

SOUTH AFRICAN LAW REFORM COMMISSION

DISCUSSION PAPER 0001/2009

Project 107

SEXUAL OFFENCES

ADULT PROSTITUTION

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INTRODUCTION

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

The members of the Commission are —

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Professor C Albertyn
Mr Justice DM Davis
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The project leaders for the investigation are Ms T Madonsela and Professor C Albertyn. The researchers responsible for the investigation, who may be contacted for assistance, are Mrs D Clark and Mrs C Pienaar.

PREFACE

This discussion paper has been prepared to elicit responses from interested parties and to serve as a basis for the Commission's deliberations. Following an evaluation of the responses and any final deliberations on the matter, the Commission may issue a report on this subject which will be submitted to the Minister of Justice and Constitutional Development for tabling in Parliament.

The views, conclusions and recommendations in this paper are not to be regarded as the Commission's final views. The paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents unless representations are marked confidential. Respondents should be aware that under section 32 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) the Commission may have to release information contained in representations.

Respondents are requested to submit **written** comments, representations or requests to the Commission by **30th June 2009** at the address appearing on the previous page. Any requests for information and administrative enquiries should be addressed to the Secretary of the Commission or the researchers assigned to this project, Mrs D Clark and Mrs C Pienaar.

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SUMMARY OF THE DISCUSSION PAPER ON ADULT PROSTITUTION

All of the proposed options presuppose the criminalisation of under-aged and coerced prostitution and trafficking of people for the purpose of prostitution.¹ The criminalisation of coerced adult prostitution must be included in the option which is ultimately recommended in the report.

Introduction

1. The primary aim of the Discussion Paper 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. A secondary aim is to review the fragmented legislative framework which currently regulates adult prostitution. Under South African legislation voluntary selling of adult prostitution, buying of voluntary adult sex as well as all prostitution related acts are criminal offences.²

2. In this Discussion Paper the Commission defines prostitution as the exchange of any financial or other reward, favour or compensation for the purpose of engaging in a sexual act (chapter 2 at p10). Because there is a marked distinction between the conditions, environment and demographic profile of prostitutes the Commission makes a further distinction between indoor and outdoor prostitution (chapter 2 at p 43).

3. The Discussion Paper has three parts. Firstly, the Commission discusses the social and legal context of prostitution. Here it discusses a range of legal, social and economic factors that are relevant to the question of whether to reform the law relating to adult prostitution. Secondly, the Commission engages in an extensive comparative analysis to look at how other countries have addressed prostitution in their laws. Thirdly, the Commission poses **four alternative legal models** that might be employed in South Africa.

¹ The legislature has recently revised and severely sanctioned commercial sexual exploitation of children and trafficking of children and adults for sexual purposes in sections 141(1)(b) and 305(5) of the Children's Act. Nothing proposed in this Act affects the provisions in the Children's Act.

² The Sexual Offences Act of 1957, section 11 of the Criminal Law (Sexual Offences) Amendment Act of 2007 and various municipal by-laws dealing e.g with riotous behaviour.

The social and legal context

4. This Discussion Paper analyses the need for law reform in relation to voluntary adult prostitution by exploring the following matters.

The impact of the current law/criminalisation

5. The Commission explores the impact of the current law on prostitutes (chapter 2 at p 19) and also looks at the enforcement of the law (chapter 3). One of its concerns is the question of whether the current law violates the rights of prostitutes (chapter 2 at 61).

The socio-economic context

6. The socio-economic determinants of prostitution suggest that prostitution is driven by the complex intersection of social and economic factors in which poverty and inequality are key drivers. The Commission looks at what motivates the supply and the demand for prostitution (chapter 2 at p 28). It also looks at the links between prostitution and crime (chapter 3 at p 58), prostitution and drugs (chapter 3 at p 68) and between prostitution and HIV (chapter 4 at p 75). The Commission suggests that an appropriate legal response needs to take account of these issues.

South Africa's constitutional and international obligations

7. The Commission raises the question of what is an appropriate response to prostitution in the context of a Constitution committed to advancing human rights and social justice. It also explores international law in relation to prostitution and suggests that the current law might fail to comply with South Africa's international obligations (chapter 5 at p 90).

The comparative legal analysis

8. In chapters 6 and 7, the Commission undertakes a comparison and analysis of different legal frameworks for prostitution in other jurisdictions. It also provides information on the European Union and the International Labour Organisation's approach to legislation dealing with prostitution

Four proposals for reform of the law

9. In Chapter 8 the Commission makes general proposals in preparation of reforming the law on prostitution. To give effect to the **general proposals** the Commission proposes that the legislature does the following: (chapter 8 page 232):

- Repeals the Sexual Offences Act.
- Repeals sections 11 of the Sexual Offences Amendment Act.
- Enacts a new Adult Prostitution Reform Act³ which may include or exclude provisions of the Sexual Offences and Sexual Offences Amendment Acts.
- If required in the new legislation, develops new terms and definitions for archaic terms.

10. In addition, the Commission proposes **four law reform options**. These proposals are:

- Total criminalisation of adult prostitution (status quo);
- Partial criminalisation of some forms of adult prostitution and prostitution related acts;
- Non-criminalisation of adult prostitution;
- Regulation of adult prostitution and prostitution related acts.

11. To give effect to the **criminalisation option**, the Commission proposes that the legislature enacts a new Adult Prostitution Reform Act to criminalise prostitution and prostitution related acts (chapter 8 page 235).

12. To give effect to the **partial criminalisation option**, the Commission proposes that the legislature enacts a new Adult Prostitution Reform Act to criminalise specific acts related to unlawful prostitution (chapter 8 page 238).

13. To give effect to a **non-criminalisation model**, the Commission proposes that the legislature enacts a new Adult Prostitution Reform Act after consulting with prostitutes, prostitution organisations and other role players (chapter 8 page 241).

³ This is just a working title for ease of reference and the Commission does not propose a name for the new Act in this Discussion Paper.

14. To give effect to a **regulation model** whereby prostitution is **legal but state-regulated**, and **outdoor prostitution is restricted** to prostitution zones, the Commission proposes that the legislature enacts a new Adult Prostitution Reform Act to regulate specific aspects of prostitution and restrict outdoor prostitution to prostitution zones (chapter 8 page 247).

15. The Commission requests the public to comment on these models by responding to the following questions to identify which model is most appropriate to South Africa.

16. **Question on general proposals**

16.1 Do you agree with the general proposals? If not, motivate your disagreement.

17. **Questions on option 1 - total criminalisation**

17.1 How must prostitution (currently 'unlawful carnal intercourse') be defined?

17.2 How will this option

- 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?
- avoid the stigmatisation and discrimination of prostitutes?
- address concerns regarding prostitution and crime?
- address concerns regarding public health and HIV?
- assist to create an environment for prostitutes to exit prostitution?

17.3 How must the issue of criminal record for prostitution, when leaving prostitution and seeking alternative employment, be addressed?

18. **Questions on proposal 2 - partial criminalisation**

18.1 How must prostitution be defined?

18.2 How must indoor prostitution be defined?

18.3 How must outdoor prostitution be defined?

18.4 Which of the following aspects must 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?
- Coerced prostitution?

18.5 How will this option

- 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?
- avoid the stigmatisation and discrimination of prostitutes?
- address concerns regarding prostitution and crime?
- address concerns regarding public health and HIV?
- assist to create an environment for prostitutes to exit prostitution?

19. **Questions on proposal 3 – non-criminalisation**

19.1 How would you address the following matters:

- Systems and procedures for regular consultation on matters in the Act.
- A prostitution supervisory body, representing the key role players in prostitution, to review the prostitution regime and make recommendations to government on a regular basis.
- Protecting the rights of prostitutes to at any time, refuse to provide or to continue to provide, a commercial sexual service to any other person.
- Protecting the right of the other party to recover contractual damages for the provision of sexual services that is not performed.
- Exclusion of persons from running a prostitution business if they are convicted offenders of specific offences
- Amnesty to prostitutes with a criminal record for prostitution and prostitution related offences who wish to exit prostitution.
- Safe sex practices in prostitution.
- Enjoyment of human rights by prostitutes and their clients.

19.2 Should the matters listed in question 1 be dealt with in this law or elsewhere?

19.3 What are you hoping to achieve with this option?

19.4 To what extent can this aim be achieved through the law?

19.5 Are there further matters that need to be addressed in this law?

19.6 How will this option

- 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?
- avoid the stigmatisation and discrimination of prostitutes?
- address concerns regarding prostitution and crime?
- address concerns regarding public health and HIV?
- assist to create an environment for prostitutes to exit prostitution?

20. **Questions on proposal 4 - regulation**

20.1 How must prostitution be defined?

20.2 How must indoor prostitution be defined?

20.3 Which aspects of prostitution should be regulated?

20.4 Must the following be criminal offences:

- selling and buying of unlawful prostitution?
- procuring for the purposes of buying unlawful prostitution?
- living on earnings of unlawful prostitution?
- detention for purposes of unlawful prostitution?
- non-compliance with the regulatory system?

20.5 How must the following 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?
- legal mechanisms and procedures for the closing down of illegal venues?

20.6 Must regulatory powers be housed within

- administrative authorities or
- medical authorities?

20.7 Must the regulatory functions be at national, provincial or local level?

20.8 Will provincial administrations and/or local authorities have some discretion e.g. may local authorities choose to criminalise prostitution?

20.9 How will this option

- reduce the demand for prostitution?

(xvi)

- reduce harm and vulnerability to abuse and exploitation of prostitutes?
- assist prostitutes to enforce their rights to equality and access to health?
- avoid the stigmatisation and discrimination of prostitutes?
- address concerns regarding prostitution and crime
- address concerns regarding public health and HIV?
- assist to create an environment for prostitutes to exit prostitution?

Request for comments

21. The Commission invites interested parties to engage with it by responding to the questions regarding the proposed options. Responses can be e-mailed, faxed or mailed to Ms D Clark or Ms C Pienaar.⁴

⁴ See p (iii) above for contact particulars. See also questions after each proposal in chap 8.

SOURCES WITH MODE OF CITATION

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PART I

INTRODUCTION TO THE DISCUSSION PAPER ON ADULT PROSTITUTION

CHAPTER 1: BACKGROUND TO, AND PROGRESS OF, THE INVESTIGATION

Introduction

1.1 The South African Law Reform Commission's ('the Commission's') Discussion Paper on Sexual Offences: Adult Prostitution explores 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.

1.2 In particular, the Commission seeks to investigate and understand whether the imperatives set by South Africa's constitutional democracy make it necessary to amend the laws dealing with prostitution. The Constitution commits South Africa to 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'.¹ It also requires the state to promote the values of 'human dignity, the achievement of equality and the advancement of human rights and freedoms'.² It is these democratic values, as well as the rights and freedoms entrenched in the Bill of Rights that guide the Commission in its work. Important here is the need to protect those who are vulnerable and to 'improve the quality of life of all citizens and free the potential of each person'.³ Equally important is the recognition of the principle of *ubuntu* and our collective responsibility for the well-being of all.

1.3 The Commission is also guided by South Africa's international obligations, especially those set out in the Convention on the Elimination of All forms of Discrimination Against Women of 1979 which South Africa ratified in 1995 without reservation,⁴ the

¹ Preamble, Constitution of the Republic of South Africa, 1996.

² Section 1(a). See also sec 7.

³ Preamble, Constitution of the Republic of South Africa, 1996.

⁴ At par 39 the Summary record of the 390th meeting of the Committee on the Elimination of Discrimination against Women reflects that efforts were being made in South Africa to discourage voluntary participation

Declaration on the Elimination of Violence Against Women of 1993, The Beijing Declaration and Platform for Action of 1995, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children of 2003, the Protocol to the African Charter on Human and People's Rights on the Rights of Women of 2005 (ratified by South Africa in December 2004 and which entered into force in November 2005) and the SADC Protocol on Gender and Development signed on 17th August 2008, all of which emphasize the need to protect women against violence and exploitation.

1.4 Prostitution⁵ is a contested issue in which societal opinions are often polarized.⁶ Any discussion around the law and adult prostitution draws together a number of themes, ranging from the constitutional protection of human rights, including those of women, to the question of the role of the law in enforcing particular moral or religious values. In addition, the socio-economic context in which prostitution occurs, and the impact of the current laws relating to prostitution on prostitutes themselves as well as society as a whole, are important considerations in determining the appropriate policy and legislative response. The Commission seeks to address the relevant themes and to provide some of the necessary contextual information to deepen the analysis of the need for law reform.

Background and scope

1.5 This investigation into **adult** prostitution⁷ 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 and the investigation was renamed 'Sexual Offences'. Due to the vast nature of this investigation the Commission decided to publish four separate sexual offence discussion papers (with draft legislation, where necessary) dealing with the substantive law, the procedural law (both to the exclusion of adult prostitution, adult prostitution and child pornography.

in commercial sex work motivated by poverty.

⁵ See par 1.16 below on the use of the term 'prostitution'.

⁶ See, for example, Magardie K '**Put an end to prostitution by removing the demand**' Mail & Guardian, 18-24 August 2000; Distiller N '**Criminalising prostitution won't end it**' Mail & Guardian, 1-7 September 2000.

⁷ Prostitution of people over the age of 18.

1.6 This Discussion Paper forms the third in this quartet of Discussion Papers and concentrates on adult prostitution. Child prostitution was comprehensively dealt with in the first and second Sexual Offence Discussion Papers.

1.7 The first Discussion Paper, published in September 1999, addressed the substantive law relating to sexual offences and contained a draft Sexual Offences Bill.⁸ It had both a child and adult focus. The second Discussion Paper, published in December 2001, dealt with matters concerning process and procedure and also focused on both adults and children.⁹ 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 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('the Sexual Offences Amendment Act') is the outcome of this leg of the investigation. The fourth paper sought to deal with child pornography and the impact and effect of pornography on children. This part of the investigation has, however, been removed from the Commission's program due to amendments to the Film and Publications Act 65 of 1996 promoted by the Department of Home Affairs in 2004.

1.8 The Commission's investigations into Sexual Offences and the Review of the Child Care Act¹⁰ resulted in child prostitution being addressed in the Children's Act 38 of 2005 ('the Children's Act') and the Sexual Offences Amendment Act.¹¹ This legislation establishes severe criminal sanctions for those 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 criminalized in terms of section 17 of the Sexual Offences Amendment Act.¹² In addition, the Children's Act addresses child prostitution under the definition of

⁸ SALRC **Discussion Paper 85** 1999.

⁹ SALRC **Discussion Paper 102** 2001.

¹⁰ Project 110.

¹¹ Both pieces of legislation define a child as a person under the age of 18.

¹² 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

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;

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.

1.9 This Discussion Paper 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 is regulated by the Sexual Offences Amendment Act and trafficking in persons for all purposes is dealt with comprehensively in the Commission's Report on Trafficking in Persons and its accompanying draft Bill, which was published on the 25th November 2008. It therefore does not form part of this Discussion Paper. From the outset the Commission wishes to state that the scope and aim of this Discussion Paper is to consider appropriate legislative options relevant to adult and un-coerced prostitution. **This Discussion paper does not relate 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.**

Methodology

1.10 This Discussion Paper 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 takes into account compliance obligations under international human rights treaties and the Constitution. It assesses the impact of current law on persons and society and the extent to which current laws assist the country in meeting its

(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."

human rights obligations. Particular attention is given to the need for protection from exploitation and violence as required by 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.

1.11 It presents 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. At this point the **Commission has deliberately refrained from making recommendations in favour of a particular option**. One of the reasons for this is that a considerable amount of time has elapsed since the publication of the Issue Paper in 2002 and the debate and views around prostitution and the management thereof by society may have developed and/or changed. However the Commission is of the opinion that the comments received from the public on the Issue Paper are valuable and indicative of generally held views and have therefore been included under the discussion of the different legal options. The Commission will be further informed by the public consultation process following the release of this Discussion Paper.

1.12 After submissions and input from this consultation process have been integrated into the proposals, the Commission's preliminary recommendations and legislative options will be prepared for further development at expert meetings. After taking the submissions received into consideration, a report will be prepared with the Commission's final recommendations. This report will then be submitted to the Minister for Justice and Constitutional Development. It remains the prerogative of the Minister to implement the Commission's recommendations.

Public participation in the investigation

1.13 The Commission invites submissions and discussion on this Discussion Paper from as broad a range of sources as possible for the purposes of this public consultation. Interested parties are invited to avail themselves of this opportunity to participate in this process. The Commission believes that it is essential to involve all stakeholders in the consideration of the appropriate legal response to prostitution. Special efforts will therefore be made to ensure that the debates are as inclusive as possible.

1.14 The Commission will assume that respondents agree to reference by the Commission to responses received and the identification of respondents, unless representations are marked confidential. Respondents should be aware that the Commission may be obliged to release information contained in representations under the Constitution of the Republic of South Africa, 1996 and the Promotion of Access to Information Act 2 of 2000, pursuant to the constitutional right to freedom of information.

1.15 Respondents are requested to submit written comments, representations or requests to the Commission by 30 May 2009 at the address appearing on the first page.

Terminology

1.16 The question of whether the Issue Paper should employ the terms 'prostitution', 'prostitutes' or 'commercial sex work' or 'sex workers' received considerable attention in the deliberations of the Commission. The views of the Commission as stated in the Issue Paper are restated and endorsed here.

1.17 In this respect, the Issue Paper noted that while the latter terms have recently gained more popularity, and are generally regarded as less offensive or judgmental than 'prostitution' or 'prostitute', there were also objections against the use of 'sex work' or 'sex worker'.¹³ The Commission found that there is no consensus among sex workers or prostitutes themselves as to what the 'appropriate' terminology should be. Prostitutes may refer to themselves as 'business girls or boys', 'sex therapists', 'masseurs or masseuses', and a wide range of related terms.

1.18 The Commission also 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'.¹⁴ The phrases 'prostitution' or 'prostitutes' would therefore be useful to connote a specific 'sub-category' of the all-encompassing concept of 'the commercial sex industry'.

1.19 Due to the considerations outlined above, as well as the fact that the terms 'prostitution' or 'prostitutes' are familiar to most members of South African society, the

¹³ See 7 and further of SALRC **Issue Paper 19** 2002.

¹⁴ See chap 3 below.

Commission has elected provisionally to use these terms for purposes of this investigation. The Commission invites submissions on what the preferred terminology should be.

Outline of Discussion Paper

1.20 The following chapter (chapter two) discusses several contextual issues to provide an understanding of the impact of the current legislative framework in South Africa on prostitutes, prostitution and society as a whole. It considers the definition of the term and society's responses to prostitution and prostitutes. The chapter points to the diversity of moral responses to the issue and the consequent multiplicity of policy and legislative responses across the world. It then identifies four models that enable a discussion of the appropriate legislative response for South Africa: total criminalisation; partial criminalisation, non-criminalisation and regulation. A brief discussion of the current legal position in South Africa¹⁵ is followed by a summary of the impact of the law and the considerations of law reform. The chapter then discusses the factors that influence women and men to become prostitutes, the different kinds of prostitution that exist, the demand for prostitution and the possibilities of providing alternatives to prostitution. It ends by setting out some of the policy implications and questions arising from the chapter.

1.21 Chapter three considers research and arguments about the connections between prostitution and crime, as well as the policy and law reform implications of this. It finds that research suggests that criminalisation of prostitution may encourage rather than reduce connections to crime and that criminalisation is not required to enable authorities to control the 'public nuisance' aspects of prostitution. The chapter also looks at law enforcement in more detail, noting the limited and selective nature of this enforcement at times, and the manner in which prostitutes rights have been violated. Finally the chapter finds that the links between prostitution and drugs are unclear, but that there are important issues for consideration in relation to coerced prostitution and trafficking.

1.22 In chapter four, the relationship between prostitutes/prostitution and HIV/AIDS is considered with a view to understanding the impact of the current law on South Africa's ability to address HIV/AIDS. The chapter seeks to raise questions as to whether the current legal framework on prostitution assists or impedes the prevention and treatment of HIV/AIDS, and if so, what other policy and legislative responses should be considered. It begins by noting that the regulation and control of prostitution has historically had a public health

¹⁵ The detail of this may be found in Annexure A.

aspect, which has re-emerged with the HIV/AIDS pandemic. The chapter then considers the role of prostitution in the spread of HIV/AIDS, the particular vulnerability of prostitutes and what structures their ability to practise safe sex with clients. Finally the chapter explores the possible impact of different legal models, the link between the legal status of prostitution and effective HIV prevention, and international policy responses from the World Health Organisation and UNAIDS.

1.23 Chapter five turns to international human rights instruments to look at the extent to which these instruments address and protect the rights of prostitutes, and what kind of policy guidelines need to be considered in determining a legal model for South Africa.

1.24 Chapter six provides a comparative analysis of legislative frameworks for prostitution in several different countries. It demonstrates the diversity of responses, each based in the country's particular legal, social and economic context. This chapter provides examples of all four models (total criminalisation; partial criminalisation, non-criminalisation and regulation) and combinations thereof (hybrid models).

1.25 Chapter seven discusses the four legislative models identified in chapter 2 and provides an overview of the submissions made to the Commission on the Issue Paper.

1.26 In Chapter eight, the Commission proposes four law reform options to address prostitution in South Africa, based on the basic legal models drawn from the comparative study in chapter 6 and as discussed in chapter 7.

PART II

THE LEGAL AND POLICY CONTEXT OF PROSTITUTION

CHAPTER 2: INTRODUCTION AND BACKGROUND

Introduction

2.1 The aim of this chapter is to discuss a range of factors relevant to the determination of an appropriate policy and legal framework for prostitution. The chapter starts by defining the term prostitution as it relates to adults, i.e. persons over the age of 18, and then discusses the diversity of societal responses to prostitution; the different legal frameworks that may be employed to deal with prostitution; and the existing legal position and the impact of the current law. The chapter then identifies a number of contextual issues that assist in understanding the role of law in addressing prostitution, including the reasons why women and men enter prostitution, the socio-economic determinants of this, the role of trafficking, the alternatives available to prostitutes and the different types of prostitution found in South Africa.

Defining prostitution

2.2 The term 'prostitution' comes from the Latin word *prostituta* which is derived from the words *pro + statuere* which means 'to cause to stand', 'to set in place', which refers to the practice of standing in public to solicit clients. The word prostitute means to expose publicly or to offer for sale.¹ It usually refers to the offer of sexual activity in return for payment but it can also mean the sacrifice of a person's self-respect for the sake of personal or financial gain.² The conventional understanding of the term prostitution however usually encompasses 'the exchange of sexual acts for money or goods'.

2.3 A modern definition contained in a study on prostitution in Namibia³ reads as follows:

¹ LAC "Whose Body is it?" Commercial Sex Work and the Law in Namibia 2002 at 1.

² Shorter Oxford Dictionary Oxford University Press 2002.

³ LAC "Whose Body is it?" Commercial Sex Work and the Law in Namibia 2002 at 1.

Prostitution consists of any sexual acts, including that which do not actually involve copulation, habitually performed by individuals with other individuals of their own or the opposite sex, for a consideration which is non-sexual.

2.4 The Commission has found it difficult to define prostitution accurately within a South African context. It has had to acknowledge that in countries which face particular socio-economic challenges, such as South Africa, it is a generally accepted fact that sexual services are frequently rendered for rewards other than financial (monetary) reward, such as food, clothes and accommodation.⁴ Indeed there are a number of sexual relationships in society which involve at least an element of material exchange, including ambiguous relationships where young women exchange sexual favours for gifts from older men – the ‘sugar daddy’ phenomenon.⁵ The Commission has noted that most persons providing sexual services in return for goods (colloquially referred to as transactional sex) do not identify themselves as prostitutes.⁶ The Commission is of the view that defining prostitution narrowly as the exchange of sexual acts for money is not realistic in light of the particular socio-economic dynamics at play in South African society. However, it acknowledges that defining prostitution too broadly to include any sexual act accompanied or precipitated by a gift or goods would also not be helpful. For the purpose of this Discussion Paper, and bearing in mind the manner in which prostitution is described in section 11 of the Sexual Offences Amendment Act,⁷ the Commission suggests 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. The Commission invites comment on how prostitution should be defined in South Africa.

Society's response to prostitution and different legal models

2.5 Any discussion around the relationship between law and morality inevitably gives rise to a complex jurisprudential debate. In relation to prostitution, the debate centres

⁴ IOM “No Experience Necessary”: The Internal Trafficking of Persons in South Africa 2008 at 37.

⁵ LAC “Whose Body is it?” Commercial Sex Work and the Law in Namibia 2002 at v.

⁶ Gardner Health Conference 2001.

⁷ **Engaging sexual services of persons 18 years or older**

11. 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.

on whether it is appropriate to enforce views of sex and morality that derive from particular moral viewpoints, through the medium of the law. In other words, should one criminalise prostitution because it is perceived to be immoral? Is it the role of the law to enforce this particular view? Many of those who argue for criminalisation do so on the basis that prostitution is immoral. Many of those who oppose criminalisation argue, *inter alia*, that it is not appropriate for the law to enforce a particular view of morality.

2.6 In reality people conceptualize 'morality' in relation to prostitution differently. Some may believe that prostitution is inherently immoral and may focus on the wickedness or 'sinfulness' of sex for sale or the woman engaged in prostitution. Others may focus on the harm that is caused by prostitution to society or to the prostitute herself. Lord Devlin, in the **Enforcement of Morals**⁸, argues that it is the harmful consequences of immorality that create the need to enforce morality:

[A]n established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions. The suppression of vice is as much the law's business as the suppression of subversive activities . . .'

In this context, forms of 'immorality' are punished because they are considered by reason of empirical evidence to be 'harmful' to others.

2.7 In relation to prostitution, however, the question of harm is also disputed. Proponents of criminalising prostitution (totally or partially) believe, for example, that regulation would lead to 'harms' such as increased crime, illegal prostitution, sexually transmitted diseases such as AIDS, and human trafficking. Some argue for total or partial criminalisation because prostitution harms women in that it promotes the oppression of women and men.⁹ Others argue that prostitution is a consensual act between adults and is therefore a victimless crime and not 'harmful'. Proponents of regulation believe that, rather than creating harm, regulation would reduce crime, improve public health, increase tax revenue, and allow individuals to make their own choices. Some claim regulation of prostitution is a necessary step in sexual liberation, or to help people out of poverty and get

⁸ (1959) as quoted in Burchell **Principles of Criminal Law** 2005 at 64.

⁹ Prostitution ProCon.org "Prostitution Policies around the World" 2008.

prostitutes off the street.¹⁰ In the Report of the Wolfenden Committee on Homosexual Offences and Prostitution¹¹ the committee referred to the 'importance which society and the law ought to give to individual freedom of choice and actions in matters of private morality:

Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality, which is, in brief and crude terms, not the law's business.

2.8 Yet others might see the harm related to prostitution as largely deriving from the state or society's response to it, either through stigmatization and marginalization, or the double moral standards applied to women and men, or abusive police conduct, or lack of access to necessary services – such as health-care. Advocates of these views might argue that non-criminalisation or partial criminalisation is necessary to reduce these harms.

2.9 Given the diversity of views about the nature and causes of prostitution, and the harms related to it, governments across the world demonstrate a similar diversity of policy and legislative responses in dealing with prostitution. In general, these can be categorized into four basic legal frameworks, identified by the UN Special Rapporteur on Violence against Women and Children as prohibition (what the Commission calls total criminalisation in this Discussion Paper), abolition (what the Commission terms partial criminalisation), regulation (also known as legalisation) and decriminalisation (what the Commission refers to as non-criminalisation).¹² These constitute very general models for discussion. In reality, as will be seen in chapter six below, each country's particular response is tailored to meet its unique legal, historical and socio-economic circumstances.¹³

2.10 However, the four models identified above provide a useful framework for considering an appropriate legislative response for South Africa given our particular socio-economic and constitutional context.

- **Total criminalisation** punishes all persons involved in prostitution, including the prostitute, the client and any third parties involved. All prostitution is considered unacceptable, and most or all aspects of prostitution are criminalised. For

¹⁰ Ibid.

¹¹ (1957) Cmd 247 as quoted in Burchell **Principles of Criminal Law** 2005 at 65.

¹² LAC "Whose Body is it?" Commercial Sex Work and the Law in Namibia 2002 at 151.

¹³ See chap 6 for a comparative study of frameworks.

example, adult prostitution is illegal in Jamaica, Saint Lucia, Botswana, Kenya, Lesotho, Swaziland, Uganda, United Republic of Tanzania, in 49 of the states in the United States of America and South Africa.

- **Partial criminalisation** punishes third parties such as pimps, brothel-keepers, traffickers and sometimes clients, but does not criminalise the transaction between the prostitute and the client. The prostitute is not criminalised directly because he or she is considered to be a victim. Different examples of partial criminalisation are found in Canada and Sweden. In Canada adult prostitution is legal, but most activities surrounding it are prohibited, making it virtually impossible to engage in prostitution without committing a crime.¹⁴ In Sweden brokering of prostitutes is prohibited and clients are specifically criminalised.
- **Non-criminalisation** involves an absence of criminal sanction. It is often combined with the acceptance of prostitution as a legitimate form of work, to be approached through labour laws which address working conditions (where prostitutes are recognised as employees) and the rights of prostitutes. Laws on prostitution proscribe harmful activities surrounding prostitution. For example, in New Zealand the Prostitution Reform Act 2003 decriminalised prostitution and established a legal framework around the sex industry, with licensed brothels operating under public health and employment laws. It is important to note that the application of labour laws to prostitution is not an automatic consequence of non-criminalisation. Whether, how and to what extent labour laws apply to prostitution is a policy choice dependent upon the nature and content of the laws of a particular jurisdiction.
- **Regulation** (sometimes referred to as legalisation) permits prostitution, but seeks to control it by means of regulatory schemes such as licensing of brothels, registration of prostitutes or identification of 'red light zones' where prostitutes may work. Sometimes mandatory health checks are part of the regulatory system. For example, adult prostitution is regulated in Singapore; there are legal red light districts, mandatory health checks, and the minimum age for prostitutes is 16 years (there has been discussion within the Ministry of Home Affairs to raise the minimum age from 16 to 18 years to bring its laws in line with international

¹⁴ For the relevant provisions see the Criminal Code of Canada, sections 210 – 213 available at Prostitution ProCon.org "Prostitution Policies around the World" 2008.

standards).¹⁵ Prostitution activities are also regulated in Nevada, USA; Amsterdam, Netherlands; some states in Germany and Australia. Prostitution and related activities falling outside of the regulated scheme are criminalised.

Existing legal position in South Africa

2.11 South Africa currently follows the model of total criminalisation or prohibition. Prostitution and prostitution related activities are specifically criminalised by the Sexual Offences Act 23 of 1957 (the Sexual Offences Act) and the Sexual Offences Amendment Act.¹⁶ The Criminal Procedure Act 51 of 1977 also contains provisions that are peripherally relevant to prostitution and municipal by-laws play a role in the legal control of prostitution. These by-laws may take the form of general and 'prostitution-specific'¹⁷ provisions.¹⁸ Municipal by-laws apply to prostitution in brothels (usually in the form of measures relating to business licenses) and prostitution conducted from the street.¹⁹ This section provides a summary of the primary prohibition contained in section 20(1)(aA) of the Sexual Offences Act. A comprehensive discussion of all prostitution related offences in the Sexual Offences Act is contained in Annexure A.

2.12 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 reward²⁰ commits an offence.²¹

¹⁵ See Singapore Window "Singapore May Raise Minimum Prostitution Age to 18".

¹⁶ Section 11 and 17 of Act 32 of 2007.

¹⁷ For example regulation 5 of the Western Cape By-Laws PN 710 of 24 November 1950 provides that 'no person shall . . . cause an obstruction or a nuisance to pedestrian or vehicular traffic on a street, by loitering or congregating in or upon such street or sitting or lying down on any stoep adjoining such street . . .' and under the title 'nuisances', regulation 41 provides that no person shall . . .(h) in or near a street loiter or solicit or importune any other person for the purpose of prostitution, immorality or mendicancy; . . .'

¹⁸ 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;

¹⁹ 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.'

²⁰ The offence consists of the following elements: having unlawful carnal intercourse or committing an indecent act; a reward and mens rea.

²¹ The penalty is imprisonment for a period not exceeding three years with or without a fine not exceeding R6

Section 1 of the Sexual Offences Act defines 'unlawful carnal intercourse' as 'intercourse other than between husband and wife'.²² Although the Act does not define the term 'carnal intercourse', Milton and Cowling²³ explain that the term is generally understood to connote penetration of the female vagina by a male penis and not intercourse *per anum*.²⁴ The understanding of 'sexual intercourse' has however been developed by the Constitutional Court's²⁵ acknowledgement of the constitutional rights of gay men to consensual anal sexual intercourse and the consequent declaration of the common-law offence of sodomy as unconstitutional and invalid. It can therefore be argued that the term 'carnal intercourse' is now understood to include vaginal and anal intercourse.

2.13 The term 'act of indecency', which is also not defined in the Act, has been developed through judicial interpretation. In **S v C**,²⁶ the court explained as follows:

Something is indecent if it offends against recognised standards of decency. The applicable standards are those of the ordinary reasonable member of contemporary society.²⁷

The courts have accepted the dictionary definitions of 'indecent', namely 'unbecoming; in extremely bad taste; unseemly; offending against propriety or decency; immodest; suggesting or tending to obscenity'.²⁸ The courts have also held that the prohibition against acts of indecency is not limited to acts which would in the ordinary course of events lead to sexual intercourse. It applies to sexual acts which do not lead to or amount to intercourse. The act must however be done for reward and it must be indecent.²⁹

000 in addition to such imprisonment.

²² 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.

²³ Milton & Cowling South African Criminal Law and Procedure 2005 E3-83-85 at 47.

²⁴ The distinction is of academic importance for purposes of this definition, since anal intercourse performed for reward would in any event resort under the definition of an 'indecent act'.

²⁵ **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others** 1999 (1) SA 6 (CC).

²⁶ 1992 (1) SACR 174 (W).

²⁷ At 175 a-b.

²⁸ **S v C** 1978 (3) SA 978 (N) at 980.

²⁹ **S v C** 1992 (1) SACR 174 (W) at 176.

2.14 The term 'reward' can encompass both a monetary reward and other forms of compensation with pecuniary value, for example, clothing, food or accommodation.

2.15 Milton and Cowling point out that although there can be little doubt that the prohibition is aimed at professional prostitutes, the legislature has not explicitly indicated that this is so. The literal meaning of the phrase 'any person' is sufficiently broad as to bring within the ambit of the prohibition any person (a lover or companion) who accepts a 'reward' for engaging in sexual intercourse.³⁰ However, in the minority judgment of **S v Jordan**, Justices O'Regan and Sachs state that in light of the heading to the section 'persons living on the earnings of prostitution', the phrase 'unlawful sexual intercourse or indecent act for reward' is only capable of being read to include activity ordinarily understood as prostitution and should therefore be interpreted restrictively.³¹

2.16 The Constitutional Court³² also held that this section is gender neutral as it penalises 'any person'. Consequently it can be applied to male prostitutes as well as female prostitutes in respect of hetero- or homosexual sexual acts for reward.

2.17 Although section 20(1)(aA) 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).³³

2.18 A popular interpretation of this section is that the 'client's' actions are neither criminalised nor regulated by the Sexual Offences Act in any manner. Milton and Cowling³⁴ submit that although the section does not specifically mention prostitutes and the term prostitute is not defined in this Act, its gist and intent is that only persons who are prostitutes commit the offence. The other partner in the sexual act – the client – does not commit an offence under the Act. The Constitutional Court upheld this view in **S v Jordan** namely, that

³⁰ Milton & Cowling South African Criminal Law and Procedure 2005 at 47.

³¹ **S v Jordan** (2002) 6 SA 642 (CC) at par 48 – 49.

³² *Ibid* at par 9.

³³ This does not of course preclude the possibility of arrest on other charges related to prostitution, e.g. soliciting in contravention of sec 20(1)(a) of the Act, or in terms of municipal by-laws.

³⁴ Milton & Cowling South African Criminal Law and Procedure 2005 at 47.

the section is directed at the prostitute only and not the client. Clients are however not exonerated from liability. The Court held that clients are equally guilty of criminal conduct and liable to the same penalties in terms of the common law and the Riotous Assemblies Act 17 of 1956.

2.19 The recently enacted Sexual Offences Amendment Act addresses the criminality of clients. Section 11 of the Act criminalises the actions of clients of adult prostitutes by providing 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.³⁵ The creation of this offence follows the suggestion in the minority judgment of **S v Jordan** that it would be unconstitutional to penalize only one party to the act of prostitution³⁶. It also emerges from the concern of the Parliamentary Portfolio Committee on Justice and Constitutional Development that, in practice, only the seller of sexual services, i.e. the prostitute (usually women) is charged and prosecuted and not the buyer of the services (usually men). The Committee argued that this selective application of the law is not acceptable in a constitutional democracy such as ours. In an effort to address this, section 11 was introduced to target clients of adult prostitutes.

2.20 Although this Discussion Paper focuses on adults, the interrelation between child and adult prostitution cannot be excluded or ignored. Many prostitutes enter prostitution as children.³⁷ 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

³⁵ Engaging in child prostitution is a separate offence in the **Sexual Offences Amendment Act** which forms part of the comprehensive offence of sexual exploitation of a child. Section 17 of the Act creates an offence of sexual exploitation of a child which inter alia criminalises all roleplayers engaging in child prostitution. It gives effect to the Commission's recommendations contained in its Report on Sexual Offences (2002) regarding the phenomenon of child prostitution. The pertinent recommendations were that:

- A complete ban should be placed on child prostitution and that anyone involved in the sexual exploitation of a child should face severe criminal sanction;
- The child prostitute should be regarded as a victim in need of care and protection and should not be prosecuted;
- Living off or benefiting from the earnings of child prostitution should be penalized; and
- Sex tourism involving children should be criminalized.

³⁶ At 43.

³⁷ Male prostitutes who participated in a study in Pretoria revealed that they commenced with prostitution between the ages of 10 and 16, with the majority of prostitutes stating age 12 as their age of entering into prostitution, Herbst **Male Sex Workers in Pretoria** 2002 at 167.

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.

2.21 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. The aim seems clearly to be an extension of protection for children from exploitation.

2.22 Currently South Africa has no legislation that comprehensively addresses trafficking in persons. For this reason the Commission has investigated this area of the law and on the 25th November 2008 published its Report, together with proposed legislation, on the issue of trafficking in persons. The Children's Act referred to above³⁸ and the Sexual Offences Amendment Act also address trafficking in respect of children and for sexual purposes. The Sexual Offences Amendment Act³⁹ contains transitional provisions relating to trafficking in persons for sexual purposes, which includes the trafficking of persons for prostitution, pending the adoption of comprehensive legislation. In addition, several common law and statutory law provisions are used to prosecute those suspected of being involved in the trafficking of persons for purposes of prostitution. Under the common law, depending on the circumstances of each case, such people can be charged with kidnapping, assault, attempted murder or murder and extortion. Legislation such as the Sexual Offences Act, the Riotous Assemblies Act,⁴⁰ the Immigration Act,⁴¹ the Basic Conditions of Employment Act,⁴² the Intimidation Act,⁴³ the Domestic Violence Act⁴⁴ and the Prevention of Organised Crime Act⁴⁵ can be used to prosecute people involved in the trafficking of other people for purposes of prostitution, by tackling specific aspects of the crime, but not the crime itself. The above-mentioned laws are, however, not sufficient to combat trafficking in adult people for sexual

³⁸ See par 1.8.

³⁹ 32 of 2007.

⁴⁰ 17 of 1956.

⁴¹ 13 of 2002.

⁴² 75 of 1997.

⁴³ 72 of 1982.

⁴⁴ 116 of 1998.

⁴⁵ 121 of 1998.

exploitation or to protect adult victims of such trafficking effectively.

2.23 In summary, the current legal position is that adult prostitution is totally criminalised – both prostitutes and clients, as well as all prostitution related role players. Although child prostitutes are not subject to a criminal sanction (but are seen to be in need of care and protection), all surrounding role players are criminalised. The trafficking of persons is partly addressed, but the subject of a separate law reform process.

Impact of the current law

2.24 One of the main considerations in assessing the need for law reform is the impact of the law, in this case the impact of total criminalisation, on society and on those who are criminalised, especially on prostitutes themselves. In this section, the Commission considers the impact of criminalisation on prostitutes and then, briefly, looks at the broader impact on society in relation to the stated purposes of the Act. Issues relating to the enforcement of the Act are also considered.

Impact of criminalisation on prostitutes

2.25 The criminalisation of prostitution is one of the ways in which a government may choose to combat prostitution and the social ills that accompany it. It is a clear expression of society's condemnation of prostitution. However, the social stigma attached to prostitution also exists independently of legal responses, arising out of a moral judgment of prostitution because of the sexual nature of the work and the fact that prostitutes operate outside of conventional gender roles. As a result, prostitutes are often regarded as less worthy than other people.⁴⁶ Jivan and Perumal argue that criminalisation reflects and deepens this stigma, identifying prostitutes as immoral and relegating them to the ranks of criminals.⁴⁷ For prostitutes the impact of this criminalisation is both subjective and objective. It is subjective because prostitutes may see themselves as 'less worthy' and adjust their behaviour accordingly. It is objective because the criminalisation of prostitution and the attendant social stigma contribute to a climate in which society treats prostitutes with discrimination and violence, often with impunity. Prostitutes are seen as less than human,

⁴⁶ Fick "Sex Workers Speak Out" 2006.

⁴⁷ Jivan & Perumal "Comments on Jordan Case" 2004. They submit that reality reveals a picture of a segment of society largely poor, who resort to sex work for economic reasons, who are vulnerable to exploitation at the hands of police, clients, pimps, landlords and even partners and who are the victims of violence.

and are denied their basic legal and human rights. This occurs in a number of ways.

2.26 Firstly, the stigma of prostitution and the fact that prostitutes are regarded as criminals by the law create a series of barriers to prostitutes claiming their rights, such as the right of access to health and other services.⁴⁸ Sloan argues that in South Africa criminalisation means that prostitutes are hesitant to access existing health services because they fear disclosure of their identity and prejudiced behaviour on the part of service providers.⁴⁹ According to Fick, prostitutes are afraid that if they seek these services and disclose their occupation they will be arrested or subject to discrimination.⁵⁰ In general, their tendency is to try to remain invisible, largely to avoid or hide from those who enforce the law, namely the police. This also means that prostitutes work in dangerous places which make it very difficult for health service providers to reach them.⁵¹

2.27 Secondly, research indicates that factors such as the criminalisation of prostitution, concurrent sexual relations, the difficulties in using HIV prevention technology, on-going exposure to high levels of violence (in particular gender based violence), stigma and the barriers to accessing healthcare services compound and interlock to render prostitutes particularly vulnerable to HIV/AIDS.⁵² This is further discussed in chapter 4 on 'Prostitution and HIV/AIDS'.

2.28 Thirdly, the criminal nature of prostitution means that prostitutes have no employment or workers' rights. Jivan and Perumal submit that because their work is illegal, prostitutes operate outside of the protection of labour laws and the law of contract, and are unable to mobilise or otherwise ensure safe working conditions. Their vulnerability as a group is thereby exacerbated.⁵³ This has many manifestations. The criminal nature of the activity means that prostitutes feel unable to challenge unfair labour practices. As they do not need to comply with labour legislation, brothel owners set their own rules and determine

⁴⁸ See e.g. Fick "Sex Workers Speak Out" 2006.

⁴⁹ Sloan "Overview of issues affecting the adult commercial sex work industry" 2000.

⁵⁰ Alexander "Morality and Human Rights".

⁵¹ Fick "Sex Workers Speak Out" 2006. Alexander "Morality and Human Rights".

⁵² Richter **Erotic Labour in Hillbrow: Sex work, Johannesburg's 'Den of Iniquity' and HIV/AIDS** 2008.

⁵³ Jivan & Perumal "Comments on Jordan Case" 2004 at 377. See also Alexander "Morality and Human Rights".

the cut of the fees paid by clients.⁵⁴ The fees paid by prostitutes to an agency (36 to 60 percent of the clients' payment) constitute the brothel's income.⁵⁵ Many agencies use fines as a way to control the behaviour of sex workers, and in some cases to supplement the agency's income.⁵⁶ Across the board there is no employment continuity, rights or benefits for prostitutes. Very few prostitutes have written contracts of 'employment' as having a formal contract under the current legal dispensation could give unscrupulous brothel owners additional leverage over them, tying them to an agency and making them even more vulnerable to exposure.⁵⁷ Although the absence of a contract ensures freedom of movement, it also means that there is no proof of 'employment' and therefore no evidence of a claim for non-payment. The contract is, in any event, not legally enforceable due to the fact that prostitution is illegal.⁵⁸ All of this enhances the vulnerability of prostitutes to exploitation and abuse.

2.29 Fourthly, the climate of criminalisation means that prostitutes are abused financially, sexually and physically by gangsters, clients, brothel owners and pimps,⁵⁹ often with impunity. Research shows that irrespective of the legal option followed, women and girls in prostitution have a mortality rate 40 times higher than the national average.⁶⁰ However, Malepe argues that, as a result of their criminalised status in society and the fact that they are by and large women, prostitutes are particularly vulnerable to all crimes of violence against women.⁶¹ There is evidence that the criminalised status of prostitution is exploited by some authorities to harass and brutalise prostitutes. Allegations of abuse by policemen range from assault to extortion and rape.⁶² SWEAT's experience is that prostitutes are often mistreated, assaulted or verbally abused by police officers when

⁵⁴ The Labour Court has ruled that prostitutes do not have labour rights under the Constitution because this would amount to the Labour Court and the CCMA sanctioning and encouraging sex work, which is illegal. **Legalbrief Today** 31 July 2008.

⁵⁵ Gould *Selling Sex in Cape Town* **ISS** 2008 at 40.

⁵⁶ *Ibid* at 41.

⁵⁷ *Ibid* at 46.

⁵⁸ 'Kylie' and Van Zyl t/a Brigittes (2007) 28 ILJ 470 (CCMA).

⁵⁹ Gould *Selling Sex in Cape Town* **ISS** 2008 at 52.

⁶⁰ The State's submissions before the Constitutional Court of South Africa in **S v Jordan**.

⁶¹ Malepe "Adult Commercial Sex Workers - Decriminalisation Or Regulation?" 2000.

⁶² See submissions by Prostitutes in chap 7 and **Sowetan** 17 July 2008.

arrested.⁶³ In addition, it is alleged that police officers abuse the current South African system by offering not to arrest prostitutes if they provide sexual services to them for free.⁶⁴

2.30 The abuse of prostitutes has many ramifications. The illegal nature of prostitution means that prostitutes are afraid of retaliation by police officers if they complain about police brutality.⁶⁵ In order to avoid contact with the police as much as possible prostitutes resort to hiding from them, or working at times when they think the police are less likely to be present.⁶⁶ As a result, they tend to work in dangerous places where their physical safety is often further threatened in order to avoid police detection.⁶⁷

2.31 It is also argued that the criminalised status of prostitution mostly prevents prostitutes from exercising their legal rights and reporting abuse. Respondents to the Commission's Issue Paper submit that crimes such as rape, assault, robbery and harassment are often not recorded or investigated when such offences are committed against prostitutes, signifying a lack of adherence to local and international law.

2.32 In response to these allegations the police say that prostitutes who accuse police of abuse and rape sometimes do so to prevent the police from doing their work and fail to back up their claims with medical evidence.⁶⁸ Recent news reports indicate that the police are acting against their own when allegations of abuse are made.⁶⁹ See also chapter 3, 'outdoor sector' and 'Police harassment'.

2.33 Finally, the impact of making an illegal existence has implications both for the ability of prostitutes to live with dignity and safety, and for their ability to leave the profession should they choose to do so. It is argued that the manner in which prostitution is currently

⁶³ Seven of the nine street-based prostitutes who participated in SWEAT's research indicated that they had experienced physical violence at the hands of the police. Fick "Sex Workers Speak Out" 2006.

⁶⁴ Fick "Sex Workers Speak Out" 2006. See also Delaney 'The legal status of adult sex work – why health services should work with the sex industry' 2000.

⁶⁵ Fick "Sex Workers Speak Out" 2006.

⁶⁶ Ibid.

⁶⁷ Ibid. See also Feingold "Human Trafficking" 2005. Malepe "Adult Commercial Sex Workers - Decriminalisation Or Regulation?" 2000.

⁶⁸ **Sowetan** 17 July 2008.

⁶⁹ According to the Volksblad two police constables have appeared in the Bloemfontein magistrate's court on charges of rape and robbery. **Volksblad** 5 January 2009.

criminalised in South Africa renders prostitutes ever more invisible and limits their opportunities to move out of the profession. In particular, the unavoidable criminal record for prostitution related offences further stigmatises prostitutes and reduces their chances of finding alternative employment.⁷⁰

Impact in relation to the purpose of the Act

2.34 Understanding the impact of the current law is also important to the determination of whether the law achieves its stated purposes. These purposes were most recently set out by the state in **S v Jordan**⁷¹ where it was argued that the law criminalising prostitution assists in preventing social ills such as child prostitution, trafficking in women and children, public nuisance, public health and other associated crimes. Counsel for the state in that case explained that the combating of social ills is a legitimate and important state objective. They also argued that irrespective of the legislative option followed, there is no perfect cure for the social ills of prostitution. The purposes are examined briefly below, and some in more detail in the chapters that follow.

2.35 It is an unfortunate reality that there is a demand for the sexual services of children and many adult prostitutes were introduced into prostitution as children. However as child prostitution is now addressed in the Children's Act⁷² and the Sexual Offences Amendment Act, arguably this purpose now falls away in relation to the law addressing adult prostitution.

2.36 The purpose of combating trafficking for prostitution also seems to fall away. The Sexual Offences Amendment Act specifically criminalises trafficking for sexual purposes (including prostitution).⁷³ Furthermore, the tabling of the Commission's comprehensive Bill on trafficking in persons (which includes prostitution) in Parliament is also imminent.⁷⁴

⁷⁰ See also Petzer 'Network of Sex Work Projects' Adult Commercial Sex Work 2000. Davis also contends that prostitutes are likely to suffer psychological consequences as a result of their activities occasioned by arrest and subsequent criminal record. The arrest process is itself degrading and humiliating and is damaging to their self-esteem. Already stigmatized for being commercial prostitutes, the criminal record attracts further stigma and reduces their chances of alternative work. Referred to by Malepe "Adult Commercial Sex Workers - Decriminalisation Or Regulation?" 2000.

⁷¹ **S v Jordan and Others** (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC).

⁷² See chap 1, par 1.8. Alexander "Morality and Human Rights".

⁷³ See sec 71 of the Act.

⁷⁴ The Commission formally handed its Report on Trafficking in Persons and draft Bill (Project 131) to the

2.37 The need to criminalise prostitution in order to address questions of public health, and especially the spread of sexually transmitted diseases, is also a matter of dispute. On the one hand Malepe submits that there is no scientific proof that prostitutes are responsible for the spread of sexually transmitted diseases⁷⁵ and Lalu suggests that it is the illegal nature of prostitution in South Africa that negatively affects public health, for example, it makes it extremely difficult for prostitutes to negotiate condom use with their clients.⁷⁶ On the other hand prostitution, by its nature, involves sexual intercourse with multiple partners and consequently carries the risk of the spread of sexually transmitted disease, including HIV, first to the prostitute and then to his or her other clients.⁷⁷ There is no evidence that condom usage is more stringently followed in a non-criminalised setting as the need for more money, rather than the legislative regime, often plays a decisive role in whether or not to use one. See further chapter 4 on Prostitution and HIV/AIDS’.

2.38 A further stated purpose of the Act is the reduction of crimes associated with prostitution.⁷⁸ Counsel in **S v Jordan** argued that related crimes proliferate in an environment fostered by prostitution, whether legal or illegal.⁷⁹ However, several local commentators have questioned the veracity of this claim. For example, Malepe contends that the assumption by lawmakers that prostitution generates further crime, and that prostitution should therefore be criminalised in order to curb criminal activities such as robbery, assault, drug and alcohol abuse, is unfounded. She argues that this is a circular argument, based on the results of the prohibition of prostitution, rather than on prostitution.⁸⁰ Sloan argues that criminalisation has actually enabled the increase in organised criminal activity within the prostitution industry which has occurred in recent years. At the same time, it has reduced the ability of prostitutes to protect themselves against those syndicates and gangs that have extended control over large parts of the industry. The alleged links between prostitution and crime are discussed in more detail in Chapter 3.

Minister of Justice and Constitutional Development on the 25th November 2008.

⁷⁵ Malepe “Adult Commercial Sex Workers - Decriminalisation Or Regulation?” 2000.

⁷⁶ Lalu “Decriminalisation of Sex Work as a Health Issue”.

⁷⁷ The State’s submissions before the Constitutional Court of South Africa in **S v Jordan**.

⁷⁸ Sloan “Overview of issues affecting the adult commercial sex work industry” 2000.

⁷⁹ The State’s submissions before the Constitutional Court of South Africa in **S v Jordan**.

⁸⁰ Malepe “Adult Commercial Sex Workers - Decriminalisation Or Regulation?” 2000.

2.39 As far as public nuisance is concerned, municipal by-laws are currently used to address complaints of public nuisance, noise, littering, loitering and indecent exposure. With the exception of the offence of enticing a person to commit an immoral act, the Sexual Offences Act does not specifically criminalise these acts. The need to criminalise these acts in prostitution specific legislation arguably falls away. See also chapter three, 'Enforcement'.

2.40 Finally, deterrence and the prevention of crime are general purposes of the criminal law. However, there is little evidence that the criminalisation of prostitution achieves these purposes. This, however, also raises the question of whether there is adequate enforcement, and whether better enforcement might prevent or deter prostitution. A number of issues are relevant here.

2.41 A number of submissions received, as well as anecdotal evidence, suggest that where the law is not enforced, or, where it is enforced, be it the Sexual Offences Act or municipal by-laws, this is done so in a selective and incomplete manner. The reality for many prostitutes is not only that there is a selective application of the law, but that prostitutes are routinely arrested or taken into custody and released, often to appease community members. This is discussed further in chapter 3.

2.42 One of the justifications for visible law enforcement might be deterrence. It is aimed at contributing to a decrease in prostitution. However there is no evidence that policing of prostitutes is effective, and some research suggests that it might exacerbate the vulnerability of the prostitute. This is discussed in more detail in chapter 3.

2.43 Now that the Sexual Offences Amendment Act clearly criminalises clients, thereby making prostitutes and clients equally liable for engaging in prostitution, the question arises as to whether this will bring about an equal application of the criminal law? There is a concern that this amounts to formal rather than substantive equality. In other words, while giving the appearance of treating prostitutes and their clients on the same footing, the reality is that prostitutes, usually women, will continue to be disproportionately affected. The reasons for this include the patterns of policing which suggest that it is prostitutes who are targeted for reasons that go beyond law enforcement (harassment, intimidation, assault, ie. forms of gender based violence), as well as the gendered patterns of social stigmatization of prostitutes (women) rather than their clients (men).⁸¹

⁸¹ See e.g. **S v Jordan** par 69 per the minority judgment of O'Regan and Sachs JJ.

2.44 In general, it appears that the criminalisation of prostitution may increase rather than reduce the possibilities of abuse and exploitation of women. There is no evidence that criminalisation prevents or deters women and men from entering prostitution, while there is evidence that, having entered the industry, prostitutes are rendered more vulnerable to exploitation and abuse by the fact that prostitution is criminalised. The consequent violation of prostitutes' legal and human rights raises important questions about South Africa's international and constitutional obligations. It was for this reason that the Gauteng based Decriminalisation of Prostitution Network (DECPRO) produced a paper proposing that, within a culture committed to eliminating human rights abuses, there are 'a number of arguments in favour of the decriminalisation of prostitution'. In particular, prostitutes' fundamental rights to equality, dignity, privacy and free economic activity were highlighted.⁸²

Reasons for becoming a prostitute

2.45 An important consideration in identifying the appropriate legal framework for prostitution in South Africa is understanding what drives the supply of, and demand for, prostitution. This enables a better evaluation of the impact of the various legal models set out at the beginning of this chapter. For example, if the 'causes' of prostitution are systemic, deeply rooted in the socio-economic inequalities of South African society, then prostitution is unlikely to disappear without deeper changes to the nature of our society. In this section, the Commission considers the 'supply side of prostitution', what social, economic and individual factors influence entry to prostitution? The demand side is considered in the next section.

2.46 In general, there is no easy answer to this question and no single causal pathway to prostitution. The reasons for and mechanisms of entry are varied and as Posel observes cannot be explained in any 'deterministic fashion'.⁸³ Given the different places prostitution occurs, from strip clubs, massage parlours, escort services, exotic dance clubs, live sex shows, brothels, call-girls and street prostitution it is difficult to generalise about what leads those, or at least those who have not been trafficked, into prostitution. In South Africa women from all walks of life, from different social and cultural backgrounds (to a greater or lesser extent), for a myriad of different reasons, are working as prostitutes.⁸⁴ The decision to

⁸² DECPRO 1997.

⁸³ Ibid. See also Schurink et al "Business women exchanging sex for money: a descriptive study" 1983 at 154-155.

⁸⁴ Kruger **SAJHR** 2004 at 143.

prostitute may perhaps be understood in terms of a number of complex and inter-related reasons, all of which are inextricably linked to the need for payment whether by hard currency, goods or in kind, but which also relate to wider social and economic issues.

Socio-economic determinants

2.47 Entry into prostitution is ultimately determined by a complex mix of social and economic determinants, in which economics seem to play a major role:

The bottom line for any woman in the sex trade is economics. However a woman feels when she finally gets into the life, it always begins as survival, the rent, the kids, the drugs, pregnancy, financing an abortion, running away from home, being undocumented, having a bad reputation, incest, it always starts as trying to get by.⁸⁵

2.48 Studies by Herbst⁸⁶ and ISS/SWEAT⁸⁷ found that, in all cases, financial responsibilities or expectations from families or dependents led to entry into prostitution. The latter study also found that it is not a job that the prostitutes like doing, or would choose to do should their range of options have been wider. For most the fact that no specific skills or qualifications were required was an important motivating factor. So too, the fact that earnings are paid immediately and that one could earn every day. In South Africa, it is suggested that

Many are school drop-outs from abusive families, often bearing children from adolescent relationships. Many have kids and grandparents to take care of. They face real financial pressures. But given their backgrounds, their options are limited. They can work as check-out girls at supermarkets; hang up clothing at retail stores; work as domestics; do waitressing; dress hair; sit at home; etc. or they can sell sex.⁸⁸

2.49 Reasons given for entering prostitution in South Africa include the following:

- 'None of us are doing this for pleasure. We are doing this for survival'.⁸⁹
- 'I was two months behind in my rent, there was no food in the house and the kids' school fees were behind, when a friend suggested [prostitution] to me. It took me

⁸⁵ Hollibaugh *On the street where we live* 1988.

⁸⁶ Herbst **Male Sex Workers in Pretoria** 2002.

⁸⁷ **ISS SWEAT** Submission to the South African Law Reform Commission 2007 at 12.

⁸⁸ Trotter **Sugar Girls and Seamen A Journey into the world of dockside prostitution in South Africa** 2007.

⁸⁹ 'Rachel' anonymous prostitute speaking at the Conference on Adult Sex Work, Cape Town, May 2000.

three weeks to think about it. I had to do it and that was that. I was determined.'

- 'I am straight. I have never been gay and will never be gay. I do what I do so that I can take care of my wife and child. If I can get another job, I will immediately stop with this work.'⁹⁰
- They are younger women. Average age of 18 – 25. They come to attend school. They are attracted to the lifestyle and want to wear the nice clothes.⁹¹

2.50 What is apparent from the above is the inter-relation of social and economic reasons. Predominantly a woman's gender position in society structures her roles and opportunities, and influences the choices that she makes. Clearly, individual agency also plays a role. Not all persons who are poor or who seek to increase their income make the decision to work as prostitutes. This decision is also contingent on the individual characteristics and personality of the person concerned,⁹² as well as their social circumstances, including the age of the person and the abuse or neglect the person has been subjected to as a child. The relationship between individual choice and socio-economic relations is contested. Thus some prostitutes rights organisations and feminists argue that not all prostitutes turn to or are coerced or forced into prostitution because they have limited options. Adopting a liberal position that valorises individual choice, they argue that women need to have the right and freedom to choose how to live their lives as sexual beings and some women make a liberating and empowered decision to become involved in prostitution.⁹³ On the other hand, a more critical approach suggests that the power relations in prostitution are more complex, and should be understood within 'a particular set of social relations which produce a series of variable and interlocking constraints upon action.'⁹⁴ For most women, 'entry into prostitution is conditioned by and predicated upon a particular set of *social* relations, rather than being a specific expression of their individual selves.'⁹⁵

2.51 More broadly, this research points to the importance of understanding prostitution in the context of gendered socio-economic inequalities and poverty. Inequality

⁹⁰ Informant Willem 1 as quoted by Herbst **Male Sex Workers in Pretoria** 2002 at 161.

⁹⁴ Interview with social worker. Polokwane, Limpopo Province. 24 June 2008 as cited in **IOM** "No Experience Necessary": The Internal Trafficking of Persons in South Africa 2008 at 37.

⁹² SALRC **Issue Paper 19** 2002 at 47.

⁹³ Fritz 2004 **SAJHR** at 230.

⁹⁴ O'Connell Davidson **Prostitution, Power and Freedom** 1998 at 18.

⁹⁵ O'Connell Davidson **Prostitution, Power and Freedom** 1998 at 5.

and poverty are some of the most pressing macroeconomic challenges facing the South African government. In this context South Africa is described as having two economies. The first economy boasts a highly skilled labour force, advanced technology and an elaborate infrastructure. The second economy, presents a high unemployment rate where an inordinate amount of people are without the skills needed to participate in the economy. The latest available Statistics South Africa Labour Force Survey recorded the unemployment rate in the third quarter of 2007 as 23%.⁹⁶ According to the Year & Poverty headcount index, 43.2% of the South African population lives below the poverty line of R3000 per capita per annum⁹⁷, approximately R250 per month. Many of the poor fall outside of the safety net of social grants and those who fall within the net are adversely affected by the decrease in value of social grants due to spiraling prices of basic necessities and the overall cost of living as a result of inflation.⁹⁸

2.52 Within these overall poverty statistics, women are usually poorer than men, often unemployed or only able to enter into informal trade.⁹⁹ While unemployment figures seemed to be improving in 2008 the global recession in 2009 has caused the economy to slow considerably. Indicators point to employment rates that remain racially skewed in favour of whites. While data¹⁰⁰ shows that women account for most of the net rise in jobs, black women, who due to South Africa's discriminatory past had the least access to economic and educational resources and have the least skills to allow them entry into broad economic participation, still fall into a group that has an unemployment rate eight times that of white men.¹⁰¹

2.53 Migration also plays a role. Urban and regional migration has been part of the historical landscape for hundreds of years. Unlike the patterns of migration under colonialism and apartheid which saw (mainly but not exclusively) men leaving their families to work in the mines, today women are just as likely to migrate in search of employment and

⁹⁶ **Fin 24** 21 March 2008.

⁹⁷ Briefing note SAIRR 2007.

⁹⁸ Department of Social Development Media Statement 17 March 2008.

⁹⁹ Pauw & Brener **Medical Research Institute** 1997 at 3.

¹⁰⁰ **South Africa Info** 28 March 2008.

¹⁰¹ **Fin 24** 28 August 2008.

opportunities for a 'better life'.¹⁰² In fact a significant transformation in migration patterns is the increase in the number of women, especially young black women, moving independently from rural to urban areas.¹⁰³ A number of factors influence this process: rural decay; the 'bright-lights' pull of urban areas which are perceived to have greater economic opportunities and the effects of the HIV/AIDS pandemic.¹⁰⁴ When parents sicken and perhaps die from the disease it is often the young women in the family who drop out of school to care for the ill parent or find that there are no funds to continue with their education; they may in addition have to care for younger siblings.¹⁰⁵ As a result of these circumstances they may end up depending on family members, to whom they may represent an economic burden and find themselves vulnerable to abuse. These young women may then move to the cities looking for opportunities or to stay with relations. There are also instances where family members may facilitate their entry into prostitution.¹⁰⁶

2.54 Without Government intervention, illegal immigrants and refugees are excluded from the formal job market and are therefore particularly vulnerable to being trapped in prostitution and prostitution related activities. Their illegal status makes them doubly vulnerable as not only are they illegally in the country but they are additionally engaging in an illegal activity. In a desperate attempt to make a living, many illegal migrants and refugees who turn to prostitution are willing to charge less than local prostitutes do and to forego using condoms in order to access more clients. Consequently the spread of

¹⁰² According to the United Nation data women migrants, especially ones migrating for work have substantially contributed to population increase in large urban centers. Furthermore, due to the problems of poverty and underemployment, many young African women have become sex workers. Ifeyinwa Umerah-Udezulu, (2001). Resensitising African Health Care and Policy Practitioners: the gendered nature of aids epidemics in Africa. EU-Africa Ministerial Conference on Migration and Development Jenda 2006. See also EU- Africa Ministerial Conference on Migration and Development, Tripoli, Libya, 22-23 November 2006, 'a contemporary aspect of migration in Africa is the growing feminization of migration as women have also started to migrate in search for greater employment/economic opportunities. Women currently make up half of Africa's migrants suggesting that traditional social roles have been modified considerably' available at <http://www.africa-union.org/root/au/Conferences/Past/2006/November/SA/EU/EU-AU.htm>.

¹⁰³ Ibid.

¹⁰⁴ Women make up an increasing proportion of those newly infected with HIV. Violence against them fuels the epidemic and enables their exploitation, including trafficking and prostitution. Minority women, refugees and migrants are particularly at risk. See Robinson '**Equally Effective**'.

