial criminalisation (selling and buying sexual services is not illegal per se, but certain prostitution-related behaviour is criminalised)**

### United Kingdom

2.148 Selling sexual services is not illegal in England and Wales, but many of the activities that make it possible are prohibited, including soliciting and running a brothel.<sup>577</sup> Whereas buying sex is not illegal per se, legislation prohibiting “kerb-crawling” was introduced in the Sexual Offences Act of 1985, as a public nuisance offence, which became an arrestable offence in 2001 through the Criminal Justice and Police Act. The Discussion Paper<sup>578</sup> noted that the United Kingdom Government was reportedly considering proposals to prosecute buyers of prostitutes in a new effort to curb the demand for prostitution, as Sweden has done. Consequently, the Sexual Offences Act of 2003 was amended by the Policing and Crime Act of 2009 to create the offence of soliciting a person in a street or public place for the purpose of obtaining sexual services from a prostitute. This can include a person soliciting from a vehicle in a street or public place, and replaces the offences of kerb-crawling and persistent soliciting contained in the Sexual Offences Act of 1985.<sup>579</sup> The 2009 amendment law has increasingly been used to deter buyers of sexual services.<sup>580</sup> In the United Kingdom, it is a criminal offence to buy the sexual services of a person who has been trafficked, exploited, subjected to force, threatened or deceived into providing a sexual service. Section 53A of the United Kingdom Policing and Crime Act of 2009 provides that paying for sexual services of a prostitute who has been subjected to force (amongst other things) is a criminal offence in England and Wales. As the law currently stands, it is irrelevant whether the buyer is aware that the prostitute has been exploited, subjected to force, threatened or deceived into providing the sexual service. The legislation in Northern Ireland contains an identical provision.<sup>581</sup>

2.149 Policy has shifted from a liberal, public nuisance approach to concerns about the health and safety of women selling sex. This shift has been accompanied by the emerging of support services for women who sell sex, often through available funding streams focusing on harm reduction and HIV/AIDS, and some with a specific aim of enabling women to exit

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<sup>577</sup> Kelly et al 9.

<sup>578</sup> SALRC *Sexual Offences: Adult Prostitution Discussion Paper* 2009 para 6.118 and 6.119, and at 151.

<sup>579</sup> Home Office “A Review of Effective Practice in responding to Prostitution” 13 Oct 2011 Available at <http://www.homeoffice.gov.uk>.

<sup>580</sup> Kelly et al 9.

<sup>581</sup> Section 64A of the Sexual Offences (Northern Ireland) Order 2008 (S.I.1769 (N.I.2)).

prostitution.<sup>582</sup> Most recent policy development has taken place through the 2006 Home Office report “Paying the Price”. Throughout these processes, government has made it clear that the sex industry cannot be left to self-regulate, and that the main target for intervention is street prostitution because of the widely documented harms associated with it.

2.150 Current practice, as established by a 2010 Home Office Circular, is to use a non-statutory “prostitutes’ caution” to demonstrate that a person is involved in prostitution. Offenders are not prosecuted until at least two cautions have been given. It is expected that prostitutes’ cautions will continue to be used to demonstrate “persistence” under the amended legislation.<sup>583</sup> In terms of paragraph 47 of the 2010 Home Office Circular, two officers would need to witness the activity and administer the caution. Details of these prostitutes’ cautions are recorded at the local police station. However, prostitutes’ cautions differ from ordinary police cautions in two respects:

- The caution is not a formal prerequisite for conviction, but it has become the way in which evidence is adduced to prove that an individual charged for the first time is a “common prostitute.” It is expected that prostitutes’ cautions will continue to be used to adduce evidence of persistence.
- The insertion of the word “persistently” provides an opportunity for the police, on encountering an individual engaging in street prostitution for the first time in any three-month period, to direct that individual to non-criminal justice interventions. Such interventions may help the individual involved to address the issues that may have caused them to enter prostitution, such as drug dependency or a history of sexual abuse, and ultimately to find a route out. Where successful, this approach can prevent vulnerable individuals from becoming involved in the Criminal Justice System.

2.151 Where the police do encounter someone loitering or soliciting on a persistent basis, they may still consider whether a non-criminal justice intervention may be the most appropriate intervention, and they can contact a local project or service to explore this option.

2.152 In accordance with paragraph 51 of the 2010 Home Office Circular, if a criminal charge is deemed necessary then the police should consider whether an order under section 17 of the Policing and Crime Act of 2009 may be appropriate. If so, they can take early steps to explore this option so that the Crown Prosecution Service may advise the court of the

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<sup>582</sup> Kelly et al 9.

<sup>583</sup> Home Office circular 006/ 2010 “Provisions in the Policing and Crime Act 2009 that relate to prostitution (sections 14 to 21)” available at <http://homeoffice.gov.uk> Accessed on 20 September 2010.

appropriateness of such an order following conviction. Section 17 of the Policing and Crime Act of 2009 amended section 1 of the Street Offences Act of 1959 to introduce a new order, effective from April 2010, which is available to courts as an alternative penalty to a fine that is applicable for people convicted of loitering or soliciting under section 1 of the Street Offences Act (Engagement and Support Orders). The purpose of the order is to provide a penalty that is a more constructive option than a fine. Fining someone involved in street prostitution can have the counterproductive effect of providing a further reason to continue engaging in prostitution – to pay the fine. Instead, this order requires the person involved in prostitution to attend three meetings with a named supervisor, who will help the individual to address the reasons for their involvement in prostitution and attempt to help them find a route out.

2.153 Paragraph 58 of the 2010 Home Office Circular provides that opportunities for diversion away from the Criminal Justice System into welfare-based interventions should always be considered before criminal sanctions. However, when the decision to pursue criminal charges has been made, the benefits of seeking an order requiring attendance at meetings should be considered at an early stage. Where effective partnerships between police and welfare-based intervention services have been established, this relationship should be used to discuss the merits of seeking an order and its supervision.

2.154 This Circular also provides for the rehabilitation of prostitutes in accordance with the Rehabilitation of Offenders Act of 1974. Section 18 of the Policing and Crime Act of 2009 amended section 5 of the Rehabilitation of Offenders Act of 1974. It applies to the rehabilitation periods for people convicted of loitering or soliciting for the purposes of prostitution and sentenced to an order under section 1 of the Street Offences Act of 1959. For those sentenced to an order requiring attendance at meetings, the rehabilitation period is six months. This is intended to accord with the maximum length of the Engagement and Support Order. When the order has been completed, the person who has been subject to the Order will have become a rehabilitated person under the Rehabilitation of Offenders Act of 1974. Section 6 of the Rehabilitation of Offenders Act of 1974 was amended to insert a new subsection (3A). It applies when someone who has been given an order breaches it and is re-sentenced for the same offence after the original six-month rehabilitation period has expired. In cases where the rehabilitation period for the new sentence ends later than that of the original order, the offender will not be treated as rehabilitated under the 1974 Act until the longer period has expired.

## Canada

2.155 Canada inherited its prostitution law from the United Kingdom and therefore shares a similar legislative heritage to South Africa's. Until recently in Canada, the buying and selling of adult sexual services were legal, while most related activities (such as public communication for the purpose of prostitution, brothels and procuring) were outlawed. As the legislative framework in Canada accorded with that of the United Kingdom until November 2014 it is dealt with here to explain its historical position but it now strictly speaking falls under the Swedish dispensation or Nordic model as it has become known. Prior to the enactment of the Protection of Communities and Exploited Persons Act, Bill C-36<sup>584</sup> it was argued that it was difficult to practise prostitution without breaking the law. The Criminal Code of Canada defines "prostitute" as "a person of either sex who engages in prostitution". It made the following behaviour unlawful:

- Section 210: Owning, managing, leasing, occupying, or being found in a bawdy house, as defined in section 197.
- Section 211: Transporting anyone to a bawdy house.
- Section 212: Procuring.
- Section 212(1)(j): Living on the avails of prostitution.
- Section 212(4): Paying for sex with anyone under the age of 18.
- Section 213: Communication in a public place for the purposes of prostitution.
- Section 279: Transporting someone. This does not specify for any particular purpose.

2.156 Cars are (still) considered a public space if they can be seen. Working independently as a prostitute and using private communication for such purposes (telephone, internet, email, etc) were considered legal.

2.157 The practical effect of these provisions is that there was only one way to sell sex in Canada without risking criminal sanction. This is where a prostitute meets a customer at an indoor location such as a hotel room or the customer's home, so called "out-call" work. "In-call" work, where the prostitute services customers from a fixed indoor location such as her home or a commercial brothel, is prohibited.<sup>585</sup> Although providing sexual services to customers encountered on the street was not itself illegal, communicating the willingness to

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<sup>584</sup> The Protection of Communities and Exploited Persons Act was assented to on 6<sup>th</sup> November 2014. This Act seeks to amend the Criminal Code in response to the Supreme Court of Canada decision in *Attorney General of Canada v Bedford* and to make consequential amendments to other Acts.

<sup>585</sup> *Canada (Attorney General) v Bedford* Ontario Court of Appeal March 26 2012 at 17.

provide such services was prohibited by the provision on communication. Street prostitution was therefore effectively illegal.<sup>586</sup> Finally, the prohibition against living on the avails of prostitution targeted anyone who provided goods or services to prostitutes because they are prostitutes. This encompassed not only pimps who exploit prostitutes for their own purposes, but anyone who derives profit from the prostitution of others. This made it illegal for a prostitute to pay someone to protect her or to assist in any aspect of her work as a prostitute.<sup>587</sup>

2.158 Recently, in *Canada (Attorney General) v Bedford*,<sup>588</sup> the constitutionality of three provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, which form the core of Parliament's response to prostitution were challenged. The challenged sections were:

1. Section 210, which prohibits the operation of common bawdy-houses. This prevented prostitutes from offering their services out of fixed indoor locations such as brothels, or even their own homes.<sup>589</sup>
2. Section 212(1)(j), which prohibited living on the avails of prostitution. This prevented anyone, including but not limited to pimps, from profiting from another's prostitution.<sup>590</sup>
3. Section 213(1)(c), which prohibited communicating for the purpose of prostitution in public. This prevented prostitutes from offering their services in public, particularly on the streets.<sup>591</sup>

2.159 The application judge found that the provisions had specific objectives. The objectives were as follows:

- The bawdy-house provisions were intended to combat neighbourhood disruption or disorder and to safeguard public health and safety.
- The prohibition against living on the avails of prostitution was aimed at "preventing the exploitation of prostitutes and profiting from prostitution by pimps."
- The provision on communication was intended "to curtail street solicitation and the social nuisance which it creates."<sup>592</sup>

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<sup>586</sup> Supra at 18.

<sup>587</sup> Supra at 19.

<sup>588</sup> 2012 ONCA 186 26 March 2012.

<sup>589</sup> Section 210 was declared invalid by the Ontario Court of Appeal in *Canada v Bedford* Ontario Court of Appeal March 26 2012. On 25 October 2012 the Supreme Court of Appeal granted the Crown leave to appeal this finding.

<sup>590</sup> In *Canada v Bedford* Ontario Court of Appeal section 212(1)(j) was declared invalid except in circumstances of exploitation. This finding is also subject to appeal in the Supreme Court of Appeal.

<sup>591</sup> The Court of Appeal found this provision valid. The Supreme Court of Appeal granted the respondents the right to cross appeal the soliciting ban.

2.160 Counsel arguing in favour of striking these provisions down stated as follows:

- Prostitutes face a high risk of physical violence;
- The risk of violence can be reduced (but not eliminated) if prostitutes are able to take basic precautions, such as working indoors, being in close proximity to people who can intervene if needed, taking time to screen customers, having regular customers, and planning an escape route; and
- The challenged provisions prevent prostitutes from taking precautions that could reduce the risk of violence.<sup>593</sup>

2.161 In the lower court, the judge held that these provisions were unconstitutional and should be struck down because they do not accord with the principles of fundamental justice enshrined in section 7 of the *Canadian Charter of Rights and Freedoms*. The court found that “the laws, individually and together, force prostitutes to choose between their liberty interest and their right to security of the persons”.<sup>594</sup> The judge reasoned that the challenged laws exacerbate the harm that prostitutes already face by preventing them from taking steps that could enhance their safety. Those steps include: working indoors, alone or with other prostitutes (prohibited by s 210); paying security staff (prohibited by s 212(1)(j)); and screening customers encountered on the street to assess the risk of violence (prohibited by s 213(1)(c)).

2.162 The matter was taken on appeal and the Ontario Court of Appeal found that:

1. The prohibition on common bawdy-houses for the purpose of prostitution is unconstitutional and must be struck down. (However, the Court suspended the declaration of invalidity for 12 months to give Parliament an opportunity to redraft a *Charter*-compliant provision.)
2. The prohibition against living on the avails of prostitution infringes section 7 of the *Charter* to the extent that it criminalises non-exploitative commercial relationships between prostitutes and other people. The Court of Appeal read in words of limitation so that the prohibition applies only to people who live on the avails of prostitution in circumstances of exploitation. In the Court’s words, “[T]his cures the constitutional defect and aligns the text of the provision with the vital legislative objective that animates it.”

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<sup>592</sup> *Canada (Attorney General) v Bedford* Ontario Court of Appeal March 26 2012 at 18.

<sup>593</sup> *Ibid.*

<sup>594</sup> *Jordan* 10.

3. The ban on communicating in public for the purpose of prostitution was constitutional, and that the appeal was allowed on this issue. The communication provision consequently remains in full force.

2.163 In summary, the effect of the judgment – if left unchallenged – would have been that prostitutes could hire drivers, bodyguards and support staff, and could work indoors in organised brothels or “bawdy houses”, whereas “exploitation” by pimps would have remained illegal.<sup>595</sup> Openly soliciting customers on the street would have remained prohibited, with the judges deeming this “a reasonable limit on the right to freedom of expression”. The court, however, suspended the immediate implementation of striking the bawdy house law for a year to allow the government an opportunity to amend the Criminal Code.<sup>596</sup> The decision by the Ontario Court of Appeal was made subject to appeal, and the declaration is therefore not in effect.<sup>597</sup> Furthermore, even if it had come into effect, the decision would only be binding in Ontario.<sup>598</sup>

2.164 The judgment in the Court of Appeal was hailed as a victory by some people. However, several former prostitutes were angered by the decision and said the court’s ruling would prevent social workers and police from intervening to rescue underage prostitutes, and that it sent the wrong message to children that prostitution is an acceptable career.<sup>599</sup> Consequently an appeal was lodged with the Supreme Court of Canada on 25 April 2012, including an extension of the stay in effect.<sup>600</sup> In lodging the appeal, the Attorney General of Canada explained that “[I]t is our position that the Criminal Code provisions are constitutionally sound. The Criminal Code provisions denounce and deter the most harmful and public aspects of prostitution.”<sup>601</sup> On 25 October 2012 the Supreme Court of Canada granted leave to the Crown to appeal the judgment and to the respondents to cross-appeal

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<sup>595</sup> Humphreys A “Ontario Court of Appeal greenlights brothels, sweeps aside many of Canada’s anti-prostitution laws” Available at <http://news.nationalpost.com> Accessed on 11 September 2012.

<sup>596</sup> Ibid.

<sup>597</sup> *Canada (Attorney General) v Bedford* Ontario Court of Appeal March 26 2012.

<sup>598</sup> Humphreys.

<sup>599</sup> Ibid.

<sup>600</sup> Attorney General of Canada “Response of the Attorney General of Canada to the Ontario Court of Appeal Decision on the Bedford Prostitution Challenge” Department of Justice April 25 2012 available at <http://www.justice.gc.ca> Accessed on 19 September 2012.

<sup>601</sup> Attorney General of Canada “Response on Bedford Appeal” 2012.

against the ban on soliciting.<sup>602</sup> The stay on the striking down of the bawdy house law was extended until the date of the trial.<sup>603</sup>

2.165 On 20 December 2013 the Supreme Court of Canada found the provisions to be unconstitutional.<sup>604</sup> In doing so the court explained that the appeals are not about whether prostitution should be legal or not but whether the laws Parliament has enacted on how prostitution may be carried out pass constitutional muster.<sup>605</sup> At the heart of the debate is the argument that the provisions prevent people involved in a risky, but legal, activity from taking steps to protect themselves from the risks. When called to decide whether there is a sufficient connection between crime-creating legislation and alleged interference with an individual's right to security of the person, the court must examine the effect of that legislation in the context in which it actually applies.<sup>606</sup> The world in which street prostitutes operate is one of dark streets and barren, isolated, silent places.<sup>607</sup> The Supreme Court of Appeal further held that Parliament is not precluded from imposing limits on where and how prostitution may be conducted as long as it does not infringe the rights of prostitutes. It was left to Parliament to choose whether it wished to devise a new approach.

2.166 Parliament subsequently amended the Canadian Criminal Code by enacting the Protection of Communities and Exploited Persons Act in response to the Supreme Court of Canada Decision in *Attorney General of Canada v Bedford*. In the preamble to the Act the Parliament in Canada expresses its grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it. It further recognises the social harm caused by the objectification of the human body and the commodification of sexual activity and the need to protect human dignity and the equality of all Canadians by discouraging prostitution, which has a disproportionate impact on women and children. It stresses the importance of denouncing and prohibiting the purchase of sexual services because it creates a demand for prostitution and the importance of continuing to denounce and prohibit the procurement of persons for prostitution. It concludes with encouraging those who engage in prostitution to report incidents of violence and to leave prostitution. This Act inter alia:

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<sup>602</sup> McGill Research Group on Health and Law McGill University *Bedford v. Canada* – The Faculty discusses “Sex Work, Rights, and the Criminal Law” *McGill Law Focus* online November 2012 available at <http://publications.mcgill.ca>.

<sup>603</sup> Global News “Supreme Court to hear prostitution law appeal; brothel ban stays for now” Oct 25 2012 available at <http://www.globalnews.ca>.

<sup>604</sup> *Canada (Attorney General) v Bedford*, Supreme Court of Appeal.

<sup>605</sup> Para 2 at 13.

<sup>606</sup> *Canada Attorney General) v Bedford* Ontario Court of Appeal March 26 2012 at 147.

<sup>607</sup> *Ibid.*

- Creates an offence that prohibits purchasing sexual services or communicating in any place for that purpose. (This is punishable with up to five years in jail and fines that begin at \$500 and increase with subsequent offences. Fines double if committed anywhere near where children are present);
- Creates an offence that prohibits receiving a material benefit that derived from the purchasing of sexual services (This makes it illegal to run a business that sells sexual services, such as escort agencies, massage parlours etc. but does not apply to “legitimate living arrangements” or for those with “legal or moral obligations” to prostitutes. A pimp would not fall under these exemptions, but a child or spouse would),<sup>608</sup>
- Creates an offence that prohibits the advertisement of sexual services offered for sale and to authorize the courts to order the seizure of materials containing such advertisements and their removal from the Internet. (This cracks down on back-of-magazine as well as online ads. It targets those who run the ads, and could extend to publishers and website administrators);<sup>609</sup>
- Seeks to modernize the offence that prohibits the procurement of persons for the purpose of prostitution;
- Creates an offence that prohibits communicating – for the purpose of selling sexual services – in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre;
- Seeks to ensure consistency between prostitution offences and the existing human trafficking offences; and
- To specify that, for the purposes of certain offences, a weapon includes anything used, designed to be used or intended for use in binding or tying up a person against their will.

### **3 Non-criminalisation of prostitutes**

#### New Zealand

2.167 In New Zealand, the Prostitution Reform Act 28 of 2003 decriminalised prostitution in respect of people selling their bodies for sexual services, brothel keeping, living off the proceeds of someone else’s prostitution, and street solicitation. This Act passed a

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<sup>608</sup> Coutts Matthew “What is and is not legal under Canada’s new prostitution laws” *Daily Brew* available at <http://ca.news.yahoo.com>.

<sup>609</sup> Ibid.

parliamentary vote by the narrowest margin (60/59).<sup>610</sup> The purposes of the reform were articulated in terms of the rights and welfare of people who sell sex; that is, that their human rights should be upheld; they should be protected from exploitation; and their welfare and occupational health and safety should be promoted.<sup>611</sup>

2.168 In terms of this legislation, prostitutes can provide access to sexual services on the street, in brothels, or in small owner-operated brothels (SOOBs) run by self-employed prostitutes. A SOOB must be operated by no more than four women and does not require an operator certificate. The aim is to promote operations which women themselves run and control.<sup>612</sup> Brothels and escort agencies are required to have an operator certificate, and local authorities are required to develop a local plan for managing prostitution. The remaining prohibitions uphold the human rights of minors and women in the sex industry, as follows:

- No one under 18 can sell sex;
- Clients must use barrier protection;
- Advertising prostitution on radio and television is banned and local authorities have powers to restrict advertising signs;
- Inducing or compelling anyone to sell sex is a criminal offence; and
- Non-citizens are prohibited from selling sex.

2.169 Under the Act, prostitutes have the right to refuse to have sex with a client even if he has paid, and they cannot be fined for refusing a client. Buyers can refer contested contracts to the Disputes Tribunal. The Act requires prostitutes to practise safe sex. The Act further extends specific rights to prostitutes, as follows:<sup>613</sup>

- Allowing them membership of trade unions;
- Acknowledging employment contracts and legal contracts with clients;
- Ensuring coverage of the sex industry by the Occupational Safety and Health agency and other relevant government agencies; and
- Reducing barriers to exiting the sex industry, for example by allowing immediate access to government unemployment benefits.

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<sup>610</sup> Kelly et al 26.

<sup>611</sup> Ibid.

<sup>612</sup> Op cit 27.

<sup>613</sup> Barnett T (MP) "Decriminalising Prostitution in New Zealand - The Campaign and the Outcome" January 2007 available at [http://text.labour.org.nz/TimBarnett/news/PRA\\_update/ASTFIL70209.pdf](http://text.labour.org.nz/TimBarnett/news/PRA_update/ASTFIL70209.pdf) Accessed on 31 August 2007.

2.170 The Act established a Prostitution Law Review Committee (the Committee) to monitor the impact of the new legislation. The Committee is made up of representatives of the sex industry, voluntary sector and government. The Committee is serviced by the Ministry of Justice and operates in conjunction with major research projects on the topic of prostitution.<sup>614</sup>

2.171 Although decriminalisation requires the removal of all prostitution-specific laws, the concern with exploitation has resulted in the retention of two specific offences. These pertain to compelling a prostitute to perform acts against her will (applicable to buyers and business operators, including pimps) and coercively claiming earnings from prostitution. A distinction is therefore made between voluntary and involuntary prostitution. Children under 18 are not permitted to sell sex, and children found doing so are defined as having been abused through sexual exploitation.<sup>615</sup> Similar provisions relating to child prostitution are found in United Kingdom and South African law. There is no defence related to the buyer's ignorance of the seller's age. Sex trafficking, including internal trafficking, are offences with severe penalties.

2.172 Kelly et al reflect that the law reform and its implementation were not intended to increase or normalise the sex industry. These moves were instead intended to grant women who sell sex the greatest possible degree of control.<sup>616</sup> The Summary Offences Act remains in force in relation to soliciting, which may be classed as offensive behaviour.

2.173 Post-2003, a study by Abel, Fitzgerald and Brunton showed that street-based prostitutes were significantly more likely than managed or private prostitutes to report being subjected to adverse experiences relating to buyers. These experiences included the buyer's refusing to pay; having money stolen by a buyer; being physically assaulted by a buyer; being threatened with physical violence; being held against their will; and being raped by a buyer.<sup>617</sup> A review document on the Prostitution Reform Act<sup>618</sup> noted that the Act appeared to have had a limited effect in preventing violence. It had, however, helped to increase the reporting of violence to the police, although prostitutes were still reluctant to see the process through to court.<sup>619</sup> Positive police cooperation between prostitutes and the police was reported in two

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<sup>614</sup> Ibid.

<sup>615</sup> Kelly et al 27.

<sup>616</sup> Ibid.

<sup>617</sup> Abel G, Fitzgerald L & Brunton C, "The Impact of the Prostitution Reform Act on the Health and Safety Practices of Sex Workers" Report to the Prostitution Law Review Committee (November 2007) at 119.

<sup>618</sup> New Zealand Ministry of Justice "Key Informant Interviews: Review of the Prostitution Reform Act 2003" (October 2007) at 10.

<sup>619</sup> Ibid.

police investigations into the murders of prostitutes in Christchurch, both of which were rapidly followed by arrests.<sup>620</sup>

2.174 By removing the illegality of prostitutes' work, the Act appears to have safeguarded their right to refuse particular clients and practices.<sup>621</sup> Concern remains that managed prostitutes might still be required to provide commercial sexual services against their will. There have been reports of prostitutes not being able to refuse even when there was a very good reason to do so.<sup>622</sup> In general, however, prostitutes in New Zealand appear to practise safe sex, and as a group their HIV/AIDS incidence rate is low.<sup>623</sup>

2.175 The Act brought the sex industry under the Health and Safety Employment Act of 1992. However, since no system of regular inspections of brothels exists, compliance with legislation is not measured. The majority of prostitutes interviewed by the Prostitution Review Committee felt that the Act could do little about violence perpetrated against them. The Prostitution Review Committee did not find that the Act had increased underage involvement in prostitution.<sup>624</sup> The Committee stated that the purpose of the Act (in terms of promoting the welfare and occupational health and safety of prostitutes) could not be fully realised in the outdoor prostitute sector, and recommended that prostitutes should be encouraged either to move to safer indoor settings or to leave prostitution altogether. With regard to the employment conditions of prostitutes, the Committee found that individual prostitutes and brothel operators should be able to choose and declare what the employment status of prostitutes working in brothels should be. Some prostitutes prefer the benefits and certainty of "employee" status, whereas others prefer the freedom and flexibility of "independent contractor" status. The Committee also found that disputes should be dealt with through employment resolution processes and the courts.<sup>625</sup>

2.176 The Committee concluded that although many prostitutes remained vulnerable to exploitative employment practices, many of the social evils predicted by people opposed to the decriminalisation of prostitution were not experienced during the period of operation of the Act. On the whole, the Act had been effective in achieving its purpose. The Committee was

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<sup>620</sup> Barnett T (MP) "New Zealand's Prostitution Reform Act 2003 – what did it change and what has happened since?" August 2006 available at [esput-ca.org](http://esput-ca.org) Accessed on 19 July 2011.

<sup>621</sup> Reportedly as a result of effective HIV/AIDS prevention campaigns that was established in the late 1980's.

<sup>622</sup> New Zealand Ministry of Justice "Key Informant Interviews" 12.

<sup>623</sup> Reportedly as a result of effective HIV/AIDS prevention campaigns that was established in the late 1980s.

<sup>624</sup> New Zealand "Government Report of the Prostitution Review Committee" (2008) available at <http://www.justice.govt.nz> at 168.

<sup>625</sup> New Zealand "Government Report" 168 and further.

confident that the vast majority of people involved in the sex industry were better off under the new Act than previously.<sup>626</sup>

2.177 The report made a range of recommendations, including that additional funding should be provided to the Ministry of Health to enable health officers to carry out regular inspections of brothels, and for the establishment or continuation of non-governmental organisations that can provide a range of services to the sex industry. This would include assistance for people who wish to leave the industry.<sup>627</sup>

## 4 Regulation of prostitutes

### Australia: Victoria

2.178 The Prostitution Control Act 102 of 1994 (incorporating amendments as at 1 August 2010) legalises indoor prostitution in Victoria, whereas street prostitution and commercial sex in massage parlours and flats remain illegal.<sup>628</sup> The Act seeks to control or regulate prostitution in Victoria while substantially increasing penalties for illegal activities and providing onerous regulations for legal operations. The stated aims of the law are to improve the health and safety of women who sell sex; to minimise the “nuisance” and negative impacts on communities; and to tackle the growth of criminal activity.<sup>629</sup> Selling sex is only legal in an indoor licensed location. Brothels in which more than two women sell sex require a licence; and where one or two women operate from the premises, they must register and obtain planning permission. Women who sell sex in registered businesses are required to have regular health checks. Brothels cannot be located in residential areas or in close proximity to schools, hospitals, kindergartens, and any place of worship.<sup>630</sup> The Criminal Code Amendment (Slavery and Sexual Servitude Act) of 1999 is a federal anti-trafficking law, which criminalises sexual servitude and deceptive recruiting, and applies to internal and transnational trafficking.

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<sup>626</sup>

Ibid.

<sup>627</sup>

Summary Source Adapted from the source Complete Document  
<http://www.justice.govt.nz/prostitution-law-review-committee/publications/pl...>

<sup>628</sup>

Kelly et al 15.

<sup>629</sup>

Op cit 16.

<sup>630</sup>

Ibid.

2.179 The outcome of the Prostitution Control Act has been the emergence in Victoria of what many people call a “two-tier” system. Street prostitution is illegal for all parties and thus forms the bottom tier; there is also a large illegal indoor sector. The second tier comprises a legal sector that is considerably more extensive than it was before the law reform. Poor conditions remain in the illegal sector, and very few small owner operated brothels have been registered.<sup>631</sup> Queensland has witnessed similar developments, with an estimated 90% of brothels in that region being illegal.<sup>632</sup>

### Germany

2.180 Selling sex in Germany has never been criminalised, but various forms of regulation have been set in place over the last century.<sup>633</sup> The Prostitutionsgesetz (Prostitution Act) of 2001 was implemented on 1 January 2002. Although neither selling nor buying adult sexual services is prohibited, both are subject to zoning restrictions; to be legal, brothels in most Länder (states) are obliged to register.<sup>634</sup> Most register under “commercial room letting” and not as a sex business. Administrative law bans the advertising of prostitution.

2.181 The underpinning philosophy is the treatment of prostitution as a form of employment. The policy aims of the law are as follows: to improve the legal and social position of people who sell sex; to improve their working conditions; to eliminate the illegal sex sector; and to enable women who wish to leave to create alternatives.<sup>635</sup> Coercion into prostitution is prohibited, and non-European Union (EU) citizens who do not have residence permits are prohibited from selling sexual services. Trafficking is also criminalised.<sup>636</sup> The federal structure of Germany means that regional (Land) authorities, and in some instances city authorities, hold regulatory power. It is possible in terms of local by-laws to ban brothel operations or to limit their hours in municipalities having fewer than 50 000 residents. The practical outcome yields a complex picture across Germany; for example, there are still Länder which do not accept prostitution as work, and in which brothel owners are not allowed to register their businesses.

2.182 The prostitution framework in Germany is a form of legalisation that functions through regulation. Defining the sale of sex as legitimate work is not only a means to integrate women who sell sex into the formal economy, but is also viewed as a mechanism to remove stigma

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<sup>631</sup> Op cit 17.

<sup>632</sup> Ibid.

<sup>633</sup> Op cit 18.

<sup>634</sup> Op cit 19.

<sup>635</sup> Ibid.

<sup>636</sup> Ibid.

and increase safety. Integration into the general recognised working population was aimed at ensuring access to pensions and health care through social insurance, alongside pre-existing responsibilities to pay tax.<sup>637</sup>

2.183 Although it has been possible to create the legal framework to enable contracts of employment to be concluded that are subject to social insurance, by 2009 few people had reportedly made use of this option. The Prostitution Act has thus also not been able to make actual, measurable improvements to prostitutes' social protection.<sup>638</sup>

2.184 In the wake of the football World Cup in 2006 and the international attention paid to the issue of trafficking, there were calls for increased regulation and monitoring. The 2007 renewed action plan on violence against women, issued by the Federal Government, included a statement that selling sex should not "be considered a reasonable means for securing one's living". This was accompanied by a commitment to developing more exit programmes.<sup>639</sup> These decisions were a response to the following findings: with regard to improving prostitutes' working conditions, hardly any measurable positive impact had been observed in practice; the Prostitution Act had not noticeably improved prostitutes' options for leaving prostitution; and as yet there were no viable indications that the Prostitution Act had reduced crime or markedly improved transparency in the world of prostitution.<sup>640</sup> However, the Act had not made it more difficult to prosecute trafficking in human beings, forced prostitution and other prostitution-related violence. A report by the Federal Government stated that the existing legal instruments of licensing, trade, police and administrative law should be used more efficiently, and that where necessary these instruments should be expanded to subject prostitutes' working conditions to legal controls, so as to protect people working in prostitution and to prevent attendant crime.<sup>641</sup>

## Netherlands

2.185 The Dutch follow a non-criminalised regulated model.<sup>642</sup> Prostitution is legal but subject to municipal regulations on location, organisation and the practice of prostitution.

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<sup>637</sup> Op cit 20.

<sup>638</sup> Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (report attached to e-mail to Ms Pienaar from Africa Christian Action dated 2 June 2009).

<sup>639</sup> Kelly et al 18.

<sup>640</sup> Germany "Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes".

<sup>641</sup> Ibid.

<sup>642</sup> "Prostitution in Amsterdam" Amsterdam Info available at

Licenses must be obtained from municipalities certifying that the legal requirements to sell sex have been fulfilled.<sup>643</sup> As of October 2000, the Dutch prostitution framework has drawn an absolute distinction between voluntary or “free” prostitution versus involuntary or forced prostitution. Under the reformed law, voluntary prostitution is to be tolerated and regulated whereas involuntary prostitution is to be combatted. The goals of the reform were to:

- Emancipate women who sell sex;
- Enhance the position of sex business owners; and
- Combat the criminal aspects.<sup>644</sup>

2.186 The current law makes it legal to operate or own a brothel, provided that people selling sex are over 18 and are not forced into it. Exploitation is regulated by administrative and labour law, with any criminality associated with prostitution dealt with through the criminal code.<sup>645</sup> Administrative law has enabled local rules and conditions for both indoor and street prostitution. A number of criminal offences with respect to the exploitation of prostitution were retained, and relevant sanctions were enhanced for some of these offences. Profiting from prostitution is punishable where conditions of coercion, deceit, and/or abuse of authority apply. The use of coercion, violence, deceit, and/or abuse of authority in recruiting and/or maintaining someone in prostitution is an offence.<sup>646</sup>

2.187 The licensing conditions for brothels forbid mandatory requirements that a prostitute should drink alcohol; they also require that safe sex is practiced. The right of people selling sex to refuse a client and/or a certain sex act is also specified in the licence conditions. Selling sex on the street outside a designated zone, if prohibited by local by-laws, is an administrative offence punishable by a fine. Selling sex without a work permit is not a criminal offence. However, the Aliens Employment Act of 1944 prohibits issuing a work permit for the sex industry; if detected, such a woman would be deported as an illegal alien, and the brothel keeper would be fined in accordance with the Aliens Employment Act and could lose their licence.<sup>647</sup> Responsibility for the regulation of sex businesses lies with local government. All brothels are required to be licensed and to meet health and safety requirements. Roughly half of the municipalities require prostitutes who operate from their own homes to have a license.

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<sup>643</sup> <http://www.amsterdam.info/prostitution/> Accessed on 3 October 2011.

<sup>644</sup> Ibid.

<sup>645</sup> Kelly et al 23.

<sup>646</sup> Ibid.

<sup>647</sup> Op cit 24.

<sup>648</sup> Ibid.

2.188 There has been considerable reassessment in the Netherlands, especially in light of the evidence of continued (and according to some, increased) trafficking<sup>648</sup> and the persistence of violence and coercion. One problem is that policy has targeted sex businesses, whereas much of the coercion involves pimps who operate in the background. Employment practices in the licensed sector have not noticeably improved since the legal reform. Some local authorities have sought to limit the growth of prostitution through urban planning initiatives. Since 2006, Amsterdam has used the Public Administration Probity Screening Act<sup>649</sup> to revoke licences of windows in De Wallen; the majority were held by a handful of owners, some of whom had known criminal connections.<sup>650</sup>

2.189 Debates are ongoing at local and national levels. A discussion in the Dutch Parliament reinforced the notion that prostitution is not “work like any other”, since holding a woman to an employment contract would remove her right to sexual self-determination.<sup>651</sup> Within this debate, political consensus has been reached that a woman who sells sex is not a typical worker, since the moment she “refuses”, her constitutional right to bodily integrity is invoked; neither her client nor her employer can force her to comply unless they are willing to break the law. Prostitution can therefore never be designated “fitting work” which adult citizens can be required to undertake in order to retain their social security entitlement.<sup>652</sup>

2.190 The prostitution regime in the Netherlands is frequently cited as the archetypal example of legalisation. However, this oversimplification misrepresents the law and policy at national and local levels. At the formal level, there has been legalisation of brothels within a supposed strong regulatory regime, but continued criminalisation of the use of any form of coercion, violence, deceit or abuse of authority. Recent debates signal a serious attempt to assess whether the reforms have delivered on policy goals.<sup>653</sup> The main points of concern identified as needing attention are as follows: trafficking remains; prostitution occurs outside fixed locations, including escort agencies; investigations by the police into the non-licensed and illegal sector should be enhanced; the relative failure to improve the position of people who sell sex and a new discussion on discouraging demand is required.<sup>654</sup>

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<sup>648</sup> A respondent, Ina van den Heever, a South African outreach worker in the Red Light District in Amsterdam, confirms that foreign women are being trafficked into the Netherlands and kept under conditions of servitude.

<sup>649</sup> Under this Act administrative bodies may refuse to issue a licence (or withdraw it) if there is a grave risk that it will be used to commit criminal offences or obtain financial benefit from criminal activities. This includes money laundering.

<sup>650</sup> Kelly et al 25.

<sup>651</sup> Ibid.

<sup>652</sup> Ibid.

<sup>653</sup> Ibid.

<sup>654</sup> Ibid.

2.191 The law does take a strong stance against trafficking, forced prostitution and underage prostitution.<sup>655</sup> In order to strengthen this stance, a new law is under consideration in the Netherlands.<sup>656</sup> Legislation aimed at crime prevention in the prostitution arena was tabled in the Dutch Parliament in May 2011.<sup>657</sup> It is meant to regulate the prostitution industry further.

## G Overview of submissions

2.192 The Discussion Paper<sup>658</sup> posed a number of questions in respect of the protection and enforcement of prostitutes' rights. The submissions received in response to each question will be dealt with in turn in the following sections.

### 1 How can harm and vulnerability to abuse or exploitation be reduced for prostitutes?

2.193 The statement that "prostitutes are exposed to harm and are vulnerable to abuse and exploitation" was supported by all respondents, irrespective of the legal model they supported. The agreement, however, ended there. Although all respondents accepted that a prostitute's vulnerability to abuse stems from various sources, the stated underlying reason for that vulnerability differed according to the legal model espoused. For some respondents, the resounding answer to the question of how to reduce harm and vulnerability to abuse and exploitation would be to continue to criminalise adult prostitution.<sup>659</sup> For others, the answer

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<sup>655</sup> Section 273f of the Dutch Penal Code provides that:

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2. Exploitation comprises at least the exploitation of another person in prostitution, other forms of sexual exploitation, forced or compulsory labour or services, slavery, slavery like practices or servitude.

<sup>656</sup> Expatica ENL "Netherlands targets clients in draft prostitution law" 7 November 2009 available at <http://www.expatica.com/nl>.

<sup>657</sup> Overheid.nl "Rules regarding the regulating of prostitution" 2011.

<sup>658</sup> SALRC *Sexual Offences: Adult Prostitution* Discussion Paper 2009.

<sup>659</sup> Family Policy Institute and more than 1000 endorsee submissions, Christian Lawyers Association of South Africa; Robyn Fudge; Marge Ballin, Director of Inter Outreach Ministries; Doctors for Life International; Nation Building; The Naked Truth; The Council of Muslim Theologians KZN; Lana (prostitute interviewed by RockingChair productions); The Islamic Forum Azaadville; WorldVision SA; Christian Action Network; Islamic Unity Convention.

was to non-criminalise<sup>660</sup> it. A lesser degree of support was given to the options of either partially criminalising<sup>661</sup> or regulating<sup>662</sup> adult prostitution.

2.194 Some respondents argue that non-criminalisation would reduce harm, abuse and exploitation by bringing prostitution practices into the mainstream. This would enable prostitutes to access their rights and enforcement of protection mechanisms<sup>663</sup> against the police, community and “employers”.<sup>664</sup> In addition, prostitutes would then be subject to regulation and monitoring.<sup>665</sup> Ms Richter<sup>666</sup> argues that non-criminalisation would remove the barriers that prostitutes face in accessing services, reporting violence and rape, and doing something as simple as opening a bank account. The SANAC Human Rights and Access to Justice Technical Task Team agrees that prostitutes are victims of violence by their clients and the police. In the Task Team’s view, perpetrators of violence (not necessarily sexual violence) are known to be relatively great risk-takers sexually. The Task Team further states that women who experience violence in any form are also more likely to be HIV positive. In its view, the lack of access for prostitutes to health, social, police, legal and financial services compounds their vulnerability.

2.195 SWEAT argues that non-criminalisation would improve what it refers to as “sex worker-police relationships” by placing them on a fundamentally different footing. This would also make the reporting and solving of other crimes much easier than at present. SWEAT submits that non-criminalisation would also bring to the attention of other state agencies the existence of prostitution, and enable those agencies to establish the relevance of prostitution to their agency obligations. SWEAT proposes that it would grant prostitutes the same rights as other citizens. SWEAT further submits that non-criminalisation legislation should include a clause that makes it an offence to coerce any person into either providing commercial sexual services or surrendering the proceeds of any commercial sexual services. SWEAT recommends listing a range of coercive behaviours and providing a definition of “coerce”. It also recommends the prohibition of specified activities if done with the intent of inducing or compelling a person to provide a commercial sexual service, or to provide their earnings from such a service. Furthermore, SWEAT recommends the inclusion of a consensual sexual contract entered into by two parties so as to remove coercive attempts by a third party such as a pimp.

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<sup>660</sup> SWEAT; Ms Bonthuys (WITS); GT Mjuza; L Jankelowitz RHRU; POWA;

<sup>661</sup> Prof Lemmer, Academy for Sexology.

<sup>662</sup> South African Women’s Lawyers Association.

<sup>663</sup> J Hicks, Commission for Gender Equality; GT Mjuza.

<sup>664</sup> L Jankelowitz of the Reproductive Health and HIV Research Unit.

<sup>665</sup> E Poto, Commission for Gender Equality.

<sup>666</sup> SA National AIDS Council Women’s Sector.

2.196 People Opposed to Women Abuse (POWA) submits that the current legal framework discriminates against women and facilitates the conditions under which women prostitutes continue to be harassed and physically or sexually abused by their pimps, brothel owners, clients and the police. POWA states that criminalisation increases a prostitute's vulnerability to violence. POWA argues that violations of the human rights of women in South African society, and the multiplicity of forms of violence against women, make the adoption of protective mechanisms an absolute necessity. POWA therefore contends that the legislature must non-criminalise prostitution to ensure women's adequate protection.

2.197 POWA further argues as follows:

[T]he State has a constitutional obligation and commitments under international law to which it is a State Party to protect ALL women from all forms of violence particularly, vulnerability and marginalization of sex workers from mainstream society –the lack of political power to change their conditions demands that the state institute necessary legal and policy measures to ensure maximum protection. Section 9(1) of the Constitution declares that everyone is equal before the law and is entitled to equal protection and benefit of the law. In order to achieve equality, section 9 (2) compels the state to promote legislative and other measures required to ensure equal benefit and protection of the law. Section 12(1) (c) of the Constitution further provides, that all persons have the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources. The rights to bodily and psychological integrity, dignity, privacy and equality enshrined in the Bill of Rights further protect women. The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) obliges states to take all legal and other measures that are necessary to provide women with effective protection against gender-based violence, including effective legal measures, penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence. Similarly, Article 4(2)(a) of the Protocol on Women's Rights in Africa pronounces that "State parties must enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public."

2.198 POWA further states that:

Article 2(g) of CEDAW expressly obliges states to "take all appropriate measures, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women". In addition, General Recommendation 19 which specifically deals with Violence against Women recognizes the particularity of most women in prostitution. Sex workers are in this industry mainly as a result of poverty and unemployment, are especially vulnerable and marginalized. Sex workers need equal protection against rape, discrimination and other forms of abuse. Article 96 of The Beijing Platform for Action states that "The human rights of women include their right to have control over and decide freely and responsibly on matters related to their

sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.”<sup>667</sup>

2.199 Of particular concern to POWA is the excessively high level of violence against women in the prostitution industry. It reports that perpetrators are largely employed within the police and law enforcement sectors. POWA refers to various studies that have documented the reluctance of prostitutes to report rape and abuse to the authorities, out of fear of secondary victimization and unsympathetic treatment by the police. Particular reference was made to the research on street-based prostitution by SWEAT and the Institute for Security Studies (ISS),<sup>668</sup> which showed that 19% of prostitutes had had to change the place where they worked due to police harassment; 12% had been raped by police officers; and 28% had been asked for sex in exchange for release from custody by the police. POWA states that it agrees with the findings of studies (not named) that have shown that aggressive policing of mainly outdoor prostitutes does not effectively serve as a deterrent to prostitution. Instead, prostitutes are forced to move from their normal places of work to more hidden places to avoid contact with the police. In these hidden places they become further exposed to physical harm such as rape, assault, robbery and harassment; crimes which POWA says are not reported, investigated or prosecuted. POWA concludes that as a result, the criminality attached to prostitution deters prostitutes from accessing police protection, thus denying them their fundamental human rights to be protected and respected as equal citizens.

2.200 Ms Bonthuys<sup>669</sup> supports the view that criminalisation renders the law itself complicit in prostitutes’ increased vulnerability. She submits that non-criminalisation would reduce this additional exploitative opportunity, but acknowledges that other social and economic causes of vulnerability would remain.

2.201 A substantial number of respondents in favour of criminalisation do not agree<sup>670</sup> that non-criminalisation will reduce the harm and vulnerability to abuse and exploitation of prostitutes. D Scarborough of the Gospel Defence League submits that non-criminalisation would increase the vulnerability of prostitutes because of the power given to pimps and madams. Rocking Chair submits the following comment:

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<sup>667</sup> Echoed in the Commission for Gender Equality Policy Brief Position Paper on Sex Work.

<sup>668</sup> Gould “*Selling Sex*” 55-56.

<sup>669</sup> University of the Witwatersrand (WITS).

<sup>670</sup> Marinda & Cornelius; The Council of Muslim Theologians KZN; A Myburg, SANCA Witbank; D Scarborough, Gospel Defence League; I & B Wilson, Presbyterian Church; Family Policy Institute endorsed by hundreds of emails; Doctors for Life International; Christian Lawyers Association; Islamic Unity Convention; The Naked Truth; Lindie Saunderson, Senior Associate/Pro Bono Co-ordinator and human rights lawyer in Alexandra township, Edward Nathan Sonnenbergs Inc; World Vision SA; Christian Action Network.

[I]n grappling with the issues of law around prostitution, we were challenged by the complexities of criminalizing the prostitute when (as we discovered), she is always the victim. By definition, a victim is someone who suffers from some adverse circumstance. Be it a broken home or an abusive relationship, every woman we interviewed was a victim. And even if she wasn't a victim from the outset, she most definitely becomes a victim at the hand of her clients. One abusive client is enough to make her a victim – not to mention the rape and sexual exploitation by the pimp or drug lord.<sup>671</sup>

2.202 A number of respondents<sup>672</sup> submit that it is not the legal status of prostitution that causes the harm to prostitutes, but the prostitution itself. In this view, prostitutes are the most vulnerable members of society and are susceptible to abuse as a consequence of the inherently exploitative nature of prostitution.<sup>673</sup> Robyn Fudge (former public prosecutor and Senior State Advocate) states that the physical, psychological and sexual harm incurred during prostitution are well documented, and come about as a result of the practise of prostitution.<sup>674</sup> According to Farley “Such harm occurs whether the prostitution is indoor or outdoor, legal or illegal”.<sup>675</sup> The Christian Action Network make reference to a study by Farley<sup>676</sup> where it was found that women in prostitution who had pornography made of them by pimps suffered greater harm and displayed significantly more severe symptoms of post traumatic stress disorder than those women who did not have pornography made of them. Fudge states that non-criminalisation or legalisation would merely render the harm invisible.

2.203 The Family Policy Institute states that South Africa's unique social challenges suggest that a non-criminalised sex industry would be catastrophic for our society.<sup>677</sup> These challenges include high rates of poverty and unemployment, rampant crime and corruption in all sectors of society, spiraling rates of sexual abuse of women and children, and the highest infection rate of HIV/AIDS in the world. In addition, a partially criminalised sex industry would provide space for pimps, gangs, crime syndicates and sex traffickers to exploit the system

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<sup>671</sup> Endorsed by Marge Ballin, Director of Inter Outreach Ministries.

<sup>672</sup> Family Policy Institute, Christian Lawyers Association of South Africa; Robyn Fudge; Marge Ballin, Director of Inter Outreach Ministries and over 1000 emails in support.

<sup>673</sup> DFL; Robyn Fudge; Family Policy Institute.

<sup>674</sup> Raymond JG Health Effects of Prostitution Making the Harm Visible Global Sexual Exploitation of Women and Girls published by The Coalition Against Trafficking in Women February 1999 available at <http://www.uri.edu>.

<sup>675</sup> “Prostitution Harms Women even if indoors: Reply to Weitzer, Farley” Accessible at <http://vaw.sagepub.com>; See also M Farley "Bad for the Body, Bad for the Heart: Prostitution Harms Women Even if Legalized or Decriminalized" *Violence Against Women* Accessed on 22 March 2007.

<sup>676</sup> Farley, M “Renting an Organ for Ten Minutes: What Tricks Tell us about Prostitution, Pornography, and Trafficking.” Accepted for publication in *Pornography: Driving the Demand for International Sex Trafficking*. Los Angeles: Captive Daughters Media.

<sup>677</sup> Endorsed by Christian Lawyers Association of South Africa.

and further enslave vulnerable women and children.<sup>678</sup> The Family Policy Institute states that this would, in effect, increase rather than reduce prostitutes' risk of harm and their vulnerability to abuse and exploitation.

2.204 The Naked Truth<sup>679</sup> submission states that “[P]rostitution takes away a woman's freedom to pursue a career and makes her a slave and a means for the pimp to make money from selling her body”. Naked Truth states that it views adult prostitution as a “civilised meat trade”, and concluded that “legalising or decriminalising prostitution gives the pimps more freedom to practice and expand their business making it more exploitative.”<sup>680</sup>

2.205 According to the Nation Building submission, research has shown that most women in prostitution have to some extent been coerced into prostitution. It cites a study in 2000 by the Dutch Institute of Social Sexological Research, in which 79% of women in prostitution reported that they were in prostitution due to some degree of force.

2.206 The Council of Muslim Theologians KZN is of the opinion that legalising prostitution would open the door for further exploitation of vulnerable women, who could have empowered themselves in a dignified manner had prostitution been condemned as illegal. The Council states that legal prostitution fosters the notion that money and pleasure are all that matter, and that human dignity and respect have no value.

2.207 Lana<sup>681</sup> believes that retaining the current law that criminalises prostitution would curb the proliferation of further exploitative acts. In her words, “We live in a country characterised by crimes against children. If prostitution becomes legal, what will this mean for our children? Men who use prostitutes like young girls – the younger the better.”

2.208 Doctors for Life International (DFL) holds that the criminalisation of prostitution sends out a clear message to society, especially young people, that prostitution is illegal precisely because of the social ills linked to it. These include gender-based violence, child abuse, human trafficking, organised crime, drug dependency, and STDs and HIV. This message conveys that prostitution is “not an option”. Therefore, criminalisation informs and protects individuals from making decisions that would be detrimental to their wellbeing.

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<sup>678</sup> Family Policy Institute; endorsed by Christian Lawyers Association of South Africa.

<sup>679</sup> The Naked Truth (TNT) is a voluntary, non-profit organisation motivated to address chemical dependence in South Africa.

<sup>680</sup> The Naked Truth.

<sup>681</sup> Lana (prostitute) in the Rocking Chair submission 16.

2.209 Marge Ballin, Director of Inter Outreach Ministries, reports that in Victoria's legal brothels and escort agencies, women continue to be raped and traumatized.<sup>682</sup> Ballin highlights a quote by Sullivan and Jeffrey's where one woman says,

If rape is defined as any unwanted sex act, then prostitution has an extremely high rate of rape because many survivors view prostitution as almost always consisting of unwanted sex acts or even in one woman's words, paid rape... prostitution is like rape. It's like when I was 15 years old I was raped. I used to experience leaving my body. I mean that's what I did when men raped me. I went to the ceiling and I numbed myself because I did not want to feel what I was feeling. I was very frightened. And while I was in prostitution I used to do that all the time. I would numb my feelings. I wouldn't even feel like I was in my body. I would actually leave my body and go somewhere else with my thoughts and with my feelings until he got off, and it was over with. I don't know how else to explain it except that it felt like rape. It was rape to me.<sup>683</sup>

2.210 Marge Ballin further submits that after many years of counselling prostitutes and young girls who have been abused (with physical violence and rape), her view is that non-criminalising prostitution would not change the situation. In her experience, by its very nature prostitution often encourages abuse. Men are inclined to disrespect women who practise prostitution, and cases of abuse and violence are reported worldwide wherever prostitution occurs.<sup>684</sup> Marge Ballin identifies the increase in the use of pornography by buyers and the re-enactment of this material with prostitutes as a disinhibiting factor that has been linked to consequent rape and murder. She states that "most of the women I work with say they have been raped by clients."<sup>685</sup> She further comments that pornography and prostitution complement and reinforce each other, and "it is not by accident that the streets where sex shops are located are generally the places where prostitution is the heaviest."

2.211 Jody, a prostitute in South Africa,<sup>686</sup> affirms that this is the case: "Even if he is banging you hard – most of the time; you feel like you are being raped for money, but you have to do it because the job situation in this country is terrible. Where is the regard for our human rights?"

2.212 In reply to the question "If prostitution was legal, would that lessen the abuse?" Jody answered as follows: "I don't think it's ever going to change. If I could, I would get out and

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<sup>682</sup> From 'The Links between Prostitution and Sex trafficking' at 5 by Mary Sullivan and Sheila Jeffrey's (2004).

<sup>683</sup> Giobbe, 1990 From 'The Links between Prostitution and Sex trafficking' at 14 by Mary Sullivan and Sheila Jeffrey's (2004).

<sup>684</sup> By Marge Ballin, Ministry Director from Inter Outreach Ministries.

<sup>685</sup> Marge Ballin Inter Outreach Ministeries.

<sup>686</sup> Jody in Rocking Chair submission at 20.

never look back. I'll tell you something: this is not something that I would wish on my worst enemy. It has made me a hard person, cold inside...".<sup>687</sup>

2.213 Ms Saunderson<sup>688</sup> states that the Constitution protects the dignity, privacy, and safety and security of all persons. She is of the opinion that legalising prostitution would unfairly infringe upon these rights and make prostitutes more vulnerable to abuse. In her experience, murdered prostitutes are found daily on the banks of the river running through Alexandra Township, under bridges in and around the townships, and in homes all over the community.

2.214 The crew making the Rocking Chair documentary on adult prostitution in South Africa submits that the making of the documentary had changed their previous simplistic views on prostitution. They report that in the current setting, nightmarish accounts of strangulation, abuse, rape, murder and gross exploitation are a reality for women trapped in prostitution. In the crew's words,

The deep sadness and hopelessness of many of the women we met is not something that is easy to forget. As a nation, not only must we protect one another, we must help one another to thrive and flourish and live fulfilled lives. The prostitutes we met, especially those who are addicted to drugs, are not thriving. They are barely surviving.<sup>689</sup>

2.215 Some respondents comment that arguments for non-criminalisation or regulation are usually based on the mistaken assumption that a regulated sex industry would contain and control the growth of the brothel and street trade, and eliminate (or at least greatly reduce) its associated problems. These include drugs, abuse, violence, organised crime, child prostitution and trafficking. Such respondents state that there is no evidence, however, to support these claims.<sup>690</sup>

2.216 The Family Policy Institute submits that in countries such as the Netherlands, Australia and Germany, where policies of non-criminalisation or regulation have been adopted, the opposite has happened. That is, such countries have experienced a dramatic increase in legal and illegal prostitution, child prostitution and trafficking in persons for sexual purposes, and an increase in violent incidents.<sup>691</sup> Non-criminalisation or regulation did nothing to "regulate the sex industries in these countries but rather spawned much larger illegal sex industries which operate parallel to the legal industry and is dominated by organised

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<sup>687</sup> Op cit 24.

<sup>688</sup> Lindie Saunderson, Senior Associate/ Pro Bono Co-ordinator and human rights lawyer in Alexandra township, Edward Nathan Sonnenbergs inc.

<sup>689</sup> Rocking Chair submission at 49.

<sup>690</sup> Family Policy Institute; endorsed by Christian Lawyers Association of South Africa.

<sup>691</sup> Ibid.

crime.”<sup>692</sup> This growth in the industry has been accompanied by an increase in the risk of harm and vulnerability to abuse and exploitation. The Family Policy Institute also submits that the National Council of Women of New Zealand, which originally supported the decriminalisation of prostitution; reportedly now maintain that the only winners from the 2003 Prostitution reform Act are males. A report by the New Zealand Prostitution Law Reform Committee issued on the operation of the Prostitution Reform Act found no evidence that the position of prostitutes had improved since the introduction of the new legislation.

**(a) Police brutality**

2.217 Police brutality is a recurring theme in detailing the harm, abuse and exploitation experienced by prostitutes. The Tshwaranang Legal Advocacy Centre submits that the police frequently engage in a labour-intensive exercise of arresting prostitutes without any intention of prosecuting them. Prostitutes in Hillbrow and surrounding areas frequently report that the police had extorted money from them or had searched their rooms and stolen their money or other assets. If prostitutes refused to comply with such extortion, they were allegedly called names, assaulted or taken to the police station and assaulted there. The Tshwaranang Legal Advocacy Centre submits that it has assisted a number of prostitutes who had been assaulted by the police. In its view, prostitutes are used by police and reservists as a means to supplement their incomes and to access sex. Jody<sup>693</sup> related her view of the exploitation she had been subjected to. She stated that she did not like the way some policemen treated her and other prostitutes.

We face police harassment ... I had an incident when I was working at The Cage. Three policemen came in (in uniform) and had a beer. One of them asked me to accompany them for the night and I said no because I had a boyfriend to get home to. He said that if I didn't come with them, he would say that they found drugs on me and arrest me. I told him that he couldn't do that. I asked him if I could see some form of identification – SWEAT taught us that. Then he left me alone.

2.218 Nation Building states that police brutality is a much publicised issue, especially among countries with high crime rates. Such brutality has been attributed to the pressures law enforcement agencies face when crime levels exceed their capacity to respond. Nation Building comments that it should also be noted that the public outrage generated by police brutality appeals to the media. Although Nation Building acknowledges that police brutality does occur, it cautioned that there are no statistics available to give substance to the

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<sup>692</sup>

Ibid.

<sup>693</sup>

Jody in Rocking Chair submission at19.

magnitude of this problem. The proportion of police brutality incidents compared with the total number of incidents that police have to respond to in the line of duty is unknown.

2.219 Furthermore, Nation Building states that reports of police brutality against prostitutes often omit any mention of other contributing factors, such as the state of mind of the prostitute, the fear of what will happen to her or her dependents at the hands of her “masters” (should she be suspected of exposing them), and the influence of drugs and alcohol. Nation Building submits that attempting to arrest a person who under such circumstances might be hysterical and uncontrollable, is difficult at the best of times.

2.220 Nation Building further submits that the argument that prostitution should be non-criminalised because of police brutality toward prostitutes lacks merit. The submission states that police brutality is a police problem and cannot be resolved by non-criminalising prostitution. It posed the question “If there is evidence of police brutality towards the user of illicit drugs, would the possession of illicit drugs be considered for legalisation?”

2.221 When asked about police officials raping and abusing prostitutes in Sunnyside, ex-police superintendent Owen Musiker<sup>694</sup> commented that “It is unacceptable. I'm not denying that it happens. There are bad apples in every bag but that must not be tolerated if it's happening.” However, he clarified as follows:

[O]ne thing you must know is that with any criminal, there is always resistance when the police show up. This resistance is often what gets misconstrued as brutality. There may be heavy-handedness on the police side but I'm not aware of the abuse. The Independent Complaints Directorate must be informed if this happens and those policemen must be sacked.

2.222 The Islamic Forum Azaadville argues that the violence and abuse inflicted on prostitutes cannot be divorced from the climate within which these acts occur. The Forum submits the following comment:

Employment and worker rights need to be contextualised by answering the following: Should hijacking also be allowed on the basis of inadequate protection in terms of working conditions? Demanding such rights must be weighted by a number of considerations such as does the right claimed contribute towards society or societal values. Any proposal to reform this industry is not feasible, practical nor enforceable. The only control which can succeed is to further strengthen current legislation in outlawing this activity.

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<sup>694</sup> Owen Musiker, ex police superintendent in Rocking Chair submission at 34.

2.223 The Islamic Forum Azaadville further argued that alleged police abuse and brutality is an issue that needs to be addressed,<sup>695</sup> but that any such abuse associated with prostitution can only be reduced by the strict enforcement of the various Acts already in place, such as the Sexual Offences Amendment Act. In the Forum's view, it is not only weak enforcement but also the lack of will displayed by relevant authorities that allow the purpose of the law to be defeated. The Forum's submission states that there can be no denying that the law serves no purpose if it is not implemented. Furthermore, the lack of will currently displayed would also affect any future Act that might be enacted to regulate the prostitute industry.

2.224 Robyn Fudge contends that non-criminalising prostitution would not resolve the problem of police corruption. In her view, the remedy is police training, skills and institutional discipline. She argues that in New Zealand, non-criminalisation has not resulted in an increased report rate of assaults.<sup>696</sup>

2.225 An anonymous respondent submits that prostitutes must be legally protected from abuse by the public and from the South African Police. The Christian Action Network state that "if prostitutes are harmed by the police in any way – that should be dealt separately by police officials."

### **(b) *Recognising prostitution as work***

2.226 SWEAT argues that recognising prostitution as work and providing prostitutes with protection and benefits in terms of labour law would reduce the harm and vulnerability to abuse and exploitation they are exposed to.<sup>697</sup> In contrast the Family Policy Institute<sup>698</sup> argues that prostitution is not labour but is a violation of human rights, and can never be considered work in the conventional sense of the word.

2.227 SWEAT submits that section 20(1A)(a) of the Sexual Offences Act violates the right to dignity in two respects: a) it fails to respect the moral choice of prostitutes, both individually and as a group, to earn their living by using their bodies; and b) having regard to the context in which much prostitution takes place, it has the effect of denying that choice where it is often made by a vulnerable group to ensure their livelihood and that of their families. SWEAT argues that the right to freedom needs to be enhanced to ensure equality and to ensure that

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<sup>695</sup> Endorsed by P Pretorius, and S Le Grange, further that abusive police should be prosecuted.

<sup>696</sup> Abel et al "Impact of the Prostitution Reform Act" 135.

<sup>697</sup> This view is echoed in the Commission for Gender Equality Policy Brief Position Paper on Sex Work at 15.

<sup>698</sup> Endorsed by the Christian Lawyers Association.

economic needs can be met. With regard to the right to privacy, SWEAT argues that section 20(1A)(a) prohibits sex as work absolutely, whether it takes place in a wholly private manner or in a public domain. SWEAT argues that a prostitute's right to privacy is violated by this provision. SWEAT also submits that in terms of section 22, every citizen has the right to choose their trade, occupation or profession freely, and that the practise of that trade, occupation or profession may be regulated by law. SWEAT argues that the choice of trade may be regulated rather than prohibited or banned entirely. However, SWEAT states that it accepts that central to the proposition that the economic activity right has been infringed is the proposition that the activity sought to be protected must not be inherently unlawful. SWEAT further argues that there is nothing inherently unlawful about prostitution. The submission adds that Article 23(1) of the Universal Declaration of Human Rights states that "Everyone has the right to work, to a choice of employment, to just and favourable conditions of work and to protection against unemployment". Furthermore, article 6.1 of the International Covenant on Economic, Social and Cultural Right recognises "[T]he right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts." Similarly, part 1(1) of the European Social Charter states that "Everyone shall have the opportunity to earn his living in an occupation freely entered upon." SWEAT therefore submits that an approach to prostitution that recognises the agency of prostitutes within their constrained choices and circumstances of poverty would be the only legal option to achieve consistency with the Bill of Rights and international conventions.

2.228 The Family Policy Institute, however, argues that if a person chooses prostitution from a limited range of options then it can hardly be viewed as a career choice.<sup>699</sup> The submissions to the Commission uniformly reflect that being a prostitute is not something that women or men aspire to be. Even the main proponent<sup>700</sup> of the non-criminalisation option submits that the purpose of its submission is not to promote sex work as a career option.

2.229 The Christian Lawyers Association of South Africa submits that recognising prostitution as work would require more than a change of name from "prostitute" to "sex worker" and the adaptation of related terms.<sup>701</sup> They argue that although using these terms serves to "sanitise" pimps and brothel keepers as legitimate businessmen, it does nothing to end the violence and exploitation of women; nor has it reduced the stigma associated with prostitution.<sup>702</sup> The Christian Lawyers Association of South Africa submit that looking back, it

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<sup>699</sup> This sentiment is shared by the Christian Lawyers Association of South Africa and Doctors for Life International.

<sup>700</sup> SWEAT.

<sup>701</sup> Christian Lawyers Association of South Africa; Family Policy Institute.

<sup>702</sup> Ibid.

becomes clear that the name for a prostitute has changed from “prostitute” to “sex worker” or “stress reliever” to make it more acceptable.<sup>703</sup> In the Association’s view, however, the vocabulary does not change the unacceptability of selling sex.<sup>704</sup>

2.230 Nation Building comments that if prostitution was recognised as an economic contract or work like any other, including prostitutes under the protection of labour legislation would present unique difficulties in respect of workers’ compensation, conflicts of interest in respect of delivery of service, not to speak of the career path, progression and sustainability.<sup>705</sup> Robyn Fudge submits that the consequences of normalising prostitution as “work” and the creation of a prostitution culture in the general workplace need to be explored. She poses the following questions: “What happens when what is usually regarded as sexual harassment becomes work? To what extent would the way women are perceived in the work place be affected?”

2.231 Robyn Fudge reports that in the United States of America and the United Kingdom, the practice of businessmen celebrating their deals by taking clients to lap-dance clubs has already become an impediment to female executive advancement; the trend appears to have become a form of institutionalised sexism. Six female bankers brought a billion pound class action suit against investment bank Dresdner Kleinwort Wasserstein in 2006. They claimed that the macho culture at the firm, which included visits to lap-dance clubs, had effectively barred them from promotion, even when they had outperformed their male colleagues.<sup>706</sup>

2.232 Robyn Fudge further reports that in 2004, Morgan Stanley (a Wall Street firm) paid 54 million dollars in a similar sex discrimination class-action suit brought by Allison Schieffelin, a convertible bonds saleswoman. Schieffelin claimed that the bank discriminated against its female employees in awarding promotions and determining salaries, and behaviour such as visits to lap-dance clubs and giving women breast-shaped birthday cakes was rife. The award was shared among 300 women.<sup>707</sup>

2.233 The Christian Lawyers Association of South Africa submits that despite the factual existence of employer-employee relationships, the risk of being unable to work is completely shifted onto the prostitute. Non-criminalisation would not solve the financial problems of

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<sup>703</sup> Christian Lawyers Association of South Africa.

<sup>704</sup> Ibid.

<sup>705</sup> Nation Building.

<sup>706</sup> Griffiths K “Sexism and the City: Women sue bank for record 1.4 bn” *Independent News UK* 10 January 2006.

<sup>707</sup> Griffiths “Sexism and the City”; Griffiths K “Morgan Stanley fires strip club bankers” *Independent News UK* 6 January 2006.

prostitutes. Prostitution, legal or illegal, is simply not a path to financial independence. While the majority of prostitutes begin prostitution for financial reasons, the majority remain in the prostitution industry for the very same reason.

2.234 The Christian Lawyers Association of South Africa<sup>708</sup> concludes that prostitution is simply not labour but is a violation of human rights and can never be considered work in the conventional sense of the word. It reports that in Sweden, prostitution is regarded as gender-based violence. The Christian Lawyers Association is of the opinion that prostitution is paid rape and that it degrades, dehumanises and reduces women to mere commodities for sale. In the Association's view, prostitution is violent work. The submission states that it is impossible to protect someone whose source of income exposes them to the likelihood of being raped on average once a week.

2.235 Sullivan and others (cited by Nation Building) documented the fact that brothel owners will – in virtually all instances – acquiesce to the requirements of the users. In a non-criminalised regime, the increased competition between brothel owners for the patronage of clients has been shown to further erode the prostitute's resistance to these requests, as she is further commoditized.

2.236 Bart Love<sup>709</sup> submits that

[A]s a father, I want to raise my son in a country where women are not just treated as equal to men, but where they are valued, cherished and appreciated. Making prostitution "work" will not do that. Listening to these women speak, I realized that this can never be called work. Prostitution is way too harmful to place in that category. None of us will ever encourage our daughters, mothers, or any woman for that matter, to take up prostitution as a career. What little girl would ever aspire to be a prostitute?

2.237 Marge Ballin of Inter Outreach Ministries agrees with Bart Love and this stance, stating that prostitution should not be acknowledged as work because it is not something that any women should want to do by choice. For this reason, Ballin explained that her organisation refuses to refer to prostitutes as "sex workers" because it believes that is a way of making the trade of selling one's body for sex seem more acceptable, whereas no sane woman wants to service 5, 10, 15 or 20 strange men a day through sex.

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<sup>708</sup> Endorsed by the Family Policy Institute submission.  
<sup>709</sup> The cameraman, Rocking Chair submission at 46

2.238 According to the Islamic Forum Azaadville, the violence and abuse inflicted on prostitutes cannot be divorced from the climate within which these activities take place. The Forum argued that any proposal to reform the prostitution industry would not be feasible, practical or enforceable. The only control which can succeed is to further strengthen current legislation in outlawing this activity. The Forum adds that the main argument in favour of non-criminalisation is that of economic empowerment. This argument needs to be tested against the reasons for the perpetration of other criminal activities as per current legislation. The submission states that armed robbery, hijackings and murder are generally perpetrated for the same reason advanced for non-criminalising prostitution; that is, economic empowerment. The consequences of legislating where unlawfulness and even anarchy become the order of the day, and where the law-abiding citizen loses all form of protection, cannot be advocated. The Forum points out that once a legal principle has been set, and such legal precedent is detrimental for the people at large, such principle will be manipulated by the criminal effect.<sup>710</sup>

2.239 The Islamic Forum Azaadville further notes that the economic factor is only one of many factors given as a reason for entering into prostitution. Without a critical analysis whereby all the factors are reviewed, the economic factor cannot be regarded as the predominant driving force for entering into prostitution.

2.240 According to the Christian Lawyers Association of South Africa, governments that legalise or non-criminalise prostitution and recognise prostitution as “sex work” inevitably have a huge economic stake in the sex industry. If women in prostitution are counted as workers, pimps as businessmen, and buyers as consumers of sexual services, the entire sex industry becomes legitimised as an economic sector. The government in question can then abdicate responsibility for making decent and sustainable employment available to women.<sup>711</sup>

2.241 The Islamic Unity Convention submits the following comment:

The right to freedom of trade, occupation and profession does not include nor can it be extended to prostitution, as that would be nothing but the denial of the right to dignity and the legalization and legitimization of the enslavement of people. To do so would be to maintain and further such enslavement. The fact that other countries (e.g. western countries) have done so is no criteria for a young African country trying to heal after more than 300 years of oppression of the indigenous population, especially its women, to do so.

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<sup>710</sup> Islamic Forum Azaadville.

<sup>711</sup> Christian Lawyers Association of South Africa; Family Policy Institute.

2.242 The Islamic Unity Convention states that “state-controlled prostitution effectively means that the state has acknowledged its failure to provide ALTERNATIVE EMPLOYMENT.” It submits that should the state legalise prostitution, this would fly in the face of the aforesaid entrenched socio-economic fundamental rights. This would effectively mean that the constitutional socio-economic fundamental rights are in effect worthless and that the state has systematically decided that those constitutionally protected rights are no longer worthy of being respected, protected, pursued and enhanced. In short, the government would have failed the nation. The submission further proposes that the state should criminalise prostitution in its entirety and fund the rehabilitation of prostitutes. The Islamic Unity Convention asks, in its submission, “Who then will benefit socially, economically and politically from the legalization of prostitution?” It proposes the following answer: “Only the criminal class will benefit from the legalisation of criminalisation of prostitution, whether it is partial, the non-criminalisation of prostitution or state regulated prostitution. No benefits will accrue to the nation.”

2.243 Nation Building argues that the non-criminalisation of prostitution would be a grave error in a country with an unemployment rate of 23% (conservative estimate); a country that has roughly 150 000 child-headed households and an estimated 3 679 000 orphans, an estimated 30 000 children already in prostitution, one of the highest HIV infection rates in the world, and a culture of gender-based violence – with one in four men admitting to having raped at least once. Nation Building argues that legalising prostitution would only serve to further entrench the dangerous misogynistic attitudes prevalent in our country.<sup>712</sup>

## **2 How can prostitutes be assisted to enforce their rights to equality and access to health?**

### **(a) *Enforcing rights to equality***

2.244 GT Mjuza argues that partial criminalisation would eliminate the mistreatment of prostitutes by authorities, by placing staff that are trained to deal sensitively with prostitutes so as to allow them to regain their confidence in exercising their rights. However, the remaining respondents to this question disagree with Mjuza’s point of view.<sup>713</sup>

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<sup>712</sup> Nation Building.

<sup>713</sup> SM Hadebe, Child of God; Marinda & Cornelius; A Megaw; GT Ndlovu, Child of God; D Scarborough, Gospel Defence League; S Tegg, Full Gospel Church; L Walter, Sabie

2.245 In answer to the question of how prostitutes can be assisted to enforce their rights to equality and access to health care, SWEAT<sup>714</sup> submits that adult prostitution should be non-criminalised. SWEAT submits that labour legislation should govern the conditions of employment of prostitutes so that they can enforce their rights. SWEAT refers to the *Kylie* matter and argues that in both the CCMA and Labour Court rulings, it is the criminality of sex work that hampered Kylie's ability to argue her case. SWEAT submits that the definition of "employee" as stipulated in the Basic Conditions of Employment Act and the Labour Relations Act and common law could apply to prostitutes whose work environment is based on an employee/employer relationship. Furthermore, that the Employment Equity Act, the Compensation of Occupational Injuries and Diseases Act, and the Unemployment Insurance Act should regulate the working conditions of these workers.

2.246 SWEAT contends that in a non-criminalised setting, stakeholders in the sex industry (such as brothel owners, managers, prostitutes and other employees) together with the Department of Labour should develop the conditions and standards to govern the sex industry. SWEAT holds the view that non-criminalisation would create conditions for prostitutes to participate more effectively in negotiating issues that affect them. It proposed that NGOs could assist prostitute groups towards self-organising and activism, and that the trade union movement would also be receptive to calls to organise prostitutes as part of their focus on vulnerable workers.<sup>715</sup> SWEAT further argues that although women have fewer economic choices, they do have agency within these constrained choices and deserve to have their choices respected. Furthermore, even if choice is constrained, there remains room for agency. Respecting a person's inherent dignity requires that everyone is treated with respect; this means that the choices people make about their own bodies, even if morally repugnant to others, need to be respected. In SWEAT's view, such respect is especially necessary when the choice might have been made out of the need to ensure one's own livelihood and that of one's family.

2.247 Ms Hicks<sup>716</sup> agrees that non-criminalising prostitution would enable prostitutes to assert their rights as sex workers and enable them to have a say in discussions and policy

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<sup>714</sup> Methodist Church; I & B Wilson, Presbyterian Church; DFL.  
Endorsed by J Hicks, Commission for Gender Equality; L Jankelowitz, RHRU; GT Mjuza; E Poto, Commission for Gender Equality; M Richter, SANAC Women's Sector; J Selby, Angels; POWA and the Commission for Gender Equality Policy Brief Position Paper on Sex Work at 16.

<sup>715</sup> Presumably referring only to those prostitutes in a legitimate employee/employer relationship.  
<sup>716</sup> Commission for Gender Equality.

formulation on the topic.<sup>717</sup> Similarly, GT Mjuza submits that they would have the freedom to use state mechanisms to enforce the enactment of law.

2.248 POWA states that it supports the non-criminalisation option because it would offer women already in the sex industry greater legal protection than they currently have. POWA submits that it understands that the sex industry is highly exploitative of women, but despite this it acknowledges that there are many women whose livelihood genuinely depends on prostitution. The submission states that current statistics in South Africa show that criminalisation does not deter prostitution.<sup>718</sup> In a similar vein to SWEAT, POWA contends that the non-criminalisation option it envisages would allow for a framework that would safeguard human rights for prostitutes, and would subject them to labour laws like ordinary workers. POWA, however, also propose that prostitutes should have access to skills development programmes that would allow for the gradual exit from prostitution to better employment opportunities.

2.249 POWA proposed that the legislative measure or mechanisms the legislature decides to construct within the non-criminalisation model should prioritize the following:

Respect, promote, protect and fulfil the human rights of sex workers as equal citizens and members of society. Sex workers are entitled to the enjoyment of all rights in the Bill of Rights. They are particularly vulnerable considering that they are women and their line of work makes them additionally vulnerable to abuse and violence not only from their partners but from clients, pimps, brothel owners, criminals and even police themselves. South Africa must fulfil its obligations in terms of international human rights law. Article 6 of CEDAW requires state parties to suppress exploitations on sex work of women. The international laws on trafficking prohibit prostitution of children but do not prohibit prostitution in as much as it relates to consenting adults. Every woman has the right to refuse sex; therefore a sex worker is well within their rights to refuse to provide a commercial sexual service to any other person. Article 3 and 4 of the Protocol to the African Charters on Human and Peoples' rights on the Rights of Women in Africa entitles every woman the right to dignity, life, integrity and security of the person, respectively. Legislative measures that criminalize street based workers should be avoided. The new law should focus more on protecting the rights of sex workers.

2.250 The Christian Action Network states that the "act of prostitution by its very nature, entrenches inequality – the view that women have less value than men."<sup>719</sup> An anonymous respondent contends that prostitutes can be assisted to enforce their right to equality by

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<sup>717</sup> Sentiments endorsed by M Richter, SANAC Women's Sector.

<sup>718</sup> It references the EU-Africa's Ministerial Conference on Migration and Development, Tripoli, Libya 22-23 November 2006 available at <http://www.africa-union.org> Accessed on 18 June 2009.

<sup>719</sup> This sentiment is endorsed by Doctors for Life International.

simply changing the name “prostitute”, as a starting point, so that they can receive recognition as workers in much the same way as hawkers do.

2.251 According to the Islamic Forum Azaadville, SWEAT has correctly pointed to “the rights issue of the Constitution.” However, the Forum argues that prostitution compromises the rights and particularly the right to dignity of prostitutes, children of role players in the prostitution industry, and members of the community; for this reason it should remain criminalised.

2.252 The Islamic Unity Convention contends that by legalising prostitution, one would not be respecting, protecting or enhancing the inherent dignity and integrity of these human beings. The Islamic Unity Convention argues that the fact that human dignity must not be compromised even in a state of emergency (ie when the life of a nation is threatened by war, invasion, general insurrection, disorder, national disaster or other public emergency) shows that the Constitution places a great deal of regard and value upon the right to dignity. In the words of the Islamic Unity Convention, “How dare we then compromise the dignity of human beings by legalizing prostitution.”

2.253 Robyn Fudge submits that the proposal that prostitution must be non-criminalised to realise various constitutional rights is “specious”. She argues that the question of the constitutionality of legislative measures to control adult prostitution has already been adjudicated by the Constitutional Court in the *Jordan*<sup>720</sup> matter; any suggestion that the current legislative measures should be changed to be brought in line with the Constitution is simply incorrect. The Christian Lawyers of South Africa agree that the criminalisation of prostitution does not deny prostitutes their basic human rights.

2.254 The Islamic Unity Convention submits that human dignity, equality and the advancement of human rights and freedoms form the founding values of the Republic, and that the Constitution is the supreme law of the Republic. The Islamic Unity Convention argues that in terms of the Constitution, the state is obliged to ensure that everyone has access to dignified health care services, sufficient food and water, and social security. This includes the obligation to address the inequitable distribution of land and natural resources, and the obligation to realise access to adequate housing for all. The Convention states that the main thrust of the Bill of Rights – as well as its leitmotif – is to respect inherent human dignity and protect and enhance it, and to ensure that every person enjoys a dignified environment within

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<sup>720</sup> *Jordan and Others v S and Others* 2002 (11) BCLR 1117(CC).

which to live. The Islamic Unity Convention argues that legalising prostitution would not achieve any of these noble ideals.

2.255 Robyn Fudge contends that the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) is second in importance only to the Constitution. In terms of PEPUDA, any gender-based violence and any practice that impairs the dignity of women, including the wellbeing and dignity of the girl child; or which undermines equality between men and women, constitutes discrimination and is prohibited. She submits that the reduction of – in particular – women and girls to sexual commodities for trade purposes through the recognition of prostitution as work undermines human dignity, causes harm, and lessens rather than enhances equality between men and women. This violates the provisions of the Act.<sup>721</sup>

2.256 Robyn Fudge refers to and endorses the following excerpt from the Commission's Discussion Paper on Trafficking in Persons:

Both prostitution and trafficking are part of a system of gender-based domination and have their roots in the imbalance of power between women and men in society. Those who facilitate trafficking and prostitution prey on women and children made vulnerable by poverty, discrimination and violence thereby rewarding predators sexually and financially, strengthening both the demand and criminal operations that ensure the supply.<sup>722</sup>

2.257 According to Doctors for Life International (DFL), a society's response to prostitution goes to the core of how that society chooses between the rights of some people and the protection of others. In the view of DFL, entry into prostitution is often precipitated by problems such as dysfunctional families, physical and/or sexual abuse, role models, illiteracy or lack of education, and being unemployed. DFL argues that the right of citizens to not have to prostitute themselves in order to survive, and the right of civil society (ie families and minors) not to be exposed to prostitution, is a right that cannot be ignored.

2.258 DFL submits that "this is one of the main reasons why DFL supports the criminalisation of prostitution, in order to protect the most vulnerable members of our society from being exploited and treated unequally. The toleration of prostitution does not serve the

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721 See Jordan *supra* at 1140 F-H; Justice O'Regan described the human body as being something more than merely organic "Nor something to be commodified... Our Constitution requires that it be respected... That the very nature of prostitution is the commodification of ones body... the very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body".

722 Chapter 4, at 61.

goal of a society based on human dignity, freedom and equality". DFL states that "prostitution automatically places the prostitute in a position of inequality".

2.259 Arguments identifying inequality, poverty and unemployment as inherent to prostitution were recurring themes in submissions that militated against the non-criminalisation of adult prostitution. Nation Building submits that most prostitutes are female and one cannot deny that women in prostitution are victims of the imbalance of power inherent in society. The submission states that women make up 90% of the prostitution "labour force" and men make up the "market". Nation Building reiterates the statement made in the Commission's Discussion Paper<sup>723</sup> that most women enter prostitution as a means of survival – "it always starts as a means of trying to get by." The submission poses the question of what other type of work requires no specific skills or training but enables the worker to earn and receive payment every day.<sup>724</sup> Similarly, the Naked Truth submission emphasises the direct link between prostitution and poverty, stating that 72% of prostitutes are currently or formerly homeless people.<sup>725</sup>

2.260 Lindie Saunderson submits that the demographic group that would be most negatively affected by legalising prostitution would be women who are desperate for money, who are unlikely to enter the formal employment sector, and who are vulnerable to diseases such as HIV. In her experience, these would be young, black women who do not possess secondary or tertiary qualifications.<sup>726</sup>

2.261 Marge Ballin (Director of Inter Outreach Ministries) submits that prostitution is not a "necessary evil" and nor should it be excused as "the oldest profession". In her view, "[I]t is the most degrading activity against womanhood, and forced prostitution is definitely a human rights issue!" Ballin further argues as follows:

[T]here is a need for action in the area of women's human rights to combat violence against women. Governments must recognise the links between prostitution and trafficking and that prostitution is violence against women. It is important therefore, to address political will of governments as they attempt to create measures against trafficking and sexual exploitation. It is critical that States implement effective sanctions against the pimps, the traffickers and the buyers.<sup>727</sup>

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<sup>723</sup> SALRC *Sexual Offences: Adult Prostitution* Discussion Paper 2009.

<sup>724</sup> Nation Building at 11.

<sup>725</sup> The Naked Truth.

<sup>726</sup> Lindie Saunderson, Senior Associate/ Pro Bono Co-ordinator and human rights lawyer in Alexandra Township, Edward Nathan Sonnenbergs Inc.

<sup>727</sup> The Links between Prostitution and Sex Trafficking (by Monica O'Connor and Grainne Healy 2006 at 4) as quoted by Marge Ballin.

2.262 Bart Love, the cameraman of *Rocking Chair*,<sup>728</sup> submits as follows:

I realized that no matter how much a woman is being paid – whether it was the R80 that Jody made or the R1000 that Amy could make in half an hour – the act of prostitution is the same and that's what's harmful to women. The human rights debate advocated by some of the people we interviewed seemed confused and distorted for me. According to one definition I've found, human rights are the agreed international standards that recognize and protect the dignity and integrity of every individual without any distinction. Women and children, who are desperate and have resorted to prostitution out of hurt, broken families, or poverty, need to be protected – not abused. Prostitution is abuse. There is no dignity in prostitution.

In consideration of the testimonies of the various people we interviewed, we were left with little choice but to conclude that:

- It is spurious to argue that the debate is about the need to redress a woman's right to sell her body for sex. None of the women we interviewed actually wanted to sell themselves.
- In terms of human rights, we were appalled at the abusive nature of the sex trade. We were also shocked to find that in every testimony fundamental basic human rights had been violated that had resulted in these women ending up in prostitution. The common threads of child abuse, drugs, human trafficking, and socio-economic victimization were the main themes in the lives of virtually every person we interviewed. It was also clear that the only economic beneficiaries of the "trade" were the brothel owners and pimps.
- The focus on the issue of prostitutes' rights seems to have caused attention to be diverted from two other critical issues: the (ab)user and those who peddle victims to satisfy their clients' demands. In a nation that prides itself in its advanced human rights policies, we realise that we still have such a long way to go to deal with gender attitudes and the plight of the vulnerable amongst us.
- Prostitution will continue to exist as long as (i) the vulnerable are not protected; (ii) abusive attitudes towards women prevail; and (iii) organized crime and corruption are not targeted. Although we are well aware that the law in and of itself cannot address all these issues, it should at least create an environment in which the combination of political will and civil society mobilization can operate to meaningfully tackle these challenges.

2.263 The Family Policy Institute and the South African Christian Lawyers Association endorse the stance taken by Ruhama, a Dublin-based voluntary organisation that works with and for women involved in prostitution. In this view, prostitution is exploitative and abusive of women and violates the most basic human rights. A woman seldom finds herself becoming involved in prostitution as a result of unlimited choices but rather as a consequence of very constrained circumstances. Prostitution is rarely chosen as a career but is instead seen as a survival strategy. In this viewpoint, legalising prostitution would mean failing to acknowledge that prostitution preys particularly on women who are vulnerable and choose prostitution as a

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At 46 - 48.

last resort. Prostitution is somehow acceptable for poor women, vulnerable women, indigenous women, women of colour or of “different” race, instead of being seen as sexual exploitation and a human rights violation. In the opinion of the Family Policy Institute and the South African Christian Lawyers Association, legalising prostitution would imply tolerating the creation of a separate, expendable, throwaway class of women. These submissions further contend that the illusion that prostitution is a choice is manipulative and deceptive. Such an illusion allows buyers and pimps to obscure the abuse involved and to confer a form of right on the abuser. The fact that money is exchanged cannot disguise that what occurs in prostitution – the bodily and psychological violations involved – are in fact sexual abuse and harassment, and would be seen as such in any ordinary workplace or social setting.

2.264 The Family Policy Institute argues that because prostitution amounts to violence against women and a breach of human rights, it becomes irrational and absurd to confer a right to be sexually exploited. Society does not see other issues of harm, such as domestic or partner violence, drug misuse, and self-harm, as “rights”. Sanctions and protections have been enshrined in law to protect vulnerable individuals and society at large. The submission states as follows:

Since 1991 The European Parliament has passed resolutions opposing prostitution, e.g. most recently the *European Parliament resolution on the current situation in combating violence against women and any future action* (2004/2220(INI)). In that resolution, among several recommendations to governments on taking measures to combat gender violence, recommendation 3 (i) urges member governments “*to combat the idea that working as a prostitute can be equated with doing a job.*”

2.265 The Family Policy Institute submission also states as follows:

The Coalition Against Trafficking in Women (CATW), and many other activists, argue that the efforts of the sex industry are having increasing success in excluding prostitution and pornography from the explicit terms of human rights instruments. Since the mid-1990s, CATW has been calling for addition of a new protocol to the 1949 convention, compelling countries that have ratified it, to enforce its provisions. They have drafted and are calling for a new convention to expand and reinforce the 1949 one. The proposed new *Convention Against All Forms of Sexual Exploitation* would make all prostitution and trafficking violations of human rights. It would, for the first time, declare that all sexual exploitation is a violation of a person’s human rights. Further it would decriminalize the women in prostitution and criminalise the pimps, procurers and customers, - as the 1999 Swedish law has done. The new convention also covers the support services, educational and economic alternatives needed for women who survive and exit prostitution. In the context of norms recently established by the international community, a State that does not act against crimes of violence against women is as guilty as the perpetrator. States are under a positive duty to prevent, investigate, and punish crimes associated with violence against women.

**(b) Access to healthcare**

2.266 SWEAT submits that South Africa's HIV & AIDS and STI National Strategic Plan for 2007-2011 (2007 NSP) calls for the non-criminalisation of prostitution. The 2007 NSP recognises that prostitutes face barriers to accessing HIV prevention and treatment services because their activity is considered unlawful. SWEAT reports that in the section on requirements for effective implementation of the 2007 NSP, the document states that "The NSP recognises that several higher-risk groups, such as sex workers and drug users, face barriers to accessing HIV prevention and treatment services, because their activity is unlawful. The NSP therefore recommends the decriminalisation of sex work."<sup>729</sup> SWEAT states that this stance is in line with the declaration of commitment made at the United Nations General Assembly Special Session on HIV/AIDS in 2001, of which South Africa is a signatory. SWEAT states that a similar approach has been adopted by UNAIDS recognising that where stigmatisation prevails and prostitution is driven underground, the prevention and treatment of HIV/AIDS becomes all but impossible. SWEAT reports that UNAIDS has adopted a human rights-based approach to HIV/AIDS, which is set out in the UNAIDS Guidance Note on HIV and Sex Work.<sup>730</sup>

2.267 SWEAT states that the nature of the sex industry is such that clients will always remain a largely invisible group. However, non-criminalisation would create conditions in which brothels could openly display and provide safer sex materials. Legitimate businesses could enforce standards of good practice and refuse clients who do not want to comply with safer sex practices. SWEAT envisages that non-criminalisation would place a duty on the government to raise awareness and target the public to reach potential clients with messages about safer sex, as part of delivering on their responsibility to ensure that infections are not spread.

2.268 SWEAT argues that one aim of a law non-criminalising prostitution would be to protect persons under the age of 18 years from prostitution-related exploitation. As such it recommends a clause to create offences in relation to "child sex work", which would be enhanced by the police being granted some power of entry into places of prostitution. SWEAT notes that child sexual exploitation is already provided for in the Sexual Offences Amendment Act, which includes a new offence of sexual exploitation of a child under the age of 18 years. To ease compliance with this provision, SWEAT recommends that under non-criminalisation

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<sup>729</sup> At 120.

<sup>730</sup> March 2009.

law, all persons working in a brothel should be obliged to sign a work contract and to produce identification (ID or passport) showing that they are 18 or over.

2.269 Ms Hicks<sup>731</sup> states that state-extended health services should be ensured for prostitutes. Similarly, A Myburgh<sup>732</sup> suggests that prostitutes be tested and medically examined every three months, to ensure their right to equality and access to healthcare. L Walter of the Sabie Methodist Church submits that partial criminalisation may place a prostitute in a position where she is more able to control the usage of condoms and might feel less ashamed to go for check-ups.

2.270 However, according to a number of respondents,<sup>733</sup> access to the public health system is already available to all people. The Family Policy Institute states that there is no evidence to suggest that prostitutes are prevented from gaining access to health facilities. Women in prostitution have the right to access health facilities such as clinics, state or private hospitals and private physicians without having to admit they are prostitutes.<sup>734735</sup> The Family Policy Institute notes that obstacles to providing health care usually pertain to capacity and attitudes rather than law, and can easily be remedied through training and institutional discipline. DFL echoes this viewpoint, and notes that if a person involved in prostitution is discriminated against regarding their rights to equality and access to health, remedies are already in place to deal with that discrimination. Everyone has easy and free access to the equality courts.

2.271 Nation Building states that some people argue that because of criminalisation, prostitutes are exposed to occupational health and safety risks. Nation Building contends that it is not the criminalisation of prostitution that makes it dangerous; it is the nature of prostitution that is dangerous and hazardous for good health. When a prostitute is alone with a client, no matter what has been negotiated, she is virtually powerless to insist that he use a condom or to stop him from beating her. A Megaw states that it is naïve to expect clients and pimps to listen to a prostitute's request for safe sex.

2.272 Nation Building states that "sex worker groups" claim that prostitutes refrain from accessing health services because of discrimination and prejudice. The submission argues that these low levels of using health services have more to do with prostitutes' feelings of

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<sup>731</sup> Commission for Gender Equality.

<sup>732</sup> SANCA, Witbank.

<sup>733</sup> Robyn Fudge; Family Policy Institute; DFL; D Scarborough, Gospel Defence League; G Hall, His People, Parkhurst; Marinda & Cornelius; Nation Building.

<sup>734</sup> Endorsed by World Vision SA and the Christian Action Network.

<sup>735</sup> Endorsed by the Christian Lawyers Association of South Africa.

shame than with actual stigma, and that this shame would not fall away even if prostitution were to be deemed acceptable work. The Christian Action Network argues that “research in Greece has shown, even where prostitution is legal prostitutes avoid going for mandatory health check ups because they want to retain anonymity and are often involved in other illegal activities such as crime and drugs.”

2.273 Nation Building further submits that the control exercised by brothel owners and pimps over “their” women, and the fact that many prostitutes are addicted to drugs, are restrictive factors that should not be underestimated. These factors have not been shown to be significantly reduced in a legalised regime.

2.274 According to the Islamic Forum Azaadville, the right of access to health and other services has not been denied to prostitutes by law. Rather, prostitutes make a choice that might be based on a “conscience” of knowing that they are perpetrating a crime. The Forum submits two comments with respect to the fears expressed by prostitutes:

1. Such fears appear to be perceived rather than real;
2. The principle that criminals are denied any medical treatment is not true.

2.275 In the Rocking Chair submission,<sup>736</sup> Jody shared that her greatest health concern was not access to health care but the health risks to which prostitutes are exposed through the nature of the sexual act. She was quoted as saying, “We are encouraged to use condoms. What scares me the most about this job is – what if a condom breaks? Unwanted pregnancy, HIV and STDs – that’s the risks we run. Who is going to pay us out for the risks we take?”

2.276 The Family Policy Institute submits that a legalised or non-criminalised system of prostitution in which health checks and certification would be mandatory only for women, and not for their clients, would be blatantly discriminatory against women. “Women only” health checks make no public health sense, because monitoring prostituted women does not protect them from HIV/AIDS or STDs. Male clients can and do transmit diseases to these women in the first place.<sup>737</sup>

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<sup>736</sup>

At 20.

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Raymond JG “10 Reasons for Not Legalizing Prostitution” as quoted in the Family Policy Institute submission; endorsed by the Christian Lawyers Association of South Africa. Supported by Christian Action Network; World Vision SA.

2.277 The Family Policy Institute further submits that so-called “enforceable” condom policies do not work. One of the interview studies by the Coalition against Trafficking in Women (CATW) reported the following findings about women in prostitution in the US:

- 47% of prostitutes interviewed said that men expected sex without a condom.
- 73% reported that men offered to pay more for sex without a condom.
- 45% said they were abused if they insisted that men use condoms.
- Some women said that certain establishments might have a rule that men should wear condoms, but in reality men still try to have sex without them.
- One woman stated, “It’s ‘regulation’ to wear a condom at the sauna, but negotiable between parties on the side. Most guys expected blow jobs without a condom.”<sup>738</sup>

2.278 The Family Policy Institute state that in reality, the enforcement of any condom policy is left to the individual woman in prostitution, and the offer of extra money is a constant pressure. One woman stated: “I’d be one of those liars if I said ‘Oh I always used a condom.’ If there was extra money coming in, then the condom would be out the window. I was looking for the extra money.” Many factors militate against condom use, including the following: the need of women to make money; older women’s decline in attractiveness to men; competition from places that do not require condoms; pimp pressure on women to have sex with no condom, for more money; money needed for a drug habit or to pay off the pimp; and the general lack of control that prostituted women have over their bodies in prostitution venues.<sup>739</sup>

2.279 The Family Policy Institute also reports that so called “safety policies” in brothels do not protect women from harm. It argues that even in brothels that supposedly monitored “customers” and utilised “bouncers”, women stated that they had been injured by buyers and at times by brothel owners and their friends. Even when someone intervened to control buyers’ abuse, the women lived in a climate of fear. Although 60% of women reported that buyers had sometimes been prevented from abusing them, half of the women said they nonetheless thought they might be killed by a “customer”.<sup>740</sup>

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<sup>738</sup> Raymond and Hughes 2001 quoted in the Family Policy Institute submission; the Christian Lawyers Association of South Africa.

