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SEXUAL OFFENCES: ADULT PROSTITUTION

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INTRODUCTION

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

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PREFACE

The Commission has decided that the most effective way of dealing with the myriad issues that have arisen during the investigation into sexual offences is to publish separate discussion papers in an attempt to:

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

This issue paper covers the third leg of the investigation. It reflects information gathered up to the end of July 2002. It has been prepared by a consultant, Ms Helene Combrinck of the Community Law Centre, University of the Western Cape, in conjunction with the research staff of the Commission and members of the Project Committee established for this investigation to elicit responses and together with those responses, to serve as a basis for the Commission's deliberations. Although the issue paper does not contain a draft Bill, it does set out three legal options on the management of **adult** prostitution in Chapter 10. The Commission has covered all aspects related to **child** prostitution in Discussion Papers 85, 102 and 103.

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

After the consultation process, the Commission will prepare a discussion paper, with draft legislation if appropriate. The discussion paper and draft legislation will set forth the Commission's preliminary recommendations and will again be subjected to a consultation process. Thereafter the Commission will prepare a report setting out its final recommendations. This report will be handed to the Minister for Justice and Constitutional Development who may implement the Commission's recommendations by introducing the draft legislation in Parliament.

The Commission will assume that respondents agree to reference by the Commission to responses received and the identification of respondents, unless representations are marked confidential. Respondents should be aware that the Commission may be obliged to release information contained in representations under the Constitution of the Republic of South Africa Act 108 of 1996, pursuant to the constitutional right to freedom of information.

Respondents are requested to submit written comments, representations or requests to the Commission by 31 October 2002 at the address appearing on the first page.

EXECUTIVE SUMMARY

This Issue Paper is the first paper of the third leg in the series of the investigation into sexual offences (Project 107). It sets forth the Commission's preliminary views regarding **adult** prostitution.

After presenting a historic overview of legal measures used to address adult prostitution and considering the current debates surrounding adult prostitution, the existing legal framework and the international developments, also in respect of trafficking and HIV/AIDS, the Commission decided to present three legal options for addressing the problem of adult prostitution. These options are:

- * Criminalise all aspects of adult prostitution as criminal offences;
- * Legalise adult prostitution within certain narrowly circumscribed conditions;
- * Decriminalise adult prostitution which will involve the removal of laws that criminalise prostitution.

Within these options further subdivisions and variations are possible. The Commission sets forth the implications should a particular option be adopted and poses questions as to all the options presented. At this stage of the investigation and pending the decision of the Constitutional Court in the *Jordan* matter, the Commission has decided not to take a particular position as to any of the options. Comments are invited on the legal options presented.

The Commission has dealt with the issue of **child** prostitution in the first two discussion papers (Discussion Papers 85 and 102) in this investigation as well as in Discussion Paper 103 on the Review of the Child Care Act. As far as **child** prostitution is concerned, the Commission's preliminary view is that child prostitution should be prohibited and that the child involved in commercial sexual exploitation should be regarded as a victim in need of protection.

CONTENTS

INTRODUCTION

PREFACE

EXECUTIVE SUMMARY

CONTENTS

GLOSSARY OF TERMS

SOURCES

TABLE OF CASES

CHAPTER 1:	BACKGROUND AND INTRODUCTION	1
Introduction		1
Origin of the investigation		2
Progress		3
Prostitution and the Issue Paper		4
The commercial sexual exploitation of children: The Commission's preliminary position		5
The Commission's continuing working methodology		8
Public participation in the investigation		9
Questions of terminology		9
CHAPTER 2:	BACKGROUND TO THE CURRENT DEBATE ON ADULT PROSTITUTION	11
Introduction		11
Government initiatives		11
Non-government initiatives		14
National conferences on prostitution		15
Constitutional challenges		16
CHAPTER 3:	HISTORICAL OVERVIEW OF LEGAL MEASURES USED TO ADDRESS ADULT PROSTITUTION	17
Introduction		17
Early origins of prostitution		17
Ancient Greece		18
Rome		20
The Judeo-Christian approach		21

Development of a regulationist approach in Britain	23
The white slave trade and abolitionism	24
Development of international response	26
Emergence of prostitutes' rights movement	27
Campaigns against trafficking	32
CHAPTER 4: MAIN DEBATES AROUND ADULT PROSTITUTION	29
Introduction	29
Definition of 'prostitution'	29
The nature of prostitution: <i>Prostitution-as-work</i> versus <i>Prostitution-as-exploitation</i>	31
(a) Prostitution-as-work	32
(b) Prostitution-as-exploitation	35
Prostitution, immorality and harm	37
(a) Prostitution as 'benign' immorality and the role of the criminal law	37
(b) Prostitution and harm	41
The criminogenic nature of prostitution	41
The moral threat to marriage and the family	43
Concerns relating to 'public nuisance'	44
Determinants of prostitution	45
(a) Economic determinants	46
(b) Socio-psychological determinants	47
The link between prostitution and drugs	49
Prostitution and trafficking	49
CHAPTER 5: SITUATIONAL ANALYSIS	51
Introduction	51
The indoor prostitution industry in South Africa	53
(a) General	53
(b) Private workers and 'call girls'	54
(c) Independent contractors	55
(d) Advertising	55

Outdoor prostitution in South Africa	55
(a) General	55
(b) The role of 'pimps' in outdoor prostitution	57
Working conditions of prostitutes in the indoor sector	58
(a) General	58
(b) Pricing	58
(c) 'Employment' conditions	59
(d) The fining system	60
(e) Addressing work conditions in the indoor sector	60
Working conditions of prostitutes in the outdoor sector	62
(a) Income variations	62
(b) Client violence	62
Law enforcement	64
(a) Indoor sector	64
(b) Outdoor sector	65
(c) Police harassment	68
Safer sex practices	69
Health services	70
Drugs	70
Summary	78
CHAPTER 6: THE CURRENT LEGAL POSITION	75
Introduction	75
The Sexual Offences Act 23 of 1957: Background	75
Unlawful carnal intercourse or indecent acts for reward	77
(a) The offence	77
(b) Unlawfulness	78
(c) Carnal intercourse / indecent act	78
(d) Reward	79
(e) Who commits this offence?	79
C Is it an offence to be a prostitute?	79
C Is section 20(1)(aA) aimed at 'professional' prostitutes only?	80

C	Can the client of the prostitute also be charged with contravention of section 20(1)(aA)?	80
	Keeping a brothel	81
(a)	Background	81
(b)	The offence	81
(c)	Keeping	82
(d)	A brothel	83
C	A house or place kept or used for purposes of prostitution	84
C	A house or place kept or used for persons to visit for purposes of unlawful carnal intercourse	84
C	A house or place kept or used for persons to visit for any other lewd or indecent purposes	85
(e)	<i>Mens rea</i>	85
(f)	Additional measures to address brothel keeping	85
	Procuring	87
(a)	Procuring of sexual intercourse	88
(b)	Procuring for a brothel	89
(c)	Procuring for common prostitution	89
(d)	To become an inmate of a brothel	90
(e)	Procuring by stupefaction	90
	Procuring by abduction	91
	Facilitating prostitution: enabling communication for purposes of prostitution	92
	Soliciting	93
(a)	Background	93
(b)	The offence	94
*	Soliciting	94
*	In a public place	95
*	For immoral purposes	95
(c)	Can the client be convicted of soliciting?	95
	Indecent exposure	96
*	Exhibited	96
*	Indecently	96

* Publicly	97
Living on the earnings of prostitution	97
(a) Background	97
(b) The offence	99
* Living on	99
* Earnings	100
* Of prostitution	100
Public indecency	100
Receiving remuneration for commission of act of indecency	101
(a) The offence	101
* Receiving consideration	101
* Act of Indecency	101
Aliens Control Act 96 of 1991	101
The Immigration Bill, 2001	102
Liquor Act 27 of 1989	103
The Businesses Act 71 of 1991	103
Municipal By-laws	104
Constitutional aspects	105
Other legal principles relating to prostitution	108
(a) Claim for loss of breadwinner	108
(b) Unemployment Insurance Benefits	109
(c) Proof of income	109
(d) Income tax liability	109
(e) Defence to a charge of contravention of section 14 of the Sexual Offences Act 23 of 1957	110
(f) Rules of evidence	111
Summary	111

CHAPTER 7:	FRAMEWORK FOR CONSIDERATION OF LEGAL OPTIONS	113
Introduction		113
Prostitution and international human rights law		113
(a) The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)		113
(b) Other human rights instruments		116
C Convention on the Elimination of All Forms of Discrimination Against Women		116
C Declaration on the Elimination of Violence against Women		118
C Beijing Declaration and Platform of Action		119
(c) UN responses to prostitution		119
(d) Summary: International human rights law		120
Foreign jurisdictions		121
(a) United States of America		123
C Nevada		123
C The San Francisco Task Force on Prostitution		127
(b) Sweden		129
(c) The Netherlands		131
(d) Germany		135
(e) Thailand		138
(f) New Zealand		140
(g) Australian Capital Territory		142
(h) Summary: Foreign jurisdictions		144
CHAPTER 8:	PROSTITUTION AND HIV/AIDS	148
Introduction		148
Prostitutes as 'pools of contagion'		149
What are the risk factors for HIV infection in prostitutes?		151
HIV/AIDS and prostitution in South Africa		153
Legal measures targeting prostitutes		154
(a) Mandatory testing		155
C Unreliability of tests		155
C False sense of security		156
C Focus on <i>ex post facto</i> detection rather than prevention		156
C Focus on prostitutes rather than clients		156

C	Violation of right to privacy and the principles of medical confidentiality	156
C	Stigmatisation of prostitutes	157
C	International approach to mandatory testing	157
(b)	Preventing prostitutes from working if HIV infected	158
(c)	Increased penalties	160
	Are these measures appropriate to address HIV infection?	160
	Legal dispensation and effective HIV prevention	161
	Summary	165
 CHAPTER 9: TRAFFICKING AND PROSTITUTION		 169
	Background	169
	Definition of trafficking	170
	Trafficking and migration	172
	Different perspectives on trafficking	173
	Trafficking and international human rights law	175
	Trafficking Protocol	175
(a)	Protection of victims of trafficking	177
(b)	Prevention, cooperation and other measures	177
(c)	Entry into force of the Protocol	177
(d)	Monitoring of implementation	178
(e)	Discussion of the Trafficking Protocol	178
	The Women's Convention	180
	South Africa's first country report to CEDAW	181
	Beijing Declaration and Platform for Action	181
	Draft Protocol on the Rights of Women in Africa	183
	Rome Statute of the International Criminal Court	183
	Government responses to trafficking and migration	183
	Current legal position in South Africa	184
 CHAPTER 10: LEGAL MODELS FOR ADDRESSING ADULT PROSTITUTION		 186
	Introduction	186
	Terminology	186
	Criminalisation	186
	Partial criminalisation (the abolitionist approach)	187
	Punishment of clients	188
	Impact of criminalisation in South Africa	188

Legalisation	191
'Legalisation' and 'Regulation'	193
Self-regulation	193
Characteristics of legalisation	194
(a) Licensing of prostitution businesses	194
(b) Zoning requirements	195
(c) Registration of prostitutes	195
(d) Mandatory health testing	196
(e) Role of local government and municipal by-laws	196
Potential impact of legalisation in South Africa	197
(a) Licensing of brothels and other prostitution businesses	198
(b) Mandatory health testing	199
(c) Tax liability	199
Decriminalisation	201
Potential impact of decriminalisation in South Africa	202

GLOSSARY OF TERMS

'Child' means a person under the age of 18 years;

'Criminalise' means that certain or all aspects of (adult) prostitution are prohibited as criminal offences;

'Decriminalise' means the removal of laws that criminalise (adult) prostitution;

'Legalise' means that (adult) prostitution is allowed within prescribed conditions;

'*Mens rea*' means fault on the part of the accused and may take the form of either intention (*dolus*) or negligence (*culpa*);

'Prostitution' means indiscriminately having sex with another person(s) for reward;

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CHAPTER 1

BACKGROUND AND INTRODUCTION

Introduction

1.1 Prostitution¹ has been the subject of considerable public debate in South Africa recently. The topic remains an emotive one, and opinions on prostitution are generally strongly polarised.² It is specifically the question of how the South African legal system should respond to prostitution that has recently received unprecedented attention.³

1.2 Any discussion of adult prostitution draws together a number of themes, ranging from the constitutional protection of human rights to the question of the role of the law in enforcing moral or religious values. This Issue Paper attempts to explore these themes against the backdrop of complex South African realities, including the socio-economic marginalisation of women and the impact of the HIV/AIDS pandemic.

1.3 Although this Issue Paper focuses on adults, the impact on and consequences of adult prostitution for children and other vulnerable groups cannot be excluded or ignored. In this context, the manner in which the law addresses prostitution is critical.

Origin of the investigation

1.4 This investigation into **adult** prostitution had as its starting point the

¹ See Par 1.37 below on the use of the term 'prostitution'.

² See, for example, K Magardie 'Put an end to prostitution by removing the demand' *Mail & Guardian*, 18-24 August 2000; N Distiller 'Criminalising prostitution won't end it' *Mail & Guardian*, 1-7 September 2000.

³ This legal response was recently thrown into sharp focus by the judgment of the Transvaal Division of the High Court in *Jordan and Others v The State* 2002 (1) SACR 17 (T), where it was held that the pivotal provision in South African law dealing with prostitution, viz. section 20(1)(aA) of the Sexual Offences Act 23 of 1957 was inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996 [hereinafter referred to as 'the 1996 Constitution'] and therefore invalid. This finding is currently awaiting confirmation by the Constitutional Court in terms of section 172(2)(a) of the 1996 Constitution. In addition, certain provisions of the Sexual Offences Act are also currently being challenged in *Philips v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2002 (1) BCLR 41 (W). The applicant in this matter has applied for a declaratory order to the effect that certain provisions of this Act are inconsistent with the Constitution. This application is discussed in more detail in Par 6.147 below.

investigation originally entitled ‘Sexual Offences By and Against Children’. The Commission decided to limit its investigation into sexual offences **against** children, as the Project Committee on Juvenile Justice was dealing specifically with the juvenile offender (i.e. with sexual offences committed **by** children).⁴ It also became clear during the course of the investigation and at the workshops held on the Issue Paper on Sexual Offences Against Children⁵ that any proposed changes in particular to the substantive law relating to sexual offences would have a far reaching effect on the position not only of children but adults as well.

1.5 This opened a lively debate as to whether all sexual crimes, including those against adults, should be covered by the investigation. However, this debate largely became irrelevant after the Commission received a request from the Justice Parliamentary Portfolio Committee and the (then) Deputy Minister of Justice to consider the position of adults affected by sexual violence. In the light of these developments, the Commission decided to expand the scope of the investigation to include sexual crimes against adults and the investigation was renamed ‘Sexual Offences’.

1.6 A considerable amount of time and energy was spent on the planning of the investigation. Questions on whether one or more discussion papers were needed and what the scope or focus of those discussion paper should be were debated. On the one hand, some felt that a particular focus (on children, for instance) might be lost in one, general discussion paper. On the other hand, practical considerations and political and other pressure made it imperative to deliver soon. In the end the Commission decided to publish four separate discussion papers (with draft legislation, where necessary).

1.7 The first Discussion Paper, published in September 1999, addressed the substantive law relating to sexual offences and contained a draft Sexual Offences Bill.⁶ It had both a child and adult focus. The second discussion paper, published in December 2001, deals with matters concerning process and procedure and again has both an adult and child focus.⁷

⁴ This was done in an attempt to minimise overlap between this investigation and other related investigations, most notably Project 106 – **Juvenile Justice** and Project 110 – **The Review of the Child Care Act**.

⁵ South African Law Commission *Issue Paper 10 (Project 107): Sexual Offences Against Children*.

⁶ South African Law Commission *Discussion Paper 85 (Project 107) Sexual Offences: The Substantive Law* [hereinafter referred to as “Discussion Paper 85”].

⁷ South African Law Commission *Discussion Paper 102 (Project 107) Sexual Offences* [hereinafter referred to as “Discussion Paper 102”].

1.8 This document forms the third in this quartet and concentrates on adult prostitution. **Child** prostitution has been comprehensively dealt with in Discussion Papers 85 and 102. The fourth paper will deal with pornography.

Progress

1.9 The previous Minister of Justice, Dr AM Omar, directed the Commission to conduct the investigation into sexual offences by and against children. In June 1996 the Commission accorded the investigation the highest possible priority rating and recommended that a Project Committee be appointed to assist the Commission in its task.

1.10 At the time of writing of this Issue Paper, the following persons were members of the Project Committee:

Ms Zubeda Seedat (Chairperson)

Ms Joan van Niekerk (Project Leader; Childline, KwaZulu Natal)

Ms Lebo Malepe (Canada - South Africa Justice Linkage Project)

Ms Charlotte McClain (Human Rights Commission)

Professor John Milton (School of Law, University of Natal)

Ms Bronwyn Pithey (formerly at Rape Crisis, now with the Sexual Offences and Community Affairs Unit in the office of the National Director of Public Prosecutions)

Dr Rose September (Institute for Child and Family Development, UWC)

1.11 With the kind financial assistance of the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), a specialist consultant in the form of Ms Helene Combrinck of the Woman and Human Rights Project, Community Law Centre, University of the Western Cape was appointed in June 2000 to initially assist with and later to prepare this Issue Paper. In providing assistance to the Project Committee, Ms Combrinck also acted in terms of a funding agreement with the Swedish Development Agency (SIDA) in terms of which the Community Law Centre was to do research 'towards addressing the current legal status of commercial sex work'. The Commission wishes to express its sincere appreciation for the work done by Ms Combrinck and the financial assistance provided by the GTZ and SIDA.

Prostitution and the Issue Paper

1.12 The Project Committee began its work in January 1997. An Issue Paper on Sexual Offences Against Children was researched and developed and then released by the

Law Commission on 31 May 1997.⁸

1.13 The Issue Paper briefly outlined the issues of child prostitution, procuring of a child for prostitution and child sex tourism, and posed the following two specific questions:

- o Should more stringent measures be adopted in the form of e.g. revoking trade licenses, confiscation of property, fines etc to be invoked where children are being accommodated on premises for the purpose of prostitution? Is it fair to brand the child prostitute a criminal?⁹
- o Should South Africa follow the international trend and provide for sanctions to end and prevent child sex tourism?¹⁰

1.14 The Issue Paper was widely distributed to all sectors involved with managing sexual offences by and against children, as well as non-governmental and community-based organisations. Comments and submissions on the Issue Paper were invited, and a number of workshops were held with at least one workshop in each of the nine provinces.¹¹

1.15 Responses received in relation to child prostitution were consolidated in the first Discussion Paper. It should be noted that due to the specific focus of the Issue Paper on sexual offences against **children**, the issues of concern around prostitution were quite narrowly delineated. In this sense, this Issue Paper simultaneously places both the problem statement and possible options relating to adult prostitution into the realm of public discussion. For the benefit of the reader, the Commission's preliminary position regarding child prostitution is set out below under the general rubric 'commercial sexual exploitation of children'.

The commercial sexual exploitation of children: The Commission's preliminary position

1.16 Following the First World Congress against the Commercial Sexual Exploitation of Children in 1996 in Stockholm, a new section 50A was inserted in the Child Care Act, 1983 by means of the Child Care Amendment Act 13 of 1999. The aim of this section is to protect children subject to this form of abuse. Section 50A reads as follows:

⁸ South African Law Commission *Issue Paper 10 (Project 107): Sexual Offences Against Children*.

⁹ Par 4.11.13.

¹⁰ Par 4.11.

¹¹ See Par 7.4.7 – 7.4.12 of Discussion Paper 85 for details of this workshop process.

(1) Any person who participates or is involved in the commercial sexual exploitation of a child shall be guilty of an offence.

(2) Any person who is an owner, lessor, manager, tenant or occupier of property on which the commercial sexual exploitation of a child occurs and who, within a reasonable time of gaining information of such occurrence fails to report such occurrence at a police station, shall be guilty of an offence.

(3) Any person who is convicted of an offence in terms of this section, shall be liable to a fine, or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

1.17 'Commercial sexual exploitation' is defined in the Child Care Act, 1983 (as amended in 1999) as the 'procurement of a child to perform a sexual act for a financial or other reward payable to the child, the parents or guardian of the child, the procurer or any other person'. The definition is in keeping with the definition agreed upon at the Stockholm World Congress.

1.18 Two components of the section are intended to strengthen protection for children who are subject to commercial sexual exploitation. The first is by the creation of an offence to criminalise participation in the commercial sexual exploitation of a child. This makes the client's actions subject to criminal sanctions, in sharp contrast to the situation under the Sexual Offences Act 23 of 1957. Secondly, subsection (2) targets the owner, lessor, manager or occupier of property on which child prostitution is taking place who, whilst being aware of such occurrences, fails to report this to the police.

1.19 The Commission approaches the commercial sexual exploitation of children in a two-pronged fashion: the focus in the Sexual Offences investigation is on the use of the criminal law, while the investigation into the Review of the Child Care Act adopts a protective, social developmental approach. However, both investigations are premised on providing severe criminal sanctions against those who sexually abuse and exploit children (the perpetrators). The Commission has also made it very clear that the child who is being sexually exploited should be regarded as a victim in need of protection and that the actions of such child should not be criminalised. The investigation into the Review of the Child Care Act goes further and not only says that such child is a victim (as opposed to an offender), but also that such child is a child in need of care and therefore entitled to the care and protection and preventative measures currently embodied in the Child Care Act, 1983 and those being proposed in the draft Discussion Paper on the Review of the Child Care Act.

1.20 An overview of the legislation addressing the issue of child prostitution is given by the Commission in its ***Discussion Paper on Sexual Offences: The Substantive Law***. In the Discussion Paper **the Commission recommends a total prohibition of child**

prostitution, and explicitly criminalises the commercial sexual exploitation of children.¹² The Commission recommends that a criminal offence be created whereby any person who intentionally invites, persuades or induces a child to allow him or her or any other person to commit a sexual act with that child for financial or other reward to the child or to any other person will be guilty of an offence. Other provisions in the draft Sexual Offences Bill seek to strengthen the prohibition of child prostitution.

1.21 Given the focus of the envisaged new sexual offences legislation and the Government's commitment to eradicate child prostitution, it is expected that stricter enforcement and more criminal investigations will bring to light more children involved in or affected by child prostitution. The Commission recommends that where a criminal investigation reveals that a particular child has been involved in prostitution, such child be treated as a child in need of care and be brought before the children's court.¹³ Where necessary, the child must be removed to a place of safety, but this should not be the general rule. It might be more appropriate, for instance, to arrest and remove a father who pimps his child, than to remove the child.

1.22 However, the point must be made that adult prostitutes (or commercial sex workers) are not per se unfit parents. The fact that a child's parent or care-giver is a prostitute does not imply that that child is in need of care. Indeed, such parent or care-giver may well be prostituting himself or herself in order to maintain his or her child.

1.23 Trafficking in children is not limited to the commercial sexual exploitation of those children and legal provisions need to cover trafficking for other purposes such as, for example, labour or trade in organs. To this end, the Commission has recommended the inclusion of specific child anti-trafficking provisions in the new children's statute.¹⁴ Although South Africa has no anti-trafficking legislation, several legal remedies in the Child Care Act, 1983 can be used to protect children who have been or are being trafficked for purposes of commercial sexual exploitation.¹⁵

1.24 Where a child is trafficked to South Africa from another country, the Commission has recommended in the Discussion Paper on the Review of the Child Care Act

¹² See section 9 of the draft Sexual Offences Bill as contained in the Commission's *Discussion Paper 102: Sexual Offences*.

¹³ Par 13.7.5.5 of Discussion Paper 103.

¹⁴ Para 13.7.4 and 22.5.4 of Discussion Paper 103.

¹⁵ See, for instance, section 51 of the Child Care Act, 1983.

that such a child should be afforded refugee status,¹⁶ entitling the child to the protection measures such a classification will bring. In particular such a child should enjoy full legal protection, in accordance with the rights set out in the Bill of Rights to the Constitution and the Refugees Act 130 of 1998, in South Africa. Where such a refugee child is found under circumstances which clearly indicate that the child in question is in need of care as contemplated in the Child Care Act, 1983, he or she must be brought before the children's court. The children's court enquiry can then trigger the full possible range of protection measures available under the Child Care Act, 1983.

1.25 Research shows that South African children are increasingly being trafficked by their own parents into slavery or prostitution in order to generate an income or to pay off a debt. The Commission believes the authorities and the Children's Court will have little difficulty in proclaiming such a trafficked child a child in need of care; to summarily remove that child, and to place that child in alternative care. In these circumstances, it seems rather pointless to expect social workers to perform family reunification services in order to have the child returned to the very person(s) who trafficked him or her in the first place. This is not to say that other welfare services should not be rendered to such family. Indeed, given the extremes to which the parent(s) have gone to traffic their own child, it should certainly be a cause for concern. This should be particularly true where other siblings remain with the parents. For this reason, the Commission has recommended that if a court finds that a child has been trafficked for purposes of commercial sexual exploitation by his or her parents or any other person legally responsible for the child, some or all of the parental rights of that person be suspended pending an enquiry, that the court holding such an enquiry may terminate all parental rights, and may order that a permanency plan for such be developed.¹⁷

1.26 The Commission believes that severe criminal sanctions linked to trafficking and the other forms of commercial sexual exploitation, the strengthening of the sexual offences legislation, the application of extra-territorial legislation, etc. will serve as a significant deterrent and therefore preventative measure.