¹⁰⁵ 'The gender inequality that is imbedded in many cultural traditions means that the domestic burden of AIDS care falls especially heavily on women because of their traditional roles as carers and homemakers, deeply engrained social attitudes and insufficient social services. Caring for family members affected by AIDS is a compassionate undertaking, but it is also a burden that can limit educational and economic opportunities for women and girls.' See **UNAIDS** The Impact of Aids on People and Societies 2006.

¹⁰⁶ Sex Workers Symposium 2007.

diseases and HIV/AIDS is disproportionately high amongst illegal migrant and refugee populations.¹⁰⁷

2.55 The feminization of labour migration has thus been identified as one of the major factors fuelling growth in the prostitution sector.¹⁰⁸ In addition, one of the unintended consequences of liberal economic development policies has been the global expansion of the commercialised sex industry.

2.56 In general entry into prostitution needs to be examined against the broader background of the economic status of women.¹⁰⁹ Prostitution serves as one means of economic survival for women with few skills.¹¹⁰ In this context, prostitution may represent a viable alternative for women coping with poverty, unemployment, failed marriages and family obligations, especially where social welfare programmes are limited. Ultimately, this aids in the creation of an environment where 'a desire for upward mobility and access to resources may lead to the exchange of sex for economic survival'.¹¹¹

2.57 Despite government policy and programmes, the reality is that poverty cannot be eradicated overnight, leaving very real consequences for those affected by it. Poverty often goes hand in hand with homelessness, interrupted education, lack of access to adequate physical and mental health interventions, and other daily stressors and struggles. Living without one's basic needs and in some cases also being unable to provide for the basic needs of one's children, younger siblings or extended family can significantly increase a person's risk of engaging in prostitution. Lack of economic resources has devastating consequences on a person's ability to alter his or her environment or to live in safety. Poverty can necessitate high-risk survival activities, such as bartering for essential goods with unprotected sex.

¹⁰⁷ **UNAIDS** Guidance Note HIV and Sex Work 2007 at 4.

¹⁰⁸ **ILO The Economics of Sex - Sex as a sector: Economic incentives and hardships fuel growth 1998.**

¹⁰⁹ Idem at 21. See also **Monday Paper** 19 July 2004 reporting on a study by Merab Kiremire into gender based violence, prostitution and trafficking in Zambia Available at <http://www.news.uct.ac.za/mondaypaper/archives/?id=4596>.

¹¹⁰ The rationale in Thailand and elsewhere, was that in exchange for engaging in an occupation, which is disapproved of by most of society and which carries known health risks, the workers expected to obtain an income greater than they could earn in other occupations. See **ILO The Economics of Sex - Sex as a sector: Economic incentives and hardships fuel growth 1998.**

¹¹¹ Idem. See also in this regard Leggett "Poverty and sex work in Durban, South Africa" 1999 at 157 et seq.

2.58 Prostitution also represents a more lucrative form of work than may be available in the formal labour market.¹¹² It is generally accepted that women occupy a more precarious position within labour markets as they tend to be employed in lower-paying, lower status jobs, and often work part-time or as casual labourers.¹¹³ In a situation where economic options are limited, the earnings from prostitution are a strong incentive for involvement, in spite of the attendant stigma and danger.¹¹⁴

‘What is key for all streetwalkers (and for most female prostitutes generally) is that there is no other job at which they could make anywhere near a comparable wage.’¹¹⁵

For single mothers with children, prostitution often offers a more flexible, remunerative and less time-consuming option than factory or service work.

2.59 In summary, the socio-economic determinants of prostitution shape the choices that are available to women. Indeed, people engaging in prostitution are often caught in catch-22 situations, which involve impossible either-or choices, illogical rules, and no easy answers. For example, they may have to choose between:

- Being evicted or finding a way to pay the rent or
- Having the children placed in care or finding funds to provide food and other necessities.

2.60 Prostitutes who are struggling economically face these and other catch-22 decisions every day. Their lack of choices often traps them in unsafe situations and relationships in which they may be dependent on pimps or madams for basic goods, such as shelter, food, medicine, healthcare, childcare etc. In some instances, their own well-being becomes secondary to basic survival and puts them at risk of developing harmful coping mechanisms such as drug and alcohol dependency. In some cases though, drug and alcohol dependence is the reason for engaging in and remaining in prostitution.

¹¹² Idem at 19-21.

¹¹³ **BMC** International Health and Human Rights 2006.

¹¹⁴ Even though they may all agree that the primary motivating factor is for the money, it is important to appreciate that ‘for the money’ can have different meanings and motivations within it, depending on the worker’s situation. Some will be battling unemployment and poverty in ways that renders sex work attractive as an economic survival option, for themselves and for any dependants they may have. Others will be in situations where economic pressures are fuelled by addictions to drugs, alcohol, or gambling. In some cases, workers may be focused on earning large sums of money to finance particular goals, such as overseas travel, house-buying, or education. See Jordan “The Sex Industry in New Zealand” 2005.

¹¹⁵ Bernstein **Hastings Women’s Law Journal** 1999 at 104.

2.61 It is important to note that a number of adult prostitutes enter into prostitution as children. The socio-economic context of this has partly been described above. In addition however, the evidence is that the vast majority of girls entering prostitution are runaway, throwaway or deserted children.¹¹⁶ Usually there was sexual abuse, physical abuse, emotional abuse and/or domestic violence and/or severe deprivation present in the child's home prior to the child leaving. With the increase in child headed households as a result of parents succumbing to AIDS a number of children are left with very few options when it comes to providing economically for themselves and their siblings. In desperation they may turn to prostitution of their own accord or be tricked into it due to their vulnerability. The advent of HIV has also brought about a demand for prepubescent virgin children as it is believed that they will not have sexually transmitted diseases and/or that having intercourse with a virgin will cure the 'client' of HIV.¹¹⁷ Statistics on age of entry into prostitution vary with one author stating that the average age is 14 but in the same sentence stating that children as young as 9 have been documented.¹¹⁸ In 2003 it was reported that between 28 000 and 30 000 children annually resort to prostitution around the country with children as young as seven working as prostitutes in Cape Town.¹¹⁹ Kreston predicts that the infantilisation of prostitution is a trend that will continue to grow.¹²⁰

2.62 Finally trafficking also provides an entry point for prostitution. The International Organisation of Migration (IOM) reports that persons are trafficked within and across the borders of South Africa for purposes of subjecting them to prostitution, some of this is coercive, occurring without the full consent of such persons.¹²¹ Young women in particular are enticed by offers of employment but are unaware that they will be forced into prostitution. Although deceit is often used to get a person to agree to move from one place to another, traffickers sometimes also use force or other forms of coercion to do so. In its recently published report on internal trafficking of persons in South Africa the IOM¹²² also

¹¹⁶ Kreston **Criminal Justice Responses to the Prostitution of Children.**

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹²² **Die Burger** 22 January 2003.

¹²⁰ Kreston **Criminal Justice Responses to the Prostitution of Children.**

¹²¹ **IAWJ** Conference on Human Trafficking: A Southern African Perspective 2008; **Sunday Tribune** 29 April 2007; **Daily News** 9 April 2007; **The Mercury** 19 December 2006; **Sunday Tribune** 17 December 2006; **IOM** Trafficking in Women and Children for Sexual Exploitation in Southern Africa 2003; Molo Songololo "The trafficking of women into the South African sex industry" 2000.

¹²² **IOM** "No Experience Necessary": The Internal Trafficking of Persons in South Africa 2008 at 37.

discuss what they term transactional sex. In these cases women had left home of their own accord to pursue work in a more promising location. When formal employment proves difficult to find, some women resort to prostitution as a means of economic survival. Often this entry into the sex industry is facilitated by a pimp who may 'swap' or 'sell' a woman who has 'outlived her usefulness' in a certain area to someone in another location.

The demand for prostitution

2.63 Understanding the demand for prostitution is an important factor in the determination of policy choices surrounding prostitution. It is considered briefly here. As with the issue of entry into prostitution (or supply), demand for prostitution is a complex phenomenon, determined by, inter alia, social factors, culture and history. It is also said to be closely related to supply in the sense that an abundance of inexpensive sexual services may stimulate growth in the sex industry.¹²³

2.64 Research on men who use prostitutes suggests that the reasons and justifications for doing so, as well as the way in which they are judged by society, are shaped by unequal gender relations and the way in which women and men are thought about in a particular society. In **S v Jordan**, the minority judgment of O'Regan and Sachs JJ described it thus:

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.¹²⁴

2.65 Clients' justifications and rationalizations for prostitution often have, at their centre, a belief in men's entitlement to sex and women's obligations to satisfy that demand.

¹²³ Ibid at 17.

¹²⁴ At paras 64 and 65.

For example, research has shown that clients justify the use of prostitutes based on men's asserted need for constant access to sex and the assumption of the inevitability of prostitution. According to this research, men have the absolute right to have their sexual needs met whenever and wherever they want.¹²⁵ Some men also argue that their use of women in prostitution could save marriages or improve their relationships, others justify prostitution as a means of improving their sexual performance.¹²⁶ A more extreme version of these justifications is that prostitution prevents rape. This argument assumes the inevitability of rape if men's sexual needs are not met - if prostitution did not exist then some men would rape women who were not prostitutes. Although none of the respondents in this research admitted that they would rape, and there was no evidence supporting their view, they were adamant that other men were incapable of controlling their impulse to sexual predation.¹²⁷ A similar justification is the pleasure of establishing dominance over women in prostitution: In the words of one of the clients 'in order to really enjoy prostitution you need to know how to control them.'¹²⁸

2.66 Clients often perceive 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.¹²⁹ Some clients recognised that prostitutes dissociate from the experience and state that the capacity to 'switch off' differentiates prostitutes from other women.¹³⁰

2.67 Research also suggests that prostitution affects not only how men think about women, it also influences their actual behaviour toward women, including sexual aggression against non-prostituting women.¹³¹ A statistically significant association has been found between clients' use of pornography and the frequency of their use of women in prostitution.¹³²

¹²⁵ **Women's Support Project & Prostitution Research and Education** Challenging Men's Demand for Prostitution in Scotland 2008 at 19.

¹²⁶ Ibid at 15.

¹²⁷ Ibid at 23.

¹²⁸ Ibid at 20.

¹²⁹ Ibid at 21.

¹³⁰ Ibid at 22.

¹³¹ Ibid at 15.

¹³² Ibid at 16.

2.68 As with the issue of women leaving prostitution, reduction in demand by men is inextricably bound up with systemic changes in gender relation. Thus, when asked what changes would have to take place in order to end prostitution, clients were unable to think beyond the conceptual limits of their entitlement to sex. Some responded that all women would have to function as prostitutes in order to stop the institution of prostitution. 'Women would have to be available for sex at any opportunity, whenever men wanted it.'¹³³ However, a number of men understood that major social change would be necessary in order to eliminate prostitution. They listed the following as essential: the eradication of poverty, promotion of sex equality, and programmes for women currently prostituting.¹³⁴

Alternatives to prostitution?

2.69 Prostitutes do not view prostitution as a long-term career choice¹³⁵ and at some point most prostitutes wish to leave prostitution.¹³⁶ Reasons for voluntary exit from prostitution include age (feel too old or tired), a crisis (of a spiritual, mental, physical nature), fear, for their children and or because someone provided them with an alternative..¹³⁷ However, prostitutes wanting to exit prostitution often face multiple and complex problems, many of which contributed to their entry into prostitution in the first place. Their capacity to exit is often dependent upon a number of factors, such as drug dependency, being HIV positive, family rejection, mental health problems or disability, repayment of a debt, securing sufficient funds to return home, having a home to return to or finding transition housing and having ready access to an alternative source of income.¹³⁸ Economic factors have a strong pull both in terms of entering prostitution from the outset and returning to prostitution after leaving it. There is a significant income differential between the earnings of a prostitute and the earnings of a person engaged in a 'normal' job where the person's level of skill and education is at the lower end of the spectrum.¹³⁹

¹³³ Ibid at 24.

¹³⁴ Ibid at 23.

¹³⁵ Gould Selling Sex in Cape Town **ISS** 2008 at 23.

¹³⁶ **UNAIDS** Guidance Note HIV and Sex Work 2007 at 8; Most of the women interviewed as part of a study on the psychological and physical impacts of prostitution on women and girls wanted to leave prostitution. See also **First Offender Prostitution Program San Francisco**.

¹³⁷ Oselin "Getting Out: An analysis of exiting street prostitution via prostitution helping programs" 2007

¹³⁸ **UNAIDS** Guidance Note HIV and Sex Work 2007 at 8.

¹³⁹ Gould Selling Sex in Cape Town **ISS** 2008 at 24.

2.70 In spite of the growing literature on how women enter prostitution and what life is like for people involved in prostitution, there is a paucity of studies that focus on how prostitutes leave a life of prostitution and by what means they do so.¹⁴⁰ Some research suggests that the underlying motivation to leave prostitution and the pathway out of this life is dependent on the mode of entry into prostitution, namely voluntary or involuntary, as well as the form of prostitution engaged in. There is also some evidence that intervention programmes play an important role in assisting women to leave prostitution. For example, a study on street prostitutes revealed three main avenues of exit, namely jail, intervention programs, and voluntarily.¹⁴¹ Most, however, sought help from intervention programs, suggesting that, for those who constitute a particularly disadvantaged group such as poor women and racial minorities who have a long history of being institutionally disenfranchised, outside support is often needed to leave outdoor prostitution.¹⁴²

2.71 Participating in an intervention program assisting prostitutes to exit prostitution is not always voluntary. Involuntary reasons include being arrested or incarcerated, receiving a court mandated sentence to attend a program, and suffering from homelessness. Although repeated contact with the criminal justice system seems to cultivate a desire to change, it usually is not enough to get prostitutes off the streets. It is court sentences following arrests and impending incarceration that typically forces women to leave their previous lifestyle and enter a program¹⁴³ At the same time, there is some evidence that the criminal nature of prostitution affects the work of intervention programmes. For example, the New Life Centre comments on difficulties ‘in accessing sex workers because the industry is still so underground.’¹⁴⁴

2.72 Exiting programs usually form part of support services offered to prostitutes. Services vary considerably – including basic harm reduction; on-site counselling and advice; health screening; safety plans; help with housing and childcare; and/or peer support.¹⁴⁵ Exit strategies generally form part of a broader package of programs and services aimed at

¹⁴⁰ Oselin “Getting Out: An analysis of exiting street prostitution via prostitution helping programs” 2007.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ **Mail & Guardian** 5 December 2007.

¹⁴⁵ New Zealand Ministry of Justice **Exiting Prostitution: Models of Best Practice** October 2007 available at <http://www.justice.govt.nz>.

assisting people to make the transition out of prostitution. To succeed exit programmes must take into account the diverse and complex needs of those engaged in prostitution, and must be designed to assist in the transition toward long-term, rather than short-term change. Program designers and service providers must recognize that transitioning out of prostitution is a long-term project, and that people engaged in prostitution may relapse several times on the way to 'recovery'.¹⁴⁶

2.73 The New Zealand Ministry of Justice found that exiting policies are influenced and directed by the legal status of prostitution and the stance governing prostitution in a particular country. It identified four stances, namely:

- An illegal activity – when exiting interventions will largely rely on coercion and penal sanctions, though not to the exclusion of social welfare methods. Women will enter such programmes to avoid going to prison.
- An immoral activity – when exiting interventions are encouraged because prostitution is seen as morally 'contagious'.
- A form of violence against women – when exiting interventions seek to 'repair the victimisation' of prostitutes on the premise that they are the 'wronged'. Prostitutes who pursue prostitution as their preferred career, or for whom it is the best occupational option, will be resistant to interventions which suggest they need help to escape 'victimisation' status.
- A social problem – when exiting interventions, even in a decriminalised regime, are supported because prostitution is seen as symptomatic of social malaise and inadequate state support systems that fail to give prostitutes alternative choices. Evidence that many prostitutes have damaged or inadequate social backgrounds adds force to this 'social problem' perspective.¹⁴⁷

2.74 In South Africa there is no national strategy to assist women out of prostitution. There are isolated cases of state run and funded programmes. There are also a number of local programs enabling prostitutes to exit prostitution, some of which are partially funded by the state. Entry into a programme is both voluntary and involuntary (to avoid a jail sentence). Examples of local programs include the New Life Centre in Berea in central

¹⁴⁶ The Salvation Army Canada **A Submission to the Subcommittee on Solicitation Laws of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness** 2005.

¹⁴⁷ New Zealand Ministry of Justice **Exiting Prostitution: Models of Best Practice** 2007.

Johannesburg, an organisation that works with prostitutes, some of whom are children,¹⁴⁸ the Salvation Army,¹⁴⁹ and the Home of Hope in Hillbrow.¹⁵⁰ A programme started by the Reproductive Health Research Unit (RHRU), a privately funded organisation attached to the University of the Witwatersrand, run by the Esselen Street Clinic, offers free counselling and testing services to prostitutes regardless of whether they wish to exit prostitution or their citizenship (given the high number of legal and illegal immigrants in the vicinity this is an important factor).¹⁵¹ The Potter's House is a shelter for abused and destitute women in the city of Pretoria, whose outreach program is aimed at *inter alia* meeting the needs of women in prostitution in low cost facilities such as Budget Hotels or who are living on the streets. These women receive support (including medical support), information, mediation on their behalves, and referral to appropriate services.¹⁵² Lerato House, an initiative of the Tshwane Leadership Foundation, provides outreach programs, preventative and basic health care services, education and training opportunities and a baby care facility for women in prostitution and unemployed women, as well as a transitional residential program supporting 70 young girls per year towards re-integration into society.¹⁵³ The Rahab Centre and the Yithuba Lami (meaning 'it's my turn) Project run by the Catholic Archdiocese of Johannesburg provides counselling and motivation; skill training and workshops; education and information on sexually transmitted diseases, HIV/AIDs and drugs; basic needs in emergencies; spiritual, physical and psychological assistance. One of the objectives of the Project is to create drop-in centre(s) and/or shelter(s) where the immediate needs of primary rehabilitation may be addressed.¹⁵⁴

2.75 Some interventions are linked to national strategies to reduce HIV/AIDS. For example, the North West Department of Health runs a High Transmission Area programme, a national priority programme for the prevention of sexually transmitted infections, including HIV and AIDS, amongst prostitutes and truck drivers. Interventions at High Transmission Areas (HTA's), where the likelihood of becoming infected with HIV is high, include training

¹⁴⁸ **Mail & Guardian** 5 December 2007.

¹⁴⁹ **Business Times** 18 May 1997.

¹⁵⁰ **Mail & Guardian** 5 December 2007.

¹⁵¹ Department of Welfare General Information 2008.

¹⁵² Tshwane Leadership Foundation 2008.

¹⁵³ *Ibid.*

¹⁵⁴ Catholic Arcdiocese Rahab Centre.

prostitutes and unemployed youth as peer educators. These peer educators are paid a stipend of R500,00 and are expected to educate prostitutes and neighbouring communities at 'hot spots', where commercial sex workers ply their trade, on HIV prevention and available health services.¹⁵⁵ This programme is also interesting in that it illustrates the complexities of prostitution in South Africa, It seems that most women at these hotspots are involved in prostitution because they have no another option, and that many are married although their husbands are unaware of their involvement in prostitution. It is also suggested that most clients are not truck drivers but local men and men of high profile in the community. One of the problems experienced by this intervention is that the higher price offered by clients for sex without a condom creates a formidable barrier to encouraging condom use. This programme clearly illustrates the need for an inter-sectoral approach whereby business could offer training, re-skilling and placement.¹⁵⁶

2.76 In general, the complexity of factors that influence entry in to prostitution mean that it is difficult to leave prostitution. In particular, the absence of real alternatives to prostitution as a means of economic survival makes it especially difficult to leave prostitution. Prostitutes seeking alternatives to prostitution require tangible social and economic assistance from government, within the broader range of anti-poverty measures.

Prevalence and the face of prostitution in South Africa

2.77 As mentioned above¹⁵⁷ prostitution occurs in a range of environments, from strip clubs, massage parlours and brothels to streets. According to Trotter¹⁵⁸ the needs and constraints of sex-buying men determine the logic and structure of the different prostitution sectors. He avers that it is not the women who dictate the profile of a sector; they participate in a sector that is already structured around the needs of men. In his view 'it's a case of sellers meeting the buyers' demands'. This raises an important point that is often ignored in debates about prostitution and the law, namely, the social forces that drive the demand for prostitution and that are often ignored in research and in legal and non-legal interventions that seek to address prostitution.

¹⁵⁵ Statement issued by the Northwest Department of Health on 11 February 2008.

¹⁵⁶ Telephonic discussion with Margaret at the Northwest Department of Health. The programme is running in 20 sub districts of the province and there are currently 17 hot spots and 2 intervention sites (Zeerust roadside clinic and Merafong) in the province.

¹⁵⁷ See par 1.63.

¹⁵⁸ Trotter **Sugar Girls and Seamen A Journey into the world of dockside prostitution in South Africa** 2007.

2.78 Herbst¹⁵⁹ comments that there is a perception among many scientists that it is only women who are involved in prostitution and that they are the only ones who provide sexual favours in exchange for reward of one or another kind. He states that male prostitution is probably as common, though perhaps less visible, than female sex work. He also states that while not all male prostitutes are homosexual, their clientele is male.¹⁶⁰ However, prostitutes are predominantly women from disadvantaged backgrounds.¹⁶¹

2.79 Posel identifies at least four categories of urban prostitutes working in Durban:¹⁶²

- Outdoor prostitutes
- Prostitutes working the seamen's and tourists' clubs¹⁶³
- Escorts and masseuses
- 'Call girls' (prostitutes working from the classified advertisements of the local newspapers).¹⁶⁴

2.80 Trotter¹⁶⁵ explains the prostitution sectors as follows:

- The dockside sex sector caters explicitly to the needs and constraints of transient foreign seamen. Their transience and foreignness, as well as their work life and social demands, forces prostitutes to accommodate them in certain ways;
- Truck-stop women cater to truckers who also have special work-related constraints;
- Courtesans cater to international businessmen; and
- Call-girls cater to local middle- and upper- class men.

¹⁵⁹ Herbst **Male Sex Workers in Pretoria** 2002 at 167.

¹⁶⁰ Ibid.

¹⁶¹ Gould *Selling Sex in Cape Town* **ISS** 2008 at 22.

¹⁶² Posel **The Sex Market In the Inner City of Durban** 1993 at 12. Leggett's more recent study confirms these categories – Leggett **ODCCP Study** 2000 at par 2.5.

¹⁶³ The terminology here is that used by Leggett rather than Posel.

¹⁶⁴ The term 'call girls' may have become misleading, since male prostitutes also advertise and provide their services in this way.

¹⁶⁵ Trotter **Sugar Girls and Seamen A Journey into the world of dockside prostitution in South Africa** 2007.

2.81 Prostitution occurs in legal and illegal establishments. In terms of the law as it currently stands the legality of an establishment providing adult entertainment does not legitimise prostitution conducted on its premises.

2.82 For the purpose of this discussion paper the Commission has elected to broadly categorise prostitution under the headings of indoor and outdoor prostitution. This distinction is necessitated by the marked difference in the conditions, environment and demographic profile of prostitutes in the two sectors.¹⁶⁶ Having said this, however, some forms of prostitution defy clear categorisation as either 'indoor' or 'outdoor' prostitution, for example, the culture of informal prostitution that has developed around the mines, where women provide a variety of services to the miners for pay (including the brewing of beer and sexual services)¹⁶⁷ and the prostitution sector that has developed to service the trucking industry.¹⁶⁸

Indoor prostitution in South Africa

2.83 Indoor prostitution occurs within brothels, escort agencies, massage parlours, private homes, clubs, hotels and bars. The range of indoor prostitution enterprises thus covers commercial, residential and industrial zones, as well as known 'night life' areas.¹⁶⁹ Within the indoor sector distinctions can be drawn between those prostitutes who work for themselves (independently) and those who work for businesses or agencies (a third party).

Independent 'self employed' prostitutes

2.84 In addition to the more formal indoor businesses, there are also smaller concerns that run without clear management or ownership structures.¹⁷⁰ These may, for example, consist of one, two or a group of prostitutes who have come together as an

¹⁶⁶ **ISS SWEAT** Submission to the South African Law Reform Commission 2007.

¹⁶⁷ See Leggett **ODCCP Study** 2000 at par 2.5.

¹⁶⁸ See in this regard generally Abdool Karrim "Reducing the risk of HIV infection among South African sex workers socioeconomic and gender barriers" 1995 at 1521-1522; Kraak **Development Update** 3(1) 2000 at 127-129; Ramjee et al "Sexually transmitted infections among sex workers in KwaZulu-Natal, South Africa" 1998 at 348-349.

¹⁶⁹ Zetler **Needs assessment of the indoor sex working industry in the Cape Town area** 1999 at 2.

¹⁷⁰ See in this regard generally Zetler (op cit) at 5.

informal collective to work from the same premises.¹⁷¹ They generally share rent and expenses, but do not have to give a cut of their earnings to any management structure.

2.85 Prostitutes working privately are therefore more able to set the conditions under which they work. For example, they place their own advertisements, make their own bookings and choose their own hours. However, depending on how one looks at it, they do not have the same level of protection or risk as those who work in agencies with other people always on the premises.¹⁷²

Independent contractors

2.86 Some owners or managers of establishments do not in fact 'employ' any of the prostitutes working at their establishments. Rather, they are letting their premises to prostitutes on an hourly basis, which means that these persons are operating as 'independent contractors'.¹⁷³

2.87 An arrangement of this nature would imply that even if the contractual relationship between management and prostitutes were to be recognised as 'legal' these prostitutes would fall outside the ambit of labour legislation aimed at regulating the employment relationship and providing protection to employees.

Agencies

2.88 Researchers¹⁷⁴ have distinguished different categories of agencies within the indoor industry:

- **Room rental agencies** offer rooms on a short-term basis. Women work from these locations on a more-or-less permanent basis. In addition outdoor prostitutes may rent such rooms for the duration of the clients booking.
- **Club-type agencies** generate income not only from the sale of sex but also from

¹⁷¹ See Leggett "The least formal sector women in sex work" 1998 at 23.

¹⁷² Zetler **Needs assessment of the indoor sex working industry in the Cape Town area** 1999 loc cit.

¹⁷³ The same argument is employed in response to attempts to discuss basic conditions of employment with owners/managers, as well as issues related to the Receiver of Revenue.

¹⁷⁴ **ISS SWEAT** Submission to the South African Law Reform Commission 2007.

the sale of alcohol. Several such agencies also offer adult entertainment (e.g. stripping and dancing). Advertisements of gay bars and clubs appear in newspapers and gay media across the world. Herbst¹⁷⁵ states that there are various gay bars in Pretoria but that very few professional male sex workers seem to frequent gay bars and clubs in pursuit of possible paying clients.

- **Brothels** often masquerade as escort agencies. According to Herbst¹⁷⁶ male brothels are very similar to brothels where female sex workers provide services under the supervision of a madam or pimp.
- **Massage-parlours** clearly advertise themselves through signage outside the establishment and offer sexual services for sale but do not offer adult entertainment or alcohol. Herbst contends that male to male sexual services are provided under the guise of a masseur service. The service fee charged varies according to what type of service is required and any additional request is charged as an 'extra'. Contact usually occurs by means of telephonic appointment.¹⁷⁷
- **Residential agencies** are extremely discreet and are operated from residential homes in suburbs or from flats (apartments).

Other indoor venues

- **Pornographic cinemas** provide cubicles for patrons to engage in prostitution. Herbst¹⁷⁸ confirms that there are many pornographic cinemas in Pretoria.
- **Steam baths** are a favourite venue for gay men all over the world. Herbst¹⁷⁹ states that steam baths are ideal venues to obtain sexual partners at a reasonably low cost.

Advertising

2.89 In South Africa, indoor businesses and 'call girls' and 'call boys' advertise

¹⁷⁵ Herbst **Male Sex Workers in Pretoria** 2002 at 13.

¹⁷⁶ Herbst **Male Sex Workers in Pretoria** 2002 at 16.

¹⁷⁷ Ibid at 15.

¹⁷⁸ Ibid at 11.

¹⁷⁹ Ibid at 12.

their services freely in daily newspapers and other publications, irrespective of the fact that prostitution is criminalised. To the average reader many of these advertisements may seem very ordinary and non-specific. According to Herbst the informed reader will however immediately grasp the nature of the services offered, for example, MSM (men who have sex with men); ISO S/M GWM MBA (in search of a sadomasochistic gay white male for mutual beneficial arrangement); M2M (male to male indicating sexual activity between two males).

Working conditions applying to prostitutes in the indoor sector

General

2.90 Due to the fact that prostitution is illegal, protective measures contained in labour legislation such as the Basic Conditions of Employment Act¹⁸⁰ or the Occupational Health and Safety Act¹⁸¹ do not apply to prostitutes.¹⁸² This means that even where prostitutes work in agencies under circumstances approximating slavery, they would not have recourse to the remedies available to other workers.

2.91 One advantage to working in the indoor sector from a legal concern is that prostitutes can conclude contracts, acquire credit and operate bank accounts, as they work for 'ostensibly legitimate businesses'.¹⁸³ They also earn more than street prostitutes, although a substantial percentage of their earnings may have to be given to the management. In most cases, workers have no discretion in selecting clients.¹⁸⁴

Pricing

2.92 In the majority of prostitution businesses, prices are set by the management. Prostitutes are not allowed to undercut management prices, but are able to accept tips (over

¹⁸⁰ 75 of 1997.

¹⁸¹ 85 of 1993.

¹⁸² The 'employment' contract between the operator and the prostitute relates to illegal activities, and therefore does not fall within the ambit of 'lawful' employment. An analogy would be, for example, a person working as a 'runner' for a drug dealer. Due to the fact that drug dealing is a criminal activity, the runner would not be in a position to claim recourse in terms of labour legislation if the drug dealer forced him to work for inordinately long hours.

¹⁸³ Leggett "The least formal sector women in sex work" 1998 at 23.

¹⁸⁴ Ibid.

and above the preset fee) from clients.¹⁸⁵

2.93 Prostitutes usually need to cultivate a good working relationship with management in order to get ‘bookings’, as managers are generally responsible for assigning clients to individual prostitutes. This gives management a degree of power over prostitutes and their earnings, since they are the ‘gatekeepers’ as far as clients are concerned.¹⁸⁶ The ISS/SWEAT study¹⁸⁷ found that like working conditions, earnings vary. The study findings show that the average fee for those working indoors is R339 for an hour, with the highest fee being R750 per hour, and the lowest R170 per hour. This is however not a clear indication of individual earnings as agency fees still have to be deducted. For each booking a percentage is paid to the agency (usually between 40% and 60%). In addition most agencies require a weekly fee for advertisements that are placed in the local newspapers.¹⁸⁸

‘Employment’ conditions

2.94 Due largely to the fact that the ‘employment’ relationship between management and prostitutes is not regulated by law, certain basic conditions of employment are not adhered to by ‘employers’. Zetler notes, for example, that there is generally no payment for overtime structured into wages.¹⁸⁹ Sick leave is rarely granted. Not one agency included in this survey had holiday leave structured into employment practices.

2.95 Management generally does not expect prostitutes to remain at a particular business for a long period of time; there is also a lack of understanding relating to the benefits of taking leave or sufficient time off from work to relax. This appears to result in what has been termed ‘worker burnout’. In addition, management stated that clients like to see new faces: prostitutes are thus not necessarily encouraged or expected to work at a particular establishment for long periods of time.

¹⁸⁵ In some cases, tips are paid via management, thus giving management access to information on the value of tips that prostitutes are earning. Other prostitutes do not disclose their tips to management – Zetler (op cit) at 3.

¹⁸⁶ Prostitutes report that this power is at times abused. It appears that management often develops closer relationships with certain prostitutes, who are then in turn more successfully promoted to clients – Zetler loc cit.

¹⁸⁷ Ibid at 15.

¹⁸⁸ Ibid at 14.

¹⁸⁹ Idem at 4.

2.96 Working hours vary considerably amongst businesses. Management sets working hours, and the duration of shifts differs greatly. In some cases, prostitutes are only required to be present once there is a request from a client; in other instances, prostitutes are expected to spend up to twenty hours a shift on the premises. Working hours are frequently mentioned by workers as being too long. Several businesses included in Zetler's survey did not allow workers to leave the premises when they were on shift duty.¹⁹⁰ The ISS/SWEAT study¹⁹¹ found that prostitutes who lived on the premises of the agency where they worked were expected to work extremely long hours without any additional compensation. The ISS/SWEAT study also found that working conditions and the arrangements between agencies and prostitutes vary enormously. While some working conditions are considered (by prostitutes) to be fair and flexible, others are clearly inflexible and exploitative to the point of being comparable to the exploitative conditions that trafficking victims are subjected to.

2.97 Although client violence occurs, the authorities are seldom if ever, called in to deal with it. It is practically easier for a brothel owner or manager to intervene to protect a prostitute. Anecdotally some establishments have panic buttons in the rooms. Furthermore screening of clients is routinely practiced in the interest of the prostitutes and other clients, and clients are made to pay for the service before receiving it.

The fining system

2.98 In the majority of indoor businesses a fining system is in place to act as a 'punishment' for overstepping rules.¹⁹² The fining system is a constant source of conflict between management and prostitutes. Fines are set by management and reportedly range from R5.00 - R1000.00.

¹⁹⁰ Ibid.

¹⁹¹ Ibid at 15.

¹⁹² See Leggett "The least formal sector women in sex work" 1998 at 23.

Outdoor prostitution in South Africa

Profile of outdoor prostitution

2.99 It is difficult to establish an accurate profile of the outdoor sector. This is due to a number of reasons, including variations between geographic areas and the transitory nature of outdoor prostitution (which is more prone to random entrance into and exit from the industry than indoor prostitution).¹⁹³

2.100 At the risk of generalisation, it may be said that outdoor prostitutes are typically in a more vulnerable socio-economic position, as evidenced by the fact that 'survival' or subsistence prostitution is more prevalent outdoors.¹⁹⁴ Outdoor prostitutes tend to be poorer and have lower education levels than prostitutes working indoors.¹⁹⁵ Street prostitutes also do not generally benefit from HIV education and condom distribution provided by indoor agencies. In addition, they face greater community intolerance than those working indoors.¹⁹⁶

2.101 Outdoor prostitutes however offer a number of explanations for their decision to work on the street rather than indoors:

Street-walkers said that they preferred walking the beat because business was far brisker and the turnover higher. One street-walker explained that in order to make contact with a client in a club or hotel one first had to spend hours talking to a man who in the end might not be interested in doing business.¹⁹⁷

2.102 Based on research conducted with 349 street prostitutes in Durban, Cape Town, and inner city Johannesburg, Leggett distinguishes two groups of outdoor prostitutes, which he terms 'fast living' and 'subsistence' prostitutes respectively.¹⁹⁸ He notes that 'fast

¹⁹³ See Leggett **ODCCP Study** 2000 at par 3.2.

¹⁹⁴ Mrs Joan van Niekerk of Childline, KZN, however, points out that some child prostitutes are kept enslaved indoors in conditions of extreme vulnerability. She cites examples of child prostitutes literally being locked up in flats and kept in bondage there where they then have to see so many clients in order to pay board and lodging or face physical violence.

¹⁹⁵ Pauw & Brener **Medical Research Institute** 1997 at 4.

¹⁹⁶ Ibid.

¹⁹⁷ Schurink et al "Business women exchanging sex for money: a descriptive study" 1983 at 159.

¹⁹⁸ Leggett "Sex workers in South Africa: worlds apart" 2000 at 26-27.

living' prostitutes are generally located in or near the central business districts of each city (Greenpoint in Cape Town, the Point / Beachfront area in Durban and near certain residential hotels in greater Hillbrow in Johannesburg).

2.103 This group was characterised by high client volumes, higher than average rates for sexual services, higher incomes and high levels of drug abuse. These prostitutes were more likely to be white, and older than the average.¹⁹⁹

2.104 Virtually all the prostitutes interviewed in inner city Johannesburg were housed in daily accommodation hotels in the greater Hillbrow area.²⁰⁰ Similarly, 75% of the prostitutes in the Durban Central Business District resided in residential hotels.²⁰¹ Cape Town showed a greater range of housing options, with women often living together with a large number of housemates in a free-standing home.²⁰²

2.105 'Subsistence' prostitutes, on the other hand, were found in more remote and isolated areas such as industrial zones, truck stops and townships. For this group, client volumes and incomes were low. Use of drugs other than alcohol and dagga was rarely reported. These prostitutes were more likely to be black. Many were living in informal settlements and supporting families with their earnings. Nearly 40% of all black prostitutes interviewed had migrated to the major cities from the Eastern Cape.²⁰³

2.106 Outdoor prostitution or public prostitution may occur on streets, in public toilets or public parks. According to Herbst²⁰⁴ a lot of prostitution takes place in public toilets in Pretoria. These toilets include public toilets in parks, shopping centres and shopping malls. Public toilets that are particularly known for the sexual activities that take place there are often advertised internationally so that visitors can easily pick up partners for casual sex

¹⁹⁹ Idem at 26.

²⁰⁰ Leggett **ODCCP Study** 2000 at par 4.2.

²⁰¹ Leggett describes these hotels as 'squalid in the extreme' (**Society in Transition** at 161). 'Most of the hotels have shared bathroom facilities and minimal space. They are decrepid, noisy, smelly buildings, infested with vermin'.

²⁰² Ibid.

²⁰³ Idem at 27.

²⁰⁴ Ibid at 13.

when visiting. Herbst²⁰⁵ avers that so many public toilets in Pretoria are frequented by men for purposes of prostitution that it would be impossible to identify all of the toilets involved. Herbst²⁰⁶ also submits that many sex acts are performed by male prostitutes in public parks itself, but that some clients book rooms in nearby hotels. He notes that one park, in the central business district of Pretoria, is in particular known for the presence of male prostitutes.

Working conditions of prostitutes in the outdoor sector

Pricing

2.107 The ISS/SWEAT study²⁰⁷ found that the average fees were significantly lower as several factors limit their ability to exact a high price for their services. Prostitutes in the outdoor sector informed the ISS/SWEAT researchers that they do not have set charges, but charge as much as they believe their clients will be willing to pay. Despite the lower fees, one prostitute stated that she could earn a great deal more on the street than as a domestic worker. Some of the prostitutes working on the street are however addicted to drugs and charge only as much as they need for their next fix. Herbst²⁰⁸ states that fees charged by male prostitutes in Pretoria range from R5.00 to R50.00.

2.108 When it comes to comparing pricing it should be acknowledged that indoor prostitution usually implies either a concession to some level of control or selection (for example, when working for an escort agency or brothel) or the financial ability to access premises from which to work (in the case of 'private' indoor prostitution), which is not the case with outdoor prostitution.

2.109 Leggett's study in Durban, Cape Town and inner city Johannesburg showed that almost half of the group typified as 'fast living' prostitutes²⁰⁹ reported making more than R4 000 per month and 42% reported having more than 20 clients per week. Over 80% of the 'subsistence' prostitutes saw fewer than 10 clients and earned less than R200 per

²⁰⁵ Ibid at 14.

²⁰⁶ Ibid at 14.

²⁰⁷ Ibid at 16.

²⁰⁸ Ibid at 204.

²⁰⁹ See par 5.21 above.

week.²¹⁰

2.110 Significantly, race was an important variable in terms of the rates charged by participants in this study. Over 75% of white women reported charging over R90 for vaginal sex, while 83% of black women charged less than that.²¹¹ (As a result, over half the white women surveyed reported making over R1 500 per week, while 80% of black women reported earning less than R500).²¹²

The role of 'pimps' in outdoor prostitution

2.111 The term 'pimp' generally refers to the 'manager' of a prostitute who works on the streets.²¹³ The notion of a 'pimp' typically evokes heated responses, with prostitutes being portrayed as helpless victims of exploitative practices. While it would not be accurate to deny this picture wholesale, particularly in light of the increase in organised criminal syndication of the industry, it is certainly also important to note that research results, as well as the experience of organisations such as SWEAT, do not bear out the stereotypical image of 'pimping'.²¹⁴

2.112 The relationships between prostitutes and 'pimps' appear to vary. Pauw and Brener report that the majority of prostitutes in their research sample worked independently. (However, a few worked with boyfriends or husbands).²¹⁵ The relationships between prostitutes and these 'pimps' were seldom abusive and exploitative. The primary function of the pimps was to offer assistance to prostitutes by protecting them while they solicit clients, safeguarding their money and belongings and taking down registration numbers of clients' vehicles.²¹⁶ The authors noted that in certain areas, groups of prostitutes employed men as bodyguards.

²¹⁰ Leggett "Sex workers in South Africa: worlds apart" 2000 at 27.

²¹¹ Leggett **ODCCP Study** 2000 at par 4.3.

²¹² Ibid.

²¹³ See Sloan "Overview of issues affecting the adult commercial sex work industry" 2000.

²¹⁴ Ibid.

²¹⁵ Pauw & Brener **Medical Research Institute** 1997 at 6.

²¹⁶ Ibid at 31.

2.113 Similarly, Leggett's earlier Durban study showed that very few of the women interviewed had 'boyfriends' or pimps on the street: the most common response was that 'they are too expensive'.²¹⁷ Herbst²¹⁸ states although he could find sufficient evidence of the existence of male madams, he could not find any evidence of pimps or male prostitutes in Pretoria.

Client violence

2.114 Outdoor prostitution poses many risks, since prostitutes often work alone and usually late at night. Once prostitutes have reached an agreement with the client, they need to enter the client's space (his car and/or home) which puts them in a vulnerable position for abuse by clients.²¹⁹

If you have a room then you know you are safe, but if you have to park somewhere, okay that man is much stronger than you so it is easy for him to rob you or to take his money back, it has happened to me many times.²²⁰

2.115 Various studies conducted in South Africa indicated how vulnerable prostitutes are to client abuse. Prostitutes in Pietermaritzburg have reported that clients beat them, raped them, abandoned them in isolated places, left them naked, and that they were thrown or forced to jump from moving vehicles.²²¹ They also reported being robbed and raped by passing men.²²² Researchers conducting a study among prostitutes at a truck stop in KwaZulu-Natal noted similar reports,²²³ and Pauw and Brener's Cape Town survey also confirm this trend.²²⁴

2.116 Focus group participants in the latter study agreed that violence from clients was one of their greatest occupational hazards. Significantly, eighteen (out of twenty five) participants stated that if they experienced problems with a client they would not take these

²¹⁷ Leggett "Poverty and sex work in Durban, South Africa" 1999 at 164.

²¹⁸ Herbst **Male Sex Workers in Pretoria** 2002 at 135.

²¹⁹ Pauw & Brener **Medical Research Institute** 1997 at 16.

²²⁰ Ibid.

²²¹ Marcus **Indicator SA** 1995 at 82.

²²² Ibid.

²²³ Abdool Karrim "Reducing the risk of HIV infection among South African sex workers socioeconomic and gender barriers" 1995 at 1523.

²²⁴ Pauw & Brener **Medical Research Institute** 1997 at 16-17.

up with the police. These participants felt that the police did not take their complaints seriously, nor did they attend adequately to the problems that prostitutes experience.²²⁵

2.117 They say 'whore, you are just a whore, you can't be raped.'²²⁶
 Apart from the obvious violation of their rights to physical integrity, the vulnerability of prostitutes to constant violence or the threat of violence may also have broader implications, e.g. on the issue of whether or not they are able to practice safer sex. Prostitutes may also face violence and abuse if they try to insist on condom use.²²⁷

Policy implications

2.118 This chapter has identified different policy and legal approaches to prostitution as well as a range of factors relating to prostitution that shape future policy choices. In particular, the chapter has looked at the negative impact of the current law on prostitutes and the harms that result from this. The chapter has also canvassed the demand for prostitution, the reasons why women and men enter prostitution (socio-economic determinants, migration etc.); the impact of the current laws; the nature and scope of prostitution in South Africa and the difficulties in exiting the profession. These raise a number of issues for consideration in determining the appropriate policy and legislative response to prostitution and the place of law in regulating, preventing, deterring or reducing prostitution. Some of these are listed below. However, they are also specifically raised for consideration in later chapters, especially chapter 8 which poses alternative legal models for prostitution.

2.119 Firstly, the question to be asked is whether, given the impact of the current law on prostitutes themselves, South Africa is failing in a number of its international obligations? An important policy question is what South Africa's response should be to this situation, and how should it address the vulnerability of women who are prostitutes? Is total criminalisation compatible with South Africa's international legal obligations, including the Declaration of the Elimination of Violence Against Women and article 2(d) of the Convention on the Elimination of Discrimination against Women (CEDAW), which mandates that State parties ensure that public authorities and institutions act in conformity with the obligation to

²²⁵ Ibid at 18.

²²⁶ Ibid. This is echoed by Rachel Khatlane, who makes the following statement: 'There is a lot of rape but the way the police treat you doesn't make you want to report. They say you are a sex worker, may be you wanted to go with the guy. They say prostitutes can't get raped, they are used to being f....' in G le Roux **Agenda**. See also in this regard Delaney 'The legal status of adult sex work – why health services should work with the sex industry' 2000.

²²⁷ Pauw & Brener **Medical Research Institute** 1997 at 16.

refrain from engaging in any act or practice of discrimination? These obligations are examined in more detail in chapter 5.

2.120 Linked to this is the question of how the criminalisation of prostitution relates to the idea of South Africa as a caring society, committed to advancing human rights and social justice.²²⁸ If the Constitution requires a concern with ‘improving the quality of life and freeing the potential of each person’ and the creation of ‘a society based on democratic values, social justice and fundamental human rights’,²²⁹ how does this affect our attitudes towards prostitutes and prostitution? What are the appropriate purposes of the law relating to prostitution? To what extent are we obliged to address the complexity of the socio-economic issues that drive the supply of, and demand for, prostitution, and the difficulties that women have in remaining within or leaving prostitution? Is criminalisation the appropriate policy response in this context? These questions are raised again in chapter 8.

2.121 If access to legally enforceable rights would offer protection to prostitutes against exploitative working conditions, unfair labour practices and unenforceable contracts²³⁰ as well as improve access to healthcare services, how should this be done? How else might prostitutes’s rights be protected?

2.122 The socio-economic determinants of prostitution suggest that prostitution is driven by the complex intersection of social and economic factors. However, poverty and inequality remain key drivers. Appropriate legal strategies need to be identified with this in mind. Policy consideration might also be given to ensuring that the programmes to eradicate poverty and inequality are effective in meeting the needs of women and men. The gendered nature of poverty means international agreements such as the Convention on the Elimination of Discrimination Against Women (CEDAW) and the Beijing Platform for Action (BPA) should shape South Africa’s response. What policy response is suggested by these factors?

2.123 How does one address the vast array of social conditions in women’s lives which eliminate meaningful choices. For example, it can be argued that in order to understand prostitution, it is necessary to also understand 1) incest and other childhood

²²⁸ See, eg. The Preamble to the 1996 Constitution.

²²⁹ Ibid.

²³⁰ Gould Selling Sex in Cape Town **ISS** 2008 at 45.

sexual assault; 2) poverty and homelessness; 3) the ways in which racism is inextricably connected with sexism in prostitution; 4) domestic violence; 5) posttraumatic stress disorder, mood and dissociative disorders as sequelae of prostitution; 6) chemical dependence; 7) the need for culturally-relevant treatment; and 8) the fact that the global nature of prostitution involves inter-provincial and inter-country trafficking as a necessary part of its profitable operation.²³¹ How does a legal framework for prostitution fit within this complexity?

2.124 In addition, should attention be paid to offering women support and alternatives to prostitution? If so, what should this entail?

2.125 Should the policy and legal response address the fact that the demand for prostitution is a major factor sustaining the industry? How should it do so?

2.126 Should reduction or prevention or deterrence be one of the purposes of the legal framework for prostitution? How would this be achieved?

²³¹ Farley Prostitution: a critical review of the medical and social sciences literature 2000 at 22.

CHAPTER 3: PROSTITUTION AND CRIME

Introduction

3.1 This chapter considers research and arguments about the connections between prostitution and crime, as well as the policy and law reform implications of this. It finds that research suggests that criminalisation of prostitution may encourage rather than reduce connections to crime and that criminalisation is not required to enable authorities to control the 'public nuisance' aspects of prostitution. The chapter also looks at law enforcement in more detail, noting the limited and selective nature of this enforcement at times, and the manner in which prostitutes rights have been violated. Finally the chapter finds that the links between prostitution and drugs are unclear, but that there are important issues for consideration in relation to coerced prostitution and trafficking.

The criminogenic nature of prostitution

3.2 Historically, one of the reasons that prostitution has been seen as undesirable is its seemingly close connection to other crimes. Organised crime, robbery, assault and drug trafficking are often cited as crimes associated with prostitution. Jenness notes that the classic argument is that these crimes proliferate in an environment fostered by prostitution.¹ In addition, neighbourhood decay is perceived to be closely associated with prostitution.² By criminalising prostitution, it is argued, the tide of crime that seems to accompany prostitution will also be stemmed.³

3.3 This motivation for the prohibition of prostitution has been criticised for its 'circular reasoning' in that it attributes the results of the criminal prohibition of prostitution to prostitution itself.⁴ This criticism therefore holds that problems of ancillary crime may arise from the conditions created by the criminalised status of prostitution (which would not be the case if prostitution were to be removed from a criminalised framework).

3.4 Levick argues that in situations where there is a substantial demand for the

¹ Jenness **Making It Work: The Prostitutes' Rights Movement in Perspective** 1993 at 31.

² Ibid.

³ See Milton in Jagwanth et al **Women and the Law** 1994 at 143.

⁴ Ibid; see also Almodovar **Hastings Women's Law Journal** 1999 at 126-127.

criminalised activities and a concomitant potential for economic profitability (as is the case with prostitution), criminalisation serves to drive the industry underground and encourages the involvement of organised crime.⁵

3.5 Posel is of the opinion that the proscription of prostitution in South Africa has had the effect of increasing the criminal element in prostitution, producing the secondary crime that has become associated with the prostitution industry.⁶ She notes that because prostitution is illegal, prostitutes seek assistance from pimps and others who 'can make their job easier', thus increasing the leverage that outsiders have in exploiting prostitutes. In many cities, the prostitution industry is therefore now highly organised and tightly controlled by pimps, gangs and / or drug dealers.⁷

3.6 Davis reports that studies have found no direct link between prostitution and 'crime, drugs and urban decay'.⁸ On the contrary, a 1977 study found that the connection between urban decay, crime and prostitution resulted from the fact that prostitution was only allowed in areas 'the city had already written off'.⁹ By contrast, where small brothels were integrated into 'healthy' neighbourhoods in Holland, such a decline did not take place.¹⁰

3.7 In contrast, in respect of coerced prostitution the 2008 Report of the International Organisation for Migration finds that trafficking for sexual exploitation in South Africa appears to have a strong link to organised crime syndicates. Several participants cited in this Report were familiar with organised crime networks, reporting such crime to be dominated by Nigerian, Chinese, Moroccan, and Eastern European syndicates with Nigerian syndicates being widely acknowledged for involvement in internal trafficking of South Africans for the purpose of commercial sexual exploitation.¹¹ It is, however, unclear to what extent, if at all, voluntary adult prostitution is linked to organised crime. The Commission

⁵ Levick **A Feminist Critique of the Prostitution/Sex Work Debate: Recommendations for Legislative Change in South Africa** 1996 at 29.

⁶ Posel **The Sex Market In the Inner City of Durban** 1993 at 29-30.

⁷ Posel at 30.

⁸ Davis "Prostitution in Canada" 1994 at par I.1b.

⁹ Idem.

¹⁰ Idem.

¹¹ **IOI** "No Experience Necessary": The Internal Trafficking of Persons in South Africa 2008 at 36.

invites comment on this point. It also invites comment on the impact of the current total criminalisation framework on crime. In other words does it curb crime or exacerbate it?

Concerns relating to 'public nuisance'

3.8 Public nuisance resulting from prostitution, notably outdoor prostitution, is frequently cited as one of the reasons why prostitution should be criminalised. These nuisance factors may include, *inter alia*, excessive noise, traffic congestion, condoms left on pavements or in gardens and other forms of littering, and trespassing.

3.9 Police often cite complaints from residents as the main motivating factor for their invoking municipal by-laws against outdoor prostitutes. Davis explains that 'police containment is defined by public demand', and notes that police will allow prostitution to exist in one area in order to keep it out of another.¹² She describes how, during the 1970's, public pressure caused the closure of two notorious sex clubs in Vancouver, Canada.¹³ As a result, the prostitutes formerly working in these clubs were displaced onto the streets.

3.10 The areas where prostitution was unofficially tolerated were unable to accommodate the new influx of prostitutes,¹⁴ with the result that the 'new' street prostitutes spilled into more upscale residential areas. Residents and local businesses of these areas were unhappy with this development and lobbied police for action. They saw the sudden appearance of prostitutes in their area as evidence that the laws were not 'tough' enough or broad enough to enable the police to do their jobs (not taking into account that it was 'tougher' enforcement that had upset the status quo and caused the redistribution of prostitution into their area in the first place).¹⁵

3.11 Davis notes that police and municipal authorities, reacting to pressure from citizen groups, typically resort to exerting pressure on higher levels of government to enact laws giving police wider latitude in enforcement. The main aim is removal, so that

... respectable citizens are not offended by the sight of prostitution and so that police and public officials are not offended by the sight of prostitution and so that police and

¹² At par 1.2.

¹³ Ibid. See also in this regard Brock "Making Work, Making Trouble" 1998 at 56-57.

¹⁴ There were estimated to be 100 prostitutes working the two clubs.

¹⁵ Ibid.

public officials may appear to have moved quickly to satisfy their constituency.¹⁶

3.12 Milton remarks that while there is no question that in some of its manifestations prostitution may produce conditions that are a nuisance to the public, these conditions are relatively easily controlled without demanding that the actual practice of prostitution be prohibited by the criminal sanction.¹⁷

Enforcement

3.13 It should be noted that there does not appear to be a national policing strategy regarding prostitution. Instead, enforcement policies are determined on the level of individual police stations or by the prosecuting authorities in a particular area. The Independent¹⁸ for example reports that men who pick up prostitutes on the streets of Durban and Pretoria are landing up behind bars as police in the two cities take the provisions of the new Sexual Offences Act to heart. But that in Johannesburg and Cape Town, police officers are being a bit more lenient as 'prostitution is not on their list of priorities at the moment'.

Indoor sector

3.14 In addition to the provisions of the Sexual Offences Act prohibiting sexual acts for reward, brothel-keeping and facilitating prostitution, the indoor industry is subject to regulation by means of the municipal by-laws pertaining to, for example, the granting of business and liquor licenses.

3.15 It appears that indoor businesses are currently able to operate without accredited business licenses, although they still remain liable for prosecution.¹⁹ Where businesses do operate outside the boundaries of licensing requirements, the management will be liable for prosecution under the relevant by-laws, usually enforced by municipal law enforcement agents (rather than by police).²⁰

¹⁶ Ibid.

¹⁷ Milton in Jagwanth et al **Women and the Law** 1994 at 144.

¹⁸ **The Independent on Saturday** 16 February 2008.

¹⁹ Zetler attributes the status quo to 'the uncertain legislative climate', as well as the lack of personnel capacity to enforce licensing – Zetler **Needs assessment of the indoor sex working industry in the Cape Town area** 1999 at 4.

²⁰ See, for example, **Cape Times** 21 December 2000.

3.16 In the wake of the Jordan judgement there appeared to be no single consistent national policing strategy regarding the indoor industry either, with the general approach being a recognition that the enforcement of the Sexual Offences Act is a personnel-intensive endeavour, requiring methods such as continuous surveillance or entrapment. There also appeared to be a recognition that police resources may be better spent elsewhere:

Prostitution is no longer regarded by police as a priority crime, says Alfred Hugget, commandant of special investigations. Although it's still a crime, the community prefers police to concentrate their efforts on more serious misdemeanours. It's almost impossible to prove a woman is a prostitute unless she's caught in a trap. A policeman would have to masquerade as a client, she'd have to offer him her services and almost do the deed before an arrest could be made. It's a time-consuming process that taxes their manpower and places the policemen in compromising situations.²¹

3.17 Post the Jordan judgement the well publicised series of applications brought by the Asset Forfeiture Unit of the National Directorate of Public Prosecutions (NDPP) against The Ranch, an indoor establishment operating in Rivonia, Gauteng, indicates that police and prosecuting authorities do enforce the Sexual Offences Act (as well as the Prevention of Organised Crime Act (POCA))²² against indoor agencies.²³ More recently, in June 2005, in the case of the **National Director of Public Prosecutions v Geys**²⁴ the NDPP approached the High Court in Pretoria for a preservation of property order in terms of section 38(2) of the POCA in respect of a property which was alleged to be operating as a brothel in contravention of section 2 of the Sexual Offences Act. The order was granted. Application to the court was then made under section 48(1) of POCA that the property be forfeited to the State. The Court found that the business conducted on the property constituted the keeping of a brothel in contravention of the Sexual Offences Act, but that only the top floor was involved in the commission of this offence. Consequently only that portion of the property, being an instrumentality of the offence within the meaning of POCA, fell to be forfeited. The Supreme Court of Appeal held that to be an instrumentality of an offence the property concerned must by definition in POCA, be 'concerned in the commission' of that offence. As the cases have interpreted that definition, the property must

²¹ **YOU Magazine** 2 March 2000. The concern about the potentially compromising effect of law enforcement is borne out by the facts of the **Jordan** case: the third appellant in casu admitted that she had performed an indecent act, viz a 'pelvic massage', on a person who later proved to be a police agent. (**S v Jordan and Others** 2002 (1) SACR 17 (T).)

²² Act 121 of 1998.

²³ See e.g. **Phillips and others v National Director of Public Prosecutions** 2001 (2) SACR 542 (W).

²⁴ (160/2007) (2008) ZASCA 15 (25 March 2008).

facilitate commission of the offence and be directly causally connected with it so that it is integral to commission of the offence. The Supreme Court of Appeal found that the whole building satisfied that requirement. The Court further held that for forfeiture to be ordered, the offence of which the property concerned is an instrumentality must be a Schedule 1 offence. Contravention of section 20(1) of the Sexual Offences Act and any offence, the punishment for which may be imprisonment exceeding one year without the option of a fine are listed as Schedule 1 offences. The penalty prescribed for brothel keeping is three years imprisonment, with or without a fine of R6 000. Forfeiture is therefore legally competent under POCA. Judge Howie clearly states that the unmistakable message to Mr Geysler, to other brothel-keepers and to the public at large is that the law does not turn a blind eye to the persistent and obdurate pursuit of a criminal business and will act to demonstrate that brothel-keeping does not pay. The appropriate means by which to convey that message in this case is by forfeiture of the property in question.

3.18 This also appears to be in line with the experience at service providing organisations such as SWEAT, where an increase in arrests of prostitutes (both indoor and outdoor) for contraventions of the provisions of the Sexual Offences Act and municipal by-laws (in the case of outdoor workers) were noted.²⁵

Outdoor sector

3.19 Enforcement of the provisions of the Sexual Offences Act against prostitutes working outdoors is subject to the same resource considerations noted above in relation to the indoor sector.²⁶ It is therefore hardly surprising that prior to December 2007 municipal by-laws, rather than the Sexual Offences Act, were primarily employed by police and municipal law enforcement officials against prostitutes. These by-laws typically penalise, for example, 'loitering' or 'creating a public nuisance'. However although the by-laws are still employed, the recent enactment of section 11 of the Sexual Offences Amendment Act in 2007 (which criminalises engaging the services of adult prostitutes) has brought about a spate of arrests by specialised task teams.²⁷ The reason for this could be that the

²⁵ See **Cape Times** 26 October 2000.

²⁶ During the early 1990's, members of the South African Narcotics Bureau, traditionally tasked with enforcement of various provisions of the Sexual offences Act, developed an entrapment method entailing that a witness to the transaction would hide in the boot of the motor vehicle being used by the alleged 'client', who would also be either a police official or agent. Prostitutes soon started to demand the opening of the car boots of prospective clients before commencing with any negotiations.

²⁷ **The Independent on Saturday** 16 February 2008.

enforcement of this crime is less resource intensive than section 20(1)(aA) of the Sexual Offences Act as the offence is committed irrespective of whether the sexual act is committed or not and that the creation of this crime has clarified the position in respect of clients beyond a shadow of a doubt.

3.20 Arrests also occur as a result of sporadic crime prevention initiatives and in response to complaints received from members of residential or business communities where prostitutes work. Experience has shown that evidence against individual prostitutes for contravening the Sexual Offences Act or a by-law is frequently slim or non-existent,²⁸ and it is not unknown for groups of prostitutes to be 'rounded up' and arrested simply because they are standing on the street.

3.21 The offences which give rise to arrest for contravention of a municipal by-law are usually relatively minor, and the police would be entitled to either issue a so-called 'spot fine'²⁹ without arresting the prostitute, or where arrest does take place, to release her on warning or a minimal amount of bail.³⁰ However, prostitutes are often arrested and detained in custody for allegedly contravening these municipal by-laws. Upon expiry of the 48-hour period within which an arrested person has to be brought before court,³¹ the prostitutes are then released without being charged with any offence.

3.22 Apart from the obvious human rights violation inherent in this practice, concerns are also raised about the implications for children of prostitutes. Prostitutes have explained to researchers that when arrested, they were seldom allowed to make phone calls to arrange for childcare while they were kept in the cells.³²

3.23 One tactic employed by police officials is to arrest prostitutes on a Friday evening, and release them on the following Sunday (i.e. two days later), thus depriving them

²⁸ Arrests have occurred for non-existent offences. See also **Palmer v Minister of Safety and Security** (WLD Case No 00/13008).

²⁹ This refers to a written notice issued in terms of secs 56 and 57(1)(b) of the Criminal Procedure Act 51 of 1977.

³⁰ In terms of sec 59 of the Criminal Procedure Act 51 of 1977.

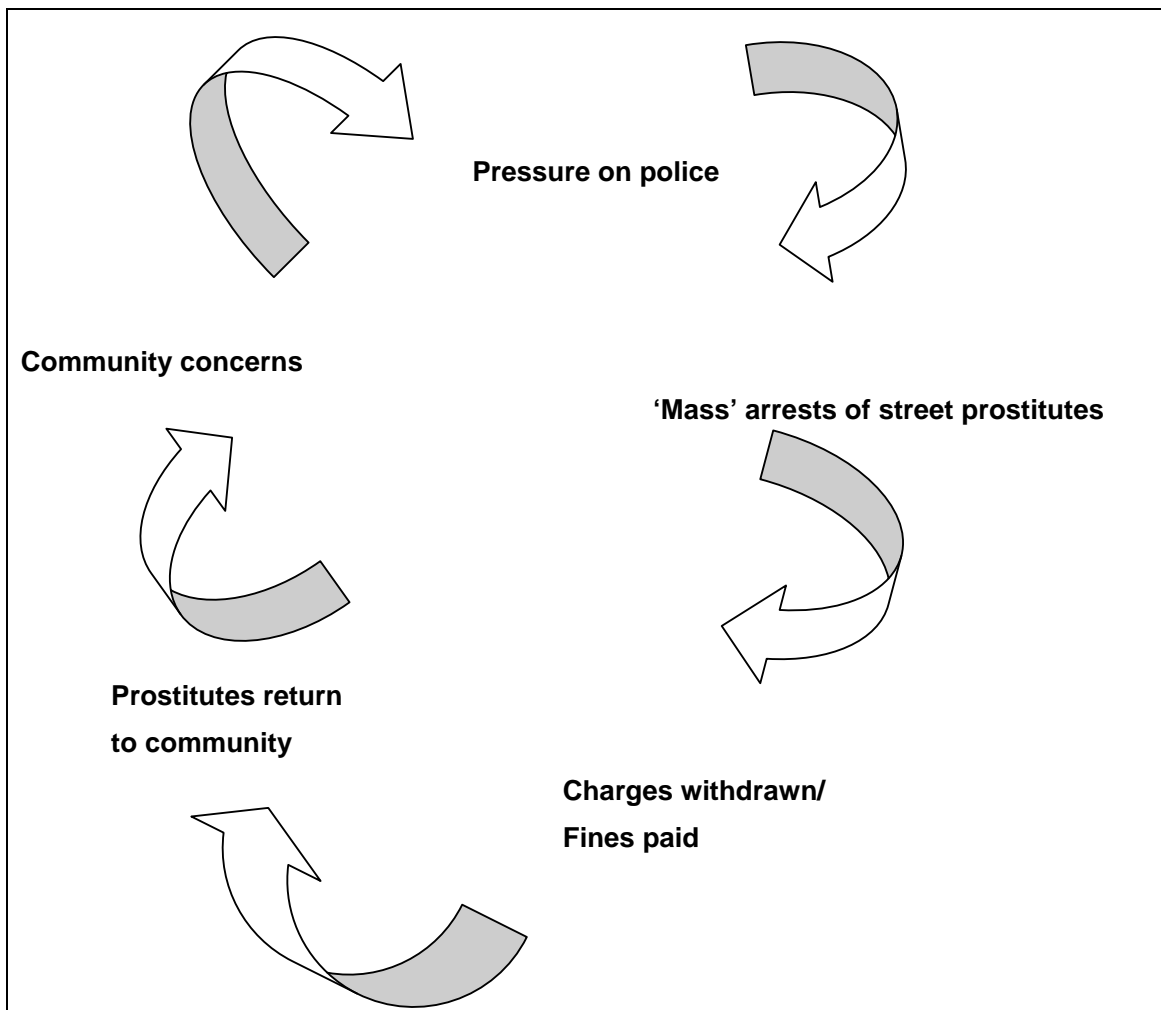
³¹ See sec 35(1)(d)(i) of the Constitution, as well as sec 50 of the Criminal Procedure Act.