<sup>739</sup> Raymond “10 Reasons for Not Legalizing Prostitution” 2003 as quoted in the Family Policy Institute submission; the Christian Lawyers Association of South Africa.

<sup>740</sup> Raymond et al “A comparative study of women trafficked in the migration process” 2002 as quoted by the Family Policy Institute; endorsed by the Christian Lawyers Association of South Africa.

2.280 The Family Policy Institute highlighted the health risks inherent in prostitution. The submission states that:

Then there is the harm to the woman herself: Like combat veterans, women in prostitution suffer from posttraumatic stress disorder (PTSD), a psychological reaction to extreme physical and emotional trauma. Symptoms are acute anxiety, depression, insomnia, irritability, flashbacks, emotional numbing, and being in a state of emotional and physical hyper alertness. 67% of those in prostitution from five countries (including SA) met criteria for a diagnosis of PTSD, a rate similar to that of battered women, rape victims, and state-sponsored torture survivors.<sup>741</sup>

2.281 The Discussion Paper<sup>742</sup> posed a question on protecting the right of a prostitute to – at any time – refuse to provide, or to continue to provide, a commercial sexual service to any other person.

2.282 The Commission received varying responses to this question. SWEAT submits that this right should be contained in legislation non-criminalising prostitution. Ms Hicks<sup>743</sup> contends that being a prostitute does not compel someone to provide a sexual service, and that the right to refuse a service should be entrenched. By contrast, Ms Poto<sup>744</sup> submits that the Constitution and the Bill of Rights are already applicable. In a submission that favours non-criminalisation, J Selby of Angels states non-criminalisation should be addressed through a supervisory body; similarly, M Richter<sup>745</sup> and L Jankelowitz<sup>746</sup> submit that the police should be encouraged to assist prostitutes. Richter envisages that prostitutes should be free to establish unions<sup>747</sup> and other collectives that could assist with the enforcement and education of their rights, and further that labour laws should apply in brothels or co-operatives. GT Mjuza argues that this would be possible by ensuring that the “trade agreement is on a willing buyer willing seller basis.” A Myburg<sup>748</sup> submits that prostitutes should be educated in assertiveness and on HIV/AIDS and rape, as such knowledge would empower them to refuse or to report.

2.283 Ms Bonthuys<sup>749</sup> observes that non-criminalisation alone would not achieve this kind of protection. She states that much depends on a prostitute’s working environment and the power relations between the prostitute and her clients or employer. Marinda and Cornelius

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<sup>741</sup> Farley et al "Prostitution in Five Countries" as quoted by the Family Policy Institute; supported by the Christian Lawyers Association of South Africa.

<sup>742</sup> SALRC *Sexual Offences: Adult Prostitution* Discussion Paper 2009.

<sup>743</sup> Commission for Gender Equality.

<sup>744</sup> Ibid.

<sup>745</sup> SANAC Women’s Sector.

<sup>746</sup> RHRU.

<sup>747</sup> Commission for Gender Equality Policy Brief Position Paper on Sex Work at 11.

<sup>748</sup> SANCA, Witbank.

<sup>749</sup> WITS.

submit that under the current laws which criminalise prostitution, a prostitute can stop trading at will. D Scarborough argues that this would not be the case if prostitution was non-criminalised. Non-criminalisation would effectively sanction the brothel system and processes. The woman would be legally used by her employer to make money, and if she refused to provide the service the employer would not make money. Therefore the woman would be under an obligation to perform “work”.

### **3 How can stigma and discrimination of prostitutes be avoided?**

2.284 An anonymous respondent simply states that changing the name “prostitute” would help. SWEAT contends that in addition to specifically applicable human rights, a law non-criminalising prostitution would go some way in addressing stigma and discrimination. SWEAT proposes that a criminalised environment is filled with risks that can lead to harm, human rights abuses, increased vulnerability and disempowerment; this results in a diminished quality of life and the internalisation of a negative self-image (“your life does not matter”). SWEAT<sup>750</sup> argues that non-criminalisation would offer a supportive environment based on a commitment to human rights; it would also reduce harm and improve the quality of life by affirming that the life of a prostitute does matter. In SWEAT’s view, “simply put – empowerment.”

2.285 Some respondents argue that non-criminalisation would remove the stigma because prostitutes would no longer be considered criminals<sup>751</sup> and would be self-employed<sup>752</sup> or able to work legally.<sup>753</sup> However, J Hicks<sup>754</sup> submits that although non-criminalisation would significantly impact on destigmatisation, it would not, in her view, address attitudes of moral superiority and prejudice towards prostitution. J Selby of Angels argues that stigma and discrimination are the result of brainwashing people against prostitution.

2.286 POWA argues that prostitution is widely misunderstood; more often than not it is conceived as evil, immoral and deviant, and prostitutes are said to enter the industry because of their own promiscuous nature. POWA contends that as a result of such misconceptions,

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<sup>750</sup> This view is echoed in the Commission for Gender Equality Policy Brief Position Paper on Sex Work at 22.

<sup>751</sup> E Bonthuys, WITS; J Hicks, Commission for Gender Equality.

<sup>752</sup> Anonymous; GT Mjuza.

<sup>753</sup> A Myburg, SANCA, Witbank; GT Mjuza; Richter M, SA National AIDS Council Women’s Sector; Centre for Justice and Crime Prevention.

<sup>754</sup> Commission for Gender Equality.

stigma and discrimination are widely manifested in the industry. Because of the stigma attached to prostitution, prostitutes are alienated by communities and become an easy target for sexual predators and drug pushers. POWA submits that various research projects across Africa have actually shown that prostitutes enter the industry for economic reasons. They need to earn money to provide for themselves and their families. The industry is relatively easy to enter because it does not require educational or vocational qualifications. POWA argues that despite the court ruling in the matter of *Jordan* in favour of the State, the minority judgment held that s 20(i)(A) amounts to indirect gender discrimination. POWA contends that the minority judgment considered the social realities of the context of prostitution which the majority ignored; mainly, that criminal sanction of the prostitute reinforces harmful stereotypes and creates stigma that renders prostitutes vulnerable to abuse.

2.287 A number of respondents submit that the stigma associated with being a prostitute exists independently of legislation, regardless of which legal model is applied.<sup>755</sup> According to the Islamic Forum Azaadville, the stigma attached to prostitutes results from their knowing (consciously or not) that their actions are repugnant to society. The Forum states that the legal status of women in prostitution does not alter or reduce the negative perceptions associated with prostitution.<sup>756</sup> Similarly, the Family Policy Institute refers to The New Zealand Prostitution Review Committee, which states that “Despite decriminalization, the social stigma surrounding involvement in the sex industry continues.”

2.288 The internalised stigma attached to prostitution is also reported to cause prostitutes to continue to operate illegally so that they can retain their anonymity.<sup>757</sup> The Family Policy Institute points out that not only does legalisation not erase the stigma of prostitution, it makes women even more vulnerable because they must lose their anonymity to be recognised as legal prostitutes.

2.289 The Family Policy illustrates its point through the following quote:

For the most part, the women in prostitution who I talk to don't really seem to care about their human rights. The stigma and shame of prostitution is still very strong even after decriminalization. The women I see feel that prejudice intensely. One of the women we work with was raped in prostitution since decriminalization. She told us, however, that she felt that 'it was part of the job'

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<sup>755</sup> DFL; Antioch Bible Church; Islamic Forum Azaadville; The Christian Lawyers Association of South Africa; The Family Policy Institute; Robyn Fudge; D Scarborough, Gospel Defence League.

<sup>756</sup> Endorsed by The Christian Lawyers Association of South Africa.

<sup>757</sup> Family Policy Institute.

of prostitution. Of all the women I've worked with, none of them told me that when they were little girls they dreamed of growing up to be prostitutes.

- Director of an Auckland agency providing services to women in prostitution, 2008<sup>758</sup>

2.290 The Family Policy Institute also referred to the Netherlands report (WODC, Research and Documentation Centre of the Dutch Ministry of Justice) in which the authors of this report stated that "Because of the more stringent police-control the new regulations also resulted in the relocation of activities within the prostitution sector: criminal forms of prostitution moved to places where there are fewer or less stringent checks." This point is worth noting as the criticism often levelled at people who advocate removing prostitution from particular localities – namely that it will merely be displaced – seem also to apply to legalisation.<sup>759</sup>

2.291 Robyn Fudge avers that in New Zealand, the fear of being "outed" in the media reportedly deters prostitutes from reporting incidents of assault to the police.<sup>760</sup> She submits that it would be naïve to assume that things are any different in South Africa.

2.292 DFL observes that discrimination can be avoided by educating the clients of prostitutes, through rehabilitation programmes, on the harmfulness of their actions and their distorted perceptions of women and sex.<sup>761</sup> DFL argues that the public ought to be informed about the socio-economic reasons for people being pushed into prostitution to survive. In its view, this information would also educate members of society and protect them from falling into the same trap.<sup>762</sup> Similarly, although arguing in favour of non-criminalisation, L Jankelowitz of the RHRU agrees that education and awareness are needed.

2.293 According to the Antioch Bible Church, the Constitution does not stipulate the de-stigmatisation of criminals. The submission also argues that there is a certain amount of discrimination against murderers, rapists, and child-molesters, and that this is necessary for the protection of people who might otherwise become their prey. This is also the case with pimps, brothel owners and prostitutes; the Antioch Bible Church state that their activities are criminal and should indeed be stigmatised. The Islamic Forum Azaadville submits that exercising the right not to associate with prostitution or prostitution-related activities does not amount to discrimination.

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<sup>758</sup>

Ibid.

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Opcit 14; endorsed by the Christian Lawyers Association of South Africa.

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Abel et al "Impact of Prostitution Reform Act" 120 and 135

<sup>761</sup>

DFL.

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Endorsed by G Hall, His People, Parkhurst.

## 4 Concerns regarding prostitution and crime

### (a) *General and organised crime*

2.294 The Discussion Paper<sup>763</sup> identified a concern about the link between prostitution and criminal activities. A few respondents<sup>764</sup> submit that there is no direct link between crime and prostitution, but that prostitution is associated with crime because it is criminalised. The Centre for Justice and Crime Prevention states that in its view, prostitution often takes place in parts of communities where urban decay has set in, resulting in a lack of social cohesion and a general neglect of the environment. Because of the nature of prostitution and by virtue of the fact that prostitutes are not protected by the law, there could be an increase in statistics of assault or robbery against the prostitutes by their clients, the police, or other community members. The Centre submits that many prostitutes admit to knowing how or where to obtain drugs or buy stolen goods, and although they themselves may not be engaging in these activities, there is an indirect link between the environment that prostitution takes place in and the contributing role it plays towards increasing crime in the area.

2.295 According to SWEAT, the key question to ask is not how concerns about prostitution and crime should be addressed, but rather what type of crime is being organised that is unique to the sex industry and needs special legislation. In SWEAT's view, a range of existing laws can deal with crimes that may be related to the sex industry (and other industries), such as money laundering, drug dealing, sexual violence, assault, extortion, and blackmail.

2.296 SWEAT submits that although some prostitutes may be involved in crime-related activities or may associate with criminals, the majority are not and do not. SWEAT further states that the prohibition of prostitution creates a situation in which prostitution can only be located in the criminal world; therefore, the non-criminalisation of prostitution would enable police authorities to prioritise the real crimes.<sup>765</sup> By contrast, the Islamic Forum Azaadville submits that there is an undisputed link between prostitution and other crimes, and that it is of no consequence where in the chain of events prostitution finds itself. Rather, the fact that it is part of many illegal activities needs to be recognised.

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<sup>763</sup> SALRC *Sexual Offences: Adult Prostitution* Discussion Paper 2009.

<sup>764</sup> The Centre for Justice and Crime Prevention; SWEAT; J Selby, Angels; J Hicks, the Commission on Gender Equality and the Tshwaranang Legal Advocacy Centre.

<sup>765</sup> SWEAT; J Hicks, the Commission on Gender Equality and the Tshwaranang Legal Advocacy Centre.

2.297 SWEAT believes that because prostitution is a criminalised offence, prostitutes are often forced underground, where they become more vulnerable to exploitation, health risks, and violence. This belief is endorsed by the Tshwaranang Legal Advocacy Centre.<sup>766</sup> Hence prostitutes may turn to a pimp for protection if they are not safe. SWEAT submits that currently the industry is regulated by pimps, criminals, brothel owners, and the police; but seldom by prostitutes themselves. SWEAT argues that often criminals oppose the non-criminalisation of prostitution, because the current underground nature of prostitution provides them with a window of opportunity for criminal activity.

2.298 SWEAT submits that the prostitute becomes a potential target of crime in a number of ways. Examples include being the target of thieves, being coerced to pay to work in a certain area or to sell drugs on behalf of a drug dealer, or pressure for the prostitute to use drugs with a client. Prostitutes are also co-opted into acts of robbery and may witness acts of crime, for example the trafficking of other people. Currently they feel unable to report these crimes due to the fear of being arrested for practising prostitution. One respondent argues that non-criminalisation would result in decreased crime.<sup>767</sup> Others submit that non-criminalisation would allow industry bodies – such as Sisonke – to address concerns around prostitution and crime,<sup>768</sup> and that prostitutes would be able to work with police forums to prevent crime.<sup>769</sup>

2.299 Conflicting submissions were received in respect of the effect of non-criminalisation on crime in New Zealand. On the one hand, some submissions argued that findings from New Zealand have shown that the relationship between prostitutes and the police have vastly improved as a result of non-criminalisation, and that improved cooperation between prostitutes and the police has resulted in an increased reporting of crimes committed against prostitutes and of general crime.<sup>770</sup> On the other hand, some submissions stated that in New Zealand, strip-club owners have complained about unfair price competition from illegal operators using Asian women; and in South Auckland, police have struggled against gangs that control underage teenage street prostitution.<sup>771</sup> The Family Policy Institute reported that Gordon Copeland (United Future MP), who was part of a 2006 working group that reviewed problems with the new legislation, found that brothels in Waitakere and on the North Shore were run by Chinese “gangs”. These gangs exploited mainly Chinese women, and also

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<sup>766</sup> SWEAT; Endorsed by the Tshwaranang Legal Advocacy Centre.

<sup>767</sup> Myburg A, SANCA Witbank

<sup>768</sup> L Jankelowitz, RHRU.

<sup>769</sup> L Sete, UNISA.

<sup>770</sup> SWEAT.

<sup>771</sup> The Family Policy Institute.

exploited the provisions relating to SOOBS (small owner-operated brothels). The Family Policy Institute adds that because prostitution is no longer illegal, the police may no longer conduct raids unless acting on specific information. According to the New Zealand Police they no longer bother to monitor the sex trade at all. Consequently, less and less is known about the trade, which enables various exploiters to operate unhindered.<sup>772</sup>

2.300 A substantial number of respondents hold the view that non-criminalisation would increase crime, because it would grant great power to people (pimps and madams) who disregard the dignity and human rights of the young women they financially exploit.<sup>773</sup>

2.301 The Family Policy Institute avers that drugs, crime and violence are intrinsic to the prostitution industry.<sup>774</sup> The Institute contends that no country has managed to break the link between prostitution, crime, drugs and violence. The submission refers to a statement by JP Smith, Chairperson for the Cape Town City Safety and Security Portfolio Committee and the Council Representative for Sea Point. The Sea Point area is a well-known prostitution “hot spot”. Smith had stated that the City had found a definite link between prostitution and general crime.

2.302 Reports from Pretoria portray a similar experience. In 2009, the *Pretoria News*<sup>775</sup> related how a motorist was killed and dozens of people injured in a spate of armed robberies carried out by prostitutes in secluded spots around the city. The majority of the attacks, which led to police issuing warnings to motorists, were on rich businessmen from Johannesburg and Rustenburg. In one of the incidents, a man was attacked by six armed men and robbed of his cell phone and wallet. The Wilsons<sup>776</sup> argue that “where there is big money, crime will continue to flourish. Non-criminalising will just open more loopholes for criminals”.

2.303 Robyn Fudge states that in South Africa, in addition to local criminal groups, foreign organised criminal groups from Russia, Bulgaria, Thailand, China and Nigeria have already established themselves in the local sex industry. She relates that strip clubs, in particular, have been used as fronts for prostitution. She cites media reports that alleged that Ulienitsky had been buying up property in Cape Town to position himself as a dominant player in a

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<sup>772</sup> Endorsed by the Christian Lawyers Association of South Africa.

<sup>773</sup> Scarborough D, Gospel Defence League; Marinda & Cornelius; Family Policy Institute and numerous supporting submissions.

<sup>774</sup> Endorsed by the Christian Lawyers Association of South Africa; Nation Building.

<sup>775</sup> Hoskin Graeme, “Prostitutes blamed for attacks” *IOL* and *Pretoria News* 3 June 2009 available at <http://www.iol.co.za>.

<sup>776</sup> Wilson I & B, Presbyterian Church.

legalised prostitution market, prior to his assassination.<sup>777</sup> Robyn Fudge argues that non-criminalisation would seem to effectively make legitimate businessmen out of an assortment of underworld crime bosses.

2.304 The Family Policy Institute points out that South Africa has high unemployment rates; extreme economic disparities; porous borders; pervasive corruption in all sectors of society; and extremely high levels of rape, violence and abuse against women and children.<sup>778</sup> The Institute states that it therefore finds it inconceivable that policies of legalisation or non-criminalisation that have proved to be complete failures in better-resourced countries would work for South Africa.<sup>779</sup> The Family Policy Institute believes that clamping down on the “demand” side of prostitution – with particular focus on pimps, gangs, crime syndicates, brothel owners and sex traffickers – would be the only way to break the long-established links between crime and prostitution.<sup>780</sup>

2.305 Lindie Saunderson’s submission aligns with that of the Family Policy Institute. Saunderson states that legalising prostitution would inevitably lead to people from Africa being exploited by foreigners. International sex traffickers would certainly see Africa – and South Africa – as a safe haven from which to run their businesses. This would result in more crime, especially sexual offences and violent crimes against vulnerable groups.<sup>781</sup>

2.306 The Family Policy Institute cautions against non-criminalisation. It reports that in Sydney, the Australian government has lost control of the illegal sex industry – which is four times larger than the legal sex industry.<sup>782</sup> The Institute submits that in Victoria, Australia, ties persist between organised crime groups and sex businesses, and that convictions for sexual slavery have involved legal brothels.<sup>783</sup> Furthermore, in South Auckland, New Zealand, bike gangs have been involved in the pimping of underage prostitutes.<sup>784</sup>

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<sup>777</sup> You magazine “Death of a Gangster” page 8, 14 June 2007

<sup>778</sup> Endorsed by Christian Lawyers Association of South Africa.

<sup>779</sup> Family Policy Institute; endorsed by Christian Lawyers Association of South Africa.

<sup>780</sup> Endorsed by the Christian Lawyers Association of South Africa; World Vision SA and Christian Action Network.

<sup>781</sup> Lindie Saunderson, Senior Associate/ Pro Bono Co-ordinator and human rights lawyer in Alexandra township, Edward Nathan Sonnenbergs Inc; endorsed by Marinda & Cornelius.

<sup>782</sup> *The Telegraph* 18 May 2009 as quoted by the Family Policy Institute; endorsed by Christian Lawyers Association of South Africa.

<sup>783</sup> What happens when prostitution becomes work? Supra at 15.

<sup>784</sup> New Zealand Herald Binning Elizabeth “Teen prostitutes pimped out by gangs” 25 January 2008 available at [nzherald.co.nz](http://nzherald.co.nz).

2.307 Country reports from Australia and the Netherlands show that legalisation has, in some respects, strengthened the links between prostitution and organised crime.<sup>785</sup> To illustrate this point, the Family Policy Institute submits that the Mayor of Amsterdam, Job Cohen, admitted that the policy of legalisation had been a failure and that he had instituted its reversal, because “It appeared impossible to create a safe and controllable zone for women that was not open to abuse by organised crime.”<sup>786</sup> The Family Policy Institute (endorsed by the Christian Lawyers Association of SA) avers that organised crime dominated the industry, in which sex trafficking, exploitation, drug abuse and money laundering was rife. The Family Policy Institute further reports that the turnaround strategy included buying out a third of the brothel windows and replacing them with fashion boutiques, withdrawing permits from dozens of sex businesses that reportedly had links to organised crime, and introducing raft of new restrictions on other aspects of the sex trade.<sup>787</sup>

2.308 The Family Policy Institute submits that in the Netherlands, brothels open under various guises to avoid registering with the government. The Dutch prostitutes’ pressure group “De Rode Draad” (The Red Thread) reported in 2006 that the number of brothels in the Netherlands had decreased dramatically since they were legalised, but that the number of saunas and massage parlours had increased. The illegal sector appeared to be growing. The Rode Draad spokeswoman Metje Blaak stated that brothels were facing increasing competition from other illegal businesses in the sex industry:

There are so many things - there's internet and lots of disguised brothels, like partner clubs and what have you, which also involve prostitution, although they keep that quiet. Then there are massage parlours where men are stimulated to ejaculation by the masseuses - all new developments - so there is less work for real prostitutes.<sup>788</sup>

2.309 The Family Policy Institute contends that although prostitutes complain about their working conditions in legal venues, things are much worse in the illegal circuit. Amsterdam councillor Roel van Duijn, who represents the Green Left party, spent several years studying the illegal sex circuit and the trade in women. Although he admitted that figures were hard to find, he estimated there were roughly 10 000 prostitutes in Amsterdam. Only a few thousand were working in the visible legal circuit. Van Duijn reported that the illegal circuit was rife with

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<sup>785</sup> Editorial *Het Parool*; Bindel and Kelly at 13 ; endorsed by Christian Lawyers Association of South Africa.

<sup>786</sup> Ibid.

<sup>787</sup> Family Policy Institute; endorsed by Christian Lawyers Association of South Africa.

<sup>788</sup> “Legalised prostitution: a dying trade”, by Margreet Strijbosch, 31-10- 2006. [www.radionetherlands.nl](http://www.radionetherlands.nl). quoted in the submission by the Family Policy Institute and endorsed by the Christian Lawyers Association of South Africa.

sex slavery, with mostly illegal immigrants being bought and sold. Van Duijn not only sought an end to illegal prostitution but also wanted to abolish legal prostitution. In his view:

There is a tendency in the Netherlands which believes that prostitution is a normal economic activity which should be made legal. I don't agree. In practice, prostitution has always been an illegal area, one which often attracts women from problem backgrounds. It is a fact too that women who have worked as prostitutes often continue to suffer from their traumatic experiences.<sup>789</sup>

2.310 The Family Policy Institute notes that in 2002 prostitution was decriminalised in Germany and that consequently the promotion of prostitution, pimping and brothels became legal. However, the overwhelming majority of prostitutes in Germany are foreign; Germany is one of the highest receivers of women trafficked for sexual exploitation. The submission refers to a report on the Prostitution Act produced by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth in 2007. In that report, the Federal Government conceded that the policy had failed to achieve the desired goals and had had no real impact on prostitutes' social protection. The *Report on the Prostitution Act* summarised the Federal Government's conclusions as follows:

The *Report of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act)* published by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth states that: German Federal Government to revisit the goals of the Prostitution Act and to see whether these goals have been fulfilled.

2.311 The report further stated as follows:

The Federal Government believes that the Prostitution Act has only to a limited degree achieved the goals intended by the legislator.

- Although it has been possible to create the legal framework to enable contracts of employment to be concluded that are subject to social insurance, few have as yet made use of this option. The Prostitution Act has thus up until now also not been able to make actual, measurable improvements to prostitutes' social protection.
- As regards improving prostitutes' working conditions, hardly any measurable, positive impact has been observed in practice. At most there are first, tentative signs which point in this direction. It is especially in this area that no short-term improvements that could benefit the prostitutes themselves are to be expected.
- The Prostitution Act has not recognisably improved the prostitutes' means for leaving prostitution.
- There are as yet no viable indications that the Prostitution Act has reduced crime. The Prostitution Act has as yet contributed only very little in terms of improving transparency in the world of prostitution. On the other hand, the fears that were partly linked to the Prostitution Act have not proved true, in particular in the area of fighting crime. The Prostitution Act has not made it more difficult to

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<sup>789</sup>

Ibid.

prosecute trafficking in human beings, forced prostitution and other prostitution-related violence. Police are no longer able to monitor the 'scene' or enter brothels as in the past to try to uncover trafficked or otherwise abused victims.<sup>790</sup>

2.312 The Family Policy Institute summarises its view of the findings of The New Zealand Prostitution Review Committee regarding events in New Zealand after the non-criminalisation of prostitution in 2003. The Institute's submission includes the following points:

- Violence in prostitution continued after prostitution was non-criminalized in New Zealand, according to the New Zealand Law Review Committee. "The majority of sex workers felt that the law could do little about violence that occurred." 35% reported in 2007 that they had been coerced to prostitute with a given john in the past 12 months. A majority of respondents felt that non-criminalisation made no difference with respect to the violence of johns in prostitution – they felt that it was inevitably a part of the sex industry. The Report notes that "few" sex workers, regardless of whether they were prostituting indoors or outdoors, reported any of the incidents of violence or crimes against them to the police.
- Many owners of brothels have the same exploitive contract arrangements that existed before prostitution was non-criminalised. Often there are no written contracts or they are of questionable quality.
- Stigma and prejudice against prostitution, and the shame associated with prostitution, continued since non-criminalisation of prostitution.
- Street prostitution in the cities increased dramatically after prostitution was non-criminalised. In Christchurch and Manukau, street prostitution has shifted into traditionally residential areas where community residents harassed those in prostitution and people in street-based prostitution who "propositioned members of the public were aggressive, disruptive, and noisy." Complaints from residents included "condoms, excrement, and other bodily waste" left in the street, shops, car parks, and on private property.
- There is inadequate protection for children against prostitution in New Zealand since non-criminalisation. An Auckland lawyer declared non-criminalization a "disaster" which had resulted in an "explosion" of children in prostitution in Auckland and Christchurch, three murders of people in prostitution, and local businesses complaining of prostitution occurring on their premises and used condoms littering streets and doorways. The police have no right of entry into brothels, and have no right to ask for age-identification papers of those in prostitution – thus investigation of suspected youth prostitution is extremely difficult, according to police officers, who asked that the law be revised.
- The US State Department has noted trafficking of women and children since prostitution was non-criminalised in New Zealand. The Trafficking in Persons Report of the US State Department notes that New Zealand has internal trafficking of women and children for commercial sexual

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790 "Report of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act)". Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, pg 79. Quoted in the submission by the Family Policy Institute and endorsed by the Christian Lawyers Association of South Africa.

exploitation, and that there are instances of debt bondage and document confiscation, and women from Asia, the Czech Republic, and Brazil “working illegally” as prostitutes.

2.313 The Family Policy Institute submits that non-criminalisation cannot stop the violence, abuse, and stigma that are built into prostitution. The Institute reports that prostitution of children and youth has increased, with humanitarian agencies declaring that in New Zealand indigenous Maori children are at the highest risk for prostitution. Furthermore, “when prostitution is non-criminalised, neighbourhoods mount legal battles over whose back yard the next brothel will be zoned into”.

2.314 The Family Policy Institute (endorsed by the Christian Lawyers Association of South Africa) further reports that in October 2008, frightened New Zealand parents discovered that a brothel was situated in the same building as a child care centre. The director of the child care centre stated that under the non-criminalised prostitution laws, “We don’t believe we have any legal avenues to stop them.”<sup>791</sup>

2.315 According to the Family Policy Institute, in South Africa the new amended Sexual Offences Act provides the tools to tackle the harmful and exploitative trade of prostitution. The buyers of sexual acts have even been criminalised in terms of section 11. The Institute believes, however, that what is required – apart from more and better exit programmes – is the will to help women out of what amounts to a form of gender-based violence.<sup>792</sup> In the Institute’s view, prostitution is a particularly nasty form of sexual exploitation, stripping its victims of their dignity, self-worth and true potential. The Institute comments that the only rational and responsible policy for South Africa to adopt would be diligent enforcement of the law as it currently stands on the statute books, with a particular focus on buyers, pimps, procurers and traffickers. In addition, government – in partnership with churches and responsible NGOs – should develop sustainable programmes to end the sexual servitude of women and children.<sup>793</sup>

2.316 DFL expresses the following opinion in its submission:

- Due to the ever present threats of violent retribution from organised crime towards people who testify against them, provision should be

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<sup>791</sup> “Brothel Shares Childcare Building” OneNews NZ, available at <http://tvnz.co.nz/view/page/411365/2199590> Accessed on Oct 14, 2008, Quoted in the submission by the Family Policy Institute and endorsed by the Christian Lawyers Association of South Africa.

<sup>792</sup> Endorsed by the Christian Lawyers Association of South Africa.

<sup>793</sup> Ibid.

made for prostitutes who are willing to leave prostitution and ex-prostitutes, to testify in such a way that there is no threat of harm to themselves or their relatives. Prostitutes in exit programmes and reintegrated ex-prostitutes would then be more willing to testify and would be more reliable witnesses than practicing prostitutes who are offered immunity from prosecution for their testimony.

- The rehabilitation of the clients of prostitutes through re-education will contribute to a decrease in the demand for prostitution and associated crime such as drug trafficking, human trafficking, child prostitution and money laundering.

**(b) Concerns about prostitution and child prostitution**

2.317 A number of respondents submit that concerns about prostitution, child prostitution and crime should be addressed by keeping all prostitution criminalised, as these problems are inextricably linked.<sup>794</sup> Doctors for Life International (DFL) asserts that many girls and boys are drawn into prostitution when they are minors. These are often foster children or orphans, children who do not have good homes or education, children who have run away, often fleeing abuse, who might have become addicted to drugs, and have been exploited by pimps. They do not enter a life of prostitution at the age of 18 but “come of age” having already been a part of a life of prostitution. Many suffer from post-traumatic stress disorder (PTSD) or Stockholm syndrome, which are both recognised clinical conditions. Such people are psychologically conditioned to a prostitution lifestyle.

2.318 The Islamic Forum Azaadville notes that the differentiation between child prostitution and adult prostitution is both legal and academic. The Forum submits that adult prostitution feeds off child prostitution. The Forum cautions against non-criminalisation, saying that a lack of police manpower and resources would ensure that adult prostitution would continue to operate under the façade that child prostitution is absent, whereas in reality children in prostitution will be paraded as adults. The Forum believes that non-criminalisation will cause the phenomenon of child prostitution to grow unhindered, in time growing the adult population of prostitutes.

2.319 According to Lindie Saunderson, a human rights lawyer and Senior Associate and pro bono co-ordinator at Edward Nathan Sonnenbergs in Alexandra township, children are inevitably drawn into matters of prostitution. She comments:

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<sup>794</sup> The Islamic Forum Azaadville; Lindie Saunderson, Senior Associate/Pro Bono Co-ordinator and human rights lawyer; Doctors for Life International; Family Policy Institute.

I know of thousands of child prostitutes/children being sexually abused or forced into prostitution (illegally) in Alex. Those of us respecting the dignity of women and children are already battling day and night to get these victims out of the cycle of prostitution. When one speaks to these women and children, 100% of them will relay their story of poverty to you and it is clear that all of them are forced into it by socio-economic circumstances. In terms of section 28(1) of the Constitution the best interest of children must be of paramount importance when decisions around them are made.

2.320 The Family Policy Institute contends that child prostitution exists within every adult prostitution market, and has increased in places where prostitution has been legalised or non-criminalised. The Institute further reports that in the Netherlands, child prostitution has significantly increased during the last 10 years with the Child Right organisation in Amsterdam estimating that there are more than 15 000 children, primarily girls, being prostituted – an increase of 11 000 people since 1996. Five thousand of these children are thought to have been trafficked from other countries, mainly Nigeria.<sup>795</sup> The Family Policy Institute reports that Victoria, the first Australian state to non-criminalise prostitution (in 2003), recorded the largest increase in child prostitution in Australia.<sup>796</sup>

2.321 The Family Policy Institute quotes Mary Sullivan of the Coalition Against Trafficking in Women, Australia. Sullivan states that “Sexual exploitation of children continues. The increased tolerance of prostitution in Victoria, in effect, requires a steady flow of women and girls to meet the demands of the vastly expanding and lucrative market.”<sup>797</sup>

2.322 Marge Ballin questions why South Africa should follow a state (Victoria) that promotes itself as having the most advanced regulation for the prostitution industry in Australia, and possibly the world, but has the largest child prostitution trade of that country.<sup>798</sup>

2.323 In her view, the legalization of prostitution was promoted in the Netherlands as a way to help end child prostitution. However, it is estimated that between 1996 and 2001, the number of children in prostitution increased by over 300%, growing from 4 000 to 15 000 individuals. Of these, 5 000 children were trafficked from other countries.<sup>799</sup>

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<sup>795</sup> Op cit 15 Family Policy Institute submission; endorsed by Christian Lawyers Association of South Africa.

<sup>796</sup> Endorsed by Marge Ballin, Director Inter Outreach Ministries.

<sup>797</sup> The Family Policy Institute.

<sup>798</sup> From ‘What Happens When Prostitution Becomes Work?’ An update on legalization of prostitution in Australia by Mary Sullivan – Coalition against Trafficking In Women, Australia as quoted by Marge Ballin.

<sup>799</sup> Marge Ballin.

2.324 Naked Truth argues that not only would non-criminalising adult prostitution increase child prostitution, but that studies have shown that a significant percentage of customers prefer very young prostitutes.<sup>800</sup>

2.325 The Family Policy Institute reports that New Zealand Police have complained that the new policy of non-criminalisation has “tied their hands” when it comes to dealing with the proliferation of under-age prostitution.<sup>801</sup>

2.326 Marge Ballin states that in South Africa some child prostitutes are as young as nine years. She adds that children are trafficked into South Africa either from poor rural areas, through pimps promising parents to give their children education and jobs, or from various African states, and are then forced into prostitution. Ballin reports that she has worked with very young girls on the street, who have sometimes come into the Inter Outreach Ministries drop-in centre.

2.327 The house mother of Tshwane Home of Hope was quoted in the Rocking Chair submission,<sup>802</sup> explaining that Tshwane Home of Hope is a safe house and shelter for the children of prostitutes and former child prostitutes. She commented:

We have one 14 year old who is pregnant. Most of the girls here have been prostituted – often by their own mothers who are prostitutes. Many of the girls are from foreign countries. Their mothers are working as prostitutes and these children have been picked up by social workers and brought here. It's very hard sometimes when the mothers pitch up here and they want to take their children – but we don't allow that because they just want to make money off the child.

2.328 The house mother related to the Commission researchers how dangerous life was, especially for girl children, on the streets of Sunnyside. She said that the girls would not last a night on the streets before being taken in by pimps and drug lords, and sold to men for sexual services. In her experience, men were more interested in children than adults. Pimps were said to try and waylay these children between the shelter and school. One child, who was successfully completing Grade 1 in 2009, had been rescued from being exploited by her mother, who would sell the child's services for the price of a plate of food: R28.

2.329 In June 2009, a local newspaper<sup>803</sup> reported that there were about 10 000 child prostitutes in Johannesburg alone, as estimated by a group concerned about child abuse.

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<sup>800</sup> The Naked Truth .

<sup>801</sup> The Family Policy Institute.

<sup>802</sup> At 34.

Bloemfontein was identified a major focal point for syndicates dealing in drugs and children trafficked for sex.<sup>804</sup> This was confirmed by the police to the Commission researchers during a night tour of Pretoria in September 2009. Furthermore, the newspaper article quoted Retha Meintjes (deputy director of public prosecution and founding member of SAPSAC, a body investigating child abuse) as saying that the situation was “equally grave” in Cape Town, Durban and Port Elizabeth. Girls in South Africa were being sold for R2 500 to R12 000 per child, according to SAPSAC.<sup>805</sup> Children who tried to resist the syndicates’ demands were subjected to “extreme physical abuse, or by withholding drugs and food from them or even death.”<sup>806</sup> The Family Policy Institute submits that the links between adult prostitution, child prostitution, sex trafficking and organised crime are indisputable.

**(c) Concerns regarding prostitution and trafficking**

2.330 SWEAT refutes claims that a link exists between non-criminalised prostitution and trafficking, and submits that non-criminalising prostitution would inhibit crimes such as trafficking. By contrast, the Family Policy Institute argues that the links between organised crime, prostitution and trafficking are well established. The Family Policy Institute states that traffickers are often highly organised entrepreneurs who earn huge profits from the exploitation of women and children. The Institute submits that international and local trafficking in women and children cannot flourish without local prostitution markets. If a local prostitution market decreases substantially, organised crime networks are likely to relocate to a more profitable location.<sup>807</sup> In the Institute’s view, the legalisation or non-criminalisation of prostitution is a “gift” to pimps, traffickers and the sex industry. The Institute argues that people often do not realise that non-criminalisation means non-criminalising the entire sex industry, not only adult prostitutes. The Institute cites Raymond as having commented that “[T]hey haven’t thought through the consequences of legalizing pimps as legitimate sex entrepreneurs.”<sup>808</sup> Nation Building agrees that legalised or non-criminalised prostitution fuels human trafficking. The Nation Building submission states that non-criminalisation effectively encourages modern-day slavery, by providing a façade behind which traffickers operate. The

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<sup>803</sup> News24 Rademeyer Alet and De Bruin Philip “10 000 child prostitutes in Jhb” *Beeld* 3 June 2009 available at <http://www.news24.com>.

<sup>804</sup> Ibid.

<sup>805</sup> Ibid.

<sup>806</sup> Ibid.

<sup>807</sup> Bindel & Kelly quoted by the Family Policy Institute; endorsed by the Christian Lawyers Association of South Africa.

<sup>808</sup> Raymond “Legitimizing Prostitution as Sex Work” quoted by the Family Policy Institute; endorsed by the Christian Lawyers Association of South Africa.

Islamic Forum Azaadville cautions that legalising or partial legalising prostitution could assist and stimulate child trafficking.

2.331 Doctors for Life comment that it has observed that many of the people (girls, boys, women and men) who are perceived to be working willingly in prostitution are, in fact, victims of trafficking. DFL relates that “they tell you directly, or more often than not, indirectly, that they are in some way or another, such as through intimidation and threats of violence and/or dependency on a specific drug and/or dealer, coerced to be in prostitution and are therefore victims of trafficking according to the United Nations definition”.

2.332 DFL also comments that many South African girls, especially rural Africans, are often not registered when they are born and therefore lack identity documents. This hampers their education, especially at high school level. Many girls fall pregnant while living in rural environments, and then leave their child with somebody else – such as their mother, grandmother, relative or friend – who requires money to look after the child. The young mother then often goes looking for a city job. But without an identity book and good education (at least to high school level) it is virtually impossible to get a proper job. The young woman might become desperate to survive and may easily fall into illicit employment such as drug dealing; she might become hooked on drugs herself and then be forced into prostitution and trafficked by the drug dealers and pimps who now control her. Such women are also often forced into the production of pornography and may end up being sex slaves.

2.333 DFL further comments that another factor contributing to young women’s desperation is the break-up of the family caused by HIV/AIDS. Many older siblings travel to towns or cities to try and get money to help their sick family members, especially younger brothers or sisters, who remain at home. These migrant youngsters may end up in the same predicament of being trafficked through forced prostitution. The children who are left behind also become vulnerable to abuse and being trafficked to other areas for sexual and labour exploitation.

2.334 DFL concludes that many girls trafficked into prostitution were psychologically, physically and sexually abused as children. “They live in a state of fear and as a result of the abuse, have lost their sense of human dignity. They will often automatically live out the role of being abused. They just don’t care anymore and have lost their trust in everybody.”

2.335 Robyn Fudge states that strip clubs are also known to traffic women for sexual exploitation, using work permits for “exotic dancers”.<sup>809</sup> She submits that if prostitution were to be non-criminalised, traffickers would similarly be able to bring in foreign women on work permits under the guise that they are “migrant sex workers”.

2.336 The Nation Building submission states that human trafficking and drug trafficking are two of the most lucrative forms of organised crime; worldwide, both activities are closely associated with prostitution. Nation Building submits that the legalisation or non-criminalisation of prostitution has not succeeded in breaking these links. Rather, they have been reinforced in many countries that have opted for the legalisation (non-criminalisation) model.

2.337 Nation Building cautions that the close connections between prostitution and organised criminal activity cannot be denied or minimised. The submission quotes Jeffrey (2006) in “Prostitution and Trafficking in Australia: 20 years of liberalization”, as follows:

In the Australian state of Victoria, where large parts of the sex trade have been legal since 1984, one of the strongest arguments put forward for the legalisation of prostitution was that it would inhibit criminal involvement and reduce opportunities for police corruption. Neither of these have, however, materialised. Members of crime families still own and run brothels, often as a front for the actual owner; many managers and associates have an inexplicably high death and injury rate; investigations have been undertaken into corrupt police officials suspected of laundering money through legal brothels; illegal brothels have spread; and numbers of women trafficked for sexual exploitation — primarily from Thailand but increasingly from China and Korea — have increased to the point where police estimate that approximately AU\$1 million is earned from trafficked women each week.<sup>810</sup>

2.338 The Family Policy Institute reports that during 2007, officials in the Netherlands were concerned that women were being forced into prostitution – which legalisation was supposed to prevent. Amsterdam’s mayor, Job Cohen, was quoted as saying “We have seen in the last years that women trafficking have becoming more, so in this respect the legalizing of the prostitution didn't work out.”<sup>811</sup>

2.339 The Family Policy Institute also reports that in 2008, Dutch banks had started to boycott sex businesses due to concerns about trafficking and money laundering.<sup>812</sup>

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<sup>809</sup> (Noseweek Dec 2008) quoted by Robyn Fudge.

<sup>810</sup> These sentiments are endorsed by Mary Sullivan of the Coalition Against Trafficking in Women, Australia.

<sup>811</sup> “Mayor unveils plan to clean up Amsterdam's red-light district” December 18, 2007, [www.abc.ca/news](http://www.abc.ca/news). Quoted in the submission by the Family Policy Institute and endorsed by the Christian Lawyers Association of South Africa.

<sup>812</sup> “Sex industry companies protest bank boycott” *Dutch News* 31 December 2008.

2.340 According to Marge Ballin, globalisation and the opening of countries in transition to the world economy have created an opportunity for national criminals to extend their illicit economic activities. These criminals establish links with foreign and international criminal networks and maximize their profits by creating economies of scale. Ballin states that one of the most rapidly growing illicit activities over the past two decades has been the trafficking of women and girls, mainly for the sex industry in Western Europe, the Netherlands, Italy, Belgium, Germany, the United Kingdom and the United States. Ballin notes that according to various estimates (cited in O'Connor and Healy 2006), up to 80% of women and girls trafficked from Central and Eastern Europe (CEE) or Commonwealth of Independent States (CIS) countries to Western Europe are destined for the sex service market. The total annual revenues of traffickers are estimated to range from US\$ 5 billion to US\$ 9 billion.<sup>813</sup>

2.341 The Family Policy Institute refers to the 2004 *Trafficking in Persons Report* by the United States Department of State, which concluded that “Legalised prostitution is a trafficker’s best shield, allowing him to legitimise his trade in sex slaves and making it more difficult to identify trafficking victims.”

2.342 The body Justice [ACTS]<sup>814</sup> cites an article in *Eye on Human Trafficking* (Issue 13/7), a 2007 publication by the International Organisation for Migration, in which “the Dutch Ministry of Justice was in favour of a legal quota for foreign sex workers being brought into the country because the Dutch prostitution market demands a variety of bodies”. According to the respondent Ina van den Heever, a South African outreach worker in the Red Light District in Amsterdam, many women found in the Red Light District are illegal foreigners who had no idea that the work they were offered was in the Netherlands or that they would be expected to prostitute themselves in order to pay for a false passport, visa, workpermit and for the airticket, trainfare and accommodation provided. She reports that numerous women in this situation were befriended in their countries of origin and offered employment in another country.

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<sup>813</sup> Monica O'Connor and Grainne Healy (2006) *The Links Between Prostitution and Sex Trafficking* 25; cited in Marge Ballin’s submission to the SALRC.

<sup>814</sup> Justice [Acts] – Prostitution and Trafficking Research 2009 Legalisation/decriminalization of prostitution promotes human trafficking for sexual exploitation. Available at [www.justiceacts.org](http://www.justiceacts.org).

2.343 The Family Policy Institute argues that curtailment of trafficking in persons for prostitution seems to go hand-in-hand with strong measures to eliminate the demand for prostituted women and children.<sup>815</sup>

2.344 The Family Policy Institute also submits that in terms of article 9.5 of the Palermo Protocol, to which South Africa is a signatory, States Parties must do more than simply discouraging the demand for trafficked persons. They must also take measures to discourage the demand that fosters all forms of exploitation of people and results in trafficking, especially of women and children. The Institute is of the opinion that non-criminalising or legalising prostitution would foster large sex markets that would act as a “pull” factor for sex traffickers, thereby failing to meet South Africa’s obligations in this regard.

2.345 According to Ballin, through Inter Outreach Ministries she has worked with young girls who certainly have been trafficked. They came from the Congo and other African states, and could hardly speak any English.

We also had a situation of a group of women coming to us for assistance that were brought in from Nigeria and told they would be given jobs. They were taken to a brothel in Sea Point and told to prostitute after which they came to us for assistance. In 2005 we had an 18 year girl brought to us for help who was part of a child sex ring from the age of 13. Her perpetrator was later caught and imprisoned through an Organization called Molo Songololo, who do lobbying and advocacy to fight human trafficking.

2.346 Ballin draws the Commission’s attention to the case of *Van Rooyen*, which involved the disappearance of several young South African girls in the 1980s, four of whom were never seen again. Since then, there have been a number of cases of lost children who possibly could have been abducted and sold into sexually slavery. South Africa has one of the highest incidences of sexual abuse in the world; in Ballin’s view, this problem would definitely escalate if laws became more lenient.

**(d) Concerns regarding prostitution and grooming**

2.347 According to the Nation Building submission, grooming is prevalent. The submission states that international studies have shown that between 65% and 90% of prostituted women were sexually abused in childhood by their own male relatives or acquaintances. Many children who are sexually exploited – mainly girls – are sold into prostitution at an early age

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<sup>815</sup> SALRC Trafficking in Persons: Discussion Paper; Endorsed by the Christian Lawyers Association of South Africa.

by the men who abuse them. According to recent international studies, the median age for girls to enter prostitution was 14 years.<sup>816</sup>

**(e) Concerns regarding prostitution and drugs**

2.348 The Naked Truth states that if prostitution were to be legalised or decriminalised, this would create an ideal environment for substance abuse and drug trafficking to flourish in. The submission notes that the link between prostitution and drugs is well-documented. It reports that the demand for drugs like crack cocaine, heroin (in mixed form called “*nyaope*” in Pretoria and “sugars” in Durban) and methamphetamine (“tik”), which are all highly addictive substances, necessitates careful review of any factors that might increase the flood of drugs in South Africa. Currently, drug users selling sex “have to sell their bodies to between 15 and 20 men per day to be able to finance this addiction.”

2.349 The Naked Truth also states that substance abuse is one of the factors that push women into prostitution. It comments that some women become addicted to drugs after their initial involvement in prostitution, either to help alleviate the psychological effect of this degrading lifestyle or through pimps – who use drugs to get a stronger hold on the women. The submission states as follows:

[T]hese girls become so dependent on the Crack and the pimps that they don't know anything else. Once they lose weight or look out of shape they are beaten in order to look better and to bring or satisfy customers and if they can't or don't they are left on the street corners to fend for themselves and most times are never seen again.<sup>817</sup>

2.350 Nation Building and The Naked Truth share a similar view that illicit drug use and abuse go hand-in-hand, with most prostitutes turning to drugs and/or alcohol as a means of desensitisation, or drug addicts turning to prostitution to sustain their habit.

2.351 Robyn Fudge states that she has observed that people engaged in prostitution mostly come from the lower strata of society, with women being overwhelmingly over-represented. These people were often homeless and lived hand-to-mouth, and substance abuse was ever-present. This was the case in both child and adult prostitution. In Fudge’s view, prostitution is – at its core – about dysfunction and exploitation. She proposes that entrenching and normalising this practice in society would constitute a grave social injustice to women and would obstruct the desired constitutional goals of achieving gender equality.

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<sup>816</sup> Nation Building at 2.

<sup>817</sup> The Naked Truth is a voluntary, non-profit organization motivated to address chemical dependence in South Africa.

2.352 Nation Building refers to a study by Church et al (2001), which found that almost two-thirds (63%) of women working in street prostitution across three cities in South Africa had reported that their main reason for being involved in prostitution was to fund a drug habit, primarily heroin. Among the study participants, 92% of the women had stated that they had used drugs in the last three months.<sup>818</sup> Church et al found that by contrast, women working indoors seldom reported drug use, but a third reported that they used alcohol while working. Nation Building also cite a study by May et al (2001), which found evidence that the use of crack was expanding among people involved in street prostitution, and that prostitution and drug use were significantly associated with homelessness.<sup>819</sup>

2.353 Nation Building also cite a 1996 report that a growing number of women in street prostitution were doing little more than funding their – and often their partners’– drug habits. The report noted that women may work daily for very long hours to enable such support.<sup>820</sup>

2.354 The Islamic Forum Azaadville submits that concerns about drugs and prostitution should not only focus on prostitutes’ use of drugs, but also on the use of prostitutes by drug lords to act as drug mules and corridors for the drug trade.

2.355 The Rocking Chair submission<sup>821</sup> quoted Lana as saying, “I know all about being desperate, hooked on drugs and wanting nothing more than the next fix – but selling your body ... there is no dignity in that.”

2.356 The Christian Lawyers Association of South Africa submits that prostitution, even when legal, is accompanied by drug and alcohol abuse. People who do not have a drug or alcohol problem when they begin prostitution invariably develop such an addiction while working as a prostitute. The Association submits that rather than legalising or non-criminalising prostitution, government action should be directed toward rehabilitating prostitutes who have alcohol and drug problems.

2.357 Although promoting non-criminalisation, L Sete from UNISA concedes that prostitutes who commit crime are addicted to drugs, and steal from their clients.

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<sup>818</sup> Reference is made to Church et al 2001.

<sup>819</sup> Reference is made to May et al, 2001.

<sup>820</sup> Nation Building at 12, reference is made to McKegany and Barnard 1996.

<sup>821</sup> At 17.

2.358 Nation Building quotes the UN & CDA 2009 *World Drug Report*<sup>822</sup> (cited in the *eNews* report), which stated that drug abuse in South Africa is twice as high as the global average. Furthermore, approximately 15% of the South African population suffers from a drug problem and a further 50% admitted to having experimented with drugs. This scenario was reportedly attributed to the following factors:

- The very low morale of the South African youth;
- That South Africa has become the gateway for drug trafficking between Asia and South America; and
- The recent entry of organised crime into the local market.<sup>823</sup>

2.359 Nation Building concludes that given the estimate of 50% of the South African population being under the age of 23, our nation is most vulnerable to exploitation through organised crime. Such vulnerability to crime in all its various forms must not be underestimated.<sup>824</sup>

**(f) Concerns regarding prostitution and racism**

2.360 The Naked Truth reports that black women travel to the cities looking for better opportunities and may be tricked into prostitution and misused by pimps. Many such women become dependent on drugs (such as nyaope, a form of heroin) and spend the rest of their lives as sex slaves. Prostitution conveys an offensive view of any woman or human being. These women are used, bought and sold as articles of trade.<sup>825</sup>

**(g) Concerns regarding prostitution and the kidnapping and abduction of girls for sexual slavery**

2.361 According to Marge Ballin<sup>826</sup> young people – and especially girls travelling alone – are the favourite target of certain procurers, who use seduction, guile and trickery to obtain their human “merchandise”. Sometimes these people use force and simply kidnap their victims. Young tourists who find themselves out of money might be offered cash or a temporary lodging, transportation, or a job. Promises of exciting art tours, film auditions, and free trips abroad are among the ruses used.

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<sup>822</sup> *eNews*22, 15 July 2009.

<sup>823</sup> Nation Building

<sup>824</sup> Ibid

<sup>825</sup> The Naked Truth.

<sup>826</sup> Director of Inter Outreach Ministries.

2.362 According to Ballin, all such ruses lead eventually to houses of prostitution, or to beatings, gang rape, threats and sexual enslavement. Bus stations, airports, and train depots are places where procurers are likely to be on the prowl for naïve young travellers.

2.363 Ballin states that kidnappers sell these naïve young women to pimps for an agreed amount. The women work back that fee for their captors in the first month, after which the pimps rake off all their income. Ballin reports that according to *Time Magazine* February 1998, two 19-year-old women (Marina and Tanya) from Bulgaria became entangled with Tzvetomir Beltchev, a five-time Bulgarian wrestling champion. Beltchev, together with his mother and roughly 20 Bulgarian bodyguards, was later accused of running several brothels in the Teplice region, using approximately 50 prostitutes. A chain link fence and three lines of barbed wire surrounded one venue where the women were kept. Major Vaclav Kubec, a police supervisor who helped co-ordinate a raid on the Beltchev brothels, stated that “We called it a prison camp.” Police arrested Beltchev's mother, cousin and five bodyguards in the raid, on charges of possessing illegal weapons, pimping, and organised criminal activity. Beltchev escaped and is still a fugitive with an Interpol warrant out for his arrest. All 44 women arrested at the time were released after being questioned. Some of them described having been beaten with a baseball bat and kicked in the stomach if they did not earn enough money.

## 5 Concerns about public health and HIV

2.364 In response to the question of how to address concerns about public health and HIV, Marlise Richter<sup>827</sup> submits that the criminalisation of prostitution would achieve several undesirable outcomes. She mentions the following points: it would create unhealthy living and working conditions for prostitutes, expose prostitutes to a high risk of physical violence, limit their access to health services, and increase the risk of HIV. Richter reports that prostitutes carry a high burden of HIV and STIs; a comparison between the prevalence of HIV and other STIs in the general population and the incidence rates among prostitutes and their clients shows a disproportionate burden of these infections among prostitutes and clients. She argues that the only way in which public health concerns about prostitution can be addressed – while safeguarding the human rights of prostitutes – is through non-criminalisation. Her submission on behalf of the Steve Biko Centre at WITS was paralleled by her submission on

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<sup>827</sup> Steve Biko Centre, WITS (endorsed by the AIDS Consortium; AIDS Legal Network; Centre for Applied Legal Studies; OUT LGBT Well-being; Socio Economic Rights Project, Community Law Centre, University of the Western Cape; South African National AIDS Council Women's Sector; Treatment Action Campaign's Women's Rights Campaign and the Tshwaranang Legal Advocacy Centre).

behalf of the SA National AIDS Council Women's Sector and that of the 2007 to 2011 SA National AIDS Council Human Rights and Access to Justice Technical Task Team (three separate submissions). Ms Richter argues that non-criminalisation would provide fewer barriers to accessing health services, HIV education, condoms and treatment.<sup>828</sup>

2.365 SWEAT agrees with this stance, adding that non-criminalisation would create an environment that protects the occupational safety and health of prostitutes and their clients, thereby enhancing public health. SWEAT<sup>829</sup> is of the opinion that the Occupational Health and Safety Act is a key aspect of the legislative framework that aims to protect workers, and that its provisions should apply to the sex industry.<sup>830</sup>

2.366 SWEAT contends that a non-criminalisation law should include the following provisions (cited here verbatim):

- A section which sets out the obligations on operators of businesses of sex workers to adopt and promote safer sex practices, and
- A section that sets out the obligations on sex workers and their clients to adopt safer sex practices.

2.367 SWEAT also recommends the following steps to strengthen and clarify these responsibilities and obligations (cited here verbatim):

- An obligation for every person who operates a business of prostitution to take all reasonable steps to ensure condoms or other similar protective barriers are used in relation to commercial sexual services provided for that business. The obligation should apply to any person who operates a business of prostitution, regardless of the size of the business. Operators of a business of prostitution also need to take all reasonable steps to minimise the risk of prostitutes and clients acquiring or transmitting Sexually Transmitted Infections (STIs).
- Operators of businesses of prostitution must take all reasonable steps to provide health information to prostitutes and clients, and, if the business in question is a brothel, that information must be prominently displayed in the brothel. This requirement should only apply to brothels because other businesses involving prostitutes do not have permanent premises where prostitutes and clients are both present.
- The information requirement should refer to health information on safer sex practices and on services for the prevention and treatment of STIs.

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<sup>828</sup> Endorsed by GT Mjuza; L Jankelowitz, RHRU; J Selby, Angels; Human Rights and Access to Justice Technical Task Team (SA National Aids Council).

<sup>829</sup> Endorsed by the Tshwaranang Legal Advocacy Centre.

<sup>830</sup> Presumably referring to prostitutes in contractual employment relationships, because the Occupational Health and Safety Act is not applicable to people outside of employment relationships.

2.368 The previous SANAC Access to Justice Technical Task Team submitted a response to the SALRC Discussion Paper.<sup>831</sup> This submission states that the National Strategic Plan for HIV & AIDS and STIs 2007-2011 (NSP) identifies “sex workers” as being at “higher-risk” for HIV & AIDS and STIs. The NSP also recognises that the unlawful nature of the occupation of prostitution renders prostitutes even more vulnerable because their criminal status acts as a barrier to their accessing prevention and treatment services for HIV and STIs. For these reasons, the NSP agreed to by Cabinet in May 2007 called for the “decriminalisation of sex work”. The 2007–2011 Technical Task Team argued that the criminalisation of prostitution has direct (and not wholly measurable) implications for the health and human rights of prostitutes. The Task Team contended that from a health perspective, criminalisation fuels the AIDS epidemic as prostitutes are at a high risk of being infected with HIV. Furthermore, other sexually transmitted infections increase the risk of HIV transmission. The Task Team concluded that the illegal nature of prostitution makes it difficult for prostitutes to access medical treatment. Similarly, J Hicks of the Commission for Gender Equality held that non-criminalising prostitution would hopefully give prostitutes the ability to negotiate safer sex, rendering them less vulnerable to assault.<sup>832</sup> However Cabinet reconsidered its position in respect of the NSP for 2011–2015, and SANAC has therefore shifted from advocating non-criminalisation to its current stance which “encourages keeping the debate on decriminalisation alive.”<sup>833</sup>

2.369 According to the Tshwaranang Legal Advocacy Centre, criminalising prostitution cannot be justified as a public health response to the HIV epidemic facing South Africa. The Centre submits that prostitutes cannot be blamed for the spread of HIV or for an increase in extra-marital relationships; and that transactional sex, inconsistent condom use and concurrent relationships seem to be common in South African society.<sup>834</sup> The submission reported that a study among 50 brothel-based prostitutes in the Hillbrow–Joubert Park area found that men in Southern Africa are often unwilling to use condoms, and that “flesh to flesh” contact is seen as a key component of masculinity. Women’s sexual decision-making should be seen in the context of such cultural pressures. Participants in the study noted that they would engage in unsafe sex if more money was offered, within a competitive environment. The Tshwaranang Legal Advocacy Centre recommends non-criminalisation to reduce the stigma faced by prostitutes when accessing health services, and to improve access to health

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<sup>831</sup> SALRC *Sexual Offences: Adult Prostitution* Discussion Paper 2009.

<sup>832</sup> J Hicks, Commission for Gender Equality.

<sup>833</sup> See para 53 of the NSP.

<sup>834</sup> This view is confirmed by the findings in Shisana et al. (2014) *South African National HIV Prevalence, Incidence and Behavioural Survey*.

services for both prostitutes and their clients. Marlise Richter<sup>835</sup> confirms the findings mentioned above, and submits that prostitutes in Hillbrow find it difficult to persuade their clients to use condoms and fear a violent reaction if they insist on it. She states that some clients demand to pay half-price if a condom is used, and that the intense competition for business weakens individual workers' bargaining power. Clients may threaten to use the services of another available prostitute who does not insist on condom use.

2.370 Marge Ballin<sup>836</sup> also refers to the dire conditions in Hillbrow and cites research by Valintine and Nkholise:

The male & female prostitutes who ply their trade in this ghetto (Hillbrow) sometimes cynically refer to what they do as "the death warrant". If they know that (according to research by the Commission for Gender Equality) 70% of the sex workers in Hillbrow are HIV positive or have full-blown AIDS, they simply don't care.<sup>837</sup>

2.371 Ballin agrees with the stance of Doctors for Life that prostitutes and their clients are high-risk populations for HIV/AIDS and sexually transmitted diseases.

2.372 In contrast to the submissions favouring non-criminalisation, Marge Ballin and Nation Building submit that precisely because of the challenges already outlined, concerns about public health and HIV should be addressed by criminalising prostitution. Nation Building contends that prostituted women are exposed to a plethora of serious health risks, which include physical injuries and infections as a result of assaults, STIs and HIV/AIDS, unwanted pregnancy and miscarriage, PTSD, depression and infertility. It argues that these not only cause severe harm to women and girls involved in prostitution, but are the result of gross violations of their integrity, dignity and rights as human beings. Nation Building further states that even if such health issues result from committing sexual acts for payment, this does not in any way diminish the extensive physical and mental damage inflicted on people's bodies and minds.

2.373 Nation Building notes that despite South Africa having the highest number (worldwide) of people living with HIV/AIDS, the argument that criminalisation creates a barrier to accessing HIV prevention and treatment services has resulted in a call for the non-

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<sup>835</sup> Steve Biko Centre, WITS (endorsed by the AIDS Consortium; AIDS Legal Network; Centre for Applied Legal Studies; OUT LGBT Well-being; Socio Economic Rights Project, Community Law Centre, University of the Western Cape; South African National AIDS Council Women's Sector; Treatment Action Campaign's Women's Rights Campaign and the Tshwaranang Legal Advocacy Centre).

<sup>836</sup> Director of Inter Outreach Ministries

<sup>837</sup> "Prostitutes don't care about safe sex as long as the money rolls in" by Cascarino Valintine and Reginald Nkholise; cited by Marge Ballin.

criminalisation or legalisation of prostitution. Nation Building states that the proponents of this view believe non-criminalisation to be essential for preventing further cases of infection. Nation Building refers to the HIV/AIDS and STI National Strategic Plan (NSP) for 2007–2011, specifically where the NSP states that it “recognises that several higher-risk groups, such as sex workers and drug users, face barriers to accessing HIV prevention and treatment services, because their activity is unlawful ... and therefore recommends the decriminalisation of sex work.”

2.374 According to Nation Building, the above argument is weak. The Nation Building submission states that the non-criminalisation of prostitution would not prevent the spread of HIV/AIDS any more than the non-criminalisation of drugs would prevent the abuse of drugs. It contends that campaigns to control the spread of HIV/AIDS by advocating “safe sex” for women in prostitution fail to address the blatant inequities between women who are bought for sex and the men who pay for it. Nation Building states that any AIDS strategy that is based on negotiating condom use – negotiations that must take place between the purchaser of sex and the woman who must supply it – assumes a symmetry of power that often does not exist even between women and men in personal consensual relationships. The submission argues that if AIDS programmes are serious about eradicating AIDS, they must challenge the sex industry.

2.375 C Kretzschmar submits that an immediate effect of non-criminalisation would be a higher prevalence of AIDS in this country, and the HIV infections data will start to spike.<sup>838</sup> Kretzschmar believes that an increase in AIDS would affect the work force, in turn affecting economic growth, presumably because people with skills and disposable income would feel free to engage in non-criminalised prostitution. D Scarborough<sup>839</sup> also submits that clients and pimps have authority over prostitutes, and in a legalised setting may demand that prostitutes provide sex without condoms.

2.376 Nation Building observes that women in prostitution are targeted by communities and government as the problem instead of the entire sex industry being seen as problematic – which would challenge the mass male “consumption” of women and children through commercial sex. Nation Building argues that this view of women as the problem is institutionalized by governments and NGOs arguing in favour of the “medicalization” of prostitution, through proposing laws on prostitution that would subject women to periodic

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<sup>838</sup> Endorsed by D Scarborough, Gospel Defence League and Marge Ballin, Director of Inter Outreach Ministries.

<sup>839</sup> Gospel Defence League.

medical check-ups. Nation Building proposes that women in the sex industry would be better protected if they submitted (or were required to submit) to health screening, especially for STIs. Nation Building also states that the way in which sex industries are responsible for the widespread health problems of women and children is mystified with proposals to implement health checks for women in the industry. No proposals have been forthcoming from people who support mandatory or voluntary medical surveillance of women in the sex industry for a similar check on men; that is, no-one has suggested medically monitoring men who purchase sex.

2.377 Nation Building states that the medicalisation of prostitutes is little more than consumer protection for men who buy sex and does not provide real protection for women who sell sex. Ultimately, such medicalisation can protect neither women nor men unless there is a concomitant medicalisation of male buyers. The submission quotes Janice Raymond's argument that addressing the health needs of prostitutes entails going beyond the health effects of prostitution:

To address the health consequences of prostitution, the international human rights community must understand that prostitution harms women and that in addition to needing health services, women must be provided with the economic, social and psychological means to leave prostitution. Until prostitution is accepted as violence against women and a violation of women's human rights, the health consequences of prostitution cannot be addressed adequately. Conversely, until the health burden of prostitution is made visible, the violence of prostitution will remain hidden.

2.378 The Naked Truth agrees that the answer is to criminalise prostitution. It submits that customers demand unprotected intercourse, making the already high risk of sexually transmitted infections even higher. Similarly, Lindie Saunderson argues<sup>840</sup> that in Alexandra Township, Johannesburg, where most residents are unemployed or receive social grants from government, people are so desperate for money that they would even expose themselves knowingly to the HI Virus in an attempt to claim disability grants after eventually developing AIDS. The Islamic Forum Azaadville similarly submits that money holds sway over health and safety, and states that non-criminalising prostitution would potentially derail the work done and progress made in combatting the HIV/AIDS pandemic.

2.379 The Islamic Forum Azaadville states that the assertion that women are more vulnerable than men to HIV infection ignores the critical fact that prostitution is not limited to single partnerships. As multiple partners are involved, prostitution is in fact a conduit for

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<sup>840</sup> Lindie Saunderson, Senior Associate/ Pro Bono Co-ordinator and human rights lawyer in Alexandra township, Edward Nathan Sonnenbergs Inc.

spreading the pandemic. What is of greater concern is that there is an acknowledgement by prostitutes that this danger exists. The Forum concludes that this acknowledgement amounts to callousness and the willingness to pass the death sentence on to innocent spouses and their children.

2.380 DFL submits that a person who has been rehabilitated and reintegrated into society is obviously at far less risk of contracting or spreading HIV/AIDS and/or STIs. Furthermore, if the clients of prostitutes are compelled by law to attend rehabilitation lectures, which may include lectures by reintegrated ex-prostitutes and health care professionals, they would pose far less of a risk in this regard. The risk of passing sexually transmitted diseases on to their spouses, which often leads to the breakdown of the family, would be lower.

2.381 Marge Ballin refers to a report by Adele Baleta titled "The love potion that can kill". In this report, Baleta stated that women were inserting aphrodisiacs, antiseptics and other agents such as traditional African remedies into their bodies to dry out their vaginas, in an attempt to pleasure their male partners.<sup>841</sup> Baleta reported that health researchers were concerned that as the AIDS epidemic ravages the African continent, "dry sex" may contribute substantially to an increased risk of acquiring AIDS and transmitting the disease. Ballin also refers to the research of Neetha Morar of the Medical Research Council, who found that dry sex was prevalent among sex workers in Kwa-Zulu Natal.<sup>842</sup> At least 80% of a group of 150 sex workers who plied their trade at truck stops in the Natal Midlands stated that they practiced "hot tight and dry" sex. The women were mainly uneducated single mothers aged between 15 to 45 years and were members of lower income groups. Morar heard that they used dry sex to give men "more sexual pleasure" and because they wanted to be "hot and tasty" for the men during sexual intercourse. They also wanted to make sure that their clients kept coming back to them because of the income generated. They said that if they did not practise this type of sex, the men would not be satisfied and they would not be paid. Informal traders in Durban sold a variety of products specifically to enhance dry sex. However, Morar reported that excessive drying might lead to tears and abrasions during sexual intercourse, increasing the risk of infection between women and their sexual partners; furthermore, condoms are at a greater risk of breaking or being accidentally removed. Morar reported that among her study group, more than half of the sex workers were HIV positive. Among women who received an average of four to five partners a day, fewer than one in four used condoms.

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<sup>841</sup> Baleta A, Concern voiced over "dry sex" practices in South Africa *Lancet* 1998 Oct 17 at 1292.

<sup>842</sup> "Dry sex" may aid in the transmission of HIV-1. Phillip Kubukeli, President of the Herbalists and Spiritual Healers Association in the Western Cape, states that dry sex is most prevalent in KwaZulu-Natal, which has the highest rate of HIV/AIDS. Source: Baleta op cit 1292.

Morar reported that the study had taken two years because she had needed time to gain the women's confidence and allow them to feel comfortable in talking about such intimate details.

2.382 The Family Policy Institute notes that the alarmingly high HIV infection rates among prostitutes, and the risk this presents to the general public health, have been well documented. The Institute submits extracts from a research document compiled by Doctors for Life. The submission comments that DFL is actively engaged in safe exit programmes for people in prostitution, and has rendered expert evidence to the Constitutional Court, Law Reform Commission and Parliament regarding the social and psychological consequences of prostitution.<sup>843</sup>

2.383 The Family Policy Institute comments that the likelihood of contracting an STI (including HIV/AIDS) is positively associated with the number of sexual partners a person has. This fact has been empirically established. Prostitution, by its nature, increases the number of sexual partners of the prostitutes and also of their clients. Prostitutes and their clients are therefore both high-risk populations for HIV/AIDS.<sup>844</sup>

2.384 The Family Policy Institute reports that in a study in South Africa at a popular truck stop midway between Johannesburg and Durban, 10 of the 12 prostitutes interviewed reported working seven days a week. In another study in Glasgow, prostitutes reported working 5.2 nights per week and servicing 7.1 clients per night; 72% of the prostitutes were also involved in private non-commercial relationships. A second Glasgow study among female street prostitutes showed that they typically worked 5.5 evenings per week and provided sexual services to 6.4 clients per night. A study among male prostitutes in the Netherlands showed that street prostitutes worked an average of 26 hours per week and home prostitutes worked an average of seven days per week. A study among 193 heterosexual female prostitutes found that 136 of the women had received on average 115 customers per month. Male buyers were also interviewed and 99 men who were interviewed had visited, on average, eight prostitutes in the past four months. The data showed that each prostitute had unprotected vaginal intercourse with an estimated average of 160 persons over a four-month period.<sup>845</sup>

2.385 The Family Policy Institute quotes Johnson and Aschkenasy's finding that the most frequently reported risk factor associated with health and HIV was a history of prostitution.

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<sup>843</sup> Endorsed by the Christian Lawyers Association of South Africa.

<sup>844</sup> Ibid.

<sup>845</sup> Ibid.

Male prostitutes were at a significantly higher risk than female heterosexual prostitutes. Other risk factors included intravenous (IV) drug use, history of STIs, having received blood transfusions, a history of multiple sex partners, or having a sex partner who used IV drugs. Also noted as risk factors were the following: number of years in prostitution, presence of seromarkers for Hepatitis B virus (HBV) or syphilis, mean percentage of encounters involving receptive anal intercourse, the presence of other STIs, sexual contact with people at increased risk, seropositivity for HIV or HBV (hepatitis B Virum) and penal or anal intercourse. The Family Policy Institute argues that obviously more than one of the above risk factors are likely to be present among prostitutes.<sup>846</sup>

2.386 The Family Policy Institute reports that male and female prostitutes are therefore considered internationally to be one of the main vectors of HIV infection in Africa, Asia, Europe, and North, Central and South America. Men who use prostitutes are at relatively high risk for acquiring HIV, especially if the female prostitute has ulcerative infections. The Family Policy Institute quotes a study in Nigeria that found that paying for sex with a prostitute was the single most significant predictor of having an STI. The Institute further states that Thailand provides a classic example of this tragedy. The Institute reports that in Thailand, prostitution is rampant. Men from all over the world go to Thailand because of the easy access to prostitution there. Without drawing a comparison to South Africa, it notes that it is no wonder then, that Thailand also has a higher rate of HIV/AIDS than any other nation in the world. In Thailand, heterosexual contact is the main route of HIV-1 transmission and female prostitutes have the highest risk of infection. In northern Thailand, the prevalence of HIV-1 is at its highest despite consistent condom use. One explanation for this finding may be that most HIV-1 infections in this region had already occurred before condom use became widespread. However, among a group of prostitutes in northern Thailand who had entered the profession during the previous year and who reported always having used condoms, the HIV-1 prevalence was 36% – which is notably high. This finding shows that HIV-1 infection has remained rampant in recent years in northern Thailand, despite a reported high level of consistent condom use. Another study in Thailand among 1172 male prostitutes also showed that male prostitutes in northern Thailand are at high risk of HIV despite current prevention efforts. The Family Policy Institute cites other examples of countries where studies have found that prostitutes are a high risk group: in Spain, mainland China, Bombay, India, Zaire, Turkey, Senegal, and Abidjan, where the seroprevalence was 80% among 1209 women prostitutes who were tested. Female prostitutes were found to have the highest absolute and proportional rate of dual seroreactivity to HIV-1 and HIV-2 described in any population to

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<sup>846</sup> Ibid.

date. Another study in Abidjan found that HIV-infected men were significantly more likely than uninfected men to have had sex with female prostitutes in their lifetime. HIV infection was independently associated with a longer duration of being a prostitute, and having a positive *Treponema palladium* agglutination test (positive test for syphilis).<sup>847</sup>

2.387 The Family Policy Institute reports that a study in Kenya examined a cohort of 1 000 prostitutes from the lower socio-economic strata, who were known to be a “reservoir” of STIs in 1985. The Institute further states that sub-Saharan Africa in general as well as West Africa, Bali, Indonesia, and Djibouti are also areas where prostitution is considered a significant risk factor in AIDS transmission. Men having unprotected sex with female prostitutes had the greatest risk of acquiring infections and (by inference) of transmitting them to women. Of the men tested, 85% were seropositive for HIV-1. Another study reported in the *New England Journal of Medicine* showed that 66% of prostitutes in Central Africa tested positive to AIDS exposure. These people were members of lower economic classes, did not use intravenous drugs, and practised only vaginal sex. Across the Atlantic, women prostitutes are also considered an important “pool” of HIV infection. The Institute reports that in the United States, approximately 33% of women entering treatment for narcotic addiction have at some time engaged in prostitution to earn money to buy drugs; such women are reportedly one of the main vectors for the spread of HIV among heterosexuals in the United States. Other American studies have been done in Argentina and Miami (Florida). A study reported by the Centers for Disease Control<sup>848</sup> in 1985 showed that 40% of 25 prostitutes tested in Miami were seropositive for HIV. A study of 41 United States servicemen infected with HIV showed that 6 of them had contracted the disease from female prostitutes. A report from Glasgow revealed that financial necessity might bolster the need for prostitutes to engage in their trade even during menstruation. During this period, blood potentially tainted with HIV is more likely to affect the male client. A favourite method of preventing visible bloodstained vaginal secretions, which might deter potential clients, is to insert absorbent material into the vagina during the menstrual period to mask the secretions. One such device is a contraceptive sponge, similar to the nonoxynol-9-impregnated “Today” sponge (Wyeth). This device has the merit of introducing a potential virucidal agent into the vagina, although its efficacy is doubtful.<sup>849</sup>

2.388 According to the Family Policy Institute, in a German congressional testimony about AIDS, WA Haseltine noted that infection among prostitutes in Germany was a major problem.

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<sup>847</sup>

Ibid.

<sup>848</sup>

Report available at [www.cdc.gov](http://www.cdc.gov).

<sup>849</sup>

Endorsed by the Christian Lawyers Association of South Africa.

The nationwide estimate for HIV infection among the prostitute population was 20%, but it was debated whether most prostitutes had been registered or not. The Family Policy Institute conceded that some studies in first world countries have concluded that heterosexual transmission of HIV-1 by prostitutes to clients is limited and inefficient. However, these studies have been few in number, according to the Institute. Furthermore, this finding applies to Western type HIV-1 disease where the incidence of AIDS is relatively low. It is not generalisable to African contexts, where heterosexual exposure to infected prostitutes with other STIs and a much higher prevalence of HIV infection yield an entirely different scenario. The Institute reported that in Africa, and also in India, the route of infection among men has mainly been heterosexual intercourse with prostitutes; long-distance truck drivers are known to be at high risk. In addition, some studies have found that women who knew they were HIV-1 seropositive were more likely to report practising anal intercourse than women who did not know whether they were positive for HIV-1.<sup>850</sup>

2.389 According to the Christian Lawyers Association of South Africa, legalising prostitution does not improve the health of prostitutes. The Association argued that in Senegal, the rate of HIV infection has continued to rise among legal prostitutes. Furthermore, in Australia the legalisation of prostitution was accompanied by a sharp increase in the number of reported cases of HIV infection among women. The Association states that the argument that better health education of prostitutes would result in fewer health consequences (as a by-product of legalisation or non-criminalisation) has not been borne out by experience.

**(a) *Physical and mental health***

2.390 The Naked Truth reports that many women who sell sex to finance their drug habit have committed suicide as a result of doing so. Nation Building submits that a prostituted woman suffers psychological trauma brought about by denial and dissociation, which are deeply embedded survival strategies for women in prostitution. Nation Building adds that “struggling to maintain the illusion of choice and a measure of control is, for the most part, too painful for women themselves to acknowledge the abuse and degradation involved, too painful to acknowledge the actual reality”. Nation Building reported that through psychological processes such as distancing, disengagement, dissociation and disembodiment, a woman has to try to separate her “real” self from the self that is involved in prostitution.

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<sup>850</sup> Ibid.

2.391 Doctors for Life International (DFL) states that many prostitutes suffer from post-traumatic stress disorder (PTSD) and Stockholm syndrome, which are both recognised clinical conditions. Furthermore, women become psychologically conditioned to the prostitution lifestyle.

2.392 DFL includes and endorses in its submission a report on the mental health needs of women involved in prostitution, authored by psychologist Evelyn Badillo-Cordero. As the content is relevant to this discussion point, it is quoted below:

Women involved in prostitution can present a wide range of emotional trauma that deeply affects the way they live. Research has found that most women involved in prostitution have a history of physical and sexual abuse as children. Exposure to having been victimised during formative years limits their ability to set healthy boundaries with others in order to be able to protect themselves. Victims of childhood sexual abuse may also come to consider their bodies to be as "damaged goods" and present a very low self-esteem. The emotional trauma left by the abuse they experienced in the early years of their life leaves them an aftermath of symptoms and behaviours (promiscuous behaviour, distrust in others, self-destructive behaviour, etc.) that make these women particularly vulnerable to becoming involved in prostitution.

Many women involved in prostitution present symptoms of Post-Traumatic Stress Disorder (PTSD) due to the abuse they have experienced as children as well as to the constant exposure to violence and abuse they suffer through prostitution as an adult. PTSD is an emotional response that, according to the American Psychiatric Association (2000), develops when someone is exposed to:

*extreme traumatic stressors involving direct personal experience of an event that involves actual or threatened death or serious injury; or other threat to one's personal integrity; or witnessing an event that involves death, injury or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate.*

In addition dissociation, which is described by the American Psychiatric Association (2000) as a disruption in the usually integrated functions of consciousness, memory, identity, or perception of the environment, has been found to be used by children that have been sexually abused and also found to be used by women involved in prostitution to avoid the emotional pain suffered by the abuse. Depression and other mood disorders have also been found to be common among prostituted women as well as suicidal behaviour.

Another emotional problem that has been presented by women involved in prostitution is what has been called the Stockholm Syndrome, where the woman identifies with her aggressor as a means of survival which leads them to deny the extent of harm which pimps and customers are capable of inflicting on them. Drugs have also been found to be used among women involved in prostitution to self-medicate the emotional pain they live in. This addition complicates their financial situation, which in most cases is what forced them

into prostitution in the first place, and further limits their ability to seek help for their emotional problems.

Furthermore, women are greatly affected psychologically because of their vulnerability to becoming infected by sexually transmitted diseases such as HIV/AIDS among others, and the stigma and health problems that these bring along with them. AIDS related dementia, usually found in the latter stages of AIDS, could limit their cognitive ability to care for themselves and also affects their decision-making ability.

In a study done on people involved in prostitution across five countries (South Africa, Thailand, Turkey, USA, Zambia) it was found that on average 92 percent of them stated that they wanted to exit prostitution. In research done on the best models of practice for exit programs designed to help women that want to come out of prostitution, it has been found that even after exiting prostitution many of these women continue to present emotional problems. If their traumatic experiences from the past have not been addressed properly after exiting prostitution it affects their ability to persevere in a new way of life. This same research states the need of the integration of mental health services, among other medical, social and educational services, in the designing of exit programs for these to be successful. In a study done in Australia targeting some of the emotional needs of this group it was found that it is also important that the mental health professionals involved in this work be aware of their specific issues of mental health needs for their interventions to be effective. They indicate that this clinical knowledge is particularly important with respect to child abuse, on-going sexual assault and stigma that often engenders a lack of trust and difficulty with disclosure.”

2.393 Dr Evelyn Badillo-Cordero states that she has gained experience as a clinical psychologist volunteering at Lifeplace, a DFL care centre for prostitutes in the Point area of Durban. Here, she has had firsthand experience in providing counsel and support to women involved in prostitution. She has seen and experienced the depth of the emotional wounds these women present with, which bind them to very difficult and sometimes dangerous situations. Given the information contained in the research quoted above, and based on Badillo-Cordero’s own experience of working with women involved in prostitution, she strongly recommends the development of holistic rehabilitation and exit programmes designed specifically for their needs, and the designation of funds to operate these programmes. She argues that in particular, the inclusion of mental health services in such programmes must be closely attended to so that the women’s emotional needs can be addressed. Badillo-Cordero contends that without such services, exit programmes – although valuable – would fall short of providing the proper help these women need to be able to reintegrate into society in a functioning and stable manner.

2.394 According to the submission by Sue Randall, deeply traumatised people may be unable to speak about their experiences, a condition that she refers to as “PTSD-related aphasia”. Randal submits that the psychological literature distinguishes between Type I and

Type II trauma.<sup>851</sup> She explains that due to the ongoing violation associated with prostitution, “prostitutes would be at high risk for Type II rather than Type I trauma”, which may require long term specialized intervention. In her view this may have “implications for the already overburdened health care system” and should be considered “when designing interventions or exit programmes”.

2.395 DFL stated that the preamble of an Act criminalising prostitution should note the inherent negative psychological consequences associated with prostitution. Furthermore, law enforcement should take cognisance of the psychological factors involved in prostitution and take steps to counsel persons arrested for prostitution, at the earliest possible opportunity.

2.396 Many participants in a New Zealand study quoted by the Christian Lawyers Association of South Africa talked of the physical and mental stress of the work. The Association reports that when asked about the “downside” of working as a prostitute, one woman replied as follows: “The wear and tear on your body. Um looking after yourself so you don’t burn out and stuff, mentally and physically and spiritually.” According to the Christian Lawyers Association of South Africa, prostitutes are the most vulnerable members of society and are susceptible to abuse as a consequence of the inherently exploitative nature of prostitution.

### **(b) Regulation of safe sex practices**

2.397 The Commission posed the question of how safe sex practices should be regulated if the preferred legislative option were anything other than criminalisation. SWEAT responds that there should be a legal obligation on all agents involved in the transaction, that is, the prostitute, the client, and if applicable the manager, to promote safer sex; and, in the case of the prostitute and client, to use safer sex. SWEAT submits that this obligation should be contained in a law that non-criminalises prostitution. GT Mjuza states that any unsafe sex practice should be reported, and that if a person did “not produce a certificate stating his or her status, this should also be reported”. The Commission for Gender Equality<sup>852</sup> adds that there should be a penalty for contravening an obligation in respect of safe sex practices. Other submissions advocating for non-criminalisation provide the following contributions: there should be a (compulsory) three-monthly medical check-up; the results of a check-up

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<sup>851</sup> It is interesting to note that a distinction between Type I and Type II PTSD is not made by Dr Cordero but presumably reference is being made to Type II.

<sup>852</sup> E Poto.

should be shown to the customer;<sup>853</sup> safe sex products should be freely available;<sup>854</sup> safer sex peer education programmes akin to those run by the RHRU<sup>855</sup> should be implemented; the “industry” should be driven by client demand (bearing in mind that prostitutes may be “undercut” by others who provide unsafe sex);<sup>856</sup> and that prostitution should be positively covered by a code of conduct developed by a consultative body.<sup>857</sup> Although M Richter<sup>858</sup> made similar recommendations, she states that there should be no legal requirements for mandatory health checks.

2.398 Respondents who oppose non-criminalisation submit that no safe sex practices are possible in prostitution. If the client pays for “unsafe sex” then the prostitute will oblige. There is no protection against this and no law will change it.<sup>859</sup> Furthermore, testing for HIV would not provide protection because the person being tested may be in a window period and may therefore falsely test negative.<sup>860</sup>

2.399 An anonymous respondent submits that irrespective of the dispensation, prostitutes must be educated about all STIs and be encouraged to practice safe sex, no matter how much the client pays for the service.

## **6 Creating an environment to help prostitutes exit prostitution**

2.400 The Commission posed the question of how an environment can be created for prostitutes to exit prostitution within the legal framework of each of the options.

2.401 The Family Policy Institute responded that an environment of total criminalisation coupled with exit programmes would create the most appropriate environment for prostitutes to exit prostitution. It states that the failure of non-criminalisation or legalisation of prostitution as a social policy is being increasingly acknowledged, and this model is being abandoned in

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<sup>853</sup> A Myburg, SANCA, Witbank.

<sup>854</sup> Ibid.

<sup>855</sup> L Jankelowitz, RHRU.

<sup>856</sup> E Bonthuys, WITS.

<sup>857</sup> J Hicks, Commission for Gender Equality.

<sup>858</sup> SA National AIDS Council Women’s Sector.

<sup>859</sup> D Scarborough, Gospel Defence League; S Tegg, Full Gospel Church; I & B Wilson, Presbyterian Church; GT Ndlovu, Child of God; SM Hadebe, Child of God; Marinda & Cornelius.

<sup>860</sup> Marinda & Cornelius.

favour of targeting the demand for prostitution together with offering programmes to help women exit the trade.<sup>861</sup>

2.402 The Family Policy Institute submits that the total criminalisation option, which clamps down on the demand side (including the criminal element that exploits and abuses women and children in prostitution) can significantly reduce the demand for prostitutes, and can break the links between prostitution and organised crime.<sup>862</sup> The Institute states that this policy, coupled with state-funded exit programmes that are supported by civil society, would be the only viable and responsible way to help women escape prostitution. The Institute submits that currently, although prostitution is criminalised, there are no viable and sustainable exit programmes available to help women escape this inherently harmful and exploitative trade. It argues that, as several studies have shown, most prostitutes will leave prostitution if provided with the necessary help and support. However, such help is not currently available or supported by government or civil society.<sup>863</sup> The Institute also comments that a zero tolerance approach to men who solicit and buy sex, and to pimps, gangs, brothel owners, crime syndicates and sex traffickers, would significantly reduce the demand for prostitutes and remove the threat of exploitation, abuse and human trafficking for sexual purposes.

2.403 The Family Policy Institute (endorsed by the Christian Lawyers Association of South Africa; DFL and the Christian Action Network) argue that exit programmes that offer real and sustainable solutions would provide prostitutes with real hope and a second chance at a life with dignity, self-respect and fulfilment.<sup>864</sup> Such programmes should include counselling, drug and alcohol rehabilitation, job skills training, life skills training and emotional support.

2.404 The Nation Building submission states that total criminalisation is, in hindsight, increasingly being recognised as the only viable option in dealing with prostitution. It submits that a number of countries that previously adopted a more liberal stance (such as Iceland, Sweden and Norway) have, to varying degrees, reversed these positions. Similarly, countries that have maintained the position of criminalisation seem on the whole to have had less of a problem with prostitution than countries that non-criminalised it. Nation Building further submits that some people argue that the Swedish model of partial criminalisation is the most

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<sup>861</sup> Family Policy Institute; endorsed by the Christian Lawyers Association of South Africa, Doctor's for Life International, Nation Building, Christian Action Network, World Vision SA .

<sup>862</sup> Endorsed by the Christian Lawyers Association of South Africa; World Vision SA and Christian Action Network.

<sup>863</sup> Ibid.

<sup>864</sup> The Family Policy Institute; endorsed by the Christian Lawyers Association of South Africa and Doctor's for Life International.

compassionate stance to take in recognition of the victimhood of the prostitute.<sup>865</sup> However, Nation Building argues that there is no reason why the state cannot maintain full criminalisation and still recognise the prostitute as a victim. The dilemma can easily be solved with a diversion strategy in which the prostitute is offered exit strategies without a criminal record, provided that she accepts the exit strategy.<sup>866</sup>

2.405 Nation Building therefore endorses total criminalisation with a strong victim-centred justice approach.<sup>867</sup> The submission explains that this approach would avoid the trap of a dualistic legal regime. The act of prostitution should remain a crime and all parties to the transaction are liable for prosecution, but the prostitute has the option of diversion. She has the choice to avoid being criminalised if she responds to the compassion extended to her. Nation Building comments that the state has no choice but to rescue her from her destructive behaviour.<sup>868</sup> The submission argues that unless both the demand and the supply side are tackled in tandem, South Africa will not succeed in preventing, deterring or reducing prostitution. Nation Building further submits that its approach is a compassionate one that recognises the prostitute as a victim, and presents her with a diversion strategy to avoid prosecution and a criminal record; therefore, Nation Building proposes that its approach needs to be adopted into law. The submission adds that if a prostitute were to refuse such assistance, he or she should face the consequences of a fine or jail term.<sup>869</sup>

2.406 Nation Building submits that in a similar fashion, a first-time user offender could be placed in a diversion programme to address the underlying attitudinal problems (subject to certain restrictions, such as no evidence of violence). Tracking the individual in the National Register of Sexual Offenders, without a criminal status initially, could also be considered. A repeat offence would, however, attract a more severe penalty.<sup>870</sup>

2.407 Nation Building comments that buyers of sex need to be treated with compassion just as do prostitutes. Instead of being fined, first time offenders should also enjoy the benefit of a diversion programme, which should sensitize them to the true nature of prostitution as an extreme form of gender-based violence.<sup>871</sup> Nation Building submits that users need counselling and rehabilitation as much as – if not more than – prostitutes. It suggested a re-education programme such as Change Course, which has proved successful in the United

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<sup>865</sup> Nation Building Submission.

<sup>866</sup> Ibid.

<sup>867</sup> Ibid.

<sup>868</sup> Ibid.

<sup>869</sup> Ibid.

<sup>870</sup> Ibid.

<sup>871</sup> Ibid.

Kingdom.<sup>872</sup> Nation Building states that such restorative programmes ought to be state-funded and run by registered NGOs. In its view, interventions such as these would be cheaper and more effective than imprisonment. Nation Building thus contends that a comprehensive, multi-faceted approach is required to deal with the issue of prostitution.<sup>873</sup> The state and civil society need to step up their efforts to create sustainable employment opportunities that protect and respect the dignity and worth of women, and remove the barriers to women accessing decent employment.<sup>874</sup>

2.408 An anonymous respondent agrees that a multi-faceted approach is necessary, and adds that to succeed, exit programmes must take into account the diverse and complex needs of people engaged in prostitution. Programmes must be designed to assist in the transition toward long-term rather than short-term change. In this respondent's view, transitioning out of prostitution is a long-term project, and people engaged in prostitution may relapse several times on the way to "recovery".

2.409 The Family Policy Institute state that a report by the Platform Organisations Shelter for Prostitutes (POOP) in the Netherlands concluded that three quarters of prostitutes (in the Netherlands) wished to attend exit programmes to enable them to leave prostitution. The report was a response to an evaluation by the Scientific Research and Documentation Centre (WODC) on the lifting of the brothel ban in October 2000. The WODC claimed that in the main, there have been few problems since the new laws were passed. However, POOP argued that illegality and coercion still dominate the industry.<sup>875</sup>

2.410 According to DFL, the option of diversion through the criminal justice system (as an alternative to punitive measures) coupled with professionally managed exit programmes and skills training would reduce the number of people who are forced to engage in an inherently harmful, exploitative and abusive practice to survive.

2.411 DFL endorses the views above supporting an exit programme and explains that the measures proposed are aimed at significantly reducing and eventually eliminating the practice of prostitution and therefore also abuse and exploitation. This would be achieved by curbing buyer demand and providing alternatives for women through effective exit programmes; the measures are not intended to make it easier for people to remain in prostitution.

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<sup>872</sup> Ibid.

<sup>873</sup> Ibid.

<sup>874</sup> Ibid.

<sup>875</sup> *Reformatorsch Dagblad*, 2003 quoted by the Family Policy Institute; endorsed by Christian Lawyers Association of South Africa.

2.412 Through its submission, DFL informs the Commission that DFL initiated a care centre named Lifeplace in the Point area in Durban, which has been running for approximately five years at the time of writing. The centre employs permanent staff assisted by medical doctors, psychologists, social workers and other volunteers. The purpose of the centre is to assist people in prostitution with their immediate problems and ultimately to facilitate their exit from prostitution. According to DFL, if the government and civil society were to do everything possible to help people caught in prostitution to leave the industry (by creating exit, rehabilitation, training and reintegration programmes), only then could one accurately assess how many people really choose to be prostitutes. According to DFL, the non-criminalisation or regulation of prostitution – and being able to simply collect license fees and taxes – would be the easy way out. This option would not concern itself with the wellbeing of prostitutes. According to DFL, prostitutes themselves never seem to be the focus of a proposed solution. DFL submits that if people cannot cope economically, society at large should not be willing to allow women – or mothers, daughters and wives – to prostitute themselves to survive. The government and civil society should fulfill their protective and defending role instead.

2.413 DFL explains its position on the criminalisation of prostitution as not victimising or stigmatising the prostitute, but wanting exit programmes to be offered as an alternative to punitive measures. To this end, DFL explains that the organisation (DFL) is involved in helping people who are involved in prostitution. DFL views criminalisation as a mechanism to lift people involved in prostitution out of coercive circumstances and to place them in rehabilitation, training and reintegration programmes. This mechanism must occur through diversion programmes offered through the criminal justice system, as alternatives to punitive measures.

2.414 The DFL submission states that many prostitutes live under coercive circumstances such as being unemployed, having children removed from them, drug addiction, abusive surroundings, violent pimps and organised crime syndicates. DFL argues that criminalisation provides a legal mechanism for a prostitute to be removed from these coercive circumstances and compelled to enter rehabilitation, training and reintegration programmes. DFL submits that this legal mechanism would also help to take care of the welfare of minor dependents of a person entering an exit programme. The welfare of minor dependents is of critical importance for the peace of mind of the person being rehabilitated, and would contribute to the success of a programme. To this end, the court should appoint a welfare officer to assess the best options to facilitate a reintegrated and normally functioning family. DFL recommends that assets forfeited to the state and any fines incurred through criminal activity related to

prostitution should be diverted to NGOs that offer exit programmes. Furthermore, as part of a national strategy on prostitution, regional or district intersectoral task teams should be established; these should include police, prosecutors, welfare officers, health care professionals, and NGOs providing exit programmes. Such teams would coordinate exit strategies and the rehabilitation of clients.

2.415 In terms of exit strategies, DFL proposes that the rehabilitation of a person engaging in prostitution should include the following (cited here verbatim):

1. *Diversion programmes through the criminal justice systems:*

1.1 The law should be worded in such a way that police, prosecutors, and magistrates etc, know that restorative justice, as in diversion programmes are of paramount importance;

1.2 The prostitute should be informed by the police, prosecutor and magistrate of the option of entering a diversion programme as an alternative to punitive measures;

1.3 Punitive measures such as fines and/or imprisonment should only be considered if the person before the court refuses to co-operate regarding rehabilitation, training and reintegration;

1.4 A social worker or NGO counselor should be involved in the process from the outset;

1.5 Records should be kept of compliance and outcomes regarding rehabilitation, training and reintegration programmes.

2. *Immediate availability of voluntary comprehensive exit programmes:*

2.1 People involved in prostitution should be able to voluntarily enter the rehabilitation and reintegration programme at any time.

3. *Funding of rehabilitation and reintegration programmes:*

3.1 Assets forfeited to the state and any fines as a result of criminal activity surrounding prostitution should be diverted to a central fund to be distributed to rehabilitation and reintegration programme providers.

4. As part of a national strategy on prostitution, regional or district intersectoral task teams should be established, comprising police, prosecutors, welfare officers, health care professionals, and NGO's providing exit programmes, in order to coordinate exit strategies. The same task team should coordinate the rehabilitation of clients.

2.416 Marge Ballin<sup>876</sup> recommends that prostitutes should be offered access to free education and health treatment for alcohol or drug problems. She also recommends that exit programmes should be put in place to assist prostitutes, and NGOs should be developed to run these programmes.

2.417 Ballin shares some stories of success by the Inter Outreach programme. She states that several women who have received assistance are now married with children, and a number are employed in good jobs. One woman, after being in prostitution and on drugs for 20 years altogether, qualified as a chef and had been working in a prestigious hotel in the country for several years at the time of writing.