1.27 The Films and Publications Act, 65 of 1996, as amended by Act 34 of 1999, defines child pornography to include 'any image, real or simulated, however created, depicting a person who is or who is shown as being under the age of 18 years, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participating in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children'. The Act makes it an offence for any person who 'knowingly

¹⁶ Para 13.7.4 and 22.5.4 of Discussion Paper 103.

¹⁷ Par 13.7.4 of Discussion Paper 103.

creates, produces, imports or is in possession of a publication which contains a visual presentation of child pornography; or creates, distributes, produces, imports or is in possession of a film which contains a scene or scenes of child pornography'. The production and possession of child pornography is thus completely prohibited.

1.28 However, while these provisions of the Films and Publications Act 65 of 1996 are on the statute book, it appears that it is very difficult in practice to prosecute and convict any person for contraventions of this Act. As a result, the Commission has decided to focus specifically on pornography and its impact upon children in a separate paper to be prepared in 2002.

1.29 Given the work already done by the Commission on the commercial sexual exploitation of children, this Issue Paper will focus on adult prostitution only.

The Commission's Continuing Working Methodology

1.30 This Issue Paper represents the current thinking and opinion of the Commission on the legal status of adult prostitution as it has been predominantly informed by research and consultation at local, national and international levels. It presents various options to deal with the problem of prostitution such as criminalization, legalization and decriminalization in Chapter 10. The advantages, disadvantages and implications of adopting a particular option are also set out in this Chapter. **The Commission therefore deliberately refrained from taking a particular position regarding the approach to be adopted to the legal regulation of prostitution at this stage of the investigation.** Obviously the Commission will be informed by the public consultation process following the release of this Issue Paper and the outcome of the constitutional challenges presently underway.

1.31 Due to the contentious nature of this subject, the Commission wishes to invite submissions and discussion on this Issue Paper from as broad a range of sources as possible. The Commission has committed itself to consult on this Issue Paper and interested parties are invited to avail themselves of this opportunity to participate in the legislative process.

1.32 After submissions and input from the consultation process have been integrated into the proposals, a discussion paper with draft legislation (if appropriate) will be prepared. The discussion paper and draft legislation will set forth the Commission's preliminary recommendations and submissions will again be invited. After taking the

submissions received into consideration, a report will be prepared. The report will contain the Commission's final recommendations. This report will then be submitted to the Minister for Justice and Constitutional Development. It remains the prerogative of the Minister to implement the Commission's recommendations.

Public participation in the investigation

1.33 The Commission believes that it is essential to involve all stakeholders in the consideration of the legal response to prostitution. Specific efforts will therefore be made to ensure that the debates are as inclusive as possible.

Questions of terminology

1.34 The question of whether this Issue Paper should employ the terms 'prostitution' / 'prostitutes' or 'commercial sex work' / 'sex workers' received considerable attention in the deliberations of the Commission. While the latter terms have recently gained more popularity, and are generally regarded as less offensive or judgmental as 'prostitution' / 'prostitute', there were also objections against the use of 'sex work/ worker'.

1.35 There is no consensus among sex workers / prostitutes themselves as to what the 'appropriate' terminology should be. Prostitutes may refer to themselves as 'business girls', 'sex therapists', 'masseurs/ masseuses', and a wide range of related terms. Colloquial terms for prostitution have also developed: for example, in Cape Town, the phrase 'sy is op die pad'¹⁸ is used to indicate that a woman is working as a prostitute (here, specifically an outdoor prostitute).¹⁹

1.36 The Commission notes that the commercial sex industry strictly speaking extends beyond what is typically referred to as 'prostitution' to also include, for example, the pornography industry and sex-based entertainment such as 'live sex shows'.²⁰ The phrases 'prostitution' / 'prostitutes' would therefore be useful to connote a specific 'sub-category' of the all-encompassing concept of 'the commercial sex industry'.

¹⁸ Literally translated: 'she is on the road'.

¹⁹ As an aside, it is interesting to note that especially in the international sphere, terms such as 'whore' and 'slut', which were traditionally used in a derogatory sense, are now being 'reclaimed' by prostitute activists. Gevisser and Cameron explain this phenomenon in the preface to *Defiant Desire: Gay and Lesbian Lives in South Africa* Braamfontein: Ravan Press 1994.

²⁰ See Chapter 3 below.

1.37 Due to the considerations outlined above, as well as the fact that the terms 'prostitution' / 'prostitutes' are familiar to most members of South African society, the Commission elected to resort to these terms for purposes of this Issue Paper. In addition, the term 'prostitution' is used in the Sexual Offences Act.

CHAPTER 2

BACKGROUND TO THE CURRENT DEBATE ON ADULT PROSTITUTION

Introduction

2.1 It is a criminal offence to work as a prostitute in South Africa. Prior to 1988, this was not the case. Although various acts associated with prostitution, for example, soliciting, brothel-keeping and procuring were regarded as offences under the Sexual Offences Act,²¹ the exchange of sexual acts for reward was not penalised. The amendment of the Sexual Offences Act to include section 20(1)(aA) however changed this position by criminalising the performance of sexual acts for reward.²²

Government initiatives

2.2 The advent of democracy in 1994 appears to have led to a gradual recognition of a need to review the current approach to prostitution.

2.3 During 1995, the Department of Health requested two researchers at the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand to investigate possible strategies for regulating prostitution.²³ The researchers compiled a draft Bill on Prostitution.²⁴

2.4 In 1996, the Gauteng Cabinet Committee on Safety and Security and Quality of Life mandated the Gauteng Ministry of Safety and Security to draft a policy document on prostitution.²⁵ The mandate also included monitoring the ways in which police utilised their resources in policing prostitution with the view to consider reprioritising of policing activities.

2.5 The Ministry produced a draft policy document, which recommended the decriminalisation of prostitution, and the document was distributed to a wide range of role players for comment. This process resulted in the setting up of a Task Team to report to the provincial Cabinet. The Gauteng Cabinet eventually endorsed and approved the Task

²¹ Sections 19(a), 2 and 10 respectively.

²² See Chapter 6 below for a discussion of the legislative history of this provision.

²³ R Rossouw 'Streetwalkers come in from the cold' *Mail & Guardian* (1-7 September 1995).

²⁴ It could not be established what happened to this Bill.

²⁵ S Rakgodi 'Sex work: decriminalisation' Unpublished paper presented at SADC Conference on Prevention and Eradication of Violence Against Women (Durban, March 1998).

Team's recommendations as set out in its final report.²⁶ The Task Team unequivocally recommended the decriminalisation of (adult) prostitution.²⁷

2.6 The Gauteng proposals for decriminalisation received support from (*inter alia*) the African National Congress at its national conference in Mafikeng in 1997.²⁸ Western Cape premier Gerald Morkel also joined in calling for the decriminalisation of prostitution.²⁹ The initiative however lost momentum in 1998 with the resignation of the MEC for Safety and Security, Ms Jessie Duarte, in March of that year.³⁰

2.7 In its first country report to CEDAW,³¹ submitted in 1997, the South African government reported on the present status of the law regarding prostitution, and noted that current laws on prostitution may violate some constitutional rights.³² According to the report, these rights include the right to equal protection and benefit of the law; the right to have one's dignity respected and protected; rights to freedom and security of the person; the right to privacy; the right to freedom of association; and the right to choose one's trade, occupation or profession.

2.8 In 1998, the Commission on Gender Equality³³ apparently³⁴ produced a brief position paper supporting the decriminalisation of sex work and conducted research on options for legal reform.

2.9 Although the draft gender policy of the Department of Justice, as cited in South Africa's report to CEDAW, envisaged the inclusion of decriminalization of prostitution,

²⁶ Task Team, Gauteng Province ***Decriminalisation of Sexwork*** (Final Report) 1997.

²⁷ *Ibid* at 7-8.

²⁸ Rakgoadi (*op cit*). See also discussion below.

²⁹ T Leggett 'The least formal sector: women in sex work' ***Crime and Conflict*** No 13 (1998) at p 21.

³⁰ Ms Duarte's office was central to the development of the initial policy document. Leggett also explains the loss of impetus as follows: '... but the two provinces were shortly rebuked with a reminder that, as the matter is governed by national legislation, there is nothing the provincial authorities can do but re-prioritise enforcement as a matter of local policy.' – see Leggett (*loc cit*).

³¹ The UN Committee on the Elimination of Discrimination Against Women is tasked with overseeing the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women [hereinafter referred to as 'CEDAW']. States parties who ratify this CEDAW are required to submit its first report to the Committee one year after ratification.

³² South Africa's Initial Country Report at Article 6.

³³ The Commission on Gender Equality is established in terms of section 187 of the Constitution.

³⁴ Attempts to obtain a copy of this document failed.

such proposal was not included in the (final) Gender Policy Statement published in May 1999.³⁵ In this Statement, the Department identified trafficking in women and children as one of its strategic areas of intervention.³⁶ The Department committed itself to the creation of a legal environment to eliminate all forms of trafficking in women and children. This legal framework will:

- C Ensure that all women and girl children enjoy the right to freedom and security of the person regardless of economic or occupational status;
- C Contribute towards the promotion of national health by minimizing the spread of HIV and other STD's;
- C Help eradicate the exploitation and abuse of, and discrimination against, women involved in prostitution and thus enable South Africa to comply with article 6 of CEDAW; and
- C Enable the Department to comply with its obligations in terms of the Beijing Platform of Action.³⁷

2.10 The document notes that international obligations in terms of CEDAW and the Beijing Platform For Action require the adoption of measures to protect women involved in prostitution from abuse and exploitation.³⁸ Violent abuse is the main concern in this regard.³⁹

2.11 The document then proposes *inter alia* the following activities in its Implementation Strategy for this area:

- C Coordinate the process of law reform in fulfillment of our commitments in terms of the Beijing Platform For Action and being guided by CEDAW particularly article 6, which mandates State Parties to 'take all appropriate measures, including legislation, to suppress all forms of trafficking in women and exploitation of prostitution of women'.
- C Participate in inter-sectoral efforts to educate the public on the new policy and law, particularly on the basis of policy choices.
- C Do everything possible within our scope of work, to support poverty alleviating strategies particularly those aimed at achieving economic empowerment of women.⁴⁰

³⁵ Department of Justice **Gender Policy Statement: Balancing the Scales of Justice through Gender Equality** (May 1999) 2nd ed.

³⁶ *Idem* at 10.

³⁷ *Idem* at 15.

³⁸ *Idem* at 16: 'Our own departmental commitments as presented to the National Conference on the Implementation of the Beijing Platform for Action include the commitment to: "... review sexual offences legislation to decriminalise where necessary and to ensure greater protection of women".'

³⁹ *Ibid.*

⁴⁰ *Ibid.*

2.12 During September 2000, the Ministry of Health scheduled a visit to a well-known brothel, The Ranch, situated in Sandton.⁴¹ This visit, according to a departmental spokesperson, formed part of 'the department's initiative to have the adult commercial sex-work industry decriminalised and regulated'.⁴² A delegation including, amongst others, Director-General Dr Eddie Mhlanga, accordingly visited The Ranch on 22 September 2000.

2.13 Subsequent to the visit, Dr Mhlanga was quoted as saying:

'We believe that the sex industry in South Africa is alive and thriving, and we need to engage roleplayers in that field so that we can protect the health of the women involved'.⁴³

Non-government initiatives

2.14 Since 1994, a number of civil society initiatives developed in response to the needs of adult prostitutes. On political level, the African National Congress has also given specific attention to the legal status of prostitutes. These developments are briefly discussed below.

2.15 In November 1994, the Sex Worker Advocacy and Education Taskforce (SWEAT) was initiated in Cape Town in response to a need to address HIV/AIDS issues and human rights abuses experienced by persons working in prostitution.⁴⁴ The presence of a vocal human rights-oriented organisation dealing exclusively with prostitution has done much to focus public attention on this issue, and has also ensured an increasing recognition of the need to re-examine the current legal status of prostitution.

2.16 A national network of organisations working towards a change in the legal dispensation was founded in January 1996. DECPRO ('Decriminalisation of Prostitution Network') included members of organisations such as SWEAT and Lawyers for Human Rights as well as academics from the Law Faculties of the University of Natal

⁴¹ Health Reporter 'Brothel-probing minister wants sex work legal' *The Star* (21 September 2000).

⁴² *Ibid.*

⁴³ L Altenroxel 'Back at the Ranch, health officials talk sex' *The Star* (23 September 2000).

⁴⁴ Petzer and Isaacs 'SWEAT: The development and implementation of a sex worker advocacy and intervention program in post-apartheid South Africa (with specific reference to the western city of Cape Town)' in Kempadoo and Doezema (eds) **Global Sex Workers: Rights, Resistance and Redefinition** (1998) at 193.

(Pietermaritzburg) and the University of the Western Cape. DECPRO produced two documents, viz. a draft document on decriminalisation of commercial sex work,⁴⁵ as well as a 'code of conduct' for policing of prostitution-related matters. A lack of funding resulted in the subsequent demise of the Network.⁴⁶

National Conferences on Prostitution

2.17 At its 50th National Conference in Mafikeng in 1997, the African National Congress firstly resolved that the Democratic Government should take the appropriate measures to remove all legislation that makes 'commercial sex work' a criminal offence. Secondly, it resolved that the Department of Health should take the appropriate measures to ensure that persons engaged in 'this occupation' have regular and confidential access to the public health system as a means of curbing the spread of all sexually transmitted diseases.⁴⁷

2.18 During 4-5 May 2000, SWEAT and the Women's Legal Centre jointly hosted a conference on prostitution in Cape Town. The Deputy Minister of Justice, Ms Cheryl Gilwald, was the keynote speaker, and noted in her address that the issues to be addressed in the Commission's investigation on adult prostitution included protecting prostitutes from violence, exploitation and coercion and affording them the rights enshrined in the Bill of Rights.⁴⁸

2.19 Conference presentations focused on the current legal status of prostitution and strong calls for reform were heard. Speakers were in agreement that the prostitution industry should be decriminalised.⁴⁹

2.20 A second national conference focusing on the health aspects of prostitution was held in Gauteng during 17-18 February 2001. Hosted by the Reproductive Health Research Unit (University of the Witwatersrand), the Conference focused on predominantly

⁴⁵ DECPRO ***Decriminalisation of Commercial Sex Work in South Africa – An Exploratory Survey*** (1997) [copy on file with S A Law Commission].

⁴⁶ Ms Helene Combrinck was a member of DECPRO.

⁴⁷ Draft Conference Resolutions [on file with S A Law Commission]. Leggett *op cit* points out that this decision appears to be absent from the final Congress resolutions – at 21.

⁴⁸ Women's Legal Centre ***Conference Report: Adult Commercial Sex Work - Decriminalisation or Regulation*** [Internet].

⁴⁹ See the following conference papers: J Sloan 'Overview of issues affecting the adult commercial sex work industry'; S Delany 'The legal status of adult sex work – why health services should work with the sex industry'; L Malepe 'Adult commercial sex workers – decriminalisation or regulation?'; H Combrinck "Control and contain"; J Gardner 'Legalisation/regulation of adult commercial sex workers – indoor sex workers'.

on issues relating to HIV/AIDS. During the two-day conference, a group of prostitutes attending the proceedings issued a statement highlighting some of their concerns and needs.⁵⁰ These concerns included the following:

‘We need more specific information about legalisation and decriminalisation of prostitution, and options for law reform...’

‘Legalize for us. We need a safe environment free of police.’

‘Legalize. We need an end to police harassment.’

Constitutional challenges

2.21 At the time of going to press, two challenges to the constitutionality of the Sexual Offences Act are making their way through the South African courts.

2.22 The first matter, ***Jordan and Others v The State***,⁵¹ was argued in the Constitutional Court on 5 March 2002.⁵² Judgment was reserved. The second challenge, ***National Director of Public Prosecutions v Phillips and Others***,⁵³ apparently awaits the outcome of the ***Jordan*** matter in the Constitutional Court before being taken further.⁵⁴

⁵⁰ Sex workers from Mothusimpilo Project, HTA (Port Elizabeth), SWEAT, Danzine, COYOTE, AIM ***Sex Workers Speak Out*** Unpublished statement: South African Conference on Sex Work: The Health Issues, Johannesburg, 19-20 February 2001.

⁵¹ 2001 (10) BCLR 1055 (T), 2002 (1) SACR 17 (T).

⁵² The case is discussed in more detail in Par 6.136 *et seq* below.

⁵³ 2001 (2) SACR 542 (W).

⁵⁴ This application is discussed below in Par 6.146 *et seq* below.

CHAPTER 3

HISTORICAL OVERVIEW OF LEGAL MEASURES USED TO ADDRESS ADULT PROSTITUTION

Introduction

3.1 The purpose of this Chapter is to provide a background to the discussion of the different legal models for addressing prostitution. As such, it is not a comprehensive exposition of the history of prostitution.

Early origins of prostitution

3.2 Prostitution is habitually referred to as ‘the oldest profession’ in the world. It has existed in every society for which there are written records.⁵⁵ Jordan notes that the earliest references are to the institution of ‘temple’ or sacred prostitution, dating from about the year 2000 BC, and that it is likely that such prostitution co-existed with commercial prostitution.⁵⁶

3.3 ‘Temple’ prostitution can be described as a religious practice related to fertility rites, where women were required to attend the temple and have sexual intercourse with any man who offered her money.⁵⁷ Sanger explains, for example, that every Babylonian woman was required to ‘prostitute’ herself once in her lifetime in the temple of the goddess Mylitta. Once inside the temple grounds, the woman was not allowed to leave until she had paid her debt, and ‘had deposited on the altar of the goddess the fee received from her lover’.⁵⁸

3.4 However, this service to the goddess did not have the connotations of oppression or loss of social recognition that it might have when measured against conventional norms.⁵⁹ In Babylonian society, for example, prostitutes were appreciated for

⁵⁵ V Jenness *Making It Work* (1993) at 2; WJ Schurink & LBG Ndabandaba ‘Sex-for-money in Durban and adjacent residential areas: an exploratory study of some features of prostitution’ *Acta Criminologica* (1991) at 34. See also WW Sanger *The History of Prostitution* 2nd ed (1913), who notes that ‘we can trace it [prostitution] from the earliest twilight in which history dawns to the clear daylight of today, without a pause or a moment of obscurity’ (at 1).

⁵⁶ J Jordan ‘Prostitution: the case for law reform’ Women’s Law Conference Papers (1993) at 205.

⁵⁷ J Milton ‘Prostitution: current debates’ in S Jagwanth *et al* (ed) *Women and the Law* (1994) at 137.

⁵⁸ Sanger (*op cit*) at 41.

⁵⁹ See S Schwarzenbach ‘Contractarians and feminists debate prostitution’ *Review of Law and Social Change* Vol XVIII (1990-1991) at 120-121.

fulfilling social or spiritual needs, and they occupied a respected position in society.⁶⁰

3.5 The main antecedents of contemporary forms of prostitution (and legal measures to address prostitution) were to be found in Ancient Greece and Rome.

Ancient Greece

3.6 Pomeroy recounts that prostitution flourished in Greece as early as the Archaic period (800-500 BC).⁶¹ In the 6th century BC, the Athenian lawgiver Solon formulated extensive legislation covering many aspects of daily life. His legislative programme included the establishment of state-owned brothels staffed by slaves.⁶² These state-owned brothels were called *Dicteria*, and the female slaves working there *Dicteriades*.⁶³

3.7 However, not only slaves were prostitutes. According to Sanger, at the height of Athenian prosperity, there were four classes of prostitutes.⁶⁴ The highest in rank were the *Hetairae*, or 'kept women', who lived in the best parts of the city, and exercised considerable influence over the politics of the state. Many of these women, in addition to physical beauty, had had intellectual training and possessed artistic talents. These attributes made them more entertaining companions to Athenian men at parties than their legitimate wives.⁶⁵

3.8 Next in this 'hierarchy' were the *Auletrides*, or flute-players, who were dancers as well.⁶⁶ Female flute-players were a common accompaniment to Athenian banquets, and these flute-players 'did not wholly rely on their music for their successes.'⁶⁷ They also provided sexual services to banquet-goers.⁶⁸

3.9 The third group were the concubines, who were slaves owned by rich men with the knowledge of their wives, 'serving equally the passions of their master and the

⁶⁰ L Shrage 'Should feminists oppose prostitution' *Ethics* (1989) at 350 cited in Schwarzenbach (*op cit*) at 121.

⁶¹ SB Pomeroy *Goddesses, Whores, Wives and Slaves* (1975) at 89.

⁶² *Idem* at 89.

⁶³ Sanger (*op cit*) at 43.

⁶⁴ *Idem* at 46.

⁶⁵ Pomeroy (*op cit*) at 89.

⁶⁶ Sanger (*op cit*) at 46.

⁶⁷ Sanger (*op cit*) at 50.

⁶⁸ Sanger describes the activities of the flute-players in detail - see 50-53.

caprices of their mistresses'.⁶⁹

3.10 The fourth group were the *Dicteriades*, who were regarded as the lowest group of prostitutes. In Solon's time, the *Dicteriades* were kept well apart from 'respectable' women. They were originally bound to reside at the Piraeus, the sea-port of Athens situated some four miles from the city, and they were forbidden to walk out by day.⁷⁰ The *Dicteriades* were not allowed to mix in religious ceremonies or to enter the temples, and they forfeited the rights of citizenship they may have had by virtue of their birth.⁷¹ In addition, the children of prostitutes were also penalized: they could not, for example, inherit property.⁷² Solon's laws continued to exert considerable influence over the lives of Athenian women into the Classical period.⁷³

3.11 One of the ways in which 'respectable' women were distinguished from prostitutes was through their dress. The material used by 'respectable' women was usually wool or linen, while prostitutes wore saffron-dyed material of gauzelike transparency.⁷⁴ The most singular characteristic by which a Greek prostitute was known was her hair: prostitutes dyed their hair a flaxen or blond colour.⁷⁵ Frequently a flaxen wig was substituted for the dyed hair.

3.12 All prostitutes were required to pay a special tax to the state. The collection of this tax was subcontracted to speculators, and it yielded a significant income to the state *fiscus*.⁷⁶

Rome

3.13 Although the Roman laws specifically addressing prostitution date from the reign of the Emperor Augustus, Sanger estimates that prostitution must have become established at Rome at about the beginning of the 3rd century BC.⁷⁷ According to the writings of Tacitus, prostitutes had been required from the earliest times to register themselves in the

⁶⁹ Sanger (*op cit*) at 46.

⁷⁰ *Idem* at 46.

⁷¹ *Idem* at 44.

⁷² *Ibid.*

⁷³ Pomeroy (*op cit*) at 89.

⁷⁴ *Idem* at 83.

⁷⁵ Sanger (*op cit*) at 46-47.

⁷⁶ See Sanger (*op cit*) at 46, Pomeroy (*op cit*) at 89.

⁷⁷ Sanger (*op cit*) at 65.

office of the *aedile* (a junior magistrate whose duties included supervision of the markets and trade).⁷⁸ The *aedile* issued prostitutes a licence (the so-called *licentia stupri*), ascertained the sum that they were to demand from their clients, and entered their names in his roll.⁷⁹ Once registered as a prostitute, it was impossible for a woman to have her name removed, even if she eventually married and became the mother of legitimate children.

3.14 One of the duties of the *aediles* was to arrest, punish and evict from the city all unregistered prostitutes. Sanger explains that this regulation had little practical impact: during the time of the empire there was a large and well-known group of unregistered prostitutes.⁸⁰ In contrast to the registered prostitutes (*meretrices*), the unregistered prostitutes or *prostibulae* did not pay any taxes.

3.15 Both slaves and free persons worked as prostitutes in brothels (*lupanaria*), inns or baths open to the public.⁸¹ Prostitutes who did not have the security of a brothel worked out-of-doors under archways.⁸² As in Greece, the law prescribed the dress of prostitutes (again with the purpose of distinguishing prostitutes from 'respectable' women).⁸³

3.16 The Emperor Augustus introduced a series of laws that directly affected prostitutes. The *lex Iulia et Papia* prohibited prostitutes and pimps to marry partners outside the ranks of ex-slaves.⁸⁴ The *lex Iulia de adulteriis coercendis* exempted prostitutes from the penalties imposed for illicit sexual relations such as adultery. McGinn notes that this formally set prostitutes aside as a category of persons without honour.⁸⁵

3.17 In 40 AD the emperor Caligula instituted a special tax on prostitutes, requiring them to pay, from their daily earnings, the amount they earned for one act of sexual intercourse.⁸⁶ This tax was enormously profitable, and the state eventually become so dependent on the revenue generated in this manner that despite the embarrassment it caused the Christian emperors, it was not abolished until 498 AD.⁸⁷

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Idem* at 68.

⁸¹ Pomeroy (*op cit*) at 192.

⁸² *Idem* at 202. The English verb 'fornicate' is derived from 'fornix', the Latin word for 'arch'. See in this regard also Sanger (*op cit*) at 72.

⁸³ *Idem* at 75. See also McGinn (*op cit*) at 157 *et seq.*

⁸⁴ See McGinn (*op cit*) at 341.

⁸⁵ *Ibid.*

⁸⁶ *Idem* at 248-249.

⁸⁷ McGinn (*op cit*) at 250.

The Judeo-Christian approach

3.18 The attitude of the early Christian church to prostitution was shaped by the belief that sexual intercourse should take place only within the ambit of a lawful marriage, and then only for purposes of procreation. Any other sexual activity was sin.⁸⁸

3.19 Although prostitution was therefore, by definition, immoral and sinful, it is significant that early Christian societies did not seek to outlaw prostitution.⁸⁹ The reasoning of the early church fathers was that however immoral, prostitution was also a necessary evil.