³² This is in violation of sec 35(2)(f)(ii), of the Constitution, which states that every detained person has the right to communicate with 'next of kin'. Section 35(2)(e) of the Constitution states that detained persons have the right to conditions of detention that are consistent with human dignity.

of an opportunity to earn any income on the potentially most lucrative evenings of the week, viz, Friday and Saturday evenings.³³

3.24 Where prostitutes are brought before court, the charges are often withdrawn at the first court appearance. Upon their release, prostitutes either return to their previous workplaces or, less frequently, move on to new areas, where resident complaints may eventually lead to a fresh round of arrests. In this way, a cycle of complaint and arrest is created, often leading to the violation of rights of prostitutes without addressing the concerns of residents on a long-term basis (see *Diagram 1*).

DIAGRAM 1: CYCLE OF COMMUNITY COMPLAINTS AND MASS ARRESTS



³³ Information conveyed to a consultant researcher by prostitutes working in Woodstock, Cape Town in 1995.

3.25 Researchers have found that certain law enforcement practices may undermine public health initiatives.³⁴ Pauw and Brener report that police confiscated condoms to use as evidence of prostitution.

I keep it [condoms] in my pocket. Because the laws [police], when they get to you, they first look in their (sic) bag, they empty your bag. Without you giving it to them they take it and if they get a condom on you, then they pick you up.³⁵

Police harassment

3.26 Outdoor prostitutes generally report high levels of harassment by police. A study of prostitutes at a truck stop in KwaZulu Natal found that participants were harassed by police and forced to provide free sexual favours.³⁶ Pauw and Brener found that violence by police officials towards prostitutes was common. Police abuse of power included rape, violence, unlawful arrest and unlawful detention.³⁷

3.27 Several submissions made to the Commission largely confirm the findings of the abovementioned studies on prostitutes in South Africa. Quotes from these submissions are set out below:

Police arrest sex workers for no reason. Sometimes the police bring clients to the sex worker (but you never know whether it's a trap). The police break into our rooms when we are not there and steal our stuff. Even if you are there they take our things saying that they are stolen property. The police sexually harass sex workers, touching your breast kissing you and requesting sexual favours and then they make you pay them a bribe.³⁸

Police rob and rape sex workers. Police threaten to arrest sex workers who don't have a SA ID or Passport, or they rob and rape them. Police disguise themselves as clients and after the session produce their police card and arrest the sex worker.³⁹

The police ignore complaints of assault and violence against sex workers but always take the client's complaints seriously. At times, the police in Worcester do protect the

³⁴ Pauw & Brener **Medical Research Institute** 1997.

³⁵ Ibid (citing Participant 15).

³⁶ Abdool Karrim "Reducing the risk of HIV infection among South African sex workers socioeconomic and gender barriers" 1995 at 1523.

³⁷ Pauw & Brener **Medical Research Institute** 1997.

³⁸ Sonto Mkhize; Felicia Ngubane; Patience Ndlovu; Rebecca Kubheka; Mary Masombuka; Jane Mkwanzazi; Sindi Mthimunye; Mantusa Nkosi; Nthabiseng Serabedi, Hillbrow Commercial Sexworkers Association.

³⁹ Mapuseletso; Sebina; Sphiwe; Musa; Dina; Dubs; Yoyo, sex workers of Carletonville.

sex workers operating on the streets.⁴⁰

The worst is when you get raped by the people who are supposed to protect you, namely the police. I was raped by two policeman, they kept me locked up in a house for almost twelve hours. When I got back to Hillbrow I was told that it is better not to lay a charge otherwise my life would be a living hell. Of all rapes that I have survived, and that I am working through in counseling – this rape by these two policeman, remains to be my most horrific experience ever.⁴¹

3.28 The most common violations were that police demanded protection money from prostitutes and committed what prostitutes described as ‘dumping’. This refers to situations where police officials would force a prostitute into a police van and ‘dump’ her in an isolated place with no means of transportation.⁴² Dumping usually occurs late at night and hence places prostitutes in dangerous situations where they might be raped or otherwise assaulted.

3.29 It is in this respect significant that during February 2000, ten prostitutes working in Claremont, Cape Town, obtained an *interim* interdict in the Cape High Court against three police officials to stop police harassment. The harassment complained of included physical assault and unlawful arrest and detention.⁴³ This matter was subsequently investigated by the Independent Complaints Directorate (ICD), and in May 2000 the ICD recommended that the three officials concerned face internal disciplinary charges as well as criminal charges.⁴⁴ The return date for the interdict was in June 2000. However, the matter was settled out of court prior to this date on the basis that the Minister of Safety and Security gave an undertaking that the three officials would be redeployed and not perform any duties relating to prostitutes until the findings of the internal disciplinary inquiries and the pending criminal charges had been finalised.⁴⁵

⁴⁰ Sex workers, Worcester community, Western Cape Province.

⁴¹ Max Fourie, an ex-prostitute.

⁴² Pauw & Brener **Agenda No 36** 1997 at 82.

⁴³ See **Sunday Times** 27 February 2000; **Mail & Guardian** 3-9 March 2000.

⁴⁴ The ICD recommended that two of the officials face charges of assault, that one official face an additional charge of crimen iniuria, and the other a charge of corruption. In addition the ICD recommended that one of the officials be prosecuted for rape. See **WLC** January – June 2000 at 3.

⁴⁵ **WLC** at 3.

The link between prostitution and drugs

3.30 The nebulous line between cause and effect becomes even more indistinct when one attempts to examine the nexus between prostitution and substance dependence. Research indicates a high incidence of substance dependence among persons working in prostitution.⁴⁶ Pauw and Brener remark that it is crucial to understand the role that drugs play in prostitution.⁴⁷ It has, for example, been suggested that drugs relieve stress and help prostitutes cope with their work.⁴⁸

3.31 According to Leggett, the links between prostitution and drugs in South Africa more closely resemble the American situation than the British one, both in terms of the drug of choice as well as the question of causation. One British study has shown that about half of the prostitutes interviewed began working in prostitution in order to pay for drugs. Leggett's research indicates that this is not the case in South Africa, but he also points out that there is currently insufficient information on the 'direction of causation', i.e. whether drugs are leading women and men into prostitution, or whether prostitution causes persons to use drugs.⁴⁹ Qualitative comments from the women interviewed in Leggett's study indicated that their reasons for entering prostitution rarely included the need to pay for drugs.⁵⁰

3.32 Research shows varying levels of drug use and substance dependence among South African prostitutes. Twenty four of the twenty five prostitutes participating in Pauw and Brener's Cape Town study had used a substance in the past six months, and fourteen were regular substance users.⁵¹ Only 2 participants reported using heroin, and this was a once off experience. The most common substances used alone and with other drugs were alcohol and 'white pipes' (a cannabis and methaqualone combination). The researchers also noted the growing frequency of crack cocaine.⁵² In a more recent study

⁴⁶ See Baldwin **Yale Journal of Law and Feminism** 1992 at 100 n 185 and authorities cited there; See also Pauw and Brener **Medical Research Institute** 1997 at 20 for the results of their South African study.

⁴⁷ Idem at 22.

⁴⁸ Ibid.

⁴⁹ At par 6.

⁵⁰ Ibid.

⁵¹ Pauw and Brener **Medical Research Institute** 1997 at 21.

⁵² Ibid.

interestingly enough Herbst found that a considerable number of the male prostitute informants were involved in drug taking with heroin being the drug of choice followed by the sniffing of poppers.⁵³

3.33 The two groups of street prostitutes distinguished by Leggett in his recent study conducted in Cape Town, Durban and inner city Johannesburg also showed marked differences in terms of drug use.⁵⁴ While almost 70% of the 'fast living' prostitutes who were prepared to discuss drugs indicated regular use of crack or Mandrax, none of the 'subsistence' workers did.⁵⁵ Again, race appeared to be a significant variable.⁵⁶

3.34 Research indicates that drug dealers have systematically targeted the prostitute community to spread crack cocaine to the larger society.⁵⁷ Prostitutes have listed a number of reasons for getting into the drug, most of which had to do with dealing with the pressures of prostitution or the life that led them into prostitution.⁵⁸ In addition, crack cocaine has led to an increased demand for unsafe sex (such as condom-free or anal sex), due to the willingness of addicts to do anything for drug money. Some women have also blamed crack for an increase in client violence, including rape.⁵⁹

Prostitution and trafficking

3.35 Trafficking of persons for the purposes of sexual exploitation is a crime that involves the recruitment, transport and exploitation of an individual which can take the form of forced prostitution, pornography or any other forced sexual practices.⁶⁰

⁵³ Herbst **Male Sex Workers in Pretoria** 2002 at 22.

⁵⁴ Leggett "Sex workers in South Africa: worlds apart" 2000 at 27.

⁵⁵ Ibid.

⁵⁶ Leggett **ODCCP Study** 2000 at par 4.4.

⁵⁷ Leggett **ODCCP Study** 2000 at par 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 drug (Leggett "The sleazy hotel syndrome: housing vice in Durban and Johannesburg" 1999.

⁵⁸ Leggett **ODCCP Study** 2000 at par 2.5.

⁵⁹ Ibid.

⁶⁰ **IOI** "No Experience Necessary": The Internal Trafficking of Persons in South Africa 2008 at 34.

3.36 One of the key protective mechanisms is the Protocol⁶¹ on trafficking which was enacted to supplement the UN Convention Against Transnational Organised Crime. Obligations contained in these and related protocols have necessitated the enactment of country specific legislation to address Trafficking in persons. Draft legislation aimed at addressing trafficking in South Africa accompanied the release of the Commission's Report on Trafficking in Persons on 25 November 2008. The Report is referred to in Chapter 2 and the Protocol is discussed below.⁶²

3.37 Since the 1980's, there has been a 'new wave' of feminist-backed campaigns against trafficking in women, child prostitution and sex tourism.⁶³ However, there is a fundamental division among these activists. This division hinges on the question of whether or not a person can voluntarily choose prostitution as a form of work and migrate to exercise that choice, or whether there is always an element of coercion even where the prostitute appears to choose this option.

3.38 The strongest proponents of this 'new wave' perspective are the Coalition Against Trafficking in Women (CATW), founded by Kathleen Barry.⁶⁴ CATW has defined prostitution as a form of sexual exploitation, similar to rape, genital mutilation, incest and battering.⁶⁵ The organisation sees 'sexual exploitation' as 'a practice by which women are sexually subjugated through abuse of women's sexuality and/ or violation of physical integrity as a means of achieving power and domination including gratification, financial gain, advancement'.⁶⁶

3.39 It is important to note that the work environment of prostitutes makes them vulnerable to becoming victims of crime, in particular trafficking in persons. Traffickers may exploit the vulnerability of prostitutes by offering them better economic alternatives or the opportunity to earn a higher income as a prostitute elsewhere. Desperate to escape from their

⁶¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime (hereinafter referred to as 'the Trafficking Protocol'.)

⁶² See Annexure A below.

⁶³ Doezema J **Forced to choose beyond the voluntary v forced prostitution dichotomy** 1998 at 37.

⁶⁴ Doezema loc cit.

⁶⁵ CATW (Draft) Convention on the Elimination of All Forms of Sexual Exploitation of Women, 1993 Article 2(b), cited in Doezema at 37.

⁶⁶ Article 1 of the CATW (Draft) Convention, cited in Doezema.

circumstances, prostitutes may take up such offers without appreciating the hardship they may suffer in the process. Those who know that they will continue working as prostitutes do not know that they will be kept in slavery-like conditions where they will be unable to escape from their exploiters.

3.40 The International Organization for Migration's Report on internal trafficking in persons in South Africa also identifies local newspaper advertisements for work in various industries with no experience required as a recruitment method specific to trafficking for purposes of sexual exploitation (which includes prostitution).

3.41 The IOM⁶⁷ makes the following key findings in respect of trafficking and commercial sexual exploitation:

- Adolescent girls and young women who leave exploitative situations as domestic servants are vulnerable to recruitment into the sex industry.
- In respect of commercial sexual exploitation, women are just as likely as men to be recruiters.
- Methods employed to control victims include restricted movement, use of force, and/or threat of physical violence.
- Substances are provided as an additional means of control particularly in sexual exploitation.
- Nigerian organized crime syndicates operate heavily in Pretoria, Port Elizabeth, Johannesburg, & Bloemfontein and traffic local black South African females into commercial sexual exploitation.
- Advertisements in local newspapers have been used as a recruitment technique to deceive young women into the sex industry.

3.42 The IOM recommend that curriculums in the school system should provide for education around human trafficking, human sexuality, sexual violence, and substance abuse; and that law enforcement should consider a more visible policing of the sex industry with sensitivity to potential internal trafficking.

3.43 In respect of gender-based violence the report avers that familial history of sexual violence and abuse may be linked to vulnerability to trafficking, particularly for the

⁶⁷ IOM "No Experience Necessary": The Internal Trafficking of Persons in South Africa 2008 at 8 - 9.

purposes of sexual exploitation. IOM data collected from brothels in Hillbrow, Johannesburg, showed that, in many cases, women had been exposed to physical or sexual abuse since childhood.⁶⁸

3.44 In respect of demand for sexual services the report states that demand for sexual services can be linked to sex tourism, a growing industry where individuals seek commercial sex as part of a travel experience. The upcoming FIFA World Cup in 2010 has reportedly sparked specific concerns around both internal and cross-border trafficking for the purposes of sexual exploitation. It is also reported that among country nationals, a demand for younger women and girls is increasing due to the HIV epidemic and the widely held myth that having sexual intercourse with a virgin can cure the disease. Additionally, men are choosing much younger girls as sexual partners to lessen the probability of infection.⁶⁹

3.45 While cultural norms may be providing a specific demographic of demand for sexual services, some suggest that supply is fueling demand. In an article on the complexities of the demand side of commercial sexual exploitation, researchers suggest that demand is determined by social factors, culture, and history and is closely related to supply and availability. It is argued that an abundance of inexpensive sexual services may actually be what is stimulating growth in the sex industry.⁷⁰

Crimes against prostitutes

3.46 Reports from SWEAT and prostitutes themselves indicate that prostitutes are subjected to endemic harassment and violence from police officials, and to a lesser extent hostility and violence from the public and clients. The criminalisation of prostitution, the social stigma of prostitution and subsequent sporadic law enforcement responses fosters a climate in which discrimination and violence thrives, often with impunity. Prostitutes are seen as less than human and without rights or protection from violence. This response is in direction violation of CEDAW article 2(d) which mandates that State parties ensure that public authorities and institutions act in conformity with the obligation to refrain from engaging in any act or practice of discrimination. False arrests also violate article 2(d) of CEDAW. Prostitutes are routinely arrested or taken into custody and released as individuals

⁶⁸ IOM "No Experience Necessary": The Internal Trafficking of Persons in South Africa 2008 at 15.

⁶⁹ IOM "No Experience Necessary": The Internal Trafficking of Persons in South Africa 2008 at 17.

⁷⁰ IOM "No Experience Necessary": The Internal Trafficking of Persons in South Africa 2008 at 17.

in sweeps, often to appease the surrounding community members. Arrests are often effected while they are not engaged in prostitution, i.e. at times when they are going about their daily lives, such as grocery shopping.

3.47 Existing laws against rape, assault, robbery and harassment are often not applied to prostitutes when such offences are committed against them signifying a lack of adherence to local and international law.

3.48 Serial killers have often targeted prostitutes as a vulnerable population. In pleading guilty in 2003 to the murders of 48 prostitutes, Gary Leon Ridgway, from the U.S. Pacific Northwest, told a judge he targeted streetwalkers 'because I thought I could kill as many as I wanted to without getting caught.'⁷¹

⁷¹ Report on Sex Workers Rights in the U.S. Under CEDAW for the 39th Session of the Committee, Sex Workers Project at the Urban Justice Centre at 6.

CHAPTER 4: PROSTITUTION AND HIV/AIDS

Introduction

4.1 This Chapter considers the relationship between prostitutes/prostitution and HIV/AIDS with a view to understanding the impact of the current law on South Africa's ability to address HIV/AIDS. The chapter seeks to raise questions as to whether the current legal framework on prostitution assists or impedes the prevention and treatment of HIV/AIDS, and if so, what other policy and legislative responses should be considered. It begins by noting that the regulation and control of prostitution has historically had a public health aspect, which has re-emerged with the HIV/AIDS pandemic. The chapter then considers the role of prostitution in the spread of HIV/AIDS, the particular vulnerability of prostitutes and what structures their ability to practise safe sex with clients. Finally the chapter explores the possible impact of different legal models, the link between the legal status of prostitution and effective HIV prevention, and international policy responses from the World Health Organisation and UNAIDS.

4.2 Historically, legal measures aimed at the regulation and control of prostitution were justified by public health concerns, such as the prevention of the spread of sexually transmitted diseases. For example, the regulationist approach adopted in the latter half of the nineteenth century in Britain (and subsequently emulated in South Africa) in the form of the Contagious Diseases Acts was motivated by attempts to halt the spread of, *inter alia*, syphilis and gonorrhoea.¹ The legislation implied drastic limitations of the bodily integrity and personal liberty of (alleged) 'common prostitutes' in the form of compulsory medical testing and extended periods of quarantine. The motivation for the imposition of invasive measures in the interest of public health lost significant ground with the discovery of penicillin and antibiotics.² However, the development and rapid growth of the HIV/AIDS pandemic, especially in sub-Saharan Africa, has resulted in a new focus on public health issues. These tend to cluster around two opposing responses. Firstly, a set of demands for stringent legal and regulatory measures to address the perceived connection between prostitutes and HIV infection,³ and

¹ From 1864 onwards a series of Contagious Diseases Acts were passed (1864, 1866 and 1869). This legislation required prostitutes to be registered as such and to present themselves for a fortnightly internal examination. Walkowitz J **Prostitution and Victorian Society** (1980) cited in Balos and Fellows **Law and Violence against Women** 1994 at 509.

² Milton & Cowling **South African Criminal Law and Procedure** 1988 at 143.

³ Jenness **Making It Work: The Prostitutes' Rights Movement in Perspective** 1993 at 89; Kandel M **'Whores in court: judicial processing of prostitutes in the Boston Municipal Court in 1990'** Yale

secondly, calls for the non-criminalisation of prostitution to enable more effective policy and programmatic interventions.⁴

Prostitution and the spread of HIV

4.3 Pauw and Brener⁵ observe that our understanding of HIV/AIDS has been complicated by its association with the often taboo and highly complicated issue of sexuality. Due to the fact that HIV/AIDS was first observed in persons whose lifestyle made the transfer of blood, blood products or bodily fluids relatively likely, initially gay men and subsequently intravenous drug users were identified as 'at risk' groups.⁶ Throughout the 1980s, HIV/AIDS was popularly understood as a fatal disease associated with homosexuality, intravenous drug use and indiscriminate, promiscuous sex.⁷ This resulted in the disease becoming inextricably linked in popular consciousness to behaviour regarded as deviant, and with individuals regarded as deviants. As HIV/AIDS began to be understood as a threat to the population at large, it gradually became a disease of the 'normal'. However, it has not lost its original connection to deviant lifestyles and 'aberrant' sexual behaviour.⁸

4.4 It is therefore not surprising that prostitutes are often held responsible for the spread of the pandemic. They are implicated as a primary bridge through which HIV/AIDS has been transmitted to the general population,⁹ and are thus perceived as 'vectors of disease'.¹⁰

Journal of Law & Feminism (1992), cited in Balos and Fellows **Law and Violence against Women** 1994 at 519-520.

⁴ Lim **The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia** (1998) at 19.

⁵ Pauw & Brener **Medical Research Institute** 1997 at 2.

⁶ Jenness **Making It Work: The Prostitutes' Rights Movement in Perspective** 1993 at 86.

⁷ Ibid.

⁸ Idem at 87.

⁹ Bastow **HIV/AIDS Policy & Law Newsletter** 1995, Jenness **Making It Work: The Prostitutes' Rights Movement in Perspective** 1993 at 87.

¹⁰ Bastow (op cit).

4.5 Although this attitude dominates the popular understanding of HIV/AIDS,¹¹ it is not borne out by the evidence. On the contrary research tends to show that prostitutes (especially women) are more vulnerable to infection than their clients, and are often unable to insist on safe sex practices.

4.6 Prostitutes are more vulnerable to being infected with HIV, rather than being the vectors of infection for biological and social reasons. Women are more vulnerable than men to HIV infection simply by virtue of biology: The relatively large mucosal surface of the female vagina, where microlesions (injuries) can occur during sexual intercourse, may offer easy entry points for the virus.¹² Semen infected with HIV typically contains a higher concentration of the virus than vaginal secretions. Furthermore, women are at least four times more vulnerable to other sexually transmitted infection (STIs), and the presence of untreated STIs is a risk factor for HIV. In general, women's greater physiological risk of HIV infection is compounded by women's lower socio-economic status¹³ and discriminatory cultural practices. At the core is women's lack of autonomy and bodily integrity in sexual relationships,¹⁴ embedded in cultural norms relating to gender,¹⁵ and often enforced by violence.¹⁶ For example, in South Africa, many forms of violence against women expand the likelihood of coerced sex, which in turn increases the risk of injuries and accordingly of HIV infection.¹⁷

4.7 Prostitution is a high risk activity in relation to HIV as it inevitably involves multiple partners. In addition, a number of psycho-sexual factors converge to exacerbate the

¹¹ Jurgens **HIV Testing and Confidentiality: Final Report** 2001.

¹² **WHO** 'Women and HIV/AIDS' Fact Sheet 2000; Quirk and De Carlo "What are women's HIV prevention needs?" 1998.

¹³ See Rao Gupta and Weiss **Bridging the gap: Addressing gender and sexuality in HIV prevention** 1998; Collins and Rau **Aids in the context of development** 2000.

¹⁴ See Wood K and Jewkes R, '**Dangerous' love: Reflections on violence among Xhosa township youth**', in Morrell **Changing men in Southern Africa** 2001.

¹⁵ See MacFadden P., '**Sex, sexuality and the problem of AIDS in Africa**', in Meena **Gender in Southern Africa: Conceptual and theoretical issues** 1995 at 150; Bujra "**Targeting men for a change: AIDS discourse and activism in Africa**" 2000; **Medical Anthropology Quarterly** "Virginity testing: Managing sexuality in a maturing HIV/AIDS epidemic" 2001 at.546; Rungunga et al "Culture, identity and reproductive failure in Zimbabwe" 2001; and Kelk Mager **Gender and the making of a South African Bantustan** 1999 at 185.

¹⁶ **CIETafrica Beyond victims and villains: The culture of sexual violence in South Africa 2000**. See also Jewkes et al "**He must give me money, he mustn't beat me**": Violence against women in three South African provinces 1999; **loveLife** 2000.

¹⁷ *Ibid.*

physiological vulnerability of prostitutes: these include early sexual debut, high rates of partner change, variable condom use, high levels of STD, high levels of STIs and violent or coercive sex.¹⁸

4.8 Given the fact that prostitutes are predominantly women, the increased susceptibility of women to HIV/AIDS (compared to that of their male sexual partners) and the concomitantly lower transmission rate from women to men than vice versa,¹⁹ implies that women prostitutes are far more at risk of contracting the virus from their male clients than the converse. Despite the fact that persons working in prostitution constitute a 'high risk' population in terms of HIV and other STI infection, there are important factors militating against a linear understanding that prostitutes are a primary bridge through which HIV/AIDS is transmitted to the general population. These include the

- fact that prostitutes are generally more aware of the need for safer sex practices (including condom use) than non-prostitute populations
- fact that women are biologically and culturally more vulnerable than men to HIV infection
- lower transmission rate from women to men than vice versa.

4.9 Thus women prostitutes are more likely to be infectees rather than infectors of HIV, a fact that is often neglected in discussions around prostitution and HIV/AIDS.²⁰

4.10 The fact that HIV vulnerability is shaped by a variety of factors means that not all prostitutes are equally at risk of HIV infection. Research has suggested that outdoor prostitutes are particularly vulnerable. In addition (and often intersecting with outdoor prostitution) child prostitutes, male and transgendered prostitutes, as well as foreign national prostitutes are also at higher risk. While HIV seems to be most prevalent amongst the more vulnerable and marginalised prostitutes, drug use is less so.

4.11 Outdoor prostitutes are said to be amongst the most vulnerable to HIV infection as they are generally poorer, younger and more likely to be drug or alcohol

¹⁸ **WLC** "Commercial Sex Work: Decriminalisation Or Regulation" 2000.

¹⁹ Statistics show that a woman having unprotected sex with an infected male runs a risk more than double that of an uninfected male having unprotected sex with an infected female - **SALRC Fifth Interim Report on aspects of the law relating to AIDS** 2001 par 3.47.1 at 59.

²⁰ Mensah "Legal and Ethical Issues Raised by HIV/AIDS in the Context of Prostitution" 2000.

dependent.²¹ Outdoor prostitutes are also considerably more vulnerable to violence from clients and police.

4.12 Leggett hypothesised an association between use of hard drugs and HIV seroprevalence.²² However, the research results showed the opposite to be the case. Indeed, the prostitutes least likely to be using drugs - the poor black women situated outside of the drug-driven CBD's - were most susceptible to HIV/AIDS. Nevertheless, the research did find that the introduction of new drugs, most notably crack cocaine, into the prostitution scenario in South Africa has dramatic implications for the spread of HIV.²³ Although intravenous drug use is relatively rare, the use of crack by prostitutes has exploded since 1996.²⁴ Studies have shown that crack users are just as likely to be HIV positive as intravenous drug users²⁵ as it has led to an increased demand for unsafe sex (such as condom-free or anal sex), due to the willingness of addicts to do anything for drug money.

4.13 Children are also at greater risk, due (*inter alia*) to increased biological vulnerability to STI's, their smaller physical size and their lack of power in negotiating safer sex behaviour.²⁶ A high incidence of children in a particular prostitute population or a high incidence of young entry into prostitution may therefore have a significant impact on the spread of HIV infection.

²¹ See DeCarlo 'What are sex workers' HIV prevention needs?' 1996.

²² Leggett **ODCCP Study** 2000 par 4.5.

²³ Leggett "Poverty and sex work in Durban, South Africa" 1999 at 162.

²⁴ Ibid.

²⁵ Ibid. Leggett describes the following synergy between crack and prostitution: crack is a stimulant (allowing long work hours) and an appetite suppressant (leading to weight loss). It is highly addictive and short-lasting (providing a need for an immediate cash income), it is a mood elevator (potentially softening the stresses of the work) and has a pro-sexual effect in some users. (Leggett **ODCCP Study** 2000 at par 2.5.) Crack use has also been correlated with other STI's, thus increasing the risk of HIV transmission, and has been found to cause blisters, sores and cuts in the mouths of users, increasing the risk of oral transmission of HIV. In addition to increasing the number of sexual encounters and the organic susceptibility to HIV, crack use also has a demoralising effect on an already vulnerable group, and may erode the capacity for prudent choice in sexual matters. See Leggett **ODCCP Study** 2000 at par 2.2 and authorities cited there.

²⁶ Lim **The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia** (1998) at 20. Younger women are at greater biological risk, since the physiologically immature cervix and scant vaginal secretions put up less of a barrier to HIV - SALRC **Fifth Interim Report on aspects of the law relating to AIDS** 2001 par 3.47.1 n 290. There is also an increased risk of trauma and micro-lesions. See also Alexander "Sex work and health: A question of safety in the workplace" 1998.

4.14 Although data pertaining to male and transgendered prostitutes is not as readily available as for women prostitutes,²⁷ there are indications that these groups of prostitutes may be particularly vulnerable to HIV infection.²⁸ Some of the factors that determine women's vulnerability also affect male prostitutes, and are compounded by factors such as sexual identity issues and homophobic repression.²⁹ The relative invisibility of male prostitutes may also be a further factor.³⁰

4.15 While no systematic research has been conducted into the number of non-nationals residing in Hillbrow, anecdotal evidence indicates that an increasing number of prostitutes come from beyond South Africa's borders. Insecure alien resident status and its associated insecurities have particular implications for the health seeking behaviour of prostitutes, their access to health care services and their working conditions.³¹ Vulnerability to HIV infection increases whenever people are socially marginalised;³² their access to information and preventive services is decreased; they have less influence on the design of prevention strategies; and most importantly, they have less power and capacity to take necessary steps to protect themselves.³³ Due to their status or lack thereof migrant prostitutes face particular challenges and may be more prone to providing their services without a condom.

Condom use and safe sex

4.16 HIV infection in prostitution can be largely reduced by condom use. Here research has shown that adult prostitutes are generally more aware of the need for safer sex

²⁷ Antenatal surveys are the recommended surveillance tool to estimate HIV in populations. Due to the fact that these surveys focus on pregnant women attending antenatal clinics, this tool has certain inherent limitations, especially in terms of extrapolation of findings to the general population. See Department of Health **National HIV and Syphilis Sero-Prevalence Survey 2000** Preamble and par 4.1.4.

²⁸ Overs **Technical Review: Prevention and the Commercial Sex Industry 2000** at 7. See also Mak Final Report **EUROPAP 1994** at 4; Laffont et al Final Report of the European Network for HIV/STD Prevention in Prostitution 1998 - 2000.

²⁹ Overs **Technical Review: Prevention and the Commercial Sex Industry 2000**.

³⁰ See Allman Ont: Health Canada 1999 at 9.

³¹ Richter **Erotic Labour in Hillbrow: Sex work, Johannesburg's 'Den of Iniquity' and HIV/AIDS 2008**.

³² **UNAIDS** Guidance Note HIV and Sex Work 2007.

³³ **WLC** "Commercial Sex Work: Decriminalisation Or Regulation" 2000.

practices (including condom use) than non-prostitute populations.³⁴ Bastow remarks, for example, that studies have shown that prostitutes use condoms more consistently than other populations similar in age, race and sex.³⁵ South African prostitutes attending a conference on prostitution and health in February 2001 made the following statement:

The [safer sex] programs are focusing on us, but we all know the general public needs the education. We know about safe sex and condoms.³⁶

4.17 Pauw and Brener found that twenty four of the twenty five participants in their study claimed always to use condoms with casual clients, while twenty three participants reported always using condoms with regular clients.³⁷ However, all participants noted that negotiation of condom use was often more difficult with regular clients.³⁸ Out of the 349 prostitutes included in Leggett's research study, only 28 women (about 8%) admitted to occasional condom free sex with clients, at least for oral sex.³⁹ Both studies⁴⁰ found that prostitutes do not usually use condoms with personal partners.⁴¹

4.18 With apparently high levels of knowledge of safe sex practices and the need for condom use, it is clear that a prostitute's ability to negotiate condom use is dependent upon a range of socio-economic factors.⁴² Two points are highlighted here. Firstly, it should be noted that there is a strong demand for unprotected sex. Secondly, the social and economic power relations of prostitution can limit the ability of prostitutes to practise and insist upon safe sex.

³⁴ SALRC **Fifth Interim Report on aspects of the law relating to AIDS** 2001 at para 3.99 - 3.104; Davis "Prostitution in Canada" 1994 at par 1.1b; Jenness **Making It Work: The Prostitutes' Rights Movement in Perspective** 1993 at 92; Banach & Metznerath "Principles for Model Sex Industry Legislation" 2000 at 25; Mak '**General Conclusions and Recommendations**' in Final Report EUROPAP 1994.

³⁵ Bastow **HIV/AIDS Policy & Law Newsletter** 1995 and Mak Final Report **EUROPAP** 1994.

³⁶ Sex workers from the Muthusimpilo Project, HTA, SWEAT.

³⁷ Pauw & Brener **Medical Research Institute** 1997 at 11-12.

³⁸ Pauw & Brener **Medical Research Institute** 1997 at 12 note that these findings should be viewed with some caution, since the boundaries between regular clients and personal partners sometimes appeared blurred.

³⁹ Leggett **ODCCP Study** 2000 at par 4.3. Eighty two percent of this group were black women, and 78% of this group were HIV positive.

⁴⁰ Idem at 13. The use of a condom connotes a distinction between professional sex and sex for pleasure – see Leggett "The least formal sector women in sex work" 1998 at 24.

⁴¹ Ibid.

⁴² Gould **Selling Sex in Cape Town ISS** 2008 at 74.

4.19 The evidence suggests that there is a great demand for condom-free sex in South Africa.⁴³ Many prostitutes and brothel owners speak of a strong demand for unprotected sex.⁴⁴ Recent research findings suggest that it is the clients of prostitutes, rather than the prostitutes themselves, that present the strongest threat to the use of condoms. Clients frequently request, or even insist on, unprotected sex. Gould writes that 'while 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 clients offer higher rates for unprotected sex'. Some clients have been known to resort to violence if unprotected sex is denied them.⁴⁵ In another example, respondents in research conducted at a KwaZulu-Natal truck stop reported that condom use was responsible for client loss and more frequent non-payment. They also stated that insisting on condom use led to physical abuse by clients, and clients insisted on paying less for sex when a condom was used.⁴⁶

4.20 Research demonstrates that a broad range of socio-economic variables⁴⁷ impact negatively on the ability of prostitutes to negotiate condom use.⁴⁸ These include poverty, violence, exploitation and abuse by managers, pimps and authorities, and drug use.

- Prostitutes who earn more money are able to demand condom use from their clients and/or partners, whereas impoverished sex workers who work in areas where there is high competition for clients are less likely to negotiate safer sex practices.⁴⁹ The offer of more money for sex without condoms is often compelling to prostitutes living in poverty.⁵⁰ According to Herbst the majority of the male prostitute informants claimed to be knowledgeable about safer sex but informed the researcher that they were prepared to have unprotected sex in return for additional monetary reward. This additional monetary reward was often as little as

⁴³ Leggett **ODCCP Study 2000** at par 2.5, citing Varga study.

⁴⁴ Gould *Selling Sex in Cape Town* **ISS 2008** at 74.

⁴⁵ Gould *Selling Sex in Cape Town* **ISS 2008** at 164.

⁴⁶ Abdool Karrim "Reducing the risk of HIV infection among South African sex workers socioeconomic and gender barriers" 1995 at 1523.

⁴⁷ **UNAIDS Guidance Note HIV and Sex Work 2007** at 6.

⁴⁸ See also in this regard the list of factors identified by the World Health Organisation - **WHO Statement on HIV Epidemiology and Prostitution 1989** at par A.1.

⁴⁹ LAC "Help Wanted: Sex Workers in Katutura, Namibia" 2008 at 12.

⁵⁰ DeCarlo 'What are sex workers' HIV prevention needs?' 1996.

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- Women are at a higher risk for physical violence when they attempt to insist on condom use with customers, whose violence contributed to their relative powerlessness.⁵¹
- Exploitative management practices by brothel owners and controllers, and perceptions of physical power and the authority to permit or withhold sexual service or profit were also determining influences crucial in condom use negotiation.⁵² Harassment by law enforcement officers (who may confiscate condoms) limits condom use.⁵³
- Drug use can mean that women are more willing to accede to clients demands if they need money for drugs.⁵⁴

4.21 Finally, the ability of prostitutes to prevent HIV infection is affected by their ability to access health care services. Here research has shown that prostitutes do not always feel comfortable visiting state funded clinics providing primary health and STD care.⁵⁵ Reasons given for this include the negative attitudes of clinic staff and perceptions that other clinic attendees judge them negatively. Participants in the Cape Town study conducted by Pauw and Brener stated that clinic staff were rude to them, more impatient with them and that prostitutes were not afforded equal treatment. Participants also indicated that they were reluctant to tell staff that they were prostitutes, fearing discrimination and that clinic staff would not respect their confidentiality.⁵⁶ Other difficulties included that clinic staff members were reluctant to give prostitutes a sufficient supply of condoms, and that not all prostitutes were aware of the existence of clinics.⁵⁷

⁵¹ Farley Prostitution: a critical review of the medical and social sciences literature 2000 at 7.

⁵² Cusick AIDS Care 1998 133-146.

⁵³ DeCarlo 'What are sex workers' HIV prevention needs?' 1996.

⁵⁴ Farley Prostitution: a critical review of the medical and social sciences literature 2000 at 6.

⁵⁵ Pauw & Brener **Medical Research Institute** 1997 at 26.

⁵⁶ Idem at 26-27. Marcus **Indicator SA** 1995 also notes that the relationship of prostitutes to the health system is problematic, 'since it is often tied to their contact with the legal system'.

⁵⁷ Idem at 27.

Legal responses to prostitution and HIV

4.22 The intersection between prostitution and HIV has resulted in a number of legal responses. These generally fall into two categories – those that call for more stringent legal control through regulation of prostitution and criminalisation of some forms of behaviour, and those that promote non-criminalisation and programmes to enhance condom use and reduce exploitation. Both of these approaches use public health as a justification, although the latter consciously promotes a human rights framework.

Expanded criminal and/or regulatory response

4.23 Three categories of measures operating in the context of criminal law or regulation have been employed to prevent the spread of HIV through prostitution:

- Mandatory testing requirements.
- Prohibiting persons who have tested positive for HIV from working as prostitutes.
- Enhancing the penalties for prostitution-related offences when committed by a person with HIV.

4.24 **Mandatory testing requirements** have been employed both as part of a legalised system (for example, in the case of Nevada), or as part of a criminalized system. These may take the form of testing as a prerequisite for employment in a legal brothel, periodic testing as one of the conditions for continued employment, and testing upon arrest for a prostitution-related offence.

4.25 The arguments in favour of mandatory testing are based on the assumption that this will curb the spread of HIV. On the other hand, mandatory testing is widely criticised due to the unreliability of tests, the creation of a false sense of security in both clients and prostitutes, the focus on *ex post facto* detection rather than prevention, the focus on prostitutes rather than clients, the violation of the right to privacy and the principles of medical confidentiality and the stigmatisation of prostitutes.

4.26 The Ontario Law Reform Commission, the Canadian HIV/AIDS Legal Network and the Canadian AIDS Society as well as the AIDS and Civil Liberties Project of the American Civil Liberties Union have examined and rejected proposals for mandatory testing of prostitutes. On the other hand, Canadian courts have on occasion required the testing of

prostitutes as a part of sentencing measures, and courts in California and Illinois have upheld the constitutionality of mandatory testing measures.

4.27 ***Measures aimed at preventing HIV positive persons from working in prostitution*** may have the effect of encouraging prostitutes to 'hide' from authorities if they think that they may be infected. The fact that prostitutes with HIV do not have access to social security systems or unemployment benefits limits their possibilities in finding another livelihood once prostitution is precluded by these legal measures.

4.28 A system of ***increased penalties upon conviction of prostitution-related offences*** may result in 'expanding' the prostitute's criminal record, further limiting the employment opportunities of persons wishing to leave prostitution.

4.29 The question that arises is whether legal measures operating within the criminal law, such as those outlined above, are appropriate for addressing prostitution and HIV/AIDS. The suitability of these measures is closely linked to the advisability of enacting specific statutory offences to penalise harmful HIV-related behaviour. In this regard, the report⁵⁸ recently completed by the Commission and its decision not to recommend such offences are significant.

4.30 A broader question is how the legal status of prostitution may impact on HIV/AIDS prevention. Research demonstrates that laws criminalising prostitution create an impediment for HIV/AIDS education and prevention programmes. Punitive measures also erode prostitutes' ability to negotiate safer sex and alienate them from public health initiatives. Prostitutes may be reluctant to carry condoms for fear of police, and businesses may similarly be reluctant to keep and display safer sex material on premises. Health and occupational safety standards cannot be implemented where prostitution is illegal.

Non-criminalisation

4.31 In many countries, existing laws, policies and practices drives prostitution underground. This makes it extremely difficult to reach prostitutes and their clients with HIV prevention, treatment, care and support programmes. One of the major arguments for the non-criminalisation of prostitution is that this legal model assists in reducing HIV transmission. For example, the Australian Intergovernmental Committee on AIDS has listed some of the

⁵⁸ SALRC Fourth Interim Report Aspects of the Law relating to AIDS 2000.

potential advantages of a non-criminalised system. These include the alleviation of the stigma associated with prostitution and the encouragement of safer sex activities in the industry. Commentators point out that rather than coercive measures, there are interventions such as peer-based education and condom distribution initiatives that would give prostitutes the means to protect themselves against HIV. However, they also caution that these kinds of programmes imply being able to access prostitutes and their clients, and the current illegal status of the industry impedes such health and education campaigns.

*A human rights approach*⁵⁹

4.32 In South Africa's constitutional democracy, human rights are a significant policy consideration. Prostitution takes place in a context of few or no rights: HIV vulnerability is high for all prostitutes and is significantly influenced by their working environment. Most sex workers find themselves working in unhealthy and unregulated conditions. Many settings offer little or no promotion of safer sex, encourage a high turnover of clients and provide little or no control over clients' behaviour.⁶⁰ They often have poor access to: adequate health services and HIV prevention measures such as male and female condoms; post-exposure prophylaxis after rape, emergency contraception, management of sexually transmitted infections; and, drug treatment and other harm reduction services. There are many barriers to providing services for prostitutes that need to be addressed, including the discrimination they face from health care and social services, and law enforcement officers.⁶¹

4.33 The protection, promotion and respect of human rights, such as the right to health, liberty, and security of person; protection from exploitation and abuse, and the principle of non discrimination are detailed in a number of international human rights instruments and form the basis of the recommended responses to HIV and prostitution.⁶² For example, the **UNAIDS International Guidelines on HIV/AIDS and Human Rights**⁶³ set out the human rights guidelines for addressing HIV/AIDS. In relation to Prostitution, the Guidelines state:

⁵⁹ This is also addressed in chapter five.

⁶⁰ **UNAIDS** Guidance Note HIV and Sex Work 2007 at 2.

⁶¹ **UNAIDS** Guidance Note HIV and Sex Work 2007 at 2.

⁶² **UNAIDS** Guidance Note HIV and Sex Work 2007 at 2 - 3.

⁶³ 2006 Consolidated Version.

With regard to adult sex work that involves no victimization, criminal law should be reviewed with the aim of decriminalising, then legally protecting occupational health and safety conditions to protect sex workers and their clients, including support for safe sex during sex work. Criminal law should not impede the provision of HIV prevention and care services to sex workers and their clients. Criminal law should ensure that children and adult sex workers who have been trafficked or otherwise coerced into sex work are protected from participation in the sex industry and are not prosecuted for such participation but rather are removed from sex work and provided with medical and psycho-social support services, including those related to HIV.⁶⁴

4.34 UNAIDS suggests that non-criminalisation constitutes a necessary, but preliminary, step to addressing HIV vulnerability amongst prostitutes.⁶⁵ In 2007, UNAIDS developed a Guidance Note to provide a unified approach by its co-sponsoring agencies to the reduction of HIV vulnerabilities in the context of prostitution, where prostitutes are defined as adults, 18 years and over. Its specific focus is the urgent need to provide access to HIV prevention, treatment, care and support for all prostitutes, and to provide life choices and occupational alternatives to prostitution, including for prostitutes living with HIV.⁶⁶ Strategies include:

- The need to address poverty and gender inequalities. Economic and social opportunities need to be expanded to reduce vulnerabilities to entry into prostitution and to provide real alternatives to prostitution for those who want to leave it. These might include development strategies that include income-generation and microfinance programmes for women, and that address women's lack of ownership of land and control of family assets.⁶⁷
- A basic education is seen as critical to poverty reduction and the elimination of gender inequalities, as well as being associated with reduced HIV vulnerability since education fosters economic independence, delayed marriage, information on sexuality, and practice of safer sex.⁶⁸

⁶⁴ At 30 par (c).

⁶⁵ **UNAIDS Global Reference Group on HIV/AIDS and Human Rights 2003.**

⁶⁶ **UNAIDS** Guidance Note HIV and Sex Work 2007 at 1.

⁶⁷ **UNAIDS** Guidance Note HIV and Sex Work 2007 at 3.

⁶⁸ **UNAIDS** Guidance Note HIV and Sex Work 2007 at 4.

- Access to decent work and alternative employment needs to be promoted. To improve human resource capacity and provide alternative job opportunities, employment growth needs to be at the centre of national HIV strategies. Vocational training programmes are needed to develop apprenticeship and skills, in both enterprise settings and the public sector, to provide skills training to youth, young women, migrants and former sex workers.⁶⁹
- Refugees, internally displaced persons, economic migrants and asylum seekers often lack alternative economic options, face discrimination, and are frequently not allowed to enter the work force of the host country, dramatically reducing their access to an income. With few alternatives, prostitution becomes a means of survival. For this reason the needs of refugees, internally displaced persons, economic migrants and asylum seekers need to be addressed.⁷⁰
- The need to address the demand for paid sex. The UN is of the opinion that 'it is possible and timely to achieve social change, and consequently behavioural change among men, to reduce the demand for sex work'.⁷¹ This requires mainstream education which includes information on HIV.
- Addressing gender inequality and violence. The World Health Organization noted that women's primary risk factor for HIV is violence. Since most women enter prostitution as a result of poverty, rape, infertility, or divorce, public health programs must address the social factors which contribute to STD/HIV.⁷²

4.35 Behavioural factors, such as the frequency of unprotected sexual intercourse and multiple sexual partners, and biological factors, such as high prevalence of sexually transmitted diseases, are some of the immediate factors accelerating the epidemic in South Africa. Some of the underlying determinants include socioeconomic factors such as poverty, migrant labour system with family disruptions, commercial sex practices, lack of formal education with higher level of illiteracy.⁷³ Many of the socio-economic factors that underlie the HIV/AIDS epidemic in South Africa also structure prostitution, with prostitutes being a particularly vulnerable group. It remains an important policy consideration that the appropriate

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Farley Prostitution: a critical review of the medical and social sciences literature 2000 at 7.

⁷³ Department of Health **Clinical Tract Module on Epidemiology of HIV.**

legal response to prostitution also takes into account South Africa's response to HIV/AIDS.⁷⁴

⁷⁴ Research by Farley and Kelly has found the incidence of HIV seropositivity amongst prostitutes, across the world, to be devastating. See Farley Prostitution: a critical review of the medical and social sciences literature 2000 at 7.

PART III

INTERNATIONAL AND COMPARATIVE LAW ON PROSTITUTION

CHAPTER 5: THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK OF THE LAW ON PROSTITUTION

Introduction to the international human rights framework of the law on prostitution

5.1 International human rights law aims to ensure that human rights guarantees are realised by States, as subjects of international law, for all the people within its territory. Primarily the focus should be on respecting, protecting and fulfilling human rights of the most vulnerable people, those who are marginalised by socialised institutions and subject to human rights abuses. Prostitutes, as members of the human family, deserve to be treated with dignity and to enjoy the human rights guaranteed to all people.¹ In addition, as women, prostitutes should be afforded those particular human rights that are extended to women under international treaties and agreements.

5.2 Throughout history, prostitutes have been regarded as a separate social category, as women who do not adhere to sexual and other behavioural norms set by society. This status meant that they were excluded from whatever international, national or customary protection from abuse was available to others as citizens, women or workers.² Thus, despite the need to realise the human rights of prostitutes, international human rights law has, to date, not provided sufficient protection for particular violations suffered by prostitutes.³

5.3 The international process concerning prostitutes began with a conference in 1895 in Paris, followed by others in London and Budapest in 1899. At the time prostitution was not named as such in international instruments and was, with different nuances, first

¹ Betteridge 'Testimony before Subcommittee on Solicitation Laws' 2005 at 3. Betteridge is Senior Policy Analyst with the Canadian HIV/AIDS Legal Network, a lawyer by training, and a member of the Ontario Bar.

² Bindman 'Redefining Prostitution as Sex Work' 1997 at par 2.

³ J Csete and M Seshu 'Still Underground: Searching for Progress in Realizing The Human Rights of Women in Prostitution' **HIV/AIDS Policy and Law Review** 2004 9(3) at 11 as referred to in Canadian HIV/AIDS LN **Sex, Work, Rights** 2005 at 49 fn 188.

addressed through the concept of 'white slavery', later as trafficking, thereafter as a human rights issue and, most recently, within labour law.

5.4 In the 19th and early 20th centuries, campaigners against transatlantic slave trade⁴ (originally referred to as abolitionists)⁵ regarded the institution of prostitution as a violation of human rights, similar to the institution of slavery, implying that no person, including an adult, was able to give genuine consent to engaging in prostitution. The campaigners were joined by proponents of 'social purity' reform and campaigners against the 'white slave trade' from Britain.⁶ International conferences led to the first international instruments concerning the trade namely the International Agreement for the Suppression of the White Slave Trade in 1904 and the International Convention for the Suppression of the White Slave Trade in 1910. These instruments were followed by two conventions on trafficking in women and children adopted by the League of Nations, namely, the International Convention to Combat the Traffic in Women and Children of 1921 and the International Convention for the Suppression of Women in Full Age of 1933.

5.5 The conclusion of the slave trade conventions reflects international efforts to end the trade in white sex slaves. Before 1949 the national governments, which at the time permitted regulated forms of prostitution, were not willing to sign a document which required the elimination of all prostitution. In order to optimise international support for these instruments, the drafters used the earliest definitions of 'white slavery' and after 1921 of 'trafficking' to distinguish between an 'innocent' woman, who found herself in the sex industry as a result of abduction or deceit, and an ordinary prostitute.⁷ This distinction between so-called voluntary and forced or coerced prostitution would become the crucial issue in so far as

⁴ A vigorous campaign to end the transatlantic slave trade and slavery began in Britain in 1783 and also developed in North America and the Caribbean, often led by the Black churches. See International Slavery Museum 'Abolition of the Transatlantic Slave Trade'.

⁵ The term 'abolitionist' was originally used to describe campaigners against the transatlantic slave trade. See Bindman 'Redefining Prostitution as Sex Work' 1997 at par 2b.

⁶ As the abolitionist campaign succeeded, its focus shifted to repressive measures to end 'male vice' which was seen as the key to ending prostitution itself. The campaign against 'white slavery' portrayed the women as 'victims' who appealed to the sympathies of the charitable middle-class reformers. However, a number of contemporary historians have questioned the actual extent of the 'white slave trade'. Their research suggests that the number of cases of real 'white slavery' was very low, and indicates that most of the 'victims' were actually prostitutes migrating in the hope of finding a better life elsewhere. Interestingly, only white women were considered 'victims' of the sex trade. Campaigners against the 'white slave trade' from Britain to Argentina were not concerned with the situation of Argentinean-born prostitutes, nor were American reformers concerned about non-Anglo-Saxon prostitutes. See J Doezema 'Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy' in Kempadoo and Doezema **Global Sex Workers** 1998 at 26, 28, 30, 35 and 36 and the sources cited there.

⁷ Bindman 'Redefining Prostitution as Sex Work' 1997.

the protection of the human rights of prostitutes, internationally and nationally, was concerned.

5.6 As will be seen in the discussion that follows, international instruments that were drawn up expressly to address prostitution do not reflect adequate respect for the human rights of prostitutes. The reason is that prostitution-specific instruments only address the rights of prostitutes who have been trafficked and are being exploited, and do not protect the rights of those who work voluntarily as prostitutes. In contrast, non-prostitute specific human rights instruments potentially offer prostitutes more protection.⁸

5.7 The following documents are discussed with reference to prostitution:

International instruments

- The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949.
- International Covenant on Civil and Political Rights of 1966.
- International Convention on Economic, Social and Cultural Rights of 1966.
- Convention on the Elimination of All Forms of Discrimination against Women of 1967.
- Declaration on the Elimination of Violence against Women of 1993.
- Beijing Declaration and Platform for Action of 1995.
- The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children of 2003.

African instruments

- The African Charter on Human and People's Rights of 1986.
- The Protocol to the African Charter on Human and People's Rights on the Rights of Women of 2005.
- Addendum to the 1997 Declaration on Gender and Development by SADC Heads of State or Government of 1998.
- SADC Protocol on Gender and Development of 2008.

⁸ Canadian HIV/AIDS LN **Sex, Work, Rights** 2005 at 49 and further.

Other international documents

- UNAIDS International guidelines on HIV/AIDS and Human Rights of 2006.
- World Charter for Prostitutes' Rights of 1985.

5.8 South Africa has signed and/or ratified several of the international and regional instruments with the resulting obligation to bring its domestic laws and policies in line with the provisions of these instruments.

The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949 ('the Trafficking Convention')

5.9 In 1949 the UN adopted the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others ('the Trafficking Convention').⁹ South Africa signed the Trafficking Convention in 1950 and ratified it in 1951.

5.10 The Preamble to the Trafficking 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.

5.11 Without defining 'prostitution' or 'exploitation', the Trafficking Convention addresses two specific concerns, namely, trafficking in persons for the purposes of prostitution and the exploitation of persons for prostitution. Regarding the latter, the Trafficking Convention requires States Parties to punish any person who exploits the prostitution of another person, who procures or entices another person into prostitution (even with the consent of that person) and to adopt sanctions against the operation of brothels or places of prostitution.¹⁰

⁹ It was approved by the United Nations ('UN') General Assembly in 1949 and entered into force in 1951. GA Res 317(IV) of 2 December 1949, U.N. Doc A/1251 (1949). Interestingly, the USA is not a party to this Convention.

¹⁰ Canadian HIV/AIDS LN **Sex, Work, Rights** 2005 at 49 and further.

Articles 1 and 2 of the Trafficking Convention require States Parties to punish any person who:

- 'to gratify the passions of another' procures, entices or leads away another person, for purposes of prostitution, even with the consent of that person
- exploits 'the prostitution of another person' even where this occurs with the consent of the exploited person
- commits certain acts relating to brothel-keeping.

5.12 In terms of article 6 of the Trafficking Convention, States Parties agree 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.

5.13 Article 17 of the Trafficking Convention requires States Parties to take or to encourage, through their public and private educational, health, social, economic and other related services, measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution. Article 17 further requires States Parties to undertake, adopt or maintain such measures as required, in terms of their obligations under the present Convention, to monitor the traffic in persons of either sex for the purpose of prostitution.

5.14 Article 20 of the Trafficking Convention requires States Parties to take the necessary measures for the supervision of employment agencies in order to prevent persons seeking employment, in particular women and children, 'from being exposed to the danger of prostitution'.

5.15 From the above it is clear that the Trafficking Convention regards prostitutes as victims, regardless of whether and to what extent they chose to be involved in prostitution. The Trafficking Convention 'recognises in a complicated way the theoretical right of adult women in prostitution to ply their trade, but is based on the premise that all sex work should end, and implicitly endorses the view that adult sex workers should be saved from themselves and rehabilitated.'¹¹

5.16 This approach contemplates the criminalisation of all the activities related to prostitution such as soliciting, brothel-keeping, procurement and living off the earnings of prostitution. The activities of the prostitute her/himself, being the victim of exploitation, are exempted from criminal sanction,¹² leading to the conclusion that the Trafficking Convention

¹¹ J Csete and M Seshu 'Still Underground: Searching for Progress in Realizing The Human Rights of Women in Prostitution' *HIV/AIDS Policy and Law Review* 2004 9(3) at 1, 8 -13 as referred to in Canadian HIV/AIDS LN **Sex, Work, Rights** 2005 at 49 fn 188.

¹² Mossman 'International Approaches to Decriminalising or Legalising Prostitution' 2007 at 11.

supports a partial (modified?) criminalisation model.¹³

International Covenant on Civil and Political Rights of 1966 ('the ICCPR')

5.17 South Africa ratified the ICCPR in 1998. States Parties to the ICCPR have the obligation to respect, protect and fulfil the rights set out in this instrument for all peoples within its territory and through its ratification South Africa has undertaken to give immediate effect to those rights.

5.18 At a fundamental level and as members of the category 'all peoples', prostitutes are entitled to the following rights from States Parties:¹⁴

- Right to life, which must be protected by law. (Article 6)
- Rights to liberty and security of the person, and the right not to be subject to arbitrary arrest or detention. (Article 9)
- Right not to be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on their honour or reputation, as well as the right to be protected by law against such interference or attacks. (Article 17)
- Right to freedom of expression. Exercise of the right may be restricted by law where necessary for respect of the rights or reputations of others, or for the protection of national security or public order, or of public health or morals. (Article 19.2, 19.3)
- Right to freedom of association with others. No restrictions may be placed on the exercise of the right other than those which are prescribed by law *and* which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. (Article 22)
- Right to equality before the law and equal protection of the law without any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, poverty, birth or other status. (Article 26)
- Right to an effective remedy for violations of rights or freedoms, notwithstanding that the violation has been committed by persons acting in an official capacity.

¹³ See chap 7 below for a discussion of the different models.

¹⁴ Canadian HIV/AIDS LN **Sex, Work, Rights** 2005 at 50.

(Article 2.3)

5.19 All of these rights can be related to one or more aspect of prostitution and as such, the ICCPR as a non-prostitution–specific convention, potentially offers prostitutes greater protection under general human rights guarantees than the Trafficking Convention.

5.20 For example, the denial of the right to equal protection of the law amounts to non-compliance with the ICCPR, and creates and sustains conditions leading to societal vulnerability to infection by HIV. Unequal protection of the law also hinders access to an enabling environment that will promote behavioural change and enable people to cope with HIV.¹⁵

5.21 The realisation of these rights seems possible within a framework of non-criminalisation for voluntary prostitution, involving the repeal of all laws against prostitution and the removal of all provisions criminalising any aspect of such prostitution. Under this model the industry will only be subject to general statutes and regulations covering employment and health insurance.¹⁶

International Convention on Economic, Social and Cultural Rights of 1966 ('ICESCR')

5.22 The principle of progressive realisation applies to this Convention and implies that countries that have ratified the Convention undertake to take steps towards the progressive realisation of the rights set out therein, while recognising that all states do not have the resources to do so immediately.¹⁷ South Africa signed the ICESCR on 3 October 1994 but has not yet ratified the Convention.¹⁸

5.23 As is the case with the ICCPR, prostitutes are principally included in the category 'all peoples' and are under the ICESCR entitled to the progressive realisation of the following human rights:¹⁹

¹⁵ UNAIDS 'International Guidelines on HIV/AIDS' 2006 at 83.

¹⁶ Mossman 'International Approaches to Decriminalising or Legalising Prostitution' 2007 at 12. See also chap 7 below for a discussion of the different models.

¹⁷ Canadian HIV/AIDS LN **Sex, Work, Rights** 2005 at 48.

¹⁸ UNHCHR 'International Covenant on Economic, Social and Cultural Rights 1966. The USA is also a party, but has not ratified this Convention.

¹⁹ Canadian HIV/AIDS LN **Sex, Work, Rights** 2005 at 50.

- Right to work, including the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, with appropriate safeguards for this right. (Article 6.1)
- Right to enjoy just and favourable conditions of work. In particular, this includes a fair wage and decent living, safe and healthy working conditions, equal opportunity for promotion, and rest, leisure and reasonable limitation of working hours and periodic holidays with remuneration for public holidays. (Article 7)
- Right to form and join a trade union, and the right of trade unions to function freely. (Article 8.1)
- Right to social security, including social insurance. (Article 9)
- Right to special protection for mothers during a reasonable period before and after childbirth, including paid leave or leave with adequate social security. (Article 10.2)
- Right to an adequate standard of living for themselves and their families. (Article 11.1)
- Right to the highest attainable standard of physical and mental health. This includes states taking steps to prevent and treat epidemic and occupational diseases. (Article 12.1)

5.24 Once South Africa has ratified this Convention, it will have to move as expeditiously and effectively as possible, within its available resources, to realise these rights, also for prostitutes.

5.25 The strong economic and social focus of the Convention supports a framework of non criminalisation for voluntary prostitution whereby prostitutes are regarded as workers and respect for their rights and improvement of their health, safety and working conditions are demanded. Hence the suitability of such a framework to regulate the industry through existing statutes and regulations covering employment and health insurance.²⁰

Convention on the Elimination of All Forms of Discrimination against Women of 1979 ('CEDAW')

5.26 The text of CEDAW was prepared by the Commission on the Status of Women

²⁰ Mossman 'International Approaches to Decriminalising or Legalising Prostitution' 2007 at 12. See also chap 7 below for a discussion of the different models.

('CSW')²¹ and was adopted by the General Assembly in 1979.²² CEDAW is described as an international bill of rights for women. CEDAW prescribes specific steps that States Parties are obliged to take in order to eliminate discrimination against women. Many of these obligations are relevant to the circumstances of prostitutes.²³ South Africa signed CEDAW in January 1993 and ratified it on 15 December 1995 without reservations.²⁴

5.27 CEDAW defines discrimination against women in article 1 in the following terms:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

5.28 States Parties are legally obliged to eliminate discrimination, as defined against all women, therefore including prostitutes. Under CEDAW States Parties must take the following general measures:²⁵

- Refrain from engaging in any act or practice of discrimination against women and ensure that public authorities and institutions shall act in conformity with this obligation (Article 2(d))
- Take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. (Article 2(e))
- Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. (Article 2 (g))
- Repeal all national penal provisions that constitute discrimination against women. (Article 2(g))

²¹ The CSW was established by the UN in 1946 with the aim to focus on women's rights. The mandate of the CSW included the preparation of recommendations relating to the field of women's rights.

²² The CSW also drafted the Declaration on the Elimination of Discrimination against Women which was adopted by the General Assembly in 1967. The Declaration was a statement of moral and political intent without the contractual force of a treaty. DAW 'Short History of CEDAW Convention'.

²³ Canadian HIV/AIDS LN **Sex, Work, Rights** 2005 at 51.

²⁴ CEDAW entered into force on 3 September 1981. South Africa submitted its first report to the Committee in 1998. Women'sNet 'RSA 1st Report to CEDAW' 1998. The United States is the only developed nation that is not a party and has not ratified this Convention. DAW 'Overview of the Convention' 2007.

²⁵ Canadian HIV/AIDS LN **Sex, Work, Rights** 2005 at 51.

- Take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices that are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for men and women. (Article 5(a))
- Take all appropriate measures to protect health and safety in working conditions, including safeguarding the function of reproduction. (Article 11(1)(f))

5.29 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. The importance of article 6 lays in the fact that, despite the similarity in the wording of article 6 of the Trafficking Convention, the premise of CEDAW is not that the elimination of all prostitution. Combating trafficking in women and exploitation for the purposes of prostitution is one among many legitimate measures for protecting women against discrimination. Thus the mischief to be addressed is exploitation, not prostitution. The ultimate objective of CEDAW, namely to ensure that discrimination against all women is eliminated, does not distinguish between those who engage in prostitution and those who do not.²⁶

5.30 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 in General Recommendation No 24 they deal with women and health.²⁷ Both are relevant to prostitution.

General Recommendation No 19 - Violence against women

5.31 Paragraph 14 of the Committee's General Recommendation No 19 sustains the interpretation that the Convention does not call for the suppression of prostitution *per se*

²⁶ Canadian HIV/AIDS LN **Sex, Work, Rights** 2005 at 52.

²⁷ As of January 2004, CEDAW had adopted 25 general recommendations of which numbers 19 and 24 deal with issues relevant to prostitution. The Committee comprises of 23 experts on women's issues from different UN member states. The Committee members are elected to serve four-year terms in staggered elections held biennially. The Committee, who has a chairperson, three vice-chairpersons and a rapporteur, is responsible for overseeing the implementation of CEDAW by acting as a monitoring system to oversee the implementation of the Convention by those States which have ratified or acceded to it. DAW 'General Recommendations by CEDAW Committee' 1986.

as it is not included in the list of exploitative practices.²⁸

5.32 Paragraph 15 of General Recommendation No. 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 their status, which may be unlawful, tends to marginalise them. They need the equal protection of laws against rape and other forms of violence.

This recommendation highlights the vulnerability of prostitutes irrespective of the reason for engaging in prostitution and their need for protection. The recommendation does not distinguish between voluntary and coerced prostitution and does not call for measures to eliminate the institution of prostitution.²⁹

5.33 The relevance of the specific reference to the position of prostitutes is that it emphasises their vulnerability to the discrimination and social and economic marginalisation that all women face, and identifies the further marginalization that comes from their status as prostitutes.³⁰

5.34 The focus on protecting prostitution's rights is further noticeable in paragraph 24 of General Recommendation No 19 which calls on States Parties to describe in their reports the penal provisions, preventive and rehabilitation measures that have been taken to protect women engaged in prostitution or are subject to trafficking and other forms of sexual exploitation.

²⁸ Paragraph 14 reads as follows:

Poverty and unemployment increase opportunities for trafficking in women. In addition to established forms of trafficking there are new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries and organized marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse.

²⁹ See in this regard J Doezema 'Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy' in Kempadoo and Doezema **Global Sex Workers** 1998 at 40.

³⁰ The theme of the vulnerability of women in general, but specifically prostitutes, and their status as a marginalised group is also emphasised throughout the UNAIDS International Guidelines on HIV/AIDS and Human Rights. See the discussion of this document in para 5.69 and further below.

General Recommendation No 24 - Women and health

5.35 The Committee notes in paragraph 6 of General Recommendation No 24 that while biological differences between women and men may lead to differences in health status, societal factors are determinative of the health status of women and men and may even cause variations between women themselves. For this reason, the 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.

5.36 Closely related to this issue, in paragraph 18 of General Recommendation No 24 the Committee identifies HIV/AIDS and other sexually transmitted diseases as central to the right to sexual health of women and adolescent girls. As a consequence of unequal power relations based on gender, women and adolescent girls are often unable to refuse sex or insist on safe and responsible sex practices, and are accordingly exposed to the risk of contracting HIV/AIDS and other sexually transmitted diseases. Women in prostitution are particularly vulnerable to these diseases. States Parties should therefore 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.

5.37 Significantly CEDAW, in addition to its implied recognition of the fact that not all prostitution is inherently exploitative, observes that the vulnerability of prostitutes to violence is exacerbated by the marginalisation that results from the fact that their status is unlawful. The right to equal protection of the law is specifically enumerated in the Convention.

5.38 In the absence of a call for measures to eliminate the institution of prostitution and particularly in view of the distinction between coerced or forced and voluntary prostitution, the non-criminalisation model has the potential to support the realisation of the rights of prostitutes provided for in CEDAW. Important features of a non-criminalisation regime are the absence of prostitution-specific regulations and the distinction between voluntary and forced, and coerced or child prostitution, the latter three types remaining criminal. The emphasis of the non-criminalisation model is on respecting the rights and improving the health, safety and working conditions of the prostitute through existing measures or through measures designed by the prostitutes themselves.³¹

³¹ Mossman 'International Approaches to Decriminalising or Legalising Prostitution' 2007 at 12. See also chap 7 below for a discussion of the different models.