2.418 Ballin quoted one woman who had commented, "I guarantee you that there's not a woman on the street who would turn down the offer of a place to live and an alternative job."<sup>877</sup> Ballin also recalled a woman who had said the following:

It's ironic that behind bars I found real freedom. I gave up. Surrendered. This was the tenth time I've been in prison – but this time was the longest and I asked God, please – if there's any point to my life make me stay in prison. Don't let me out until I'm ready to start a new life.<sup>878</sup>

2.419 A woman who had been through an exit programme submits the following comment:

We need more exit programmes like the one I've been through. I want to be a symbol of hope to other girls. I want to tell them that prostitution doesn't define them, that they are worth more and that there is something better. I want to have a home that they can come to.<sup>879</sup>

2.420 Lana<sup>880</sup> told the Rocking Chair crew how she managed to leave prostitution. Lana said that a couple had befriended her and helped her turn her life around. She stated that "They would call and look out for me. They were a shoulder to cry on. They were there for me." Lana also recounted the following:

I heard about SWEAT when I was a prostitute, but in the four years I worked in the brothel, I never met anyone from SWEAT – no one came by and tried to make things better for me. What are they getting out of this? Who is paying their salaries? How are they improving the lives of prostitutes? No one can protect you from the client who walks in with AIDS or from the client who

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<sup>876</sup> Director of Inter Outreach Ministries

<sup>877</sup> Rocking Chair submission at 12.

<sup>878</sup> Amy in Rocking Chair Submission at 9.

<sup>879</sup> Rocking Chair submission at 13.

<sup>880</sup> Op cit 16.

refuses to pay. All I saw was more and more women go downhill, get hooked on drugs. Many never came out alive."<sup>881</sup>

2.421 Another woman was asked by the Rocking Team crew whether, if she was offered another opportunity, she would take it or would choose to stay in prostitution. She replied: "If someone came to me tomorrow and offered me a better opportunity, I would definitely take it."<sup>882</sup>

2.422 The Rocking Chair submission recommends a "restorative justice" approach specifically designed for prostitution, similar to the approach used in Kansas City, US. Rocking Chair explains that in terms of this approach people enter into a process of diversion through the court system, referrals, outreach programmes and "walk-ins". Each person receives care on a personal basis, using individual needs assessments, peer counselling, licensed therapists, shelter, food, health care, drug treatment and legal help.

2.423 The Rocking Chair submission explains that leaving a life of prostitution, drug addiction and violence, and transitioning to a new life that is free from such abuse, is difficult. The goal should be to offer compassionate and non-judgemental counselling and support through peer and survivor-run services. Such support should offer individuals who are sexually exploited an opportunity to be educated and empowered to take back their lives.

2.424 On the demand side, Rocking Chair submits that "offender accountability re-education programmes" or "john's schools" should also be created. The submission suggests that attendees could be either voluntary or court-ordered. It explains that in the US, the Veronica's Voice programme is aimed at dramatically reducing recidivism among first-time arrested customers or "johns". Similar programmes have a solid track record of helping women and girls to escape prostitution and drug addiction and step away from the criminal justice system's revolving door once and for all. Rocking Chair argues that such a pragmatic and restorative justice programme can move law enforcement, criminal justice, and human services to a new level of performance in eliminating the tragic human consequences and high community cost of prostitution.<sup>883</sup>

2.425 According to Rocking Chair, Veronica's Voice also runs an intervention programme jointly with the municipal court. Judges offer women who have been arrested for prostitution

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<sup>881</sup> Lana in the Rocking Chair submission at 17.

<sup>882</sup> Jody in Rocking Chair submission at 24.

<sup>883</sup> Rocking Chair submission at 50.

the opportunity to seek help with Veronica's Voice in lieu of jail time.<sup>884</sup> Veronica's Voice provides a needs assessment based on each person's history and current profile. People participating in Veronica's Voice are mandated to attend a one-day intensive workshop, which addresses all issues relating to prostitution and a life of commercial sexual exploitation. Clients report to Veronica's Voice for supervised probation and/or community service. Veronica's Voice then makes recommendations to the court on immediate steps to be taken, including the most needed intervention. These might include medical treatment, shelter, trauma recovery, drug rehabilitation, and so on. At the time of writing, Veronica's Voice was shouldering the entire cost of the intervention programme. Veronica's Voice collaborates with community organisations and medical facilities to secure appropriate care and treatment for people in need.<sup>885</sup>

2.426 Finally, Veronica's Voice also offers "exiting classes". These are weekly sessions at which weekly, monthly and long-term goals are set.<sup>886</sup> Participants are given a variety of tools through a city-wide networking system. Each aspect of a participant's current life is evaluated to make sure that he or she is set up for success rather than failure; furthermore, people are offered support for the rest of their lives. Mentoring other survivors is highly encouraged, and most participants want peer mentoring.<sup>887</sup>

2.427 The SWEAT submission calls for a non-criminalised environment, and states that the combination of certain factors would make a person's departure from the occupation easier. Such factors would include the absence of enduring criminal (offence) records for prostitutes for general prostitution-related offences; greater engagement by state agencies; a reduction in stigma; and a safer and less coercive prostitution environment. Similarly, POWA submits that in a non-criminalised setting, the government should work to make available adequate funding for the establishment or strengthening of institutions or programmes to provide a range of services, skills development or employment for prostitutes wishing to exit the industry.<sup>888</sup> The idea of creating legal halfway-houses was also mooted.<sup>889</sup> An anonymous respondent cautions that although learnerships and skills development programmes may equip prostitutes to exit, such people would continue to need guidance and psychotherapy. POWA comments that very few services currently exist that provide legal and/or psychosocial assistance to prostitutes. POWA states that the main reason for people entering prostitution is

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<sup>884</sup> Op cit 51.

<sup>885</sup> Ibid.

<sup>886</sup> Ibid.

<sup>887</sup> Ibid.

<sup>888</sup> Endorsed by L Jankelowitz; L Sete, UNISA; A Myburgh, SANCA, Witbank; Anonymous.

<sup>889</sup> A Myburgh, SANCA, Witbank.

socioeconomic factors; hence, government must be encouraged to increase its measures to eradicate poverty.

2.428 Although J Selby the owner of Angels supports non-criminalisation, he however believes that the legal framework would not change the prostitution environment, or make the environment more conducive for exiting prostitution. In his view, a prostitute exits of her own accord as it is “the old story of the horse and the water”.<sup>890</sup> D Scarborough<sup>891</sup> cautions that non-criminalisation or regulation would make it exceedingly difficult to exit, because of the state-approved “systems and processes” which have been given negotiating powers and the authority to set the rules for prostitution.

2.429 Respondent A Megaw advocates for partial criminalisation, and submits that the criminalisation of pimps and madams would clamp down on the demand side, including the criminal element that exploit and abuse women and children in prostitution. In this respondent’s view, partial criminalisation would break the links with organised crime. According to Megaw, partial criminalisation coupled with state-funded exit programmes supported by civil society would be the only viable and responsible way to help women escape prostitution. L Walter<sup>892</sup> argues that where there is no criminal record, there will be no contractual obligation to third parties.

## **7 What happens to a criminal record (for selling sex for reward) when a person exits prostitution and seeks other employment?**

2.430 The Commission posed the question of how the issue of a criminal record for selling sex for reward should be addressed when a person leaves prostitution and seeks alternative employment. The Rocking Chair submission states that criminalising the prostitute makes it much harder for a person to re-enter and function in society and to put their best foot forward when they have a criminal record. Rocking Chair explains that it witnessed this in its interactions with Amy. The crew saw how much of a struggle it was for Amy not to run back to her pimp and the streets of Sunnyside – because for 10 years, that was all she had known. But more than that, to re-enter society she needed a job. To secure a job when she had not finished school and now had a criminal record was extremely difficult. If this was not enough, Amy herself said that prostitution had damaged her emotionally, physically, psychologically

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<sup>890</sup> Presumably referring to the saying “you can take a horse to water but you can’t make it drink”.

<sup>891</sup> Gospel Defence League.

<sup>892</sup> Sabie Methodist Church.

and spiritually – and that as a result, she was finding it a huge challenge to reintegrate into a “normal life”.<sup>893</sup>

2.431 According to the Rocking Chair submission, the only viable way women trapped in prostitution would have a fair chance of starting a new life would be if their criminal records were expunged.<sup>894</sup> A clean record must be used as a motivating factor for women to exit prostitution and begin a new life as a dignified member of society.<sup>895</sup> The unfortunate circumstances that force women into prostitution should not be used to chain them to their past indefinitely. As a consequence, all recorded criminal activity associated with a woman’s life in prostitution must be rescinded when the woman agrees to the assistance offered by state-funded exit programmes. The Family Policy Institute states that women who are offered and accept assistance to leave prostitution can in turn provide authorities with intelligence about the modus operandi of crime syndicates and sex traffickers.<sup>896</sup>

2.432 In DFL’s view, regarding the first or second offence: if a prostitute successfully completes rehabilitation in respect of a particular charge or charges related to prostitution, such a charge should be withdrawn when the person reappears in court after the rehabilitation process. DFL states that there must also be an effective system of checks and balances on prostitutes regarding how often they have been guilty of a crime, how often they have been rehabilitated and so on, so that the system is not open to abuse. DFL comments that until now, persons charged with prostitution have not had the option of alternatives to punitive measures, such as diversion programmes through the criminal justice system. The DFL submission states that ideally a criminal record for prostitution should be scrapped when it can be shown that the person has been rehabilitated, trained and reintegrated.<sup>897</sup> DFL states that the practical application in law of such a measure could pose a challenge to lawmakers, but that due to the exploitative nature of prostitution it would be in the interest of justice to give serious consideration to this possibility.

2.433 A few of the respondents in favour of non-criminalisation<sup>898</sup> support granting amnesty to prostitutes who have a criminal record for prostitution or prostitution-related offences but

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<sup>893</sup> Rocking Chair submission at 49.

<sup>894</sup> Endorsed by GT Ndlovu, Child of God; SM Hadebe, Child of God; S Tegg, Full Gospel Church; I & B Wilson, Presbyterian Church;

<sup>895</sup> Endorsed by the Christian Lawyers Association of South Africa.

<sup>896</sup> Endorsed by the Christian Lawyers Association of South Africa; World Vision SA and Christian Action Network.

<sup>897</sup> Endorsed by I & B Wilson of the Presbyterian Church.

<sup>898</sup> E Bonthuys, WITS; A Myburg, SANCA, Witbank; L Jankelowitz, RHRU; GT Mjuza; POWA.

who wish to exit prostitution. J Hicks,<sup>899</sup> however, comments that if legislation that non-criminalises prostitution is passed, all such criminal records should be expunged regardless of whether a person wishes to exit or not. J Hicks adds that the amnesty provision should be publicised widely, made widely accessible, and have minimal bureaucratic hurdles and cost. Richter<sup>900</sup> questions why a criminal record should only be deleted when a prostitute takes on other employment. She argues that this presupposes that people who continue with prostitution are still doing something wrong. She submits that many prostitutes may want to try other employment, but perhaps return to prostitution or engage in it “part-time”. She poses the question of how the current provisions on amnesty would respond to such a scenario (ie where the break is not a clean one). In Richter’s view, it would be best to have a blanket amnesty for all “sex workers” who have criminal records for offences relating to prostitution.<sup>901</sup> E Poto<sup>902</sup> submits that all clients who have been prosecuted for these crimes must be provided amnesty too.

2.434 Respondent, A Myburg of SANCA Witbank comments that “[T]hey must get amnesty to exit easily and get easy employment.” By contrast, GT Mjuza is of the opinion that “[T]hey [criminal records] must be kept in mind but not made determinants of whether or not to employ someone”.

2.435 D Scarborough of the Gospel Defence League feels strongly that if a crime has been committed – and under the present system of criminalisation prostitution is a crime – the record stands in the same way as for any other crime. Further that:

[A] criminal record is the same for all offenders, and, like a CV, it stands. No one can make it undone. But like every other rehabilitated offender, a prostitute can prove that she has turned over another leaf and has become a decent and trustworthy employee. No law can make her good. Only a change of heart can do it. The issue of a criminal record should therefore be treated in the same way as it is with all other offenders who are being re-integrated into society.

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<sup>899</sup> Commission for Gender Equality. Endorsed by GT Mjuza; M Richter, SA National AIDS Council Women’s Sector; J Selby, owner of Angels; SWEAT; E Poto, Commission for Gender Equality.

<sup>900</sup> SA National AIDS Council Women’s Sector.

<sup>901</sup> This viewpoint is endorsed by E Bonthuys, WITS.

<sup>902</sup> Commission for Gender Equality.

## H Evaluation of policy options

2.436 This chapter has sought to define a person who provides sexual services for payment within the context of voluntary prostitution. It has discussed different theoretical and legal approaches used in respect of prostitutes, and has expounded pertinent submissions made to the Commission in this regard.

2.437 The Commission has been mindful that the way prostitution is practised in a particular country is shaped not only by its legal status but also by myriad other social and cultural contexts. The content of the current research and the submissions received confirm the reality that, from the prostitute's perspective, in South Africa prostitution is practised amid complex social, cultural and economic realities. These include poverty, sexual inequality, socio-economic marginalisation of women, lack of formal education, scarcity of employment in the formal sector, the disparate impact of the HIV/AIDS pandemic on women, and in some instances addiction to substances such as alcohol and drugs. In respect of law reform an important consideration is whether the current legislative scheme exacerbates the social problems associated with prostitution or serves the purpose of countering them.

2.438 There was general consensus from respondents to the Discussion Paper<sup>903</sup> that the practice of selling sexual services is often borne out of a choice made within severely limiting socio-economic circumstances, and in a context of social inequality. It is not disputed that most women and even girls enter prostitution due to tragic circumstances such as family breakdown, sexual abuse, rape and poverty, and the need for general economic survival.<sup>904</sup> Studies on prostitution show that most prostitutes come from dysfunctional homes, and a large percentage – one study estimated at least 80% – were victims of rape or incest early in their lives.<sup>905</sup>

2.439 The routes of entry into prostitution appear to vary. However, the researchers were informed at nearly all workshops which they attended around South Africa of the growing practice in which a man gives particular attention to a woman who seems to be emotionally and financially vulnerable. He becomes her pseudo-boyfriend, and once he has gained her trust he suggests a holiday or a move to another province. Within the borders of South Africa,

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<sup>903</sup> SALRC *Sexual Offences: Adult Prostitution* Discussion Paper 2009.

<sup>904</sup> Family Policy Institute.

<sup>905</sup> Confirmed by numerous interviews conducted by and submitted by Rocking Chair eg “You give yourself away sexually because that’s what was taken from you” - Noleen abused by her stepfather from age 13; Jody was raped at age nine by her grandfather.

there seems to be an established corridor of movement between the cities of Pretoria, Johannesburg, Bloemfontein, Port Elizabeth and Durban. The move usually takes place across multiple provinces. Once the man has the woman away from her familiar surroundings and family or support network, he tells her that she needs to pay for her upkeep by engaging in sexual services for reward. As part of the same process, usually she is also gradually introduced to drugs. The Commission's researchers met a woman in Sunnyside who had been moved from Port Elizabeth via Bloemfontein to Pretoria, and was totally dependent on her pimp for accommodation, food and drugs. These trends in movement were confirmed by outreach workers<sup>906</sup> and a workshop attendee in Port Elizabeth who was originally from Pretoria.

2.440 Many prostitutes are said to use or be addicted to drugs and/or alcohol, and lack the skills to earn a liveable wage to support themselves and their families.<sup>907</sup> According to a former police Superintendent, Owen Musiker, in the Pretoria area 95% of men and women in prostitution are involved in drugs as they just cannot cope any other way.<sup>908</sup> He stated that most prostitutes are young girls who are runaways fleeing abuse. Sometimes they are forced onto the streets by their own parents, and once on the streets they are "snatched up by a drug lord". The house mother at Tshwane House of Hope Shelter confirmed that this was the case, stating that young girls would not last one night on the surrounding streets without being taken in by drug lords or pimps. The Commission's researchers met a Grade 1 child (six years old) at the Tshwane House of Hope in Sunnyside who had been rescued from her mother, who had been selling the child to perform sexual services. The researchers also met other girl children who had been found on the street or rescued from pimps.<sup>909</sup>

2.441 There are also reports of girls and women who are already addicted to drugs, who try to cut out the middle man and go straight to the dealer. The dealer ensures that they have a ready supply of drugs; this increases their vulnerability and ensures that any money made is handed over to the drug lord, pimp or brothel owner. The drugs help the girls to cope with the

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<sup>906</sup> Respondent Ina van den Heever, a South African outreach worker in the Red Light District in Amsterdam confirms that the same modus operandi is followed to bring women to Amsterdam to engage in prostitution.

<sup>907</sup> Marge Ballin, Director of Inter Outreach Ministries; Bart Love, cameraman, Rocking Chair submission.

<sup>908</sup> Confirmed in SWEAT/Wechsberg.

<sup>909</sup> Girls involved in prostitution are increasingly getting younger, with their ages dropping from 14 to 13 and 12 (Prostitution: The 'World's Oldest' and Most Dangerous Profession posted on November 12, 2011 Available at <http://projectsocialart.com>); Street children, some as young as eight years, are increasingly being lured into prostitution by local and foreign tourists in the Knysna area (*The Herald Online News*, 26 July 2006 Available at [www.oijj.org/news\\_ficha.php?home=SI&cod=34665&pags=0&idioma=es](http://www.oijj.org/news_ficha.php?home=SI&cod=34665&pags=0&idioma=es)).

terribly unnatural world that is prostitution.<sup>910</sup> Prostitutes controlled by pimps are also used as a conduit to supply buyers with drugs.<sup>911</sup> Stef<sup>912</sup> confirmed this reality, stating that she had traded her dreams for heroine on the streets of Pretoria, and ended up sleeping under a bridge. Amy and Noleen shared similar stories, stating that:

[Y]ou never have money because it all goes to drugs. The more you make, the more you use. You use because if you didn't, you couldn't live with yourself and the reality of what life is like as a prostitute. When you are under the influence, you can do things that you'd never normally do.<sup>913</sup>

[C]lients would pick me up [off the street] and if I was lucky enough, we'd do business in a hotel and I'd get to have a shower. Most of the time I stank – I was dirty and skinny from the drugs.<sup>914</sup>

2.442 Although the Commission expected the debate to be laden with moral and religious rhetoric, it has found that the debate has transcended ideological divides. Despite the fact that the majority of submissions came from religious institutions and individuals from a range of different religions, the views in these submissions have not clashed or sought harsh retribution against the prostitute. The majority of submissions acknowledged the harm of prostitution and the vulnerable position of people who provide sexual services, and the need to extend a compassionate hand to assist them to exit from prostitution – albeit through the retention of a criminalised system. The remainder of the submissions also acknowledged the vulnerable position of prostitutes but advocated for non-criminalisation as the solution. Essentially, the debate has fallen along the lines of those who view prostitution as work and those who view it as exploitation.

2.443 The theory that prostitution should be viewed as an economic contract or form of work assumes the exercise of a person's powers of self-determination. This view posits that there should be no distinction between prostitutes and other female workers who perform dangerous and low-status labour (eg domestic work, work in factories, or poorly paid manual labour). This theory also suggests that recognising prostitution as work would ensure that labour benefits would accrue to prostitutes. With regard to the accrual of labour benefits, it is important to note that the Labour Relations Act expressly excludes independent contractors from its reach and is only applicable to people covered by the definition of "employee".<sup>915</sup> An

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<sup>910</sup> Former police Superintendent, Owen Musiker, confirmed in SWEAT/ Wechsberg.

<sup>911</sup> This was confirmed by the Commission researchers during interviews in the Pretoria CBD.

<sup>912</sup> Interview at SALRC on 15 October 2009. Stef was a prostitute for a number of years. She advocates for total criminalisation, harsher penalties and exit programmes. She is involved in outreach work to prostitutes.

<sup>913</sup> Rocking Chair submission.

<sup>914</sup> Ibid.

<sup>915</sup> Definition of "employee" in section 213 of the Labour Relations Act 66 of 1995.

independent contractor would therefore include a prostitute who works for herself or works from a brothel but without an employment contract. For prostitute “employees” who would fit the definition in the Labour Relations Act, it is important to note that by fulfilling the primary objects of the Act the aim is to advance economic development and therefore expand the particular industry. This principle itself challenges the argument that non-criminalisation and the granting of labour benefits would constrain the growth of the prostitution industry. The Basic Conditions of Employment Act and the Compensation for Occupational Injuries and Diseases Act additionally regulate minimum standards for specific sectors and commensurate compensation in the case of injury, disablement and death. Non-criminalisation would not automatically entitle prostitutes to protection in terms of either of these Acts. For example, currently domestic workers are not covered by the Labour Relations Act. To make these Acts applicable, the Minister of Labour would have to elect to make a sectoral determination setting minimum standards and would have to include prostitutes in the reach of the Compensation Act. Due to the lived experience of occupational injuries and diseases among prostitutes, and the inability to limit the risks connected therewith, it is arguable whether the Act would be made applicable. The very nature of prostitution – including negotiable condom compliance and frequent reports of violence – allows for the exchange of bodily fluids, with a concomitant and continuous high risk of the transmission of HIV and STIs between individuals. The occupational health and safety issues covered by the Code of Good Practice on Key Aspects of HIV and Employment aim to create a safe working environment for people with HIV or AIDS to engage in the workplace. However, it is doubtful that the “workplace” envisaged in the Code was ever intended to include an environment that contains an ever-present risk of exposure and transmission of HIV and STIs resulting from the intimate nature of services provided. It is even more doubtful that the Code would encourage prostitutes with HIV or AIDS to continue providing their services, even with the use of condoms.

2.444 In summary, if the legislative framework were to be changed it would not automatically provide labour rights and benefits to prostitutes. Labour rights and benefits are only applicable to people in an employment relationship based on an employment contract. The Commission agrees with Smith that due to the nature of the agreement between prostitutes and buyers, prostitutes are independent contractors in respect of the buyers and most brothel owners, and can therefore not automatically be considered employees. The non-criminalisation and recognition of prostitution as work in terms of labour legislation could mean that prostitutes who do enter into an employment relationship could oblige their employers to comply with minimum standards set by labour legislation, and could have recourse in terms thereof if the employer did not comply. The Commission is of the view that contrary to arguments in this regard, the non-criminalisation and recognition of prostitution as

work or its inclusion in the reach of labour legislation would not provide prostitutes with work-related pension benefits, because no national law currently prescribes this benefit for employees. In respect of the current law, in the Kylie case<sup>916</sup> the court found that irrespective of the dispensation applicable to prostitutes, and whether or not prostitution is considered to be work, prostitutes should not be stripped of their right to be treated with dignity by clients or employers.<sup>917</sup>

2.445 It is uncontested that the current socio-economic climate in South Africa is dire. A large number of people are faced with the triple scourges of unemployment, inequality and poverty. Poverty is heavily “gendered”,<sup>918</sup> and the means by which poverty-stricken and unemployed - and often uneducated - women in South Africa try to make a living, including through prostitution, bears stark testimony to the socio-economic realities they face.

2.446 Although poverty is unquestionably a key factor behind people’s entry into prostitution, prostitution is not the only avenue followed by poor people trying to make money. Some women may generate income through various entrepreneurial ventures or may find employment in notoriously vulnerable sectors such as domestic work or agricultural labour. Studies in other countries have shown that “luxury” prostitutes may earn between two and six times as much as women from similar population groups who are not involved in prostitution. Even “ordinary prostitutes” in those countries earn considerably more than women in “other kinds of low-skill, labour-intensive, and female-dominated work.”<sup>919</sup> However, insufficient South African data are available to make the same comparison between prostitutes and other unskilled female workers in this country (eg domestic workers or farm workers). Furthermore, the prostitute’s income does not necessarily accrue only to the woman herself; a large portion of it may be skimmed off by other role-players (eg pimps and brothel owners) who generate their own income by exploiting such women.<sup>920</sup>

2.447 When determining whether prostitution should be categorised as work, the question arises as to whether a person who sells her sexual services because of poverty is financially, emotionally, physically or socially worse off than someone who, for example, provides a

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<sup>916</sup> *Kylie v Commission for Conciliation, Mediation and Arbitration and Others* 2010 (10) BCLR 1029 (LAC) para 19.

<sup>917</sup> In *S v Jordan* 2002(6) SA 642 (CC) para 74 the Constitutional Court pointed out that prostitutes who are arrested and accused by the police must nevertheless always be treated with dignity, as the law must be applied in a constitutional manner; and that prostitutes have the right to be treated with dignity by their customers.

<sup>918</sup> ANC Gender Paper 2012.

<sup>919</sup> Ole Martin Moen “Is Prostitution harmful?” *J Med Ethics* Online First, published on August 28 2012 accessed at [jme.bmj.com](http://jme.bmj.com).

<sup>920</sup> This will be dealt with in Chapter 4.

service as a domestic worker. Stated differently, does the effect of selling sex on a person's emotional and physical wellbeing differ from the effect of performing any other low-status occupation? Are prostitutes more vulnerable than women in non-sexualised but poorly paid, low-status occupations? Although a person who sells sexual services may not qualify for labour benefits in a non-criminalised setting, could the possible financial gain of prostitution outweigh the negative effects of the type of "work" performed?

2.448 Some people consider the negative effects of being a prostitute to be significant, and hardly comparable with the negative effects of domestic work or agricultural labour. One woman proclaimed prostitution to be "i-job",<sup>921</sup> but the Commission researchers were present at numerous workshops and meetings where several prostitutes said that they experience disassociation from what is happening. This disconnection from their emotional reality forms a survival strategy. The sexual acts are often violent, degrading and abusive, and may include the woman being tied to bedposts and lashed until she bleeds, having her breasts bitten, being burnt with cigarettes, and even being urinated or defecated on.<sup>922</sup> Marge Ballin explained that women who have worked in prostitution often exhibit symptoms of traumatic brain injury (TBI) as a result of being beaten, hit and kicked on the head, strangled or having their heads slammed into objects such as dashboards. In a meeting at the Commission's offices in 2002, Ellen Jordan pointed out to the researchers some of the injuries she had sustained over the years.

2.449 Amy said that "[E]ven though you get routinely raped and beaten and abused, you keep hoping that your knight in shining armour will arrive."<sup>923</sup> Jody commented that "[O]n a bad day, I might do one client. On busy days, I might do up to 12 clients but then I am so raw I bleed."<sup>924</sup> Another aspect of the impact on women in prostitution is the constant verbal and sexualised verbal abuse they endure, which has been described as "toxic verbal assaults".<sup>925</sup> The Commission acknowledges that such abuse is documented and is known to be traumatic and long-lasting in its negative effect on battered women.<sup>926</sup> Furthermore, Noleen commented as follows:

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<sup>921</sup> A COSATU Gender Conference speaker, advocating for prostitution to be recognised as work.

<sup>922</sup> Discussion in the Commission Workshop in Port Elizabeth and submission by Marge Ballin, Director of Inter Outreach Ministries.

<sup>923</sup> Rocking Chair submission at 8.

<sup>924</sup> Op cit 22.

<sup>925</sup> Submission by Marge Ballin, Director of Inter Outreach Ministries.

<sup>926</sup> The Domestic Violence Act 116 of 1998 makes provision for the granting of an interdict against domestic violence which may consist of emotional, verbal abuse and psychological abuse.

I've had some clients try to strangle me ... why do you think serial killers usually go after prostitutes? It's because no one is as vulnerable as a prostitute. No person or law can protect you from the dangers of the job. It's physically, emotionally and spiritually destructive. About 90 percent of women in the business are addicted to drugs or alcohol. How else can you put yourself through that on a daily basis? And then there's the shame. Only drugs can dull the shame".<sup>927</sup>

2.450 Despite significant legislative advances being made to provide labour rights and benefits to employees in the domestic and agricultural sectors, such workers remain vulnerable due to their position on the lowest rungs of the labour ladder. Their work may be physically demanding, but this work has not been reported to have an impact on these workers' mental, psychological and physical health to the extent that prostitution reportedly has. The farmworkers' strike in the Western Cape during late 2012 focused the Commission researchers' attention on the desperate conditions of those farmworkers, whose minimum wage was set at R69 per day. The focus however was not on the fact that they were farm labourers or the work they were employed to do, but on their remuneration. For all intents and purposes it would seem that employment in this sector is considered to be menial but decent.

2.451 Given the nature of the service provided through prostitution, the core question would seem to be whether prostitution should be considered to be work and more specifically decent work in the context of an employment relationship. The aim of the ILO Decent Work Agenda and the Decent Work Programme for South Africa is to promote opportunities for people to obtain decent and productive work;<sup>928</sup> similarly, the aim of the New Growth Path is to create decent work that will contribute to reducing inequality and defeating poverty. Together with the 2009–2014 Medium Term Strategic Framework and the National Planning Commission,<sup>929</sup> the focus seems to be on addressing major developmental challenges in South Africa. Many of these developmental issues are cited as reasons for entering prostitution. Decent employment, undergirded by quality basic education and a skilled and capable workforce, is the goal strived for. Job creation and skills development targets are crucial elements of The New Growth Path. Insights on ways to afford women with an alternative to prostitution can be gained from reflecting on the past and academic work such as Hunter's.<sup>930</sup>

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<sup>927</sup> Rocking Chair submission at 12.

<sup>928</sup> ILO "Country Profile" 7.

<sup>929</sup> National Planning Commission NDP "Executive Summary".

<sup>930</sup> See paragraph 2.105 above.

2.452 Neither the ILO nor the South African policy documents mentioned in the previous paragraph have promoted legalising prostitution as a solution to poverty; nor have they identified prostitution as an employment option for poor or marginalised people. Prostitution does not fit comfortably into the international definition of decent work. To the contrary, although prostitution would seem to provide superficially attractive short-term financial benefits, it has not been shown to lift women out of a lifetime of poverty and economic inequality. It is argued that the reason for this lies in the very personal and private nature of the service provided, which heightens a prostitute's vulnerability to exploitation.<sup>931</sup> Classic examples of the non-criminalisation and regulation models are found in the Netherlands and Germany, and these countries' approach to prostitution as "work" is instructive. The Dutch Parliament has concluded that prostitution is not "work like any other",<sup>932</sup> and the German Federal Government has stated that selling sex shall not "be considered a reasonable means for securing one's living".<sup>933</sup> A nine-country study found that the intention to convert prostitution into a legally regulated type of employment has not been achieved, as there is no other profession in which an individual uses their own body and sexual intimacy in a comparable way.<sup>934</sup> That study reflected the inherent difficulties in trying to integrate prostitution into formal employment laws and structures. The authors concluded that efforts to treat prostitution as formal employment reveal a host of contradictions, which neither law nor policy can resolve.<sup>935</sup> In conclusion, it is reassuring to note that in South Africa, the Constitutional Court per Justices O'Regan and Sachs held that no example had been brought to its attention of international law or domestic constitutional law which has been used in any country successfully to challenge laws penalising prostitution on the grounds that such laws violated rights of autonomy or rights to pursue a livelihood.<sup>936</sup> **The Commission is in agreement with these findings, and notes the challenges experienced in comparative jurisdictions in this regard. It is therefore of the opinion that prostitution should not be recognised as a reasonable means to secure a person's living in South Africa; and should not, from a formal labour perspective, be considered to be work or decent work. This stance aligns with the partial criminalisation model found in the Nordic countries and Canada and the total criminalisation model currently in place in South Africa.**

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<sup>931</sup> Raymond "Legitimizing Prostitution as Sex Work" 2003.

<sup>932</sup> See paragraph 2.189 above.

<sup>933</sup> See paragraph 2.184 above.

<sup>934</sup> Kelly et al 40.

<sup>935</sup> Op cit 47.

<sup>936</sup> *Jordan v the State* 2002(6) SA 642(CC) at para 93.

2.453 Proponents who view prostitution as exploitation<sup>937</sup> pose the question of whether one can really speak of choice if there are no viable alternatives to actually choose from. It is argued that for most people, prostitution is not a freely-made choice because the conditions that would permit genuine choice are not present – such as physical safety, equal power with buyers, and real alternatives.<sup>938</sup> Most women in prostitution do not have viable alternatives. They are coerced into prostitution by sex inequality, race or ethnic inequality, and economic inequality.<sup>939</sup> According to this interpretation, prostitution should be viewed as a form of exploitation or coercion resulting from the economic marginalisation of women through educational deprivation and job discrimination, ultimately rendering them vulnerable to recruitment into prostitution.

2.454 The acts of violence, abuse and exploitation meted out by police, clients, pimps and others are clearly unlawful, irrespective of the legal framework governing prostitution. While agreeing that arresting a person who may be under the influence of drugs or alcohol and may be hysterical and uncontrollable is difficult at best, the Commission condemns the deliberate abuse and exploitation of prostitutes for reasons such as supplementing one's income and gaining access to "free" sex. The Commission is of the view that allegations of police brutality and extortion are not unique to prostitution. They should be dealt with as a police problem that requires corrective measures to be taken. The chances of a change in the law addressing this abuse of power are negligible. The Commission agrees with Ms Fudge that the remedy lies in police training, skills and institutional discipline. Specifically with regard to the police, the Cape High Court has confirmed the illegality of police abuse by interdicting the South African Police Service and the Cape Metropolitan Police from arresting prostitutes for a purpose other than to bring the arrestees before a court of law to face due prosecution.

2.455 On the one hand it is argued that some of the dangers that accompany the choice to engage in prostitution are caused by the unlawfulness of prostitution; on the other hand, it is argued that these dangers are inherent in the institution of prostitution and are thus impervious to change through law or policy<sup>940</sup> and may be exacerbated by non-criminalising prostitution. It could also be argued that within the context of extreme poverty, exploitation can take place in most professions, and that it is poverty rather than the selling of sex that is the cause of such exploitation. Consequently, the legislative framework could be said to

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<sup>937</sup> Exploitation is defined by the *Shorter Oxford English Electronic Dictionary* as "an attempt to gain advantage over or to subdue a person".

<sup>938</sup> Mercatornet Navigating modern complexities "The real harms of prostitution" 19 October 2010 available at <http://www.mercatornet.com>.

<sup>939</sup> Ibid.

<sup>940</sup> Kelly et al 59.

exacerbate the social problems that cause prostitution. However, within the South African context and given the high levels of gender violence and inequality added to the country's challenge of poverty, the exploitation of especially women in prostitution would seem to be inherent in the institution of prostitution - and if not inherent then at least dependent on these external factors. Whichever way it is argued, there is no justification for this exploitation, including the abuse of power by officers of the law. **The Commission agrees that acts of violence, abuse and exploitation by police officers need to be addressed in the strongest terms. It endorses<sup>941</sup> and builds on the following non-legislative recommendations contained in the joint WLC and SWEAT project,<sup>942</sup> specifically that:**

- 1. The Commission on Gender Equality and the Human Rights Commission should investigate the human rights violations that prostitutes experience;**
- 2. The police and the Independent Police Investigative Directorate should investigate reports of prostitution-related violence and unlawful conduct by officers;**
- 3. The police should establish guidelines for police conduct when dealing with prostitutes and instructions should be issued in this regard;**
- 4. Administrative mechanisms for monitoring and responding to reports of police violence and unlawful conduct should be developed to help minimise such occurrences, to enable effective responses, and to ensure the protection of complainants from further victimisation.**

2.456 The Commission notes with concern that despite legislative change in other countries, there has largely been an inability to address or diminish the criminal aspects associated with prostitution or the exploitation associated with it.<sup>943</sup> It would seem that where adult prostitution is non-criminalised, the illegal sector expands alongside the legal sector, exacerbating the vulnerability of prostitutes in the illegal sector. There might be some compliance but this appears to be the exception to the rule. The persistence of illegal prostitution in such countries seems to have arisen through authorities having underestimated the structure, power and vested interests of the sex industry, including deeply embedded exploitative practices.<sup>944</sup> The argument that legalising prostitution would refocus police on the criminal aspects associated with prostitution has been found to be flawed.<sup>945</sup> For example, in the

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<sup>941</sup> WLC/SWEAT.

<sup>942</sup> SWEAT/Manoek.

<sup>943</sup> Kelly et al 59.

<sup>944</sup> Op cit 61; also SALRC researchers' discussions with senior detectives in the SAPS who divulge that prostitution is a smokescreen for drug dealing and money laundering by businessmen who are silent partners in these establishments.

<sup>945</sup> According to SWEAT "Decriminalisation of sex work will free police officers to tackle real crime like violence against women . . .". SWEAT Media Release 12<sup>th</sup> December 2011.

Netherlands the responsibility of the police to regulate the licensed sector has diminished their capacity to actively control the illegal sector.<sup>946</sup> Internationally, the assumption that regulating the legal sector would free up police resources to control the illegal sector has unfortunately proved inaccurate,<sup>947</sup> and the Commission cannot imagine that the outcome would be any different in South Africa. The large, entrenched, well-organised, well-capitalised prostitution sector creates a barrier to the noble aims to rectify the weak position of women who sell sex. The potential for exploitation and abuse of power by “employers” is embedded in the political economy of the sex industry, with all of these challenges being multiplied for non-nationals.<sup>948</sup> There is no evidence to date that any setting can render prostitution “safe”.<sup>949</sup> Although prostitution may be a financially viable alternative to other forms of low-skill, labour-intensive and female-dominated work, on a daily basis women who engage in prostitution are faced with the prospect of exploitation on a physical, emotional and sometimes even financial level. Given the intimate nature of the transaction, there is very little that the law can do to protect a woman during this transaction, at least not until after the harm has been done.<sup>950</sup> This fact sets prostitution apart from any other occupation that might be deemed similar in certain regards (eg low income, low status).

2.457 The Commission agrees with the submission made by SWEAT that there are a range of existing laws to deal with crimes associated with prostitution and prostitution-related activities, such as money laundering, drug dealing, sexual violence, assault, extortion and blackmail. The Commission also finds merit in the submission by the Centre for Justice and Crime Prevention that prostitution often takes place in parts of communities where urban decay has set in, resulting in a lack of social cohesion and a general neglect of the environment. The Commission is, however, of the view that it would be naïve to think that prostitution could be neatly excised from these activities through non-criminalisation. Prostitution would continue to be shaped by the same socio-economic factors that concentrate crime in areas plagued by poverty, inequality and unemployment. Country reports from Australia and the Netherlands confirm this reality. Violence by buyers and other role players seem to continue unabated in non-criminalised settings.

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<sup>946</sup> Kelly et al 49.

<sup>947</sup> Ibid.

<sup>948</sup> Ibid.

<sup>949</sup> Op cit 43.

<sup>950</sup> The preamble to the Sexual Offences Amendment Act admits that the prevalence of the commission of sexual offences in our society is primarily a social phenomenon, which is reflective of deep-seated, systemic dysfunctionality in our society, and that legal mechanisms to address this social phenomenon are limited and are reactive in nature.

2.458 The Commission shares the concern that a shift away from criminalisation would cause an increase in child prostitution. Although illegal and met with severe penalties, the preference of some buyers for younger girls has repeatedly been brought to the attention of the Commission. The Commission agrees that child and adult prostitution cannot be compartmentalised separately, since many adult prostitutes start out selling sexual services as children – when they are at their most vulnerable.

2.459 A meeting with Piet Byleveld<sup>951</sup> revealed that most criminals have a particular lifestyle which includes prostitution and drugs. In Byleveld's experience, strip clubs and venues where prostitution is found are often a front for crimes such as money laundering and drug dealing. His experience accords with findings in this regard internationally.

**2.460 The Commission notes that available evidence shows that prostitution in South Africa is exploitative, and that a significant number of women who are coerced into a lifestyle of prostitution through economic marginalisation (as a result of poverty, lack of education and inequality) are harmed in this way. The Commission is alarmed by the firsthand reports of the nature and extent of physical and psychological harm that prostitutes are exposed to. Although a partially criminalised approach may recognise the exploitation of the prostitute the Commission for Gender Equality avers that the Nordic approach has impacted negatively on prostitutes.<sup>952</sup> The Commission is also mindful of the legislative shift in Canada away from a partially criminalised system where the prostitute and buyer are non-criminalised to a system where only the prostitute is non-criminalised in an attempt to protect prostitutes from violence and exploitation. However it is too early to ascertain the effect of the change in the law although concerns have been expressed in this regard.<sup>953</sup> The Commission is therefore of the opinion that a change in the current legislative framework would not significantly alter this scenario, and may even expose prostitutes to further harm.**

2.461 The Commission shares the view that the curtailment of trafficking in persons for prostitution seems to go hand-in-hand with strong measures to eliminate the demand for women and children. The Commission is alarmed at the reported commoditisation of women in the wake of the non-criminalising of prostitution in certain regions. The large numbers of foreign women, especially undocumented or women without work permits, in countries such

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<sup>951</sup> Communication with a former top detective in the SAPS. Meeting held on 10 August 2010.

<sup>952</sup> Commission for Gender Equality Position Paper on Sex Work at 6.

<sup>953</sup> Coutts Matthew, "What is and is not legal under Canada's new prostitution laws" Dec 8 2014 available at <https://ca/news.yahoo.com>.

as the Netherlands also raises concern about the movement of women into such countries to meet demand.

2.462 The Commission is mindful of South Africa's commitment in terms of the Palermo Protocol. The Palermo Protocol binds its signatories to taking measures to discourage the demand that fosters all forms of exploitation of persons, especially of women and children, and that leads to trafficking. The Commission has been made aware, through a number of forums, of the movement of women across the national and provincial borders of South Africa for the purposes of prostitution. This is despite the fact that trafficking and prostitution are illegal in this country. A significant number of foreign women engaging in prostitution already reside illegally in South Africa. Some of these women have been labelled "economic migrants" and others are said to have been trafficked.<sup>954</sup>

2.463 It is important to note that the Constitution does not protect or grant to non-citizens within South Africa the right to choose a trade, occupation or profession.<sup>955</sup> In New Zealand, presumably in an effort to curb the influx of foreign women and the possibility of women being trafficked, the Prostitution Reform Act 28 of 2003 prohibits non-residents from selling sex in New Zealand. Notably, the New Zealand Ministry of Justice reports that the prohibition on non-residents working in the sex industry, coupled with New Zealand's geographical isolation and robust legal system, provide protection against New Zealand being targeted as a destination for human traffickers. The Ministry does, however, acknowledge that some people working in the sex industry do so in breach of their immigration status, and that because they fall outside the protection of the Prostitution Reform Act they may be vulnerable to exploitation.<sup>956</sup> In contrast to New Zealand, South Africa has porous borders<sup>957</sup> and is already home to approximately 5 million illegal immigrants.<sup>958</sup> **The Commission is of the view that based on the current indicators, the legislative options of partial- and non-criminalisation across the board hold a strong possibility of stimulating an increase in legal and illegal migration and possibly in trafficking for purposes of prostitution. The Commission recommends retaining a criminalised framework in respect of immigrants. The Commission notes that a change from a criminalised legislative framework on**

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<sup>954</sup> News 24 (all the following articles available at <http://www.news24.com>) "Human trafficking trial continues in KZN" 25 January 2013; "Human trafficking: 47 victims freed in SA" 6 May 2012; "Thai women detained in Brothel raid" 16 May 2012; "Woman rescued from Cape Town brothel" 28 September 2012; "Hawks crack down on brothels" 1 December 2012.

<sup>955</sup> Section 22.

<sup>956</sup> Ministry of Justice, New Zealand "Trafficking" available at <http://www.justice.gov.nz>.

<sup>957</sup> Sowetan Live "Refugees overwhelm South Africa" 23 May 2012 available at <http://www.sowetanlive.co.za>.

<sup>958</sup> Migration News "Illegal Immigration to South Africa" August 1995 Volume 2 Number 8 available at <http://migration.ucdavis.edu/mn/>.

**prostitution would incur the risk of creating a dual system of legal plus illegal prostitution.** This is a challenge currently being faced in Germany, where non-EU citizens who lack residence permits are prohibited from selling sexual services, but in reality they make up the majority of women doing so.<sup>959</sup> Germany is also reported to be one of the most popular destinations in Europe for women trafficked from Ukraine and Russia.<sup>960</sup>

2.464 One of the most vocal lobby arguments in favour of non-criminalising adult prostitution stems from the need to curtail the spread of HIV and other STIs and to provide access to adequate health care. The argument is that non-criminalising prostitution would enhance the health and safety of women who sell sex by enhancing their access to health care and increasing their practice of safe sex. However, there is scant evidence to suggest that these ideals are achievable in reality.<sup>961</sup> For example, many factors – not least the triple scourge of inequality, poverty and unemployment – militate against condom use. Several studies have shown that women tolerate physical and sexual violence and in South Africa it has been found that women accommodate men’s aversion to using condoms in order to secure an income,<sup>962</sup> although failure to use condoms carries a high HIV risk. The Commission is of the view that changing the legislative framework will not in and of itself change this scenario. The Commission for Gender Equality also reports that in respect of partial criminalisation there is a reduction in condom usage.<sup>963</sup>

2.465 Resources in the public health sector designed to meet basic health needs are limited.<sup>964</sup> Therefore, irrespective of the legal framework governing prostitution, from a resource and medical perspective health care workers may not be able to provide a patient with treatment for repeated STI infections if it is not prudent to do so. Health care workers may also question the wisdom of that person continuing to have unprotected sex if he or she has already been diagnosed with HIV, due to the risk of reinfection. That said, everyone –

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<sup>959</sup> In Germany 75% of the prostitutes are foreigners and most of them are illegal immigrants. Factbook on Global Sexual Exploitation Germany.

<sup>960</sup> Global Survival Network, Vladimir Isachenkov, “Soviet Women Slavery Flourishes,” Associated Press, 6 November 1997 as reported in Factbook on Global Sexual Exploitation Germany.

<sup>961</sup> Kelly et al 40.

<sup>962</sup> This seems to be the experience in other African countries too. *The Malawi Medical Journal* Kalanda Boniface United Nations Population Fund 22(1): 10 – 11 March 2010 reports that young girls are subjected to unprotected sex for various reasons which include failure to access condoms and pressure from their clients who bargain to pay more if they do not use a condom. The consequences include infection with STIs including HIV, and adolescent or teen- age pregnancy leading to young motherhood or unsafe abortions; these findings were despite the fact that most of the women were knowledgeable about the transmission, signs and symptoms and prevention of HIV and other STIs.

<sup>963</sup> Commission for Gender Equality Position Paper on Sex Work at 7.

<sup>964</sup> National Department of Health White Paper for the transformation of the Health System in South Africa available at <http://www.doh.gov.za>.

including prostitutes – has a constitutional right to have access to health care services, including reproductive health care.<sup>965</sup> One of the key targets of the National Development Plan 2030 is to provide quality health care while promoting health and well-being.<sup>966</sup>

2.466 The SANAC NSP 2012–2016 states that it aims to realise these rights, and in so doing focuses on the drivers of the HIV epidemic in relation to vulnerable groups, which expressly includes prostitutes. Strategic Objective 2 of the NSP<sup>967</sup> is focused on primary strategies to prevent sexual and vertical transmission of HIV and STIs using a combination of prevention approaches. These include implementing a comprehensive national social and behavioural change communication strategy with a focus on key populations (which includes prostitutes). This strategy aims to increase demand and uptake of health care services, to promote healthy behaviours, and to address norms and behaviours that put people at risk for HIV, STIs and TB. These social interventions include efforts to change cultural and social norms that increase people’s vulnerability to HIV and STIs, and to reinforce norms and behaviours that are protective. The NSP recognises that some social norms, notably gender norms, foster behaviours that place individuals at increased risk of HIV infection, such as multiple partnerships, intimate partner violence and alcohol abuse.<sup>968</sup> Strategic Objective 3 focuses on sustaining the health and wellness of HIV-positive people.<sup>969</sup> One key objective is to keep people within the health care system, adherent to treatment, and maintaining their optimum health. To achieve this objective, the NSP’s aim is to expand the operating hours of service delivery points and ensure a continuum of care across service delivery points.<sup>970</sup> As prostitutes do not keep traditional working hours, the extended hours for health care could enhance the uptake of health services by this population. Given the reported aversion of buyers of sexual services to using male condoms, it is reassuring that there is a commitment to promoting the use of female barrier methods.<sup>971</sup> This is in addition to making a range of barrier methods freely available to everyone, including training by health care workers on their correct use.<sup>972</sup>

**2.467 The Commission is of the view that using the criminal law to correct health care workers who choose to discriminate against prostitutes or behave with condescension**

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<sup>965</sup> Section 27 of the Constitution.

<sup>966</sup> National Planning Commission Our Future - make it work National Development Plan 2030 Free State Summit NPC Presentation to the Department of Justice and Constitutional Development 22<sup>nd</sup> April 2013.

<sup>967</sup> Strategic Objective 2 at 39.

<sup>968</sup> Ibid.

<sup>969</sup> At 15.

<sup>970</sup> Strategic Objective 3 at 15.

<sup>971</sup> National Department of Health 83.

<sup>972</sup> Ibid.

towards prostitutes would only be counterproductive. Such behaviour would be better addressed through internal complaint mechanisms or equality legislation.<sup>973</sup> The Commission is further of the view that the implementation and achievement of the NSP objectives would have a beneficial influence on prostitutes' understanding of, access to and uptake of health services. The NSP objectives can be implemented independently of the legislative framework governing prostitution. In turn, the increased use of health care services by prostitutes could be expected to help reduce the spread of STIs and HIV. The Commission is mindful that reform of the legislative framework in other countries<sup>974</sup> does not appear to have been an effective vehicle for reducing the stigma attached to prostitution.<sup>975</sup> Legalisation has not been found to erase the stigma of prostitution, but renders women even more vulnerable because they must lose their anonymity in order to be recognised as legal prostitutes.<sup>976</sup> The Commission for Gender Equality also reports that partial criminalisation results in a significant increase in stigma and discrimination<sup>977</sup> (although from the exposition above<sup>978</sup> it would seem to be more the experience of buyers than prostitutes). For this reason the Commission recommends that guidelines for health care workers should rather be established regarding their interaction with vulnerable groups, including prostitutes.<sup>979</sup> The abuse of power by police officials is already illegal and should not be tolerated.

2.468 With regard to abuse by police, the Commission agrees with Ms Fudge and the Family Policy Institute that the solution is to be found in training and institutional discipline. As recommended above, the police should establish guidelines for police conduct when dealing with prostitutes and instructions should be issued in this

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<sup>973</sup> More specifically the Promotion of Equality & Prevention of Unfair Discrimination Act 4 of 2000.

<sup>974</sup> In Malawi, where prostitution is decriminalised the country's sex workers are often arrested by police and charged with minor offences such as loitering and disorderly conduct. In 2010, 14 sex workers who were detained by police and forced to undergo HIV tests sued the government for violating their privacy, in a case that has yet to be heard by the High Court. "Malawi sex workers unite against harassment" *Legalbrief Today*: General Issue No: 3162 (13 November 2012).

<sup>975</sup> From the Rocking Chair submission at 7 "We asked Amy whether decriminalising prostitution would make it easier for women to report such abuses. 'Oh please. No. It's like a child who gets abused by her father. She seldom tells anyone. Why? Because of the shame. Changing the law won't take away the shame.'"

<sup>976</sup> Family Policy Institute.

<sup>977</sup> Commission for Gender Equality Position Paper on Sex Work at 7.

<sup>978</sup> See paragraph 2.138 and further.

<sup>979</sup> The recommendation contained in a recent study that there should be an effort to respect and develop gender sensitivity in health, social welfare and HIV prevention services for prostitutes and to include and consult with transgender people in the process should be heeded. Boyce & Isaacs "An Exploratory Study of the Social Contexts, Practices and Risks of Men Who Sell Sex in Southern and Eastern Africa" 2011.

regard. These guidelines should include prohibiting police from confiscating condoms and from interfering or harassing health or outreach workers who distribute condoms. Discrimination affecting a prostitute's access to health care or right to equality can be dealt with through the equality courts.

2.469 The Commission does not support the call for mandatory health checks and certification of prostitutes. The Commission agrees that “women only” health checks make no public health sense because monitoring prostituted women would not protect them from HIV/AIDS or STDs. The fact is that male “clients” can and do originally transmit disease to the women.<sup>980</sup>

2.470 As the law currently stands, prostitutes can be charged with a number of offences in terms of the Sexual Offences Act. These offences are as follows: enticing; soliciting; importuning in a public place for immoral purposes; wilfully and openly exhibiting in indecent dress at any door or window in open view;<sup>981</sup> procuring;<sup>982</sup> residing in a brothel; assisting in the management of a brothel; and receiving money taken in a brothel.<sup>983</sup> Offences that relate to brothels and third parties will be dealt with in Chapter 4.

2.471 As stated above,<sup>984</sup> the Sexual Offences Amendment Act contains a potential anomaly. Although a child is legally allowed to consent to a sexual act from the age of 16, a consensual sexual act with a child is criminalised as exploitation of the child where such an act is accompanied by a reward. The aim seems clearly to be an extension of protection for children from exploitation. Accordingly, only the person who extends the reward is criminalised in terms of this section; the child is not criminalised. **The Commission reiterates that this Report in no way derogates from the criminalisation of under-aged (under 18) prostitution. The Commission endorses section 17 of the Sexual Offences Amendment Act and the use of 18 years as a defining line between child and adult prostitution.**

2.472 The offences in the Sexual Offences Act that are directly pertinent to this chapter are as follows:

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<sup>980</sup> Raymond “Legitimizing Prostitution as Sex Work” quoted in the Family Policy Institute submission; endorsed by the Christian Lawyers Association of South Africa.

<sup>981</sup> Section 19.

<sup>982</sup> Section 10.

<sup>983</sup> Section 3.

<sup>984</sup> See para 1.26 above.

## **Section 19: Sexual Offences Act 23 of 1957:**

### **19 Enticing to commission of immoral acts**

(1) Any person who entices, solicits, or importunes in any public place for immoral purposes, shall be guilty of an offence.

(2) Any person 18 years or older who wilfully and openly exhibits himself or herself in an indecent dress or manner at any door or window or within view of any public street or place or in any place to which the public have access, shall be guilty of an offence.

and

### **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; or

(b) in public commits any act of indecency with another person, shall be guilty of an offence. . .

2.473 When considering these offences, the Commission has questioned whether the effect of criminalising prostitution and the manner in which the provisions are framed are proportionate to the legislative objective. In other words, given the current social, political and economic assumptions, are the objectives valid today?

2.474 The predecessor to the Sexual Offences Act was the Immorality Act 5 of 1927. The original Immorality Act of 1927 did not deal with prostitution but with “illicit carnal intercourse between Europeans and Natives”.<sup>985</sup> Over the years the offences in the Immorality Act were repealed. In 1988 the title of the Act was changed to the Sexual Offences Act, which repealed all previous legislation, including the Immorality Act of 1927 and its amendments. The preamble of the Sexual Offences Act 23 of 1957 states that its purpose is “to consolidate and amend the laws relating to brothels and unlawful carnal intercourse” and other related offences. It is therefore important not to confuse or morph the contents of the repealed Immorality Act and the current Sexual Offences Act under the heading of the original Immorality Act, as they do not share the same objective.

2.475 In the *Jordan* matter,<sup>986</sup> the applicants argued that the purpose of the Sexual Offences Act was simply to enforce what the legislator regarded as the morality of the people; and to see to it that the law should uphold one particular moral position, namely that sex outside of marriage should be prohibited. SWEAT reiterated this argument in its submission by stating

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<sup>985</sup> See the preamble to the Immorality Act 5 of 1927.

<sup>986</sup> *Jordan v the State* 2002 (6) SA 642 (CC) at para 107.

that adult prostitution is a victimless crime, and that current laws on prostitution serve a particular moral viewpoint rather than the common good. In the view of the Constitutional Court, if one accepts that the aim was to enforce a particular conception of morality on the whole of society, the question arises whether the legislation must be regarded as having been saddled with this illegitimate purpose, or whether it can be regarded as having assumed a new purpose that would be legitimate and justifiable in an open and democratic society.<sup>987</sup> The Court held that the mere fact that the original legislative purpose of a statute might have been incompatible with current constitutional standards does not deprive it of the capacity to serve a legitimate governmental purpose today.<sup>988</sup>

2.476 Some of the effects of criminalisation are that, as with any offence, a prostitute faces the risk of imprisonment flowing from conviction for any of the offences in the Sexual Offences Act. This limits a person's right to freedom and security if that person engages in prostitution.

2.477 A reading of section 19 of the Sexual Offences Act – which prohibits enticing or soliciting for immoral purposes – shows that its objective is to target the social nuisance associated with street prostitution. Such nuisance would include noise, street congestion, and interference with innocent bystanders.

2.478 In *Canada v Bedford*<sup>989</sup> it was found that public solicitation for the purposes of prostitution is closely associated with street congestion and noise; oral harassment of non-participants; and general detrimental effects on passers-by or bystanders, especially children. The court found that the eradication of the nuisance-related problems caused by street solicitation is a pressing and substantial concern, and that sending the message that street solicitation for the purposes of prostitution is not to be tolerated constitutes a valid legislative aim.

2.479 It further found<sup>990</sup> that one needs to take into account the seriousness of the “nuisance” presented by street prostitution, which is accompanied by drug use and other crimes. Residents of vulnerable neighbourhoods have provided dramatic evidence of the harms associated with street prostitution, including the following: noise, impeding traffic, children witnessing acts of prostitution, harassment of residents, problems associated with

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<sup>987</sup> Supra para 108.

<sup>988</sup> Supra para 112.

<sup>989</sup> Supra para 114.

<sup>990</sup> Supra para 114.

drug use by prostitutes, unsanitary acts, violence, unwelcome solicitation of women and children by customers, and unwelcome solicitation of male residents by prostitutes. The court held that while it is fair to say that a prostitute might be able to avoid a “bad date” up front by negotiating details such as payment, services to be performed, and condom use, it is equally likely that the customer could pass muster at an early stage only to turn violent once the transaction is underway.<sup>991</sup> It is also possible that the prostitute may proceed even in the face of perceived danger, either because her judgment is impaired by drugs or alcohol or because she is so desperate for money that she feels compelled to take the risk.<sup>992</sup>

2.480 The Commission notes with concern that the vulnerability of prostitutes is exacerbated by substance abuse. The question of whether substance abuse drives women into prostitution or is introduced after commencing prostitution seems academic. Research has found that serious investment in drug rehabilitation, with intake centres nearby the solicitation areas, is essential.<sup>993</sup> **The Commission is of the view that substance abuse in the context of prostitution deserves further attention and intervention.**

2.481 Section 19 essentially criminalises soliciting, preventing adult prostitutes from offering their services in any public place. One of the benefits of non-criminalisation is said to be that where women are able to openly solicit or communicate with buyers they are better able to assess the risk presented by a buyer. From this perspective, it is unclear to what extent the prohibition on soliciting in public might actually cause or contribute to the harm that prostitutes experience. It is argued that criminalisation fosters violence because women on the street are forced to negotiate quickly and move to darker, more isolated areas to avoid arrest.<sup>994</sup> A related argument is that if prostitutes are able to take more time in screening potential buyers, purportedly because they would not fear being arrested, they would be more able to decline buyers with violent tendencies. Under a criminalised model, prostitutes must work in secrecy, far from protection services, to allow buyers complete anonymity; this further endangers the prostitute and adds to the vulnerability of selling sexual services on the street. Although contested,<sup>995</sup> the Commission for Gender Equality argues that this is the position for partial criminalisation too.<sup>996</sup>

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<sup>991</sup> Supra para 125.

<sup>992</sup> Supra para 125.

<sup>993</sup> Leggett T “Sex Workers in South Africa Worlds Apart” Nedbank ISS Crime Index No 6 (2000) 25 – 28.

<sup>994</sup> Feminisms “The Myths of Bedford v Canada: Why decriminalizing prostitution won’t help” August 7, 2011 available at <http://www.feminisms.org>.

<sup>995</sup> See paragraph 2.138 and further.

<sup>996</sup> Commission for Gender Equality Position Paper on Sex Work at 7.

2.482 The idea of screening, however, does not really address the problem of violence in prostitution. This theory merely accepts that violent buyers exist and will continue to exist and will continue to try to pick women up.<sup>997</sup> As in all relationships, it is difficult – if not impossible – to assess a partner’s proclivity to violence at the outset. Women living in poverty do not always have the luxury of refusing buyers they feel nervous about. The real problem is surely not the women’s physical location but the buyers’ proclivity to violence. If these men are violent, how would moving the transaction completely out of the public view to behind the closed door of a brothel make the transaction safer?<sup>998</sup>

2.483 According to *Canada v Bedford*<sup>999</sup> the prohibition against soliciting is not a dominant or even a significant factor among the many social, economic, personal and cultural variables that combine to place a “survival sex worker” at risk on the street. Rather it has been found to be a contributor to harm.<sup>1000</sup>

2.484 If economic hardship is one of the main reasons women enter prostitution, arguably such women would not want to move into a brothel where they would have to share their earnings with the brothel owners. These third parties have a vested economic interest in women pleasing the buyers, which could increase the pressure on women to perform acts they would not otherwise agree to.<sup>1001</sup> The *Bedford* trial record contains ample evidence that legal brothels in countries using the non-criminalised model may serve as a cover for child prostitution and trafficking of women, and are linked to organised crime.<sup>1002</sup> In the Netherlands and Australia, the illegal sector is said to comprise more than half of the prostitution industry.<sup>1003</sup> The United Nations *Special Rapporteur on Violence Against Women* reported that in 2004 alone, 405 cases of trafficking in women were discovered in the Netherlands. The *Special Rapporteur* reported that there were at least 50 documented murders of prostituted women in the Netherlands between 1992 and 2004, several of whom were “murdered in a brothel or ‘window’, and a few of them were murdered at home by their pimp.” The *Special Rapporteur* summarised her findings as follows:

[T]he new prostitution legislation of 2000 has not meant that prostitutes are now more safe. The ability to work indoors, the decriminalisation of organising prostitution and the legalisation of sex work have not removed the risk of being beaten, abused or coerced ... . In short, the new legislation’s goals of reducing

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Ibid.

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Ibid.

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Op cit para 114.

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*Canada v Bedford* at para 129.

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Feminisms “The Myths of Bedford v Canada” 2011.

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Ibid.

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Ibid.

the violence against women and the exploitation of women have not been met.<sup>1004</sup>

2.485 It is instructive to note that in a review of the Penal Code of Zambia in 2005, the actions of persons who persistently solicit or importune for immoral purposes was repealed and was replaced in section 146(1)(b) of the Code, in that such person commits a felony and is liable, upon conviction, to imprisonment for a term not exceeding fifteen years.

2.486 The safety of prostitutes on the street is clearly not an automatic outcome of non-criminalisation. Even brothel owners who advocate for non-criminalisation have justified the existence of brothels (as opposed to street prostitution and the associated public solicitation) by referring to the threat of violence against women, violence to community order, and the dangers associated with disease.<sup>1005</sup> Community concerns related to street prostitutes and solicitation have not changed in New Zealand following the non-criminalisation of prostitution.<sup>1006</sup> Paul Bellamy of the New Zealand Parliamentary Library concluded his research paper on the Prostitution Reform Act by stating that “[D]espite decriminalisation the industry remains controversial, with some issues remaining. These include the working conditions and the location of sex work.”<sup>1007</sup>

2.487 Some local governments in New Zealand have sought to restrict the practice of street solicitation. For instance, the Hamilton City Council passed a by-law in 2004 restricting the location of sex work and creating a “Permitted Brothel Area”. This was challenged unsuccessfully in the High Court (2006) and Court of Appeal (2007).<sup>1008</sup> The Manakau City Council (Regulation of Prostitution in Specified Places) Bill was introduced in 2010.<sup>1009</sup> Reported aspects of street prostitution that cause “significant concern” in affected areas include noise, anti-social behaviour, offensive and dangerous litter, soliciting during non-traditional times, aggressive solicitation, under-age prostitution and gang involvement.<sup>1010</sup> The presence of street-based prostitution is seen as undesirable, having a negative effect on people’s perceptions of the area and even on property values. Moral objections to prostitution

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<sup>1004</sup>

Ibid.

<sup>1005</sup>

Brents BG & Hausbeck K “Violence and Legalized Brothel Prostitution in Nevada Examining Safety, Risk and Prostitution Policy” *Journal of Interpersonal Violence* Vol 20 March 2005 270-295 downloaded from [jiv.sagepub.com](http://jiv.sagepub.com) at University of Maryland School of Law on 20 July 2010.

<sup>1006</sup>

New Zealand Parliament (author Bellamy Paul) Parliamentary Support Research Papers “Prostitution law reform in New Zealand” (July 2012) Parliamentary Library available at <http://www.parliament.nz>.

<sup>1007</sup>

Ibid.

<sup>1008</sup>

Ibid.

<sup>1009</sup>

Ibid.

<sup>1010</sup>

Ibid.

and the presence of street-based prostitutes underpin some community complaints, but CCTV data records show that regardless of moral issues, prostitution activity is associated with loitering, drunkenness, glue sniffing and other drug taking.<sup>1011</sup> Despite solicitation being legal in New Zealand, pressure applied to buyers by the community is said to have resulted in shortened negotiation times, leading to concerns about the increased endangerment of prostitutes.<sup>1012</sup>

2.488 According to the New Zealand Ministry of Justice, the Prostitution Reform Act does not regulate street prostitution. Certain territorial authorities have consequently introduced by-laws containing prohibitions on soliciting in or within view of a public place. When the law was passed, some people expressed the hope that the non-criminalisation of brothel keeping would encourage street-based prostitutes to work indoors. However, a study in 2008 found that there had been little movement between the street and indoor managed sectors.<sup>1013</sup> The New Zealand Ministry of Justice made positive reference to the success of the model strategy to address street-based prostitution in the 2004 British Home Office Co-ordinated Prostitution Strategy for England and Wales.<sup>1014</sup>

2.489 Although prostitution and soliciting remain illegal in England and Wales, the above-mentioned strategy has successfully been adapted to address local issues in Ipswich, England (the Ipswich Street Prostitution Strategy 2007–2012).<sup>1015</sup> The initiative has been managed by a joint strategic group comprising Ipswich Borough Council, Suffolk Constabulary, and health and social service providers (including mental health, drug and alcohol services, and organisations that work with prostitutes). The overall aim of completely eliminating street prostitution in Ipswich was realised in 2008. Tackling demand was seen as a priority for the police, and there was a zero-tolerance approach to kerb-crawling, which resulted in 140 arrests. Furthermore, newspaper advertisements have been removed.<sup>1016</sup>

2.490 When called to decide whether there is a sufficient connection between crime-creating legislation and an alleged interference with an individual's right to security of the person, the court must examine the effect of that legislation in the world in which it actually operates.<sup>1017</sup>

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<sup>1011</sup> New Zealand Ministry of Justice "Review of Street-based Prostitution in Manukau City" available at <http://www.justice.govt.nz>.

<sup>1012</sup> Ibid.

<sup>1013</sup> Ibid.

<sup>1014</sup> Ibid.

<sup>1015</sup> Ibid.

<sup>1016</sup> Safer Suffolk Partnership Board "Countrywide Strategy for on-street prostitution and sexual exploitation" Meeting held on 20 September 2011, report available at [www.transformingsuffolk.co.uk](http://www.transformingsuffolk.co.uk).

<sup>1017</sup> *Canada v Bedford* Ontario Court of Appeal March 26 2012 at para 147.

The world in which street prostitutes operate is one of dark streets and barren, isolated, silent places. It is a dangerous world, always bearing the risk of violence and even death.

2.491 In Canada, the Ontario Court of Appeal<sup>1018</sup> recently found that the ban on communicating in public for the purpose of prostitution is constitutional. Section 213(1)(c) of the Criminal Code, R.S.C. 1985, c. C-46 prohibits communicating for the purpose of prostitution in public. This prevents prostitutes from offering their services in public and particularly on the streets. The recently enacted Canadian Protection of Communities and Exploited Persons Act enacted in response to the *Bedford* decision (which partially criminalises prostitution) confirms this position by creating an offence that prohibits communicating – for the purpose of selling sexual services - in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre. Essentially, this provision prohibits behaviours that are similarly prohibited under section 19 of the Sexual Offences Act. New Zealand has also retained its Summary Offences Act, which classifies soliciting as offensive behaviour, because it was found that prostitutes’ visibility increases the likelihood that men will purchase sex. **The Commission has not found sufficient reason to recommend the repeal of the prohibition contained in section 19, and recommends the retention thereof with the necessary changes in language. The Commission is of the opinion that section 19 of the Sexual Offences Act meets the legislative objective of addressing blatantly visible harmful aspects of prostitution, thereby discouraging prostitution. The Commission agrees with the court in *Canada v Bedford* that the eradication of nuisance-related problems caused by street solicitation is a pressing and substantial concern, and that sending the message that street solicitation for the purposes of prostitution will not be tolerated constitutes a valid legislative aim. This recommendation could be incorporated into either the partial- or total criminalisation option. Section 40(1)(f) of the Criminal Procedure Act<sup>1019</sup> would therefore continue to enable a peace officer to arrest a prostitute who is openly soliciting clients.**<sup>1020</sup>

2.492 In respect of section 20(1A)(a) it is important to note that although this section effectively prohibits the core function of a prostitute’s work,<sup>1021</sup> it does not penalise “being” a

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<sup>1018</sup> *Canada v Bedford*.

<sup>1019</sup> Criminal Procedure Act 51 of 1977.

<sup>1020</sup> Soliciting is a crime in terms of section 19 of the Sexual Offences Act.

<sup>1021</sup> Therefore a person cannot be arrested simply for being known to the police as a prostitute – there has to be at least a reasonable suspicion that he or she had engaged in sexual intercourse or had performed an indecent act for reward (at a specified time with a specified person).

prostitute.<sup>1022</sup> For a woman who sells her sexual services, it could be argued that section 20(1A)(a) could affect her ability to reduce her risk of exploitation and harm because it would criminalise employing a pimp, driver or bodyguard. Such activities (eg hiring a driver) would be lawful in any other context – that is, not done in relation to prostitution or another criminal activity. It could be argued that the woman would be forced to choose between the substantial risk to personal safety that comes with not having protection and the risk of incarceration that comes with non-compliance with the prohibitions. In *Canada v Bedford*,<sup>1023</sup> the application judge is quoted at paragraph 362 as stating that “[T]hus while it is ultimately the client who inflicts violence upon a prostitute, in my view the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence”.<sup>1024</sup> Conversely, in the same case, it was argued that the personal decision to engage in prostitution – an inherently dangerous and antisocial activity – effectively breaks the causal chain between any added risk of harm and the criminal prohibitions that limit the venues at which, and the manner in which, the respondents can conduct the very dangerous activity they have chosen.<sup>1025</sup>

2.493 As there are a range of legal responses to prostitution in “open and democratic societies”,<sup>1026</sup> it is essentially a matter of policy to decide which legislative model accords with a government’s goals and strategies. In *S v Jordan* the Constitutional Court held that section 20(1A)(a) of the Sexual Offences Act does not infringe the constitutional right to privacy, freedom and security, and the right to economic activity. The Constitutional Court found that if the right to privacy was found to have been limited, the limitation was justified based on the legitimate aim of the state in proscribing prostitution. Furthermore, the diminution of dignity arises from the character of prostitution itself and not from the proscription of prostitution.<sup>1027</sup> It concluded that the Sexual Offences Act pursues an important and legitimate constitutional purpose, namely to outlaw commercial sex.

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<sup>1022</sup> This does not of course preclude the possibility of arrest on other charges related to prostitution, e.g. soliciting in contravention of sec 20(1A)(a) of the Act, or in terms of municipal by-laws.

<sup>1023</sup> *Canada v Bedford* Ontario Court of Appeal March 26 2012.

<sup>1024</sup> Supra 45.

<sup>1025</sup> Supra 55.

<sup>1026</sup> Meyerson 153.

<sup>1027</sup> Contrary to the *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) in which the Constitutional Court struck down the criminal prohibition against sodomy as an unjustifiable limitation of the rights of equality, dignity and privacy there is no interference by the law in respect of the expression of sexuality by a specific group of people. The prohibition strikes at any expression of sexuality coupled with economic gain.

2.494 The current overall legislative scheme (Sexual Offences Act and Sexual Offences Amendment Act) could be said to be aimed at eradicating, or at least discouraging, prostitution. The long title of the Criminal Law (Sexual Offences and Related Matters) Amendment Act<sup>1028</sup> states inter alia that its purpose is to comprehensively and extensively review and amend all aspects of the laws and the implementation of the laws relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences, in a single statute. The long title is followed by the preamble, which states that the Act is being enacted for a number of reasons, including that:

... women and children, being particularly vulnerable, are more likely to become victims of sexual offences, including participating in adult prostitution and sexual exploitation of children ...;

2.495 Pending the outcome of this Report, and despite the finding in *S v Jordan* that buyers were also contravening the law in terms of the Riotous Assemblies Act, the then Parliamentary Portfolio Committee on Justice and Constitutional Development decided to eradicate any uncertainty by incorporating a statutory offence into the Sexual Offences Act of 2007 criminalising the actions of buyers.<sup>1029</sup>

**2.496 The Commission is of the opinion that in South Africa, prostitution in its many guises – albeit when ostensibly voluntary – is clearly exploitative of women and men who provide sexual services. Even what appears to be chosen or self-initiated involvement in prostitution is usually a symptom of the inequality and marginalisation which are the daily lived experience of many impoverished women. In the Commission’s view, the exploitation of a person’s lack of alternatives does not amount to a considered exercise of choice. Most prostitution in South Africa can be considered an aspect of male violence against women and children. The Commission is of the view that legalising prostitution would increase the demand, both locally and internationally, for more prostituted persons, and would set up a culture in which prostitution and sexual coercion become normalised. Changing the legislative framework could be an extremely dangerous cultural shift juxtaposed against the high statistics of sexual crimes against women. Women would be considered even more expendable than at present. South Africa is grappling with high levels of violence against women, with sexual assault and intimate partner violence contributing to increased risks for HIV infection.<sup>1030</sup> The Commission is of the opinion that due to the**

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<sup>1028</sup> Which repealed all sections in the Sexual Offences Act except the sections relating to adult prostitution as this matter was still receiving the attention of the Commission.

<sup>1029</sup> This point will receive further attention in Chapter 3 below.

<sup>1030</sup> South African National AIDS Council” National Strategic Plan on HIV, STIs and TB 2012 - 2016” at 36.

**systemic inequality between men and women in South Africa, no form of legalisation of prostitution would magically address the power imbalance between the buyer and the prostitute; nor would it reduce the demand by buyers for unsafe or high-risk sex.** In New Zealand, despite the non-criminalised status of prostitution, evidence of physical and sexual assaults persists, with the majority of prostitutes making it clear that the law could not protect them from violence.<sup>1031</sup>

2.497 Some people may – even if subconsciously – consider prostitution a reasonable choice for a particular sector or class of women. Prostitution might then seem somehow acceptable for poor women, vulnerable women, and women of colour, instead of consistently being seen as sexual exploitation and a human rights violation. Any support for such a notion would amount to tolerating the creation of a separate, expendable, “throwaway” class of women. Research discussed in this chapter and submissions (written and oral) made to the Commission have shown that intrinsic to prostitution are numerous violations of human rights. These include sexual harassment, economic servitude, educational deprivation, job discrimination, partner and family violence, racism, classism, vulnerability to frequent physical and sexual assault, and being subjected to body invasions that are equivalent to torture. By legalising prostitution, one would fail to acknowledge that prostitution “preys” particularly on women who are vulnerable and who choose prostitution as a last resort.<sup>1032</sup> However, SWEAT argues that although women become prostitutes primarily because of economic necessity, criminalising prostitution has the effect of denying a choice by a vulnerable group to ensure their own livelihood; thus, criminalisation fails to respect their moral choice to sell sex for reward and to earn a living by using their own bodies. **With regard to this argument, the Commission is not convinced that changing the legal framework to one of non-criminalisation would address the violations or vulnerability experienced by prostitutes. Essentially it would seem that two legislative options remain, i.e. that of total criminalisation or that of partial criminalisation such as is found in the Nordic countries and Canada. Although the partial criminalisation model recognises the invidious position prostitutes find themselves in and it is reported by Max Waltman<sup>1033</sup> to have brought about a decrease in street prostitution and trafficking in Sweden, it is too early to report on the position in other Nordic countries or Canada. Furthermore the Commission for Gender Equality<sup>1034</sup> contends that prostitutes continue to suffer harassment from police and seldom report incidents of violence and coercion; that**

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<sup>1031</sup> Kelly et al 51.

<sup>1032</sup> RUHAMA’s position, endorsed by the FPI and the South African Christian Lawyers Association and supported by Doctors for Life International.

<sup>1033</sup> See paragraph 2.138 and further.

<sup>1034</sup> Commission for Gender Equality Position Paper on Sex Work at 7.

violence has increased; and that there is greater competition, declining prices and harsher conditions. Another important consideration is that Sweden's reported success is linked to the country being a strong welfare state, which is not the position here. Although this will be reflected as an option the Commission recommends that the selling of sexual services by an adult prostitute should remain criminalised, and that the prohibition in section 20(1A) be retained and reworded in keeping with the recommendations in this Report.

2.498 The retention of section 20(1A)(a) necessitates the retention, with the necessary grammatical amendments, of section 268 of the Criminal Procedure Act. Section 268 provides for a competent verdict in the event that the evidence on a charge of unlawful carnal intercourse or attempted unlawful carnal intercourse with another person does not prove that offence but rather the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6, or 7 of the Sexual Offences Amendment Act.

2.499 The Commission finds that section 277 of the Criminal Procedure Act, which regulates the admission of evidence of character and previous sexual experience in criminal matters, is non-specific in nature and is not dependent on the legislative framework applicable to adult prostitution. Section 277 should therefore not be amended.

2.500 A topic often discussed in conjunction with non-criminalising prostitution is **sex tourism and the benefits thereof**. Although legalising prostitution may provide an initial benefit in the form of increased tourism, the experiences of other countries have shown that this may have an unintended but severe long-term economic consequence. Once the pendulum swings back from the initial upturn in tourism, there is a real risk of an increased presence of overt prostitution with concomitant urban decay and a sharp decline in general tourism. The Netherlands and Madagascar are changing their laws to implement strict regulations on prostitution in an attempt to turn the tide of diminishing tourism. Although in South Africa the law and daily reality often do not tally, the country has never been advertised as a sex tourism destination. Such a perception or label is not something the South African Government, and especially the Minister of Tourism, want ascribed to our nation.<sup>1035</sup> When considering which employment and tourist market segment we wish to attract to South Africa, one might conclude that our large home-based hospitality industry is unlikely to want to attract

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<sup>1035</sup> Submission to the SALRC by the Minister of Tourism.

buyers who have a predisposition to gender-based violence – a trait known to afflict many buyers of sexual services. South Africa has all the appeal necessary to attract high tourist volumes without the need to erode its “brand value” by positioning the country as a sex tourist destination.<sup>1036</sup> **The Commission cannot see any benefit in rebranding South Africa as a sex tourism destination.**

2.501 **The Commission recommends that the prohibitions contained in sections 19 and 20(1A)(a) be retained, but that these sections be repealed and re-enacted with the necessary changes to the language of the prohibition. However, the Commission acknowledges that many prostitutes find themselves in a vulnerable position before they engage in prostitution and also during their engagement in prostitution. Therefore, the Commission recommends that where a prostitute is found to be in conflict with the law these prohibitions be accompanied by an option to divert out of the criminal justice system, so that people may access supportive resources and systems to exit prostitution. Diversion may follow processes already available to the prosecution or a more formalised system akin to that provided for in the Child Justice Act. The Commission agrees with Doctors for Life that criminalisation provides a legal mechanism for a prostitute to be removed from the coercive circumstances she finds herself in, and to provide people with the opportunity to enter rehabilitation, training and reintegration programmes.** The need for access to skills development programmes in order to gradually exit from prostitution has been endorsed by – inter alia – POWA, Nation Building, Doctors for Life, the Islamic Unity Convention and the Family Policy Institute. As discussed in this chapter, the aims of the 2009–2014 Medium Term Strategic Framework and the National Planning Commission show a political commitment to addressing major developmental challenges in South Africa. Diversion presents an opportunity to address the vulnerability and marginalisation of prostitutes through skilling and education programmes that would equip them to participate in the formal economy. **The Commission is of the view that this move away from the formal criminal justice system would help to fulfil South Africa’s obligation in terms of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), namely to take all legal and other measures that are necessary to provide women with effective protection against gender-based violence, and to protect women against all kinds of violence. This approach does not preclude women in this situation from accessing assistance from the Department of Social Development in the form of counselling, skills training and**

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<sup>1036</sup> Nation Building; RM Verreyne, Rev Christian Reformed Church.

**development, family support services and internships as is provided for in its Customer Service Charter.**

2.502 Parts 4 and 7 of the Policy Directives of the National Prosecuting Authority indicate that although diversion is primarily employed in the case of juvenile offenders, it could also be considered for adults. In the case of adult offenders who were involved in crimes that were found to be relatively lacking in seriousness within the specific context, diversion options such as victim-offender mediation programmes and the performance of community service could be considered.<sup>1037</sup> Currently there are several established diversion service providers in South Africa which provide a wide range of developmental and therapeutic interventions. Offenders are not subjected to trial; they are not convicted and, for this reason do not receive a criminal record. Records of any previous involvement in a diversion option are, however maintained.<sup>1038</sup>

2.503 The aim of diversion is essentially to encourage a person to be accountable for the harm they have caused, and to promote their reintegration into society without burdening the person with a criminal record. It may include some object as compensation or provide an opportunity for people affected by the harm to express their views or promote reconciliation, depending on the circumstances.<sup>1039</sup> Although harm is suffered by communities from the nuisance associated with prostitution, evidently the person most harmed by prostitution is the prostitute herself. The benefit of diversion is that it promotes dignity and wellbeing, and assists the person to view him- or herself as having something valuable to contribute to society.<sup>1040</sup>

2.504 Importantly, diversion programmes embody restorative justice principles. Such principles focus on reconciliation, restitution and the successful integration of victims and offenders as productive members of safe communities, rather than retribution and punishment.<sup>1041</sup> Based on admittance of guilt and the showing of remorse, recommendations are made on the suitability of diversion as well as the types of programmes to be attended.<sup>1042</sup> Diversion programmes for prostitutes could include community service, life-skills or

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<sup>1037</sup> Davis & Busby "Diversion as an option for certain offenders: the view of programme participants diverted during the Hatfield Court Pilot Project" *Acta Criminologica* 19(1) 2006 at 102.

<sup>1038</sup> Jules-Macquet R "Diversion and Non-Custodial Sentencing: Trends and Analysis" NICRO 2013 at 5.

<sup>1039</sup> Op cit 103.

<sup>1040</sup> Ibid.

<sup>1041</sup> Op cit 104.

<sup>1042</sup> Ibid.

responsibility training, attendance at a rehabilitation programme (eg drug and alcohol), or therapy (if a psychological problem seems to be present).<sup>1043</sup> Based on the identified socio-economic problems faced by the majority of women in prostitution, there is a clear need for state agencies to recognise and establish the relevance of prostitution to their agency obligations. Programmes and benefits could be shaped to address the challenges prostitutes face.

2.505 Diversion can be defined as the channelling of prima facie cases away from the criminal justice system, with or without conditions imposed. Conditions can range from a simple caution or referral to the welfare system to participation in particular programmes and/or reparation or restitution. Diversion can take place prior to arrest, charge, plea or sentencing.<sup>1044</sup> If compliance proves problematic, the ultimate sanction that the prosecutor can apply is the reinstatement of the prosecution and to continue with the case through trial.<sup>1045</sup>

**2.506 The Commission agrees with Doctors for Life that the welfare of the minor dependents of the person entering a diversion programme is of critical importance for the peace of mind of the person, and consequently the success of the programme. The Commission recommends that the Court, in making an order for diversion, should appoint a social worker or order the Department of Social Development to assess the best options to facilitate the goal of a reintegrated and functioning family. The Commission agrees that successful diversion aimed at exit from prostitution would depend on an integrated approach. To this end the Commission recommends a national strategy on prostitution, which should involve regional or district intersectoral task teams. Such task teams must represent the police, prosecutors, welfare officers, health care professionals and NGOs that provide exit programmes, with these various teams coordinating their efforts to fulfil the exit strategies.**

**2.507 The Commission finds merit in the argument by a number of respondents that ideally, following successful diversion and the completion of rehabilitation, training and reintegration, a former prostitute's prior criminal record should be expunged.<sup>1046</sup> The Commission agrees that the prospect of obtaining a clean record must be used as a motivating factor for women to exit prostitution and begin a new life equipped and**

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<sup>1043</sup> Op cit 106.

<sup>1044</sup> SALC *Juvenile Justice* Report Project 106 2000.

<sup>1045</sup> Badenhorst C & Conradie H "Diversion: the present position and proposed future provisions" *Acta Criminologica* 17(2)2004.

<sup>1046</sup> Endorsed by GT Ndlovu, Child of God; SM Hadebe, Child of God; S Tegg, Full Gospel Church; I & B Wilson, Presbyterian Church; Christian Lawyers Association of South Africa; Rocking Chair submission.

fully integrated into society.<sup>1047</sup> The unfortunate circumstances that force women into prostitution should not be used to chain them to their past indefinitely. As a consequence, all recorded criminal activity associated with a woman's life in prostitution must be rescinded when the woman agrees to and complies with the assistance offered by state-funded exit programmes.

## I Summary and recommendation

2.508 The Commission has not found the legislative options of non-criminalisation and regulation to be preferred options. Non-criminalisation will not automatically provide labour benefits i.e. entitle prostitutes to protection in terms of the Basic Conditions of Employment Act or the Compensation for Occupational Injuries and Diseases Act or provide work related benefits such as pension. The Labour Relations Act also expressly excludes independent contractors and therefore does not protect a prostitute who works for herself. The Commission has found that non-criminalisation does not align with the aims of the ILO Decent Work Agenda, the Decent Work Programme for South Africa or the New Growth Path i.e. to provide decent and productive work that will contribute to reducing inequality and defeating poverty. Legalising prostitution does not fit comfortably into the international definition of decent work and can hardly be seen to be a solution to poverty or an employment option for poor or marginalised people. The short term financial benefits of prostitution do not translate into financial independence or a way out of poverty and economic inequality. The Commission is of the opinion that prostitution should not be recognised as a reasonable means to secure a person's living in South Africa and should not, from a formal labour perspective, be considered work or decent work.

2.509 The Commission is of the view that allegations of police brutality and extortion are not unique to prostitution and should be dealt with as a police problem that requires corrective measures to be taken. The chance of a change in the law addressing this abuse is negligible. Within the South African context and given the high levels of gender violence and inequality added to the country's challenge of poverty, the exploitation of especially women in prostitution would seem to be inherent in the institution of prostitution – and if not inherent then at least dependent on these contingent external factors. The argument that legalising prostitution would refocus police on the criminal aspects associated with prostitution has been

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<sup>1047</sup> Endorsed by Doctors for Life and the Christian Lawyers Association of South Africa.

found to be flawed. In countries where prostitution is regulated or non-criminalised the illegal sector expands alongside the legal sector, exacerbating the vulnerability of prostitutes in the illegal sector. The potential for exploitation and abuse of power by “employers” is embedded in the political economy of the sex industry, with all of these challenges being multiplied for non-nationals.

2.510 The Commission is of the view that non-criminalisation and regulation holds risks of an expansion of the illegal trade in child prostitution and trafficking and an increase in legal and illegal migration. The Commission has concluded that prostitution in South Africa is exploitative, and that a significant number of women who are coerced into a lifestyle of prostitution through economic marginalisation (as a result of poverty, lack of education and inequality) are harmed in this way.

2.511 In considering the partial criminalisation model (where all roleplayers are criminalised with the exception of the prostitute) the Commission has found the position in Sweden and the recent developments in Canada instructive. This legislative option aligns with the Commission’s conclusion that prostitution should be viewed as a form of exploitation or coercion resulting from the economic marginalisation of women through educational deprivation and job discrimination, ultimately rendering them vulnerable to recruitment into prostitution. The curtailment of trafficking in persons for prostitution seems to go hand-in-hand with strong measures to eliminate the demand for women and children. Research on the position in Sweden reflects a decline in trafficking and illegal immigrants. Although this model seems to present a legislative option for consideration, the Commission is mindful that the Commission for Gender Equality has raised a number of concerns pertaining to this option, namely that it results in a decline in condom usage; gives rise to a significant increase in stigma and discrimination; and causes prostitutes to work in secrecy, far from protection services, to allow buyers complete anonymity endangering the prostitute and adding to the vulnerability of selling sexual services on the street. Further that this model results in prostitutes continuing to suffer harassment from police and that they seldom report incidents of violence and coercion; that violence has increased; and that there is greater competition, declining prices and harsher conditions. However research in Sweden by Max Waltman<sup>1048</sup> shows that this model has brought about a decrease in street prostitution and trafficking in Sweden. It is important to consider that the demographics in Sweden are markedly different to that of South Africa in respect of our porous borders, the number of women engaging in prostitution, the number of illegal immigrants already in the country, and the levels of poverty

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<sup>1048</sup> See paragraph 2.138 and further.

and unemployment. South Africa also does not provide a social service net for the majority of able bodied employable adults who are unemployed. The success of the Swedish model is in part ascribed to it being a strong welfare state. The effect of the recently changed dispensation in Canada is also uncertain. Prostitution was until recently legal for the prostitute and buyer while everything around it was illegal and now following a finding of unconstitutionality has become legal for the prostitute only and only in certain circumstances. Action groups<sup>1049</sup> are already mobilising to contest the constitutionality of the newly enacted law and evidence of whether the Protection of Communities and Exploited Persons Act will have the desired effect of protecting exploited women is yet to be seen. In the *Jordan* case the Constitutional Court found the position in South Africa to be constitutional.

2.512 If government elects to enact legislation in line with partial criminalisation the Commission suggests that section 19 of the Sexual Offences Act should be repealed and that provisions criminalising soliciting and committing sexual acts in a public place should be criminalised in the Sexual Offences Amendment Act. It is recommended that where prostitutes find themselves in conflict with the law options for diversion may include those available already for low level crime or that provisions similar to that provided for in the Child Justice Act should be enacted. For ease of evaluation the latter option is reflected below. Although a formal costing has not been done, it is anticipated that diversion will improve the lives of prostitutes who agree to be diverted and will in turn provide cost savings in criminal justice, health and human services systems. As an intervention it has the potential of addressing the root causes of women engaging in prostitution, thereby reducing repetitive arrests. At a prevention level it may offer women with tools to examine future behaviour and provide opportunities for new and different choices in decision making. Diversion would ideally be available to prostitutes and buyers. A number of innovative programs like The Sage Project<sup>1050</sup> which allows first offenders charged with certain prostitution crimes to bypass the court system by participating in a course and paying a sliding scale administrative fee have been found cost effective, stable and sustainable.

2.513 The Commission then also suggests that section 20(1A) of the Sexual Offences Act should be repealed in so far as the actions of the prostitute are criminalised. Legislation in this regard may provide as follows:

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<sup>1049</sup> Coutts Matthew "What is and is not legal under Canada's new prostitution laws" *Daily Brew* available at <http://ca.news.yahoo.com>.

<sup>1050</sup> The Sage Project First Offender Prostitution Program webpage <http://www.sagesf.org>.

## **1 Option 1: Partial criminalisation (Prostitute not criminalised)**

### ***Soliciting to commit a sexual act***

(1) A person 18 years or older (“A”) who unlawfully and intentionally entices, solicits, or importunes in any public place to commit a sexual act with a person (“B”) for financial or other reward, favour or compensation to A or to a third person (“C”) is guilty of the offence of soliciting to commit a sexual act.<sup>1051</sup>

(2) A person 18 years or older (“A”) who wilfully and openly exhibits himself or herself at any door or window or within view of any public street or place or in any place to which the public have access, with the intention of enticing, soliciting or importuning another person to commit a sexual act for financial or other reward, favour or compensation is guilty of the offence of exhibiting to commit a sexual act.

(3) Reference to a public place includes a vehicle in a street or public place.

### ***Committing sexual acts in public***

(1) A person 18 years or older (“A”) who unlawfully and intentionally commits a sexual act with a person (“B”), for financial or other reward, favour or compensation to B or to a third person (“C”) in public is guilty of the offence of committing a sexual act in public.

(2) Reference to a public place includes a vehicle in a street or public place.

### ***Consideration of diversion***

(1) A matter may, after consideration of all relevant information presented, including whether the person (“A”) has a record of previous diversions, be considered for diversion if –

- (a) A acknowledges responsibility for the offence;
- (b) A has not been unduly influenced to acknowledge responsibility;
- (c) there is a prima facie case against A;
- (d) A consents to diversion; and

- (e) the prosecutor indicates that the matter may be diverted.

### ***Diversion order***

- (1) A prosecutor may divert a matter involving a person who is alleged to have committed a prostitution-related offence and may select an appropriate diversion option.
- (2) If a matter is diverted, the person alleged to have committed a prostitution-related offence must appear before a magistrate in chambers to have the diversion option made an order of court.
- (3) If a prosecutor decides not to divert a matter, he or she must refer the matter to court for adjudication.
- (4) The court may order diversion if the court is satisfied that the order is appropriate and will benefit the reintegration of the person into society.
- (5) Diversion options include –
  - (a) Compulsory attendance at a specified centre or place for a specified vocational, educational or therapeutic purpose, which may include a period or periods of temporary residence;
  - (b) Referral to intensive therapy to treat or manage problems that have been identified as a cause of the person coming into conflict with the law, which may include a period or periods of temporary residence.

### ***Provision and accreditation of diversion programmes and diversion service providers***

- (1) A prosecutor or court may only refer a matter for diversion to a diversion programme and diversion service provider that has been accredited and has a valid certificate of accreditation.
- (2) (a) The Cabinet member responsible for social development, in consultation with the Cabinet members responsible for the administration of justice, education, correctional services, safety and security and health, must –
  - (i) create a policy framework to develop the capacity within all levels of Government and the non-governmental sector to establish, maintain and develop programmes for diversion;
  - (ii) establish and maintain a system for accreditation, as prescribed, of programmes for diversion and diversion service providers; and
  - (iii) ensure the availability of resources to implement diversion programmes, as prescribed.

- (b) The system for accreditation referred to in paragraph (a)(ii) must contain –
  - (i) criteria for the evaluation of diversion programmes;
  - (ii) criteria for the evaluation of the content of diversion programmes, to ensure they reflect a meaningful and adequate response to the harm caused by prostitution-related offences and provide appropriate and relevant training and skills for a person’s successful integration into society and the formal economy;
  - (iii) mechanisms to monitor diversion programmes and diversion service providers in respect of their ability to render quality service in achieving the objectives of diversion and their ability to promote compliance with diversion orders;
  - (iv) measures for the removal of diversion programmes and diversion service providers from the system, where appropriate.
- (c) The Cabinet member responsible for social development must –
  - (i) before the commencement of this Act, table the policy framework and system for accreditation referred to in (a)(i) and (ii) in Parliament;
  - (ii) three months after tabling the policy framework and system for accreditation in Parliament, publish a notice in the *Gazette*, inviting applications for the accreditation of diversion programmes and diversion service providers, as provided for in the policy framework and system for accreditation referred to in subparagraph (i), which applications must be submitted within four months from the publication of the notice;
  - (iii) within four months of the closing date for applications referred to in subparagraph (ii), ensure that all applications received are considered and decided on, with preference being given to the finalisation of applications in respect of diversion programmes and diversion service providers which existed at the time of commencement of the Act.
- (d) After the expiry of the time limits referred to in paragraph (c), all applicants for accreditation must be dealt with in the manner and within the time limits determined in the policy framework and system for accreditation.
- (e) The Cabinet member responsible for social development must issue a prescribed certificate of accreditation to each diversion programme and diversion service provider that is accredited in terms of this section.
- (f) A certificate of accreditation referred to in paragraph (e) is valid for a maximum period of four years from the date of accreditation.

- (g) A quality assurance process must be conducted in the prescribed manner in respect of each accredited diversion programme and diversion service provider.

(3)(a) The Cabinet member responsible for social development must publish the particulars of each diversion programme and diversion service provider that is accredited or removed from the system in terms of this section in the *Gazette* within 30 days of accreditation or removal.

(b) The Director-General: Social Development must, immediately after any publication referred to in paragraph (a), provide a copy of the publication to –

- (i) the relevant role-players falling under his or her jurisdiction; and
- (ii) the Director-General: Justice and Correctional Services, who must distribute the publication to all relevant role-players who are involved in the administration of this Act.

### ***Monitoring of compliance with diversion order***

(1) When making a diversion order, the court referred to in section xx must identify a probation officer or other suitable person to monitor the person's compliance with the diversion order.

(2) If a person fails to comply with the diversion order, the probation officer or person identified in terms of section (1) must, in the prescribed manner, notify the magistrate in writing of the failure.

### ***Failure to comply with diversion order***

(1) If a person fails to comply with any diversion order, the prosecutor may decide –

- (a) to proceed with the prosecution; or
- (b) not to go to trial, but to place the person on another diversion option which is more onerous than the diversion option originally decided on.

(2) If a person fails to comply with any diversion order, the court referred to in section xx may, on being notified of the failure in the prescribed manner, issue a warrant of arrest for the person or cause a summons to be issued in respect of the person, to appear before the court.

(3) The court may-

- (a) make an appropriate order to assist the person to comply with the diversion order;

- (b) change the diversion order to ensure compliance; or
- (c) record the acknowledgment of responsibility made by the person as an admission referred to in section 220 of the Criminal Procedure Act, and proceed with trial.

2.514 The Commission suggests the amendment of section 268 of the Criminal Procedure Act by the substitution of the following section for that section:

**268. [Statutory unlawful carnal intercourse] Committing of sexual acts in public by persons 18 years or older**

If the evidence on a charge of [unlawful carnal intercourse or attempted unlawful carnal intercourse with another person in contravention of any statute] committing sexual acts in public by persons 18 years or older as contemplated in clause xx of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 does not prove that offence but -

- (a) the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;
- (b) the offence of common assault; or
- (c) the statutory offences of -
  - (i) (ii) soliciting [, enticing or importuning such other person to have unlawful carnal intercourse] to commit a sexual act as contemplated in clause xx of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007;
  - (iii) [soliciting, enticing or importuning such other person to commit an immoral or indecent act; or
  - (iv) conspiring with such other person to have unlawful carnal intercourse],

the accused may be found guilty of the offence so proved.