3.20 St Augustine, for example, expressed the belief in the fourth century AD that if one were to remove prostitution, 'you will pollute all things with lust'.⁹⁰ He maintained that men's sexual appetites cannot easily be maintained within marriage, and for this reason men need sexual outlets outside of marriage – otherwise they will become adulterers and destroy homes and families.⁹¹ Society therefore needs to facilitate men's access to prostitutes, while at the same time ensuring that the wives of these men remain faithful to their husbands. (The fidelity of wives was regarded as essential for men to be able to determine their own progeny for purposes of birthright and inheritance.)⁹² The sentiments of St Augustine were echoed, nine centuries later, by St Thomas Aquinas (1225-1274), who stated:

'[Prostitution] is like the filth of the sea, or a sewer in the palace. Take away the sewer, and you will fill the palace with prostitution... Take away prostitutes, and you will fill it with sodomy.'⁹³

3.21 The European position from the Middle Ages onward was therefore that prostitution, although morally unacceptable, was tolerated. This resulted in legal

⁸⁸ Milton in Jagwanth, Schwikkard and Grant (eds) *Women and the Law* (1994) at 137; J Burchell & J Milton *Principles of Criminal Law* 2nd ed (1997) at 622. See also Genesis 38:15; Deuteronomy 23: 17 - 18; Joshua 2:1; Proverbs 5:3; 1 Corinthians 6:9, 1 Corinthians 6:15. In the Holy Qur'an, chastity outside marriage is emphasised. See S XXIV 33: 'Let those who find not the wherewithal for marriage keep themselves chaste, until God gives them means out of His grace. ... But force not your maids to prostitution when they desire Chastity, in order that ye may make a gain in the goods of this life. But if anyone compels them, yet, after such compulsion, is God oft-forgiving, most merciful (to them)'.

⁸⁹ Jordan (*op cit*) at 206, Milton *loc cit*.

⁹⁰ *De Ordine* II.4(12), cited in Milton (*op cit*) at 138.

⁹¹ Jordan *loc cit*.

⁹² Jordan notes that St Augustine's argument required two classes of women: the good, virtuous, sexually faithful wives to service men's procreative needs within marriage, and prostitutes who could tend to their sexual needs outside marriage. This reasoning was the basis of the madonna / whore dichotomy, which continues to pervade contemporary gender dynamics (*loc cit*).

⁹³ *Opuscula* XVI, cited in Milton *loc cit*.

mechanisms aimed at controlling and containing, rather than eradicating, prostitution.⁹⁴

3.22 This approach can be termed ‘regulationism’ with reference to regulatory measures such as licensing requirements for brothels where prostitutes were subjected to, for example, forced medical examinations and restrictions on their mobility.⁹⁵ These early attempts at regulatory measures can be seen as the fore cursors of the legal approach currently referred to as ‘legalisation’.

3.23 Jordan notes that by the 17th century, the practice of visiting prostitutes was so widespread that guidebooks to brothels were being produced and men could claim visits to prostitutes on their tax returns.⁹⁶ However, the Protestant reformers such as Luther and Calvin took a much stricter view of prostitution and condemned it outright as immoral.⁹⁷ They insisted on the suppression of prostitution by means of criminal sanction. This ‘more strictly moralistic approach’ took root especially in the United States and (to a lesser extent) in Britain.⁹⁸

Development of a Regulationist approach in Britain

3.24 The British, while not taking the Continental approach of ‘stigmatised tolerance’, also did not concede to the Protestant demand of absolute prohibition.⁹⁹ Prior to the late nineteenth century, there were no common law criminal sanctions relating to prostitution, except for prohibitions on the keeping of ‘bawdy houses’.¹⁰⁰ Working as a prostitute or soliciting for purposes of prostitution was not a criminal offence.

3.25 However, in 1824 a Vagrancy Act rendered prostitutes ‘wandering in public places’ and ‘behaving in a riotous and indecent manner’ liable for punishment as ‘idle and disorderly persons’. In 1839 a police offences Act penalised prostitutes in London who loitered in public places ‘for the purposes of prostitution or solicitation’. These early attempts

⁹⁴ Milton *loc cit.*

⁹⁵ J Doezema ‘Loose women or lost women? The re-emergence of the myth of white slavery in contemporary discourses of trafficking in women’ *Gender Issues* (2000) at 26-27.

⁹⁶ Jordan *loc cit.* See, however R Barnes-September *Child Victims of Prostitution in the Western Cape* (2000) at 8 contra.

⁹⁷ Milton (*op cit*) at 139.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ ‘Bawdy houses’ were places where ‘dissolute and debauched persons’ congregated and by their behaviour disturbed the public peace, thereby becoming a public nuisance and liable to prosecution as such – JRL Milton & MG Cowling *South African Criminal Law and Procedure Vol III: Statutory Offences* 2nd ed as revised (1988) at E3-120 n 2.

at legislative control were not completely successful. According to one estimate, by the 1860's there were over 80 000 women working as prostitutes in London.

3.26 From 1864 onwards, a series of Contagious Diseases Acts were passed (1864, 1866 and 1869). This legislation, which was promoted by the military and medical establishments in an attempt to contain the spread of venereal diseases primarily among enlisted men in garrison towns and ports¹⁰¹ required 'common prostitutes' to be registered as such and to present themselves for a fortnightly internal examination.

3.27 If found suffering from gonorrhoea or syphilis, a prostitute could be interned in a certified lock hospital (a hospital containing venereal wards) for a period not exceeding nine months.¹⁰² Any woman could be identified on the word of a police official as a 'common prostitute', and therefore any woman (especially a working class woman) on her own in a certain area at a certain time could be detained and forced to submit to the internal examinations.¹⁰³

The white slave trade and abolitionism

3.28 The Contagious Diseases Acts soon became the subject of an intense campaign led by the early feminist Josephine Butler. Butler and her fellow campaigners opposed the then-current views of the prostitute as the 'fallen women' or 'sexual deviant' and rather saw prostitutes as victims of male vice, to be rescued and rehabilitated rather than policed and punished.¹⁰⁴ They objected to the Contagious Diseases Acts for what they perceived to be state recognition of a 'double standard' of sexual behaviour for men and women. They also criticised the Acts for giving the state additional powers to police and control the lives of all women, especially working class women.¹⁰⁵

3.29 This approach, referred to as the 'abolitionist' approach, (due to the attempts to abolish not only the offensive Acts but also prostitution itself), is to be distinguished from the competing view of regulationism found in European and American approaches to prostitution. While Pre-Victorian regulation was based on the religious / moral notion of the

¹⁰¹ J Walkowitz *Prostitution and Victorian Society* (1980) cited in B Balos & ML Fellows *Law and Violence Against Women* (1994) at 509.

¹⁰² Walkowitz *loc cit*. See also Milton *loc cit* and J Doezema "Forced to choose" in K Kempadoo & J Doezema *Global Sex Workers* (1998) at 35.

¹⁰³ For a more detailed discussion, see Doezema *loc cit* and Walkowitz (*op cit*) at 509-511.

¹⁰⁴ Doezema (*op cit*) at 27.

¹⁰⁵ *Idem*; Walkowitz (*op cit*) at 510.

prostitute as ‘a fallen woman’, a new rationale for regulation was found in the Victorian age in the science of sexuality, which perceived of the prostitute as a sexual deviant and spreader of diseases.¹⁰⁶ The Contagious Diseases Acts were therefore manifestations of this regulationist approach.

3.30 After the final repeal of the Contagious Diseases Acts in 1886, the abolitionist campaign eventually shifted its focus to repressive measures to end ‘male vice’, since this male vice was seen as the key to ending prostitution itself.¹⁰⁷ It should be noted that the abolitionists were joined in their early efforts by proponents of ‘social purity’ reform,¹⁰⁸ and as the abolitionist campaign succeeded in its objective of having the Contagious Diseases Acts repealed, the more repressive aims of the social purists came to dominate the agenda. Child prostitution and the perceived horrors of the so-called ‘white slave trade’ therefore commanded the attention of the social purity movement.¹⁰⁹

3.31 Doezema explains that as European women began to migrate to other countries in search of work, stories of ‘white slavery’ began to circulate.¹¹⁰ A number of highly publicised exposés of this trade served to generate widespread public attention. These accounts were often of a sensationalist nature:

‘The typical story involves white adolescent girls who were drugged and abducted by sinister immigrant procurers, waking up to find themselves captive in some infernal foreign brothel, where they were subject to the pornographic whims of sadistic, non-white pimps and brothel-master’.¹¹¹

3.32 An essential aspect of the campaign against ‘white slavery’ was to evoke public sympathy for the victims. It was only by absolving the prostitute from all responsibility for her own situation, and by constructing her as a ‘victim’ that she could appeal to the sympathies of the charitable middle-class reformers:¹¹²

¹⁰⁶ Doezema (*op cit*) at 26.

¹⁰⁷ Doezema (*op cit*) at 35-36. See also Jenness *Making it Work: The Prostitutes’ Rights Movement in Perspective* (1993) at 33; C Leigh ‘A first hand look at the San Francisco Task Force Report on Prostitution’ *Hastings Women’s Law Journal* (1999) at 62.

¹⁰⁸ These social purity reformers, many of them male, wanted not only to abolish prostitution, but also aimed to ‘cleans[e] society of vice’ through a repressive programme focusing on, in particular, the sexual behaviour of young people – see Doezema (*op cit*) at 27.

¹⁰⁹ *Idem* at 35.

¹¹⁰ Doezema (*op cit*) at 27.

¹¹¹ N Roberts *Whores in History: Prostitution in Western Society* (1992), cited in Doezema (*op cit*) at 36.

¹¹² *Idem* at 28.

'The "white slave" image as used by abolitionists broke down the old separation between "voluntary" sinful and/ or deviant prostitutes and "involuntary" prostitutes. By constructing all prostitutes as victims, it removed the justification for regulation.'¹¹³

3.33 It is interesting to note that only white women were considered 'victims' of the sex trade; for example, campaigners against the 'white slave trade' from Britain to Argentina were not concerned with the situation of Argentina-born prostitutes, nor were American reformers concerned about non-Anglo-Saxon prostitutes.¹¹⁴

3.34 At the end of the nineteenth century, international efforts to end the trade in white sex slaves were consolidated around a series of conferences on the prevention of trafficking. The first conference was held in Paris in 1895, with two more in London and Budapest in 1899. The first international instruments concerning the trade were created in 1904 and 1910 respectively,¹¹⁵ followed by two further conventions on the traffic in women and children adopted by the League of Nations.¹¹⁶ These instruments were infused with the abolitionist approach to prostitution.¹¹⁷

3.35 A number of contemporary historians have questioned the actual extent of the 'white slave trade'. Their research suggests that the actual number of cases of 'white slavery' was very low,¹¹⁸ and indicates that most of the 'victims' were actually prostitutes migrating in the hope of finding a better life elsewhere.¹¹⁹

3.36 It is therefore ironic that the original, emancipatory efforts of the abolitionist movement (dedicated to decrease state control over poor and working class women) evolved to support the 'social purity' agenda that would give the state new repressive powers over women.¹²⁰ The campaign against white slavery resulted in the adoption of, for example, the Criminal Law Amendment Act of 1885 in Britain that was used against prostitutes and working class women.¹²¹

¹¹³ Doezema (*op cit*) at 28.

¹¹⁴ *Idem* at 30.

¹¹⁵ The International Agreement for the Suppression of the White Slave Trade, Paris (1904) and the International Convention for the Suppression of the White Slave Trade (1910).

¹¹⁶ The International Convention to Combat the Traffic in Women and Children (1921) and the International Convention for the Suppression of Women in Full Age (1933).

¹¹⁷ The impact of the abolitionist approach is discussed below.

¹¹⁸ See Doezema (*op cit*) at 26 and authorities cited there.

¹¹⁹ Doezema (*op cit*) at 36.

¹²⁰ *Idem* at 30.

¹²¹ *Ibid.* The author notes the further example of the U.S. Mann Act of 1910 that was used by police as an excuse to arrest prostitutes and persecute black men.

Development of international response

3.37 Although the campaign against the white slave trade lost momentum after 1914 when the First World War effectively halted migration from Europe,¹²² the abolitionist ethos informing the first international instruments on trafficking prevailed beyond this period.

3.38 This abolitionist approach held that the institution of prostitution in itself constituted a violation of human rights, similar to the institution of slavery.¹²³ This implied that no person, including an adult, was regarded as being able to give genuine consent to engaging in prostitution. The abolitionist view, as concretised in the early international documents, required governments to abolish prostitution through the penalisation of 'third parties' (procurers or pimps) who induced women into prostitution, whether openly, by deceit or through coercion and therefore profited from the transaction between the prostitute and the client.¹²⁴ The punishment of the prostitute was not envisaged, since she was regarded as a victim.¹²⁵

3.39 The international agreements concluded after 1895 culminated in the adoption by the UN of the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others in 1949.¹²⁶ This Convention, which combined and superseded the earlier agreements, has been the focus of considerable criticism on various levels, ranging from its basic underlying approach to prostitution to the inadequacy of its implementation mechanisms.¹²⁷

Emergence of prostitutes' rights movements

3.40 After the adoption of the 1949 Trafficking Convention, feminist and international concern about prostitution and trafficking in women diminished for a while. Since the 1970's, however, prostitution has again become a subject of international activism, starting with the emergence of prostitutes' rights movements and organisations in Europe and the United States.

¹²² *Ibid.*

¹²³ Bindman points out that the term 'Abolitionist' was originally used to describe campaigners against the transatlantic slave trade – see J Bindman *Redefining Prostitution as Sex Work on the International Agenda* (1997) [Internet] (at Par 2b).

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ GA Res 317(IV) of 2 December 1949, U.N. Doc A/1251 (1949) [hereinafter referred to as 'the Trafficking Convention'].

¹²⁷ The Convention is discussed in more detail in Chapter 7 below.

3.41 A 'self-identified' prostitutes' movement began with the establishment of an organisation called COYOTE ('Call Off Your Old Tired Ethics') in San Francisco in 1973.¹²⁸ Jenness also recounts an incident in 1975 in Lyons, France, when local prostitutes took over a church and made public a list of grievances, as the official launch of the prostitutes' rights movement.¹²⁹ The basis of this strike was a plea to be protected from police harassment and repression arising from a revision of French prostitution laws that had resulted in prostitutes being forced to work on the streets, leaving them vulnerable to an increased number of physical assaults and arrests.

3.42 The Lyons incident sparked a number of other events in France, all of which received unprecedented media attention. In the process, it raised public awareness of the problems of prostitutes, and also led to the formation and solidification of prostitutes' rights organisations in the US and in Europe.¹³⁰ On an international level, the International Committee for Prostitutes Rights was established in 1985, and two World Whores Congresses were held respectively in Amsterdam, the Netherlands, in 1985 and in Brussels, Belgium, in 1986. At the First World Whores Congress, a 'World Charter of Prostitutes Rights' was adopted.

3.43 Kempadoo observes with concern that the international prostitutes' movement has been dominated by Western prostitutes and activists, and she also notes the absence of Third World prostitutes' organisations from, for example, the two World Whores Congresses referred to above.¹³¹ However, the lack of Third World prostitute representation in the international arena began to be redressed in the 1990's, as the international AIDS conferences provided a new platform for prostitutes to meet and organise.¹³²

¹²⁸ See Jenness (*op cit*) at 42-47 on the formation of COYOTE.

¹²⁹ *Idem* at 2.

¹³⁰ Organisations established at this time included the French Collective of Prostitutes, the English Collective of Prostitutes, the New York Prostitutes Collective, the Australian Prostitutes Collective, *De Rode Draad* ('Red Thread') in Netherlands and the Italian Committee for the Civil Rights of Prostitutes.

¹³¹ Kempadoo (*op cit*) at 20.

¹³² *Ibid.*

CHAPTER 4

MAIN DEBATES AROUND (ADULT) PROSTITUTION

Introduction

4.1 There is a vast body of literature dealing with various aspects of prostitution.¹³³ Due to the specific purpose and scope of this Issue Paper, it is not possible to do justice to this existing *corpus* of work. However, in this Chapter an attempt is made to provide at least an overview of the main debates.

Definition of 'prostitution'

4.2 Arriving at the meaning of the terms 'prostitution' and 'prostitute' is not an easy task, especially in an African context. Scholars who have studied irregular sexual unions in non-Western cultures (including African societies) have confronted difficulties in identifying or limiting the boundaries of prostitution.¹³⁴ The conventional understanding of prostitution usually encompasses 'the exchange of sexual acts for money or goods'. However, Skramstad notes that in an African context, exchange of sexual services for money is only one of many actions that may lead to a label as prostitute. Conversely, exchange of sexual services for money is not always considered as acts of prostitution.¹³⁵

4.3 Dirasse, in her evaluation of different definitions of prostitution, proposes the approach of 'viewing all mating patterns on a continuum that ranges from more permanent and legally sanctioned unions to casual sexual encounters with varying degrees of remuneration for sexual activity'.¹³⁶ She notes that different societies place the boundaries of legitimacy and decency at different points on this continuum: for example, in Ethiopia many different 'mating patterns' are found, ranging from more permanent and legally sanctioned unions to casual sexual encounters.¹³⁷ She makes the point that prostitution as found in

¹³³ There is, however, a lack of contemporary material focusing on sub-Saharan Africa.

¹³⁴ L Dirasse *The Commoditization of Female Sexuality: Prostitution and Socio-Economic Relations in Addis Ababa, Ethiopia* (1991) at 2.

¹³⁵ H Skramstad 'Prostitute as metaphor in gender construction: a Gambian setting' Working Paper D 1990:11, Chr Michelsen Institute, Norway (1990) at 1.

¹³⁶ Dirasse (*op cit*) at 4-5. Kempadoo also makes use of this notion of the 'continuum of sexual relations from monogamy to multiple sexual partners' as found in African and Caribbean countries – at 12.

¹³⁷ Dirasse (*op cit*) at 5. The provision of certain domestic services as part of the transaction between prostitute and client has also been noted in respect of colonial Kenya: see eg L

Ethiopia differs considerably from institutions known by the same name in Europe or the United States, in the sense that Ethiopian prostitution is characterised by relatively low stigma and absence of syndicate control. In addition, there is usually a mutual emotional attachment between the prostitute and her regular clients, and these clients get additional limited domestic privileges, such as meals.¹³⁸

4.4 The difficulties of narrowing down the concept of 'prostitution' are further compounded by the fact that persons who exchange sexual acts for rewards other than money (e.g. for clothes, food or lodging) may not identify themselves as prostitutes, due to the fact that the transaction does not entail the actual receipt of money. Leggett notes that less traditional forms of prostitution are practised in rural and township areas.¹³⁹

4.5 It is therefore useful to bear in mind that current legal definitions of prostitution may be at variance with more culture-specific understandings of this notion in the African context.

4.6 An early legal definition is found in *R v Kam Cham*,¹⁴⁰ where 'prostitutes' were defined as persons who engage indiscriminately in sexual relations for pecuniary reward.¹⁴¹ Milton and Cowling accordingly propose the following definition of a 'prostitute' for legal purposes:¹⁴²

'A person will be regarded as a prostitute if she engages in (i) sexual relations (ii) indiscriminately (iii) for pecuniary gain.'

4.7 This definition is unsatisfactory for two reasons. Firstly, the word 'indiscriminately' has a connotation of random, undistinguishing conduct that may be at odds with how prostitutes select and negotiate with their clients,¹⁴³ and secondly, it assumes that the prostitute will be a woman ('she'). Although the majority of the world's prostitutes are women, men and transgendered persons are becoming increasingly visible in prostitution.¹⁴⁴

White 'Women's domestic labour in colonial Kenya: prostitution in Nairobi, 1909-1950' Working Paper No 30 African Studies Centre: Boston University (1980).

¹³⁸ Dirasse (*op cit*) at 5.

¹³⁹ T Leggett 'The Least Formal Sector: Women in Sex Work' *Crime and Conflict* No 13 (1998) at 22. See also the discussion on the determinants of prostitution below.

¹⁴⁰ 1921 EDL 327.

¹⁴¹ At 329.

¹⁴² Milton & Cowling (*op cit*) E3-76.

¹⁴³ See in this regard e.g. W Schurink and T Leventhal 'Business women exchanging sex for money: a descriptive study' *SA Journal of Sociology* (1983) at 158.

¹⁴⁴ See in this regard e.g. Kempadoo (*op cit*) at 6.

4.8 A further factor to be taken into consideration when developing a definition of adult prostitution is the fact that sexual services are occasionally rendered for rewards other than financial (monetary) reward, such as food, clothes and accommodation. Certain authors contend that the definition of prostitution should be limited to those persons who provide sexual services for financial reward, firstly because the inclusion of all rewards would cast the ambit of 'prostitution' too broadly, and secondly because many of the persons providing sexual services in return for, for example, food or accommodation do not readily identify themselves as prostitutes.¹⁴⁵

The Nature of Prostitution: *Prostitution-As-Work* versus *Prostitution-As-Exploitation*

4.9 During the 1970's and the 1980's, conflicting perspectives of prostitution emerged when the nascent prostitutes' rights organisations developed a view of prostitution that distinguished between forced and voluntary prostitution in response to feminists (and others) who saw all prostitution as abusive.¹⁴⁶ At the risk of over-simplification, these conflicting perspectives can be divided into those interpreting ***prostitution as work***, and those interpreting ***prostitution as exploitation***.¹⁴⁷ It is especially among feminist authors that divergent views on prostitution have resulted in an apparently non-navigable rift.¹⁴⁸

4.10 In addition to the moral objections, one of the principle factors that will determine the question of how the law should address adult prostitution is the issue of whether prostitution is viewed predominantly as work or as exploitation. These two perspectives are accordingly explored in more detail here.

(a) Prostitution-as-work

4.11 Proponents of the prostitution-as-work perspective hold that women have a right to choose to engage in prostitution, as in any other form of work, and they should

¹⁴⁵ J Gardner Paper read at Health Conference (February 2001).

¹⁴⁶ *Ibid* at 32.

¹⁴⁷ See N Bingham 'Nevada sex trade: a gamble for the workers' *Yale Journal of Law and Feminism* (1998) 77-84.

¹⁴⁸ Unfortunately the scope of this Issue Paper does not allow an extensive discussion of the different and conflicting feminist perspectives on prostitution. See in this regard e.g. Jenness (*op cit*) at 34-36; M Levick *A Feminist Critique of the Prostitution / Sex Work Debate* (Unpublished LLM dissertation, University of Cape Town) 1996 at 1; S Schwarzenbach 'Contractarians and feminists debate prostitution' *Review of Law and Social Change* (1990/1991) at 104 *et seq.*

therefore have the same rights as other workers.¹⁴⁹ This movement aims to construct (voluntary) prostitution as a legitimate occupation, and argues that where some adult prostitutes make a relatively free decision to go into prostitution, they should be at liberty to do so.¹⁵⁰

4.12 A fundamental premise underlying this view is that not all prostitution is forced or coerced. There is, however, a recognition that there is a difference between those who choose prostitution as ‘an expression of sexual liberation’,¹⁵¹ those who choose it due to economic pressures and those exposed to overt pressure or coercion from third parties in the form of deception, violence and / or debt bondage. While proponents of this view agree that in some instances exploitation of prostitutes may occur, they contend that as a general principle women freely choose prostitution as a form of work.¹⁵²

4.13 One feminist view resorting under this perspective, viz. **contractarian feminism**, sees prostitution as the contracting out of sexual services for a particular time period in exchange for money, the sale of sexual services being no different to that of workers who supply other services or labour in the marketplace.¹⁵³

‘The contractarian concludes that we will begin to recognise that a person’s right to sell his or her sexual services is neither more nor less of a right than that involved in selling his or her labour-power in any of its multifaceted forms.’¹⁵⁴

4.14 The **liberal feminist** position resembles that of the contractarians. The core liberal argument focuses on individual rights (including, for example, the rights to privacy, autonomy and sexual self-expression)¹⁵⁵ and the value of equality before the law.¹⁵⁶ The organisation COYOTE, an example of a liberal feminist group, had from its inception the concern to challenge the image of prostitutes as ‘fallen women’, ‘social deviants’ and

¹⁴⁹ N Bingham ‘Nevada Sex Trade: A Gamble for the Workers’ *Yale Journal of Law and Feminism* (1998) at 77.

¹⁵⁰ Lim (*op cit*) at 14.

¹⁵¹ Lim (*op cit*) at 14-15.

¹⁵² *Ibid.* See also NJ Almodovar ‘For their own good: the results of the prostitution laws as enforced by cops, politicians and judges’ *Hastings Women’s Law Journal* (1999) at 122-123; Jenness (*op cit*) at 69-70; Lim (*op cit*) at 14-15.

¹⁵³ Levick (*op cit*) at 11. See also Bingham (*op cit*) at 78.

¹⁵⁴ Schwarzenbach (*op cit*) at 105.

¹⁵⁵ MA Baldwin ‘Split at the root: prostitution and feminist discourses of law reform’ *Yale Journal of Law and Feminism* (1992) at 95.

¹⁵⁶ Levick (*op cit*) at 13.