Declaration on the Elimination of Violence against Women of 1993 ('the Declaration')

5.39 In the late 1980s and early 1990s, the CSW, the UN Committee on CEDAW and eventually the Commission on Human Rights brought the issue of violence against women to the forefront of the international agenda.³² The CSW undertook the drafting of the Declaration for the Elimination of Violence against Women ('the Declaration') in the early 1990s.³³

5.40 The Declaration provides a definition of gender-based abuse, calling it any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

5.41 Article 2 of the Declaration sets out three areas in which gender based-violence commonly takes place. Trafficking in women and 'forced prostitution' is included in article 2(b).

5.42 Although the measures required of States Parties under the Declaration do not expressly refer to prostitution, some of the provisions may arguably have relevance for women prostitutes. For example, the Declaration requires States Parties to take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitise them to the needs of women.³⁴

5.43 Once again, the emphasis on violence against women and the distinction between forced and voluntary prostitution suggests a framework whereby voluntary prostitution is subject to non-criminalisation.³⁵

³² So far violence against women had been considered to be a private matter, rather than a public or a human rights issue requiring government or international action. This approach was encouraged by an active NGO movement that saw this issue as a major organizing tool for the women's movement.

³³ The Declaration for the Elimination of Violence against Women was adopted by the General Assembly of the United Nations on 20 December 1993. UNDP/ 'Women and Violence' 1996. A Declaration is not legally binding on the states that have adopted it, but can lead to the formation of binding obligations through customary international law and may be considered when interpreting treaties.

³⁴ Article 4(i).

³⁵ Mossman 'International Approaches to Decriminalising or Legalising Prostitution' 2007 at 12. See also chap 7 below for a discussion of the different models.

Beijing Declaration, Platform for Action 1995 and Reaffirming Resolution of 2005

5.44 In September 1995 official representatives from over 180 countries gathered in Beijing, China, for the Fourth World Conference on Women. The Beijing Declaration and the Platform for Action, published after the conference reflect the issues and concerns of the world's women at the end of the 20th century.³⁶ At its annual meeting in March 2005, the CSW adopted a Resolution reaffirming the Beijing Declaration and Platform for Action and welcomed the progress made thus far towards achieving gender equality.³⁷

5.45 On these occasions prostitution was again addressed in the context of forced prostitution and trafficking. At this stage the theme of distinguishing between forced and voluntary prostitution seems to have become the accepted approach and associated therewith, the predilection for the non criminalisation of voluntary prostitution.³⁸

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children of 2003 ('the Trafficking Protocol')

5.46 The Trafficking Protocol requires ratifying states to legislate in order to prevent and combat trafficking in persons, protect and assist victims of trafficking and promote cooperation among states in order to meet those objectives. South Africa signed the Trafficking Protocol on 14 December 2000 and ratified it on 20 February 2004.³⁹

5.47 Article 3 of the Trafficking Protocol provides that trafficking in persons shall mean

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of

³⁶ Minnesota Advocates for Human Rights 'Summary Beijing Declaration and BPA' 1996.

³⁷ The Commission also called upon the United Nations system, international and regional organizations, all sectors of civil society, including non-governmental organizations, as well as all women and men, to fully commit themselves and to intensify their contributions to the implementation of the Beijing Declaration and Platform for Action and the outcome of the twenty-third special session of the General Assembly.

³⁸ Mossman 'International Approaches to Decriminalising or Legalising Prostitution' 2007 at 12. See also chap 7 below for a discussion of the different models.

³⁹ In December 2000 the General Assembly of the United Nations opened the Trafficking Protocol for signature and it entered into force on 25 December 2003. The USA ratified the Protocol with reservation in 2005. By 2006 the Protocol had been signed by 117 states and ratified by 110. The Protocol falls under the jurisdiction of the United Nations Office on Drugs and Crime. Article 1 of the Protocol stipulates that the Protocol must be interpreted together with the Convention against Transnational Organised Crime

the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

In terms of article 3 'exploitation' includes

at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

5.48 Under article 5 of the Trafficking Protocol each states party shall adopt such legislative and other measures as may be necessary to criminalise the conduct set forth in article 3 *inter alia* the trafficking of children for purposes of commercial sexual exploitation of children.

5.49 The UN Special Rapporteur on Violence against Women pointed out that trafficking is undertaken for a myriad of purposes including, but not limited to, prostitution. Therefore, to regulate against trafficking for purposes of prostitution only, would exclude vast numbers of women. In this regard the development of the Trafficking Protocol is significant in that it requires States Parties to legislate against trafficking for various reasons, including prostitution.⁴⁰

5.50 However, in so far as it uses language similar to that of the Trafficking Convention, the Trafficking Protocol does not advance the matter of respecting the rights and agency of adult women in voluntary prostitution.⁴¹

African instruments

The African Charter on Human and People's Rights of 1986 ('African Charter')

5.51 The African Charter is a regional human rights instrument specifically designed to reflect the history, values, traditions and development of Africa. The African Charter was adopted by the Organisation of African Unity in 1981.⁴² The African Charter has entered into

⁴⁰ UNESCO 'Report of the Special Rapporteur on Violence against Women' 2000.

⁴¹ J Csete and M Seshu 'Still Underground: Searching for Progress in Realizing The Human Rights of Women in Prostitution' **HIV/AIDS Policy and Law Review** 2004 9(3) at 12 as referred to in Canadian HIV/AIDS LN **Sex, Work, Rights** 2005 at 49 fn 188.

⁴² The Charter seeks to combine African values with international norms by not only promoting internationally recognised individual rights, but also by proclaiming collective rights and individual duties. Since coming

force in October 1986 and South Africa ratified it June 1995.

5.52 Under article 1 of the African Charter member states undertake to adopt legislative or other measures to give effect to the rights, duties and freedoms enshrined in the chapter on human and people's rights. Article 2 entitles every individual to the enjoyment of the rights and freedoms set out in the chapter.

5.53 No specific reference is made to prostitution in the rights listed in the chapter on human and people's rights. However, the rights to equality, dignity, work under equitable and satisfactory circumstances, health and to be free from exploitation are all addressed in the Charter and can be related to the circumstances of prostitutes.

The Protocol to the African Charter on Human and People's Rights on the Rights of Women of 2005 ('the Protocol on the Rights of Women')

5.54 It was important to transform the African human rights discourse to more closely reflect women's experiences. The Protocol on the Rights of Women represents the first major step towards this goal.⁴³ This marked a milestone in the protection and promotion of women's rights in Africa, creating new rights for women in terms of international standards. South Africa ratified the Protocol in December 2004 and it entered into force in November 2005.⁴⁴

5.55 The Protocol on the Rights of Women *inter alia* calls for an end to all forms of violence against women including unwanted or forced sex, whether it takes place in private or in public, and a recognition of protection from sexual violence as inherent in the right to dignity. The rights of particularly vulnerable groups of women are specifically recognized, including widows, elderly women, disabled women and 'women in distress,' which includes poor women, women from marginalized populations groups, and pregnant or nursing women in detention.⁴⁵

into operation, the task of enforcing the rights enshrined in the Charter has been entrusted to the African Commission on Human and People's Rights. Delpont 'The African Regional System of Human Rights' 2004.

⁴³ Delpont 'The African Regional System of Human Rights' 2004.

⁴⁴ As of 26 February 2008, 23 African countries have ratified the Protocol. Equality Now 'Protocol on the Rights of Women in Africa'.

⁴⁵ Equality Now 'Protocol on the Rights of Women in Africa'.

5.56 Article 1 defines 'harmful practices' to mean

all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity

Article 1 also defines 'violence against women' to mean

all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm,

5.57 Article 2(1) requires of States Parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures and article 2(2) refers to the elimination of stereotyping of women.

5.58 Under article 3, States Parties undertake to protect women from all forms of violence, 'particularly sexual and verbal violence.' Similarly, article 4(2) obliges States Parties to 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.

5.59 With specific reference to women in armed conflict, article 11(3) requires of States Parties to protect asylum seeking women, refugees, returnees and internally displaced persons

against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity.

5.60 Article 14 deals with women's health and reproductive rights and provides that States Parties shall ensure respect for and promote the right to health of women, including sexual and reproductive health. Specific reference is made to the right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS.

5.61 As mentioned before, prostitutes are vulnerable to violence and exploitation due to their marginalised position in society. Their health and physical well-being are also at risk. Therefore all provisions dealing with violence against women and their right to health are relevant to prostitution. It is only when prostitution is 'unwanted or forced' that it explicitly falls foul of the Protocol.

Addendum to the 1997 Declaration on Gender and Development by SADC Heads of State or Government of 1998

5.62 On a regional level, in 1998 members of the Southern African Development Community (SADC)⁴⁶ signed an addendum to the 1997 Declaration on Gender and Development whereby violence against women and children in all its forms was strongly condemned.

5.63 In this addendum, reference is made to forced prostitution in paragraph 5 which recognises 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.

5.64 All three of the above documents focus strongly on forced and unwanted sex, which leads to the conclusion that voluntary sex, even in exchange for money, is acceptable. Therefore, they suggest that measures are required to ensure that commercial sex is indeed voluntary and that the human rights of prostitutes are protected. This indicates support for a framework of non-criminalisation.

SADC Protocol on Gender and Development of 2008

5.65 In 2008, SADC Heads of State and Government signed the SADC Protocol on Gender and Development, representing another important step towards the empowerment of women, the elimination of discrimination and the achievement of gender equality and equity.⁴⁷

5.66 Article 2 emphasises the empowerment of women and girls for the purposes of ensuring gender equality and equity and particular reference is made to the elimination of barriers which prevent them from participating meaningfully in all spheres of life.

⁴⁶ SADC has been in existence since 1980, when it was formed as an alliance of nine majority-ruled States in Southern Africa known as the Southern African Development Coordination Conference with the main aim of coordinating development projects in order to lessen economic dependence on the then apartheid South Africa. The founding Member States are: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

⁴⁷ SAfAIDS 'SADC Protocol on Gender and Development' 2008. This Protocol is a legally binding agreement compelling SADC Member States (including South Africa) to hasten efforts towards gender equity in the region. The SADC Protocol on Gender and Development calls for far reaching changes and includes timelines for these goals of gender equality and equity in National Constitutions and the repeal of all discriminatory laws.

5.67 Article 7 requires of States Parties to put in place legislative and other measures which promote and ensure the practical realization of equality for women. These measures include *inter alia* positive and practical steps ensuring equality for women complainants in the criminal justice system and programmes to address gender bias and stereotypes.

5.68 Articles 17 and 19 require States Parties to adopt policies and enact laws which ensure equal access, benefit and opportunities for women and men in trade and entrepreneurship and to wage employment in all sectors of the economy.

Other international instruments

UNAIDS International Guidelines on HIV/AIDS and Human Rights

5.69 In 2006, UNAIDS published the International Guidelines on HIV/AIDS and Human Rights ('the Guidelines'). In the foreword to this document, reference is made to the growth in the prevalence of HIV in marginalised groups, such as prostitutes,⁴⁸ stating that discrimination against women in law and in practice renders them disproportionately vulnerable to HIV and AIDS. The protection of the sexual rights of women is critical and that includes the right to have control over and to decide freely and responsibly on matters related to their sexuality.⁴⁹

5.70 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 considered controversial, particularly regarding the status of women and children and prostitutes. It is emphasised that it is the responsibility of all States to identify how they can best meet their human rights obligations and protect public health within their specific political, cultural and religious contexts.⁵⁰

5.71 Guideline 4: Criminal Laws and Correctional Systems, promotes the decriminalised model for voluntary adult prostitution where it specifically states⁵¹

⁴⁸ UNAIDS 'International Guidelines on HIV/AIDS' 2006 at 4.

⁴⁹ UNAIDS 'International Guidelines on HIV/AIDS' 2006.

⁵⁰ UNAIDS 'International Guidelines on HIV/AIDS' 2006 at 16.

⁵¹ UNAIDS 'International Guidelines on HIV/AIDS' 2006 at 30.

[W]ith regard to adult sex work that involves no victimization, **criminal law should be reviewed with the aim of decriminalising**, then legally regulating occupational health and safety conditions to protect sex workers and their clients, including support for safe sex during sex work. Criminal law should not impede provision of HIV prevention and care services to sex workers and their clients. (Own emphasis)

5.72 With reference to child and adult forced or coerced prostitution on the other hand, the Guidelines state that criminal law should ensure that such children and forced or coerced women are protected from participation and are not prosecuted for such participation. The predilection for these two categories of prostitutes is seemingly for the partial criminalisation framework. The Guidelines further state that these children and women should be removed from prostitution and provided with medical and psycho-social support services, including those related to HIV.⁵²

5.73 In so far as legal support services are concerned, the Guidelines propose the implementation of such services by States to educate people who are affected by HIV about their rights. In this context it recognises that the recommendations for law reform for prostitutes might be controversial in certain national, cultural and religious contexts.⁵³

5.74 Guideline 8: Women, Children and Other Vulnerable Groups promotes the creation of a supportive and enabling environment for women, children and other vulnerable groups by addressing underlying prejudices and inequalities, specially designed social and health services and support to community groups, including prostitutes.⁵⁴

5.75 Part III of the Guidelines deals specifically with the international human rights obligations and HIV. In this context, reference is made to the disproportionately high incidence or spreading of HIV among some populations. Prostitutes are highlighted as members of a group who already suffer from a lack of human rights protection and from discrimination and marginalisation due to their illegal status.⁵⁵

World Charter for Prostitutes' Rights of 1985

5.76 Prostitutes regard human rights as a means to improve their health and

⁵² UNAIDS 'International Guidelines on HIV/AIDS' 2006 at 30.

⁵³ UNAIDS 'International Guidelines on HIV/AIDS' 2006 at 48 and 51.

⁵⁴ UNAIDS 'International Guidelines on HIV/AIDS' 2006 at 52 and 55.

⁵⁵ UNAIDS 'International Guidelines on HIV/AIDS' 2006 at 78.

working conditions and to counter their social and political marginalisation. In 1985, the International Committee for Prostitutes' Rights, a non-governmental organisation, developed the World Charter for Prostitutes' Rights ('the World Charter'), linking its strategies for change to the human rights framework. This document demanded that prostitutes be guaranteed human rights including freedom of speech, travel, immigration, work, marriage, motherhood, health and housing. The prostitutes' movement also aimed to end unethical and abusive behaviour towards prostitutes.⁵⁶

5.77 The World Charter pleaded for the decriminalisation of all aspects of adult prostitution 'resulting from individual decision', the regulation of third parties according to standard business codes and eradication of laws that deny freedom of association. It also addressed all the issues that would support a decriminalised framework.

Summary

5.78 At present there is no international instrument that explicitly condemns unforced prostitution. Reanda submits that the Trafficking Convention has formalised the distinction between voluntary and forced prostitution by declaring only forced prostitution as a human rights violation.⁵⁷ On this issue Doezema submits that there appears to be no integrated and co-ordinated UN policy regarding prostitution and that different UN instruments and bodies have taken different ideological stances.⁵⁸ For example, the Trafficking Convention for its predominantly abolitionist approach to prostitution and for regarding prostitutes as victims not recognising the right of an individual to voluntarily as a prostitute. At the same time modern abolitionists have argued for the unequivocal definition of prostitution as a violation of human rights and to call for the amendment of the Trafficking Convention to declare both voluntary and forced prostitution a violation of human rights and for its complete abolition.⁵⁹

⁵⁶ UNAIDS 'International Guidelines on HIV/AIDS' 2006 at 98.

⁵⁷ Reanda 'Prostitution as a Human Rights Question' 1991 at 210. See also Lim **The Sex Sector** 1998 at 15.

Doezema, however, opines that the distinction between forced and voluntary prostitution, as currently understood, had no relevance at the time of the drafting of the international instruments concerned. The very notion of 'voluntary' prostitution was inimical to the abolitionist views which prevailed at the time and the notion of the prostitute willingly choosing her occupation was unimaginable. See J Doezema 'Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy' in Kempadoo and Doezema **Global Sex Workers** 1998 at 38.

⁵⁸ See J Doezema 'Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy' in Kempadoo and Doezema **Global Sex Workers** 1998 at 41 n 36.

⁵⁹ Lim **The Sex Sector** 1998 at 15 and further. The UN Special Rapporteur on Violence against Women

5.79 Another example is UNESCO⁶⁰ arguing, on the one hand, that prostitution *per se* constitutes a human rights violation. On the other hand the UN Special Rapporteur on Violence Against Women in her 1997 report, observed that some women become prostitutes through 'rational choice' while others become prostitutes as a result of coercion, deception or economic enslavement.⁶¹ The Rapporteur noted with concern the impact of repressive legal measures on the rights of women working in prostitution.⁶²

5.80 Prostitution activists are not all allies either. For some, prostitution is neither legitimate nor voluntary labour but rather human rights abuse, inherently coercive and degrading. However, their premise that all prostitution should end undermines prostitutes' legitimate claims to human rights and serves as a basis for governments to make excuses for their failure to take action to respect, protect and fulfil the human rights of prostitutes.⁶³

5.81 Other activists argue that legal frameworks and the discrimination are the problem and not prostitution *per se*.⁶⁴ They regard the distinction between voluntary and forced prostitution, and the age of the prostitute to be determining factors of the legal status of the prostitute. Voluntary adult prostitution is essentially seen as consenting sex and no business of the state and therefore the power should be shifted away from the state and clients to the prostitutes and their rights in society.⁶⁵

5.82 Prostitutes and advocates have also examined the potential applicability of international labour law to prostitution and sex. In an analysis of the applicability of international labour law, it is submitted that⁶⁶

supports this interpretation. See UNESCO 'Report of the Special Rapporteur on Violence against Women' 2000 at par 24.

⁶⁰ The United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the Working Group on Contemporary Forms of Slavery. See Reanda 'Prostitution as a Human Rights Question' 1991 at 204-205 for a brief exposition of the position taken by UNESCO.

⁶¹ See also Reanda 'Prostitution as a Human Rights Question' 1991 at 213. The Beijing Platform itself, on the one hand, notes only 'enforced prostitution' in its definition of violence against women, while on the other hand, it calls for the implementation of the 'abolitionist' 1949 Trafficking Convention.

⁶² UNESCO 'Report of the Special Rapporteur on Violence against Women' 2000 at par 22-25.

⁶³ Saunders 'Fifteen Years after the World Charter for Prostitutes' Rights' 2000.

⁶⁴ Saunders 'Fifteen Years after the World Charter for Prostitutes' Rights' 2000.

⁶⁵ Mossman 'International Approaches to Decriminalising or Legalising Prostitution' 2007 at 13 and 15. See also chap 7 below for a discussion of the different models.

⁶⁶ Canadian HIV/AIDS LN **Sex, Work, Rights** 2005 at 52 fn 193.

[A]n employment or labour perspective is a necessary, if not sufficient, condition for making prostitution part of the mainstream debate on human, women's, and workers' rights at a local, national and international level.

In her report on economic and social policy and its impact on violence against women, the UN Special Rapporteur on Violence against Women makes the following observation:

Where prostitution is not legal, women are unprotected by labour laws. This means that they have no guarantee of being able to work in a safe environment and they have no right to social security. They have no right to reject clients and if they experience abuse, they have no means to take action against the abusers.⁶⁷

Conclusion

5.83 Notwithstanding this debate on the meaning of prostitution, South Africa's involvement in the International, African, Regional and United Nations instruments, discussed above, means that the current legal position of prostitution is in need of comprehensive review. It is clear that South Africa's international obligations to realise various rights such as dignity, security of the person, equality and equal access to the law and access to health, - care, as well as to provide effective remedies for violations of rights, must inform the decisions of the legislature.

⁶⁷ UNESCO 'Report of the Special Rapporteur on Violence against Women' 2000 at par 51.

CHAPTER 6: COMPARATIVE STUDY OF THE LAW ON PROSTITUTION IN DIFFERENT JURISDICTIONS

Introduction to the comparative study of the law on prostitution in different jurisdictions

6.1 This chapter is a comparative analysis of the manner in which different jurisdictions have addressed the issue of prostitution. It demonstrates the diversity of legislative responses that exist, and the different combinations of criminalisation and regulation that occur. In addition, it provides information on the European Union and the International Labour Organisation's approach to legislation dealing with prostitution.

6.2 Comparative examples should always be approached with caution. Although the constitutional framework of some jurisdictions may bear a similarity to South Africa, the context and circumstances of each jurisdiction are unique and have a significant effect on the prevalence and occurrence of prostitution, as well as the policy and legislative responses to this.

History of the law on prostitution

6.3 In 6th century Ancient Greece prostitutes were divided into four classes, the highest of which exercised considerable influence over state politics. However, the lowest class of prostitutes¹ was kept apart from 'respectable women'² and such prostitutes forfeited any right of citizenship they may have had by virtue of their birth.³ In addition, their children were penalised by not being allowed to inherit property.⁴ Extensive legislation existed covering the establishment of state-owned brothels staffed by slaves.

¹ Pomeroy **Goddesses, Whores, Wives and Slaves** 1975 at 89. According to Sanger there were four classes of prostitutes. The highest in rank were the Hetairae, or 'kept women', who lived in the best parts of the city, and exercised considerable influence over the politics of the state. Next in this 'hierarchy' were the Auletrides, flute-players and dancers who also provided sexual services to banquet-goers. The third class were the concubines, who were slaves owned by rich men with the knowledge of their wives. The fourth class were the Dicteriades, who were regarded as the lowest class of prostitutes. Sanger **History of Prostitution** 1913 at 46.

² They were originally bound to reside at the sea-port of Athens situated about four miles from the city, and they were forbidden to walk out by day. Sanger **History of Prostitution** 1913 at 46.

³ Sanger **History of Prostitution** 1913 at 44.

⁴ Sanger **History of Prostitution** 1913 at 44.

6.4 It is estimated that prostitution became established in Rome about the beginning of the 3rd century BC.⁵ From the earliest times prostitutes had to register themselves in the office of a junior magistrate whose duties included supervision of the markets and trade.⁶ This magistrate issued prostitutes with a licence, ascertained the sum of money that they were to charge their clients, and entered their names in his roll.⁷ Unregistered prostitutes were arrested, punished and evicted from the city.

6.5 Although the early Christian church regarded prostitution as immoral and sinful,⁸ early Christian societies did not outlaw prostitution.⁹ The early church fathers reasoned that, however immoral, prostitution was also a necessary evil¹⁰ and that society needs to facilitate men's access to prostitutes.¹¹ This is referred to as the stigmatised tolerance approach. Similarly, from the Middle Ages in Europe prostitution, although morally unacceptable, was tolerated. This resulted in legal mechanisms aimed at controlling and containing, rather than eradicating, prostitution.¹² However, protestant reformers, such as Luther and Calvin, took a different view of prostitution and condemned it outright as immoral

⁵ Sanger **History of Prostitution** 1913 at 65. Both slaves and free persons worked as prostitutes in brothels (lupaniaria), inns or baths open to the public. Prostitutes who did not have the security of a brothel worked out-of-doors under archways. Pomeroy **Goddesses, Whores, Wives and Slaves** 1975 at 192.

⁶ Sanger **History of Prostitution** 1913.

⁷ Sanger **History of Prostitution** 1913. Once registered as a prostitute, it was impossible for a woman to have her name removed, even if she eventually married and became the mother of legitimate children. Pomeroy **Goddesses, Whores, Wives and Slaves** 1975 at 202.

⁸ This attitude was shaped by the belief that sexual intercourse should take place only within the ambit of a lawful marriage, and then only for purposes of procreation. Any other sexual activity was sin. Milton in Jagwanth, Schwikkard & Grant **Women and the Law** 1994 at 137; Burchell & Milton **Principles of Criminal Law** 1997 at 622. See also Genesis 38:15; Deuteronomy 23: 17 - 18; Joshua 2:1; Proverbs 5:3; 1 Corinthians 6:9, 1 Corinthians 6:15. In the Holy Qur'an, chastity outside marriage is emphasised. See S XXIV 33: 'Let those who find not the wherewithal for marriage keep themselves chaste, until God gives them means out of His grace. ... But force not your maids to prostitution when they desire Chastity, in order that ye may make a gain in the goods of this life. But if anyone compels them, yet, after such compulsion, is God oft-forgiving, most merciful (to them)'.

⁹ Jordan 'Prostitution: The Case for Law Reform' 1993 at 206, Milton in Jagwanth, Schwikkard & Grant **Women and the Law** 1994 at 137.

¹⁰ De Ordine II.4(12), cited in Milton in Jagwanth, Schwikkard & Grant **Women and the Law** 1994 at 138.

¹¹ Jordan notes that St Augustine's argument required two classes of women: the good, virtuous, sexually faithful wives to service men's procreative needs within marriage, and prostitutes who could tend to their sexual needs outside marriage. This reasoning was the basis of the madonna/whore dichotomy, which continues to pervade contemporary gender dynamics. Jordan 'Prostitution: The Case for Law Reform' 1993 at 206.

¹² Milton in Jagwanth, Schwikkard & Grant **Women and the Law** 1994 at 137; Burchell & Milton **Principles of Criminal Law** 1997 at 139.

and insisted on the suppression of prostitution by means of criminal sanction¹³ - absolute prohibition.

6.6 The British did not favour the European stigmatised tolerance approach or absolute prohibition and preferred a more regulatory approach. Prior to the late nineteenth century, there were no common law criminal sanctions relating to prostitution.¹⁴

The context of comparative analysis

6.7 Laws and policies on prostitution, as well as their enforcement, reflect specific values and societal attitudes regarding women, gender and sexuality, but do not necessarily reflect the realities of prostitution in a specific country. Comparative information must therefore be approached with circumspection.

6.8 The following comparative analysis provides an exposition of past and current legislation on prostitution of the selected jurisdictions. Reference is also made to the form of government, legal system, ethnic and religious composition of the population of as well as the socio-economic context of the laws.

6.9 There is a great variety of legal responses At one end of the legal spectrum, in some **Muslim countries**, any person involved in the act of prostitution commits an offence for which the death penalty can be imposed.¹⁵ At the other end of the legal spectrum, the **Netherlands** has decriminalised prostitution, prostitutes are tax-paying and unionised, and brothels are legal and advertised as businesses. Between these extremes, variations based on different permutations of the four basic models occur, namely total criminalisation, partial criminalisation, non-criminalisation and regulation.¹⁶ The following examples can be cited:

¹³ Milton in Jagwanth, Schwikkard & Grant **Women and the Law** 1994 at 137; Burchell & Milton **Principles of Criminal Law** 1997 at 139.

¹⁴ Except for prohibitions on the keeping of 'bawdy houses' where 'dissolute and debauched persons' congregated and by their behaviour disturbed the public peace, thereby becoming a public nuisance and liable to prosecution as such. Milton & Cowling **South African Criminal Law and Procedure** 1988 at E3-120 n 2.

¹⁵ E.g. in Iran, Sudan and Afghanistan. See **BBC News** 'Death Penalty in Iran', HRW 'Execution Women Prostitutes' 1997 and Miller 'The Legality of Prostitution' 2006.

¹⁶ Unless otherwise indicated, the source of this information is **Prostitution Overview**. The different models are discussed in detail in chap 7.

- Prostitution is criminalised as a misdemeanour in 49 of the states in the United States of America and it is illegal to buy or sell sexual services.
- In the Australian state of **Victoria** and in **Turkey** prostitution is legal and regulated. Brothels must be licensed and only prostitutes working in brothels must be registered.
- In **Japan** only vaginal prostitution is illegal.
- In **Canada** and **Bulgaria** prostitution is legal, but most related activities are illegal. Pimping is illegal and it is illegal for both parties to negotiate a sex-for-money deal in a public place, including bars.
- In **Denmark**, **Brazil** and **Costa Rica** prostitution *per se* is legal, but profiting from prostitution by others is illegal.
- In **Norway** paid sex services are banned to all Norwegian citizens both within the country and abroad and all pimps and prostitutes are expellable d from the country.¹⁷

6.10 For the purpose of this comparative analysis, the following jurisdictions were selected on the basis of the particular legal model employed: United States of America, Sweden, the Netherlands, Germany, Thailand, United Kingdom of Great Britain and Northern Ireland, New Zealand and selected African countries. As will be seen, 'hybrid' systems often occur displaying a combination of, for example, both criminalisation and legalisation of prostitution. In addition, the approach of the European Union and the International Organisation is considered.

Prostitution laws in the United States of America (USA)

6.11 The USA is a constitutional-based federal republic comprising fifty states with own jurisdictions and constitutions.¹⁸ Each state has its own unique legal system.¹⁹

6.12 Prostitution is widespread in the USA with no major effort to limit or prevent it until the end of the 19th century. In 1910, Congress passed the Mann Act under its power to regulate interstate commerce, as a means of addressing the problem of prostitution and

¹⁷ **Standart** 'Bulgarian Prostitutes Leave Norway' 2009.

¹⁸ To this should be added the District of Columbia (the quasi-self-governing capital city) and other legal entities with bodies of local law, such as Puerto Rico and the USA Virgin Islands.

¹⁹ With the exception of a few states. **World Factbook** - USA.

immorality in general.²⁰ By 1915 nearly all the states had passed laws regarding the keeping of brothels or profiting in other ways from the earnings of prostitutes.

6.13 During World War II there was a great increase in prostitution near military bases which led to an increase in sexually transmitted disease. In 1941 Congress passed the May Act which made it a federal offence to practice prostitution in areas designated by the secretaries of the army and the navy.²¹

6.14 In December 2002, based on evidence that prostitution is inherently harmful and dehumanising and fuels trafficking in persons as a form of modern-day slavery, the Federal government adopted a strong position against legalised prostitution in a National Security Presidential Directive. In terms of this directive, it is U.S policy that prostitution and related activities fuel the growth of modern-day slavery by providing a façade behind which traffickers for sexual exploitation operate.²²

6.15 Prostitution is predominantly dealt with in state legislation rather than federal legislation. At present, prostitution is prohibited as a criminal offence in every state of the USA, except under certain circumstances, in the state of Nevada.²³ This legislation can be categorised into three types of criminal statute,²⁴ namely, those

- criminalising the prostitute but not the client (e.g. Kentucky)²⁵
- criminalising both the prostitute and the client but are stricter towards the prostitute (e.g. Colorado)²⁶
- criminalising the prostitute and client alike (e.g. Idaho).²⁷

²⁰ Leonard in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 133.

²¹ **Answers.com** 'Prostitution'.

²² U.S Department of State 'The Link between Prostitution and Sex Trafficking' 2004.

²³ Bingham 'Nevada Sex Trade' 1998 at 69 n 1, listing the relevant state legislation.

²⁴ Lefler 'Shining the Spotlight on Johns' 1999 at 17.

²⁵ Kentucky Revised Statutes Chap 529 § 020.

²⁶ Colorado Statutes Title 18 Article 7 § 201 and § 205.

²⁷ Idaho Statutes Title 18, Chap 56 § 13 and § 14.

6.16 In the state of **Nevada**,²⁸ legislation dealing with prostitution creates a combination of criminalisation and legalisation in prescribed circumstances. Under Title 15: Crimes and Punishment of the Nevada Revised Statutes²⁹ (NRS) a 'prostitute' is defined as

a male or female person who for a fee engages in sexual intercourse, oral-genital contact or any touching of the sexual organs or other intimate parts of a person for the purpose of arousing or gratifying the sexual desire of either person.³⁰

Prostitution, solicitation, pandering and living on the earnings of a prostitute³¹ are prohibited and criminalised. However, the prohibition and criminal sanction do not apply to the client of a prostitute.³²

6.17 In 1971 Nevada became the first and, to date, the only state to legalise prostitution in certain prescribed circumstances.³³ Under the NRS (as amended) a county

²⁸ In 2000, the population of Nevada was comprised as follows: whites 75.2%, blacks 6.8%, Asians 4.5%, Native Americans 1.3%, Native Hawaiians and other Pacific Islanders 0.4% and those of mixed heritage or not reporting race 11.8%. Hispanics, who may be of any race, were 19.7%. The Roman Catholic Church is the largest religious group in Nevada, claiming nearly one-quarter of those attending a church. The largest Protestant denominations are the Baptists and the Methodists. **MSN Encarta** - Nevada.

²⁹ See in general the NRS: Chap 201 - Crimes Against Public Decency and Good Morals.

³⁰ NRS: Chap 201 § 295.

³¹ NRS: Chap 201 § 300(1) provides that a person who:

- (a) Induces, persuades, encourages, inveigles, entices or compels a person to become a prostitute or to continue to engage in prostitution;
 - (b) By threats, violence or by any device or scheme, causes, induces, persuades, encourages, takes, places, harbors, inveigles or entices a person to become an inmate of a house of prostitution or assignation place, or any place where prostitution is practiced, encouraged or allowed;
 - (c) By threats, violence, or by any device or scheme, by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, or having legal charge, takes, places, harbors, inveigles, entices, persuades, encourages or procures a person to enter any place within this state in which prostitution is practiced, encouraged or allowed, for the purpose of prostitution;
 - (d) By promises, threats, violence, or by any device or scheme, by fraud or artifice, by duress of person or goods, or abuse of any position of confidence or authority or having legal charge, takes, places, harbors, inveigles, entices, persuades, encourages or procures a person of previous chaste character to enter any place within this state in which prostitution is practiced, encouraged or allowed, for the purpose of sexual intercourse;
 - (e) Takes or detains a person with the intent to compel the person by force, threats, menace or duress to marry him or any other person; or
 - (f) Receives, gives or agrees to receive or give any money or thing of value for procuring or attempting to procure a person to become a prostitute or to come into this state or leave this state for the purpose of prostitution,
- is guilty of pandering.

See also § NRS 201.354, 201.300 and 201.320.

³² NRS: Chap 201 § 300(3).

³³ In 1978 the Nevada Supreme Court found that the 1971 state law had implicitly removed the assumption that brothels are public nuisances per se. See **Nye County v. Plankinton**, 94 Nev. 739, 587 P.2d 421 (1978). In another case, brothel owners in Lincoln County protested when the county outlawed prostitution in 1978, after having issued licenses for 7 years. The Nevada Supreme Court ruled in favour of the county.

with a population of less than 400 000³⁴ may choose to allow prostitution and solicitation of prostitution if it occurs within a 'licensed house of prostitution'. This means that prostitution is legal in those counties within a controlled environment, namely, a licensed brothel.³⁵

6.18 By January 2004 about 30 legal brothels, employing about 300 female prostitutes at any given time, existed in eleven out of sixteen counties of the state of Nevada.³⁶ The other 11 counties permit licensed brothels in certain specified areas or cities. Under state law, brothels are not allowed to advertise their services in counties where indoor prostitution is illegal.³⁷

6.19 Variations in the regulations are common between the counties and generally concern health, licensing conditions and fees. License fees for brothels range from \$100 000 per annum in Storey County to \$200 in Lander County. Licensed prostitutes must be at least 21 years old, except in Storey County and Lyon County, where the legal age is 18.³⁸

6.20 Health matters are also regulated under the NRS and the Nevada Administrative Code (NAC)³⁹. Under chapter 41: Actions and proceedings in particular cases concerning persons of the NRS, brothel owners may be held liable if clients become infected with HIV after a prostitute has tested positive for the virus.⁴⁰ Anyone who is arrested for

See **Kuban v. McGimsey** 96 Nev. 105, 110 (1980)). Case law and other references from **Wikipedia** 'Prostitution in Nevada'.

³⁴ Population distribution is very uneven. In 2000 some 92 percent of Nevadans were classified as inhabitants of urban areas. Most of the urban population was concentrated in the Las Vegas and Reno areas. **MSN Encarta** - Nevada.

³⁵ NRS: Chap 201 § 354(1) provides that it is unlawful for any person to engage in prostitution or solicitation therefor, **except in a licensed house of prostitution** and (2) that any person who violates subsection 1 is guilty of a misdemeanor. (own emphasis).§ NRS 244.345(8) reads as follows:
In a county whose population is 400,000 or more, the license board shall not grant any license to a petitioner for the purpose of operating a house of ill fame or repute or any other business employing any person for the purpose of prostitution.

³⁶ **Wikipedia** 'Prostitution in Nevada'.

³⁷ The state law prohibiting the advertising of brothels in counties which have outlawed prostitution was enacted in 1979; it was promptly challenged on First Amendment grounds. The Nevada Supreme Court declared it to be constitutional. See **Princess Sea Industries, Inc., v. State**, 97 Nev. 534; 635 P.2d 281 (1981) as referred to in **Wikipedia** 'Prostitution in Nevada'.

³⁸ **Wikipedia** 'Prostitution in Nevada'. Carson City, Washoe County, Douglas County, and Lincoln County brothels are illegal. Eureka County neither permits nor prohibits brothels and does not have any.

³⁹ The NAC contains the rules and regulations for implementation of the statutes.

⁴⁰ NRS: Chap 201 § 356 provides as follows regarding the liability of the owner or operator of a house of prostitution for employment of prostitutes tested positive for exposure to human immunodeficiency virus:

violating the provisions regarding prostitution or solicitation is required to submit to a HIV test of the State Board of Health.⁴¹

6.21 In addition to these provisions in the NRS, the NAC contains a number of requirements specifically aimed at prostitutes. For example, it directs a person seeking employment as a prostitute in a licensed house of prostitution to submit to a series of tests for HIV, syphilis and gonorrhoea.⁴² Once employed, a prostitute must undergo monthly HIV and syphilis tests and weekly gonorrhoea and Chlamydia tests.⁴³ In addition, the NAC expects a person working as a prostitute in a licensed house to require clients to use a latex prophylactic.⁴⁴

6.22 As far as sanctions are concerned, the NRS provides that a person who engages in prostitution, including a prostitute in a licensed brothel, after testing positive for HIV, is guilty of a class B felony and will be punished by imprisonment for a minimum of two and a maximum of ten years, a fine of \$10,000 or both.⁴⁵

6.23 From the above it is therefore clear that Nevada generally follows a policy of criminalisation, although counties may permit a highly regulated type of prostitution to exist in a limited geographical area under a regime of partial criminalisation.⁴⁶

An owner of a house of prostitution, the person who operates the house or his agent who employs or continues to employ a prostitute after he knows or should know that the prostitute has tested positive in a test approved by regulation of the State Board of Health for exposure to the human immunodeficiency virus, is liable for any damages caused to a person exposed to the virus as a result of the employment.

⁴¹ NRS: Chap 201 § 356(1). If the arrested person is subsequently convicted, he or she must pay \$100 to cover the costs of the test.

⁴² § NAC 441A.800.

⁴³ § NAC 441A.805.

⁴⁴ § NAC 441A.805.

⁴⁵ NRS: Chap 201 § 358. Bingham 'Nevada Sex Trade' 1998 at 90, comments that the penalty of imprisonment will do little to protect a prostitute who works in a licensed brothel from being exposed to a client who is HIV positive and either does not know it, or does know but continues to frequent legal brothels.

⁴⁶ Bingham 'Nevada Sex Trade' 1998 at 92. Since Nevada legalised brothels in 1971, no other state has seriously considered legalisation. Bills to permit licensing of prostitutes and brothels were introduced in the 1970's, to no avail. In 1992, a New York City Councillor offered a resolution for licensing prostitutes, restricting legal brothels to certain parts of the city, and requiring HIV tests of the prostitutes. The proposal reportedly met with stiff opposition in the city council and never passed the committee stage. Weitzer 'Prostitution Control in America' 1999 at 88.

Prostitution laws in Sweden⁴⁷

6.24 In the mid 1990s a survey found that there were about 2500 prostitutes in Sweden of which 650 were outdoor prostitutes. An average of 125 000 (10%) of Swedish men were reported to buy sexual services annually.⁴⁸

6.25 Prostitution was condoned, but regulated, in Sweden as early as 1847. Women were required to submit to medical examinations and carry cards that certified that they were in good health.⁴⁹ During most of the previous century harsh penalties were imposed on prostitution-related activities such as pimping,⁵⁰ while prostitutes were liable to pay taxes on their earnings.⁵¹ Various government funded social service programmes supported women who wanted to leave the industry as prostitution was seen as a social problem.⁵²

6.26 In the 1960s and early 1970s, liberal Swedish politicians advocated for decriminalisation of prostitution. However, in the mid-1970s, the women's movement and children's rights advocates started questioning who really benefited from free access to women through prostitution.⁵³ Subsequently, the Swedish women's movement began arguing for non-traditional gender roles and for women's sexual liberty, emphasising that legalisation of prostitution was not part of the movement's view of sexual liberation.⁵⁴ This generated a debate on whether prostitution should be criminalised.

⁴⁷ Sweden has a population of almost 9 million living on 450.000 km². The indigenous ethnic compilation is Swedes, Finns and Sami minorities. Almost 80% of the population is followers of the Lutheran religion. **World Factbook** - Sweden.

⁴⁸ Kouvo 'Swedish Approach to Prostitution'.

⁴⁹ Bindel 'Briefing on Current Trends within the Sex Industry in Sweden' 2003.

⁵⁰ Meerkotter **We Work with Our Bodies** at 38.

⁵¹ Sirkiä 'Prostitution Laws in Finland and Sweden' 2003.

⁵² Kilvington et al 'Prostitution Policy in Europe' 2000. Kilvington is a member of the Department of Epidemiology and Public Health, Imperial College School of Medicine at St Mary's. It is frequently argued that women become prostituted because they are economically disadvantaged. However, in Sweden, with its cradle-to-grave social welfare policies, this is harder to argue. Bindel 'Briefing on Current Trends within the Sex Industry in Sweden' 2003.

⁵³ Kouvo 'Swedish Approach to Prostitution'.

⁵⁴ Kouvo 'Swedish Approach to Prostitution'. During the 20 years of lobbying for recognition of prostitution as abusive towards women, feminists and some female politicians argued that young men growing up in a culture where prostitution is acceptable will often form detrimental views of women and sexual relationships, which in turn can become a barrier to equality between men and women. See also Winberg 'Pathbreaking Strategies in the Global Fight against Sex Trafficking' 2003.

6.27 The Prostitution Committee of 1977⁵⁵ did not propose that either the sale or purchase of sexual services should be made criminal offences. At that time it was feared that prostitution would go underground with increased risks for both parties. However, a decade later in 1986, the National Organisation for Women's Shelters and Young Women's Shelters in Sweden included the idea of criminalising clients of prostitutes in its official plan of action. Continual pressure and lobbying from the organisation and other feminists resulted in a number of female politicians across party lines supporting this approach during the 1990s.⁵⁶

6.28 By 1993 the Prostitution Committee⁵⁷ proposed the criminalisation of both the buyer and seller of prostitution. One of the Committee's reasons for the proposal was that purchasing sex is not socially acceptable. Five years later, in 1998, the Prostitution Committee proposed a legal package called 'The Protection of Women' which suggested that only the purchaser of sexual services be criminalised.⁵⁸

6.29 Initially, many people and organisations were against this approach, amongst them the Minister of Justice, social workers, and prostitutes themselves.⁵⁹ However, in 1998 the Social Democrats' party congress agreed that criminalising the buying of sex was an appropriate policy response. As a result, a comprehensive Violence Against Women Bill was introduced as part of the Swedish government's attempt to fulfil the requirements of the Beijing Platform For Action.⁶⁰ Despite the fact that the law did not enjoy the support of the majority of members of Parliament, the law was passed under the instruction that everybody had to vote according to their party's view.⁶¹

⁵⁵ SOU 1981:71. Norwegian Ministry of Justice and Police Affairs 'Purchasing Sexual Services' 2004 at par 2.1.1

⁵⁶ Bindel 'Briefing on Current Trends within the Sex Industry in Sweden' 2003.

⁵⁷ SOU 1995:15. Norwegian Ministry of Justice and Police Affairs 'Purchasing Sexual Services' 2004 at par 2.1.1.

⁵⁸ Proposition 1997/98:55. Norwegian Ministry of Justice and Police Affairs 'Purchasing Sexual Services' 2004 at par 2.1.1

⁵⁹ Kouvo 'Swedish Approach to Prostitution'.

⁶⁰ DAW 'Platform for Action'.

⁶¹ The Act Prohibiting the Purchase of Sexual Services (1998:408). Sirkiä 'Prostitution Laws in Finland and Sweden' 2003. Sirkiä is the president of SALLI - United Sex Professionals of Finland.

6.30 Subsequently, in January 1999, the Act Prohibiting the Purchase of Sexual Services⁶² amended the Swedish Penal Code⁶³ making it illegal to buy sexual services with a penalty of a fine or imprisonment for up to six months.⁶⁴ The offence covers all forms of sexual services, whether purchased outdoors or indoors, saunas or massage parlours.⁶⁵ This law also criminalises the brokering of sexual services, and provides for up to six years in prison for pimps and up to 10 years for traffickers of prostitutes.

6.31 This approach has not been uncontroversial. De Santis explains this legislation by arguing that it treats prostitution as a form of violence against women:

In Sweden prostitution is regarded as an aspect of male violence against women and children. It is officially acknowledged as a form of exploitation of women and children and constitutes a significant social problem... gender equality will remain unattainable so long as men buy, sell and exploit women and children by prostituting them.⁶⁶

6.32 Sirkiä notes that both radical feminism and the traditions of a paternalistic welfare society were influential in the adoption of this approach in Sweden.⁶⁷ She interprets radical feminism as the idea that all women are subordinate to men, to the extent women do not have a free will. Rather, women are seen as victims of 'patriarchy' to be protected by the state from doing 'wrong' things - even against their own will. In this context, prostitution is not regarded as a social problem but rather as a symptom of the inequality between the sexes. Effectively it means that a woman cannot consent to sell sexual services because she is said to be the victim of inequality. This 'puritan' approach is thus opposed to 'free sex' and the commercial sex industry.

⁶² 1998:408.

⁶³ Sirkiä 'Prostitution Laws in Finland and Sweden' 2003.

⁶⁴ 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.

⁶⁵ Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 par 2525. See Norwegian Ministry of Justice and Police Affairs 'Purchasing Sexual Services' 2004 par 2.2.3 for a discussion of the elements of the offence.

⁶⁶ De Santis 'Sweden's Prostitution Solution' 2004. De Santis is an advocate and activist who works to stop violence against women. She is also the director of the Women's Justice Centre of California.

⁶⁷ Sirkiä 'Prostitution Laws in Finland and Sweden' 2003.

6.33 Sirkiä notes that the Swedish feminist movement had a deep impact on political parties and the public debate on prostitution.⁶⁸ By making this a feminist question, judicial and social objections became unimportant. The fact that women's and sex equality had been prioritised on the national political agenda through the 1990's, and that there were almost 50% women in the Swedish parliament in 1999 also played a role.⁶⁹

6.34 The Swedish welfare state's tradition of social engineering and state paternalism also explains this approach to regulating prostitution. The explanatory memorandum of the relevant chapter of the **Swedish Penal Code** confirmed the importance of the normative functions of the law in Swedish society.⁷⁰ The gist of the Swedish approach is that prostitution and its associated problems should be addressed at the root, rather than relying on piecemeal initiatives. As such the Swedish regime is not simply a piece of ideological legislation, but a holistic approach to the problems of prostitution and is regarded as a long-term project.⁷¹ The government regards the role and function of the law to be not only that of detection and enforcement, but also of education and prevention.⁷² Since the government measures its effectiveness not only by numbers of arrests and convictions, but also by the impact on the whole of society, it also invests in drug and alcohol rehabilitation programmes and other exit strategies to enable more women to leave prostitution.⁷³

6.35 The government places as much emphasis on raising awareness about the realities and consequences of prostitution as on enforcing the criminal law. Proper enforcement requires adequate resources to ensure effective implementation and the police and prosecutors have been educated on all aspects of the law which is considered vital for achieving effective enforcement.⁷⁴

⁶⁸ Sirkiä 'Prostitution Laws in Finland and Sweden' 2003

⁶⁹ Kouvo 'Swedish Approach to Prostitution'.

⁷⁰ Kouvo 'Swedish Approach to Prostitution'.

⁷¹ Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 par 2525.

⁷² Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 par 2525.

⁷³ See the sources referred to in Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 par 2525.

⁷⁴ See the sources referred to in Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 par 2525.

6.36 In 2002 additional legislation was passed to bolster the original prostitution legislation. The Act Prohibiting Human Trafficking for the Purpose of Sexual Exploitation imposed criminal penalties for anyone trafficking in human beings for sexual purposes, drawing on the definition of trafficking in the **UN Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children** of 2001.⁷⁵ Penalties under this Act range from two to ten years imprisonment. This legislation further strengthened the government's ability to pursue the network of persons that surround and support prostitution, such as the recruiters, the transporters, and the hosts.⁷⁶

6.37 The impact of the new law on prostitution has been unclear. Initially, the legislation criminalising the clients of prostitutes resulted in an immediate decline in the number of prostitutes working visibly on the streets. Although the first impression was that the project was not exceptionally successful,⁷⁷ the number of prostitutes on the streets decreased from about 20-30 women to one - three women per night in Stockholm and Gothenburg. However, police made very few arrests and prostitution eventually returned to its earlier levels.⁷⁸ In 2000 Kilvington *et al* cautioned that although the initial decline in the number of prostitutes working visibly on the streets, was unlikely to reflect a move out of prostitution altogether.⁷⁹ By 2004, however, an investigation by the Swedish National Board of Health and Welfare found that the legislation had had a major impact on outdoor prostitution. Although, the legislation had not eliminated prostitution, it has certainly stemmed its growth and acts as a deterrent to traffickers.⁸⁰

⁷⁵ See chap 5 above.

⁷⁶ De Santis 'Sweden's Prostitution Solution' 2004 and Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 par 2525.

⁷⁷ Kilvington *et al* 'Prostitution Policy in Europe' 2000 at 12. Many prostitutes have been encouraged to switch to other 'high-tech' forms of client networking, such as working with cell phones and computers. Outdoor prostitutes complain that they must now work later and more irregular hours in order to escape the attention of the police. Bernstein "Why can't the US be like Sweden (or Holland)?" 2000. Bernstein is a member of Department of Sociology, Barnard College, Columbia University.

⁷⁸ In the first nine months of 1999, only three clients were found guilty and fined. Kilvington *et al* 'Prostitution Policy in Europe' 2000 at 12. Bernstein "Why can't the US be like Sweden (or Holland)?" 2000 recounts that two of these clients confessed after being literally caught in the act.

⁷⁹ It is submitted that there is an increase in prostitution in hotels and restaurants. Outdoor prostitutes complain that they must now work later and more irregular hours in order to escape the attention of the police. Kilvington *et al* 'Prostitution Policy in Europe' 2000 at 12. Many prostitutes have been encouraged to switch to other 'high-tech' forms of client networking, such as working with cell phones and computers. Bernstein "Why can't the US be like Sweden (or Holland)?" 2000.

⁸⁰ The investigation showed that in 1998 in Stockholm some 280 women were known to work on the streets whilst the number in 1999 was 170. In Gothenburg some 286 women were reported to be working on the streets in 1998, whilst in 1999 the figure was 80 women. Subsequent to these observations the numbers of known prostitutes remained constant. Norwegian Ministry of Justice and Police Affairs 'Purchasing Sexual Services' 2004 par 2.1.1. See also the analysis of the statistics in para 2.1.1 and 2.1.2.

6.38 The Act has been amended to address problems as they became evident. For example, it was found that the Act did not cover those who purchase sexual services on behalf of someone else and that men paying regularly for sex from the same woman are not guilty of an offence. The Sexual Crime Committee promptly revised the relevant provisions and drafted amendments to close these loopholes.⁸¹ In 2005 an amendment to chapter 6 of the Swedish Penal Code widened the scope of its application. The legislation prohibiting the purchase of sexual services was amended to include cases where payment has been promised or made by someone else. The ban on purchasing sexual acts from children was strengthened by extending the penal provision to include the purchase of sexual acts from children. A person who induces a child under 18 years to undertake or endure a sexual act in return for payment can be sentenced to pay a fine or to imprisonment for a period not exceeding two years.⁸²

6.39 The Swedish government has also identified problems with the enforcement of the law. Extensive funds were made available and police and prosecutors from the top ranks down to the officer on the beat received intensive training.⁸³ Increased competence and knowledge of the police have had noticeable and immediate effects.⁸⁴ One year after the training began in 2003 there was a 300% increase in arrests.⁸⁵

6.40 Several opinion polls, conducted in 2000, 2001 and 2002, show that the vast majority of Swedes continue to support the legal reform and the policies that flow from it.⁸⁶ The majority of those who wanted to repeal it were men, with only seven per cent of women in support of its repeal.⁸⁷ The police and prosecutors are also staunch supporters of the

⁸¹ Bindel 'Briefing on Current Trends within the Sex Industry in Sweden' 2003.

⁸² Sweden 'Fact Sheet on Prostitution' 2005. Council of Europe 'Legislation in the Field of Violence against Women' 2007.

⁸³ De Santis 'Sweden's Prostitution Solution' 2004.

⁸⁴ See Norwegian Ministry of Justice and Police Affairs 'Purchasing Sexual Services' 2004 par 2.4.2 for a discussion of the enforcement of the law on the Purchase of Sex.

⁸⁵ This fact is believed to be the result of the investigating officers' better understanding of the reasons behind the legislation, their deeper comprehension of the conditions that make women vulnerable to becoming victims of prostitution and trafficking, and the development of better investigation methods. Ekberg 'The Swedish Law'. It is not the intention of the government to prove the effectiveness of the new law primarily through the number of convictions; rather to challenge the normalisation of prostitution. Bindel 'Briefing on Current Trends within the Sex Industry in Sweden' 2003.

⁸⁶ Bindel 'Briefing on Current Trends within the Sex Industry in Sweden' 2003.

⁸⁷ Bindel 'Briefing on Current Trends within the Sex Industry in Sweden' 2003.

legislation since it was found that the prostitution legislation benefits them in dealing with all sex crimes.⁸⁸

6.41 In July 2008, still emphasising the impact of prostitution on social equality, gender equality and the enjoyment of human rights, the Swedish Government adopted a further action plan for combating prostitution.

6.42 The action plan covers the following priority areas:⁸⁹

- Greater protection and support for people at risk: The action plan aims to intensify outreach activities and give greater priority to sheltered housing, treatment centres and other forms of support and protection.
- More emphasis on preventive work: The action plan places a high premium on preventative work by heightening people's awareness of those exposed to prostitution and trafficking. Important aspects of preventive work such as education and information among official bodies and voluntary organisations, ethical guidelines and codes of conduct as are vital ingredients of the plan. Measures to help victims find alternative means of support are also needed. Special priority is to be attached to information targeting children and young people.
- Higher standards and greater efficiency in the justice system: Training and education focusing on prostitution, with a special focus on young victims, must be improved. There is a need for effective and appropriate legislation for combating prostitution.
- Increased national and international cooperation: Global and inter-regional cooperation, cross-sectoral approach uniting government agencies, NGOs, researchers and the general public are crucial elements of combating trafficking for sexual purposes. Therefore the structures for cooperation and coordination of efforts in this field need to be strengthened.
- Higher level of knowledge and awareness: Quantitative, qualitative and comparative studies are essential to ensure that official bodies and non government organisations understand the relevant issues.

⁸⁸ Bindel 'Briefing on Current Trends within the Sex Industry in Sweden' 2003.

⁸⁹ Altogether, the Government will be investing R261 593 000 in 36 measures up to the year 2010. Sweden 'Action Plan against Prostitution and Human Trafficking' 2008.

Prostitution laws in the Netherlands⁹⁰

6.43 In 1911, a general ban on brothels came into force in the Netherlands under art 250bis of the Dutch Penal Code which prohibited the running of a brothel in order to profit from women working as prostitutes. Prostitution in itself was not criminalised.⁹¹

6.44 However, in line with the extremely liberal social policies of the Netherlands,⁹² prostitution was condoned by many local governments by the second half of the twentieth century. The police only interfered when public order was at stake or in cases of human trafficking. The gradual relaxation in the implementation of the Dutch Penal Code on prostitution effectively resulted in a position of *de facto* decriminalisation, hence the popular perception that prostitution is 'decriminalised' in the Netherlands.⁹³ Since 1981, repeated unsuccessful attempts were made to bring the law in line with practice.⁹⁴

6.45 In October 2000 the Dutch government amended the Criminal Code to reflect the new Dutch policy that prostitution is a reality and will never disappear, causing government to take a realistic stance on the problem. The amendment removed the 1911 ban on brothels⁹⁵ and article 250bis of the Dutch Penal Code was replaced with a new article 250a in which it is no longer a crime to operate brothels in which adult prostitutes work of their own accord.⁹⁶

⁹⁰ The Netherlands has a heterogeneous population of 15 million people. The ethnic groups found in the Netherlands are Dutch 83%, other 17% (of which 9% are non-Western origin mainly Turks, Moroccans, Antilleans, Surinamese, and Indonesians). The following diversity exists in terms of religious values: Roman Catholic 31%, Dutch Reformed 13%, Calvinist 7%, Muslim 5.5%, other 2.5%, none 41% (2002) **World Factbook** – The Netherlands. Very conservative (eg orthodox religious) and modern groups can be found living next to each other peacefully. See in this regard Vlaardingebroek 'Influence of Human Rights Conventions' 1997.

⁹¹ The next article of the law related to the punishment of trafficking in persons women and forcing persons to prostitution. Wetboek van Strafrecht (Criminal Code) art 250bis and 250ter. **Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004.**

⁹² On euthanasia, drug use, gay marriage (and now prostitution), Dutch law is said to be the cutting edge of Western liberalism. **Infoplease** 'Netherlands'. Kurtz 'Going Dutch?' 2004. See also Ehrlich 'Liberal Netherlands on Immigration'.

⁹³ See Kilvington et al 'Prostitution Policy in Europe' 2000 at 12.

⁹⁴ In 1983 the Minister of Justice unsuccessfully proposed an amendment to the law on prostitution. Doezeema 'Who Gets to Choose?' 2002. Public opinion polls, conducted in the late 1990s, show that 73 percent of Dutch citizens favored legalisation of brothels, 74 percent said that prostitution was an 'acceptable job,' and in a 1999 poll 78 percent felt that prostitution is a job like any other job. Polls cited in Weitzer **Sex for Sale** 2000 at 178 and referred to in **Wikipedia** 'Prostitution in the Netherlands'.

⁹⁵ Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004.

⁹⁶ At this stage, it was estimated that there were 25 000 prostitutes working in the Netherlands (1,6 persons

6.46 The Dutch government remains strongly opposed to forced prostitution and prostitution involving minors. The new article 250a of the Penal Code prohibits forced prostitution. Therefore, while lifting the ban on brothels, the fight against forced prostitution and prostitution of minors was intensified by increasing the punishment for these forms of prostitution to six years imprisonment.⁹⁷

6.47 The rationale for these policy and legislative changes originated in the sexual revolution of the 1960's and 1970's and that fact that prostitutes were no longer seen as victims. Advocates adopted a liberal approach which argued that women were entitled to control their own bodies and had the right to decide to sell sex. Thus voluntary prostitution should be permitted. However, the women's movement was opposed to the exploitation of women in involuntary and under-aged prostitution, calling for harsher penalties against this.⁹⁸

6.48 Following the amendment to the Criminal Code, the operation of prostitution related businesses is regulated in the same way as other commercial businesses⁹⁹ and the mandate to regulate adult voluntary prostitution is delegated by the state to the various regional and local authorities.¹⁰⁰ Decentralisation was chosen as it is the municipalities and local authorities that are actually faced with the matter of prostitution.¹⁰¹

per 1,000). Approximately 32% of these prostitutes are Dutch, 22% are Latin American, 19% are Eastern European, 13% are African (south of the Sahara), 6% come from other countries from the European Union (aside from the Netherlands), 5% come from Northern Africa and 3% are Asian. Approximately 5% of the prostitutes are male, and another 5% are transsexual. **Mobiliteit in de Nederlandse Prostitutie EUROPAP** 1998, a study by the Dutch Ministry of Foreign Affairs available at <http://www.prostitutie.nl/studie/documenten/gezondheidszorg/mobnedprost.pdf> (accessed on 2 February 2007) and referred to in **Wikipedia** 'Prostitution in the Netherlands'. Amsterdam is well known for its prostitution industry with 2000 brothels and numerous escort services. Of these, approximately 45% worked in brothels which vary from simple private houses to larger clubs with up to 20 women employed. Another 20% worked in window prostitution, 15% as escorts, 5% on the streets and 5% from their homes. An estimated 10% worked in massage parlours, sex shops, sex theatres and bars **Wikipedia** 'Prostitution in the Netherlands'.

⁹⁷ Norwegian Ministry of Justice and Police Affairs 'Purchasing Sexual Services' 2004.

⁹⁸ Norwegian Ministry of Justice and Police Affairs 'Purchasing Sexual Services' 2004.

⁹⁹ Kilvington et al 'Prostitution Policy in Europe' 2000 at 7.

¹⁰⁰ In view of the fact that the fundamental right to choose one's own profession freely is safeguarded both in the Dutch Constitution and in international rights conventions, it was assumed that the responsibilities of the local authorities to regulate prostitution activity would not result in local prohibitions against brothels. Nevertheless, 43 minor local authorities (12%) have indeed chosen a no brothel-policy by banning brothels within their jurisdictions. Norwegian Ministry of Justice and Police Affairs 'Purchasing Sexual Services' 2004.

¹⁰¹ For this purpose the Dutch Local Government association has, in terms of art 151a of the Law on Municipalities created a model that 94% of local authorities have chosen to use it. Norwegian Ministry of Justice and Police Affairs 'Purchasing Sexual Services' 2004.

6.49 Local governments were thus able to develop systems to regulate brothels. Regulation by regional and local authorities entails prescribing conditions for licensing, as well as the number and type of commercial sex based businesses to be accepted by the municipality. Specific conditions include the size of brothels, their geographical location and health and safety regulations.¹⁰² As such, brothels must:¹⁰³

- register with local authorities
- meet health and safety standards
- confirm that they do not hire illegal immigrants *i.e.* persons without a valid residence permit, and underage¹⁰⁴ persons
- have condoms available and protect prostitutes from clients who are unwilling to use condoms.

6.50 In order to create the desired uniformity and integration of local policy, the national government has issued guidelines and suggestions for community and regional levels. These have been published in the Handbook Local Prostitution Policy. The most important elements are:

- A 'contract of control' with a set of agreements between local government, the police and the public prosecution on the correlation of administrative and punitive measures.
- Local government can organise a licensing system in order to regulate the prostitution sector on the basis of a model published by the Association of Dutch Municipalities.
- Specific guidelines were developed for the public prosecutors on how to proceed in cases of trafficking in persons and forced prostitution.
- A special guideline is written on how to deal with victims of trafficking in the legal procedures.
- A code of conduct for civil servants and policemen on how to behave in the prostitution milieu.
- Officials who are responsible for the issuing of licenses have access to criminal records in order to check the background of owners and managers of brothels.

¹⁰² Kilvington et al 'Prostitution Policy in Europe' 2000 at 7.

¹⁰³ Norwegian Ministry of Justice and Police Affairs 'Purchasing Sexual Services' 2004.

¹⁰⁴ In the Netherlands the age of consent is 16 however, sex with a prostitute under 18 is illegal. **World Sex Explorer** 'Age of Consent'.

- Prostitutes must identify themselves to the police to be protected by the law.¹⁰⁵

6.51 A prostitute who falls ill may apply for disability payments or register at an unemployment office.¹⁰⁶ However, prostitutes who choose to stop working are not eligible for unemployment benefits but are entitled to seek social assistance and may register as jobseekers.¹⁰⁷

6.52 The need to regulate outdoor prostitution emerged as residents complained about the lack of peace and order and pollution of the areas where outdoor prostitution occurred.¹⁰⁸ As a result some municipalities introduced tolerance zones *ie* an outdoor area or an area designated by the municipality for permitted outdoor prostitution.

6.53 Two years after implementation of the new dispensation, the Association of Municipalities reported difficulties with the implementation of the new regulations due to their vagueness in a number of areas.¹⁰⁹ Wagenaar points out that lack of experience of the manner of regulation as well as, in some cases, lack of support for decriminalisation among some of the enforcers of the legislation, have impeded effective implementation.¹¹⁰

6.54 Some research exists on the impact of the new legal dispensation. Overall, it is estimated that it has led to a general decrease in the prostitution industry by 30-40%. Possible reasons for this are the following: Prior to the new law, nearly 80% of the window prostitutes were illegal migrants, 35% of brothels and sex clubs had to close because they don't want to or can't afford to pay taxes, or the clubs don't want to abide by the new labour guidelines.¹¹¹ However, there seems to have been less impact on outdoor prostitution. A year after decriminalising indoor prostitution, an investigation into outdoor prostitution, prostitution from private flats or residences, escort services and prostitution via the Internet

¹⁰⁵ See the sources referred to in Nalooop & Dauvallier 'Current Trends within the Netherlands'.

¹⁰⁶ Kilvington et al 'Prostitution Policy in Europe' 2000 at 7.

¹⁰⁷ Norwegian Ministry of Justice and Police Affairs 'Purchasing Sexual Services' 2004.

¹⁰⁸ Dutch Penal Code art 91 and Local Government Laws art 150 and 151. The Dutch Union of Municipalities has prepared standard police bylaws for this purpose. Norwegian Ministry of Justice and Police Affairs 'Purchasing Sexual Services' 2004.

¹⁰⁹ Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004.

¹¹⁰ Norwegian Ministry of Justice and Police Affairs 'Purchasing Sexual Services' 2004.