## **2 Option 2: Total criminalisation**

2.515 The Commission is of the view that the preferred option would be that of total criminalisation. It has found insufficient reason to recommend a change from the current system other than for the need to place all crimes in one statute and to amend the language. Changing the legislative framework could be an extremely dangerous cultural shift juxtaposed against the high statistics of sexual crimes against women. Women would be considered even more expendable than at present. Due to the systemic inequality between men and

women in South Africa, no form of legalisation of prostitution would magically address the power imbalance between the buyer and the prostitute; nor would it reduce the demand by buyers for unsafe or high risk sex. Criminalisation provides a legal mechanism for a prostitute to be removed from the coercive circumstances she finds herself in, and where this model partners with diversion provides people with the opportunity to enter rehabilitation, training and reintegration programmes. The Commission therefore recommends that sections 19 and 20(1A) of the Sexual Offences Act should be repealed and that provisions criminalising soliciting; the commission of sexual acts in a public place and the making available of sexual services by persons 18 years or older should be criminalised in the Sexual Offences Amendment Act. Options for diversion may include those available already or a system similar to that provided for in the Child Justice Act. With regard to diversion the same comment as provided in Option 1 above applies here. Legislation in this regard may provide as follows:

### ***Soliciting to commit a sexual act***

(1) A person 18 years or older (“A”) who unlawfully and intentionally entices, solicits, or importunes in any public place to commit a sexual act with a person (“B”) for financial or other reward, favour or compensation to A or to a third person (“C”) is guilty of the offence of soliciting to commit a sexual act.<sup>1052</sup>

(2) A person 18 years or older (“A”) who wilfully and openly exhibits himself or herself at any door or window or within view of any public street or place or in any place to which the public have access, with the intention of enticing, soliciting or importuning another person to commit a sexual act for financial or other reward, favour or compensation is guilty of the offence of exhibiting to commit a sexual act.

(3) Reference to a public place includes a vehicle in a street or public place.

### ***Committing sexual acts in public***

(1) A person 18 years or older (“A”) who unlawfully and intentionally commits a sexual act with a person (“B”), for financial or other reward, favour or compensation to B or to a third person (“C”) in public is guilty of the offence of committing a sexual act in public.

(2) Reference to a public place includes a vehicle in a street or public place.

### ***Making available of sexual services by persons 18 years or older***

A person 18 years or older (“A”) who unlawfully and intentionally makes available his or her services to a person (“B”), for financial or other reward, favour or compensation to A or to a third person (“C”) —

(a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or

(b) by committing a sexual act with B,

is guilty of the offence of making available his or her sexual services for reward.

### ***Consideration of diversion***

(1) A matter may, after consideration of all relevant information presented, including whether the person (“A”) has a record of previous diversions, be considered for diversion if —

(a) A acknowledges responsibility for the offence;

(b) A has not been unduly influenced to acknowledge responsibility;

(c) there is a prima facie case against A;

(d) A consents to diversion; and

(e) the prosecutor indicates that the matter may be diverted.

### ***Diversion order***

(1) A prosecutor may divert a matter involving a person who is alleged to have committed a prostitution-related offence and may select an appropriate diversion option.

(2) If a matter is diverted, the person alleged to have committed a prostitution-related offence must appear before a magistrate in chambers to have the diversion option made an order of court.

- (3) If a prosecutor decides not to divert a matter, he or she must refer the matter to court for adjudication.
- (4) The court may order diversion if the court is satisfied that the order is appropriate and will benefit the reintegration of the person into society.
- (5) Diversion options include –
  - (a) Compulsory attendance at a specified centre or place for a specified vocational, educational or therapeutic purpose, which may include a period or periods of temporary residence;
  - (b) Referral to intensive therapy to treat or manage problems that have been identified as a cause of the person coming into conflict with the law, which may include a period or periods of temporary residence.

### ***Provision and accreditation of diversion programmes and diversion service providers***

- (1) A prosecutor or court may only refer a matter for diversion to a diversion programme and diversion service provider that has been accredited and has a valid certificate of accreditation.
- (2)
  - (a) The Cabinet member responsible for social development, in consultation with the Cabinet members responsible for the administration of justice, education, correctional services, safety and security and health, must –
    - (i) create a policy framework to develop the capacity within all levels of Government and the non-governmental sector to establish, maintain and develop programmes for diversion;
    - (ii) establish and maintain a system for accreditation, as prescribed, of programmes for diversion and diversion service providers; and
    - (iii) ensure the availability of resources to implement diversion programmes, as prescribed.
  - (b) The system for accreditation referred to in paragraph (a)(ii) must contain –
    - (i) criteria for the evaluation of diversion programmes;
    - (ii) criteria for the evaluation of the content of diversion programmes, to ensure they reflect a meaningful and adequate response to the harm caused by prostitution-related offences and provide appropriate and relevant training and skills for a person's successful integration into society and the formal economy;

- (iii) mechanisms to monitor diversion programmes and diversion service providers in respect of their ability to render quality service in achieving the objectives of diversion and their ability to promote compliance with diversion orders;
  - (iv) measures for the removal of diversion programmes and diversion service providers from the system, where appropriate.
- (c) The Cabinet member responsible for social development must –
- (i) before the commencement of this Act, table the policy framework and system for accreditation referred to in (a)(i) and (ii) in Parliament;
  - (ii) three months after tabling the policy framework and system for accreditation in Parliament, publish a notice in the *Gazette*, inviting applications for the accreditation of diversion programmes and diversion service providers, as provided for in the policy framework and system for accreditation referred to in subparagraph (i), which applications must be submitted within four months from the publication of the notice;
  - (iii) within four months of the closing date for applications referred to in subparagraph (ii), ensure that all applications received are considered and decided on, with preference being given to the finalisation of applications in respect of diversion programmes and diversion service providers which existed at the time of commencement of the Act.
- (d) After the expiry of the time limits referred to in paragraph (c), all applicants for accreditation must be dealt with in the manner and within the time limits determined in the policy framework and system for accreditation.
- (e) The Cabinet member responsible for social development must issue a prescribed certificate of accreditation to each diversion programme and diversion service provider that is accredited in terms of this section.
- (f) A certificate of accreditation referred to in paragraph (e) is valid for a maximum period of four years from the date of accreditation.
- (g) A quality assurance process must be conducted in the prescribed manner in respect of each accredited diversion programme and diversion service provider.
- (3)(a) The Cabinet member responsible for social development must publish the particulars of each diversion programme and diversion service provider that is accredited or removed from the system in terms of this section in the *Gazette* within 30 days of accreditation or removal.
- (b) The Director-General: Social Development must, immediately after any publication referred to in paragraph (a), provide a copy of the publication to –

- (i) the relevant role-players falling under his or her jurisdiction; and
- (ii) the Director-General: Justice and Correctional Services, who must distribute the publication to all relevant role-players who are involved in the administration of this Act.

### ***Monitoring of compliance with diversion order***

- (1) When making a diversion order, the court referred to in section xx must identify a probation officer or other suitable person to monitor the person's compliance with the diversion order.
- (2) If a person fails to comply with the diversion order, the probation officer or person identified in terms of section (1) must, in the prescribed manner, notify the magistrate in writing of the failure.

### ***Failure to comply with diversion order***

- (1) If a person fails to comply with any diversion order, the prosecutor may decide –
  - (a) to proceed with the prosecution; or
  - (b) not to go to trial, but to place the person on another diversion option which is more onerous than the diversion option originally decided on.
- (2) If a person fails to comply with any diversion order, the court referred to in section xx may, on being notified of the failure in the prescribed manner, issue a warrant of arrest for the person or cause a summons to be issued in respect of the person, to appear before the court.
- (3) The court may-
  - (a) make an appropriate order to assist the person to comply with the diversion order;
  - (b) change the diversion order to ensure compliance; or
  - (c) record the acknowledgment of responsibility made by the person as an admission referred to in section 220 of the Criminal Procedure Act, and proceed with trial.

The amendment of section 268 of the Criminal Procedure Act by the substitution of the following section for that section:

**268. [Statutory unlawful carnal intercourse] Making available of sexual services by persons 18 years or older**

If the evidence on a charge of [unlawful carnal intercourse or attempted unlawful carnal intercourse with another person in contravention of any statute] making available of sexual services by persons 18 years or older as contemplated in clause xx of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 does not prove that offence but -

- (a) the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;
- (b) the offence of common assault; or
- (c) the statutory offences of -
  - (i) [committing an immoral or indecent act with such other person] committing sexual acts in public as contemplated in clause xx of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; or
  - (ii) soliciting [, enticing or importuning such other person to have unlawful carnal intercourse] to commit a sexual act as contemplated in clause xx of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007;
  - (iii) [soliciting, enticing or importuning such other person to commit an immoral or indecent act; or
  - (iv) conspiring with such other person to have unlawful carnal intercourse],

the accused may be found guilty of the offence so proved.

# CHAPTER 3: PEOPLE WHO PAY FOR SEXUAL SERVICES: THE CLIENT OR BUYER

## A Introduction and background

3.1 The aims of this chapter are to consider a definition of the buyer of sexual services; to discuss the different legal approaches used in respect of buyers; to evaluate the submissions made to the Commission in this regard; and to arrive at a suitable legal approach for South Africa.

3.2 The chapter starts with a brief discussion on relevant terminology. It then provides an overview of selected theoretical approaches to buyers of sexual services, which underpin the legal models identified in the Discussion Paper. The overview is followed by an exposition of the existing legal position in South Africa and a comparative summary of the law as it relates to buyers of sexual services. The chapter then identifies a number of contextual issues relevant to the role of the law in addressing the buyer aspect of prostitution. These issues include the following: understanding the demand for prostitution; who the purchaser is, and why people pay for sexual services; the impact of engaging in prostitution on and attitude of people paying for sexual services towards prostitutes; the impact on society; and the impact of criminalising people who pay for sexual services. The chapter concludes with an exposition of pertinent submissions made to the Discussion Paper,<sup>1053</sup> followed by an evaluation of the chapter. The final section lists the Commission's recommendations for the most suitable legal response in respect of people who pay for sexual services.

## B Defining a person who pays for sexual acts

3.3 Despite the fact that people who pay for sexual services are integral to the occurrence of prostitution, society and most research focus only on prostitutes. Buyers have been largely ignored or hidden from the public discourse on prostitution. Consequently, although a proliferation of terms – mostly derogatory – are used to describe prostitutes, the

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<sup>1053</sup> SALRC *Sexual Offences: Adult Prostitution* Discussion Paper 2009.

words used to describe people who pay for sexual services are often euphemisms or neutral economic descriptions, such as “johns”, “clients”, “buyers” or “consumers”.

3.4 In *S v Jordan*, the minority judgment of O’Regan and Sachs JJ describes this duality of approach as follows:

The female prostitute has been the social outcast, the male patron has been accepted or ignored. She is visible and denounced, her existence tainted by her activity. He is faceless, a mere ingredient in her offence rather than a criminal in his own right, who returns to respectability after the encounter. In terms of the sexual double standards prevalent in our society, he has often been regarded either as having given in to temptation, or as having done the sort of thing that men do. Thus, a man visiting a prostitute is not considered by many to have acted in a morally reprehensible fashion. A woman who is a prostitute is considered by most to be beyond the pale. The difference in social stigma tracks a pattern of applying different standards to the sexuality of men and women. ...[T]he stigma is prejudicial to women, and runs along the fault lines of archetypal presuppositions about male and female behaviour, thereby fostering gender inequality.<sup>1054</sup>

3.5 As reflected in the Discussion Paper<sup>1055</sup> the question of whether the Commission should employ the terms “prostitution” and “prostitutes” or “commercial sex work” and “sex workers” received considerable attention. This dilemma had featured strongly in the deliberations of the Commission. However, the terminology used for people who pay prostitutes or give a reward for sexual services was, regrettably, not considered. Consequently, interchangeable terms were used. The Commission has in the course of its research found that the words “buyer”, “client”, “johns”, “users of prostitutes”, “prostitutors”, “abusers”, “tricks”, “kerb-crawlers” and “customers” – to name but a few – are used in various forums to refer to people who pay for or give a reward to a prostitute for sexual services.

3.6 The Commission is cognisant that some people hold the view that the use of the terms “client” and “customer” in relation to a person who pays a prostitute for sexual services lends credibility to these actions, essentially legitimising the act of paying for sex. Such terms may even be seen to condone the commodification of the prostitute’s body as “something” that can be bought. Certain terms such as “buyer” and “client” are, however, colloquially used in the South African sex industry and are recognised as referring to people who buy or pay for a sexual service. For this reason the Commission has decided to use what it considers to be a relatively neutral term, namely “buyer”, in this Report.

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<sup>1054</sup> At paras 64 and 65.

<sup>1055</sup> See SALRC *Sexual Offences: Adult Prostitution* Discussion Paper 2009 at 6.

3.7 As men make up the vast majority of prostitution buyers worldwide,<sup>1056</sup> buyers (as a group) are referred to as male in this report.<sup>1057</sup> This generalisation should not be seen to exclude women as buyers.<sup>1058</sup> It is, however, important to understand the relevance of gender in respect of how buyers and prostitutes are viewed and labelled by society, since this is integral to examining the relationships and power differences between men and women. This debate asks important questions about who has access to resources, money and decision-making structures, and how people are able to make a living.<sup>1059</sup> Unequal gender relations and the way in which women and men are thought about in a particular society would seem to underpin the reasons and justifications for men buying sex, and the way in which such buyers are viewed by society.

## **C Theoretical approaches to prostitution in respect of the buyer**

3.8 As explained earlier in this paper,<sup>1060</sup> the Discussion Paper identified four legal models. This discussion was intended to provide a useful framework for considering an appropriate legislative response for South Africa. The identified models were total criminalisation, partial criminalisation, non-criminalisation and regulation.

3.9 As also stated earlier, each model and its various permutations is underpinned by one or more theoretical approaches to prostitution. These theoretical approaches are in turn grounded in wider constructions of male sexuality, morality, masculinity and feminist debate.

3.10 Five of the most popular theoretical approaches, as they relate to buyers, will be discussed in the following order:

- People who pay a prostitute for a sexual service are considered to engage in a consumer activity or an economic contract;
- Paying a prostitute for sexual services amounts to violence;
- Paying a prostitute is a social construct;

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<sup>1056</sup> Flood, M “Men’s roles in sexual exploitation and its prevention” Global Symposium on Engaging Men and Boys in Achieving Gender Equality, Rio de Janeiro, Brazil, 2009; World Aids Campaign “Sex Work and the Law: The case for decriminalisation” available on [www.worldaidscampaign.org](http://www.worldaidscampaign.org) at 4; Also the SWEAT & ISS submission.

<sup>1057</sup> See para 1.33 above.

<sup>1058</sup> According to the SWEAT & ISS submission in a small number of SA agencies women occasionally make use of the services of male prostitutes.

<sup>1059</sup> World AIDS Campaign 4.

<sup>1060</sup> See para 1.9 above.

- Paying a prostitute for sexual services is a biological inevitability; and
- Paying a prostitute for sexual services is an addiction.<sup>1061</sup>

## 1 Prostitution as an economic contract

3.11 Recognising the purchase of sexual services as engagement in an economic contract or as engagement in consumer behaviour treats prostitution as a normal economic activity. This activity is seen as made up of the purchase of non-procreative sex by a buyer from a seller. Accordingly, the prostitution market is structured similarly to markets for other goods, and there are suitable goods for both price-sensitive and non-price-sensitive consumers. Depending on his economic status, the person buys the type of prostitution that is within his means. Buying sexual services is construed as being similar to any other purchase of goods, in that the customer chooses the goods most suitable for him from a number of offers and pays the requested amount, gaining the right to consume the goods.<sup>1062</sup> Proponents of this theory are often labelled liberal feminists.

3.12 As with other goods, the buyers' preferences are important to the make-up of the services offered. In South Africa one of the most frequent requests is for "new girls",<sup>1063</sup> which explains the fluidity of the environment in which prostitutes work. Prostitutes move between brothels and between brothel and street prostitution. Specific requests may have to do with a particular hair colour or ethnicity; age may also be an important factor. The demand determines more than just who is recruited and employed to work in a brothel;<sup>1064</sup> it also plays a role in the circumstances surrounding the sexual service. For example, a buyer may have specific wishes regarding clothing or may be willing to pay more for sex without a condom.<sup>1065</sup>

3.13 Some buyers reason that paying for sexual services is less expensive than having a regular partner – whether a girlfriend, lover or spouse.<sup>1066</sup> A South African agency owner explained this reasoning as follows:

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<sup>1061</sup> Eespere, Katri "The hidden side of prostitution: sex buyers speak" *Research Report Tallinn* 2007.

<sup>1062</sup> Op cit 8.

<sup>1063</sup> Discussion Paper 2009 at para 2.95. Prostitutes are thus not necessarily encouraged or expected to work at a particular establishment for long periods of time, illustrating the expendability of prostitutes.

<sup>1064</sup> See Chapter 4 which deals with brothels and establishments that facilitate prostitution.

<sup>1065</sup> Claude Kajsa *Targeting the Sex Buyer* 9.

<sup>1066</sup> Eespere 20.

First of all I think there is a new attitude. You have a lot of these young set earning good money, in good jobs, don't want to be involved, don't want to send flowers tomorrow morning, don't want a phone call only ... it's a new attitude, which didn't exist in my day. We wanted to do the whole in-love thing, the dates and all that.<sup>1067</sup>

3.14 In 2005 the *British Medical Journal* reported the results of a study<sup>1068</sup> on the rising incidence of sexually transmitted infections and risky sexual behaviours. The study found that the proportion of men who reported paying for heterosexual sex had increased and that such men had multiple commercial and non-commercial partners. A common response from men interviewed in Britain during and after the release of this research report reflected that the allure of prostitutes and paying for sexual services lies in the fact that there is no emotional or social commitment. As one participant ("Sam") commented, "Money displaces the emotions. It frees you from that bond, that responsibility... . The distance you get from exchanging cash for sex means that afterwards you don't contemplate the impact on the prostitute."<sup>1069</sup>

3.15 In short, the theory in which prostitution is seen as an economic contract includes the view that some men seek immediate gratification and the ability to choose their sexual experiences as well as convenient, low-commitment sex. This orientation has been dubbed "McSex", presumably alluding to the convenience of ordering and being served fast food at the outlet McDonalds.<sup>1070</sup>

3.16 In terms of this theory, the expectations from both sides are clear from the outset, which purportedly rules out misunderstandings. The precise details (money and specific requests) are agreed to in advance.<sup>1071</sup> For some buyers this means that the prostitute is considered to provide a service much like a barber or a masseur, and should be treated with some respect. For other buyers, it means that if they have enough money it is possible to buy immunity from all rules governing personal interaction and conduct with fellow human beings; that is, money supposedly gives such buyers the right and opportunity not to be polite or considerate of the prostitute's wishes.<sup>1072</sup>

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<sup>1067</sup> SWEAT & ISS submission.

<sup>1068</sup> Ward H et al, "Sexually Transmitted Infections Who pays for sex? An analysis of the increasing prevalence of female commercial sex contacts among men in Britain" *British Medical Journal* (2005) 81: 467 – 471.

<sup>1069</sup> Spurrell Clare "Who pays for sex? You'd be surprised" *Times Online* 7 November 2006 available at <http://women.timesonline.co.uk>.

<sup>1070</sup> Monto M.A "Female Prostitution, Customers, and Violence" 2004 *Violence Against Women* 173.

<sup>1071</sup> Eespere 21.

<sup>1072</sup> Op cit 20.

3.17 Research has found that some buyers consider certain services to be something a “proper woman” would not do or be expected to do,<sup>1073</sup> and therefore such buyers obtain these services from prostitutes. A Scottish study found that buyers often perceived prostitutes to be qualitatively different from other women. One man even suggested that prostitutes are fatally flawed and somehow “morally different” from other women and were more materialistic.<sup>1074</sup> Some buyers recognised that prostitutes dissociate from the experience, and stated that the capacity to “switch off” differentiates prostitutes from other women.<sup>1075</sup>

3.18 Where buying sexual services is considered to be an economic contract, some buyers construe the relationship between prostitute and buyer as one of equals, where both parties have full responsibility for their actions.<sup>1076</sup> Where it becomes clear that a prostitute is selling her body solely for economic reasons, some buyers moralise that they are helping to feed the prostitute’s family.<sup>1077</sup> In a society where gender, equality and class create the dominant perspective, the female body is relegated to a buyable, sellable and exchangeable commodity.<sup>1078</sup> In countries where supply outstrips demand, the person being bought for sex is, bluntly put, “expendable”.<sup>1079</sup> Where the power imbalance between the two parties is more marked or accentuated due to economic disparities, prostitutes may also be more susceptible to violence.

3.19 In South Africa, the majority of prostitutes sell their sexual services for economic reasons.<sup>1080</sup> One could reason that selling sexual services in these circumstances is strictly about supply and demand and entails providing a service to a willing buyer at a stipulated or negotiated price. As such, it could be construed as purely an economic transaction between the buyer and the prostitute.

3.20 If prostitution is seen in this light, the economic theory might seem to justify a non-criminalisation or regulation model. Prostitution would be allowed in the context of a free

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<sup>1073</sup> Op cit 21.

<sup>1074</sup> Macleod J, Farley M, Anderson L, & Golding J “Challenging Men’s Demand for Prostitution in Scotland: A research report based on interviews with 110 men who bought women in prostitution” Women’s Support Project & Prostitution Research and Education Glasgow 2008 at 19.

<sup>1075</sup> Ibid.

<sup>1076</sup> Eespero 25.

<sup>1077</sup> Ibid.

<sup>1078</sup> Prostitution in Thailand: “Myth and Reality” available at <http://www.exoticindiaart.com> Accessed on 18 March 2011.

<sup>1079</sup> Claude 9.

<sup>1080</sup> The open workshops conducted by the Commission around South Africa during 2009 and closed workshops for prostitutes in 2009 and 2010 bore witness to this.

market, legal consumer activity, which may or may not require compliance with certain industry prescripts (eg licences). Due to entrenched gender and sexual inequality and dire financial or survival needs, the reality for most South African prostitutes is that this transaction is seldom if ever a contract entered into by equals. Although a choice is made to sell sexual services, this choice is exercised amid very limited options with little hope of finding another viable income. Simply stated, the buyer is inevitably in a position of financial power. In focus group workshops that the Commission held to discuss the Discussion Paper, prostitutes from Cape Town, Johannesburg, Pretoria and Rustenburg reported breaches of agreement and intimidation by buyers. They cited examples such as buyers' refusal to pay; being paid less; being raped or beaten by buyers; buyers' refusal to wear condoms; or pressure to provide sexual services without a condom, for more payment. A change in the law away from criminalisation would provide recourse after the fact, but would not change the reality faced by prostitutes due to the personal nature of their interaction with buyers. The Commission is of the view that non-criminalisation or regulation could therefore not be justified in South Africa on the strength of this theory alone.

## 2 Prostitution in the context of violence and exploitation

3.21 Some theorists argue that prostitution is violence, as expressed through the rapes and other sexual abuses perpetrated by buyers. Prostitution is seen as a form of violence against women, irrespective of whether outright physical violence is involved. The distinction between coerced and voluntary prostitution is regarded as a fallacy.<sup>1081</sup>

3.22 In terms of this theory, men who buy sexual services are defined as men who denigrate all womankind through their actions.<sup>1082</sup> As such, prostitution perpetuates the exploitation and subjugation of women and the view of women as commodities. If prostitutes are viewed as commodities, this sheds light on some of the negative issues associated with prostitution, specifically the acceptance of the rape myth (that prostitutes cannot be raped or are asking for it); attraction to violent sexuality; and failure by buyers to use condoms with prostitutes.<sup>1083</sup> This would seem to suggest that a proclivity towards violent sexuality, rather than the act of buying sexual services per se, may be associated with some of the violence faced by prostitutes.<sup>1084</sup>

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<sup>1081</sup> Weitzer R "The Mythology of Prostitution: Advocacy Research and Public Policy" *Sex Res Soc Policy* (2010).

<sup>1082</sup> Eespere 8.

<sup>1083</sup> Monto "Female Prostitution" 174.

<sup>1084</sup> Ibid.

3.23 According to Eespere,<sup>1085</sup> the predominant construction of masculine sexuality – which is prevalent in violence against women – also positions gay men in the class of subjugated and exploited people. Therefore, the same theory applies to gay prostitution. According to this theory, the aggressive nature of men is not biological but is rather culturally constructed as a part of the male gender role. As a result, it is amenable to change. Men are socialised to have sexual desires and to consider it natural that these desires be satisfied. The relationship between the buyer and the prostitute is depicted as cold, selfish and mechanical, with one party clearly in a position of power. The proponents of this view believe that the actions of buyers of prostitution should be punishable, and that this would allow prostitution – and trafficking in human beings, which is often considered inseparable – to be combated more effectively.<sup>1086</sup>

3.24 This theory is based on the perceived sense of masculine entitlement to sexual access to women or power over women. Some men, the argument states, see the ability to have sex whenever they desire it to be an essential aspect of masculinity; men also see women as obliged to provide such sexual access. Taken to the extreme, such an orientation exempts men from accountability for the problems associated with prostitution by suggesting that most violence against prostitutes can be explained by poor service from a particular prostitute.<sup>1087</sup> That assumption is questioned by proponents of this theory, who argue that men must be challenged to develop a new construction of masculinity that does not depend on sexual access to women.<sup>1088</sup> The criminalisation of prostitution is seen as part of the solution.

3.25 A related and overlapping issue is the degree to which prostitution and violence are perpetrated by buyers to reinforce their male privilege. This may be done either to punish women who do not accept their subordinate status in society, or as an attempt to reassert a bruised or challenged sense of masculinity. The Christian Action Network submission observes that the massive power imbalance in prostitution gives buyers the social and economic power to hire people in prostitution.

3.26 Research suggests that engaging in prostitution perpetuates violence against women. Such engagement affects not only how men think about women, it also influences

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<sup>1085</sup> Eespere 8.

<sup>1086</sup> Feminist Issues “Theoretical View of the Degrading Nature of Prostitution” available at [http://www.feministissues.com/theoretical\\_view.html](http://www.feministissues.com/theoretical_view.html) Accessed on 18 March 2011.

<sup>1087</sup> Monto 174.

<sup>1088</sup> Op cit 175.

their actual behaviour toward women, including sexual aggression against non-prostituting women.<sup>1089</sup> A Scottish study found a statistically significant association between buyers' engagement in prostitution after viewing pornography and the frequency of violence in their encounters with women in prostitution.<sup>1090</sup> Various studies conducted in South Africa indicate how vulnerable prostitutes are to abuse by buyers.<sup>1091</sup> The Christian Action Network submits that "pornography is one of the forces that drive the demand" and that "pornography is cultural propaganda which drives home the notion that women are prostitutes". The Christian Action Network believes that pornography should be recognised as "prostitution filmed".

3.27 According to Monto,<sup>1092</sup> the proportion of buyers who commit acts of violence against women probably varies depending on the context in which the prostitution occurs. In this view, there is no reason to believe that most buyers are violent.

3.28 However, a South African study by Jewkes et al (2011) showed that men who have sex with women in prostitution may be more violent than other men.<sup>1093</sup> The same study showed that the more often men visited women in prostitution, the greater was their likelihood of perpetrating sexual violence towards other non-prostitute sexual partners.<sup>1094</sup> A previous South African study among young rural men who had had transactional relationships or sex with a woman in prostitution showed that this group of men was far more likely to be physically and sexually violent towards their partners, as well as more likely to rape non-partners, compared with men who did not have transactional relationships.<sup>1095</sup> An older study in the United States of America similarly found that men who had had sex with a woman in prostitution were more likely to be sexually violent towards all women, compared with males in the general population.<sup>1096</sup> Men who perceive themselves as entitled to sex

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<sup>1089</sup> Macleod et al 15.

<sup>1090</sup> Op cit 16.

<sup>1091</sup> Discussion Paper 2009, para 2.115.

<sup>1092</sup> Monto 177.

<sup>1093</sup> University of Witwatersrand Workshop on "The Role of Men in Transactional Sex – does the law have a role in regulating this behaviour and if so how should it do it?" Discussion round table presentation by Professor Jewkes on research entitled "Men, sex and the provider role: Crime, violence, correlated psychological attributes associated with South African Men's engagement in prostitution and transactional sex in South Africa" (9 November 2011).

<sup>1094</sup> WITS Workshop "Men, sex and the provider role" presentation 9 November 2011.

<sup>1095</sup> Dunkle et al "Transactional sex and economic exchange with partners among young South African men in the rural Eastern Cape: prevalence, predictors, and associations with gender-based violence".

<sup>1096</sup> Monto M A and McRee N "A comparison of the Male Customers of Female Street Prostitutes With National Samples of Men" 2005 *International Journal of Offender Therapy and Comparative Criminology* 49: 505 – 529; see also Busch, Bell, Hotaling & Monto "Male Customers of Prostituted women: Exploring Perceptions of Entitlement to power and Control and Implications for Violent Behavior toward Women" 2002.

with a woman because they have provided for her or have paid for her sexual services were found to hold more conservative views on gender issues and to be more likely to use violence against women, compared with men who did not pay for sex or expect sex in return for gifts. This finding is unsurprising, because the notion of men's sexual entitlement is "indivisible from a gender order that subordinates women and legitimates men's dominance and control over them".<sup>1097</sup> In the study by Jewkes et al, among the two subgroups of men who had had a transactional relationship and men who had had sex with a woman in prostitution, the prevalence of having committed rape was similar: more than half of the men in each subgroup had committed rape. Men in either of these two subgroups were twice as likely to have raped someone compared with men who had had neither transactional relationships nor sex with a woman in prostitution.<sup>1098</sup>

3.29 International social science literature notes that men who have sex with women in prostitution tend to be hostile towards women.<sup>1099</sup> In the study by Jewkes et al, psychological assessment showed that men who had engaged in both transactional relationships and having sex with a woman in prostitution scored significantly higher on two psychopathic traits (Machiavellian egocentricity and externalisation of blame) compared with men who had had transactional relationships only. Men who had had transactional relationships but not sex with women in prostitution scored significantly higher on these two psychopathic traits compared with men who had done neither.<sup>1100</sup> Jewkes<sup>1101</sup> reported that "a very high proportion of men who had done 'both' had raped women, or men, and had been physically violent on multiple occasions towards women." Men who had engaged in neither of these practices were two thirds less likely to have been violent towards women.<sup>1102</sup> According to Hunter, "it seems likely that men who are unperturbed by the illegality and stigma associated with buying sex from a woman in prostitution would also disregard other social mores. They would thus be relatively more inclined to use drugs or to have a history of engagement in socially marginal (or anti-social) practices such as gang membership and robbery".<sup>1103</sup> In a 1998 study published in the *British Medical Journal*, 75% of a group of men who had had sex with a woman in prostitution presented as extremely violent people. This evidence of

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<sup>1097</sup> WITS Workshop "Men, sex and the provider role" presentation 9 November 2011.

<sup>1098</sup> Ibid.

<sup>1099</sup> Macleod J, Farley M, Anderson L, Golding J "Challenging Men's Demand for Prostitution in Scotland: A research report based on interviews with 110 men who bought women in prostitution" Women's Support Project & Prostitution Research & Education Glasgow (2008).

<sup>1100</sup> WITS Workshop "Men, sex and the provider role" presentation 9 November 2011.

<sup>1101</sup> Ibid.

<sup>1102</sup> Ibid.

<sup>1103</sup> Hunter M "*Love in the Times of AIDS: Inequality, gender and rights in South Africa*".

misogyny and proclivity to rape supports the theory in international literature that a woman in prostitution is at heightened risk of violence.<sup>1104</sup>

3.30 The question must be asked whether the experience of buying sex may itself lead men to perceive themselves as being entitled to receive sex from women, or to be more preoccupied with sex and thus more likely to rape and act violently towards women. This is a critical consideration during review of legislation on the sex industry. In other jurisdictions, changes to the prostitution regime that have included non-criminalisation or partial legalisation and regulation have invariably resulted in expansion of the sex industry.<sup>1105</sup> The levels of crime and violence disclosed by men who buy sex from women in prostitution suggest that such men prefer an unregulated world. In South Africa, the non-criminalisation of prostitution would therefore be unlikely to make much difference for this particular group of (dangerous) men.<sup>1106</sup> In the study by Jewkes et al, men who reported having sex with a woman in prostitution also showed a distinct proclivity to having engaged in sexual bullying at school. They also showed an associated range of psychological attributes, notably hostility towards women, belief in the rape myth and psychopathic traits that would position them in more instrumental and often violent relations with women.<sup>1107</sup>

3.31 The Commission noted in the Discussion Paper<sup>1108</sup> that although buyer violence occurs, the authorities are seldom if ever called in to deal with it. Intervention by a brothel owner or manager to protect a prostitute is easier practically. Anecdotal accounts indicate that some establishments install panic buttons in the rooms. Furthermore, buyers are routinely screened in the interests of both the prostitutes and other buyers, and buyers are required to pay for the service before receiving it. The Commission also noted that on the streets, the primary function of pimps is to offer assistance to prostitutes by protecting them while they solicit buyers, and by safeguarding their money and belongings and writing down the registration numbers of buyers' vehicles.<sup>1109</sup>

3.32 Participants in a South African study by Pauw and Brener (1997) stated that if they experienced problems with a buyer, they would not take these up with the police. These participants felt that the police did not take their complaints seriously and nor did they attend

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<sup>1104</sup> Church S, Henderson M, Barnard M, Hart G "Violence by Clients towards Female Prostitutes in Different Work Settings" *British Medical Journal* (2001); Farley et al "Prostitution, Violence Against Women, and Posttraumatic Stress Disorder".

<sup>1105</sup> Kelly et al.

<sup>1106</sup> WITS Workshop "Men, sex and the provider role".

<sup>1107</sup> Ibid.

<sup>1108</sup> Para 2.97 at 47.

<sup>1109</sup> Para 2.112 at 51.

adequately to the problems that prostitutes experience. One participant commented that the police would say, “Whore, you are just a whore, you can’t be raped”.<sup>1110</sup>

3.33 It is the Commission’s view that the theory which equates prostitution with violence may be used to justify both the total criminalisation and partial criminalisation models. This theory is, however, most often advanced to justify partial criminalisation, in which only the buyer and other third parties are criminalised.

3.34 A related theory of violence, which is ascribed to liberal proponents, is based on the premise that violence often accompanies prostitution but is not equated with the act of prostitution. This version of the violence theory recognises that prostitution is often accompanied by violence but is not violence in and of itself. This theory lends support to the regulation or non-criminalisation models. The theory holds that the illegal nature of prostitution (under a criminalised system) invites further criminal and violent elements. Hence it could be argued that legalising or non-criminalising prostitution would help to address the criminal and – by way of association – violent milieu in which criminalised prostitution operates, and would provide prostitutes with recourse against violent buyers.

### **3 The theory of buying sexual services as a social construct**

3.35 The theory in which the buying of sexual services is seen as a social construct is premised on the view that the demand for commercial sex is socially, culturally and historically determined. In other words, such demand is socially constructed, and people are socialised towards a need for a specific product or service. This theory holds that societies instil the idea in men that buying services from a prostitute is either unacceptable for a variety of societal or moral reasons, or that it is an acceptable practice – because it provides a way to have fun or allows men to define themselves as “adult”, a “real man”, or some other desirable standard of social identity.<sup>1111</sup> This theory is integrally linked to particular societal and cultural ideas of masculinity and sexuality, and therefore also to notions of the worth and status of women in a particular society. The demand for prostitution is formed in a social and cultural context in which masculinity and masculine sexuality are constructed through

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<sup>1110</sup> Pauw and Brener “Identifying Factors which Increase Risk of HIV Infection and Mitigate Against Sustained Safer Sex Practices Among Street Sex Workers in Cape Town” 1997 (SA Medical Research Institute, unpublished) at 16.

<sup>1111</sup> Eespere 9.

notions of sexual mastery and control over a woman's body.<sup>1112</sup> Depending on the specific constructs of masculinity, this could include the social acceptance of sexual violence and violence against women in general, irrespective of whether women are engaged in prostitution. Despite its progressive Constitution which entrenches the right to equality, South Africa is inherently patriarchal and gender inequality is endemic across the social spectrum. This fact partly explains the devastatingly high levels of violence, and specifically sexual violence, against women in South Africa.

3.36 In certain societies (eg in India and Thailand), a young man might be introduced to prostitutes by older men, sometimes as a sexual initiation.<sup>1113</sup> Intensive sexual activity is often normalised as primarily concerned with male sexual needs, whereas female sexuality is controlled, repressed and nearly non-existent.<sup>1114</sup> This inherent male need is juxtaposed against the image of a woman who sells her body for sex as being a hypersexual woman. This stereotype of prostitutes is "sold" to society through erotic and pornographic films,<sup>1115</sup> but buyers admit that women involved in prostitution most often lack the necessary education, skills, aptitude or acquaintances to follow any other occupation.<sup>1116</sup> The Women's Forum Australia endorses the view that the mass production and consumption of pornography harms women in general, by contributing to violence and discrimination against women and by conditioning its users to respond sexually to women as "inferiorized, fetishized objects who crave humiliation and degradation".<sup>1117</sup> The Forum reported that intense pornography consumption adds significantly to the likelihood of sexual aggression. Greater exposure to pornography (whether "violent" or "non-violent") has been associated with increased acceptance of violence and aggression.<sup>1118</sup> The Forum also reported that there is a clear relationship between a sexually callous attitude and a personal history of forceful, coercive, aggressive sexual conquests.<sup>1119</sup> The perceived enjoyment by women of their own objectification and humiliation in pornography creates the belief that this form of violence and inequality is natural and normal.<sup>1120</sup>

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1112 Ibid.

1113 Flood.

1114 Eespere 9.

1115 Op cit 24.

1116 Ibid.

1117 Stark Christine and Whisnant Rebecca (eds) *Not for Sale: Feminists Resisting Prostitution and Pornography* quoted in Women's Forum Australia Submission to the National Council to Reduce Violence Against Women and Children available at [womensforumaustralia.org](http://womensforumaustralia.org).

1118 Stark & Whisnant 6.

1119 Ibid.

1120 Ibid.

3.37 An important aspect of this theory is its recognition that buying a person for sex constitutes a form of entertainment or leisure activity. In this respect (ie from the buyer's perspective), prostitution is clearly a buyer's market. In any given country ascribing to this theory, the laws on prostitution may or may not be congruent. For example, in Thailand the contradictory position exists that although prostitution is illegal, the country is known and advertised as a sex tourist destination. In South Africa, although the law and reality often do not tally, the country is not advertised as a sex tourism destination – a perception or label the South African Government (particularly the Minister of Tourism) does not want ascribed to South Africa.<sup>1121</sup> However, at the local level, although advertising prostitution is prohibited by law, advertisements for sexual services abound in classified columns under the guise of “adult entertainment” in various daily newspapers.<sup>1122</sup>

3.38 The internet is also said to be used as a marketing and social networking tool.<sup>1123</sup> The internet offers anonymity as well as extensive opportunities for making contact and for creating eye-catching advertisements.<sup>1124</sup> The words “prostitution” or “sex for sale” are not used, but it is clear from the words “erotic massage” what is intended. Using advertising in more overt ways, such as on roadside billboards, has progressively fallen into disrepute. In 2009 the South African Advertising Standards Authority (ASA) ordered Teazers strip club to remove an advertising billboard on Rivonia Road in Sandton. The ASA found that “[T]he billboard in question portrays the model as a ‘piece of ass’ – a degrading expression often used to refer to attractive women and/or sexual intercourse with them”. The ASA also found that the “photo does nothing for the purpose of liberating women from stereotypical beliefs and portraying them as leaders with equal rights on all levels.”<sup>1125</sup> In Australia, Rosewarne<sup>1126</sup> argued that the use of highly sexualised imagery in billboard advertising contributes to exclusion and inequality. In her words,<sup>1127</sup> “such sexist advertising works to make public space a socially inclusive space for men where women are used as decoration

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<sup>1121</sup> Submission to the SALRC by the Minister of Tourism.

<sup>1122</sup> Advertisements are placed on a daily basis in all leading newspapers such as the *Pretoria News* or on a weekly basis in local municipal newspapers such as the *Record* newspaper. However contact or identifying details are limited to a description of the person offering the service, a mobile phone number and in certain adverts the suburb where the person operates. Examples found in the *Pretoria News* 31 March 2011 include “Young Kinky open minded, Lisa (number), Sunnyside”; “Afro-babe with no limits (number) Pta East”; “New Angel, White stunner, Brooklyn (number) 24/7”. The adverts clearly reflect the buyers’ perceived need for variety and youth.

<sup>1123</sup> This has not been formally verified, but anecdotal evidence seems to support this statement.

<sup>1124</sup> Claude 17.

<sup>1125</sup> News 24 “Teazers told to remove sexy ad”.

<sup>1126</sup> Rosewarne Dr L “*Sex in Public: Women, Outdoor Advertising and Public Policy Newcastle UK*” Cambridge Scholars Publishing (2007) cited in Women’s Forum Australia Submission.

<sup>1127</sup> Op cit 14.

in a way that sexually objectifies them and may offend and harass them, thus contributing to their inequality and social exclusion”.

3.39 The Beijing Platform for Action (1995) acknowledged that “the use of women and girls as sex objects, including pornography” is a “factor contributing to the continued prevalence of ... violence against women”. In the Beijing Declaration and Platform for Action, a strategic objective on violence stated that pornography is “incompatible with the dignity and worth of the human person” – along with “racism, xenophobia, ethnic cleansing and terrorism”.<sup>1128</sup> This statement is augmented by The Human Rights Committee, General Committee 28 on Equality of Rights between Men and Women under the International Covenant on Civil and Political Rights (ICCPR), which states that the publication and dissemination of obscene and pornographic material that portrays women and girls as objects of violence or of degrading and inhumane treatment is likely to promote this kind of treatment of women and girls. State Parties should provide information about legal measures to restrict the publication or dissemination of such material.<sup>1129</sup>

3.40 The Commission is of the view that understanding the buying of sexual services as a social construct can underpin any legislative model. The theory could be used to endorse non-criminalisation or regulation, if the purchase of sexual services is portrayed as a socially acceptable practice or as the best option for women in prostitution. It could also be used to endorse a total criminalisation or partial criminalisation model, if society chooses to construct or deconstruct the perceived societal acceptance of prostitution by criminalising the buyers of prostitutes. Total criminalisation models are often coupled to rehabilitation programmes for buyers, which are aimed at modifying buyers’ behaviour patterns. In certain countries there is a specific focus on the “rehabilitation” of buyers. “Johns’ schools” or “demand deterrence strategies” form an integral part of various offender programmes in the United States. In the United Kingdom, the behaviour of a person who buys sexual services is classified as antisocial and the person may be issued with an Anti-Social Behaviour Order, enforced by an Acceptable Behaviour Contract. These measures are intended to encourage offenders to address their criminal behaviour and its impact on the community.<sup>1130</sup> The Women’s Forum Australia has called on the Australian Government to initiate and support wording in international instruments that acknowledges pornography and prostitution as practices

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<sup>1128</sup> UN Document, Fourth World Conference on Women, September 4 – 15, 1995, Beijing Declaration and Platform for Action, 225. Cited in Women’s Forum Australia Submission 11.

<sup>1129</sup> UN Human Rights Commission Doc. CCPC/C/21/Rev.1/Add.10 2000 at 11.

<sup>1130</sup> Willoughby M “Demand Deterrence Strategies: International Initiatives to Eliminate Demand for the Sex Trade Chicago Alliance Against Sexual Exploitation” (July 2008).

harmful to the dignity and status of women, and wording that seeks to prevent the exploitation of women in advertising and pornography.<sup>1131</sup>

3.41 Programmes are also used to assist prostitutes to exit from prostitution. The South African Department of Tourism's endorsement of the total criminalisation model is based on a combination of the social construct theory and the violence theory. The Minister of Tourism's aim – and that of government – is to portray and market South Africa as a family friendly destination and not a destination for sex-tourist buyers. A model of non-criminalised or regulated prostitution would not fit with this aim.

#### **4 The theory of buying sex as a biological inevitability**

3.42 The theory of buying a person for sex because of biological inevitability is one of the oldest and best-known theories used to explain the demand for prostitution. This theory is based on the premise that men's sexual impulses are as instinctive and uncontrollable as (for example) the drive to secure food and water. According to biological theories, prostitution fills a void between male and female sexuality, and offers a way for men who would otherwise have no sexual partners to satisfy their sexual needs. This theory therefore applies both to able-bodied and disabled men, and might seem particularly relevant for men who are bedridden or completely dependent on others to satisfy their physical needs.<sup>1132</sup> This theory also posits that because men are essentially victims of their own uncontrollable sexual desires, were it not for prostitutes, men with unsatisfied sexual needs could become dangerous to women who are not prostitutes.<sup>1133</sup> According to this theory, men have only two options: to find themselves a mistress or to use the services of a prostitute.<sup>1134</sup> Thus the rationale to explain prostitution is that men will continue to seek out prostitutes to fulfil their biological need, irrespective of the legality, illegality or social acceptability of doing so.

3.43 The Commission is of the view that the theory that men buy sexual services based on biological inevitability or need could be used to endorse various legislative models, namely non-criminalisation, regulation, and partial criminalisation. To this end it could be argued that the wisest choice would be to make the purchase of sexual services safer for everyone involved by legalising prostitution rather than criminalising it, because criminalisation causes the prostitute (as the more vulnerable party) to provide her sexual

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<sup>1131</sup> Rosewarne 11.

<sup>1132</sup> Eespere 29.

<sup>1133</sup> Op cit 9.

<sup>1134</sup> Op cit 31.

services in an unsafe environment. However, ascribing to this theory would mean, firstly, ignoring the fact that not all men engage in prostitution. Secondly, it would mean dispelling the existence of rational choice by effectively labelling men who buy sexual services as animals that act or react purely by instinct or impulse.

## 5 The theory of buying sexual services as an addiction

3.44 The theory that buying sexual services from another person is a form of addiction relates to the classification of “sex addiction” as a diagnosable and treatable disease. In this view, the addiction to prostitution should be treated in much the same way as alcohol or drug dependency is treated. Studies estimate that between 3% and 6% of the world’s population can be considered sex addicts.<sup>1135</sup> Such addicts use sex as a mechanism to cope with their anxiety and/or emotional pain. Sex addiction is characterised by a constant seeking of risks or self-destructive behaviour and a constant search for new and more intense sexual experiences.<sup>1136</sup>

3.45 An aspect of this theory is that people tend to buy sexual services in tandem with other substance abuse or addictions, such as drug or alcohol addiction or use. Men’s consumption of alcohol before visiting a prostitute seems to be more the rule than the exception, especially where buying sexual services forms part of a night of entertainment.<sup>1137</sup> According to some buyers, alcohol helped to relieve their tension and made their behaviour less inhibited and more self-confident. However, buyers who visited a prostitute without first using alcohol tended to be men for whom the purchase of sex had become habitual or was even a dependency. They often made such visits during the work day when they could not indulge in alcohol use.<sup>1138</sup>

3.46 A South African study by Leggett (2000) found that drug dealers were systematically targeting the prostitute community to spread addiction to crack cocaine among society at large.<sup>1139</sup> Some prostitutes in Arcadia, Pretoria alleged that their pimps made more money

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<sup>1135</sup> Op cit 9.

<sup>1136</sup> Op cit10.

<sup>1137</sup> Op cit16.

<sup>1138</sup> Ibid16.

<sup>1139</sup> Leggett T ODCCP Study on the Relationship between Drug Use and HIV in South Africa 2000 UN Office for Drug Control and Crime Prevention at para 2.5. Leggett found that the use of crack cocaine in the South African context started among prostitutes in Hillbrow. Anecdotal evidence indicates that dealers then sent addicted prostitutes from Hillbrow to Durban in 1996 to spread the use of the drug (Leggett “The sleazy hotel syndrome: housing vice in Durban and Johannesburg” 1999).

selling drugs to prostitutes' buyers and prostitutes themselves than they did from actual prostitution. In addition, the use of crack cocaine has led to an increase in demand for unsafe sex practices such as condom-free or anal sex, because crack addicts appear willing to do anything to obtain money for their drug habit. Some women have also blamed crack addiction for an increase in buyer violence, including rape.<sup>1140</sup>

3.47 According to SWEAT and the Institute for Security Studies (ISS), some South African brothel agency owners have reported isolated cases of abuse, and have stated that buyers under the influence of alcohol are the most likely to be violent or abusive.<sup>1141</sup>

3.48 The Commission is of the view that the theory of the buying of prostitution as an addiction is mostly associated with the total criminalisation model. However, the same theory could also be used to justify the non-criminalisation of prostitutes, or partial criminalisation in which the prostitute and buyers' transaction is legalised – to allow for added protection from abusive third parties such as pimps.

## **D Current law in South Africa**

### **1 Total criminalisation (buyer criminalised)**

3.49 In South Africa the actions of buyers of sexual services are criminalised in several ways under a number of laws, both national and municipal. Only the contravention of national law will be dealt with here because municipal by-laws relate to actions that are not restricted to prostitution (eg loitering on the street).

3.50 Buyers of sexual services are not expressly criminalised in terms of section 20(1A)(a) of the Sexual Offences Act of 1957. However, in view of the provisions of section 18(2) of the Riotous Assemblies Act,<sup>1142</sup> the buyer would be liable to the same penalties, if not as a common-law accessory then in the alternative to the charges brought against a prostitute in contravention of section 20(1A)(a) of the Sexual Offences Act of 1957. This section of the Sexual Offences Act criminalises unlawful carnal intercourse or indecent acts for reward,

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<sup>1140</sup> Leggett ODCCP Study para 2.5.

<sup>1141</sup> SWEAT & ISS submission.

<sup>1142</sup> Act 17 of 1956.

which is the primary offence of prostitution. The penalty for being a buyer of a prostitute is therefore three years' imprisonment, with or without a fine of R6 000.<sup>1143</sup>

3.51 A buyer may also be charged with soliciting in terms of section 19(a) of the Sexual Offences Act of 1957. Section 19(a) provides that any person who entices, solicits or importunes in any public place for immoral purposes commits an offence. According to Milton and Cowling, the practice of buyers approaching members of the public to ascertain whether they are available for prostitution can cause embarrassment or nuisance to members of the public. This has resulted in statutory prohibitions against "soliciting" in public.<sup>1144</sup> The penalty is a fine not exceeding R4 000 or imprisonment for a period not exceeding two years, or both such fine and imprisonment.<sup>1145</sup>

3.52 Section 20(1)(b) of the Sexual Offences Act of 1957 further provides that any person who in public commits any act of indecency with another person is guilty of an offence. In the context of prostitution, this provision may be used against prostitutes and buyers who complete the sexual transaction in public (eg in a car parked within public view). The penalty is a fine not exceeding R4 000 or imprisonment for a period not exceeding two years, or both such fine and imprisonment.<sup>1146</sup>

3.53 Section 11 of the Sexual Offences Amendment Act (2007) expressly criminalises the actions of buyers of adult prostitutes. This section provides that a person who engages the services of a person 18 years or older for financial or other reward, favour or compensation for the purpose of engaging in a sexual act, irrespective of whether the act is committed or not, or by committing a sexual act with the person, is guilty of the offence of engaging the sexual services of a person 18 years or older.

3.54 As stated earlier,<sup>1147</sup> despite the finding in *S v Jordan* that buyers were contravening the law in terms of the Riotous Assemblies Act, the then Parliamentary Portfolio Committee on Justice and Constitutional Development decided to eradicate any uncertainty by incorporating this offence into the Sexual Offences Amendment Act. The Committee's resolve was strengthened by submissions pointing out that in practice, despite the Riotous Assemblies Act, only the prostitute (usually a woman) is charged and prosecuted, but not the

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<sup>1143</sup> *National Director of Public Prosecutions v Geyser and Another* 2008 (2) SACR 103 (SCA); *National Director of Public Prosecutions v Bosch* 2009 (2) SACR at 558.

<sup>1144</sup> Milton & Cowling "Statutory Offences" 2005 at para E3-88.

<sup>1145</sup> Section 22(g).

<sup>1146</sup> *Ibid.*

<sup>1147</sup> See para 2.129 above.

buyer of the service (usually a man). The Committee argued that this selective application of the law is not acceptable in a constitutional democracy. In an effort to address this problem, section 11 was introduced to expressly target the buyers of adult prostitutes.

3.55 However, some critics have argued that in practice, all that was achieved was formal rather than substantive equality. The reasons for this view include the gendered patterns of social stigmatisation of prostitutes (women) rather than their buyers (men); such patterns of stigma are not necessarily influenced by the law. Media reports suggest that the enactment of section 11 of the Sexual Offences Amendment Act resulted in a spate of arrests of buyers by specialised task teams.<sup>1148</sup> Unfortunately, the Commission has been unable to obtain confirmation of the actual figures for arrests from either the National Prosecuting Authority or the South African Police Service. It appears that no official record exists of the number of buyers arrested, charged or prosecuted in terms of section 11 of the Sexual Offences Act.<sup>1149</sup>

3.56 A buyer could also fall foul of other provisions in the Sexual Offences Amendment Act that relate to child prostitution or trafficking in persons. Any person who performs a sexual act for reward with a person under the age of 18, or with a person who has been trafficked for the purpose of prostitution, could be charged in terms of this Act. The trafficking provisions have, however, recently been repealed by provisions in the Trafficking in Persons Act 7 of 2013. Section 7 of this Act provides that any person who uses the services of a victim of trafficking, and knows or ought reasonably to have known that the person is a victim of trafficking, is guilty of an offence for which a fine or imprisonment for a period not exceeding 15 years may be imposed. It would therefore have to be alleged and proved that the buyer knew or reasonably ought to have known that the prostitute was trafficked, to incur liability for this offence. The buyer would not be held strictly liable and would not therefore be committing an offence in terms of trafficking legislation simply by buying sexual services from a prostitute who had been trafficked.

3.57 A buyer who engages in violent or harmful behaviour could also be charged for committing common law crimes such as kidnapping, common assault, assault with intent to cause grievous bodily harm, extortion, attempted murder and murder. Statutory offences are contained in the Sexual Offences Act,<sup>1150</sup> the Riotous Assemblies Act,<sup>1151</sup> the Immigration

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<sup>1148</sup> *The Independent on Saturday* "Hookers' clients arrested by police" 16 February 2008 available at <http://www.independentsaturday.co.za> Accessed on 19 January 2009.

<sup>1149</sup> Email correspondence between the researcher and the NPA and SAPS at various stages of this investigation.

<sup>1150</sup> Act 23 of 1957.

Act,<sup>1152</sup> the Basic Conditions of Employment Act,<sup>1153</sup> the Intimidation Act,<sup>1154</sup> the Domestic Violence Act<sup>1155</sup> and the Prevention of Organised Crime Act.<sup>1156</sup>

## **2 Comparative law on prostitution with a focus on the buyer**

3.58 As explained previously, legislation that relates to adult prostitution and focuses on the buyer can loosely be categorised into four legislative models selected for scrutiny by the Commission. These are: 1) total criminalisation, which criminalises both the prostitute and the buyer (as is currently the case in South Africa);<sup>1157</sup> 2) partial criminalisation, which either criminalises the prostitute but not the buyer (eg Kentucky)<sup>1158</sup> or criminalises the buyer but not the prostitute (eg Sweden); 3) non-criminalisation, in which neither the prostitute nor the buyer is criminalised (eg New Zealand); and 4) regulation, where prostitution is allowed subject to regulations. Various permutations of these models also exist such that buyers are criminalised in certain circumstances; for example, if they pay a third party to obtain sex with a prostitute, or pay for sexual services where a prostitute is subjected to force (eg United Kingdom).

3.59 South Africa is an example of the total criminalisation model, where the behaviour of buyers is criminalised on a number of fronts. This aspect was discussed in paragraphs 2.115 and further, and the information will not be repeated here.

## **3 Partial criminalisation (buyer not criminalised)**

### United States of America: Kentucky

3.60 In Kentucky, prostitutes are criminalised, but the law specifically states that a man (ie the buyer) cannot be convicted of prostitution and no penalties are provided for patronising a prostitute. One statute even requires prostitutes to undergo HIV testing, without buyers having to do the same. Chapter 529 in section 90 of the Kentucky Revised Statute, which came into effect in 1998, provides that if a person is convicted of prostitution or procuring,

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<sup>1151</sup> Act 17 of 1956.

<sup>1152</sup> Act 13 of 2002.

<sup>1153</sup> Act 75 of 1997.

<sup>1154</sup> Act 72 of 1982.

<sup>1155</sup> Act 116 of 1998.

<sup>1156</sup> Act 121 of 1998.

<sup>1157</sup> The reach of section 11 of the Sexual Offences Act has been explained above.

<sup>1158</sup> Kentucky Revised Statutes Chap 529 S 020.

they must undergo testing for HIV and other STIs and the results must be made available to the courts. Where a person commits, offers or agrees to commit prostitution, whilst knowing that they have tested positive for HIV and that there is a chance of their transmitting the disease, such a person could face a harsher penalty.<sup>1159</sup>

#### 4 Partial criminalisation (buyer criminalised)

##### Sweden, Norway and Iceland

3.61 In 1999, Sweden enacted a law that forbids the purchase of sexual services. However, it does not prohibit the sale of sexual services. In 2009 both Norway and Iceland enacted similar laws,<sup>1160</sup> and France is reported to be considering following suit.<sup>1161</sup> The legislation is gender-neutral so that buyers and sellers are recognised as being either men or women. In practice, however, such laws focus on the demand for women and children who are exploited sexually, and criminalise the buyers of sexual services – who are typically men. The law prohibiting the purchase of sexual services is an important component of Sweden’s strategy to combat both prostitution and human trafficking. In the Swedish government’s view, prostitution and human trafficking are linked by the buyers, whose money finances organised crime. In other words, such buyers make human trafficking both possible and lucrative.<sup>1162</sup> The goal of the Swedish law is twofold: to convince people to abstain from committing the crime of buying sexual services, and to establish norms under which no woman, man, girl or boy can be sold and no-one has the right to sexually exploit another human being.<sup>1163</sup>

3.62 Legislation in Sweden regards women in prostitution as victims of male violence. According to Waltman,<sup>1164</sup> the Swedish Government endorses the theory that there is a “huge power-imbalance between the buyer and prostituted person which enables the former to exploit and subject the latter to degrading, dangerous and inhumane treatment”.<sup>1165</sup> Thus a connection is made between gender-based violence and prostitution, and for this reason the law criminalises the purchase of sex. The Swedish Parliament noted that men’s violence

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<sup>1159</sup> Meerkotter A “Consensual Commercial Sex Work: A Brief Overview of Legislation in Various Jurisdictions” Community Law Centre, University of the Western Cape (2002) at 56.

<sup>1160</sup> Claude 6.

<sup>1161</sup> *The Guardian*.

<sup>1162</sup> Claude 6.

<sup>1163</sup> Ibid.

<sup>1164</sup> PhD Candidate at the Department of Political Science, Stockholm University (Sweden).

<sup>1165</sup> *UN Rapporteur on Violence against Women 2007* as quoted by Max Waltman in “Prohibiting Purchase of Sex in Sweden: Impact, Obstacles, Potential, and Supporting Escape” Stockholm University Working Paper Series 2010:3 Department of Political Science at 3.

against women is not consonant with aspirations toward a gender-equal society and must be fought against with all means.<sup>1166</sup> Prostitution is regarded as a form of sex inequality and violence against women, which exploits and harms the prostituted person.<sup>1167</sup> The Swedish Parliament recognises that prostitution stems from inequality as well as entrenching it.<sup>1168</sup>

3.63 Supporters of the partial criminalisation model hold that because of the extremely unequal positions of power between the buyer and prostituted person, if prostitution is legalised or decriminalised then the buyer has no incentive to treat a prostitute properly. They further argue that no evidence exists of improvement in the health, safety, or economic circumstances of prostituted women under the legalised model (ie where the purchase and procurement of sex is legal).<sup>1169</sup> In this view, legalisation or non-criminalisation pushes the limits of what can be perpetrated against women and lessens the women's ability to counter buyers' demands for unsafe or high-risk sex.<sup>1170</sup>

3.64 Nonetheless, although the Swedish law has not eradicated prostitution it has evidently reduced the demand for prostitution<sup>1171</sup> and the number of people involved in it.<sup>1172</sup> The law also seems to have single-handedly changed public attitude. In 2008 in Sweden, 79% of women and 60% of men favoured the country's laws on prostitution. The young adult population (aged 18 to 38 years), particularly young women, were most strongly in favour of the law.<sup>1173</sup> In Waltman's view, the Swedish law could be further strengthened by heavily criminalising buyers and third-party profiteers, while still decriminalising and offering support to prostituted people.<sup>1174</sup>

3.65 According to a research report in 2008 by the Nordic Gender Institute, the number of buyers of sexual services in Sweden declined after the introduction of the sex purchase law.<sup>1175</sup> A poll was conducted to determine whether the law had influenced individual patterns of behaviour. The results were compared with those of a similar poll in 1996. The

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<sup>1166</sup> Waltman Max Stockholm University 3.

<sup>1167</sup> Op cit 4.

<sup>1168</sup> Op cit 19.

<sup>1169</sup> Op cit 20.

<sup>1170</sup> Ibid.

<sup>1171</sup> Op cit 23.

<sup>1172</sup> Arguably because demand from sex-buying men is the reason for prostitution. Claude Targeting the Sex Buyer 13.

<sup>1173</sup> Waltman Stockholm University 25.

<sup>1174</sup> Op cit 27.

<sup>1175</sup> Claude 9.

findings showed that the number of male buyers had decreased from 13.6% in 1996 to 7.9% in 2008. Each poll surveyed 2 500 individuals aged between 18 and 74 years.<sup>1176</sup>

3.66 Waltman quotes the 2003 *Report of the National Board of Health and Welfare*, which states that “Police who have studied the occurrence of violence have not found any evidence of an increase [in violence or prostitution] ... . The interview data and other research indicate that violence and prostitution are closely linked, whatever sort of legislation may be in effect.”<sup>1177</sup> Waltman states that the “least resource-heavy” way to handle prostitution would be for men to change their own behaviour and stop buying sex.<sup>1178</sup>

3.67 The Swedish law has both practical and symbolic significance. According to Claude, “We are making an unequivocal statement to the poor, exploited women and girls when we – the citizens of wealthy countries – tell them that it’s not OK to buy human beings for sexual purposes.”<sup>1179</sup>

3.68 However, according to Östergren, prostitutes themselves have contested politicians’ claims that only buyers are punished and that the prostitutes are protected from exploitation.<sup>1180</sup> Arguably, because the number of buyers is lower, prices are also lower and the competition is tougher for the women. This scenario leads to prostitutes selling sex without the protection of condoms so that they can charge higher fees, or to accepting more buyers than before since the fee for each transaction is lower. The Commission for Gender Equality confirms this shortfall of the Nordic model.<sup>1181</sup> A study by the Swedish National Board of Health and Welfare found that buyers are now considered to be “worse” and more dangerous than before, and that women who cannot leave prostitution or move their businesses are dependent on these more dangerous men since they can no longer afford to turn them down.<sup>1182</sup> In addition, the Swedish National Police Board has reported that the law sets up an obstacle to prosecuting profiteers who exploit the sexual labour of others.<sup>1183</sup> Earlier legal cases against such people were sometimes supported by the testimonies of sex buyers, but such buyers are no longer willing to testify since they are now also considered guilty of committing a crime.

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Claude 9.

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SoS “Prostitution in Sweden” 2003 available at <http://www.socialstyrelsen.se>. Cited in Waltman Stockholm University 39.

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Claude 13.

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Op cit 16.

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Östergren Petra “Alla rättigheter tillhör” (2011) available at <http://www.petraostergren.com/>.

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Commission for Gender Equality Position Paper on Sex Work at 7.

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Ibid.

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Ibid.

3.69 The Police Board report also pointed out that prostitutes have fallen into a difficult, legally constructed, “in-between” position with regard to the new law. The female prostitute sells sex but this is not considered a criminal act. However, because purchasing sexual services is now a crime, the prostitute can be made to appear as a witness in the trial process. She therefore lacks the rights of either the accused or the victim. The Police Board report discusses that prostitutes are subjected to invasive searches and questioning so that evidence against buyers might be obtained *in flagranti*.<sup>1184</sup>

3.70 In Sweden, procurement for sex is a crime against the state. One of the implications of this scenario is that following a conviction for procurement, damages are not always paid to the victim, namely the prostitute. Furthermore, the prostitute has no unconditional right to special counsel in the run-up to and during the legal proceedings.<sup>1185</sup>

3.71 Between January 1999 and August 2009 in Sweden, 2 069 individuals were reported for criminal activity in respect of prostitution. For the period 1999 to 2008, legal action was brought against 590 individuals, with the following results: fines were assessed, summary fines were imposed, or the prosecutor declined to prosecute. According to the National Council for Crime Prevention, in 2008 a total of 69 judgments, impositions of summary fines and prosecutor declinations for the crime of buying sexual services were issued. Of these, 19 cases were assessed fines. During the same year, eight people were convicted for procurement, three of whom were sentenced to prison; and three people were convicted of gross procurement, all of whom were sentenced to prison.<sup>1186</sup>

## **5 Partial criminalisation (third parties and certain behaviour of buyers criminalised)**

### United Kingdom

3.72 In the United Kingdom, buying the sexual services of a person who has been trafficked, exploited, subjected to force, threatened or deceived into providing a sexual service is a criminal offence. Section 53A of the United Kingdom Policing and Crime Act 2009 provides that paying for the sexual services of a prostitute who has been subjected to force (among other things) is a criminal offence in England and Wales. As the law currently stands, it is irrelevant whether or not the buyer was aware that the prostitute had been

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<sup>1184</sup> Ibid.

<sup>1185</sup> Claude19.

<sup>1186</sup> Op cit 21.

exploited, subjected to force, threatened or deceived into providing the sexual service. The legislation in Northern Ireland contains an identical provision.<sup>1187</sup> However, merely being a buyer of a prostitute is not criminally sanctioned.

3.73 Despite this distinction, Hamilton comments that the Home Office<sup>1188</sup> has made its ideological position clear in no uncertain terms: paying for sex is unacceptable and will not be tolerated.<sup>1189</sup> Hamilton states that the increased criminalisation of buyers plus the rehabilitation of women (through social-welfare exit programmes) does little to challenge “root causes and may lead to an overly simplistic view of the complexities involved.”<sup>1190</sup> Moreover, this approach seems to mirror an old paradigm of welfare response that focuses on “saving” and “responsibilising” fallen women.<sup>1191</sup> Hamilton questions the United Kingdom Government’s strict liability offence of buying sex from a person “who is controlled for another person’s gain”<sup>1192</sup> – in other words, unwittingly paying for sex with a trafficked woman – leading to a prosecution of rape. Hamilton contends that on the basis that even in circumstances where the “buyer” is aware that a woman came from overseas and works in a brothel, this knowledge by itself “does not provide any man using a prostitute with a reasonable assurance that the prostitute he is using is subject to coercion and unlawful detention.”<sup>1193</sup>

3.74 Hamilton reports that the United Kingdom Government is seeking to use “naming and shaming” as a key strategy in reducing the demand for prostitution.<sup>1194</sup> Hamilton concedes that a policy of “stigmatisation” and perceived enforcement might have some value in reducing demand; however, this approach is inherently risky owing to the likely “unintended consequences” of merely displacing prostitution activities. This would encourage prostitution to become less visible and therefore more risky for people on the “supply-side”.<sup>1195</sup> Sanders and Campbell similarly question the rationale behind anti-demand strategies, ranging from media-driven “marketing messages” directed at potential “punters” to anti-kerbcrawling initiatives as enshrined in the Sex Offences Act of 1985 (updated in the Criminal Justice and Police Act of 2001) and the “naming and shaming” of people caught paying for sex.<sup>1196</sup>

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<sup>1187</sup> Section 64A of the Sexual Offences (Northern Ireland) Order 2008 (S.I.1769 (N.I.2)).  
<sup>1188</sup> Home Office “*Tackling the Demand for Prostitution: A Review*” London: Home Office (2008a).  
<sup>1189</sup> Hamilton “Review of Demanding Sex: Critical Reflections on the Regulation of Prostitution” *Internet Journal of Criminology* (2009).  
<sup>1190</sup> Op cit 2.  
<sup>1191</sup> Ibid.  
<sup>1192</sup> Home Office “Tackling the Demand”.  
<sup>1193</sup> Hamilton 6.  
<sup>1194</sup> Home Office “Tackling the Demand”.  
<sup>1195</sup> Hamilton 5.  
<sup>1196</sup> Op cit 6.

3.75 Soliciting by a buyer (commonly referred to as kerb-crawling) is also criminalised in the United Kingdom. The kerb-crawling legislation in England and Wales derives from a complex interplay of factors. These include general public fear of HIV and the influence of police officials harnessing the reactions of small but vocal resident groups in red-light districts, along with a powerful rhetoric of child protection to increase police power.<sup>1197</sup> On 1 April 1999, kerb-crawling became a recordable offence triable only in magistrates' courts, and on 1 September 2001 it became an arrestable offence. Police have the power of summary arrest of kerb-crawlers, which enables them to take men into custody and question them rather than having to summons kerb-crawlers to appear in a magistrate's court to answer to a charge.<sup>1198</sup>

3.76 The Commission Discussion Paper<sup>1199</sup> noted that the United Kingdom Government was reportedly considering proposals to prosecute buyers of prostitutes, as in Sweden, in a new effort to curb the demand for prostitution.

## 6 Non-criminalisation of buyers

### New Zealand

3.77 In New Zealand, the Prostitution Reform Act 28 of 2003 decriminalised prostitution in respect of people selling their bodies for sexual services, brothel keeping, living off the proceeds of someone else's prostitution, and street solicitation. In terms of this legislation, buyers can access sexual services on the street, in brothels or in small owner-operated brothels (SOOBs) run by self-employed prostitutes. However, even pre-2003 buyers were not criminalised and were able legally to pay or offer to pay for sex.<sup>1200</sup> The Prostitution Reform Act makes it an offence for prostitutes and buyers not to use safe sex practices.<sup>1201</sup> A buyer is defined in the Act as a person who receives, or seeks to receive, commercial sexual services. A distinction is made between voluntary and involuntary prostitution. It remains a crime to coerce "someone to provide sexual services". The Act provides that contracts between provider and buyer are recognised, but providers have the right to refuse services. Buyers can refer contested contracts to the Disputes Tribunal. However, there have been reports of prostitutes being unable to refuse even if there was a very good reason

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<sup>1197</sup> Brooks-Gordon & Gelsthorpe "What men say when apprehended for kerbcrawling: a model of prostitutes clients' talk" *Psychology, Crime & Law*, 2003 9(2) at 146.

<sup>1198</sup> Ibid.

<sup>1199</sup> Para 6.118 and 6.119, at 151.

<sup>1200</sup> Abel et al "The Impact of the Prostitution Reform Act".

<sup>1201</sup> New Zealand Ministry of Justice "Key Informant Interviews" 8.

to do so.<sup>1202</sup> The Summary Offences Act remains in force in relation to soliciting that may be classed as offensive behaviour.

3.78 Post-2003, one study found that street-based prostitutes were significantly more likely than managed or private prostitutes to report having been subjected to adverse experiences relating to buyers. The reported incidents included refusal of a buyer to pay, having money stolen by a buyer, being physically assaulted by a buyer, being threatened with physical violence by someone, being held against one's will, and being raped by a buyer.<sup>1203</sup> In a review document of the Prostitution Reform Act<sup>1204</sup> it was noted that the Act appears to have had limited effect in preventing violence. The Act had, however, helped to increase the reporting of violence to the police, despite prostitutes still being reluctant to carry the process through to court.<sup>1205</sup> Positive police cooperation was reported during police investigations into the murders of two prostitutes in Christchurch, both of which were rapidly followed by arrests.<sup>1206</sup>

## 7 Regulation of buyers

### Australia: Victoria

3.79 The Prostitution Control Act 102 of 1994 (incorporating amendments as at 1 August 2010) seeks to control or regulate prostitution in Victoria. Section 12 of the Act regulates offences by buyers in relation to street prostitution, by prohibiting soliciting. It specifically states that a person may not loiter near a place of worship; a hospital; a school, kindergarten or children's services centre; or a public place frequented by children and in which children are present at the time of the person's loitering for the purpose of soliciting. However, the Act provides for exceptions to street prostitution offences.<sup>1207</sup> Where the sexual service is not visible to a person in a public place outside a legal brothel or in any premises, then it does not constitute an offence.

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<sup>1202</sup> Op cit 12.

<sup>1203</sup> Abel et al "Impact of the Prostitution Reform Act" at 119.

<sup>1204</sup> New Zealand Ministry of Justice "Key Informant Interviews" 10.

<sup>1205</sup> Ibid.

<sup>1206</sup> Barnett T MP "New Zealand's Prostitution Reform Act".

<sup>1207</sup> Section 14 of the Act.

## Netherlands

3.80 The Dutch system endorses a non-criminalised, regulated model.<sup>1208</sup> Prostitution is a legal activity, subject to municipal regulations regarding location, organisation and specific practices. Licenses must be obtained from municipalities certifying that the legal requirements to sell sex have been fulfilled.<sup>1209</sup> Section 250a of the Dutch Penal Code provides that it is no longer a crime to operate brothels in which adult prostitutes work of their own accord. Voluntary adult prostitution and the purchase of sex from prostitutes is therefore allowed in certain areas. Buyers are considered sexual consumers.<sup>1210</sup> Buyers of unlicensed prostitutes, however, can be prosecuted, because such buyers sustain a form of prostitution in which abuse and exploitation are difficult to prevent. The law takes a strong stance against trafficking, forced prostitution and underage prostitution,<sup>1211</sup> and new laws to strengthen this stance are being considered in the Netherlands.<sup>1212</sup> Legislation aimed at crime prevention in the prostitution arena was tabled in the Dutch Parliament in May 2011<sup>1213</sup> and is intended to further regulate the prostitution industry.

## **8 Understanding demand: who is the buyer and why does he buy sex?**

3.81 The demand for prostitution is an important factor to consider when evaluating policy choices on prostitution. Although it would be convenient if a core motivation for men seeking out prostitutes could be identified, empirical research has shown that in reality such men are driven by various motivations.<sup>1214</sup> The only obvious commonality is the purchase of sexual services. Notably, however, most men do not purchase sexual services from prostitutes and very few are regular users.<sup>1215</sup> An American study with a nationally representative sample of men found that 82,3% of men reported never having paid a woman for sex.<sup>1216</sup> Similarly, a study published in the *British Medical Journal* in 2005 found that 91% of British men reported

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<sup>1208</sup> Amsterdam Info.

<sup>1209</sup> Ibid.

<sup>1210</sup> Raymond JG “Prostitution on Demand: Legalizing the Buyers as Sexual Consumers” *Violence Against Women* 2004.

<sup>1211</sup> Section 273f of the Dutch Penal Code provides that:

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2. Exploitation comprises at least the exploitation of another person in prostitution, other forms of sexual exploitation, forced or compulsory labour or services, slavery, slavery like practices or servitude.

<sup>1212</sup> Expatica ENL “Netherlands targets clients in draft prostitution law”.

<sup>1213</sup> Overheid.nl “Rules regarding the regulating of prostitution” 2011.

<sup>1214</sup> Monto “Female Prostitution” 171 – 172.

<sup>1215</sup> Op cit 160 – 188.

<sup>1216</sup> Op cit 168.

that they had not paid for sexual services from a prostitute.<sup>1217</sup> Conclusive statistics on the percentage of South African buyers were not available at the time of writing this report.

3.82 Despite the small population of buyers in any given country, data on buyers' ages and other demographics are largely unrecorded. According to anecdotal accounts by several South African prostitutes and brothel owners, buyers include unmarried men<sup>1218</sup> and married men aged between 16 and 80 years (or older).<sup>1219</sup> Prostitutes in Johannesburg and Rustenburg reported that buyers have diverse backgrounds and range from doctors to miners and from young students to pensioners. Buyers may be locals or foreigners, and some treat the women with respect but others – “especially Nigerians” – do not.<sup>1220</sup> According to Eespere in Eastern Europe, comparative studies have shown that “the typical buyer has money, education, and power; his life is stable and he has a family”.<sup>1221</sup> On the other hand, studies of buyers in the United States of America and United Kingdom have shown that buyers were fairly likely to be unmarried or separated.<sup>1222</sup> According to the World Aids Campaign some buyers reported being “in a highly functioning relationship outside of the prostitution”, while others were not.<sup>1223</sup>

3.83 In Eastern Europe, buyers range from teenagers to octogenarians, but the men are generally between 30 and 50 years of age.<sup>1224</sup> One South African agency owner reportedly said he had noted a shift towards younger buyers (between 20 and 30 years old).<sup>1225</sup> This pattern is also evident among British buyers, with the largest group being in their mid-twenties to mid-thirties.<sup>1226</sup>

3.84 It appears from the available data that a “typical” buyer cannot be accurately described in terms of race, age, socio-economic status or marital status. The only true defining feature of all buyers is the position of power they have over the women from whom they buy sexual services.<sup>1227</sup>

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<sup>1217</sup> Spurrell.  
<sup>1218</sup> SWEAT, Sisonke and SALRC facilitated meeting 29 July 2010.  
<sup>1219</sup> SWEAT & ISS submission.  
<sup>1220</sup> SWEAT, Sisonke and SALRC facilitated meeting 29 July 2010.  
<sup>1221</sup> Eespere 6.  
<sup>1222</sup> Monto 168; Spurrell.  
<sup>1223</sup> World Aids Campaign 10.  
<sup>1224</sup> Claude 7.  
<sup>1225</sup> Participant at the SALRC workshop in Durban.  
<sup>1226</sup> Spurrell.  
<sup>1227</sup> Nation Building's submission.

3.85 According to Monto,<sup>1228</sup> social science research on prostitution seems to have confirmed rather than contradicted certain popular notions of male buyers. These apparently accurate stereotypes include the following:

- Some buyers visit prostitutes because they feel too shy, awkward, or unattractive to establish conventional sexual relationships.
- Some buyers, accustomed to having sexual access to women, visit prostitutes when they are away from their regular partner due to travel or if they are in-between conventional sexual relationships.
- Some buyers feel that their wives or partners are unwilling or unable to satisfy them.
- Some buyers are attracted to particular physical characteristics, such as a particular ethnicity or body type.
- Some buyers desire sexual experiences that they do not feel they can request from a conventional sexual partner, or which their regular partner refuses to provide. Such requests might include oral or anal sex, dominance or submission, role playing, various fetishes, and myriad other activities or experiences.
- Some buyers are men with very active sex lives who seek out prostitutes to secure an even greater number of sexual partners.
- The illicit or risky nature of the prostitution encounter is attractive to some buyers.
- Some buyers prefer the convenience of “bought” sex over a regular partner who requires greater effort, negotiation, and time.
- Some men wish to avoid the commitment and mutual obligation involved in a conventional relationship.
- Some married men may see prostitution as less risky than having an extramarital affair.
- Some buyers feel that sex with prostitutes gives them greater control during the sexual encounter, or that it allows an immediate sexual release.
- Some buyers seek prostitutes for primarily nonsexual reasons, such as companionship, sympathy, friendship or love.

3.86 It is clear that there are many reasons why men buy sex. The reasons seem to differ across societies, and may – on a “micro” level – reflect a particular set of family values or views on gender, masculinity and sexuality. The list above is by no means exhaustive. Analysing each reason may shed some light on the underlying cause for a particular man’s choice to buy sexual services; the reasons stated can loosely be categorised under the four main theories explained earlier in this report. For the purpose of this chapter, it is sufficient to

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<sup>1228</sup> Monto 171 – 172.

say that the main conclusion to be drawn from reading the list above is that, bluntly put, men buy women in prostitution because they can. More often than not, the legal status of prostitution appears somewhat irrelevant. As such, prostitution is constructed from a masculine perspective as being inevitable, not that it is actually so.

## **E Overview of submissions**

3.87 The Discussion Paper invited comment on the four legislative models discussed in that Paper, and asked respondents to identify the model they believed to be most appropriate for South Africa. Some comments specifically addressed the topic of buyers of sexual services, whereas other submissions discussed the preferred choice of legal model. Views pertinent to the discussion have been categorised in the following sections according to each of the four models. Comments made in support of a specific model are included under the relevant model.

### **1 Total criminalisation**

3.88 A number of respondents<sup>1229</sup> supported the total criminalisation of prostitution, that is, criminalisation of all aspects of prostitution, including the buying thereof. In the view of these respondents,<sup>1230</sup> prostitution is inherently harmful not only to the prostitute but also to the buyer of sexual services; it is inherently anti-family and is harmful to society in general. The primary concern of respondents in this category was the abuse, rape and physical violence against prostitutes by buyers in South Africa.<sup>1231</sup> Nation Building submitted that it is not the criminalisation of prostitution that makes it dangerous, but rather the actual nature of prostitution, which is both dangerous and hazardous to people's health. When a prostitute is alone with a buyer, no matter what has been negotiated, she is virtually powerless to insist that he use a condom or to stop him from beating her. In the words of Lana, a prostitute interviewed for the Rocking Chair submission, "No one can protect you from the buyer who walks in with AIDS or from the buyer who refuses to pay."

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<sup>1229</sup> Minister of Tourism; Doctors For Life International; Robyn Fudge; Family Policy Institute (endorsed by more than 1000 of endorsing emails), The Islamic Forum Azaadville; Marge Ballin, Ministry Director from Inter Outreach Ministries; The Christian Lawyers Association of South Africa; Nation building; the Council of Muslim Theologians KZN; Lindie Saunderson, Edward Nathan Sonnenbergs Inc; The Naked Truth; Islamic Unity Convention; Antioch Bible Church; Rocking Chair; World Vision; Christian Action Network; Ina van den Heever.

<sup>1230</sup> Bart Love, the cameraman in the Rocking Chair submission p 46 - 48; Abdullah Saeed.

<sup>1231</sup> Marge Ballin, Inter Outreach Ministries, Nation Building, Family Policy Institute.

3.89 Robyn Fudge states that the physical, psychological and sexual harm incurred during prostitution are well documented, and results from the actual practice of prostitution. Such harm is present whether the prostitution occurs indoor or outdoor and regardless of whether it is legal or illegal. Fudge avers that non-criminalisation or regulation would merely render the harm invisible. Marge Ballin of Inter Outreach Ministries similarly states that changing the legal framework would not make prostitutes less vulnerable to harm. She reports that in legal brothels and escort agencies in Victoria, women continue to be raped and traumatised. Ballin avers that non-criminalised prostitution encourages abuse by its very nature. Ms Saunderson states that legalising prostitution would unfairly infringe on the rights of dignity, privacy, and safety and security, and would consequently make prostitutes more vulnerable to abuse. She reports that murdered prostitutes are found daily on the bridges and banks of the river running through Alexandra township, where she works.

3.90 The Family Policy Institute argues that prostitution is not labour but is a violation of human rights, and can never be considered work in the conventional sense of the word. According to the Institute, it is “paid rape” and degrades, dehumanises and reduces women to mere commodities for sale. In the Institute’s view, using the words “sex work” serves to sanitise pimps and brothel keepers as legitimate businessmen but does nothing to end the violence and exploitation of women; nor has it reduced the stigma associated with prostitution.

3.91 The Family Policy Institute points out that any government that decriminalises prostitution as “sex work” would inevitably gain a huge economic stake in the sex industry. Women would be counted as workers, pimps as business-men, and buyers as consumers (of sexual services), and thus the entire sex industry would be legitimised as an economic sector. The government concerned would then be able to abdicate responsibility for making genuinely decent and sustainable employment available to women. The Institute contends that The National Council of Women of New Zealand, which originally supported the decriminalisation of prostitution, is now of the view that the only winners from the 2003 Prostitution Reform Act are males.<sup>1232</sup>

3.92 The Islamic Forum Azaadville endorses the criminalisation of buyers because of the negative effect of buyers’ behaviour on third parties intimately related to the buyer (ie spouse and children). In its opinion, the reasons advanced by buyers do not constitute any basis for

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<sup>1232</sup> Family Policy Institute.

changing the law. DFL similarly states that the criminalisation of prostitution sends out a clear message to society, especially young people, that prostitution is illegal precisely because of the social ills linked to it – such as gender-based violence, child abuse, human trafficking, organised crime, drug dependency, STDs and HIV – and that it is “not an option”. In this way criminalisation informs and protects individuals from making decisions that would be detrimental to their wellbeing.<sup>1233</sup>

3.93 Many respondents<sup>1234</sup> submit that the “need” for prostitution is a socially constructed one, which is often linked to the “acceptable” use of violence against women in prostitution. They argue that criminalising the behaviour of buyers, as in section 11 of the Sexual Offences Amendment Act, sends a clear message that buying sexual services is not socially acceptable.<sup>1235</sup> Additionally it is argued that efforts need to be made to address the social attitudes that sustain this trade, as well as factors such as poverty and lack of skills which make people vulnerable to exploitation.<sup>1236</sup> Because prostitution is driven by demand, DFL advocates for far tougher measures to deal with the buyers of prostitutes.<sup>1237</sup> The Family Policy Institute also argues that clamping down on demand would affect the availability of prostitutes<sup>1238</sup> and would break the links with organised crime.<sup>1239</sup> DFL states that demand would be significantly reduced through the introduction of rehabilitation programmes for buyers.<sup>1240</sup> Other measures include fines and/or imprisonment, impounding of buyers’ vehicles, buyers’ photographs being placed on a database, and even informing a spouse of the behaviour of the buyer and therefore of risks to the spouse.<sup>1241</sup> Fudge concedes that criminalising the demand side would not end prostitution but she is confident that it would significantly help to reduce prostitution, as it would target the demand that drives the trade.

3.94 Nation Building, Rocking Chair and the Christian Lawyers Association of South Africa comment that buyers need to be treated with compassion. They suggest that instead of being fined, first-time offenders should – like prostitutes – enjoy the benefit of a diversion programme, which would sensitise them to the true nature of prostitution as an extreme form of gender-based violence. The aim would be to integrate buyers into society so that they are

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<sup>1233</sup> Marge Ballin (Inter Outreach Ministries) argues that prostitutes are vulnerable to harm irrespective of the legal framework.

<sup>1234</sup> Christian Lawyers Association of South Africa.

<sup>1235</sup> Christian Lawyers Association of South Africa; Family Policy Institute.

<sup>1236</sup> Robyn Fudge.

<sup>1237</sup> Endorsed by Robyn Fudge.

<sup>1238</sup> Family Policy Institute, Christian Lawyers Association of South Africa

<sup>1239</sup> Family Policy Institute

<sup>1240</sup> DFL.

<sup>1241</sup> Ibid.

empowered and less inclined to relapse.<sup>1242</sup> Randall<sup>1243</sup> believes that apartheid resulted in a sense of emasculation for many men, who felt disempowered and were left with an “overwhelming sense of being rendered children rather than adults”. Randall submits that the social construct of masculinity in South Africa needs to be addressed as many men have “moved away from being providers and protectors of women to being attackers of women in order to prove their masculinity”. She believes that “all South African men, not just the subgroups that visit prostitutes or commit rape, have in some way been affected by the historical assault on the black male psyche”.

3.95 The Rocking Chair submission recommends a restorative justice approach specifically related to prostitution, as in Kansas City in the United States of America. Buyers are referred through the court system or other referrals and outreach programmes, and some buyers are “walk-ins”. The restorative programme works with every buyer, providing individual needs assessment, peer counselling, licensed therapists, shelter, food, health care, drug treatment and legal help. An initiative called Veronica’s Voice also offers “exiting classes”. These are weekly sessions with buyers where weekly, monthly and long-term goals are set.<sup>1244</sup> Buyers are given a variety of tools through a city-wide networking system. Each aspect of their current life is evaluated to make sure the buyer is set up for success and not for failure. They are offered support for a lifetime, and are strongly encouraged to mentor other buyers – who typically desire such mentoring.<sup>1245</sup> Rocking Chair argues that this pragmatic and restorative justice programme moves law enforcement, criminal justice, and human services to a new level of performance in eliminating the tragic human consequences and high community cost of prostitution.<sup>1246</sup> According to Rocking Chair, Veronica’s Voice also runs an intervention programme with the municipal court so that judges can offer women who have been arrested for prostitution the chance to seek help from Veronica’s Voice in lieu of jail time.<sup>1247</sup>

3.96 DFL states that rehabilitation programmes which educate buyers on the harmfulness of their actions can change these men’s usually distorted perceptions of women and sex. Furthermore, if buyers are compelled by law to attend rehabilitation lectures – which may be presented by ex-prostitutes and health care professionals – they will be far less inclined to buy sexual services, and therefore the risk of passing on diseases to their spouses (which

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<sup>1242</sup> Rocking Chair at 48.

<sup>1243</sup> Sue Randall submission.

<sup>1244</sup> Rocking Chair submission at 51.

<sup>1245</sup> Ibid.

<sup>1246</sup> Op cit 50.

<sup>1247</sup> Op cit 51.

often leads to the breakdown of a family) will also be reduced. Prostitutes and their buyers are both high-risk populations for HIV/AIDS.<sup>1248</sup> The data submitted by DFL showed that each prostitute had had unprotected vaginal intercourse with an estimated average of 160 persons over a 4-month period.<sup>1249</sup>

3.97 Mr Marthinus van Schalkwyk (MP), the Minister of Tourism, endorsed the total criminalisation model, including the criminalisation of buyers. His submission stated that broad societal interests should be considered against imperatives that have a negative implication on the long-term goals of the country. Van Schalkwyk, together with Rev RM Verreyne of the Christian Reformed Church, was of the view that South Africa should encourage patronage by tourists who are concerned with humanitarian issues, ethical and healthy holidays, and who seek self-development. He states that non-criminalised prostitution would chase away this valuable category of environmentally conscious tourists, would create problems for South Africa as a host country (including health and crime problems), would affect the reputation of the country and would accelerate moral degeneration. Bart Love of the Rocking Chair crew<sup>1250</sup> similarly submitted that a totally criminalised model can create an environment in which the combination of political will and civil society mobilization can cooperate to meaningfully tackle the social challenges.

3.98 The Gender Coordinator of World Vision South Africa submits that it is imperative for all stakeholders to engage in moral regeneration, and that the morality of buying someone else's body should be explored.

3.99 The DFL states that the fact that police often do not charge buyers arrested for prostitution, and the reluctance of prosecutors to prosecute for the crime of prostitution, is not a reason to say that the criminalisation of prostitution does not curb the demand for prostitution. The effectiveness of the law criminalising prostitution in South Africa depends first and foremost on properly drafted legislation and, just as importantly, on effective and efficient policing and prosecution. The Islamic Forum Azaadville agrees and further states that prostitution can only be reduced to a minimum by the strict enforcement of various Acts already in place, such as the Sexual Offences Amendment Act. In the Forum's view,

[I]t is not only the enforcement factor but also the lack of will displayed by the authorities that allows the purpose of law to be defeated. There can be no denying that law has no purpose if it will not be implemented. Furthermore the

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<sup>1248</sup> Endorsed by the Christian Lawyers Association of South Africa.

<sup>1249</sup> Ibid.

<sup>1250</sup> Bart Love, the cameraman in the Rocking Chair submission at 46-48.

lack of will currently displayed will also be present for any Act that will be enacted to regulate the prostitute industry.

## 2 Partial criminalisation

3.100 Some respondents<sup>1251</sup> are in favour of criminalising buyers and all third parties involved in prostitution. In their view, prostitutes should not be criminalised. Although no formal submission was received from the NGO Embrace Dignity, that organisation is known to publicly endorse this model (also known as the Swedish model). However, Embrace Dignity has stated that it is not adverse to total criminalisation.<sup>1252</sup> According to the Embrace Dignity website,<sup>1253</sup> the solution it proposes is comprehensive, with a foundation of social and economic transformation to create a more equal society and to end violence against women. Embrace Dignity advocates for criminalising the purchase of sex and people who exploit the vulnerability created by poverty and sexual inequality. The aim is to end men's demand created by the sex industry, and to offer women training and a wider set of choices of employment. The ultimate goal is to provide women and poor people with a wider choice of educational and employment opportunities and thus a wider set of life choices. An affiliated view<sup>1254</sup> is that the buyer must be arrested and the prostitute given a choice of an exit programme. The purposes of following this route were described by various respondents as follows: to reduce the incidence of prostitution,<sup>1255</sup> to stop HIV,<sup>1256</sup> to rehabilitate people in prostitution,<sup>1257</sup> to limit a social evil that is destructive to the family,<sup>1258</sup> to discourage prostitutes and clients,<sup>1259</sup> to discourage drug taking and crime,<sup>1260</sup> and to allow prostitutes to protect themselves from exploitation and violence.<sup>1261</sup>

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<sup>1251</sup> S Le Grange; A Meqaw; L Turner.

<sup>1252</sup> Meeting held with Embrace Dignity on 8 December 2012.

<sup>1253</sup> Embrace Dignity website information available at <http://www.embracedignity.co.za> Accessed on 26 September 2011.

<sup>1254</sup> Marinda & Cornelius.

<sup>1255</sup> E Bonthuys, WITS. L Walter, Sabie Methodist Church.

<sup>1256</sup> SM Hadebe; GT Ndlovu; S Tegg, Full Gospel Church.

<sup>1257</sup> G Hall, His People Parkhurst.

<sup>1258</sup> D Scarborough, Gospel Defence League.

<sup>1259</sup> Ibid.

<sup>1260</sup> Ibid.

<sup>1261</sup> L Walter, Sabie Methodist Church.

### 3 Regulation

3.101 A few respondents advocated for the legalisation and regulation of prostitution, including the legalisation of buyers.<sup>1262</sup> For example, the South African Women's Lawyers Association (SAWLA) advocates for regulation, with the aim of protecting prostitutes as a vulnerable group. Professor Lemmer discussed the usefulness of prostitution to buyers. He stated that due to a lack of professional therapists, prostitution may contribute to solving sexual problems in individuals and between couples. In his opinion, a "good prostitute" is an expert at building a buyer's self-esteem, especially for people who cannot find a sex partner. He listed the following types of people as being likely to benefit from prostitutes:

- Physically impaired people;
- Unattractive singles;
- Gays; and
- Married couples needing sex therapy.

3.102 Lemmer adds that being with a prostitute does not always imply having sexual intercourse. Buyers are willing to pay in exchange for gender communication, or to receive emotional care or just to be touched and cuddled. In his view, the legalisation of prostitution would also accommodate people with a high libido and would reduce the number of sexual molesters and rapists in society.

3.103 Lemmer disagrees with partial criminalisation as a legislative option, on the grounds that protecting prostitutes to the exclusion of buyers and broader society is not a sufficient reason to criminalise buyers but not prostitutes.

### 4 Non-criminalisation

3.104 Ms Hicks of the Commission for Gender Equality advocates for non-criminalisation on the grounds that it would lift prostitution out of the criminal realm, where abuse and exploitation flourish. It would then be part of a transparent arena where the rights of both the prostitute and the buyer could be ensured, abuse minimized and vulnerability addressed.

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<sup>1262</sup> Professor Lemmer; South African Women's Lawyers Association (SAWLA).

SWEAT<sup>1263</sup> states that selling sex is a legitimate form of labour and disputes the position that selling sex constitutes a sexual offence, or that sex for reward between consenting adults should be criminalised.

3.105 SWEAT opposes the inclusion of the phrase “the reduction of demand for prostitution” under the purpose of any legislative model. SWEAT argues that in a situation of willing buyer and seller, where nobody is a victim and the state has a clear inability to monitor these transactions, the rationale of the law (implicitly or explicitly) to reduce demand or the government taking a position on demand reduction is unclear. SWEAT further submits that no law, under any of the models, has been proven to have a direct effect in reducing the demand for prostitution.

3.106 SWEAT submits that experience in other countries has shown that non-criminalisation (including the non-criminalisation of buyers) allows for successful initiatives that can result in improvements for women in prostitution. These include better negotiating skills; the ability to refuse buyers; improved access to and use of condoms; training to recognise, avoid, and escape violence; better STI and HIV preventive services; and provision of safe houses, drop-in centres, and STI treatment. SWEAT further submits that in New Zealand, for example, prostitutes are able to report buyers who want to practise unsafe sex, that cooperation between prostitutes and police has improved, and there has been an improvement in occupational health and safety standards.

3.107 Dr Mhlanga of the South African Department of Health endorses the non-criminalisation of prostitution. He submits that his greatest problem is attending to women who have been physically and sexually abused by buyers and who present with severe injuries. He is of the view that non-criminalisation would protect prostitutes from physical and financial abuse by buyers and assist them to access medical help for assaults and early disease detection.

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<sup>1263</sup> Endorsed by Shane Petzer; Steve Biko Centre for Bioethics WITS; AIDS Consortium; AIDS Legal Network; Centre for Applied Legal Studies; OUT LGBT Well-being; Socio Economic Rights Project, Community Law Centre, University of the Western Cape; South African National AIDS Council Women’s Sector; Treatment Action Campaign’s Womens Rights Campaign; Tshwaranang Legal Advocacy Centre; Centre for the Study of Violence and Reconciliation Gender Based-Violence Program; Gender Dynamix; Good Hope Metropolitan Community Church; Institute for Security Studies; Joint Working Group (LGBTI Sector); Legal Resources Centre; People Opposing Women Abuse; SACCAWU; Women and HIV/AIDS Gauge, Health Systems Trust; Women’s Legal Centre; Women’s Net and World Aids Campaign.

3.108 One respondent<sup>1264</sup> submits that buyers should not be criminalised, because women’s participation in prostitution is often an act of financial desperation and survival. Thus these women have a real need for buyers who require their services.