'victims'.¹⁵⁷ Rather, they choose to depict prostitutes as choosing legitimate work, stating that prostitution is first and foremost a work issue and thus the master concept of work should replace the master concept of crime as the fundamental stance of society towards prostitution. Moreover, it is service work that should be respected and protected like work in other legitimate service occupations. The organisation also holds that most women who work as prostitutes choose do so, even in a society where prostitution is illegal. Finally, prostitution is work that people should have the right to choose.¹⁵⁸

4.15 Supporters of the view that the majority of adult prostitutes choose to enter prostitution recognise that this may be a choice exercised within a limited range of options. Bindman provides an explanation of this 'choice within limits':

'The street worker who accepts a client she would prefer to reject, for fear of being unable to meet daily expenses, or the worker in hired premises who must earn a minimum amount to pay the proprietor for the day's hire for the premises, is facing not slavery but simple economic and social injustice, of the kind which constrains workers in every field to accept inequitable or dangerous conditions. The solution to this injustice lies beyond the scope of law alone, in the field of economic and social rights'.¹⁵⁹

4.16 Building on the claim that the vast majority of prostitutes voluntarily choose prostitution and that it is a legitimate form of work, proponents of the prostitution-as-work perspective demand that the rights of prostitutes be respected in the same way that other worker's rights are respected.¹⁶⁰ They attribute much of the police harassment and general violence experienced by prostitutes to society's refusal to recognise that prostitutes have rights, and cite both gender and ethnic discrimination in police enforcement of laws against prostitution.¹⁶¹

'From the point of view of some groups, then, it is the **laws against prostitution** that constitute the violation of human rights, rather than the prostitution itself'.¹⁶²

4.17 The proponents of the view that prostitution is work argue that the ending of

¹⁵⁷ Bingham *loc cit*.

¹⁵⁸ Jenness (*op cit*) at 67.

¹⁵⁹ Bindman (*op cit*) Par 2b.

¹⁶⁰ Bingham (*op cit*) at 79.

¹⁶¹ Bingham notes in relation to the US that female prostitutes are arrested in much greater numbers than the men who solicit them, and most of the women who are arrested are 'minority' women - (*op cit*) at 79 n 74.

¹⁶² Lim (*op cit*) at 15. Our emphasis.

exploitative practices in the prostitution industry is currently held back by the distinction between prostitutes and other workers performing female, dangerous and low-status labour, such as domestic work or work in factories or on the land.¹⁶³ Bindman, for example, points to the international conventions that aim to protect all workers from exploitation. She however cautions that before the protection of these instruments can be invoked, it is necessary to first identify prostitution as work.¹⁶⁴

‘The distinction between “the prostitute” and everyone else helps to perpetuate her exclusion from the ordinary rights which society offers to others, such as rights to freedom from violence at work, to a fair share of what she earns, or to leave her employer. An employment or labour perspective, designating prostitution as sex work, can bring this work into the mainstream debate on human, women’s and workers’ rights. It also allows us to recognize that the sex industry is always not where the worst conditions are to be found.’¹⁶⁵

4.18 Supporters of the prostitution-as-work perspective therefore demand the decriminalisation of prostitution,¹⁶⁶ and argue that if the laws criminalising prostitution were removed, prostitution would be more likely to be seen as a legitimate form of work. This would in turn reduce the risk of police harassment and brutality, and would place prostitutes within the ambit of protective labour mechanisms.¹⁶⁷

‘The lack of international and local protection renders sex workers vulnerable to exploitation in the workplace, and to harassment or violence at the hands of employers, law enforcement officials, clients and the public. The need for worker protection, including occupational safety provisions, is of particular relevance in the current context of HIV/AIDS.’¹⁶⁸

4.19 While it is acknowledged that exploitation may result from prostitution, commentators point out that this possibility of exploitation may also apply to other forms of labour, for example, low-paid manual labour in the agriculture industry,¹⁶⁹ and is therefore not unique to prostitution.

¹⁶³ See e.g. Bindman *International Perspective* at 65-67.

¹⁶⁴ *Idem* at 67.

¹⁶⁵ Bindman *International Perspectives* at 65-67.

¹⁶⁶ See for example Jenness (*op cit*) at 47-49.

¹⁶⁷ Bingham (*op cit*) at 81.

¹⁶⁸ Bindman (*op cit*) at Par 2a.

¹⁶⁹ Bindman notes (in the international context) that exploitation may also occur, for example, in the carpet industry in India, the growing of sugar cane in Haiti, and in domestic service in Indonesia and the United Kingdom – *International Perspectives* at 67.

4.20 In addition to seeing prostitution as economic empowerment, certain prostitutes' rights activists have also expressed the view that prostitution is a sexually progressive practice for women, providing some women with a context for exercising power in sexual transactions. Alexander reports that many women in prostitution assert that 'the first time they felt powerful was the first time they turned a trick'.¹⁷⁰

(b) **Prostitution-as-exploitation**

4.21 On the other end of the spectrum is the view that prostitution is inherently exploitative, and that domination and violence are its essential features. This view is enunciated by, amongst others, the organisation WHISPER ('Women Hurt in Systems of Prostitution Engaged in Revolt'). Like the proponents of the prostitution-as-work view, WHISPER works towards the decriminalisation of prostitution.¹⁷¹ However, this is where the agreement between the two perspectives ends.

4.22 Supporters of WHISPER and others who categorise themselves as **radical feminists** renounce a number of the principles of the prostitution-as-work movement.¹⁷² They challenge the latter perspective's notion that prostitution is a victimless crime, relying on studies and interviews with current and former prostitutes documenting the fear and violence they experienced while in prostitution.¹⁷³ According to this perspective, the sexual acts of prostitution per se constitute violence, even where the prostitute 'consents' to such acts. Carter and Giobbe add:

'Then there are the ancillary harms: the rapes, the robberies and the inevitable beatings punctuated by shouts of "bitch" and "whore" and "slut", gratuitously meted out by pimps, by johns and by the police. These are the commonplace insults to injury that are directed at prostitutes simply because they are prostitutes.'¹⁷⁴

¹⁷⁰ P Alexander 'Introduction' in F Delacoste & P Alexander (eds) **Sex Work: Writings by Women in the Sex Industry** (1987) at 15, cited in Baldwin (*op cit*) at 96. Margo St James, founder member of COYOTE, also wrote that 'I've always thought that whores were the only emancipated women.' - M St James 'The Reclamation of Whores' in L Bell (ed) **Good Girls / Bad Girls: Feminists and Sex Trade Workers Face to Face** (1987) at 84, cited in E Bernstein 'What's wrong with prostitution? What's right with sex work? Comparing markets in female sexual labor' **Hastings Women's Law Journal** (1999) at 98. See also S Chun 'An uncommon alliance: finding empowerment for exotic dancers through labor unions' **Hastings Women's Law Journal** (1999) at 233.

¹⁷¹ See however V Carter & E Giobbe 'Duet: Prostitution, racism and feminism discourse' **Hastings Women's Law Journal** (1999) at 54-55 *contra*.

¹⁷² Bingham *loc cit*.

¹⁷³ *Idem* at 82. See also E Giobbe 'Prostitution: Buying the right to rape' in AW Burgess (ed) **Rape and Sexual Assault III: A Research Handbook** (1991) at 499, cited in B Balos & ML Fellows (*op cit*) at 499.

¹⁷⁴ Carter and Giobbe (*op cit*) at 47.

4.23 Proponents of the prostitution-as-exploitation view also argue that the physical and sexual abuse inherent in prostitution results in many health complications and lasting damage, ranging from physical injuries such as gunshot wounds, knife wounds and broken bones to depression and post-traumatic stress disorder.¹⁷⁵

4.24 They reject the claim that prostitution is a valid employment opportunity for women,¹⁷⁶ and instead note that it is ‘one of the most graphic examples of men’s domination of women’.¹⁷⁷

‘Prostitution is not like anything else. Rather everything else is like prostitution because it is the model for women’s condition, for gender stratification and its logical extension sex discrimination. Prostitution is founded on enforced sexual abuse under a system of male supremacy that itself is built along a continuum of coercion – fear, force, racism and poverty.’¹⁷⁸

4.25 Opponents of prostitution refute the notion of women freely choosing to enter prostitution, claiming that most women are coerced or physically forced into a life of prostitution and cannot escape.¹⁷⁹ This coercion may consist in the above forms of ‘direct’ coercion, or may consist in the economic marginalisation of women through educational deprivation and job discrimination, which ultimately renders them vulnerable to recruitment into prostitution.¹⁸⁰ This is expressed as follows by MacKinnon:

‘What is woman’s best economic option? Aside from modelling (with which it has much in common) hooking is the only job for which women as a group are paid more than men.’¹⁸¹

4.26 According to this analysis, therefore, the economic marginalisation that ‘forces’ women into prostitution constitutes a more subtle form of coercion, which ultimately implies that even where women appear to freely choose prostitution as the only or the most

¹⁷⁵ *Ibid* at 47-48.

¹⁷⁶ See Schwarzenbach (*op cit*) at 108-109.

¹⁷⁷ C Pateman ‘Defending prostitution: charges against Ericsson’ *Ethics* (1983) at 561, cited in Schwarzenbach (*op cit*) at 106.

¹⁷⁸ S Wynter ‘WHISPER: Women Hurt in Systems of Prostitution Engaged in Revolt’ in Delacoste & Alexander (*op cit*) at 268, cited in Bingham *loc cit*. ‘Sarah Wynter’ was the pseudonym used by Evelina Giobbe until 1989, when she took back her birth name – see Baldwin (*op cit*) 47 n 3.

¹⁷⁹ Bingham (*op cit*) at 82.

¹⁸⁰ Carter and Giobbe (*op cit*) at 43.

¹⁸¹ C MacKinnon *Feminism Unmodified: Discourses on Life and Law* (1987) 23-25, cited in Bernstein (*op cit*) at 104.

lucrative form of employment available to her, this choice is not really made voluntarily.¹⁸²

Prostitution, immorality and harm

4.27 Closely linked to the debate on whether prostitution should be viewed as work or as exploitation, there is also the question of whether prostitution is a 'harmless' form of immorality (that does not belong within the ambit of the criminal sanction) or alternatively, is inherently harmful and should therefore be subject to state control through criminalisation.

(a) Prostitution as 'benign' immorality and the role of criminal law

4.28 Burchell and Milton note that the enforcement of (sexual) morality through the medium of criminal law has long been a contentious issue.¹⁸³ The authors define the function of criminal law as follows:

'The criminal law is thus a social mechanism that is used to coerce members of society, through the threat of pain and suffering, to abstain from conduct which is harmful to various interests of society. Its object is to promote the welfare of society and its members by establishing and maintaining peace and order'.¹⁸⁴

4.29 They proceed to explain that many forms of 'immorality' are therefore punished because they are considered to be 'harmful' to others. However, where one assumes that a particular activity is not inherently harmful, the question arises whether the law should punish such 'immorality' *merely because it is immoral?*¹⁸⁵

4.30 This issue rose into prominence in Britain during the 1950's with the publication of the Report of the Wolfenden Committee on Homosexual Offences and Prostitution.¹⁸⁶ The majority of the Committee defined the function of the criminal law as being to preserve public order and decency, to protect citizens from what is 'offensive or injurious' and to provide sufficient safeguards against exploitation and corruption of others,

¹⁸² A Marxist feminist analysis of prostitution attempts to draw a parallel between prostitution, capitalist labour and the nature of the bourgeois marriage (Levick (*op cit*) at 15.) According to Marx, 'prostitution (in the ordinary sense) is only a specific expression of the general prostitution of the labourer'.

¹⁸³ Burchell & Milton (*op cit*) at 34. See in this regard also South African Law Commission **Project 85: Fifth Interim Report on Aspects of the Law Relating to AIDS: The Need for a Statutory Offence aimed at Harmful HIV-related Behaviour** (2001) Par 7.3.1.

¹⁸⁴ Burchell and Milton (*op cit*) at 2.

¹⁸⁵ *Ibid* at 35.

¹⁸⁶ Cited in Burchell & Milton *loc cit*.

particularly those who are especially vulnerable. In the view of the Committee it is not the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular behaviour beyond what is necessary to carry out the functions outlined.¹⁸⁷

4.31 The Wolfenden Committee also referred to the importance that society and the law should give to individual freedom of choice in matters of private morality:

‘Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.’¹⁸⁸

4.32 The publication of the Wolfenden Report led to a debate as to whether the preservation of morality is essential to the welfare of society. Lord Devlin argued that the ‘loosening of moral bonds’ is often the first stage of disintegration of a society, and therefore society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions:

‘The suppression of vice is as much the law’s business as the suppression of subversive activities...’¹⁸⁹

4.33 Hart presented the counter-argument that there is no empirical evidence to support Devlin’s assumption that immorality threatens the very existence of society,¹⁹⁰ and notes that Devlin moves from the acceptable proposition that some common morality is essential to society to the unacceptable proposition that ‘a change in morality is tantamount to the destruction of society’.¹⁹¹

4.34 The regulation of sexual morality by means of criminal sanction is not unknown in South African criminal law. For example, adultery, inter-racial sexual relations and sodomy have at different times all been subject to criminal prohibition.

4.35 This question recently received the attention of the Constitutional Court in ***National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and***

¹⁸⁷ Par 13-14.

¹⁸⁸ Section 61.

¹⁸⁹ Lord Devlin *The Enforcement of Morals* (1959) at 14-15, cited in Burchell & Milton (*op cit*) at 35-36.

¹⁹⁰ HLA Hart *Law, Liberty and Morality* (1962) at 50, cited in Burchell & Milton (*op cit*) at 36.

¹⁹¹ *Ibid* at 51.

Others,¹⁹² where the court was called on to determine the constitutionality of (*inter alia*) the common law offence of sodomy. In evaluating the impact of this offence on gay men, Ackerman J held that the nature and purpose of this common law offence is to criminalise private conduct of consenting adults which causes no harm to anyone else.

‘It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society.’¹⁹³

4.36 The court also notes, in its subsequent inquiry into the purpose of the common law prohibition, that the enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as a legitimate purpose.¹⁹⁴ Ackerman J emphasises that the Constitution does not debar the state from enforcing morality; however, he does add the following cautionary note:

‘What is central to the character and functioning of the state, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.’¹⁹⁵

4.37 The question that arises next is whether this basic premise changes if it transpires that the majority of society disapproves of particular activities.

4.38 Almodovar argues that societal disapproval of certain activities or practices does not necessarily mean that these activities should also be criminalised.¹⁹⁶ Behaviour that is unacceptable to the majority of society is not always penalised or prohibited. She notes that, for example, ‘not that long ago’, laws prohibiting homosexuality were actively enforced:

‘Well-meaning people believed that a stint behind bars would convince homosexuals to modify their offensive, immoral behavior... The question is, who determines which values, opinions and preferences become law in this society? Who decides what is offensive to us all? If there are a sufficient number of people who do not like gays, and they are vocal enough, should we return to incarcerating homosexuals because they offend society?’¹⁹⁷

¹⁹² 1998 (12) BCLR 1517 (CC); 1999 1 SA 6 (CC). See also Edwin Cameron ‘Constitutional protection of sexual orientation and African conceptions of humanity’ **SALJ** Vol 118 (2001) 642 at 647 *et seq.*

¹⁹³ At Par 26.

¹⁹⁴ At Par 37.

¹⁹⁵ At Par 136.

¹⁹⁶ Almodovar (*op cit*) at 128.

¹⁹⁷ *Ibid.*

4.39 The South African Constitutional Court again noted the effect of the Constitution in this regard in its recent judgment in ***Carmichele v Minister of Safety and Security and Another***.¹⁹⁸ The Court (per Ackermann J and Goldstone J) points out that before the advent of the 'interim' Constitution,¹⁹⁹ the refashioning of the common law entailed 'policy decisions' and value judgments', which had to reflect 'the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people.'²⁰⁰ A balance had to be struck between the interests of the parties and the conflicting interests of the community according to the court's perceptions of what justice demanded.

'Under section 39(2) of the Constitution concept such as "policy decisions and value judgments" reflecting the "wishes... and the perceptions... of the people" and "society's notions of what justice demands" might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution'.²⁰¹

4.40 It should further be noted that the difficulties of enforcing sexual morality by means of criminal sanction are compounded in a heterogeneous and diverse society such as the South African one.

(b) **Prostitution and harm**

4.41 The above analysis is contingent on the assumption that prostitution is in fact a ***harmless*** form of immorality. However, in stark contrast, there is also the contention that there are certain harms that are inherent to prostitution. Certain of these harmful aspects have been included in the discussion on prostitution-as-exploitation above. Additional facets that may be regarded as harmful include:

- C The criminogenic nature of prostitution
- C The threat to marriage and family
- C Concerns relating to 'public nuisance'
- C Health considerations, most notably the perceived relation between prostitution and HIV/AIDS

4.42 The latter aspect is addressed in more detail in Chapter 6 below. The first

¹⁹⁸ 2001 (10) BCLR 995 (CC).

¹⁹⁹ The Constitution of the Republic of South Africa Act 200 of 1993.

²⁰⁰ At Par 56.

²⁰¹ *Ibid.*

three aspects will be discussed here.

The criminogenic nature of prostitution

4.43 Historically, prostitution has been seen as undesirable because of its close connection to other crimes. Organised crime, robbery, assault, and drug trafficking are often cited as crimes associated with prostitution. Jenness notes that the classic argument is that these crimes proliferate in the environment fostered by prostitution.²⁰² In addition, neighbourhood decay is perceived to be closely associated with prostitution.²⁰³ By criminalising prostitution, it is argued, the tide of crime that seems to accompany prostitution will also be stemmed.²⁰⁴

4.44 This motivation for the prohibition of prostitution has been criticised for its 'circular reasoning' in that it attributes the results of the criminal prohibition of prostitution to prostitution itself.²⁰⁵ This criticism therefore holds that problems of ancillary crime may arise from the conditions created by the criminalised status of prostitution (which would not be the case if prostitution were to be removed from a criminalised framework).

4.45 Levick argues that in situations where there is a substantial demand for the criminalised activities and a concomitant potential for economic profitability (as is the case with prostitution), criminalisation serves to drive the industry underground and encourages the involvement of organised crime.²⁰⁶

4.46 Posel is of the opinion that the proscription of prohibition in South Africa has had the effect of increasing the criminal element in prostitution, producing the secondary crime that has become associated with the prostitution industry.²⁰⁷ She notes that because prostitution is illegal, prostitutes seek assistance from pimps and others who 'can make their job easier', thus increasing the leverage that outsiders have in exploiting prostitutes. In many cities, the prostitution industry is therefore now highly organised and tightly controlled by pimps, gangs and / or drug dealers.²⁰⁸

²⁰² Jenness (*op cit*) at 31.

²⁰³ *Ibid.*

²⁰⁴ See Milton in Jagwanth, Schwikkard and Grant (eds) ***Women and the Law*** (1994) 143.

²⁰⁵ *Ibid*; see also Almodovar (*op cit*) at 126-127.

²⁰⁶ Levick at 29.

²⁰⁷ Posel (*op cit*) at 29-30.

²⁰⁸ Posel (*op cit*) at 30.

4.47 Davis reports that studies have found no direct link between prostitution and 'crime, drugs and urban decay'.²⁰⁹ On the contrary, a 1977 study found that the connection between urban decay, crime and prostitution resulted from the fact that prostitution was only allowed in areas 'the city had already written off'.²¹⁰ By contrast, where small brothels were integrated into 'healthy' neighbourhoods in Holland, such a decline did not take place.²¹¹

The moral threat to marriage and the family

4.48 Levick notes that in the Western world, the dominant pattern of behaviour that has been taught and reinforced is Christianity.²¹² Flowing from this religious ideology is the claim that prostitution is hostile to the notion of the family, 'the union of one man with one woman in the holy estate of matrimony'.²¹³ Prostitution thus threatens the powerful vision of the family unit as the foundation of society, and presents us with the spectre of a woman who defiantly refuses to comply with expectations of fidelity and chastity.

4.49 As the idea of (non-commercial) sexual relations outside of marriage has become more accepted, the emphasis of the moral condemnation of prostitution has shifted to the impersonal and unemotional aspects of performing sexual acts for reward.²¹⁴ The contemporary argument, derived from Kantian ethics, holds that commercial sex is wrong because it involves 'the alienation of the body to the will of another, and thus undermines the ultimate roots of the integrity of the moral personality'.²¹⁵ Levick remarks that the Kantian perspective, which subscribes to unity of sex and romantic love, directs its analysis at expectations of a woman's sexuality, while ignoring the male client's equal participation in the transaction and his concomitant moral responsibility.²¹⁶

4.50 The male demand for prostitution has traditionally been explained through the

²⁰⁹ Davis (*op cit*) at Par I.1b.

²¹⁰ *Idem*.

²¹¹ *Idem*.

²¹² Levick (*op cit*) at 7.

²¹³ Levick (*op cit*) at 47, see also Milton in Jagwanth, Schwikkard and Grant (eds) ***Women and the Law*** (1994) at 144.

²¹⁴ Levick (*op cit*) at 8.

²¹⁵ *Ibid*. According to Kant, the body is the repository of autonomous human personality, (the primary good). To sell the body is to alienate the personality, which is morally wrong - see Milton (*op cit*) at 146-147.

²¹⁶ D Posel '***The Sex Market in the Inner City of Durban***' Occasional Paper No 28: Economic Research Unit, University of Natal, Durban (1993) at 8.

proposition that men possess more intense and insistent sexual urges, and because of this, they desire a variety of sexual partners.²¹⁷ These urgent and inevitable sexual needs 'entitle' men to the transgression of the norm of unity of sex and romantic love. Thus the role of men in the prostitution transaction is explained by fundamental, 'natural' biological differences between men and women.²¹⁸ Levick explains how these stereotypical biological explanations raise social expectations of sexual behaviour:

'In the social setting of prostitution, the expectations of the behaviour of men and women constitute a double standard of sexual morality. And these double standards are translated into legislation which invariably penalise sex workers, who are mostly women, and ignore the customers, who are mostly men'.²¹⁹

4.51 She argues that the South African legislation on prostitution is situated squarely within the realm of the moralist standpoint. The current prohibition of prostitution is not attributable to concerns that prostitution may permit and perpetuate the sexual objectification or subjugation of women. Rather, the legislation arose from the 'white, male Christian Nationalist Government which chose to construct the statute in a way that reinforced the stereotypes that sustain the commercial sex industry'.²²⁰

Concerns relating to 'public nuisance'

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

4.53 Police often cite complaints from residents as the main motivating factor for their invoking municipal by-laws against street prostitutes. Davis explains that 'police containment is defined by public demand', and notes that police will allow prostitution to exist in one area in order to keep it out of another.²²¹ She describes how, during the 1970's, public pressure caused the closure of two notorious sex clubs in Vancouver, Canada.²²² As a result, the prostitutes formerly working in these clubs were displaced onto the streets.

²¹⁷ Levick (*op cit*) at 8-9.

²¹⁸ *Idem* at 9; Posel (*op cit*) at 9.

²¹⁹ Levick (*op cit*) at 9-10.

²²⁰ Levick (*op cit*) at 10.

²²¹ At Par 1.2.

²²² *Ibid.* See also in this regard D Brock *Making Work, Making Trouble* (1998) at 56-57.

4.54 The areas where prostitution was unofficially tolerated were unable to accommodate the new influx of prostitutes,²²³ with the result that the 'new' street prostitutes spilled into more upscale residential areas. Residents and local business of these areas, unhappy with this development, lobbied police for action. They saw the sudden appearance of prostitutes in their area as evidence that the laws were not 'tough' enough or broad enough to enable the police to do their jobs (not taking into account that it was 'tougher' enforcement that had upset the status quo and caused the redistribution of prostitution into their area in the first place).²²⁴

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

'... respectable citizens are not offended by the sight of prostitution and so that police and public officials are not offended by the sight of prostitution and so that police and public officials may appear to have moved quickly to satisfy their constituency.'²²⁵

4.56 Milton remarks that while there is no question that in some of its manifestations prostitution may produce conditions that are a nuisance to the public, these conditions are relatively easily controlled without demanding that the actual practice of prostitution be prohibited by the criminal sanction.²²⁶

Determinants of prostitution

4.57 Another issue that has been the subject of considerable debate, is the question *why* women and men enter prostitution. Although it may be tempting to attempt to identify the 'causes' of prostitution, it is important to note the complexity of prostitution and of the dynamics underlying the decision to work as a prostitute.²²⁷ As Posel explains, the supply of prostitution cannot be explained in a 'deterministic fashion', and the decision to prostitute should be understood in terms of economical criteria, socio-psychological factors and the demand for commoditised sex.²²⁸

²²³ There were estimated to be 100 prostitutes working the two clubs.

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ Milton in Jagwanth, Schwikkard and Grant (eds) *Women and the Law* (1994) at 144.

²²⁷ See in this regard Posel (*op cit*) at 19.

²²⁸ *Ibid.* See also Schurink & Levinthal (*op cit*) at 154-155.

(a) **Economic determinants**

4.58 Economic factors constitute a significant driving force behind prostitution, with prostitution serving both as a means of economic survival for women with few skills and as a more lucrative form of employment than that available to them in the formal labour market.²²⁹ The prostitution 'market', therefore, should be examined against the broader background of the economic status of women.²³⁰

'What is key for all streetwalkers (and for most female prostitutes generally) is that there is no other job at which they could make anywhere near a comparable wage.'²³¹

4.59 Pauw and Brener point out that South African women are usually poorer than men, often unemployed or only able to enter into informal trade.²³² Escalating unemployment, as well as poor levels of education and skills decrease women's employment opportunities and wages, thus creating an environment where 'a desire for upward mobility and access to resources may lead to the exchange of sex for economic survival'.²³³

4.60 The reasons given by prostitutes themselves bear out this analysis. South African prostitutes have explained their entry into prostitution as follows:

'None of us are doing this for pleasure. We are doing this for survival.'²³⁴

'I was two months behind in my rent, there was no food in the house and the kids' school fees were behind, when a friend suggested it [prostitution] to me. It took me three weeks to think about it. I had to do it and that was that. I was determined.'²³⁵

"Nomandla", 27, who acted as the spokesperson, has matric and is the mother of two young children. She said she was separated from her husband and after losing her job making tea at a factory, decided to make a living as a prostitute.²³⁶

²²⁹ *Idem* at 19-21.