¹¹¹ Bernstein 'Why can't the US be like Sweden (or Holland)?' 2000.

concluded that illegal (forced prostitution and prostitution of minors) outdoor prostitution had not decreased. The tendency was for these forms of prostitution to move to municipalities where the control was not as strict and less effective. Such prostitution effectively became invisible to the authorities.¹¹²

6.55 Reports further suggest that mobility within the Netherlands and in neighbouring countries has increased as a direct result of the new policies, with illegal prostitutes moving across the borders to Belgium and Luxembourg.¹¹³

Prostitution laws in Germany¹¹⁴

6.56 Strict regulation of all potential venereal disease patients was introduced in Germany during World War I. Prostitutes had to be registered with local health authorities and submit to regular medical tests.¹¹⁵ After World War II, British forces involved in the occupation of Germany were given special protection through cooperation between the British military police and the German civil police. In Hamburg, for example, young girls seen in the streets during the late evening and night, risked being arrested and submitted to enforced medical venereal disease check-ups.¹¹⁶

6.57 After World War II, the country was divided into East Germany and West Germany. In East Germany, as in all countries of the communist Eastern Block, prostitution was illegal and didn't exist according to the official position. However, there were high-class prostitutes working in the hotels of East Berlin and the other major cities, and outdoor prostitutes who mainly targeted Western visitors.¹¹⁷

¹¹² M Goderie, F Spierings and S ter Woerds 2002 **Illegality, Involuntary Prostitution and Prostitution by Minors A Year after Lifting the Brothel Ban** Verwey- Jonker Institute as referred to in Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004.

¹¹³ See Kinnel & Praats **Policies on Sex Work** 2000.

¹¹⁴ The German population is comprised as follows: German 91.5%, Turkish 2.4%, other 6.1% (made up largely of Greek, Italian, Polish, Russian, Serbo-Croatian, Spanish) The religious breakdown of the German population is Protestant 34%, Roman Catholic 34%, Muslim 3.7%, unaffiliated or other 28.3%. The **World Factbook** – Germany.

¹¹⁵ Blom **Fighting Venereal Diseases** 2006.

¹¹⁶ M Freund 'Women, Venereal Disease and The Control Of Female Sexuality in Post-War Hamburg' in Davidson and Hall (eds), op. cit., note 7, at 205–19, referred to in Blom **Fighting Venereal Diseases** 2006. During the war between 300 and 400 female concentration camp inmates were used to provide sexual services to male slave labourers as incentives and to reward cooperative inmates. **Spiegel Online** 'Forced Prostitution in Concentration Camps' 2007.

¹¹⁷ **Wikipedia** 'Prostitution in Germany'.

6.58 In West Germany, the registration and testing requirements remained in place. Many prostitutes did not submit to these tests, in order to avoid the registration and concomitant stigmatisation and in effect operated illegally.¹¹⁸

6.59 Germany was re-united in November 1989. By the early 1990's, research estimated that approximately 150 000 - 500 000 women and men worked as prostitutes in Germany and that between 10% - 30% of the adult male population had had experiences with prostitutes. A comparatively small number of males offer sexual services to females, while the vast majority serve male clients through outdoor prostitution to procure drugs.¹¹⁹

6.60 At this stage, although prostitution was not criminalised under German law, it was considered to be immoral.¹²⁰ This sentiment had both legal and social consequences:¹²¹ As an immoral contract is null and void,¹²² claims by prostitutes against their clients were unenforceable¹²³ causing them to depend on gang structures to enforce payment through violent means.¹²⁴ In addition, a prostitute working out of her apartment could lose her lease and prostitutes had difficulties entering the German system of health care and social security because of their occupation.¹²⁵

6.61 Despite the otherwise comparatively lenient approach towards prostitutes, section 180a of the German Criminal Code listed 'promotion of prostitution' as a criminal offence, punishable by up to three years imprisonment. These prohibitions placed the

¹¹⁸ **Wikipedia** 'Prostitution in Germany'.

¹¹⁹ **Wikipedia** 'Prostitution in Germany'. Almost 75% of the prostitutes are foreigners. Altink **Stolen Lives** 1995 at 33 and 'Trafficking of Women to the European Union: Characteristic, Trends and Policy Issues' European Conference on Trafficking in Women, June 1996 as referred to in Hughes, Sporicic, Mendelsohn & Chirgwin 'Factbook on Global Sexual Exploitation: Germany' 1999.

¹²⁰ See Broomby 'Berlin Prostitution no Longer Immoral' 2000 and Francis 'German Brothel Given Legal All-Clear' 2000.

¹²¹ Ziegler 'Smuggling and Trafficking of Human Beings in Germany' 2005 fn 287.

¹²² § 138 German Civil Code (Bürgerliches Gesetzbuch) provides that a legal transaction is void under § 138(1) if its entire character, resulting from its content, motivation and purpose taken together, offends good morals. **German Law Archive**.

¹²³ This view was renounced in 55 NJW 1885 (2002) referring to a change in morality. See this reference in Ziegler 'Smuggling and Trafficking of Human Beings in Germany' 2005 fn 288.

¹²⁴ **Wikipedia** 'Prostitution in Germany'.

¹²⁵ Ziegler 'Smuggling and Trafficking of Human Beings in Germany' 2005 fn 289.

operators of brothels in constant legal danger. Most brothels were run as bars with an attached but legally separate room rental.¹²⁶

6.62 In 2000, changing political sentiment meant that government considered the introduction of new rules to end discrimination against prostitutes.¹²⁷ A decision by a Berlin Court triggered a change in Germany's general attitude towards prostitution. The Court heard an application for closure of a bar that served as a meeting point for prostitutes and their clients. The Court held that prostitution as a profession was now widely accepted, as long as it is freely entered into without force.¹²⁸

6.63 Subsequently in December 2001, the Social Democratic government of Germany legalised pimping and prostitution through the Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten (the Act) stating that prostitution should not be considered to be immoral anymore.¹²⁹ Although the conservative parties supported the goal of giving prostitutes access to the social security and health care system, in the Federal Parliament, they opposed the Act because they wanted to retain the 'offending good morals' status.¹³⁰ Despite this opposition, the Act came into operation on 1 January 2002, describing prostitution as a job.¹³¹

6.64 The Act permits adult prostitution under certain conditions and prostitutes are allowed to obtain regular work contracts. Regulation by local communities is permitted. For example, they are authorised to prohibit prostitution in districts that have less than 50 000 people. A district with more than 50 000 residents may prohibit prostitution in, for example residential areas, public parks, schools and some city centres.¹³²

¹²⁶ Eironline 'Ver.di Seeks to Give Prostitutes a Voice' 2002.

¹²⁷ See Broomby 'Berlin Prostitution no Longer Immoral' 2000 and Francis 'German Brothel Given Legal All-Clear' 2000. See also the German Ministry for Family Affairs Report par 2.1

¹²⁸ Administrative Court (Verwaltungsgericht) Berlin (Az.: 35 A 570.99) 1 December 2000. See the German Ministry for Family Affairs Report.

¹²⁹ Hughes 'Germany: Sex Trafficking, Prostitution, and World Cup Games' 2004. See also the German Ministry for Family Affairs Report par 2.1.

¹³⁰ Easton 'German Culture: The Sex Industry & Prostitution in Germany'.

¹³¹ Bundesgesetzblatt Jahrgang 2001 Teil I Nr. 74.

¹³² Introductory Law to the Criminal Code Anh. 1 Art. 297. See also Criminal Code § 184b which prohibits prostitutes from operating in the vicinity of schools or other facilities frequented by children or in a house where children live.

6.65 Where allowed, brothels must officially register the prostitutes in their employ and pay a fee of about 15-25 Euros per prostitute per day to local authorities. Prostitutes in turn, are taxed on their earnings.¹³³ No compulsory health testing exists although free, anonymous and voluntary health testing is available.¹³⁴

6.66 Outdoor prostitutes are also regulated. For example, the city of Cologne has implemented a model that provides prostitutes with a safe working environment, away from the city centre. An area about the size of a football field has been identified in a specific suburb of Cologne and has been fenced off for the purposes of prostitution. A gate allows clients in, and there are security cameras on site for the protection of the women working in the area. Clients can drive onto the site where the prostitutes are housed in small huts known as 'performance boxes.' This so-called 'supervised line' concept allows prostitutes in Cologne to operate in a protected environment.¹³⁵

6.67 These steps aim to pursue the modernisation and regulation of prostitution through a project that will protect prostitutes, minimize the criminal element and move prostitution out of the city centre and into a specially designed area on the outskirts of the city.¹³⁶ However, most outdoor prostitutes prefer to work without the supervision of the authorities and, as a result, operate in the climate of fear and violence that the project is trying to eradicate.¹³⁷

6.68 Activities relating to forced prostitution, trafficking in human beings, fostering the prostitution of children and procuring remain penalised under the German Criminal Code.¹³⁸

¹³³ As a result a city like Cologne receives about 700,000 Euros a month, see Easton 'German Culture: The Sex Industry & Prostitution in Germany'.

¹³⁴ Many prostitutes still do not register with the authorities due to fear of stigmatization. **Wikipedia** 'Prostitution in Germany'.

¹³⁵ A social worker from the Catholic Church's social services for women department emphasises that safety for the prostitutes was a major consideration in the layout. 'Every hut is fitted so that the driver has to get out on the side nearest to the wall, and the prostitute has the side with an exit into the street in case she has to get away in an emergency. There are red alarm buttons in every box that can be pressed. Baeva 'Cologne Leads the Way in Safe Prostitution' 2005.

¹³⁶ The concept and project is the culmination of three years of work by a joint task force made up of members of the Catholic Church's social services for women, the local police and the Public Order, Social and Health Department. Baeva 'Cologne Leads the Way in Safe Prostitution' 2005

¹³⁷ Baeva 'Cologne Leads the Way in Safe Prostitution' 2005.

¹³⁸ Criminal Code § 180 and § 181.

6.69 The new legal regime has been criticised on several grounds. For example, HYDRA, an organisation which lobbies for the normalisation of the occupation of prostitution and the elimination of all mention of prostitution from the legal code, has criticised the Act as inadequate. The organisation has campaigned against the fact that, despite being taxed, registered prostitutes do not receive the same benefits as other taxpayers, such as social security payments or health insurance benefits.¹³⁹ The Act has also been criticised by prostitutes for not giving them the right to advertise, and for failing to abolish the law which prevents prostitutes from working wherever they like, thus restricting them to 'red-light' districts.¹⁴⁰

6.70 An analysis of the law by Klee, a German prostitute notes the fact that it creates several important rights and responsibilities to prostitutes, clients and employers. It creates obligations for prostitutes to pay taxes and register themselves. It specifies that clients may not deny payment of an agreed price to prostitutes on the grounds that they were not satisfied. It imposes a duty on employers to pay health care and to grant paid leave to prostitutes in their employ. Klee also identified several problems, including the fact that the law makes no provision for migrant prostitutes through the amendment of immigration regulations.

6.71 Klee also submits that the implementation of the law has been imperfect and inconsistent. The lack of outreach and training by the state has meant that the inexperience of prostitutes with the labour rights framework and their suspicion of the state have inhibited their enjoyment of the protections afforded by the law. Also, the law has been implemented in different ways in different regions of Germany: thus, while Berlin has interpreted it in ways that are largely favourable to prostitutes, Cologne has used it to institute a severe 'pleasure tax' that applies to the sex industry alone.¹⁴¹

6.72 Four years after the introduction of the law, research revealed that the goal of improving social security for approximately 400,000 prostitutes has not been reached. The crime rate connected with prostitution has also not dropped significantly.¹⁴² Further, only 1%

¹³⁹ Meerkotter **We Work with Our Bodies** at 47.

¹⁴⁰ See e.g. **Spiegel** 'Das Bringt Uns Gar Nichts' 2002. The latter issue was allegedly deliberately left out to ensure the Bill's passage through Parliament.

¹⁴¹ In a debate centred on comparisons between different legal frameworks at a conference of Europe at the International Committee on the Rights of Sex Workers in Europe in Brussels October 2005. Sukthankar **International Union Rights** 2005 at 8.

¹⁴² Polzer 'German Prostitution Law Has Failed' 2007.

of all prostitutes in Germany have employment contracts and although 87% of prostitutes draw health insurance, only one in three is insured under her own name.¹⁴³ In addition many women choose outdoor prostitution because they want to avoid being controlled and exploited by the sex 'businessmen'.¹⁴⁴

6.73 According to a report commissioned by the Federal Minister for Family Affairs, the opportunity provided in the Act to opt out of prostitution has hardly been used. The Act has also been criticised for the fact that it was based on the false assumption that prostitutes in general work voluntarily while in fact many prostitutes are forced to sell sex and do so under great health risks and inhumane conditions.¹⁴⁵

6.74 In January 2007 the Federal Minister for Family Affairs announced that the country's prostitution laws would be made more stringent.¹⁴⁶

We want to rigorously go after the criminal element surrounding prostitution. That includes punishing customers of forced prostitutes, raising the minimal age [of 16 to 18] and much stricter controls over brothels, with the message that prostitution is not just a job like any other.

Prostitution laws in Thailand¹⁴⁷

6.75 For centuries prostitution has been part of the Thai tradition. State agencies recently estimated that between 100,000 – 200,000 women and girls are active in the prostitution industry in Thailand, however non government organisations estimate that it is ten times higher at 1,000,000 - 2,000,000.¹⁴⁸ At least one-third of Thai prostitutes are under the age of 18. With children as young as six years old working in prostitution, most adult prostitutes started when they were children.¹⁴⁹

¹⁴³ Polzer 'German Prostitution Law Has Failed' 2007.

¹⁴⁴ Raymond 'Ten Reasons for Not Legalizing Prostitution' 2003.

¹⁴⁵ Polzer 'German Prostitution Law Has Failed' 2007.

¹⁴⁶ **The Washington Times** 'Germany Eyeing Tougher Prostitution Laws' 2007.

¹⁴⁷ The population of 64,631,595 of Thailand is composed as follows: Thai 75%, Chinese 14%, other 11%. According to a 2000 census the different religions adhered to are Buddhist 94.6%, Muslim 4.6%, Christian 0.7%, other 0.1%. **World Factbook** – Thailand. Sixty nine percent of the population are rural dwellers, 15% are Bangkok residents and the remaining 16% live in Thailand's other big cities. **Stickman's Guide to Bangkok** 'Thailand'.

¹⁴⁸ Somswasdi 'Legalization of Prostitution in Thailand' 2004.

¹⁴⁹ U.S Department of State 'Thailand Country Report on Human Rights Practices for 1998' 1999. It is

6.76 Historical records show child sexual exploitation to be culturally entrenched in an ancient history of temple prostitution (devadasi) which, although outlawed, still continues today.¹⁵⁰ Furthermore, to be dutiful, in times of economic crisis children had to make sacrifices, doing whatever they could to relieve their parents' financial hardship. This included working in brothels or entering marriages of convenience.¹⁵¹ Even after the final abolition of slavery in 1905,¹⁵² many women 'voluntarily' entered prostitution in order to earn a living.¹⁵³

6.77 The expansion of the export economy and the commercialisation of the rice trade in the nineteenth century brought a large influx of immigrant workers into Thailand.¹⁵⁴ Phongpaichit suggests that this is when prostitution was first introduced to Thailand on a large and commercial scale.¹⁵⁵

6.78 The legislative history is one of increasing control. In 1909 the **Control and Prevention of Venereal Disease Act**¹⁵⁶ established government regulation of prostitution through a system of licensing fees and required registered prostitutes to be free of infectious disease.¹⁵⁷ Then in 1928 the presence of foreign nationals in the Thai brothels led to the passing of the **Trafficking in Women and Girls Act**¹⁵⁸ which created an absolute

estimated that the prostitution industry comprises 3% of Thailand's economy. theage.com 'Thailand Mulls Legal Prostitution' 2003. Somswasdi 'Legalization of Prostitution in Thailand' 2004.

¹⁵⁰ **Bangkok Post** 'Thailand Intimacy and Healthy Sexuality Research Report' 1999.

¹⁵¹ Jirapinyo 'Prostitution – Where Is the Solution?'

¹⁵² In 1865 the King ruled that children could not be sold without their consent by their parents but the law could not overnight do away with the parental authority that Asian parents have wielded over their children for centuries. Lim 'King Rama V' 2005.

¹⁵³ Jirapinyo 'Prostitution – Where Is the Solution?'. Armstrong 'Sex Work in Northern Thailand' 2000.

¹⁵⁴ W Boonchalaksi & P Guest 1994 'Prostitution in Thailand' Institute for Population and Social Research, Mahidol University Thailand at 3, referred to by Armstrong 'Sex Work in Northern Thailand' 2000.

¹⁵⁵ P Phongpaichit 1982 **From Peasant Girls to Bangkok Masseuses** International Labour Office. Geneva at 4, referred to by Armstrong 'Sex Work in Northern Thailand' 2000.

¹⁵⁶ During 1910 to 1925 sexually transmitted diseases rates in Bangkok were estimated to be 75-80% of adult males. Bamber, Hewison and Underwood 'Sexually Transmitted Diseases in Thailand' 1993.

¹⁵⁷ HRW 'Trafficking of Burmese Women' 1993 and Jirapinyo 'Prostitution – Where Is the Solution?'

¹⁵⁸ B.E. 2471. This law expressly prohibited trafficking in women and girls and any person, who brings women or girls into Thailand for the purpose of having sexual intercourse with other persons, was liable to seven years imprisonment or a fine of not more than 1,000 baht or both.. HRW 'Trafficking of Burmese Women' 1993. Section 7 exempts women and girls who have been trafficked into Thailand from imprisonment and/or fines

prohibition on trafficking. Then, as part of a social purification campaign, the **Thai Penal Code** of 1956¹⁵⁹ criminalised procurement for the purpose of prostitution. The Code provided for specific and quite harsh punishment for abuse of girls who were forced into prostitution. The severity of penalties increased where the offences were committed against girls under 18 years, and even more for offences against girls younger than 15 and 13 years of age.¹⁶⁰

6.79 Prompted by the failure of the Control and Prevention of Venereal Disease Act of 1909 to suppress illegal prostitution¹⁶¹ and the UN Convention for the Suppression of the Trafficking in Persons and the Exploitation of the Prostitution of Others of 1949, the Suppression of Prostitution Act¹⁶² was enacted in 1960. This Act, replaced the Control and Prevention of Venereal Disease Act of 1909 and criminalised prostitution and the procurement thereof. In the Suppression of Prostitution Act of 1960, prostitution is defined as the giving of sexual services in exchange for money on *a regular basis to several men*. Thus, a woman who gives sexual service in return for money on regular basis to only one man is not considered a prostitute. From this perspective, the commercial aspect of prostitution is not the serious moral offence but rather the multiplicity of sexual relations with several men.¹⁶³

6.80 Under the Suppression of Prostitution Act of 1960, women convicted of prostitution were sentenced to up to six months in jail and were expected to be rehabilitated afterwards.¹⁶⁴ Convicted procurers could be sentenced to imprisonment not exceeding three months or a fine not exceeding 1,000 baht, or both, while brothel owners could be sentenced to imprisonment not exceeding one year or a fine not exceeding 4,000 baht.

¹⁵⁹ B.E. 2499.

¹⁶⁰ Section 282 and 283 as referred to in HRW 'Trafficking of Burmese Women' 1993. See also J Caye **Preliminary Survey on Regional Child Trafficking for Prostitution in Thailand** 1995 referred to in UNIFEM 'Factsheets on Gender Issues' 2002.

¹⁶¹ HRW 'Trafficking of Burmese Women' 1993.

¹⁶² B.E. 2503.

¹⁶³ In Thai cultural such a woman is considered to be 'a minor wife'. While the prostitution of women and young girls is a social product coming from within among Thai populace, the phenomenal increase of boy prostitution in the country has been accelerated by foreign influence in that foreign clients have brought boy prostitution out of closet and into a large-scale industry in recent times. Jirapinyo 'Prostitution – Where Is the Solution?'.

¹⁶⁴ See Jeffery and Leslie **Sex And Borders** 2002 Vancouver: UBC Press referred to by Wielenga 'Sex Trade - The Case of Thailand' 2006.

6.81 Despite the fact that the Suppression of Prostitution Act of 1960 criminalised prostitution, the thrust of the majority of the provisions was the reform of prostitutes. This Act provides, for example, that convicted prostitutes 'should be given medical treatment, vocational training or both'.¹⁶⁵ The result is that the Thai Penal Code of 1956 assigns more severe penalties to the procurers of prostitution than the actual Suppression of Prostitution Act of 1960.¹⁶⁶

6.82 However, six years later the Thai government's commitment to eradicating prostitution was called into serious question with the introduction of the Entertainment Places Act of 1966.¹⁶⁷ This Act regulates nightclubs, dance halls, bars and places for 'baths, massage or steam baths which have women attend to customers' and allows such places to operate only under a license to be obtained from local police stations. Although the Entertainment Places Act of 1966 outlaws the use of such licensed establishments for prostitution, police enforcement was lax and many 'places of service' failed to register altogether. The Entertainment Places Act of 1966 sets 18 years as the minimum age for women to work in such establishments but the penalty for employing under-age women is only 2,000 baht.¹⁶⁸

6.83 It is alleged that the Entertainment Places Act of 1966 was promulgated at a time when the Thai government sought to increase state revenue from the presence of U.S. armed forces stationed in Vietnam. This view is supported by the fact that one year after the passage of the Entertainment Places Act, Thailand and the U.S. military agreed to allow American soldiers stationed in Vietnam during the Vietnam War to visit Thailand for rest and recreation, causing the sex trade problem to grow even more.¹⁶⁹ The influx of Americans opened up areas of the sex industry like massage parlours and brothels, consequently opening up more jobs for Thai women and children.¹⁷⁰ It is alleged that the then Thai

¹⁶⁵ J Caye **Preliminary Survey on Regional Child Trafficking for Prostitution in Thailand** 1995 referred to in UNIFEM 'Factsheets on Gender Issues' 2002.

¹⁶⁶ HRW 'Trafficking of Burmese Women' 1993.

¹⁶⁷ HRW 'Trafficking of Burmese Women' 1993.

¹⁶⁸ Armstrong 'Sex Work in Northern Thailand' 2000 at 11. Also HRW 'Thai Legal Context' and J Caye **Preliminary Survey on Regional Child Trafficking for Prostitution in Thailand** 1995 referred to in UNIFEM 'Factsheets on Gender Issues' 2002.

¹⁶⁹ J Caye **Preliminary Survey on Regional Child Trafficking for Prostitution in Thailand** 1995 referred to in UNIFEM 'Factsheets on Gender Issues' 2002.

¹⁷⁰ According to researcher Trinh Dam Truong, '[I]n 1967 it was estimated that the spending of the U.S. military personnel on R&R in Thailand came to approximately five million dollars. By 1970, the amount

government did not enforce the prohibitive prostitution laws since tourists provided the Thai economy with large amounts of money in a short period of time.¹⁷¹

6.84 After the end of the Vietnam War in 1975, sex tourism showed a steady profit as tourism agencies picked up where the war had left off.¹⁷² Military troops and other men from around the world returned to Asia for its well known sex trade.¹⁷³ In contrast to this practice, however, the 1979 **Immigration Act**¹⁷⁴ was enacted which denies entry to Thailand to those who have engaged in prostitution, trading in girls and other immoral activities.

6.85 By 1990, Thailand had several pieces of legislation addressing different but sometimes overlapping elements of both trafficking and prostitution. The resulting inconsistencies, while not insurmountable, have undermined the development of clear legal sanctions on forced prostitution and trafficking.¹⁷⁵ In 1993, Human Rights Watch pointed to the following inconsistencies and contradictions: the Penal Code severely penalises persons who have sex with minors, the Anti-Prostitution law does not; the Anti-Trafficking law exempts women trafficked into prostitution from imprisonment or fines; the Anti-Prostitution law makes no such exemption; the Suppression of Prostitution Act penalises prostitution and the Entertainment Places Act, at least indirectly, regulates and even taxes it.¹⁷⁶

6.86 In 1996 the Prevention and Suppression of Prostitution Act (new Act)¹⁷⁷ replaced the Suppression of Prostitution Act of 1960. Under the new Act 'prostitution' means:

rose to approximately 20 million dollars, or as much as one-fourth of total rice exports for that year.' Referred to in HRW 'Trafficking of Burmese Women' 1993.

¹⁷¹ C Arnold & A M Bertone 'Addressing The Sex Trade in Thailand: Some Lessons Learned from NGOs' Part 1 2002 **Academic Journal of Research** referred to by Wielenga 'Sex Trade - The Case of Thailand' 2006.

¹⁷² The Thai government still promoted prostitution because of the annual profit which amounted from \$5 million in 1967 to \$20 million in 1970. See Jeffery and Leslie 'Sex And Borders' Vancouver: UBC Press 2002 referred to by Wielenga 'Sex Trade - The Case of Thailand' 2006.

¹⁷³ C Arnold & A M Bertone 'Addressing The Sex Trade in Thailand: Some Lessons Learned from NGOs' Part 1 2002 **Academic Journal of Research** referred to by Wielenga 'Sex Trade - The Case of Thailand' 2006.

¹⁷⁴ B.E. 2522.

¹⁷⁵ HRW 'Trafficking of Burmese Women' 1993.

¹⁷⁶ HRW 'Trafficking of Burmese Women' 1993.

¹⁷⁷ B.E. 2539.

The acceptance of sexual intercourse, the acceptance of any other act, or the commission of any act for sexual gratification of another person in a promiscuous manner, in order to gain financial or other benefit, no matter whether the person who accepts such act and the person who commits such act are of the same or opposite sex.

The new Act provides that:

- Prostitution, by both male and female, in public places and brothels, is illegal and sets the penalty for offering sexual services at a fine of 1000 baht.
- The clients of a prostitute under the age of 18 also commit an offence punishable by imprisonment of up to two years (if the prostitute is a child less than 15, the term of imprisonment shall be up to 6 years).
- Procurement of prostitutes under the age of 18, including by owners of brothels, parents and legal guardians, shall be punishable with up to 20 years of imprisonment.
- Parents or guardians who collaborate in the prostitution of a child under the age of 18 commit an offence punishable by a fine and revocation of guardianship.
- Those involved in forced prostitution will be punished by a term of imprisonment from 10 to 20 years and a fine from 200,000 to 400,000 baht.
- Persons who force another person into prostitution through violence or intimidation shall be punishable with up to 20 years of imprisonment; if such actions result in injury or death, punishment shall be life imprisonment or execution.
- All prostitutes under age 18 shall receive protection and vocational development for up to 2 years.
- If the prostitution is forced, the prostitute is not deemed to have committed an offence.
- Advertisement for and procurement of prostitutes as well as ownership or management of brothels are prohibited.

6.87 The new Act also establishes a Committee for Protection and Development of Occupation to prescribe and implement policies for the eradication of prostitution. The Act further provides for the establishment of rehabilitation institutions to assess the mental and physical health, as well as the aptitudes of convicted prostitutes. Convicted prostitutes may then be sentenced to a Place for Protection and Development, which shall provide occupational training and rehabilitation.¹⁷⁸

¹⁷⁸ ILO Thailand Legislation.

6.88 In 1997 the Measures in the Prevention and Suppression of Trafficking in Women and Children Act¹⁷⁹ was enacted. This Act prohibits the trafficking of any woman or child, or arranging for any woman or child to act or receive any act for sexual gratification of a third person.¹⁸⁰ Also in 1997 the Penal Code Amendment Act¹⁸¹ was enacted which provides that those who commit an offence under sections 282 and 283 of the Thai Penal Code outside of the Kingdom of Thailand may be punished for that offence in Thailand. The penalty is increased if the person being exploited is younger than 18 years old.¹⁸²

6.89 Research shows that the legal position on prostitution in Thailand contradicts the de facto position. Despite the government's official approach of criminalisation, with prostitution technically illegal and many acts related to prostitution being criminalised, prostitution is widely accepted by society.¹⁸³ The sex industry is 'highly visible, economically successful and internally differentiated'.¹⁸⁴ It is said that the political will to enforce the prohibitive legislation is questionable. In addition, it is submitted that many police officers are unaware of revised laws, budgets are limited and the issue is not priority with the police.¹⁸⁵ Indications are that police corruption is rife. Bindman remarks that local police are generally on very good terms with sex establishments, from whom they receive regular remittances.¹⁸⁶ Contacts with the police may include demands for cash or sexual favours.¹⁸⁷

¹⁷⁹ B.E. 2540.

¹⁸⁰ ILO Thailand Legislation.

¹⁸¹ (No. 14) B.E. 2540.

¹⁸² If between 15 and 18 years old - maximum 15 years in prison plus a fine, or under 15 years old - maximum twenty years in prison and a fine. ILO Thailand Legislation. Bindman 'Redefining Prostitution as Sex Work' 1997 at par 3e submits that such 'rehabilitation' means hardship for the prostitutes and their families that they support, and is of little value where unemployment is rife. The rehabilitation centres are regarded as little different from a prison.

¹⁸³ Meerkotter **We Work with Our Bodies** at 18.

¹⁸⁴ W Boonchalaksi and P Guest 'Prostitution in Thailand' in Lim **The Sex Sector** 1998 at 131. A survey, compiled by the Ministry of Public Health in 1999, three years after the enactment of the legislation aiming to curb prostitution, indicates an increase in the number of individuals engaged in sexual services: from 63941 in 1998 to 69139 in 1999. The number of child prostitutes rose from 4.4% to 5.3% in 1999. ThaiWorldView.com 'Thailand's Dark Face' 2005.

¹⁸⁵ Berger & van de Glind 'Children in Prostitution, Pornography and Illicit Activities in Thailand' 1999.

¹⁸⁶ Bindman 'Redefining Prostitution as Sex Work' 1997 para 3e.

¹⁸⁷ Bindman 'Redefining Prostitution as Sex Work' 1997 para 3e.

6.90 A complex set of interrelated factors associated with economic development and gender roles operates to provide 'an increasing supply of women for the sex sector'. The demand for prostitution persists because of the social acceptance of men buying sexual services and the increased disposable income of a large and growing segment of the Thai population.¹⁸⁸ Prostitution has a huge impact with billions of baht annually coming into the economy each year, helping hundreds of thousands of women escape poverty and supporting their families in the rural villages. See in this regard the tradition referred to in paragraph 6.74 above that in times of crisis children have to make sacrifices to relieve their parent's financial hardship.

6.91 From a gender viewpoint, much of the impetus sustaining the high rate of prostitution is cultural. Although the foreign aspect of prostitution attracts much attention, most of the clients patronising the cheapest establishments are Thai men.¹⁸⁹ A young Thai man would be ridiculed by his peers for admitting that he is a virgin. In this context prostitutes play a large part in forming the sexual identity of young Thai males, since their first sexual contact would normally be with a prostitute while accompanied by some friends.¹⁹⁰ The activity of visiting a whorehouse has become a social activity.¹⁹¹

6.92 Moreover, many Thai women believe that prostitution protects 'good' women against rape, and wives prefer their husbands to visit prostitutes rather than take a minor wife, which is perceived as a greater threat to family stability.¹⁹² While it is perfectly acceptable for men to visit prostitutes, premarital sex between men and women who are dating is strictly forbidden.¹⁹³

¹⁸⁸ W Boonchalaksi and P Guest 'Prostitution in Thailand' in Lim **The Sex Sector** 1998 at 131-132.

¹⁸⁹ W Boonchalaksi and P Guest 'Prostitution in Thailand' in Lim **The Sex Sector** 1998 at 136-137, submit that contrary to popular belief, foreign tourists appear to constitute only a small proportion of prostitution clients. Although they may dominate as clients for certain relatively small sectors of the industry, most clients of prostitutes in Thailand are Thai men. Surveys of sexual behaviour show that every day at least 450,000 Thai men visit prostitutes. See S Steven 'A Plague Awaits' *The New York Times Magazine* July 1991 at 26, referred to in Hall 'Prostitution in Thailand and Southeast Asia' 1999.

¹⁹⁰ S Steven 'A Plague Awaits' *The New York Times Magazine* July 1991 at 26, referred to in Hall 'Prostitution in Thailand and Southeast Asia' 1999.

¹⁹¹ See the sources referred to by in Hall 'Prostitution in Thailand and Southeast Asia' 1999.

¹⁹² Jõe-Cannon 'Primer on the Demand for Prostitution' 2005.

¹⁹³ A survey of both sexes by the Deemar Corporation in 1990, bore out that '80% of males and 74% of the females responded that it was 'natural for men to pursue sex at every opportunity.' See the sources referred to by in Hall 'Prostitution in Thailand and Southeast Asia' 1999.

6.93 In 2004 the government of Thailand was reported to be considering legalising prostitution, suggesting that legalisation would improve the condition of prostitutes and would generate a lot of money for the economy and for the government.¹⁹⁴ However, there has been little movement on this to date.

Prostitution laws in the United Kingdom of Great Britain and Northern Ireland¹⁹⁵

6.94 As early as 1751 the **Disorderly Houses Act**¹⁹⁶ criminalised the keeping of common bawdy houses or brothels, gaming houses, betting houses and disorderly places of entertainment, by declaring it a misdemeanour and punishable by a fine or imprisonment.¹⁹⁷ The Vagrancy Act of 1824 was the first law in the history of the UK¹⁹⁸ to use the term 'common prostitute'.¹⁹⁹ Subsection 3 stated that 'any common prostitute behaving in a riotous or indecent manner in a public place or thoroughfare' was liable to a fine or imprisonment. The early trend of criminalisation specific behaviour of prostitutes was proceeded with when the Metropolitan Police Act²⁰⁰ was passed in 1839 and subsection 54 stipulated that 'any common prostitute loitering or soliciting for the purposes of prostitution to the annoyance of inhabitants or passers-by' would be subject to arrest and, if convicted, to a fine.²⁰¹ From 1864 onwards, a series of Contagious Diseases Acts were passed which required 'common prostitutes' to be registered as such and to present themselves for a fortnightly internal examination.²⁰²

¹⁹⁴ Douglas 'Thailand: Government Debates Legalizing Prostitution' 2004. See also Somswasdi 'Legalization of Prostitution in Thailand' 2004.

¹⁹⁵ According to an estimate of 2006, the United Kingdom has a population 60,609,153. The ethnic groups are White 92.1%, Black 2%, Indian 1.8%, Pakistani 1.3%, mixed 1.2%, other 1.6% (2001 census). Almost 72% are Christian (Anglican, Roman Catholic, Presbyterian, Methodist) and the rest are Muslim 2.7%, Hindu 1%, other 1.6%, unspecified or none 23.1% (2001 census). **World Factbook** – UK.

¹⁹⁶ **1751** c.36, Act (Old GB Parliament). UK Statute Law Database.

¹⁹⁷ Owens et al'Recommendations for Political Policy on Prostitution' Appendix 8.

¹⁹⁸ Unless otherwise indicated the source for this discussion on the history of prostitution in the UK is Laite 'Paying the Price Again' 2006.

¹⁹⁹ 1824 c. 83.

²⁰⁰ 2 & 3 Vict. c .47.

²⁰¹ This provision was only applicable to London's police districts but in 1847, the Towns Police Clauses Act put a very similar law in place for the rest of England. 10 & 11 Vict c. 89.

²⁰² Acts of 1864, 1866 and 1869. These laws were promoted by the military and medical establishments in an attempt to contain the spread of venereal diseases primarily among enlisted men in garrison towns and ports. Walkowitz **Prostitution and Victorian Society** Cambridge University Press, New York 1980 cited in Balos and Fellows **Law and Violence against Women** 1994 at 509. Walkowitz is a history professor at

6.95 Early feminist Josephine Butler²⁰³ and her followers rejected the view that prostitutes are 'fallen women' or 'sexual deviant', but rather saw prostitutes as victims of male vice to be rescued and rehabilitated rather than policed and punished.²⁰⁴ They criticised the Contagious Diseases Acts for giving the state additional powers to police and control the lives of all women, especially working class women, and objected to what they perceived to be state-recognition of a 'double standard' of sexual behaviour for men and women.²⁰⁵

6.96 These early feminists argued that governments should abolish prostitution through the penalisation of 'third parties' (procurers or pimps) who induced women into prostitution, whether openly, by deceit or through coercion, and therefore profited from the transaction between the prostitute and the client.²⁰⁶ The punishment of the prostitute was not envisaged, since she was regarded a victim.²⁰⁷

6.97 In 1885 Parliament passed the **Criminal Law Amendment Act**²⁰⁸ with subsection 13 of Criminal Law Amendment Act making keepers or managers of premises used as a brothel liable to a fine or three months' imprisonment. Since the Act did not define the term 'brothel', the Court decided in 1895 in **Singleton v. Ellison**²⁰⁹ that it referred to premises used by more than one woman for the purposes of prostitution.²¹⁰ This ruling meant that any prostitute living with another prostitute would be guilty of keeping a brothel. At the time, the vast majority of prostitutes rented premises with other prostitute women, or

Johns Hopkins University.

²⁰³ 1828-1906.

²⁰⁴ Doezeema 'Who Gets to Choose?' 2002 at 27.

²⁰⁵ Walkowitz **Prostitution and Victorian Society** Cambridge University Press, New York 1980 cited in Balos and Fellows **Law and Violence against Women** 1994 at 510. The Contagious Diseases Acts were finally repealed in 1886.

²⁰⁶ Walkowitz **Prostitution and Victorian Society** Cambridge University Press, New York 1980 cited in Balos and Fellows **Law and Violence against Women** 1994 at 510.

²⁰⁷ Walkowitz **Prostitution and Victorian Society** Cambridge University Press, New York 1980 cited in Balos and Fellows **Law and Violence against Women** 1994 at 510.

²⁰⁸ It also created protective laws against procurement and forcible detainment of women by third parties for the purposes of prostitution. 48 & 49 Vict. c. 69

²⁰⁹ 1895 IQB at 607.

²¹⁰ Cf **Durose v. Wilson** (1907) 71JP 263 where it was accepted that a 'brothel' is a place where a number of such single-prostitute establishments were grouped together referred to by Perkins 'Working Girls' 1991.

rented rooms from poor landladies. The years following the Act saw a crackdown on these sorts of brothels, and the women who owned them were convicted in numbers reaching over 1000 a year, while keepers of larger brothels were rarely prosecuted.²¹¹

6.98 In 1889, following the Amendment to the Vagrancy Act²¹² 'living off the earnings of a prostitute' was made an offence and in 1900 almost seven and a half thousand women were convicted under the solicitation laws compared to only 165 pimps.

6.99 Around the time of the First World War, various feminist organisations and civil rights associations protested against the solicitation laws, which they regarded to be unequal, unjust and injurious to the women who fell within the scope of the legislation. These feminists and libertarians campaigned against the shortcomings of the justice system and the stigmatisation of the term 'common prostitute', with which a woman could be labelled after only one conviction for soliciting. The critics argued that the solicitation laws rested on a gross double standard of sexual morality which held women solely responsible for the transgression and nuisance of selling sex while leaving men unmentioned and unpunished in the buying of it. During the mid 1920s a campaign, led by Lady Astor, led to a departmental enquiry into street offences. Lady Astor did not approve of prostitutes but was opposed to the double standards embodied in these laws. The report of the Street Offences Committee was published in 1929 and supported the recommendations of the feminist and libertarian critics.²¹³

6.100 In 1956 the Government passed the **Sexual Offences Act**²¹⁴ which altered the prostitution law for the first time since 1912 when it combined what the essence of the

²¹¹ From the 1890s to the 1920s blocks of flats were rented to prostitutes individually allowing women to live together without falling in the scope of the Act. This led to an increase in the value of the real estate of commercial sex: landlords would run several properties and charge the women extortionate rents. It also drew other third-party elements into prostitution: cabmen, bell boys and pimps, for example. These third parties would help prostitutes get clients in more subtle ways, as brothel and street prostitution were subjected to increased repression. These third parties would also often exploit abuse and extort prostitute women, who were made more and more vulnerable to such ill-treatment by their increasingly criminalized status.

²¹² 1898 c. 39.

²¹³ The report concluded that the term 'common prostitute' should not be used in new legislation and that it should provide for the prosecution of any person (male or female) who disturbed the public peace for immoral purposes. Although the recommendations did not lead to new legislation during the 1930s, continued opposition to the laws and frustration on the part of the police did see arrest rates remain low until after the Second World War. See Sambrook 'British Optical Munitions Industry' 2004.

²¹⁴ 1956 c. 69.

1885 **Criminal Law Amendment Act**, the 1898 law against 'pimping', with the Criminal Law Amendment Act of 1912, which had created the offence of 'trafficking'.

6.101 During the same period, a Departmental Committee on Homosexual Offences and Prostitution, known as the 'Wolfenden Committee',²¹⁵ was charged with reassessing the government's approach to homosexuality and prostitution. The Wolfenden Report, published in 1957, found that it was not the state's job to police private morality and that prostitution could not be condemned by the law as immoral in and of itself. The Report noted the principled opposition to solicitation laws and the view that such laws relied on a double standard for men and women, as well as the fact that the use of the term 'common prostitute' was stigmatising and unjust. However, the Committee concluded that the women were guilty of an offence because they were the most visible and nuisance-generating face of commercial sex and submitted that removal of the laws would place innocent women at risk of arrest.

6.102 The report came out in favour of the rights of 'respectable' citizens to enjoy neighbourhoods free from the blight of outdoor prostitution. This emphasis on citizens' rights appealed to some of those who had fought for the rights of women to be free from harassment. Instead of condemning the injustice of existing solicitation laws, the Report's recommended that they be strengthened. It proposed that the requirement of proving annoyance be removed from the new statute in order to help the police clear the streets and protect the rights of the citizens. The Report also recommended amalgamation and standardisation of disparate solicitation laws and various by-laws into one Act.

6.103 Following the recommendations of the Wolfenden Report, Government repealed all three of the former solicitation laws and replaced them with the Street Offences Act of 1959. This Act made it an offence for 'any common prostitute to loiter or solicit for the purposes of prostitution'.²¹⁶

6.104 The implementation of the new legislation led to an intensive crackdown on outdoor prostitution in the 1960s and resulted in an increase indoor prostitution, such as

²¹⁵ After Lord **Wolfenden**, the Chairman of the Committee.

²¹⁶ 1959 c. 57. In keeping with the report's views and the de facto situation developed by the criminal justice system, the 'annoyance clause' was officially removed from the Act. The relevant statutes in Scotland and Northern Ireland are different but the effects are the same. Owens et al 'Recommendations for Political Policy on Prostitution' Appendix 8.

escort services and massage parlours. There was also an increase in kerb-crawling and incidences of violent attack, murder and the involvement of exploitative third parties.²¹⁷

6.105 As outdoor prostitution gradually recovered and indoor prostitution flourished, two more government committees were appointed²¹⁸ which eventually led to the enactment of the Sexual Offences Act of 1985. This Act created the offence of kerb crawling, namely the persistent soliciting of a woman by a man for the purposes of prostitution.²¹⁹

6.106 Following considerable pressure from various individuals and organisations, such as the Children's Society and Barnardo's, a leading UK children's charity, who were concerned about the involvement of children in the sex industry, government again reviewed the issue during the 1990s.²²⁰ The Home Office appointed two Sex Offences Review teams to consider the law on sexual offences. A Report entitled **Setting the Boundaries** was published in July 2000.²²¹

²¹⁷ Laite 'Paying the Price Again' 2006. See also Self 'History Repeating Itself' 2004.

²¹⁸ The Working Party on Vagrancy and Street Offences (1974 -76), the Criminal Law Revision Committee (1980-86). Three out the four reports published by the Criminal Law Revision Committee dealt with prostitution: Criminal Law Revision Committee (1980), Fifteenth Report, 'Sexual Offences', Cmnd. 9213. Criminal Law Revision Committee (1982), Working Paper on Offences Relating to Prostitution and Allied Offences. Criminal Law Revision Committee (1984), Sixteenth Report, 'Prostitution in the Street', Cmnd. 9329. See Self 'History Repeating Itself' 2004 at 3 fn 9 and 10.

²¹⁹ 1985 c. 44. The Sexual Offences Act of 1985 provided as follows:

1. Kerb-crawling

- (1) A man commits an offence if he solicits a woman (or different women) for the purpose of prostitution—
 - (a) from a motor vehicle while it is in a street or public place; or
 - (b) in a street or public place while in the immediate vicinity of a motor vehicle that he has just got out of or off, persistently or, in such manner or in such circumstances as to be likely to cause annoyance to the woman (or any of the women) solicited, or nuisance to other persons in the neighbourhood.
- (2) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale

²²⁰ As a result of Street Offences Act of 1959, women and girls under the age of eighteen were acquiring criminal records following convictions for loitering or soliciting. The Society submitted that the Act ignored the client who, according to them, is a child sex-abuser and ought to be punished accordingly.

In the meantime, Barnardo's embarked upon its 'Streets and Lanes' project in Bradford and published a number of documents focusing upon the abuse of children through prostitution. The report 'Whose Daughter Next' with its accompanying video, provided the background and documentation of abduction and imprisonment of young girls in apartments where they were offered for prostitution by their boyfriend/pimp, to whom they clung as the only source of affection and stability in their lives. See Self 'History Repeating Itself' 2004 at 4.

²²¹ Review of Part 1 of the Sex Offenders Act 1997 in 2001. UK Home Office 'Setting the Boundaries' 2000.

6.107 The Report explicitly stated that the review did not consider the legal basis for the regulation of prostitution, nor in what circumstances prostitution could or should be legal. The review therefore did not consider the offences in the Sexual Offences Act of 1956 dealing with brothel-keeping, parts of other Sexual Offences Acts that deal with kerb-crawling or section 1 of the Street Offences Act of 1959. The Report made it clear that the review only considered these Acts insofar as they link to offences of sexual exploitation of individuals in prostitution.²²²

6.108 The Report recommended the following offences related to exploitation:

- Commercial sexual exploitation of children in which 'child' should refer to any person up to the age of 18, and where sexual exploitation includes the use of a child in prostitution or in the making of pornography.
- Exploiting others by receiving money or reward from men and women who are prostitutes.
- Managing or controlling the activities of men and women who are prostitutes, for money or reward.
- Recruiting men or women into prostitution whether or not for reward or gain.
- Trafficking offence namely bringing or enabling a person to move from one place to another for the purposes of commercial sexual exploitation or to work as a prostitute for reward.²²³

6.109 The Report also proposed a new framework of penalties²²⁴ and pointed out that anomalies existed between penalties for certain sexual offences. For example, the maximum sentence for unlawful sexual intercourse with a girl under the age of sixteen was two years imprisonment, whereas the maximum sentence for anal intercourse with a boy or girl under the age of 16 was life imprisonment.²²⁵

²²² Para 020 UK Home Office 'Setting the Boundaries' 2000

²²³ Recommendations 49, 50 and 52 UK Home Office 'Setting the Boundaries' 2000.

²²⁴ The Working Party on Vagrancy and Street Offences (1974 -76), the Criminal Law Revision Committee (1980-86). Three out the four reports published by the Criminal Law Revision Committee dealt with prostitution: Criminal Law Revision Committee (1980), Fifteenth Report, 'Sexual Offences', Cmnd. 9213. Criminal Law Revision Committee (1982), Working Paper on Offences Relating to Prostitution and Allied Offences. Criminal Law Revision Committee (1984), Sixteenth Report, 'Prostitution in the Street', Cmnd. 9329. See Self 'History Repeating Itself' 2004 at 3 fn 9 and 10.

²²⁵ Paragraph 023 UK Home Office 'Setting the Boundaries' 2000.

6.110 Finally, the Report recommended a further review of the law on prostitution.²²⁶ As a result of this, in November 2002 the Government published a White Paper: 'Protecting the Public: Strengthening Protection against Sex Offenders and Reforming the Law on Sexual Offences'. This White Paper proposed a modernisation of the law on sexual offences and described much of the existing law contained in the Sexual Offences Act of 1956 as archaic, incoherent, discriminatory and not reflecting changes in society and social attitudes. The White Paper also set out the Government's intention to protect the public from sexual offences.²²⁷

6.111 In May 2004 the Government began the proposed modernisation by enacting the Sexual Offences Act of 2003 (the Act).²²⁸ The Act provides that it is an offence for a person to, in any part of the world, cause or incite prostitution or to control any of the activities of another person relating to such a person's prostitution, for the expectation of gain for himself or a third person.²²⁹ Section 51(2) of the Act defines 'prostitute' to mean:

a person (A) who, on at least one occasion and whether or not compelled to do so, offers or provides sexual services to another person in return for payment or a promise of payment to A or a third person.

This definition also applies to the sections dealing with child prostitution and the exploitation of prostitution. The term 'payment' in the definition of 'prostitution' with regard to child prostitution means 'any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount.'²³⁰ Section 54(2) of the Act defines the term 'gain' as follows:

- (a) any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount; or
- (b) the goodwill of any person which is or appears likely, in time, to bring financial advantage.

²²⁶ Recommendation 53 in UK Home Office 'Setting the Boundaries' 2000.

²²⁷ Cm 5668. UK Home Office 'Protecting the Public' 2002.

²²⁸ 2003 chap 42. UK Statute Law Database.

²²⁹ Sections 52 and 53 of the Act.

²³⁰ Section 51(3) of the Act.

A person found guilty of these offences is, on summary conviction, liable to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both; and on conviction on indictment, to imprisonment for a term not exceeding seven years.

6.112 The Act further amended section 33 of the Sexual Offences Act of 1956 in order to make it an offence to keep or manage a brothel to which people resort for practices involving prostitution. A person guilty of these offences is, on summary conviction, liable to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both; and on conviction, to imprisonment for a term not exceeding 7 years.

6.113 Sections 48 – 50 of the Act make it an offence to, in any part of the world, cause or incite child prostitution, control a child prostitute or arrange or facilitate child prostitution.²³¹

6.114 Although the Sexual Offences Act of 2003 can be regarded as a major overhaul and review of the Sexual Offences Act of 1956, it did not replace or repeal the latter, or the Sexual Offences Act of 1985 in their entirety. Under the Sexual Offences Act of 2003 it is illegal²³²

- for a prostitute to loiter or conduct solicitation in a street or public place
- for a potential client to solicit persistently, or solicit from a motor vehicle (kerb crawling)
- to own or run a brothel
- to control prostitution for gain
- to cause or incite child prostitution, where child is defined as below 18.

6.115 The British government continues to address the issue of prostitution. . In July 2004 it published a Consultation Paper entitled 'Paying the Price'²³³ as its next step in the strategy to deal with prostitution. This paper looked primarily at the issue of outdoor prostitution and its harmful impact on the lives of the prostitute and the lives of members of

²³¹ A person guilty of these offences is, on summary conviction, liable to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both; and on conviction on indictment, to imprisonment for a term not exceeding 7 years. Sections 48 – 50 of the Act.

²³² In England and Wales. In Scotland and the Republic of Ireland the position is similar, although there is no specific legislation such as the 'kerb crawling' offence under the **Sexual Offences Act** of 1985. **Wikipedia** 'Prostitution in UK' and SW5 'More UK Law' 2004.

²³³ Available at UK Home Office 'Paying the Price' 2004.

the community.²³⁴ The general approach is that prostitution should be prevented by alleviating circumstances which make young people vulnerable to exploitation and coercion into prostitution.²³⁵ The paper further focussed on providing help, advice and a pathway out for those involved, as well as on bringing pimps, traffickers and exploiters to justice.²³⁶

6.116 In January 2006, the government published its Coordinated Prostitution Strategy.²³⁷ This includes prevention, obviating demand, developing of routes out of prostitution and ensuring justice. It aims to disrupt all aspects of sex markets namely demand, supply and opportunity by

- preventing individuals, and particularly children and young people, from being drawn into prostitution
- providing appropriate protection and routes out for those already involved
- protecting communities from the nuisance associated with prostitution
- ensuring that those who control, coerce or abuse those in prostitution are brought to justice.

6.117 Following a proposal in the Green Paper of 2004 to give city councils the discretion to set up tolerance zones, small licensed brothels and a register of prostitutes, some British cities²³⁸ had experimented with 'tolerance zones'²³⁹ during the period of the

²³⁴ The harm associated with prostitution includes violence, abuse and stigmatisation of the prostitute and her family. Problems caused to the wider community include the spread of sexually and drug transmitted infections. UK Home Office 'Paying the Price' 2004 at 8.

²³⁵ It is submitted that as many as 70% of those involved in prostitution started out as children or young teenagers. Their vulnerability and need for affection means they can be easy prey for those determined to exploit them. Often they become trapped in a web of fear and deceit in which drug addiction, prostitution and responding to the demands of pimps becomes a way of life. UK Home Office 'Paying the Price' 2004 at 5.

²³⁶ The other side of the coin is to deliver justice to those affected, including the families of young people coerced into prostitution and the communities blighted by prostitution.

²³⁷ UK Home Office 'A Coordinated Prostitution Strategy' 2006. The report provides a summary of the many responses received to the Consultation Paper 'Paying the Price' and sets out the Government's proposals for a coordinated prostitution strategy. The summary of responses incorporates written submissions to the review, views expressed at seminars and focus groups, and other information published since the close of the consultation exercise. This information, together with the scoping exercise for Paying the Price and the evaluation of 11 projects funded by the Crime Reduction Programme, has informed the development of a coordinated prostitution strategy for England and Wales.

²³⁸ E.g. since 2000, police in Aberdeen have operated a 'managed zone' whereby the city's estimated 130 prostitutes were allowed to solicit within a small, mainly industrial, area adjoining the harbour, although now sexual activity is allowed to take place there. Edinburgh had one of the UK's oldest unofficial tolerance zones until it was scrapped in 2001. Akwagyiram 'Managing Prostitution in the UK' 2006.

²³⁹ A managed area/tolerance zone is generally considered to be an area in which no arrests are made for

review of the prostitution industry. However, the Coordinated Prostitution Strategy document of 2006 abandoned the idea of managed zones of prostitutes in non-residential areas in favour of small, worker-run, brothels, *i.e.* a maximum of two or three prostitutes working together for safety from a flat.²⁴⁰ Sanders suggests that the relaxation of this rule implies that the government finally understands the fundamental difference between indoor and outdoor prostitution and the fact that these should be approached separately.²⁴¹

6.118 In September 2007 the UK Government was reported to be considering proposals to prosecute clients of prostitutes in a new effort to curb the demand for prostitution as Sweden did eight years ago. Part of the motivation for this approach is the growth in sex trafficking. Other proposals being considered include large-scale programmes to 'name and shame' men caught kerb crawling, which is already illegal. However, current campaigners are reported to believe that indoor- and outdoor prostitution can only be terminated by criminalising clients and sending out the message that paying for sex is not acceptable.²⁴²

6.119 In November 2008, media reports indicated that the UK government intends to propose new laws that will make it illegal to pay for sex with women 'controlled for another person's gain' such as pimps, traffickers or brothel owners. Ignorance will no longer be a defence and offenders will receive a criminal record and a large fine. In reaction to this proposal, the Metropolitan Police's Human Trafficking Unit responded that such laws could be unenforceable in view of the fact that it is difficult for the police to identify the prostitutes who are working against their will.²⁴³

prostitution-related offences although the enforcement of the law on other matters (for example, drug offences) continues.

²⁴⁰ The decision not to allow 'managed areas' for prostitutes was criticised by some and welcomed by others. See e.g. Hinsliff, Townsend & Asthana 'No 10 'Blocked Move to Legalise Prostitution' 2007 and Akwagyiram 'Managing Prostitution in the UK' 2006.

²⁴¹ Sanders 'Debating Prostitution' 2006. Sanders is a member of the School of Sociology and Social Policy, University of Leeds.

²⁴² Branigan 'Men Who Buy Sex Could Face Prosecution' 2007.

²⁴³ Travis 'Men Who Pay for Sex with Trafficked Women' 2008 and Whitehead 'Prostitute Clients to Face Hefty Fines' 2008.

Prostitution laws in New Zealand²⁴⁴

6.120 Reports on the sex industry in New Zealand date back to the years of European colonisation when, in the gold-mining days of the early 1800s, money and alcohol were abundant but women were few in number and prostitution flourished.²⁴⁵ The earliest legislation concerning prostitution derived from the English Vagrancy Act of 1824,²⁴⁶ which could be invoked against a prostitute for wandering in a public street or place and behaving in a riotous or indecent manner. A conviction would render a prostitute liable to a fine or imprisonment.²⁴⁷

6.121 It is claimed that by 1864 there were 200 full-time prostitutes in Dunedin and most sizeable towns throughout the colony had 'red-light' districts. In 1866 New Zealand passed its own Vagrancy Act which was repealed with the introduction of the Police Offences Act of 1884. The latter Act contained similar provisions to the Vagrancy Acts which related to the soliciting or importuning by 'common prostitutes' of passers-by.²⁴⁸

6.122 The Contagious Diseases Act of 1869 was the first major legal intervention into prostitution in New Zealand. This Act did not criminalise prostitution but sought to regulate the industry by subjecting any woman deemed to be a 'common prostitute' to forcible medical examination and detention.²⁴⁹ Under this Act police officers had the discretion to ascertain who was a 'common prostitute'. Women deemed to be prostitutes could be removed by the police and subjected to compulsory genital examination at the hands of a police surgeon. Women found to have a venereal disease were placed in a jail or hospital ward run like a jail. The legislation also made it an offence for house-owners to let

²⁴⁴ New Zealand has a population of just over 4 million living on 268,680 km². According to a census of 2001 the ethnic compilation is European 69.8%, Maori 7.9%, Asian 5.7%, Pacific Islander 4.4%, other 0.5%, mixed 7.8%, unspecified 3.8%. The population adheres to the following religions Anglican 14.9%, Roman Catholic 12.4%, Presbyterian 10.9%, Methodist 2.9%, Pentecostal 1.7%, Baptist 1.3%, other Christian 9.4%, other 3.3% and unspecified 17.2%, none 26%. **World Factbook** – New Zealand.

²⁴⁵ Jordan 'The Sex Industry in New Zealand' 2005 Executive Summary and the sources referred to by him. Dr Jordan is a member of the Institute of Criminology at the Victoria University of Wellington.

²⁴⁶ 1824 c. 83.

²⁴⁷ Jordan 'The Sex Industry in New Zealand' 2005 Executive Summary.

²⁴⁸ Jordan 'The Sex Industry in New Zealand' 2005 Part I.

²⁴⁹ No such assault on their bodies or their freedom was experienced by their male clients. Jordan 'The Sex Industry in New Zealand' 2005 Part I.

rooms to women known to be common prostitutes who were also suffering from any venereal disease.²⁵⁰

6.123 With this legislation New Zealand sought to regulate and control the sex industry through legislation, rather than seeking the elimination of prostitution itself. These regulatory and criminal sanctions typically focussed on the prostitutes rather than their clients and stigmatised them as a threat to the family unit.²⁵¹ Any woman objecting to being treated in this manner and classified as such had the onus of proving she was not a prostitute.²⁵²

6.124 Over time, certain conduct associated with prostitution became prohibited or regulated. For example, by 1961 brothel-keeping was prohibited under the Crimes Act with a fine of up to five years, whereas massage parlours had to be licensed and operators had to keep a register of all current workers.²⁵³ Under the same legislation, living on the earnings of prostitution and procuring sexual intercourse were prohibited. A person found guilty of these offences was liable to imprisonment for a period of up to five and seven years respectively.²⁵⁴ However, by 1978 the Massage Parlours Act enabled the sex industry to operate behind the façade of a superficially innocent massage activity.²⁵⁵ Under the Summary Offences Act of 1991 it was an offence for a prostitute to offer sex for money in a public place, but not an offence to pay or to offer to pay for sex.²⁵⁶

6.125 In 1987 the New Zealand Prostitutes Collective (NZPC) was formed and since its inception sought equal rights for prostitutes. The NZPC has campaigned for the

²⁵⁰ Jordan 'The Sex Industry in New Zealand' 2005 Part I.

²⁵¹ Women's movements began campaigning for measures to enhance the nation's 'moral purity'. In 1899 pressure was placed on the Auckland City Council to introduce a curfew prohibiting standing on the streets, with the Women's Christian Temperance Union hoping this might curb soliciting by young girls. Prostitutes were labelled as members of an underclass, with groups such as the Women's Christian Temperance Union and the National Council of Women in the late nineteenth century mounting attacks against them and barmaids. Jordan 'The Sex Industry in New Zealand' 2005 Part I.

²⁵² Jordan 'The Sex Industry in New Zealand' 2005 Part I.

²⁵³ Section 147.

²⁵⁴ Section 148 and 149 of the Crimes Act 1961.

²⁵⁵ This Act defines prostitution as 'the offering by a man or woman of his or her body for purposes amounting to common lewdness for payment'. Barnett 'Decriminalising Prostitution in New Zealand' 2007. By 1991 soliciting for the purposes of prostitution was punishable with a fine up to \$200 under section 26 of the Summary Offences Act 1991

²⁵⁶ CEDAW 'The Status of Women in New Zealand' 2006.

recognition of prostitution as regular work and the repeal of those laws that criminalise and discriminate against prostitutes. In 1988, for example, the NZPC signed a contract with the New Zealand Minister of Health to provide a range of services to prostitutes with a focus on HIV and AIDS.²⁵⁷

6.126 By 1996 a coalition of women's and human rights and public health interest groups supported the introduction in Parliament of a private Bill aimed at decriminalising prostitution and protecting the rights of prostitutes. The Bill was first read in parliament in 2000, whereafter it took two and a half years to pass it through a Select Committee. During the different committee stages amendments were made to address concerns expressed by fundamentalist Christians and some feminist organisations. Parliament allowed Members of Parliament to vote according to their conscience, rather than along party lines. The Bill was finally passed with 60 votes to 59 with 1 abstention.²⁵⁸

6.127 The stated purpose of the Bill, which became the Prostitution Reform Act of 2003 (the Act), is to decriminalise prostitution while not endorsing or morally sanctioning prostitution or its use.²⁵⁹ The Act is founded on the principle of harm minimisation, in other words identifying the genuine harms caused by prostitution and writing law and policy to minimise them. For example, the registration of prostitutes is no longer required since it has no useful purpose, but the penalties for coercion or being the client of an under-age prostitute were increased significantly. Other examples are the abandonment of the bans on prostitution-related activities which were confusing and inconsistently applied, police registration of indoor and outdoor prostitutes, the ban on prostitutes with prostitution- or drug-related convictions being able to work in brothels and the licensing of all employees in the sex industry.²⁶⁰

²⁵⁷ See NZPC 'Law'.

²⁵⁸ After the passage of the Prostitution Reform Act, the Maxim Institute and other conservative Christian organisations tried to gain an appropriate number of signatures for a citizens initiated referendum under **New Zealand's Citizens Initiated Referendum Act** of 1993. Although it was allowed an extension, these groups fell well short of gaining the number of authenticated signatures required. In the current 48th New Zealand Parliament, a Prostitution Law Reform (Manukau City Council) Amendment Bill led to hearings before a select committee, but failed to pass its second parliamentary reading. **Wikipedia** 'Prostitution in New Zealand'. See also para 6.133 an further for specific critique by the Maxim Institute on the Act

²⁵⁹ CEDAW 'The Status of Women in New Zealand' 2006.

²⁶⁰ Barnett 'Decriminalising Prostitution in New Zealand' 2007.

6.128 Under the Act it is an offence to coerce ('induce or compel') a prostitute into having sex or threaten a prostitute in any way.²⁶¹ Prostitutes have the right to refuse to have sex with a client. Prostitutes can not be forced to have sex with a client by anyone - including managers, receptionists, minders, clients, other workers - even if he has paid. Prostitutes cannot be fined for refusing a client.²⁶² It is also an offence for any person to pay for sexual services with any person under the age of 18 years or for any person to employ those under 18 in the sex industry.²⁶³ The Act requires operators in the sex industry to promote safer sex and clients and prostitutes to practise it. The Act controls the advertising of prostitution and prostitution activities by temporary residents and potential migrants.²⁶⁴

6.129 The Act further protects prostitutes by

- 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
- reducing barriers to exiting the sex industry, for example by allowing immediate access to Government unemployment benefits.²⁶⁵

6.130 The Act gives local government the right to make bylaws affecting the signage and location of brothels, although brothels cannot be banned outright. A brothel is a place that is habitually used by one or more prostitutes for commercial sex activities with clients. Some councils limit brothels to certain areas, while others have labour regulations affecting any prostitute who works from home. All brothels must display health promotion messages.²⁶⁶ Although brothel operators or a client can be fined or imprisoned for coercing a person under 18 into prostitution, it is not illegal to be a prostitute if you are younger than 18.²⁶⁷

²⁶¹ Any person who does so is liable on conviction on indictment to imprisonment for a term not exceeding 14 years.

²⁶² NZPC 'Law'.

²⁶³ Jordan 'The Sex Industry in New Zealand' 2005 Executive Summary and the sources referred to by him.

²⁶⁴ Barnett 'Decriminalising Prostitution in New Zealand' 2007.

²⁶⁵ Barnett 'Decriminalising Prostitution in New Zealand' 2007.

²⁶⁶ NZPC 'Law'.

²⁶⁷ Many newspapers require photo ID before allowing adverts for prostitutes in the adult entertainment

6.131 Under the Act, an operator is any person who has any form of control over a prostitute and all operators are required to have 'Operators Certificates'. This includes owners, directors of companies, managers, and may include receptionists. People who have previous convictions for violence, sexual offences, or certain drug related offences may not be able to get an Operators Certificate. Previous convictions do not exclude prostitutes from working.²⁶⁸ Up to four prostitutes can work together and do not need an Operators Certificate, so long as no one is in charge of anyone else. Where more than four prostitutes work together as equals, they must apply for an Operators Certificate.²⁶⁹ Statistics indicate that approximately 65% of prostitutes work in brothels, 10% on the streets and 25% from home or rental properties in small groups.²⁷⁰

6.132 The Act does not deal specifically with street work, and some councils attempt to control street work through local ordinances.²⁷¹

6.133 In a document that criticised the Act at the time of its enactment, the Maxim Institute (the Institute) points to the negative effects of non-criminalisation on prostitutes and society as a whole.²⁷² The Institute submits that child prostitution increases in a decriminalised environment and that it does not address the fact that the majority of children start in prostitution because of sexual abuse, dysfunctional homes and to finance a drug habit.²⁷³

6.134 Although the New Zealand government is careful to state that it does not condone prostitution through the legislation, the Institute argues that is the very nature of the

columns. This is to ensure that they do not 'cause, assist, facilitate, or encourage a person under 18 years of age to provide commercial sexual services to any person', which also carries a prison sentence. NZPC 'Law'.

²⁶⁸ NZPC 'Law'.

²⁶⁹ NZPC 'Law'.

²⁷⁰ Barnett 'Decriminalising Prostitution in New Zealand' 2007.