3.109 The Tshwaranang Legal Advocacy Centre endorses the non-criminalisation of prostitution, subject to the criminalisation of coercive and exploitative practices. Non-criminalisation was also supported by the Human Rights and Access to Justice Technical Task Team of the South African National Aids Council (SANAC). The SANAC submission stated the following points: there is an “astonishingly high” prevalence of rape and sexual violence in South African society; a documented relationship exists between violence and sexual risk-taking; women who experience violence (of any form) are more likely to have HIV than other women; and sexual violence is a key driver of the HIV epidemic. The solution, according to SANAC, is to provide protection through occupation health laws and the labour law, not through the criminal law.

3.110 Ms Hicks of The Commission for Gender Equality states that a law providing for non-criminalisation should include the right to refuse to provide a sexual service to a buyer, and the right of a buyer to recover payment if a service is not rendered after payment has been made.<sup>1265</sup> GT Mjuzza and J Selby of Angels submit that the transaction agreement should involve a willing buyer and willing seller, and that non-payment should be dealt by a supervisory body as a breach of contract.<sup>1266</sup> E Bonthuys of WITS raises the question of public policy in contract law, which deems contracts for adult prostitution contrary to public policy or the *boni mores*. Bonthuys states that these statutory provisions would need to be expressly amended. A number of respondents were opposed to providing for such a clause as being contrary to public policy.<sup>1267</sup>

3.111 SWEAT further submits that there should be a legal obligation on the prostitute and the buyer to practice safe sex. Ms Hicks of The Commission on Gender Equality proposes instead that safe sex practices should be covered by a code of conduct developed by a consultative body. A number of respondents<sup>1268</sup> state that safe sex and prostitution will never be compatible.

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<sup>1264</sup> J Solinus Joliffe.

<sup>1265</sup> Endorsed by SWEAT.

<sup>1266</sup> Ibid.

<sup>1267</sup> Marinda & Cornelius; D Scarborough, Gospel Defence League.

<sup>1268</sup> SM Hadebe; Marinda & Cornelius; GT Ndlovu; D Scarborough, Gospel Defence League; S Tegg, Full Gospel Church; I & B Wilson, Presbyterian Church.

## 5 Evaluation of policy options and recommendations

3.112 This chapter has sought to understand prostitution from a buyer's perspective, by way of discussing a number of contextual issues. These include why people pay for sexual services and what drives the demand for prostitution. The chapter has presented the various legal approaches used in respect of buyers and has expounded pertinent submissions made to the Commission.

3.113 It is essential to remember that the manner in which prostitution is practised in a particular country is shaped not only by its legal status but also by myriad other social and cultural contexts. In South Africa, prostitution is practised – from the prostitutes' perspective – amid complex social, cultural and economic realities. Relevant influences include poverty, sexual inequality, socio-economic marginalisation of women, lack of formal education, scarcity of employment in the formal sector, the disparate impact of the HIV/AIDS pandemic on women, and in some instances addiction to substances such as alcohol and drugs.

3.114 In the discussion of the theoretical approaches applicable to buyers of sexual services, the Commission observed that the majority of prostitutes in South Africa sell sexual services for economic reasons. Theoretically, if selling and buying sexual services was known to be a purely economic transaction between a willing buyer and a willing seller, this would support the move towards a non-criminalised or regulated model. However, such a notion cannot be assumed as fact, especially in South Africa. Because of entrenched gender and sexual inequality as well as dire financial or survival needs, the reality for most South African prostitutes is that the transaction is seldom – if ever – a contract entered into by equals. Firsthand narratives heard at workshops have revealed that this inequality and lack of bargaining power is compounded for foreign prostitutes, especially people who are in the country illegally and engage in prostitution to subsist. Although a choice is made to sell sexual services, this choice is exercised amid very limited options with little hope of finding another viable income. **Due to the personal nature of a prostitute's interaction with buyers, the Commission notes that a change in the law would not in itself protect prostitutes from the abuses they have been subjected to by buyers.**

3.115 During workshops and related discussions, the Commission was informed that violence by buyers towards prostitutes is extremely prevalent in South Africa. Prostitutes in Pietermaritzburg reported that buyers beat them, rape them, abandon them in isolated

places, leave them naked, and that they are thrown or forced to jump from moving vehicles.<sup>1269</sup> They have also reported being robbed and raped by passing men.<sup>1270</sup> One prostitute in Sunnyside told the Commission's researchers that she was routinely raped by 70% of her buyers. Prostitutes from Johannesburg, Pretoria, Rustenburg and Cape Town who participated in a Commission workshop confirmed the abusive behaviour by buyers listed above. A 1995 study among prostitutes at a truck stop in KwaZulu-Natal noted similar reports,<sup>1271</sup> and Pauw and Brener's Cape Town survey in 1997 also confirmed this trend.<sup>1272</sup> Violence from buyers seems to be one of the most serious occupational hazards for women in prostitution.

3.116 The joint ISS and SWEAT submission indicates that buyers who use prostitutes soliciting in the streets tend to be more abusive and violent than buyers who use indoor prostitutes.<sup>1273</sup> When the buyer picks up a prostitute from the street, he remains in control of the situation with regard to the location of the interaction simply because he is driving the vehicle.<sup>1274</sup> Pauw and Brener also note in their research report that after a prostitute has reached an agreement with a buyer, she is often required to enter the buyer's territory (eg his car or home) and that this puts her in a vulnerable position for abuse.<sup>1275</sup>

**3.117 In the Commission's view, although partial criminalisation is an option, the retention of the total criminalisation model is justified in South Africa. Considerations that support this conclusion are the context of extreme social inequality and sexual violence in this country, as well as evidence of high levels of violence perpetrated by many buyers of sexual services. Whether violence is associated primarily with the behaviour of individual buyers or is somehow inherent in all forms of prostitution-related activity, the Commission finds no justification for legalising the role of buyers in prostitution. (This would be particularly unwise if it was coupled with the retention of criminalisation of prostitutes themselves.) The Commission realises that once a prostitute is alone with a buyer, no matter what is or has been negotiated, she is virtually powerless from then on either to insist that he uses a condom or to prevent**

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<sup>1269</sup> Marcus T "Aids and the highways: sex workers and truck drivers in KwaZulu-Natal" *Indicator SA* 1995 at 82.

<sup>1270</sup> Ibid.

<sup>1271</sup> Karrim Abdool "Reducing the risk of HIV infection among South African sex workers socio economic and gender barriers" 1995 at 1523.

<sup>1272</sup> Pauw & Brener 16.

<sup>1273</sup> SWEAT & ISS submission.

<sup>1274</sup> Ibid.

<sup>1275</sup> Pauw & Brener 16.

**him assaulting her. Non-criminalising the buyers of prostitution would therefore infringe on a prostitute’s rights of dignity, privacy and safety and security.**

3.118 The application of the theory in which the buying of and demand for sexual services is seen as a social construct raises divergent responses in the South African context. On the one hand, large segments of South African society are vocally opposed to non-criminalising prostitution. The Commission has literally received thousands of emails emphatically expounding the social unacceptability of prostitution, and supporting the criminalisation of buyers of sexual services in the context of total criminalisation of prostitution. The Minister of Tourism has informed the Commission that he wishes to portray South Africa as a family-friendly destination and does not want South Africa advertised as a destination for sex touring buyers. On the other hand, the ready supply of prostitutes – albeit a result of economic hardship – has surely arisen in response to a demand from buyers. This would seem to indicate a vastly different social construct. The Commission is therefore of the view that conceptualising the buying of sexual services as a social construct is a theoretical approach that could underpin any of the legislative models. **As stated above, the Commission cannot see any benefit in re-branding South Africa as a sex tourist destination.**<sup>1276</sup> The Commission believes that the view of Randall<sup>1277</sup> on the intersection between gender violence and the altered social construct of masculinity – away from men being providers and protectors of women to being attackers of women in order to prove their masculinity – deserves mention. Randall identifies emasculation under apartheid as an important factor in the way some men view women in South Africa, and a contributor to the legacy and normalising of the violence perpetrated by such men, especially where this sense of powerlessness is compounded by unemployment.

3.119 The Commission acknowledges the theory that links buying sexual services to biological inevitability. The theory however overlooks the fact that not all men engage in prostitution, and it ignores the idea that people can exercise rational choice. This argument appears no more valid as an explanation of prostitution than it does as a rationalisation or justification of why some men rape women. The submission by Randall<sup>1278</sup> however provides a different perspective. Randall submits that it is a “biological fact that men have much higher levels of testosterone than women do, and that testosterone is a hormone that drives both sexual behaviour and aggression.” She argues that “the emasculating effects of apartheid are paralleled by today’s climate, where so many men are unemployed” and

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<sup>1276</sup> See para 2.491.  
<sup>1277</sup> Sue Randall submission.  
<sup>1278</sup> Ibid.

“rootless in terms of family life and may also have a childhood history of abuse”. Randall believes that these macro-social factors need to be addressed. She suggests that “men’s hormonal and biological drives need to be channelled more effectively and obstacles to personal development and personal empowerment (including unemployment) need to be addressed nationally.” Unemployment and poverty would seem to be an important underlying factor in the provision of sexual services and the demand thereof.

3.120 The issue of people using substances such as alcohol and drugs prior to buying sexual services or during the encounter has been raised at workshops facilitated by the Commission, and during interviews by the Commission research team. Substance use and abuse seems widespread. As reflected above, **the Commission is of the view that substance abuse in the context of prostitution deserves further attention and intervention.**<sup>1279</sup>

3.121 It could be argued that although legal change might not be able to alter social power relations or protect prostitutes from exploitation and abuse, such change may grant prostitutes a little more power to negotiate their contracts with third parties.<sup>1280</sup> Currently, buyers are aware that prostitutes are unlikely to report them to the police if they do not pay them or if they physically hurt them, and that even if a buyer is reported it is unlikely to result in legal sanction. This scenario, according to SWEAT and ISS, reduces the power prostitutes have to negotiate the transaction.<sup>1281</sup> The Commission is of the view that on the face of it, the option of non-criminalisation would not result in the legalisation of violence and coercion towards prostitutes. However, as mentioned throughout this report, comparative research has clearly shown that due to the intimate and private nature of the service provided, non-criminalisation would not protect prostitutes from violence and coercion.

3.122 **The Commission is of the view that irrespective of the legal dispensation applied to the buying or selling of prostitution, in terms of the existing law a buyer who engages in violent or harmful behaviour can already be charged for committing common law crimes. These include kidnapping, common assault, assault with intent to cause grievous bodily harm, extortion, attempted murder and murder. As discussed in paragraph 3.57, statutory offences are contained in the Sexual Offences Act,<sup>1282</sup> the Riotous Assemblies Act,<sup>1283</sup> the Immigration Act,<sup>1284</sup> the Basic Conditions**

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<sup>1279</sup> See par 2.477.

<sup>1280</sup> SWEAT & ISS submission.

<sup>1281</sup> Ibid.

<sup>1282</sup> Act 23 of 1957.

<sup>1283</sup> Act 17 of 1956.

of Employment Act,<sup>1285</sup> the Intimidation Act,<sup>1286</sup> the Domestic Violence Act<sup>1287</sup> and the Prevention of Organised Crime Act.<sup>1288</sup>

3.123 Furthermore, section 7 of the Trafficking in Persons Act 7 of 2013 provides that any person who uses the services of a victim of trafficking, and knows or ought reasonably to have known that the person is a victim of trafficking, is guilty of an offence for which a fine or imprisonment for a period not exceeding 15 years may be imposed. The buyer would not be held strictly liable and would not therefore be committing an offence in terms of trafficking legislation by virtue of having bought sexual services from a prostitute who had been trafficked. The Commission is of the view that trafficking of people for prostitution will be adequately dealt with in this legislation.

3.124 Nation Building submits that although other legislation is in place to deal with abusive behaviour, an insidious side-effect of non-criminalising prostitution would be that policing capacity would be diminished, because the underlying crime issues would no longer be considered a priority. The ensuing vacuum in law enforcement would be a major contributing factor in the likely increase in organised crime, human trafficking and drug trafficking associated with legalised prostitution.<sup>1289</sup>

3.125 Some authors have argued that in Sweden, criminalising buyers has led to a reduction in the number of prostitutes; however, others argue that this has not reduced prostitution but has shifted it from the streets to indoors.<sup>1290</sup> Yet others have argued rather dramatically that by criminalising only the buyers, the effect has been that “Sweden suddenly acquired hundreds of thousands of new perverts”. Furthermore, buyers – and men in general – have been “demonised.”<sup>1291</sup> The UN CEDAW Committee stated in 2001 that:

354. While welcoming the criminalisation of the purchase of sexual services, the Committee expresses concern that this **might** have increased the incidence of clandestine prostitution, thereby rendering prostitutes more vulnerable. It also expresses concern that Sweden has become a country of destination for trafficked women.

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<sup>1284</sup> Act 13 of 2002.

<sup>1285</sup> Act 75 of 1997.

<sup>1286</sup> Act 72 of 1982.

<sup>1287</sup> Act 116 of 1998.

<sup>1288</sup> Act 121 of 1998.

<sup>1289</sup> Endorsed by Christian Lawyers Association of South Africa.

<sup>1290</sup> World AIDS Campaign 11.

<sup>1291</sup> Ibid.

3.126 The Committee subsequently requested Sweden to provide full information and data on the exploitation of women and on prostitution, including clandestine prostitution, in its next periodic report.<sup>1292</sup> As discussed in paragraph 3.64 above, an increased incidence of clandestine prostitution has not been proved, but there has been a clear reduction in the number of prostitutes, and the overall demand for prostitutes in Sweden has diminished so markedly that neighbouring countries are following suit in their legislation.

3.127 Eespere<sup>1293</sup> reported that in Estonia, although the buying and selling of persons for sex is not punishable by law, many buyers believe that society condemns their behaviour and as a result they feel compelled to conceal it. They also try to hide their use of prostitution from non-prostitute intimate partners, which may have dire consequences in terms of spreading sexually transmitted diseases to such partners.

3.128 Apart from the obvious violation of the right to physical integrity, the vulnerability of prostitutes to constant violence or the threat of violence by buyers may also have broader implications. For example, it affects their ability to practise safer sex, because buyers may become violent or abusive if a woman tries to insist on condom use. In the Discussion Paper,<sup>1294</sup> Lalu<sup>1295</sup> suggested that it is the illegal nature of prostitution in South Africa that negatively affects public health, for example by placing prostitutes in a weaker position to negotiate condom use with buyers. On the other hand, prostitution by its very nature involves sexual intercourse with multiple partners and consequently carries the risk of spreading sexually transmitted disease – including HIV, first to the prostitute and then to his or her other buyers.<sup>1296</sup> There is no evidence that condom usage is more stringently followed in a non-criminalised setting, because the prostitute's need for money often plays a more decisive role than the legislative regime when decisions about condom use are made.

3.129 The Commission is concerned that research evidence has shown there is a great demand for condom-free sex in South Africa.<sup>1297</sup> Many prostitutes and brothel owners speak of a strong demand by buyers for unprotected sex.<sup>1298</sup> Research findings suggest that the buyers of prostitutes rather than the prostitutes themselves present the greatest threat to the

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<sup>1292</sup> Op cit 12.

<sup>1293</sup> Eespere 15.

<sup>1294</sup> Para 2.37.

<sup>1295</sup> Lalu V "Considering Decriminalisation of Sex Work as a Health Issue in South Africa" available at <http://www.kit.nl/net/>.

<sup>1296</sup> The State's submissions before the Constitutional Court of South Africa in *S v Jordan*.

<sup>1297</sup> Discussion Paper at para 4.19 citing Leggett ODCCP Study at para 2.5.

<sup>1298</sup> Gould C 74.

use of condoms. Buyers frequently request, or even insist on, unprotected sex. Gould<sup>1299</sup> reported that “[W]hile we found sex workers to be well aware of the potential consequences of having unprotected sex, their ability to insist on condom-use is undermined by the fact that buyers offer higher rates for unprotected sex.” Some buyers have been known to resort to violence if unprotected sex is denied them. In an earlier study conducted at a KwaZulu-Natal truck stop, participants (prostitutes) reported that requests for condom use were responsible for buyer loss and more frequent non-payment. They also stated that insisting on condom use led to physical abuse by buyers, and that buyers insisted on paying less for sex when a condom was used.<sup>1300</sup>

3.130 Baleta refers to Neetha Morar of the Medical Research Council where she reported that “dry sex” was prevalent among sex workers in Kwa-Zulu Natal.<sup>1301</sup> At least 80% of a group of 150 sex workers who plied their trade at truck stops in the Natal Midlands reported that they practised “hot tight and dry” sex.<sup>1302</sup> In interviews with the women – who were mainly uneducated single mothers aged between 15 and 45 and came from lower income groups – Morar learnt they used dry sex to give men “more sexual pleasure” and because they wanted to be “hot and tasty” for the men during sexual intercourse. They also wanted to make sure that their buyers kept coming back because of the income this would generate. If they did not practice such sex, the men would not be satisfied and they would not be paid.<sup>1303</sup> This practise however makes these women extremely susceptible to contracting HIV and other STI’s as the artificial drying of the mucosal layers of the vagina make vaginal injuries and the tearing of a condom – where the use of a condom is not already forgone – highly likely. The practice of engaging in anal sex to prevent pregnancy where a buyer refuses to wear a condom further elevates the health risks involved.

3.131 The Commission is of the view that a number of questions arise when considering the desired legal status of buyers of sexual services. One of the most important is whether a person’s sexual services ought to be purchasable. Based on the recommendations contained in Chapter 2, the answer to this question is “no”. In line with this reasoning, the buyers of sexual services should remain criminalised, and related behaviour (such as soliciting) should also remain criminalised.

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1299

Op cit 164.

1300

Karrim 1523.

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Baleta A “Concern voiced over ‘dry sex’ practices in South Africa” *Lancet* 1998 Oct 17;352(9136) at1292.

1302

Op cit.

1303

Op cit.

3.132 As stated above,<sup>1304</sup> there is general consensus from respondents to the Discussion Paper that the practice of selling sexual services is often borne out of a choice made in severely limiting socio-economic circumstances, and in a context of social inequality. **The Commission is of the view that criminalising the role of buyers is necessary to address this inequality, which is both economic and sexual. Furthermore, criminalisation sends out a clear message to society that buying sexual services that are mainly provided because of poverty, inequality and unemployment is exploitative, and therefore illegal. Given the inequality between prostitutes and buyers, the Commission doubts whether prostitutes would be able to exercise the right to refuse sex without a condom. The Commission is aware that criminalising demand does not end prostitution, but is confident that it does play a significant role in reducing prostitution because it targets the demand that drives the selling of sexual services.**

3.133 **The Commission reiterates its opinion that legalising prostitution would only increase the demand, locally and internationally, for more prostituted persons. This would in turn foster a culture in which prostitution and sexual coercion are normalised. Changing the legislative framework could be a dangerous cultural shift juxtaposed against the high incidence of sexual crime against women in South Africa; women would be considered even more expendable than before. South Africa is grappling with high levels of violence against women, with sexual assault and intimate partner violence contributing to increased risks for HIV infection.<sup>1305</sup> The Commission is of the opinion that due to the systemic inequality between men and women in South Africa, no form of legalisation of prostitution would magically address the power imbalance between the buyer and the prostitute, or the demand by buyers for unsafe or high-risk sex.**

3.134 The pertinent sections in the Sexual Offences Act and the Sexual Offences Amendment Act relevant to buyers are as follows:

***Section 19: Sexual Offences Act 23 of 1957:***

**19 Enticing to commission of immoral acts**

(1) Any person who entices, solicits, or importunes in any public place for immoral purposes, shall be guilty of an offence . . .

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<sup>1304</sup> See para 2.435.

<sup>1305</sup> SANAC National Strategic Plan 36.

**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; or
- (b) in public commits any act of indecency with another person, shall be guilty of an offence. . .

**Section 11: Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007:**

**11 Engaging sexual services of persons 18 years or older**

A person (“A”) who unlawfully and intentionally engages the services of a person 18 years or older (“B”), for financial or other reward, favour or compensation to B or to a third person (“C”)—

- (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
- (b) by committing a sexual act with B, is guilty of engaging the sexual services of a person 18 years or older.

3.135 As stated in Chapter 2<sup>1306</sup> the Commission has not found sufficient reason to recommend the repeal of the prohibition contained in section 19 and recommends the retention thereof with the necessary changes in language. The proposed prohibitions in Chapter 2 are hereby extended to include buyers. The Commission recommends the retention of the prohibition contained in section 11 of the Sexual Offences Amendment Act; the repeal of sections 19 and 20(1A) of the Sexual Offences Act. The prohibitions contained in sections 19 and 20(1A)(b) should be reworded as follows:

**xx Making sexual services available by a person 18 years or older**

(1) A person 18 years or older (“A”) who unlawfully and intentionally makes his or her sexual services available to a person (“B”), for financial or other reward, favour or compensation to B or to a third person (“C”)—

- (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
- (b) by committing a sexual act with B, is guilty of making his or her sexual services available.

(2) A person (“A”) who wilfully and openly exhibits himself or herself at any door or window or within view of any public street or place or in any place to which the public have access, with the intention of making his or her sexual services available

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<sup>1306</sup> See para 2.481.

for financial or other reward, favour or compensation is guilty of the offence of exhibiting to commit a sexual act.

(3) Reference to a public place includes a vehicle in a street or public place.

## **xx Committing sexual acts in public**

(1) A person 18 years or older (“A”) who unlawfully and intentionally commits a sexual act with a person (“B”), for financial or other reward, favour or compensation to B or to a third person (“C”) in public is guilty of the offence of committing a sexual act in public.

(2) A person (“B”) who unlawfully and intentionally commits a sexual act with a person 18 years or older (“A”), for financial or other reward, favour or compensation to A or to a third person (“C”) in public is guilty of the offence of committing a sexual act in public.

(3) Reference to a public place includes a vehicle in a street or public place.

3.136 Section 54 of the Sexual Offences Act extends to potential buyers of sexual services. It places a clear obligation on a person who knows that a sexual offence has been committed against a child to report such knowledge immediately to a police official; this would include child prostitution as contemplated in Section 17 of this Act. Non-compliance with this obligation is an offence that is coupled, on conviction, to a fine or imprisonment for a period not exceeding five years. There is no such obligation in respect of adult prostitution. A buyer who reports the commission of an offence against an adult prostitute (eg a suspected victim of trafficking being kept against her will or subjected to exploitation) may face possible prosecution for his part in the prostitution-related activity. The Prevention and Combating of Trafficking in Persons Act<sup>1307</sup> provides that a person (which would include a buyer) who on reasonable grounds suspects that an adult person is a victim of trafficking, may, but is not obliged to, report that suspicion to a police official for investigation.<sup>1308</sup> There is no indemnity granted for reporting under these circumstances in terms of this Act. Because a potential buyer may refrain from reporting abuse and/or exploitation to avoid prosecution for engaging the sexual services of an adult prostitute, the Commission recommends that the Act makes express provision that the court has the authority, in terms of section 204 of the Criminal Procedure Act 51 of 1977,<sup>1309</sup> to grant a discharge from

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<sup>1307</sup> Act 7 of 2013.

<sup>1308</sup> Clause 19(2).

<sup>1309</sup> 204. Incriminating evidence by witness for prosecution

prosecution to a buyer (or potential buyer) for attempting to be involved in a specific

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(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor -

- (a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness -
  - (i) that he is obliged to give evidence at the proceedings in question;
  - (ii) that questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor;
  - (iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;
  - (iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and
- (b) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.

(2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him -

- (a) such witness shall, subject to the provisions of subsection (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and
- (b) the court shall cause such discharge to be entered on the record of the proceedings in question.

(3) The discharge referred to in subsection (2) shall be of no legal force or effect if it is given at preparatory examination proceedings and the witness concerned does not at any trial arising out of such preparatory examination, answer, in the opinion of the court, frankly and honestly all questions put to him at such trial, whether by the prosecution, the accused or the court.

(4) (a) Where a witness gives evidence under this section and is not discharged from prosecution in respect of the offence in question, such evidence shall not be admissible in evidence against him at any trial in respect of such offence or any offence in respect of which a verdict of guilty is competent upon a charge relating to such offence.

(b) The provisions of this subsection shall not apply with reference to a witness who is prosecuted for perjury arising from the giving of the evidence in question, or for a contravention of section 319 (3) of the Criminal Procedure Act, 1955 (Act 56 of 1955).

[Para. (b) amended by s. 1 of Act 49/96]

prostitution-related activity, should that person become aware of the exploitation or commission of an offence against a prostitute and report thereon to the authorities. To avoid buyers trying to circumvent their criminal liability for participation in the reported offences by way of their reporting thereof, the Commission also recommends that it be expressly stated that this stay of prosecution does not extend to the buyer's actual participation in the reported offence. The proposed clause reads as follows:

***Exclusion of criminal liability for reporting of an offence related to prostitution***

(1) A court may make a finding discharging a person from prosecution as provided for in terms of section 204 of the Criminal Procedure Act 51 of 1977 for an offence related to prostitution, where such person reports another offence while engaging the sexual services of an adult prostitute as provided for in section 11.

(2) This discharge does not extend to such person's participation in the reported offence.

**3.137 The Commission has indicated earlier<sup>1310</sup> that where consent is negated in the context of sexual behaviour, such conduct may constitute a sexual offence as provided for in terms of the Sexual Offences Amendment Act. However, the Commission thinks it prudent to include a specific offence relating to engaging the sexual services of a person who has been subjected to force, threats or deception. This prohibition reads as follows:**

***Paying for sexual services of a person subjected to force***

- (1) A person (A) commits an offence if—
- (a) A makes or promises payment for the sexual services of a person 18 years or older (B),
  - (b) a third person (C) has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has made or promised payment, and
  - (c) C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B).
- (2) The following are irrelevant—
- (a) where in the world the sexual services are to be provided and whether those services are provided,
  - (b) whether A is, or ought to be, aware that C has engaged in exploitative conduct.
- (3) C engages in exploitative conduct if—
- (a) C uses force, threats (whether or not relating to violence) or any other form of coercion, or

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<sup>1310</sup> See para 3.57 above.

- (b) C practises any form of deception.

**3.138 One of the aims of combating demand is to find ways to reduce the demand for adult prostitution; therefore, the Commission recommends that advertising prostitution on radio, television or print media should be expressly banned.**

***Advertising the sexual services of persons 18 years or older***

- (1) A person (“A”) who unlawfully and intentionally through advertising directly or indirectly encourages, instigates or aids the engagement of services of a person 18 years or older (“B”), for financial or other reward, favour or compensation to B or to a third person (“C”)—
  - (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
  - (b) by committing a sexual act with B,  
is guilty of advertising the sexual services of a person 18 years or older.

3.139 The provisions relevant to diversion as discussed in Chapter 2 are applicable to buyers as well as women in prostitution, and will not be repeated here.

# CHAPTER 4: THIRD PARTIES

## A Introduction and background

4.1 The aim of this chapter is primarily to consider the role of third parties in respect of prostitution, and more specifically the role of beneficiaries of prostitution. The chapter will exposit and evaluate the submissions made to the Commission in this regard so that a suitable legal approach for South Africa can be identified.

4.2 The chapter starts with an overview of the current law relating to third parties and beneficiaries of prostitution (see paragraph 4.3 below for a definition of third parties). Thereafter, the chapter moves on to examine pertinent submissions made in response to questions posed in the Discussion Paper<sup>1311</sup> on the legislative options of partial criminalisation, regulation, and non-criminalisation (see paragraph 4.4 below). The responses to questions such as whether safe sex practices, sex education and advertising of prostitution should be regulated are also reflected. This section is followed by an evaluation of the material presented in the chapter, and the Commission's recommendations for the most suitable legal response in respect of third parties or beneficiaries of prostitution.

4.3 The category of third parties benefiting from the proceeds of prostitution spans a wide range of people. Such persons may or may not be aware of the source of the benefit they receive, and may or may not be actively involved in acquiring such benefit. Beneficiaries include minor dependants and siblings; major dependants such as parents, grandparents and siblings; partners including husbands, spouses, cohabitees, and boyfriends; pimps<sup>1312</sup> and other business partners; brothel owners; managers; landlords; escort agencies, massage parlours, strip clubs or "hotels"; corrupt police officials or other officials who abuse their positions or abuse prostitutes; and traffickers, transporters or smugglers – to name but a few.

4.4 With regard to the legislative option of partial criminalisation and regulation, attention is given to aspects of prostitution that should remain criminalised. Such activities might

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<sup>1311</sup> SALRC *Sexual Offences: Adult Prostitution* Discussion Paper 2009.

<sup>1312</sup> The *Shorter Oxford English Dictionary* (2007 CD version) defines a pimp "as a person who provides opportunities for illicit sexual intercourse; especially a man who takes a percentage of a prostitute's earnings, frequently in return for arranging clients etc.; a pander".

include engaging in outdoor sexual intercourse outside a brothel with persons aged 18 years or older, for reward; having outdoor sexual intercourse for reward with persons 18 years and older; procurement of unlawful carnal intercourse prostitution; living on earnings of unlawful prostitution; assistance for purposes of unlawful prostitution; enticing, soliciting or importuning unlawful prostitution; and coerced prostitution. With respect to the option of non-criminalisation, the question of whether persons who are convicted of specific offences should be excluded from running a prostitution business is dealt with.

## **B Current law in South Africa**

4.5 As stated in Chapter 2,<sup>1313</sup> South Africa currently follows the model of total criminalisation of prostitution. The criminal provisions in the Sexual Offences Act are enforced by police officials, and a person convicted of contravening the provision of the Sexual Offences Act may be punished with a fine or imprisonment or both. The conduct of all persons involved in prostitution (ie the prostitute, the buyer, and third parties such as pimps and brothel owners) is criminalised in South Africa.

4.6 Offences listed in the Sexual Offences Act relevant to third parties are as follows: keeping a brothel,<sup>1314</sup> certain persons deemed to keep a brothel,<sup>1315</sup> procuration,<sup>1316</sup> assistance for purposes of unlawful carnal intercourse,<sup>1317</sup> residing in a brothel, assisting in the management of a brothel, and/or receiving moneys taken in a brothel,<sup>1318</sup> an owner or occupier permitting on his premises the defilement of a female or any offence against the Sexual Offences Act;<sup>1319</sup> living on the earnings of prostitution; and committing or assisting in the commission of indecent acts.<sup>1320</sup>

4.7 These offences, in addition to the provisions discussed in Chapters 2 and 3, are essentially the remaining provisions of the Sexual Offences Act following the amendment thereof in 2007.

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<sup>1313</sup> See para 2.121 above.

<sup>1314</sup> Section 2.

<sup>1315</sup> Section 3.

<sup>1316</sup> Section 10.

<sup>1317</sup> Section 12A

<sup>1318</sup> Section 3.

<sup>1319</sup> Section 17

<sup>1320</sup> Section 20(1).

4.8 For the purpose of clarity and to place the submissions in context, the offences in the Sexual Offences Act relevant to this chapter are discussed in the following sections. The definitions contained in the Sexual Offences Act relevant to these offences are as follows:

'brothel' includes any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or indecent purpose;

'house' includes a dwelling house, building, room, out-house, shed or tent or any part thereof;

'owner' includes any person who lets or sub-lets or permits the occupation of any house or place whether in his or her own right or that of another;

'place' includes any field, enclosure, space, vehicle, or boat or any part thereof[.]

4.9 Although the classic stereotype of a brothel is an establishment in a house, presided over by a formidable "madame", it is clear from these definitions that the Act has cast its net far wider. It contemplates the possibility of a brothel being kept, for instance, in a boat, tent or even a field. Corbett JA found in *S v M and another*<sup>1321</sup> that where the definition speaks of a house or place " ... used for purposes of prostitution ...", at the same time it means a house or place that is consistently or habitually so used; it does not refer to a house or place where a single act or a few isolated acts of prostitution may have taken place.<sup>1322</sup>

4.10 Section 2 of the Sexual Offences Act criminalises the keeping of a brothel and provides as follows:

Any person who keeps a brothel shall be guilty of an offence.

4.11 The penalty for contravening this section is imprisonment for a period not exceeding three years, with or without a fine not exceeding R6 000 in addition to such imprisonment.<sup>1323</sup> The offence consists of the following elements: keeping, a brothel, and *mens rea*.<sup>1324</sup>

4.12 "Keeping" requires that the accused must have exercised some degree of management, supervision or control of a more or less permanent character.<sup>1325</sup> The owner of

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<sup>1321</sup> As per Corbett JA in *S v M and another* 1977 (4) SA 886 (A).

<sup>1322</sup> Ibid.

<sup>1323</sup> Section 22(a) of the Act.

<sup>1324</sup> Directly translated from Latin, *Mens rea* means "a guilty mind", but loosely translated as the state of mind which makes an illegal act a crime or a criminal state of mind.

<sup>1325</sup> Milton & Cowling "Statutory Offences" 2005 at E3-109 n 3 and the authorities cited there.

the premises is not necessarily “keeping” it; he or she must, in addition, control or supervise the operation of the brothel.<sup>1326</sup>

4.13 In *S v M and another*<sup>1327</sup> Corbett JA held that in a number of cases, while considering the ordinary meaning of “keeps a brothel”, the court has emphasized the elements of management and control. In applying the law to the facts, Corbett JA further held that the evidence established conclusively that the appellants – two self-confessed prostitutes who provided intercourse from a flat – did keep a brothel. The flat constituted a house “kept”, or at any rate used habitually, for the purposes of prostitution. He held that he was convinced that the appellants exercised such powers of management and control over the premises as to bring themselves within the provisions of section 2; that is, that they kept a brothel.

4.14 It was argued that section 2 does not refer to the prostitution of oneself by women (girls) working in a brothel, and that consequently the so-called “common prostitute” could not also be the keeper of a brothel – because she cannot manage herself.<sup>1328</sup> Corbett JA held that it may well be that in the case where a brothel is managed and controlled by a “madame” or mistress who is herself not a prostitute, it would be incorrect to say that any one of the prostitutes working there was keeping the brothel. However, Corbett JA also stated as follows:

She [the mistress], not they [the prostitutes], would have management and control. It does not follow, however, that in a case where there is no mistress, prostitutes themselves cannot keep a brothel. Nor do I think that such a mistress is a *sine qua non* of a brothel. It seems to me that where, as in the present case, two prostitutes together hire or gain de facto control of premises and then, while maintaining control thereof proceed to use the premises habitually for the purpose of prostitution, they commit the offence of keeping a brothel.<sup>1329</sup>

4.15 In the matter of the *National Director of Public Prosecutions v Geysler and Another*,<sup>1330</sup> the respondent had kept a brothel on the top floor of a property. Accordingly, this floor, along with its contents and a pro rata part of the unbuilt portion of the property, was an instrumentality of the offence of contravening section 2 of the Sexual Offences Act, and was declared forfeit to the state. On appeal, the evidence showed that the ground floor of the property housed a bar and space where people could socialise, and was also a venue for erotic dances and strip shows. More specifically, this was where the customers booked

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<sup>1326</sup>

Ibid.

<sup>1327</sup>

*S v M and Another* 1977 (4) SA 886 (A).

<sup>1328</sup>

Ibid.

<sup>1329</sup>

Ibid.

<sup>1330</sup>

2008 (2) SACR 103 (SCA).

and paid for the services of the prostitutes and where the management of the establishment was conducted. The ground floor was therefore an essential component of the brothel, and the court a quo had erred in finding that only the top floor had been involved.<sup>1331</sup> The SCA found that the whole building satisfied the requirement that the property must facilitate commission of the offence and be directly causally connected with it so that it was integral to the commission of the offence. This feature was enough to make the whole property an instrumentality, whatever insignificance the surrounding grounds may have had. The court found that brothel keeping did not have to involve personally selling “commercial sex”. The owner had let the upper rooms for the purpose of prostitution and had knowingly received a share of the moneys of the business.<sup>1332</sup>

4.16 The primary question was found to be not whether forfeiture would constitute punishment, but whether it would have the necessary remedial effect. The remedial effect required was one which would convey the unmistakable message to the first respondent, to other brothel keepers, and to the public at large that the law does not turn a blind eye to the persistent and obdurate pursuit of a criminal business.<sup>1333</sup> The court held that the appropriate means to convey that message was by forfeiture of the property in question. The defence was not bolstered by evidence that some visitors to “Ambassadors” came merely to socialise, or that the business earned more from its liquor sales than prostitution, or that the prostitutes were not employees but free agents. The fact remained that commercial sex was the drawcard and focal activity of the business.<sup>1334</sup>

4.17 Schedule 1 of the Prevention of Organised Crime Act 121 of 1998 contains an itemised list of common-law and statutory offences. Item 11 involves the contravention of section 20(1) of the Sexual Offences Act. Item 33 involves any offence that carries a punishment of imprisonment exceeding one year without the option of a fine. The penalty prescribed for brothel keeping is three years’ imprisonment, with or without a fine of R6 000, and therefore falls within the reach of this Act.<sup>1335</sup>

4.18 The police and the prosecution services had neither the resources nor the inclination to institute criminal proceedings in the matter of *National Director of Public Prosecutions v Geyser and Another*.<sup>1336</sup> Reference was made to the matter of *Vermaak* where it was held

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<sup>1331</sup> 2008 (2) SACR 103 (SCA) at para 16.

<sup>1332</sup> Op cit para 15.

<sup>1333</sup> Op cit para 36.

<sup>1334</sup> Op cit para 14.

<sup>1335</sup> Op cit para 18.

<sup>1336</sup> 2008 (2) SACR 103 (SCA).

that where the offence involves the operation of a business, the primary focus is on remedial effect even though the question of an imposed or potential criminal sentence may still have some relevance.

4.19 The KZN Human Trafficking Prostitution Brothels and Pornography Task Team maintains that brothels are clearly a front for illegal activity. According to the HPPB, cases have shown that massage parlours, escort agencies, gentlemen's clubs, bed-and-breakfasts and even homes in residential areas can be fronts for keeping a brothel, and for conducting prostitution or other illegal activities (eg rape, assault, drug dealing, pornography or kidnapping). For this reason, buildings used as brothels are referred to the Asset Forfeiture Unit for confiscation of the building as an instrument of crime.<sup>1337</sup>

4.20 Section 3 of the Sexual Act Offences Act provides for an extension of the concept of "keeping." This section enumerates circumstances under which certain persons – who may somehow be associated with the brothel but would not normally be considered to be "keeping" – are deemed to be keeping the brothel. Section 3 reads as follows:

The following persons shall for the purposes of section *two* be deemed to keep a brothel:

- (a) any person who resides in a brothel unless he or she proves that he or she was ignorant of the character of the house or place;
- (b) any person who manages or assists in the management of any brothel;
- (c) any person who knowingly receives the whole or any share of any moneys taken in a brothel;
- (d) any person who, being the tenant or occupier of any house or place, knowingly permits the same to be used as a brothel;
- (e) any person who, being the owner of any house or place, lets the same, or allows the same to be let, or to continue to be let, with the knowledge that such house or place is to be kept or used or is being kept or used as a brothel;
- (f) any person found in a brothel who refuses to disclose the name and identity of the keeper or manager thereof;
- (g) any person whose spouse keeps or resides in or manages or assists in the management of a brothel unless such person proves that he or she was ignorant thereof or that he or she lives apart from the said spouse and did not receive the whole or any share of the moneys taken therein.

4.21 It is clear from the above that even persons who are not physically present on the premises, and who do not necessarily control, supervise or manage the premises, may in terms of section 3 be deemed to be keeping the brothel.

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<sup>1337</sup> Email correspondence with the co-chair of the HPPB.

4.22 The onus of proving that a house or place is being kept or used (or will be kept or used) as a brothel with the knowledge of the owner is, in terms of section 4 of the Act, on the prosecution, provided that –

(a) if it is established to the satisfaction of the court that, having regard to the locality and accommodation, the rent to be paid or paid for the house or place is exorbitant, the onus shall be on the accused to prove that he was ignorant that such house or place is to be kept or used or was kept or used as a brothel; and

(b) proof of written notice having been given to the owner by a police officer not below the rank of sergeant or by two householders living in the vicinity of the house or place that such house or place is being kept or used as a brothel, shall be conclusive proof of knowledge on his part.

4.23 It is necessary for the State to prove firstly that prostitution occurred at the house or place,<sup>1338</sup> and secondly that the establishment was kept or used *for this purpose*. This implies that a single isolated act of prostitution (or even a few isolated acts) would not qualify a house or place as a brothel.<sup>1339</sup>

4.24 Milton and Cowling further note that not every house or place where unlawful carnal intercourse occurs will be regarded as a brothel, but rather those kept or used for purposes of “carnal connection for the purposes of prostitution”.<sup>1340</sup>

4.25 The inclusion of “any other lewd or indecent purpose” in the definition extends the traditional meaning of the term “brothel” (namely, a place visited for purposes of obtaining sexual intercourse) to include places where sexual activity other than conventional sexual intercourse takes place.<sup>1341</sup> Therefore, masturbation of men in massage parlours has been held to constitute a “lewd and indecent act”, thus bringing the establishment within the purview of the definition of a brothel.<sup>1342</sup> Similarly, performances involving female nudity or indecent poses were sufficient to result in the place being considered a brothel.<sup>1343</sup>

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<sup>1338</sup> It is for this reason that so-called escort agencies that arrange for prostitutes to meet clients elsewhere for purposes of sexual acts are not brothels. See Milton & Cowling “Statutory Offences” 2005 at E3-119 n 2.

<sup>1339</sup> Op cit E3-119.

<sup>1340</sup> *R v Louw and Woolf* 1920 TPD 48 at 49, cited in Milton & Cowling “Statutory Offences” at E3-120 n 4.

<sup>1341</sup> Milton & Cowling “Statutory Offences” 2005 at E3-121.

<sup>1342</sup> *S v P* 1975 (4) SA 68 (T).

<sup>1343</sup> *S v M* 1977 (3) SA 379 (C).

4.26 *Mens rea* is an element of the offence. According to Milton and Cowling, this term implies that the State must prove that the accused knew, or at least foresaw, that the house or place was a brothel (as defined in the Act).<sup>1344</sup>

4.27 In *S v Jordan*<sup>1345</sup> the High Court held that sections 2, 3(b) and 3(c) of the Sexual Offences Act – the so-called “brothel provisions” which cover brothel-keeping – are constitutional. The High Court held that section 2 was a measure to restrict the commercial exploitation of prostitutes, which it described as “trading in the body of a human being”, and added that if a third party managed a prostitute or prostitutes with their consent this would amount to trafficking in human beings. The High Court concluded that public abhorrence at this kind of exploitation permitted the state to limit the individual rights of such third parties to freedom of trade, occupation and profession, by regulating and prohibiting such practices.<sup>1346</sup>

4.28 The Constitutional Court held that sections 2, 3(b) and (c) must be read to regulate only commercial sex. In its view, because the subsections point to the business aspects of a brothel, they are capable of being read restrictively so as to criminalise only people engaged in managing or receiving money from brothels (ie business premises for commercial sex). The same reasoning is applied to “keeping a brothel” so that it is construed in a narrow fashion to apply only to keeping a brothel for the purposes of commercial sex.<sup>1347</sup>

4.29 The Constitutional Court held that the Sexual Offences Act, including the brothel provisions, continues to pursue an important and legitimate constitutional purpose, namely the control of commercial sex<sup>1348</sup>

4.30 The court further held that if criminalising prostitution itself has been accepted in open and democratic societies as a means of promoting the quality of life, so too is the criminalisation of brothels. Indeed, the suppression of brothels has far greater acceptance than the criminalisation of prostitution.<sup>1349</sup>

4.31 It was argued in the Constitutional Court that brothels could ensure that both prostitutes and customers could have sex in a protected environment that was free from violence and in which proper health controls could be managed. In response to this

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<sup>1344</sup> Milton & Cowling “Statutory Offences” 2005 at E3-122.

<sup>1345</sup> *S v Jordan and Others* 2002 (1 )SA 797 (T).

<sup>1346</sup> *Jordan v the State* 2002 (6) SA 642 (CC) at para 35.

<sup>1347</sup> Supra para 101.

<sup>1348</sup> Supra para 114.

<sup>1349</sup> Supra para 116.

argument, the court held<sup>1350</sup> that in essence the argument in favour of providing constitutional protection for the existence of brothels turns on the contention that the fundamental rights of prostitutes to freedom and security of the person can better be protected in brothels than on the streets. The court further held that all the reasons, however, for holding that it is open to the legislature in its judgement to seek to suppress prostitution as an economic activity, so as to improve the quality of life in South Africa, apply with equal if not stronger force to the prohibition of brothels. Similarly, if the rights to dignity and freedom of individual prostitutes are not limited by the Act, even less so are such rights challenged in the case of brothel-keepers. The same considerations apply to privacy. In its view, the reduced rights which prostitutes are granted become even more attenuated for brothel-keepers.<sup>1351</sup>

4.32 Section 5 of the Sexual Offences Act provides that any contract to let any house or place to be kept or used as a brothel shall be null and void. Section 6 of the same Act provides that any contract of letting and hiring of any house or place which subsequent to the making of such contract becomes a brothel shall, as from the date of such event become null and void: Provided that upon proof by the owner of his ignorance that the house or place was so kept or used, he shall be entitled to recover the rent up to the date upon which he became aware that the house or place was being kept or used as a brothel.

4.33 Section 7 provides that the owner of any house or place kept or used as a brothel shall be entitled to apply to the magistrate of the district in which such house or place is situated for the summary ejection of any person who may be keeping or using such house or place as a brothel; and such magistrate shall be entitled, after enquiry, to order the summary ejection of such person.

4.34 Section 8 regulates the proceedings following a complaint by householders or the police that a house or place is used as a brothel. The section provides as follows:

(1) If it appears to any magistrate on sworn information laid before him by not less than two householders of good repute that any house or place in the vicinity of the dwellings of such householders is being kept or used as a brothel or on similar information upon oath laid before him by any police officer not below the rank of sergeant, or by a welfare officer employed by a department of State responsible for Health and Welfare, a local authority or a welfare organization registered under the National Welfare Act, 1978 (Act 100 of 1978), the magistrate may-

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<sup>1350</sup> Supra para 118.

<sup>1351</sup> Supra para 119.

- (a) issue a warrant for the arrest of the person alleged to be the keeper of such brothel; or
- (b) issue a warrant authorizing any police officer not below the rank of sergeant
  - (i) to enter at any time and within such period as shall be stated in such warrant, such house or place for the purpose of ascertaining the name and identity of the keeper of such house or place;
  - (ii) to interrogate, and to demand the name and address of any person found in or upon such house or place; and
  - (iii) to demand, search for, and seize any account book, receipt, paper, document or thing likely to afford evidence of the commission by any person of an offence under this Act.

(2) Any person found in or upon such house or place who, when called upon to do so by the police officer conducting the search, refuses to furnish his name and address or furnishes a name or address which is false in any material particular or refuses to disclose the name or identity of the keeper of such house or place or to produce any book, receipt, paper, document or thing which he has in his possession or custody or under his control, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding R1 000 and in default of payment to imprisonment for a period not exceeding six months.

(3) The issue of a warrant under paragraph (b) of subsection (1) shall not in any way affect the power of the magistrate to issue at any time a warrant under paragraph (a) of subsection (1) or under any other law.

4.35 Since the promulgation and enactment of the Prevention of Organised Crime Act 121 of 1998, this piece of legislation has increasingly been used in conjunction with the Sexual Offences Act to declare property used as a brothel in contravention of section 2 of the Sexual Offences Act forfeit to the State. In the matter of the *National Director of Public Prosecutions v Bosch*,<sup>1352</sup> the respondent (Bosch) was arrested and paid an admission of guilt fine of R1 500 for keeping a brothel.<sup>1353</sup> Bosch contended that the evidence presented by the state should not be allowed and considered, inter alia because a warrant as required by section 8 of the Sexual Offences Act was not obtained to enter and search her premises and to seize anything.<sup>1354</sup>

4.36 Van Heerden AJ explained that although the procedures set out in section 8 of the Sexual Offences Act and section 25 of the Criminal Procedure Act were not followed, both these sections relate to preliminary formalities that need to be complied with prior to evidence being gathered at premises by South African Police Service (SAPS) members. It

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<sup>1352</sup> 2009 (2) SACR 547 (KZD).

<sup>1353</sup> *National Director of Public Prosecutions v Bosch* 2009 (2) SACR 547 (KZD)

<sup>1354</sup> Ibid.

was found that this assertion was nullified in that a manager in charge and control of the premises had given consent for the search. There was no evidence that the members of SAPS went beyond providing an opportunity to commit an offence. It is also important to note the finding of Van Heerden AJ that the Sexual Offences Act and the Criminal Procedure Act are aimed at regulating criminal law and its procedure, and that such regulations are not necessarily needed to resolve disputes of a civil nature as in the Bosch case. It is well established that in civil proceedings the court has the discretion to allow as admissible evidence otherwise illegally obtained, under certain circumstances.

4.37 The court held that the evidence in the Bosch case was of the kind that could lawfully be obtained, that permission had been sought and granted to search the premises, and that the non-compliance with the provisions of the Acts did not automatically mean “unfair” in a civil law setting. Consequently the evidence was admitted.

4.38 Van Heerden AJ held that the NDPP had succeeded in establishing that Bosch actively kept and managed a brothel, and as such contravened the provisions of section 2 of the Sexual Offences Act (which makes it an offence to keep a brothel). The onus was on the applicant to establish on a balance of probabilities that the premises facilitated unlawful carnal intercourse. The court also found that by allowing her property to be used as a brothel, the respondent not only contravened the provisions of section 2 of the Sexual Offences Act but also of section 20(1) thereof, by facilitating prostitutes having unlawful carnal intercourse with their customers on the property. Bosch also aided the customer’s simultaneous offence either by being an accessory at common law or by contravening section 18(2) of the Riotous Assemblies Act 17 of 1956. The court concluded that the whole property was sufficiently linked to the offence to make it an instrumentality. Section 22(a) of the Sexual Offences Act prescribes the penalty for brothel-keeping as three years imprisonment, with or without a fine of R6 000. Forfeiture may be ordered for any offence, the punishment for which may be imprisonment exceeding one year without the option of a fine.

4.39 In deciding whether the deprivation by way of forfeiture would not be out of proportion to the purpose, reference was made to Judge President Howie in the matter of *National Director of Public Prosecutions v Geyser and Another 2008 (2) SACR 103 (SCA)* in which he held that:

And there can be little doubt, to my mind, that brothel-keeping would be seen by a majority in society, if not society as a whole, as morally more reprehensible than operating unregistered gaming machines. Brothel-keepers, as mentioned, commit their own offence and aid in the commission of the

prostitutes' offence. In doing so, they themselves earn an income from prostitution."<sup>1355</sup>

4.40 In the Bosch case, Van Heerden concluded as follows: "I hope that the message will go out to other brothel-keepers and also to the respondent, that their conduct will not be tolerated by courts."

4.41 Section 10 of the Sexual Offences Act criminalises the act of procuring. The section provides as follows:

Any person who —

- (a) procures or attempts to procure any female to have unlawful carnal intercourse with any person other than the procurer or in any way assists in bringing about such intercourse; or
- (b) inveigles or entices any female to a brothel for the purpose of unlawful carnal intercourse or prostitution or conceals in any such house or place any female so inveigled or enticed; or
- (c) procures or attempts to procure any female to become a common prostitute; or
- (d) procures or attempts to procure any female to become an inmate of a brothel; or
- (e) applies, administers to or causes to be taken by any female any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower her so as thereby to enable any person other than the procurer to have unlawful carnal intercourse with such female,

shall be guilty of an offence.

4.42 "Procuring" in the context of the Sexual Offences Act means the obtaining or recruitment of persons for purposes of their working as prostitutes. Offences relating to procuring are contained in sections 9 and 10 of the Act. As section 9 specifically relates to the procuring of children and was recently repealed by the Sexual Offences Amendment Act, the current discussion refers only to section 10 and other related provisions of the Act.<sup>1356</sup>

4.43 In terms of section 10, procurement of any woman for the following purposes or through the following means constitutes a criminal offence:

- procuring for sexual intercourse
- procuring for a brothel
- procuring to become a common prostitute
- procuring to become an inmate of a brothel

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<sup>1355</sup> At 26.

<sup>1356</sup> See para 3.7.4 of Discussion Paper 85, where section 9 of the Sexual Offences Act is discussed.

- procuring by stupefaction.

4.44 An analysis of the different components of section 10 of the Sexual Offences Act follows.

**(a) Procuring for sexual intercourse**

4.45 Section 10(a) of the Act provides that it is an offence for any person to procure or attempt to procure any female to have unlawful carnal intercourse with any person other than the procurer, or in any way to assist in bringing about such intercourse. The elements of the offence are that the accused procured a female to have unlawful sexual intercourse.

4.46 The term “procuring”, in its ordinary meaning, means “to produce by endeavour”, and thus involves an element of persuasion, inducement or influencing.<sup>1357</sup> It is therefore essential for the accused to have played some active part in “obtaining” the woman. Where, for example, a woman willingly engages in intercourse (and therefore does not have to be persuaded), there can be no procurement. Similarly, mere acquiescence on the part of the accused procurer to the intercourse taking place would not amount to procuring.<sup>1358</sup>

4.47 The prohibition extends beyond the act of procuring to include assisting “in any way” to bring about the intercourse with the procured woman. This section is aimed at penalising any person who furthers the procurement or helps to bring it about.<sup>1359</sup>

4.48 As the provision expressly refers to the procurement of a *female*, it follows that the offence is not committed if the procured person is a man. It should be noted that in contrast with section 9 of the Act, no age limit is set out in section 10: the offence can therefore be committed in respect of a woman of any age.

4.49 The object of procuring the woman must be for her to have *unlawful carnal intercourse*, and therefore the offence is not committed if the woman is procured in order to engage in immoral or indecent acts other than such intercourse.<sup>1360</sup> The offence is committed only if the intercourse actually takes place, and also only if the intercourse takes place with someone other than the procurer.

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<sup>1357</sup> Milton & Cowling “Statutory Offences”2005 at E3-126.

<sup>1358</sup> Ibid.

<sup>1359</sup> Op cit E3-126 n 12 and examples cited there.

<sup>1360</sup> Milton & Cowling “Statutory Offences”2005 at E3-128.

**(b) Procuring for a brothel**

4.50 Section 10(b) of the Sexual Offences Act provides that it is an offence to inveigle or entice any woman to a brothel for the purpose of unlawful carnal intercourse or prostitution, or to conceal in any such house or place any female so inveigled or enticed. In addition, section 10(d) provides that it is an offence to procure or attempt to procure a woman to become an inmate of a brothel.

4.51 The offence created by section 10(b) of the Act takes two forms: (a) obtaining females for prostitution in brothels and (b) concealing the female in the brothel. “Enticing” has been defined as “alluring”, “beguiling” or “petitioning”, whereas “inveigling” has a related meaning but suggests an additional element of deception.<sup>1361</sup> The prohibition against concealing a woman in a brothel is aimed at conduct that would “seek to prevent a female enticed into the brothel from being discovered and removed by family or officials”.<sup>1362</sup> The offence is committed by concealing the woman (female) in any place in a house or place that is a brothel.

**(c) Procuring for common prostitution**

4.52 Section 10(c) provides that it is an offence for any person to procure or attempt to procure a woman to become a common prostitute. Only the “common prostitute” element will be discussed here.<sup>1363</sup> It should be noted that the offence is not committed by procuring a woman to have unlawful carnal intercourse but rather by procuring her to be a prostitute.

4.53 This section specifies that the woman must have been procured to be a “common” prostitute. Although there is no statutory definition for the term, it is understood to refer to persons who “habitually ply the trade of a prostitute” as opposed to those who merely occasionally engage in prostitution.<sup>1364</sup> It also follows that the offence is committed only if the woman concerned is not already a “common” prostitute. Likewise, the offence is committed only if the accused procured the woman for “common” prostitution and no other purpose.<sup>1365</sup>

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<sup>1361</sup> Op cit E3-134.

<sup>1362</sup> Ibid.

<sup>1363</sup> The other elements have either been discussed elsewhere or do not require further elucidation.

<sup>1364</sup> Milton & Cowling “Statutory Offences”2005 at E3-136.

<sup>1365</sup> Ibid.

**(d) To become an inmate of a brothel**

4.54 Section 10(d) makes it an offence for any person to procure or attempt to procure a woman to become an “inmate of a brothel”. In the absence of a statutory definition, the term “inmate” should be accorded its ordinary meaning. According to the *Concise Oxford Dictionary*<sup>1366</sup> this term has the following possible meanings:

- (a) an occupant of a hospital, prison, institution etc; or
- (b) an occupant of a house, especially one of several [occupants].

4.55 Depending on the interpretation followed, the term could imply mere occupancy of a brothel; or it could imply an element of imprisonment or loss of autonomy, and could thus refer to a situation where the procured woman is not able to leave such brothel of her own volition. It should be noted that it is not required for the woman to become a prostitute or to engage in unlawful carnal intercourse or acts of indecency to be considered an inmate of a brothel. The mere fact of her being an “inmate” would mean the offence is committed.

**(e) Procuring by stupefaction**

4.56 Section 10(e) of the Sexual Offences Act provides that it is an offence for any person to apply, administer to, or cause any female to take any drug, intoxicating liquor, matter or thing with the intent to stupefy or overpower her so as to enable any person other than the procurer to have unlawful carnal intercourse with her. This offence is clearly aimed at the methods used by procurers to overcome resistance on the part of women being forced into prostitution. The offence is committed by the administration of substances that have the effect of rendering the woman incapable of resisting physical force. Milton and Cowling state that the offence would also be committed by binding, strapping or holding down the woman or otherwise restricting her physical movements.<sup>1367</sup>

4.57 The section in question states that the purpose of the procurement would be to enable a person to have unlawful carnal intercourse with a woman. According to Milton, the offence consists in the administering of the drugs or other substances with the specific intent described, and it is not necessary that intercourse should have taken place.<sup>1368</sup>

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<sup>1366</sup> 1995 edition.

<sup>1367</sup> Milton & Cowling “Statutory Offences” 2005 at E3-133.

<sup>1368</sup> Milton JRL South African Criminal Law and Procedure Juta 1971 at 348.

4.58 Section 12 of the Sexual Offences Act criminalises the detention of a woman for purposes of unlawful carnal intercourse. It provides as follows:

- (1) Any person who takes or detains any female against her will-
  - (a) to or in or upon any house or place with intent that she may be unlawfully carnally known by any male, whether a particular male or not; or
  - (b) to or in a brothel,

Shall be guilty of an offence.

(2) . . . . .

(3) Any person shall be deemed to detain a female in or upon any house or place or in a brothel if, with intent to compel or induce her to remain in or upon such house or place or in such brothel, such person withholds from her any wearing apparel or other property to the possession of which she is entitled or which has been lent or supplied to her by such person or for the purposes of prostitution; and any such female shall be justified in taking away such wearing apparel as is necessary to enable her to leave such house or place or brothel.

4.59 Section 12(1)(a) of the Sexual Offences Act provides that it is an offence for any person to take or detain a woman, against her will, to or in or upon a house or place with intent that she may be unlawfully carnally known by any male, whether a particular male or not. The penalty is imprisonment for a period not exceeding seven years.<sup>1369</sup> The element of “taking” or “detaining” requires that the accused performed some act amounting to either the transporting or conveying of the woman to the house or place in question. Alternatively, it requires that the accused’s actions amounted to depriving the woman of the “power or ability to depart from the premises”.<sup>1370</sup>

4.60 Section 12(3) of the Act provides that the accused will be deemed to have detained a woman if he withholds any wearing apparel with intent to compel or induce her to remain in the place. Milton and Cowling note that it is essential to allege and prove that the woman was either taken or detained against her will. If the woman went to the place voluntarily or remained there voluntarily, the offence is not committed.<sup>1371</sup> In this regard, a woman is presumed to be involuntarily at the place if she is under 16 years of age,<sup>1372</sup> or, if she is between 16 and 21 years of age, she was detained against the will of her parents or person having lawful care or charge of her.<sup>1373</sup>

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<sup>1369</sup> Section 22(e).

<sup>1370</sup> Milton & Cowling “Statutory Offences” at E3-138.

<sup>1371</sup> Op cit E3-138.

<sup>1372</sup> Section 12(2)(a).

<sup>1373</sup> Section 12(2)(b).

4.61 Similar to the provision in section 10(e), this section requires that the objective of the abduction or detention of the woman should be that she would be unlawfully carnally known by a man. This implies that the offence is committed even where the intention is not strictly speaking to abduct the woman for purposes of forcing her into prostitution. Milton and Cowling again submit that it is not an element of the offence that intercourse should actually have taken place: the offence is complete once the taking or detention with the prescribed intent takes place.<sup>1374</sup>

4.62 Section 12A regulates the actions of a person who provides assistance for the purpose of prostitution. It provides as follows:

(1) Any person who, with intent or while he reasonably ought to have foreseen the possibility that any person, who is 18 years or older, may have unlawful carnal intercourse, or commit an act of indecency, with any other person for reward, performs for reward any act which is calculated to enable such other person to communicate with any such person, who is 18 years or older, shall be guilty of an offence.

(2) . . . .

4.63 The provisions of section 12A(1) and to some extent section 20(1)(c) of the Sexual Offences Act are aimed at the operation of so-called “escort agencies”. These are establishments that, for a fee, introduce a client to an “escort” who will accompany the client for an agreed period. In some (we submit, the majority of) cases, there is unequivocal consensus that such accompaniment is aimed at the client contracting with the escort for sexual services.

4.64 Milton and Cowling note that the legislature has created this offence specifically to penalise the owners or managers of escort agencies who provide prostitutes to their customers, and thereby facilitate prostitution.<sup>1375</sup>

4.65 Section 12A(1) of the Sexual Offences Act provides that any person who, with intent or while he or she reasonably ought to have foreseen the possibility that any person may have unlawful carnal intercourse or commit an act of indecency with another person for reward, performs for reward any act which is calculated to enable such other person to communicate with any such person, commits an offence. The penalty is imprisonment for a period not exceeding five years.<sup>1376</sup>

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<sup>1374</sup> Milton & Cowling “Statutory Offences” 2005 at E3-138.

<sup>1375</sup> Op cit E3-143.

<sup>1376</sup> Section 22(d) of the Act.

4.66 Milton and Cowling explain that the accused commits this offence if he or she, with the prescribed *mens rea*, performs an act which is calculated to enable the client to communicate with the prostitute.<sup>1377</sup> Whether the accused has performed such an act will be determined by the objective consideration of whether what was done had been calculated to achieve communication of one party with the other.<sup>1378</sup>

4.67 The Act provides no definition for the term “reward” as used in this subsection. However, in common parlance, the term can encompass both a monetary reward and other forms of compensation with pecuniary value, for example clothing, food or accommodation.

4.68 The inclusion of the phrase “with intent” requires that the accused should not merely know that one party is a prostitute, but should in addition intend (which includes “foreseeing”) that the parties will engage in sexual acts for reward.<sup>1379</sup> This situation would arise where the accused provides a client with an escort on the explicit understanding that an act of prostitution will follow.

4.69 The section includes the scenario where there is no such explicit understanding but nor is the possibility necessarily excluded. This appears to cover the scenario where the accused arranges for a person to be an escort, without the question of sexual intercourse being raised, but the accused acts in a way that creates the possibility or opportunity for the parties to engage in sexual intercourse.<sup>1380</sup> The formulation of “reasonably ought to have foreseen” therefore places the form of *mens rea* required here into the realm of *negligence* in addition to intention.

4.70 Section 17 of the Sexual Offences Act penalizes persons who knowingly permit premises to be used for the purpose of “any offence” under the Act. Milton and Cowling see this section as a sort of blanket provision that can be invoked in respect of any of the offences under the Act.<sup>1381</sup> The penalty is imprisonment for a period not exceeding six years, with or without a fine not exceeding R12 000. The offence reads as follows:

Any person who being the owner or occupier of any house or place or having or acting or assisting in the management or control thereof knowingly permits the use of such house or place for the purpose of any offence against any provision of this Act, shall be guilty of an offence.

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<sup>1377</sup> Milton & Cowling “Statutory Offences” 2005 at E3-146.

<sup>1378</sup> Ibid.

<sup>1379</sup> Op cit E3-145.

<sup>1380</sup> Ibid.

<sup>1381</sup> Milton & Cowling “Statutory Offences” 2005 at E3-147 - 148.

4.71 Section 20 of the Sexual Offences Act criminalises persons living on the earnings of prostitution, or committing or assisting in the commission of indecent acts. Section 20 provides as follows:

- (1) Any person who-
- (a) knowingly lives wholly or in part on the earnings of prostitution; or
  - (b) . . .
  - (c) in public or in private in any way assists in bringing about, or receives any consideration for, the commission by any person of any act of indecency with another person,

Shall be guilty of an offence.

. . .

- (2) If it is made to appear to a magistrate by information on oath that there is reason to suspect that any house is used for purposes of prostitution and that any person residing in or frequenting the house is living wholly or in part on the earnings of prostitution, the magistrate may issue a warrant authorizing any police officer not below the rank of sergeant to enter and search the house and to arrest that person.

4.72 Section 20(1)(a) of the Sexual Offences Act provides that it is an offence for any person knowingly to live wholly or in part on the earnings of prostitution. The penalty is imprisonment for a period not exceeding three years, with or without a fine not exceeding R6 000 in addition to such imprisonment.<sup>1382</sup> Milton and Cowling note that this section is directed against the exploitation of prostitution.<sup>1383</sup> The notion of “living on” is construed widely to include not only that which “maintains the life of the recipient” but also other purposes.<sup>1384</sup> Proof of this element therefore requires evidence relating to the nature of the accused’s relationship with the prostitute; the accused’s personal domestic circumstances; and the nature, source and amount of the accused’s income and cost of living.

4.73 In terms of section 21(3) of the Act, a person who is proved to have no visible means of support and who -

- (a) resides in a brothel
- (b) lives with a prostitute; or
- (c) habitually is in the company of a prostitute -

is deemed to be knowingly living wholly or in part on the earnings of prostitution.

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<sup>1382</sup> Section 22(a) of the Act.

<sup>1383</sup> Milton & Cowling “Statutory Offences” 2005 at E3-99.

<sup>1384</sup> Ibid.

4.74 The effect of this presumption is to establish not only that the accused lived on the earnings of prostitution, but also that he or she did so *knowingly*.<sup>1385</sup>

4.75 While the earnings referred to here are usually received directly from the prostitute, it is sufficient if the money is given in relation to the act of prostitution; the earnings may therefore be given directly to the accused by the client of the prostitute.<sup>1386</sup> Milton and Cowling submit that the concept of earnings is not confined to wages for the service rendered, but should be more widely construed as “profits or income produced by prostitution”.<sup>1387</sup> Evidence must exist that the earnings were received at a time when the prostitute was working as such. There must also be some more or less direct nexus between the earnings and the activities of the prostitute.<sup>1388</sup>

4.76 The ambit of this offence was examined in detail in *S v H*.<sup>1389</sup> Three women were charged with contravening section 20(1)(a) of the Sexual Offences Act, and the State alleged that they had unlawfully and knowingly lived wholly or partially on the earnings of prostitution: “to wit, by receiving money for the purposes of sexual intercourse”. The defence raised on behalf of the three accused was one of law, that is, that the provisions of section 20(1)(a) of the Act were directed at persons who parasitically live on the earnings of a prostitute rather than being directed at the prostitute herself. On appeal, the Appellate Division (per Kumleben JA) examined the pre-Union enactments in the Transvaal, Cape, Orange Free State and Natal, which had preceded the introduction of section 20(1)(a).<sup>1390</sup> Significantly, three of these four provinces had referred to “every **male** person who knowingly lives wholly or in part on the earnings of prostitution ...” [emphasis added]. Only in Natal, the wording stated that the law applied to “every person”.

4.77 Kumleben JA found that the reference to a male person made it clear that these enactments did not have the prostitute in mind, because a prostitute – in terms of the understanding that prevailed at the time of promulgation of the Sexual Offences Act – was a **woman**.<sup>1391</sup> The court added that although the use of the word “prostitute” in reference to a male person had subsequently come to be recognised, this was not the case at the time that

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<sup>1385</sup> Milton & Cowling “Statutory Offences” 2005 at E3-100.

<sup>1386</sup> Op cit E3-103.

<sup>1387</sup> Ibid.

<sup>1388</sup> Op cit E3-104.

<sup>1389</sup> 1988 (3) SA 545 (AD).

<sup>1390</sup> These were (as cited at 552A-G of the judgment) s 21(1)(a) of Ord 46 of 1903 (T); s 33(1) of Act 36 of 1902 (C); s 13(1)(a) of Ord 11 of 1903 (O); s 15(1)(a) of Act 31 of 1903 (N).

<sup>1391</sup> At 552G.

the Act had been promulgated.<sup>1392</sup> Section 20(1)(a) therefore had to be interpreted against this background. The court remarked that had the legislature intended to change the essential character of the offence with the promulgation of the Sexual Offences Act and the repeal of its predecessors, it would not have done so by merely extending the range of persons to which the offence applied. The court's finding was that the broadening of "**every male person**" in the preceding enactments to "**every person**" in the Act merely served to indicate that the offence of parasitically living on the earnings of prostitution could similarly be committed by a woman. The appeal was accordingly dismissed.

4.78 When the range of persons who may benefit from prostitution is portrayed as a continuum, on one end of the scale such beneficiaries are not actively involved in promoting prostitution and might not even be aware of the source of the benefit they receive; on the other end, the beneficiaries are well aware of the prostitution and are actively involved in promoting it, and actively benefit from the proceeds thereof. Examples of beneficiaries who are not actively involved or are unaware may include minor dependants or siblings in child-headed households. Where beneficiaries are actively involved, the Commission has identified a number of exploitative behaviours. These include the following:

- financial exploitation (where a beneficiary retains the bulk of the earnings from prostitution);
- forced or coerced prostitution (identifiable by the nature of the work, clients, and hours of work, all of which constitute forced labour);
- physical abuse (represented by rape, assault, forced drug and alcohol abuse and the creation of substance dependency);
- coercive conditions (eg refusal to provide or allow condoms; the practice of forms of sex that include violence or the threat of violence);
- failure to protect prostitutes against violence by clients;
- dangerous working conditions;
- physical confinement;
- psychological abuse (including verbal);
- bribery and corruption;
- trafficking;
- harassment and false arrest; and
- denial of access to health care.

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<sup>1392</sup> At 552H.

4.79 Section 20(1)(a) does not differentiate between children and adults in criminalising a person who knowingly lives on the earnings of prostitution. Therefore, a younger sibling or the child of a prostitute who knows that he or she is supported on the earnings of prostitution is in fact guilty of the same offence as would be the owner of a brothel in which the prostitute plies his or her trade. Arguably, this is not the intention of the legislature.<sup>1393</sup> In this regard, it is noteworthy that in terms of section 56 of the Sexual Offences Amendment Act the legislature specifically provides a defence to a charge under the offence of sexual exploitation of a child (section 17) if the person charged is a child and is not involved in prostituting the exploited child, for example, as a pimp. This defence specifically caters for children who are living off the earnings of the prostitution of another child, such as an older sibling.

4.80 Section 21 contains presumptions relevant to the sections discussed above. It provides as follows:

...  
(3) Whenever in any prosecution under this Act a person is proved to reside in a brothel or to live with or to be habitually in the company of a prostitute and has no visible means of subsistence, such person shall, unless he or she satisfies the court to the contrary, be deemed to be knowingly living wholly or in part on the earnings of prostitution.

(4) Whenever in any prosecution for an offence under section 12A it is proved –  
(a) that the accused has performed any act for reward which was calculated to enable any person to communicate with any other person who is a prostitute; or  
(b) that the other person with whom communication was made as a result of such act has had unlawful carnal intercourse, or has committed an act of indecency, with such person for reward,

the accused shall be presumed to have performed such act with intent or while he reasonably ought to have foreseen the possibility that such person may have unlawful carnal intercourse, or commit an act of indecency, with such person for reward unless the contrary is proved beyond reasonable doubt.

4.81 Trafficking in persons for all purposes, including for the purpose of prostitution is regulated under the Prevention of Trafficking in Persons Act 7 of 2013. As third parties orchestrate or accommodate prostitution that flows from trafficking, it is necessary to investigate to what extent trafficking and prostitution are aligned in South Africa. The Prevention of Trafficking in Persons Act and the offences contained therein are not dealt with here per se, but it is instructive to note the United States *Trafficking in Persons Report*

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<sup>1393</sup> SALC *Sexual Offences: Substantive Law* Discussion Paper 1999 at 156.

2013<sup>1394</sup> country narrative for South Africa. This report describes South Africa as a source, transit and destination country for men, women and children who are being subjected to forced labour and sex trafficking. The report states that according to news items in February 2013, the Sabie Magistrate's Court initiated the prosecution of two offenders, a Mozambican woman and a South African businessman, who were charged with the sex trafficking of five Mozambican girls. Another item reported that the March 2010 Thai sex trafficking convictions had been overturned on appeal, because the court translator was fearful for her safety and had covered her face during the proceedings.<sup>1395</sup>

4.82 The *Trafficking in Persons Report* also stated, in its country narrative on South Africa that:

[I]n its efforts against sex trafficking, the South African government is said to have prosecuted low-level cases with one to three victims, typically from South Africa or neighbouring countries, but has not successfully prosecuted larger, international syndicates involving Nigerian, Russian, Bulgarian, Chinese, and Thai traffickers who dominate the sex trade in several South African cities.<sup>1396</sup>

The same report stated that well-known brothels in South Africa – including some that had previously used sex trafficking victims – continued to operate without police intervention. In addition, no cases against traffickers of Thai women have been initiated since 2007. Many stakeholders have reported the failure by police to proactively identify sex trafficking victims or to pursue investigations in certain cases. For example, police regularly evacuated alleged victims of sex trafficking without opening investigations against the perpetrators, and there was one report of police taking a full week to respond to a distress call from a victim.<sup>1397</sup> Of concern is the report that although the Sexual Offences Amendment Act requires that sex-trafficked women must not be charged with crimes committed as a direct result of their being trafficked, some such victims were nonetheless arrested and jailed. The screening of women in prostitution was at times done too hastily to accurately assess their victimisation as trafficked people. For instance, 11 women in prostitution were brought in front of the Cape Town Magistrate's Court after police arrested them for contravening the Immigration Act during a brothel raid. One of these women allegedly remained in jail for seven months without being screened.<sup>1398</sup>

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<sup>1394</sup> The United States Trafficking in Persons Report 2013 available at <http://www.state.gov> Accessed on 25 June 2013 at 46.

<sup>1395</sup> Ibid.

<sup>1396</sup> Op cit 45.

<sup>1397</sup> Op cit 46.

<sup>1398</sup> Ibid.

4.83 The country narrative referred to in the above paragraphs may be broadly reflective of the scenario in South Africa. However, the establishment of dedicated teams – such as the HPPB Task Team in Kwa-Zulu Natal – seems to be bearing fruit.

4.84 At the time of writing the current report (finalised in late 2013), a Durban doctor and his wife who were standing trial on charges relating to human trafficking and keeping a brothel were possibly going to lose the Point building from where the alleged brothel had operated.<sup>1399</sup> In accordance with a preservation order acquired by officials of Durban’s Asset Forfeiture Unit, The Inn Town Lodge – a three-storey building with 36 bedrooms and estimated to be worth roughly R1.3 million – was set to fall under the control of the court-appointed curator. The couple was reportedly standing trial together with an alleged drug and prostitution boss, as well as his two “runners”, on a collective 156 charges relating to the alleged keeping of a brothel and prostitution.<sup>1400</sup> The charges included assault, rape, sexual exploitation of a child, dealing in cocaine and racketeering. The couple allegedly ran a brothel where children as young as 12 were kept.<sup>1401</sup> All the accused had pleaded not guilty, with the doctor claiming he left the business in the hands of his manager and that if any illegal activities took place on the premises, he was unaware of them.<sup>1402</sup> A receptionist who had made the bookings for prostitutes testified that there had been no need for her to blow the whistle because both the police and the eThekweni Metro Police had visited the hotel. She said police members would leave and come back, and at times the Metro Police took photos of the girls and told them “not to do it”.<sup>1403</sup>

4.85 In another matter in Durban, it was reported that the “boss” who had managed the activities at two Durban brothels pleaded guilty to racketeering.<sup>1404</sup> Kogilan Mudaly was involved in managing the After Dark “gentlemen’s club” in Cato Street and the Leeds Crescent brothel in Pinetown between 2004 and 2007. He pleaded guilty in the KZN High Court (Durban) after securing a plea bargain agreement with the state. Judge Kate Pillay ordered Mudaly to pay a fine of R100 000 or face five years in jail. He was also given a 10-year jail term, wholly suspended for five years on condition that he was not convicted of an offence involving sexual exploitation during the suspension period. A newspaper report

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<sup>1399</sup> “AFU get preservation order on alleged brothel” *Legalbrief Today*: Criminal Issue No: 3252 (12 April 2013).

<sup>1400</sup> *Legalbrief Today* 12 April 2013.

<sup>1401</sup> News 24 “Human trafficking trial continues in KZN” 25 January 2013 available at <http://www.news24.com>.

<sup>1402</sup> *Legalbrief Today* 12 April 2013.

<sup>1403</sup> News 24 “Human trafficking trial continues in KZN”.

<sup>1404</sup> “Brothel boss fined after plea deal” *Legalbrief Today*: In Court Issue No: 3169 (22 November 2012).

stated that Mudaly, Lionel Johnston and Thai nationals Rannsay Suwanakooop and Pongton “Dan” Thiamtat collectively faced 30 charges, including racketeering and money laundering as well as contraventions of the sexual offences, immigration and liquor laws in 2006. In the run-up to this case, police arrested 26 Thai women and four alleged handlers. The police believed that the clubs were brothels involved in human trafficking.<sup>1405</sup> The women arrested included girls in their early teens.<sup>1406</sup> A Home Affairs official involved in the raid said he was concerned about the “new trend” of young girls working in brothels: “Those girls were much younger than the ones we usually find in such situations.”<sup>1407</sup> Officials involved in the raid said international crime syndicates recruited women under the pretext they would be employed in the hospitality industry as waitresses or as “nannies”.<sup>1408</sup>

4.86 At the time of writing this report, the National Prosecuting Authority (NPA) was reportedly pursuing a racketeering case against two alleged brothel-keepers whose convictions had been overturned on a technicality the previous year (2012).<sup>1409</sup> They were charged with running a brothel in Umbilo and offences related to prostitution and human trafficking.

4.87 In an earlier case in 2009, an ex-policeman who was thought to be a brothel owner and pimp, as well as his wife (operating as the “madame” of the house) and three Thai women, were arrested in Durban North. They were charged with keeping a brothel and living on the proceeds of a brothel.<sup>1410</sup> A number of items were confiscated from related properties, including police equipment and documents, expired travel documents and Thai passports, unlicensed guns and R5 ammunition.<sup>1411</sup>

4.88 In another Durban incident in 2013 that was reported in the press, five women believed to be from Thailand were arrested during a raid on a suspected brothel in Morningside. The owner of the house was suspected to be part of a human trafficking syndicate, and police were reportedly searching for him.<sup>1412</sup>

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<sup>1405</sup> *Sunday Tribune* “Cops want to see Thai girls’ clients” 17 December 2006 Available at SA Media – The University of the Free State. Ref No: 19196.

<sup>1406</sup> Ibid.

<sup>1407</sup> Ibid.

<sup>1408</sup> Ibid.

<sup>1409</sup> “Brothel case to start afresh” *Legalbrief Today*: Criminal Issue No: 3215 (15 February 2013).

<sup>1410</sup> *Witness* “Cops take down brothel network” 13 May 2009 Available at SA Media – The University of the Free State. Ref No: 6635.

<sup>1411</sup> Ibid.

<sup>1412</sup> *News 24* “Thai women detained in Brothel raid” 16 May 2012.

4.89 A news report<sup>1413</sup> in 2011 stated that a Chinese woman in Cape Town, who had had a previous conviction for keeping a brothel, had pleaded guilty to fresh charges of keeping a brothel as well as charges of living off the earnings of prostitution and operating a business without a licence. She was tried separately for 13 charges including trafficking in humans for sexual purposes. She stated that she had deliberately not obtained a business licence as she was aware that brothels were illegal in South Africa. Chinese women employed in the brothel were required to charge their clients R300 an hour for sexual services, and paid cash directly to the brothel owner.

4.90 During 2012, a Nigerian woman was rescued from a brothel in central Cape Town. The news report<sup>1414</sup> stated that detectives had launched a sting operation at an alleged brothel and had then found the woman being kept against her will. Two women were arrested, one for prostitution and the other for operating a brothel. Yet another news report stated that three female Chinese nationals had been arrested for running a brothel from a home in George.<sup>1415</sup>

4.91 In December 2012, news reports from Gauteng stated that the Hawks had raided and shut down two suspected brothels on the East Rand.<sup>1416</sup> Twenty-three people were arrested and R31 000 was confiscated from the brothels. The first raid occurred in Malvern and seven foreign nationals were arrested, four women from Thailand and two from China; in addition, a man believed to be the brothel owner was arrested. The second raid took place in Edenvale and one South African woman and 14 women from Thailand were arrested. A Yugoslavian man, thought to be the owner, was also arrested together with a man from the Congo, and these two men were charged with operating a brothel. The women – some of whom had entered the country without documentation – faced charges of illegal immigration and soliciting money for the purpose of prostitution.<sup>1417</sup>

4.92 In 2008 in Gauteng, the Tshwane Metro Police drug unit arrested one suspected pimp, three prostitutes and two of their clients in a raid on what they believed to be a brothel in the upmarket suburb of Monument Park.<sup>1418</sup> According to the Metro Police, it was becoming increasingly common for pimps to operate brothels in the suburbs. The news report stated that “many adverts in the classifieds pages advertise an individual girl running

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<sup>1413</sup> *IOL News* “Woman fined for keeping brothel” 11 November 2011 available at [www.iol.co.za](http://www.iol.co.za).

<sup>1414</sup> *News 24* “Woman rescued from Cape Town brothel” 28 September 2012.

<sup>1415</sup> *News 24* “3 women held for running brothel” 17 June 2012.

<sup>1416</sup> *News 24* “Hawks crack down on brothels” 1 December 2012.

<sup>1417</sup> *Ibid.*

<sup>1418</sup> *Pretoria News* “Brothel swoop nets pimp, rocks, spoons” 16 January 2008 available at SA Media – The University of the Free State. Ref. No. 554.

her own thing, but more often she is part of a bigger operation.”<sup>1419</sup> The Metro Police were responding to a tip-off from a prostitute who had worked in the brothel and had agreed to be admitted to a rehabilitation clinic to seek help for her drug problem, in return for not being prosecuted. The pimp, prostitutes and customers were medically tested for drug use and all were found positive for this. As part of a larger initiative, 33 people were arrested on drug-related charges and secondary charges of prostitution.<sup>1420</sup> The news report stated that almost all of the arrested prostitutes were linked to drug networks and foreign pimps.<sup>1421</sup>

4.93 The lucrative nature of establishments in the sex industry was illustrated by the battle over a Durban strip club in 2012.<sup>1422</sup> *The Mercury* dubbed the venue in question “Durban’s most popular strip joint” and reported that its future was being thrashed out in the KZN High Court (Durban). According to *Legalbrief*, the widow of murdered “sleaze boss” Lolly Jackson, Demi, was fighting her husband’s former partner over this business, which had been earning Lolly at least R100 000 a month at the time of his murder in May 2010.<sup>1423</sup>

4.94 In 2005, concerns were aired in the media about the “strong suspicions” by the Film and Publications Board that certain adult shops in Port Elizabeth were encouraging prostitution in that city.<sup>1424</sup> It was alleged that clients were picking up prostitutes and taking them to such shops, where they would watch pornographic films and conduct their “business” in rooms on the premises. According to the Film and Publications Board compliance monitor, this was in fact a nationwide problem.<sup>1425</sup> The spokesperson was quoted as saying that the Board was especially concerned about child pornography and prostitution. Apparently the owners of most adult shops did nothing to stop prostitution taking place on their premises; thus, the Board was devising means to ensure that such prostitution did not happen.<sup>1426</sup>

4.95 A report by *The Witness* in 2010 stated that victims of trafficking were being kept in brothels, private houses and mining compounds, and were often rotated between different venues. Some were forced into other criminal activities like smuggling and the drug trade.<sup>1427</sup>

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1419

Ibid.

1420

Ibid.

1421

Ibid.

1422

“Ownership battle over Durban strip club” *Legalbrief Today*: Litigation Issue No: 3161 (12 November 2012).

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*Legalbrief Today* 12 November 2012.

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The Herald “Prostitution at adult shops causes concern” 18 February 2005 available at SA Media – The University of the Free State Ref No 669.

1425

Ibid.

1426

Ibid.

1427

*Witness* “What is Human Trafficking” 10 March 2010 available at SA Media – The University

## C Questions posed in the Discussion Paper

4.96 The Discussion Paper posed a number of questions pertaining to third parties.<sup>1428</sup> This chapter discusses submissions and answers to the questions that have not been dealt with in the preceding chapters.

4.97 With respect to the option of partial criminalisation, the following questions were posed; that is, respondents were asked to comment on which of the following aspects should be criminalised under a partial criminalisation option:

- Engaging outdoor sexual intercourse of persons 18 years and over for reward outside a brothel;
- Having outdoor sexual intercourse for reward with persons 18 years and over;
- Procurement of unlawful carnal intercourse prostitution;
- Living on earnings of unlawful prostitution;
- Assistance for purposes of unlawful prostitution;
- Enticing, soliciting or importuning unlawful prostitution; and
- Coerced prostitution.

4.98 With respect to the option of regulation, the following questions were posed; that is, whether the following offences should be criminal offences:

- Procuring for the purposes of buying unlawful prostitution;
- Living on earnings of unlawful prostitution;
- Detention for purposes of unlawful prostitution; and
- Non-compliance with the regulatory system.

4.99 The question was also posed whether the following should be regulated:

- Safe-sex practices;
- Sex education;
- Advertising of prostitution;
- Implementation by the police or similar state law enforcement agencies;
- Police access to venues where prostitution takes place; and

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<sup>1428</sup> of the Free State Ref No. 388710 March 2010. For ease of reference the term “third party” will be used to refer to a collective group including brothel keepers, pimps and massage parlour owners, club owners and escort agencies allowing prostitution.

- Legal mechanisms and procedures for the closing down of illegal venues.

4.100 With respect to the option of non-criminalisation the question was posed as to whether persons who are convicted of specific offences should be excluded from running a prostitution business.

## D Overview of submissions

4.101 The majority of respondents to the Discussion Paper are in favour of the total criminalisation of both indoor<sup>1429</sup> and outdoor<sup>1430</sup> prostitution, including the criminalisation of brothels and all third parties involved in prostitution. These submissions have largely been dealt with in the previous chapters. A few respondents support the legislative options of regulation and non-criminalisation,<sup>1431</sup> which – depending on the submission – might include the prostitute’s right to work in a brothel or to make use of a pimp.

4.102 Before discussing the responses to the specific questions posed in the Discussion Paper, some of the broad issues mentioned in respect of the legislative models of regulation and non-criminalisation are dealt with in the following paragraphs.

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<sup>1429</sup> SM Hadebe, Child of God; G Hall, His People Parkhurst; Marinda & Cornelius; GT Ndlovu, Child of God; E Rens, Methodist Womens Auxiliary; D Scarborough, Gospel Defence League; S Tegg, Full Gospel Church; L Walter, Sabie Methodist Church; I & B Wilson, Presbyterian Church; Family Policy Institute and 1331 supporting emails, Christian Lawyers Association of South Africa; Robyn Fudge; Marge Ballin, Director of Inter Outreach Ministries; Doctors for Life International; Nation Building; The Naked Truth; The Council of Muslim Theologians KZN; Lana (prostitute interviewed by RockingChair productions); The Islamic Forum Azaadville; Islamic Unity Convention; Lindie Saunderson, Edward Nathan Sonnenbergs Inc; Red Light District/Rooi Lig Distrik-Amsterdam (Ina van den Heever); The Gender Coordinator World Vision South Africa; Christian Action Network; Antioch Bible Church.

<sup>1430</sup> SM Hadebe, Child of God; G Hall, His People Parkhurst; Marinda & Cornelius; GT Ndlovu, Child of God; E Rens, Methodist Womens Auxiliary; D Scarborough, Gospel Defence League; S Tegg, Full Gospel Church; L Walter, Sabie Methodist Church; I & B Wilson, Presbyterian Church; Family Policy Institute and 1331 supporting emails, Christian Lawyers Association of South Africa; Robyn Fudge; Marge Ballin, Director of Inter Outreach Ministries; Doctors for Life International; Nation Building; The Naked Truth; The Council of Muslim Theologians KZN; Lana (prostitute interviewed by RockingChair productions); The Islamic Forum Azaadville; Islamic Unity Convention; Lindie Saunderson, Edward Nathan Sonnenbergs inc; Red Light District/Rooi Lig Distrik-Amsterdam (Ina van den Heever); The Gender Coordinator World Vision South Africa; Christian Action Network; Antioch Bible Church.

<sup>1431</sup> SWEAT; SA Petzer; Steve Biko Centre for Bioethics WITS; AIDS Consortium; AIDS Legal Network; Centre for Applied Legal Studies WITS; OUT LGBT Well-being; Socio Economic Rights Project, Community Law Centre, University of the Western Cape; South African National AIDS Council Women’s Sector; Treatment Action Campaign’s Women’s Rights Campaign; Tshwaranang Legal Advocacy Centre.

4.103 The South African Women’s Lawyers Association (SAWLA) voices its support for the model of regulation. It advocates for the following: a regulatory body that would regulate the issuing of licences to intimate service providers, brothels and “pimps”; licensing should entail conditions such as compulsory medical check-ups, which could result in the service provider’s licence being withdrawn if test results were unfavourable; and enforced compliance. According to SAWLA, employers should comply with labour legislation and tax laws. Similarly, A Myburg<sup>1432</sup> states that every prostitute should have a legal work permit which is renewable every three months and which would require certain procedures such as medical examinations (including tests for HIV and STDs) and a permanent address.

4.104 D Keulder submits that a person should be able to choose what kind of profession he or she wants to practise, and that prostitution itself is not criminal. Dr J Lemmer<sup>1433</sup> conveys a similar view and submitted that prostitution has both advantages and disadvantages. In Lemmer’s view, the purpose of sexuality is procreation, relation and recreation; prostitution can contribute to all three purposes. He adds that prostitution is not a substitute for a happy sexual relationship, but it may help to solve sexual problems among individuals and couples – for example, in the absence of a sex therapist, or if a buyer is physically impaired. Lemmer comments that non-criminalisation focuses on self-regulation, and in his opinion this is out of the question. He states that the prostitute, client and society as a whole need to be represented as objective role-players.

4.105 Dr RE Mhlanga of the Department of Health submits that prostitution should not be criminalised. In his view, non-criminalisation would protect human rights, provide access to health care, and prevent prostitutes from being abused by buyers, law enforcement [officers] and “middle men”. He therefore endorsed the non-criminalisation model.

4.106 SWEAT<sup>1434</sup> also advocates for the model of non-criminalisation. SWEAT submits<sup>1435</sup> that selling sex is a legitimate form of labour and that criminalising this activity violates the

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<sup>1432</sup> SANCA Witbank.

<sup>1433</sup> Founder and Principal Member of the Academy of Sexology.

<sup>1434</sup> Working in partnership with RHRU, POWA, Women’s Legal Centre and Tshwaranang Legal Advocacy Centre towards the realisation of an empowered sex worker sector in South Africa that is capacitated and thus significantly better able to defend its human rights and challenge human rights abuses (as per SWEATS submission).

<sup>1435</sup> Endorsed by the AIDS Consortium; Centre for the Study of Violence and Reconciliation Gender Base Violence Program; Gender DymaniX; Good Hope Metropolitan Community Church; Institute for Security Studies; Joint Working Group (LGBTI Sector); Legal Resources Centre; People Opposing Women Abuse; SACCAWU; Tshwaranang Legal Advocacy Centre; Women and HIV/AIDS Gauge, Health Systems Trust; Women’s Legal Centre; Women’s Net; World Aids Campaign.

fundamental rights of prostitutes.<sup>1436</sup> It disputes that prostitution is a sexual offence and that sex for reward between consenting adults should be criminalised. SWEAT argues that although prostitution may be harmful to some prostitutes, and that such harm should be addressed by legislative and other means in the same way as harm generated by any other occupation, it rejects the assumption that prostitution is harmful for all individuals working in the sex industry. The SWEAT submission further states as follows:

[I]n South Africa, where the police often misuse a lack of clarity on a legal position, it would benefit sex workers to spell out in law some of the key protections to which they should be entitled:

- The removal of criminal laws which prohibit the sale or purchase of consensual adult sex and related criminal offences;
- The application of existing labour laws to sex workers;
- The facilitation of contact between sex workers and occupational health and safety agencies, through specific legal provisions that require operators of brothels to promote safer sex practices by displaying and providing information about safer sex practices and the creation of offences for those who do not comply with these requirements; and
- Passing of a law that validates what may currently be illegal contracts but prohibits coercion and affirms that every sex worker can refuse to provide any sexual service.

4.107 SWEAT further states that:

[P]arties operating in the sex industry, such as sex workers, other employees employed in the industry, brothel managers and owners should openly lead the process of developing an effective model that will govern the industry. This model should enable parties to manage and administer the industry as in the case of other legitimate industries. The role of government should be to create an enabling environment for parties to set their standards and to monitor the industry.

4.108 SWEAT believes that non-criminalisation would allow people to conduct adult prostitution as a legitimate business. This would ensure that brothel owners and managers uphold minimum conditions of employment as stipulated in the relevant legislation. Recognition of the industry as a business would allow the owners and managers of brothels to register under the Business Act and to apply for business licences. Owners in the indoor sex work industry would be able to form business associations that would represent their interests in forums, which in turn would regulate and govern the industry.

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<sup>1436</sup> SWEAT uses the term “sex work” to refer to people in prostitution. For the sake of uniformity in this Report, the Commission has used “prostitute” or “prostitution” rather than “sex worker” or “sex work” even when summarising the submission from SWEAT.

4.109 In respect of brothels and third parties, SWEAT submits that the following sections of the Sexual Offences Act should be repealed:

- Section 2: Keeping a brothel;
- Section 3: Certain persons deemed to keep a brothel;
- Section 4: Onus of proof;
- Section 5: Contract to let house or place for a brothel void;
- Section 6: Use of house or place as a brothel voids contract of letting;
- Section 7: Summary ejection when a house or place is used as a brothel;
- Section 8: Proceedings upon complaint by householders or police that a house or place is used as a brothel;
- Section 10: Procuration;
- Section 12A: Assistance for purposes of unlawful carnal intercourse;
- Section 20(1)(a): Any person who knowingly lives wholly or in part on the earnings of prostitution;
- Section 20(1)(c): Receiving remuneration for commission of act of indecency;
- Section 20(2): Authorising police authorities to enter and search any house used for purposes of prostitution.

4.110 The SWEAT submission in essence proposes the repeal of all sections of the Sexual Offences Act, with the exclusion of one section: section 12. This section criminalises the detention of a person for purposes of unlawful carnal intercourse. In this call to repeal the Sexual Offences Act, SWEAT states that the Act itself is rarely used, and that where it is used, entrapment procedures are necessary. Hence, the Act is an ineffective tool.

4.111 SWEAT also submits that the following laws should be repealed:

- Section 160 of the Liquor Act; and
- Any by-law that is specific to prostitution, such as the law that stipulates no loitering for the purposes of prostitution.

4.112 SWEAT argues that the purpose of a new law would be to deliver on the following aims:

- Protection of the human rights of persons that practise sex work;
- Promotion of the health and safety of sex workers;
- Recognition of the services of sex workers as legitimate labour;
- Recognition of the right to freedom of economic activity within the sex industry;
- Empowerment of sex workers to choose to remain or to exit the sex industry; and

- Balancing the rights and needs of the sex worker and sex industry with the rights and interests of the community.

4.113 SWEAT opposes the inclusion of “reduction of demand for prostitution” as a purpose of a new Act. In this regard, SWEAT argued that in a situation of willing buyer and seller and no victim, and a clear inability for the state to monitor [prostitution and related crimes], the rationale of the law (implicitly or explicitly) is unclear, as is the government’s stance on reducing the demand for prostitution.

4.114 By contrast, the Family Policy Institute submits that reducing demand is necessary. In explaining its stance, the Institute states that since prostitution was non-criminalised in New Zealand in 2003 through the Prostitution Reform Act, unlicensed brothels containing no more than four prostitutes are allowed to operate in suburban areas – called “small owner operated brothels” (SOOBs). The Institute reports that large towns and cities such as Christchurch, Hamilton and Manakau are now struggling to control the proliferation of brothels in suburban areas. The increase in street prostitution and attendant problems has led the Council in Manakau to try and recriminalise street solicitation. The New Zealand Police have complained that the new policy has tied their hands when it comes to dealing with the proliferation of under-age prostitution.

4.115 An anonymous submission states that non-criminalisation would result in an increase in the growth of the sex industry, and that if this increase could not be satisfied locally it would lead to an increase in the number of victims trafficked for sexual purposes.