²³⁰ *Idem* at 21.

²³¹ Bernstein (*op cit*) at 104.

²³² I Pauw & L Brener '**Identifying factors which increase risk of HIV infection and mitigate against sustained safer sex practices among street sex workers in Cape Town**' Medical Research Institute (1997) at 3.

²³³ *Idem*. See also in this regard T Leggett 'Poverty and sex work in Durban, South Africa' **Society in Transition** (1999) 157 *et seq.*

²³⁴ 'Rachel' anonymous prostitute speaking at the Conference on Adult Sex Work, Cape Town, May 2000.

²³⁵ 'Julie' interviewed in 'Sex and the city' **Student Life** (March 2000).

²³⁶ T Mbita 'In the shade of roadside trees, the oldest trade of all thrives' **Cape Argus** (9

4.61 Once it is recognised that prostitution has a strong economic foundation, an examination of the relationship between the growth of the prostitution sector and general economic development logically follows.²³⁷ Lim notes that certain macro-economic development policies may influence the proliferation of the prostitution sector through their impact on, for example, the availability of viable or remunerative employment alternatives for the poorly educated or persons with limited skills, growing income inequalities and their cumulative socio-economic consequences and the strategies adopted by poor families for survival, especially in the absence of ‘social safety nets’.²³⁸

(b) **Socio-psychological determinants**

4.62 Not all persons who are poor or who seek to increase their income make the decision to work in prostitution. In addition to the pivotal role played by economic determinants, this decision is also contingent on the individual characteristics and personalities of the person concerned. Early scholars devoted much time and effort to the development of physical and psychological profiles of prostitutes.

4.63 Parent-Duchatelet, in his anthropological study of Parisian prostitutes,²³⁹ presented a statistical description of the physical types of prostitutes, the quality of their voices, the colour of their hair and eyes, their physical abnormalities, their sexual profiles in relation to childbearing and disease, their family background and education.²⁴⁰ He developed a stereotype of the prostitute as ‘plump’, filthy and speaking in a harsh voice.²⁴¹ He also composed a personality sketch of the prostitute, which noted (*inter alia*) that prostitutes were women with ‘lightness and mobility of the spirit’, women who have difficulty in following ‘a chain of reasoning; the smallest things distracts and carries them away’.²⁴²

4.64 As bizarre as Parent-Duchatelet’s findings may appear to the modern reader,

November 1999).

²³⁷ Lim (*op cit*) at 11.

²³⁸ *Idem* at 11-12.

²³⁹ AJB Parent-Duchatelet *De la prostitution dans la Ville de Paris*, cited in S Bell *Reading, Writing, and Rewriting the Prostitute Body* (1994) at 45.

²⁴⁰ Bell (*op cit*) at 45-46. She notes that Parent-Duchatelet tried, although failed, to establish a correlation between Parisian prostitutes’ colouring and their place of origin in cities, towns or the countryside.

²⁴¹ *Idem* at 48.

²⁴² *Idem* at 49. Parent-Duchatelet also suggests that the prostitute personality displays a greater tendency towards lesbianism – Bell *loc cit*.

Bell observes that his study was the prototype for most nineteenth-century research on prostitution in Europe, and served as a model for the British investigation of prostitution from the 1840's to the 1880's.²⁴³

4.65 It is therefore not surprising that Dirasse cautions against an uncritical reliance on social science literature for an analysis of the determinants of prostitution.²⁴⁴ She argues that most psychological and psychoanalytic works emphasise perceived instabilities in the woman's personality, leading to a view of the prostitute as a deviant, neurotic personality.²⁴⁵ She criticises these analyses for their excessive focus on the prostitute rather than on the social context in which choices are exercised.²⁴⁶

4.66 The same caution should therefore be applied in noting the common denominators that have been identified in women and men who work as prostitutes. These common denominators include a sense of worthlessness and a lack of self-esteem and a high incidence of childhood incest, sexual abuse or neglect.²⁴⁷

4.67 However, when looking at these denominators, the lines between cause and effect become easily blurred. Authors have pointed out that prostitutes' lack of self-esteem may be as much **a result** of working in prostitution (with the concomitant social ostracism and constant threat of criminal prosecution) as a **cause** thereof.²⁴⁸

The link between prostitution and drugs

4.68 The nebulous line between cause and effect becomes even more indistinct when one attempts to examine the nexus between prostitution and substance dependence. Research indicates a high incidence of substance dependence among persons working in prostitution.²⁴⁹ Pauw and Brener remark that it is crucial to understand the role that drugs

²⁴³ See also Sanger (*op cit*), who extensively relies on Parent-Duchatelet in his chapters on prostitution in Paris – at 153 *et seq.*

²⁴⁴ L Dirasse ***The Commoditization of Female Sexuality*** (1991) at 10.

²⁴⁵ *Idem* at 11.

²⁴⁶ *Idem* at 11-13. See also Posel (*op cit*) at 23.

²⁴⁷ *Idem* at 22; Baldwin (*op cit*) at 100; Carter & Giobbe (*op cit*) at 43-44.

²⁴⁸ Posel (*op cit*) at 23.

²⁴⁹ See Baldwin (*op cit*) at 100 n 185 and authorities cited there; Carter and Giobbe (*op cit*) at 49. See also Pauw and Brener (*op cit*) at 20 for the results of their South African study.

play in prostitution.²⁵⁰ It has, for example, been suggested that drugs relieve stress and help prostitutes cope with their work.²⁵¹

4.69 According to Leggett, the links between prostitution and drugs in South Africa more closely resemble the American situation than the British one,²⁵² both in terms of the drug of choice as well as the question of causation.²⁵³ One British study has shown that about half of the prostitutes interviewed began working in prostitution in order to pay for drugs. Leggett's research indicates that this is not the case in South Africa, but he also points out that there is currently insufficient information on the 'direction of causation', i.e. whether drugs are leading women and men into prostitution, or whether prostitution causes persons to use drugs.²⁵⁴

Prostitution and trafficking

4.70 Since the 1980's, there has been a 'new wave' of feminist-backed campaigns against trafficking in women, child prostitution and sex tourism.²⁵⁵ However, there is a fundamental division among these activists. This division hinges on the question of whether or not a person can voluntarily choose prostitution as a form of work, or whether, as proposed by the so-called 'neo-abolitionists', there is always an element of coercion even where the prostitute appears to choose this option.

4.71 The strongest proponents of the 'neo-abolitionist' perspective are the Coalition Against Trafficking in Women (CATW), founded by Kathleen Barry.²⁵⁶ CATW has defined prostitution as a form of sexual exploitation, similar to rape, genital mutilation, incest and battering.²⁵⁷ The organisation sees 'sexual exploitation' as 'a practice by which women are sexually subjugated through abuse of women's sexuality and/ or violation of physical integrity as a means of achieving power and domination including gratification, financial gain, advancement'.²⁵⁸

²⁵⁰ *Idem* at 22.

²⁵¹ *Ibid.*

²⁵² At Par 4.4.

²⁵³ See in this regard also Par 5.72 *et seq* below.

²⁵⁴ At Par 6.

²⁵⁵ Doezema (*op cit*) at 37.

²⁵⁶ Doezema *loc cit*.

²⁵⁷ CATW (Draft) Convention on the Elimination of All Forms of Sexual Exploitation of Women, 1993 Article 2(b), cited in Doezema (*op cit*) at 37.

²⁵⁸ Article 1 of the CATW (Draft) Convention, cited in Doezema *loc cit*.

4.72 An important recent development around trafficking is the development of a Protocol²⁵⁹ on trafficking to supplement the UN Convention Against Transnational Organised Crime. This Protocol is discussed below.²⁶⁰

²⁵⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime [hereinafter referred to as 'the Trafficking Protocol'.]

²⁶⁰ See Chapter 9 below.

CHAPTER 5

SITUATIONAL ANALYSIS

Introduction

5.1 Adult commercial sex work in South Africa encompasses a broad range of activities and enterprises – including the adult pornographic media industry, massage parlours, live performances such as ‘strip’ shows, brothels, escort agencies and outdoor or street prostitution.

5.2 In legal terms, the adult pornographic media industry can to a large extent be described as **legalised**: the Films and Publications Act²⁶¹ provides for the lawful possession, distribution and exhibition of adult pornographic material, provided that these actions take place within the framework constructed by the Act.²⁶²

5.3 Although the sector of the adult commercial sex industry generally referred to as ‘prostitution’ is formally criminalised, the system in practice is a hybrid mixture of criminalisation and legalisation.²⁶³ There are also instances where criminal prohibitions, though formally in place, are not enforced by police or the prosecuting authorities.

5.4 It should be noted that although the majority of persons working as prostitutes in South Africa are women, there is also a significant percentage of male and transgendered prostitutes. The number of women making use of the services of prostitutes is negligibly small.

5.5 In this Chapter, present trends in prostitution in South Africa are examined. Due to the current criminalised status of the industry, reliable data on prostitution is difficult to obtain.²⁶⁴ (It is, for example, difficult if not impossible to estimate the number of persons working in prostitution in South Africa.) This obviously limits the extent of this situational analysis. In addition, the prostitution scenario also continually changes according to such variables as the general economic climate, law enforcement trends, drug trends, patterns of

²⁶¹ Act 65 of 1996.

²⁶² See sections 25-29 of this Act.

²⁶³ See Chapter 6 below.

²⁶⁴ Leggett ODCCP at Par 2.5.

migration, seasonal considerations, and the viability of alternative informal opportunities.²⁶⁵ An additional feature that makes precise analysis of the prostitution industry difficult, is its transitory nature – persons working in prostitution constantly enter and leave the industry.²⁶⁶

5.6 However, certain trends have begun to emerge from recent research and intervention projects. Research projects have focussed *inter alia* on the following aspects of adult prostitution:²⁶⁷

- C Knowledge, attitudes and general sexual behavioural patterns / practices among prostitutes and other persons with regard to sexuality and AIDS-related matters,²⁶⁸
- C Prostitution in Durban, with specific reference to the inner city area;²⁶⁹
- C The trucking industry and HIV interventions, specifically concentrating on prostitutes and truck drivers in KwaZulu-Natal;²⁷⁰
- C Condom usage among prostitutes in Durban;²⁷¹
- C Factors increasing risk of HIV infection among street prostitutes in Cape Town;²⁷²
- C HIV interventions with hotel-based prostitutes in Hillbrow, Johannesburg;²⁷³

²⁶⁵ Leggett ODCCP at Par 3.2.

²⁶⁶ Pauw and Brener MRC Study at 33. See also Leggett ODCCP at Par 3.2. This is not unique to the South African scenario.

²⁶⁷ This is not an exhaustive list.

²⁶⁸ W Schurink, I Liebenberg and E Schurink Memorandum to the Department of National Health and Population Development on 'Commercial Sex Work: A study of knowledge, attitudes and general behavioural patterns / practices among prostitutes and other persons with regard to sexuality and AIDS-related matters' (1993).

²⁶⁹ Posel (1993); T Leggett 'Poverty and sex work in Durban, South Africa' ***Society in Transition*** (1999) at 157-167.

²⁷⁰ See T Marcus et al 'Aids and the highways: sex workers and truck drivers in KwaZulu-Natal' ***Indicator SA*** Vol 13 No 1 (1995) at 80-84; QA Karrim et al 'Reducing the risk of HIV infection among South African sex workers: socio-economic and gender barriers' ***American Journal of Public Health*** Vol 85, No 11 (1995) 1521-1525; G Kraak 'The road less travelled: government and civil society join against HIV/AIDS in the trucking industry' ***Development Update*** (date) 125-138; G Ramjee et al 'Sexually transmitted infections among sex workers in KwaZulu-Natal, South Africa' ***Sexually Transmitted Diseases*** Vol 25 No 7 (1998) 346-349.

²⁷¹ See Varga study.

²⁷² See Pauw and Brener MRC Study; I Pauw and L Brener 'Naming the dangers of working on the street' ***Agenda*** No 36 (1997) 80-84.

²⁷³ Sinead Delany's study.

- C Informal prostitution that has developed around mining communities; and
- C The relationship between drug use and HIV in South Africa, conducted among prostitutes in Cape Town, Johannesburg and Durban.²⁷⁴

5.7 Due to the specific focus of this Issue Paper, **child prostitution** is not examined here.²⁷⁵ The Commission however recognises that children are to be found working in both indoor and outdoor prostitution in South Africa,²⁷⁶ and also notes with concern the increasing extent to which children form part of the South African prostitution industry.²⁷⁷ The Commission has taken a strong position against child prostitution, as set out in the Discussion Paper on Sexual Offences.²⁷⁸

The Indoor Prostitution Industry in South Africa

(a) General

5.8 Indoor prostitution occurs within brothels, escort agencies, massage parlours, private homes, clubs, hotels and bars and brothels. The range of indoor prostitution enterprises thus covers commercial, residential and industrial zones, as well as known 'night life' areas.²⁷⁹

5.9 Researchers have distinguished different sectors within the indoor industry. Posel, for example, identifies at least four categories of urban prostitutes working in Durban:²⁸⁰

²⁷⁴ Leggett ODCCP. See also T Leggett 'The Sleazy Hotel Syndrome: housing vice in Durban and Johannesburg' *Crime and Conflict* No 18 (1999) 14-20.

²⁷⁵ See Discussion Paper 85 at Par 9.7.3 – 9.7.10.

²⁷⁶ See in this regard generally R Barnes-September et al *Child Victims of Prostitution in the Western Cape* (2000) 71 *et seq*; Molo Songololo *The Trafficking of Children for Purposes of Sexual Exploitation – South Africa* (2000) 29-43.

²⁷⁷ Leggett recently found that in a sample of 349 prostitutes from Cape Town, Durban and Johannesburg, half the population was under 24, and over 10% were underage (younger than 18 years). T Leggett ODCCP Study on the Relationship between Drug Use and HIV in South Africa (2000) at Par 3.2.

²⁷⁸ Discussion Paper 85 at Par 3.7.3.1. See also Discussion Paper 103 at Par. 13.7.5.3.

²⁷⁹ S Zetler 'Needs assessment of the indoor sex working industry in the Cape Town area' (SWEAT, February 1999) at p 2.

²⁸⁰ Posel (*op cit*) at 12. Leggett's more recent study confirms these categories – ODCCP at Par 2.5.

- C Street prostitutes;²⁸¹
- C Prostitutes working the seamen's and tourists' clubs;²⁸²
- C Escorts and masseuses; and
- C 'Call girls' (prostitutes working from the classified advertisements of the local newspapers).²⁸³

5.10 The author further notes that each sector has unique working conditions and shows its own demographic patterns.²⁸⁴ While Posel's study is specific to Durban, her analysis applies *mutatis mutandis* to prostitution in other major urban centres in South Africa.

5.11 Two forms of prostitution that defy clear categorisation as either 'indoor' or 'outdoor' prostitution are the informal culture of informal prostitution that has developed around the mines, where women provide a variety of services to the miners for pay (including the brewing of beer and sexual services)²⁸⁵ and the prostitution sector that has developed to service the trucking industry.²⁸⁶

(b) Private workers and 'call girls'

5.12 In addition to the more formal indoor businesses, there are also smaller informal 'agencies' that run without clear management or ownership structures.²⁸⁷ These may, for example, consist of a group of prostitutes who have come together as an informal collective to work from the same premises.²⁸⁸ They generally share rent and expenses, but do not have to give a cut of their earnings to any management structure.

5.13 Prostitutes working privately are therefore more able to set the conditions under which they work. For example, they place their own advertisements, make their own bookings and choose their own hours. However, these workers do not have the same level

²⁸¹ Street prostitution is discussed below.

²⁸² The terminology here is that used by Leggett rather than Posel.

²⁸³ The term 'call girls' may have become misleading, since male prostitutes also advertise and provide their services in this way.

²⁸⁴ See Posel (*op cit*) at 12-16 for a brief description of each category.

²⁸⁵ See Leggett ODCCP at Par 2.5.

²⁸⁶ See in this regard generally Abdool Karrim et al (*op cit*) at 1521-1522; Kraak (*op cit*) at 127-129; Ramjee et al (*op cit*) at 348-349.

²⁸⁷ See in this regard generally Zetler (*op cit*) at 5.

²⁸⁸ See Leggett *Crime & Conflict* No 13 (1998) at 23.

of protection as workers who work in agencies with other people always on the premises.²⁸⁹

(c) Independent contractors

5.14 Some owners interviewed by Zetler indicated that they do not in fact 'employ' any of the prostitutes working at their establishments. Rather, they are letting their premises to prostitutes on an hourly basis, which means that these persons are operating as 'independent contractors'.²⁹⁰

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

(d) Advertising

5.16 In South Africa, indoor businesses and 'call girls' advertise their services freely in daily newspapers and other publications, irrespective of the fact that the industry is strictly speaking criminalised.

Outdoor Prostitution in South Africa

(a) General

5.17 It is even more difficult to establish an accurate profile of the outdoor sector than of the indoor sector. This is due to a number of reasons, including variations between geographic areas and the transitory nature of outdoor prostitution (which is more prone to random entrance into and exit from the industry than indoor prostitution).²⁹¹ Due to high levels of distrust of 'strangers' prevalent among outdoor prostitutes, researchers often experience difficulties obtaining information.²⁹²

5.18 However, it should be acknowledged that indoor prostitution usually implies either a concession to some level of control or selection (for example, when working for an

²⁸⁹ Zetler *loc cit.*

²⁹⁰ The same argument is employed in response to attempts to discuss basic conditions of employment with owners / managers, as well as issues related to the Receiver of Revenue.

²⁹¹ See Leggett ODCCP at Par 3.2.

²⁹² See Pauw & Brener MRC Study at 6.

escort agency or brothel) or the financial ability to access premises from which to work (in the case of 'private' indoor prostitution).

5.19 At the risk of generalisation, it may be said that outdoor prostitutes are typically in a more vulnerable socio-economic position, as evidenced by the fact that 'survival' or subsistence prostitution is more prevalent outdoors.²⁹³ Outdoor prostitutes tend to be poorer and have lower education levels than prostitutes working indoors.²⁹⁴ Street prostitutes also do not benefit from HIV education and condom distribution provided by indoor agencies. In addition, they face greater community intolerance than those working indoors.²⁹⁵

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

'Street-walkers said that they preferred walking the beat because business was far brisker and the turnover higher. One street-walker explained that in order to make contact with a client in a club or hotel one first had to spend hours talking to a man who in the end might not be interested in doing business'.²⁹⁶

5.21 Based on research conducted with 349 street prostitutes in Durban, Cape Town, and inner city Johannesburg, Leggett distinguishes two groups of outdoor prostitutes, which he terms 'fast living' and 'subsistence' prostitutes respectively.²⁹⁷ He notes that 'fast living' prostitutes are generally located in or near the central business districts of each city (Greenpoint in Cape Town, the Point / Beachfront area in Durban and near certain residential hotels in greater Hillbrow in Johannesburg).

5.22 This group was characterised by high client volumes, higher than average rates for sexual services, higher incomes and high levels of drug abuse. These prostitutes were more likely to be white, and older than the average.²⁹⁸

²⁹³ Mrs Joan van Niekerk of Childline, KZN, however, points out that some child prostitutes are kept enslaved indoors in conditions of extreme vulnerability. She cites examples of child prostitutes literally being locked up in flats and kept in bondage there where they then have to see so many clients in order to pay board and lodging or face physical violence.

²⁹⁴ Pauw and Brener MRC Study at 4.

²⁹⁵ *Ibid.*

²⁹⁶ Schurink and Levinthal (*op cit*) at 159.

²⁹⁷ Leggett 'Sex workers in South Africa: worlds apart' *ISS Crime Index* No 6 (2000) at 26-27.

²⁹⁸ *Idem* at 26.

5.23 Virtually all the prostitutes interviewed in inner city Johannesburg were housed in daily accommodation hotels in the greater Hillbrow area.²⁹⁹ Similarly, 75% of the prostitutes in the Durban Central Business District resided in residential hotels.³⁰⁰ Cape Town showed a greater range of housing options, with women often living together with a large number of housemates in a free-standing home.³⁰¹

5.24 'Subsistence' prostitutes, on the other hand, were found in more remote and isolated areas such as industrial zones, truck stops and townships. For this group, client volumes and incomes were low. Use of drugs other than alcohol and dagga was rarely reported. These prostitutes were more likely to be black. Many were living in informal settlements and supporting families with their earnings. Nearly 40% of all black prostitutes interviewed had migrated to the major cities from the Eastern Cape.³⁰²

(b) **The role of 'pimps' in outdoor prostitution**

5.25 The term 'pimp' generally refers to the 'manager' of a prostitute who works on the streets.³⁰³ The notion of a 'pimp' typically evokes heated responses, with prostitutes being portrayed as helpless victims of exploitative practices. While it would not be accurate to deny this picture wholesale, particularly in light of the increase in organised criminal syndication of the industry, it is certainly also important to note that research results, as well as the experience of organisations such as SWEAT, do not bear out the stereotypical image of 'pimping'.³⁰⁴

5.26 The relationships between prostitutes and 'pimps' appear to vary. Pauw and Brener report that the majority of prostitutes in their research sample worked independently. (However, a few worked with boyfriends or husbands).³⁰⁵ The relationships between prostitutes and these 'pimps' were seldom abusive and exploitative. The primary function of the pimps was to offer assistance to prostitutes by protecting them while they solicit clients, safeguarding their money and belongings and taking down registration numbers of clients'

²⁹⁹ Leggett ODCCP at Par 4.2.

³⁰⁰ Leggett describes these hotels as 'squalid in the extreme' (***Society in Transition*** at 161). 'Most of the hotels have shared bathroom facilities and minimal space. They are decrepit, noisy, smelly buildings, infested with vermin'.

³⁰¹ *Ibid.*

³⁰² *Idem* at 27.

³⁰³ See Sloan (*op cit*).

³⁰⁴ *Ibid.*

³⁰⁵ Pauw and Brener MRC Study at 6.

vehicles.³⁰⁶ The authors noted that in certain areas, groups of prostitutes employed men as bodyguards.

5.27 Similarly, Leggett's earlier Durban study showed that very few of the women interviewed had 'boyfriends' or pimps on the street: the most common response was that 'they are too expensive'.³⁰⁷

Working Conditions applying to Prostitutes in the Indoor Sector

(a) General

5.28 Due to the fact that prostitution is illegal, protective measures contained in labour legislation such as the Basic Conditions of Employment Act³⁰⁸ or the Occupational Health and Safety Act³⁰⁹ do not apply to prostitutes.³¹⁰ This means that even where prostitutes are forced to work in agencies under circumstances approximating slavery, they would not have recourse to the remedies available to other workers.

5.29 One advantage to working in the indoor sector is that these persons can acquire regular flats and bank accounts, as they work for 'ostensibly legitimate businesses'.³¹¹ They also earn more than street prostitutes, although a substantial percentage of their earnings may have to be given to the management. In most cases, workers have no discretion in selecting clients.³¹²

(b) Pricing

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

³⁰⁶ Pauw and Brener MRC Study at 31.

³⁰⁷ T Leggett 'Poverty and sex work in Durban, South Africa' *Society in Transition* (1999) at 164.

³⁰⁸ Act 75 of 1997.

³⁰⁹ Act 85 of 1993.

³¹⁰ The 'employment' contract between the operator and the prostitute relates to illegal activities, and therefore does not fall within the ambit of 'lawful' employment. An analogy would be, for example, a person working as a 'runner' for a drug dealer. Due to the fact that drug dealing is a criminal activity, the runner would not be in a position to claim recourse in terms of labour legislation if the drug dealer forced him to work for inordinately long hours.

³¹¹ Leggett *Crime and Conflict* No 13 (1998) at 23.

³¹² *Ibid.*

and above the preset fee) from clients.³¹³

5.31 Prostitutes usually need to cultivate a good working relationship with management in order to get ‘bookings’, as managers are generally responsible for assigning clients to individual prostitutes. This gives management a degree of power over workers, since they are the ‘gatekeepers’ as far as clients are concerned.³¹⁴

(c) **‘Employment’ conditions**

5.32 Due largely to the fact that the ‘employment’ relationship between management and prostitutes is not regulated by law, certain basic conditions of employment are not adhered to by ‘employers’. Zetler notes, for example, that there is generally no payment for overtime structured into wages.³¹⁵ Sick leave is rarely granted. Not one agency included in this survey had holiday leave structured into employment practices.

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

5.34 Working hours vary considerably amongst businesses. Management sets working hours, and the duration of shifts differs greatly. In some cases, prostitutes are only required to be present once there is a request from a client; in other instances, prostitutes are expected to spend up to twenty hours a shift on the premises. Working hours are frequently mentioned by workers as being too long. Several businesses included in Zetler’s survey did not allow workers to leave the premises when they were on shift duty.³¹⁶

³¹³ In some cases, tips are paid via management, thus giving management access to information on the value of tips that prostitutes are earning. Other prostitutes do not disclose their tips to management – Zetler (*op cit*) at 3.

