

SOUTH AFRICAN LAW REFORM COMMISSION

REPORT

Project 107

SEXUAL OFFENCES

ADULT PROSTITUTION

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Summary of the Report and recommendations

A Introduction and background

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

2. The aim of this Report, as was the aim of the Issue Paper² and Discussion Paper³ which preceded this Report, is to review the fragmented legislative framework that currently regulates adult prostitution within the larger framework of all statutory and common law sexual offences. The statutory provisions under review are contained in the Sexual Offences Act 23 of 1957 (the Sexual Offences Act). The secondary aim is to consider the need for law reform in relation to adult prostitution and to identify alternative policy and legislative responses that might regulate, prevent, deter or reduce prostitution. As there are a range of legal responses to prostitution in “open and democratic societies”⁴ it is essentially a matter of policy to decide which legislative model accords with governments’ goals and strategies (see para 2.493).

3. The investigation into the legal position relating to adult prostitution constitutes the third leg of the larger Commission project on Sexual Offences (Project 107). The investigation was

¹ Kelly L, Coy M, Davenport R “*Shifting Sands: A Comparison of Prostitution Regimes Across Nine Countries*” (London Metropolitan University 2009) at 5.

² South African Law Commission *Sexual Offences: Adult Prostitution* (Project 107) Issue Paper 19 (2002).

³ South African Law Reform Commission *Sexual Offences: Adult Prostitution* (Project 107) Discussion Paper 1 (2009).

⁴ Meyerson Denise Does the Constitutional Court of South Africa take rights seriously? The case of *S v Jordan* 2004 Acta Juridica 138 at 153.

de-linked by the Commission from the larger project that has delivered, among others, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Amendment Act). The delinking was intended to give the issue of adult prostitution focused attention. As the law currently stands in South Africa, adult prostitution (i.e. selling of sexual services, buying of voluntary adult sexual services, and all prostitution related acts) are criminal offences.⁵

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

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

⁵ Sexual Offences Act 23 of 1957 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

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

7. The Commission has sought to move beyond popular rhetoric to give a clearly reasoned investigation that is based on an analysis of local and international legal principle, precedent and experience. In the course of this investigation the Commission has identified three central themes to the debate aimed at legislative reform on adult prostitution, namely whether prostitution is work or exploitation; access to health and prevention of the transmission of HIV; and addressing arbitrary arrest and exploitation.⁶ The Commission has found that prostitution in South Africa is driven by a complex intersection of social and economic factors in which poverty, unemployment and inequality are key drivers and has thus been mindful that our Constitution requires that the law be a means to achieve social justice.

8. The Commission is of the view that exploitation, particularly of women in prostitution, seems inherent in prostitution and depends on the external factors of gender violence, inequality and poverty and is not caused by the legislative framework in which it finds itself.⁷ The Commission has concluded that changing the legislative framework could create an extremely dangerous cultural shift juxtaposed against the high numbers of sexual crimes already committed against women. Women would be considered even more expendable than at present. The Commission has noted that the prevalence of prostitution in our society and the

⁶ These themes are similarly identified in the Commission for Gender Equality Policy Brief Position Paper on Sex Work (2013) available at www.cge.org.za.

⁷ South African National AIDS Council “National Strategic Plan on HIV, STIs and TB 2012 -2016” at 36.

inherent exploitation associated with it is primarily a social phenomenon, which is reflective of deep-seated, economic and sexual inequality, and that legal mechanisms to address this social phenomenon are limited and are reactive in nature, but nonetheless necessary. For this reason and as stated above the Report contains legislative and non-legislative recommendations.

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

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

11. The Report endorses and builds on the following non-legislative recommendations contained in the joint Women's Legal Centre⁸ and SWEAT project,⁹ specifically that:

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

⁸ WLC and SWEAT joint report "Every sex worker a human rights defender" (2012).

⁹ SWEAT National Sex Work Symposium: Best practices in HIV prevention, care and treatment for sex workers in South Africa (22 – 23 AUGUST 2012) Presentation titled "Create an enabling environment for sex workers: Police harassment and abuse of sex workers: 3 years of documenting sex workers' human rights violations" Stacey-Leigh Manoek.

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

¹⁰ More specifically the Promotion of Equality & Prevention of Unfair Discrimination Act 4 of 2000.

11. Substance abuse in the context of prostitution deserves further attention and intervention (para 2.480); and
12. Transactional relationships, as a growing social phenomenon, be further investigated from a social and gender-based violence intervention perspective (para 1.76).

12. It is necessary to point out that the Sexual Offences Amendment Act contains a potential anomaly. Although a child is legally allowed to consent to a sexual act (which includes touching or penetration) from the age of 16, a consensual sexual act with a child is criminalised as exploitation of the child where such an act is accompanied by a reward or payment. The aim seems clearly to protect this category of children from sexual exploitation. This Report in no way derogates from the criminalisation of under-aged prostitution (younger than 18 years).¹¹ The Commission endorses section 17 of the Sexual Offences Amendment Act and the use of 18 years as a defining line between child and adult prostitution. The added protection is justified due to the vulnerability of children. Anyone paying a consenting child between 16 and 18 for sexual services could be charged with committing the offence of sexual exploitation of a child (child prostitution). A charge of statutory rape or rape of the child could be considered only if the child was between 12 and 16¹² or under the age of 12.¹³

13. All the proposed recommendations contained in this Report presuppose the criminalisation of under-aged (under 18)¹⁴ and coerced prostitution and trafficking of people for the purpose of prostitution. Such activities are all subject to regulation and criminalisation, as appropriate, under other laws and law reform processes. From the outset the Commission confirms its view that these activities must remain criminalised.

¹¹ See Chapter 2 for elucidation on this point.

¹² Statutory rape or statutory sexual violation.

¹³ Rape or sexual assault.

¹⁴ See Chapter 2 for elucidation on this point.

B Recommendations

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

1 Definitions and terminology

15. The Commission is aware that the terminology used in the prostitution debate is integral to the larger debate on preferred legislative models. Although the Commission has attempted to keep gender identification neutral in this Report, in several instances we have used feminine pronouns to refer to people who provide sexual services for payment and masculine pronouns for buyers of sexual services. Available evidence and research has shown that most prostitutes are women and most buyers are men. However, we recognise that a number of men and transgendered or transsexual people provide sexual services for reward and that a minority of female buyers exists (para 1.33).

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

17. In the Discussion Paper¹⁵ the Commission proposed the continued use of the words “prostitution” and “prostitute”. The Commission has decided to retain the term “prostitution” when referring to the selling and buying of sexual acts and related activities. For the sake of

¹⁵ At 6.

consistency, the Commission elects to refer to an adult person (older than 18 years) who voluntarily offers or provides sexual services for financial or other reward, favour or compensation, irrespective of whether the sexual act occurs or not as a prostitute (para 2.3).

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

19. For the definition of “prostitution”, the Commission was asked to list various methods of payment, such as food, accommodation, protection and drugs.¹⁶ Although most respondents felt that in practice cash is the preferred method of payment, other payments range from a plate of food¹⁷ to mobile phone airtime. The Commission believes that listing specific methods of payment may be restrictive. It therefore recommends retaining the inclusive reference to payment as being “any financial or other reward, favour or compensation”, which currently appears in the Sexual Offences Amendment Act (para 1.69).

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

21. The Commission maintains that true transactional relationships should not be confused with adult prostitution. Although transactional relationships do not form part of this investigation,

¹⁶ S Goddard, Bet Sheekom; L Sete UNISA; Fred Williams.

¹⁷ Interview at a safe-house during a police guided tour facilitated by Rocking Chair in Sunnyside, Pretoria on 22 September 2009.

preliminary research has uncovered troubling trends that require attention. The Commission therefore recommends that relationships of this nature, as a growing social phenomenon, be further investigated from a social and gender-based violence intervention perspective (in contrast with the need for legal intervention or law reform) (para 1.76).

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

23. In Chapter 2 the Commission examines the definition of a person who provides sexual services for payment within the context of voluntary prostitution as well as various legal approaches in respect of prostitutes. In this chapter the Commission evaluates the submissions made to it on these issues. The chapter starts with a brief discussion of terminology. It then provides an overview of selected theoretical approaches to prostitutes, which underpin the legal models identified in the Discussion Paper. The overview is followed by an exposition of the current legal position in South Africa and an updated comparative summary of the law as it relates to prostitutes. The discussion portion of the chapter concludes with an exposition of submissions made in response to questions posed in the Discussion Paper,¹⁸ as follows: — how to reduce harm and vulnerability to abuse and exploitation of prostitutes; how prostitutes can be assisted to enforce their rights to equality and access to health care; how stigma and discrimination against prostitutes can be avoided; how concerns regarding prostitution and crime should be addressed; how concerns regarding public health and HIV should be addressed; how an environment can be created for prostitutes to exit prostitution; and finally, how the issue of a criminal record for selling sex for reward should be addressed when a person leaves prostitution to seek other employment. This section is followed by an evaluation of the chapter and the Commission's recommendations on what the most suitable legal response should be in respect of people who provide sexual services for payment.

24. In Chapter 3 the Commission examines the definition of a buyer of sexual services. The Commission also discusses the legal approaches used in respect of buyers, and evaluates the submissions made to the Commission to arrive at a suitable legal approach for South Africa. The chapter starts with a brief discussion on relevant terminology. It then provides an overview of selected theoretical approaches to buyers of sexual services, which underpin the legal

¹⁸ SALRC *Sexual Offences: Adult Prostitution* Discussion Paper 2009.

models identified in the Discussion Paper.¹⁹ The overview is followed by an exposition of the current legal position in South Africa and a comparative summary of the law as it relates to buyers of sexual services. The Commission then identifies a number of contextual issues to assist in understanding the role of the law in addressing this aspect of prostitution, as follows: understanding the demand for prostitution, and who the purchasers are and why they pay for sexual services; the impact on and attitude of people paying for sexual services; the impact on society and the impact of criminalising people for paying for sexual services. The chapter concludes with an exposition of pertinent submissions made on the Discussion Paper, followed by an evaluation of the chapter and the Commission's recommendations on what the most suitable legal response should be in respect of people who pay for sexual services.