4.116 SWEAT states that it advocates for the following principles: safeguarding the human rights of prostitutes; protection from exploitation; promotion of the welfare and occupational health and safety of prostitutes; the improvement of social order by creating an environment that is conducive to public health and tackles crime; protection of children from exploitation in relation to prostitution; and ensuring that commercial sex transactions are consensual and not subject to third-party coercion. SWEAT also counters the following allegations: that working conditions for prostitutes are inherently unsafe, unfair and poor; that pimps are automatically exploitative; and that brothels are always unsanitary. In arguing against these allegations, SWEAT states that these are overly simplistic stereotypes. In its view, not all pimps and managers exploit prostitutes, and not all brothels and prostitution locations are unclean and unsafe. SWEAT submits that a remoulded law could do much to tackle such problems where they do exist, and that denial of the protection of the law encourages the exploitation of prostitutes, inaccessibility to worker’s rights and unhealthy conditions.

4.117 An anonymous respondent submits that safety policies in brothels do not protect prostitutes from harm, and that exploitation and violence in prostitution are viewed as sexualised and are often tolerated as being part of the so-called job. This tolerance is said to be based on clients' justification and rationalisation that men are entitled to sex, and women's obligation to satisfy that demand, especially when paid to do so. The same respondent submits that the purpose of prostitution is to provide, for a fee, an interaction in which one person is treated as the subject who is enabled to act and to determine which sexual acts occur, on the basis of his personal desire, to the exclusion of the other person's preferences. This is in sharp contrast to non-commercial relational sex, or even promiscuous anonymous sex, where both parties act on the basis of personal desire and both parties are free to retract without economic consequences.

4.118 SWEAT notes that prostitution is a rational survival and economic choice, even if it creates difficulties in other respects, such as working under exploitative conditions and risking human rights violations. The SWEAT submission states that any approach to prostitution needs to take cognisance of the fact that faced with few economic choices, the person has agency within these constrained choices and deserves to have their choices respected. The submission states that "[T]he situation across Africa exemplifies the bare economic facts of poverty" such that foreign or homeless prostitutes engage in sex for as little as R5 or for something to eat. Given their lack of education, they may earn more as a prostitute than they would in a "normal" job. According to SWEAT,

[S]ex work is often a survival strategy in which many sex workers come from situations of extreme poverty and in which the sex industry becomes one of the few options open to them to survive ... they earn more by selling sex than they would elsewhere ... educational or vocational qualifications are not directly relevant."

4.119 An anonymous respondent disagrees with SWEAT's stance. This anonymous respondent states that to normalise prostitution as a reasonable job choice for poor women would render invisible their strong desire to actually escape prostitution.<sup>1437</sup> In her experience, the majority of prostitutes do not want to lose their anonymity even in a legalised setting.<sup>1438</sup> She states that "in Holland and Germany, few women register themselves as prostitutes even though they would accrue various benefits such as pension funds or union

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<sup>1437</sup> Endorsed by Thandi from Hillbrow who entered prostitution because of poverty. She requests government to create jobs for "ex-sex workers" or people who would like to stop being a prostitute. In her words "we are trapped" and "we need decent jobs".

<sup>1438</sup> This sentiment is shared by Doctors for Life International.

representation. The respondent believes that such women aim to leave prostitution as quickly as possible, leaving no legal record of having been in prostitution". She further states that "prostitution formalises women's subordination by gender, race and class; and that poverty, racism and sexism are inextricably connected in prostitution". She submits that predominantly a woman's gender position in society structures her roles and opportunities, and influences the choices that she makes. As such, prostitution is a gendered survival strategy which involves the assumption of unreasonable risks by the person.

4.120 The Christian Lawyers Association of South Africa and another anonymous respondent argues that the non-criminalisation of prostitution does not address the causes of prostitution but merely addresses the symptoms of other social and economic constraints. Non-criminalisation cannot discharge the onus on government to provide jobs for its citizens. In this person's view, creating a hazardous profession and calling it a viable alternative employment opportunity would be irresponsible.

4.121 SWEAT submits that "criminalisation exposes prostitutes to occupational health and safety risks such as exposure to hazards, injuries, and diseases, harassment, violence, musculoskeletal injuries, bladder problems, stress, depression, alcohol and drug use, respiratory infections, latex allergy, the removal of children, and death". With regard to mortality, SWEAT states that in some regions the standardised mortality rate among prostitutes is six times that of the general population. SWEAT argues that because prostitution is criminalised, prostitutes have no recourse to legal protection regarding their working conditions, as the illegal nature of their work precludes them from the operation of any protective laws. The consequence is that working conditions are often unsafe and unhygienic, and any working relationship is potentially exploitative. SWEAT states that the fact is prostitutes have no realistic option but to work under these conditions. The submission notes that worldwide, prostitutes comprise a segment of society that is largely poor and has resorted to prostitution for economic reasons; that prostitutes are vulnerable to exploitation at the hands of the police, clients, pimps, landlords and even partners; and that they are frequently the victims of violence. SWEAT argues that these circumstances are the consequences of criminal prohibition. Prostitutes who work from home or from rented flats are unable to rely on the police because their activity is illegal. Their only form of security against violent clients is screening. Prostitutes in brothels have the benefit of safety in numbers, but they may still be exposed to poor working conditions and exploitation. In summary, SWEAT argues that prostitutes are at high risk due to the fact that they are not able to access services or protection from the police when they need it.

4.122 An anonymous respondent holds a different view to that of SWEAT and states that deterrence and the prevention of crime are general purposes of the criminal law. Deterrence and prevention are effective only when a particular law is properly enforced. This respondent argues that prostitutes who seek alternatives to prostitution require tangible social and economic assistance from government, within the broader range of anti-poverty measures. Furthermore, when legal barriers disappear so too do the social and ethical barriers to treating women as sexual commodities. In the respondent's view, the legalisation of prostitution sends a message to generations of men and boys that women are sexual commodities and that prostitution is "harmless fun". This anonymous respondent further submits that an excess of "sexual services" on offer means that women must compete to provide such services by engaging in practices such as anal sex, sex without condoms, bondage and domination, and any other proclivities demanded by clients.

4.123 In respect of the operation of brothels, SWEAT recommends as follows:

- An obligation for every person who operates a business of sex work to take all reasonable steps to ensure condoms or other similar protective barriers are used in relation to commercial sexual services provided for that business. The obligation should apply to any person who operates a business of sex work, regardless of the size of the business. Operators of a business of sex work also need to take all reasonable steps to minimise the risk of sex workers and clients acquiring or transmitting Sexually Transmitted Infections (STIs).
- Operators of a business of sex work must take all reasonable steps to provide health information to sex workers and clients, and, if the business in question is a brothel, that information must be prominently displayed in the brothel. This requirement should only apply to brothels because other businesses involving sex workers do not have permanent premises where sex workers and clients are both present.
- The information requirement should refer to health information on safer sex practices and on services for the prevention and treatment of STIs.

4.124 SWEAT submits that under a decriminalised model, the role of government would entail the following aspects:

- A national directive to cease arrests and convictions of prostitution related crimes;
- A national directive regarding the scrapping of prostitution specific by-laws and a directive regarding clarifying definitions of existing by-laws;

- Implementation of the National HIV/AIDS Strategic Plan;
- Amending the Business Act in order that brothels be licensed in accordance with other businesses;
- Engaging the National and Provincial Departments of Health in working in partnership with licensing authorities and the prostitution “industry” regarding health and safety standards. Codes of good practice that comply with licensing requirements could include the displaying of safer sex messages, ensuring all clients use a condom as well as ensuring that prostitutes are exposed to safer sex education and encouraged to access health care services on a regular basis. The Department of Health must also be tasked with the phasing in of accessible health services for groupings such as prostitutes, for example health services available in the evenings.
- The Department of Labour be given an active role to play in promoting fair and equitable practices within the prostitution “industry”. SWEAT envisages a transitional period whereby the Department of Labour would play a facilitating and advisory role and engage with other Government Departments, including Health, in order to ensure that any regulatory system including the possibility of an eventual Sectoral Determination is in the interests of the prostitutes concerned. Thereafter the Department of Labour could and should play a monitoring and enforcement role.
- The Department of Safety and Security be given the task of sensitising police and law enforcement officials regarding changes to legislation. Clearly this needs a partnership approach with civil society and, when brought down to a micro level of community forums, seems more manageable.
- The Department of Social Development be instructed to engage with prostitutes around issues of social security and poverty alleviation including re-skilling and alternative income generating projects. Social Development should be tasked with taking the lead role in dealing with the commercial exploitation of children as well as issues of force and coercion into the industry in partnership with the Department of Safety and Security.
- Delivering the responsibility to educate the public regarding any changes to national legislation around adult prostitution and to pro-actively contribute to national awareness-raising about destigmatisation and reducing discrimination against prostitutes.
- Engaging in awareness raising with men in South Africa who constitute the majority of potential and/or actual clients of prostitutes around safer sex practices and their rights and responsibilities when engaging the services of prostitutes.

4.125 SWEAT states that the stigma associated with prostitution arises mostly because various religious and other groups believe that prostitution is inherently immoral. It submits that labelling prostitution as a crime exacerbates and reinforces this stigma. Furthermore,

there are physical, emotional and psychological consequences associated with this stigma, and prostitutes receive almost no support to assist them to cope with these negative aspects of their work. Many prostitutes are unable to tell their families of the work that they do. In turn this makes it more difficult to report incidents of violence and abuse to the authorities.

4.126 SWEAT states that the illegal nature of prostitution means that labour legislation cannot apply, and owners and managers of brothels have no duty to set working standards nor to comply with employment practices. The State also has no duty, under a criminalised framework, to inspect and monitor labour practices. In the words of Ms G, quoted in the SWEAT submission: “We would like to have equal rights to those people working in other jobs. For example, sick leave, UIF, pregnancy leave, annual leave, bonus ...”.

4.127 SWEAT submits that all legal businesses are regulated by industry standards that apply, across the board, to the industry in question. In its view, the absence of such standards in the sex industry allows criminals, individual managers and corrupt police officers to determine the conditions under which prostitutes work. SWEAT concludes that under non-criminalisation, existing laws like the Basic Conditions of Employment Act and the Labour Relations Act would be used to regulate the sex industry. SWEAT argues that non-criminalisation would mean that prostitutes could gain access to services provided by the Department of Labour and the Commission on Conciliation, Mediation and Arbitration (CCMA), as well as unemployment insurance and other employment benefits. It would also allow prostitutes to mobilise through unions or workers’ collectives. SWEAT further argues that legal recognition of prostitution would ensure the application of ILO Conventions to address childcare, social security and other work-related issues.

4.128 SWEAT states that prostitutes also have difficulty accessing legal and financial services due to the criminal status of their work. Furthermore, some financial services (eg opening bank accounts, being granted credit or taking life insurance) are difficult to access because of the need to state one’s occupation on application forms and to prove one’s income.

4.129 SWEAT submits that prostitutes working in brothels are largely “invisible”, with little recourse to legal intervention in relation to problems experienced while working. Currently, complaints include excessive working hours, unfair commissions, unfair deductions and fines, working under duress and inability to leave the premises. Prostitutes face threats of violence and exposure. However, SWEAT also submits that some brothels ensure fair and safe working conditions and some managers and owners have shown an interest in setting

adequate standards. SWEAT states that although it has drawn up a code of conduct for certain male-to-male agencies, it had been unable to secure a body or agency to monitor and enforce the code, primarily due to the fact that prostitution is criminalised.

4.130 On the subject of pimps, SWEAT argues that although there are exploitative and abusive pimps, some pimps provide a protective service by looking after money earned, keeping a record of clients' number-plates, and negotiating safe locations known to the pimp. SWEAT states that the relationship between pimp and prostitute may be contractual or of an employment nature.

4.131 SWEAT submits that discrimination and prejudice towards prostitutes limit their ability to access health services, and that this situation is concerning because of the high health risks associated with prostitution. It is averred that some pimps or managers compel prostitutes to use drugs with their clients. Vulnerability to STIs and HIV is therefore greater.

4.132 With regard to the use of drugs, an anonymous respondent submits that it is debatable whether drugs lead women and men into prostitution or whether prostitution causes people to use drugs. In this respondent's view, the fact of the matter is that statistically, prostitution and drugs are closely linked. With one comes the other, and irrespective of the legislative model employed the incidence thereof will not be reduced. The respondent argues that prostitutes do not take drugs to deal with the risk of arrest, they take drugs to cope with the nature of the work that they do; therefore, the only way to reduce drug use is to reduce prostitution. Doctors for Life International state that many women can not work in brothels because they are drug addicts or are not what the brothel owners are looking for.

4.133 SWEAT further submits that HIV prevalence rates amongst some prostitutes are higher than in the average population, and that this scenario should be viewed against the backdrop of prostitutes' limited access to health services (due to their fear of discrimination or arrest on disclosing their occupation). SWEAT alleges that some health care officials refuse to provide treatment, or provide inadequate treatment, and make abusive remarks after discovering or suspecting that a person is a prostitute. Some prostitutes mistrust health care workers to protect their confidentiality in respect of their communities, and fear the response of their community and family. SWEAT submits that prostitutes therefore either do not seek help for sexual and reproductive health complaints, or seek help in the private sector - including "off the street". SWEAT concludes that the ongoing criminalisation of

prostitution directly affects prostitutes' ability to protect themselves against HIV and other STIs.

4.134 The Tshwaranang Legal Advocacy Centre proposes the enactment of a law that would achieve the following aims: clearly spell out that prostitutes have the same human rights as everyone else; deal with coercive practices in the sex industry; and allow prostitutes to employ others to engage in punting or protection, provided that the prostitutes are genuinely the employers and the situation is not exploitative or coercive. The Centre further supports the creation of a supervisory body to oversee the sex industry and which would represent "sex workers, sex worker organisations, associations and trade unions".

4.135 By contrast, Robyn Fudge is of the opinion that non-criminalisation or regulation of prostitution would not be in line with international and regional treaty obligations – at least not for the buyer, pimp, or brothel keeper. She submits that international instruments that specifically refer to gender, prostitution and trafficking are most relevant. She argues that the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* obliges States Parties to punish any person who procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; and exploits the prostitution of another person, even with the consent of that person. She states that in terms of this Convention, States Parties must punish any person who keeps, manages, or knowingly finances or takes part in the financing of a brothel; and who knowingly lets, rents a building or other place or any part thereof for the purposes of the prostitution of another. Fudge further argues that Article 6 of the *Convention on the Elimination of Discrimination against Women* (CEDAW) uses the same wording as the 1949 *Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others* in its call for States Parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women". Fudge submits that in both instances, the "exploitation of prostitution" can only refer to third-party profiteers from prostitution.

4.136 An anonymous respondent writes that the most critical aspect that needs to be evaluated when considering total criminalisation (as opposed to non-criminalisation) occurs in the context of human trafficking. This respondent submits that at present, in order to enter a brothel – after intelligence sources have indicated that it might house victims of human trafficking – SAPS utilise the so-called "prostitution provisions" to gain access; they then transact with the potential victims, after which a raid takes place. In the respondent's view, non-criminalisation would leave SAPS with limited grounds on which to access legal

brothels. She states that criminalising prostitution therefore has the valuable “offshoot” of curbing the crime of human trafficking. She further states that a comparison can be made with legal and illegal taverns. Policing of taverns is poor and there are currently more unlicensed than licensed taverns.

4.137 Another anonymous respondent<sup>1439</sup> submits that prostitution is linked to organised crime irrespective of the laws governing prostitution in a particular country. This view was echoed by another submission which stated that as the market for prostitution increases, so does the market for trafficked women and men to meet the demand.<sup>1440</sup> Wherever large sums of money can be made with minimal investment, syndication will occur. Prostitutes will continue to pay overheads for accommodation, protection, condoms, lubricants and “agents” fees for obtaining clients.<sup>1441</sup>

4.138 Ms Fudge points out that the *Protocol to the African Charter on Human and Peoples’ Rights on the rights of Women in Africa* not only recognises a woman’s right to dignity, but obliges States Parties in several regards. That is, to adopt and implement appropriate measures to prohibit any *exploitation or degradation*, as well as to adopt and implement measures to ensure the protection of every woman’s right to respect for her human dignity; and protection from all forms of violence, particularly sexual and verbal violence.<sup>1442</sup> Fudge states that violence against women is defined as including “all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts...”. The harm suffered by women or girls engaged in prostitution would, Fudge suggests, certainly fall within this definition and therefore constitutes violence.<sup>1443</sup> Furthermore, States Parties are to ensure that the right to sexual and reproductive health is promoted and respected.<sup>1444</sup> This includes the right to self-protection and the right to be protected against STIs, as well as the right to be informed on one’s health status and on the health status of one’s partner, particularly if affected by STIs (including HIV/AIDS). In this context, prostitution could also constitute violence against the unsuspecting wife or partner of a prostitute user, as her health or life would be placed at risk through his behaviour. Raymond has estimated that in developing countries, approximately

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1439 Anonymous respondent.  
1440 Ibid.  
1441 Ibid.  
1442 Art 3. and 3.4  
1443 Art 1(j).  
1444 Art 14(1)(d).

70% of cases of female infertility are associated with sexually transmitted diseases that can be traced back to the woman's own husband or partner.<sup>1445</sup>

4.139 Robyn Fudge is of the opinion that although adult prostitution is not referred to directly in the Protocol, the indirect and combined effect of all provisions in the Protocol suggests that such a practice would not be permissible, at least not in the case of a pimp or buyer.

4.140 The responses to specific questions posed in the Discussion Paper on models other than criminalisation are presented in the following sections.

## **1 Regulation**

### **(a) Procuring for the purposes of buying unlawful prostitution**

4.141 A number of respondents are in favour of criminalising the act of procuring.<sup>1446</sup> However, M Kotze-Marais of the Free State Department of Health submits that procuring should not be a crime. SWEAT notes that it would depend on what is meant by "unlawful sex work" as that would vary between legal models.

### **(b) Living on earnings of unlawful prostitution**

4.142 The majority of respondents submit that this aspect should be criminalised. M Kotze-Marais submits that this aspect should be regulated. SWEAT again submits that it would depend on what is meant by "unlawful sex work".

### **(c) Detention for purposes of unlawful prostitution**

4.143 All but one respondent<sup>1447</sup> submit that detaining a person for purposes of unlawful prostitution should be criminalised. SWEAT agrees that this should be criminalised, and adds that it should be criminalised under any legal model, including non-criminalisation.

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<sup>1445</sup> Raymond JG "Making the Harm Visible".

<sup>1446</sup> SM Hadebe, Child of God; Marinda & Cornelius; GT Mjuza; E Russell, Methodist Women's Auxillary; D Scarborough, Gospel Defences League; S Tegg, Full Gospel Church; I & B Wilson, Presbyterian Church.

<sup>1447</sup> M Marais-Kotze, Department of Health, Free State.

**(d) Non-compliance with the regulatory system**

4.144 Numerous respondents<sup>1448</sup> submit that because prostitution should be criminalised, no regulatory system would be needed. D Scarborough comments that a regulatory system would not work. SWEAT notes that although non-compliance should be criminalised, this criterion highlights a fatal flaw in the regulatory approach. SWEAT submitted that regulation is in essence based on the presumption that sex work is by its nature unacceptable and illegal, but can be tolerated under certain defined circumstances. SWEAT concludes that this scenario would lead to fraught, tense and unreasonable outcomes.

**(e) How must safe-sex practices be regulated?**

4.145 A number of respondents state that where a person has more than one partner, safe sex cannot be regulated.<sup>1449</sup> In the words of D Scarborough,<sup>1450</sup> “the prostitute provides what the client demands and the client pays for what he wants – this cannot be regulated”. M Marais-Kotze<sup>1451</sup> submits that there should be compulsory testing of the prostitute, and that the prostitute may demand a test or proof of health (absence of HIV and hepatitis) from the buyer. Furthermore, she may require the use of a condom but this would be her choice; and that “extra-genital violence” should, however, still be a crime.

4.146 GT Mjuza comments that a supervisory body could be created so that breaches could be reported. Furthermore, identification of both parties should be produced. T Nikiwe<sup>1452</sup> submits that there must be peer educators and community health workers at designated areas to give information on safe sex practices; mobile clinics should visit designated areas; and support groups and a database of prostitutes should be formed.

4.147 E Russell of the Methodist Women’s Auxillary comments that a prostitute has a legal right to lay a charge against a client for non-compliance with the legal requirement to use a condom for vaginal, anal or oral sex. There should be a free supply of condoms to prostitutes during compulsory weekly health checks at health clinics; adequate efficient records should be kept; and prostitutes should be issued with laminated registration cards.

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<sup>1448</sup> SM Hadebe, Child of God; Marinda & Cornelius; GT Mjuza; E Russell, Methodist Women’s Auxillary; D Scarborough, Gospel Defences League; S Tegg, Full Gospel Church; I & B Wilson, Presbyterian Church.

<sup>1449</sup> I & B Wilson, Presbyterian Church; S Tegg, Full Gospel Church; GT Ndlovu, Child of God; Marinda & Cornelius; SM Hadebe, Child of God.

<sup>1450</sup> Gospel Defence League.

<sup>1451</sup> Department of Health, Free-State.

<sup>1452</sup> Department of Health, Gauteng.

4.148 SWEAT comments that safe-sex practices can be regulated under the non-criminalisation or regulation model.

**(f) How should sex education be regulated?**

4.149 A few respondents indicate that sex education should not be regulated.<sup>1453</sup> One respondent<sup>1454</sup> states that sex education for minors has not improved matters, and another respondent<sup>1455</sup> suggests a focus on sex within the confines of marriage and commitment. E Russell is of the opinion that qualified sex education experts should teach sex education in schools from primary to tertiary level; counsellors should be trained and employed in schools to recognise and assist disturbed children; and educational psychologists and sex therapists should be trained to test prospective teachers for deviant sexual behaviour. M Marais-Kotze agrees that sex education should start in the schools, and adds that the following should also be provided: posters in designated areas; counselling for HIV; other education on demand; and the issue of certificates.

4.150 GT Mjuza states that there should be a mandatory induction course on registration as a prostitute; impromptu follow-ups within the designated zones; and inspectors in attendance at sites where prostitutes pick up clients. D Keulder submits that there should be compulsory involvement in programmes upon registration of the regulatory body. T Nkiwe<sup>1456</sup> comments that prostitutes should be given skills and that this should be done through peer educators at designated areas. D Scarborough<sup>1457</sup> disagrees and states that sex education is useless, because prostitutes simply aim to please their clients.

**(g) How should advertising of prostitution be regulated?**

4.151 The majority of respondents are opposed to the advertising of prostitution.<sup>1458</sup> E Russell<sup>1459</sup> submits that prostitutes can inform their clients without adverts. D

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<sup>1453</sup> SM Hadebe, Child of God; GT Ndlovu, Child of God; S Tegg, Full Gospel Church; I & B Wilson, Presbyterian Church.

<sup>1454</sup> I & B Wilson, Presbyterian Church.

<sup>1455</sup> Marinda & Cornelius.

<sup>1456</sup> Department of Health, Gauteng.

<sup>1457</sup> Gospel Defence League.

<sup>1458</sup> SM Hadebe, Child of God; Marinda & Cornelius; E Russell, Methodist Women's Auxillary; D Scarborough, Gospel Defence League; S Tegg, Full Gospel Church; I & B Wilson, Presbyterian Church; GT Mjuza.

<sup>1459</sup> Methodist Women's Auxillary.

Scarborough<sup>1460</sup> states that advertising should be forbidden in order to combat violence against women. Other respondents state that such advertising should be regulated, as is the case for alcohol and cigarettes,<sup>1461</sup> or should be restricted to *Penthouse*-type magazines; and that the content, size and colour should be strictly regulated.<sup>1462</sup> T Nikiwe<sup>1463</sup> comments that designated areas should be advertised to indicate that prostitutes are protected in these areas. SWEAT submits that some restrictions on the advertising of “sex work” services would be needed for electronic media, and maybe also for the content and size of print and internet advertisements, to maintain standards of public decency. Furthermore, because some prostitutes would be operating illegally, there would need to be some form of register to which the media had access to ensure that they were not inadvertently advertising illegal prostitutes. SWEAT concludes that this question raises difficult human rights issues.

#### **(h) Police access to venues where prostitution occurs**

4.152 SWEAT submits that police may need to access venues to check on the licensing of key staff. Some respondents submit that only specially selected and trained police officers should have such access.<sup>1464</sup> One respondent submits that police would need to obtain a warrant;<sup>1465</sup> another that access should be allowed only when there is a criminal offence occurring, or for routine inspections.<sup>1466</sup> E Russell<sup>1467</sup> submits that police should be able to search for underaged or coerced prostitutes and the people who “employ” them. Some respondents argue that the police should have the same access they would have to any crime scene;<sup>1468</sup> one person states that police should have free access only to illegal venues.<sup>1469</sup> I & B Wilson<sup>1470</sup> comment that although police access should be permitted, it should be illegal for police to request sex.

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<sup>1460</sup> Gospel Defence League.

<sup>1461</sup> D Keulder.

<sup>1462</sup> M Marais-Kotze, Department of Health, Free State.

<sup>1463</sup> Department of Health, Gauteng.

<sup>1464</sup> E Russell, Methodist Women’s Auxillary; D Scarborough, Gospel Defence League.

<sup>1465</sup> D Keulder.

<sup>1466</sup> GT Mjuza; M Marais-Kotze, Department of Health, Free State.

<sup>1467</sup> Methodist Women’s Auxillary.

<sup>1468</sup> Marinda & Cornelius; D Scarborough, Gospel Defence League.

<sup>1469</sup> M Marais-Kotze, Department of Health, Free State.

<sup>1470</sup> Presbyterian Church.

**(i) Legal mechanisms and procedures for closing down illegal venues**

4.153 A few respondents merely state that indeed mechanisms and procedures should exist through which illegal venues could be closed down.<sup>1471</sup> One respondent states that there should be legal mechanisms and procedures for closing down *all* venues of prostitution.<sup>1472</sup> This respondent also states that prostitution destroys families, dehumanises women, creates crime, denies women human dignity, and reduces them to “sellable articles with a short life-span”.<sup>1473</sup> D Keulder comments that there should be specialised units which would operate on the same principle as the Liquor Boards. M Marais-Kotze states that the mechanisms and procedures should be the same as those which apply to illegal termination of pregnancies at non-designated sites or facilities. E Russell<sup>1474</sup> suggests that the courts should issue legal permits to police officers and these would be signed by a judge or magistrate to make the permit official. If a proprietor was unable to produce a permit, these specially appointed police should have the power to remove all prostitutes to a designated place of safety, and the illegal “owner” would be prosecuted for fraud and human trafficking.

## **2 Partial criminalisation**

***Partial criminalisation: Which of the following acts must be criminalised under a partial criminalisation option?***

**(a) *Engaging outdoor sexual intercourse of persons 18 years and over for reward outside a brothel***

4.154 With the exception of GT Mjuza, the remaining 11 respondents<sup>1475</sup> who commented on this question said that this act should remain criminalised. S Le Grange submits that pimps, clients of prostitutes, keepers of brothels and all parties involved in the prostitution business – except for the prostitute him- or herself – should be open to prosecution. In other words, all those who benefit financially from the prostitution business (except the prostitute) should be charged with breaking the law.

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<sup>1471</sup> SM Hadebe, Child of God; GT Ndlovu, Child of God; S Tegg, Full Gospel Church; D Scarborough, Gospel Defence League.

<sup>1472</sup> D Scarborough, Gospel Defence League.

<sup>1473</sup> Ibid.

<sup>1474</sup> Methodist Women’s Auxiliary.

<sup>1475</sup> SM Hadebe, Child of God; G Hall, His People Parkhurst; D Jane, City of Jhb Councillor Ward 56; S Le Grange; Marinda & Cornelius; GT Ndlovu, Child of God; E Rens, member Methodist Women’s Auxiliary; D Scarborough, Gospel Defence League; S Tegg, Full Gospel Church; L Walter, Sabie Methodist Church; I & B Wilson Presbyterian Church.

**(b) Having outdoor sexual intercourse for reward with persons 18 years and over**

4.155 Twelve respondents said “yes”<sup>1476</sup> – that is, having sexual intercourse outdoors for reward with a person over the age of 18 should remain criminalised. One respondent said “no”.<sup>1477</sup> Prof J Lemmer states that this option would protect the rights of prostitutes but not of their clients or society as a whole. In his view, prostitution must be affordable and available to the poorest of the poor, with legal health regulations such as the compulsory use of condoms.

**(c) Procurement of unlawful prostitution**

4.156 A number of respondents submit that procurement should remain criminalised.<sup>1478</sup> Marinda and Cornelius specifically advise that the buyer should be arrested, and the prostitute given the choice of an exit programme.

**(d) Living on earnings of unlawful prostitution**

4.157 A number of respondents submit that living on the earnings of prostitution should also remain criminalised.<sup>1479</sup> Respondent A Megaw states that pimps, madames, human trafficking agents and drug dealers must remain criminalised. The prostitute, who is largely a pawn in the greed of the pimps, should not be prosecuted if she elects to find alternate ways of earning income and to receive training.<sup>1480</sup> Furthermore, pimps use drugs to lure new girls into the trade, and once they are hooked there is no way out.<sup>1481</sup> S Le Grange submits that

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<sup>1476</sup> SM Hadebe, Child of God; G Hall, His People Parkhurst; D Jane, City of Jhb Councillor Ward 56; Marinda & Cornelius; S Le Grange; GT Ndlovu, Child of God; E Rens, member Methodist Women’s Auxillary; D Scarborough, Gospel Defence League; S Tegg, Full Gospel Church; L Walter, Sabie Methodist Church; I & B Wilson Presbyterian Church; Rev RM Verryne, Christian Reformed Church.

<sup>1477</sup> GT Mjuza.

<sup>1478</sup> SM Hadebe, Child of God; D Jane, City of Johannesburg Councillor, Ward 56; Marinda & Cornelius; GT Mjuza; GT Ndlovu, Child of God; E Rens, member Methodist Women’s Auxillary; D Scarborough, Gospel Defence League; S Tegg, Full Gospel Church; Rev RM Verryne, Christian Reformed Church; L Walter, Sabie Methodist Church; I & B Wilson, Presbyterian Church.

<sup>1479</sup> SM Hadebe, Child of God; D Jane, City of Johannesburg Councillor, Ward 56; Marinda & Cornelius; GT Mjuza; GT Ndlovu, Child of God; E Rens, member Methodist Women’s Auxillary; D Scarborough, Gospel Defence League; S Tegg, Full Gospel Church; Rev RM Verryne, Christian Reformed Church; L Walter, Sabie Methodist Church; I & B Wilson, Presbyterian Church; S Le Grange.

<sup>1480</sup> Supported by L Turner.

<sup>1481</sup> A Megaw.

any people found guilty of financial gain from prostitution should have their assets seized and the profits thereof should be used in the restoration, education and reintegration of prostitutes into other work, if these prostitutes so choose. People who do not own sex-work related assets, such as the clients, should be heavily fined to fund initiatives that support the emotional, spiritual and physical health of prostitutes. This should be in addition to any other sentence given to them by the judge once they are found guilty.

**(e) Assistance for purposes of unlawful prostitution**

4.158 A number of respondents submit that assistance for purposes of unlawful prostitution should remain criminalised.<sup>1482</sup>

**(f) Enticing, soliciting or importuning unlawful prostitution**

4.159 A number of respondents submit that enticing, soliciting or importuning for prostitution should remain criminalised.<sup>1483</sup>

**(g) Coerced prostitution**

4.160 In response to this question, eleven respondents submitted that coerced prostitution should be criminalised.<sup>1484</sup> According to L Walter,<sup>1485</sup> the purpose of the law criminalising third parties is to reduce the instance of prostitution and coercion and yet to insure the rights of prostitutes to protect themselves from exploitation and violence. Other respondents submit that the reasons for retaining a criminalised framework are as follows: to stop the transmission of HIV;<sup>1486</sup> to eliminate prostitution and rehabilitate those in it to start a new life;<sup>1487</sup> to limit a social evil which is destructive of the family, by discouraging prostitutes and

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<sup>1482</sup> SM Hadebe, Child of God; D Jane, City of Johannesburg Councillor, Ward 56; Marinda & Cornelius; GT Mjuza; GT Ndlovu, Child of God; D Scarborough, Gospel Defence League; S Tegg, Full Gospel Church; Rev RM Verryne, Christian Reformed Church; L Walter, Sabie Methodist Church; I & B Wilson, Presbyterian Church.

<sup>1483</sup> Ibid.

<sup>1484</sup> SM Hadebe, Child of God; D Jane, City of Johannesburg Councillor, Ward 56; Marinda & Cornelius; GT Mjuza; GT Ndlovu, Child of God; E Rens, member Methodist Women's Auxillary; D Scarborough, Gospel Defence League; S Tegg, Full Gospel Church; Rev RM Verryne, Christian Reformed Church; L Walter, Sabie Methodist Church; I & B Wilson, Presbyterian Church.

<sup>1485</sup> Sabie Methodist Church.

<sup>1486</sup> SM Hadebe, Child of God; GT Ndlovu, Child of God; S Tegg, Full Gospel Church.

<sup>1487</sup> G Hall, His People, Parkhurst.

clients, and also by discouraging drug-taking and crime.<sup>1488</sup> The majority of people who responded to this question were of the view that this option complies with the human rights protected in the Constitution – such as the rights to dignity, equality, freedom and of the family as an institution.<sup>1489</sup> E Bonthuys of WITS, however, argues that constitutional challenges will arise if the option of partial criminalisation is chosen in that selective criminalisation discriminates on the basis of gender.

### 3 Non-criminalisation

4.161 The general comment on the option of non-criminalisation was varied, with some arguing that non-criminalisation creates a two tier system where prostitutes are unable or unwilling to comply with the proposed system. Marinda and Cornelius submit that Germany and Australia have two systems with more illegal brothels than legal ones. D Scarborough comments that pimps and brothel owners are not “employers” and cannot protect the general welfare and human rights of their unfortunate “employees”. They are invariably unscrupulous money-makers. DFL adds that the safety of prostitutes cannot be guaranteed in brothels and that many women can not work in brothels because they have babies, or children to look after, are drug addicts or are not what the brothel owners are looking for. They invariably engage in prostitution outside of the system and create a two tier system. Ms Richter, writing for the SANAC Women’s Sector, states that non-criminalisation is a legal model that few countries have chosen; therefore, where applicable, South Africa should learn from New Zealand.

4.162 Faber submits that if government were to non-criminalise prostitution, it would be forging an association with exploiters, pimps, drug traffickers and criminals.<sup>1490</sup> In Faber’s view, people involved in harbouring male or female prostitutes (in brothels) and those who manage the affairs of prostitutes (pimps), or who solicit or attempt to solicit the sexual services of women or men involved in prostitution, should be imprisoned without the option of fines. They have exploited other people.<sup>1491</sup> D Cabral agrees, and submits that the punishment of pimps, brothel-owners, gangs, traffickers and syndicates must be much

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<sup>1488</sup> D Scarborough, Gospel Defence League.

<sup>1489</sup> Marinda & Cornelius; Scarborough D, Gospel Defence League; Mjuza GT; Walter L, Sabie Methodist Church; Wilson I & B, Presbyterian Church.

<sup>1490</sup> Faber M, GGN.

<sup>1491</sup> Pretorius P; E Rens, Methodist Women’s Auxiliary; E Naidoo, Family Policy Institute; C Porter.

firmer. Rev J Makua of the Jerusalem Apostolic Faith Christian Mission states that the laws targeting pimps, procurers and traffickers must be enforced.<sup>1492</sup>

4.163 E Rens of the Methodist Women's Auxiliary argues that stiff sentences should be introduced for pimps if convicted of any act relating to prostitution – at least five years without the option of a fine. In her words, "These parasites are driven by greed as are some of the prostitutes, but not all." According to L Freitag, legalising prostitution would not bring order. Legalisation has failed to protect prostitutes from abuse, and new problems have been introduced.

4.164 A strong call for moral regeneration is made by numerous respondents,<sup>1493</sup> with a call for government to take a strong stand against prostitution.<sup>1494</sup>

**(a) Protecting the rights of prostitutes to refuse (at any time) to provide or continue to provide a commercial sexual service to any other person**

4.165 In response to the question posed above J Hicks<sup>1495</sup> comments that being a prostitute does not compel a person to provide a sexual service, and the right to refuse to provide such should be entrenched. SWEAT agrees and states that this right should be contained in legislation. E Bonthuys of WITS cautions that non-criminalisation alone would not provide such protection. In her view, the protection would also depend on a prostitute's working environment and the power relations between a particular prostitute and her clients or employers. L Jankelowitz<sup>1496</sup> adds that the police, "sex worker" groups and brothel managers could assist in protecting the rights of prostitutes. In the opinion of J Selby of Angels, these matters should be addressed by a supervisory body. E Poto,<sup>1497</sup> however, comments that prostitutes would be prosecuted. D Scarborough of the Gospel Defence League questions how a prostitute can be helped if what she is forced to do is perfectly legal; that is, her "employer's" cruelty is sanctioned by "systems and processes". In Scarborough's view, "non-criminalisation does not protect the prostitute. It is protecting the

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<sup>1492</sup> Endorsed by Rev RM Verreyne, Christian Reformed Church.

<sup>1493</sup> Ramela P; Mampintsha MG, Rev Ubabalo; Marinda & Cornelius, MEC Ministries; N Noruka, Good News Community; E Rens, Methodist Women's Auxiliary; Wilson I & B, Presbyterian Church; L Deighton; SM Hadebe, Child of God; G Hall; His People Parkhurst; S & M Koekemoer, AGS Kerk; R Leeman; Makua J, Rev Jerusalem Apostolic Faith Christian Mission; N Moss, NMMU; A Mould; GT Ndlovu, Child of God; N Noruka, Good News Community Church; M Sackman; S Tegg, Full Gospel Church; BE Freitag.

<sup>1494</sup> M Cornelius, MEC Ministries; Faber M, GGN; MD Makamu; N Noruka, Good News Community Church.

<sup>1495</sup> Commission for Gender Equality.

<sup>1496</sup> RHRU, supported by M Richter, SANAC Women's Sector.

<sup>1497</sup> Commission for Gender Equality.

unscrupulous money maker who uses her. Prostitutes hardly ever get the money they ‘earn’.”

4.166 According to SWEAT,<sup>1498</sup> there should be a reciprocal right for the other party to recover contractual damages if the sexual service is not provided. Two respondents<sup>1499</sup> are of the view that this scenario too should be dealt with by a supervisory body. E Poto<sup>1500</sup> comments that the other party will be entitled to access to justice and legal representation to protect his right, E Bonthuys<sup>1501</sup> points out that to do this – and to enforce a prostitutes’ right to sue clients and pimps or brothels – would necessitate addressing the issue of public policy in contract law, because such contracts may be considered contrary to public policy. D Scarborough,<sup>1502</sup> Marinda and Cornelius state that the whole notion of there being a contract is “absurd”.

***(b) Excluding persons from running a prostitution business if they are convicted offenders of specific offences***

4.167 GT Mjuza submits that the criminal aspect should be “utterly terminated and that no-one is entitled to take advantage of another’s sexual organs”. Ms Hicks of the Commission for Gender Equality comments that “there should be specific convictions that exclude persons from running a prostitution business for allowing or supporting child abuse, trafficking and non-compliance with regulations”. A Myburg<sup>1503</sup> submits that there should be a register with all offenders’ names like child molesting, sexual abuse and rapists. If a person wants to run a prostitution business, they must get a work permit; if their name is on the register, they will not be able to open a business. L Jankelowitz<sup>1504</sup> submits that exclusion of persons should be dealt with by a regulatory body, similar to the procedure for schools and hospitals.<sup>1505</sup> SWEAT states that it supports a “light registration regime” for people running businesses of a certain size, but believes that exclusions based on convictions for specific offences should not be absolute and should be open to review. Some respondents, however, state there is no way anyone would be able to control this<sup>1506</sup> and there would be

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1498 Endorsed by J Hicks, Commission for Gender Equality.

1499 GT Mjuza; J Selby, Angels.

1500 Commission for Gender Equality.

1501 WITS.

1502 Gospel Defence League.

1503 SANCA Witbank.

1504 RHRU.

1505 Endorsed by J Selby, Angels.

1506 Marinda & Cornelius.

an “explosion” of brothels if non-criminalisation was implemented.<sup>1507</sup> One respondent<sup>1508</sup> comments that most people who run prostitution businesses are offenders, even if not (yet) convicted. Furthermore, non-criminalisation would favour the protection of criminal activity, to the detriment of womanhood in particular and the wider public in general.

4.168 SWEAT adds that risks attached to prostitution should be identified. According to SWEAT, some of these risks are as follows: being coerced into prostitution or to remain in it; being exploited by criminals and forced into criminal activities like selling drugs; becoming trapped in the industry and living with the effects of stigmatisation, and at risk for becoming a target for hate crimes; and police corruption, which is exacerbated by the prostitute’s aversion to contacting state agencies for fear of criminal outcomes.

4.169 SWEAT argues that competent adults are free to make poor investments, provided that others do not deceive or withhold information from them. For example, smokers are allowed to smoke in private but cigarette advertising must warn of the dangers of smoking. Dworkin was quoted as saying that the right to make one’s own choices is an indispensable quality of freedom. SWEAT submits that there are many ways in which human beings exploit their bodies for commercial gain – such as boxing, modelling, dancing, and manual labour. Liberty to do this is integral to the concept of freedom. In all of these instances, the underlying activity (eg dancing, boxing or other sport, modelling) is lawful. SWEAT argues that “sex work” falls into the same category as these examples and that there is nothing inherently unlawful about the activity on which the commercial enterprise is based, namely sex between consenting adults. Under a criminalised model, an important feature of the act of sex-for-reward is that it is an offence although the participants are consenting adults. The offence does not punish any specific harm caused by the perpetrator (the sex worker) to another person. At most, the harm it punishes is self-harm.

4.170 A prominent argument<sup>1509</sup> is that it is unnecessary to target prostitution itself to effectively combat its offensive “byproducts” – which are properly the subject of other laws dealing with nuisance, violence, panhandling and the public sale of goods. However, D Cabral submitted that the only way to deter prostitution as well as more serious crimes associated with it (eg drugs, gangsterism, trafficking, sex-slavery, child prostitution, rape, and abuse) is through total criminalisation. Cabral quoted William Wilberforce as follows:

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<sup>1507</sup> I & B Wilson, Presbyterian Church.

<sup>1508</sup> D Scarborough, Gospel Defence League.

<sup>1509</sup> Anonymous submission; D Keulder

The most effectual way to prevent greater crimes is by punishing the smaller, and by endeavouring to repress that general spirit of licentiousness, which is the parent of every species of vice. I know that by regulating the external conduct we do not at first change the hearts of men, but even they are ultimately to be wrought upon by these means, and we should at least so far remove the obtrusiveness of the temptation, that it may not provoke the appetite which might otherwise be dormant and inactive.

4.171 SWEAT recommends some measure of control, namely that non-criminalising legislation should include a clause that makes it an offence to coerce any person either into providing a commercial sexual service or into surrendering their proceeds from any commercial sexual service. SWEAT recommends listing a range of coercive behaviours and providing a definition of “coerce”. It also recommends the prohibition of specified activities if done with the intent of inducing or compelling a person to provide a commercial sexual service or to surrender their earnings from such a service. SWEAT also recommends the inclusion of a consensual sexual contract entered into by two parties so as to remove coercive attempts by a third party such as a pimp.

4.172 SWEAT argues that one aim of this law must be the protection of persons under the age of 18 years from exploitation in relation to prostitution. It therefore recommends a clause to create offences in relation to “child sex work”, which would be enhanced by the police having some power of entry into places of prostitution. SWEAT notes that police power is already provided for in the Criminal Law (Sexual Offences) Amendment Act, which includes a new offence of sexual exploitation of a child under the age of 18 years. To ease compliance with this provision, SWEAT recommends that under a non-criminalisation law, all persons working in a brothel should be obliged to sign a work contract and produce identification (ID) or a passport that shows they are at least 18 years old.

## **E Evaluation of policy options**

4.173 Several respondents submit that the reasons for retaining a criminalised framework are as follows: to stop the transmission of HIV;<sup>1510</sup> to eliminate prostitution and rehabilitate those in it to start a new life;<sup>1511</sup> to limit a social evil which is destructive of the family, by discouraging prostitutes and clients and also by discouraging drug-taking and crime.<sup>1512</sup>

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<sup>1510</sup> SM Hadebe, Child of God; GT Ndlovu, Child of God; S Tegg, Full Gospel Church.

<sup>1511</sup> G Hall, His People, Parkhurst.

<sup>1512</sup> D Scarborough, Gospel Defence League.

Several people were of the view that the criminalisation option complies with the human rights protected in the Constitution – such as the rights to dignity, equality, freedom and of the family as an institution.<sup>1513</sup> However, various respondents argued that non-criminalising prostitution and legitimising brothels and third parties would achieve the following aims: protect the human rights of people who practise prostitution; promote the health and safety of people engaged in prostitution; recognise the services of prostitutes as legitimate labour; recognise the right to freedom of economic activity within the sex industry; empower prostitutes to choose either to remain in or to exit the sex industry; and balance the rights and needs of prostitutes and the sex industry with the rights and interests of the broader community. These and related points of view are considered below.

**(a) Protecting the human rights of persons that practise prostitution**

4.174 Proponents of non-criminalisation have stated that this model protects the human rights of persons who practice prostitution, and therefore improves the lives of women and children. Some proponents believe that non-criminalisation would curb the growth of the brothel and street trade; however, this assertion was not endorsed by respondents who were otherwise in favour of non-criminalisation in South Africa. SWEAT stated that the rationale of the law or government taking a position on demand reduction is unclear, given that the activities of prostitution are consensual and the state is unable to monitor them. Yet other supporters of non-criminalisation stated that this model would eliminate organised crime and end child prostitution and sex trafficking.<sup>1514</sup> However, some writers have stated that non-criminalisation is a recipe for disaster,<sup>1515</sup> and have reported that in countries such as the Netherlands, Australia and Germany – where a policy of non-criminalisation has been adopted – the opposite results have occurred.<sup>1516</sup>

**(b) Growth of the industry**

4.175 According to reports contained in the *Canada v Bedford* court record,<sup>1517</sup> the experience of non-criminalised regimes (eg New Zealand, Germany and Australia) has shown that both legal and illegal sectors of the prostitution industry have expanded after

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<sup>1513</sup> Marinda & Cornelius; Scarborough D, Gospel Defence League; Mjuza GT; Walter L, Sabie Methodist Church; Wilson I & B, Presbyterian Church.

<sup>1514</sup> Endorsed by submissions in favour of non-criminalisation.

<sup>1515</sup> *Cape Argus* “Legalising sex work is a recipe for disaster” 29 January 2009 available at SA Media – The University of the Free State. Ref No. 530.

<sup>1516</sup> Ibid.

<sup>1517</sup> *Canada v Bedford Ontario Court of Appeal* March 26 2012.

non-criminalisation. According to Laura Johnston, this makes sense because men are given the message that their prostitution behaviour is acceptable.<sup>1518</sup> In Victoria, the “surplus” of prostitutes caused by the system of legalisation has meant that they are either forced to retire or to risk working in illegal prostitution in uncontrolled agencies or on the streets.<sup>1519</sup> These nations have all experienced a dramatic increase in legal and illegal prostitution.<sup>1520</sup>

4.176 Other jurisdictions following similar policy choices seem to be faced with similar challenges. In Victoria, Australia it is estimated that there are three times more illegal than legal brothels.<sup>1521</sup> Many legal brothel owners are reportedly involved in establishing and profiting from illegal brothels as well.<sup>1522</sup> Victoria was the first state to legalise prostitution and it has the highest rates of child prostitution.<sup>1523</sup> Illegal street prostitution is reported to have continued as a “harmful” and “unacceptable” practice,<sup>1524</sup> and the illegal sector has grown more than the legal sector. Ties to organised crime have not been broken; murders, assaults, and exploitation have continued.<sup>1525</sup>

4.177 Similarly, the United States Department of State, Bureau of Public Affairs<sup>1526</sup> notes that the legalisation of prostitution not only expands the market for commercial sex but also opens up markets for criminal enterprises, and creates a safe haven for criminals who traffic people into prostitution. The Bureau has reported that organised crime networks do not register with the government, do not pay taxes, and do not protect prostitutes. Legalisation simply makes it easier for them to blend in with a purportedly regulated sex sector and makes it more difficult for prosecutors to identify and punish people who traffick others.<sup>1527</sup> By contrast, Sweden, which adopts a tough stance against buyers, facilitators and traffickers, has been more successful in the battle against trafficking and exploitation.<sup>1528</sup>

4.178 There are conflicting reports on the growth of prostitution in New Zealand. One journal article reported that non-criminalisation has had little effect on the number of people

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<sup>1518</sup> Johnston Laura *Feminisms* “The Myths of Bedford v Canada: Why decriminalizing prostitution won’t help” August 7, 2011 available at <http://www.feminisms.org>.

<sup>1519</sup> Australian Institute of Criminology, “Trends & Issues in Crime and Criminal Justice” 22 *Prostitution Laws in Australia* (May 1990) available at <http://www.aic.gov.au> at 6.

<sup>1520</sup> *Cape Argus* “Legalising sex work is a recipe for disaster” 29 January 2009.

<sup>1521</sup> *Ibid.*

<sup>1522</sup> *Ibid.*

<sup>1523</sup> *Ibid.*

<sup>1524</sup> *Ibid.*

<sup>1525</sup> *Ibid.*

<sup>1526</sup> US Department of State, Bureau of Public Affairs Global Affairs 11/24/4 The Link between Prostitution and sex Trafficking available at [www.state.gov/g/tip](http://www.state.gov/g/tip).

<sup>1527</sup> *Ibid.*

<sup>1528</sup> *Cape Argus* “Legalising sex work is a recipe for disaster” 29 January 2009.

working in the sex industry, and that the number of prostitutes on the street has remained stable.<sup>1529</sup> The authors cautioned that although in New Zealand non-criminalisation has not created the unwanted and unintended consequence of increasing either the overall number of prostitutes or the size of the street sector, this does not mean non-criminalisation would be experienced in the same way in other countries.<sup>1530</sup> In New Zealand, incentives to enter the industry remained unchanged.<sup>1531</sup> Thus, an upsurge in the number of persons entering prostitution cannot necessarily be ascribed to the legal status of prostitution, but may also be the result of structural or economic factors (eg health, family, housing, welfare and labour policies) as well as personal factors.<sup>1532</sup>

4.179 The overwhelming failure of non-criminalisation or legalisation of prostitution as a social policy is increasingly being acknowledged, and these models are being abandoned in favour of targeting buyer demand coupled with exit programmes.<sup>1533</sup> According to an article published in 2009 in the *Cape Argus*, the experience of other countries leads to the conclusion that –

The only sane and responsible policy for South Africa is to diligently enforce the laws currently on our statute books with particular focus on buyers, pimps, procurers and traffickers[;] and for government, in partnership with churches and responsible NGOs to develop sustainable exit programmes to end the sexual servitude of our women and children.<sup>1534</sup>

### (c) *Trafficking*

4.180 One argument for legalising prostitution in the Netherlands was that legalisation would help to end the exploitation of desperate immigrant women who had been trafficked there for prostitution.<sup>1535</sup> However, according to Raymond,<sup>1536</sup> the Netherlands and other

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<sup>1529</sup> Abel et al “Impact of Decriminalisation”.

<sup>1530</sup> Abel GM et al The Impact of Decriminalisation on the Number of Sex Workers in New Zealand.

<sup>1531</sup> Abel GM et al The Impact of Decriminalisation on the Number of Sex Workers in New Zealand.

<sup>1532</sup> Ibid.

<sup>1533</sup> Cape Argus “Legalising sex work is a recipe for disaster” 29 January 2009.

<sup>1534</sup> Ibid.

<sup>1535</sup> Servamus “Legalisation of Prostitution is a gift to traffickers” 1 December 2007 available at SA Media – The University of the Free State. Ref. No. 19070.

<sup>1536</sup> Claims that legalisation of prostitution would control and reduce child prostitution have not proved true, with police suspecting that child prostitute abusers choose the Netherlands because of its prostitution-promoting environment. Raymond “Prostitution on Demand” 1165; see also *Cape Argus* “Legalising sex work is a recipe for disaster” 29 January 2009. Legalised prostitution increases the number of women and children trafficked into commercial sex slavery - US Department of State “The Link between Prostitution and Sex Trafficking Global Affairs”.

nations with similar policies have in fact experienced a dramatic increase in child prostitution and trafficking in persons for sexual purposes. One study found that 80% of women in brothels in the Netherlands had been trafficked from other countries. In 1994, the International Organisation of Migration stated that in the Netherlands alone, “nearly 70% of trafficked women were from the CEEC (Central and Eastern European Countries).”<sup>1537</sup> Prior to the clampdown on the industry, the Dutch Ministry of Justice is reported to have argued in favour of a legal quota of foreign “sex workers”, because the Dutch prostitution market demanded a variety of “bodies”.<sup>1538</sup> Prostitution was also recognised as an economic activity. This policy was aimed at enabling women from the European Union and former Soviet bloc countries to obtain working permits as “sex workers” in the Dutch sex industry if they could prove that they were self-employed. However, Servamus reported that traffickers were using these work permits to bring foreign women into the Dutch prostitution industry, masking the fact that women had been trafficked by coaching them to describe themselves as independent “migrant sex workers”.<sup>1539</sup>

4.181 During the first year after the ban on brothels was lifted in the Netherlands, eight Dutch victim support organisations reported an increase in the number of victims of trafficking. Twelve victim support organisations reported that the number of victims from other countries had not diminished.<sup>1540</sup>

4.182 Particularly in the Netherlands, active steps are now being taken to reverse these negative consequences. In 2009, Kelly et al reported that one third of all brothel windows in Amsterdam had been bought out and replaced by upmarket fashion boutiques.<sup>1541</sup> Plans have also been announced to buy out the majority of the remaining windows, and a raft of new restrictions on other aspects of the sex trade has been proposed.<sup>1542</sup>

4.183 Tolerance zones set up for street prostitution have proved a failure. The central Amsterdam Tipplezone (pick-up area) was closed in 2003, followed by the closure of the Tipplezone in Rotterdam.<sup>1543</sup> The Tipplezones had become havens for traffickers and drug dealers and were unsafe for women.<sup>1544</sup> According to Kelly et al, recent debates in the Netherlands have highlighted the need for serious reassessment of whether the reforms

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<sup>1537</sup> Servamus.

<sup>1538</sup> Ibid.

<sup>1539</sup> Ibid.

<sup>1540</sup> Ibid.

<sup>1541</sup> Kelly et al 25.

<sup>1542</sup> *Cape Argus* “Legalising sex work is a recipe for disaster” 29 January 2009.

<sup>1543</sup> Ibid.

<sup>1544</sup> Ibid.

have delivered on policy goals.<sup>1545</sup> The main critiques have been as follows: trafficking remains; more attention is needed on prostitution that takes place outside fixed locations, including escort agencies; investigations by the police into non-licensed and illegal business must be enhanced; the position of people who sell sex has not improved; and a new discussion is needed on ways to discourage demand.<sup>1546</sup>

4.184 According to Servamus, the sheer number of foreign women in the German prostitution industry suggests that these women were trafficked into Germany, a process euphemistically described as “facilitated migration”.<sup>1547</sup> Servamus states that it is almost impossible for poor women to facilitate their own migration, underwrite the costs of travel and travel documents, and set themselves up in “business” without assistance.<sup>1548</sup>

4.185 Weitzer<sup>1549</sup> reported findings in Australia that were quite different from the scenario in Germany. Weitzer quoted GAATW as follows:

Trafficking numbers are low primarily due to the geographical isolation of the country, combined with a strict immigration and border control. There are legal channels for migration into the sex industry, which reduces the need for migrants to depend on organized crime syndicates or traffickers.

4.186 An analysis of victims of trafficking in the Balkans seems to support the notion that most trafficking occurs into the sex industry. According to Gould,<sup>1550</sup> this phenomenon might be partly the result of “easier” identification of victims in the sex industry compared with those in other sectors, because the sex industry is monitored by law enforcement officials.

4.187 Gould referred to a 2003 IOM report<sup>1551</sup> that noted that the working conditions of women trafficked into the sex industry were extremely exploitative, and included debt-bondage, long working hours, a limited right to refuse clients, and no freedom of movement.<sup>1552</sup> Gould noted, however, that it was impossible to know whether women who were not trafficked might have been vulnerable to similar levels of exploitation. Similarly, it was impossible to determine what the particular factors were that rendered certain women

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1545 Kelly et al 25.

1546 Ibid.

1547 Servamus.

1548 Ibid.

1549 Weitzer R Legalizing Prostitution: Morality Politics in Western Australia *Brit.J.Criminol* (2009) at 95.

1550 Gould “Cheap Lives countering human trafficking: considerations and constraints” *SA Crime Quarterly* No (16 June 2006) at 24.

1551 Martens, Pieczkowski et al 2003 cited in Gould “Cheap Lives”.

1552 Gould “Cheap Lives” 25.

more vulnerable to being trafficked than others, if they all shared the same economic and social situation; and whether the conditions under which trafficked women worked in the sex industry differed significantly from the conditions experienced by voluntary prostitutes.<sup>1553</sup>

4.188 According to an article published in 2010 in *The Witness*, in South Africa an NPA spokesperson stated that the range of nationalities among rescued people suggested that southern Africa is a significant hub for global human trafficking operations.<sup>1554</sup> The spokesperson added that South Africa had become a source, transit and destination country for the following groups of people:

- Women and girls trafficked internally and occasionally onwards to Asian countries for sexual exploitation;
- Chinese, Thai and Eastern European women trafficked into South Africa for debt-bonded sexual exploitation;
- [People from] Mozambique, Lesotho, Malawi, as well as refugee-producing countries, such as Angola, Rwanda, the Democratic Republic of the Congo, are source countries for women and children trafficked into SA.
- Men and boys from Malawi, Mozambique and Zimbabwe trafficked into South Africa for forced labour, particularly agricultural labour.<sup>1555</sup>

4.189 According to the article, the routes traffickers use when moving in and out of South Africa change regularly, depending on factors such as detection by the authorities, the permeability of borders, and destinations which are easiest to obtain a visa for.<sup>1556</sup> Asked where victims are taken, the NPA spokesperson said: “Victims are kept in brothels, private houses, and mining compounds, and often rotated between different venues.” She added that “Many women are forced into debt bondage for three to six months to repay R50 000 to R60 000 to the agents who brought them here.” Furthermore, in many cases women and children are lured to SA with the promise of jobs, education or marriage, only to be sold and sexually exploited in the country’s major urban centres or in small towns and rural environments.<sup>1557</sup>

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1553

Ibid.

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*Witness* “Julia Denny-Dimitrou puts the spotlight on human trafficking” 10 March 2010 available at SA Media – The University of the Free State ref No 3887.

1555

Ibid.

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Ibid.

1557

Ibid.

4.190 During the run-up to the 2010 World Cup, the Cape Town children’s NGO Molo Songololo alleged that brothels, gangs, pimps, individuals, family members and even children were recruiting teenagers (mainly girls) to meet the perceived demand for sexual services during the World Cup.<sup>1558</sup> The organisation said that it had received reports of children being prostituted in Cape Town and surrounding areas on the streets and in open spaces, bars, taverns and shebeens as well as private homes.<sup>1559</sup>

4.191 However, a survey conducted by the Universiteit Gent in Belgium found there had been no spike in business during the World Cup, nor a shift in the ages of prostitutes.<sup>1560</sup> The survey included 1 200 prostitutes who had advertised on a website and in newspapers in Johannesburg, Cape Town and Durban. Prostitutes did report that their most recent client had been a foreigner, indicating that foreign clients might have largely replaced local clients.<sup>1561</sup> A nurse working for the NGO Red Light in Durban said that prostitutes were being abused by the patrons and the pimps: “It’s about power and control”.<sup>1562</sup> A report by an International Organisation for Migration informant suggested that vulnerable, poor and unemployed people were being trafficked into rich suburbs near sport stadiums for prostitution. They originated from rural areas such as the Eastern Cape, Mpumalanga and Limpopo.<sup>1563</sup>

4.192 In 2010, in an open letter to President Jacob Zuma, the former Deputy Minister of Health Nozizwe Madlala-Routledge implored him not to let sex slavery turn South Africa into a “pimp state”.<sup>1564</sup> She wrote that large numbers of women-abusers, pimps, brothel and strip club owners go unpunished because they are powerful men with money. They buy women’s bodies and bribe the police. In her view, “[t]he world should hang its head in shame that it has allowed women’s bodies to be commercialised and objectified.”<sup>1565</sup> Madlala-Routledge questioned how much choice or agency a woman or girl can exert if she has no food to put on the table, or has been socialised to think that her body exists for a man’s pleasure. She stated that victims are lured into situations of sex trafficking and are then subjected to debt-bondage and “conditioning” (eg starvation, confinement, beatings, physical abuse, rape, and forced drug use). The numerous health risks, including drug and alcohol addiction, physical

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Ibid.

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Ibid.

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*The Independent on Saturday* “Call to legalise sex work in Aids fight” 11 June 2011.

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Ibid.

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Ibid.

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*Beeld* “Seks nou hiér te koop” 1 Nov 2008 available at SA Media – The University of the Free State Ref No. 6167.

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*Sunday Times* “Don’t let sex slavery turn South Africa into a pimp state” 6 June 2010 available at SA Media – The University of the Free State Ref. No.835.

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Ibid.

injuries, sexually transmitted diseases (including HIV), sterility and forced abortions are all highlighted by Madlala-Routledge. Not surprisingly, these women are at risk for post-traumatic stress disorder, acute anxiety, depression, insomnia and self-loathing. Madlala-Routledge commented that prostitution is incompatible with the dignity of women, and must be ended if trafficking is to end. Supply is determined by demand, hence her closing call to address the demand and not allow South Africa to be turned into a “pimp state”.<sup>1566</sup>

4.193 In the US Department of State *Trafficking in Persons Report 2013*, the United States ranked South Africa as Tier 2 on its list for trafficking.<sup>1567</sup> One of the factors in evaluating a country’s trafficking status is whether it has taken steps to reduce the demand for commercial sex. Countries placed on Tier 3 of a *Trafficking in Persons* report – just one step lower than South Africa’s current ranking – risk sanctions such as the withholding of United States foreign assistance.<sup>1568</sup> Prior to the 2013 report, South Africa was on the Tier 2 “watch list”. Now, as a Tier 2 country, South Africa is considered a country whose government does not fully comply with the minimum standards of the Trafficking Victims Protection Act (TVPA), but is making significant efforts to bring itself into compliance with those standards.<sup>1569</sup>

4.194 The *US Trafficking in Persons Report 2013*<sup>1570</sup> states that “Nigerian syndicates dominate the commercial sex trade in Hillbrow and other areas of South Africa. Local criminal rings and street gangs also organise child prostitution”.<sup>1571</sup> The report further states that “Russian and Bulgarian crime syndicates operate in the Cape Town sex trade, and Chinese nationals coordinate the sex trafficking of Asian nationals”.<sup>1572</sup> Traffickers are said to “control victims through intimidation and threats, including witchcraft, use of force, withholding of passports, debt bondage, and forced use of drugs and alcohol”.<sup>1573</sup> The Report states that “women and girls from China, Taiwan, Thailand, Cambodia, India, Russia, Ukraine, Moldova, Bulgaria, Brazil, the Democratic Republic of the Congo, Rwanda, Mozambique, Lesotho, Swaziland, and Zimbabwe are recruited for legitimate work in South Africa, but are sometimes subsequently subjected to forced prostitution or taken onward to Europe for forced prostitution”.<sup>1574</sup> Further that “taxi drivers or thugs at the border transport

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<sup>1566</sup> Ibid.

<sup>1567</sup> *Trafficking in Persons Report 2013*.

<sup>1568</sup> Ibid.

<sup>1569</sup> Ibid.

<sup>1570</sup> Ibid.

<sup>1571</sup> Op cit 45.

<sup>1572</sup> Ibid.

<sup>1573</sup> Ibid.

<sup>1574</sup> Ibid.

Zimbabwean migrants, including children, into South Africa, where they may be subjected to sex or labour trafficking upon arrival".<sup>1575</sup>

4.195 The Report makes a number of recommendations for South Africa. These include screening all deportees for victimisation; screening for victims amongst vulnerable groups, including women in prostitution; and replicating the coordinated anti-trafficking law enforcement and victim referral mechanisms of Kwa-Zulu Natal and the Western Cape in all provinces.<sup>1576</sup>

4.196 In 2005, Weitzer<sup>1577</sup> reported that although studies had estimated that hundreds of thousands of women were being trafficked into prostitution every year, these figures were vague and unreliable. However, Weitzer hastened to add that the unreliable figures did not imply that trafficking is a myth. In his view it does occur, alongside voluntary migration of people in search of work; consequently, it would be wrong to conclude that all these migrants have been trafficked against their will.<sup>1578</sup>

4.197 It is argued that legalising prostitution is a gift to traffickers and that a legalised or non-criminalised prostitution industry is one of the root causes of sex trafficking.<sup>1579</sup>

#### **(d) Increasing autonomy**

4.198 All the women engaged in prostitution who conversed with the Commission at workshops or meetings and through submissions said they were adults. However, internationally the average age of entry into prostitution is reportedly 14 or 15.<sup>1580</sup> Anecdotal evidence suggests that in South Africa the average age of entry into prostitution is even younger, with reports of 11- and 12-year-olds entering the industry.<sup>1581</sup> Male prostitutes who participated in a study in Pretoria in 2002 revealed that they had entered prostitution between the ages of 10 and 16, with the majority having been 12 years at entry.<sup>1582</sup>

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<sup>1575</sup>

Ibid.

<sup>1576</sup>

Ibid.

<sup>1577</sup>

Weitzer R "New directions in research on prostitution Crime" *Law & Social Change* (2005) at 228.

<sup>1578</sup>

Op cit 229.

<sup>1579</sup>

Servamus.

<sup>1580</sup>

Johnston.

<sup>1581</sup>

*Daily News* "Child Prostitution is rife in Durban" 9 September 2012 available at <http://www.iol.co.za>.

<sup>1582</sup>

Herbst MC "Male Sex Workers in Pretoria: An Occupational Health Perspective" UNISA (June 2002) 167.

According to an NPA spokesperson in 2010, the average age of entry into prostitution is 12 to 14 and traffickers are known to recruit at schools and after-school programmes.<sup>1583</sup>

4.199 Women of colour are overrepresented in the prostitution industry both in South Africa and elsewhere.<sup>1584</sup> Many of them face multiple challenges as a result of low levels of education and high levels of poverty, inequality and unemployment. If these challenges are not addressed by non-criminalisation, how can the majority of women in prostitution – who say they want to exit from prostitution – be helped? If their challenges are not addressed simultaneously with the introduction of non-criminalisation, non-criminalisation can hardly be said to be synonymous with the freedom to make meaningful life choices.

4.200 Throughout this report, evidence has been discussed which suggests that the majority of prostitutes are vulnerable and poor; numerous studies have shown that nearly all prostitutes say that if it were not for the economic pressures they face, they would not engage in prostitution. If this research finding is accepted as fact, the question arises whether non-criminalisation and legitimising the role of third parties would provide prostitutes with the remedy they truly seek. Are the interests of the sex industry and third parties perhaps overshadowing the rights and interests of women in the industry? Are the benefits that are said to accrue to the sex industry and women engaging in prostitution under non-criminalisation being simplistically conflated?

4.201 The effect of non-criminalisation would be to ensure that brothels could be run, men could earn money from the prostitution of women, and men could demand sexual access to women – all without fear of criminal sanction. The pool of women who would meet this demand are mostly women of colour who are faced with poverty, inequality and unemployment in other sectors.<sup>1585</sup> Raymond et al reported that once a woman enters prostitution, she realises that she has no control over the choice of client, the pace or price of work, or the nature of the sexual activity. She is the shared property of any male who can pay a price for sex and for her body.<sup>1586</sup> Non-criminalisation would not change the basic dynamics at play in this exchange.

4.202 Respondents in favour of non-criminalisation insist that one aim of the law must be to protect persons under the age of 18 years from exploitation in relation to prostitution.

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<sup>1583</sup> *Witness* “What is Human Trafficking”.

<sup>1584</sup> Johnston.

<sup>1585</sup> *Ibid.*

<sup>1586</sup> Raymond, J., D’Cunha, J. et al (2002) “A comparative study of women trafficked” at 141 quoted by Raymond JG in “Prostitution on Demand” at 1171.

Specifically, some respondents recommended a clause that would create an offence in relation to “child sex work” and would be enhanced by the police having some power of entry into places of prostitution. The need for this type of intervention raises the following question: If prostitution is considered exploitative for children, how – given the vulnerability of women in prostitution – would it be less exploitative once a child turns 18, or for persons older than 18? In the *Bedford v Canada* case it was argued that non-criminalising johns and pimps would have no impact on the majority of women. However, Laura Johnston argued that non-criminalising third parties and brothels would remove the ability to police men’s actions in prostitution (unrelated to a woman’s age) and would therefore increase the harm experienced by the vast majority of women – who “want out”.<sup>1587</sup> She added that evidence from other countries shows that in addition to a proliferation of both legal and illegal prostitution industries, removing the deterrence of a criminal law for men leads to increased demand for prostitution. In the Netherlands, the legal framework has not led to increased autonomy for prostitutes. Women and girls who sell their bodies are routinely threatened, beaten, raped, and terrorized by pimps and customers.<sup>1588</sup> In 2009, more than 100 women who had been forced to work in Amsterdam’s red-light district were reported either to have come from dysfunctional family circumstances or had travelled from countries in Eastern Europe or Southeast Asia and had fallen victim to human trafficking. They had either been lured by decent job offers or simply sold by their parents.<sup>1589</sup>

**(e) *Providing sexual services from a brothel or indoor facility is relatively safe***

4.203 One of the benefits proffered in favour of non-criminalisation is that non-criminalisation would allow women to move indoors, off the streets.<sup>1590</sup> Indoor prostitution generally implies the intervention of a third party. According to Rutherford-Smith, third-party prostitution may offer certain benefits, such as facilitating transactions with customers, higher earnings, advertising services, security, a place of work, a sense of anonymity, flexible working hours, availability of prophylactics, assistance with family planning, and transport.<sup>1591</sup> This view translates into the contention that non-criminalised prostitution performed in an indoor facility is safer than criminalised prostitution,<sup>1592</sup> and that women are

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<sup>1587</sup> Johnston.

<sup>1588</sup> Project Syndicate Mees H “Does Legalizing Prostitution work?” 23 January 2009 available at <http://www.project-syndicate.org>.

<sup>1589</sup> Ibid.

<sup>1590</sup> Johnston.

<sup>1591</sup> Rutherford Smith S “Locatio conduction Leno: Employment in the Third-Party Prostitution Industry in South Africa” *SA Merc LJ* (2001) 246.

<sup>1592</sup> Brents &, Hausbeck K “Violence and Legalized Brothel Prostitution in Nevada Examining

less likely to be victims of violence and exploitation in brothels.<sup>1593</sup> Fear of violence is said to be part of the culture of prostitution. However, according to Brents and Hausbeck, “the most frequent comment [made by prostitutes] is that brothels are the safest of sex work alternatives in a very risky business”.<sup>1594</sup> The corollary of this argument is that outdoor or street prostitutes are more vulnerable to brutality that takes place in dangerous areas, and they are unable to report such brutality.<sup>1595</sup> In Canada, it has been argued that if prostitution was legalised by repealing the bawdy house provisions, the most marginalised and vulnerable prostitutes – people who work on the streets (and who also tend to be poor and of certain racial groups) – would not necessarily gain from such reforms.<sup>1596</sup> Proponents of non-criminalisation, however, argue that state regulation such as occurs with a legalised brothel industry merely replaces illegal pimps with legal ones.<sup>1597</sup>

4.204 In an analysis of the *Bedford* case, Brush<sup>1598</sup> concludes that the non-criminalisation of brothels would mostly benefit people who need legal protection the least. Brush contends that prostitutes who work indoors already enjoy relatively safe working conditions and are far less likely to be criminalised than their street-based counterparts. In Brush’s view, such reforms would benefit relatively elite women rather than those who are poor, “racialised”, and disproportionately criminalised.<sup>1599</sup>

4.205 However, one should not assume that brothels and indoor prostitution are immune to violence<sup>1600</sup> or that non-criminalising prostitution would move street prostitution indoors. In *Bedford v Canada*, evidence proving the contrary was led. Justice Himmel noted as follows:

[W]hile it was hoped that the PRA (Prostitution Reform Act, 2003 of New Zealand) would lead street-based prostitutes (11 per cent of the New Zealand sex trade) to move indoors, evidence suggests there is little movement between the street and indoor sectors of the industry.

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1593 Safety, Risk and Prostitution Policy”.

1594 Op cit 270.

1595 Op cit 287.

1596 According to Weitzer workers differ in their risk to victimisation: Assault, robbery and rape are occupational hazards for streetwalkers and for those coercively trafficked into prostitution, but are relatively uncommon among off-street workers who have not been recruited by force or fraud. Weitzer “New directions in research on prostitution” 2005 at 216. See also <http://www.bio-medicine.org/medicine-news/Canadian-street-prostitutes-requests-protection-6282-1/> accessed 18 June 2009.

1597 Brush SC “Finding Middle Ground: Sex Radicalism, Radical Feminism and Prostitution Law Reform in Canada” Essay for the degree of Master of Arts Queens University Kingston Ontario Canada April 2012 at 36.

1598 Brents & Hausbeck 270.

1599 Brush 43.

1600 Ibid 43.

1600 [http://www.rapecrisisscotland.org.uk/documents/Farley/Resp to Weitzer.pdf](http://www.rapecrisisscotland.org.uk/documents/Farley/Resp%20to%20Weitzer.pdf). Accessed 18 June 2009.

4.206 The *Bedford* record notes that the Netherlands has not met its goal of eliminating street prostitution. According to *The Spectator's* author Julie Bindel, twelve years after the brothel trade was legalised in that country, instead of women being afforded better protection the market has simply increased.<sup>1601</sup> Indoor prostitution venues and activities include escort services, exotic dancing, private dancing, peep shows, own residence, brothels, and massage parlours,<sup>1602</sup> often organised by a third party. Researchers Raphael and Shapiro identified 26 different types of prostitution activities or venues.<sup>1603</sup> Bindel reports that “rather than confine the brothels to a discrete part of the city, the sex industry has spilt out all over Amsterdam – including on-street. Rather than be given rights in the “workplace,” the prostitutes have found the pimps are as brutal as ever. The government-funded union set up to protect them has been shunned by the vast majority of prostitutes, who remain too scared to complain.”<sup>1604</sup>

4.207 Bindel further reports that the brothel boom is over.<sup>1605</sup> A third of Amsterdam's bordellos have been closed due to the involvement of organised criminals and drug dealers and the increase in trafficking of women.<sup>1606</sup> Bindel comments that police now acknowledge that the red-light district has mutated into a global hub for human trafficking and money-laundering. The streets have been infiltrated by grooming gangs seeking out young, vulnerable girls and marketing them to men as virgins who will do whatever they are told.<sup>1607</sup> According to Bindel Amsterdam's regular tourist trade, the museums and canals, fear that their visitors are vanishing along with the city's reputation.<sup>1608</sup> Bindel further reports that in the Netherlands the realisation is starting to dawn that legalisation has not been emancipation. It has instead resulted in the appalling, inhuman, degrading treatment of women, because it declares the buying and selling of human flesh acceptable.<sup>1609</sup>

4.208 The position in South Africa seems just as dire. An anonymous respondent submitted that in indoor prostitution, prostitutes can be more easily controlled than on the streets. They can be locked in their rooms and heavily drugged or restrained<sup>1610</sup> and beaten, and no-one

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<sup>1601</sup> Bindel Julie “The Spectator Why Even Amsterdam doesn't want legal brothels” available at <http://www.spectator.co.uk> Accessed on 24 May 2013.

<sup>1602</sup> Raphael Jody & Shapiro Deborah L, “Violence in Indoor and Outdoor Prostitution Venues” *Violence Against Women* 2004 at 131 Downloaded from [vaw.sagepub.com](http://vaw.sagepub.com) on 20 July 2010.

<sup>1603</sup> Ibid.

<sup>1604</sup> Bindel “Why Even Amsterdam doesn't want legal brothels”.

<sup>1605</sup> Ibid.

<sup>1606</sup> Ibid.

<sup>1607</sup> Ibid.

<sup>1608</sup> Ibid.

<sup>1609</sup> Ibid.

<sup>1610</sup> “As long as they are making the money, anything goes. In a particular club they have dungeon rooms – there's no way for her to get help if she wanted.” Raymond “Prostitution

would be any wiser. An anonymous respondent submitted that pimps who run brothel prostitution are no less dangerous than pimps on the street.<sup>1611</sup>

4.209 Johnston argues that in a capitalist system, increased competition between prostitution “businesses” leads to lower prices, increased demand for riskier and more violent sex acts, and increased pressure on women to tolerate the “customer’s” behaviour.<sup>1612</sup> Brothels in Victoria have become high-risk areas for prostitutes, who are often exposed to physical violence, HIV and other sexually transmitted diseases.<sup>1613</sup> Safe sex is unpopular among the clientele of most brothels, with the result that a prostitute’s good intentions regarding safe sex often lapse if she has waited all night for a client and someone wants sex without a condom.<sup>1614</sup> Following its study on prostitution laws, the Australian Institute of Criminology reported that one disadvantage of removing the sanction of law was that more people might take part in potentially harmful activities, particularly if they were profitable.<sup>1615</sup>

4.210 A study by Raphael and Shapiro<sup>1616</sup> showed that women in various prostitution venues were often victims of violence, a finding that contradicts the notion of indoor sex trade activities as harmless, consensual entertainment.<sup>1617</sup> Raphael and Shapiro reported substantial violence against women indoors, including frequent attempts at rape.<sup>1618</sup> Fifty percent of women in escort services reported having had forced sex; more than half (51.2%) of women who worked as exotic dancers had been threatened with a weapon; and a third of women who exchanged sex for money at their own residence had experienced at least one form of sexual violence, such as threatened rape, fingers or objects inserted vaginally, or forced sex.<sup>1619</sup> Some indoor prostitutes were frequent victims of violence, and in some instances the type of violence was more serious and the levels higher than those experienced by women outdoors.<sup>1620</sup>

4.211 Raphael and Shapiro concluded that their findings of significant violence at all prostitution venues raise serious questions about “customers” and their assumptions, and

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1611 on Demand”1173.  
1612 Anonymous submission.  
1613 Johnston.  
1614 Australian Institute of Criminology *Prostitution Laws in Australia* at 6.  
1615 Ibid.  
1616 Op cit 8.  
1617 Raphael & Shapiro.  
1618 Op cit 126.  
1619 Op cit 27–128.  
1620 Op cit 133.  
Op cit 136.

their motivations in seeking out women in prostitution and physically abusing and threatening them.<sup>1621</sup> According to Raphael and Shapiro, men who perpetrate such violence must be viewed as batterers rather than customers, and appropriate remedies must be designed.

4.212 Raphael and Shapiro stated that their findings supported the “routine activities” theory. This theory asserts that the frequency and location of crime are affected by three important factors: the presence of likely offenders, who are presumed to be motivated to commit the crimes; the absence of effective guardians; and the availability of suitable targets.<sup>1622</sup> With regard to likely offenders, Raphael and Shapiro stated that some men in patriarchal societies are socialised by their male peers and other cultural agents to view women and girls in prostitution as suitable targets for their sexual aggression. The sexual acts that are paid for in prostitution usually occur in private, irrespective of whether the prostitute plies her trade on the street or in a brothel; this serves to isolate the participating individuals from direct interference. Raphael and Shapiro reported that the ability of a woman to summon help while in a hotel room with a dangerous abuser may be extremely limited, and the same applies in a car.<sup>1623</sup> In the “routine activities” theory, all the abuser requires is the perception that capable guardians are absent.<sup>1624</sup> It appears that in all kinds of prostitution venues, the “customer” harbours assumptions and expectations about what the woman will tolerate, and her behaviour may be coerced through violence and threats of violence.<sup>1625</sup>

4.213 Brents and Hausbeck, in their 2005 report of a study on brothels in Nevada, stated that prostitution was not inherently violent but that “fear of violence – which in and of itself constitutes a sense of danger and risk – was a critical component of legalised prostitution.”<sup>1626</sup> They also found that “Brothel managers and owners see themselves as protecting women from violence on the streets by providing a legal alternative to illegal prostitution. They also see themselves protecting both customers and prostitutes from disease through state-mandated health testing...”<sup>1627</sup>

4.214 Brents and Hausbeck stated that one way to “... conceptualise prostitution-related violence is through policies that see prostitution as evidence of generalised social disorder

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1621 Op cit 137.  
1622 Ibid.  
1623 Op cit 138.  
1624 Ibid.  
1625 Ibid.  
1626 Op cit 271.  
1627 Ibid.

and that seek not to eliminate but to control and hide prostitutes from public life.”<sup>1628</sup> According to Brents and Hausbeck, “Most laws legalising and regulating prostitution are framed by this rhetoric. Prostitution is too visible and flaunts socially corrosive behaviour publicly.”<sup>1629</sup>

4.215 According to Brents and Hausbeck, Nevada’s laws “punish third parties to prostitution, they regulate and zone prostitution away from so-called respectable areas of communities, and they address concerns over the spread of disease.”<sup>1630</sup> In effect, the law “prohibit[s] the licensing of prostitution from [sic] counties with populations of over 400,000 ... This law leaves open the possibility for legal prostitution in Nevada counties with populations below this limit.” In addition, the law –

[R]egulates pandering, pimping, zoning, advertising, and sexually transmitted diseases. With the exception of prohibitions on brothel advertising, the rationale for these regulations is almost exclusively based upon the rhetoric of risk and violence associated with prostitution. The statutes prohibit pandering, anyone who forces, decoys, or entices a woman to become a prostitute and to work in a brothel ... These laws also protect spouses from being forced into prostitution...<sup>1631</sup>

4.216 Brents and Hausbeck also reported that “If a working girl tests positive for anything other than HIV, she is unable to work until treated, cured, and her physician reinstates her health card. If she tests positive for HIV, she can no longer work as a legal brothel prostitute.”<sup>1632</sup> This point is important to note as it may have relevance for the South African context, where conservative estimates place the percentage of HIV-positive cases among female prostitutes at roughly 60%.<sup>1633</sup> Considering the prevalence of HIV in South Africa, even if brothels were deemed to be a safer environment than the streets, the sheer number of women prostitutes who struggle with addiction and illness could mean few of them would be allowed to operate from indoor facilities such as brothels.<sup>1634</sup>

4.217 Brents and Hausbeck report that in Nevada’s legalised brothels,

[T]he mechanisms most consistently employed in brothels to provide safety from various types of risks and threats include guidelines for the negotiation process, call buttons and audio room monitoring, control of customer behaviour, good relations with police, limiting out-of-brothel services, limiting

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<sup>1628</sup> Op cit 273.

<sup>1629</sup> Ibid.

<sup>1630</sup> Op cit 275.

<sup>1631</sup> Op cit 276.

<sup>1632</sup> Ibid.

<sup>1633</sup> SANAC News Special Report.

<sup>1634</sup> Johnston.

the movement of prostitutes, adhering to health regulations, and engaging in preventative practices. Both brothel managers and prostitutes explained that these mechanisms protect the safety of workers and customers alike. However, the most detailed and central safety mechanisms are clearly those that protect profitability for owners. In other words, a safe, conflict-free transaction that protects the laborers as well as the customers is built into the operating structure of brothels as a means to sustain the economic and social viability of the legalized prostitution industry. One could argue that protection for prostitutes is extended when and where it coincides with the primary goal of brothel owners: profits. ... Although there undoubtedly are brothel owners who are a bit cavalier about safety mechanisms in the name of frugality, the vast majority of brothel owners are keenly aware of the close relationship between perceptions of safety and their own profitability.<sup>1635</sup>

4.218 Brents and Hausbeck also reported that “Most owners identified employee theft as the major reason for using intercom systems to listen in on negotiations between the prostitute and the buyer, betraying a basic mistrust of prostitutes.”<sup>1636</sup> Some owners said they listened in on the negotiation as it was during negotiations on payment that the man may become angry or violent. However, some prostitutes stated “this provided a false sense of security as the owners did not always listen in”.<sup>1637</sup> Brents and Hausbeck reported that “As added security, all the brothels ... had call buttons in each of the prostitutes’ rooms.” However, “the panic buttons seem to serve as more of a symbolic than an actual mechanism for protection against danger.”<sup>1638</sup> In Nevada,

Unlike street prostitutes, the brothels can rely on local law enforcement as back-up in the unlikely case of trouble. ... Brothel owners have a clear interest in maintaining their image as law-abiding, trouble-free businesses to keep their licences and maintain good relations within their communities. The owners we interviewed ensure this by making it policy to call the police at the slightest hint of trouble to send a message that they don’t tolerate bad behaviour.<sup>1639</sup>

4.219 According to Brents and Hausbeck, when customers do become abusive or violent, the women support one another. However, “another potential arena for violence in the brothels is violence among the women.”<sup>1640</sup> Although there may be a “sorority house-like atmosphere”, the women in fact compete “against each other for the interests, affection, and money of brothel customers.”<sup>1641</sup>

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1635 Brents & Hausbeck 277.

1636 Op cit 278.

1637 Op cit 279.

1638 Op cit 280.

1639 Op cit 283.

1640 Ibid.

1641 Ibid.

4.220 Brents and Hausbeck report that most of the so-called “cat houses” closely monitor the movement of prostitutes. Further, “the vast majority of brothels do not allow women to leave the premises while they are on contract to work, even if they are not on shift. There are few other professions where this kind of paternalistic supervision and lock down occurs.”<sup>1642</sup>

Brents and Hausbeck argue that

“the rule not to allow prostitutes out of the house is for health safety reasons. Despite that Nevada’s legal prostitutes work as independent contractors, prostitutes accept movement restrictions based on the perceived intention to protect both them and their buyers. Brothel profitability and a perceived shortage of workers does seem to be driving a slow liberalisation of policies that restrict prostitute’s movement”.<sup>1643</sup>

4.221 Brents and Hausbeck submit that prostitution is violent and inherently dangerous and that the danger is real and always present, but aver that brothels offer the safest environment available for women to sell consensual sex acts for money.<sup>1644</sup> The perception is that there is a potential for danger inherent in every interaction.<sup>1645</sup>

4.222 Brents and Hausbeck report that brothel owners justify the existence of brothels based on the threat of violence against women, violence to community order and dangers associated with disease.<sup>1646</sup> The question of pimps seemed an important one for owners and was one topic that would always get owners and managers angry.<sup>1647</sup> Managers speak of pimps with anger and derision and argue that brothels are a place where women can break free from pimps.<sup>1648</sup> Brents and Hausbeck are quoted as stating that “the legal brothel industry in Nevada can be an escape valve for those women who are forced into the business by a pimp in an illegal setting. Because by coming into a legal brothel and we have had a couple of these cases, she is now doing something which is legal so he cannot use that as a force over her, and he is the one that is illegal.”<sup>1649</sup>

4.223 Brents and Hausbeck identify economics as a powerful driving force behind various systems of keeping risk in check. In their view the intersection of capitalist interests and

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<sup>1642</sup> Op cit 285.  
<sup>1643</sup> Op cit 281.  
<sup>1644</sup> Op cit 289.  
<sup>1645</sup> Op cit 290.  
<sup>1646</sup> Op cit 291.  
<sup>1647</sup> Ibid.  
<sup>1648</sup> Op cit 292.  
<sup>1649</sup> Ibid.

patriarchal mechanisms of control is evident in many brothel policies and practices.<sup>1650</sup> Brents and Hausbeck submit that in a social world that is still characterised by patriarchal systems of sexism and gender-based oppression and that is market driven and capitalistic, various forms of social and economic exploitation persist for individuals and within social institutions.<sup>1651</sup>

4.224 In a study on brothels published in 2010, Jeffreys noted the development of a trend in the prostitution industry in the western world, namely a boom in escort prostitution.<sup>1652</sup> Jeffreys submits that escort prostitution “operates largely through mobile phones and the internet, and is said to be supplanting the brothel as the major form in which prostituted women are delivered to male buyers. These businesses operate without shopfronts on a physical street” .<sup>1653</sup>

4.225 The benefits of safety and reduced crime accredited to legalisation are linked to the assumption that prostitution would take place in brothels – which can institute health and safety codes. Legalisation supposedly also enables easy identification of the illegal brothel industry, which can theoretically be closed down.<sup>1654</sup> However, Jeffreys argues that there is no way in which escort prostitution can be controlled or made safe; hence these arguments in favour of legalising prostitution can be refuted.<sup>1655</sup> Jeffreys also reported a worrying phenomenon where what was previously known as “call girl” prostitution has been extended to include many illegal foreign nationals, who rarely pay tax, and a number of the women are younger than twenty when they start.<sup>1656</sup> In Jeffreys’ view, escort prostitution now contains some of the most vulnerable women and girls.<sup>1657</sup> Jeffreys argues that

“brothels with walls, which can be subjected to monitoring and the creation of OHS plans and panic buttons in rooms, are becoming a minority form of prostitution. . . legalised brothels are expensive and are restrictive. Escort prostitution is easily organised through mobile phones and the internet and can be staffed by the pimps with trafficked women without attracting the attention that might result from placing these women in brothels. Through this avenue violence is not reduced and neither is organised crime.”<sup>1658</sup>

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<sup>1650</sup> Op cit 293.

<sup>1651</sup> Op cit 294.

<sup>1652</sup> Jeffreys S “Brothels without Walls: the Escort Sector as a Problem for the Legalization of Prostitution” *Social Politics* 2010 Volume 17 at 211.

<sup>1653</sup> Op cit 210.

<sup>1654</sup> Ibid.

<sup>1655</sup> Ibid.

<sup>1656</sup> Op cit 219.

<sup>1657</sup> Ibid.

<sup>1658</sup> Op cit 230.

4.226 In the past decade the British Home Office has investigated a number of aspects relating to prostitution. The research has brought about a shift in the United Kingdom towards viewing prostitutes as victims, focusing on exit strategies and clamping down on human trafficking in respect of prostitution. Keeping a brothel is criminalised in section 33 of the Sexual Offences Act 1956, where it specifies that “it is an offence for a person to keep a brothel, or to manage, or act or assist in the management of a brothel”. A brothel has no statutory definition but case law has established that any premises qualify where two or more women practise prostitution, or where a number of prostitutes occupy the same building with some common management. This could be in the form of a private home or commercial premises such as a massage parlour or sauna.<sup>1659</sup> Anyone involved with the running of a brothel – for example prostitutes, maids and cleaners – can be prosecuted for assisting in the running of the brothel. Additionally, men and women could be charged with offences related to living off immoral earnings. There is also a common law offence of keeping a disorderly house, which can be used if only one prostitute works from the premises. It is also an offence for landlords to allow their premises to be used as a brothel.<sup>1660</sup>

4.227 Zambia revised its Penal Code in 2005, amending the chapter dealing with offences of morality to include section 149, which criminalises the keeping of a house, room, set of rooms, or place of any kind whatsoever for purposes of prostitution. The Canadian Protection of Communities and Exploited Persons Act also replaced the definition of “common bawdy-house” in the Canadian Criminal Code with the following definition: “common bawdy-house” means, for the practice of acts of indecency, a place that is kept or occupied or resorted to by one or more persons’

4.228 The evidence presented in research from around the world and through comparative experience refutes, or at least raises serious questions about, the validity of the contention that prostitution indoors or in a brothel is safer than criminalised prostitution, and that women prostitutes are less likely to be victims of violence and exploitation if they work in or from brothels.

**4.229 The Commission agrees that prostitution is a gendered survival strategy that involves the assumption of unreasonable risks by a person who is a prostitute. The Commission does not agree that prostitution should be offered as a legal and rational**

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<sup>1659</sup> Home Office “For Love or Money” 5.

<sup>1660</sup> Ibid.

survival and economic choice, given that social science has clearly shown that legalisation creates difficulties in certain respects – such as people working under exploitative conditions and risking human rights violations. Based on the submissions and on comparative and local research, the Commission finds that the fundamental rights of prostitutes to freedom and security of the person are not known to be protected in brothels. The establishment of legal brothels would not necessarily promote the quality of life of people in prostitution. The Commission therefore concludes that there is no reason for legalising brothels. Furthermore, the Commission is of the view that restricting the commercial exploitation of prostitutes by prohibiting such practices is a justifiable limitation on the individual rights of third parties to freedom of trade, occupation and profession.

**(f) *The benefit to prostitutes of allowing third parties to benefit from or live off the earnings of prostitution***

4.230 Section 20(1) of the Sexual Offences Act makes it a crime to knowingly live wholly or in part on the earnings of prostitution. Similar provisions are found in comparative Commonwealth countries. Recent developments in these countries have brought about varying results.

4.231 In the United Kingdom, since 2004 there has been a shift towards focussing on exit strategies and clamping down on human trafficking in respect of prostitution.<sup>1661</sup> The introduction of the strict liability offence of “paying for sex with someone who is controlled for another person’s gain” bears testimony to this shift.<sup>1662</sup> The offence is one of strict liability in that ignorance of the fact that a prostitute was controlled is irrelevant for the purposes of prosecution.<sup>1663</sup> In the United Kingdom the pimping offences of “living off immoral earnings” are found in three sections. It is an offence for a man “knowingly to live wholly or in part on the earnings of prostitution”. If he lives with or is habitually in the company of a prostitute, or exercises control, direction or influence over her movements in a way which shows he is aiding, abetting, or compelling her prostitution, he is presumed to be knowingly living off

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<sup>1661</sup> The need to provide exit strategies is shared in the United States where it was found that the vast majority of women in prostitution don’t want to be there. Few seek it out or choose it, and most are desperate to leave it. Children are also trapped in prostitution – despite the fact that international covenants and protocols impose upon state parties an obligation to criminalise the commercial sexual exploitation of children. US Department of State “The Link between Prostitution and sex Trafficking Global Affairs”.

<sup>1662</sup> Home Office “*Tackling the Demand*” 16.

<sup>1663</sup> Pudifin S & Bosch S “Prostituting the 2010 Soccer World Cup – a more practical approach to prostitution policy in South Africa” XLII CILSA 2009 at 280.

immoral earnings, unless he proves to the contrary.<sup>1664</sup> The corresponding offence for women who manage female prostitutes is defined under section 31, where it is an offence for a woman “to exercise control, direction or influence over a prostitute’s movements” for the purpose of gain. The management of male prostitutes by a person of either sex constitutes a further separate offence if that person “knowingly lives ... on the earnings of the prostitution of another man”.<sup>1665</sup> All three offences carry a maximum penalty of seven years’ imprisonment.

4.232 Under section 22 of the United Kingdom Sexual Offences Act 1956 it is also an offence for a person to procure a woman to become a prostitute or to leave her usual home intending her to work or to frequent a brothel.<sup>1666</sup> Under section 23 it is an offence for a person to procure a girl under the age of 21 to have unlawful (outside of marriage) sexual intercourse with a third person.

4.233 A review of the Penal Code in Zambia in 2005 resulted in the reintroduction of the crime of knowingly living wholly or in part on the earnings of prostitution.<sup>1667</sup> This crime includes the actions of any person who is proved to exercise control, direction or influence over the movements of a prostitute in such a manner as to show that the person is aiding, abetting or compelling the prostitution with any other person. It is a felony coupled to a term of imprisonment not exceeding 15 years.

4.234 Dutch criminal law also still penalises pimping. However, municipal authorities have the power to sign agreements with brothel-keepers, under which agreements the brothel-keepers may – with police supervision – freely exercise their “trade.” The prostitutes they employ must have reached majority and must possess papers; they are also required to protect their own health and that of their clients; and they must not have been “forced.”<sup>1668</sup> However, Marie-Victoire Louis reports that 80% of Amsterdam prostitutes are foreigners and 70% have no papers, and only four of the 250 officially listed Amsterdam brothels had actually signed an agreement with the mayor. According to Louis “[T]he reality is reported to be that many women are immigrants who are terrified, threatened and raped. Frequently

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<sup>1664</sup> Section 30 of the Sexual Offences Act (1956).

<sup>1665</sup> Section 5 of the Sexual Offences Act (1967).

<sup>1666</sup> Home Office “*Tackling the Demand*” 6.

<sup>1667</sup> Section 146.

<sup>1668</sup> Louis Marie-Victoire Making the Harm Visible, Legalizing Pimping, Dutch Style available at <http://www.uri.edu> Accessed on 24 May 2013.

they have no money, papers or contact with the outside world, and may not even know in what town they are living. They are hardly able to notify the police of coercion”.<sup>1669</sup>

4.235 With regard to similar provisions in Canada, it was argued in the Canadian Court of Appeal that “the objective of provisions against living on the avails of prostitution is to prevent pimps from exploiting prostitutes or profiting from the prostitution of other people”.<sup>1670</sup> In an application to have these provisions struck from the statute book, it was contended that “the effect of these provisions is also to prevent a prostitute from hiring a security guard, a personal driver, or an assistant who could work to reduce the risk of violence”.<sup>1671</sup> Furthermore, the provisions could actually increase the vulnerability and exploitation of the very group they were intended to protect.<sup>1672</sup> In *Canada v Bedford* it was argued that the offence does not require proof of exploitation unless the accused lives with the prostitute; nor is it confined to the classic notion of a “pimp”.<sup>1673</sup> For this reason it was asserted that the effects of the provision may go beyond preventing exploitation to capture conduct by third persons that might have benefitted prostitutes and made their work safer.<sup>1674</sup> In summary, the argument was that the law prevents prostitutes from taking measures that could reduce their harm, and at worst drives them into the hands of the very predators that the law intends to guard against.<sup>1675</sup> In defending the need to retain these provisions, the state argued that while it criminalises conduct, it does so to protect persons engaged in prostitution. Consequently if this provision is struck down, this protection would be lost. The state proposed to remedy the provision by recasting it as follows:

Everyone who lives wholly or in part on the avails of prostitution of another person in circumstances of exploitation is guilty of an indictable offence ...<sup>1676</sup>

In terms of the recently enacted Protection of Communities and Exploited Persons Act any person receiving a material benefit from sexual services in Canada is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.<sup>1677</sup> This offence however contains exceptions. This offence does not apply to a person who receives the benefit

(a) in the context of a legitimate living arrangement with the person from whose sexual services the benefit is derived;

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<sup>1669</sup>

Ibid.