³¹⁴ Prostitutes report that this power is at times abused. It appears that management often develops closer relationships with certain workers, who are then in turn more successfully promoted to clients – Zetler *loc cit*.

³¹⁵ *Idem* at 4.

³¹⁶ *Ibid*.

(d) **The fining system**

5.35 In the majority of indoor businesses a fining system is in place to act as a 'punishment' for overstepping rules.³¹⁷ The fining system is a constant source of conflict between management and prostitutes. Fines are set by management and reportedly range from R5.00 - R1000.00.

(e) **Addressing work conditions in the indoor sector**

5.36 The ramifications of the fact that prostitutes cannot claim recourse to labour legislation and concomitant remedies were recently illustrated when a group of prostitutes working in a brothel in Cape Town obtained an interim interdict against management to refrain from violating their basic rights.

5.37 During June 1999, SWEAT obtained a High Court interdict against the management of an escort agency,³¹⁸ preventing them from infringing on the human rights of prostitutes working at the agency.

5.38 The interdict was based on statements indicating that escorts were forced to work excessive hours (in some cases 19 hour shifts per day),³¹⁹ could not leave the premises and were not allowed to have personal visitors.³²⁰ In addition, prostitutes were expected to share their beds with other workers and were threatened that the nature of their work would be revealed to their family members if they did not 'toe the line'.³²¹ The brothel management confiscated and held their identity documents and other personal documents, and often failed to hand over money earned by and due to the prostitutes.³²² Since the agency was recruiting prostitutes from Gauteng, KwaZulu-Natal and the Eastern Cape, these women had almost no support system in Cape Town, making it very difficult for them to leave the agency.

³¹⁷ See Leggett *Crime & Conflict* No 13 (1998) at 23.

³¹⁸ Although the agency is referred to throughout as an 'escort agency', it appears to be common cause that sexual acts were performed for reward on the premises, which implies that the business complied with the definition of a 'brothel' rather than an escort agency.

³¹⁹ See SWEAT Press Release dated 29 November 2000.

³²⁰ See I Fredericks 'Madam from Hell in a sweat over "sex slaves"' *Sunday Times*, 5 November 2000.

³²¹ SWEAT Press Release dated 29 November 2000.

³²² *Ibid.*

5.39 During October 2000, SWEAT again received complaints regarding forced labour at the agency. This complaint was forwarded to the Department of Labour. The Department conducted an inspection of the premises and found that prostitutes on the premises were apparently not being treated in accordance with common labour practices, and that conditions at the premises appeared to be in contravention of the earlier interdict.

5.40 On 27 October 2000, an application was made to the Cape Town High Court for the management to be found in contempt of the interdict granted in June 1999. An interim interdict was issued on the same day, with a return date of 23 November 2000. The matter was eventually settled on 29 November 2000, and the agreement of settlement was made an order of court.

5.41 In terms of Par 4 of the agreement of settlement, the respondents (the agency management) must ensure that fair labour practices are adopted and followed in the conduct of their businesses. The inclusion of this paragraph is significant in the light of the reluctance on the part of the presiding officer hearing the application, Desai J, to consider making an order including specific labour conditions. Desai J is reported as noting that since prostitution remains illegal, he could not be asked to regulate an illegal industry.³²³ He therefore asked counsel appearing on behalf of the applicants to produce evidence on whether prostitution is allowed in terms of the Constitution. Due to the fact that the parties eventually settled the matter, such evidence was not led.

5.42 The fact that prostitution is currently illegal has not prevented efforts aimed at setting industry standards. In October 1999, a code of conduct was drafted for male escort agencies in Cape Town. This code set out standards agreed to by agency management, prostitutes and SWEAT, and included the following:

- C Theft or extortion from clients will lead to dismissal of the masseur.
- C No drugs will be permitted on work premises.
- C Managers must check the identity documents of prostitutes to ensure that they are over the age of 'consent'.³²⁴
- C Prostitutes must practise safer sex at all times. This includes using a condom, even for oral sex.
- * Prostitutes will be given a copy of the agency's rules and the penalties for breaking them.

³²³ H Geldenhuys 'Judge refuses order against escort agency' *Cape Times*, 8 November 2000.

³²⁴ According to the current provisions of section 14(1)(b) of the Sexual Offences Act, the age limit for consensual sexual acts between two men is currently 19 years.

- C Core working hours will be established and masseurs will be given time off from work.
- C Minimum prices will be explored so that reasonable prices will be paid for services offered.³²⁵

5.43 It has been suggested that violations of this code should ideally be dealt with by a regulatory body. However, the establishment of such a body is difficult while the industry remains illegal.³²⁶

Working Conditions of Prostitutes in the Outdoor Sector

(a) Income variations

5.44 Leggett's recent study in Durban, Cape Town and inner city Johannesburg showed that almost half of the group typified as 'fast living' prostitutes³²⁷ reported making more than R4 000 per month and 42% reported having more than 20 clients per week. Over 80% of the 'subsistence' prostitutes saw fewer than 10 clients and earned less than R200 per week.³²⁸

5.45 Significantly, race was an important variable in terms of the rates charged by participants in this study. Over 75% of white women reported charging over R90 for vaginal sex, while 83% of black women charged less than that.³²⁹ (As a result, over half the white women surveyed reported making over R1 500 per week, while 80% of black women reported earning less than R500).³³⁰

(b) Client violence

5.46 Outdoor prostitution poses many risks, since prostitutes often work alone and usually late at night. Once prostitutes have reached an agreement with the client, they need to enter the client's space (his car and/or home) which puts them in a vulnerable position for abuse by clients.³³¹

³²⁵ J Soal 'Setting sex work standards' *Cape Times*, 12 October 1999.

³²⁶ *Ibid.*

³²⁷ See Par 5.21 above.

³²⁸ Leggett *ISS Crime Index* at 27.

³²⁹ Leggett ODCCP at Par 4.3.

³³⁰ *Ibid.*

³³¹ Pauw and Brener MRC Study at 16.

'If you have a room then you know you are safe, but if you have to park somewhere, okay that man is much stronger than you so it is easy for him to rob you or to take his money back, it has happened to me many times'.³³²

5.47 Various studies conducted in South Africa indicated how vulnerable prostitutes are to client abuse. Prostitutes in Pietermaritzburg have reported that clients beat them, raped them, abandoned them in isolated places, left them naked, and that they were thrown or forced to jump from moving vehicles.³³³ They also reported being robbed and raped by passing men.³³⁴ Researchers conducting a study among prostitutes at a truck stop in KwaZulu-Natal noted similar reports,³³⁵ and Pauw and Brener's Cape Town survey also confirm this trend.³³⁶

5.48 Focus group participants in the latter study agreed that violence from clients was one of their greatest occupational hazards. Significantly, eighteen (out of twenty five) participants stated that if they experienced problems with a client they would not take these up with the police. These participants felt that the police did not take their complaints seriously, nor did they attend adequately to the problems that prostitutes experience.³³⁷

'They say "whore, you are just a whore, you can't be raped"'.³³⁸

5.49 Apart from the obvious violation of their rights to physical integrity, the vulnerability of prostitutes to constant violence or the threat of violence may also have broader implications, e.g. on the issue of whether or not they are able to practice safer sex. Prostitutes may also face violence and abuse if they try to insist on condom use.³³⁹

³³² *Ibid.*

³³³ T Marcus 'Aids and the highways: sex workers and truck driver in KwaZulu-Natal' *Indicator SA* (1995) at 82.

³³⁴ *Ibid.*

³³⁵ Q Abdool Karrim *et al* 'Reducing the risk of HIV infection among South African sex workers: socio-economic and gender barriers' *American Journal of Public Health* (1995) at 1523.

³³⁶ Pauw and Brener MRC Study at 16-17.

³³⁷ *Idem* at 18.

³³⁸ Pauw and Brener MRC Study. This is echoed by Rachel Khatlane, who makes the following statement: 'There is a lot of rape but the way the police treat you doesn't make you want to report. They say you are a sex worker, may be you wanted to go with the guy. They say prostitutes can't get raped, they are used to being f....' in G le Roux *Agenda*. See also in this regard S Delaney (*op cit*).

³³⁹ Pauw and Brener MRC Study at 16.

Law Enforcement

5.50 It should be noted that there does not appear to be a national policing strategy regarding prostitution. Instead, enforcement policies are determined on the level of individual police stations or by the prosecuting authorities in a particular area.

(a) Indoor sector

5.51 In addition to the provisions of the Sexual Offence Act prohibiting sexual acts for reward, brothel-keeping and facilitating prostitution, the indoor industry is as a rule subject to regulation by means of the municipal by-laws pertaining to, for example, the granting of business and liquor licenses.³⁴⁰

5.52 It appears that indoor businesses are currently able to operate without accredited business licenses, although they still remain liable for prosecution.³⁴¹ Where businesses do operate outside the boundaries of licensing requirements, the management will be liable for prosecution under the relevant by-laws, usually enforced by municipal law enforcement agents (rather than by police).³⁴² Significantly, these municipal by-laws are not enforceable against prostitution businesses only, but against any business not complying with licensing requirements.

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

'Prostitution is no longer regarded by police as a priority crime, says Alfred Hugget, commandant of special investigations. Although it's still a crime, the community prefers police to concentrate their efforts on more serious misdemeanours. It's almost impossible to prove a woman is a prostitute unless she's caught in a trap. A policeman would have to masquerade as a client, she'd have to offer him her services and almost do the deed before an arrest could be made. It's a time-consuming process that taxes their manpower and places the policemen in compromising situations'.³⁴³

³⁴⁰ See Par 6.131 below.

³⁴¹ Zetler attributes the *status quo* to 'the uncertain legislative climate', as well as the lack of personnel capacity to enforce licensing – *op cit* at p 4.

³⁴² See, for example, R Morris 'Bid to shut "brothel" refused' **Cape Times** 21 December 2000.

³⁴³ I Kuhne 'Luxury life of the high-class hookers' **YOU Magazine**, 2 March 2000. The concern about the potentially compromising effect of law enforcement is borne out by the facts of the

5.54 In spite of this, the series of applications brought by the Asset Forfeiture Unit of the National Directorate of Public Prosecutions against the owner / management of The Ranch, an indoor establishment operating in Rivonia, Gauteng, indicates that police and prosecuting authorities do on occasion choose to enforce the Sexual Offences Act (as well as the Prevention of Organised Crime Act)³⁴⁴ against indoor agencies.³⁴⁵

5.55 This also appears to be in line with the experience at service providing organisations such as SWEAT, where an increase in arrests of prostitutes (both indoor and outdoor) for contraventions of the provisions of the Sexual Offences Act and municipal by-laws (in the case of outdoor workers) has recently been noted.³⁴⁶

(b) **Outdoor sector**

5.56 Enforcement of the provisions of the Sexual Offences Act against prostitutes working outdoors are subject to the same resource considerations noted above in relation to the indoor sector.³⁴⁷ It is therefore hardly surprising that municipal by-laws, rather than the Sexual Offences Act, are primarily employed by police and municipal law enforcement officials against prostitutes.³⁴⁸ These by-laws typically penalise, for example, 'loitering' or 'creating a public nuisance'.³⁴⁹

5.57 Arrests often occur in response to complaints received from members of residential or business communities where prostitutes work. Experience has shown that evidence against individual prostitutes is frequently slim or non-existent,³⁵⁰ and it is not

Jordan case: the third appellant *in casu* admitted that she had performed an indecent act, viz a 'pelvic massage', on a person who later proved to be a police agent. (**S v Jordan and Others** 2002 (1) SACR 17 (T).)

³⁴⁴ 121 of 1998.

³⁴⁵ See e.g. **Phillips and others v National Director of Public Prosecutions** 2001 (2) SACR 542 (W).

³⁴⁶ See H Geldenhuys 'Call in court to decriminalise prostitution' **Cape Times**, 26 October 2000.

³⁴⁷ During the early 1990's, members of the South African Narcotics Bureau, traditionally tasked with enforcement of various provisions of the Sexual offences Act, developed an entrapment method entailing that a witness to the transaction would hide in the boot of the motor vehicle being used by the alleged 'client', who would also be either a police official or agent. Prostitutes soon started to demand the opening of the car boots of prospective clients before commencing with any negotiations.

³⁴⁸ See e.g. Gauteng Task Team Final Report at 8.

³⁴⁹ See Chapter 6 below for a more detailed discussion of the offences created under these municipal by-laws.

³⁵⁰ Arrests have occurred for non-existent offences. See also **Palmer v Minister of Safety and Security** (WLD Case No 00/13008).

unknown for groups of prostitutes to be 'rounded up' and arrested simply because they are standing on the street.

5.58 The offences referred to above are relatively minor, and the police would be entitled to either issue a so-called 'spot fine'³⁵¹ without arresting the prostitute, or where arrest does take place, to release her on warning or a minimal amount of bail.³⁵² However, prostitutes are often arrested and detained in custody for allegedly contravening these municipal by-laws. Upon expiry of the 48-hour period within which an arrested person has to be brought before court,³⁵³ the prostitutes are then released without being charged with any offence.

5.59 Apart from the obvious human rights violation inherent in this practice, concerns are also raised about the implications for children of prostitutes. Prostitutes have explained to researchers that when arrested, they were seldom allowed to make phone calls to arrange for childcare while they were kept in the cells.³⁵⁴

5.60 One tactic employed by police officials is to arrest prostitutes on a Friday evening, and release them on the following Sunday (i.e. two days later), thus depriving them of an opportunity to earn any income on the potentially most lucrative evenings of the week, viz Friday and Saturday evenings.³⁵⁵

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

³⁵¹ This refers to a written notice issued in terms of sections 56 and 57(1)(b) of the Criminal Procedure Act 51 of 1977.

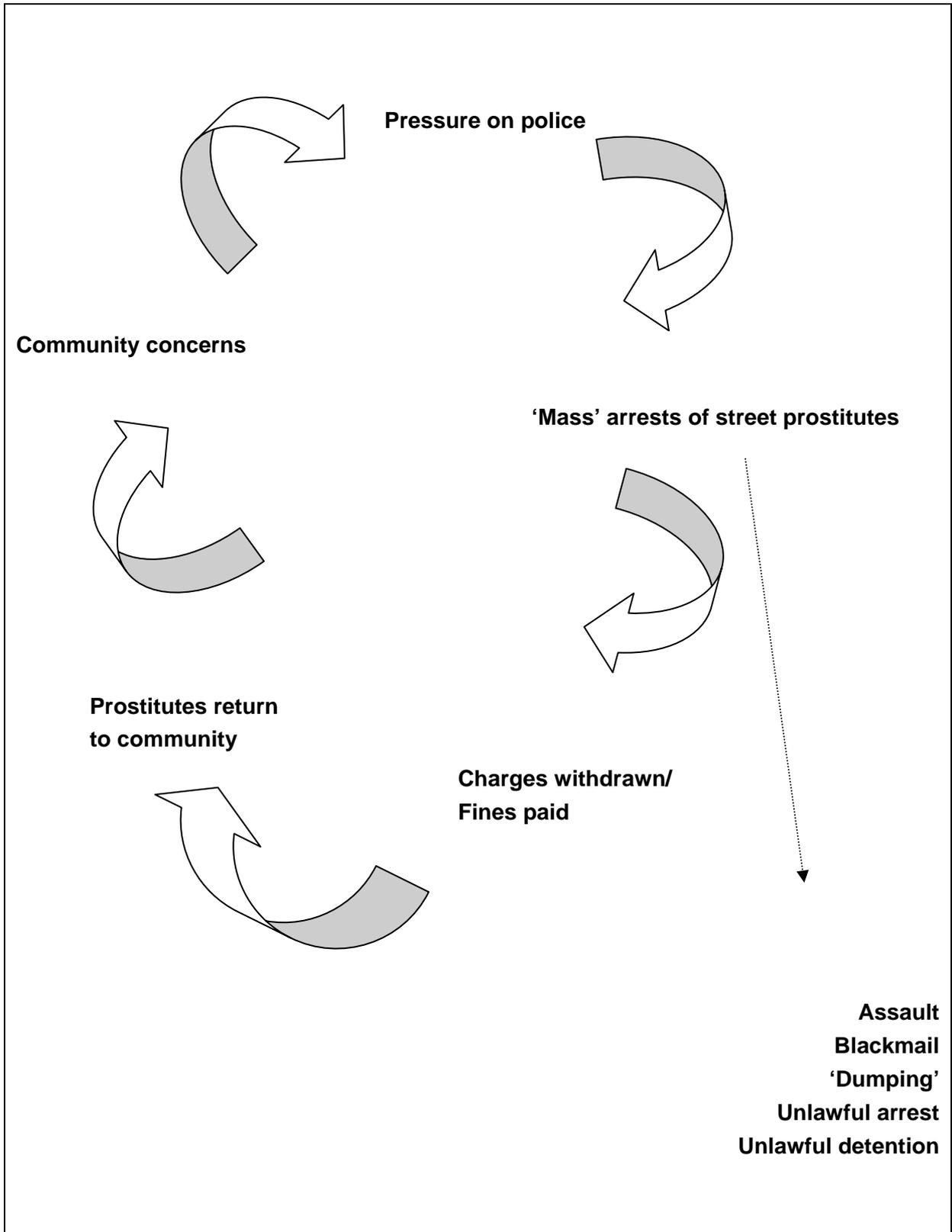
³⁵² In terms of section 59 of the Criminal Procedure Act 51 of 1977.

³⁵³ See section 35(1)(d)(i) of the Constitution, as well as section 50 of the Criminal Procedure Act.

³⁵⁴ This is in violation of section 35(2)(f)(ii), of the Constitution, which states that every detained person has the right to communicate with 'next of kin'. Section 35(2)(e) of the Constitution states that detained persons have the right to conditions of detention that are consistent with human dignity.

³⁵⁵ Information conveyed to consultant researcher by prostitutes working in Woodstock, Cape Town in 1995.

DIAGRAM 1: CYCLE OF COMMUNITY COMPLAINTS AND MASS ARRESTS



5.62 Researchers have found that certain law enforcement practices may undermine public health initiatives.³⁵⁶ Pauw and Brener report that police confiscated condoms to use as evidence of prostitution.

“I keep it [condoms] in my pocket. Because the laws [police], when they get to you, they first look in their (sic) bag, they empty your bag. Without you giving it to them they take it and if they get a condom on you, then they pick you up.”³⁵⁷

(c) **Police harassment**

5.63 Outdoor prostitutes generally report high levels of harassment by police. A study of prostitutes at a truck stop in KwaZulu Natal found that participants were harassed by police and forced to provide free sexual favours.³⁵⁸ Pauw and Brener found that violence by police officials towards prostitutes was common. Police abuse of power included rape, violence, unlawful arrest and unlawful detention.³⁵⁹ The most common violations were that police demanded protection money from prostitutes and committed what prostitutes described as ‘dumping’. This refers to situations where police officials would force a prostitute into a police van and ‘dump’ her in an isolated place with no means of transportation.³⁶⁰ Dumping usually occurs late at night and hence places prostitutes in dangerous situations where they might be raped or otherwise assaulted.

5.64 It is in this respect significant that during February 2000, ten prostitutes working in Claremont, Cape Town, obtained an *interim* interdict in the Cape High Court against three police officials to stop police harassment. The harassment complained of included physical assault and unlawful arrest and detention.³⁶¹

5.65 This matter was subsequently investigated by the Independent Complaints Directorate [ICD], and in May 2000 the ICD recommended that the three officials concerned face internal disciplinary charges as well as criminal charges.³⁶²

³⁵⁶ Pauw and Brener MRC Study 19.

³⁵⁷ *Ibid* (citing Participant 15).

³⁵⁸ Abdool Karrim *et al* (*op cit*) at 1523.

³⁵⁹ Pauw and Brener MRC Study at 19. See also Leggett *Society in Transition* at 165.

³⁶⁰ Pauw & Brener *Agenda* 82.

³⁶¹ See J Bezuidenhout ‘Hands off the hookers’ *Sunday Times*, 27 February 2000; M Merten ‘Finally, peace’ for sex workers’ *Mail and Guardian*, 3-9 March 2000.

³⁶² The ICD recommended that two of the officials face charges of assault, that one official face an additional charge of *crimen iniuria*, and the other a charge of corruption. In addition the ICD recommended that one of the officials be prosecuted for rape. See *Women’s Legal*

5.66 The return date for the interdict was in June 2000. However, the matter was settled out of court prior to this date on the basis that the Minister of Safety and Security gave an undertaking that the three officials would be redeployed and not perform any duties relating to prostitutes until the findings of the internal disciplinary inquiries and the pending criminal charges had been finalised.³⁶³

Safer sex practices

5.67 Studies conducted among prostitutes in South Africa report a relatively high degree of condom use with clients. Pauw and Brener describe that twenty four of the twenty five participants in their study stated that they always used condoms with casual clients, while twenty three participants reported always using condoms with regular clients.³⁶⁴ However, all participants noted that negotiation of condom use was often more difficult with regular clients.³⁶⁵ The finding in several other studies that prostitutes do not usually use condoms with personal partners was also confirmed in this research study.³⁶⁶

5.68 Out of the 349 prostitutes included in Leggett's research study, 28 women (about 8%) admitted to occasional condom free sex with clients, at least for oral sex.³⁶⁷ Over 70% of the prostitutes with boyfriends said that they did not use condoms with them.³⁶⁸

5.69 It is extremely troubling to note that there is a great demand for condom-free sex in South Africa.³⁶⁹ Respondents in research conducted at a KwaZulu-Natal truck stop reported that condom use was responsible for client loss and more frequent non-payment. They also stated that condom use led to physical abuse by clients, and clients insisted on paying less for sex when a condom was used.³⁷⁰

Centre News [WLCN] January – June 2000 at p 3.

³⁶³ WLCN at p 3.

³⁶⁴ Pauw and Brener MCR Study at 11-12.

³⁶⁵ Pauw and Brener MRC Study at 12 note that these findings should be viewed with some caution, since the boundaries between regular clients and personal partners sometimes appeared blurred.

³⁶⁶ *Idem* at 13. The use of a condom connotes a distinction between professional sex and sex for pleasure – see Leggett **Crime and Conflict** No 13 (1998) at 24.

³⁶⁷ Leggett ODCCP at Par 4.3. Eighty two percent of this group were black women, and 78% of this group were HIV positive.

³⁶⁸ *Ibid.*

³⁶⁹ Leggett ODCCP at Par 2.5, citing Varga study.

³⁷⁰ Abdool Karrim *et al* (*op cit*) at 1523.

Health services³⁷¹

5.70 Research has shown that prostitutes do not always feel comfortable visiting state funded clinics providing primary health and STD care.³⁷² Reasons given for this included the negative attitudes of clinic staff and perceptions that other clinic attendees judged them negatively. Participants in the Cape Town study conducted by Pauw and Brener stated that clinic staff were rude to them, more impatient with them and that prostitutes were not afforded equal treatment. Participants also indicated that they were reluctant to tell staff that they were prostitutes, fearing discrimination and that clinic staff would not respect their confidentiality.³⁷³ Other difficulties included that clinic staff members were reluctant to give prostitutes a sufficient supply of condoms, and that not all prostitutes were aware of the existence of clinics.³⁷⁴

5.71 Marcus *et al* further note that the main public health care services have little capacity to engage in a meaningful way in an intervention with prostitutes working in the context of the trucking industry.³⁷⁵

Drugs

5.72 Leggett reports that South Africa's unique history and distinctive cultures have resulted in a local drug 'scene' unlike any other in the world.³⁷⁶ Isolation during the years of sanctions insulated the country, with the result that cocaine and heroin, although present in small amounts before the first democratic elections in 1994, only took off once South Africa fully engaged in international commerce again. In their place, substances such as Mandrax and Wellconal enjoyed a popularity seen nowhere else. One of the results is that drugs in South Africa are mainly smoked or snorted, with only a small percentage of intravenous injection.³⁷⁷

³⁷¹ While the question of HIV/AIDS and prostitution arises under health concerns, this topic is dealt with in detail in Chapter 8 below.

³⁷² Pauw and Brener MRC Study at 26.

³⁷³ *Idem* at 26-27. Marcus *et al* also note that the relationship of prostitutes to the health system is problematic, 'since it is often tied to their contact with the legal system' (*loc cit* at 82).

³⁷⁴ *Idem* at 27.

³⁷⁵ At 84.

³⁷⁶ ODCCP at Par 2.4.

³⁷⁷ The incidence of intravenous drug use is significant in the sense that this is one of the factors that may make prostitutes more vulnerable to HIV infection – see Chapter 8 below.

5.73 Crack cocaine became popular in South Africa only after the opening of the border in 1994. It has however since exploded into a major social problem, particularly among prostitutes.³⁷⁸

5.74 Recent research shows varying levels of drug use and substance dependence among South African prostitutes. Twenty four of the twenty five prostitutes participating in Pauw and Brener's Cape Town study had used a substance in the past six months, and fourteen were regular substance users.³⁷⁹ Only 2 participants reported using heroin, and this was a once off experience. The most common substances used alone and with other drugs were alcohol and 'white pipes' (a cannabis and methaqualone combination). The researchers also noted the growing frequency of crack cocaine.³⁸⁰

5.75 The two groups of street prostitutes distinguished by Leggett in his recent study conducted in Cape Town, Durban and inner city Johannesburg also showed marked differences in terms of drug use.³⁸¹ While almost 70% of the 'fast living' prostitutes who were prepared to discuss drugs indicated regular use of crack or Mandrax, none of the 'subsistence' workers did.³⁸² Again, race appeared to be a significant variable.³⁸³

5.76 One variable that has not been addressed sufficiently in South African studies is the question of causality: did drug use precede or follow the inception of prostitution? Qualitative comments from the women interviewed in Leggett's study indicated that their reasons for entering prostitution rarely included the need to pay for drugs.³⁸⁴

5.77 Research indicates that drug dealers have systematically targeted the prostitute community to spread crack cocaine to the larger society.³⁸⁵ Prostitutes have listed a number of reasons for getting into the drug, most of which had to do with dealing with the

³⁷⁸ The connection between crack use and high levels of sexual activity, including the exchange of sex for money or drugs, is so great that crack has been as closely linked with HIV as intravenous drugs – Leggett ODCCP at Par 2.2.