25. In Chapter 4, an overview is given of the current law relating to third parties and beneficiaries of prostitution. The category of third parties benefiting from the proceeds of prostitution spans a wide range of people. Such people may or may not be aware of the source of the benefit they receive, and may or may not be actively involved in acquiring such benefit. Beneficiaries include minor dependants and siblings; major dependants such as parents, grandparents and siblings; partners including husbands, spouses, cohabitees, and boyfriends; pimps and other business partners; brothel owners; managers; landlords; escort agencies, massage parlours, strip clubs or "hotels"; corrupt police officials or other officials who abuse their positions or abuse prostitutes; and traffickers, transporters or smugglers. This list is not exhaustive. Thereafter the chapter gives an exposition of submissions made in response to questions posed in the Discussion Paper²⁰ on the legislative options, namely partial criminalisation, regulation, and non-criminalisation. With regard to partial criminalisation and regulation, attention is given to aspects of prostitution that should remain criminalised. Some possibilities include the following: engaging in outdoor sexual intercourse with persons 18 years and over for reward outside a brothel; having outdoor sexual intercourse for reward with persons 18 years and over; procurement of unlawful carnal intercourse prostitution; living on earnings of unlawful prostitution; assistance for purposes of unlawful prostitution; enticing, soliciting or importuning unlawful prostitution; and coerced prostitution. The responses to questions such as whether safe sex practices, sex education and advertising of prostitution should be regulated are also presented. With respect to the option of non-criminalisation, the Commission explores the question of whether persons who are convicted of specific offences should be excluded from

¹⁹ Ibid.

²⁰ Ibid.

running a prostitution business. This chapter concludes with a summary and evaluation, followed by the Commission's recommendations for a suitable legal response in respect of third parties or beneficiaries of prostitution.

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

2 People Who Offer Sexual Services for Payment: The Prostitute

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

28. There is general consensus from respondents to the Discussion Paper that the practice of selling sexual services is often the result of a choice made in severely limiting socio-economic circumstances, and in a context of social inequality. It is not disputed that most women and even girls enter prostitution due to tragic circumstances such as family breakdown, sexual abuse, rape, and poverty, and for economic survival (para 2.437).²¹

29. Although the Commission expected the debate to be laden with moral and religious rhetoric it found that it transcended ideological divides. Despite the fact that most submissions came from religious institutions and people from a range of religions, the views in these submissions have not clashed nor sought harsh retribution against the prostitute.²² In general the submissions acknowledged the harm of prostitution and the vulnerable position of people who provide sexual services, and the need to extend a compassionate hand to them by assisting them to exit from prostitution – albeit through retaining a criminalised system. The remainder of the submissions also acknowledged the vulnerable position of prostitutes but

²¹ Family Policy Institute.

²² This finding stands in contrast to the view in the Commission for Gender Equality Position Paper on Sex Work that 'very often societal perceptions of sex work are informed by religious opinion that views sex work as "sin" and sex workers as "fallen or sinful" women' at 3.

advocated for non-criminalisation as the solution. Essentially the debate has fallen along the lines of those who view prostitution as work and those who view it as exploitation (para 2.442).

30. Given the nature of the service provided through prostitution, the core question seems to be whether prostitution should be considered to be work and more specifically decent work in the context of an employment relationship. The aim of the International Labour Office (ILO) Decent Work Agenda and the Decent Work Programme for South Africa is to promote opportunities for people to obtain decent and productive work.²³ Similarly, the aim of the New Growth Path is to create decent work that will contribute to reducing inequality and defeating poverty. Together with the 2009–2014 Medium Term Strategic Framework and the National Planning Commission, the focus is on addressing major developmental challenges in South Africa. Many of these challenges are listed as reasons for entering prostitution. Decent employment undergirded by quality basic education and a skilled and capable workforce is the ultimate goal. Job creation and skills development targets are crucial elements of The New Growth Path (para 2.451).

31. Neither the ILO nor the above South African policy documents have promoted legalising prostitution as a solution to poverty; nor have they identified prostitution as an employment option for poor or marginalised people. Prostitution does not fit comfortably into the international definition of “decent work”. To the contrary, although prostitution may seem to provide superficially attractive short-term financial benefits, it has not been shown to lift women out of a lifetime of poverty and economic inequality. The reason for this may lie in the very personal and private nature of the service provided, which heightens a prostitute’s vulnerability to exploitation (para 2.452).²⁴

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

²³ International Labour Organization (ILO) International Labour Office “Decent Work Country Profile South Africa” Geneva Switzerland (2011) available at www.ilo.org 7.

²⁴ Raymond JG “Legitimizing Prostitution as Sex Work: UN Labour Organisation (ILO) Calls for Recognition of the Sex Industry” available at <http://action.web.ca>.

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

34. The Commission concludes that within the South African context of high levels of gender violence and inequality coupled with the challenge of poverty, women are particularly vulnerable to being exploited in prostitution. Exploitation, particularly of women in prostitution, seems inherent in prostitution and depends on the external factors of gender violence, inequality and poverty. Whichever way it is argued, there is no justification for this exploitation, including the abuse of power by officers of the law. The Commission agrees with respondents that acts of violence, abuse and exploitation by police officers need to be addressed in the strongest terms. The Commission endorses and builds on the following non-legislative recommendations contained in the joint Women's Legal Centre²⁵ and Sex Workers Education and Advocacy Taskforce (SWEAT) project,²⁶ specifically that:

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

²⁵ WLC and SWEAT joint report "Every sex worker a human rights defender" (2012).

²⁶ SWEAT National Sex Work Symposium: Best practices in HIV prevention, care and treatment for sex workers in South Africa (22 – 23 AUGUST 2012) Presentation titled "Create an enabling environment for sex workers: Police harassment and abuse of sex workers: 3 years of documenting sex workers' human rights violations" Stacey-Leigh Manoek.

35. The Commission believes that evidence has shown that prostitution in South Africa is exploitative and that a significant number of women coerced into a lifestyle of prostitution through economic marginalisation (resulting from poverty, lack of education and inequality) are harmed by it. The Commission is alarmed by first-hand reports of the nature and extent of the physical and psychological harm that prostitutes are exposed to. **Although a partially criminalised approach may recognise the exploitation of the prostitute the Commission for Gender Equality avers that the Nordic approach has impacted negatively on prostitutes.**²⁷ **The Commission is also mindful of the legislative shift in Canada away from a partially criminalised system where the prostitute and buyer are non-criminalised to a system where only the prostitute is non-criminalised in an attempt to protect prostitutes from violence and exploitation. However it is too early to ascertain the effect of the change in the law although concerns have been expressed in this regard.**²⁸ **The Commission is therefore of the opinion that a change in the current legislative framework would not significantly alter this scenario, and may even expose prostitutes to further harm.** (para 2.460)

36. The Commission agrees with the submission made by SWEAT that there are a range of existing laws to deal with crimes associated with prostitution and prostitution related activities; these include money laundering, drug dealing, sexual violence, assault, extortion and blackmail. The Commission also finds merit in the submission by the Centre for Justice and Crime Prevention that prostitution often takes place in parts of communities where urban decay has set in, resulting in a lack of social cohesion and a general neglect of the environment. However, it believes that it would be naïve to think that prostitution could be neatly excised from the above activities through non-criminalisation. Prostitution would continue to be shaped by the same socio-economic factors that concentrate crime in areas plagued by poverty, inequality and unemployment. Country reports from Australia and the Netherlands confirm this pattern. Violence perpetrated by buyers and other role players apparently continue unabated in non-criminalised settings (para 2.457).

37. The Commission shares the concern that a shift away from criminalisation would cause an increase in child prostitution. Although illegal and met with severe penalties, the preference

²⁷ Commission for Gender Equality Position Paper on Sex Work at 6.

²⁸ Coutts Matthew, "What is and is not legal under Canada's new prostitution laws" Dec 8 2014 available at <https://ca/news.yahoo.com>.

of some buyers for younger girls has repeatedly been brought to the Commission's attention. The Commission believes that child and adult prostitution cannot be strictly compartmentalised; many adult prostitutes started out selling sexual services when they were children and most vulnerable (para 2.458).

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

39. The Commission notes that correcting the behaviour of health care workers who discriminate against prostitutes or behave condescendingly towards them, by means of criminal law, would only be counterproductive. It believes that such behaviour would be better addressed through internal complaints mechanisms or equality legislation.²⁹ It also believes that implementing and achieving the South African National AIDS Council National Strategic Plan for HIV, STIs and TB 2012 -2016 (NSP) objectives would significantly improve the use of health services. These objectives can be implemented independently of the legislative framework governing prostitution. Their implementation would improve people's understanding of, access to, and uptake of health services; in turn, this may significantly reduce the spread of sexually transmitted infections (STIs) and HIV. The Commission is mindful that reform of the legislative framework in other countries³⁰ has not proved to be an effective method for changing the stigma attached to prostitution.³¹ Legalisation has not been found to erase the stigma of prostitution, but makes women even more vulnerable because they must sacrifice their anonymity to be

²⁹ More specifically the Promotion of Equality & Prevention of Unfair Discrimination Act 4 of 2000.

³⁰ In Malawi where prostitution is decriminalised the country's sex workers are often arrested by police and charged with minor offences, such as loitering and disorderly conduct. Three years ago - 14 sex workers who were detained by police and forced to undergo HIV tests sued the government for violating their privacy in a case that has yet to be heard by the High Court. "Malawi sex workers unite against harassment" *Legalbrief Today*- General Issue No: 3162 (13 November 2012).

³¹ 'We asked Amy whether decriminalising prostitution would make it easier for women to report such abuses. "Oh please. No. It's like a child who gets abused by her father. She seldom tells anyone. Why? Because of the shame. Changing the law won't take away the shame." Rocking Chair submission at 7.

recognised as legal prostitutes.³² **The Commission for Gender Equality also reports that partial criminalisation results in a significant increase in stigma and discrimination³³ (although from the exposition above³⁴ it would seem to be more the experience of buyers than prostitutes).** For this reason the Commission recommends that guidelines for health care workers should be established for interacting with people from vulnerable groups, including prostitutes. The abuse of power by police officials is already illegal and should not be tolerated (para 2.467).

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

41. The Commission does not support the call for mandatory health checks and certification of prostitutes. The Commission believes that "women only" health checks do not make sense for public health because monitoring prostituted women would not protect them from HIV/AIDS or STIs. This is because male "clients" can and do originally transmit such diseases to the women (para 2.469).³⁵

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

43. The Commission believes that in South Africa, prostitution in its many guises – albeit "voluntary" – clearly exploits women and men who provide sexual services. Even ostensibly self-chosen or self-initiated involvement in prostitution is a symptom of the inequality and

³² Family Policy Institute.

³³ Commission for Gender Equality Position Paper on Sex Work at 7.

³⁴ See paragraph 2.138 and further.

³⁵ (Raymond:2003) as quoted in the Family Policy Institute submission; endorsed by the Christian Lawyers Association of South Africa.

marginalisation that are a daily experience of many impoverished people, especially women. The exploitation of a person's lack of alternatives does not amount to a considered exercise of that person's own choice. Prostitution in South Africa can also be viewed as an aspect of male violence against women and children. South Africa is grappling with high levels of violence against women, with sexual assault and intimate partner violence contributing to increased risks for HIV infection.³⁶ Changing the legislative framework could create an extremely dangerous cultural shift juxtaposed against the high numbers of sexual crimes already committed against women. Women would be considered even more expendable than at present. Furthermore, the Commission believes that legalising prostitution would increase the demand, locally and internationally, for more prostituted persons, and would foster a culture that normalises prostitution and sexual coercion. Overall, the Commission believes that due to the systemic inequality between men and women in South Africa, any form of legalisation will not magically address the power imbalance between the buyer and the prostitute, or the demand by buyers for unsafe or high-risk sex (para 2.496).