²⁷¹ CEDAW 'The Status of Women in New Zealand' 2006.

²⁷² For sources in support of the points made by the Institute in opposition of decriminalisation, see Maxim Institute 'Six Myths on Prostitution Reform Bill' 2003. See also Raymond 'Ten Reasons for Not Legalizing Prostitution' 2003

²⁷³ For sources in support of the points made by the Institute in opposition of decriminalisation, see Maxim Institute 'Six Myths on Prostitution Reform Bill' 2003.

law to approve or disapprove of something. The Institute submits that non-criminalisation sends the message that the selling of sex as commodity is approved by the community.²⁷⁴

6.135 Finally the Institute submits that it is a myth that non-criminalisation of prostitution is the only option. The Institute argues that if the real aim (as stated by the New Zealand government) is to prevent violence against women, a better solution would be to adopt the Swedish model of criminalising those who purchases sex. Referring to the positive results achieved in Sweden, the Institute comments that criminalisation of the client targets the demand for prostitution.²⁷⁵

6.136 The Act established a Prostitution Law Review Committee (the Committee) to monitor its 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.²⁷⁶

6.137 The Act provides that the Committee should review the operation of, and consider amendments to, the Act after it has been in operation for three years.²⁷⁷ In May 2008, the Committee published its first and very comprehensive report.

6.138 The Committee reported on the following topics:²⁷⁸

- **Human rights:** By removing the illegality of their work, the Act has safeguarded the right of prostitutes to refuse particular clients and practices. The Committee is nevertheless concerned that some managed prostitutes are still required to provide commercial sexual services against their will.

²⁷⁴ For sources in support of the points made by the Institute in opposition of decriminalisation, see Maxim Institute 'Six Myths on Prostitution Reform Bill' 2003.

²⁷⁵ For sources in support of the points made by the Institute in opposition of decriminalisation, see Maxim Institute 'Six Myths on Prostitution Reform Bill' 2003.

²⁷⁶ In 2005, the Committee released its report on the nature and extent of the sex industry in New Zealand. Barnett 'Decriminalising Prostitution in New Zealand' 2007.

²⁷⁷ As at March 2006, there have been eight people convicted of employing or using prostitutes under the age of 18 since the Act was passed. CEDAW 'The Status of Women in New Zealand' 2006.

²⁷⁸ New Zealand Government **Report of the Prostitution Review Committee** 2008 at 12 and further. For a list of the Committee's recommendations see page 18 and further of the report.

- **Health, safety and well-being of prostitutes:** In general prostitutes were found to practice safe sex with a very low rate of HIV/AIDS incidence amongst them.²⁷⁹ The Act brought the sex industry under the Health and Safety Employment Act 1992. However, since no system of regular inspections of brothels exists, compliance with legislation is not measured. The majority of prostitutes interviewed felt that the Act could do little about violence against them.
- **Avoiding or exiting the sex industry:** The most common reason for entering the industry across all sectors is financial. As a result, exiting the industry is difficult with the potential loss of income constituting a significant barrier. An important point is that not all prostitutes want to exit as they are reluctant to lose the flexible working hours and the sense of belonging that some prostitutes describe.²⁸⁰ Despite the perception that most prostitutes are coerced to enter the industry, the Committee reports that only an average of 3.9% across all sectors are reported to have been forced by someone else at the time of entry and thereafter.
- **Brothel operator certification system:** The eligibility criteria for holding a certificate should be maintained, with the addition of a criterion that a certificate holder must be willing to facilitate inspections.
- **Use of under age people in prostitution:** The current threshold should be maintained as it acknowledges the vulnerability of people used in under age prostitution and recognises that there is a difference between commercial prostitution and other prostitution. The committee does not find that the Act has increased under age involvement in prostitution.
- **Outdoor prostitutes:** The numbers of outdoor prostitutes have remained stable since the enactment of the Act. The Committee considers that the purpose of the Act, in terms of promoting the welfare and occupational health and safety of prostitutes, cannot be fully realised in the outdoor prostitute sector and recommends that they be encouraged to either move to safer indoor settings or leave prostitution altogether.
- **Response of territorial authorities to the Act:** National legislation as to the location of brothels would be inappropriate as each area has its own needs and considerations. The management of prostitution in each area is best left to

²⁷⁹ Reportedly as a result of effective HIV/AIDS prevention campaigns that was established in the late 1980's.

²⁸⁰ These prostitutes find it offensive that they should be offered assistance to leave a job where they are quite happy. . New Zealand Government **Report of the Prostitution Review Committee** 2008 at 15.

territorial authorities who can effectively respond to the needs in the communities and consistent with the aims of the Act.

- **Employment conditions for prostitutes:** It should be a matter of choice for individual prostitutes and brothel operators to declare what the employment status of prostitutes working in brothels should be. Some prostitutes prefer the benefits and certainty of employment status, and others the freedom and flexibility of independent contractor status. Disputes should be dealt with through employment resolution processes and the courts.

6.139 The Committee concluded that, although many prostitutes are still vulnerable to exploitative employment practices, during the period of operation of the Act prostitution did not increase in size and many of the social evils predicted by those opposed to the decriminalisation of prostitution have not been experienced. On the whole the Act

has been effective in achieving its purpose, and the Committee is confident that the vast majority of people involved in the sex industry are better off under the PRA than they were previously.²⁸¹

6.140 Finally, the Committee is of the view that by 2018 the long-term impact of the Act will be much clearer.

Prostitution laws in African countries²⁸²

Botswana

6.141 Adult prostitution is illegal under the Penal Code of Botswana.²⁸³ The Penal Code prohibits procurement for the purpose of prostitution and penalises any person who

procures or attempts to procure any woman or girl to leave her usual place of abode in Botswana with intent that she may, for the purposes of prostitution, become an inmate of or frequent a brothel either in Botswana or elsewhere.

6.142 The Penal Code prohibits procurement by threats, intimidation, false pretenses, false representations, or administration of drugs. The Penal Code also prohibits

²⁸¹ New Zealand Government **Report of the Prostitution Review Committee** 2008 at 168 and further.

²⁸² The Commonwealth Secretariat 'Overview on Adult Prostitution' 2007 at 10 and further forms the basis for this discussion.

²⁸³ Chapter 08:01 of the Laws of Botswana.

living on earnings from prostitution, using any premises for prostitution, and maintaining brothels.²⁸⁴ If the perpetrator is a male who is under the age of 40, the court may impose - in addition to any imprisonment - corporal punishment.

6.143 While adult prostitution is illegal in Botswana, it remains widely practiced. The possibility to legalise prostitution was discussed, but not decided, at the SADC Parliamentary Forum's 21st plenary assembly session in 2007 in South Africa.²⁸⁵

Ghana

6.144 Adult prostitution per se is not illegal under the Criminal Code of Ghana. Prostitution is defined by section 279 of the Criminal Code²⁸⁶ to 'include the offering by a person of his body commonly for acts of lewdness (sex) payment although there is no act of ordinary sexual connection.' Brothel-keeping is an offence.²⁸⁷

6.145 Section 276 of the Criminal Code²⁸⁸, provides that any person who persistently solicits or importunes in any public place or in sight of any public place for the purpose of prostitution shall be liable for a first offence to a fine not exceeding 500.000 and for a second or subsequent offences shall be guilty of a misdemeanour. Section 275 of the Criminal Code provides that any person who in any public place or in sight of any public place persistently solicits or importunes to obtain clients for any prostitute or for any other immoral purpose shall be guilty of a misdemeanour.

6.146 Ghana has been engaged in the debate on the issue of legalising adult prostitution. In 2005, the Ghana AIDS Commission Director-General proposed that commercial prostitution be legalised.²⁸⁹ Other commentators propose that prostitution not be decriminalised as it will compound the problems that criminalisation aim to resolve. They

²⁸⁴ See SAIS 'Human Rights Reports in Africa' Botswana.

²⁸⁵ The discussion took place in the context of proposed amendments to the Public Health Act of Botswana. See **Sunday Standard** 'Prostitution, Homosexuality May Be Legalised' 2007.

²⁸⁶ Criminal Code 1960 (Act 29) as amended by sec 15 of Act 554.

²⁸⁷ Sec 106 of Criminal Code 1960 (Act 29).

²⁸⁸ Criminal Code 1960 (Act 29) as amended by sec 14 of Act 554.

²⁸⁹ Amoah 'Ghana Aids Commission Chief wants Prostitution Legalised' 2005. See also the discussion by Eric 'A Glance at Prostitution' 2008.

recommend that the government should attempt to end prostitution by reducing poverty and enforcing the existing laws.²⁹⁰

Kenya

6.147 Under the Kenyan Penal Code procurement to have unlawful carnal connexion is a misdemeanour and punishable by imprisonment and corporal punishment.²⁹¹ A male person living on earnings of prostitution or who persistently solicits or importunes for immoral purposes is guilty of a felony.²⁹² Similarly, a woman living on earnings of prostitution or who is aiding, abetting or compelling a prostitute to commit prostitution is guilty of a felony.²⁹³ The Penal Code also declares it a felony to keep a brothel.²⁹⁴

Lesotho

6.148 The Women and Girls Protection Act of 1949 prohibits procuring any woman or girl to have 'unlawful carnal connection,' whether in the country or elsewhere. The Act also prohibits procuring a female to send her out of the country for prostitution or to frequent a brothel. Punishment for the offense is a fine or imprisonment for up to 6 years. A woman's consent is no defense for the crime. Procurement using threats, intimidation, false pretenses, false representation or drugs is also prohibited.

6.149 In 2003, Parliament passed the Sexual Offences Act.²⁹⁵ In accordance with this Act, it is an offence for a person to engage in a sexual act with another person through the use of force (physical or psychological) or threat, other forms of compulsion.²⁹⁶

²⁹⁰ Obeng 'Should Prostitution Be Legalized?' Ghana Home Page 2008.

²⁹¹ Section 147 of Chap 63 of the Laws of Kenya.

²⁹² Section 153 of Chap 63 of the Laws of Kenya.

²⁹³ Section 154 of Chap 63 of the Laws of Kenya.

²⁹⁴ Section 159 of Chap 63 of the Laws of Kenya.

²⁹⁵ Act No. 29 of 2003.

²⁹⁶ See SAIS 'Human Rights Reports in Africa' Lesotho.

Namibia

6.150 Prostitution was never an offence in terms of the Namibian common law, and the act of engaging in sexual intercourse for reward is not criminalised in terms of any Namibian statute. Various other aspects of prostitution are, however, currently criminalised by statutes such as the Combating of Immoral Practices Act of 1980. The Act is aimed primarily at pimps and brothel owners and at public manifestations of prostitution.

6.151 The Combating of Immoral Practices Act prohibits soliciting, living off the earnings of prostitution and keeping a brothel. The Act further prohibits procurement, including procuring a woman for the purpose of unlawful carnal intercourse, enticing a woman to a brothel for the purpose of prostitution, procuring a woman to make her become a prostitute or an inmate of a brothel, or causing any drug or intoxicating liquor to be taken by a woman with intent to stupefy or overpower her so as to enable any person to have unlawful carnal intercourse with her. The Combating of Immoral Practices Act penalises taking any female to a brothel or detaining her against her will for the purpose of unlawful carnal intercourse with another person.²⁹⁷

6.152 The former Health Minister strongly supported the move to legalise prostitution in Namibia and argued that legalising the trade would empower prostitutes to negotiate safer sex and help slow the spread of HIV, because they could then be tested, treated, counseled and educated about sexually transmitted diseases. However, this argument was rejected by the Minister's cabinet colleagues and Parliament, largely as a result of conservative values.²⁹⁸

6.153 The Legal Assistance Centre in Namibia²⁹⁹ continues to advocate for the decriminalisation of prostitution, arguing that illegality is a basis for harassment by clients and the police.³⁰⁰

²⁹⁷ See SAIS 'Human Rights Reports in Africa' Namibia.

²⁹⁸ See UN media IRIN 'Namibia Considers Legalising Prostitution' 2006.

²⁹⁹ A public interest law centre advocating human rights in Namibia.

³⁰⁰ See UN media IRIN 'Namibia Considers Legalising Prostitution' 2006.

Nigeria

6.154 Adult prostitution *per se* is not illegal in Nigeria. However, under section 225A of the Nigerian Criminal Code³⁰¹ male persons who live of the earnings of prostitution or who persistently solicit in public places for immoral purposes, shall be liable to imprisonment for two years, and, in the case of a second or subsequent conviction, shall be liable to caning. It is also an offence to keep or manage a brothel and a guilty party is liable to a fine or imprisonment.

6.155 Individual Nigerian States can amend the Criminal Code, and in 2000 Edo State added new provisions making prostitution itself a crime and purporting to criminalise trafficking.³⁰²

Swaziland

6.156 Article 42 of the Criminal Code of Swaziland makes procuring girls and women for prostitution punishable by 5 years imprisonment or a fine of 1000 Rand.

Uganda

6.157 The Ugandan Penal Code³⁰³ prohibits procuring a female and causing her to become a common prostitute, to leave the country to frequent a brothel elsewhere, or to become an inmate of a brothel. Punishment for those offenses is imprisonment for up to 7 years. The same punishment applies in cases in which a female below age 21 is procured for the purpose of unlawful carnal connection with any other person in Uganda or elsewhere.³⁰⁴ The code also prohibits procuring any person by using threats, intimidation, false pretense, or false representation or by administering drugs.³⁰⁵

³⁰¹ Laws of the Federation of Nigeria 1990 Criminal Code Act Chap 77.

³⁰² Pearson 'Human Traffic, Human Rights' 2002 at 159.

³⁰³ Ugandan Statutes Chap 120.

³⁰⁴ Article 125.

³⁰⁵ Article 126.

6.158 Under the Criminal Code, owning or occupying premises where a girl younger than 18 is induced to have unlawful sex with any man is punishable by imprisonment for 5 years.³⁰⁶

6.159 In a recent debate in Parliament, a number of MPs came out in favour of moving towards legalising prostitution, with the view to ensuring that the business is conducted in a safer way, whereby prostitutes would go through medical check-ups. In addition, prostitutes would be required to pay taxes to the government.³⁰⁷

6.160 This has triggered a countrywide debate among Ugandans and two opposing groups have emerged, one supporting the idea, and the other vehemently against it.³⁰⁸

United Republic of Tanzania

6.161 Under chapter XV of the Tanzania Penal Code³⁰⁹ adult prostitution, benefiting from the proceeds of the business, and procurement or assisting someone to engage in prostitution is illegal.³¹⁰

Zambia

6.162 Zambia has not legislated against prostitution but has laws that prohibit activities related to it. Under the Zambia Penal Code³¹¹ prostitution is referred to as a phenomenon with an economic dimension and certain aspects of it are penalised. It is illegal to solicit for clients, and to live off the earnings of a person who is engaged in prostitution. It is also a punishable offence to detain a woman or a girl against her will and compel her to have sex with a man.

³⁰⁶ Article 127. In terms of arts 125 and 126 no person can be convicted of procurement on the evidence of only one witness unless corroborating evidence is given.

³⁰⁷ Kihale 'Should Prostitution be Legalised?' 2007.

³⁰⁸ Kihale 'Should Prostitution be Legalised?' 2007.

³⁰⁹ Cap. 16 Chap XV stipulates offences against morality.

³¹⁰ Kihale 'Should Prostitution be Legalised?' 2007.

³¹¹ Chapter 87.

Senegal

6.163 In Senegal, prostitution is judged by society to be immoral. Those who practice it are often punished by the family and the community through rejection and physical and verbal violence. This moral attitude of the population has a strong basis in religious beliefs.³¹² In practice, prostitution exists predominantly in urban centres and is increasing due to economic hardship.

6.164 A legal framework for prostitution was established through Law 66-21 of February 1966. Senegal was one of the first countries in West Africa to regulate prostitution with a number of positive results. These included free access to health care, control of sexually transmitted infections and free access to condoms and information. Another important benefit was the early control of sexually transmitted infections among female prostitutes prior to the beginning of the HIV epidemic.³¹³

6.165 The law requires prostitutes to be at least 21 years of age and registered with the State. They are also required to undergo regular health examinations and carry health cards. Free condoms are provided at the first visit to the clinic and are renewed monthly. Article 318 of the Penal Code can be used to accuse prostitutes of public indecency and sets the limits for the law regulating prostitution. Because of these restrictions, prostitutes can be prosecuted for soliciting, non presentation of the health records, non compliance with medical visits and non registration as a prostitute.

6.166 It is, however, illegal to aid or abet a woman to enter prostitution, to live off the earnings of a prostitute or to run a brothel.³¹⁴ The definition of soliciting in article 9 of the Penal Code is open for interpretation by the police and often leads to abuse. As a result of this, prostitutes are no longer motivated to be registered and prefer to exercise their trade clandestinely.³¹⁵

³¹² Lo 'Western Africa Assessment on Sexual Health and Rights' 2006 at 13. Also Prostitution ProCon.org 'Prostitution Policies around the World' 2008.

³¹³ Lo 'Western Africa Assessment on Sexual Health and Rights' 2006 at 18. Also Prostitution ProCon.org 'Prostitution Policies around the World' 2008.

³¹⁴ Articles 323 and 325 of the Penal Code. Lo 'Western Africa Assessment on Sexual Health and Rights' 2006 at 18. Also Prostitution ProCon.org 'Prostitution Policies around the World' 2008.

³¹⁵ Lo 'Western Africa Assessment on Sexual Health and Rights' 2006 at 18. Also Prostitution ProCon.org 'Prostitution Policies around the World' 2008.

Cote d'Ivoire

6.167 While prostitution is not legalised in Cote d'Ivoire and is disapproved of as a punishable social deviance, it is nevertheless 'tolerated'. However, the majority of prostitutes experience rejection, ostracism, rackets, exploitation, stigma, rape and violence from men, *ie* clients, barmen, pimps, policemen, young boys enrolled in the political militia. This, as well as their low economic status and the high illiteracy rate, causes a high level of self stigmatisation among prostitutes. It also constitutes a major constraint to their ability to speak out and to look for help when their rights are violated.³¹⁶

6.168 The Penal Code prohibits soliciting others to engage in debauchery³¹⁷ and makes it punishable by a fine or imprisonment for 3 to 15 months.³¹⁸ Procurement is an offence that includes assisting in the prostitution of others,³¹⁹ sharing in the profits from the prostitution of others,³²⁰ living with a person regularly engaged in prostitution,³²¹ delivering or enticing a person into prostitution,³²² and acting as an intermediary between persons engaged in prostitution and those who exploit or remunerate prostitution.³²³ Punishment for procurement is a fine and imprisonment for 1 to 5 years.³²⁴ Maintaining an establishment that has prostitution as its primary or secondary purpose is punishable under the penal Code by a fine and imprisonment for 2 to 5 years.³²⁵

³¹⁶ Lo 'Western Africa Assessment on Sexual Health and Rights' 2006 at 28. Also Prostitution ProCon.org 'Prostitution Policies around the World' 2008.

³¹⁷ SAIS 'Human Rights Reports in Africa' Cote d'Ivoire.

³¹⁸ Article 338.

³¹⁹ Article 335(1).

³²⁰ Article 335(2).

³²¹ Article 335(3).

³²² Article 335(4).

³²³ Article 335(5).

³²⁴ Article 335. The punishment is doubled in cases involving a minor under the age of 21 or an act accompanied by threats, duress, violence, abuse of authority, or fraud. Article 336.

³²⁵ Article 339(1).

The International Labour Organisation

6.169 The International Labour Organisation (ILO) is the global body of the United Nations responsible for drawing up and overseeing international labour standards. The ILO is devoted to advancing opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and human dignity. Its main aims are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue in handling work-related issues.³²⁶

*The ILO Report*³²⁷

6.170 In 1998 the ILO published a report entitled **The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia**, based on detailed studies of prostitution in four countries, namely Indonesia, Malaysia, Philippines and Thailand. These national case studies 'are illustrative of the situation in many countries,' with the Report noting that prostitution and its attendant problems are universal.

6.171 The Report notes the rapid growth of prostitution in recent decades, with the sex business assuming the dimensions of a commercial sector that contributes substantially to employment and national income in the region. In addition, the revenues it generates are crucial to the livelihoods and earnings potential of millions of workers beyond the prostitutes themselves. Despite this fact, the industry is not recognized as an economic sector in official statistics, development plans or government budgets and there is no clear legal stance nor effective public policies or programmes to deal with prostitution in any of the four countries.

6.172 Emphasising the diversity in the industry, the report states that some freely choose prostitution as an expression of sexual liberation, or as an economically rational decision based on income potentials, costs involved and available alternatives. Others are pressured by poverty and dire economic circumstances. Still others are subject to overt coercion from third parties.³²⁸

³²⁶ The ILO was created in 1919, as part of the Treaty of Versailles that ended World War I, to reflect the belief that universal and lasting peace can be accomplished only if it is based on social justice.

³²⁷ Unless otherwise indicated the source for this information is ILO 'The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia' 1998, a report based on detailed studies of prostitution and commercial sex work in Indonesia, Malaysia, Philippines and Thailand.

³²⁸ ILO 'The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia' 1998 at 212 as referred to by Raymond 'Legitimizing Prostitution as Sex Work' 2003 at 8.

6.173 The report addresses prostitution as a form of work. Despite the stigma and dangers associated with prostitution, prostitution provides significantly higher earnings than other forms of unskilled labour. In the absence of social welfare programmes, prostitution is often the only viable alternative in communities coping with poverty, unemployment, failed marriages and family obligations. While a significant proportion of prostitutes claimed they wanted to leave the occupation if they could, for single mothers with children, it offers a more flexible, remunerative and less time-consuming option than factory or service work. The rationale was that in exchange for engaging in an occupation which is disapproved of by most of society and which carries known health risks, 'the workers expected to obtain an income greater than they could earn in other occupations.' The report emphasises, however, that the earnings and working conditions are miserably low at the bottom end of the market with comparatively higher risks in terms of personal safety and exposure to sexually transmitted diseases and HIV/AIDS.

6.174 The Report recommends prostitution be addressed as an economic sector, an approach that policy-makers have avoided in favour of moral, religious, health, human rights and criminal issues. The following should be considered when developing policy:

- Separate measures need to be envisaged for adult prostitution versus child prostitution. Children are invariably victims of prostitution whereas adults could choose prostitution as an occupation.
- The variety of circumstances prevailing among prostitutes needs to be recognised: some prostitutes freely choose prostitution, others are pressured by poverty and dire economic circumstances, and still others are coerced or deceived into prostitution.
- The focus of the policy should be on structures that sustain prostitution and not the individual. These include the economic and social bases of the phenomenon as well as the double standard of morality for men and women.
- Official recognition of prostitution by maintaining records about it would be useful in assessing, for example, the health impacts of the sector, the scope and magnitude of labour market policies needed to deal with workers in the sector and the possibilities for extending the taxation net to cover many of the lucrative activities associated with it.

- Recognition of the sex industry as an economic sector may enable governments to regulate and monitor the expanding criminal elements of the industry such as organised crime, drug abuse and child prostitution.³²⁹
- Policies for the promotion of tourism, the export of female labour for overseas employment, the promotion of rural-urban migration to provide cheap labour for export-oriented industrialisation, when combined with growing income inequalities and the lack of social safety nets, indirectly contribute to the growth of the sex sector.
- Any health programme should be directed at prostitutes as well as clients.

*Comments on the ILO report*³³⁰

6.175 The ILO report has been subject to extensive debate; Raymond³³¹ submits that although the ILO stops short of advocating legalisation of prostitution, the economic recognition promoted by the report could not occur without legal acceptance of the industry.³³²

6.176 However, Raymond is critical of the ILO's approach, advocating for a more systemic approach whose starting point is that the significant contribution of the sex industry to the economy and GDP of many countries is cause for alarm and for action against the industry, rather than a motivation its economic recognition. The ILO should question why prostitution is the only place where women can turn in the absence of alternatives. The fact that there are no better job options should not be manipulated to 'turn women's desperate economic plight against them by institutionalising their exploiters as entrepreneurs.' In fact, the ILO confuses compliance with consent by defining force narrowly. Other studies show that very few women really choose prostitution as a career.

6.177 Raymond notes that the lack of criticism of men buying women for prostitution implicitly supports the view that men need sex and are entitled to have it. Raymond argues

³²⁹ ILO 'The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia' 1998 as referred to by Raymond 'Legitimizing Prostitution as Sex Work' 2003 at 5.

³³⁰ Unless otherwise indicated the source for this information is ILO 'The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia' 1998, a report based on detailed studies of prostitution and commercial sex work in Indonesia, Malaysia, Philippines and Thailand.

³³¹ Dr J G Raymond was the Co-Executive Director of the Coalition against Trafficking in Women in 2003.

³³² Raymond 'Legitimizing Prostitution as Sex Work' 2003.

that women in prostitution are violated, not because the laws do not protect them or their work, but because of men's abuse of prostitutes and the sexual, physically degrading, exploitative and degrading acts that it involves. Rather than improving these circumstances, official recognition of the sex sector will reinforce women's subordination and lead to greater sexual objectification and economic inequality of women.

6.178 Raymond does not support the approach of the ILO, suggesting that statistics from Holland and Germany, which have recognised prostitution as work and as an economic sector, indicate that this approach has caused prostitution to flourish more than when it was illegal. Raymond's view is that the ILO report points to an indifferent approach to the injury and suffering of women in prostitution. Rather, women in prostitution need social services, educational opportunities, and economic alternatives – jobs that do not lock them into lives of sexual and economic exploitation.

6.179 Ditmore³³³ supports the ILO's recommendation for the recognition of the sex industry as labour as ILO statutes governing minimum standards of working conditions could be applied to the sex industry, and modified where necessary to accommodate conditions specific to prostitution.³³⁴ Where prostitution is a criminal activity, prostitutes are denied the right to decent working conditions and this has repercussions as violations of human rights. Where prostitutes have attained better working conditions, on the other hand, and where minimum standards for employment and attendant requirements for occupational health and safety apply, they are empowered to address issues of abuse.

6.180 In another comment on the ILO report, Agustín and Weldon³³⁵ note the support for the recommendations by social-justice activists who see it as progressive and humane.³³⁶ However, they suggest that further research is needed as to how various kinds of legislation affect the well-being of prostitutes. This research should use control groups of women from similar backgrounds as the prostitutes who are studied. The research should distinguish between forced and voluntary prostitution, include both men and women and include all responses whether they conform to the researcher's politics or not.

³³³ Melissa Ditmore is from the Network of Sex Work Projects.

³³⁴ Examples of such specifics include the right to decline a client, Ditmore 'Addressing Sex Work as Labour' 1999.

³³⁵ Laura Agustín is a member of Connexions for Migrants, an association of Third World migrants in Europe and Jo Weldon is the director of the Sex Workers International Media Watch.

³³⁶ Agustín and Weldon 'The Sex Sector: A Victory for Diversity' 2003 at 31.

The European Court of Justice

6.181 The Court of Justice of the European Communities, usually called the European Court of Justice (ECJ), is the highest court of the European Union (EU). It has the ultimate say on matters of EU law in order to ensure equal application across the various European Union member states.³³⁷

6.182 In 2000, the ECJ overruled a decision by a Dutch immigration officer to deny a Czech woman permission to reside in the Netherlands for the purposes of prostitution, on the basis that prostitution could not be seen as labour. The ECJ made it clear that prostitution is labour in the full juridical sense, and so, when nationals of these countries can prove that they are able to support themselves as self-employed prostitutes, they must be given residence permits.³³⁸

³³⁷ The body was established in 1952 and is based in Luxembourg City. **Wikipedia** – European Court of Justice. The ECJ comprises of 27 Judges and eight Advocates General. The Judges and Advocates General are appointed by common accord by the governments of the Member States for a renewable term of six years. They are chosen from among lawyers whose independence is beyond doubt and who possess the qualifications required for appointment, in their respective countries, to the highest judicial offices, or who are of recognised competence. The Court may sit as a full court, in a Grand Chamber of 13 judges or in Chambers of three or five judges. The Court sits as a full court in the particular cases prescribed by the Statute of the Court (proceedings to dismiss the European Ombudsman or a Member of the European Commission who has failed to fulfil his or her obligations, etc.) and where the Court considers that a case is of exceptional importance. It sits in a Grand Chamber when a Member State or an institution which is a party to the proceedings so requests, and in particularly complex or important cases. Other cases are heard by Chambers of three or five judges. See Court of Justice of the European Communities.

³³⁸ Kilvington et al'Prostitution Policy in Europe' 2000 at 12. **Aldona Malgorzata Jany and others v Staatssecretaris van Justitie 2001.**

PART IV

LEGAL MODELS AND PROPOSALS

CHAPTER 7: DIFFERENT LEGAL FRAMEWORKS FOR PROSTITUTION LAW AND PUBLIC RESPONSES

Introduction to different legal models for prostitution

7.1 In chapter 2, the Commission has identified four legislative models for addressing prostitution.¹ In this Chapter, these are discussed in more detail, together with the responses received by the Commission to the Issue Paper.² The models are:

- Total criminalisation
- Partial criminalisation
- Non-criminalisation
- Regulation

7.2 These four models respond in different ways to the complexity of prostitution and the fact that:

- prostitution takes many forms, for example, adult and under-aged prostitution, outdoor and indoor prostitution, voluntary and coerced prostitution
- different role-players are involved in prostitution, for example: prostitutes, clients, brothel owners and pimps
- different categories of laws may regulate the purchase and sale of sex, including criminal law, labour law, municipal law, etc.

7.3 A major division between the models is between those that criminalise prostitution and those that do not. Where prostitution is subject to the criminal law, the actions of only one, or of some, or of all the role players involved in prostitution may be criminalised under all circumstances or under certain circumstances only. Total

¹ These four models are drawn from a report by the UN Special Rapporteur on Violence against Women and Children. See chap 2.8 and 2.9 above.

² Submissions may be dated as they were received by the SALRC in 2002 after publishing Issue Paper 19 (Project 107) Sexual Offences: Adult Prostitution 2002.

criminalisation refers to those legislative models that criminalise all aspects of prostitution, whereas partial criminalisation refers to laws that only criminalise some aspects of prostitution. For example, one may only punish prostitutes who sell sex or only punish those who are involved in the management and organisation of prostitution or only punish those who purchase sex.³ All models, however, criminalise coerced and underage prostitution.

7.4 Two models do not use the criminal law as a primary means of addressing prostitution. These are non-criminalisation and regulation. Under the non-criminalisation model prostitutes and prostitution related businesses are generally subject to the laws which apply to all employees and business sectors, and do not operate under a specific regulatory regime.⁴ Under the regulation model a specific regulatory system determines where, when and how prostitution will take place. Some elements of prostitution such as prostitution of a minor and forced prostitution, usually remain criminalised under the decriminalised (New Zealand) and regulatory (the Netherlands) models. In addition, regulatory models may criminalise forms of prostitution that occur outside of the permitted forms.

7.5 In general, each country has its particular version of one or more of these models. A major factor in determining which model, or variation thereof, should be adopted in a particular jurisdiction is the identification of the purpose or purposes that the lawmaker seeks to achieve. In determining such purpose or purposes, the following matters play a role: socio-economic issues, moral and religious viewpoints, human rights, the nature of the harm to women, culture and tradition, and trafficking in persons for the purpose of selling sex. The particular meaning and weight attached to each factor varies across jurisdictions, and are contingent upon the particular historical, philosophical and social context of each country. Approaches to dealing with prostitution are also influenced by whether it is viewed as a phenomenon that can or should be eliminated, or as one that will persist or should be left alone.⁵ The following paragraphs briefly illustrate some of the different purposes identified by comparative jurisdictions in determining their particular legal responses to prostitution.

³ Pinto, Scandia and Wilson 'Prostitution Laws in Australia' 1990.

⁴ Hughes 'Women's Wrongs' 2004. The measures can also protect communities who request such protection from their perception of the consequences of exposure to prostitution and related activities and / or to protect the health of both the prostitute and his or her client. See para 745 and further for a discussion of the non-criminalisation model.

⁵ Georghiou, McCallum 'Briefing Prostitution Tolerance Zones (Scotland) Bill' 2002.

Total criminalisation

7.6 The USA, Thailand and South Africa are examples of the total criminalisation of prostitution.

- The Federal government of the USA opposes legalised prostitution and supports criminalisation based on the idea that prostitution is inherently harmful and dehumanising, and fuels trafficking in persons.⁶
- In Thailand, the safeguarding of the welfare of women and children and the prevention of the exploitation of children are cited as reasons for criminalising prostitution.⁷ Despite this official approach to criminalisation, however, prostitution is widely accepted by society and is a significant part of the sex tourism industry in that country.
- Criminalisation in South Africa is justified on moral grounds to prevent social ills such as child prostitution, trafficking in women and children, public nuisance, public health and other associated crimes.⁸

Partial criminalisation

7.7 In Sweden and the UK, prostitution is subject to partial criminalisation.

- In Sweden, the client of the prostitute is criminalised. The stated purpose of this is to reduce male violence against women and children (of which prostitution is a part). It is believed that criminalising the buyer will reduce the demand for prostitution, and thus end the oppression of prostitutes.⁹
- In the UK, brothel-keeping, pimping and under-aged prostitution are illegal, but not the act of prostitution. The purpose of the UK Sexual Offence legislation (which is broader than just prostitution) is to protect the public from sexual crimes whilst also protecting the right of adults to a private life. Specific purposes in

⁶ U.S Department of State 'The Link between Prostitution and Sex Trafficking' 2004.

⁷ Preamble, the prevention and Suppression of Prostitution Act of 1996.

⁸ See the State's arguments in **S v Jordan and Others**.

⁹ De Santis 'Sweden's Prostitution Solution' 2004.

relation to prostitution include prevention, obviating demand, developing of routes out of prostitution and ensuring justice.¹⁰

While the Swedish model focuses on reducing the demand for prostitution, the UK model emphasises the reduction of exploitation by third parties.

Non-criminalisation

7.8 In New Zealand, prostitution is no longer subject to criminalisation. In doing so, the government emphasised that the purpose of the legislation was not to endorse or morally sanction prostitution but to safeguard the rights and safety of prostitutes and to minimise the harms caused by prostitution.¹¹

7.9 It is difficult to isolate particular purposes in relation to models. In some form or another, all models are concerned with issues of morality and harm – although these can be defined quite differently by different jurisdictions. At the same time '[s]ex work is mainly an economic activity and has foundations in deeply ingrained patriarchal values and beliefs in society'.¹² What distinguishes some approaches to prostitution is the extent to which they acknowledge 'these economic and social foundations, or focus mainly on moral and religious issues'.¹³ What is notable is that the regulation and non-criminalisation models are more likely to express concern for the rights, health and safety of prostitutes, and to seek to minimise the socio-economic harms caused to prostitutes themselves. Some forms of partial criminalisation also express this concern, especially where the purpose is to prevent reduce forced and under-aged prostitution. They are less prevalent in criminalisation models especially total criminalisation.

Regulation

7.10 In the Netherlands and Germany, prostitution is subject to regulation.

¹⁰ UK Home Office 'Protecting the Public' 2002.

¹¹ Section 3 of the Prostitution Reform Act of 2003.

¹² Karandikar 'Need for Developing a Sound Prostitution Policy' 2008.

¹³ Karandikar 'Need for Developing a Sound Prostitution Policy' 2008.

- The Netherlands accepts prostitution as a reality that will never disappear. Hence it seeks to regulate prostitution to protect prostitutes from commercial exploitation, prevent involuntary prostitution, advance the rights of those who work as prostitutes and eliminate criminal involvement in the prostitution industry.¹⁴
- In Germany, prostitution is permitted and regulated. The purpose of this is to remove the taint of immorality from prostitution and to strengthen the working rights of prostitutes and protect them against social and legal discrimination.¹⁵

Note however that both the Dutch and German governments are adamant that activities relating to forced prostitution, trafficking in human beings and the prostitution of children are illegal.

7.11 In the following discussion the four models of total criminalisation, partial criminalisation, non-criminalisation and regulation are discussed, first to identify the features of each model, and secondly to provide summaries of the comments received on the Issue Paper. At the end of each section an evaluation of the model is provided.

The total criminalisation and partial criminalisation models

7.12 These two models are discussed together as they raise similar issues and the comments received on the Issue Paper tend to use these interchangeably. However, the distinction between the two should also be noted namely who is targeted by the criminalisation.

Features of the total criminalisation and partial criminalisation models

7.13 Under these two criminalisation models some or all aspects of prostitution are prohibited as criminal offences. These criminal provisions are usually enforced by police officials and other state law enforcement agencies that are authorised to apprehend and, where appropriate, arrest persons suspected of committing these offences. A person charged with and convicted of such a criminal offence will usually face punishment in the

¹⁴ Article 250a of the Dutch Penal Code. See Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004, Norwegian Ministry of Justice and Police Affairs 'Purchasing Sexual Services' 2004.

¹⁵ Administrative Court (Verwaltungsgericht) Berlin (Az.: 35 A 570.99) 1 December 2000. See the German Ministry for Family Affairs Report, Hughes 'Germany: Sex Trafficking, Prostitution, and World Cup Games' 2004.

form of a fine or imprisonment, or both. A distinction is made between *partial* and *total* criminalisation.

7.14 There are different types of **partial criminalisation**. In one, activities related to prostitution such as soliciting, brothel-keeping and living off the earnings of prostitution are prohibited, while prostitutes themselves are free from criminal sanction. The UK is an example of this partial criminalisation model. Another version criminalises persons who solicit or facilitate the performance of sexual services of prostitutes *i.e.* the client or pimp, but not the prostitutes. Sweden is an example of this.

7.15 **Total criminalisation** penalises prostitution and all acts relating to prostitution. Examples of this model are rare.¹⁶ The laws against prostitution in the state of Idaho in the United States of America are an example. It may happen in a model of total criminalisation that the sanctions towards the prostitute and solicitor is stricter than those towards the other role players, as is the case in the state of Colorado in the United States of America. The current legal regime in South Africa is also an example of this.

Comments by respondents to the Issue Paper on the total criminalisation and partial criminalisation models

7.16 Although some respondents to the Issue Paper¹⁷ did distinguish between partial and total criminalisation, it should be borne in mind that not all respondents were aware of this distinction.

7.17 A number of respondents to the Issue Paper were opposed to prostitution and supported total criminalisation of prostitution in South Africa.¹⁸ Many of these based their

¹⁶ Phoenix 'Regulating Prostitution' 2007 at 7.

¹⁷ The relevant questions posed to respondents in the Issue Paper were the following:

- If you are of the opinion that criminalisation of adult prostitution is appropriate, please indicate:
Which form should this system of criminalisation take?
Total criminalisation.
Partial criminalisation.
Should the clients of prostitutes be guilty of a criminal offence?

¹⁸ For example Mike Dabrowski; N.A. Ward; Brian Jubber, ACDP Ladysmith Branch; Igshaan Thomas; Ann Selbach; Anne van Vuuren; Shirley Bolley, Sharon Apolles; Shamala Naidoo; Ndyebo;FS; Anonymous; Adrian Fourie; Keval-Ann Walker; Doctors For Life International; Mev. A Louw; Anne de Vos; Niekerk van Hasselt; Me Ronell Henning, Director of Music Ladybird Music Academy, Ladybrand; Mrs Hanneljie Lategang Owner Fort Animy Guesthouse, Ladybrand; Me Tiz Berbieri Furniture Sales manager; Neels Veljoen, Berkshire, United Kingdom; The Diocese of Port Elizabeth Mother's Union Christian Family Life in conjunction with all the Christian organisations in Port Elizabeth; Mrs Lulu Msutu, Vice-President Of The

views on moral and religious grounds.¹⁹ Some of these respondents stated that the very act of a human being selling his or her body for gain demeans and undermines the dignity of humanity, making sex objects of prostitutes.²⁰ A group of concerned Christian women, strongly opposed to prostitution, said that it degrades women and poses a danger to children. It also lowers moral standards in our country, downgrading entire neighbourhoods and breaking up the family structure which is necessary to healthy development of normal children.²¹

7.18 Some respondents argued that prostitution is harmful to the prostitute, to the client and to society as a whole.²² Doctors for Life International (DFLI) made specific reference to the risks of transmitting diseases, including HIV. It also expressed its concern for the detrimental effect that prostitution may have on the psychology of the prostitute.²³

7.19 J van Hasselt appealed to the Commission to refrain from changing the current legal position of criminalisation of prostitutes and stated that prostitution:²⁴

- is not a victimless crime

Mother's Union Christian Family Life; Bishop Bethlehem Nopece, The Bishop Of The Church Of The Province Of Southern Africa (Anglican) In Port Elizabeth; all Women of Diocese of Port Elizabeth; Dr Graham Catto, Pastor Hatfield Christian Church; Phillip Rosenthal; Christine Stander; Franz Von Reiche, Additional Magistrate, Pretoria Magistrate's Office, Civil Section, Waymakers Christian Fellowship; Mnr Hannes Marais; J Van Hasselt; Dieter Claassen, Committee member, CFT- Pretoria; Brian Jubber, ACDP Ladysmith Branch, Peter D Anderson Minister of the East Claremont Congregation church; P & B Anderson; Jeanine McGill; Shirley Bolley; Rod & Cathy Campbell; Olive Smith, Chairperson: splashes of joy interdenominational prayer group; Dr Tim G Grout, on behalf of Crisis Pregnancy Care in Nelspruit; Rev Wilfred Mabizela; Miss Annelize Ruiters; Miss Clair Charles; Leslie Berg; Reverend Pieter Marias, Field Director Africa, Florida Evangelistic Association, South Africa; Christians for Truth, representing 107 000 members; Anonymous Hotel Owner; Anel and Ernst Scribe; Marius Pretorius, Christianview.org.

¹⁹ For example Jeanine McGill, Andre Fourie; Shirley Bolley; The Diocese of Port Elizabeth Mother's Union Christian Family Life; Bishop Bethlehem Nopece, The Bishop Of The Church Of The Province Of Southern Africa (Anglican) In Port Elizabeth; Philip Rosenthal; Christine Stander; Dieter Claassen CFT Pretoria; Peter D Anderson; Rod & Cathy Campbell; Franz Von Reiche, Additional Magistrate, Pretoria Magistrate's Office, Civil Section.

²⁰ For example Sharon Apolles; Me Ronell Henning, Director of Music Ladybird Music Academy, Ladybrand; Mrs Hanneljie Lategang Owner Fort Animy Guesthouse, Ladybrand; Me Tiz Berbieri; Furniture Sales manager.

²¹ Splashes of joy interdenominational prayer group.

²² Doctors For Life International; Igshaan Thomas; Franz Von Reiche, Additional Magistrate, Pretoria Magistrate's Office, Civil Section.

²³ These concerns were also expressed by Christine Stander, Waymakers Christian Fellowship, Marius Pretorius.

²⁴ These concerns were shared by Christianview.org.

- defiles woman through misuse of their sexuality which cause emotional and spiritual damage
- corrupts men
- promotes a view of women as sex objects and this leads to decreased value of the family,
- undermines loyalty in marriage and leads to divorce, instability and family break-ups
- spreads diseases and affects innocent women
- is not often a 'free choice'
- is usually accompanied by forms of force or enslavement and drug abuse
- is addictive to men
- causes neighbourhood decay.

7.20 A number of respondents were opposed to the criminalisation of prostitution. Some of these submitted that the current criminalisation of prostitution impacts negatively on prostitutes' health, welfare and reproductive health, limits their access to social services and gets in the way of HIV education and prevention programmes.²⁵ Respondents also pointed to the following negative effects of the criminalisation of prostitutes:²⁶ they are more prone to police brutality, stigmatised, violated, arrested, imprisoned, exploited and have limited access to health services.

7.21 SWEAT stated that the criminalisation of prostitution is a violation of prostitutes' constitutional rights and will not succeed in putting an end to it. On the contrary, SWEAT's monitoring research indicates that criminal prosecution only makes prostitutes more vulnerable to acts of violence since it forces them and their clients outside the traditional safe areas. The threat of prosecution pushes them underground and thereby augments the organised criminal world.

7.22 Hazel, a prostitute for nine years who currently owns several brothels, opposed the current status of criminalisation, saying that not all prostitution is exploitative. She submitted that if prostitution remains criminalised it will send prostitutes deeper into hiding. In her view, criminalisation enhances HIV risk as prostitutes take chances. If

²⁵ Mapuseletso; Sebina; Sphiwe; Musa; Dina; Dubs; Yoyo, prostitutes of Carletonville, Dr R E Chernis.

²⁶ Thandi Sam, Princess Cele, Nosipho Ndlovu, Phindile Mthethwa; Princess Mkhize, Children's Rights Ministries, Chatsworth, Durban; Kate Brady; Pam Taai; Deidre Klopper; Stone Ross; Martha Raw; Rick Pes, sex workers of King Williams Town.

prostitution were legal, prostitutes would not be looked down on and could openly go for HIV tests.

7.23 Brief comments were received from respondents to the effect that criminalisation of prostitution makes it difficult to earn a living for the following reasons:²⁷

- Landlords evict and terminate the leases of prostitutes or refuse them accommodation to ply their trade.
- Prostitutes' children are victimised by neighbours and the community.
- Prostitutes are verbally abused by the public.
- Prostitutes are physically abused, mostly by the police.
- Police steal from prostitutes and rape them.
- It violates a prostitute's human rights.
- There are no facilities for outdoor prostitutes to clean up or to relax.
- Conditions in hotels are unsavoury.
- Clients refuse to pay for the services or want unprotected sex.
- Clients are unreasonable.
- Some prostitutes are embarrassed, scared and anxious by what they do, but are forced to due to social and economic situations.
- Prostitutes have no benefits such as UIF and Medical Aid.
- Poor access to health services.

7.24 A number of respondents were in favour of partial criminalisation.²⁸ Hennie, an escort agency owner, submitted that outdoor prostitution and pimping should be criminalised, but not brothels and escort agencies as they provide a safer working environment for prostitutes.

7.25 Some respondents proposed that laws prohibiting forced prostitution and prostitution of minors should remain in place and that prostitutes should not be permitted in

²⁷ Diana, Rachel, Charmaine, Tasha, Buyiswa, Zodwa, Sindiswa, Kelly, Cape metropolitan region; Sex workers, Worcester community, Western Cape Province, Thandi Sam, Princess Cele, Nosipho Ndlovo, Phindile Mthethwa, Princess Mkhize Children's Rights Ministries, Chatsworth, Durban, Mantwa, Lele, Mpho, Prudence, Maria and Else, prostitutes from Rustenburg, North-West Province, Sonto Mkhize, Felicia Ngubane, Patience Ndlovu, Rebecca Kubheka, Mary Masombuka, Jane Mkwanazi, Sindi Mthimunye, Mantusa Nkosi, Nthabiseng Serabedi of the Hillbrow Commercial Sexworkers Association, Mapuseletso; Sebina; Sphiwe; Musa; Dina; Dubs; Yoyo, prostitutes of Carletonville, Prostitutes, Worcester Community, Western Cape Province; Kate Brady, Pam Taai, Deidre Klopper, Stone Ross, Martha Raw, Rick Pes, prostitutes of King Williams Town.

²⁸ Mozilla; Marlize Antonites; Peter Du Plessis; Keleco Mochwanaesi; Hennie, escort agency owner.

public spaces.²⁹ Keleco Mochwanaesi suggested that only those aspects of adult prostitution that have become associated with violent crimes, drug abuse and living off the earnings of a prostitute³⁰ should be criminalised.

7.26 Raymond Venkatsamy opposed partial criminalisation and submitted that it would create a loop-hole where brothel-keeping and soliciting will just be fronts for prostitutes.

7.27 A number of respondents argued that clients of prostitutes should be guilty of a criminal offence.³¹ Igshaan Thomas stated that if prostitution is criminalised the prostitute and the client should be punished equally. Mozilla said that the client is the person who is creating the criminal activity and therefore should be prosecuted. Raymond Venkatsamy made the comment that it is essential to control the demand.

7.28 On the other hand, some respondents were of the opinion that clients should not be guilty of a criminal offence.³²

7.29 As far as sentencing is concerned, an anonymous respondent proposed corporal punishment on biblical grounds, or a fine. This respondent also submitted that a married customer should receive an additional penalty such as losing the whole joint estate in a subsequent divorce.³³

²⁹ Kate Brady; Pam Taai; Deidre Klopper; Stone Ross; Martha Raw; Rick Pes, sex workers of King Williams Town.

³⁰ Also supported by Diana, Rachel, Charmaine, Tasha, Buyiswa, Zodwa, Sindiswa and Kelly (sex workers), Cape metropolitan region.

³¹ For example Mike Dabrowski; Shamala Naidoo; FS; Marlize Antonites; Ndyebo; Anonymous; Brian Jubber ACDP Ladysmith Branch; Sharon Apolles; Igshaan Thomas; Mozilla; Mev Marais; N.A Ward; Raymond Venkatsamy; Hazel, massage parlour owner; Anne van Vuuren; Adrian Fourie; Doctors for Life International; Dr Graham Catto, Pastor Hatfield Christian Church; Rod & Cathy Campbell, Kate Brady; Pam Taai; Deidre Klopper; Stone Ross; Martha Raw; Rick Pes, sex workers of King Williams Town.

³² Keleco Mochwanaesi; Peter Du Plessis, Diana, Rachel, Charmaine, Tasha, Buyiswa, Zodwa, Sindiswa and Kelly (sex workers), Cape metropolitan region.

³³ Anonymous.

Evaluation of the model to criminalise prostitution (total criminalisation) or certain aspects of prostitution (partial criminalisation)

7.30 Criminalisation of prostitution is generally favoured by two categories of commentators: those opposed to prostitution on moral and religious grounds (tending to total criminalisation) and those opposed to prostitution on human rights and (certain) feminist grounds (tending to partial criminalisation). According to both groups prostitution depends upon the willing or unwilling exploitation of a certain group and class of persons for another's personal gain and the proposed solution is to criminalise prostitution or certain aspects thereof. The underlying theory is that prostitution will be eliminated by strict legal measures and dedicated consistent enforcement of the applicable prohibiting legislation. However, the underlying understanding of prostitution and rationale for criminalisation is quite different across the two groups.

7.31 The rationales advanced by those opposed on moral and religious grounds are based on traditional concepts of morality³⁴ and include prevention of sexually transmitted diseases, the prevention of public nuisances, crime prevention and the prevention of immorality.³⁵ As far as immorality is concerned it is argued that legislation prohibiting sex for reward will impose a particular sexual morality on society *i.e.* that extra-marital sex is regarded as unlawful carnal intercourse.³⁶ The wording of the prohibiting statutes of Colorado reflects this approach by referring to intercourse 'with any person not his spouse'.³⁷ Interestingly, the South African legislation has a similar understanding of 'unlawful carnal intercourse'.³⁸

³⁴ Morality derives from the Latin word *mos*, (plural *mores*) which means customs or people's values and traditions, people's heritage or ways of life and conduct in a given community. According to the Oxford Advanced Learner's Dictionary the noun 'morals' means standards or principles of good behaviour; especially in matters of sexual relationships. In the same context 'immoral' would refer to conduct not following accepted standards of sexual behaviour. Since moral values vary from community to community and from time to time, some communities will find it acceptable to legalise prostitution or certain aspects thereof and others will not.

³⁵ Malepe at 'Adult Commercial Sex Workers - Decriminalisation or Regulation?' 2000.

³⁶ The morality argument originated from the high powered moralism of the late 19th century. Throughout the 20th century European cultural contact with non-western societies changed traditional attitudes to prostitution. Countries like Japan, India, Thailand and China, where prostitution traditionally had been officially approved of and certain kinds of prostitutes had a high social status introduced harsh laws against commercial sex modelled on British and American legislation. See Perkins 'Working Girls' 1991.

³⁷ Colorado Revised Statutes 18-7-201.

³⁸ See definition of 'unlawful carnal intercourse' in sec 1 of the Sexual Offences Act in Annexure A.

7.32 Such reasoning tends to advance particular ideas of gender roles, sexuality, marriage and family, and tends to censure women who are prostitutes as particularly immoral. Laws concerning prostitution that are formulated on the assumption that prostitution is an immoral activity and that women are the most immoral participants, usually criminalise the prostitute/women.³⁹

7.33 However, researchers such as Leidholdt suggest that criminalisation does not work in most instances where the criminal sanction is directed against the victims, namely the women. Instead, Leidholdt proposes that criminal sanctions be directed against the clients who fuel the demand.⁴⁰ Similarly, Hughes proposes that, considering the documented harm to women who are prostituted, women should not be criminalised for being the victim of those abuses and that the law should create remedies that assist victims and prosecute perpetrators.⁴¹

7.34 Certain feminist and human rights groups move beyond the conservative analysis of moral and religious objectors by defining prostitution as a form of sexual exploitation that violates women's dignity, autonomy, equality and physical and mental integrity.⁴² Prostitution is seen as a practice whereby men achieve power and domination over women and children for the purpose of sexual gratification and financial gain. As such, prostitution is a demand market created by men who buy and sell women's sexuality for their own profit and pleasure.⁴³ As a result, it is men's actions that should be outlawed.⁴⁴ It is furthermore said that government policies that regulate prostitution or government failure to enforce laws against pimps, traffickers, brothel owners and male clients fuel the demand and as a result, gives state sanction to prostitution.⁴⁵

7.35 It is also argued that men who grow up in a culture where prostitution is acceptable tend to form derogatory views of women and sexual relationships, which in turn

³⁹ Hughes & Roche 'Legalizing Prostitution Will Not Stop the Harm' 1999.

⁴⁰ Leidholdt 'Prostitution – A Modern form of Slavery' 1999.

⁴¹ Hughes & Roche 'Legalizing Prostitution Will Not Stop the Harm' 1999.

⁴² Hughes & Roche 'Legalizing Prostitution Will Not Stop the Harm' 1999.

⁴³ Hughes & Roche 'Legalizing Prostitution Will Not Stop the Harm' 1999.

⁴⁴ Leidholdt 'Prostitution – A Modern form of Slavery' 1999. See also Ekberg 'The Swedish Law' 2004.

⁴⁵ Hughes & Roche 'Legalizing Prostitution Will Not Stop the Harm' 1999 in Introduction.

become a barrier to equality between men and women.⁴⁶ Long standing social hierarchies that are centred around domination of men over women, of adults over children, of rich over poor, of racial and ethnic majorities over racial and ethnic minorities, and of so called 'First World' over so-called 'Third World' countries support these derogatory and negative views of women.⁴⁷

7.36 However, underlying all these arguments, whether moral, religious, feminist or human rights orientated in nature, is that prostitutes (in South Africa) or pimps and brothel owners (in the UK) or the clients of prostitutes (in Sweden) are criminalised⁴⁸ in the hope that this will reduce or eliminate the sex industry altogether.⁴⁹

7.37 Criticisms of the criminalisation model refer to the effects of criminalisation and to its (non) enforcement. For example, it is argued that by punishing clients, the law also indirectly punishes prostitutes as it forces them into risky behaviour in order to 'protect' a client.⁵⁰ Fewer clients also mean prostitutes have to work for lower prices and consequently extend hours to earn the money they require for their subsistence.⁵¹

7.38 It is also argued that prostitution occurs within multiple power relations of domination, degradation and subservience: men over women, older over younger, citizen over alien, moneyed over impoverished, violent over victimized, connected over isolated, housed over homeless, tolerated and respected over despised. The criminalisation of prostitution merely legitimises these scenarios of domination.⁵²

⁴⁶ See the sources referred to in Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004.

⁴⁷ Leidholdt 'Prostitution – A Modern form of Slavery' 1999.

⁴⁸ Hughes & Roche 'Legalizing Prostitution Will Not Stop the Harm' 1999. Raymond 'Ten Reasons for Not Legalizing Prostitution' 2003.

⁴⁹ See Part II: Overseas Models of Prostitution Law Reform Evaluations' in Jordan 'The Sex Industry in New Zealand' 2005.

⁵⁰ According to the Swedish pro-prostitution group the criminalisation of sex buyers in Sweden unofficially made prostitution business very competitive thereby pushing prostitutes to involvement with more dangerous clients. Permittina 'Should Prostitution be Criminalized or Legalized?' 2005.

⁵¹ Campbell and Storr 'Challenging the Kerb Crawler Rehabilitation Programme' 2001 at 99. Also arguing against criminalisation, Östergren state that female Swedish prostitutes feel discriminated against and endangered by the laws that seek to protect them. Östergren 'Sexworkers Critique of Swedish Prostitution Policy' 2004.

⁵² MacKinnon 'Prostitution and Civil Rights' 1993.

7.39 A different kind of problem is the inconsistent enforcement of the legislation. For example, in the United Kingdom there does not seem to be a national enforcement policy against the illegal prostitution related activities. The resulting lack of consistent enforcement means that neither the prostitute's rights organisations nor the residents' associations are satisfied with the way prostitution is controlled or regulated.⁵³

7.40 This problem was acknowledged by the UK government in its Coordinated Prostitution Strategy in 2006. One of the key elements in this Strategy is the undertaking better to enforce laws against kerb crawling and those who exploit prostitutes. In general, proactive policing and greater enforcement of penalties are encouraged. More specifically, the Strategy aims to develop training for sexual offence liaison officers and all investigative levels dealing with women involved in prostitution. It also proposes training for all criminal justice agencies on the realities of prostitution.⁵⁴

7.41 Inconsistent enforcement is also a problem in the United States of America. For example, outdoor prostitutes, being the most visible members of the prostitution industry, are more likely to be arrested than any other type of prostitute, or their clients.⁵⁵ However, some US cities are changing their enforcement policies and some police forces delegate a considerable amount of resources towards eliminating prostitution.⁵⁶

7.42 However, where the cost of controlling, processing and incarceration is substantial, unless there is evidence to suggest that it effectively deters prostitutes from entering the trade, enforcement of such legislation is likely to be criticised.⁵⁷

7.43 In Sweden, despite the fact that the Act Prohibiting the Purchase of Sexual Services of 1998 enjoys significant support from the Swedish citizens,⁵⁸ the Swedish police have experienced considerable difficulty in enforcing the Act. Firstly, there is uncertainty as to which activities are prohibited under the Act. Secondly, the Courts are reluctant to convict

⁵³ Hindle & Barnett 'Prostitution: A Review of Legislation in Selected Countries' 2003 at 23 -32.

⁵⁴ UK Home Office 'A Coordinated Prostitution Strategy' 2006.

⁵⁵ Hindle & Barnett 'Prostitution: A Review of Legislation in Selected Countries' 2003 at 30.

⁵⁶ Hindle & Barnett 'Prostitution: A Review of Legislation in Selected Countries' 2003 at 30.

⁵⁷ Hindle & Barnett 'Prostitution: A Review of Legislation in Selected Countries' 2003 at 30 and further.

⁵⁸ A public opinion poll of 2001 found that 81% of the populace endorsed the legislation. Hindle & Barnett 'Prostitution: A Review of Legislation in Selected Countries' 2003 at 22 and fn 102.

purchasers if the prostitute does not confirm that the act has indeed taken place.⁵⁹ These issues are being addressed by the government in dedicated and funded campaigns to make the legislation work.

7.44 Although history shows that prostitution has never been eradicated through criminalisation, some countries still strive towards the ideal.⁶⁰

The non-criminalisation model

Features of the non-criminalisation model

7.45 Non-criminalisation refers to the model of removing laws that criminalise adult prostitution and related activities.⁶¹ Under the non-criminalisation model, the supervision of prostitutes, other role players and business establishments typically takes place through general legislation on labour, occupational, health and safety and human rights.⁶² Generally non-criminalisation does not mean the removal of criminal sanctions against abuse, trafficking or forced or under age prostitution.⁶³

7.46 A characteristic of non-criminalisation is self-regulation, namely that any special regulation of the prostitution industry, concerning, for example, zoning, rental property and professional associations, is done by involving prostitutes and other stake holders such as brothel managers, clients, communities and others employed by the industry.⁶⁴ Such self-regulation may entail the establishment of a monitoring institution and a

⁵⁹ Hindle & Barnett 'Prostitution: A Review of Legislation in Selected Countries' 2003 at 30 and further.

⁶⁰ Schurink *et al* 'Commercial Sex Work' 1993 at 145.

⁶¹ Distiller 'Advocating for The Right to Sell Sex' 2001 at 38, also referred to in Commonwealth Secretariat 'Overview on Adult Prostitution' 2007.

⁶² Only the disruptive and abusive activities and behaviours would be regulated using criminal law explicitly designed to deal with them. Sex Trade Advocacy and Research, Department of Sociology and Anthropology, University of Windsor, Canada as referred to in 'A Pan- Commonwealth Secretariat 'Overview on Adult Prostitution' 2007.

⁶³ Distiller 'Advocating for The Right to Sell Sex' 2001 at 38. Pinto, Scandia and Wilson 'Prostitution Laws in Australia' 1990 at 8.

⁶⁴ Distiller 'Advocating for The Right to Sell Sex' 2001 at 38. See also Petzer at WLC 'Commercial Sex Work: Decriminalisation or Regulation' 2000.

code of conduct setting out standards to be regulated by that institution.⁶⁵ The legal position of prostitutes in New Zealand is an example of the non-criminalisation model.

7.47 *De facto* decriminalisation is often viewed as a version of non-criminalisation and occurs where criminal sanctions penalising prostitution and prostitution related activities are in place, but are not enforced because the police do not make arrests or the prosecuting authorities do not institute criminal proceedings against arrested persons. However, prostitutes remain vulnerable under *de facto* decriminalisation and may continue to be exploited. The legal position of prostitutes in Thailand is an example of this

7.48 The current position in South Africa is to criminalise both the actions of the prostitute and the client. However, in practice this criminal sanction is seldom enforced. Where arrests are made, criminal proceedings seldom, if ever, follow. Similarly, arrests and prosecution for contravention of the prohibition on brothel-keeping are rare. For this reason, prior to the Jordan case, some have argued that a system of *de facto* decriminalisation exists in South Africa.⁶⁶

Comments by respondents to the Issue Paper on the non-criminalisation model

7.49 It should be noted that not all respondents made the technical distinction between non-criminalisation and regulation. The following paragraphs provide a summary of respondents' comments on the non-criminalisation model and questions in the Issue Paper.⁶⁷

⁶⁵ Leigh 'San Francisco Task Force Report on Prostitution' 1999.

⁶⁶ See Combrinck at WLC 'Commercial Sex Work: Decriminalisation or Regulation' 2000. Kalwahali also states that convictions of and cases on prostitution have been scanty. Kalwahali 'Criminalisation of Prostitution in South African Criminal Law' 2005. Jean Redpath from the Institute for Human Rights & Criminal Justice Studies, Technikon SA and one of the respondents to the Issue Paper submitted that the law as a whole is undermined if acts, which the legislature has defined as crimes, are not policed consistently across South Africa. She adds that respect for the law is undermined where less serious offences such as prostitution appear to be pursued more zealously than violent crime. Another respondent, John Selby, had similar views.

⁶⁷ The questions posed in the Issue Paper were the following:

- If you are of the opinion that decriminalisation is appropriate, please indicate –
 - Whether there are any acts related to adult prostitution that should remain criminalised, for example, procurement?
 - How should existing municipal by-laws targeting prostitution be dealt with?
 - Should any specific measures be enacted (for example, the imposition of duties on the management of prostitution-related businesses to promote safer sex practices)?

7.50 A number of respondents supported non-criminalisation of adult prostitution.⁶⁸ Abrahamsohn submitted that criminalisation and regulation of prostitution sends the industry underground where social evils may be more prevalent.

7.51 In a joint submission the Centre for Applied legal Studies (CALS), Sex Worker Education & Advocacy Taskforce (SWEAT), the Women's Legal Centre (WLC), People opposing Women Abuse (POWA), the Legal Resources Centre (LRC), Tshwaranang Legal Advocacy Centre to End Violence Against Women (TLAC), the Commission on Gender Equality (CGE), the Gay and Lesbian Coalition and Sexual Harassment Education Project (SHEP) support non-criminalisation as the most workable solution to the problem of prostitution. They submitted that criminalisation is a violation of human rights and is based on outdated morality. They further submitted that black prostitutes are most vulnerable as the majority of them work outdoors and are the most adversely affected by criminalisation.

7.52 Those in favour of non-criminalisation anticipated the following benefits for prostitutes in a decriminalised regime:

- Better access health facilities.
- Fair labour practices, as prostitution will then be seen as a form of work.
- Brothels will be run as normal businesses under general commercial law.
- Public nuisance laws will stop loitering, indecent exposure.⁶⁹
- Recognition of prostitution as a legitimate form of work.⁷⁰
- No stigma will be attached to prostitution.⁷¹
- Self-regulation by prostitutes setting of their own standards and rules.⁷²

⁶⁸ Mozilla; Alf Abrahamsohn; Hennie (escort agency owner); Keleco Mochwanaesi; Anonymous (ex sex-worker) only for those over 21; SWEAT; Sonto Mkhize; Felicia Ngubane; Patience Ndlovu; Rebecca Kubheka; Mary Masombuka; Jane Mkwanazi; Sindi Mthimunye; Mantusa Nkosi; Nthabiseng Serabedi, of the Hillbrow Commercial Sexworkers Association; Thandi Sam, Princess Cele, Nosipho Ndlovu, Children's Rights Ministries, Chatsworth, Durban; Mantwa, Lele, Mpho, Prudence, Maria and Else, sex workers from Rustenburg, North-West Province; Sex workers, Worcester community, Western Cape province; Kate Brady; Pam Taai; Deidre Kloppe; Stone Ross; Martha Raw; Rick Pes, sex workers of King Williams Town; Mapuseletso; Sebina; Sphiwe; Musa; Dina; Dubs; Yoyo, sex workers of Carletonville; Group of sex workers, Central Durban; Centre for Applied legal Studies, Sex Worker Education & Advocacy Taskforce, the Women's Legal Centre, People opposing Women Abuse, the Legal Resources Centre, Tshwaranang Legal Advocacy Centre to End Violence Against Women, the Commission on Gender Equality, the Gay and Lesbian Coalition and SHEP; Dr R E Chernis; Western Cape Network on Violence Against Women; Jean Redpath, Institute for Human Rights & Criminal Justice Studies, Technikon SA.