<sup>1670</sup>

*Canada v Bedford Ontario Court of Appeal* March 26 2012 at 97.

<sup>1671</sup>

Supra 98.

<sup>1672</sup>

Ibid.

<sup>1673</sup>

Supra 96.

<sup>1674</sup>

Supra 99.

<sup>1675</sup>

Supra 103.

<sup>1676</sup>

Supra.

<sup>1677</sup>

Section 286.2.

- (b) as a result of a legal or moral obligation of the person from whose sexual services the benefit is derived;
- (c) in consideration for a service or good that they offer; on the same terms and conditions, to the general public; or
- (d) in consideration for a service or good that they do not offer to the general public but that they offered or provided to the person from whose sexual services the benefit is derived, if they did not counsel or encourage that person to provide sexual services and the benefit is proportionate to the value of the service or good.

4.236 In a report published in 2000, the Home Office of the United Kingdom<sup>1678</sup> states that in specifying the offence of “pimping” as living on the earnings of prostitution, the legislation embraces a range of diverse people. The Home Office study differentiates between five groups of pimps, namely: “men who manage prostitutes coercively; domestic partners of prostitutes; prostitutes managed by pimps; prostitutes with domestic partners; and massage /sauna managers”.<sup>1679</sup> The report states, that in particular, any prostitute’s partner who benefits from the income of prostitution is theoretically – and sometimes also in practice – affected by pimping legislation. However, in society at large, partners would only be seen as pimps where they occupy a controlling or coercive role. Control therefore seems central to the popular idea of pimping.<sup>1680</sup> On the continuum of people who live off the earnings of prostitution, one extreme represents people who either know from where the income originates and resign themselves to this reality and the money it provides, or those who do not know and similarly just accept it. This pole may be considered the “inactive” end of the continuum, where people who benefit from a prostitute’s income exercise little or no control over that person.<sup>1681</sup> On the other end are people who know the source and who actively manage or direct a person’s prostitution and control her income. At this end of the continuum, people control one or more persons engaging in prostitution.<sup>1682</sup>

4.237 As stated above, partners of prostitutes also strictly fall within the definition of someone who lives off the earnings of a prostitute. They differ from the traditional stereotype of a pimp in that they are not involved with more than one prostitute at a time; in addition, they keep a watchful eye on their partner while she is working (eg by recording vehicle registration numbers, or maintaining contact by mobile phone). However according to the

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1678 May et al 2.  
 1679 Ibid.  
 1680 Ibid.  
 1681 Ibid.  
 1682 Ibid.

United Kingdom Home Office it appears that within this group, movement between prostitutes as partners is commonplace.<sup>1683</sup>

4.238 Laura Johnston<sup>1684</sup> contests the assertion that persons such as loving partners and children can be charged for pimping. She states that “the living on the avails” implies that someone is “living parasitically off a prostitute’s earnings”.<sup>1685</sup> Such a person must have a vested economic interest in another’s continued prostitution to be convicted. The Home Office found that whereas the terminology used to refer to prostitution and people involved in it were matters largely of convention, defining pimps and pimping was more complex.<sup>1686</sup> People are involved in the management of prostitution in many different capacities, some of which would not generally be regarded as pimping. For one thing, the Home Office found that “the concept is gendered, both in law and in popular parlance”;<sup>1687</sup> pimping is almost always thought of as a male activity. The Home Office reports that women are “seldom regarded as pimps and are charged with different offences to men”.<sup>1688</sup>

4.239 The main findings of the Home Office study<sup>1689</sup> about the nature of pimping were as follows (cited here verbatim):

- Far from all prostitutes are ‘run’ by pimps.
- Those who are pimped are significantly at risk of physical and emotional abuse from their pimp.
- Many are self-managed, often supporting partners.
- Whilst partners are in breach of the law on pimping, they are less likely than pimps to deploy instrumental or coercive violence.
- Street workers are more likely than those working off-street to have a pimp, but a large minority, possibly a majority, do not.
- Younger prostitutes are more likely to be pimped than older ones.
- Pimps undoubtedly play a part in drawing people into prostitution, but do not provide the only route into it; they probably play a larger part in locking people into prostitution.

4.240 The role pimps play in drawing people into prostitution is hard to establish with certainty. It would seem that some prostitutes are drawn into prostitution by pimps and others become locked into prostitution after meeting a pimp.<sup>1690</sup>

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<sup>1683</sup> Op cit 12; 15.

<sup>1684</sup> Johnston.

<sup>1685</sup> Ibid.

<sup>1686</sup> May et al 2.

<sup>1687</sup> Ibid.

<sup>1688</sup> Ibid.

<sup>1689</sup> Ibid.

<sup>1690</sup> Ibid.

4.241 The Home Office study<sup>1691</sup> found some striking differences between different forms of prostitution management (cited here verbatim):

- Pimps running street prostitutes tended to have a diverse repertoire of offending styles.
- They had long criminal histories and did not necessarily define themselves as pimps.
- The majority had pimped juveniles at some stage.
- They routinely used violence, often using or threatening the use of guns, in the furtherance both of pimping and of other crimes.
- Many were heavily involved in drug dealing, and most had significant drug habits.
- Drug dependence often substituted for violence as the means of coercing compliance from prostitutes.
- Whilst pimps had extensive contact with the criminal justice system, only a very small proportion of their offending came to police attention.
- Managers of off-street prostitutes tended to be women, without significant involvement in other forms of crime. Their relationships with prostitutes were contractual rather than coercive. There were pressures on this group of managers to avoid working with juveniles and to minimise drug use on their premises.<sup>1692</sup>

4.242 Johnston<sup>1693</sup> contends that “pimps who prostitute women are neither supportive partners nor beneficent bodyguards. They are men who use physical and sexual violence, drugs, and psychological manipulation to make money off women”.<sup>1694</sup> Johnston comments that the benefit of the “living off the avails” charge is that it is one of the few charges in the criminal code related to violence against women that police can proceed on without the statement or testimony of the woman.<sup>1695</sup>

4.243 Raphael and Shapiro also report that violence from pimps was a problem for many prostitutes, regardless of the sex trade venue. Women in escort services identified pimps as perpetrating up to half of the violence against them, as did women who used hotels. Among women providing escort services, 31% of those who reported having been slapped had been assaulted by pimps. Among women who were victims of forced sex, 35.7% identified a pimp as the perpetrator.<sup>1696</sup> However, Weitzer<sup>1697</sup> contests the statistics obtained by Raphael and Shapiro and states that the methodology was flawed. Nonetheless, Weitzer agrees that

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<sup>1691</sup>

Ibid.

<sup>1692</sup>

Ibid.

<sup>1693</sup>

Johnston.

<sup>1694</sup>

ibid.

<sup>1695</sup>

Ibid.

<sup>1696</sup>

Raphael & Shapiro 135.

<sup>1697</sup>

Weitzer R “Flawed Theory and Method in Studies of Prostitution” *Violence Against Women* 11 (7) (July 2005) at 946.

violence in prostitution is a serious problem.<sup>1698</sup> He affirms that female prostitutes, particularly those on the streets, are vulnerable to assault, robbery, rape and murder.<sup>1699</sup> Weitzer also states that studies have shown that male prostitutes experience much less violence and exploitation and exercise a greater control over their own working conditions, compared with female or transgender prostitutes.<sup>1700</sup>

4.244 According to the Home Office report, prostitutes experience varying levels of violence from their pimps. When asked what would be needed for them to discontinue prostitution, a significant number said that “getting rid” of their pimp would be a major factor.<sup>1701</sup> The Home Office study reports that for some pimps, the use of arbitrary physical abuse seems pervasive – including acts of brutal violence such as beatings, kicking, knife wounds, rape, and murder.<sup>1702</sup> For other pimps, the service they provide relates to protection and is sourced directly by prostitutes. The first finding is unsurprising, considering that the Home Office study showed that pimps tend to be involved in a wide range of criminal activities, including drug dealing, firearm possession and acquisitive crimes.<sup>1703</sup> Similarly, in Nevada (United States of America) pimps reportedly have “a finger in a number of pies”.<sup>1704</sup> During the arrest of a pimp in Nevada, the Metro Police found numerous gutted cars and a cache of weapons including an AK-47 and an AR-15.<sup>1705</sup> One pimp was convicted on 13 counts related to running prostitutes, including first-degree kidnapping, pandering and living off the earnings of a prostitute.<sup>1706</sup>

4.245 According to an article in the Las Vegas Sun, the “pimp subculture is said to be filled with money, manipulation and violence”.<sup>1707</sup> The Las Vegas Sun states that “a pimp said to have honed his radar for the weak and vulnerable, carefully crafting his combination of emotional and physical control to keep his prostitutes in line is reported to be “heading for jail for good” after a “litany” of prior unsuccessful prosecutions.<sup>1708</sup> According to “police, prosecutors and academics who focus on sex trafficking and pandering ... pimps control

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<sup>1698</sup> He critiques writings that use the “worst examples” as well as writings that celebrate and romanticise prostitution, pornography, and other forms of prostitution, typically using “best available examples” to argue that prostitution is or can be empowering and lucrative.

<sup>1699</sup> Weitzer “Flawed Theory” 946.

<sup>1700</sup> Ibid.

<sup>1701</sup> May et al 12.

<sup>1702</sup> Op cit 19.

<sup>1703</sup> Op cit 12.

<sup>1704</sup> Las Vegas Sun “Pimp subculture filled with money, manipulation, violence” 11 March 2013 available at <http://www.lasvegassun.com>.

<sup>1705</sup> *Las Vegas Sun* “Pimp subculture filled with money, manipulation, violence” 11 March 2013.

<sup>1706</sup> Ibid.

<sup>1707</sup> Ibid.

<sup>1708</sup> Ibid.

their world with brutal cruelty, maintain networks while incarcerated, sometimes earn millions a year and frequently are difficult to bring to justice.”<sup>1709</sup>

4.246 The *Las Vegas Sun* reports that “[p]hotos and videos on social media of men flashing wads of \$100 bills, driving luxury cars and surrounded by women make the lifestyle look appealing”.<sup>1710</sup> But according to a UNLV professor of criminal justice, “we shouldn’t judge the institution based on some glamorized info we get from media”. Further that “[t]he levels of violence and the nature of this subculture is not what we’ve been presented in the media.”<sup>1711</sup>

4.247 Raymond<sup>1712</sup> submits that the violence that women are subjected to is an intrinsic part of prostitution and sexual exploitation. In Raymond’s view, “pimps use violence for many different reasons and purposes. Violence is used to initiate some women into prostitution and to break them down so that they will do the sexual acts. After initiation, at every step of the way, violence is used for sexual gratification of the pimps, as a form of punishment, to threaten and intimidate women, to exert the pimp’s dominance, to exact compliance, to punish women for alleged “violations”, to humiliate women, and to isolate and confine women”. Raymond reports that women who stated that sex establishments gave them some protection qualified this claim by pointing out that no “protector” was ever in the room with them, where “anything” could occur.<sup>1713</sup>

4.248 Pimp-controlled prostitutes are relatively likely to be the victims of violence from customers. This finding suggests that the pressure to make extra money – to support the pimp – exposes these women to additional risk.<sup>1714</sup> The higher levels of customer violence experienced by women controlled by pimps (compared with women who do not have pimps) suggest that, contrary to popular belief, pimps do not provide protection from violent customers.

4.249 Writing in 2009 about the South African context, Pudifin and Bosch argue that decriminalisation would not offer a quick fix to all problems (including violence from clients, third parties and pimping) associated with street-based prostitution.<sup>1715</sup> In their view, the New

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1709

Ibid.

1710

Ibid.

1711

Ibid.

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Raymond JG “10 Reasons for Not Legalizing Prostitution”.

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Ibid.

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Norton-Hawk Maureen “A Comparison of Pimp- and Non-Pimp-Controlled Women” *Violence Against Women* 2004 Downloaded from [vaw.sagepub.com](http://vaw.sagepub.com) on 20 July 2010.

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Pudifin & Bosch 285.

Zealand experience cannot be neatly transposed to South Africa because the regulation of prostitution in New Zealand before it was decriminalised was different from the current South African system. The lifestyle of South African prostitutes is beset with abuse, HIV/AIDS, drug use and poverty.<sup>1716</sup> According to Julie Bindel, non-criminalisation in Amsterdam has meant that pimps have been reclassified as “managers” and “businessmen”,<sup>1717</sup> with abuse suffered by the women now called an “occupational hazard”.<sup>1718</sup> The change in terminology and regime has served to normalise the abuse.

4.250 The Home Office reports a consistent finding that pimps have a wide repertoire of offending, and demographic profiles that match extensive criminal involvement (such as low educational attainment and high levels of unemployment).<sup>1719</sup> It was further found that pimps are products of their circumstances no less than are their victims. Many had started their criminal careers in their early teens or before; all had spent time at Young Offender Institutions. Many grew up in prostitution areas and were exposed to pimps and drug dealers in their formative years.<sup>1720</sup>

4.251 The Home Office study identified the most important question on pimping as the need to know the extent to which people are manipulated into prostitution and then kept there by coercion.<sup>1721</sup> Some of these relationships are based on an emotional dependency where vulnerable individuals are targeted with initial gestures of friendship. The Home Office study referred to four stages through which people are subjected to manipulation and eventual domination (quoted verbatim):<sup>1722</sup>

- Ensnaring – of mostly vulnerable, socially isolated teenagers;
- Establishing dependency – by displays of affection and generosity;
- Taking control – establishing a sexual relationship, introducing the idea of prostitution; and
- Total dominance – sustained by physical coercion.

4.252 The above strategy is also evident in South Africa. This was confirmed by submissions made during workshops and one-to-one interviews with prostitutes by Commission researchers. It also occurs in other jurisdictions. According to the Metro Police vice squad in Las Vegas, “Typically [pimps] are going to have networking abilities already established in any city before they arrive.” The *Las Vegas Sun* reports that pimps are said to

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<sup>1716</sup>

Ibid.

<sup>1717</sup>

Bindel “Why Even Amsterdam doesn’t want legal brothels”; Raymond “Prostitution on Demand”.

<sup>1718</sup>

Bindel “Why Even Amsterdam doesn’t want legal brothels”.

<sup>1719</sup>

Home Office “For Love or Money” 7.

<sup>1720</sup>

Ibid 2.

<sup>1721</sup>

Op cit 7.

<sup>1722</sup>

Ibid.

“move between areas and to move prostitutes from area to area”. Further that “for recruitment, social media has been a boon for pimps, expanding their reach and taking their overtures off the streets”.<sup>1723</sup> The *Sun* reports that pimps are “still going into traditional venues like areas where kids are going to be most vulnerable – schools, places where kids congregate – and they are going to look for particularly young girls who are disconnected or disassociated from stable families and are looking for acceptance with someone”.<sup>1724</sup> Once the grooming ends, the “grooming period” earning the woman’s trust and laying out the rules of procedure begins.<sup>1725</sup> They offer friendship and kindness. They may sell it as protection or love, but the idea is: “I am in your corner. I’ll help you survive.”<sup>1726</sup>

4.253 Women under the control of pimps have their movements, finances and interactions with buyers regulated. The pimp keeps control through violence, which includes sexual assault, beatings and torture. The pimps also decide how much money a prostitute must earn each night. The *Las Vegas Sun* reveals that “[o]ften the girls are branded, with tattoos like bar codes, the pimp’s name or alias, or perhaps something as simple as a symbol, a single dollar sign on the inside of the woman’s forearm”.<sup>1727</sup> Pimps are reported to earn an income from prostitution and “legitimate businesses on the side”.<sup>1728</sup>

4.254 The Home Office study highlights the growth in drug dependency and its effect on the organisation of prostitution. The Home Office surprisingly referred to research showing that prostitutes have suffered from the disappearance of the classic pimp, as the obligation to protect “their” women no longer exists.<sup>1729</sup> This trend identified in the United Kingdom is evident in South Africa.<sup>1730</sup> As noted in South Africa drug dependence is problematic<sup>1731</sup> and has replaced physical coercion as the process by which people are locked into prostitution. Pimps now provide prostitutes with drugs and in so doing maximise their incomes from two illicit markets simultaneously.<sup>1732</sup> Despite the decline in traditional pimping, women do not seem to have acquired any greater autonomy. Prostitutes who are now addicted to drugs continue to hand over the majority of their earnings to men who exercise financial and sexual control over them.<sup>1733</sup>

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<sup>1723</sup> *Las Vegas Sun* “Pimp subculture filled with money, manipulation, violence” 11 March 2013.

<sup>1724</sup> Ibid.

<sup>1725</sup> Ibid.

<sup>1726</sup> Ibid.

<sup>1727</sup> Ibid.

<sup>1728</sup> Ibid.

<sup>1729</sup> Home Office “For Love or Money” 8.

<sup>1730</sup> See para 2.82 above.

<sup>1731</sup> See para 2.62 and para 2.82 above.

<sup>1732</sup> Home Office “For Love or Money” 8.

<sup>1733</sup> Ibid.

4.255 The pimps interviewed in the Home Office study were all “generalists” who had committed a variety of crimes as well as pimping. They exerted a considerable degree of power over the lives of prostitutes, deciding almost every aspect of their lives. Some of the first meetings had occurred in nightclubs; other pimps had directly targeted women at bus stations, had started out as drug suppliers, or had met the women through mutual friends.<sup>1734</sup>

4.256 According to the Home Office study some of the reasons cited by pimps for working with prostitutes were as follows: having grown up in a prostitution-oriented environment; making a deliberate choice owing to the lucrative nature of the work; and the lack of effort required to be a pimp.<sup>1735</sup> Although some of the pimps reported benefits for prostitutes due to the protection offered to them, a number of prostitutes stated that they did not feel any such benefits because no protection was offered – and they already had a steady supply of drugs.<sup>1736</sup>

4.257 The Home Office study reports that prostitutes without pimps, however, reported lower earnings, fewer days worked, and fewer clients. They did report a higher level of autonomy in their working lives, choosing where to work and non-involvement of their partners.<sup>1737</sup> Violence was a routine feature of their personal lives but it was not of the same intensity as that experienced by women with pimps.<sup>1738</sup>

4.258 The Home Office study also reports that “madams” generally have a contractual rather than coercive relationship with prostitutes. The agreements include rental or capitation fees to be paid by prostitutes to their managers. They work on a “self-employed” basis which allows managers to distance themselves from the services offered.<sup>1739</sup> The Home Office study found that the working lives of parlour managers were markedly different from pimps’ lifestyles. The role of the manager focused on people management and administration.<sup>1740</sup> All the parlours, however, had rules that were non-negotiable and if a worker disobeyed any of the rules they were usually told not to come back.<sup>1741</sup> Landlords were aware of the work

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<sup>1734</sup> Op cit 11.  
<sup>1735</sup> Ibid.  
<sup>1736</sup> Op cit 12.  
<sup>1737</sup> Op cit 22.  
<sup>1738</sup> Ibid.  
<sup>1739</sup> Op cit 8.  
<sup>1740</sup> Op cit 25.  
<sup>1741</sup> Op cit 26.

conducted from their premises. Due to the rental charged per week, the Home Office study suggests that landlords also make a considerable profit from the work of prostitutes.<sup>1742</sup>

4.259 In the view of the Home Office study,

[A]s legally defined, living off the earnings of prostitution does not necessarily have any serious consequences. For example, a prostitute who willingly chooses to support her partner's drug habit transforms him, in the eyes of the law, into a pimp. From a libertarian standpoint, pimping may even seem a minor problem – if one accepts the assumption that all people who operate in sex markets exercise a degree of choice in doing so.<sup>1743</sup>

However, the Home Office study showed – as did previous research – that “pimping can be highly coercive, and that those who are most vulnerable to such coercion are young people with limited personal resources. The consequences of such coercion can often be sufficiently serious to justify regarding it as a form of ‘slow rape’”.<sup>1744</sup> According to the Home Office, the harm in pimping lies not in the fact of benefitting materially from prostitution, but in manipulating or forcing vulnerable individuals into an activity which is most likely to damage them to the same degree as crimes such as rape.<sup>1745</sup>

4.260 There is another reason for focussing effort on the policing of pimps. The Home Office study found that pimps' criminal careers were long and their current criminal activities were highly diverse. Pimping may thus be an indicator of a one-man crime problem, as well as a harm in its own right. The study found that two thirds of pimps were in possession of illegal firearms; three quarters were dealing in drugs; two thirds had committed at least one robbery; two thirds had committed assault occasioning actual bodily harm (ABH); and half had committed assault occasioning grievous bodily harm (GBH).<sup>1746</sup>

4.261 Currently the burden of proof is on the defendant to rebut the presumption that he was “knowingly living on the earnings of prostitution”. Under the current legislation in the United Kingdom, “living on” is relatively easy to prove, but as a lesser evil will not attract heavy sentences.<sup>1747</sup>

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<sup>1742</sup> Op cit 27.  
<sup>1743</sup> Op cit 37.  
<sup>1744</sup> Op cit 38.  
<sup>1745</sup> Ibid.  
<sup>1746</sup> Ibid.  
<sup>1747</sup> Op cit 39.

4.262 The United Kingdom Criminal Law Revision Committee proposed that the pimping legislation should be revised to form three separate offences:

- Organising prostitution for gain;
- Controlling or directing prostitution for gain;
- Assisting a person to meet a prostitute for the purposes of prostitution.

4.263 The Home Office agreed with the proposals of the Criminal Law Revision Committee, but added that explicit reference should be made to the pimping of juveniles and to coercive forms of control as aggravating factors. From a pragmatic perspective, it argued for the retention of the “living on” offence to provide a safety net in cases where the more serious charge fails to be proven.<sup>1748</sup>

4.264 The Home Office study gave some thought to primary and secondary prevention of pimping. In its view primary prevention focuses on steps to reduce the chances of a person becoming involved in pimping, whereas secondary prevention focuses on ways of helping those already involved to disengage themselves.<sup>1749</sup> The Home Office study highlights the need for creative ways to stop the development of pimping careers and reduce the incidence of young people believing their only opportunity exists in the illegal economy. However, where primary prevention fails, it recommends that punishment needs to be followed by constructive work to help offenders find alternatives to pimping.<sup>1750</sup>

4.265 In Amsterdam, after prostitution was non-criminalised the sex tourist industry reportedly grew faster than the regular type of tourism. The *Spectator* reports that as the city became the “brothel of Europe”, women were imported by traffickers from Africa, Eastern Europe and Asia to meet the demand.<sup>1751</sup> The pimps remained but became legitimate; violence was still prevalent but was part of the job; and trafficking increased.<sup>1752</sup> Support for women to leave prostitution became almost non-existent.<sup>1753</sup> Furthermore, as women did not seem to want to be known as prostitutes, only 5% of them registered to pay tax. The resultant illegality has led to an increase in trafficking, unlicensed brothels and pimping.<sup>1754</sup> DFL predicts a similar response to legalisation in South Africa. It states that “many prostitutes do not register anyway because they don’t want the stigma of being a prostitute or being controlled and having to pay tax to somebody for selling their own body”.

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<sup>1748</sup> Op cit 40.

<sup>1749</sup> Op cit 46.

<sup>1750</sup> Op cit 44.

<sup>1751</sup> Bindel “Why Even Amsterdam doesn’t want legal brothels”.

<sup>1752</sup> Ibid.

<sup>1753</sup> Ibid.

<sup>1754</sup> Ibid.

4.266 In Las Vegas the *Las Vegas Sun* reports that “pandering and sex trafficking cases are notoriously hard to prosecute, with victim cooperation the most challenging part, prosecutors said. The women fear for their lives – and the lives of friends and family – if they testify against their pimp. Sentences for pandering can be light, and even those convicted will spend little time in a jail, a fact that does not escape prostitutes who have seen the worst of the violence”.<sup>1755</sup> Similarly, in the United Kingdom the Home Office supports the expedition of cases dealing with pimps as lengthy delays between reporting pimps and such reports being dealt with in the criminal justice system mean that witnesses may become too frightened or disillusioned and may withdraw.<sup>1756</sup>

4.267 The *Las Vegas Sun* writes that “[p]imps frequently set up in several cities and can be hard to track continuously”.<sup>1757</sup> At the time of writing, the Nevada legislature was expected to discuss changes to the state’s pandering laws by altering some of the phrasing, providing for civil suits against pimps by victims, toughening penalties, and strengthening forfeiture provisions.<sup>1758</sup>

4.268 Kelly et al support the Swedish model which contains a range of “exploitation of prostitution” offences. These include pimping and profiting, and cover any person who promotes or improperly exploits “casual sexual relations for payment”; the offences carry a maximum penalty of four years’ imprisonment, increased to six years in cases of “gross” or “aggravated” procuring.<sup>1759</sup>

4.269 One of the clearest findings of the Home Office study is that effective police action against pimps is helped by specialisation. The benefits listed in the Home Office study are as follows:

- “A specialist unit develops clear ownership of pimping as a problem.
- It builds up specialist knowledge of the relevant legislation.
- It can establish relationships of trust with prostitutes, who are likely to be key witnesses.
- It can develop working links with corresponding specialists within the Crown Prosecution Service”.<sup>1760</sup>

4.270 Suggestions for good practice in organising vice policing include the following:

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<sup>1755</sup> *Las Vegas Sun*.  
<sup>1756</sup> Home Office “For Love or Money” 43.  
<sup>1757</sup> *Las Vegas Sun*.  
<sup>1758</sup> *Las Vegas Sun*.  
<sup>1759</sup> Kelly et al 31.  
<sup>1760</sup> Home Office “For Love or Money” 40.

- “Those assigned to specialist vice units should serve a probationary period.
- Investigative training should be given to all officers assigned to specialist vice units.
- Officers assigned to specialist vice units need training about drug misuse”.<sup>1761</sup>

4.271 With regard to the police response, the Home Office found that where dedicated units existed, the number of arrests increased considerably.<sup>1762</sup> All police respondents felt that there needed to be one unit dealing with all vice-related issues rather than a fragmented system.<sup>1763</sup> A focussed vice policing approach resulted in successful initiation of proceedings against a large number of prostitutes for soliciting, and action taken against pimps.<sup>1764</sup> It was found that in areas with specialisation, more active prosecution and successful convictions occurred.

4.272 Police suggested that prostitutes should be treated as vulnerable witnesses when giving evidence in court against pimps. The Home Office study found that even if prostitutes reported pimps to the police, many dropped the complaint for fear of reprisal; others stated that they were too fearful to report.<sup>1765</sup> Prostitutes generally felt the criminal justice system failed them when reporting violent men.<sup>1766</sup> In areas where a vice squad existed, prostitutes’ views were often more favourable,<sup>1767</sup> with the majority of prostitutes in such areas holding a positive view of the police.<sup>1768</sup> The Home Office report stated that the relationship between prostitutes and police officers is often “difficult”. Where officers fostered good relations with prostitutes there was a degree of trust present. The Home Office recommended that senior police management should put measures in place to protect officers from false allegations and equally to protect potential defendants from corrupt police officers.<sup>1769</sup> Methods to stem corruption include tenure periods in specialist units, the creation of a Complaints Investigation Bureau, and a confidential phone line for officers to disclose the bad or criminal practices of their colleagues.<sup>1770</sup>

**4.273 The Commission is of the opinion that there is sufficient merit in retaining the offence of “knowingly living off the earnings of prostitution”. It recommends that this offence should be extended to include the offence of “benefiting from the prostitution**

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<sup>1761</sup> Op cit 41.  
<sup>1762</sup> Op cit 29.  
<sup>1763</sup> Op cit 30.  
<sup>1764</sup> Op cit 31.  
<sup>1765</sup> Op cit 34.  
<sup>1766</sup> Op cit 35.  
<sup>1767</sup> Ibid.  
<sup>1768</sup> Ibid.  
<sup>1769</sup> Ibid.  
<sup>1770</sup> Ibid.

of a person". In this regard, the Commission recommends that the defences available to people who live off the earnings of, or benefit from, the sexual exploitation of a child (as provided for in the Sexual Offences Amendment Act) should be applicable to these offences in respect of adults too. Section 54 of the Sexual Offences Amendment Act provides for a defence in respect of the sexual exploitation of a child or a person with a mental disability. It inter alia provides that a person may not be convicted of an offence contemplated in section 17(4) or (5) or section 23(4) or (5) if that person is a child and is not a person contemplated in section 17(1) and (2) or 23(1) and (2). The sections in question are the offence of benefiting from the sexual exploitation of a child;<sup>1771</sup> living from the earnings of the sexual exploitation of a child;<sup>1772</sup> benefiting from the sexual exploitation of a person with a mental disability;<sup>1773</sup> and living from the earnings of the sexual exploitation of a person with a mental disability.<sup>1774</sup> The defence is not valid where the person benefiting from the sexual exploitation of a child or person with a mental disability, or living from the earnings of the sexual exploitation of a child or person with a mental disability, is also the person who engages the services of the child for financial or other reward, favour or compensation;<sup>1775</sup> offers the service of a child for financial or other reward, favour or compensation;<sup>1776</sup> engages the services of a person with a mental disability for financial or other reward, favour or compensation;<sup>1777</sup> or offers the service of a person with a mental disability for financial or other reward, favour or compensation.<sup>1778</sup>

**4.274 The Commission concedes that various structural factors and the concomitant lack of resources are sad realities that an impoverished family may have to face. However, the Commission believes that social intervention is more easily accessible and within the reach of an adult than a vulnerable child. By extending the exemption to adults, the Commission fears that the exemption may prompt an increase in prostitution by impoverished adults. The Commission therefore recommends that the exemption be put in place for children only.**

**4.275 In addition to the recommendations pertaining to the South African Police Service in Chapter 2, the Commission recommends that the South African Police Service should consider specialisation in the area of prostitution. The reasons for this**

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<sup>1771</sup> Section 17(4) of the Sexual Offences Amendment Act.  
<sup>1772</sup> Section 17(5) of the Sexual Offences Amendment Act.  
<sup>1773</sup> Section 23(4) of the Sexual Offences Amendment Act.  
<sup>1774</sup> Section 23(4) of the Sexual Offences Amendment Act.  
<sup>1775</sup> Section 17(1) of the Sexual Offences Amendment Act.  
<sup>1776</sup> Section 17(2) of the Sexual Offences Amendment Act.  
<sup>1777</sup> Section 23(1) of the Sexual Offences Amendment Act.  
<sup>1778</sup> Section 23(2) of the Sexual Offences Amendment Act.

recommendation are, first, the lack of clarity on legislative developments regarding the remaining provisions of the Sexual Offences Act; and second, the clear finding of the United Kingdom Home Office Study that effective police action is helped by specialisation. The benefits of specialisation, as listed in paragraph 4.269 above, are as follows: clear “ownership” of the crime; the building up of specialist knowledge of the relevant legislation; and establishing relationships of trust with prostitutes, who are likely to be key witnesses. In addition, a specialist unit could develop working links with corresponding specialists within the National Prosecuting Authority that deal (for example) with asset forfeiture.<sup>1779</sup>

4.276 Further consideration should be given to the Home Office suggestions for good practice in organising vice policing, as follows: people assigned to specialist vice units should serve a probationary period; investigative training should be given to all officers assigned to specialist vice units; and officers assigned to specialist vice units need training about drug misuse.<sup>1780</sup>

**(g) Public nuisance**

4.277 Many of the third-party offences seem to be associated with aspects of public nuisance. These are mostly brought to the attention of authorities through the public nuisance caused by their presence in communities (eg soliciting and living off the earnings of prostitution). Municipal by-law infractions may include loitering and drinking or rowdiness in public. Weitzer states that public nuisance is most salient where the main problem is street prostitution, and may be muted in contexts in which street prostitution is marginal.<sup>1781</sup> The United Kingdom has opted to follow the public nuisance approach with all prostitution-related offences; hence, every offence under the Sexual Offences Act of 1985 must show an aspect of public nuisance in order to justify criminal prosecution.<sup>1782</sup> According to Pudifin and Bosch the effect of the New Zealand Prostitution Reform Act 28 of 2003 on the role of the police was to divest the police of any authority to respond to complaints of prostitution per se by residents; police no longer have any power to help residents who feel uncomfortable in areas which are frequented by prostitutes.<sup>1783</sup>

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<sup>1779</sup> Home Office “For Love or Money” 40.

<sup>1780</sup> Op cit 41.

<sup>1781</sup> Weitzer “Legalizing Prostitution”.

<sup>1782</sup> Pudifin & Bosch 279.

<sup>1783</sup> Op cit 284.

4.278 Combrinck<sup>1784</sup> states that even where street prostitution is legalised, the role of municipal by-laws in effecting control over the industry is substantial.<sup>1785</sup> Both France and New South Wales (Australia) have transitioned through periods when street solicitation was non-criminalised. However, general (municipal) nuisance laws were used to such an extent that the arrest rates of street prostitutes equalled those made when solicitation was still illegal.<sup>1786</sup> Combrinck stated that street prostitutes had strongly resisted control mechanisms and had vehemently resisted zoning regulations.<sup>1787</sup> She argued that prostitutes who worked illegally in these countries were being held hostage to the same risks confronting prostitutes under a criminalised system.

4.279 According to Jeffreys, the advertising of prostitution hampers all efforts to minimize the effect of prostitution on the “community.”<sup>1788</sup> Citizens do not wish to be confronted with prostitution advertising in their neighbourhoods or local newspapers. Even in legal settings such as Victoria, restrictions are in place on how such advertising may be conducted.<sup>1789</sup> Jeffreys states that advertising is particularly vital for escort prostitution because there is no brothel at which men can call to buy women “on their way home from work”.<sup>1790</sup> The effect of prostitution advertising on women’s equality can be seen to have an effect on public space that is harmful.<sup>1791</sup> Jeffreys comments that “[a]dvertising for prostitution whether in print media or in the streetscape may, like other sexist advertising, affect the way in which women experience their relationship with the world and the way that women’s status is understood”.<sup>1792</sup> In Queensland, the advocacy group Sexual Service Providers Advocacy Network (SSPAN) has defended the retention of language depicting race, colour and ethnicity, “[s]ince male buyers want to buy bodies of a particular skin color and may even be violent if they do not get what they want.”<sup>1793</sup> Inevitably, residents are exposed to the sale of “sexed” and “racialised” bodies.<sup>1794</sup>

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<sup>1784</sup> Women’s Legal Centre Seminars – “Violence Against Women Adult Commercial Sex Work: Decriminalisation or Regulation” National Conference on 4 & 5 May 2000 Hosted by Women’s Legal & SWEAT “Control and Contain’: The Legalisation of Commercial Sex Work in South Africa (with specific reference to outdoor sex workers)” Helene Combrinck.

<sup>1785</sup> Ibid.

<sup>1786</sup> Ibid.

<sup>1787</sup> Ibid.

<sup>1788</sup> Jeffreys 228.

<sup>1789</sup> Ibid.

<sup>1790</sup> Ibid.

<sup>1791</sup> Op cit 229.

<sup>1792</sup> Ibid.

<sup>1793</sup> Ibid.

<sup>1794</sup> Ibid.

4.280 As stated in paragraph 2.491 above, **the Commission is of the opinion that the eradication of nuisance-related problems caused by street solicitation is a pressing and substantial concern. Sending the message that street solicitation for the purposes of prostitution will not be tolerated constitutes a valid legislative aim. Consequently, advertising premises or persons as available for prostitution should also remain prohibited.**

***(h) Recognising the services of prostitutes as labour, as well as the right to freedom of economic activity within the sex industry***

4.281 A shift in certain circles of international debate and vocabulary has seen the phrase “a women’s right to freedom” being replaced by “a women’s right to self-determination”. Pimps and brothel-keepers have become “third parties”, “intermediaries”, “prostitution managers”, “owners of managers of premises”, and “managers of the sex industry”. The prostitutes have become “sex workers” or “sex professionals”. As for clients, in the Netherlands they are known as “consumers of prostitution” – usually anonymous.

4.282 The argument behind such changes in terminology is that prostitution should be regarded as an economic activity like any other. The only criminal offences are “forms of exploitation involving an element of coercion or fraud, or the abuse of a situation of dependency on prostitution.” This distinction paves the way for recognising the existence of “forced prostitution” on the one hand, and, on the other, prostitution that is “free”, “voluntary” and based on “rational” (that is, economic) choice.

4.283 SWEAT has argued that non-criminalisation ensures that brothel owners and managers uphold minimum conditions of employment, as stipulated in the relevant legislation. Recognition of the industry as a business would allow owners and managers of brothels to register under the Business Act and to apply for business licences. Owners in the indoor sex-work industry would be able to form business associations that would represent their interests in forums that would regulate and govern the industry. The recognition of prostitution as a legal form of labour, as well as the right to freedom of economic activity within the sex industry, were discussed in Chapters 2 and 3.

4.284 It was noted in paragraph 2.50 of this report that selling sex exposes women to risks that may entrap them further in poverty, thereby exacerbating their social difficulties and increasing their dependence on men. It is a gendered reality that prostitution may be the

“best of the worst” economic options that women face, and it is understandable that women turn to prostitution under dire circumstances. **The Commission is of the view that the desperate economic plight of certain women should not be manipulated against them by institutionalising or legitimising businesses that specialise in facilitating the selling of sex. The Commission is further of the view that if the sex sector and prostitution were to be regarded merely as a form of legitimate “labour”, this would reinforce women’s subordination and may actually increase their objectification and economic inequality. Despite other arguments, the Commission believes that the non-criminalisation and legal recognition of prostitution as “labour” or as the “merchandise” of a business (such as a brothel) would not provide prostitutes with the benefits typically ascribed to this model. The Commission is of the opinion that non-criminalisation would not foster the achievement of equality between men and women. Attempts to regulate prostitution by non-criminalising it or by introducing licences for legal brothels have not addressed the core problem: the routine abuse and violence that form the prostitution experience.**<sup>1795</sup>

4.285 The Commission confirms its finding that neither the International Labour Organization nor South African policy documents have promoted legalising prostitution as a solution to poverty; nor have they identified prostitution as an employment option for poor and marginalised people. Prostitution does not fit comfortably with the international definition of “decent work”. There are inherent difficulties in trying to integrate prostitution into formal employment laws and structures. Efforts to treat prostitution as formal employment reveal a host of contradictions that neither law nor policy can resolve. The Commission has found that prostitution should not be considered a reasonable means to secure a person’s living in South Africa, and should not – from a formal labour perspective – be considered work or decent work. Therefore, no justification remains for legitimising brothels and related enterprises that are based primarily on the facilitation of prostitution, or for legitimising third parties involved in doing so.

4.286 The Commission is further of the opinion that its recommendations do not preclude the Department of Health from being tasked with the phasing-in of accessible health services for groupings such as prostitutes. These might include, for example, health services made available in the evenings or ways of countering discrimination and prejudice towards this vulnerable group. There is a high health

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<sup>1795</sup> US Department of State “Link between Prostitution and Sex Trafficking”.

risk involved in prostitution and access to health services is vital. The Commission is further of the view that the Department of Social Development and the Ministry of Women should be mandated to engage with prostitutes on issues of social security and poverty alleviation, including reskilling and alternative income-generating projects. It is instructive to note that according to the Australian Institute of Criminology, the need for women to enter prostitution can be reduced significantly only through long-term economic and social measures; and that the Swedish system has provided such women with sufficient economic and social security to enable them to leave the trade if they desire, by providing accommodation, money, emotional support and alternative employment.<sup>1796</sup> Cluver & Orkin report that behavioural economists in South Africa have recently recommended financial incentives such as social grants to reduce sexual risk-taking.<sup>1797</sup>

4.287 Presumably with regard to the operation of brothels and the impact of the Liquor Act on brothels, SWEAT submits that section 160 of the Liquor Act should be repealed. As a number of legislative amendments have been effected since 2002 when SWEAT made its first submission, the Commission researchers assumed that SWEAT's new submission referred to section 160 of the Liquor Act 27 of 1989. This section provides that the holder of an on-consumption licence is guilty of committing an offence if any of the following occurs: if drunkenness or licentious conduct is allowed on the licensed premises; if liquor is sold or supplied to a person who is in a state of intoxication; if the licensed premises is used as a brothel or frequented by persons regarded as prostitutes, and if persons are allowed to perform an offensive, indecent or obscene act, or are not clothed or properly clothed to perform or to appear on a part of the licensed premises where entertainment of any nature is presented or to which the public has access. In the matter *Andrew Lionel Phillips, Viva Afrika Investments CC versus The DPP (WLD) et al*<sup>1798</sup> a challenge was brought against subsection 160(d), which makes it an offence for an on-consumption licence holder to allow a person (i) to perform an offensive, indecent or obscene act or (ii) who is not clothed or not properly clothed to perform or to appear on licensed premises where entertainment is presented or to which the public has access. The court held that only section 160(d) is unconstitutional and of no force and effect. Justice Madala, however, disagreed and stated that the combination of alcohol, intoxicated men and provocative nude dancing is potentially disastrous,<sup>1799</sup> and consequently that it is not an unduly onerous limitation for the

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<sup>1796</sup> Australian Institute of Criminology *Prostitution Laws in Australia* 1990 at 8.

<sup>1797</sup> *Business Day* Cluver Lucie & Orkin Mark "Grants keep HIV sugar daddies at bay" (26 November 2013) available at <http://www.bdlive.co.za> Accessed on 27 November 2013.

<sup>1798</sup> CCT20/02.

<sup>1799</sup> para 49

government to require that liquor licence owners must refrain from selling alcohol on days when a performance involving people “not clothed or not properly clothed” will occur. Justice Ngcobo further held that the overall purpose of section 160 is to reduce, as far as possible, the negative consequences of liquor being consumed in a public place. This limited purpose is reasonable, legitimate and important.<sup>1800</sup> As section 160 was not included in the revised Liquor Act 59 of 2003, which repealed the whole of the Liquor Act 27 of 1989 and is not directly pertinent to the sale of sexual services, the Commission elects not to address this matter further in this Report.

## F Recommendation

4.288 From the entire foregoing discussion, it is apparent that the non-criminalisation of prostitution and the legitimising of brothels and third parties would not protect the human rights of persons who practise prostitution; nor necessarily promote the health and safety of persons engaged in prostitution; nor automatically recognise the services of prostitutes as legitimate labour, or their right to freedom of economic activity within the sex industry; nor empower prostitutes to choose to remain or to exit the sex industry; and would not achieve a balance between, on the one hand, the rights and needs of prostitutes and the sex industry and, on the other, the rights and interests of the community. Proponents who favour the non-criminalising of prostitution venues make suggestions on how to keep women in prostitution but few on how to help women get out.<sup>1801</sup> Prostitutes seeking alternatives to prostitution require tangible social and economic assistance from government, within the broader range of anti-poverty measures. In the Commission’s view, if legal barriers were to disappear so too would all social and ethical barriers to treating women as sexual commodities.

4.289 The Commission has, in reconsidering the objectives of the Sexual Offences Act, reflected on the current social, political, and economic assumptions that are valid in South Africa. Its findings resonate with the position taken by Ruhama<sup>1802</sup> in that it agrees that the illusion that prostitution is a choice is manipulative and deceptive. This myth allows buyers and pimps to obscure the abuse involved and confers a form of right on the abuser. The fact that money – or any other financial or other incentive – is exchanged cannot disguise the reality that prostitution always involves bodily and psychological violations. These can accurately be termed “sexual abuse” and “harassment”, and would be recognised as such in

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<sup>1800</sup> para 57

<sup>1801</sup> Raymond “Prostitution on Demand” 1177.

<sup>1802</sup> A Dublin based voluntary organisation that works with and for women involved in prostitution.

any so-called ordinary workplace or social setting. Therefore, it is clear that the sex industry would be unable to self-regulate precisely because of the widely documented harms associated with it.<sup>1803</sup> The Commission agrees with Ms Bonthuys of WITS that changing the legislative framework would not automatically improve a prostitute's working environment or the power relations between a particular prostitute and her buyer or third party manager.

4.290 South Africa needs to ensure that it has a coherent legal framework and effective tools to tackle abusers and exploiters. It is necessary to ensure that law enforcement officers have the right intelligence-based approach to deal with the stranglehold of pimps and their links with drug markets, trafficking and other areas of organised crime. Systematic abuse, violence and exploitation are endemic in South Africa.

4.291 The Commission endorses the finding of the Constitutional Court per Justices O'Regan and Sachs where they held that where the existing Sexual Offences Act opts for prohibition, this is a constitutionally permissible legislative choice.<sup>1804</sup> The Court held that there is a strong public interest in the regulation of prostitution in a manner that fosters the achievement of equality between men and women. Furthermore it was held that open and democratic societies generally denounce prostitution.<sup>1805</sup> These sentiments were preceded in the matter of *The National Director of Public Prosecutions v Phillips and Others*<sup>1806</sup> where the court found that the overthrow of the legislation, while not beyond contemplation, would not be achieved without the rejection of weighty considerations of policy and morality. Furthermore, the court was convinced that prostitution and the related offences under the Sexual Offences Act would survive constitutional scrutiny.

4.292 The Commission finds it apt to reflect the view of the Constitutional Court<sup>1807</sup> with reference to the Canadian Commission into Pornography and Prostitution. The Canadian report stated that the law by itself enjoys no special claim to be a solution to prostitution within society, but that "Despite the romantic notion entertained in some quarters that all will be well with the world of prostitution if only the criminal law is removed, the practical truth, it seems, is that it will not. All of the opportunities for damage, abuse, and exploitation remain."<sup>1808</sup> The Court stressed the importance of forging new tools and shaping innovative

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<sup>1803</sup> Kelly et al 31.

<sup>1804</sup> *Jordan v the State* 2002 (6) SA 642 (CC) at para 92.

<sup>1805</sup> Supra para 93.

<sup>1806</sup> 2002(4)SA 122 para 72.

<sup>1807</sup> At par 127.

<sup>1808</sup> The Canadian Commission into Pornography and Prostitution "Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution" Vol 2 Canadian Government Publishing Centre, Ottawa (1985) at 508. Accessed from

remedies as necessary to achieve the goal of effectively vindicating entrenched rights.<sup>1809</sup> It is the Commission's view that the recommendations contained in this Report contain such remedies.

**4.293 The Commission therefore recommends the retention of criminal sanctions for brothels and all third party offences. It recommends the repeal of sections 2, 3, 4, 5, 6, 7, 8, 10, 12, 12A, 20(1)(a), 20(1)(c) and 20(2) and the definitions pertinent to these sections of the Sexual Offences Act. It also recommends the enactment of the following definitions and provisions in the Sexual Offences Amendment Act:**

**“brothel”** includes any house, place, movable or immovable property kept or used for purposes of prostitution or for persons to visit for the purpose of engaging in prostitution;

**“house”** includes a dwelling house, building, room, out-house, shed or tent or any part thereof;

**“owner”** includes any person who lets or sub-lets or permits the occupation of any house or place, whether in his own right or that of another; or any person who owns, leases, rents, manages, occupies or has control of any movable or immovable property; and who intentionally allows or knowingly permits such movable or immovable property to be used for purposes of prostitution;

**“place”** includes any field, enclosure, space, vehicle, or boat or any part thereof;

**“police officer”** means any member of any police force established under the authority of any law;

**“prostitution”** means engaging the sexual services of a person 18 years or older for financial or other reward, favour or compensation for the purpose of engaging in a sexual act, irrespective of whether the sexual act is committed or not.

### **Keeping a brothel**

Any person who keeps a brothel shall be guilty of an offence.

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<sup>1809</sup> <http://www.lareau-legal.ca> on 21 November 2013.  
Para 128.

### **Certain persons deemed to keep a brothel**

Any person who:

- (a) resides in a brothel unless the person proves ignorance as to the character of the house or place;
- (b) manages or assists in the management of a brothel;
- (c) knowingly receives the whole or any share of any moneys taken in a brothel;
- (d) being the tenant or occupier of any house or place, knowingly permits the same to be used as a brothel;
- (e) being the owner of any house or place, lets the same, or allows the same to be let, or to continue to be let, with the knowledge that such house or place is to be kept or used or is being kept or used as a brothel.
- (f) is found in a brothel who refuses to disclose the name and identity of the keeper or manager thereof; and
- (g) any person whose spouse keeps or resides in or manages or assists in the management of a brothel, unless such person proves that he or she was ignorant thereof or that he or she lives apart from the said spouse and did not receive the whole or any share of the moneys taken therein,

is deemed to keep a brothel.

### **Onus of proof**

The onus of proof that a house, place, movable or immovable property is to be kept or used or is being used for prostitution to the knowledge of the owner shall be on the prosecution:

Provided that –

- (a) if it is established to the satisfaction of the court that, having regard to the locality and accommodation, the rent paid or to be paid for the house, place, movable or immovable property is exorbitant, the onus shall be on the owner to prove ignorance that such house, place, movable or immovable property is to be kept or used or was kept or used as a brothel;
- (b) proof of written notice having been given to the owner by a police officer or by two householders living in the vicinity of the house, place, movable or immovable property is being kept or used as a brothel, shall be conclusive proof of knowledge on his part.

### **Contract to let house, place, movable or immovable property for a brothel void**

Any contract to let any house, place, movable or immovable property to be kept or used as a brothel is null and void.

### **Use of house or place as a brothel voids contract of letting**

Any contract of letting and hiring of any house, place, movable or immovable property which subsequently to the making of such contract becomes a brothel is from the date of such event null and void: Provided that upon proof of the owner's ignorance that the house, place, movable or immovable property was so kept or used the owner shall be entitled to recover the rent up to the date upon which the owner became aware that the house, place, movable or immovable property was being kept or used as a brothel.

### **Summary ejectment when a house or place is used as a brothel**

The owner of any house, place, movable or immovable property kept or used as a brothel may apply to a court that has jurisdiction for the summary ejectment of any person who may be keeping or using such house, place, movable or immovable property as a brothel; and such court shall, after an enquiry, be competent to order the summary ejectment of such person.

### **Proceedings upon complaint by householders or police that a house or place is used as a brothel**

(1) If two or more householders of good repute make oath or place sworn information before a court that any house, place, movable or immovable property in the vicinity of the dwellings of such householders is being kept or used as a brothel, or if similar information is made on oath by any police officer or official employed by a department of state responsible for health or social development or by a local authority or a registered welfare organisation, the court may –

- (a) issue a warrant for arrest of the person alleged to be the keeper of such brothel; or
- (b) issue a warrant authorizing any police officer to –
  - (i) enter at any time and within a period stated in the warrant such house, place, movable or immovable property, for the purpose of ascertaining the name and identity of the keeper of such house, place, movable or immovable property;
  - (ii) interrogate and to demand the name and address of any person found in or upon the house, place, movable or immovable property; and
  - (iii) demand, search for, and seize any account book, receipt, paper, document or thing likely to afford evidence of the commission by any person of an offence under this Act.

(2) Any person found in or upon such house, place, movable or immovable property who, when called on to do so by the police officer conducting the search, refuses to furnish the police officer with the person's own name and address; or furnishes a false name or address; or refuses to disclose the name or identity of the keeper of such house, place, movable or immovable property; or refuses to produce any book, receipt, paper, document or thing that is in the possession, custody or control of the person; shall be guilty of an offence and liable on conviction to a fine not exceeding R1 000, and in default of payment to imprisonment for a period not exceeding six months.

(3) The issuing of a warrant under subsection (1)(b) shall in no way affect the power of the court to issue at any time a warrant under subsection (1)(a) or under any other law.

### **Procuration**

Any person who –

- (a) procures or attempts to procure any person to engage in prostitution with any person other than the procurer, or in any way assists in bringing about such sexual act; or
- (b) inveigles or entices any person to a brothel for the purpose of a sexual act or prostitution, or who conceals in any such house, place, movable or immovable property any person so inveigled or enticed; or
- (c) procures or attempts to procure any person to become a prostitute; or
- (d) procures or attempts to procure any person to become an inmate of a brothel; or
- (e) applies, administers to or causes any person to take any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower the person so as to enable any person other than the procurer to engage in a sexual act with such person,

shall be guilty of an offence.

### **Detention of a person for purposes of prostitution**

(1) Any person who takes or detains a person against their will –

- (a) to or in or upon any house, place, movable or immovable property with the intent that the person be made available for prostitution; or
- (b) to or in a brothel,

shall be guilty of an offence.

(2) Any person is deemed to detain a person in or upon any house, place, movable or immovable property or in a brothel if, with the intent to compel or induce the person to remain in or upon such, house, place, movable or immovable property or in such brothel, such person withholds any identifying documentation, clothing or possessions necessary to enable the person to leave such house, place, movable or immovable property or brothel.

### **Assistance for purposes of unlawful carnal intercourse**

Any person who, with intent or while he reasonably ought to have foreseen the possibility that any person who is 18 years or older may engage in prostitution, performs for reward any act calculated to enable any other person to communicate with any such person who is 18 years or older, shall be guilty of an offence.

### **Owner or occupier permitting on his premises any prostitution-related offence**

Any person who, being the owner or occupier of any house, place, movable or immovable property and having or acting or assisting in the management or control thereof, knowingly permits the use of such house, place, movable or immovable property for the purpose of any prostitution-related offence, shall be guilty of an offence.

### **Persons living on earnings of prostitution or committing or assisting in the commission of sexual acts**

(1) Any person who –

- (a) knowingly lives wholly or in part on the earnings of prostitution; or
- (b) in public or in private in any way assists in bringing about or receives any consideration for the commission of a sexual act with another person,

shall be guilty of an offence.

(2) If any court on the strength of information on oath finds that there is reason to suspect that any house, place, movable or immovable property is used for purposes of prostitution and that any person residing in or frequenting the house is living wholly or in part on the earnings of prostitution, the magistrate may issue a warrant authorizing any police officer to enter and search the house and to arrest that person.

Section 56 of the Sexual Offences Amendment Act is amended by inserting the following defence:

(9) A person (A) may not be convicted of an offence of knowingly living wholly or in part on the earnings of prostitution, or of receiving any consideration for the commission of a sexual act with another person (B), if A is –

- (a) a child; and
- (b) not a person contemplated in clause 9, 10 or 11, as the case may be.

### **Presumptions**

(1) Whenever in any prosecution under this Act a person is proved to reside in a brothel or to live with or to be habitually in the company of a prostitute, and has no visible means of

subsistence, such person shall, unless the court is satisfied to the contrary, be deemed to be knowingly living wholly or in part on the earnings of prostitution.

- (2) Whenever in any prosecution for an offence under section xx it is proved –
- (a) that the accused has performed any act for reward, such act being calculated to enable any person to communicate with any other person who is a prostitute; or
  - (b) that the other person with whom communication was made as a result of such act has engaged in prostitution,

the accused shall be presumed to have performed such act with intent or while he reasonably ought to have foreseen the possibility that such other person may engage in prostitution, unless the contrary is proved beyond reasonable doubt.

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## **FOREIGN LEGISLATION**

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The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, 2000 (Palermo Protocol)

CEDAW

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## **RESEARCH INTERVIEWS**

Research interview with Barnett, MP (former Parliamentarian in New Zealand) held on August 2009

Skype research interview with Vera Baird, the UK Solicitor-general 21 July 2010

Research interview with Piet Byleveldt former top detective in the SAPS held on 10 August 2010

Research interview with Major-General Tertius Geldenhuys SAPS Legal Services held on 19 August 2011

Research interview with Stef a former prostitute and outreach worker held on 15 October 2009.

The open workshops conducted by the Commission around South Africa during 2009 and closed workshops for prostitutes arranged by SWEAT and SISONKE in 2009 and 2010.

Research interview with Ms Nozizwe Madlala-Routledge (Embrace Dignity) on 7 December 2012.

Email correspondence with the co-chair of the HPPB (protracted).

Email correspondence between the researcher and the NPA and SAPS (protracted).

# ANNEXURE A: DRAFT AMENDMENT BILL

## Option 1: Partial criminalisation (Prostitute not criminalised)

REPUBLIC OF SOUTH AFRICA

CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT  
AMENDMENT BILL

(MINISTER FOR JUSTICE AND CORRECTIONAL SERVICES)

GENERAL EXPLANATORY NOTE:

[            ]            Words in bold type in square brackets indicate omissions from existing enactments.  
\_\_\_\_\_            Words underlined with a solid line indicate insertions in existing enactments.

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B I L L

**To amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 by inserting offences relating to prostitution of persons 18 years or older; and to provide for matters connected therewith.**

**Parliament of the Republic of South Africa enacts, as follows:—**

**Repeal of Act 23 of 1957**

1. The Sexual Offences Act, 1957 is hereby repealed.

#### **Amendment of section 268 of Act 51 of 1977**

2. Section 268 of the Criminal Procedure Act, 1977 is hereby amended by the substitution of the following section:

**“268. [Statutory unlawful carnal intercourse] Committing sexual acts in public by persons 18 years or older**

If the evidence on a charge of **[unlawful carnal intercourse or attempted unlawful carnal intercourse with another person in contravention of any statute]** committing a sexual act in public as contemplated in clause 10I of the Sexual Offences Act, 2007 does not prove that offence but -

(a) the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the **[Criminal Law (Sexual Offences and Related Matters) Amendment Act] Sexual Offences Act, 2007**, respectively;

(b) the offence of common assault; or

(c) the statutory offences of -

(i) soliciting **[, enticing or importuning such other person to have unlawful carnal intercourse]** to commit a sexual act as contemplated in clause 10H of the Sexual Offences Act, 2007;

(iii) **[soliciting, enticing or importuning such other person to commit an immoral or indecent act; or**

(iv) **conspiring with such other person to have unlawful carnal intercourse],**

the accused may be found guilty of the offence so proved.”.

#### **Amendment of Part 3 of Act 32 of 2007**

3. The following heading is hereby substituted for the heading of Part 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (In this Act referred to as the principal Act):

“Persons 18 years or older: Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation, exposure or display of or causing exposure or display of genital organs, anus or female breasts (“flashing”)[,]”

and child pornography to persons 18 years or older [or engaging sexual services of persons 18 years or older]".

#### **Insertion of Part 3A in Act 32 of 2007**

4. The following part is hereby inserted after Section 10 of the principal Act:

#### **Part 3A**

#### **Definitions and offences relating to the prostitution of persons 18 years or older, the keeping of brothels and the provision of diversion orders**

#### **Definitions**

**10A.** For the purposes of this Chapter, and unless the context indicates otherwise –  
**“brothel”** includes any house, place, movable or immovable property kept or used for purposes of prostitution or for persons to visit for the purpose of engaging in prostitution;

**“house”** includes a dwelling house, building, room, out-house, shed or tent or any part thereof;

**“owner”** includes any person who lets or sub-lets or permits the occupation of any house or place whether in his own right or that of another; or any person who owns, leases, rents, manages, occupies or has control of any movable or immovable property and intentionally allows or knowingly permits such movable or immovable property to be used for purposes of prostitution;

**“place”** includes any field, enclosure, space, vehicle, or boat or any part thereof;

**“police officer”** means any member of any police force established under the authority of any law;

**“prostitution”** means providing or engaging the sexual services of a person 18 years or older for financial or other reward, favour or compensation for the purpose of engaging in a sexual act, irrespective of whether the sexual act is committed or not.

#### **Procuration**

**10B.** Any person (“A”) who –

- (a) procures or attempts to procure any person 18 years or older (“B”) to engage in prostitution with any person other than the procurer (“C”), or in any way assists in bringing about such sexual act; or

- (b) inveigles or entices B to a brothel for the purpose of a sexual act or prostitution or who conceals in any such house, place, movable or immovable property any person 18 years or older so inveigled or enticed; or
- (c) procures or attempts to procure B to become a prostitute; or
- (d) procures or attempts to procure B to become an inmate of a brothel; or
- (e) applies, administers to or causes B to take any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower the person 18 years or older so as to enable any person other than the procurer to engage in a sexual act with such person,

shall be guilty of an offence.

### **Detention of a person 18 years or older for purposes of prostitution**

**10C.** (1) Any person (“A”) who takes or detains a person 18 years or older (“B”) against their will—

(a) to or in or upon any house, place, movable or immovable property with the intent that the person be made available for prostitution; or

(b) to or in a brothel,

shall be guilty of an offence.

(2) A is deemed to detain B in or upon any house, place, movable or immovable property or in a brothel if, with the intent to compel or induce B to remain in or upon such, house, place, movable or immovable property or in such brothel, A withholds any identifying documentation, clothing or possessions necessary to enable B to leave such house, place, movable or immovable property or brothel.

### **Paying for sexual services of a person 18 years or older subjected to force**

**10D.** (1) A person (“A”) commits an offence if—

(a) A makes or promises payment for the sexual services of a person 18 years or older (“B”),

(b) a third person (“C”) has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has offered, made or promised payment, and

(c) C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B).

(2) The following are irrelevant—

(a) where in the world the sexual services are to be provided and whether those services are provided,

- (b) whether the person offering, making or promising payment is, or ought to be, aware that C has engaged in exploitative conduct.
- (3) C engages in exploitative conduct if—
  - (a) C uses force, threats (whether or not relating to violence) or any other form of coercion, or
  - (b) C practices any form of deception.

#### **Assistance for purposes of engaging in prostitution**

**10E.** Any person (“A”) who, with intent or while the person reasonably ought to have foreseen the possibility that any person, who is 18 years or older (“B”), may engage in prostitution, performs for reward any act that is calculated to enable any other person (“C”) to communicate with B, shall be guilty of an offence.

#### **Advertising the sexual services of persons 18 years or older**

**10F.** (1) A person (“A”) who unlawfully and intentionally through advertising directly or indirectly encourages, instigates or aids the engagement of services of a person 18 years or older (“B”), for financial or other reward, favour or compensation to B or to a third person (“C”) —

- (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
  - (b) by committing a sexual act with B,
- is guilty of advertising the sexual services of a person 18 years or older.

#### **Owner or occupier permitting on his premises any prostitution-related offence**

**10G.** Any person who, being the owner or occupier of any house, place, movable or immovable property and having or acting or assisting in the management or control thereof, knowingly permits the use of such house, place, movable or immovable property for the purpose of any prostitution-related offence, shall be guilty of an offence.

#### **Soliciting to commit a sexual act**

**10H.** (1) A person 18 years or older (“A”) who unlawfully and intentionally entices, solicits, or importunes in any public place to commit a sexual act with a person (“B”) for financial or other reward, favour or compensation to A or to a third person (“C”) is guilty of the offence of soliciting to commit a sexual act.

(2) Where B unlawfully and intentionally entices, solicits, or importunes in any public place to commit a sexual act with A for financial or other reward, favour or

compensation to A or to C, B is guilty of the offence of soliciting to commit a sexual act.

(3) If A openly exhibits himself or herself at any door or window or within view of any public street or place or in any place to which the public have access, with the intention of enticing, soliciting or importuning B to commit a sexual act for financial or other reward, favour or compensation is guilty of the offence of exhibiting to commit a sexual act.

(4) Reference to a public place includes a vehicle in a street or public place.

### **Committing sexual acts in public**

**10I.** (1) A person 18 years or older ("A") who unlawfully and intentionally commits a sexual act with a person ("B"), for financial or other reward, favour or compensation to B or to a third person ("C") in public is guilty of the offence of committing a sexual act in public.

(2) A person ("B") who unlawfully and intentionally commits a sexual act with a person 18 years or older ("A"), for financial or other reward, favour or compensation to A or to a third person ("C") in public is guilty of the offence of committing a sexual act in public.

(3) Reference to a public place includes a vehicle in a street or public place."

### **Persons living on earnings of prostitution or committing or assisting in the commission of sexual acts**

**10J.** (1) Any person ("A") who —  
(a) knowingly lives wholly or in part on the earnings of prostitution; or  
(b) in public or in private in any way assists in bringing about, or receives  
any consideration for, the commission of a sexual act with another  
person, irrespective of whether the sexual act is committed or not,  
shall be guilty of an offence.

(2) If any court on the strength of information on oath finds that there is reason to suspect that any house, place, movable or immovable property is used for purposes of prostitution and that A who resides in or frequenting the house is living wholly or in part on the earnings of prostitution, the magistrate may issue a warrant authorizing any police officer to enter and search the house and to arrest A.

**Insertion of sections 11A, 11B, 11C, 11D, 11E, 11F, 11G, 11H, 11I, 11J, 11K, 11L, 11M and 11N in Act 32 of 2007**

5. The following sections are hereby inserted in the principal Act after section 11:

**“Keeping a brothel**

**11A.** Any person who keeps a brothel shall be guilty of an offence.

**Certain persons deemed to keep a brothel**

**11B.** Any person who:

- (a) resides in a brothel unless the person proves ignorance as to the character of the house or place;
- (b) manages or assists in the management of a brothel;
- (c) knowingly receives the whole or any share of any moneys taken in a brothel;
- (d) being the tenant or occupier of any house or place, knowingly permits the same to be used as a brothel;
- (e) being the owner of any house or place, lets the same, or allows the same to be let, or to continue to be let, with the knowledge that such house or place is to be kept or used or is being kept or used as a brothel.
- (f) is found in a brothel who refuses to disclose the name and identity of the keeper or manager thereof; and
- (g) any person whose spouse or partner keeps or resides in or manages or assists in the management of a brothel, unless such person proves that he or she was ignorant thereof or that he or she lives apart from the said spouse or partner and did not receive the whole or any share of the moneys taken therein,

is deemed to keep a brothel.

**Onus of proof**

**11C.** The onus of proof that a house, place, movable or immovable property is to be kept or used or is being used for prostitution to the knowledge of the owner shall be on the prosecution: Provided that—

- (a) if it is established to the satisfaction of the court that, having regard to the locality and accommodation, the rent paid or to be paid for the house, place, movable or immovable property is exorbitant, the onus shall be on the owner to prove ignorance that such house, place, movable or immovable property is to be kept or used or was kept or used as a brothel;

(b) proof of written notice having been given to the owner by a police officer or by two householders living in the vicinity of the house, place, movable or immovable property is being kept or used as a brothel, shall be conclusive proof of knowledge on the owner's part.

**Contract to let house, place, movable or immovable property for a brothel void**

**11D.** Any contract to let any house, place, movable or immovable property to be kept or used as a brothel is null and void.

**Use of house or place as a brothel voids contract of letting**

**11E.** Any contract of letting and hiring of any house, place, movable or immovable property which subsequently to the making of such contract becomes a brothel is from the date of such event null and void: Provided that upon proof of the owner's ignorance that the house, place, movable or immovable property was so kept or used the owner shall be entitled to recover the rent up to the date upon which the owner became aware that the house, place, movable or immovable property was being kept or used as a brothel.

**Summary ejectment when a house or place is used as a brothel**

**11F.** The owner of any house, place, movable or immovable property kept or used as a brothel may apply to a court that has jurisdiction for the summary ejectment of any person who may be keeping or using such house, place, movable or immovable property as a brothel; and such court shall, after an enquiry, be competent to order the summary ejectment of such person.

**Proceedings upon complaint by householders or police that a house or place is used as a brothel**

**11G. (1)** If two or more householders of good repute make oath or place sworn information before a court that any house, place, movable or immovable property in the vicinity of the dwellings of such householders is being kept or used as a brothel or if similar information is made on oath by any police officer or official employed by a department of state responsible for health or social development, a local authority or by a registered welfare organisation, the court may —

(a) issue a warrant of arrest of the person alleged to be the keeper of such brothel; or

(b) issue a warrant authorizing any police officer to —

- (i) enter at any time and within a period stated in the warrant such house, place, movable or immovable property for the purpose of ascertaining the name and identity of the keeper of such house, place, movable or immovable property;
- (ii) interrogate and to demand the name and address of any person found in or upon the house, place, movable or immovable property; and
- (iii) demand, search for, and seize any account book, receipt, paper, document or thing likely to afford evidence of the commission by any person of an offence under this Act.

(2) Any person found in or upon such house, place, movable or immovable property who, when called on to do so by the police officer conducting the search, refuses to furnish the police officer with the person's own name and address; or furnishes a false name or address; or refuses to disclose the name or identity of the keeper of such house, place, movable or immovable property; or refuses to produce any book, receipt, paper, document or thing that is in the possession, custody or control of the person; shall be guilty of an offence and liable on conviction to a fine not exceeding R1 000, and in default of payment to imprisonment for a period not exceeding six months.

(3) The issuing of a warrant under subsection (1)(b) shall in no way affect the power of the court to issue at any time a warrant under subsection (1)(a) or under any other law.

### **Presumptions**

**11H. (1)** Whenever in any prosecution under this Act a person ("A") is proved to reside in a brothel or to live with or to be habitually in the company of a prostitute and has no visible means of subsistence, such person shall, unless the court is satisfied to the contrary, be deemed to be knowingly living wholly or in part on the earnings of prostitution.

- (2) Whenever in any prosecution for an offence under section 12 it is proved-
  - (a) that the accused has performed any act for reward which was calculated to enable any person to communicate with any other person who is a prostitute;
  - or
  - (b) that the other person with whom communication was made as a result of such act has engaged in prostitution, the accused shall be presumed to have performed such act with intent or while he reasonably ought to have

foreseen the possibility that such other person may engage in prostitution, unless the contrary is proved beyond reasonable doubt.

### **Consideration of diversion**

11I. (1) A matter may, after consideration of all relevant information presented, including whether the person 18 years or older (“A”) who is alleged to have committed a prostitution related offence has a record of previous diversions, be considered for diversion if –

- (a) A acknowledges responsibility for the offence;
- (b) A has not been unduly influenced to acknowledge responsibility;
- (c) there is a prima facie case against A;
- (d) A consents to diversion; and
- (e) the prosecutor indicates that the matter may be diverted.

### **Diversion order**

11J. (1) A prosecutor may divert a matter involving a person who is alleged to have committed a prostitution related offence and may select an appropriate diversion option.

(2) If a matter is diverted, the person alleged to have committed a prostitution related offence must appear before a magistrate in chambers, in order to have the diversion option, made an order of court.

(3) If a prosecutor decides not to divert a matter, he or she must refer the matter to court for adjudication.

(4) The court may order diversion if the court is satisfied that the order is appropriate and will benefit the reintegration of the person into society.

(5) Diversion options include –

- (a) Compulsory attendance at a specified centre or place for a specified \_\_\_\_\_ vocational, educational or therapeutic purpose, which may include a \_\_\_\_\_ period or periods of temporary residence;
- (b) Referral to intensive therapy to treat or manage problems that have \_\_\_\_\_ been identified as a cause of the person coming into conflict with the \_\_\_\_\_ law, which may include a period or periods of temporary residence.

**Provision and accreditation of diversion programmes and diversion service providers**

11K. (1) A prosecutor or court may only refer a matter for diversion to a diversion programme and diversion service provider that has been accredited and has a valid certificate of accreditation.

(2)(a) The Cabinet member responsible for social development, in consultation with the Cabinet members responsible for the administration of justice, education, correctional services, safety and security and health must –

- (i) create a policy framework to develop the capacity within all levels of Government and the non-governmental sector to establish, maintain and develop programmes for diversion;
  - (ii) establish and maintain a system for accreditation, as prescribed, of programmes for diversion and diversion service providers; and
  - (iii) ensure the availability of resources to implement diversion programmes, as prescribed.
- (b) The system for accreditation referred to in paragraph (a)(ii) must contain –
- (i) criteria for the evaluation of diversion programmes;
  - (ii) criteria for the evaluation of the content of diversion programmes to ensure they reflect a meaningful and adequate response to the harm caused by prostitution related offences and provide appropriate and relevant training and skills for successful integration into society and the formal economy;
  - (iii) mechanisms to monitor diversion programmes and diversion service providers in respect of their ability to render quality service in achieving the objectives of diversion and their ability to promote compliance with diversion orders;
  - (iv) measures for the removal of diversion programmes and diversion service providers from the system, where appropriate.
- (c) The Cabinet member responsible for social development must –
- (i) before the commencement of this Act, table the policy framework and system for accreditation referred to in (a)(i) and (ii) in Parliament;
  - (ii) three months after tabling the policy framework and system for accreditation in Parliament, publish a notice in the *Gazette*, inviting applications for the accreditation of diversion programmes and diversion service providers, as provided for in the policy framework and system for accreditation referred to in subparagraph (i), which applications must be submitted within four months from the publication of the notice;

- (iii) within four months of the closing date for applications referred to in subparagraph (ii), ensure that all applications received are considered and decided on, with preference being given to the finalisation of applications in respect of diversion programmes and diversion service providers which existed at the time of commencement of the Act.
  - (d) After the expiry of the time limits referred to in paragraph (c), all applicants for accreditation must be dealt with in the manner and within the time limits determined in the policy framework and system for accreditation.
  - (e) The Cabinet member responsible for social development must issue a prescribed certificate of accreditation to each diversion programme and diversion service provider that is accredited in terms of this section.
  - (f) A certificate of accreditation referred to in paragraph (e) is valid for a maximum period of four years from the date of accreditation.
  - (g) A quality assurance process must be conducted in the prescribed manner in respect of each accredited diversion programme and diversion service provider.
- (3)(a) The Cabinet member responsible for social development must publish the particulars of each diversion programme and diversion service provider that is accredited or removed from the system in terms of this section in the *Gazette* within 30 days of accreditation or removal.
- (b) The Director-General: Social Development must, immediately after any publication referred to in paragraph (a), provide a copy of the publication to –
- (i) the relevant role-players falling under his or her jurisdiction; and
  - (ii) the Director-General: Justice and Correctional Services, who must distribute the publication to all relevant role-players who are involved in the administration of this Act.

### **Monitoring of compliance with diversion order**

**11L.** (1) When making a diversion order, the court referred to in clause 21, must identify a probation officer or other suitable person to monitor the person's compliance with the diversion order.

(2) If a person fails to comply with the diversion order, the probation officer or person identified in terms of section (1) must, in the prescribed manner, notify the magistrate in writing of the failure.

### **Successful compliance by a person 18 years or older with diversion order**

**11M. (1)** Where a person 18 years or older involved in a prostitution related offence successfully complies with any diversion order he or she may apply to the court referred to in clause 21 for an order that previous convictions for prostitution related offences be expunged.

**(2)** The court referred to in clause 21 may after examining the evidence before it make an order that such person's criminal record insofar as it relates to prostitution related offences be expunged.

### **Failure to comply with diversion order**

**11N. (1)** If a person fails to comply with any diversion order, the prosecutor may decide —

**(i)** to proceed with the prosecution; or

**(ii)** not to go to trial, but to place the person on another diversion option which is more onerous than the diversion option originally decided on.

**(2)** If a person fails to comply with any diversion order, the court referred to in clause 21 may, on being notified of the failure, in the prescribed manner, issue a warrant of arrest for the person or cause a summons to be issued in respect of the person, to appear before the court.

**(3)** The court may-

**(i)** make an appropriate order to assist the person to comply with the diversion order;

**(ii)** change the diversion order to ensure compliance; or

**(iii)** record the acknowledgment of responsibility made by the person as an admission referred to in section 220 of the Criminal Procedure Act and proceed with trial.”.

### **Amendment of section 56 of Act 32 of 2007**

**6.** Section 56 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 is hereby amended by the following insertion:

**“(9)** A person may not be convicted of an offence of knowingly living wholly or in part on the earnings of prostitution or receiving any consideration for, the commission of a sexual act with another person, if that person is —

**(a)** a child; and

- (b) not a person contemplated in section 10B, 10C or 10D, as the case may be.
- (10) (a) A court may make a finding discharging a person from prosecution as provided for in terms of section 204 of the Criminal Procedure Act 51 of 1977 for an offence related to prostitution of a person 18 years or older where such person reports another offence while engaging the sexual services of a person 18 years or older as provided for in section 11.
- (b) This discharge does not extend to such person’s participation in the reported offence.”.

#### **Amendment of section 72 of Act 32 of 2007**

7. Section 72 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) This Act is called the [**Criminal Law (Sexual Offences and Related Matters) Amendment Act**], Sexual Offences Act 2007, and , subject to subsection (2), takes effect on 16 December 2007, or an earlier date fixed by the President by proclamation in the *Gazette*.”

#### **Amendment of index of Act 32 of 2007**

8. The index of the principal Act is hereby amended –
- (a) by the substitution of the heading Part 3 after item 7 with the following heading:
- “Part 3: Persons 18 years or older: Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation, exposure or display of or causing exposure or display of genital organs, anus or female breasts (“flashing”)[,] and child pornography to persons 18 years or older [**or engaging sexual services of persons 18 years or older**]”; and
- (b) by the insertion after item 10 of the following items:
- “Part 3A: Definitions and offences relating to the prostitution of persons 18 years or older, the keeping of brothels and the provision of diversion orders**

10A. Definitions

- 10B. Procuration
- 10C. Detention of a person 18 years or older for purposes of prostitution
- 10D. Paying for sexual services of a person 18 years or older subjected to force
- 10E. Assistance for purposes of engaging in prostitution
- 10F. Advertising the sexual services of persons 18 years or older
- 10G. Owner or occupier permitting on his premises any prostitution-related offence
- 10H. Soliciting to commit a sexual act
  
- 10I. Committing sexual acts in public
- 10J. Persons living on earnings of prostitution or committing or assisting in the commission of sexual acts”; and

(c) by the insertion after item 11 of the following items:

- “11A. Keeping a brothel
- 11B. Certain persons deemed to keep a brothel
- 11C. Onus of proof
- 11D. Contract to let house, place, movable or immovable property for a brothel void
- 11E. Use of house or place as a brothel voids contract of letting
- 11F. Summary ejection when a house or place is used as a brothel
- 11G. Proceedings upon complaint by householders or police that a house or place is used as a brothel
- 11H. Presumptions
- 11I. Consideration of diversion
- 11J. Diversion order
- 11K. Provision and accreditation of diversion programmes and diversion service providers
- 11L. Monitoring of compliance with diversion order
- 11M. Successful compliance by a person 18 years or older with diversion order
- 11N. Failure to comply with diversion order”.

### **Transitional provision**

**9.** Any reference in any law to the Criminal Law (Sexual Offences and Related Matters) Amendment Act must after implementation of this Act be considered to be a reference to the Sexual Offences Act.

### **Short title and commencement**

**10.** This Act shall be called the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Amendment Act 2014, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

## Option 2: Total criminalisation (with diversion)

REPUBLIC OF SOUTH AFRICA

CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT  
AMENDMENT BILL

(MINISTER FOR JUSTICE AND CORRECTIONAL SERVICES)

### GENERAL EXPLANATORY NOTE:

[            ]            Words in bold type in square brackets indicate omissions from existing enactments.  
\_\_\_\_\_            Words underlined with a solid line indicate insertions in existing enactments.

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### B I L L

**To amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 by inserting offences relating to prostitution of persons 18 years or older; and to provide for matters connected therewith.**

**P**arliament of the Republic of South Africa enacts, as follows:—

#### **Repeal of Act 23 of 1957**

1. The Sexual Offences Act, 1957 is hereby repealed.

## **Amendment of section 268 of Act 51 of 1977**

2. Section 268 of the Criminal Procedure Act, 1977 is hereby amended by the substitution of the following section:

**“268. [Statutory unlawful carnal intercourse] Making available of sexual services by persons 18 years or older**

If the evidence on a charge of **[unlawful carnal intercourse or attempted unlawful carnal intercourse with another person in contravention of any statute] making available of sexual services by persons 18 years or older as contemplated in clause 10I of the Sexual Offences Act, 2007** does not prove that offence but -

(a) the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the **[Criminal Law (Sexual Offences and Related Matters) Amendment Act] Sexual Offences Act, 2007**, respectively;

(b) the offence of common assault; or

(c) the statutory offences of -

(i) **[committing an immoral or indecent act with such other person] committing sexual acts in public as contemplated in clause 10J of the Sexual Offences Act, 2007; or**

(ii) **soliciting [, enticing or importuning such other person to have unlawful carnal intercourse] to commit a sexual act as contemplated in clause 10H of the Sexual Offences Act, 2007;**

(iii) **[soliciting, enticing or importuning such other person to commit an immoral or indecent act; or**

(iv) **conspiring with such other person to have unlawful carnal intercourse],**

the accused may be found guilty of the offence so proved.”.

## **Amendment of Part 3 of Act 32 of 2007**

3. The following heading is hereby substituted for the heading of Part 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (In this Act referred to as the principal Act):

“Persons 18 years or older: Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation, exposure or display of or causing exposure or display of genital organs, anus or female breasts (“flashing”)[,] **and child pornography to persons 18 years or older [or engaging sexual services of persons 18 years or older]**”.

## Insertion of Part 3A in Act 32 of 2007

4. The following part is hereby inserted after Section 10 of the principal Act:

### **“Part 3A**

#### **Definitions and offences relating to the prostitution of persons 18 years or older, the keeping of brothels and the provision of diversion orders**

##### **Definitions**

**10A.** For the purposes of this Chapter, and unless the context indicates otherwise –  
**“brothel”** includes any house, place, movable or immovable property kept or used for purposes of prostitution or for persons to visit for the purpose of engaging in prostitution;

**“house”** includes a dwelling house, building, room, out-house, shed or tent or any part thereof;

**“owner”** includes any person who lets or sub-lets or permits the occupation of any house or place whether in his own right or that of another; or any person who owns, leases, rents, manages, occupies or has control of any movable or immovable property and intentionally allows or knowingly permits such movable or immovable property to be used for purposes of prostitution;

**“place”** includes any field, enclosure, space, vehicle, or boat or any part thereof;

**“police officer”** means any member of any police force established under the authority of any law;

**“prostitution”** means providing or engaging the sexual services of a person 18 years or older for financial or other reward, favour or compensation for the purpose of engaging in a sexual act, irrespective of whether the sexual act is committed or not.

##### **Procuration**

**10B.** Any person (“A”) who –

(a) procures or attempts to procure any person 18 years or older (“B”) to engage in prostitution with any person other than the procurer (“C”), or in any way assists in bringing about such sexual act; or

(b) inveigles or entices B to a brothel for the purpose of a sexual act or prostitution or who conceals in any such house, place, movable or immovable property any person 18 years or older so inveigled or enticed; or

- (c) procures or attempts to procure B to become a prostitute; or
  - (d) procures or attempts to procure B to become an inmate of a brothel; or
  - (e) applies, administers to or causes B to take any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower the person 18 years or older so as to enable any person other than the procurer to engage in a sexual act with such person.
- shall be guilty of an offence.

### **Detention of a person 18 years or older for purposes of prostitution**

**10C.** (1) Any person ("A") who takes or detains a person 18 years or older ("B") against their will—

- (a) to or in or upon any house, place, movable or immovable property with the intent that the person be made available for prostitution; or
- (b) to or in a brothel,

shall be guilty of an offence.

(2) A is deemed to detain B in or upon any house, place, movable or immovable property or in a brothel if, with the intent to compel or induce B to remain in or upon such, house, place, movable or immovable property or in such brothel, A withholds any identifying documentation, clothing or possessions necessary to enable B to leave such house, place, movable or immovable property or brothel.

### **Paying for sexual services of a person 18 years or older subjected to force**

**10D.** (1) A person ("A") commits an offence if—

- (a) A makes or promises payment for the sexual services of a person 18 years or older ("B"),
- (b) a third person ("C") has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has offered, made or promised payment, and
- (c) C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B).

(2) The following are irrelevant—

- (a) where in the world the sexual services are to be provided and whether those services are provided,
- (b) whether the person offering, making or promising payment is, or ought to be, aware that C has engaged in exploitative conduct.

(3) C engages in exploitative conduct if—

- (a) C uses force, threats (whether or not relating to violence) or any other form of coercion, or
- (b) C practices any form of deception.

**Assistance for purposes of engaging in prostitution**

**10E.** Any person (“A”) who, with intent or while the person reasonably ought to have foreseen the possibility that any person, who is 18 years or older (“B”), may engage in prostitution, performs for reward any act that is calculated to enable any other person (“C”) to communicate with B, shall be guilty of an offence.

**Advertising the sexual services of persons 18 years or older**

**10F. (1)** A person (“A”) who unlawfully and intentionally through advertising directly or indirectly encourages, instigates or aids the engagement of services of a person 18 years or older (“B”), for financial or other reward, favour or compensation to B or to a third person (“C”) —

- (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
  - (b) by committing a sexual act with B,
- is guilty of advertising the sexual services of a person 18 years or older.

**Owner or occupier permitting on his premises any prostitution-related offence**

**10G.** Any person who, being the owner or occupier of any house, place, movable or immovable property and having or acting or assisting in the management or control thereof, knowingly permits the use of such house, place, movable or immovable property for the purpose of any prostitution-related offence, shall be guilty of an offence.

**Soliciting to commit a sexual act**

**10H. (1)** A person 18 years or older (“A”) who unlawfully and intentionally entices, solicits, or importunes in any public place to commit a sexual act with a person (“B”) for financial or other reward, favour or compensation to A or to a third person (“C”) is guilty of the offence of soliciting to commit a sexual act.

(2) Where B unlawfully and intentionally entices, solicits, or importunes in any public place to commit a sexual act with A for financial or other reward, favour or compensation to A or to C, B is guilty of the offence of soliciting to commit a sexual act.

(3) If A openly exhibits himself or herself at any door or window or within view of any public street or place or in any place to which the public have access, with the intention of enticing, soliciting or importuning B to commit a sexual act for financial or other reward, favour or compensation is guilty of the offence of exhibiting to commit a sexual act.

(4) Reference to a public place includes a vehicle in a street or public place.

### **Making available of sexual services by persons 18 years or older**

**10I.** A person 18 years or older (“A”) who unlawfully and intentionally makes available his or her services to a person (“B”), for financial or other reward, favour or compensation to A or to a third person (“C”) —

- (a) for the purpose of engaging in a sexual act with B or C, irrespective of whether the sexual act is committed or not; or
- (b) by committing a sexual act with the B or C,

is guilty of the offence of making available his or her sexual services for reward.

### **Committing sexual acts in public**

**10J.** (1) A person 18 years or older (“A”) who unlawfully and intentionally commits a sexual act with a person (“B”), for financial or other reward, favour or compensation to B or to a third person (“C”) in public is guilty of the offence of committing a sexual act in public.

(2) A person (“B”) who unlawfully and intentionally commits a sexual act with a person 18 years or older (“A”), for financial or other reward, favour or compensation to A or to a third person (“C”) in public is guilty of the offence of committing a sexual act in public.

(3) Reference to a public place includes a vehicle in a street or public place.”

### **Persons living on earnings of prostitution or committing or assisting in the commission of sexual acts**

**10K.** (1) Any person (“A”) who —

- (a) knowingly lives wholly or in part on the earnings of prostitution; or
- (b) in public or in private in any way assists in bringing about, or receives any consideration for, the commission of a sexual act with another person, irrespective of whether the sexual act is committed or not,

shall be guilty of an offence.

(2) If any court on the strength of information on oath finds that there is reason to suspect that any house, place, movable or immovable property is used for purposes

of prostitution and that A who resides in or frequenting the house is living wholly or in part on the earnings of prostitution, the magistrate may issue a warrant authorizing any police officer to enter and search the house and to arrest A.

**Insertion of sections 11A, 11B, 11C, 11D, 11E, 11F, 11G, 11H, 11I, 11J, 11K, 11L, 11M and 11N in Act 32 of 2007**

5. The following sections are hereby inserted in the principal Act after section 11:

**“Keeping a brothel**

**11A.** Any person who keeps a brothel shall be guilty of an offence.

**Certain persons deemed to keep a brothel**

**11B.** Any person who:

- (a) resides in a brothel unless the person proves ignorance as to the character of the house or place;
- (b) manages or assists in the management of a brothel;
- (c) knowingly receives the whole or any share of any moneys taken in a brothel;
- (d) being the tenant or occupier of any house or place, knowingly permits the same to be used as a brothel;
- (e) being the owner of any house or place, lets the same, or allows the same to be let, or to continue to be let, with the knowledge that such house or place is to be kept or used or is being kept or used as a brothel.
- (f) is found in a brothel who refuses to disclose the name and identity of the keeper or manager thereof; and
- (g) any person whose spouse or partner keeps or resides in or manages or assists in the management of a brothel, unless such person proves that he or she was ignorant thereof or that he or she lives apart from the said spouse or partner and did not receive the whole or any share of the moneys taken therein,

is deemed to keep a brothel.

**Onus of proof**

**11C.** The onus of proof that a house, place, movable or immovable property is to be kept or used or is being used for prostitution to the knowledge of the owner shall be on the prosecution: Provided that—

- (a) if it is established to the satisfaction of the court that, having regard to the locality and accommodation, the rent paid or to be paid for the house, place,

movable or immovable property is exorbitant, the onus shall be on the owner to prove ignorance that such house, place, movable or immovable property is to be kept or used or was kept or used as a brothel;

- (b) proof of written notice having been given to the owner by a police officer or by two householders living in the vicinity of the house, place, movable or immovable property is being kept or used as a brothel, shall be conclusive proof of knowledge on the owner's part.

**Contract to let house, place, movable or immovable property for a brothel void**

**11D.** Any contract to let any house, place, movable or immovable property to be kept or used as a brothel is null and void.

**Use of house or place as a brothel voids contract of letting**

**11E.** Any contract of letting and hiring of any house, place, movable or immovable property which subsequently to the making of such contract becomes a brothel is from the date of such event null and void: Provided that upon proof of the owner's ignorance that the house, place, movable or immovable property was so kept or used the owner shall be entitled to recover the rent up to the date upon which the owner became aware that the house, place, movable or immovable property was being kept or used as a brothel.

**Summary ejectment when a house or place is used as a brothel**

**11F.** The owner of any house, place, movable or immovable property kept or used as a brothel may apply to a court that has jurisdiction for the summary ejectment of any person who may be keeping or using such house, place, movable or immovable property as a brothel; and such court shall, after an enquiry, be competent to order the summary ejectment of such person.

**Proceedings upon complaint by householders or police that a house or place is used as a brothel**

**11G. (1)** If two or more householders of good repute make oath or place sworn information before a court that any house, place, movable or immovable property in the vicinity of the dwellings of such householders is being kept or used as a brothel or if similar information is made on oath by any police officer or official employed by a department of state responsible for health or social development, a local authority or by a registered welfare organisation, the court may —

- (a) issue a warrant of arrest of the person alleged to be the keeper of such brothel; or
- (b) issue a warrant authorizing any police officer to –
  - (i) enter at any time and within a period stated in the warrant such house, place, movable or immovable property for the purpose of ascertaining the name and identity of the keeper of such house, place, movable or immovable property;
  - (ii) interrogate and to demand the name and address of any person found in or upon the house, place, movable or immovable property; and
  - (iii) demand, search for, and seize any account book, receipt, paper, document or thing likely to afford evidence of the commission by any person of an offence under this Act.

(2) Any person found in or upon such house, place, movable or immovable property who, when called on to do so by the police officer conducting the search, refuses to furnish the police officer with the person's own name and address; or furnishes a false name or address; or refuses to disclose the name or identity of the keeper of such house, place, movable or immovable property; or refuses to produce any book, receipt, paper, document or thing that is in the possession, custody or control of the person; shall be guilty of an offence and liable on conviction to a fine not exceeding R1 000, and in default of payment to imprisonment for a period not exceeding six months.

(3) The issuing of a warrant under subsection (1)(b) shall in no way affect the power of the court to issue at any time a warrant under subsection (1)(a) or under any other law.

### **Presumptions**

11H. (1) Whenever in any prosecution under this Act a person ("A") is proved to reside in a brothel or to live with or to be habitually in the company of a prostitute and has no visible means of subsistence, such person shall, unless the court is satisfied to the contrary, be deemed to be knowingly living wholly or in part on the earnings of prostitution.

- (2) Whenever in any prosecution for an offence under section 12 it is proved-
  - (a) that the accused has performed any act for reward which was calculated to enable any person to communicate with any other person who is a prostitute;  
or

- (b) that the other person with whom communication was made as a result of such act has engaged in prostitution, the accused shall be presumed to have performed such act with intent or while he reasonably ought to have foreseen the possibility that such other person may engage in prostitution, unless the contrary is proved beyond reasonable doubt.

### **Consideration of diversion**

**11I.** (1) A matter may, after consideration of all relevant information presented, including whether the person 18 years or older (“A”) who is alleged to have committed a prostitution related offence has a record of previous diversions, be considered for diversion if –

- (a) A acknowledges responsibility for the offence;
- (b) A has not been unduly influenced to acknowledge responsibility;
- (c) there is a prima facie case against A;
- (d) A consents to diversion; and
- (e) the prosecutor indicates that the matter may be diverted.

### **Diversion order**

**11J.** (1) A prosecutor may divert a matter involving a person who is alleged to have committed a prostitution related offence and may select an appropriate diversion option.

(2) If a matter is diverted, the person alleged to have committed a prostitution related offence must appear before a magistrate in chambers, in order to have the diversion option, made an order of court.

(3) If a prosecutor decides not to divert a matter, he or she must refer the matter to court for adjudication.

(4) The court may order diversion if the court is satisfied that the order is appropriate and will benefit the reintegration of the person into society.

(5) Diversion options include –

- (a) Compulsory attendance at a specified centre or place for a specified vocational, educational or therapeutic purpose, which may include a period or periods of temporary residence;
- (b) Referral to intensive therapy to treat or manage problems that have been identified as a cause of the person coming into conflict with the law, which may include a period or periods of temporary residence.

**Provision and accreditation of diversion programmes and diversion service providers**

11K. (1) A prosecutor or court may only refer a matter for diversion to a diversion programme and diversion service provider that has been accredited and has a valid certificate of accreditation.

(2)(a) The Cabinet member responsible for social development, in consultation with the Cabinet members responsible for the administration of justice, education, correctional services, safety and security and health must –

- (i) create a policy framework to develop the capacity within all levels of Government and the non-governmental sector to establish, maintain and develop programmes for diversion;
  - (ii) establish and maintain a system for accreditation, as prescribed, of programmes for diversion and diversion service providers; and
  - (iii) ensure the availability of resources to implement diversion programmes, as prescribed.
- (b) The system for accreditation referred to in paragraph (a)(ii) must contain –
- (i) criteria for the evaluation of diversion programmes;
  - (ii) criteria for the evaluation of the content of diversion programmes to ensure they reflect a meaningful and adequate response to the harm caused by prostitution related offences and provide appropriate and relevant training and skills for successful integration into society and the formal economy;
  - (iii) mechanisms to monitor diversion programmes and diversion service providers in respect of their ability to render quality service in achieving the objectives of diversion and their ability to promote compliance with diversion orders;
  - (iv) measures for the removal of diversion programmes and diversion service providers from the system, where appropriate.
- (c) The Cabinet member responsible for social development must –
- (i) before the commencement of this Act, table the policy framework and system for accreditation referred to in (a)(i) and (ii) in Parliament;
  - (ii) three months after tabling the policy framework and system for accreditation in Parliament, publish a notice in the *Gazette*, inviting applications for the accreditation of diversion programmes and diversion service providers, as provided for in the policy framework and system for accreditation referred to in subparagraph (i), which applications must be submitted within four months from the publication of the notice;

- (iii) within four months of the closing date for applications referred to in subparagraph (ii), ensure that all applications received are considered and decided on, with preference being given to the finalisation of applications in respect of diversion programmes and diversion service providers which existed at the time of commencement of the Act.
  - (d) After the expiry of the time limits referred to in paragraph (c), all applicants for accreditation must be dealt with in the manner and within the time limits determined in the policy framework and system for accreditation.
  - (e) The Cabinet member responsible for social development must issue a prescribed certificate of accreditation to each diversion programme and diversion service provider that is accredited in terms of this section.
  - (f) A certificate of accreditation referred to in paragraph (e) is valid for a maximum period of four years from the date of accreditation.
  - (g) A quality assurance process must be conducted in the prescribed manner in respect of each accredited diversion programme and diversion service provider.
- (3)(a) The Cabinet member responsible for social development must publish the particulars of each diversion programme and diversion service provider that is accredited or removed from the system in terms of this section in the *Gazette* within 30 days of accreditation or removal.
- (b) The Director-General: Social Development must, immediately after any publication referred to in paragraph (a), provide a copy of the publication to –
- (i) the relevant role-players falling under his or her jurisdiction; and
  - (ii) the Director-General: Justice and Correctional Services, who must distribute the publication to all relevant role-players who are involved in the administration of this Act.

### **Monitoring of compliance with diversion order**

**11L.** (1) When making a diversion order, the court referred to in clause 21, must identify a probation officer or other suitable person to monitor the person's compliance with the diversion order.

(2) If a person fails to comply with the diversion order, the probation officer or person identified in terms of section (1) must, in the prescribed manner, notify the magistrate in writing of the failure.

### **Successful compliance by a person 18 years or older with diversion order**

**11M. (1)** Where a person 18 years or older involved in a prostitution related offence successfully complies with any diversion order he or she may apply to the court referred to in clause 21 for an order that previous convictions for prostitution related offences be expunged.

**(2)** The court referred to in clause 21 may after examining the evidence before it make an order that such person's criminal record insofar as it relates to prostitution related offences be expunged.

### **Failure to comply with diversion order**

**11N. (1)** If a person fails to comply with any diversion order, the prosecutor may decide —

**(i)** to proceed with the prosecution; or

**(ii)** not to go to trial, but to place the person on another diversion option which is more onerous than the diversion option originally decided on.

**(2)** If a person fails to comply with any diversion order, the court referred to in clause 21 may, on being notified of the failure, in the prescribed manner, issue a warrant of arrest for the person or cause a summons to be issued in respect of the person, to appear before the court.