44. Some people may (even if subconsciously) consider prostitution a fair choice for a particular sector or class of women. In this light, prostitution might be considered somehow acceptable for poor women, vulnerable women, and women of colour, instead of being seen as sexual exploitation and a human rights violation. If this notion is supported then our society is effectively tolerating the creation of a separate, expendable, throwaway class of women. Research discussed in this Report and submissions (written and oral) made to the Commission have shown that intrinsic to prostitution are numerous violations of human rights: sexual harassment, economic servitude, educational deprivation, job discrimination, partner and family violence, racism, classism, vulnerability to frequent physical and sexual assault, and being subjected to body invasions that are equivalent to torture. By legalising prostitution, society would fail to acknowledge that prostitution preys particularly on women who are vulnerable and choose prostitution as a last resort.³⁷ The Commission is not convinced that changing the legal framework to one of non-criminalisation would address the violations or vulnerability experienced by prostitutes. Essentially it would seem that two legislative options remain, i.e. that of total criminalisation or that of partial criminalisation such as is found in the Nordic countries and Canada. Although the partial criminalisation model recognises the invidious position prostitutes

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

³⁷ RUHAMA's position, endorsed by the FPI and supported by the South African Christian Lawyers Association and Doctors for Life International.

find themselves in and it is reported by Max Waltman³⁸ to have brought about a decrease in street prostitution and trafficking in Sweden, it is too early to report on the position in other Nordic countries or Canada. Furthermore the Commission for Gender Equality³⁹ contends that prostitutes subject to a partially criminalised legal framework continue to suffer harassment from police and seldom report incidents of violence and coercion; that violence has increased; and that there is greater competition, declining prices and harsher conditions. Another important consideration is that Sweden's reported success is linked to the country being a strong welfare state, which is not the position here. Although this will be reflected as an option the Commission recommends that the selling of sexual services by an adult prostitute should remain criminalised, and that the prohibition in section 20(1)(aA) of the Sexual Offences Act be retained and reworded in line with the recommendations in this Report (para 2.497). The Commission is therefore of the view that the preferred option would be that of total criminalisation (para 2.515). The Commission therefore recommends that sections 19 and 20(1A) of the Sexual Offences Act should be repealed and that provisions criminalising soliciting; the commission of sexual acts in a public place and the making available of sexual services by persons 18 years or older should be criminalised in the Sexual Offences Amendment Act.

45. A reading of section 19 of the Sexual Offences Act shows that its objective is to curb the social nuisance associated with street prostitution, including noise, street congestion, and interference with innocent bystanders (para 2.477). Section 19 prohibits enticing or soliciting for immoral purposes. The Commission believes that this section meets the legislative objective of addressing blatantly visible and harmful aspects of prostitution and thereby discouraging prostitution. The Commission agrees with the ruling in a recent case in Canada⁴⁰ that eradicating the nuisances caused by street solicitation is a pressing and substantial concern, and that giving the public a clear message that street solicitation for prostitution will not be tolerated is a valid legislative aim (par 2.478). The Commission recommends retaining this prohibition with the necessary changes in language. This recommendation could be incorporated into either the partial- or total criminalisation option. Section 40(1)(f) of the Criminal Procedure Act⁴¹ would therefore continue to enable a peace officer to arrest a prostitute who is openly soliciting clients (para 2.491).⁴²

³⁸ See paragraph 2.138 and further.

³⁹ Commission for Gender Equality Position Paper on Sex Work at 7.

⁴⁰ *Canada (Attorney General) v Bedford Ontario Court of Appeal* March 26 2012.

⁴¹ Criminal Procedure Act 51 of 1977.

⁴² Soliciting is a crime in terms of section 19 of the Sexual Offences Act.

46. The Commission recommends that the prohibitions contained in sections 19 and 20(1)(aA) of the Sexual Offences Act be retained but that these sections be repealed and re-enacted with the necessary changes in language. Many prostitutes find themselves in a vulnerable position before they engage in and during their engagement in prostitution. The Commission has taken note of this and therefore also recommends that these prohibitions be accompanied with an option to divert out of the criminal justice system so that they can access supportive resources and systems in order to exit prostitution. The Commission agrees with Doctors for Life that criminalisation provides a legal mechanism to remove a prostitute from coercive circumstances and to provide her with an opportunity to enter rehabilitation, training and reintegration programmes. The need for access to skills development programmes to enable a gradual exit from prostitution was discussed and supported by POWA, Nation Building, Doctors for Life, the Islamic Unity Convention, the Family Policy Institute, and other respondents. The aims of the 2009–2014 Medium Term Strategic Framework and the National Planning Commission show a political commitment to addressing major developmental challenges in South Africa. Diversion presents an opportunity to address the vulnerability and marginalisation of prostitutes through skilling and education, to enable their inclusion in the formal economy. The Commission believes that a focus outside of the formal criminal justice system will allow South Africa to meet its obligations under the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to take all legal and other measures necessary to provide women with effective protection against gender-based violence and to protect women against all kinds of violence (para 2.501). This approach does not preclude women in this situation from accessing assistance from the Department of Social Development in the form of counselling, skills training and development, family support services and internships as is provided for in its Customer Service Charter.

47. The Commission agrees with Doctors for Life that the welfare of minor dependants of a person entering a diversion programme is critically important for the peace of mind of the person, and consequently for the success of the programme. The Commission recommends that the court, in making an order for diversion, should appoint a social worker or order the Department of Social Development to assess the best options to facilitate the goal of a reintegrated and functioning family. The Commission agrees that successful diversion aimed at exit from prostitution would depend on an integrated approach. It therefore recommends a national strategy on prostitution comprising of regional or district intersectoral task teams

representing people from various helping professions, namely police, prosecutors, welfare officers, health care professionals, and NGOs providing exit programmes. Such task teams would be required to coordinate exit strategies (para 2.506).

48. The Commission finds merit in the argument by a number of respondents that following successful diversion, rehabilitation, training and reintegration, a former prostitute's prior criminal record should be expunged.⁴³ The Commission agrees that the prospect of having a clean record could be used as a factor that motivates women to exit prostitution and begin a new life, fully equipped to integrate into society.⁴⁴ The unfortunate circumstances that force women into prostitution should not chain them to their past indefinitely. The Commission recommends that all recorded criminal activity associated with a woman's life in prostitution must be rescinded if and when she agrees to exit, and complies with the assistance offered by state funded exit programs (para 2.507).

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

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

51. If government elects to enact legislation in line with partial criminalisation the Commission suggests that section 19 of the Sexual Offences Act should be repealed and that provisions criminalising soliciting and committing sexual acts in a public place should be criminalised in the

⁴³ Endorsed by GT Ndlovu, Child of God; SM Hadebe, Child of God; S Tegg, Full Gospel Church; I & B Wilson, Presbyterian Church; Christian Lawyers Association of South Africa; Rocking Chair submission.

⁴⁴ Endorsed by Doctors for Life and the Christian Lawyers Association of South Africa.

Sexual Offences Amendment Act. It is recommended that where prostitutes find themselves in conflict with the law options for diversion may include those available already for low level crime or that provisions similar to that provided for in the Child Justice Act should be enacted (para 2.512). Although a formal costing has not been done, it is anticipated that diversion will improve the lives of prostitutes who agree to be diverted and will in turn provide cost savings in criminal justice, health and human services systems. As an intervention it has the potential of addressing the root causes of women engaging in prostitution, thereby reducing repetitive arrests. At a prevention level it may offer women with tools to examine future behaviour and provide opportunities for new and different choices in decision making. The Commission then also suggests that section 20(1A) of the Sexual Offences Act should be repealed in so far as the actions of the prostitute are criminalised (para 2.514).

52. A topic often discussed in conjunction with a change in the legislative framework governing prostitution is sex tourism and the benefits thereof. Although legalising prostitution may provide an initial advantage in increased tourism, the experiences of other countries show that this may have an unintended but serious long-term economic consequence. Once the pendulum swings back from the initial upturn in tourists, there is a very real risk of an increased presence of overt prostitution, which is associated with urban decay and a sharp decline in general tourism. When contemplating which employment and tourist market segment one wishes to attract to South Africa, it is doubtful whether this country's large home-based hospitality industry wishes to attract people who have a predisposition to gender-based violence – as research shows is often the case with buyers of sexual services. South Africa has all the appeal necessary to attract high tourist volumes without the need to erode its “brand value” by positioning the country as a sex tourist destination.⁴⁵ The Commission cannot see any benefit in re-branding South Africa in this way (para 2.500).

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

53. Irrespective of the legal dispensation applied to the buying or selling of prostitution in terms of the existing law, a buyer who engages in violent or harmful behaviour can at present be charged for committing common law crimes such as kidnapping, common assault, assault with

⁴⁵ Nation Building.

intent to cause grievous bodily harm, extortion, attempted murder and murder. Statutory offences are contained in the Sexual Offences Act,⁴⁶ the Riotous Assemblies Act,⁴⁷ the Immigration Act,⁴⁸ the Basic Conditions of Employment Act,⁴⁹ the Intimidation Act,⁵⁰ the Domestic Violence Act⁵¹ and the Prevention of Organised Crime Act (para 3.122).⁵²

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

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

56. As stated earlier, the Commission believes that legalising or non-criminalising prostitution would increase the demand for prostituted persons, both locally and internationally. This would foster a culture in which prostitution and sexual coercion are normalised. Changing

⁴⁶ Act 23 of 1957.

⁴⁷ Act 17 of 1956.

⁴⁸ Act 13 of 2002.

⁴⁹ Act 75 of 1997.

⁵⁰ Act 72 of 1982.

⁵¹ Act 116 of 1998.

⁵² Act 121 of 1998.

the legislative framework could be a dangerous cultural shift juxtaposed against the high numbers of sexual crimes against women. Women would be considered even more expendable than before. South Africa is grappling with high levels of violence against women, with sexual assault and intimate partner violence contributing to increased risks for HIV infection.⁵³ The Commission believes that the systemic inequality between men and women in South Africa means that non-criminalisation (legalisation) would not be able to magically address the power imbalance between the buyer and the prostitute, or reduce the demand by buyers for unsafe or high-risk sex (para 3.133).