⁶⁹ It was supposed to do that in the past, but now it will ensure that it is not used to target prostitutes and prostitution.

⁷⁰ Dr R E Chernis.

⁷¹ Group of sex workers, Central Durban; Dr R E Chernis.

7.53 One organisation argued that non-criminalisation is the preference of the majority of prostitutes that they have worked with since 1994. Other respondents pointed out that non-criminalisation would allow legal recourse to prostitutes when clients did not fulfill their part of the agreement.⁷³

7.54 The Western Cape Network on Violence Against Women also supported the non-criminalisation model, stating that no person's human rights should be violated on the basis of their trade, occupation, work, calling or profession. The Network submitted that prostitution is a service industry like any other, in which people exchange skills for money or other reward, and that those people have the right to do so under the full protection of law. The Network further stated that there is no evidence of any law that has succeeded in stopping prostitution.

7.55 The Network contended that prostitutes deserve the same rights as workers in any other trade, including the right to legal protection from crimes such as sexual harassment, sexual abuse and rape. The opposite argument is that individuals and groups who believe prostitution is 'wrong' have the right not to engage in the industry as workers or as clients.

7.56 The Network proposed that the same laws that regulate every other business in South Africa should be applicable to adult prostitution. These include, but are not limited to, laws about:⁷⁴

- advertising
- home operated small business
- industrial relations
- occupational health and safety
- planning and zoning
- restrictions on other businesses at brothels
- special enforcement provisions for the police
- testing for sexually transmitted diseases for adult prostitutes engaging in consensual sex

⁷² Thandi Sam, Princess Cele, Nosipho Ndlovu, Children's Rights Ministries, Chatsworth, Durban.

⁷³ Mantwa, Lele, Mpho, Prudence, Maria and Else, sex workers from Rustenburg, North-West Province.

⁷⁴ Mozilla and Alf Abrahamsohn, Anonymous.

- trade practices.

7.57 On the question of the current status of prostitution-related acts, some respondents responded that all prostitution-related acts should be decriminalised on condition that no infringement of any person's constitutional rights and common law rights takes place.⁷⁵

7.58 Some respondents supported the non-criminalisation of adult prostitution, but emphasised that acts of prostitution with children should remain criminalised. Hennie proposed that prostitution should only be legal from the age of 18 years. An anonymous respondent submitted that adult prostitution below the age of 21 years should be criminalised because she believed that prostitution requires a level of maturity. Other respondents stated that drug abuse, violence, living of the proceeds of prostitution and pimping should be criminalised.⁷⁶

7.59 On the question regarding the status of existing municipal by-laws, some respondents submitted that by-laws that target prostitution should be repealed⁷⁷ SWEAT submitted that National Government should give a national directive to all local government structures and police authorities that municipal by-laws should not be used to target prostitutes and that by-laws specific to prostitution must be repealed.⁷⁸

7.60 Some respondents who are opposed to non-criminalisation submitted that existing municipal by-laws targeting prostitution should be enforced⁷⁹ and strengthened.⁸⁰ N.A Ward suggested that areas which are known to be pickup points could have an anti-loitering bylaw passed, where smaller fines could be imposed with a relatively simple legal procedure, or even authority to give spot fines could be granted, such as is done with traffic offences.

⁷⁵ Mozilla and Alf Abrahamsohn, Anonymous.

⁷⁶ Keleco Mochwanaesi, Anonymous.

⁷⁷ Mozilla; Alf Abrahamsohn; Peter Du Plessis; SWEAT.

⁷⁸ Althea Macquene, Advocacy and Lobbying Co-ordinator, Jayne Arnott, Director .

⁷⁹ Sharon Apolles; Anne van Vuuren.

⁸⁰ Brian Jubber, of the ACDP Ladysmith Branch.

7.61 Some respondents submitted that condom usage should be promoted but not enforced⁸¹ and proposed that prostitutes should be allowed to refuse clients who refuse to use condoms⁸² A number of respondents submitted that HIV positive prostitutes should have the right to work because they do practice safe sex.⁸³ Another respondent stated that safe sex practices are already promoted.⁸⁴ However, one respondent commented that a requirement of condom use is futile as in her opinion it is a well known fact that users offer prostitutes more money for unprotected sex.⁸⁵

7.62 The Hillbrow Commercial Sex Workers Association⁸⁶ submitted that the following protective rules should be implemented in the sex industry:

- Implementation of all regulations with the Bill of Rights as guiding principle.
- Standardisation of fees for sexual services.
- Protection against violent crimes from police instead of harassment.
- Accessible health facilities and educating health care providers to provide services rather than intimidate prostitutes.
- Debriefing sessions with counsellors within existing state services.
- Legal assistance in cases of assault or wrongful arrest.

7.63 A number of respondents were entirely opposed to non-criminalisation.⁸⁷ A group of prostitutes in Central Durban identified the following as negative consequences of non-criminalisation:

- No restriction areas mean prostitutes will work everywhere.
- Young people will leave school to become prostitutes.

⁸¹ Hazel, massage parlour owner, Thandi Sam, Princess Cele, Nosipho Ndlovu, Children's Rights Ministries, Chatsworth, Durban.

⁸² Thandi Sam, Princess Cele, Nosipho Ndlovu, Children's Rights Ministries, Chatsworth, Durban.

⁸³ Sex workers, Worcester community, Western Cape Province, Mapuseletso; Sebina; Sphiwe; Musa; Dina; Dubs; Yoyo, sex workers of Carletonville, Mantwa, Lele, Mpho, Prudence, Maria and Else, sex workers from Rustenburg, North-West Province.

⁸⁴ Hennie, escort agency owner.

⁸⁵ Sharon Appolles.

⁸⁶ Sonto Mkhize; Felicia Ngubane; Patience Ndlovu; Rebecca Kubheka; Mary Masombuka; Jane Mkwanzazi; Sindi Mthimunye; Mantusa Nkosi; Nthabiseng Serabedi.

⁸⁷ Anne van Vuuren; N.A.Ward; Brian Jubber of ACDP Ladysmith Branch;

- This will increase the spread of HIV/AIDS.
- The industry will become a career choice.
- Crime will increase.

7.64 The comments of respondent who came out in favour of criminalisation of prostitution and who would obviously be opposed to non-criminalisation are not repeated here.

Evaluation of the model for non-criminalisation of prostitution

7.65 The non-criminalisation approach of allowing prostitution with only minimal self-regulation⁸⁸ accepts the socio-economic imperatives of prostitution and seeks to address the human rights of those involved in prostitution. In particular, it is argued that the criminalisation of prostitution infringes on, *inter alia* rights to privacy, freedom of trade and security of the person, dignity, privacy and equality before the law. Thus a primary policy purpose for not criminalising prostitution would be to protect these rights.

7.66 The non-criminalisation approach encompasses a variety of views on the nature for prostitution. These include a classic liberal approach to prostitution in which individual autonomy, including bodily autonomy and choice should be protected. Prostitutes have the right to use their bodies as they wish.⁸⁹ As such prostitution is considered to be a personal choice and hence a private matter between consenting adults.⁹⁰ Here prostitution is a kind of work entitled to the protection of law. A more critical approach might still value the bodily autonomy and freedom and security of the prostitutes, but would stress that these are choices made under constrained circumstances and within a socio-economic context of gender inequality. In addition to rights of liberty and autonomy, the latter proponents would also emphasise right to equality and dignity. For both, the exploitative practices associated with prostitution will only end when prostitution is identified as work and is decriminalised.⁹¹

⁸⁸ In the earliest periods of human history, in most non-western societies where prostitution existed, in European history until the late Middle Ages, and throughout most of 19th century England and its colonies, as well as North America, the operations of prostitutes were little restricted by law. See Perkins 'Working Girls' 1991.

⁸⁹ R Weitzer 'Prostitution Control in America: Rethinking Public Policy' **Crime, Law & Social Change** 32 83 - 102 1999 at 86.

⁹⁰ The only role for the state is to eradicate the objective conditions that force people into prostitution and to ensure that those exploiting prostitutes are penalised. Shaver 'Prostitution: A Critical Analysis' 1985 at 494.

⁹¹ Bonthuys & Monteiro 'Sex for Sale' 2004 at 661.

7.67 In general terms the arguments in favour of non-criminalisation are similar to those used to oppose criminalisation and those in favour of criminalisation usually motivates opposition to non-criminalisation.

7.68 For example, those against criminalisation argue that it is not an effective deterrent to prostitution while it reflects and reinforces the stigmatisation and marginalisation of prostitutes. Criminalisation, it is said, causes prostitutes to work under circumstances where they are exposed to violence and exploitation. The matching argument in favour of non-criminalisation is that violence and exploitation of prostitution can be adequately addressed through enforcement of other offences under criminal law and that prostitutes should be allowed to organise into unions and rights groups under a system where prostitution is not criminalised.⁹²

7.69 A number of those who favour non-criminalisation feel that the emphasis on morality underlying the criminalisation of prostitution is outdated.⁹³ In addition, some may emphasise the impact of non-criminalisation on the socio-economic realities of prostitution.⁹⁴ For example, they accept that non-criminalisation may not completely eliminate outdoor prostitution, which poses most dangers for women, but argue that it will enhance women's choices, make the streets safer and allow community based support programmes.⁹⁵ Non-criminalisation may enable prostitutes to work in less remote areas safely⁹⁶ and will reduce violence towards prostitutes and their reliance on pimps.⁹⁷

⁹² Kilvington et al 'Prostitution Policy in Europe' 2000 at 90. See also Canada DOJ **Report and Recommendations Concerning Prostitution-Related Activities** 1998 Part III B (iv)(a).

⁹³ Canada DOJ **Report and Recommendations Concerning Prostitution-Related Activities** 1998 Part III B (iv).

⁹⁴ See chap 2 above.

⁹⁵ Goodyear & Cusick 'Protection Of Sex Workers' 2007.

⁹⁶ Canada DOJ **Report and Recommendations Concerning Prostitution-Related Activities** 1998 Part III B (iv)(b).

⁹⁷ According to a report by the Department of Justice of Canada current research suggests that the illegal status of prostitution activities, especially those that occur in public or on the street, has contributed to a large amount of violence. Canada DOJ **Report and Recommendations Concerning Prostitution-Related Activities** 1998 Part III B (iv).

7.70 It is also argued that non-criminalisation will also allow prostitutes easier access to services, thus making them less vulnerable to victimisation.⁹⁸ They will be able to undergo health checks without fear of prosecution.⁹⁹ As with other legal businesses, standards regarding health and age could be enforced.¹⁰⁰

7.71 It is further argued that non-criminalisation will relieve the criminal justice system of the burden of policing and penalising large numbers of females.¹⁰¹ Non-criminalisation removes hypocrisy within the criminal justice system and fosters responsibility, empowerment, self-esteem and self-care.¹⁰² Non-criminalisation represents a reasonable working compromise between prostitutes, clients, residents and the community and will improve relations between prostitutes and residents.¹⁰³

7.72 Some advocates of non-criminalisation, in its purest form, believe that prostitution falls within the private sphere of human existence and any state interference into the private lives, particularly the economic and personal rights, should be kept to a minimum.¹⁰⁴ In that sense non-criminalisation allows prostitutes to go into business for themselves.¹⁰⁵

7.73 While some opponents of non-criminalisation believe that it will sanction the exploitation of women (see the position in Sweden), others argue that non-criminalisation of prostitution is the better short-term option for realising the long term goal of the total dissolution of patriarchy with its demand for the commercial sex market.¹⁰⁶

⁹⁸ Canada DOJ **Report and Recommendations Concerning Prostitution-Related Activities** 1998 Part III B (iv)(b).

⁹⁹ Pinto, Scandia and Wilson 'Prostitution Laws in Australia' 1990 at 8.

¹⁰⁰ Canada DOJ **Report and Recommendations Concerning Prostitution-Related Activities** 1998 Part III B (iv)(b).

¹⁰¹ Pinto, Scandia and Wilson 'Prostitution Laws in Australia' 1990 at 8.

¹⁰² Feminists For Free Expression **The Free Speech Pamphlet Series: Prostitution**. L Artz 'Feminism And Sex Work' and Malepe at 'Adult Commercial Sex Workers - Decriminalisation Or Regulation?' 2000.

¹⁰³ Pinto, Scandia and Wilson 'Prostitution Laws in Australia' 1990 at 8.

¹⁰⁴ Malepe at 'Adult Commercial Sex Workers - Decriminalisation Or Regulation?' 2000

¹⁰⁵ Feminists For Free Expression **The Free Speech Pamphlet Series: Prostitution**. See Artz and Malepe at WLC 'Commercial Sex Work: Decriminalisation or Regulation' 2000.

¹⁰⁶ Malepe at 'Adult Commercial Sex Workers - Decriminalisation Or Regulation?' 2000

7.74 According to O'Neill, many international women's groups support non-criminalisation because it enhances women's self determination. She refers to the Women's Rights and Gender Equality Committee of the European Parliament which called on member states to decriminalise prostitution and protect the health and safety of prostitutes. The Committee pointed out that the 'semi-illegal, shady background against which prostitutes operate actually encourages such abuses as prostitution under duress, degrading working and living conditions, maltreatment and murder.'¹⁰⁷

7.75 In 1997, the Asia Pacific Women's Consultation on prostitution, held in Bangkok, decided to support the recognition of prostitution as work and the promotion of the human rights and dignity of women. The human rights activists, prostitutes, lawyers and academics who participated in the meeting issued a statement which defined all labour performed by women in the sex industry as work and recognised women in prostitution as workers. The statement explicitly advocated for non-criminalisation of prostitutes as workers, stating that it is not prostitution that is the problem but rather 'abuse, violence and criminality'.¹⁰⁸ The Human Rights Caucus of the United Nations also regards prostitution as legitimate labour.¹⁰⁹

7.76 In 1998 the Gauteng based Decriminalisation of Prostitution Network produced a paper proposing that, within a culture committed to eliminating human rights abuses, there are 'a number of arguments in favour of the decriminalisation of prostitution'. In particular, prostitutes' fundamental rights to equality, dignity, privacy and free economic activity are highlighted. In the same year the Commission on Gender Equality produced a brief position paper supporting the non-criminalisation of prostitution.¹¹⁰

7.77 Malepe argues that decriminalising prostitution will break the vicious cycle of harm by breeding a climate for improving conditions of women involved in prostitution. It will

¹⁰⁷ Nursing Times 'Into Europe' Oct at 24 1990 as referred to by O'Neill 'Prostitution, Feminism and Critical Praxis: Profession Prostitute?' 1996.

¹⁰⁸ Asia Pacific Women's Meeting 'Recognize the Work, Dignity and Human Rights of Women in Prostitution' 1997. Twenty countries in Asia and the Pacific were represented by 50 participants.

¹⁰⁹ Distiller 'Advocating for The Right to Sell Sex' 2001 at 35, Doezema 'Who Gets to Choose?' 2002. The Human Rights Caucus consists of non-governmental organizations from around the world namely Global Rights (formerly International Human Rights Law Group), Foundation Against Trafficking in Women, Global Alliance Against Traffic in Women, Asian Women's Human Rights Council, La Strada, Ban-Ying, Fundacion Esperanza, Foundation for Women, KOK-NGO Network Against Trafficking in Women, Women's Consortium of Nigeria, Women, Law & Development in Africa (Nigeria). **Global Rights Annotated Guide To The Complete UN Trafficking Protocol.**

¹¹⁰ See Sloan at WLC 'Commercial Sex Work: Decriminalisation or Regulation' 2000.

give them the best chance to gain some measure of control over their lives and to reduce the danger involved in their profession.¹¹¹

7.78 Those opposed to non-criminalisation argue that it would not address the most serious problems of prostitution. Their arguments are generally along the following lines. Prostitution is not like any other job, with the result that the normalisation of prostitution as work has not occurred in countries that have decriminalised prostitution. In addition, many prostitutes do not sign up to join unions because unionisation is incompatible with the coercive and abusive nature of prostitution.¹¹²

7.79 Opponents to non-criminalisation also submit that, despite allegations to the contrary, countries where prostitution has been decriminalised still have serious problems of sex trafficking and organised crime.¹¹³

7.80 The nuisance aspect of prostitution continues despite non-criminalisation because drug addiction among prostitutes could exclude many of them from moving either to brothels or into safety zones.

7.81 Another criticism of the non-criminalisation model is that it gives the impression that the government endorses prostitution.¹¹⁴ A related argument is that ordinary people wrongly believe that the non-criminalisation of prostitution dignifies the women in prostitution by making them professionals. Raymond argues that the problem is that dignifying prostitution as work doesn't dignify the prostitutes but simply dignifies the sex industry.¹¹⁵

7.82 In a document that critiques the Prostitution Reform Bill of New Zealand which decriminalised prostitution, the Maxim Institute (the Institute) points to the negative effects non-criminalisation would have on prostitutes and society as a whole.¹¹⁶

¹¹¹ Malepe at 'Adult Commercial Sex Workers - Decriminalisation Or Regulation?' 2000

¹¹² Hughes 'Prostitution and Methods of its Regulation' 2004.

¹¹³ Raymond 'Ten Reasons for Not Legalizing Prostitution' 2003 and Hughes 'Prostitution and Methods of its Regulation' 2004. Maxim Institute 'Six Myths on Prostitution Reform Bill' 2003.

¹¹⁴ Davis 'Prostitution in Canada' 1994 at 24.

¹¹⁵ Raymond 'Ten Reasons for Not Legalizing Prostitution' 2003.

¹¹⁶ For sources in support of the points made by the Institute in opposition of decriminalisation, see Maxim Institute 'Six Myths on Prostitution Reform Bill' 2003. See also Raymond 'Ten Reasons for Not Legalizing

7.83 The Institute submits that it is a myth that prostitution is a free choice since the vast majority of prostitutes do not regard their work as something they choose to do. Rather, the lack of choice is the major drive to start prostitution. It is thus suggested that decriminalising prostitution and treating the industry like any other business points to a lack of understanding of the inherently exploitative nature of prostitution.¹¹⁷

7.84 The Institute contends that the aims of safeguarding the human rights of prostitutes, improving health and safety and reducing exploitation have never been achieved through non-criminalisation but have been worsened by it. The Institute submits that non-criminalisation will not reduce exploitation or coercion and will not move prostitutes off the street and into the safety of brothels. It is stated as a fact that health risks and abuse increase under non-criminalisation. Subsequently the effect of non-criminalisation is the normalisation of human rights violations which would otherwise be legally actionable or emotionally damaging.¹¹⁸ The Institute also submits that child prostitution increases in a decriminalised environment.¹¹⁹

7.85 Reviewing the ways in which legitimating prostitution as work causes the harm of it to women to become invisible, Raymond makes similar inferences about non-criminalisation.¹²⁰ She refers to a study in which trafficked and prostituted women interviewed in 5 countries warned against the non-criminalisation of prostitution saying that it would create more risks and harm for women at the hands of already violent clients and pimps.¹²¹

7.86 In another article Raymond contends that 'romantic notions' about decriminalised prostitution reducing violence to women in prostitution, creating higher

Prostitution' 2003

¹¹⁷ For sources in support of the points made by the Institute in opposition of decriminalisation, see Maxim Institute 'Six Myths on Prostitution Reform Bill' 2003.

¹¹⁸ Maxim Institute 'Six Myths on Prostitution Reform Bill' 2003.

¹¹⁹ See also the discussion of the report of the Prostitution Law Review Committee of New Zealand in chap 6.138 and further.

¹²⁰ Raymond 'Ten Reasons for Not Legalizing Prostitution' 2003.

¹²¹ See reference in fn 3 of Raymond 'Ten Reasons for Not Legalizing Prostitution' 2003.

earnings and protecting women's health are belied by the reality in countries that have already legalised prostitution.¹²²

The regulation model

Features of the regulation model

7.87 Regulation refers to the removal of general criminal sanctions against prostitution in combination with measures aimed at state regulation and control of the industry.¹²³ See, for example, the position in Nevada, USA, and the Netherlands as discussed in Chapter 6 above. The phrase 'legalisation of prostitution' is sometimes used interchangeably with the term 'regulation'.¹²⁴

7.88 The control measures in a regulated system are based on the prevailing social norms and conditions of the particular jurisdiction. These measures will typically prescribe health checks, registration of prostitutes, licensing of brothels and sometimes the zoning of certain areas in which prostitution is allowed.¹²⁵ In many instances, the specifics of the policy concerning the regulation of brothels are left up to the state (Nevada) or municipal (The Netherlands) legislatures.¹²⁶

7.89 The sanctions for non-compliance with this regulatory system are usually of a criminal nature, with enforcement by the police or similar state law enforcement agencies.¹²⁷ This means that criminalisation remains an element of the regulation model.¹²⁸

¹²² Raymond 'Prostitution on Demand' 2004 at 1184.

¹²³ In its broadest sense, the regulation policy originates in Athens of the Classic period, in the Roman Empire, in the late Medieval period and in the licensing systems of the 19th century. See Perkins 'Working Girls' 1991. See Combrinck at WLC 'Commercial Sex Work: Decriminalisation or Regulation' 2000.

¹²⁴ Regulation is also used in a more specific sense to refer to instances of civil law regulation or self-regulation by the prostitution industry. In that context, regulation could refer to remedies in terms of labour law, such as laying a complaint arising from the employment contract against a brothel owner as an employer with the Department of Labour. Leigh 'San Francisco Task Force Report on Prostitution' 1999.

¹²⁵ See Levick **A Feminist Critique of the Prostitution/Sex Work Debate** at 30; Bingham 'Nevada Sex Trade' 1998 at 91.

¹²⁶ Sukthankar **International Union Rights** 2005 at 8.

¹²⁷ See Combrinck at WLC 'Commercial Sex Work: Decriminalisation or Regulation' 2000.

¹²⁸ The definitive characteristic of regulation is therefore not that criminal sanctions are removed, since under decriminalisation all laws which specifically criminalise prostitution are also scrapped. J Sloan at WLC 'Commercial Sex Work: Decriminalisation or Regulation' 2000 See also Distiller 'Advocating for The Right to Sell Sex' 2001 at 37.

7.90 Certain legal measures are characteristically associated with regulation, and in what follows general trends are discussed. The term 'prostitution-businesses' will be used to refer to brothels, escort agencies and other prostitution-related businesses.

Licensing of prostitution businesses

7.91 A regulated system may require the licensing of prostitution-businesses and the issuing of such licences is often dealt with on the level of local government.

Registration of prostitutes

7.92 Prostitutes are often required to register with the authorities in order to ensure that they practice their trade within the prescribed legal framework. The registration of prostitutes is often linked to other control measures such as mandatory health testing. The arguments supporting mandatory health testing generally revolve around public health concerns and the need to prevent spreading HIV infection through prostitution.

Zoning requirements

7.93 Prostitution may be limited to specific areas if prostitution businesses are subjected to general business licensing requirements. In this instance, prostitution businesses would be allowed in the same areas as other businesses but not, for example, in residential areas, on the same basis that other businesses are excluded from such areas.

7.94 Alternatively, zoning requirements could entail the creation of specific 'red-light' districts, with all prostitution businesses restricted to a specific area in the city or district.

Limiting outdoor prostitution

7.95 The control measures in a legalised system are often aimed at limiting the more visible manifestations of prostitution. For this reason, outdoor prostitution usually remains illegal in many legalised systems.¹²⁹ In the few instances where outdoor prostitution is legalised, the role of municipal by-laws in effecting control over the industry may be

¹²⁹ Kalwahali 'Criminalisation of Prostitution in South African Criminal Law' 2005.

particularly significant. In these instances general municipal nuisance laws are often used to create the same effect as if outdoor solicitation is illegal.¹³⁰

Role of local governments and municipal by-laws

7.96 Regulation often depends on local level regulation and represents a compromise between the prostitution industry and the interests of local communities.¹³¹ A regulated system therefore typically authorises local communities to decide whether or not to allow prostitution in a particular area. Where local government structures are given broad discretionary powers to decide whether or not to allow prostitution-related businesses, the number of legal brothels may be sharply limited as communities seek to limit the existence of prostitution in their areas.¹³²

Comments by respondents to the Issue Paper on the regulation model

7.97 Respondents commented as follows on the regulation model and the questions posed in the Issue Paper.¹³³

¹³⁰ See Combrinck at WLC 'Commercial Sex Work: Decriminalisation or Regulation' 2000.

¹³¹ See also Davis (*op cit*) at par II.1.

¹³² See Davis (*op cit*) at par II.2. This is referred to as the 'not in my backyard' phenomenon, where each local authority attempts to deflect the establishment of prostitution-related businesses in that particular area.

¹³³ The questions posed in the Issue Paper were the following:

- If you are of the opinion that legalisation of adult prostitution is appropriate, please indicate which conditions should be imposed:
 - Licensing requirements
 - Zoning
 - Registration of individual prostitutes
 - Mandatory health testing for HIV and other STI's of all adult prostitutes
 - Mandatory health testing for HIV and other STI's of all clients of adult prostitutes
- If you are of the opinion that licensing requirements should be imposed, please indicate whether prostitution-related businesses should be subjected to the same requirements as other business establishments or should additional requirements specific to prostitution be imposed?
- If additional requirements should be imposed what should these requirements entail?
 - Should the granting of licenses be dealt with on the level of local government?
 - How should businesses that are currently the holders of valid business licenses be dealt with?
- If you are of the opinion that zoning requirements should be imposed, please indicate:
 - Should prostitution-related businesses be subjected to the same zoning requirements as other businesses or should prostitution be limited to specific streets or areas (so-called 'red-light' districts)?
 - Should outdoor prostitution be allowed within the demarcated zones?
- If you are of the opinion that adult prostitutes should be subject to registration, please indicate:
 - What the purpose of registration should be?
 - Which official body or institution should be responsible for the management of the registration system?
 - Whether registration should be conditional on compliance with specific requirements?

Regulation or not?

7.98 A number of respondents were opposed in principle to regulating prostitution.¹³⁴ Their objections were mainly based on religious,¹³⁵ moral¹³⁶ and health grounds.¹³⁷ Some respondents suggested that, instead of regulating prostitution, attention should be given to exit programmes to ensure that prostitutes are equipped to earn in a more socially acceptable and dignified way.¹³⁸

7.99 Some respondents supported the regulation of prostitution.¹³⁹ According to Marlene Fourie, the advantages of regulating prostitutes include the keeping of a register of legal prostitutes; the ability to refer and coordinate; regulating working conditions to the advantage of the prostitute and client; providing prostitutes a voice and the possibility of union membership.

7.100 Dr T Naidoo of the South African Hindu Community submitted that the Mahasabha supports the lifting of the criminal sanction on prostitution but emphasised that the practice be very strictly controlled to discourage it in every way possible. He proposed that regulation should render assistance to prostitutes in the realm of health care, legal advice and protection against criminals and others.

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- Which measures should be taken to protect the privacy of persons registered as prostitutes?
 - If you are of the opinion that mandatory health testing requirements should be imposed, please indicate:
 - What the purpose of such testing requirements should be?
 - To whom such testing requirements should apply (the prostitute or the client)?
 - Specify any additional conditions that should be imposed under a legalised system.

¹³⁴ N.A. Ward; Brian Jubber: ACDP Ladysmith Branch; Anne van Vuuren; A De Voux (UCT Health faculty Student); Ms Margaret Gallie.

¹³⁵ Ms Margaret Gallie, Brian Juber: ACDP Ladysmith Branch.

¹³⁶ Mrs Susan Keegan, Brian Juber: ACDP Ladysmith Branch.

¹³⁷ A De Voux (UCT Health faculty Student), Brian Jubber ACDP Ladysmith Branch.

¹³⁸ A De Voux (UCT Health faculty Student), Brian Jubber ACDP Ladysmith Branch.

¹³⁹ Eg Phindile Mthethwa; Princess Mkhize, Children's Rights Ministries, Chatsworth, Durban; Mozilla; Ellen Jordan; Hazel, Massage Parlour owner; Elaine Martinez; Hennie, escort agency owner; Robert Acquet (prostitute); Frans Van Aswegen, Department of Sociology, University of Stellenbosch; S.G. Mkhalihi.

7.101 Some respondents were of the opinion that specific measures should be enacted to exercise some control over the prostitution industry.¹⁴⁰ The proposed measures included regular health tests and liability for tax¹⁴¹ and conditional business licensing.¹⁴² It was suggested that the business licences of the management of prostitution-related businesses could be made subject to regulations related to hygiene, health, and safe sex (at the very least for penetrative sexual acts) and that they be subject to the same regulation as other commercial enterprises relating to consumer protection and labour law.¹⁴³

7.102 An anonymous respondent submitted that specific measures should include strict licensing conditions and regulations regarding employment and employment records and pre-employment screening for criminal conduct. A further proposal was that the fees or income received by the management of prostitution-related businesses be regulated to ensure minimum wages for prostitutes. This respondent expressed concern about the practical feasibility of regulating outdoor prostitutes.

Licensing of prostitution businesses

7.103 Some respondents in favour of regulation¹⁴⁴ submitted that prostitution-businesses should be licensed,¹⁴⁵ commenting that licensing of brothels and hotels will control crime and provide security for prostitutes against aggressive or criminal clients.¹⁴⁶ Hazel, a massage parlour owner, suggested that licensing prostitution-businesses would stop prostitutes going into residential areas or onto the streets.

¹⁴⁰ Mozilla; Peter Du Plessis; Keleco Mochwanaesi; anonymous respondent (ex-sex worker); Hillbrow Commercial Sexworkers Association.

¹⁴¹ Keleco Mochwanaesi.

¹⁴² Alf Abrahamsohn.

¹⁴³ Alf Abrahamsohn.

¹⁴⁴ Unless otherwise indicated, only the comments of those in favour of regulation will be referred to when dealing with the rest of the questions posed in the Issue Paper.

¹⁴⁵ Mozilla; Ellen Jordan; Hazel, Massage Parlour owner; Elaine Martinez; Hennie, escort agency owner.

¹⁴⁶ Sonto Mkhize, Felicia Ngubane, Patience Ndlovu, Rebecca Kubheka, Mary Masombuka, Jane Mkwanzazi, Sindi Mthimunye, Mantusa Nkosi, Nthabiseng Serabedi of the Hillbrow Commercial Sexworkers Association.

7.104 A number of respondents commented that prostitution-businesses should be subject to the same general health and safety requirements as other business establishments¹⁴⁷ while a few suggested that only indoor prostitution should be regulated.¹⁴⁸

7.105 The following additional and specific licensing requirements for prostitution-businesses were proposed: restrictions on the age of employed prostitutes, monitoring of environmental hygiene, special tax requirements, limitations on the costs of services, annual renewal of licenses subject to inspection of premises and more expensive licenses. It was also proposed that hotel and brothel managers should be held liable for a safe working environment for prostitutes.¹⁴⁹ Hazel, a massage parlour owner, submitted that a license should be produced when advertising.

7.106 Another respondent suggested the following additional licensing requirements: compulsory education of prostitutes, prominent information display regarding sexually transmitted diseases aimed at clients, provision of condoms and mandatory health testing.¹⁵⁰ This respondent further proposed that specific requirements be set regarding the exterior of buildings and advertisements.¹⁵¹

7.107 Ellen Jordan recommended that the relevant businesses be registered as closed corporations for purposes of control and tax purposes. She further recommended that: no person with a criminal record be permitted to apply for a licence, own or manage a relevant business; such businesses may only operate from business premises; such businesses not be allowed near or next to school, hospitals, old age homes or churches and that the number of brothels and related businesses per area be limited. She emphasised

¹⁴⁷ Mozilla; Frans Van Aswegen, Department of Sociology, University of Stellenbosch.

¹⁴⁸ Elaine Martinez, Mr S.G. Mkhalihi.

¹⁴⁹ Elen Jordan, Hennie, an escort agency owner, Mozilla, Sonto Mkhize, Felicia Ngubane, Patience Ndlovu, Rebecca Kubheka, Mary Masombuka, Jane Mkwanazi, Sindi Mthimunye, Mantusa Nkosi and Nthabiseng Serabedi of the Hillbrow Commercial Sexworkers Association.

¹⁵⁰ Frans Van Aswegen of the Department of Sociology of the University of Stellenbosch. This respondent said that he is not generally in favour of mandatory health testing but submitted that individual business owners may be allowed to require prostitutes to be tested on condition that the owner should carry the costs involved in testing.

¹⁵¹ Local authorities should formulate clear standards regarding the exterior of buildings housing prostitution businesses as well as advertisement of prostitution services in public areas. The display of sexually explicit material should be prohibited and as a general rule the approach should be to be discreet not lurid. While prostitution business may be allowed in central business area, public sensibility concerning sexually explicit depiction should be taken into account. Furthermore, in the light of the emphasis on children's rights in the Constitution, children who visit central business areas should also be protected against such material (this will also be in line with protection entailed in the Films and Publication Act).

the right of residents not to have prostitution in their suburbs. She further recommended that a maximum of four licences be issued per month by an appointed body and that informal brothels¹⁵² also be obliged to register.

7.108 Elaine Martinez proposed that the following specific licensing requirements be set for prostitution-related businesses before registration: compliance with special health requirements as set by the Department of Health, regular HIV tests, compulsory condom use, clean linen, adequate towels and bathroom facilities, office hours (for instance day and night shifts) and appropriate dress code when entering or exiting the workplace. She recommended that the owner of the business should charge the client for use of the premises and the prostitute charge the client for services rendered. The prostitute will then only pay the owner her taxes and it will be the owners' responsibility to pay the taxes of the business.

7.109 Hennie, an escort agency owner, recommended regular health inspection of the premises and regular blood tests to test prostitutes for drug related problems as licensing conditions. He proposed that if a certain number of prostitutes are found to be on illegal substance the license should be deemed void.

7.110 On the question how current owners of prostitution-businesses with valid licenses should be dealt with, Mozilla submitted that they should not be discriminated against. Ellen Jordan however, submitted that such businesses should re-apply under a new set of conditions and regulations, and N A Ward commented that such businesses should be investigated to see if they are breaking the law. If so, the owners must be prosecuted.

Registration of prostitutes

7.111 Some respondents argued that all prostitutes should be registered¹⁵³ while others recommended that only indoor prostitutes be required to register.¹⁵⁴

7.112 Respondents in favour of registration of prostitutes suggested that it could serve the following purposes:

¹⁵² E.g. cheap hotels, 'guest houses' or gentleman's clubs', 'rooms' (frequented by prostitutes).

¹⁵³ Elen Jordan, Phindile Mthethwa of the Princess Mkhize, Children's Rights Ministries in Chatsworth, Durban.

¹⁵⁴ Mr S.G. Mkhaphi, Mozilla and Hennie, an escort agency.

- Prostitutes would become taxable entities and be able to claim tax benefits.
- Allow some control over prostitutes for purposes of mandatory health testing. UIF and Receiver of Revenue and Workman's Compensation.¹⁵⁵
- Prostitutes would be protected against police harassment.¹⁵⁶
- Prostitution would be regulated and it will give an indication of the extent of the prostitution industry in the country.¹⁵⁷
- Provide some track record of both indoor and outdoor prostitutes.¹⁵⁸
- Services such as condoms, health checks, HIV testing and counselling, sexually transmitted disease treatment, sterilisation, child care, pension, medical aid and other labour support could be offered.¹⁵⁹

7.113 One respondent proposed that the South African Sex Workers Union (SASWU) should be the official body responsible for the management of the registration system.¹⁶⁰ Other respondents agreed that the registering body should include representatives from the prostitutes' community to ensure that their interests in terms of confidentiality are protected,¹⁶¹ while another stated that such registration should only be with organizations working with prostitutes.¹⁶²

¹⁵⁵ Hennie, an escort agency.

¹⁵⁶ Sonto Mkhize, Felicia Ngubane, Patience Ndlovu, Rebecca Kubheka, Mary Masombuka, Jane Mkwanzazi, Sindi Mthimunye, Mantusa Nkosi and Nthabiseng Serabedi of the Hillbrow Commercial Sexworkers Association.

¹⁵⁷ Ellen Jordan.

¹⁵⁸ Hennie, an escort agency submitted that the main problem he has experienced with regard to brothel prostitutes is that they cause problems at an agency and then travel from one agency to another. He maintained that they have drug and alcohol problems and that when they move the new agency or brothel where the person goes and works knows nothing of this. A registration system could require them to notify the registration body of her or his new location. He states that this could apply for 'outdoor' prostitutes as well and should be linked to a fine in case of non-compliance.

¹⁵⁹ Marlene Fourie.

¹⁶⁰ Ellen Jordan.

¹⁶¹ Sonto Mkhize, Felicia Ngubane, Patience Ndlovu, Rebecca Kubheka, Mary Masombuka, Jane Mkwanzazi, Sindi Mthimunye, Mantusa Nkosi and Nthabiseng Serabedi of the Hillbrow Commercial Sexworkers Association.

¹⁶² Phindile Mthethwa of the Princess Mkhize, Children's Rights Ministries in Chatsworth, Durban. This respondents also submitted that details of registration should only be given to health officials for the purposes of treatment and medication for prostitutes and that confidentiality and respect for the privacy of prostitutes should be of vital importance. HIV status should only be listed on registration cards and registration details if a prostitute gives permission for this; and that only non-governmental organizations should be allowed to monitor prostitutes in one particular area.

7.114 Mozilla recommended that a new official body or institution should be created to govern the health and business issues of the prostitution industry. Hennie, an escort agency owner, agreed that a new body be created to provide jobs and which should be funded by owners of such brothels, agencies and private prostitutes.

7.115 Other proposals regarding registration included the issuing of renewable permits linked to regular HIV testing, drug testing¹⁶³ and carrying of identity cards.¹⁶⁴

7.116 Although in favour of regulation and registration, some respondents cautioned that although registration might violate a prostitute's right to privacy.¹⁶⁵ It was recommended that information on registered members must be confidential and that requested information only be released after the written permission of the member has been obtained. Where criminal activity has taken place the information may be accessed by way of court order.¹⁶⁶

7.117 A different view was that if a prostitute can enjoy the same advantages and disadvantages of a normal job by law and prostitution is recognised as a legal profession or job then there is no need to protect their privacy.¹⁶⁷

7.118 Sharon Appolles remarked that whether you register prostitutes for control purposes or not, many will operate outside of the system to escape controls. Other respondents suggested that few prostitutes will register because they do not want to be known as prostitutes. They submitted that the register should be kept for the purposes of issuing permits only and that this register should be confidential. They further proposed that prostitutes should be registered as informal traders or service providers with no limits on the number of workers and only age restrictions. There should also be no limitations on working hours.¹⁶⁸

¹⁶³ Mr S.G. Mkhaphi

¹⁶⁴ Phindile Mthethwa of Princess Mkhize, Children's Rights Ministries in Chatsworth, Durban.

¹⁶⁵ Sonto Mkhize, Felicia Ngubane, Patience Ndlovu, Rebecca Kubheka, Mary Masombuka, Jane Mkwanzazi, Sindi Mthimunye, Mantusa Nkosi and Nthabiseng Serabedi of the Hillbrow Commercial Sexworkers Association.

¹⁶⁶ Ellen Jordan, Mozilla.

¹⁶⁷ Hennie, an escort agency.

¹⁶⁸ Diana, Rachel, Charmaine, Tasha, Buyiswa, Zodwa, Sindiswa and Kelly (prostitutes), Cape metropolitan region.

Zoning

7.119 Opinions on the principle of zoning prostitution varied.¹⁶⁹ A number of respondents were in favour of limiting prostitution to certain areas by means of zoning.¹⁷⁰ Others felt that the prostitutes themselves should be able to choose the areas they would like to work in.¹⁷¹

7.120 Some respondents argued that a distinction should be made between indoor and outdoor prostitution for purposes of zoning. One respondent argued that 'street girls' should be zoned but not brothels¹⁷² while another submitted that 'outdoor' and 'indoor prostitutes' should not be zoned in the same area.¹⁷³ A few respondents submitted that only 'indoor' prostitution should be legalised and zoned and that the zoning requirements of brothels should be the same as for other businesses.¹⁷⁴

7.121 One respondent recommended a limited system of zoning in which outdoor prostitution is prohibited in specific areas such as residential areas, central business districts, and public open spaces, such as parks frequented by public.¹⁷⁵ His proposal called for controlled and open zones which should not overlap. 'Controlled zones' should be demarcated on the borders of a central business district where viable. Provision should be made for sufficient outdoor lighting, presence of police or private security services, and outreach services to prostitutes. Another respondent cautioned that these zones can become soft targets for drug pushers.¹⁷⁶

¹⁶⁹ Since the respondents who are opposed to regulation also oppose zoning, only the comments of those respondents who are in favour of regulation will be referred to here.

¹⁷⁰ Peter du Plessis; Phindile Mthethwa; Princess Mkhize, Children's Rights Ministries, Chatsworth, Durban; Hennie, escort agency owner; Elaine Martinez.

¹⁷¹ Phindile Mthethwa, writing on behalf of some prostitutes.

¹⁷² Ellen Jordan

¹⁷³ Hennie, escort agency owner. He stated that currently 'outdoor prostitutes' harass clients who want to visit escort agencies before they enter the escort agency premises.

¹⁷⁴ Elaine Martinez; Hazel, Massage Parlour owner; Mr S.G. Mkhaliphi; Ellen Jordan;

¹⁷⁵ Frans Van Aswegen, Department of Sociology, University of Stellenbosch.

¹⁷⁶ Hennie, an escort agency owner.

7.122 This respondent further recommended that outdoor prostitution be allowed outside residential areas, central business districts and public open spaces frequented by the public in so called 'open zones'. No specific services (e.g. street lighting, security) should be provided there since it would be unrealistic to expect the state and local authorities to cater for all venues where outdoor prostitution could potentially take place. Prostitution and clients use these areas at own risk. He explained that the twofold approach to outdoor prostitution is needed because it is difficult to contain red-light areas.

7.123 Some respondents submitted that prostitution should not be allowed in areas like churches, prisons, hospitals and schools,¹⁷⁷ but should be restricted to specific areas of towns and cities away from residential areas.¹⁷⁸

7.124 A number of respondents were opposed to zoning,¹⁷⁹ stating that their regular clients would not know where to find them, the prostitutes will fight amongst each other for territory and some of will have to travel long distances to work.¹⁸⁰ Other objections were that zoning would limit their right to freedom of movement and increase existing stigmatization.¹⁸¹

Mandatory health testing

7.125 Some respondents were in favour of regular mandatory health testing for HIV and other sexually transmitted diseases, where prostitutes are issued with a health, HIV and other sexually transmitted disease certificate.¹⁸² Although, some suggested that it would be difficult to enforce in practice.¹⁸³

¹⁷⁷ Mantwa, Lele, Mpho, Prudence, Maria and Else, prostitutes from Rustenburg, North-West Province.

¹⁷⁸ Dr T Naidoo, South African Hindu Community.

¹⁷⁹ Sharon Apolles; Sonto Mkhize, Felicia Ngubane, Patience Ndlovu, Rebecca Kubheka, Mary Masombuka, Jane Mkwanzazi, Sindi Mthimunye, Mantusa Nkosi and Nthabiseng Serabedi of the Hillbrow Commercial Sexworkers Association, Prostitutes, Worcester community, Western Cape province.

¹⁸⁰ Diana, Rachel, Charmaine, Tasha, Buyiswa, Zodwa, Sindiswa and Kelly (prostitutes), Cape metropolitan region.

¹⁸¹ Ellen Jordan; Elaine Martinez.

¹⁸² Hazel, Massage Parlour owner; Mozilla; Ellen Jordan; Peter du Plessis; N.A.Ward.

¹⁸³ Mozilla, Ellen Jordan, Hazel, Hennie escort agency owner, N.A.Ward.

7.126 A number of respondents submitted that testing should be voluntary.¹⁸⁴ One respondent cautioned that there may be constitutional obstacles to mandatory testing, although the limitation clause referring to the purpose of testing may justify such testing.¹⁸⁵

7.127 Hennie, an escort agency owner, submitted that a person's registration as a prostitute should be withdrawn to prevent him or her from continuing to work as a prostitute when he or she poses a health threat. Additional purposes of testing could be to detect rape, assault and abuse situations; to estimate the prevalence of back street abortions; to give assistance with pregnancy and birth control; to test for drug abuse; to identify illegal aliens; to provide information on HIV/AIDS and sexually transmitted diseases and to provide a support system for infected persons.¹⁸⁶

7.128 It was suggested that mandatory testing could ensure that prostitutes can be effectively treated if they tested positive for any sexually transmitted diseases. This would also offer peace of mind to clients as they need not have to worry about sexually transmitted diseases. Another point of view is that the institution representing the prostitute could be held vicariously liable if the client became infected by a specific prostitute.¹⁸⁷

7.129 There were also respondents who opposed mandatory testing of prostitutes as a group.¹⁸⁸ Some proposed that all citizens should be required to test on a regular basis to ensure safety of family members.¹⁸⁹

¹⁸⁴ Thandi Sam, Princess Cele and Nosipho Ndlovu of the Children's Rights Ministries in Chatsworth, Durban; Sonto Mkhize; Felicia Ngubane; Patience Ndlovu; Rebecca Kubheka; Mary Masombuka; Jane Mkwanzazi; Sindi Mthimunye; Mantusa Nkosi; Nthabiseng Serabedi, Hillbrow Commercial Sexworkers Association; Kate Brady; Pam Taai; Deidre Klopper; Stone Ross; Martha Raw; Rick Pes, sex workers of King Williams Town; Mapuseletso; Sebina; Sphiwe; Musa; Dina; Dubs; Yoyo, sex workers of Carletonville; Group of sex workers, Central Durban

¹⁸⁵ Keleco Mochwanaesi.

¹⁸⁶ Ellen Jordan.

¹⁸⁷ Mozilla.

¹⁸⁸ Diana, Rachel, Charmaine, Tasha, Buyiswa, Zodwa, Sindiswa and Kelly (prostitutes) in the Cape metropolitan region; Mantwa, Lele, Mpho, Prudence, Maria and Else, Sex workers from Rustenburg in the North-West Province and Sex Workers from the Worcester Community, Western Cape Province; Frans van Aswegen, Department of Sociology, University of Stellenbosch; Sonto Mkhize; Felicia Ngubane; Patience Ndlovu; Rebecca Kubheka; Mary Masombuka; Jane Mkwanzazi; Sindi Mthimunye; Mantusa Nkosi; Nthabiseng Serabedi, Hillbrow Commercial Sexworkers Association; Phindile Mthethwa; Princess Mkhize, Children's Rights Ministries, Chatsworth, Durban.

¹⁸⁹ Anne van Vuuren, Frans Van Aswegen, Department of Sociology, University of Stellenbosch, Ellen Jordan.

7.130 An opponent of regulation recommended that those prostitutes who test positive for HIV should be liable to a severe suspended sentence imposed in addition to their sentence for the offence of prostitution itself.¹⁹⁰

Special conditions to be imposed under regulation

7.131 Ellen Jordan proposed the following conditions to be imposed under a legalised system:

- Certain conditions required to obtain guesthouse licenses should apply to premises being used for prostitution.
- Mandatory health workshops must be held.
- Counselling must be provided for prostitutes and their clients.
- Police should be removed from the industry (criminal investigation) and inspectors should be appointed.
- In order to advertise via media (newspaper etc.) – a license and/or registration documents must be produced.
- Rape crisis centres must be available.
- Drug rehabilitation assistance must be provided for.
- A 'caravan clinic' should be situated in 'red light' districts.

7.132 Mozilla proposed that all prostitutes should form part of a non-profit organisation and that all proceeds from prostitution after tax should flow directly to the prostitute.

7.133 Hennie, an escort agency owner, recommended that prostitutes be allowed to choose whether they want to work privately or to join a brothel or escort agency. Peter Du Plessis suggested that counselling should be provided for prostitutes and their clients.

Role of local governments and municipal by-laws

7.134 A number of respondents were of the opinion that licenses for prostitution-businesses should be managed and granted on the level of local government because it is in

¹⁹⁰ N.A.Ward.

the best position to control the premises efficiently and effectively. Primary health care providers, environmental officers, police and social workers could assist.¹⁹¹

7.135 One respondent suggested that local authorities are in the best position to gauge local opinion and will best be able to deal with complaints. He stated that he is unsure as to the right of the public to object to the granting of licenses if prostitution becomes legal.¹⁹² Another respondent, who opposed the regulation of prostitution, argued that if a community decided that it does not want such places in their midst, the local government should respect their wishes and refuse the license application.¹⁹³

Evaluation of the model to legalise prostitution

7.136 Commentators supporting regulation often use similar arguments to those who support non-criminalisation and these arguments often correspond with those made in opposition of criminalisation.

7.137 Opponents of the regulation of prostitution belong to at least two categories namely, those who favour criminalisation and those who favour non-criminalisation. The former category argues that prostitution should not be regulated because it is a crime, while the latter support non-criminalisation rather than regulation. Consequently, some arguments referred to below will be familiar as they have been discussed under the evaluation of criminalisation, and will also feature in the discussion of non-criminalisation, albeit from different viewpoints.

7.138 In general, opponents of regulation of prostitution anticipate that it will lead to significant increases in the harmful and anti-social elements of prostitution, such as the:¹⁹⁴

¹⁹¹ Mozilla; Hazel, massage parlour owner; Ellen Jordan; Hennie, an escort agency owner; Frans Van Aswegen of the Department of Sociology of the University of Stellenbosch; Sonto Mkhize, Felicia Ngubane, Patience Ndlovu, Rebecca Kubheka, Mary Masombuka, Jane Mkwanazi, Sindi Mthimunye, Mantusa Nkosi and Nthabiseng Serabedi of the Hillbrow Commercial Sexworkers Association. Ellen Jordan submits that this should be done in conjunction with an appointed body

¹⁹² Frans Van Aswegen of the Department of Sociology of the University of Stellenbosch.

¹⁹³ Brian Jubber: ACDP Ladysmith Branch.

¹⁹⁴ See Part II: Overseas Models of Prostitution Law Reform Evaluations' in Jordan 'The Sex Industry in New Zealand' 2005. Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 at 1212. Contrary to claims that legalization and decriminalization would regulate the expansion of the sex industry and bring it under control, the sex industry expanded 25 percent in the Netherlands over the last decade, after pimping became legalized and then brothels decriminalized in the Netherlands in 2000. Raymond 'Ten Reasons for Not Legalizing Prostitution' 2003.

- size of the sex industry
- amount of visible outdoor prostitution
- levels of violence against prostitutes
- extent of child prostitution
- involvement of illegal immigrants
- levels of drug use
- rates of sexually transmitted diseases¹⁹⁵
- involvement of gangs and organised crime¹⁹⁶
- trafficking of prostitutes and sex tourism¹⁹⁷
- administrative burden of governments.¹⁹⁸

7.139 Some proponents of regulation argue that prostitution cannot be eradicated,¹⁹⁹ because men's demand for prostitutes has not abated through the ages.²⁰⁰ Therefore, since other regimes fail to address the issue of prostitution it must be controlled and regulated through legislation.²⁰¹ As such, regulation is said to reflect a state attitude that prostitution is inevitable²⁰² and essentially represents a compromise position.²⁰³

¹⁹⁵ Local authorities often lack support/resources to carry out licence checks and ensure that health and safety requirements are met. Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 at 1212.

¹⁹⁶ Country reports from Australia and the Netherlands highlight that regulation has, in some respects, strengthened links between organised crime and outdoor prostitution and particular. Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 at 1212.

¹⁹⁷ Personal Affidavit by Dr Sheila Jeffreys 'The Failure of legalised prostitution in the state of Victoria, Australia'. According to Hughes the Netherlands is the strongest international proponent for legalised prostitution. Amsterdam is the leading sex tourist centre in Europe. In 1997 the Netherlands legalized brothels. The result has been increased trafficking to Amsterdam from all over the world. See the sources referred to in Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 at 1414.

¹⁹⁸ Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 at 1212.

¹⁹⁹ See Combrinck at WLC 'Commercial Sex Work: Decriminalisation or Regulation' 2000.

²⁰⁰ Even early Christian societies did not seek to eliminate prostitution, with the Church fathers justifying this stance by asserting that 'Sewers are necessary to guarantee the wholesomeness of palaces.' See Part II: Overseas Models of Prostitution Law Reform Evaluations' in Jordan 'The Sex Industry in New Zealand' 2005.

²⁰¹ Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004. In its broadest sense, the regulation policy originates in Athens of the Classic period, in the Roman Empire, in the late Medieval period and in the licensing systems of the 19th century. See Perkins 'Working Girls' 1991.

²⁰² This notion is advanced from different quarters such as pimps, governments, public health officials, and from sexologists and evolutionary psychologists. Farley 'Bad for the Body, Bad for the Heart' 2004 at 1087.

7.140 In addition to the motivation of inevitability, it is argued that regulation would promote the health, hygiene and safety of prostitutes. Another strong rationale for controlling prostitution by regulating the industry is that prostitutes and their clients can be monitored since it is a containment model based on managing the problem compared to the abolitionist model which is based on ignoring it.²⁰⁴

7.141 A further reason that is often cited as motivation for regulation is that legalised prostitution has the potential to be financially beneficial to governments since legalised prostitutes and brothel owners can be taxed on their earnings.²⁰⁵

7.142 Those in favour of the option to legalise prostitution predict the following:²⁰⁶

- Working in a controlled environment will break the links between prostitution and organised crime.
- Levels of violence against women in prostitution would decrease.
- Prostitutes would report attacks to the police if they were not involved in 'illegal activities' when assaults occur.
- Regulation would improve sexual health of prostitutes, and by implication, their clients, because the activity would occur in a clean and safe environment.
- The link between prostituted women and their pimps would be broken, as women would no longer be dependent on a pimp for 'protection' from the authorities.
- Regulation would 'free up' time and resources for law enforcers to tackle the illegal sector, such as trafficking and child prostitution, thereby ensuring that priority was given to policing the 'nasty' elements of the trade.
- Legalised brothels would improve the quality of life for people who live and work in areas currently affected by outdoor prostitution, especially if they were located away from residential areas and schools.
- Prostitution enables women to work flexible hours earning more than low paid part time work.

²⁰³ See Combrinck at WLC 'Commercial Sex Work: Decriminalisation or Regulation' 2000. See also the sources referred to in Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 at 1414.

²⁰⁴ Liberator 'Regulating the Oldest Profession' 2005 par B.

²⁰⁵ Miller 'The Legality of Prostitution' 2006.

²⁰⁶ See the sources referred to in Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 at 1212.

- The 'revolving door', where women are arrested, fined, and return to prostitution in order to pay them, would end, and women would have more control over if and when they 'worked'.
- Taxing the earnings of women in prostitution would generate revenue.

7.143 Arguments supporting regulation of indoor prostitution in particular are based on a presumption that such a move would shift prostitution off the street. However, some research demonstrates that an expanding legal sector is accompanied by a similar increase in the illegal sector.²⁰⁷ For example, Farley suggests that it is an error to assume that women in prostitution sign up for prostitution in one location and stay there. In fact, they move between different kinds of prostitution, depending on the location of johns, the level of police harassment, and where the most money can be made²⁰⁸

7.144 There are various reasons for this. First, some prostitution-businesses seek to evade the demands of regulation and second, women who are serious drug users are seldom able to comply with the rules and requirements of legal prostitution-businesses. Third, it is possible that a proportion of clients prefer outdoor prostitution. It is clear from international research that the majority of those in outdoor prostitution have serious drug problems.²⁰⁹ A strategy of regulation could therefore further criminalise and marginalise such problems.²¹⁰

7.145 According to Raymond, the promise that regulation will take the criminal elements out of prostitution-businesses by strict regulation of the industry is unrealistic and that the real growth in prostitution after regulation is often in the illegal sector.²¹¹ Distiller

²⁰⁷ See the sources referred to in Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 at 1414.

²⁰⁸ She refers to recent experiments with tolerance zones which have failed to deliver the expected benefits. Farley found that 46 NZ interviewees had been in many different kinds of prostitution, including escort, strip club, phone sex, Internet prostitution, peep show, bar prostitution, outdoor prostitution, brothel prostitution, and prostitution associated with a military base. See Farley 'Bad for the Body, Bad for the Heart' 2004 at 1099.

²⁰⁹ See para 3.30 above about the link between prostitution and drugs.

²¹⁰ See the sources referred to in Local Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 at 1414.

²¹¹ Since the onset of legalization in Victoria, brothels have tripled in number and expanded in size - the vast majority having no licenses but advertising and operating with impunity. Sullivan and Jeffreys **Legalising Prostitution Is Not The Answer** 2001. In New South Wales, brothels were decriminalized in 1995. In 1999, the numbers of brothels in Sydney had increased exponentially to 400-500 and the vast majority has no license to operate. Referred to by J G. Raymond 'Ten Reasons for Not Legalizing Prostitution' 2003.

suggests that regulation creates an ongoing criminalised component of the prostitution industry and regulatory rules do not take into account the human and labour rights of prostitutes.²¹²

7.146 According to Combrinck, regulation assumes that it is in the best interest of state authorities to implement ways of controlling and containing the industry.²¹³ Hughes' objection to this is the fact that regulation means it is permissible to exploit and abuse women as long as it is under prescribed conditions.²¹⁴

7.147 A regular criticism of the regulated regime in the Netherlands is that only indoor prostitution is legalised, as a result it does not address outdoor prostitution or the dangers associated with it. In practice the illegal forms of prostitution have merely moved to places where there are fewer or less stringent checks.²¹⁵ In fact, an evaluation of the effects of removing the brothel ban in the Netherlands points to the fact that criminals actually look for ways to keep prostitutes at work outside of the licensed sector, for greater financial gain. This fragmentation of prostitution activities has caused significant problems for both enforcement and interventions such as medical aid and social work.²¹⁶

7.148 The evaluation also found that, due to the complex regulations on licensing, taxes, health services, social security and policing, a significant number of the entrepreneurs in the sex-industry had closed their businesses. Also, half the registered sex establishments have disappeared, partly because they were not able to recruit women. At the same time outdoor prostitution has flourished. This means that not only illegal, but also the legal prostitutes, have relocated their activities to the informal sector.²¹⁷

²¹² Distiller 'Advocating for The Right to Sell Sex' 2001 at 38.

²¹³ See Combrinck at WLC 'Commercial Sex Work: Decriminalisation or Regulation' 2000.

²¹⁴ Hughes & Roche 'Legalizing Prostitution Will Not Stop the Harm' 1999.

²¹⁵ See the sources referred to in Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 at 1414.

²¹⁶ See Goderie, Spierings and ter Woerds, 2002 as referred to in Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 at 1414. See also Norwegian Ministry of Justice and Police Affairs 'Purchasing Sexual Services' 2004.

²¹⁷ See the sources referred to in Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 at 1414.

7.149 Similarly, Lefler reports that outdoor prostitutes in the large cities of Nevada are still more than legal indoor prostitutes, indicating that the system of regulation with its strict control has neither reduced prostitution nor brought the industry under state control. Most of the prostitution occurring in Nevada takes place in the illegal sector.²¹⁸

7.150 Specific arguments dealing with registration, health and safety, violence and exploitation, social stigma and government's interest in regulating (or decriminalising) prostitution are addressed in the next sections.

Registration of prostitution-businesses

7.151 An important question is whether prostitution-businesses are subject to the same requirements as other business establishments or whether different requirements, specific to prostitution, are imposed. For example, where the granting of a licence is contingent upon a finding that the applicant is a 'proper' person to operate such business, prostitutes who have a criminal record of related convictions may be excluded on that basis.²¹⁹ Alternatively, if the granting of licences is subject to complex and expensive application procedures, it may happen that businesses refuse to comply with these processes and continue to operate 'illegally'²²⁰ thus necessitating different procedures.

Health and hygiene of prostitutes

7.152 The rising threat of HIV and other sexually transmitted diseases has been used as one of the most compelling arguments in support of the regulation of prostitution.²²¹ For example, Sanders and Campbell argue that by prescribing health and hygienic requirements, the state can impose high standards of health and safety and thereby diminish risks of sexually transmitted diseases.²²² They submit that such a system would allow women to work in safe and appropriate working conditions.²²³

²¹⁸ Lefler 'Shining the Spotlight on Johns' 1999 at 19.

²¹⁹ Banach & Metzenrath 'Principles for Model Sex Industry Legislation' 2000 at 12 and 28-29.

²²⁰ Banach & Metzenrath 'Principles for Model Sex Industry Legislation' 2000 at 13, 28.

²²¹ Armentano 'The Case for Legalized Prostitution' 1993.

²²² Sanders & Campbell 'What's Criminal about Female Indoor Sex Work?' 2007.

²²³ Sanders & Campbell 'What's Criminal about Female Indoor Sex Work?' 2007

7.153 The evidence suggests that the effect of health requirements is varied. In Nevada, HIV testing is required state-wide for prostitutes once a month and prostitutes must undergo weekly tests for sexually transmitted diseases. There are very harsh penalties for a prostitute, and the brothel in which she works, if she tests positive for HIV. Anyone who tests HIV positive and is working in a licensed brothel is guilty of a felony. Licensed prostitutes who test positive for treatable sexually transmitted diseases are required to stop working until they test negative. Additionally, brothel owners are held liable for the spread of sexually transmitted diseases caused by the women working in their establishment to the clientele. Hough submits that since mandatory HIV testing began in 1986, no brothel workers have tested positive for the disease in Nevada.²²⁴

7.154 In Senegal, prostitution is regulated by government for the specific purpose of reducing HIV infection. Prostitutes are required to register, have monthly medical checks, to receive HIV counselling and are supplied with condoms. However, in a study comparing registered women who had received HIV education with those who were unregistered and uneducated about HIV, researchers found higher HIV infection rates among the registered women.²²⁵

7.155 Bingham submits that the problem with the system of registering for health purposes is that although those registered are subjected to mandatory HIV testing, clients who make use of the services of licensed prostitutes are not subject to any tests. While 'legal' prostitutes may therefore have more medical check-ups than most illegal prostitutes and non-prostitutes, these mandatory check-ups are intended to protect the client from infection by a prostitute, not the other way round.²²⁶

7.156 Delaney has similar objections to a regulatory system, arguing that the focus on registration of prostitutes is more concerned with monitoring the disease status of prostitutes rather than their health and welfare.²²⁷ Jeffreys infers that although the regulation of prostitution is usually motivated by *inter alia* the preservation of health, the actual object is

²²⁴ Hough 'Sodomy and Prostitution' 2005 at 114-115.

²²⁵ See the resources referred to by Farley 'Bad for the Body, Bad for the Heart' 2004 at 1112.

²²⁶ Bingham 'Nevada Sex Trade' 1998 at 96.

²²⁷ See Delaney at WLC 'Commercial Sex Work: Decriminalisation or Regulation' 2000.

to protect the health of male buyers rather than female prostitutes.²²⁸ Raymond submits that a legalised system of prostitution that mandates health checks and certification only for women and not for clients is blatantly discriminatory to women.²²⁹

Violence against and exploitation of prostitutes

7.157 Those in favour of regulation argue that it will eliminate the unsafe environment of violent and oppressive pimps, beatings, low earnings and drug-dependency that is often the fate of prostitutes in countries where prostitution is illegal.

7.158 Sanders and Campbell argue that regulation would prevent underground prostitution thereby ensuring that encounters between the prostitute and her client take place within controlled environments that ensures safety for both customer and prostitute.²³⁰ It is said that if prostitutes did not have to go to isolated locations to avoid the police, they would be much less likely to be subject to violence and murder.²³¹

7.159 Hough submits that countries where prostitution has been legal and regulated for a long time have a lower rate of prostitution related crimes than those where prostitution is criminalised.²³² Sanders and Campbell cite Nevada as an example of a strictly regulated regime where violence against prostitutes is rare.²³³ They admit that there are indeed risks and exploitation within the brothel industry, but submit that an exclusive focus on these ignores the relatively safer working conditions experienced by many indoor prostitutes.²³⁴

²²⁸ Jeffrey's 'The Legalisation of Prostitution' 2004.

²²⁹ Raymond 'Ten Reasons for Not Legalizing Prostitution' 2003.

²³⁰ Raphael and Shapiro submit that evidence suggests that the indoor markets, in particular massage parlours and women working collectively from independent flats, are safer than the streets, referred to by Sanders & Campbell 'What's Criminal about Female Indoor Sex Work?' 2007. Liberator 'Regulating the Oldest Profession' 2005.

²³¹ Sanders & Campbell 'What's Criminal about Female Indoor Sex Work?' 2007.

²³² Hough 'Sodomy and Prostitution' 2005 at 115.

²³³ Brents and Hausbeck (2005:270) as referred to by Sanders & Campbell 'What's Criminal about Female Indoor Sex Work?' 2007.

²³⁴ Sanders & Campbell 'What's Criminal about Female Indoor Sex Work?' 2007.

7.160 Armentano contends that prostitutes who are physically harmed in a legalised system have equal rights to police protection and legal recourse.²³⁵ Raymond, questions this view, suggesting that there is no evidence that regulation has eliminated violence against and exploitation of prostitutes. On the contrary, there is evidence that the degradation, exploitation as well as the harm, abuse and violence to women remain in a regulated regime.²³⁶

7.161 In this context, mention is often made of the fact that regulation mostly does not address outdoor prostitution. This shortcoming of regulation stems from the incorrect assumption that regulation will cause prostitutes to move their business indoors where it will be physically safer for them than on the streets, thereby decreasing outdoor prostitution.²³⁷ In contrast, wherever prostitution has been legalised in the world it has led to a two-tier system with the smaller group of legal prostitutes, usually in brothels, and the larger group of illegal prostitutes, usually in the streets.²³⁸ The problems often associated with outdoor prostitution, such as severe violence against the women involved and drug addiction, remain.²³⁹

7.162 In fact, one of the most significant limitations of regulation in the Netherlands is said to be the exclusion of outdoor prostitution and thereby the marginalisation of the most vulnerable and exploited women.²⁴⁰ As a result, the rationale behind the law in the Netherlands, namely to provide more control over criminal behaviour and to ensure women were protected from violence and exploitation has not been achieved.²⁴¹

²³⁵ Armentano 'The Case for Legalized Prostitution' 1993, Hough 'Sodomy and Prostitution' 2005 at 115.

