

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

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.

Africa.

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).

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.

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).

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?
 - 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 at dclark@justice.gov.za or Ms C Pienaar at capienaar@justice.gov.za.⁴

⁴ See p (iii) in the Discussion Paper for further contact particulars. See also questions after each proposal in chap 8.