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

58. Section 54 of the Sexual Offences Amendment Act also extends to potential buyers of sexual services. It places a clear obligation on a person who has knowledge that a sexual offence has been committed against a child to report such knowledge immediately to a police official; this would include child prostitution as contemplated in section 17 of this Act. Non-compliance with this obligation is an offence that on conviction can result in a fine or imprisonment for up to five years. There is no such obligation in respect of adult prostitution. A buyer who reports the commission of an offence against an adult prostitute (eg a suspected victim of trafficking being kept against her will or being subjected to exploitation) may face possible prosecution for his part in the prostitution related activity. The Prevention and Combating of Trafficking in Persons Act⁵⁴ provides that a person (which would include a buyer) who on reasonable grounds suspects that an adult person is a victim of trafficking, may, but is not obliged to, report that suspicion to a police official for investigation.⁵⁵ No indemnity is granted for reporting under these circumstances in terms of the Act. The Commission notes that a potential buyer might decide not to report abuse or exploitation because he wishes to avoid being prosecuted for engaging the sexual services of an adult prostitute. The Commission recommends that the Act makes express provision that the court has the authority, in terms of section 204 of the Criminal Procedure Act, 51 of 1977, to grant a discharge from prosecution to buyers who find themselves in such a situation. In other words, a buyer who becomes aware of the exploitation or commission of an offence against a prostitute and reports this to the

⁵³ South African National AIDS Council (SANAC) “National Strategic Plan on HIV, STIs and TB 2012 -2016” at 36.

⁵⁴ Act 7 of 2013.

⁵⁵ Section 19(2).

authorities should not be prosecuted for attempting to be involved in a specific prostitution related activity. To reduce the likelihood that buyers may try to circumvent their criminal liability for participating in reported offences by reporting the prostitute's exploitation, the Commission recommends that it be expressly stated that this stay of prosecution does not extend to the buyer's actual participation in the reported offence (para 3.136).

59. The Commission has indicated that where consent is negated in the context of sexual behaviour, such conduct may constitute a sexual offence as provided for in terms of the Sexual Offences Amendment Act. However, the Commission thinks it prudent to include a specific offence related to engaging the sexual services of a person who has been subjected to force, threats or deception (para 3.137).

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

4 Third Parties

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

62. The Commission believes that there is sufficient merit in retaining the offence of knowingly living off the earnings of prostitution. It recommends that this offence should be

extended to include the offence of benefiting from the prostitution of another person. In this regard the Commission recommends that the defences available to people who live off the earnings of, or benefit from, the sexual exploitation of a child (as provided for in the Sexual Offences Amendment Act) should be applicable to these offences in respect of adults too. Section 54 of the Sexual Offences Amendment Act provides for a defence in respect of the sexual exploitation of a child or a person with a mental disability. Inter alia, section 54 provides that a person may not be convicted of an offence contemplated in section 17(4) or (5) or section 23(4) or (5) if that person is a child and is not a person contemplated in section 17(1) and (2) or 23(1) and (2). The sections in question are the offence of benefiting from the sexual exploitation of a child;⁵⁶ living from the earnings of the sexual exploitation of a child;⁵⁷ benefiting from the sexual exploitation of a person with a mental disability;⁵⁸ and living from the earnings of the sexual exploitation of a person with a mental disability.⁵⁹ The defence is not valid where the person who benefits from the sexual exploitation of a child or person with a mental disability, or who lives off the earnings from the sexual exploitation of a child or person with a mental disability, is the same person who engages the services of the child for financial or other reward, favour or compensation;⁶⁰ offers the service of a child for financial or other reward, favour or compensation;⁶¹ engages the services of a person with a mental disability for financial or other reward, favour or compensation;⁶² or offers the service of a person with a mental disability for financial or other reward, favour or compensation (para 4.273).⁶³

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

⁵⁶ Section 17(4) of the Sexual Offences Amendment Act.

⁵⁷ Section 17(5) of the Sexual Offences Amendment Act.

⁵⁸ Section 23(4) of the Sexual Offences Amendment Act.

⁵⁹ Section 23(4) of the Sexual Offences Amendment Act.

⁶⁰ Section 17(1) of the Sexual Offences Amendment Act.

⁶¹ Section 17(2) of the Sexual Offences Amendment Act.

⁶² Section 23(1) of the Sexual Offences Amendment Act.

⁶³ Section 23(2) of the Sexual Offences Amendment Act.

64. In addition to the recommendations pertaining to the South African Police Service in Chapter 2, the Commission recommends that given the lack of clarity on legislative developments around the remaining provisions of the Sexual Offences Act, the South African Police Service should consider specialisation in this area. One of the clearest findings of the Home Office Study in the United Kingdom is that effective police action is helped by specialisation. The benefits listed are a clear “ownership” of the crime; the building up of specialist knowledge of the relevant legislation; establishing relationships of trust with prostitutes who are likely to be key witnesses; and that specialisation can develop working links with corresponding specialists within the National Prosecuting Authority (eg those who deal with asset forfeiture).⁶⁴ Consideration should further be given to the suggestions for good practice on the organisation of vice policing, namely that police officials assigned to specialist vice units should serve a probationary period; investigative training should be given to all officials assigned to specialist vice units; and officials assigned to specialist vice units need training about drug misuse (para 4.276).⁶⁵

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

66. In the Commission’s view selling sex exposes women to risks that can entrap them further into poverty, exacerbate their existing social difficulties and increase their dependence on men. It is a gendered reality that prostitution may be the best of the worst economic options that women have, and it is understandable that women turn to prostitution in these circumstances. The Commission is of the view that their desperate economic plight should not be manipulated against them by institutionalising businesses that specialise in facilitating the sale of sex as a legitimate business. The Commission is further of the view that recognising the legitimacy of the sex sector and prostitution merely as a form of labour would reinforce women’s subordination and may lead to the greater objectification and economic inequality of women. In

⁶⁴ Home Office (authors May T, Harocopos A, Hough M) “ For Love or Money: Pimps and the management of sex work Police Research Series Paper 134 (2000) Available at <http://www.homeoffice.gov.uk> 40.

⁶⁵ Op cit 41.

the Commission's view the non-criminalisation and recognition of prostitution as labour, or as the merchandise of a business such as a brothel, would not provide prostitutes with the benefits ascribed to this model. The Commission is of the opinion that non-criminalisation will not foster the achievement of equality between men and women. Attempts to regulate prostitution by non-criminalising it or introducing licences for legal brothels do not address the core problem: the routine abuse and violence that form the prostitution experience (para 4.284).⁶⁶

67. The Commission confirms its finding that neither the ILO nor South African policy documents have promoted legalising prostitution as a solution to poverty or identified prostitution as an employment option for the poor and marginalised. The Commission is of the view that prostitution does not fit comfortably into the international definition of decent work and that there are inherent difficulties in trying to integrate prostitution into formal employment laws and structures. Efforts to treat prostitution as formal employment reveal a host of contradictions which neither law nor policy can resolve. As the Commission has found that prostitution should not be considered a reasonable means to secure a person's living in South Africa and should not from a formal labour perspective be considered work or decent work, there remains no justification for legitimising either brothels and related enterprises based primarily on facilitating prostitution or third parties involved in doing so (para 4.285).

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

⁶⁶ US Department of State, Bureau of Public Affairs Global Affairs 11/24/4 "The Link between Prostitution and Sex Trafficking" available at www.state.gov/g/tip.

leave prostitution if they so desire by providing accommodation, money, emotional support and alternative employment (para 4.286).⁶⁷

69. The Commission has in reconsidering the objectives of the Sexual Offences Act given consideration to the current social, political, and economic assumptions that are valid in South Africa today. Its findings resonate with the position taken by Ruhama⁶⁸ in that it agrees that the illusion that prostitution is a choice is manipulative and deceptive. This notion allows the buyers and the pimps to obscure the abuse involved and to confer a form of right on the abuser. The fact that money or any other financial or other incentive is exchanged cannot disguise that what occurs in prostitution – the bodily and psychological violations involved – are in fact sexual abuse and harassment, and would be seen as such in any so-called ordinary workplace or social setting. It is clear that the sex industry cannot be left to self-regulate precisely because of the widely documented harms associated with it.⁶⁹ The Commission agrees with Ms Bonthuys of WITS that changing the legislative framework would not automatically improve a prostitute's working environment or the power relations between a particular prostitute and her buyer or third party manager (para 4.289).

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

71. The Commission endorses the finding of the Constitutional Court per Justices O'Regan and Sachs where they held that where the existing Sexual Offences Act opts for prohibition, it is a constitutionally permissible legislative choice.⁷⁰ The Court held that there is a strong public interest in the regulation of prostitution in a manner which will foster the achievement of equality between men and women. Furthermore they stated that open and democratic societies generally denounce prostitution.⁷¹ These sentiments were preceded in the matter of *The*

⁶⁷ Australian Institute of Criminology "Trends & Issues in Crime and Criminal Justice" No 22 Prostitution Laws in Australia (May 1990) available at <http://www.aic.gov.au> 8.

⁶⁸ A Dublin based voluntary organisation that works with and for women involved in prostitution.

⁶⁹ Kelly et al 31.

⁷⁰ *Jordan v the State* 2002 (6) SA 642 (CC) para 92.

⁷¹ Op cit para 93.

*National Director of Public Prosecutions v Phillips and Others*⁷² where the court found that the overthrow of the legislation, while not beyond contemplation, would not be achieved without rejecting weighty considerations of policy and morality. The court was further convinced that prostitution and the related offences under the Sexual Offences Act will survive constitutional scrutiny.

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

⁷² 2002 (4) SA 122 para 72.

ANNEXURE A: DRAFT AMENDMENT BILL

Option 1: Partial criminalisation (Prostitute not criminalised)

REPUBLIC OF SOUTH AFRICA

CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT AMENDMENT
BILL

(MINISTER FOR JUSTICE AND CORRECTIONAL SERVICES)

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.
_____ Words underlined with a solid line indicate insertions in existing enactments.

B I L L

To amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 by inserting offences relating to prostitution of persons 18 years or older; and to provide for matters connected therewith.

Parliament of the Republic of South Africa enacts, as follows:—

Repeal of Act 23 of 1957

1. The Sexual Offences Act, 1957 is hereby repealed.

Amendment of section 268 of Act 51 of 1977

2. Section 268 of the Criminal Procedure Act, 1977 is hereby amended by the substitution of the following section:

“268. [Statutory unlawful carnal intercourse] Committing sexual acts in public by persons 18 years or older

If the evidence on a charge of **[unlawful carnal intercourse or attempted unlawful carnal intercourse with another person in contravention of any statute]** committing a sexual act in public as contemplated in clause 10I of the Sexual Offences Act, 2007 does not prove that offence but -

(a) the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the **[Criminal Law (Sexual Offences and Related Matters) Amendment Act]** Sexual Offences Act, 2007, respectively;

(b) the offence of common assault; or

(c) the statutory offences of -

(i) soliciting **[, enticing or importuning such other person to have unlawful carnal intercourse]** to commit a sexual act as contemplated in clause 10H of the Sexual Offences Act, 2007;

(iii) **[soliciting, enticing or importuning such other person to commit an immoral or indecent act; or**

(iv) **conspiring with such other person to have unlawful carnal intercourse],**

the accused may be found guilty of the offence so proved.”.