²³⁶ Raymond 'Ten Reasons for Not Legalizing Prostitution' 2003.

²³⁷ Farley submits that it is an error to assume that women in prostitution sign up for prostitution in one location and stay there. In fact, they move between different kinds of prostitution, depending on the location of johns, the level of police harassment, and where the most money can be made (e.g., near military bases or during political or business conventions). Farley 'Bad for the Body, Bad for the Heart' 2004 at 1099.

²³⁸ Jeffreys 'The Legalisation of Prostitution' 2004, DFL Newsletter April 2003, Sukthankar **International Union Rights** 2005 at 22.

²³⁹ Jeffreys 'The Legalisation of Prostitution' 2004.

²⁴⁰ See the sources referred to in Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 at 1414.

²⁴¹ See the sources referred to in Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 at 1414.

7.163 Many arguments in support of regulation of prostitution are based on the idea that it will enhance women's choice, which in turn is based on a distinction between 'free' and 'forced' prostitution and trafficking. Opponents of regulation argue that the extreme conditions of exploitation in the sex industry make such distinctions meaningless to women under the control of pimps or traffickers and that most women in prostitution did not make a rational choice to enter prostitution.²⁴² Rather than consent, a prostituted woman complies with the only options available to her to survive economically. This means that regulation contributes to the exploitation of such women.²⁴³

7.164 Raymond agrees that regulating the sex industry promotes the distinction between forced and voluntary prostitution. However, a prostitute alleging that she was forced into prostitution by a pimp or other perpetrators, has the burden of proving such coercion which, in practice, means that very few prostitutes will successfully lay charges and very few offenders will be prosecuted.²⁴⁴

7.165 Hughes submits that prostitution is not merely a job like any other. Rather, it is a form of abuse and exploitation that women engage in only if they are forced to or have no other options. As such, women and children are controlled by mafias and criminals, and cannot register with an authority or join a union. The unionisation of prostitutes a myth and is incompatible with the coercive and abusive nature of prostitution.²⁴⁵

7.166 Lastly, opponents of regulation argue that the expectation that it will reduce trafficking has not been realised. On the contrary, the evidence suggests an increase in trafficking to supply the expanding industry in countries that regulate prostitution.²⁴⁶ Trafficked women are placed in both illegal and legal brothels.²⁴⁷

²⁴² The sex industry doesn't differentiate between 'free' and 'forced' prostitution and research reveals that men who buy women and children in prostitution don't differentiate either. Hughes & Roche 'Legalizing Prostitution Will Not Stop the Harm' 1999.

²⁴³ Most of the women interviewed in CATW studies reported that choice in entering the sex industry could only be discussed in the context of the lack of other options and they emphasised that women in prostitution had few other options. Many spoke about prostitution as the last option, or as an involuntary way of making ends meet. See the sources referred to by Raymond 'Ten Reasons for Not Legalizing Prostitution' 2003.

²⁴⁴ Raymond 'Ten Reasons for Not Legalizing Prostitution' 2003.

²⁴⁵ Hughes 'Prostitution and Methods of its Regulation' 2004.

²⁴⁶ Referred to in Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 at 1414.

²⁴⁷ Jeffreys 'The Legalisation of Prostitution' 2004, Hughes 'Prostitution and Methods of its Regulation' 2004.

Issues of social stigma

7.167 Farley points out that no one wants the business of prostitution in his or her community with the result that zoning of the physical locations for prostitution becomes a feature of regulation. She submits that this regulation of prostitution by zoning is a physical manifestation of the same social/psychological stigma that those who propagate regulation and non-criminalisation want to avoid. Zoning means that prostitutes are physically isolated and socially rejected.²⁴⁸ It could also be unconstitutional in that it violates freedom of movement.²⁴⁹

7.168 Some advocates of regulation of prostitution see the social stigma against prostitution as the primary harm of prostitution and suggest that regulation (or non-criminalisation) would remove this social prejudice against women in prostitution.²⁵⁰ For example, Jonker submits the purpose of regulation should be to promote acceptance, rights, social acceptance, non-criminalisation, freedom from violence, emancipation and empowerment. However, she accepts that regulation also means that prostitutes cannot remain anonymous anymore, and may not be able to escape the social stigma attached to being identified as a prostitute.²⁵¹

7.169 Opponents of regulation see the removal of the social stigma as the reason why prostitution should not be legalised. They argue that when the legal barriers disappear, so too do the social and ethical barriers to treating women as sexual commodities. Regulation of prostitution sends the message to new generations of men and boys that women are sexual commodities and that prostitution is harmless fun.²⁵² At the same time, women and girls internalise the message that the female body is a marketable commodity.²⁵³

²⁴⁸ Farley 'Bad for the Body, Bad for the Heart' 2004 at 1092 -1093.

²⁴⁹ Distiller 'Advocating for The Right to Sell Sex' 2001 at 38.

²⁵⁰ Farley 'Bad for the Body, Bad for the Heart' 2004 at 1091. Hough argues that regulating the prostitution industry may limit the stigma and discrimination faced by prostitutes and may give adults a greater ability to conduct their private sexual lives without fear of overly-intrusive government interference. Hough 'Sodomy and Prostitution' 2005 at 124.

²⁵¹ Jonker 'Unionising Sex Workers' 2005 at 5. Daley says that the majority of women in legalised prostitution jurisdictions choose to operate illegally and underground, as referred to in Local Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 at 1414. See also Raymond 'Ten Reasons for Not Legalizing Prostitution' 2003.

²⁵² Raymond 'Ten Reasons for Not Legalizing Prostitution' 2003.

²⁵³ Leidholdt 'Prostitution – A Modern form of Slavery' 1999.

7.170 In this regard Leidholdt submits that once prostitution is accepted by a society as sex work, it becomes even more difficult for poor women and girls who are socialised into an ethos of self-sacrifice, to resist economic and familial pressures to enter prostitution. Legalised prostitution that is regulated causes the values and dynamics of prostitution to spill over into other areas of society, influencing the valuation and treatment of women and girls and lowering their status.²⁵⁴

7.171 There are commentators who are of the view that regulation has done nothing to diminish the stigma of the sex trade. It is said that in the Netherlands prostitution is merely tolerated by the majority of the Dutch population and that it is not regarded as a desirable occupation. It appears that the shift in opinion is about the industry, rather than the women within it²⁵⁵ and that the stigma of the prostitute remains after regulation.²⁵⁶

7.172 Hughes submits that even if it is correct that regulation cleans up the image of prostitution, this doesn't end the violence and exploitation that go with prostitution. She says that it allows criminals and members of organised crime rings to become legitimate businessmen and work hand-in-hand with the state in marketing women's bodies.²⁵⁷

Government's interests in regulating prostitution

7.173 In addition to other considerations, such as protecting the health of women and preventing the exploitation of vulnerable groups, governments that regulate prostitution have a huge economic stake in the prostitution industry. Under regulation, prostitutes would pay income tax on their earnings and thus contribute, in whole or in part, to the cost of state regulation. The increased tax revenue is alleged to be a considerable incentive for lawmakers considering the regulation of prostitution.²⁵⁸ Where prostitution is confined to

²⁵⁴ Leidholdt 'Prostitution – A Modern form of Slavery' 1999.

²⁵⁵ See the sources referred to in Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 at 1414.

²⁵⁶ Farley 'Bad for the Body, Bad for the Heart' 2004 at 1091. Ordinary people believe that, in calling for legalization or decriminalization of prostitution, they are dignifying and professionalizing the women in prostitution. But dignifying prostitution as work doesn't dignify the women, it simply dignifies the sex industry. Similarly people often don't realise that decriminalisation, for example, means decriminalization of the whole sex industry not just the women. And they haven't thought through the consequences of legalizing pimps as legitimate sex entrepreneurs or third party businessmen, or the fact that men who buy women for sexual activity are now accepted as legitimate consumers of sex. Raymond 'Ten Reasons for Not Legalizing Prostitution' 2003.

²⁵⁷ Hughes & Roche 'Legalizing Prostitution Will Not Stop the Harm' 1999.

²⁵⁸ Miller 'The Legality of Prostitution' 2006. See Combrinck at WLC 'Commercial Sex Work: Decriminalisation

specifically designated areas it has economical advantages for municipal councils who will share in the profits.²⁵⁹

7.174 A concomitant benefit of regulating prostitution is that prostitutes can be counted as workers, pimps as businessmen, and buyers as consumers of sexual services, which arguably means that governments can abdicate responsibility for making decent and sustainable employment available to women.²⁶⁰

7.175 However, Leidholdt warns that when governments recognise prostitution as a source of work for poor women, this inevitably leads to organised prostitution and increases in sex tourism and sex trafficking.²⁶¹

7.176 Some of those who advocate regulation argue that the costs of enforcing criminalisation are wasted costs in a futile 'war on prostitution' in which demand cannot be eliminated.²⁶² On the other hand, it is also necessary to consider that, if implemented properly, regulation places significant burdens on police and local authorities to enforce regulations and control the illegal sectors.²⁶³

Conclusion

7.177 Criminalisation of prostitution involves the use of criminal sanctions to control prostitution and related activities with the view ultimately to eradicate it. The underlying assumption is that prostitution is a social evil which cannot be countenanced in any other way. Commentators are divided on whether or not it is possible, or appropriate, to attempt to eradicate prostitution through prohibitive legislation.

or Regulation' 2000.

²⁵⁹ See Part II: Overseas Models of Prostitution Law Reform Evaluations' in Jordan 'The Sex Industry in New Zealand' 2005.

²⁶⁰ Raymond 'Ten Reasons for Not Legalizing Prostitution' 2003.

²⁶¹ Leidholdt 'Prostitution – A Modern form of Slavery' 1999.

²⁶² Armentano estimates that the city of Los Angeles alone spends close to 100 million dollars annually dealing with illegal prostitution. The real cost, of course, is that these public resources could have been used to protect law-abiding citizens from real criminals. Armentano 'The Case for Legalized Prostitution' 1993.

²⁶³ See the sources referred to in Bindel and Kelly 'Critical Examination of Responses to Prostitution' 2004 at 1414. See also Liberator 'Regulating the Oldest Profession' 2005.

7.178 Under regulation attempts are made to regulate prostitutes and prostitution-related businesses. The assumption is that prostitutes serve the sexual needs of others and by regulating prostitution the worst side effects can be controlled. The success of the regulation model may be compromised where government prescribes regulations without consultation and regard to what is needed by prostitutes themselves.

7.179 The non-criminalisation model of prostitution in its purest form, regards prostitution as neither a crime nor a licensable activity, but merely a matter between two adults. In terms of this view, the only role for the state is to eradicate the objective conditions that force people into it and to penalise those who profit from it.²⁶⁴ In practice, governments may consider non-criminalisation for various reasons, such as reducing exploitation of people in vulnerable positions, protection of health and compliance with international obligations.

7.180 The models discussed above confirm that the contents of the models may vary and different policy choices are possible. Practical examples are the following.

7.181 The current system in the Netherlands is generally referred to as an example of regulation where **prostitution, brothel ownership and pimping are legal**. The current system in Sweden is referred to as an example of partial criminalisation where being a **client of a prostitute, brothel owner or a pimp have been criminalised**. However, from a different perspective, despite the fact that all the elements of voluntary adult prostitution are legal in the Netherlands, any form of or involvement in **under-aged and coerced prostitution is illegal**. Similarly it is important that being a **prostitute is not illegal** in Sweden.

7.182 Other examples are the UK, where **prostitution is legal** and being a **client is not illegal, brothel ownership and pimping are illegal**, and Germany where **prostitution, being a client and brothel ownership are legal**, and **pimping is illegal**.

7.183 Another variation on the theme is Thailand, where **prostitution, brothel ownership and pimping are illegal** but due to the tolerant attitude towards prostitution of society and government, all these activities are **de facto legalised**.

²⁶⁴ F M Shaver 'Prostitution: A Critical Analysis of Three Policy Approaches' **Canadian Public Policy** XI:3:493 503 at 494.

7.184 In the USA prostitution is prohibited as a criminal offence in state legislation, with variations between **criminalising the prostitute but not the client** and **criminalising both the prostitute and the client**. The exception is the state of Nevada. In certain counties of the state of Nevada, prostitution has been **decriminalised, but is strictly regulated**.

7.185 From the above, it is clear that South Africa will have to find a model mostly suited for its own unique circumstances. In doing so, South Africa has to be guided by its socio-cultural values, its constitutional commitments and its international human rights obligations. In addition, attention needs to be paid to practical considerations such as the HIV pandemic. It is also important to consider the purposes of any law that addresses prostitution. Chapter 8 outlines four broad policy and legislative options for addressing prostitution.

CHAPTER 8: PROPOSALS FOR REFORM OF THE LAW ON PROSTITUTION

Introduction to proposals for law reform

8.1 This Discussion Paper has considered a range of issues relevant to the question of reforming the law relating to adult prostitution. These include the social and legal context of the current law (chapter 2), the linkages between prostitution and crime (chapter 3) and between prostitution and HIV/AIDS (chapter 4). These chapters suggest that the current South African law on prostitution might not effectively address a range of issues relating to prostitution, and might contribute to prostitutes' vulnerability to exploitation and abuse. In addition, the Commission also suggested, in chapter 5, that the current legal position falls short of South Africa's international obligations.

8.2 Because different policy choices are possible, the Commission decided not to draft actual legislative options at this stage. Instead, the Commission sets out four alternative approaches to adult prostitution and asks a series of questions about each one, dealing with the purposes, principles and details of, and justifications for, that option. Public responses to these questions are invited to assist the Commission in determining the appropriate legal model for South Africa.

8.3 The four law reform options each offer a different manner of addressing prostitution in the South African context. These basic legal models are drawn from international and comparative literature, as well as from the comparative study in chapter 6. They were discussed in detail in chapter 7. They are:

- Total criminalisation of prostitution. (status quo)
- Partial criminalisation of some forms of prostitution and prostitution related acts.
- Non-criminalisation of prostitution.
- Regulation of prostitution and prostitution related acts.

Background to the proposals for law reform

8.4 The Constitution of South Africa is the ultimate standard against which proposals for reforming the law on prostitution must be measured. International obligations form a second source of authority and guidance. Within the constraints of the Constitution and our international obligations, law reform must also take account of South Africa's particular socio-economic circumstances and its cultural, moral and religious diversity.

8.5 The Commission proposes that, in order to heed South Africa's constitutional commitments and international obligations, the appropriate law reform option should, *inter alia*, address the following issues:

- Reduce the demand for prostitution.
- Reduce harm and vulnerability to abuse and exploitation of prostitutes.
- Assist prostitutes to enforce their rights, including their rights to equality and access to health.
- Avoid the stigmatisation and discrimination of prostitutes.
- Address concerns regarding prostitution and crime.
- Address concerns regarding public health and HIV.
- Assist in developing an enabling environment for interventions that allow people to exit prostitution.

8.6 The Commission notes the fragmentation of the current legal position on prostitution between the Sexual Offences Act of 1957 (Sexual Offences Act) and the Criminal Law (Sexual Offences) Amendment Act of 2007 (Sexual Offences Amendment Act).

8.7 The Sexual Offences Amendment Act is a full status Act and deals with a wide range of issues, among others, repealing all provisions in the Sexual Offences Act that relate to sexual offences with children and sexual offences other than adult prostitution. What remains of the original Sexual Offences Act contains only adult prostitution related offences and procedural provisions, using archaic terminology such as 'defilement' and 'unlawful carnal intercourse'. In addition, the Sexual Offences Act must currently be read together with the Sexual Offences Amendment Act because section 11 of the latter creates the offence of engaging the sexual services of a person over 18 years.¹

8.8 The Commission proposes that irrespective of which legal option the legislature chooses, the remaining provisions of the Sexual Offences Act must be reviewed in order to make the law more accessible and transparent, and to enhance legal certainty. This can be achieved by the enactment of a new Adult Prostitution Reform Act² (with

¹ See also par 2.21 above about the potential anomaly brought about by the Sexual Offences Act.

² This is just a working title for ease of reference and the Commission does not propose a name for the new Act in this Discussion Paper.

updated terminology) in respect of the chosen option. The Commission makes this proposal below (general proposals).

8.9 All of the proposed options pre-suppose the criminalisation of under-aged and forced prostitution. The legislature has recently revised and severely sanctioned commercial sexual exploitation of children and these provisions remain valid.³ Section 12 of the Sexual Offences Act criminalises detention for purposes of unlawful intercourse. This provision must be included in the option which is ultimately recommended in the report.⁴

8.10 In identifying the appropriate legal model for South Africa, it should be noted that the legislature must consider the following aspects when proposing new legislation:

- Clear legal wording.
- The availability of financial resources and functioning organisations.
- Communication with all parties.
- Buy-in of the parties to the law.
- Effective implementation.

Proposals for law reform

8.11 The Commission submits that proposals to reform the law of prostitution must reflect a holistic approach to prostitution and heed practical considerations, such as the HIV pandemic and the ability to implement the law effectively. In addition, attention should be paid to respecting, protecting and fulfilling the human rights of the most vulnerable people, including those who are marginalised by social institutions and subject to exploitation and abuse. Prostitutes, as members of the human family, deserve to be treated with dignity and to enjoy those human rights guaranteed to all people.⁵

³ Sections 141(1)(b) and 305(5) of the Children's Act. None of the proposed options affects the provisions in the Children's Act.

⁴ The Commission does not make any proposals regarding offences of trafficking for sexual purposes in this investigation. The Commission recommended in its investigation into trafficking in persons, (Project 131) available at <http://www.doj.gov.za/salrc/index/htm>, that section 71 of the Sexual Offences Amendment Act, which makes trafficking for purposes of sexual services an offence, be carried over in new trafficking legislation.

⁵ Betteridge "Testimony before Subcommittee on Solicitation Laws" 2005 at 3. Betteridge is Senior Policy Analyst with the Canadian HIV/AIDS Legal Network, a lawyer by training, and a member of the Ontario Bar.

8.12 A national strategy to deal with prostitution is crucial regardless of which model is chosen by the legislature. The aim of such a strategy should be, inter alia, to:

- implement the legislation or policy
- offer viable alternatives to prostitution
- assist an individual exit from prostitution should he or she choose to do so
- support re-skilling, health and education initiatives
- promote economic independence
- promote sexual health and safer sexual practices
- provide for a review system and body to evaluate the effectiveness of the legislation and make recommendations for improvement.

8.13 The proposals set out below include:

- **General proposals** on what is required in preparation for reforming the law on prostitution.
- **Specific proposals** in relation to each of the four options. Here the Commission sets out the principles of each options followed by the issues that must be dealt with in legislation relating to that option
- **Questions** about each option that should be addressed by respondents to the Discussion Paper. In answering these questions, respondents are requested to take the above paragraphs into consideration.

GENERAL PROPOSALS**The Commission proposes that the legislature:**

1. Repeals the Sexual Offences Act.
2. Repeals sections 11 of the Sexual Offences Amendment Act.
3. Enacts a new Adult Prostitution Reform Act⁶ which may include or exclude provisions of the Sexual Offences and Sexual Offences Amendment Acts.

Q**Question on general proposals****Q****Q****Q**

1. Do you agree with the general proposals? If not, please motivate your disagreement.

⁶ This is just a working title for ease of reference and the Commission does not propose a name for the new Act in this Discussion Paper.

8.14 The Commission proposes the following four options **as alternatives** for reforming the law on prostitution.

PROPOSAL 1: TOTAL CRIMINALISATION OF PROSTITUTION AND PROSTITUTION RELATED ACTIVITIES

The total criminalisation model gives effect to the policy decision to

criminalise

- selling and buying of prostitution

and

- prostitution related acts

Total criminalisation as an option entails

- *repealing* the current prostitution legislation

and

- enacting new legislation *to criminalise*

- voluntary selling of adult sex

and

- buying of voluntary adult sex

and

- prostitution related acts

To give effect to the criminalisation option, the Commission proposes that the legislature:

1. Repeals the Sexual Offences Act.
2. Repeals section 11 of the Sexual Offences Amendment Act.
3. Enacts a new Adult Prostitution Reform Act⁷ to criminalise prostitution and prostitution related acts, e.g.:
 - 3.1 Engaging prostitution services of persons 18 years and over for reward.
 - 3.2 Having sexual intercourse with persons 18 years and over for reward.
 - 3.3 Keeping a house or place to be used for prostitution services.
 - 3.4 Procurement of prostitution services.
 - 3.5 Assistance for purposes of prostitution services.
 - 3.6 Owner or occupier of any house or place permitting offences under the Act on his premises.
 - 3.7 Enticing, soliciting or importuning offences under the Act in public places.
 - 3.8 Living on earnings of prostitution.
 - 3.9 Forced prostitution.
4. If required in the new legislation, develops new terms and definitions for archaic terms e.g.:
 - 4.1 'unlawful carnal intercourse'
 - 4.2 'brothel'
 - 4.3 'defilement'
 - 4.4 'immoral acts'
 - 4.5 'indecent acts'

⁷ This is just a working title for ease of reference and the Commission does not propose a name for the new Act in this Discussion Paper.

Q	<u>Questions on proposal 1 - total criminalisation</u>
Q	1. How must prostitution (currently 'unlawful carnal intercourse') be defined?
Q	2. What would the purposes of the new law?
Q	3. How will this option comply with
Q	3.1 South Africa's international obligations?
Q	3.2 the Constitution?
Q	4. How will this option
Q	4.1 reduce the demand for prostitution?
Q	4.2 reduce harm and vulnerability to abuse and exploitation of prostitutes?
Q	4.3 assist prostitutes to enforce their rights, including their rights to equality and access to health?
Q	4.4 avoid the stigmatisation and discrimination of prostitutes?
Q	4.5 address concerns regarding prostitution and crime?
Q	4.6 address concerns regarding public health and HIV?
Q	4.7 assist to create an environment for prostitutes to exit prostitution?
Q	5. How must the issue of criminal record for prostitution, when leaving prostitution and seeking alternative employment, be addressed?
Q	
Q	
Q	

**PROPOSAL 2: PARTIAL CRIMINALISATION OF PROSTITUTION AND
PROSTITUTION RELATED ACTIVITIES**

The partial criminalisation model gives effect to the policy decision to

- *decriminalise* the voluntary selling of adult sex
- and*
- *criminalise* buying voluntary adult sex
 - indoors
- and/or*
- outdoors
- and*
- *criminalise some or all* acts related to unlawful prostitution.

Partial criminalisation as an option entails

- *repealing* the current prostitution legislation
- and*
- enacting legislation *to criminalise*
 - buying of voluntary adult sex
 - indoors
 - and/or*
 - outdoors
- acts related to unlawful prostitution e.g.:
 - procurement for the purposes of adult prostitution and/or
 - brothel related activities and/or
 - living on earnings of prostitution and/or
 - detention for purposes of prostitution.

To give effect to the partial criminalisation option, the Commission proposes that the legislature:

1. Repeals the Sexual Offences Act.
2. Repeals section 11 of the Sexual Offences Amendment Act.
3. Enacts a new Adult Prostitution Reform Act⁸ to criminalise specific acts related to unlawful prostitution e.g.:
 - 3.1 Engaging outdoor sexual intercourse of persons 18 years and over for reward.
 - 3.2 Having outdoor sexual intercourse for reward with persons 18 years and over.
 - 3.3 Procurement of unlawful prostitution.
 - 3.4 Living on earnings of unlawful prostitution.
 - 3.5 Assistance for purposes of unlawful prostitution.
 - 3.6 Enticing, soliciting or importuning unlawful prostitution.
 - 3.7 Forced prostitution.
4. If required in the new legislation, develops new terms and definitions for archaic terms e.g.:
 - 4.1 'unlawful carnal intercourse'
 - 4.2 'brothel'
 - 4.3 'defilement'
 - 4.4 'immoral acts'
 - 4.5 'indecent acts'

⁸ This is just a working title for ease of reference and the Commission does not propose a name for the new Act in this Discussion Paper.

Q	<u>Questions on proposal 2 - partial criminalisation</u>
Q	1. How must prostitution be defined?
Q	2. How must indoor prostitution be defined?
Q	3. How must outdoor prostitution be defined?
Q	4. Which of the following aspects must be criminalised under a partial criminalisation option:
Q	4.1 Engaging outdoor sexual intercourse of persons 18 years and over for reward outside a brothel?
Q	4.2 Having outdoor sexual intercourse for reward with persons 18 years and over?
Q	4.3 Procurement of unlawful carnal intercourse prostitution?
Q	4.4 Living on earnings of unlawful prostitution?
Q	4.5 Assistance for purposes of unlawful prostitution?
Q	4.6 Enticing, soliciting or importuning unlawful prostitution?
Q	4.7 Forced prostitution?
Q	5. What would the purposes of the new law?
Q	6. How will this option comply with
Q	6.1 South Africa's international obligations?
Q	6.2 the Constitution?
Q	7. How will this option
Q	7.1 reduce the demand for prostitution?
Q	7.2 reduce harm and vulnerability to abuse and exploitation of prostitutes?
Q	7.3 assist prostitutes to enforce their rights, including rights to equality and access to health?
Q	7.4 avoid the stigmatisation and discrimination of prostitutes?
Q	7.5 address concerns regarding prostitution and crime?
Q	7.6 address concerns regarding public health and HIV?
Q	7.7 assist to create an environment for prostitutes to exit prostitution?

**PROPOSAL 3: NON-CRIMINALISATION OF PROSTITUTION AND PROSTITUTION
RELATED ACTIVITIES**

The non-criminalisation option gives effect to the policy decisions to

decriminalise

- voluntary selling of adult sex

and

- buying of voluntary adult sex

and

- prostitution related activities *and*

allow

- prostitutes to regulate themselves *and*

apply

- general law to prostitution and prostitution related acts.

The focus of the non-criminalisation model is on self regulation.

The model has the following characteristics

1. Prostitutes working for an employer in a legal prostitution venue are employees under a legal service contract and the general labour-, tax-, unemployment insurance law apply.
2. Prostitutes working as independent contractors do not fall in the scope of laws such as the Labour Relations Act of 1995, the Employment Equity Act of 1998, the Basic Conditions of Employment Act of 1997, the Occupational Health and Safety Act of 1993 and the Unemployment Insurance Act of 2001.
3. The law of contract applies to any agreements between prostitutes and clients to buy and sell sexual services.
4. No action is criminal purely because it took place in a prostitution context.

5. Prostitutes and prostitute organisations are involved in systems and processes to design measures to protect the general welfare and human rights of prostitutes.
6. Other stakeholders in prostitution such as management, clients and the communities where prostitutes work are involved in systems and processes to develop measures regarding advertising, zoning, ownership of property and trade unions.
7. Prostitution supervisory bodies do the following:
 - 7.1 review the operation of the legislation
 - 7.2 advise government on policy issues related to prostitution
 - 7.3 make additional regulations for unforeseen circumstances
 - 7.4 provide information and education to prostitutes
 - 7.5 develop alternative options to prostitutes
 - 7.6 develop exit strategies for prostitutes who want to leave prostitution.

Non-criminalisation as an option entails

- *repealing* the current prostitution legislation
- and*
- enacting new legislation to *provide for* prostitution related matters

To give effect to a non-criminalisation model, the Commission proposes that the legislature:

1. Repeals the Sexual Offences Act.
2. Repeals section 11 of the Sexual Offences Amendment Act.
3. Enacts a new Adult Prostitution Reform Act⁹ after consulting with prostitutes, prostitution organisations and other role players to provide for matters such as the following:
 - 3.1 Systems and procedures for regular consultation on matters in the Act.
 - 3.2 A prostitution supervisory body, representing the key role players in prostitution, to review the prostitution regime and make recommendations to government on a regular basis.
 - 3.3 Protect the right of prostitutes to at any time, refuse to provide or to continue to provide, a commercial sexual service to any other person.
 - 3.4 Protect the right of the other party to recover contractual damages for the provision of sexual services that is not performed.
 - 3.5 Exclusion of a person from running a prostitution business if they are convicted offenders of specific offences e.g.:
 - participation in an organised criminal group
 - sexual crimes
 - murder
 - manslaughter
 - assault
 - abduction
 - robbery
 - extortion
 - burglary
 - money laundering
 - offences under the Arms legislation
 - drug abuse.

⁹ This is just a working title for ease of reference and the Commission does not propose a name for the new Act in this Discussion Paper.

- 3.6 Amnesty to prostitutes with a criminal record for prostitution and prostitution related offences who wish to exit prostitution.
 - 3.7 Safe sex practices in prostitution.
 - 3.8 Enjoyment of human rights by prostitutes and their clients.
4. If required in the new legislation, develops new terms and definitions for archaic terms e.g.:
- 4.1 'unlawful carnal intercourse'
 - 4.2 'brothel'
 - 4.3 'defilement'
 - 4.4 'immoral acts'
 - 4.5 'indecent acts'

Questions on proposal 3 – non-criminalisation

1. How would you address the following matters:
 - 1.1 Systems and procedures for regular consultation on matters in the Act.
 - 1.2 A prostitution supervisory body, representing the key role players in prostitution, to review the prostitution regime and make recommendations to government on a regular basis.
 - 1.3 Protecting the rights of prostitutes to at any time, refuse to provide or to continue to provide, a commercial sexual service to any other person.
 - 1.4 Protecting the right of the other party to recover contractual damages for the provision of sexual services that is not performed.
 - 1.5 Exclusion of persons from running a prostitution business if they are convicted offenders of specific offences
 - 1.6 Amnesty to prostitutes with a criminal record for prostitution and prostitution related offences who wish to exit prostitution.
 - 1.7 Safe sex practices in prostitution.
 - 1.8 Enjoyment of human rights by prostitutes and their clients.
2. Should the matters listed in question 1 be dealt with in this law or elsewhere?
3. What would the purposes of the new law?
4. To what extent can this aim be achieved through the law?
5. Are there further matters that need to be addressed in this law?
6. How will this option comply with
 - 6.1 South Africa's international obligations
 - 6.2 the Constitution
7. How will this option
 - 7.1 reduce the demand for prostitution?
 - 7.2 reduce harm and vulnerability to abuse and exploitation of prostitutes?
 - 7.3 assist prostitutes to enforce their rights, including rights to equality and access to health?

Q	7.4 avoid the stigmatisation and discrimination of prostitutes?
Q	7.5 address concerns regarding prostitution and crime?
Q	7.6 address concerns regarding public health and HIV?
	7.7 assist to create an environment for prostitutes to exit prostitution?

PROPOSAL 4: REGULATION OF PROSTITUTION AND PROSTITUTION RELATED ACTIVITIES (ALSO REFERRED TO AS 'LEGALISATION OF PROSTITUTION'¹⁰)

The regulation model gives effect to the policy decision to

- remove the criminal sanction on
 - indoor prostitution*and/or*
 - outdoor prostitution*and/or*
 - some prostitution related acts
- and*
- subject the legal aspects of prostitution to state regulation
- and*
- subject the remaining illegal aspects to criminalisation.

The regulation model focuses on legalising and regulating prostitution. Criminalisation of the illegal aspects remains an element.

The regulation model has the following versions:

- Legal and regulated indoor and outdoor prostitution or
- Legal and regulated indoor prostitution *combined with either*
 - criminalised outdoor prostitution *or*
 - legal but strictly regulated outdoor prostitution.¹¹

¹⁰ See discussion in p 202 above.

¹¹ The Commission proposes this version because it allows a fuller description of the possibilities under this option.

Regulation as an option generally entails

- *repealing* the current prostitution legislation
- and*
- enacting new legislation to *regulate*
 - legal voluntary adult prostitution
 - and*
 - particular aspects of prostitution related acts *and/or criminalise*
 - illegal aspects of voluntary adult prostitution.¹²

¹² E.g. outdoor prostitution outside of zoned areas.

To give effect to a regulation model whereby
• prostitution is legal but state-regulated, and
• outdoor prostitution is restricted to prostitution zones,
the Commission proposes that the legislature:

1. Repeals the Sexual Offences Act.
2. Repeals section 11 of the Sexual Offences Amendment Act.
3. Enacts a new Adult Prostitution Reform Act¹³ to regulate the following aspects of prostitution:
 - 3.1 Legal prostitutes:
 - a. Operating conditions for prostitutes e.g.:
 - i register with a state authority to acquire permits to work as prostitutes
 - ii submit to regular health checks
 - iii submit to treatment if infected with a sexually transmitted disease
 - iv pay taxes on the earnings of prostitution
 - v adhere to limitations on where to advertise prostitution
 - vi adhere to limitations on where to solicit for purposes of prostitution.
 - b. Prohibited advertising of prostitution e.g.:
 - i public and main streets
 - ii theatres
 - iii telephone booths
 - iv or close to residential areas, churches, hospitals and schools visited by minors
 - v places where prostitution is illegal.
 - 3.2 Legal indoor prostitute venues:
 - a. Define legal indoor prostitution venues.

¹³ This is just a working title for ease of reference and the Commission does not propose a name for the new Act in this Discussion Paper.

- b. Prescribe location of legal indoor prostitution venues e.g.:
 - i no proximity to residential areas, churches, hospitals, schools or any other place regularly frequented by children for recreational or cultural activities
 - ii no interferences with the amenities of the neighbourhood
 - iii must have sufficient off-street parking
 - iv must have suitable access to the venue.
- c. Prescribe licensing conditions of legal indoor prostitution venues e.g.:
 - i adequate working conditions and facilities and
 - ii access to health services including health checks, birth control and sex education
 - iii the number of venues per area.
- d. Prescribe operating conditions of legal indoor prostitution venues e.g.:
 - i limit numbers of prostitutes working per venue
 - ii limit working hours
 - iii prescribe minimum wages
 - iv limit deductions from earnings of prostitutes.

3.3 Legal outdoor prostitution zones:

- a. define working areas
- b. identify prostitution zones
- c. regular police patrol of working areas
- d. drop-in shelters.

3.4 Specific prostitution related crimes e.g.:

- a. selling and buying of unlawful adult sex
- b. procuring for the purposes of buying unlawful adult sex
- c. coercion to become a prostitute
- d. living on earnings of unlawful adult prostitution
- e. detention for purposes of unlawful carnal intercourse
- f. trafficking in persons for sexual purposes
- g. non-compliance with the regulatory system.

3.5 Specific prostitution related acts e.g.:

- a. safe-sex practices
- b. sex education
- c. implementation by the police or similar state law enforcement agencies
- d. police access to venues where prostitution takes place

- e. legal mechanisms and procedures for the closing down of illegal venues
 - f. regulatory powers whether by
 - i. administrative authorities or
 - ii. medical authoritiesand whether on a
 - i. national or
 - ii. provincial or
 - iii. local level.
4. If required in the new legislation, develops new terms and definitions for archaic terms e.g.:
- 4.1 'unlawful carnal intercourse'
 - 4.2 'brothel'
 - 4.3 'defilement'
 - 4.4 'immoral acts'
 - 4.5 'indecent acts'

Questions on proposal 4 - regulation

- | | |
|---|---|
| Q | |
| Q | 1. How must prostitution be defined? |
| Q | 2. How must indoor prostitution be defined? |
| Q | 3. Which aspects of prostitution should be regulated |
| Q | 4. Must the following be criminal offences: |
| Q | 4.1 selling and buying of unlawful prostitution? |
| Q | 4.2 procuring for the purposes of buying unlawful prostitution? |
| Q | 4.3 living on earnings of unlawful prostitution? |
| Q | 4.4 detention for purposes of unlawful prostitution? |
| Q | 4.5 non-compliance with the regulatory system? |
| Q | 5. How must the following be regulated: |
| Q | 5.1 safe-sex practices? |
| Q | 5.2 sex education? |
| Q | 5.3 advertising of prostitution? |
| Q | 5.4 implementation by the police or similar state law enforcement agencies? |
| Q | 5.5 police access to venues where prostitution takes place? |
| Q | 5.6 legal mechanisms and procedures for the closing down of illegal venues? |
| Q | 6. Must regulatory powers be housed within |
| Q | 6.1 administrative authorities or |
| Q | 6.2 medical authorities? |
| Q | 7. Must the regulatory functions be at national, provincial or local level? |
| Q | 8. Will provincial administrations and/or local authorities have some discretion e.g. |
| Q | may local authorities choose to criminalise prostitution? |
| Q | 9. What would the purposes of the new law? |
| Q | 10. How will this option comply with |

Q	10.1 South Africa's international obligations
Q	10.2 the Constitution
Q	11. How will this option
Q	11.1 reduce the demand for prostitution?
Q	11.2 reduce harm and vulnerability to abuse and exploitation of prostitutes?
Q	11.3 assist prostitutes to enforce their rights, including their rights to equality and access to health?
Q	11.4 avoid the stigmatisation and discrimination of prostitutes?
Q	11.5 address concerns regarding prostitution and crime
Q	11.6 address concerns regarding public health and HIV?
Q	11.7 assist to create an environment for prostitutes to exit prostitution?

ANNEXURE A: CURRENT LEGAL POSITION IN SOUTH AFRICA

1. As stated in chapter 2, in terms of the current law it is a criminal offence to prostitute oneself, to be the client of a prostitute and to engage in certain prostitution related behaviour in South Africa. In South African law, prostitution is currently dealt with in terms of the Sexual Offences Act 23 of 1957 (the Sexual Offences Act) and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Amendment Act), although other legislation, such as the Aliens Control Act 96 of 1991, also contain provisions that are peripherally relevant to prostitution.¹ In addition, municipal by-laws play a role in the legal control of prostitution. These by-laws may take the form of either general or 'prostitution-specific' provisions. Municipal by-laws apply to both prostitution in brothels (usually in the form of measures relating to business licenses) and to prostitution conducted from the street.

2. As the primary offence of prostitution (unlawful carnal intercourse or indecent acts for reward)² and the offence of engaging a person for sexual services³ is dealt with in chapter 2 this annexure will provide an overview of the remaining sections of the Sexual Offences Act which relate to adult prostitution and the law relevant to trafficking of persons for purposes of prostitution.

The Sexual Offences Act 23 of 1957

3. South African legislation on prostitution has largely followed English statutes.⁴ In 1957 the various laws regulating sexual acts or relations were repealed⁵ and re-enacted in a consolidating Immorality Act.⁶ This Act, subsequently renamed the

¹ The provisions concerned are discussed *infra*.

² Section 20(1)(aA) of the Sexual Offences Act.

³ Section 11 of the Sexual Offences Amendment Act.

⁴ Milton & Cowling *South African Criminal Law and Procedure Vol III: Statutory Offences* at Par E3-79.

⁵ An overview of the history of these laws is given in the Issue Paper.

⁶ Act 23 of 1957.

Sexual Offences Act,⁷ is still in force and contains the current provisions regulating various aspects of adult prostitution. The 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.⁸

4. In the following section the offences relating to prostitution created by the Sexual Offences Act will be discussed in some detail. The offences are discussed in the order of their inclusion in the Act.

Keeping a brothel

5. Section 2 of the Act provides that any person who keeps a brothel shall be guilty of an offence. The penalty for contravention of 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.⁹

6. The offence consists of the following elements: keeping; a brothel and *mens rea*.

7. 'Keeping' requires that the accused must have exercised some degree of management, supervision or control of a more or less permanent character.¹⁰ The owner of the premises is not necessarily 'keeping' it: he or she must, in addition, control or supervise the operation of the brothel.¹¹

8. Section 3 of the Act provides for an extension of the concept of 'keeping' by enumerating circumstances where certain persons (who may somehow be

⁷ Section 10 of the Immorality Amendment Act 2 of 1988.

⁸ The offences relating to prostitution are discussed *infra*.

⁹ Section 22(a) of the Act.

¹⁰ Milton & Cowling (*op cit*) at E3-109 n 3 and the authorities cited there.

¹¹ *Idem* at E3-109.

associated with the brothel but who would not normally be considered to be 'keeping') are deemed to be keeping the brothel.

9. The section lists the following persons:

- (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;
- (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; or
- (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.

10. It is clear from the above that even persons who are not physically present on the premises or controlling, supervising and managing the premises may in terms of this section be deemed to be keeping the brothel.

11. The onus of proving that a house or place is to be kept or used (or is being kept or used) as a brothel to the knowledge of the owner will in terms of section 4 of the Act 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 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.

12. A 'brothel' is defined in the Sexual Offences Act as '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.'¹² The concept of a 'place' is further defined as including 'any field, enclosure, space, vehicle, or boat or any part thereof'.¹³ The Sexual Offences Act therefore designates a *house* or *place* (as defined in the extended sense) as a brothel when it is kept or used –

- (a) for purposes of prostitution;
- (b) for persons to visit for purposes of unlawful carnal intercourse; and
- (c) for persons to visit for any other lewd or indecent purpose.

1.3 It is necessary for the State to prove firstly that prostitution occurred at the house or place,¹⁴ 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) will not qualify a house or place as a brothel.¹⁵

14. Milton and Cowling further note that it is not every house or place where unlawful carnal intercourse occurs that will be regarded as a brothel, but rather those kept or used for purposes of 'carnal connection for the purposes of prostitution'.¹⁶

¹² Section 1 of the Act.

¹³ *Idem*.

¹⁴ 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 (*op cit*) E3-119 n 2.

¹⁵ *Idem* at E3-119.

¹⁶ **R v Louw and Woolf** 1920 TPD 48 at 49 as cited in Milton & Cowling (*op cit*) at E3-120 n 4.

15. The inclusion of 'any other lewd or indecent purpose' in the definition of brothel extends the traditional meaning of the term 'brothel' (viz a place visited for purposes of obtaining sexual intercourse) to places where sexual activity other than conventional sexual intercourse takes place.¹⁷ 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'.¹⁸ Similarly, performances involving female nudity or indecent poses were sufficient to result in the place being considered a brothel.¹⁹

16. *Mens rea* is an element of the offence. According to Milton and Cowling, this 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.²⁰

17. The Sexual Offences Act contains a number of additional measures aimed at the curtailment of brothel keeping. According to section 5 of the Act, any contract to let a house or place to be kept as a brothel shall be null and void. Section 6 provides that any contract of letting and hiring of any house or place that subsequent to the conclusion of such contract becomes a brothel will, as from the date of such event, become null and void. If the owner can provide proof that he or she was ignorant of the fact that the house or place was kept as a brothel, he or she will be entitled to recover the rent up to the date upon which he or she became aware that the house or place was being kept as a brothel. In accordance with section 7 of the Act the owner of a house kept as a brothel will also be entitled to apply to the magistrate of the district where such house is situated for the summary ejection of any person who may be keeping the house as a brothel. The magistrate will be entitled after enquiry to order the summary ejection of such person.²¹

¹⁷ *Idem* at E3-121.

¹⁸ **S v P** 1975 (4) SA 68 (T).

¹⁹ **S v M** 1977 (3) SA 379 (C).

²⁰ Milton & Cowling (*op cit*) at E3-122.

²¹ Section 7 of the Act.

18. Section 8 of the Sexual Offences Act sets out measures that may be taken to effect the arrest of the brothel keeper or to obtain a warrant for entry and search of the brothel. If sworn information is placed before a magistrate by certain persons or organisations that any house or place is being kept or used as brothel, the magistrate may issue a warrant for the arrest of the person alleged to be the brothel keeper,²² or may issue a warrant authorising entry into and search of the house, as well as seizure of certain items.²³ The persons entitled to place such information before the magistrate are—

- (a) at least two 'householders of good repute' whose dwellings are in the vicinity of the brothel;
- (b) a police officer not below the rank of sergeant;
- (c) a welfare officer employed by department of state responsible for Health and Welfare, a local authority or a welfare organisation registered under the National Welfare Act 100 of 1978. However, as sections of this Act have been assigned to the provinces by proclamation or repealed it is likely that this entitlement now rests on social workers employed by the Department of Social Development and other registered social workers in the employ of welfare organisations..

19. The warrant referred to above may authorise any police officer not below the rank of sergeant to –

- (a) enter the brothel at any time for the purpose of ascertaining the name and identity of the brothel keeper;
- (b) interrogate, and to demand the name and address of, any person found in the brothel; and
- (c) 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 the Act.²⁴

²² Section 8(1)(a) of the Act.

²³ Section 8(1)(b) of the Act.

²⁴ Sections 8(1)(b)(i) – (iii).

20. In terms of section 8(2) any person found in the brothel who, when called upon to do so by the police officer conducting the search, refuses to furnish his or her name and address or furnishes a name or address which is false or refuses to disclose the name or identity of the brothel keeper of such house or place or to produce any book, receipt, paper, document or thing that he or she has in their 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.

Procuring

21. 'Procuring' in the context of the Sexual Offences Act is 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. Since section 9 specifically relates to procuring of children and was recently repealed by the Sexual Offences Amendment Act, this discussion will refer only to section 10 and other related provisions of the Act.²⁵ Section 10 of the Act reads 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,

²⁵ See par 3.7.4 of Discussion Paper 85, where section 9 of the Sexual Offences Act is discussed.

shall be guilty of an offence.

22. In terms of this section, 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
- procuring by stupefaction

23. An analysis of the different components of section 10 of the Sexual Offences Act follows.

Procuring for sexual intercourse

24. 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.

25. The term 'procuring', in its ordinary meaning, means 'to produce by endeavour', and thus involves an element of persuasion, inducement or influencing.²⁶ It is therefore essential for the accused to have played some active part in 'obtaining' the woman. Where, for example, the 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 in the intercourse taking place would not amount to procuring.²⁷

²⁶ Milton & Cowling (*op cit*) at E3-126.

²⁷ *Ibid.*

26. The prohibition extends beyond the act of procuring to also include assisting 'in any way' to bring about the intercourse with the procured woman. This is aimed at penalising anyone who furthers the procurement or helps to bring it about.²⁸

27. Since the provision expressly refers to the procurement of a '*female*', it follows that the offence will not be committed if the procured person is a man. It should be noted that in contrast with section 9 of the Act, there is no age limit set out in section 10: the offence can therefore be committed in respect of a woman of any age.

28. 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.²⁹ 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.

Procuring for a brothel

29. 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.

30. 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', while 'inveigling' would have a related meaning suggesting an additional element of deception.³⁰ The prohibition of 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

²⁸ *Idem* at E3-126 n 12 and examples cited there.

²⁹ *Idem* at E3-128.

³⁰ Milton & Cowling (*op cit*) at E3-134.

or officials'.³¹ It is committed by concealing the female in a place in the house or place which is the brothel.

Procuring for common prostitution

31. 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. The 'common prostitute'-element will only be discussed here.³²

32. 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.

33. 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.³³ 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 what the accused procured the woman for was 'common' prostitution.³⁴

To become an inmate of a brothel

34. 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 Dictionary³⁵ this term has the following possible meanings:

³¹ *Ibid.*

³² The other elements have either been discussed elsewhere or do not require further elucidation.

³³ Milton & Cowling (*op cit*) at E3-136.

³⁴ *Ibid.*

³⁵ 1995.

- (a) an occupant of a hospital, prison, institution etc; or
- (b) an occupant of a house, especially one of several.

35. Depending of the interpretation followed it could imply mere occupancy of a brothel or it could imply an element of imprisonment or loss of autonomy, and could thus refer to the situation where the procured woman is not in a position 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. The mere fact of her being an 'inmate' would suffice.

Procuring by stupefaction

36. 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.

37. 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 putting up resistance against physical force. Milton and Cowling are of the opinion that the offence would also be committed by binding, strapping or holding down the woman or otherwise restricting her physical movements.³⁶

38. The section in question states that the purpose of the procurement should 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 and it is not necessary that the intercourse should have taken place.³⁷

Detention for purposes of unlawful carnal intercourse

³⁶ *Idem* at E3-133.

³⁷ Milton J.R.L **South African Criminal Law and Procedure** Juta 1971 at page 348.

39. 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.³⁸

40. 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'.³⁹

41. 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.

42. 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.⁴⁰ In this regard, a woman is presumed to be involuntarily at the place if she is under 16 years of age,⁴¹ or, being 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.⁴²

43. Similar to the provision in section 10(e), this section requires that the objective of the abduction or detention of the woman should be for her to be unlawfully carnally known by a man. This implies that the offence will be 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

³⁸ Section 22(e).

³⁹ Milton & Cowling (*op cit*) at E3-138.

⁴⁰ *Idem* at E3-138.

⁴¹ Section 12(2)(a).

⁴² Section 12(2)(b).

intercourse should actually have taken place: the offence is complete once the taking or detention with the prescribed intent takes place.⁴³

Assistance for purposes of unlawful carnal intercourse

44. The provisions of section 12A(1), and also to some extent, of 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.

45. 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.⁴⁴

46. 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 5 years.⁴⁵

47. 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.⁴⁶ Whether the accused has performed such

⁴³ Milton & Cowling (*op cit*) at E3-138.

⁴⁴ *Idem* at E3-143.

⁴⁵ Section 22(d) of the Act.

⁴⁶ Milton & Cowling (*op cit*) E3-146.

an act will be determined by the objective consideration of whether what was done was calculated to achieve communication of one party with the other.⁴⁷

48. The Act provides no definition for the term 'reward' as used in this subsection. However, in common parlance, the term 'reward' can encompass both a monetary reward and other forms of compensation with pecuniary value, for example, clothing, food or accommodation.

49. The inclusion of the phrase 'with intent' requires that the accused should not merely know that the one party is a prostitute but should in addition intend (which includes 'foreseeing') that the parties will engage in sexual acts for reward.⁴⁸ This situation would arise where the accused provides the client with an escort on the explicit understanding that an act of prostitution will follow.

50. The section also includes the situation where there is no such explicit understanding, but where this possibility is not necessarily excluded. This appears to address the situation where the accused arranges for a person to be an escort without the question of sexual intercourse being raised but where the accused acts in a way that creates the possibility or opportunity for the parties to engage in sexual intercourse.⁴⁹ 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.

Permitting premises to be used

51. 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.⁵⁰ The penalty is imprisonment for a period not exceeding six years with or without a fine not exceeding R12 000.

⁴⁷ *Ibid.*

⁴⁸ *Idem* at E3-145.

⁴⁹ *Ibid.*

⁵⁰ Milton & Cowling (*op cit*) E3-147 - 148.

Soliciting

52. Milton and Cowling explain that of necessity prostitutes must make known their availability for purposes of sexual relations. In practice this has involved the prostitutes being physically present in places where they can find or attract customers. Alternatively, they may have an agent who approaches potential clients to inform them of the prostitute's availability. A related phenomenon is the practice of potential customers approaching members of the public in order to ascertain whether they are available for prostitution. This behaviour may cause embarrassment or nuisance to members of the public and has consequently led to statutory prohibitions upon 'soliciting' in public.⁵¹

53. Section 19(a) of the Sexual Offences Act provides that any person who entices, solicits or importunes in any public place for immoral purposes commits an offence. The penalty is a fine not exceeding R4000 or imprisonment for a period not exceeding two years or both such fine and imprisonment.⁵²

54. The *actus reus* of the offence consists in 'enticing', 'soliciting' or 'importuning'. Milton and Cowling explain these terms as follows:

- 'Entice': This term connotes alluring or attracting by hope of pleasure, and involves a petitioning. Any offer or proposal made will involve an enticing.⁵³
- 'Solicit': In relation to prostitution, this term has been defined as 'accosting and importuning'. The term therefore indicates an approach to a person, which is accompanied by an asking or inviting in an earnest manner. It too denotes beguiling, alluring or petitioning.⁵⁴

⁵¹ *Idem* at E3-88.

⁵² Section 22(g).

⁵³ *Idem* at E3-91 n 1 and authorities cited there.

⁵⁴ *Idem* at E3-91 n 4-6 and authorities cited there.

- ‘Importune’: This term has a connotation of persistence and requires a repetition or insistence that is not necessarily present in the case of enticing or soliciting.⁵⁵

55. The offence is therefore committed by a direct physical invitation by the accused person, and the accused has to be physically present in the public place. Whether an advertisement of the prostitute’s availability will amount to a solicitation seems to depend upon whether the prostitute is present where the advertisement takes place.⁵⁶ The soliciting may consist in words, gestures, signs or display. It is not necessary that the person solicited was aware of the solicitation.⁵⁷ A public place in this context would be a place to which the public has access, whether of right or not.⁵⁸ The requirement of ‘immoral purposes’ here refers to *sexually* immoral purposes.⁵⁹ The Appellate Division (as it then was) stated in **R v H**⁶⁰ that it is impossible to define immorality in this sense, and that each case must be evaluated on its own facts. Based on this *dictum*, Milton and Cowling submit that the purpose of the solicitation must be to commit an act of a sexual nature that, according to contemporary standards of morality, is considered to be immoral.

56. The use of the word ‘any person’ in section 19(a) implies that the prohibition applies to both to the prostitute and the pimp, and the question that arises is whether the client who solicits (either a prostitute or other persons) can also be charged with this offence.⁶¹ The weight of authority seems to favour the view that persons who are not prostitutes, but wish to enter into a sexual transaction with a prostitute, commit

⁵⁵ *Idem* at E3-91 n 7-9 and authorities cited there.

⁵⁶ *Idem* at E3-91.

⁵⁷ *Ibid.*

⁵⁸ *Idem* at E3-92.

⁵⁹ *Idem* at E3-93.

⁶⁰ 1959 (4) SA 427 (A).

⁶¹ Milton & Cowling (*op cit*) at E3-90.

the offence if they solicit another person (whether a prostitute or not) for this immoral purpose.⁶²

57. Section 19(b) of the Act provides that any person who wilfully and openly exhibits him or herself in an indecent dress or manner at any door or window or within the view of any public street or place to which the public have access, commits an offence. The penalty is a fine not exceeding R4 000 or imprisonment for a period not exceeding two years or both such fine and imprisonment. This provision is implemented not only against prostitutes, but is also utilised for other instances of indecent exposure, such as 'flashing'.

58. There are however circumstances in which it will be lawful to expose one's person, for example, for reasons of personal safety⁶³ or in the course of artistic or educational activities. However, the inclusion of the term 'wilfully' in the section indicates that mere negligence will not suffice. The offence will only be committed where the accused intends to be seen.⁶⁴

59. The requirement of 'exhibiting' implies the exposure of some part of the body. The term has been held to consist in a conscious display of the body for the purpose of it being viewed by members of the public.⁶⁵

60. As stated above, the Act does not define the term 'indecent', and the term must be understood in terms of the standards of the ordinary reasonable member of contemporary society.

61. The offence can be committed –

(a) at any door or window;

⁶² See Milton & Cowling *loc cit* and authorities cited there.

⁶³ Milton & Cowling (*op cit*) at E4-7 n 1 cite the example of where the clothes are on fire.

⁶⁴ *Ibid.*

⁶⁵ See **S v K** 1983 (1) SA 65 (C).

- (b) within view of any public street or place; or
- (c) in any place to which the public have access.

62. This formulation implies that it is not essential for the door or window where the exhibition takes place to be within the view of the public or a public place. In relation to the second aspect, viz within view of a public street or public place, the test is whether the place is visible from the street or place: it is not essential that someone should have *actually seen* the accused.⁶⁶

Living on the earnings of prostitution

63. 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.⁶⁷

64. Milton and Cowling note that this section is directed against the exploitation of prostitution.⁶⁸ The notion of 'living on' is construed widely so as to include not only that which 'maintains the life of the recipient' but also other purposes.⁶⁹ 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.

65. 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

⁶⁶ Milton & Cowling (*op cit*) at 4-14.

⁶⁷ Section 22(a) of the Act.

⁶⁸ Milton & Cowling (*op cit*) at Par E3-99.

⁶⁹ *Ibid.*

(c) habitually is in the company of a prostitute -
is deemed to be knowingly living wholly or in part on the earnings of prostitution.

66. The effect of this presumption is not only to establish that the accused lived on the earnings of prostitution, but also that he or she did so *knowingly*.⁷⁰

67. While the 'earnings' referred to here are usually received directly from the prostitute, it is sufficient that the money is given in consideration of the act of prostitution and can therefore be given directly to the accused by the client of the prostitute.⁷¹ Milton and Cowling submit that the concept of earnings is not confined to the wages for the service rendered, but should be more widely construed as 'profits or income produced by prostitution'.⁷² There must be evidence that the earnings were received at a time when the other person was working as a prostitute. There must also be some more or less direct nexus between the earnings and the activities of the prostitute.⁷³

68. The ambit of this offence was examined in detail in **S v H**.⁷⁴ The respondent in this matter was arrested following an incognito visit by three police officials to an escort agency, where they engaged the services of three escorts.⁷⁵ The escorts accompanied the three police officials to a caravan park, and during the course of the evening, each of the women agreed to have sexual intercourse with her partner for reward. Money changed hands. At a stage when the women had undressed and were about to fulfil their side of the agreement, they were arrested.

69. The three women were charged with contravention of 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

⁷⁰ Milton & Cowling (*op cit*) at E3-100.

⁷¹ *Idem* at E3-103.

⁷² *Ibid.*

⁷³ *Idem* at E3-104.

⁷⁴ 1988 (3) SA 545 (AD).

⁷⁵ See 551D *et seq.*

purposes of sexual intercourse'. The defence raised on behalf of the three accused was one of law, i.e. that the provisions of section 20(1)(a) of the Act were directed at persons who parasitically live on the earnings of a prostitute, and not the prostitute herself. The court a quo rejected this argument, and the accused were convicted. However, one of the accused (the respondent before the Appellate Division) appealed to the (then) Transvaal Provincial Division of the Supreme Court, and her conviction and sentence were set aside.⁷⁶ The State in turn appealed against this finding.

70. On appeal, the Appellate Division (per Kumleben JA) examined the pre-Union enactments in the Transvaal, Cape, Orange Free State and Natal that preceded the introduction of section 20(1)(a).⁷⁷ Significantly, each of these referred to 'every **male** person'⁷⁸ who knowingly lives wholly or in part on the earnings of prostitution ..." (with the exception of the Natal version, which applied to 'every person'). Kumleben JA found that the reference to a male person made it clear that these enactments did not have the prostitute in mind, since a prostitute, in terms of the understanding prevailing at the time of promulgation of the Sexual Offences Act, was a **woman**.⁷⁹ 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 the Act had been promulgated.⁸⁰ Section 20(1)(a) therefore had to be interpreted against this background. The court remarked that had the legislature, with the promulgation of the Sexual Offences Act and the repeal of its predecessors, intended to change the essential character of the offence, 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.

⁷⁶ This judgment is reported as **S v H** 1986 (4) SA 1095 (T).

⁷⁷ 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).

⁷⁸ Our emphasis.

⁷⁹ At 552G.

⁸⁰ At 552H.

71. This section does not differentiate between children and adults when it criminalises knowingly living on the earnings of prostitution. In reality a younger sibling or a child or a prostitute, knowing that he or she is supported on the earnings of prostitution is guilty of the same offence as the owner of the brothel in which the prostitute plies his or her trade. Arguably, this is not the intention of the legislature.⁸¹

72. 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 child, for example, as a pimp. This defence specifically caters for children who are living off the earnings of the prostitution of another child e.g. an older sibling.

Unlawful carnal intercourse or indecent acts for reward (offence of prostitution)

73. This offence is discussed in detail in chapter 2 of the discussion paper.

Public indecency

74. Section 20(1)(b) of the Sexual Offences Act provides that any person who in public commits any act of indecency with another person is guilty of an offence. The penalty is a fine not exceeding R4 000 or imprisonment for a period not exceeding two years or both such fine and imprisonment.⁸²

75. In the context of prostitution, this provision is often utilised against prostitutes and clients who complete the sexual transaction in public (e.g. in a car parked within public view). This section is not only used against prostitutes.

⁸¹ South African Law Reform Commission Discussion Paper on Sexual Offences: The Substantive Law (1999) at pp156.

⁸² Section 22(g) of the Act.

Receiving remuneration for commission of act of indecency

76. Section 20(1)(c) of the Sexual Offences Act provides that it is an offence for any person, in public or in private, to assist in bringing about, or to receive any consideration for, the commission by any person of any act of indecency with another person. The penalty is a fine not exceeding R4 000 or imprisonment for a period not exceeding two years or both such fine and imprisonment.⁸³

77. Milton and Cowling observe that the gist of the offence appears to be that the accused receives the consideration in return for providing a person, place or opportunity for the commission of an indecent act by others.⁸⁴

78. It must be alleged and proved that two persons engaged in an act that was of an indecent nature. The act of indecency must have actually taken place.

Trafficking

79. The following paragraphs outline the legal position with regard to adults who have been trafficked for purposes of prostitution.

80. South Africa has signed and/or ratified various international instruments that condemn trafficking in persons. The most recent of these instruments is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. This Protocol supplements the United Nations Convention against Transnational Organised Crime and must be read with the Convention as the Convention requires states parties to legislate on various matters relevant to the issue of trafficking in persons.⁸⁵

⁸³ Section 22(g) of the Act.

⁸⁴ Milton & Cowling (*op cit*) at E3-132.

⁸⁵ Article 1 of the Protocol stipulates that the Protocol must be interpreted together with the Convention Against Transnational Organised Crime. Article 37(4) of the Convention Against Transnational Organised Crime provides that any protocol to the Convention must be interpreted together with the Convention, taking into account the purpose of that protocol.

81. In terms of section 231(2) of the Constitution,⁸⁶ an international agreement binds the Republic of South Africa only when it is enacted into law by way of national legislation, unless it is an agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive.

82. Hence the South African government has commenced with various processes to bring its domestic laws in accordance with the standards set by these international instruments. These processes are discussed in paragraphs 1.98 -1.99.

83. Currently South Africa has no legislation that comprehensively addresses the trafficking of persons. Furthermore, the existing legal measures that can be applied to prosecute offences relating to trafficking in persons are not sufficient to combat trafficking in persons or to protect victims of trafficking effectively. For this reason the Commission has investigated the issue of trafficking in persons for purposes of law reform. The Commission published its findings in its report (accompanied by draft legislation for the attention of the Department of Justice and Constitutional Development) on the 25th November 2008.

84. In the interim, the Criminal Law (Sexual Offences and Related Matters) Amendment Act⁸⁷ contains transitional provisions relating to trafficking in persons pending the adoption of comprehensive legislation.⁸⁸ This Act criminalises the trafficking of a person for purposes of any form or manner of exploitation, grooming or abuse of a sexual nature of such person, including the commission of any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person. Hence a person suspected of being involved in the trafficking of persons for purposes of prostitution could be charged in terms of this Act.

⁸⁶ Constitution of the Republic of South Africa Act 108 of 1996.

⁸⁷ Act No. 32 of 2007.

⁸⁸ The provisions relating to trafficking contained in the Criminal Law (Sexual Offences and Related Matters) Amendment Act will be repealed by their incorporation into the comprehensive legislation on trafficking in persons.

85. Furthermore, the Act repeals the common law offence of rape and creates two gender-neutral statutory offences namely rape and compelled raped. Female victims of trafficking who are forced to have sexual intercourse with men against their will are being raped. Perpetrators could therefore be charged with the offence of rape. Perpetrators could be those who transport the victims to the place of exploitation⁸⁹ or a client at, for example, a brothel.⁹⁰ Furthermore, traffickers who force victims of trafficking to have sex with clients could be charged as an accomplice to the offence of rape as they associate themselves wittingly with the commission of the crime in that they knowingly afford the clients the opportunity to rape the victims.⁹¹ However, if the prosecution cannot prove that the client has raped the victim, the trafficker who has forced the victim to have sex with the client cannot be charged as an accomplice to the offence. This is because an accomplice's liability is accessory in nature so that there can be no question of an accomplice without a perpetrator who commits the crime.⁹² Alternatively, the prosecution may opt to charge the client as an accomplice to the offence created in section 20(1)(aA) of the Sexual Offences Act.⁹³ This section makes it an offence for any person 18 years or older to have unlawful carnal intercourse, or commit an act of indecency, with any other person for reward. In this case the offence will be committed by the victim of trafficking⁹⁴ who should not be prosecuted because she was forced to have sexual intercourse with the client. The client could still be prosecuted as an accomplice to the offence notwithstanding the fact the victim of trafficking who committed the offence is not prosecuted for the commission of the offence.⁹⁵ Similarly, the trafficker who has forced the victim to have sex with the client can be charged as an accomplice to the offence.

⁸⁹ It sometimes happens that traffickers rape their victims during the trafficking process in order to break their spirit and to prepare them for the exploitation to which they will be subjected.

⁹⁰ The prosecution will have to prove that the client intentionally had sexual intercourse with the victim, whilst knowing that she is not consenting to such intercourse.

⁹¹ Burchell p. 599.

⁹² Burchell p.599.

⁹³ Act No. 23 of 1957.

⁹⁴ In **S v Jordan** 2002 (6) SA 642 (CC) the majority judgment found that this section is directed at prostitutes only and not their clients.

⁹⁵ Burchell p. 604.

86. In addition, several common law and statutory law provisions could be used to prosecute a person suspected of being involved in the trafficking of persons if the prosecution is not able to prove the offence of trafficking in persons in a particular case. Under the common law, depending on the circumstances of each case, such persons could be charged with kidnapping, common assault, assault with intent to cause grievous bodily harm, rape, extortion, attempted murder and murder. Statutory offences are provided for in the Sexual Offences Act,⁹⁶ the Riotous Assemblies Act,⁹⁷ the Immigration Act,⁹⁸ the Basic Conditions of Employment Act,⁹⁹ the Intimidation Act,¹⁰⁰ the Domestic Violence Act¹⁰¹ and the Prevention of Organised Crime Act.¹⁰² These common law and statutory law offences are discussed in more detail below.

⁹⁶ Act No. 23 of 1957.

⁹⁷ Act No. 17 of 1956

⁹⁸ Act No. 13 of 2002.

⁹⁹ Act No. 75 of 1997.

¹⁰⁰ Act No. 72 of 1982.

¹⁰¹ Act No. 116 of 1998.

¹⁰² Act No. 121 of 1998.

ANNEXURE B**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, Chevon, Bronwyn, Sandy, Amina, Josie; manageress: Linda; garden worker: Elizabeth; cleaners: Gwen, Bridget)
38. Matrinez E
39. McGill J
40. Mkhalihi 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