³⁷⁹ Pauw and Brener MRC Study 21.

³⁸⁰ *Ibid.*

³⁸¹ See Leggett *ISS Crime Index* at 27.

³⁸² *Ibid.*

³⁸³ Leggett ODCCP at Par 4.4.

³⁸⁴ *Ibid.*

³⁸⁵ Leggett ODCCP at Par 2.5. Leggett found that the use of crack cocaine in the South African context started among prostitutes in Hillbrow. Anecdotal evidence indicates that dealers then sent addicted prostitutes from Hillbrow to Durban in 1996 to spread the drug (*Crime and Conflict* No 18 (1999) at 17).

pressures of prostitution or the life that led them into prostitution.³⁸⁶

5.78 Many prostitutes who have been in the industry for some period of time complained that crack had increased the number of women on the street, and driven down the median age.³⁸⁷ Increased competition has driven down the prices, forcing prostitutes to handle greater volumes of clients in order to maintain income levels. It has also led to an increased demand for unsafe sex (such as condom-free or anal sex), due to the willingness of addicts to do anything for drug money. Some women have also blamed crack for an increase in client violence, including rape.³⁸⁸

Summary

5.79 The South African adult prostitution industry is extremely diverse, and due to its criminalised status, reliable information about the industry is difficult to obtain. However, recent research projects have made it possible to identify certain general trends. For ease of analysis, prostitution can be divided into two categories, viz indoor and outdoor (street) prostitution. (There are also forms of prostitution, for example, informal prostitution around the mines and the trucking industry, that do not necessarily easily resort under either indoor or outdoor prostitution.)

5.80 Indoor prostitution businesses consist of brothels, escort agencies and massage parlours as well as clubs and bars. In addition, there are also private workers working from home or private premises. Indoor businesses as well as prostitutes working from private premises advertise their services freely, especially in the print media.

5.81 It is more difficult to establish an accurate profile of the outdoor sector than of the indoor sector. It may however be said that outdoor prostitutes are generally in a more vulnerable socio-economic position than those working indoors.

5.82 Researchers have distinguished two groups of outdoor prostitutes, viz 'fast living' and 'subsistence' prostitutes. The former group was characterised by high client volumes, higher than average rates for provision of sexual services, higher incomes and high levels of drug abuse. This group was generally located in the central business districts of Cape Town, Durban and inner city Johannesburg.

³⁸⁶ Leggett ODCCP at Par 2.5.

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.*

5.83 Subsistence prostitutes, who were more likely to be black, were found in more remote areas. Client volumes and incomes were low, and the use of drugs other than dagga and alcohol was rare.

5.84 The relationships between prostitutes and 'pimps' seem to vary. The majority of participants in one Cape Town study preferred to work independently, and where pimps did feature, the relationship was seldom reported to be abusive or exploitative.

5.85 Working conditions in the indoor sector are greatly influenced by the fact that prostitution is illegal and that protective labour measures therefore do not apply to the 'employment' relationship between management and prostitutes. This implies that basic conditions of employment are not adhered to, for example, in relation to payment for overtime, sick leave, paid holiday leave or duration of working hours. Efforts to improve working conditions in the indoor sector in the form of taking legal action against exploitative management or drawing up codes of conduct for indoor businesses have been hampered by the illegal nature of the industry.

5.86 The outdoor sector is characterised by significant variations in income and client volume. The working conditions in this sector present many risks, including violence by clients.

5.87 In addition to the provisions of the Sexual Offences Act, indoor prostitution establishments are also liable for prosecution under municipal by-laws relating to businesses. There appears to be no consistent national policing strategy regarding the indoor industry, although an increase in arrests and prosecutions under the Sexual Offences Act as well as the Prevention of Organised Crime has recently been noted.

5.88 Municipal by-laws, rather than the Sexual Offences Act, are employed against outdoor prostitutes. Arrests frequently occur because of complainants from residents or businesses, and often result in severe violations of the rights of prostitutes in the form of unlawful arrest and detention, bribery, and assault (including sexual assault). This practice of mass arrests is seldom successful in addressing the concerns of residents, and presents severe dangers and difficulties for prostitutes. Other law enforcement practices, such as the confiscation of condoms, undermine public health initiatives. Police harassment of prostitutes occurs frequently.

5.89 Studies conducted among South African prostitutes show a relatively high degree of condom use with clients. However, it was also found that prostitutes do not

usually use condoms with personal partners. The Commission notes with concern the research finding that there is a great demand for prostitutes to provide sexual services without condoms.

5.90 Prostitutes do not always feel comfortable visiting state funded clinics, and have ascribed this *inter alia* to negative staff attitudes and fear of discrimination.

5.91 Research indicates varying levels of drug use and substance dependence. The most commonly used substances were alcohol, dagga and Mandrax, with an alarming increase in the use of crack cocaine. Crack appears to have had an adverse impact on the prostitution industry, especially in the outdoor sector. Race appeared to be a significant variable in terms of drug use. It is not sufficiently clear in the South African context whether drug use precedes or follows the entry into prostitution.

CHAPTER 6

THE CURRENT LEGAL POSITION

Introduction

6.1 In South African law, prostitution is currently mainly dealt with in terms of the Sexual Offences Act,³⁸⁹ although other legislation, such as the Aliens Control Act,³⁹⁰ also contains provisions that are peripherally relevant to prostitution.³⁹¹ In addition, municipal by-laws play an important role in the legal control of prostitution. Due to the focus on **adult** prostitution, this discussion does not include reference to the current Child Care Act or the proposed Child Care Bill. However, this legislation will be dealt with in Chapter 9 below.

The Sexual Offences Act 23 of 1957: Background

6.2 South African legislation on prostitution has largely followed English statutes.³⁹² Milton and Cowling explain that in 1868 the Cape government enacted the Contagious Diseases Prevention Act, which compelled prostitutes to take an examination for venereal disease.³⁹³ The 1882 Police Offences Act³⁹⁴ penalised so-called 'common prostitutes' and 'nightwalkers' loitering in public places for purposes of prostitution or solicitation.³⁹⁵ In 1893 legislation aimed at the prevention of child prostitution was also enacted by the Cape Parliament.³⁹⁶

6.3 The discovery of diamonds and gold brought a flood of prostitutes to the Transvaal, which in turn led to the enactment of a series of immorality laws prohibiting prostitution and brothel keeping.³⁹⁷ This legislation again caused prostitutes and pimps to migrate to the Cape, Natal and the (then) Orange Free State, which promptly resulted in the enactment of legislation in these colonies aimed at prohibiting brothels, the procurement of

³⁸⁹ Act 23 of 1957.

³⁹⁰ Act 96 of 1991.

³⁹¹ The provisions concerned are discussed *infra*.

³⁹² Milton & Cowling ***South African Criminal Law and Procedure Vol III: Statutory Offences*** at Par E3-79.

³⁹³ *Ibid.*

³⁹⁴ Act 27 of 1882 (C).

³⁹⁵ Section 5(29).

³⁹⁶ See Milton & Cowling *loc cit*.

³⁹⁷ See Milton & Cowling (*op cit*) at E3-79 n 8 for a discussion of the provisions concerned.

women as prostitutes and living on the earnings of prostitution ('pimping').³⁹⁸ It is significant to note that the legislation did not penalise acts of prostitution as such, although 'white' prostitutes were prohibited from accepting men who were not white as clients.³⁹⁹

6.4 In 1957 the various laws regulating sexual acts or relations were repealed and re-enacted in a consolidating Immorality Act.⁴⁰⁰ This Act, subsequently renamed the 'Sexual Offences Act',⁴⁰¹ is still in force and contains the current provisions regulating various aspects of prostitution. The Act penalises (inter alia) the keeping of brothels, the procurement of women as prostitutes, soliciting by prostitutes, and living off the earnings of prostitution.⁴⁰²

6.5 Until 1988, the Act did not prohibit prostitution as such. The introduction of section 20(1)(aA) however dramatically changed the legal position: this provision criminalized engaging in sexual intercourse or performing indecent acts for reward.

6.6 It is significant to note that this section was inserted in the Sexual Offences Act in 1988 following the judgement by the Appellate Division in **S v H**.⁴⁰³ The (then) Immorality Act was amended pursuant to a report by a committee of the President's Council that stated that the Committee accepted that prostitution unfortunately cannot be eradicated by measures under the criminal law.⁴⁰⁴ The Committee, on the contrary, had evidence that penal sanctions do little, if anything, 'to make a hardened prostitute abandon her way of life'. The Committee therefore took cognisance of the fact that the most effective way of combatting prostitution would be to deal with the public manifestations under the criminal law and 'leave other manifestations to public opinion'.⁴⁰⁵

³⁹⁸ Betting Houses, Gaming Houses and Brothels Suppression Act 36 of 1902 (C); Act 31 of 1903 'To amend the Law relating to Brothels and Immorality' (N); Suppression of Brothels and Immorality Ordinance 11 of 1903 (O) [cited in Milton & Cowling *loc cit*].

³⁹⁹ See Milton & Cowling *op cit* E3-2 n 4 for an exposition of these provisions. Milton 'Unfair discrimination on the grounds of "gender, sex... [or] sexual orientation". How the Sexual Offences Act 1957 does it all' **SACJ** (1997) 297 notes that the Immorality Act 1927 was enacted, according to its long title, 'to prohibit illicit carnal intercourse between Europeans and natives'.

⁴⁰⁰ Act 23 of 1957.

⁴⁰¹ Section 10 of the Immorality Amendment Act 2 of 1988.

⁴⁰² The offences relating to prostitution are discussed *infra*.

⁴⁰³ 1988 (3) SA 545 (AD). The judgment is discussed in more detail below.

⁴⁰⁴ Report of the Ad Hoc Committee of the State President's Council on the Immorality Act (PC 1/1985) Par 4.13 cited in Milton & Cowling at E3-2 n 17.

⁴⁰⁵ *Ibid.*

6.7 In spite of this finding, Parliament decided to criminalise the provision of sexual services for reward, resulting in the enactment of section 20(1)(aA). Milton notes that the parliamentary debates around this issue revolved around moral considerations.⁴⁰⁶

6.8 It is significant to note that in spite of the introduction of section 20(1)(aA), the Act still stops short of stating that it is an offence to **be** a prostitute.⁴⁰⁷ The Act does not define the term 'prostitution' either, although it relies on the concept in the construction of various offences.⁴⁰⁸

6.9 In the following section, the offences relating to prostitution created by the Sexual Offences Act will be discussed in some detail. Section 20(1)(aA), being the primary enactment, will be dealt with first; all other offences are discussed in the order of their inclusion in the Act.

Unlawful carnal intercourse or indecent acts for reward

(a) The offence

6.10 Section 20(1)(aA) of the Act provides that any person who has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward commits an offence. The penalty is imprisonment for a period not exceeding three years with or without a fine not exceeding R6 000 in addition to such imprisonment.⁴⁰⁹

6.11 The offence consists of the following elements:⁴¹⁰

C Unlawfully

C Having carnal intercourse or committing an indecent act

⁴⁰⁶ *Idem* at 149. The author notes that the parliamentary member for Pietermaritzburg North characterised prostitution (together with homosexuality) as 'the first signs of a disintegrating community'; the member for Sandton rejected the possibility of licensing of prostitutes as 'opening a door to national degeneration', and the member for Roodeplaat expressed his satisfaction at the proscription of prostitution, stating that it 'was wrong for the prostitute to get away with it in the past'. (Debates of Parliament 15 February 1988 col 889, 891 and 893 cited in Milton *loc cit.*)

⁴⁰⁷ See discussion *infra*.

⁴⁰⁸ See, for example, the discussion of *procuring* *infra*.

⁴⁰⁹ Section 22(a) of Act 23 of 1957.

⁴¹⁰ Milton & Cowling *op cit* identify an additional element, i.e. being a prostitute. However, the position taken here is that the offence is not only committed by 'prostitutes' - see discussion *infra*.

- C For reward
- C *Mens rea*

6.12 These elements will be discussed in more detail *infra*.⁴¹¹

(b) **Unlawfulness**

6.13 Section 1 of the Act defines ‘unlawful carnal intercourse’ as ‘intercourse other than between husband and wife’. It should be noted that the Act does not criminalise **all** instances of unlawful carnal intercourse; such intercourse is only prohibited as a criminal offence when taking place under **certain specific circumstances**, i.e. unlawful carnal intercourse with young persons,⁴¹² or when performed for reward.

(c) **Carnal intercourse / indecent act**

6.14 Although the Act does not define the term ‘carnal intercourse’, Milton and Cowling explain that the term is generally understood to connote penetration of the female vagina by a male penis. Intercourse *per anum* would not be included in this definition.⁴¹³

6.15 The term ‘act of indecency’, which does not find definition in the Act, has been developed through judicial interpretation. In **S v C**,⁴¹⁴ the court explained this as follows:

‘Something is indecent if it offends against recognised standards of decency. The applicable standards are those of the ordinary reasonable member of contemporary society’.⁴¹⁵

6.16 The courts have accepted the dictionary definitions of ‘indecent’, namely ‘unbecoming; in extremely bad taste; unseemly; offending against propriety or decency; immodest; suggesting or tending to obscenity’.⁴¹⁶

⁴¹¹ For each of the offences under discussion here, the element of *mens rea* will not be discussed in detail, except where a specific aspect of this element is noteworthy.

⁴¹² Section 14 of the Act.

⁴¹³ The distinction is of academic importance for purposes of this definition, since anal intercourse performed for reward would in any event resort under the definition of an ‘indecent act’.

⁴¹⁴ 1992 (1) SACR 174 (W).

⁴¹⁵ At 175a-b.

⁴¹⁶ **S v C** 1978 (3) SA 978 (N) at 980.

6.17 This interpretation implies that the term ‘indecent’ as employed in the Act has a rather amorphous meaning, which will change in contents as times and mores change. The court in **S v C**⁴¹⁷ acknowledged the difficulties inherent in this concept:

‘I bear in mind that opinions may widely differ as to whether or not any particular action is indecent.’⁴¹⁸

(d) **Reward**

6.18 The term ‘reward’ in ordinary language can encompass both a monetary reward and other forms of compensation with pecuniary value, for example, clothing, food or accommodation.

6.19 Milton and Cowling point out that the use of such a wide construction of the term ‘reward’ would bring within the ambit of the prohibition ‘not only the professional prostitute receiving money from a client but also a mistress or lover receiving some gift or other recompense in consideration for sexual intercourse’.⁴¹⁹ For this reason, it is more satisfactory to limit the understanding of ‘reward’ as used in this context to ‘financial reward’.⁴²⁰

(e) **Who commits this offence?**

C **Is it an offence to be a prostitute?**

6.20 As stated earlier, the Anglo-American approach to prostitution regarded it as neither necessary nor appropriate to prohibit the *occupation* of prostitution.⁴²¹ Engaging in sexual intercourse for reward was accordingly not prohibited by penal sanction, and this approach also prevailed in South African legislation until 1988. However, as discussed *supra*, the amendment of the Act in 1988 to introduce section 20(1)(aA) changed this.

6.21 It should be noted that although section 20(1)(aA) effectively prohibits the core function of the prostitute’s work, it does not penalise ‘being’ a prostitute. This distinction

⁴¹⁷ 1992 (1) SACR 174 (W).

⁴¹⁸ At 175e.

⁴¹⁹ Milton & Cowling (*op cit*) at Par E3-86.

⁴²⁰ Milton & Cowling (*loc cit*) accordingly recommend that ‘reward’ should be construed as ‘pecuniary recompense’.

⁴²¹ Milton & Cowling (*op cit*) at E3-81.

is of more than academic significance, especially in the sphere of law enforcement. A person cannot be arrested for being known to the police as a prostitute – there has to be at least a reasonable suspicion that he or she had engaged in sexual intercourse or had performed an indecent act for reward (at a specified time with a specified person).⁴²² It is this aspect that makes enforcement of section 20(1)(aA) relatively time-consuming and labour-intensive.⁴²³

C **Is section 20(1)(aA) aimed at ‘professional’ prostitutes only?**

6.22 The wording of this section is broad enough to include any person (a spouse or lover) who receives a reward for engaging in sexual intercourse or an indecent act. Milton and Cowling are of the opinion that this literal meaning is too broad, and the provision should be strictly construed so as to be confined to those who ‘habitually and indiscriminately’ engage in sexual acts for reward.⁴²⁴

6.23 However, in **S v C**⁴²⁵ the court (per Van Dijkhorst J) expressly rejected this proposed narrow interpretation:

‘The wording of section 20(1)(aA) does not limit its offenders to the category of professional prostitutes. It clearly includes all who for reward have unlawful carnal intercourse or commit acts of indecency, the novice as well as the hardened streetwalker. Where the legislature intended to refer to prostitutes and their profession it did so explicitly, as is evidenced by ss 9(1)(b), 10(b) and (c), 12(3), 14(2)(a), 14(4)(a), 20(1)(a) and 21(3).’

C **Can the client of the prostitute also be charged with contravention of section 20(1)(aA)?**

6.24 There is some debate as to the ambit of section 20(1)(aA). Is it only the person who **accepts** the reward (the prostitute) who commits an offence, or also the client (the person who **gives** the reward)? According to Milton and Cowling, the provision only penalises the actions of the prostitute, and not the client. The authors base this conclusion on the wording of the section and say the subject is the person who performs a sexual act for reward ‘with any other person’. The authors therefore content that it is the person who

⁴²² This does not of course preclude the possibility of arrest on other charges related to prostitution, e.g. soliciting in contravention of s 20(1)(a) of the Act, or in terms of municipal by-laws.

⁴²³ See also Par 5.53 above.

⁴²⁴ Milton & Cowling (*op cit*) at E3-83.

⁴²⁵ 1992 (1) SACR 174 (W).

receives the reward who commits the offence, and the person who gives the reward (the 'other person') is not the subject of the prohibition.⁴²⁶

6.25 The Commission has already pointed out in its Discussion Paper 85 that it regards this aspect of the criminal prohibition of prostitution as a manifestation of the hypocrisy of a society which condemns and penalizes the actions of prostitutes, while their customers, who are ultimately responsible for the prevalence of this phenomenon, have neither slur, nor stigma, nor prosecution to fear.⁴²⁷

Keeping a brothel

(a) Background

6.26 Milton and Cowling explain that prior to 1885, brothels were allowed in terms of English legislation, unless they qualified as so-called 'bawdy houses'.⁴²⁸ Likewise, South African colonial common law did not object to brothel keeping, unless the manner in which the establishment was kept amounted to a public nuisance.⁴²⁹ However, from 1899 legislation was enacted in the Transvaal, Cape and later the other colonies to prohibit brothels.⁴³⁰ These provisions were repealed and essentially re-enacted in sections 2 to 8 of the Sexual Offences Act.

(b) The offence

6.27 Section 2 of the Act provides that any person who keeps a brothel shall be guilty of an offence. The penalty for contravention of this section is imprisonment for a period not exceeding three years with or without a fine not exceeding R6 000 in addition to such imprisonment.⁴³¹

6.28 The offence consists of the following elements:

C Keeping

⁴²⁶ Milton & Cowling (*op cit*) at E3-83 n 1. See also Discussion Paper 85 at Par 3.7.5.8 for opinion *contra*.

⁴²⁷ Discussion Paper 85 at Par 3.7.5.7.

⁴²⁸ Milton & Cowling (*op cit*) at E3-107.

⁴²⁹ *Ibid.*

⁴³⁰ *Idem* at E3-107 n 6 and authorities cited there.

⁴³¹ Section 22(a) of the Act.

- C A brothel
- C *Mens rea*

(c) **Keeping**

6.29 This element requires that the accused must have exercised some degree of management, supervision or control or a more or less permanent character.⁴³² The owner of the premises is not necessarily 'keeping' it: he or she must, in addition, control or supervise the operation of the brothel.⁴³³

6.30 Section 3 of the Act provides for an extension of the concept of 'keeping' by enumerating circumstances where certain persons (who may somehow be associated with the brothel but who would not normally be considered to be 'keeping') are deemed to be keeping the brothel.

6.31 The section lists the following persons:⁴³⁴

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

⁴³² Milton & Cowling (*op cit*) at E3-109 n 3 and the authorities cited there.

⁴³³ *Idem* at E3-109.

⁴³⁴ The scope of this Issue Paper does not permit a detailed analysis of each of these provisions. See in this regard Milton & Cowling (*op cit*) at E3-111 to E3-117.

6.32 It is clear from the above that even persons who are not physically present on the premises or controlling, supervising and managing the premises may in terms of this section be deemed to be keeping the brothel.

6.33 The effect of section 4 of the Act should also be noted. This section provides that in prosecutions under the Act, the onus of proving that a house or place is to be kept or used (or is being kept or used) as a brothel to the knowledge of the owner will be on the prosecution, provided that –

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

(b) proof of written notice having been given to the owner by a police officer not below the rank of sergeant or by two householders living in the vicinity of the house or place that such house or place is being kept or used as a brothel, shall be conclusive proof of knowledge on his part.

6.34 The Commission is of the opinion that these provisions clearly place a considerable onus on the accused person, which he or she would have to discharge in order to avoid conviction. For this reason, the provisions (and the ‘presumptions’ contained therein) may not pass constitutional scrutiny.⁴³⁵

(d) **A brothel**

6.35 A ‘brothel’ is defined in the Act as ‘any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or indecent purpose.’⁴³⁶ The concept of a ‘place’ is further defined as including ‘any field, enclosure, space, vehicle, or boat or any part thereof’.⁴³⁷ The Act therefore designates a **house** or **place** (as defined in the extended sense) as a brothel when it is kept or used -

⁴³⁵ See *S v Zuma and Others* 1995 (2) SA 642 (CC) and subsequent decisions. However, Spoelstra J reached a different conclusion in the *Jordan* matter. The court did not consider the potential impact of the ‘deeming’ provisions in section 3 of the Sexual Offences Act on the presumption of innocence.

⁴³⁶ Section 1 of the Act.

⁴³⁷ *Idem*.

- (a) For purposes of prostitution;
- (b) For persons to visit for purposes of unlawful carnal intercourse; and
- (c) For persons to visit for any other lewd or indecent purpose.

C **A house or place kept or used for purposes of prostitution**

6.36 It is necessary for the State to prove firstly that prostitution occurred at the house or place,⁴³⁸ and secondly that the establishment was kept or used **for this purpose**. This implies that a single isolated act of prostitution (or even a few isolated acts) will not qualify a house or place as a brothel.⁴³⁹

C **A house or place kept or used for persons to visit for purposes of unlawful carnal intercourse**

6.37 Milton and Cowling explain that this rather quaint provision seems to be aimed at what English law termed ‘bawdy’ or ‘disorderly’ houses:

‘Bawdy houses were places where “dissolute and debauched persons” were drawn together and by their behaviour disturbed the public peace, thereby becoming a public nuisance and liable to prosecution as such’.⁴⁴⁰

6.38 The authors further note that it is not every house or place where unlawful carnal intercourse occurs that will be regarded as a brothel, but rather those kept or used for purposes of ‘carnal connection for the purposes of prostitution’.⁴⁴¹ (A broad interpretation of this phrase would entail that the house of an unmarried couple living together and regularly having what according to the current version of the Act amounts to ‘unlawful carnal intercourse’⁴⁴² with each other would qualify as a ‘brothel’.)⁴⁴³

⁴³⁸ It is for this reason that so-called escort agencies that arrange for prostitutes to meet clients elsewhere for purposes of sexual acts are not brothels. See Milton & Cowling (*op cit*) E3-119 n 2.

⁴³⁹ *Idem* at E3-119.

⁴⁴⁰ *Idem* at E3-120 n 2.

⁴⁴¹ ***R v Louw and Woolf*** 1920 TPD 48 at 49 as cited in Milton & Cowling (*op cit*) at E3-120 n 4.

⁴⁴² The Sexual Offences Act defines ‘unlawful carnal intercourse’ as intercourse other than between husband and wife – s 1.

⁴⁴³ Milton & Cowling (*op cit*) at E3-120.

C **A house or place kept or used for persons to visit for any other lewd or indecent purposes**

6.39 This provision extends the traditional meaning of the term 'brothel' (viz a place visited for purposes of obtaining sexual intercourse) to places where sexual activity other than conventional sexual intercourse takes place.⁴⁴⁴ Therefore, masturbation of men in massage parlours has been held to constitute a 'lewd and indecent act', thus bringing the establishment within the purview of the definition of a 'brothel'.⁴⁴⁵ Similarly, performances involving female nudity or indecent poses were sufficient to result in the place being considered a brothel.⁴⁴⁶

(e) **Mens rea**

6.40 *Mens rea* is an element of the offence. According to Milton and Cowling, this implies that the State must prove that the accused knew, or at least foresaw, that the house or place was a brothel as defined in the Act.⁴⁴⁷

(f) **Additional measures to address brothel keeping**

6.41 The Act contains a number of additional measures aimed at the curtailment of brothel keeping. According to section 5 of the Act, any contract to let a house or place to be kept as a brothel shall be null and void. Section 6 provides that any contract of letting and hiring of any house or place that subsequent to the conclusion of such contract becomes a brothel will, as from the date of such event, become null and void. If the owner can provide proof that he or she was ignorant of the fact that the house or place was kept as a brothel, he or she will be entitled to recover the rent up to the date upon he or she became aware that the house or place was being kept as a brothel. The owner of a house kept as a brothel will also be entitled to apply to the magistrate of the district where such house is situated for the summary ejection of any person who may be keeping the house as a brothel. The magistrate will be entitled after enquiry to order the summary ejection of such person.⁴⁴⁸

6.42 Section 8 of the Act sets out measures that may be taken by to effect the

⁴⁴⁴ *Idem* at E3-121.