Amendment of Part 3 of Act 32 of 2007

3. The following heading is hereby substituted for the heading of Part 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (In this Act referred to as the principal Act):

“Persons 18 years or older: Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation, exposure or display of or causing exposure or display of genital organs, anus or female breasts (“flashing”)[,] and child

pornography to persons 18 years or older [or engaging sexual services of persons 18 years or older]”.

Insertion of Part 3A in Act 32 of 2007

4. The following part is hereby inserted after Section 10 of the principal Act:

“Part 3A

Definitions and offences relating to the prostitution of persons 18 years or older, the keeping of brothels and the provision of diversion orders

Definitions

10A. For the purposes of this Chapter, and unless the context indicates otherwise –
“brothel” includes any house, place, movable or immovable property kept or used for purposes of prostitution or for persons to visit for the purpose of engaging in prostitution;
“house” includes a dwelling house, building, room, out-house, shed or tent or any part thereof;

“owner” includes any person who lets or sub-lets or permits the occupation of any house or place whether in his own right or that of another; or any person who owns, leases, rents, manages, occupies or has control of any movable or immovable property and intentionally allows or knowingly permits such movable or immovable property to be used for purposes of prostitution;

“place” includes any field, enclosure, space, vehicle, or boat or any part thereof;

“police officer” means any member of any police force established under the authority of any law;

“prostitution” means providing or engaging the sexual services of a person 18 years or older for financial or other reward, favour or compensation for the purpose of engaging in a sexual act, irrespective of whether the sexual act is committed or not.

Procuration

10B. Any person (“A”) who –

- (a) procures or attempts to procure any person 18 years or older (“B”) to engage in prostitution with any person other than the procurer (“C”), or in any way assists in bringing about such sexual act; or

- (b) inveigles or entices B to a brothel for the purpose of a sexual act or prostitution or _____ who conceals in any such house, place, movable or immovable property any person 18 years or older so inveigled or enticed; or
 - (c) procures or attempts to procure B to become a prostitute; or
 - (d) procures or attempts to procure B to become an inmate of a brothel; or
 - (e) applies, administers to or causes B to take any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower the person 18 years or older so as to enable any person other than the procurer to engage in a sexual act with such person,
- shall be guilty of an offence.

Detention of a person 18 years or older for purposes of prostitution

10C. (1) Any person (“A”) who takes or detains a person 18 years or older (“B”) against their will—

(a) to or in or upon any house, place, movable or immovable property with the intent that the person be made available for prostitution; or

(b) to or in a brothel,

shall be guilty of an offence.

(2) A is deemed to detain B in or upon any house, place, movable or immovable property or in a brothel if, with the intent to compel or induce B to remain in or upon such, house, place, movable or immovable property or in such brothel, A withholds any identifying documentation, clothing or possessions necessary to enable B to leave such house, place, movable or immovable property or brothel.

Paying for sexual services of a person 18 years or older subjected to force

10D. (1) A person (“A”) commits an offence if—

(a) A makes or promises payment for the sexual services of a person 18 years or older (“B”),

(b) a third person (“C”) has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has offered, made or promised payment, and

(c) C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B).

(2) The following are irrelevant—

(a) where in the world the sexual services are to be provided and whether those services are provided,

(b) whether the person offering, making or promising payment is, or ought to be, aware that C has engaged in exploitative conduct.

(3) C engages in exploitative conduct if—

(a) C uses force, threats (whether or not relating to violence) or any other form of coercion, or

(b) C practices any form of deception.

Assistance for purposes of engaging in prostitution

10E. Any person (“A”) who, with intent or while the person reasonably ought to have foreseen the possibility that any person, who is 18 years or older (“B”), may engage in prostitution, performs for reward any act that is calculated to enable any other person (“C”) to communicate with B, shall be guilty of an offence.

Advertising the sexual services of persons 18 years or older

10F. (1) A person (“A”) who unlawfully and intentionally through advertising directly or indirectly encourages, instigates or aids the engagement of services of a person 18 years or older (“B”), for financial or other reward, favour or compensation to B or to a third person (“C”) —

(a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or

(b) by committing a sexual act with B,

is guilty of advertising the sexual services of a person 18 years or older.

Owner or occupier permitting on his premises any prostitution-related offence

10G. Any person who, being the owner or occupier of any house, place, movable or immovable property and having or acting or assisting in the management or control thereof, knowingly permits the use of such house, place, movable or immovable property for the purpose of any prostitution-related offence, shall be guilty of an offence.

Soliciting to commit a sexual act

10H. (1) A person 18 years or older (“A”) who unlawfully and intentionally entices, solicits, or importunes in any public place to commit a sexual act with a person (“B”) for

financial or other reward, favour or compensation to A or to a third person (“C”) is guilty of the offence of soliciting to commit a sexual act.

(2) Where B unlawfully and intentionally entices, solicits, or importunes in any public place to commit a sexual act with A for financial or other reward, favour or compensation to A or to C, B is guilty of the offence of soliciting to commit a sexual act.

(3) If A openly exhibits himself or herself at any door or window or within view of any public street or place or in any place to which the public have access, with the intention of enticing, soliciting or importuning B to commit a sexual act for financial or other reward, favour or compensation is guilty of the offence of exhibiting to commit a sexual act.

(4) Reference to a public place includes a vehicle in a street or public place.

Committing sexual acts in public

10I. (1) A person 18 years or older (“A”) who unlawfully and intentionally commits a sexual act with a person (“B”), for financial or other reward, favour or compensation to B or to a third person (“C”) in public is guilty of the offence of committing a sexual act in public.

(2) A person (“B”) who unlawfully and intentionally commits a sexual act with a person 18 years or older (“A”), for financial or other reward, favour or compensation to A or to a third person (“C”) in public is guilty of the offence of committing a sexual act in public.

(3) Reference to a public place includes a vehicle in a street or public place.”

Persons living on earnings of prostitution or committing or assisting in the commission of sexual acts

10J. (1) Any person (“A”) who —

(a) knowingly lives wholly or in part on the earnings of prostitution; or

(b) in public or in private in any way assists in bringing about, or receives any consideration for, the commission of a sexual act with another person, irrespective of whether the sexual act is committed or not,

shall be guilty of an offence.

(2) If any court on the strength of information on oath finds that there is reason to suspect that any house, place, movable or immovable property is used for purposes of

prostitution and that A who resides in or frequenting the house is living wholly or in part on the earnings of prostitution, the magistrate may issue a warrant authorizing any police officer to enter and search the house and to arrest A.

Insertion of sections 11A, 11B, 11C, 11D, 11E, 11F, 11G, 11H, 11I, 11J, 11K, 11L, 11M and 11N in Act 32 of 2007

5. The following sections are hereby inserted in the principal Act after section 11:

“Keeping a brothel

11A. Any person who keeps a brothel shall be guilty of an offence.

Certain persons deemed to keep a brothel

11B. Any person who:

- (a) resides in a brothel unless the person proves ignorance as to the character of the house or place;
- (b) manages or assists in the management of a brothel;
- (c) knowingly receives the whole or any share of any moneys taken in a brothel;
- (d) being the tenant or occupier of any house or place, knowingly permits the same to be used as a brothel;
- (e) being the owner of any house or place, lets the same, or allows the same to be let, or to continue to be let, with the knowledge that such house or place is to be kept or used or is being kept or used as a brothel.
- (f) is found in a brothel who refuses to disclose the name and identity of the keeper or manager thereof; and
- (g) any person whose spouse or partner keeps or resides in or manages or assists in the management of a brothel, unless such person proves that he or she was ignorant thereof or that he or she lives apart from the said spouse or partner and did not receive the whole or any share of the moneys taken therein,
is deemed to keep a brothel.

Onus of proof

11C. The onus of proof that a house, place, movable or immovable property is to be kept or used or is being used for prostitution to the knowledge of the owner shall be on the prosecution: Provided that—

(a) if it is established to the satisfaction of the court that, having regard to the locality and accommodation, the rent paid or to be paid for the house, place, movable or immovable property is exorbitant, the onus shall be on the owner to prove ignorance that such house, place, movable or immovable property is to be kept or used or was kept or used as a brothel;

(b) proof of written notice having been given to the owner by a police officer or by two householders living in the vicinity of the house, place, movable or immovable property is being kept or used as a brothel, shall be conclusive proof of knowledge on the owner's part.

Contract to let house, place, movable or immovable property for a brothel void

11D. Any contract to let any house, place, movable or immovable property to be kept or used as a brothel is null and void.

Use of house or place as a brothel voids contract of letting

11E. Any contract of letting and hiring of any house, place, movable or immovable property which subsequently to the making of such contract becomes a brothel is from the date of such event null and void: Provided that upon proof of the owner's ignorance that the house, place, movable or immovable property was so kept or used the owner shall be entitled to recover the rent up to the date upon which the owner became aware that the house, place, movable or immovable property was being kept or used as a brothel.

Summary ejection when a house or place is used as a brothel

11F. The owner of any house, place, movable or immovable property kept or used as a brothel may apply to a court that has jurisdiction for the summary ejection of any person who may be keeping or using such house, place, movable or immovable property as a brothel; and such court shall, after an enquiry, be competent to order the summary ejection of such person.

Proceedings upon complaint by householders or police that a house or place is used as a brothel

11G. (1) If two or more householders of good repute make oath or place sworn information before a court that any house, place, movable or immovable property in the vicinity of the dwellings of such householders is being kept or used as a brothel or if similar information is made on oath by any police officer or official employed by a department of state responsible for health or social development, a local authority or by a registered welfare organisation, the court may –

(a) issue a warrant of arrest of the person alleged to be the keeper of such brothel; or

(b) issue a warrant authorizing any police officer to –

(i) enter at any time and within a period stated in the warrant such house, place, movable or immovable property for the purpose of ascertaining the name and identity of the keeper of such house, place, movable or immovable property;

(ii) interrogate and to demand the name and address of any person found in or upon the house, place, movable or immovable property; and

(iii) demand, search for, and seize any account book, receipt, paper, document or thing likely to afford evidence of the commission by any person of an offence under this Act.

(2) Any person found in or upon such house, place, movable or immovable property who, when called on to do so by the police officer conducting the search, refuses to furnish the police officer with the person's own name and address; or furnishes a false name or address; or refuses to disclose the name or identity of the keeper of such house, place, movable or immovable property; or refuses to produce any book, receipt, paper, document or thing that is in the possession, custody or control of the person; shall be guilty of an offence and liable on conviction to a fine not exceeding R1 000, and in default of payment to imprisonment for a period not exceeding six months.