**(3)** The court may-

**(i)** make an appropriate order to assist the person to comply with the diversion order;

**(ii)** change the diversion order to ensure compliance; or

**(iii)** record the acknowledgment of responsibility made by the person as an admission referred to in section 220 of the Criminal Procedure Act and proceed with trial.”.

### **Amendment of section 56 of Act 32 of 2007**

**6.** Section 56 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 is hereby amended by the following insertion:

**“(9)** A person may not be convicted of an offence of knowingly living wholly or in part on the earnings of prostitution or receiving any consideration for, the commission of a sexual act with another person, if that person is —

**(a)** a child; and

(b) not a person contemplated in section 10B, 10C or 10D, as the case may be.  
(10) (a) A court may make a finding discharging a person from prosecution as provided for in terms of section 204 of the Criminal Procedure Act 51 of 1977 for an offence related to prostitution of a person 18 years or older where such person reports another offence while engaging the sexual services of a person 18 years or older as provided for in section 11.

(b) This discharge does not extend to such person's participation in the reported offence."

#### **Amendment of section 72 of Act 32 of 2007**

7. Section 72 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) This Act is called the **[Criminal Law (Sexual Offences and Related Matters) Amendment Act]**, Sexual Offences Act 2007, and , subject to subsection (2), takes effect on 16 December 2007, or an earlier date fixed by the President by proclamation in the *Gazette*."

#### **Amendment of index of Act 32 of 2007**

8. The index of the principal Act is hereby amended –

(a) by the substitution of the heading Part 3 after item 7 with the following heading:

"Part 3: Persons 18 years or older: Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation, exposure or display of or causing exposure or display of genital organs, anus or female breasts ("flashing"),[,] and child pornography to persons 18 years or older **[or engaging sexual services of persons 18 years or older]**"; and

(b) by the insertion after item 10 of the following items:

**Part 3A: Definitions and offences relating to the prostitution of persons 18 years or older, the keeping of brothels and the provision of diversion orders**

10A. Definitions

- 10B. Procuration
- 10C. Detention of a person 18 years or older for purposes of prostitution
- 10D. Paying for sexual services of a person 18 years or older subjected to force
- 10E. Assistance for purposes of engaging in prostitution
- 10F. Advertising the sexual services of persons 18 years or older
- 10G. Owner or occupier permitting on his premises any prostitution-related offence
- 10H. Soliciting to commit a sexual act
- 10I. Making available of sexual services by persons 18 years or older
- 10J. Committing sexual acts in public
- 10K. Persons living on earnings of prostitution or committing or assisting in the commission of sexual acts”; and

(c) by the insertion after item 11 of the following items:

- “11A. Keeping a brothel
- 11B. Certain persons deemed to keep a brothel
- 11C. Onus of proof
- 11D. Contract to let house, place, movable or immovable property for a brothel void
- 11E. Use of house or place as a brothel voids contract of letting
- 11F. Summary ejection when a house or place is used as a brothel
- 11G. Proceedings upon complaint by householders or police that a house or place is used as a brothel
- 11H. Presumptions
- 11I. Consideration of diversion
- 11J. Diversion order
- 11K. Provision and accreditation of diversion programmes and diversion service providers
- 11L. Monitoring of compliance with diversion order
- 11M. Successful compliance by a person 18 years or older with diversion order
- 11N. Failure to comply with diversion order”.

### **Transitional provision**

**9.** Any reference in any law to the Criminal Law (Sexual Offences and Related Matters) Amendment Act must after implementation of this Act be considered to be a reference to the Sexual Offences Act.

### **Short title and commencement**

**10.** This Act shall be called the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Amendment Act 2014, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

# **ANNEXURE B: LIST OF RESPONDENTS**

## **LIST OF RESPONDENTS TO ISSUE PAPER 19 SUBMISSIONS RECEIVED ON ISSUE PAPER NO 19 ON BEHALF OF INSTITUTIONS**

1. ACDP (M Dean, Medial Liaison Officer Free State)
2. ACDP Ladysmith Branch (Jubber B)
3. Centre for Applied Legal Studies
4. Children's Rights Ministries, Chatsworth
5. Christians for Truth (Sibisi F Rev, Olsen K Rev, Christmas J)
6. Christianview.org.
7. Church of the Province of Southern Africa (Anglican) in Port Elizabeth (Nopece B Bishop)
8. Commission on Gender Equality
9. Crisis Pregnancy Care in Nelspruit (Grout T G Dr)
10. Diocese of Port Elizabeth Mother's Union Christian Family Life in conjunction with all the Christian organisations in Port Elizabeth
11. Doctors For Life International
12. Festival of Light Adelaide Australia (Phillips D Dr National President)
13. Florida Evangelistic Association, South Africa (Marias P Rev, Field Director Africa)
14. Gay and Lesbian Coalition
15. Hatfield Christian Church (Cato G Dr Pastor)
16. Hillbrow Commercial Sexworkers Association (Mkhize S, Ngubane F, Ndlovu P, Kubheka R, Masombuka M, Mkwanzazi J, Mthimunye S, Nkosi M, Serabedi N)
17. Institute for Human Rights & Criminal Justice Studies, Technikon SA (Redpath J)
18. Inter Outreach Ministries (Ballin M)
19. Legal Resources Centre
20. Mother's Union Christian Family Life (Msutu L, Vice-President)
21. People Opposing Women Abuse
22. Sex Workers Education and Advocacy Task Force
23. SHEP
24. South African Hindu Community (Naidoo T Dr)
25. Tshwaranang Legal Advocacy Centre to End Violence Against Women
26. Waymakers Christian Fellowship
27. Western Cape Network on Violence Against Women
28. Women of Diocese of Port Elizabeth
29. Women's Legal Centre
30. Worcester community, Western Cape Province

## **SUBMISSIONS RECEIVED ON ISSUE PAPER NO 19 FROM INDIVIDUALS**

1. Acquet R (Prostitute)
2. Abrahamsohn A
3. Anderson P & B
4. Anderson P D (Minister of the East Claremont Congregation Church)
5. Anonymous
6. Anonymous Hotel Owner
7. Antonites M

8. Apolles S
9. Berbieri T (Furniture Sales Manager)
10. Berg L
11. Bolley S
12. Booth C
13. Brady K
14. Campbell R & C
15. Cele P
16. Charles C
17. Chernis Dr RE
18. Claassen D (Committee member, CFT- Pretoria)
19. Dabrowski M
20. De Vos A Dr
21. De Voux (Student University Cape Town Health Faculty)
22. Du Plessis P
23. Fourie A
24. Fourie M
25. FS
26. Gallie M
27. Group of Sex Workers (Anonymous), Durban
28. Hazel (Massage parlour owner)
29. Hennie (Escort agency owner)
30. Henning R (Director of Music Ladybird Music Academy, Ladybrand)
31. Jordan E
32. Keegan S
33. Lategang H (Owner Fort Animy Guesthouse, Ladybrand)
34. Louw A
35. Mabizela W Rev
36. Marais H
37. Massage Parlour Durban (sex workers: Nicci, Tanya, Demi, Michelle, Claudine, Paula, Savannah, Sammy, Marie, Chevonn, Bronwyn, Sandy, Amina, Josie; manageress: Linda; garden worker: Elizabeth; cleaners: Gwen, Bridget)
38. Matrinez E
39. McGill J
40. Mkhaphi S G
41. Mkhize P
42. Mochwanaesi K
43. Mozilla
44. Mthethwa P
45. Musgrave M M
46. Naidoo S
47. Ndlovu N
48. Ndyebo
49. Neuman K
50. Pretorius M
51. Prostitutes from Rustenburg, North-West Province (Mantwa, Lele, Mpho, Prudence, Maria, Else)
52. Prostitutes in the Cape Metropolitan Region (Diana, Rachel, Charmaine, Tasha, Buyiswa, Zodwa, Sindiswa, Kelly)
53. Rosenthal P
54. Ruiters A
55. Sam T
56. Scribe A & E
57. Selbach A
58. Selby J

59. Sex workers of Carletonville (Mapuseletso, Sebina, Sphiwe, Musa, Dina, Dubs, Yoyo)
60. Sex workers of King Williams Town (Brady K, Taai P, Klopper D, Ross S, Raw M, Pes R)
61. Smith O (Chairperson: Splashes of Joy Interdenominational Prayer Group)
62. Stander C
63. Thomas I
64. Van Aswegen F (Dept Sociology, University of Stellenbosch)
65. Van Hasselt J
66. Van Hasselt N
67. Van Vuuren A
68. Veljoen N
69. Von Reiche F (Additional Magistrate, Pretoria Magistrate's Office, Civil Section)
70. Vos A
71. Walker K
72. Ward N A

#### **LIST OF RESPONDENTS TO DISCUSSION PAPER 1/2009**

- 1 Abdullah Saeed
- 2 Abrahams Anastasia
- 3 Abrahams Celeste
- 4 Abrahams Mario
- 5 Abrahams Valda
- 6 Academy for Sexology (Lemmer Johann, Prof)
- 7 Acker Willem
- 8 Ackerman Marietjie
- 9 Adams Chantell
- 10 Adams Edward
- 11 Adams Priscilla
- 12 Adley Brian & Joey
- 13 Adley I J
- 14 Adley S B
- 15 Adriaanse Carol
- 16 Aenmey Tracy
- 17 Agnew RW
- 18 AGS Potgietersrus Gemeente (De Meyer Sue)
- 19 Ahmed Abu
- 20 Ainslie Soekie
- 21 Aitchison Helen
- 22 Akal Luke
- 23 Albert Jackie
- 24 Alcock Jean Marion
- 25 Alexander Althian
- 26 Alexander Evangelist
- 27 All Safia
- 28 Allen Yvonne
- 29 Althian Alexander
- 30 Altmann Manus
- 31 Amato David
- 32 Ameeroodin FM
- 33 Amm Aileen
- 34 Amm Kathryn
- 35 Anderson Barbara
- 36 Anderson Gloria

37 Anderson Peter & Barbara (Reverend)  
38 Andrew Carol  
39 Andriaanse Carol  
40 Angell-Schau Ray  
41 Angels (Selby John)  
42 Anirudhra Kamraj  
43 Anonymous  
44 Antioch Bible Church (Cantrell Tim Dr/ Pastor / Teacher)  
45 Antoni Zama  
46 April Andre  
47 Arendse Claudia  
48 Arendse Lindsay  
49 Arenz Ché  
50 Arran Kamala  
51 Arries Samuel  
52 Asanda Skosana  
53 Ashley Sean  
54 Askew Shane  
55 Atherstone Lora & Wayne  
56 Aveling Cornelius  
57 Ayliffe Jeanette  
58 Ayliffe Jenni  
59 Backhouse Beverley  
60 Badenhorst J.A & Family  
61 Badenhorst Leona  
62 Badenhorst Charl  
63 Badger Louise  
64 Bagwell Malcolm  
65 Bailey-McEwan Margaret  
66 Baker Billy  
67 Bakker Lena  
68 Ballantine Robin  
69 Bam Marge  
70 Banjwa Nandipha  
71 Barker Gavin  
72 Barkhuizen Mark  
73 Barkhuizen Sonja  
74 Barnard Bonita  
75 Barnard Theo  
76 Barnsley Robin  
77 Barrett Filicia  
78 Bartie GC  
79 Bartie Ronald  
80 Basson Eugene & Charmaine  
81 Basson Tere  
82 Basson Trudi  
83 Basson W A  
84 Basua Heleen  
85 Batchelor Darilyn  
86 Bateman ME (Dr)  
87 Bath Juanita  
88 Battershill Lois  
89 Beadon Henry Patric Terence  
90 Beadon Terry  
91 Bean Michael

92 Beattie Joseph and Lisa  
 93 Becker Pam  
 94 Bedingham LA  
 95 Beelders Belinda  
 96 Bekker Isabel  
 97 Bekker Jan Prof  
 98 Bekker Susan, (endorsed by 3 respondents)  
 99 Bell Ian  
 100 Bell Tom and Masina  
 101 Benade Hendrik J  
 102 Benade Justin  
 103 Bendall Nicolene & Clinton  
 104 Benjamin Joshua  
 105 Benjiman Gabriel J (Reverend)  
 106 Bennett Louise  
 107 Bennett Ross  
 108 Berea Hillbrow Home of Hope (Motsa Khanyisile)  
 109 Berg Richard & Leigh  
 110 Best Gary  
 111 Best Lesley  
 112 Bester Manie  
 113 Bet Sheekoom (Goddard Shelly)  
 114 Bet Sheekoom House of Restoration for Women and Children in Crisis (Preller John)  
 115 Beukes Maggie  
 116 Bevan Jacqui  
 117 Bevan Mike  
 118 Bezuidenhout Jannie  
 119 Bezuidenhout Leona  
 120 Bezuidenhout Vanessa  
 121 Bezuidenhout Wesley  
 122 Billing Adele (endorsed by 3 respondents)  
 123 Billingsley-Traylor Stephanie  
 124 Bishop Ann  
 125 Blaauw Pieter  
 126 Black Brenda B  
 127 Blackburn Deon  
 128 Blackhouse Beverley  
 129 Blem Brian  
 130 Blom Chris, (endorsed by 4 respondents)  
 131 Blundell Rebecca  
 132 Boden Alexander Charles Victor  
 133 Bodenstein Andries Jacobus Laubser  
 134 Boikhutso Tryphosa  
 135 Bokala Kamogelo  
 136 Bokwe Ruth  
 137 Bolus Chris & Donna  
 138 Bonthuys Elsje  
 139 Boo Nandi  
 140 Booth – Jones Laurene  
 141 Booyesen C F  
 142 Booyesen Charmaine  
 143 Booyesen Kenna  
 144 Booyesen Venita  
 145 Bornman Rudolf & Marinda  
 146 Borrageiro Filomena

147 Bosch Brenda  
148 Boshoff Elizabeth  
149 Bosua Heleen  
150 Botes Jaco  
151 Botes Janetta  
152 Botes Lynette  
153 Botha Andra  
154 Botha Diyan  
155 Botha Elsa  
156 Botha Fred, Mari & Family  
157 Botha Juanita  
158 Botha Marina  
159 Botha Werner  
160 Bothma Dewald  
161 Boulle Bernadette  
162 Boucher B (Endorsed by 3 respondents)  
163 Bowyer Brian & Helen  
164 Bowyer E.J  
165 Bowyer Mike  
166 Boyce John  
167 Boyce Sally V  
168 Boyd Trent  
169 Boysen CF  
170 Brand Carika  
171 Brannon John  
172 Brannon Louise  
173 Brauns Victor  
174 Bredenkamp Audrey  
175 Bredenkamp Bettina  
176 Bresler Robert  
177 Brett Dymock  
178 Brewer LeRoux  
179 Brian Dengler  
180 Brimelow Patrick  
181 Brink Avril  
182 Brink Louise  
183 Broodryk Nico & Alta  
184 Broodryk Petronella Jacoba  
185 Brown Anne  
186 Brunke Renate  
187 Bruwer Elsa  
188 Bryant Tom & Liz  
189 Bryon Jackie  
190 Buchler Debbie  
191 Bullivant Paul & Susan  
192 Burger P  
193 Busisiwe Mthamzeli  
194 Butterson Roy  
195 Buys GB  
196 Buys SJ  
197 Byleveld Elizna  
198 Cabral Daniel  
199 Cairns Graham & Heather  
200 Calitz Bennie  
201 Calitz Peter

202 Calvert Elizabeth  
203 Calvert Liza  
204 Campbell Ruth  
205 Campion Andrew J (Pastor)  
206 Campion Denice  
207 Carby Shellique  
208 Carinus Lisa  
209 Carstens Clyde & Benita  
210 Carter Rosemary  
211 Cartwright Andrew  
212 Cassidy Denis  
213 Cassidy Michael  
214 Cassisa Belinda  
215 Castleman Pat  
216 Cathey Steven  
217 Cavanagh Brenden  
218 Central Baptist Church (Dr Nowlan J.W)  
219 Chalmers Brent  
220 Chapman Stuart  
221 Charles Melanie  
222 Charlton Annelee & David  
223 Chathurlall J  
224 Chathurlall Shama Devi  
225 Chatteris Chris  
226 Chetty Elaine  
227 Chetty Mark  
228 Chetty Roy  
229 Chidoori Rumbidzai Elizabeth  
230 Chifadza Leminah  
231 Christ Church Midrand (Walker D I)  
232 Christian Church in Centurion, Gauteng (Watt Charlene)  
233 Christian Citizenship Committee Baptist Union of South Africa (Holness Peter)  
234 Christian Family Church, international, Bethlehem (Ruthven Vernon)  
235 Christian View Network (Bechard Mark)  
236 Christiani Annie  
237 Christians for Truth, Western Cape (Le Roux Gerhard)  
238 Christie Grant  
239 Church of the Way, Benoni (Van der Merwe Rory)  
240 Cilliers Kobus  
241 Cilliers Nelda  
242 Cilliers Susan  
243 Claassen Christelle  
244 Claassen Lynette  
245 Clark Helen Joy  
246 Clarke Tony  
247 Clingen Tracey-Ann  
248 Cloete Jasper  
249 Clowes Mike  
250 Clucas Tanya  
251 Coertzer Renita  
252 Coetsee Gideon  
253 Coetsee Harry  
254 Coetsee Albert  
255 Coetsee Christa  
256 Coetsee EA

257 Coetzee Esme  
258 Coetzee G. S  
259 Coetzee Gideon  
260 Coetzee Juanita  
261 Coetzee Nicolet  
262 Coetzee Niela  
263 Coetzee Rita  
264 Cogill Brian  
265 Cogill Chantal  
266 Cogill Desmond  
267 Cogill Garry & Heidi  
268 Cogill Marie  
269 Cogill Martin  
270 Cogill Michael  
271 Cogill Shaun  
272 Cole Megan  
273 Coltman Martin  
274 Coltman S  
275 Combrinck Arno  
276 Commission for Gender Equality (Hicks Janine)  
277 Commission for Gender Equality (Poto Eunice)  
278 Community of Smithfield (Endorsed by 67 respondents)  
279 Community of Smithfield (Webber C.C)  
280 Conradie Elsabe  
281 Coqui Petra  
282 Cormick Gary  
283 Cornelius Marinda  
284 Cousins Kevin Christopher  
285 Coward Kim  
286 Cowie Bruce & Sylvia  
287 Cox Gavin  
288 Cox Jon  
289 Crawford Elizabeth  
290 Craythorne Malinda (SA Hunter)  
291 Cronje Frans J  
292 Cronje Heidi (Endorsing Family Policy Institute)  
293 Croucamp Hermann & Lana  
294 Crowe Murray  
295 Crundwell Peter  
296 Cullen K  
297 Cummings Bev  
298 Cunningham Claude  
299 Da Silva Waldri  
300 Dahl Leif  
301 Dahl Trevor  
302 Dale Marlise  
303 Daly Shaun  
304 Damsell JC  
305 Dance Yvette  
306 Dangor Suleman  
307 Dani Stef  
308 Daniel Gordon & Mariolize  
309 Daniels Lionel  
310 Daniels Sharon  
311 Dasan Mark

312 Daseman Tracey  
313 Daubermann Larry  
314 Davids Beatrice  
315 Davids Dahnell  
316 Day Brian  
317 Day Elke  
318 Day Sandy  
319 De Abreu Ana  
320 De Beer Sharon  
321 De Bruin Brigette Mariana  
322 De Charmoy Brenda  
323 De Freitas Mario  
324 De Haas Sandy  
325 De Jager C.A  
326 De Klerk Beau  
327 De Klerk Chris-Mari  
328 De Klerk Leon  
329 De Kock Tracey  
330 De Kock Willie & Erna  
331 De Lange Helena  
332 De Nysschen Michelle  
333 De Plessis Johan  
334 De St Pern Marjory  
335 De Swardt Abrie  
336 De Vaal Michael Hamman  
337 De Villiers Fred  
338 De Villiers Karna  
339 De Villiers Nerina  
340 De Villiers Renato  
341 De Villiers Trnayo  
342 De Vos Atella  
343 De Vos Evette  
344 De Vos J  
345 De Waal Nadia  
346 De Wet Amanda  
347 De Wet Ansonet  
348 Deall Graham  
349 Dean Brian  
350 Deetlefs Sharon  
351 Deffenthal Louise  
352 Deighton Lou  
353 Delport Chrystal  
354 Dengler Brian  
355 Dennis Jane  
356 Denton Alwena  
357 DeNysschen Michelle  
358 Destadler Marlene  
359 Devenish Lynette  
360 Dickie June  
361 Diedericks Carl  
362 Diesel-Reynolds Darron  
363 Diesel-Reynolds Peter  
364 Diesel-Reynolds Sonja  
365 Diffenthal Louise  
366 Disney Chris & Dee

- 367 Dixie Shirley
- 368 Dlamini L.B., (Rev)
- 369 Dlamini Sandile
- 370 Doctors for Life International (representing approximately 1 600 medical doctors and specialists locally and abroad)
- 371 Domoney Louise
- 372 Donald Drew
- 373 Donaldson Irene
- 374 Doorasamy Richard
- 375 Dos Santos Elaine
- 376 Dos Santos Johnny
- 377 Dos Santos Laura
- 378 Dos Santos Michelle
- 379 Dos Santos Nadine
- 380 Douening Hester (Pastor)
- 381 Downie Eric
- 382 Downing Elaine
- 383 Downing Fred
- 384 Downing Hester
- 385 Downs Jo-Ann
- 386 Doyle Caren
- 387 Dran Brian
- 388 Dreyer Cas & Lili
- 389 Drilling H & A
- 390 Du Plessis Andre & Sally
- 391 Du Plessis Bishop
- 392 Du Plessis Cindy
- 393 Du Plessis Elmarie
- 394 Du Plessis Francois
- 395 Du Plessis Johan
- 396 Du Plessis Kobus
- 397 Du Plessis Laetitia
- 398 Du Plessis Louise
- 399 Du Plessis Mariska
- 400 Du Plessis Nico
- 401 Du Plessis Nicolene
- 402 Du Plessis Peet
- 403 Du Plessis Petrus
- 404 Du Plessis Rachel
- 405 Du Plessis Riana
- 406 Du Prees Johanna
- 407 Du Preez Dave
- 408 Du Preez F.A
- 409 Du Preez Gert
- 410 Du Toit Cecilia
- 411 Du Toit Johan & family
- 412 Du Toit Lesley
- 413 Du Toit Michael
- 414 Du Toit Petrus
- 415 Dubbley Cheryllyn
- 416 Dumalisile Pholisa
- 417 Dutch Reform Church Quellerina (Gous J.H.G) (Dr)
- 418 Dymock
- 419 Eckard Memory
- 420 Eden Worship Centre (Koster Vivienne) (Endorsed by 39 respondents)

421 Edith  
 422 Edward Nathan Sonnenburgs inc (Saunderson Lindie, Senior Associate/Pro Bono  
 Coordinator and Human Rights lawyer in Alexandra Township)  
 423 Edwards Tony  
 424 Eenst Werner  
 425 Efstratiou Lliana  
 426 Eksteen Thys  
 427 Ellerman AB  
 428 Ellerman Tessa  
 429 Ellis Kobus  
 430 Ellis Laura  
 431 Els D, (Endorsed by 4 respondents)  
 432 Els Pauli  
 433 Enerson May  
 434 Engelbrecht Arlene  
 435 Engelbrecht Elga  
 436 Engelbrecht Martin, (Endorsed by 2 respondents)  
 437 Erasmus Wendy  
 438 Erasmus Zonobia  
 439 Ernerson C.G, (Mr), (Endorsed by 2 respondents)  
 440 Ernst Werner  
 441 Erwee Wilem  
 442 Esterhuizen Andries  
 443 Esterhuizen Maritha  
 444 Esterhuyse Gert  
 445 Eva  
 446 Faber Magda  
 447 Faber Marie  
 448 Falkson Andrew  
 449 Family Policy Institute (Naidoo Errol) (Endorsed by World Vision SA; Christian Action  
 Network; Doctors for Life International; Christian Lawyers Association of South Africa  
 and the majority of the respondents who submitted in their personal capacities)  
 450 Faro Fritz  
 451 Farquharson Nicky  
 452 Fenner John  
 453 Ferguson Lindy  
 454 Fergusson Ern & Pearl  
 455 Ferreira Alta  
 456 Fichardt Debbie  
 457 Fietze Patrick & Melody (Mr & Mrs)  
 458 Filander Joyce  
 459 Fish Hoek Baptist Church (Pastor John V. Thomas)  
 460 Fisher Linda  
 461 Fisher Sheine  
 462 Fisher Yvonne  
 463 Flatela Andiswa  
 464 Flaum Grant M  
 465 Forrester Keith & Carien  
 466 Forson Brenda  
 467 Fourie Ansie  
 468 Fourie Bronwen  
 469 Fourie Eben & Carien  
 470 Fourie Family  
 471 Fourie Heather  
 472 Fourie Helouise

473 Fourie Jacques  
 474 Fouzia Sahabedin  
 475 Foxtton Justin  
 476 Fradd Jean  
 477 Francis Patty  
 478 Frans Merise  
 479 Fraser Halkett Jill  
 480 Freitag Brian  
 481 Freitag Lindy  
 482 French Carol  
 483 Friend Leanne  
 484 Froise Vic  
 485 Fromentin Amy-Lee  
 486 Fromentin Dylan  
 487 Frost Janine  
 488 Fudge Robyn (former Public Prosecutor and Senior State Advocate)  
 489 Fuller Jane  
 490 Furrows Noel  
 491 Futter Lynn & Evon  
 492 Gafney Jennifer, Merryl  
 493 Galpin Rick (Endorsing Family Policy Institute)  
 494 Gardner Ashton  
 495 Gauld Don  
 496 Gaven Rosemary & Brian  
 497 Gavin  
 498 Geldenhuys Pietie  
 499 Gerber Bee  
 500 Gerber Louis  
 501 Gernmann Wilhelm  
 502 Ghignone Giovanni  
 503 Gibson Kim  
 504 Giessing Johan  
 505 Gilchrist Mike, Glenda, Ross & Bronwyn  
 506 Gillespie Johan  
 507 Gillespie Tom  
 508 Gleeson Nadia  
 509 Global Worship Centre (Phillips Janet) (endorsed by 99 respondents)  
 510 Glopal Lionel  
 511 Gobodo Vuyo  
 512 God TV (Jafta Benjamin)  
 513 Goddard Allen  
 514 Goedemoed Baptist Church Durbanville (Arendse Judy) (Endorsed by 60 respondents)  
 515 Goldberg Jason  
 516 Gomomo Lulama Edith  
 517 Goncalves Nuno  
 518 Goosen Corne  
 519 Goosen Garth  
 520 Goosen Helen  
 521 Goosen Louise  
 522 Goosen Petra, (Endorsed by 156 respondents)  
 523 Gopalan Veni, Elgin Brown and Hamer  
 524 Gordon Deon  
 525 Gordon Eric  
 526 Gordon Mr & Mrs, (Endorsed by Mariolize Daniel)

527 Goulding Susan & Brian  
528 Gous Henk  
529 Gouws Irene  
530 Gouws Ken  
531 Gouws Reg  
532 Govender Derusha  
533 Govender Devan  
534 Govender Leon  
535 Govindsamy Merisha, (Endorsed by 2 respondents)  
536 Govindsamy Prema  
537 Grages Wendy  
538 Grant Christie  
539 Grant Stacey  
540 Grantham Roland  
541 Grassman Avis  
542 Grauls Ingrid  
543 Gray Lorraine  
544 Gray Susan  
545 Greeff Michelle  
546 Greeff Petro  
547 Green AJ  
548 Green Maria  
549 Green Tiaan  
550 Greg  
551 Grenfell Peter  
552 Greyling Joseph  
553 Greyvenstein Erik & Marguerite  
554 Griessel Sophia  
555 Griffiths Gail  
556 Grimbeek Tania  
557 Grobler Annalien  
558 Grobler Brian  
559 Grobler CH  
560 Grobler Ferdi  
561 Grobler Hettie  
562 Groenewald Conrad  
563 Groom Richard  
564 Guebor Moses  
565 Gulemond Diane  
566 Guma Nona  
567 Gush Wendy  
568 Guy Laurian  
569 Gwele Mandisa  
570 Hadebe SM  
571 Hagen Margaret  
572 Hager LP  
573 Haggett Sarah Rutherford  
574 Halkett Jill  
575 Hall Gudrun  
576 Hall Kevin  
577 Hall Sally  
578 Hamman Chris  
579 Hamman Suzaan  
580 Hanekom Louisa  
581 Hannalie

582 Harbor Renee  
583 Harper Eric  
584 Harrington Mike  
585 Harrison Brenda  
586 Hart Melinda  
587 Hartley Mike  
588 Hartog Diane  
589 Hartzenberg Louise  
590 Hassim Mohamed  
591 Headley Andrew  
592 Henderson JK  
593 Hendricks Jaylaine  
594 Henn Anne  
595 Henn P C  
596 Henning Philip & Nadia  
597 Hepburn Karen  
598 Hermann Carl  
599 Hern Wimpie  
600 Herold Chris  
601 Herold Christopher.Edward, Dr  
602 Herrmann Carl  
603 Herselman Brad  
604 Heymans NM  
605 Hildah Ligamma  
606 Hill Peter  
607 Hill Ross (School Teacher)  
608 Hills Rykie  
609 Hindes Esme  
610 His People Christian Church (Lerefolo Simon)  
611 Hlongwana Nokhuthala D,  
612 Hoare A. P, (Mr)  
613 Hoare Tony  
614 Hobo Given  
615 Hobo Lilitha  
616 Hobo Math  
617 Hobo Nobantu (Mrs)  
618 Hodgkinson Pauline  
619 Hodgson Tarryn  
620 Hodson Astara  
621 Hodson Graham  
622 Hoffmann Tina (Endorsed by 46 respondents)  
623 Holloway Ashleigh  
624 Holtzhausen Carina  
625 Holzinger Beverly  
626 Hoon Annemie  
627 Hooper Cheryl  
628 Horak Warren  
629 Horn Doberah  
630 Hough Stephan  
631 Howard Carina  
632 Howard Lyndsay  
633 Howard Ron, (Reverend)  
634 Howes Carol & Anthony  
635 Hudson Cheryl  
636 Hughes Debra (Endorsing Family Policy Institute)

637 Human Hannes  
 638 Human Michele  
 639 Humphreys June  
 640 Humphry Lyn  
 641 Hunsraj Reena  
 642 Hutcheson John & Ann  
 643 Hutt David  
 644 Huysamen Helona  
 645 Huyser Corrie  
 646 Innes Angus  
 647 Institutes for Security Studies (Gould Chandre)  
 648 Inter Outreach Ministries (Ballin Marge)  
 649 Interdiocesan Catholic Women Association (Legodi Connie)  
 650 Ireland Vicky  
 651 Isaacs Verity  
 652 Islamic Forum Azaadville  
 653 Islamic Unity Convention (Davids Magboeba)  
 654 Jacklin Vaughn & Allison  
 655 Jackman Bruce  
 656 Jacobs Damig  
 657 Jacobs Janine  
 658 Jacobs Lebo  
 659 Jakins Robin  
 660 Janie Dennys  
 661 Jankelowitz Lauren  
 662 Janse van Vuuren Albert  
 663 Janse van Vuuren Chantal  
 664 Janse van Vuuren Rudolf  
 665 Jansen van Rensburg MC  
 666 Jansen van Vuuren Lorraine  
 667 Jansingh Geert  
 668 January Charles  
 669 Jara Elvis  
 670 Jeftha Olivia  
 671 Jegg Sandra  
 672 Jempson Lyn  
 673 Joey  
 674 Johnson Don  
 675 Jolley Alastair  
 676 Jolliffe Solinus  
 677 Jones Family  
 678 Jones Jane  
 679 Jordaan Christina  
 680 Jordaan David  
 681 Jordaan Salome  
 682 Joseph Michelle  
 683 Joseph Sheri Lee Ann  
 684 Joslin JP  
 685 Joubert Issie  
 686 Joubert Magie  
 687 Joubert Mariana  
 688 Joubert Pierre & Riana  
 689 Joyce Meyer Ministries South Africa (Senekal Brad, Media & Outreach Coordinator  
 Hand Of Hope)  
 690 Justin

691 Kahlau Olivier Elizabeth  
692 Kakoulla Panos Michael  
693 Kamffer Cynthia  
694 Kaminsky Suritha  
695 Kamukwamba Lubumba  
696 Kapp Charmaine  
697 Kapp Hannes  
698 Kapp Ian  
699 Karsten Herman  
700 Katima John  
701 Kauchali-Taleb Shabana  
702 Kay Delyse  
703 Keeling Joan  
704 Keene Catharine  
705 Keet Glenda  
706 Keith Micheal (Dr)  
707 Kelbrick Erika  
708 Kellerman Nolene  
709 Kelly Hanelie  
710 Kelly Percy  
711 Kelso Tracey  
712 Kenmuir Jann  
713 Kenny Shelly  
714 Kentane Bande  
715 Kepkey Adam  
716 Keulder Doria  
717 Keyzer Carol  
718 Kgoale Charles  
719 Khamker F  
720 Khan Faeza  
721 Khmalo Makhosazane  
722 Khoury David  
723 Khoury MaryJane  
724 Khoza Janet S  
725 Khumalo Amanda  
726 Khumalo Makhosazane  
727 Khwethana Wilson & Emily  
728 Killian Olivia  
729 Kirchmann Brian & Gail  
730 Kirsten Ronel  
731 Kistnasamy R  
732 Kistnasamy S D  
733 Kitima John  
734 Kitshoff Elbre  
735 Kiva Wendy (Endorsed by 8 respondents)  
736 Klein Nataly  
737 Kleinbooi Regina  
738 Kleinhans Alison  
739 Klerck E  
740 Klerck Francesca  
741 Kleyn Duard ( Endorsing Family Policy Institute)  
742 Klomp Dries  
743 Knapp Simone  
744 Knoetse Dewald  
745 Knoetse Juandre

746 Koegelenberg Minnelene  
747 Koekemoer Gary  
748 Koekemoer Marius  
749 Koekemoer Sonja (AGS Kerk)  
750 Koeleman Linda, (Mrs)  
751 Koetze Dewald  
752 Kohler Brian  
753 Kohrs Walter  
754 Kok Annie  
755 Kok Onnie  
756 Kokler Ina  
757 Kolbe Corlia  
758 Kolbe Janine  
759 Kolbe Lukas  
760 Kolbe Suan (Endorsed by 11 respondents)  
761 Koloko Florence  
762 Kopp Felicity  
763 Koster Danielle  
764 Koster Kirsty  
765 Kotze Annalise  
766 Kotze Sandra  
767 Kreeling Joseph  
768 Kretschmar Craig  
769 Krige Willie  
770 Kropf Kenneth  
771 Kruger Bernat, (Endorsed by Hennie Kruger and Susan Kruger)  
772 Kruger Elizabeth  
773 Kruger Francois  
774 Kruger Hennie  
775 Kruger Jarno  
776 Kruger Maria PSJ  
777 Kruger Philip  
778 Kruger Susan  
779 Kruger Tessa  
780 Krull Des  
781 Krull Marita, (Mrs)  
782 Kruyer Greg  
783 Kurien Deepa Mary  
784 Kymdell S  
785 Labuschagne Andre J  
786 Ladybrand Gebedsnetwerk (Louw A.S.M)  
787 Lagardien Zarreen  
788 Lakay Adrian  
789 Lalor Clare  
790 Lalor Nuala  
791 Lamb Sue  
792 Landsberg Louis  
793 Lane Brad  
794 Lane James  
795 Lang Arlene, (Mrs)  
796 Langerman Peter  
797 Langley Linda  
798 Langley Roy  
799 Larsen Sandy  
800 Lasch Michael

801 Laubscher Bertha  
802 Law Lois  
803 Lawrence B D  
804 Lawrence L, (Mrs)  
805 Lawson Tracy  
806 Lawton Richard  
807 Le Grange Sonya  
808 Le Marquand Sue  
809 Le Roux Brewer  
810 Le Roux Elsabe  
811 Le Roux H (Endorsed by 4 respondents)  
812 Le Roux Jacqui  
813 Leeman Rachel, (Mrs)  
814 Leeman Rea  
815 Lefebure Lindsey  
816 Lenny-Mannie Julie  
817 Leo Stephen  
818 Leserskring & leisure books (Harrison Celeste)  
819 Leukes Sheila  
820 Levendal Michelle & Allen  
821 Levenson Desire  
822 Lewis Clinton  
823 Lezar W  
824 Lezart George  
825 Liebenberg Joanne  
826 LifeHouse Church (Bradshaw Gary)  
827 Ligamma Hildah  
828 Ligthelm Ina  
829 Lillywhite Darren  
830 Lindeque Morne  
831 Live Line Technology (Risi Kevin)  
832 Lloyd Alison  
833 Lloyd Monica  
834 Lock Jeremy & Pat  
835 Lock JW  
836 Lodder Robert D  
837 Logie Errol  
838 London Road Church (Pastor Stander W.P)  
839 Long Anita  
840 Longino Libby  
841 Lotter Tracy (Aenmey)  
842 Loubser Anna-Marie  
843 Loubser Jeanne  
844 Loubser Marriete  
845 Loubser Rijk & Franchia  
846 Loubser Ruthie  
847 Lourens Lizanne  
848 Louw Daniel  
849 Louw Lynette  
850 Louw Melissa  
851 Louw SSM  
852 Louw Werner  
853 Lubbe Alyssa  
854 Lubbe Eugene  
855 Ludick Daneel

856 Ludick Letitia  
857 Lund Karin  
858 Lupton-Smith Alison  
859 Lupton-Smith Gillian  
860 Lutge Chantelle  
861 Lynn AD  
862 Lynn Aubrey (Denel Dyna)  
863 Mabena-Skosana Collen  
864 Mabija Sesethu  
865 Mabizela David  
866 Mac Donald Dan  
867 Mac Donald Marina  
868 Mac Donald Shelanna  
869 Mac Gregor Beatrice Estelle  
870 Mac Taggart Duncan  
871 Mac Taggart Jackie  
872 Maclachlan Belinda  
873 Madela Phumlani  
874 Mafney Meryl  
875 Magano Ntebo (Endorsed by 4 respondents)  
876 Magill Keith  
877 Maguga Lungiswa  
878 Mahlangu Molato  
879 Mahlangu N  
880 Mahlangu Philemon  
881 Maine Joel  
882 Makamu MD  
883 Makeketlane Emily  
884 Makepeace Billy  
885 Makepeace Charlotte  
886 Makhanya-Simelane Dolly  
887 Makua Jan  
888 Malan Marius  
889 Malan Waldo  
890 Malaza Valencia  
891 Malherbe Kobus  
892 Malherbe Pierre & Ursula  
893 Malherbe Susan  
894 Mampietsa Mziwamadoda  
895 Mandri Annen  
896 Mandri L  
897 Mandrt Annen Arjunan  
898 Manley Liz  
899 Manson Anthea  
900 Manuel Farida  
901 Manuel Gavin  
902 Manyuni Michael  
903 Mapabo Plaxcedes  
904 Marais Hannes  
905 Marais Johan  
906 Marais JS  
907 Marais Marlene  
908 Marais MI  
909 Marais-Kotze Marianne  
910 Maree Amanda

911 Maree Etienne  
912 Maree Wessel  
913 Marinda & Cornelius  
914 Maritz Anna-marie  
915 Marks Cliff  
916 Marks Gail  
917 Marks Wisley  
918 Marlise Dale  
919 Marnewick Linke  
920 Marquand Sue Le  
921 Marrah Andre  
922 Marsden Robin  
923 Martin Anthony Lee  
924 Martin Charmaine  
925 Martin Colette  
926 Martin J (Endorsed by 101 respondents)  
927 Martin Rosemary  
928 Martin Wesley  
929 Martindale John  
930 Martinson Sylvia  
931 Marx Louna  
932 Maryna  
933 Masango Matshadi (Endorsed by 4 respondents)  
934 Mashamaite Juliet (Endorsed by 3 respondents)  
935 Mashego Tsepo  
936 Mashishi Rebeca  
937 Mason Peter  
938 Masuku Lungile  
939 Matefi Tanya  
940 Mathee Anna E  
941 Mathew Judith  
942 Mathews Edward  
943 Mathews Fiona  
944 Mathews Miriam  
945 Mathews Nomie  
946 Maxwell John  
947 May G  
948 Mayephu Joel Mxolisi  
949 Mayne Anne  
950 Maythan Lisa  
951 Mazomba T  
952 Mbeki Thabo  
953 Mbiza Zukisa  
954 Mc Clunan Jane  
955 Mc Cormack Alice  
956 Mc Cormack George  
957 Mc Cormick Gary  
958 Mc Cosh Lynette  
959 Mc Donald Rowan  
960 Mc Intosh Evan  
961 Mc Kellar Lisa  
962 Mc Killop Wendy  
963 Mc Minn Adrian  
964 Mc Nair Leanne  
965 Mc Nicol R

966 Mc Queen R & E-A  
967 Mcloughlin Lorraine  
968 Mdletshe Khosi  
969 Mee Ken  
970 Meerkotter Anneke  
971 Megaw Anthea & Bryan  
972 Meier Minette  
973 Meintjies Abraham Johannes  
974 Meko Princess Dineo  
975 Melis Val  
976 Meng Astrid  
977 Merriman W, (Mrs)  
978 Meshoe KRJ  
979 Metcalfe Amanda  
980 Meyer Barbara  
981 Meyer Cornelius  
982 Meyer Faan  
983 Meyer JP  
984 Meyer Liza (Endorsed by 3 respondents)  
985 Meyer S E  
986 Meyer Theuns  
987 Meyer Yvonne  
988 Mgaga Zingisa  
989 Mgatyelwa Nobom  
990 Mhlanga Roland  
991 Mhlati Tami  
992 Micheal Keith  
993 Miles Yvonne  
994 Millar Sherilee  
995 Mills Bruce  
996 Mills Desrae  
997 Mills Glen & Marie  
998 Mills Janet  
999 Mills Michelle  
1000 Milne Lyneth  
1001 Milsana Zolile  
1002 Minnie Anmarie  
1003 Mitchell Lisa  
1004 Mjuza Gwendoline Thunyelwa  
1005 Mlisana Zolile  
1006 Mmapheto Tumisane  
1007 Mocke Jasper  
1008 Modiegi Thooe  
1009 Modiko BV  
1010 Moffat Judy  
1011 Mofoking Crystal  
1012 Mogale Samual  
1013 Moilwe Billy  
1014 Moleko Lerato  
1015 Moleko Nthabiseng  
1016 Moleshe Siphokazi  
1017 Möller Andre & Debbie  
1018 Moller Janis  
1019 Molo Sangololo (Solomons Patric)  
1020 Molokomme Suzan

1021 Momsen Erik  
1022 Mondl, Merebank (Ngwenya Phumzile)  
1023 Monqwe Jane  
1024 Monteiro Minda  
1025 Monyuni Michael  
1026 Moodley Bonney  
1027 Moodley Clinton  
1028 Moodley DK  
1029 Moodley Kuben  
1030 Moodley Nereis  
1031 Moolman Leandri  
1032 Moonieya Gaye  
1033 Moonsamy Logie  
1034 Moresby-White Karen  
1035 Morgan DW  
1036 Morgan Les  
1037 Morne Lindeque  
1038 Morris Pamela  
1039 Morris Penny  
1040 Morrison Marguerite  
1041 Morrison Percy  
1042 Morstert Elmarie  
1043 Morte Aleta  
1044 Mortimer Audri  
1045 Moses John  
1046 Moss Nomzano  
1047 Mostert Elmarie  
1048 Mosupye Kelello  
1049 Mother and Safe Home for babies needing emergency foster Care (Wood Fay)  
1050 Motshitela Peter  
1051 Motshwanerg JM  
1052 Moukoko Arschette  
1053 Mould Amanda Penelope  
1054 Mould Dave  
1055 Mouton Ronel  
1056 Mpemvu Prozesky Thabang (Mr)  
1057 Mpepo Nombuyiselo  
1058 Mshumpela Noluvuyo  
1059 Mthamzeli Busisiwe  
1060 Mthembu Norah  
1061 Mudaly R  
1062 Mudde Rob  
1063 Muggels Johannes, (Reverend)  
1064 Muhomba Invocation  
1065 Mulaudzi Bernard Maluta  
1066 Mulaudzi Lusani  
1067 Muller Adrian  
1068 Muller Herbert, (Mr.)  
1069 Muller Lourie  
1070 Munckton Antonel  
1071 Munisi Nkati  
1072 Munnick Robert Shawn & Tracy-Leigh  
1073 Munro Sue  
1074 Murphy B  
1075 Muslim Judicial Council SA (Allie Abdul Khaliq)

1076 Muslim School, Education (Kenny Kulsum)  
1077 Mwale William  
1078 Myburg Anneke  
1079 Myburgh Mike  
1080 Myburgh Susan  
1081 Nagel Merinda  
1082 Nagel Rudi  
1083 Nagy Michelle  
1084 Naicker Jane  
1085 Naidoo Darryl  
1086 Naidoo Larversan  
1087 Naidoo Sivashni  
1088 Naidu Jaya  
1089 Naidu Siva  
1090 Nakin Khopotso  
1091 Nation Building (Green Jim)  
1092 Ncanywa Sandra, (Endorsed by 3 respondents)  
1093 Ncapayi Mzwandile  
1094 Ncapayi Priscilla  
1095 NcNair Leanne  
1096 Ndala Create  
1097 Ndalana Liziwe  
1098 Ndevu Kathleen  
1099 Ndlovu Mathenga  
1100 Neilson Abigail  
1101 Nel Carin  
1102 Nel Chantal  
1103 Nel E  
1104 Nel Frieda  
1105 Nel George A, (Senior Pastor)  
1106 Nel Jackie  
1107 Nel Justus  
1108 Nel Kyla  
1109 Nel Lizel (Secretary)  
1110 Nell Louis  
1111 Nell Lynette  
1112 New Covenant Church, Bryanston (Bell Ashley)  
1113 NG Kerk Rondebosch (Marx JF)  
1114 Ngapayi Mzwandile  
1115 Ngatyelwa Nobom  
1116 Ngene Chris  
1117 Ngulele Lizzy  
1118 Nieman Charlene  
1119 Niemand Belinda  
1120 Nieuwoudt Stoffel  
1121 Nigrini Marie  
1122 Nikiforos Lorna  
1123 Nikwe Tamle  
1124 Njovana Caroline  
1125 Nkone Theo  
1126 NMPP Project (Ntanzi Themba)  
1127 Noad Robert  
1128 Nobom Mgatyelwa  
1129 Nortje Vanessa  
1130 Noruka Norhi

1131 Noval Peter John  
1132 Nxumalo Patricia  
1133 Nxumalo S, (Miss)  
1134 Nyakane Jillian  
1135 Nyumbu Coco  
1136 O'Connor Melanie  
1137 O'Neill Carol  
1138 Oberholster Marius  
1139 Oberholster Paul  
1140 Oberholzer Tina  
1141 O'Callaghan Francis  
1142 O'Connor Melanie  
1143 Odendaal Esmé  
1144 Odendaal Lisa  
1145 Odendaal Reinhardt & Karin  
1146 Olivier Adri  
1147 Olivier Andre & Lynette  
1148 Olivier Barbara  
1149 Olivier Esther  
1150 Olivier Kahlau Elizabeth  
1151 Olivier Wilma  
1152 Olsen Margrit & Sibisi Fano  
1153 On Hing Eleen  
1154 O'Neill Carol  
1155 O'Neill Frances  
1156 Oosthuizen Gert Daniel  
1157 Oosthuizen Lize  
1158 Oosthuizen Neil  
1159 Oosthuizen Roy  
1160 Opperman Danie  
1161 Optik Solway  
1162 O'Regan Sharon  
1163 Osner Chantelle  
1164 Owen Morné  
1165 Padayachy Kaumeshree  
1166 Palm Kurt  
1167 Palmer-Harrington Edith, (Mrs)  
1168 Parker Antony & Bronwyn  
1169 Parker Tim  
1170 Parsley Valerie  
1171 Patterson Rhoda  
1172 Paulus Daniel  
1173 Paulus Shireen  
1174 Pearton Don  
1175 Peers Grant  
1176 Pekane Ayanda  
1177 Pelser Susan  
1178 People Opposed to Women Abuse (POWA)  
1179 Perkins Mark  
1180 Persson Lorens  
1181 Perumal Lavendran  
1182 Petersen Fatima (Endorsed by 42 respondents)  
1183 Petersen Regina  
1184 Petrik Marko  
1185 Petzer Shane

1186 Phillips Helen  
1187 Phinah Ramela  
1188 Phipson David  
1189 Pickvance GP  
1190 Pienaar Albert  
1191 Pienaar Comine  
1192 Pienaar Jean  
1193 Pienaar Kathleen  
1194 Pienaar SE  
1195 Pietersen Regina  
1196 Pietersen Stephan  
1197 Pillay Andrew  
1198 Pillay Gabriel  
1199 Pillay Jay  
1200 Pillay Maninagalai  
1201 Pillay Morgan  
1202 Pillay Ronald  
1203 Pillay Sanette  
1204 Pillay Shaun  
1205 Pillay Tracy  
1206 Pinetown Presbyterian Church (Smith Jeremy, Reverend)  
1207 Pingo Denise  
1208 Pinks Chris  
1209 Pinks Sally-Anne  
1210 Pinky  
1211 Pluddemann Christof  
1212 Pole C  
1213 Pole Cindy  
1214 Pornss Shane  
1215 Pornss Soladia  
1216 Porter Coral  
1217 Porter Sharon  
1218 Porter Steve  
1219 Potgieter Dorette  
1220 Potgieter Johan  
1221 Potgieter Mariaan  
1222 Potgieter Neil  
1223 Potgieter Santa  
1224 Potgieter Sophia  
1225 Poulter Eleanor, (Mrs),  
1226 Powell Alex  
1227 Preez FA  
1228 Preston Brian  
1229 Preston Delia  
1230 Pretorius Gesin  
1231 Pretorius Hugo  
1232 Pretorius Pieter  
1233 Pretorius Shandre'  
1234 Pretorius Willem  
1235 Price S, Mrs.  
1236 Prince S  
1237 Prins Pam  
1238 Prinsloo Albert  
1239 Prinsloo Hendrico  
1240 Prinsloo Maritza

1241 Prinsloo S  
1242 Pudifin Sarah  
1243 Putter Lisa  
1244 Quincey Tracy  
1245 Quvana Nomfezeko  
1246 Qwele Mandisa  
1247 Rabe ML  
1248 Radebe Victor  
1249 Rademan Herman  
1250 Rakolota Abel  
1251 Ramela Phinah  
1252 Ramkisson Roshen  
1253 Ramkissoo Nikita  
1254 Randall Joy  
1255 Randall Sheldon  
1256 Randall Sue  
1257 Rantsho Martha  
1258 Rautenbach John  
1259 Rawula W, (Mr & Mrs)  
1260 Rayvonne Peter Rhoda  
1261 Reardon Elizabeth, (Mrs)  
1262 Reardon Liz  
1263 Rebelo Franco  
1264 Red Light District, Amsterdam (Van den Heever Ina)  
1265 Reddy Kay  
1266 Rees Dave  
1267 Reid Daphne  
1268 Reijnders Andre  
1269 Reinbach Daphne  
1270 Rens Edwin Samuel  
1271 Rens Eileen  
1272 Rescue Ramah  
1273 Retief Marno  
1274 Retief Tina  
1275 Reyneke Nicolette  
1276 Reyneke-Barnard Elske  
1277 Rheeders Rosemary,  
1278 Richard Melissa  
1279 Richards Mariette  
1280 Ries Wolfgang  
1281 Riley Sean Bryan  
1282 Rimensberger Nicole  
1283 Ritchie Claire  
1284 River Ministries (Tyhoko Zwelakhe)  
1285 Rob H  
1286 Roberts Grant  
1287 Roberts Jean, Concerned SA Citizen  
1288 Robertson JC  
1289 Robson Tim  
1290 Rocking Chair (Mc Donald Antoinette)  
1291 Roebert Pal  
1292 Rogers EAP  
1293 Rogers Gary  
1294 Ronelle S  
1295 Ronnie Velayuthan

1296 Roodt Lisa  
1297 Roodt Quintin  
1298 Roos Belle  
1299 Rose-Innes J  
1300 Rosenberg GL  
1301 Ross Belle  
1302 Ross Charmaine  
1303 Rossouw Cora  
1304 Rossouw Gideon  
1305 Rossouw Marius  
1306 Rossouw Tracy-Jean  
1307 Rossouw Trevor  
1308 Rostoll Wesley  
1309 Roux Trudie  
1310 Rudolph Kobus  
1311 Rupert Williamson  
1312 Russell Eileen  
1313 Russell Family  
1314 Rust Ian  
1315 Rutherford Haggett Sarah  
1316 Ruttenberg Jared  
1317 Sabela Octavia  
1318 Sabie Kath Whitely  
1319 Sackman Maxine  
1320 Saeed Abdullah  
1321 Sahabedin Fouzia  
1322 Sakhile Nelly  
1323 Sampson David  
1324 Samuel Muller  
1325 Samuels Carwyn  
1326 Sanches Maria  
1327 Sandenbergh Corinne  
1328 SAPS Legal Support, Crime Operations, National Crime Investigations (Van Graan NF)  
1329 Saptoe Rosy  
1330 Sasol Technology (Gregory Chantelle)  
1331 Saunders Ingrid  
1332 Saunders Lee  
1333 Scannell Jan  
1334 Scarborough Dorothea  
1335 Schalkwijk Peter  
1336 Scheepers Ella  
1337 Scheneberger Naomi  
1338 Schmahl Hannes  
1339 Schmidt Tommy  
1340 Schmitt Wolfgang  
1341 Schoeman Leon  
1342 Schonknecht Cindy  
1343 Schonknecht Sally  
1344 Schuster Brian  
1345 Scott Anisca  
1346 Scott Charmaine  
1347 Scott Stevens  
1348 Seaman Jayne, (Mrs)  
1349 Sefiti Abel

- 1350 Segwai Pontsho  
1351 Seifert Wolfgang  
1352 Seigels Winifred  
1353 Sekatane Bethuel  
1354 September Richard  
1355 Seshuane Patrick  
1356 Sete Lerato  
1357 Sex Worker Education and Advocacy Taskforce (SWEAT) (Fick Nicole)  
1358 Sex Worker Education and Advocacy Taskforce (SWEAT) Endorsed by Legal Resources Centre; Tshwaranang Legal Advocacy Centre; Women's Legal Centre; Gender DymaniX; Women and HIV/AIDS Gauge, Health Sytems Trust; Women'sNet; Joint Working Group (LGBTI Sector); SACCAWU; Centre for the study of violence and reconciliation Gender Base-violence program; AIDS Consortium; Good Hope Metropolitan Community Church; World AIDS Campaign; People Opposing Women Abuse; Institute for Security Studies (Fick Nicole)  
1359 Sex worker, Cape Town: Bianca  
1360 Sex worker, Cape Town: Jodie  
1361 Sex worker, Claremont: Miqaila  
1362 Sex worker, in a private house, Claremont: Angela  
1363 Sex worker, in a private house, Claremont: Anita  
1364 Sex worker, in a private house, Claremont: Bony  
1365 Sex worker, in a private house, Claremont: Candy  
1366 Sex worker, in a private house, Claremont: Coco  
1367 Sex worker, in a private house, Claremont: Dolly  
1368 Sex worker, in a private house, Claremont: Faith  
1369 Sex worker, in a private house, Claremont: Gabby  
1370 Sex worker, in a private house, Claremont: Kelly  
1371 Sex worker, in a private house, Claremont: Lerato  
1372 Sex worker, in a private house, Claremont: Lulu  
1373 Sex worker, in a private house, Claremont: Mandy  
1374 Sex worker, in a private house, Claremont: Nomonde  
1375 Sex worker, in a private house, Claremont: Nomvuzo  
1376 Sex worker, in a private house, Claremont: Nozuko  
1377 Sex worker, in a private house, Claremont: Sasha  
1378 Sex worker, in a private house, Claremont: Tina  
1379 Sex worker, in a private house, Claremont: Zandy  
1380 Sex worker, in a private house, Claremont: Zondwa  
1381 Sex worker, Johannesburg, Sonia  
1382 Sex worker, Johannesburg: Busi  
1383 Sex worker, Johannesburg: Falicia  
1384 Sex worker, Johannesburg: Makungu Maodza Moyo  
1385 Sex worker, Johannesburg: Muchaneta  
1386 Sex worker, Johannesburg: Suzan  
1387 Sex worker, Johannesburg: Thandi  
1388 Sex worker, Southern suburbs: Begumi  
1389 Sex worker, Southern suburbs: Jody  
1390 Sex worker, Southern suburbs: Zoe  
1391 Sex worker, various places: Lisa Leendertz  
1392 Sex Worker: Ashleigh  
1393 Sex worker: Bianca  
1394 Sex worker: Eva Da Diva  
1395 Sex worker: Simone  
1396 Sex worker: Tina  
1397 Shabalala Annie  
1398 Shamrock S

1399 Sharman Sarita  
 1400 Sharon A.O.G. Group of Churches (Clarence Peter D, Reverend/ Pastor /  
 Chairperson, )  
 1401 Shearar Mark  
 1402 Sheneberger Naomi  
 1403 Shield Ministries (Hessel Leslie)  
 1404 Shingles Elize  
 1405 Shwababa Siviwe  
 1406 Siaki Barbara  
 1407 Sibisi Fano  
 1408 Sibongile  
 1409 Sidebottom Ann  
 1410 Sifiti Albert  
 1411 Sikwebu Afikile  
 1412 Sime Schonette  
 1413 Simons L  
 1414 Sisonke JHB (Richter Marlise)  
 1415 Skevington Mike  
 1416 Skippers Granville  
 1417 Skosana Asanda  
 1418 Slater Vanessa  
 1419 Smidt Gerhardt, (Dr)  
 1420 Smit B.G  
 1421 Smit Dirk  
 1422 Smit Elma  
 1423 Smit Elmarie  
 1424 Smit Joe  
 1425 Smit M  
 1426 Smith Alma  
 1427 Smith Andy  
 1428 Smith Annemi  
 1429 Smith Benard & Erna  
 1430 Smith Bev  
 1431 Smith Charline  
 1432 Smith Johann  
 1433 Smith Keown  
 1434 Smith Kristin  
 1435 Smith Loraine  
 1436 Smitsdorff Monica  
 1437 Snyders Johan  
 1438 Snyman Gail  
 1439 Sobuza Fundile  
 1440 Sokolic Frank  
 1441 Solomon F C  
 1442 Solomon Rowena  
 1443 Somaru Kajal  
 1444 Somdaka Siyasanga  
 1445 Sonderholm Liani  
 1446 South African Catholic Bishops' Conference Parliamentary Liaison Office  
 1447 South African Christian Football Association (Courtis Spencer Bruce)  
 1448 Spangehl Venessa  
 1449 Spengler Jane  
 1450 Spoelstra Nan  
 1451 Stander Chantel  
 1452 Stander Jan

- 1453 Stander Wikus
- 1454 Stanford Cheryl
- 1455 Stansfield Leonora
- 1456 Staude Wayne
- 1457 Stead Pat
- 1458 Steenkamp Jannie
- 1459 Steenkamp Marie
- 1460 Steenkamp S.E.M
- 1461 Steffen Bianca
- 1462 Stephan Deanne
- 1463 Steve Biko Centre for Bioethics, University of Witwatersrand (Richter Marlise and Bodin Chesa)
- 1464 Steve Biko Centre WITS (Marlise Richter), Endorsed by AIDS Consortium; AIDS Legal Network; Centre for Applied Legal Studies; OUT LGBT Well-Being; Socio-Economic Rights Project; Community Law Centre, University of Witwatersrand; south African National AIDS Council Women's Sector; Treatment Action Campaign's Women's Rights Campaign; Tshwaranang Legal Advocacy Centre
- 1465 Stevens Jean
- 1466 Stewart Beth
- 1467 Steyn Engela
- 1468 Steyn Martin
- 1469 Steyn Tarryn
- 1470 Stiekema Carol-Ann
- 1471 Stirling Worship Centre Full Gospel Church of God (Davi Stef, Pastor)
- 1472 Stockill Judy
- 1473 Stone Gavin
- 1474 Stone Liezl
- 1475 Stone Marion
- 1476 Stott Phillip
- 1477 Stowe FM
- 1478 Straatwerk (Outreach ministry to people in need in Cape Town) (Bruwer Madri)
- 1479 Strange Helen
- 1480 Stratis Beverley
- 1481 Straut Ronelle
- 1482 Stroebel Hilda
- 1483 Struyweg Abaraham
- 1484 Struyweg Daniel Johannes
- 1485 Struyweg Johannes
- 1486 Struyweg Maria Elizabeth
- 1487 Struywes ME
- 1488 Strydom Antenette
- 1489 Strydom Helga
- 1490 Strydom Johan
- 1491 Stuart John
- 1492 Stuart Ronelle
- 1493 Subroyen Bala
- 1494 Sulaimaan Muhammed
- 1495 Summerstrand Campus South (Stenning Marida)
- 1496 Sunnyside Victory Centre (Du Preez Johann A, Pastor)
- 1497 Swanepoel Emil
- 1498 Swanepoel Peter
- 1499 Taariq
- 1500 Taigbenu Akpofure
- 1501 Takane Anita
- 1502 Tamle Nikiwe

1503 Tate Peter  
1504 Tate Shelley  
1505 Tayler Anne  
1506 Tayler Callie  
1507 Tayler K.A.  
1508 Tayler Keir  
1509 Te Roller Marita  
1510 Teitge Michelle  
1511 Temlett Ivor  
1512 Ter Morshuizen Alan  
1513 Ter Morshuizen Leslie  
1514 Ter Morshuizen Victoria  
1515 Terblanche Victor  
1516 Terlouw Andre  
1517 Tertiens Pamela  
1518 The Full Gospel Church of God in SA  
1519 The soul providers trust (Rev Brent Chalmers)  
1520 Themba Skosana  
1521 Theron Ben  
1522 Theron Edith  
1523 Theron Nick  
1524 Thieras Randal  
1525 Thomas Dicky  
1526 Thomas John  
1527 Thomas Lesley  
1528 Thomas Patsy  
1529 Thompson Anja  
1530 Thompson Lynn  
1531 Thooe Modiegi  
1532 Thorne Helen  
1533 Thorne HS  
1534 Thornhill Jennifer  
1535 Tilbury Glenis G  
1536 Tilbury Michaela E  
1537 Tillett Lyn  
1538 Titus Adri  
1539 Toich Lucia  
1540 Tomlinson Taryn  
1541 Tonkin Lori-Anne  
1542 Troost Derick  
1543 Trotter Henry (Yale University)  
1544 Truter Dan and Heidi (Endorsed by 58 respondents)  
1545 Truter Deidre  
1546 Tryon Denzil  
1547 Tshabalala Annie  
1548 Tshamala Noah, Abigail, Emany, Samuel  
1549 Tshwaranang Legal Advocacy Centre  
1550 Tucker Di  
1551 Tucker Ockert  
1552 Tucker Ryno  
1553 Tucker Vaughn  
1554 Turner Lesley  
1555 Tutt Fiona  
1556 Tyson Madine  
1557 Umphakathi Okhathazekile Concern for young people in South Africa (Buthelezi T)

1558 United Nations Development Fund For Women (UNIFEM)  
1559 Uren-Viner Janette  
1560 Uys H  
1561 Valente Neusa  
1562 Van Aarde Judy  
1563 Van Aarde Lidia  
1564 Van Aswegen Elvera  
1565 Van Aswegen Marinda  
1566 Van Biljon Annalie  
1567 Van Breda Cindy  
1568 Van Coller Leonie  
1569 Van de Merwe Frederick  
1570 Van den Berg Amanda  
1571 Van den Berg Celeste  
1572 Van den Berg Jackie  
1573 Van den Berg Mariaan  
1574 Van den berg Sam  
1575 Van den Heever Callie  
1576 Van der Feyst Robert  
1577 Van der Hoogt Thea, (Mrs)  
1578 Van der Hoven Nico  
1579 Van der Lingen Neels  
1580 Van der Merwe Andre  
1581 Van der Merwe Cheryl  
1582 Van der Merwe Claudia  
1583 Van der Merwe Ebeth  
1584 Van der Merwe Frederick  
1585 Van der Merwe Jacques  
1586 Van der Merwe Johan  
1587 Van der Merwe Louise  
1588 Van der Merwe Marisa (Endorsed by 39 respondents)  
1589 Van der Merwe Martie  
1590 Van der Merwe Paul  
1591 Van der Merwe Schalk & Amri  
1592 Van der Merwe W (Endorsed by 39 respondents)  
1593 Van der Ryst Miemie  
1594 Van der Sandt Henry  
1595 Van der Vinne Kees  
1596 Van der Vyver Aletta  
1597 Van der Vyver Jaco  
1598 Van der Walt M  
1599 Van der Westhuizen Elize  
1600 Van Deventer Barrie and Anton  
1601 Van Dorp Lizelle  
1602 Van Dyk Marie  
1603 Van Dyk Nico  
1604 Van Dyk Thinus  
1605 Van Eck A.J.  
1606 Van Heerden Amanda  
1607 Van Heerden Patrick  
1608 Van Heerden Trudie  
1609 Van Huyssteen J, (Mr & Mrs)  
1610 Van Jaarsveld Wilma  
1611 Van Lelyveld Chris  
1612 Van Locherenberg Lynette

1613 Van Niekerk Charl  
1614 Van Niekerk Jaco  
1615 Van Niekerk JP  
1616 Van Niekerk Magtildt  
1617 Van Niekerk Manetta  
1618 Van Niekerk Marelize  
1619 Van Niekerk Myra, (Mrs), (Endorsed by Arlene Malloy and Princess Reddy)  
1620 Van Niekerk Rheebea  
1621 Van Niekerk Roslyn  
1622 Van Niekerk Schalk  
1623 Van Noordwyk Christel  
1624 Van Rensburg Hary  
1625 Van Rensburg John  
1626 Van Rensburg Mary  
1627 Van Rooyen JN  
1628 Van Rooyen Maria  
1629 Van Rooyen Suzette  
1630 Van Schalkwyk Annette  
1631 Van Schalkwyk Belma  
1632 Van Schalkwyk Johan  
1633 Van Schalkwyk Marije  
1634 Van Schalkwyk Sonya  
1635 Van Staaden Linda  
1636 Van Staden Christa  
1637 Van Staden Johan  
1638 Van Staden Jolene  
1639 Van Staden Kevin  
1640 Van Staden Priscilla  
1641 Van Tonder Angela  
1642 Van Tonder Anthony  
1643 Van Tonder Attie  
1644 Van Tonder Leon  
1645 Van Tonder Wynand & Bessie  
1646 Van Vuuren Ann  
1647 Van Vuuren Pam  
1648 Van Wyk Johan  
1649 Van Wyk KJ  
1650 Van Wyk Lisa  
1651 Van Zijl George  
1652 Van Zijl LM  
1653 Van Zyl Albert  
1654 Van Zyl Anel  
1655 Vanda Thembaselani  
1656 Vanda Zukie  
1657 Veerabudary Peter  
1658 Venter Johan  
1659 Venter Sandri  
1660 Venter Zelda  
1661 Vermaak Patty  
1662 Vermeulen Ben  
1663 Vermeulen Jacobus  
1664 Verreyne Richard  
1665 Verreyne Tobie  
1666 Versfeld Rina  
1667 Versteeg Christo

1668 Verwey Rene  
1669 Viljoen Carel  
1670 Viljoen Leonie  
1671 Visagie Irene  
1672 Visser Jeanette  
1673 Visser Karin  
1674 Visser Piet  
1675 Visser Rianna  
1676 Visser Theresa  
1677 Vollgraaff Andries & Beverley  
1678 Volschenk Johan  
1679 Von Reiche FVA (Additional, Magistrate, Civil Section, Pretoria)  
1680 Vuyo  
1681 Wahl L  
1682 Walker L (Mrs)  
1683 Walker Sheila, Larry, Zee, Michelle  
1684 Wallace Charmaine  
1685 Wallace-Bradley Jane  
1686 Waller Heidi  
1687 Walter Lynne  
1688 Walters Rico  
1689 Walters Sheila  
1690 Watson Lesley  
1691 Watson Ruth  
1692 Watson Sandy  
1693 Watts Gwen  
1694 Watts Tim  
1695 Webb Elzaan  
1696 Webster Alan  
1697 Webster Nikita  
1698 Wellmanns Rainer  
1699 Wells Annie  
1700 Wels Lena  
1701 Werner Ernst  
1702 Wessels Ronald  
1703 Westley Marie  
1704 Weston Pam  
1705 Wetherill Judy  
1706 Whitcomb Jeremy  
1707 White Gary  
1708 White Ruth  
1709 Whiteley Kathy (Sabie)  
1710 Whitfield Joscelin  
1711 Whitwell Piers  
1712 Whyte Carol  
1713 Wickli Barbara  
1714 Widd Iron  
1715 Wiid Ivor  
1716 Wilaon G  
1717 Wildenboer Liezl  
1718 Wilkes Judy  
1719 Wilkinson Cliff  
1720 Wilkinson Inga  
1721 Wille Paul  
1722 Williams Connie

1723 Williams Eleonora  
1724 Williams Fred  
1725 Williams Janet (Janet massage Therapist)  
1726 Williams Jenny-Lee  
1727 Williams John  
1728 Williams P  
1729 Williams Rebecca  
1730 Williams Su  
1731 Williamson Christianne  
1732 Williamson Rupert  
1733 Willie Burger Auditors (Wessels Estelle)  
1734 Willie Paul  
1735 Willmore Heather  
1736 Wilson Alan  
1737 Wilson Barbro  
1738 Wilson G, (Mr)  
1739 Wilson Ian  
1740 Wilson TS  
1741 Witten Virginia  
1742 Witthuhn Yvette  
1743 Wolfaardt Celest  
1744 Wolfgang Seifert  
1745 Wood Allister  
1746 Wood Sue  
1747 World Vision South Africa, Gender Coordinator  
1748 Wulfsohn Basil  
1749 Yates Linda  
1750 Young Barbara  
1751 Zanele MD  
1752 Zeelie Carl  
1753 Zevenster Hardus  
1754 Ziegler Susanne  
1755 Ziller Daniel  
1756 Ziller Family  
1757 Ziller Ian  
1758 Ziller Sanet  
1759 Ziller Simon  
1760 Zumbika Betserai  
1761 Zwane Sipiwe

# ANNEXURE C: WORKSHOPS

## PRETORIA WORKSHOP 19 MAY 2009

	<b>Surname</b>	<b>Initials</b>	<b>Company</b>
1	Awdlusi	Oluwadamilola Abosede	Mokwana Attorneys
2	Bokaba	Edna	Hospersa (Fedusa)
3	Booyens		Dept Social Work and Criminology, University of Pretoria
4	Burrow	Phillippa	MCSA Womens Auxilliary
5	Demana	Neliswa	DOJ&CD
6	Dimbaza	Mzukisi M	Magistrate's Court Cape Town
7	du Plessis	E	South African Police Service
8	Gamader	Nompumeleld	Dept of Health
9	Gititu	Wambui	International Organisation for Migration (IOM)
10	Haggett	Sarah Rutherford	UNISA
11	Herselman	Madelein	FCS Klerksdorp (CPU)
12	Kgamede	Sello	Hospersa
13	le Roux	Susan	International Organisation for Migration (IOM)
14	Loubser	Ruth	SASHA Sex-Educator, Medical Nurse and Exec Member
15	Lutya	Thozama	Social Work and Criminology Dept Univ Pretoria
16	Machabaphala	Tshepiso	Dept of Health
17	Mahlobogwane	Frans	UNISA
18	Maseko	Jabulani Maxwell	S A Police Service
19	Möller	Melani	Student at University Pretoria
20	Montesh	Moses	UNISA
21	Murray	Grant	UNISA Dept of Jurisprudence
22	Nobongoza	Humphrey	United Democratic Movement (UDM)
23	Robertson	Sheila	MCSA Womens Auxilliary
24	Sedibe	Mabatho	Methodist Church of SA
25	Seemane	Rebone Nonia	S A Police Service
26	Selepe	Tsholo	S A Police Service
27	Sparg	Annie	(ACDP) African Christian Democratic Party
28	Stefiszyn	K	UP: Centre for Human Rights
29	Steyn	Alet	South African Police Service
30	Swanepoel	Annali	(ACDP) African Christian Democratic Party
31	Swart	Bernadine	Methodist Church of SA
32	van Blijon	Kenny	Public Prosecutor at Sexual Offence Court Klerksdorp
33	van der Sandt	Wessels	S A Police Service
34	Vermeulen	Zelda	Methodist Church of SA
35	Wildenboer	L	UNISA Dept of Jurisprudence
36	Yates	Linda	African Christian Democratic Party

### Additional workshop attendees (Pretoria)

	<b>Surname</b>	<b>Initials</b>	<b>Company</b>
1	Coetzee	Christa	SASHA/Psychologist
2	du Preez	H	Justice
3	Gitith	Wanbi	10M
4	Letsago	MD	Unisa
5	Ligthelm	J	C.I.T
6	Magadani	Elvis	Justice
7	Mashish	Phumizik	Hospersa
8	Mpete	BJ	S.A.P.S
9	Mqdomba	Zulc	DOL
10	Naiden	Kevin	Bethesda Rev.Church
11	Ramlal	Ash K	Magistrates Commission
12	Schofied	N	The Expeditionary
13	Sekoawe	Lizzi	Department of Health
14	va Develer	Adina	Director Public Prosecution
15	vd Merwe	Kirsten	Justice / BCN
16	Veereman	Leon	NPA

## JOHANNESBURG WORKSHOP 26 MAY 2009

	<b>Surname</b>	<b>Title</b>	<b>Initials</b>	<b>Company</b>
1	Baliso		Vuyelwa	Sisonke
2	Barker		Gavin	Booyens CDF
3	Bonthuys		Elsje	School of Law Wits
4	Cawood		Lynne	Childline
5	Chakuvinga		Pamela	Sisonke
6	Coetser	Rev	W J	Nederdutch Reformed Church
7	de Roland-Phillips	Ms	Pule	The Western Extension Residents' Association
8	Dlamini		Jabu	Sisonke
9	Edwards	Mrs	Francisca Nobuhle	Berea-Hillbrow Home of Hope
10	Ferreira		Helena	NPA
11	Gould	Dr	Chandre	Institute for Security Studies
12	Halle		Zain	Khulisa Crime Prevention Initiative
13	Jadezwi		Nonceba	Judiciary
14	Jane	Cllr	Dennis	CoJ, DA - Ward Councillor 56
15	Jankelowitz		Lauren	RHRU, Reproductive Health & HIV Research Unit
16	Jele		Gugu	City of Johannesburg (Health) HIV & AIDS
17	Kgomo		Leah	Sisonke
18	Kionga		Baku	Sonke Gender Justice Network
19	Kykkotis		Seraphim	Greek Orthodox Church
20	Lalu		Vivienne	SWEAT
21	Lee	Mrs	Sylvia	MCSA Women's Auxiliary
22	Leope		Lebogang	Sonke Gender Justice Network
23	Lesheba		Tumi	Sisonke
24	Lutshaba		Betty	Sisonke
25	Machaka		Mpho	Standard Bank
26	Madalane		Henry Sgu	Dept of Home Affairs
27	Maema	Ms	Keketso	Commission for Gender Equality
28	Makhathini		Mantoa	Sisonke
29	Makhosane		Mohau	Medical Research Council of South Africa
30	Marumo		Tshipinare	Commission for Gender Equality
31	Mashamba	Ms	Iris	GDoH, Multisectoral AIDS Unit
32	Mashinini		Nomsa	Sisonke
33	Matshazi		Sikhululekile	Sisonke
34	Mbatha		Nonhlanhla	Sisonke
35	Mbonani		Muzi	Olive Leaf Foundation
36	Mdhluli		Constance	Sisonke
37	Meerkoter		Anneke	Tshwaranang Legal Advocacy Centre
38	Mhlongo		Sibongile	Commission for Gender Equality
39	Mills		Shereen	OALS
40	Minnaar		Nanette	Khulisa Crime Prevention Initiative
41	Mkhwanazi		Pretty	Sisonke
42	Mlambo		Fikile	Sisonke
43	Mokoena	Mrs	Mosley Lebeloane	Families South Africa (FAMSA)
44	Mokonyama		Eric	South African Human Rights Commission
45	Mokoquwe		S C	SAPS
46	Molekoa		Phillip	S A Human Rights Commission
47	Moleshe	Adv	Siphokazi	Independent Complaints Directorate (ICD) Gauteng

48	Moloi		Khethiwe	Sisonke
49	Monyeki		Johanna	Sisonke
50	Motgume		T	SAPS
51	Motlatla		Rebecca	Dept of Health
52	Motsa		Khanyisile	Berea-Hillbrow Home of Hope
53	Motshitela		Peter	ACDP Youth Foundation
54	Motumi		Mpho	SAPS
55	Mpaneg		Zukiswa	Sisonke
56	Mphusu		Josephine	Tshikulu Social Investment
57	Msila		Thaneleka	Sisonke
58	Mzuzo		Xolelwa	Sisonke
59	Napo		Vernet	Commission on Gender Equality
60	Ndkleni		Amelia	Sisonke
61	Ndlovu		Sbanzile	Sisonke
62	Ndlovu		Sibhekinkosi	Sisonke
63	Neba		Laura	Sisonke
64	Nengovhela	Adv	Mutuwa	National Prosecuting Authority (NPA)
65	Nengovhela		M P	NPA
66	Nkosi		Nqobile	Sisonke
67	Nkosi		Thami	Sonke Gender Justice Network
68	Nonyane	Ms	Nuku	Independent Complaints Directorate (ICD) Gauteng
69	Nyangairi		Barbara	Forced Migration Studies Programme, Univ of Witwatersrand
70	Padaychee		Denise	Justice Alliance of S A
71	Phillips		Andrew	The Ranch
72	Pitso		Samuel B	SAPS
73	Poto		Eunice	Commission for Gender Equality
74	Rens	Mrs	Eileen	MCSA Women's Auxiliary
75	Richter		Marlise	Steve Biko Centre for Bioethics. Faculty of Health Sciences Unis of the Witwatersrand
76	Ringane		Veronica	Sisonke
77	Seohatse		Lerato	Commission for Gender Equality
78	Sete	Ms	Lerato	UNISA
79	Shoba		Sbanzile	Sisonke
80	Sigworth		Romi	Centre for the Study of Violence & Reconciliation (CSV)
81	Sithole		Thembehle	Sisonke
82	Skosana		Catherine	Dept of Health
83	Tamle	Ms	Nikiwe	Gauteng Dept of Health, Public Health-Mother & Children
84	Tsibkanye		Portia	Sisonke
85	Tuadi		M	SAPS
86	van Zyl		Danzel	South African Human Rights Commission

### Additional workshop attendees (Johannesburg)

	<b>Surname</b>	<b>Initials</b>	<b>Company</b>
1		Sissy	Sisonke
2	Ben Zeer	Ori	SAMRC
3	Chauke	Gloria	Sisonke
4	Gololo	Mamorwa	ACDP
5	Honenmann	Brain	Aids Law Projects
6	Jerome	John	Church
7	Loius	J	NCWSA
8	Macy	Laura	Sisonke
9	Marite	M M	Berea Hillbrow House of Hope
10	Marumo	Tshipinare	Commission for gender equity
11	Matlanyane Sexwale	B	CDP
12	Maughan	Karyn	Independent News paper
13	Mayham	William	RHRU
14	Mnisi	Cathy	DOJ : Randburg
15	Modi	Mmotse	SAIFAC
16	Mokoena	Moslem Lebeloane	FAMSA National
17	Mpotu	Sibusiso	Sisonke
18	Ndlovu	Sibongile	Sisonke
19	Ngobo	Thobekile	Sisonke
20	Nzuza	Sindiswe	Sex Worker
21	Pawayi	Basil	Church
22	Phetta	Godfrey	Student
23	Pule	Albert	City Press
24	Ramagaga	Tizina	ISS
25	Sithole	Thembi	Sisonke
26	Smith	Gail	City Press
27	Tloukoko	Arschitle	The Salvation Army
28	Very	Gert	Church
29	Wood	Allister	The Salvation Army
30	Yates	Linda	ACDP

### CAPE TOWN WORKSHOP 28 MAY 2009

	<b>Surname</b>	<b>Title</b>	<b>Initials</b>	<b>Company</b>
1	Amollo		Rebecca	Community Law Centre, Univ of Western Cape
2	Arde		Angelique	Stop Trafficking of people, working group of Connect Network
3	Badi		Nomvuyo	Treatment Action Campaign
4	Bird		Cheryl	ACSA
5	Bruwer		Madri	Straatwerk
6	Cele		Gaynor	His People Christian Church
7	Christopher		Debbie	Living Hope Bible Church
8	Cloete		Melville	S A Police Service
9	Cornelius		Marina E	M E C Ministries
10	Davids		Magboeba	Islamic Unity Convention Women's Forum
11	Davids		Fatima	City of Cape Town
12	Donam		M	Justice Acts
13	du Plessis		Andre	Western Cape Religious Leaders Forum
14	du Plessis		Sally	Western Cape Religious Leaders Forum
15	Dudley	Mrs	Cherylyn	A C D P
16	Els		WP	Community Representative-Bellville
17	Fletcher	Prof	B P M	Teen Against Prostitution
18	Gibb		Margie	Methodist Church Women's Auxiliary Cape District
19	Gie		Andrew	City Partnership
20	Harper		Eric	SWEAT
21	Howie		Cheryl	Women of Destiny
22	Human		Chine	Standing together to Oppose pornography
23	Isaac		Sueanne	Parliament
24	Ismail		Y	Islamic Unity Convention Women's Forum
25	Jansen		Jeffree	Protestant Association of SA
26	Kariem		Achmed	Family Policy Institute
27	Khuzwayo		Thabisile	Aids Legal Network
28	Kraai		N	Treatment Action Campaign
29	Kuhnert		Kira-Leigh	Open Society Foundation for South Africa
30	Lakay		Keegan	Commission for Gender Equality
31	le Roux	Mr	Gerhard	Christians for Truth
32	Macala		VN	SAPS
33	Mahlasela	Capt		SAPS Legal Service
34	Masoka		Nomvuzo	Mosaic
35	Matthee		Rene	SAPS
36	Moore		Natalie	Activists Networking against the exploitation of children
37	Mwamuka		Matipa	Activists Networking against the exploitation of children
38	Naidoo		Pam	2010 Operations: City of Cape Town
39	Ndalama		Liziwe	ACOP
40	Padayachee		Denie	
41	Peers		Grant	East Claremont Congregation Church
42	Qinisile		Nomsa	T A C Khayelitsha
43	Radebe		Bongiwe	Aids Legal Network
44	Roller		M Te	Community Representative-Bellville
45	Samson		Jessica	Member of Society Active in Gender Issues
46	Sanger		Gherith	Women's Legal Centre
47	Scarborough		Dorothea	Gospel Defence League

48	Stage		Kgomotso	Godly Government Network
49	Stephens		Justine	City of Cape Town
50	Stern		Orly	Sonke Gender Justice
51	Strydom		L	Magistrate
52	Studti		Brendan	Grant Gunston Inc
53	Titus		Garm	N P A SOCA Unit
54	van der Schaff		Gahsiena	Aids Legal Network
55	van Rooyen		Hester	Volunteer- Magistrate Court
56	van Wyk		Linda	N P A
57	Vermeulen		B H	Magistrate Mosselbay
58	Verreynne		R	Christians Reformed Church in SA
59	Wakefield		Lorenzo	Community Law Centre, Univ of Western Cape
60	Warren	Mr	Abraham	Doctors for Life
61	Whittle		Patricia	Parliament
62	Wiesspiere		H	
63	Williams		Jennifer	Women's Legal Centre
64	Wilson		E	St Anne's Home
65	Wilson		M	Justice Acts

## DURBAN WORKSHOP 2 JUNE 2009

	<b>Surname</b>	<b>Title</b>	<b>Initials</b>	<b>Surname</b>	<b>Company</b>
1	Claassen		Johan	Claassen	KZN Provincial Substance Abuse Forum (Dept Soc Dev)
2	Coltman		Martin	Coltman	Doctors for Life International (Legal Services)
3	de St Pern		Marjorie	de St Pern	Women's Auxiliary of the Methodist Church
4	de Wet		Martus	de Wet	Doctors for Life International (Legal Services)
5	Dobson		Carole	Dobson	ACDP
6	Downs		Glenton Keith	Downs	The Centre for Christian Democracy in Africa
7	Fisher		Sheine	Fisher	Operation Bobbi Bear
8	Fisher		Dianna	Fisher	Operation Bobbi Bear
9	Hartley	Rev	Errol	Hartley	Wesleyan Church of Southern Africa
10	Hicks		Janine	Hicks	Commission for Gender Equality
11	Holness		Willene	Holness	Legal Resources Centre
12	Hughes		Debra	Hughes	Prospective Volunteer for Doctors for Life
13	Khamba	Ms	Ntokozo	Khamba	Dept of Local Government & Traditional Affairs
14	Kheswa		Nonduduzo S	Kheswa	Ngubane & Partners Inc
15	Khoza		Vusi	Khoza	UNODC (United Nations Office on Drugs and Crime)
16	Majola		Ndabuko	Majola	Communal Foundation
17	Melis		Val	Melis	NPA
18	Menzies		Darlene	Menzies	The Development House
19	Mlatsha		Bongiwe	Mlatsha	International Organization for Migration
20	Mthembu	Adv	Mhlaliseni Michael	Mthembu	
21	Munoo		Tanuja	Munoo	S A Human Rights Commission
22	Mweli		Thobile	Mweli	Doctors for Life International (Legal Services)
23	Naidoo	Adv		Naidoo	
24	Nala		Dumisile	Nala	Childline KZN
25	Nel		Phillip	Nel	SAPS Social Crime Prevention
26	Ngcobo	Mr	M J	Ngcobo	Independent Complaints Directorate
27	Nkuebe	Dr	Tseliso	Nkuebe	Doctors for Life International (Legal Services)
28	Overall		Chris	Overall	Durban Metropolitan Police Service
29	Powys		Taryn Janine	Powys	Commission for Gender Equality
30	Ramdin	Mrs	Rhona R	Ramdin	SASSA - South African Social Security Agency
31	Reardon	Mrs	Elizabeth	Reardon	African Christian Democratic Party
32	Selby		John	Selby	Private Guest House
33	Smith	Rev	Jeremy	Smith	Pinetown Presbyterian Church
34	Swanepoel		Emil	Swanepoel	ACDP
35	Thomas	Mrs	Jean	Thomas	Methodist Church Women's Auxiliary
36	van Niekerk		Joan	van Niekerk	Childline South Africa
37	Williams		Peter	Williams	S A Police Services

**MOKOPANE 11 JUNE 2009**

	<b>Surname</b>	<b>Title</b>	<b>Initials</b>	<b>Company</b>
1	Chauke	Adv	H W	Magistrate
2	Cloete		P H	Regional Court, Limpopo Division
3	du Plessis	Adv	J	Magistrate Tshilwarhuoiku
4	Frew		David	I M D Africa
5	Hankins	Ms	Bridgette	Anglo Platinum Mines
6	Kellerman		Andries Petrus Rudolf	Magistrate Dzanani
7	Keulder		D	NPA
8	Khosi Mashamba		NTL	Limpopo House of Traditional Leaders
9	Lebese		M L	SAPS
10	Lesufi	Mr	Ronnie	Moletsi Community Radio
11	Maake		KC	Justice
12	Mablio		TC	NPA
13	Mabotha		Sophie	Anglo Platinum Mines
14	Madingana		HS	NPA
15	Maila		MI	NPA Thabampoopa
16	Manganyi		EEL	NPA
17	Masanya		MS	NPA Mokerong
18	Mashala	Pastor	Elba	Zoe Tabernacle
19	Mashile		ET	Magistrate Mokerong
20	Mathabatha		Yvonne	Limpopo Gambling Board
21	Mathabatha	Adv	N C	NPA Nebo
22	Matlamela		RS	Provincial Crime- SAPS Limpopo
23	Mokwele		Mina	Anglo Platinum Mines
24	Moloto		KN	NPA
25	Mothobuka		T	Provincial Crime- SAPS Limpopo
26	Mthombeni	Mr	N C	Regional Court, Thohoyandou
27	Nel		Elba	DPP
28	Nom		TS	Justice
29	Phetla		M A	SAPS
30	Phiri	Mrs	T J	Regional Court, Limpopo Division
31	Rabospe- Ncuabekug		L E	Magistrate's Commission
32	van Rooyen		R S	NPA Modimole
33	Zuma		RP	NPA Thabampoopa

## KIMBERLEY WORKSHOP 25 JUNE 2009

	<b>Surname</b>	<b>Title</b>	<b>Initials</b>	<b>Company</b>
1	Birch	Adv	T T	NPA Kimberley
2	Hanisi		Christopher	Gender Equality
3	Krieger	Dr	A	Dept of Health Free State
4	Ligammba		Hildah	DOJCD
5	Manhe		Lenah	SAPS Upington
6	Marais	Dr	J M	Dept of Health Free State
7	Meruti		Kenosi	Gender Equality
8	Monyobo	Ms	P	Free State Health
9	Mosemeng		Innocentia	UNODC United Nations Office on Drugs & Crime
10	Mtini		Ntombenani P	Dept of Justice
11	Pilane		Kelebogile	Gender Equality
12	Pillay	Adv	Soraya	NPA
13	Pretorius		Staphanie	UNDOC Project of Assistance to the Victim Empowerment Programme
14	Sangqu	Adv	Lulama M	Family Advocate
15	Tshazibana		Mvuleni	Gender Equality
16	van den Heever	Mr	P J	Family Advocate

### Additional workshop attendees

	<b>Surname</b>	<b>Initials</b>	<b>Company</b>
1	Bontes	D W	NPA: Bloemfontein
2	Mampintsha	M	Ubabalo Foundation
3	Mabaso	J	NPA: DPP Kimberley
4	Kgatwe	K M	NPA: Kimberley
5	Jontus	C N	Dept of Safety & Liaison
6	Brandt	E	Dept of Safety & Liaison
7	Mongale	K	Ubabalo Foundation
8	Seshuane	P T	African Proper Net
9	Motshwemeng	J M	Harvest Ministries Int.
10	Moilwe	B	Transformation Centre
11	Pakkies	R	Transformation Centre
12	Chonga	P M	Ubabalo Foundation
13	Lekelake	L S	Dept of Social Services
14	Lekhela	H P	Dept of Education
15	Mogorosi	I	Dept of Education
16	Cidraas	I	Gamagara Crisis Centre
17	Wilson	T S	Ubabalo Foundation
18	Segoai	K	Ubabalo Foundation

**PORT ELIZABETH WORKSHOP 26 JUNE 2009**

	<b>Surname</b>	<b>Title</b>	<b>Initials</b>	<b>Company</b>
1	Abdulla		Zurina	NICRO
2	Arries		Samuel	Uitenhage Child & Family Welfare Society
3	Baduza		Kanya	Teacher
4	Bosman		Delia	National Prosecuting Authority
5	Croft		Arthur	Methodist Church of S A, Grahamstown District
6	Croft	Mrs	Salome	Methodist Church of S A, Grahamstown District Women's Auxiliary
7	Crouse	Adv	Lilla	Legal Aid South Africa
8	de Beer		Louise	Women's Aux, Methodist Church
9	Dondashe	Mrs		Good news church
10	Erasmus		Corne	Christelike-Maatskaplike Raad P E
11	Faber		Magda	Teacher & Prophetess
12	Gqirana		Nolitha	Soweto on Sea Primary School
13	Jukuju		Ntombekhaya	Community Church
14	Kaise		Sinesipho	
15	Kitshoff	Mrs	Diana	SANCA
16	Lulama		Mdlokovana	Administrator
17	Makaba		L V	Magistrate Port Elizabeth
18	Mantakana		Fezeka	Peddie Women's Support Centre
19	Mengezeleli		Bacca	Godly Governance Women's Council
20	Mfuko		Nosiphiwo	
21	Mhambi		Buyiswa	Empilisweni Masimanyane Aids Centre
22	Mhlophe		Afrika	Good News Community Church
23	Moss		Nomzamo	
24	Muller	Mrs	Dawn	Methodist Church of S A, Grahamstown District Women's Auxiliary
25	Ngwendu		Nombasa	Good news
26	Niemand		Arnold	
27	Njajula		Nosiphiwo	Good News Community Church
28	Nkuzi		Ayanda	Women's Council
29	Noruka		Norhi	
30	Ntapane	Mrs	S	UDM
31	Ntomboxolo		Ntengo	Masimanyane Women's Support Centre
32	Ntozini		Lwando	Student
33	Pieterse		Olga	CWSA
34	Robenson		Judith	Magistrate Grahamstown
35	Russell	Mrs	Eileen	Methodist Church of S A, Grahamstown District Women's Auxiliary
36	Sam		Albertina	Masimanyane Women's Support Centre
37	Santi		Busisiwe	Black Sash
38	Shupinyaneng		Puleng	
39	Sigcu		Nombulelo	
40	Sigcu		Xolani	
41	Siwunola		Lundi	Masimanyane Women's Support Centre
42	Socenywa		Nelisa	
43	Soyamba		Wandisa	
44	Speelman		Eugy	
45	von Bonde	Dr	John	Nelson Mandela Metropolitan University (NMMU)
46	Weber		Rebecca	Slate

### Additional workshop attendees (Port Elizabeth)

	<b>Surname</b>	<b>Title</b>	<b>Initials</b>	<b>Company</b>
1	Babelo		Debia	Good news
2	Basson		Trudi	Maranatha Street Workers Trust
3	Blouw		Lulama	GNCC
4	Bougard		Tania	NICRO
5	Chabula		Dolly	Noueleluntu Women's Organisation
6	Course		Lilla	Child Welfare SA
7	Foslara		Nomobeko	WAWA EL
8	Goddard		Shelly	Bet Sheekoom
9	Griffiths		Gail	Bet Sheekoom
10	Keshaba		O M	ACDP
11	Majaru		Nomalizo	GNCC
12	Maluleke		Joy	DOJ &CD
13	Masekwana		Nombasa	GNCC
14	Mnyanda		Malibongwe	His Kingdom Reigns Christ
15	Mosehana		Thami	Community Church Bisho
16	Mqomboti		Z Mvyiwe	Good news
17	Niemand	Mrs	B	Private
18	Nkwentsha		B	Ikuwezi WSC
19	Peller		John	Betsheekuom
20	Thompson		Liesel	MTR Smith Child's home
21	Van den Heever		Ina	Christian Centre EL
22	Van Niekerk		Schalk	Ramah rescue

### NELSPRUIT WORKSHOP 9 JULY 2009

	<b>Surname</b>	<b>Title</b>	<b>Initials</b>	<b>Company</b>
1	Cilliers		Marinda	Childline Mpumalanga
2	du Toit		J H	Justice
3	Engelbrecht		Naomi	Judiciary Regional Cost President Mpumalanga
4	Letsoalo		Masilo	Commission for Gender Equality
5	Makua	Rev	Jan	Jerusalem Apostolic Faith Christian Mission
6	Manzini		Ntuthuko	Commission for Gender Equality
7	Mare	Pastor	T J	Nelspruit Community Forum
8	Mphokane		V L	Chief Magistrate Mthathe
9	Mthimunye	Mr	P M	Child Justice and Family Law
10	Mussane (BellaMussane)		Bella	Divine Pattern Christian Ministries Maputo Mozambique
11	Ndou		Freedom	Childline Mpumalanga
12	Nkozi		Bangizwe	Commission for Gender Equality
13	Siziba		Sikoliwe	Childline Mpumalanga
14	Skhosana		Abraham	SAPS
15	Smook		Breggie	Childline Mpumalanga
16	Uren-Viner	Rev	Janette	Anglican Church and Ubuntu Community Care Centre Sabie
17	van Zyl		Albert	Christian Lawyers Association of SA

### Additional workshop attendees (Nelspruit)

	<b>Surname</b>	<b>Title</b>	<b>Initials</b>	<b>Company</b>
1	Cilliers		M	Childline
2	Deall		G	New Convent Church
3	Du Toit		JH	Justice
4	Engelbrecht		WA	Judiciary- Regional Court
5	Hlebeya		KK	House of traditional leaders
6	Hussane		Belariea	Divine Pattern Christian Ministries
7	Letsoalo		Masilo	Commission of Gender Equality
8	Makau	Rev	Jan	Jerusalem Apostolic Faith Christian Mission
9	Makaula		DD	Justice
10	Manzini		M	Commission of Gender Equality
11	Mare		TJ	NCF & INWSSDF
12	Mpholane		VL	Judiciary- District
13	Mthimunye		PM	DOJ Regional Office
14	Mthimunye		BA	House of traditional leaders
15	Ndlovu		Mpumi	DOJ Magistrate Court Nelspruit
16	Ndou		AF	Childline
17	Nel		L	New Convent Church
18	Ngobeni		Robert	SABC TV News
19	Nkosi		MJ	Justice
20	Nkosi		NL	GRIP
21	Nkosi		Bansizwe	Commission of Gender Equality
22	Nkosi		Happy	SABC TV News
23	Nkosi		NM	GRIP
24	Nkosi		Dumisani	DOJ Magistrate Court Eerstehoek
25	Phoma		Mpumu	SABC TV News
26	Siziba		S	Childline
27	Skhosana		A	SAPS Standerton
28	Smooou		B	Childline
29	Van Zyl		Albert	Christian Lawyers ASS SA
30	Vilakazi		VL	GRIP
31	Vren-Viner	Rev	J	Anglican Church Sabie/Ubuntu Community Care Centre
32	Walter		Lynne	Methodist Church: Sabie