(3) The issuing of a warrant under subsection (1)(b) shall in no way affect the power of the court to issue at any time a warrant under subsection (1)(a) or under any other law.

Presumptions

11H. (1) Whenever in any prosecution under this Act a person (“A”) is proved to reside in a brothel or to live with or to be habitually in the company of a prostitute and has no visible means of subsistence, such person shall, unless the court is satisfied to the contrary, be deemed to be knowingly living wholly or in part on the earnings of prostitution.

(2) Whenever in any prosecution for an offence under section 12 it is proved-

- (a)** that the accused has performed any act for reward which was calculated to enable any person to communicate with any other person who is a prostitute; or
- (b)** that the other person with whom communication was made as a result of such act has engaged in prostitution, the accused shall be presumed to have performed such act with intent or while he reasonably ought to have foreseen the possibility that such other person may engage in prostitution, unless the contrary is proved beyond reasonable doubt.

Consideration of diversion

11I. (1) A matter may, after consideration of all relevant information presented, including whether the person 18 years or older (“A”) who is alleged to have committed a prostitution related offence has a record of previous diversions, be considered for diversion if –

- (a)** A acknowledges responsibility for the offence;
- (b)** A has not been unduly influenced to acknowledge responsibility;
- (c)** there is a prima facie case against A;
- (d)** A consents to diversion; and
- (e)** the prosecutor indicates that the matter may be diverted.

Diversion order

11J. (1) A prosecutor may divert a matter involving a person who is alleged to have committed a prostitution related offence and may select an appropriate diversion option.

(2) If a matter is diverted, the person alleged to have committed a prostitution related offence must appear before a magistrate in chambers, in order to have the diversion option, made an order of court.

(3) If a prosecutor decides not to divert a matter, he or she must refer the matter to court for adjudication.

(4) The court may order diversion if the court is satisfied that the order is appropriate and will benefit the reintegration of the person into society.

(5) Diversion options include –

(a) Compulsory attendance at a specified centre or place for a specified vocational, educational or therapeutic purpose, which may include a period or periods of temporary residence;

(b) Referral to intensive therapy to treat or manage problems that have been identified as a cause of the person coming into conflict with the law, which may include a period or periods of temporary residence.

Provision and accreditation of diversion programmes and diversion service providers

11K. (1) A prosecutor or court may only refer a matter for diversion to a diversion programme and diversion service provider that has been accredited and has a valid certificate of accreditation.

(2)(a) The Cabinet member responsible for social development, in consultation with the Cabinet members responsible for the administration of justice, education, correctional services, safety and security and health must –

(i) create a policy framework to develop the capacity within all levels of Government and the non-governmental sector to establish, maintain and develop programmes for diversion;

(ii) establish and maintain a system for accreditation, as prescribed, of programmes for diversion and diversion service providers; and

(iii) ensure the availability of resources to implement diversion programmes, as prescribed.

(b) The system for accreditation referred to in paragraph (a)(ii) must contain –

(i) criteria for the evaluation of diversion programmes;

(ii) criteria for the evaluation of the content of diversion programmes to ensure they reflect a meaningful and adequate response to the harm caused by prostitution related offences and provide appropriate and relevant training and skills for successful integration into society and the formal economy;

(iii) mechanisms to monitor diversion programmes and diversion service providers in respect of their ability to render quality service in achieving

the objectives of diversion and their ability to promote compliance with diversion orders;

(iv) measures for the removal of diversion programmes and diversion service providers from the system, where appropriate.

(c) The Cabinet member responsible for social development must –

(i) before the commencement of this Act, table the policy framework and system for accreditation referred to in (a)(i) and (ii) in Parliament;

(ii) three months after tabling the policy framework and system for accreditation in Parliament, publish a notice in the *Gazette*, inviting applications for the accreditation of diversion programmes and diversion service providers, as provided for in the policy framework and system for accreditation referred to in subparagraph (i), which applications must be submitted within four months from the publication of the notice;

(iii) within four months of the closing date for applications referred to in subparagraph (ii), ensure that all applications received are considered and decided on, with preference being given to the finalisation of applications in respect of diversion programmes and diversion service providers which existed at the time of commencement of the Act.

(d) After the expiry of the time limits referred to in paragraph (c), all applicants for accreditation must be dealt with in the manner and within the time limits determined in the policy framework and system for accreditation.

(e) The Cabinet member responsible for social development must issue a prescribed certificate of accreditation to each diversion programme and diversion service provider that is accredited in terms of this section.

(f) A certificate of accreditation referred to in paragraph (e) is valid for a maximum period of four years from the date of accreditation.

(g) A quality assurance process must be conducted in the prescribed manner in respect of each accredited diversion programme and diversion service provider.

(3)(a) The Cabinet member responsible for social development must publish the particulars of each diversion programme and diversion service provider that is accredited or removed from the system in terms of this section in the *Gazette* within 30 days of accreditation or removal.

(b) The Director-General: Social Development must, immediately after any publication referred to in paragraph (a), provide a copy of the publication to –

(i) the relevant role-players falling under his or her jurisdiction; and

(ii) the Director-General: Justice and Correctional Services, who must distribute the publication to all relevant role-players who are involved in the administration of this Act.

Monitoring of compliance with diversion order

11L. (1) When making a diversion order, the court referred to in clause 21, must identify a probation officer or other suitable person to monitor the person's compliance with the diversion order.

(2) If a person fails to comply with the diversion order, the probation officer or person identified in terms of section (1) must, in the prescribed manner, notify the magistrate in writing of the failure.

Successful compliance by a person 18 years or older with diversion order

11M. (1) Where a person 18 years or older involved in a prostitution related offence successfully complies with any diversion order he or she may apply to the court referred to in clause 21 for an order that previous convictions for prostitution related offences be expunged.

(2) The court referred to in clause 21 may after examining the evidence before it make an order that such person's criminal record insofar as it relates to prostitution related offences be expunged.

Failure to comply with diversion order

11N. (1) If a person fails to comply with any diversion order, the prosecutor may decide –

(i) to proceed with the prosecution; or
(ii) not to go to trial, but to place the person on another diversion option which is more onerous than the diversion option originally decided on.

(2) If a person fails to comply with any diversion order, the court referred to in clause 21 may, on being notified of the failure, in the prescribed manner, issue a warrant of arrest for the person or cause a summons to be issued in respect of the person, to appear before the court.

(3) The court may-

- (i) make an appropriate order to assist the person to comply with the diversion order;
- (ii) change the diversion order to ensure compliance; or
- (iii) record the acknowledgment of responsibility made by the person as an admission referred to in section 220 of the Criminal Procedure Act and proceed with trial.”.

Amendment of section 56 of Act 32 of 2007

6. Section 56 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 is hereby amended by the following insertion:

“(9) A person may not be convicted of an offence of knowingly living wholly or in part on the earnings of prostitution or receiving any consideration for, the commission of a sexual act with another person, if that person is –

(a) a child; and

(b) not a person contemplated in section 10B, 10C or 10D, as the case may be.

(10) (a) A court may make a finding discharging a person from prosecution as provided for in terms of section 204 of the Criminal Procedure Act 51 of 1977 for an offence related to prostitution of a person 18 years or older where such person reports another offence while engaging the sexual services of a person 18 years or older as provided for in section 11.

(b) This discharge does not extend to such person’s participation in the reported offence.”.

Amendment of section 72 of Act 32 of 2007

7. Section 72 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) This Act is called the [**Criminal Law (Sexual Offences and Related Matters) Amendment Act**], Sexual Offences Act 2007, and , subject to subsection (2), takes effect on 16 December 2007, or an earlier date fixed by the President by proclamation in the *Gazette*.”

Amendment of index of Act 32 of 2007

8. The index of the principal Act is hereby amended –
- (a) by the substitution of the heading Part 3 after item 7 with the following heading:
“Part 3: Persons 18 years or older: Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation, exposure or display of or causing exposure or display of genital organs, anus or female breasts (“flashing”)[,] and child pornography to persons 18 years or older [**or engaging sexual services of persons 18 years or older**]”; and
- (b) by the insertion after item 10 of the following items:
“Part 3A: Definitions and offences relating to the prostitution of persons 18 years or older, the keeping of brothels and the provision of diversion orders
- 10A. Definitions
10B. Procuration
10C. Detention of a person 18 years or older for purposes of prostitution
10D. Paying for sexual services of a person 18 years or older subjected to force
10E. Assistance for purposes of engaging in prostitution
10F. Advertising the sexual services of persons 18 years or older
10G. Owner or occupier permitting on his premises any prostitution-related offence
10H. Soliciting to commit a sexual act
10I. Committing sexual acts in public
10J. Persons living on earnings of prostitution or committing or assisting in the commission of sexual acts”; and
- (c) by the insertion after item 11 of the following items:
“11A. Keeping a brothel
11B. Certain persons deemed to keep a brothel
11C. Onus of proof

- 11D. Contract to let house, place, movable or immovable property for a brothel void
- 11E. Use of house or place as a brothel voids contract of letting
- 11F. Summary ejection when a house or place is used as a brothel
- 11G. Proceedings upon complaint by householders or police that a house or place is used as a brothel
- 11H. Presumptions
- 11I. Consideration of diversion
- 11J. Diversion order
- 11K. Provision and accreditation of diversion programmes and diversion service providers
- 11L. Monitoring of compliance with diversion order
- 11M. Successful compliance by a person 18 years or older with diversion order
- 11N. Failure to comply with diversion order”.

Transitional provision

9. Any reference in any law to the Criminal Law (Sexual Offences and Related Matters) Amendment Act must after implementation of this Act be considered to be a reference to the Sexual Offences Act.

Short title and commencement

10. This Act shall be called the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Amendment Act 2014, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

Option 2: Total criminalisation (with diversion)

REPUBLIC OF SOUTH AFRICA

CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT AMENDMENT
BILL

(MINISTER FOR JUSTICE AND CORRECTIONAL SERVICES)

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.
_____ Words underlined with a solid line indicate insertions in existing enactments.

B I L L

To amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 by inserting offences relating to prostitution of persons 18 years or older; and to provide for matters connected therewith.

Parliament of the Republic of South Africa enacts, as follows:—

Repeal of Act 23 of 1957

1. The Sexual Offences Act, 1957 is hereby repealed.

Amendment of section 268 of Act 51 of 1977

2. Section 268 of the Criminal Procedure Act, 1977 is hereby amended by the substitution of the following section:

“268. [Statutory unlawful carnal intercourse] Making available of sexual services by persons 18 years or older

If the evidence on a charge of **[unlawful carnal intercourse or attempted unlawful carnal intercourse with another person in contravention of any statute]** making available of sexual services by persons 18 years or older as contemplated in clause 10I of the Sexual Offences Act, 2007 does not prove that offence but -

(a) the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the **[Criminal Law (Sexual Offences and Related Matters) Amendment Act]** Sexual Offences Act, 2007, respectively;

(b) the offence of common assault; or

(c) the statutory offences of -

(i) **[committing an immoral or indecent act with such other person]** committing sexual acts in public as contemplated in clause 10J of the Sexual Offences Act, 2007; or

(ii) soliciting **[, enticing or importuning such other person to have unlawful carnal intercourse]** to commit a sexual act as contemplated in clause 10H of the Sexual Offences Act, 2007;

(iii) **[soliciting, enticing or importuning such other person to commit an immoral or indecent act; or**

(iv) conspiring with such other person to have unlawful carnal intercourse],

the accused may be found guilty of the offence so proved.”.

Amendment of Part 3 of Act 32 of 2007

3. The following heading is hereby substituted for the heading of Part 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (In this Act referred to as the principal Act):

“Persons 18 years or older: Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation, exposure or display of or causing exposure or display of genital organs, anus or female breasts (“flashing”)[,] and child

pornography to persons 18 years or older [or engaging sexual services of persons 18 years or older]”.

Insertion of Part 3A in Act 32 of 2007

4. The following part is hereby inserted after Section 10 of the principal Act:

“Part 3A

Definitions and offences relating to the prostitution of persons 18 years or older, the keeping of brothels and the provision of diversion orders

Definitions

10A. For the purposes of this Chapter, and unless the context indicates otherwise –
“brothel” includes any house, place, movable or immovable property kept or used for purposes of prostitution or for persons to visit for the purpose of engaging in prostitution;
“house” includes a dwelling house, building, room, out-house, shed or tent or any part thereof;

“owner” includes any person who lets or sub-lets or permits the occupation of any house or place whether in his own right or that of another; or any person who owns, leases, rents, manages, occupies or has control of any movable or immovable property and intentionally allows or knowingly permits such movable or immovable property to be used for purposes of prostitution;

“place” includes any field, enclosure, space, vehicle, or boat or any part thereof;

“police officer” means any member of any police force established under the authority of any law;

“prostitution” means providing or engaging the sexual services of a person 18 years or older for financial or other reward, favour or compensation for the purpose of engaging in a sexual act, irrespective of whether the sexual act is committed or not.

Procuration

10B. Any person (“A”) who –

- (a) procures or attempts to procure any person 18 years or older (“B”) to engage in prostitution with any person other than the procurer (“C”), or in any way assists in bringing about such sexual act; or

- (b) inveigles or entices B to a brothel for the purpose of a sexual act or prostitution or who conceals in any such house, place, movable or immovable property any person 18 years or older so inveigled or enticed; or
 - (c) procures or attempts to procure B to become a prostitute; or
 - (d) procures or attempts to procure B to become an inmate of a brothel; or
 - (e) applies, administers to or causes B to take any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower the person 18 years or older so as to enable any person other than the procurer to engage in a sexual act with such person,
- shall be guilty of an offence.

Detention of a person 18 years or older for purposes of prostitution

10C. (1) Any person (“A”) who takes or detains a person 18 years or older (“B”) against their will—

(a) to or in or upon any house, place, movable or immovable property with the intent that the person be made available for prostitution; or

(b) to or in a brothel,

shall be guilty of an offence.

(2) A is deemed to detain B in or upon any house, place, movable or immovable property or in a brothel if, with the intent to compel or induce B to remain in or upon such, house, place, movable or immovable property or in such brothel, A withholds any identifying documentation, clothing or possessions necessary to enable B to leave such house, place, movable or immovable property or brothel.

Paying for sexual services of a person 18 years or older subjected to force

10D. (1) A person (“A”) commits an offence if—

(a) A makes or promises payment for the sexual services of a person 18 years or older (“B”),

(b) a third person (“C”) has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has offered, made or promised payment, and

(c) C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B).

(2) The following are irrelevant—

- (a) where in the world the sexual services are to be provided and whether those services are provided,
- (b) whether the person offering, making or promising payment is, or ought to be, aware that C has engaged in exploitative conduct.
- (3) C engages in exploitative conduct if—
 - (a) C uses force, threats (whether or not relating to violence) or any other form of coercion, or
 - (b) C practices any form of deception.

Assistance for purposes of engaging in prostitution

10E. Any person (“A”) who, with intent or while the person reasonably ought to have foreseen the possibility that any person, who is 18 years or older (“B”), may engage in prostitution, performs for reward any act that is calculated to enable any other person (“C”) to communicate with B, shall be guilty of an offence.

Advertising the sexual services of persons 18 years or older

10F. (1) A person (“A”) who unlawfully and intentionally through advertising directly or indirectly encourages, instigates or aids the engagement of services of a person 18 years or older (“B”), for financial or other reward, favour or compensation to B or to a third person (“C”) —

- (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
 - (b) by committing a sexual act with B,
- is guilty of advertising the sexual services of a person 18 years or older.

Owner or occupier permitting on his premises any prostitution-related offence

10G. Any person who, being the owner or occupier of any house, place, movable or immovable property and having or acting or assisting in the management or control thereof, knowingly permits the use of such house, place, movable or immovable property for the purpose of any prostitution-related offence, shall be guilty of an offence.

Soliciting to commit a sexual act

10H. (1) A person 18 years or older (“A”) who unlawfully and intentionally entices, solicits, or importunes in any public place to commit a sexual act with a person (“B”) for

financial or other reward, favour or compensation to A or to a third person (“C”) is guilty of the offence of soliciting to commit a sexual act.

(2) Where B unlawfully and intentionally entices, solicits, or importunes in any public place to commit a sexual act with A for financial or other reward, favour or compensation to A or to C, B is guilty of the offence of soliciting to commit a sexual act.

(3) If A openly exhibits himself or herself at any door or window or within view of any public street or place or in any place to which the public have access, with the intention of enticing, soliciting or importuning B to commit a sexual act for financial or other reward, favour or compensation is guilty of the offence of exhibiting to commit a sexual act.

(4) Reference to a public place includes a vehicle in a street or public place.

Making available of sexual services by persons 18 years or older

10I. A person 18 years or older (“A”) who unlawfully and intentionally makes available his or her services to a person (“B”), for financial or other reward, favour or compensation to A or to a third person (“C”) —

(a) for the purpose of engaging in a sexual act with B or C, irrespective of whether the sexual act is committed or not; or

(b) by committing a sexual act with the B or C,

is guilty of the offence of making available his or her sexual services for reward.

Committing sexual acts in public

10J. (1) A person 18 years or older (“A”) who unlawfully and intentionally commits a sexual act with a person (“B”), for financial or other reward, favour or compensation to B or to a third person (“C”) in public is guilty of the offence of committing a sexual act in public.

(2) A person (“B”) who unlawfully and intentionally commits a sexual act with a person 18 years or older (“A”), for financial or other reward, favour or compensation to A or to a third person (“C”) in public is guilty of the offence of committing a sexual act in public.

(3) Reference to a public place includes a vehicle in a street or public place.”

Persons living on earnings of prostitution or committing or assisting in the commission of sexual acts

10K. (1) Any person (“A”) who —

(a) knowingly lives wholly or in part on the earnings of prostitution; or

(b) in public or in private in any way assists in bringing about, or receives any consideration for, the commission of a sexual act with another person, irrespective of whether the sexual act is committed or not,

shall be guilty of an offence.

(2) If any court on the strength of information on oath finds that there is reason to suspect that any house, place, movable or immovable property is used for purposes of prostitution and that A who resides in or frequenting the house is living wholly or in part on the earnings of prostitution, the magistrate may issue a warrant authorizing any police officer to enter and search the house and to arrest A.

Insertion of sections 11A, 11B, 11C, 11D, 11E, 11F, 11G, 11H, 11I, 11J, 11K, 11L, 11M and 11N in Act 32 of 2007

5. The following sections are hereby inserted in the principal Act after section 11:

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11A. Any person who keeps a brothel shall be guilty of an offence.

Certain persons deemed to keep a brothel

11B. Any person who:

(a) resides in a brothel unless the person proves ignorance as to the character of the house or place;

(b) manages or assists in the management of a brothel;

(c) knowingly receives the whole or any share of any moneys taken in a brothel;

(d) being the tenant or occupier of any house or place, knowingly permits the same to be used as a brothel;

(e) being the owner of any house or place, lets the same, or allows the same to be let, or to continue to be let, with the knowledge that such house or place is to be kept or used or is being kept or used as a brothel.

(f) is found in a brothel who refuses to disclose the name and identity of the keeper or manager thereof; and

(g) any person whose spouse or partner keeps or resides in or manages or assists in the management of a brothel, unless such person proves that he or she was ignorant thereof or that he or she lives apart from the said spouse or partner and did not receive the whole or any share of the moneys taken therein, is deemed to keep a brothel.

Onus of proof

11C. The onus of proof that a house, place, movable or immovable property is to be kept or used or is being used for prostitution to the knowledge of the owner shall be on the prosecution: Provided that—

- (a) if it is established to the satisfaction of the court that, having regard to the locality and accommodation, the rent paid or to be paid for the house, place, movable or immovable property is exorbitant, the onus shall be on the owner to prove ignorance that such house, place, movable or immovable property is to be kept or used or was kept or used as a brothel;
- (b) proof of written notice having been given to the owner by a police officer or by two householders living in the vicinity of the house, place, movable or immovable property is being kept or used as a brothel, shall be conclusive proof of knowledge on the owner's part.

Contract to let house, place, movable or immovable property for a brothel void

11D. Any contract to let any house, place, movable or immovable property to be kept or used as a brothel is null and void.

Use of house or place as a brothel voids contract of letting

11E. Any contract of letting and hiring of any house, place, movable or immovable property which subsequently to the making of such contract becomes a brothel is from the date of such event null and void: Provided that upon proof of the owner's ignorance that the house, place, movable or immovable property was so kept or used the owner shall be entitled to recover the rent up to the date upon which the owner became aware that the house, place, movable or immovable property was being kept or used as a brothel.

Summary ejection when a house or place is used as a brothel

11F. The owner of any house, place, movable or immovable property kept or used as a brothel may apply to a court that has jurisdiction for the summary ejection of any person who may be keeping or using such house, place, movable or immovable property as a brothel; and such court shall, after an enquiry, be competent to order the summary ejection of such person.

Proceedings upon complaint by householders or police that a house or place is used as a brothel

11G. (1) If two or more householders of good repute make oath or place sworn information before a court that any house, place, movable or immovable property in the vicinity of the dwellings of such householders is being kept or used as a brothel or if similar information is made on oath by any police officer or official employed by a department of state responsible for health or social development, a local authority or by a registered welfare organisation, the court may –

(a) issue a warrant of arrest of the person alleged to be the keeper of such brothel;
or

(b) issue a warrant authorizing any police officer to –

(i) enter at any time and within a period stated in the warrant such house, place, movable or immovable property for the purpose of ascertaining the name and identity of the keeper of such house, place, movable or immovable property;

(ii) interrogate and to demand the name and address of any person found in or upon the house, place, movable or immovable property; and

(iii) demand, search for, and seize any account book, receipt, paper, document or thing likely to afford evidence of the commission by any person of an offence under this Act.

(2) Any person found in or upon such house, place, movable or immovable property who, when called on to do so by the police officer conducting the search, refuses to furnish the police officer with the person's own name and address; or furnishes a false name or address; or refuses to disclose the name or identity of the keeper of such house, place, movable or immovable property; or refuses to produce any book, receipt, paper, document or thing that is in the possession, custody or control of the person; shall

be guilty of an offence and liable on conviction to a fine not exceeding R1 000, and in default of payment to imprisonment for a period not exceeding six months.

(3) The issuing of a warrant under subsection (1)(b) shall in no way affect the power of the court to issue at any time a warrant under subsection (1)(a) or under any other law.

Presumptions

11H. (1) Whenever in any prosecution under this Act a person (“A”) is proved to reside in a brothel or to live with or to be habitually in the company of a prostitute and has no visible means of subsistence, such person shall, unless the court is satisfied to the contrary, be deemed to be knowingly living wholly or in part on the earnings of prostitution.

(2) Whenever in any prosecution for an offence under section 12 it is proved-

- (a) that the accused has performed any act for reward which was calculated to enable any person to communicate with any other person who is a prostitute; or
- (b) that the other person with whom communication was made as a result of such act has engaged in prostitution, the accused shall be presumed to have performed such act with intent or while he reasonably ought to have foreseen the possibility that such other person may engage in prostitution, unless the contrary is proved beyond reasonable doubt.

Consideration of diversion

11I. (1) A matter may, after consideration of all relevant information presented, including whether the person 18 years or older (“A”) who is alleged to have committed a prostitution related offence has a record of previous diversions, be considered for diversion if –

- (a) A acknowledges responsibility for the offence;
- (b) A has not been unduly influenced to acknowledge responsibility;
- (c) there is a prima facie case against A;
- (d) A consents to diversion; and
- (e) the prosecutor indicates that the matter may be diverted.

Diversion order

11J. (1) A prosecutor may divert a matter involving a person who is alleged to have committed a prostitution related offence and may select an appropriate diversion option.

(2) If a matter is diverted, the person alleged to have committed a prostitution related offence must appear before a magistrate in chambers, in order to have the diversion option, made an order of court.

(3) If a prosecutor decides not to divert a matter, he or she must refer the matter to court for adjudication.

(4) The court may order diversion if the court is satisfied that the order is appropriate and will benefit the reintegration of the person into society.

(5) Diversion options include –

(a) Compulsory attendance at a specified centre or place for a specified vocational, educational or therapeutic purpose, which may include a period or periods of temporary residence;

(b) Referral to intensive therapy to treat or manage problems that have been identified as a cause of the person coming into conflict with the law, which may include a period or periods of temporary residence.

Provision and accreditation of diversion programmes and diversion service providers

11K. (1) A prosecutor or court may only refer a matter for diversion to a diversion programme and diversion service provider that has been accredited and has a valid certificate of accreditation.

(2)(a) The Cabinet member responsible for social development, in consultation with the Cabinet members responsible for the administration of justice, education, correctional services, safety and security and health must –

(i) create a policy framework to develop the capacity within all levels of Government and the non-governmental sector to establish, maintain and develop programmes for diversion;

(ii) establish and maintain a system for accreditation, as prescribed, of programmes for diversion and diversion service providers; and

(iii) ensure the availability of resources to implement diversion programmes, as prescribed.

(b) The system for accreditation referred to in paragraph (a)(ii) must contain –

- (i) criteria for the evaluation of diversion programmes;
- (ii) criteria for the evaluation of the content of diversion programmes to ensure they reflect a meaningful and adequate response to the harm caused by prostitution related offences and provide appropriate and relevant training and skills for successful integration into society and the formal economy;
- (iii) mechanisms to monitor diversion programmes and diversion service providers in respect of their ability to render quality service in achieving the objectives of diversion and their ability to promote compliance with diversion orders;
- (iv) measures for the removal of diversion programmes and diversion service providers from the system, where appropriate.
- (c) The Cabinet member responsible for social development must –
 - (i) before the commencement of this Act, table the policy framework and system for accreditation referred to in (a)(i) and (ii) in Parliament;
 - (ii) three months after tabling the policy framework and system for accreditation in Parliament, publish a notice in the Gazette, inviting applications for the accreditation of diversion programmes and diversion service providers, as provided for in the policy framework and system for accreditation referred to in subparagraph (i), which applications must be submitted within four months from the publication of the notice;
 - (iii) within four months of the closing date for applications referred to in subparagraph (ii), ensure that all applications received are considered and decided on, with preference being given to the finalisation of applications in respect of diversion programmes and diversion service providers which existed at the time of commencement of the Act.
- (d) After the expiry of the time limits referred to in paragraph (c), all applicants for accreditation must be dealt with in the manner and within the time limits determined in the policy framework and system for accreditation.
- (e) The Cabinet member responsible for social development must issue a prescribed certificate of accreditation to each diversion programme and diversion service provider that is accredited in terms of this section.
- (f) A certificate of accreditation referred to in paragraph (e) is valid for a maximum period of four years from the date of accreditation.
- (g) A quality assurance process must be conducted in the prescribed manner in respect of each accredited diversion programme and diversion service provider.

(3)(a) The Cabinet member responsible for social development must publish the particulars of each diversion programme and diversion service provider that is accredited or removed from the system in terms of this section in the Gazette within 30 days of accreditation or removal.

- (b) The Director-General: Social Development must, immediately after any publication referred to in paragraph (a), provide a copy of the publication to –
- (i) the relevant role-players falling under his or her jurisdiction; and
 - (ii) the Director-General: Justice and Correctional Services, who must distribute the publication to all relevant role-players who are involved in the administration of this Act.

Monitoring of compliance with diversion order

11L. (1) When making a diversion order, the court referred to in clause 21, must identify a probation officer or other suitable person to monitor the person's compliance with the diversion order.

(2) If a person fails to comply with the diversion order, the probation officer or person identified in terms of section (1) must, in the prescribed manner, notify the magistrate in writing of the failure.

Successful compliance by a person 18 years or older with diversion order

11M. (1) Where a person 18 years or older involved in a prostitution related offence successfully complies with any diversion order he or she may apply to the court referred to in clause 21 for an order that previous convictions for prostitution related offences be expunged.

(2) The court referred to in clause 21 may after examining the evidence before it make an order that such person's criminal record insofar as it relates to prostitution related offences be expunged.

Failure to comply with diversion order

11N. (1) If a person fails to comply with any diversion order, the prosecutor may decide –

- (i) to proceed with the prosecution; or
- (ii) not to go to trial, but to place the person on another diversion option which is more onerous than the diversion option originally decided on.

(2) If a person fails to comply with any diversion order, the court referred to in clause 21 may, on being notified of the failure, in the prescribed manner, issue a warrant of arrest for the person or cause a summons to be issued in respect of the person, to appear before the court.

(3) The court may-

(i) make an appropriate order to assist the person to comply with the diversion order;

(ii) change the diversion order to ensure compliance; or

(iii) record the acknowledgment of responsibility made by the person as an admission referred to in section 220 of the Criminal Procedure Act and proceed with trial.”.

Amendment of section 56 of Act 32 of 2007

6. Section 56 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 is hereby amended by the following insertion:

“(9) A person may not be convicted of an offence of knowingly living wholly or in part on the earnings of prostitution or receiving any consideration for, the commission of a sexual act with another person, if that person is –

(a) a child; and

(b) not a person contemplated in section 10B, 10C or 10D, as the case may be.

(10) (a) A court may make a finding discharging a person from prosecution as provided for in terms of section 204 of the Criminal Procedure Act 51 of 1977 for an offence related to prostitution of a person 18 years or older where such person reports another offence while engaging the sexual services of a person 18 years or older as provided for in section 11.

(b) This discharge does not extend to such person’s participation in the reported offence.”.

Amendment of section 72 of Act 32 of 2007

7. Section 72 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) This Act is called the [**Criminal Law (Sexual Offences and Related Matters) Amendment Act**], Sexual Offences Act 2007, and , subject to subsection (2), takes effect on 16 December 2007, or an earlier date fixed by the President by proclamation in the *Gazette*.”

Amendment of index of Act 32 of 2007

8. The index of the principal Act is hereby amended –

(a) by the substitution of the heading Part 3 after item 7 with the following heading:

“Part 3: Persons 18 years or older: Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation, exposure or display of or causing exposure or display of genital organs, anus or female breasts (“flashing”)[,] and child pornography to persons 18 years or older [**or engaging sexual services of persons 18 years or older**]”; and

(b) by the insertion after item 10 of the following items:

“Part 3A: Definitions and offences relating to the prostitution of persons 18 years or older, the keeping of brothels and the provision of diversion orders

10A. Definitions

10B. Procuration

10C. Detention of a person 18 years or older for purposes of prostitution

10D. Paying for sexual services of a person 18 years or older subjected to force

10E. Assistance for purposes of engaging in prostitution

10F. Advertising the sexual services of persons 18 years or older

10G. Owner or occupier permitting on his premises any prostitution-related offence

10H. Soliciting to commit a sexual act

- 10I. Making available of sexual services by persons 18 years or older
- 10J. Committing sexual acts in public
- 10K. Persons living on earnings of prostitution or committing or assisting in the commission of sexual acts”; and

(c) by the insertion after item 11 of the following items:

- “11A. Keeping a brothel
- 11B. Certain persons deemed to keep a brothel
- 11C. Onus of proof
- 11D. Contract to let house, place, movable or immovable property for a brothel void
- 11E. Use of house or place as a brothel voids contract of letting
- 11F. Summary ejection when a house or place is used as a brothel
- 11G. Proceedings upon complaint by householders or police that a house or place is used as a brothel
- 11H. Presumptions
- 11I. Consideration of diversion
- 11J. Diversion order
- 11K. Provision and accreditation of diversion programmes and diversion service providers
- 11L. Monitoring of compliance with diversion order
- 11M. Successful compliance by a person 18 years or older with diversion order
- 11N. Failure to comply with diversion order”.

Transitional provision

9. Any reference in any law to the Criminal Law (Sexual Offences and Related Matters) Amendment Act must after implementation of this Act be considered to be a reference to the Sexual Offences Act.

Short title and commencement

10. This Act shall be called the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Amendment Act 2014, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.