⁴⁴⁵ **S v P** 1975 (4) SA 68 (T).

⁴⁴⁶ **S v M** 1977 (3) SA 379 (C).

⁴⁴⁷ Milton & Cowling (*op cit*) at E3-122.

⁴⁴⁸ Section 7 of the Act.

arrest of the brothel keeper or to obtain a warrant for entry and search of the brothel. If sworn information is placed before a magistrate by certain persons or organisations that any house of place is being kept or used as brothel, the magistrate may issue a warrant for the arrest of the person alleged to be the brothel keeper,⁴⁴⁹ or may issue a warrant authorising entry into and search of the house, as well as seizure of certain items.⁴⁵⁰ The persons entitled to place such information before the magistrate are –

- (a) at least two ‘householders of good repute’ whose dwellings are in the vicinity of the brothel;
- (b) a police officer not below the rank of sergeant;
- (c) a welfare officer employed by department of state responsible for Health and Welfare, a local authority or a welfare organisation registered under the National Welfare Act 100 of 1978.

6.43 The warrant referred to above may authorise any police officer not below the rank of sergeant to –

- (a) enter the brothel at any time for the purpose of ascertaining the name and identity of the brothel keeper;
- (b) interrogate, and to demand the name and address of, any person found in the brothel; and
- (c) demand, search for, and seize any account book, receipt, paper, document or ‘thing’ likely to afford evidence of the commission by any person of an offence under the Act.⁴⁵¹

6.44 In terms of section 8(2) any person found in the brothel who, when called upon to do so by the police officer conducting the search, refuses to furnish his or her name and address or furnishes a name or address which is false in any material particular or refuses to disclose the name or identity of the brothel keeper of such house or place or to produce any book, receipt, paper, document or thing that he or she has in their possession or custody or under his control, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding R1 000 and in default of payment to imprisonment for a period not exceeding six months.

⁴⁴⁹ Section 8(1)(a) of the Act.

⁴⁵⁰ Section 8(1)(b) of the Act.

⁴⁵¹ Sections 8(1)(b)(i) – (iii).

Procuring

6.45 'Procuring' is the obtaining or recruitment of persons for purposes of their working as prostitutes. During the late 19th century, legislation was enacted in England aimed at the eradication of the so-called 'white slave trade'.⁴⁵² The provisions of the Victorian statute were subsequently replicated in South African legislation,⁴⁵³ and although the relevant provisions of the Act have undergone some modification, being no longer expressly directed at the protection of woman who are not prostitutes, they are still essentially based on the English statutory measures.

6.46 Offences relating to procuring are contained in sections 9 and 10 of the Act. Since section 9 specifically relates to procuring of children, this discussion will refer only to section 10 and other related provisions of the Act.⁴⁵⁴ Section 10 of the Act reads as follows:

Procuration

Any person who-

(a) procures or attempts to procure any female to have unlawful carnal intercourse with any person other than the procurer or in any way assists in bringing about such intercourse; or

(b) inveigles or entices any female to a brothel for the purpose of unlawful carnal intercourse or prostitution or conceals in any such house or place any female so inveigled or enticed; or

(c) procures or attempts to procure any female to become a common prostitute; or

(d) procures or attempts to procure any female to become an inmate of a brothel; or

(e) applies, administers to or causes to be taken by any female any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower her so as thereby to enable any person other than the procurer to have unlawful carnal intercourse with such female,

shall be guilty of an offence.

⁴⁵² The Criminal Law Amendment Act 1885 (as cited in Milton & Cowling (*op cit*) at E3-124) was enacted to combat the 'white slave trade'. It is now regarded as doubtful whether the phenomenon of white slavery (which entailed amongst other methods the luring of young girls into brothels under false pretences where they were seduced or raped and subsequently held under circumstances of economic bondage) was as prevalent or widespread as claimed by the highly sensational disclosures at the time. See also Par 3.28 *et seq* above.

⁴⁵³ See Milton & Cowling (*op cit*) at E3-124 n 2 and authorities cited there.

⁴⁵⁴ See Par 3.7.4 of Discussion Paper 85, where section 9 of the Sexual Offences Act is discussed.

6.47 In terms of this section, procurement of any woman for the following purposes or through the following means constitutes a criminal offence:

- C Procuring for sexual intercourse
- C Procuring for a brothel
- C Procuring to become a common prostitute
- C Procuring to become an inmate of a brothel
- C Procuring by stupefaction

An analysis of the different components of section 10 of the Act follows.

(a) Procuring for sexual intercourse

6.48 Section 10(a) of the Act provides that it is an offence for any person to procure or attempt to procure any female to have unlawful carnal intercourse with any person other than the procurer or in any way to assist in bringing about such intercourse. The elements of the offence are that the accused procured a female to have unlawful sexual intercourse.

6.49 The term 'procuring', in its ordinary meaning, means 'to produce by endeavour', and thus involves an element of persuasion, inducement or influencing.⁴⁵⁵ It is therefore essential for the accused to have played some active part in 'obtaining' the woman. Where, for example, the woman willingly engages in intercourse (and therefore does not have to be persuaded), there can be no procurement. Similarly, mere acquiescence on the part of the accused procurer in the intercourse taking place would not amount to procuring.⁴⁵⁶

6.50 The prohibition extends beyond the act of procuring to also include assisting 'in any way' to bring about the intercourse with the procured woman. This is aimed at penalising anyone who furthers the procurement or helps to bring it about.⁴⁵⁷

6.51 Since the provision expressly refers to the procurement of a '*female*', it follows that the offence will not be committed if the procured person is a man. It should be noted that in contrast with section 9 of the Act, there is no age limit set out in section 10: the

⁴⁵⁵ Milton & Cowling (*op cit*) at E3-126.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ *Idem* at E3-126 n 12 and examples cited there.

offence can therefore be committed in respect of a woman of any age.

6.52 The object of procuring the woman must be for her to have *unlawful carnal intercourse*, and therefore the offence is not committed if the woman is procured in order to engage in immoral or indecent acts other than such intercourse.⁴⁵⁸ The offence is committed only if the intercourse actually takes place, and also only if the intercourse takes place with someone other than the procurer.

(b) Procuring for a brothel

6.53 Section 10(b) of the Act provides that it is an offence to inveigle or entice any woman to a brothel for the purpose of unlawful carnal intercourse or prostitution or to conceal in any such house or place any female so inveigled or enticed. In addition, section 10(d) provides that it is an offence to procure or attempt to procure a woman to become an inmate of a brothel.

6.54 The offence created by section 10(b) of the Act takes two forms: (a) obtaining females for prostitution in brothels and (b) concealing the female in the brothel. 'Enticing' has been defined as 'alluring', 'beguiling' or 'petitioning', while 'inveigling' would have a related meaning suggesting an additional element of deception.⁴⁵⁹ The prohibition of concealing a woman in a brothel is aimed at conduct that would 'seek to prevent a female enticed into the brothel from being discovered and removed by family or officials'.⁴⁶⁰ It is committed by concealing the female in a place in the house or place which is the brothel.

(c) Procuring for common prostitution

6.55 Section 10(c) provides that it is an offence for any person to procure or attempt to procure a woman to become a common prostitute. The 'common prostitute'-element only will be discussed here.⁴⁶¹

6.56 It should be noted that the offence is not committed by procuring a woman to have unlawful carnal intercourse, but rather by procuring her to enter the trade of prostitution.

⁴⁵⁸ *Idem* at E3-128.

⁴⁵⁹ Milton & Cowling (*op cit*) at E3-134.

⁴⁶⁰ *Ibid.*

⁴⁶¹ The other elements have either been discussed elsewhere or do not require further elucidation.

6.57 The section specifies that the woman must have been procured to be a 'common' prostitute. Although there is no statutory definition for the term, it is understood to refer to persons who 'habitually ply the trade of a prostitute' as opposed to those who merely occasionally engage in prostitution.⁴⁶² It also follows that the offence is committed only if the woman concerned is not already a 'common' prostitute. Likewise, the offence is committed only if what the accused procured the woman for was 'common' prostitution.⁴⁶³

(d) To become an inmate of a brothel

6.58 Section 10(d) makes it an offence for any person to procure or attempt to procure a woman to become an 'inmate of a brothel'. In the absence of statutory definition, the term 'inmate' should be accorded its ordinary meaning. According to the Concise Oxford Dictionary⁴⁶⁴ this term has the following possible meanings:

- (a) an occupant of a hospital, prison, institution etc; or
- (b) an occupant of a house, especially one of several.

6.59 It therefore seems to denote (especially if the first meaning above is attributed to the term) an element of imprisonment or loss of autonomy, and could thus refer to the situation where the procured woman is not in a position to leave such brothel of her own volition. It should be noted that it is not required for the woman to become a prostitute, or to engage in unlawful carnal intercourse or acts of indecency. The mere fact of her being an 'inmate' would suffice.

(e) Procuring by stupefaction

6.60 Section 10(e) of the Act provides that it is an offence for any person to apply, administer to or cause to be taken by any female any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower her so as to enable any person other than the procurer to have unlawful carnal intercourse with her.

6.61 This offence is clearly aimed at the methods used by procurers to overcome resistance on the part of women being forced into prostitution. The offence is committed by the administration of substances that have the effect of rendering the woman incapable of

⁴⁶² Milton & Cowling (*op cit*) at E3-136.

⁴⁶³ *Ibid.*

⁴⁶⁴ 1995.

putting up resistance against physical force. Milton and Cowling are of the opinion that the offence would also be committed by binding, strapping or holding down the woman or otherwise restricting her physical movements.⁴⁶⁵

6.62 The section in question states that the purpose of the procurement should be for a person to have unlawful carnal intercourse with a woman. Since this phrase does not refer to 'unlawful carnal intercourse *for reward*' or to prostitution as such, the offence would strictly speaking be committed once such intercourse takes place, irrespective of whether the ultimate purpose of the procurement is to bring the woman into prostitution. However, Milton and Cowling suggest a different interpretation of this section:

'The gist of the offence is not, it is submitted, that the object of the accused's actions is that sexual intercourse with the woman should be achieved. Rather it is that the stupefaction or immobilisation is to enable the woman to be taken into prostitution'.⁴⁶⁶

Procuring by abduction

6.63 Section 12(1)(a) of the Act provides that it is an offence for any person to take or detain a woman against her will to or in or upon a house or place with intent that she may be unlawfully carnally known by any male, whether a particular male or not. The penalty is imprisonment for a period not exceeding 7 years.⁴⁶⁷

6.64 The element of 'taking' or 'detaining' requires that the accused performed some act amounting to either the transporting or conveying of the woman to the house or place in question. Alternatively, it requires that the accused's actions amounted to depriving the woman of the 'power or ability to depart from the premises'.⁴⁶⁸

6.65 Section 12(3) of the Act provides that the accused will be deemed to have detained a woman if he withholds any wearing apparel with intent to compel or induce her to remain in the place.

6.66 Milton and Cowling note that it is essential to allege and prove that the woman was either taken or detained against her will. If the woman went to the place

⁴⁶⁵ *Idem* at E3-133.

⁴⁶⁶ Milton & Cowling (*op cit*) at E3-133.

⁴⁶⁷ Section 22(e).

⁴⁶⁸ Milton & Cowling (*op cit*) at E3-138.

voluntarily or remained there voluntarily the offence is not committed.⁴⁶⁹ In this regard, a woman is presumed to be involuntarily at the place if she is under 16 years of age,⁴⁷⁰ or, being between 16 and 21 years of age she was detained against the will of her parents or person having lawful care or charge of her.⁴⁷¹

6.67 Similar to the provision in section 10(e), this section requires that the objective of the abduction or detention of the woman should be for her to be unlawfully carnally known by a man. This implies that the offence will be committed even where the intention is not *stricto sensu* to abduct the woman for purposes of forcing her into prostitution. Milton and Cowling again submit that it is not an element of the offence that intercourse should actually have taken place: the offence is complete once the taking or detention with the prescribed intent takes place.⁴⁷²

Facilitating prostitution: enabling communication for purposes of prostitution

6.68 The provisions of section 12A(1), and also to some extent, of section 20(1)(c) of the Act are aimed at the operation of so-called 'escort agencies'. These are establishments that, for a fee, introduce a client to an escort who will accompany the client for an agreed period. In some (we submit, the majority of) cases, there is unequivocal consensus that such accompaniment is aimed at the client contracting with the 'escort' for sexual services.

6.69 Milton and Cowling note that the legislature has created the offence of facilitating prostitution specifically to penalise the owners or managers of 'illegitimate' escort agencies who provide prostitutes to their customers.⁴⁷³

6.70 Section 12A(1) of the Act provides that any person who, with intent or while he or she reasonably ought to have foreseen the possibility that any person may have unlawful carnal intercourse, or commit an act of indecency, with another person for reward, performs for reward any act which is calculated to enable such other person to communicate with any such person commits an offence. The penalty is imprisonment for a period not

⁴⁶⁹ *Idem* at E3-138.

⁴⁷⁰ Section 12(2)(a).

⁴⁷¹ Section 12(2)(b).

⁴⁷² Milton & Cowling (*op cit*) at E3-138.

⁴⁷³ *Idem* at E3-143.

exceeding 5 years.⁴⁷⁴

6.71 Milton and Cowling explain that the accused commits this offence if he or she, with the prescribed *mens rea*, performs an act which is calculated to enable the client to communicate with the prostitute.⁴⁷⁵ Whether the accused has performed such an act will be determined by the objective consideration of whether what was done was calculated to achieve communication of one party with the other.⁴⁷⁶

6.72 The Act provides no definition for the term 'reward' as used in this subsection. Milton and Cowling are of the opinion that in this context the reward must be of a pecuniary nature.⁴⁷⁷

6.73 The inclusion of the phrase 'with intent' requires that the accused should not merely know that the one party is a prostitute but should in addition intend (which includes 'foreseeing') that the parties will engage in sexual acts for reward.⁴⁷⁸ This situation would arise where the accused provides the client with an escort on the explicit understanding that an act of prostitution will follow.

6.74 The section also includes the situation where there is no such explicit understanding, but where this possibility is not necessarily excluded. This appears to address the situation where the accused arranges for a person to be an escort without the question of sexual intercourse being raised but where the accused acts in a way that creates the possibility or opportunity for the parties to engage in sexual intercourse.⁴⁷⁹ The formulation of 'reasonably ought to have foreseen' therefore places the form of *mens rea* required here into the realm of *negligence* in addition to intention.

Soliciting

(a) Background

6.75 Milton and Cowling explain that the embarrassment or nuisance that may be

⁴⁷⁴ Section 22(d) of the Act.

⁴⁷⁵ Milton & Cowling (*op cit*) E3-146.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ Milton & Cowling (*op cit*) at E3-147.

⁴⁷⁸ *Idem* at E3-145.

⁴⁷⁹ *Ibid.*

caused to members of the public who become the subject of the methods used by prostitutes or their agents to advertise their services has led to statutory prohibitions upon 'soliciting' in public.⁴⁸⁰ English legislation enacted from 1824 onwards penalised various aspects of soliciting, and these legislative measures were also replicated in the South African colonies.⁴⁸¹ The different colonial statutes were eventually consolidated in section 19 of the Sexual Offences Act.

(b) **The offence**

6.76 Section 19(a) of the Act provides that any person who entices, solicits or importunes in any public place for immoral purposes commits an offence. The penalty is a fine not exceeding R400 or imprisonment for a period not exceeding two years or both such fine and imprisonment.⁴⁸²

6.77 The offence consists of the following elements:

- C Soliciting
- C In a public place
- C For immoral purposes
- C *Mens rea*

- C **Soliciting**

6.78 The *actus reus* of the offence consists in 'enticing', 'soliciting' or 'importuning'. Milton and Cowling explain these terms as follows:

- C 'Entice': This term connotes alluring or attracting by hope of pleasure, and involves a petitioning. Any offer or proposal made will involve an enticing.⁴⁸³
- C 'Solicit': In relation to prostitution, this term has been defined as 'accosting and importuning'. The term therefore indicates an approach to a person, which is accompanied by an asking or inviting in an earnest manner. It too denotes beguiling, alluring or petitioning.⁴⁸⁴

⁴⁸⁰ *Idem* at E3-88.

⁴⁸¹ *Idem* at E3-188 and authorities referred to there.

⁴⁸² Section 22(g).

⁴⁸³ *Idem* at E3-91 n 1 and authorities cited there.

⁴⁸⁴ *Idem* at E3-91 n 4-6 and authorities cited there.

C 'Importune': This term has a connotation of persistence and requires a repetition or insistence that it not necessarily present in the case of enticing or soliciting.⁴⁸⁵

6.79 The offence is therefore committed by a direct physical invitation by the accused person, and the accused has to be physically present in the public place. Whether an advertisement of the prostitute's availability will amount to a solicitation seems to depend upon whether the prostitute is present where the advertisement takes place.⁴⁸⁶

6.80 The soliciting may consist in words, gestures, signs or display. It is not necessary that the person solicited were aware of the solicitation.⁴⁸⁷

C **In a public place**

6.81 A public place in this context would be a place to which the public has access, whether of right or not.⁴⁸⁸

C **For immoral purposes**

6.82 The requirement of 'immoral purposes' here refers to *sexually* immoral purposes.⁴⁸⁹ The Appellate Division (as it then was) stated in *R v H*⁴⁹⁰ that it is impossible to define immorality in this sense, and that each case must be evaluated on its own facts. Based on this *dictum*, Milton and Cowling submit that the purpose of the solicitation must be to commit an act of a sexual nature that, according to contemporary standards of morality, is considered to be immoral.

(c) **Can the client be convicted of soliciting?**

6.83 Although prohibitions of soliciting were traditionally directed exclusively at the prostitute or the pimp,⁴⁹¹ section 19(a) refers to 'any person'. This implies that the prohibition

⁴⁸⁵ *Idem* at E3-91 n 7-9 and authorities cited there.

⁴⁸⁶ *Idem* at E3-91.

⁴⁸⁷ *Ibid.*

⁴⁸⁸ *Idem* at E3-92.

⁴⁸⁹ *Idem* at E3-93.

⁴⁹⁰ 1959 (4) SA 427 (A).

⁴⁹¹ See Milton & Cowling (*op cit*) at E3-88, where the authors list a number of English and colonial statutes specifically aimed at males.

applies to both to the prostitute and the pimp, and the question that arises is whether the client who solicits (either a prostitute or other persons) can also be charged with this offence.⁴⁹² The weight of authority seems to favour the view that persons who are not prostitutes, but wish to enter into a sexual transaction with a prostitute, commit the offence if they solicit another person (whether a prostitute or not) for this immoral purpose.⁴⁹³

Indecent exposure

6.84 Section 19(b) of the Act provides that any person who wilfully and openly exhibits him or herself in an indecent dress or manner at any door or window or within the view of any public street or place to which the public have access, commits an offence. The penalty is a fine not exceeding R4 000 or imprisonment for a period not exceeding two years or both such fine and imprisonment. This provision is implemented not only against prostitutes, but is also utilised for other instances of indecent exposure, such as ‘flashing’ (the ‘raincoat offence’).

6.85 There are circumstances in which it will not be unlawful to expose one’s person, for example, for reasons of personal safety⁴⁹⁴ or in the course of artistic or educational activities. However, the inclusion of the term ‘wilfully’ in the section indicates that mere negligence will not suffice. The offence will only be committed where the accused intends to be seen.⁴⁹⁵

C Exhibited

6.86 The requirement of ‘exhibiting’ implies the exposure of some part of the body. The term has been held to consist in a conscious display of the body for the purpose of it being viewed by members of the public.⁴⁹⁶

C Indecently

6.87 As stated above, the Act does not define the term ‘indecenty’, and the term must be understood in terms of the standards of the ‘ordinary reasonable member of

⁴⁹² Milton & Cowling (*op cit*) at E3-90.

⁴⁹³ See Milton & Cowling *loc cit* and authorities cited there.

⁴⁹⁴ Milton & Cowling (*op cit*) at E4-7 n 1 cite the example of where the clothes are on fire.

⁴⁹⁵ *Ibid.*

⁴⁹⁶ See **S v K** 1983 (1) SA 65 (C).

contemporary society’.

C Publicly

6.88 The offence can be committed –

- (a) at any door or window;
- (b) within view of any public street or place; or
- (c) in any place to which the public have access.

6.89 This formulation implies that it is not essential for the door or window where the exhibition takes place to be within the view of the public or a public place.

6.90 In relation to the second aspect, viz within view of a public street or public place, the test is whether the place is visible from the street or place: it is not essential that someone should have *actually seen* the accused.⁴⁹⁷

Living on the earnings of prostitution

(a) Background

6.91 The term ‘pimp’ may encompass a broad range of persons who are involved in certain activities relating to prostitution.⁴⁹⁸ These may consist in a person acting in managerial capacity and also providing the prostitute with protection and clients.⁴⁹⁹ The pimp may also manage the financial affairs of the prostitute and provide him or her with various other forms of support. It also occurs quite typically that landlords allow prostitutes to make use of their premises for visits by clients. The actions described above are generally penalised under the offence of ‘living off the earnings of prostitution’, since they are regarded as encouraging prostitution by making it possible for the prostitute to continue doing business.

6.92 The ambit of this offence was examined in detail in **S v H**.⁵⁰⁰ The respondent in this matter was arrested following an incognito visit by three police officials to an escort

⁴⁹⁷ Milton & Cowling (*op cit*) at 4-14.

⁴⁹⁸ See in this regard also Par 5.25 above.

⁴⁹⁹ *Idem* at E3-97.

⁵⁰⁰ 1988 (3) SA 545 (AD).

agency, where they engaged the services of three escorts (including the respondent *in casu*).⁵⁰¹ The escorts accompanied the three police officials to a caravan park, and during the course of the evening, each of the women agreed to have sexual intercourse with her partner for reward. Money changed hands. At a stage when the women had undressed and were about to fulfil their side of the agreement, they were arrested.

6.93 The three women were charged with contravention of section 20(1)(a) of the Sexual Offences Act, and the state alleged that they had unlawfully and knowingly lived wholly or partially on the earnings of prostitution, ‘to wit, by receiving money for the purposes of sexual intercourse’.

6.94 The defence raised on behalf of the three accused pleaded was one of law, i.e. that the provisions of section 20(1)(a) of the Act were directed at persons who parasitically live on the earnings of a prostitute, and not the prostitute herself. The court *quo* rejected this argument, and the accused were convicted. However, one of accused (the respondent before the Appellate Division) appealed to the (then) Transvaal Provincial Division of the Supreme Court, and her conviction and sentence were set aside.⁵⁰² The State in turn appealed against this finding.

6.95 On appeal, the Appellate Division (per Kumleben JA) examined the pre-Union enactments in the Transvaal, Cape, Orange Free State and Natal that preceded the introduction of section 20(1)(a).⁵⁰³ Significantly, each of these referred to ‘every **male** person’⁵⁰⁴ who knowingly lives wholly or in part on the earnings of prostitution ...” (with the exception of the Natal version, which applied to ‘every person’). Kumleben JA found that the reference to a male person made it clear that these enactments did not have the prostitute in mind, since a prostitute, in terms of the understanding prevailing at the time of promulgation of the Sexual Offences Act, was a **woman**.⁵⁰⁵ (The court added that although the use of the word ‘prostitute’ in reference to a male person had subsequently come to be recognised, this was not the case at the time that the Act had been promulgated.)⁵⁰⁶

6.96 Section 20(1)(a) therefore had to be interpreted against this background. The

⁵⁰¹ See 551D *et seq.*

⁵⁰² This judgment is reported as **S v H** 1986 (4) SA 1095 (T).

⁵⁰³ These were (as cited at 552A-G of the judgment) s 21(1)(a) of Ord 46 of 1903 (T); s 33(1) of Act 36 of 1902 (C); s 13(1)(a) of Ord 11 of 1903 (O); s 15(1)(a) of Act 31 of 1903 (N).

⁵⁰⁴ Our emphasis.

⁵⁰⁵ At 552G.

⁵⁰⁶ At 552H.

court remarked that had the legislature, with the promulgation of the Sexual Offences Act and the repeal of its predecessors, intended to change the essential character of the offence, it would not have done so by merely extending the range of persons to which the offence applied. (The court's finding was that the broadening of '**every male person**' in the preceding enactments to '**every person**' in the Act merely served to indicate that the offence of parasitically living on the earnings of prostitution could similarly be committed by a woman.) The appeal was accordingly dismissed.

(b) **The offence**

6.97 Section 20(1)(a) of the Act provides that it is an offence for any person knowingly to live wholly or in part on the earnings of prostitution. The penalty is imprisonment for a period not exceeding three years with or without a fine not exceeding R6 000 in addition to such imprisonment.⁵⁰⁷

C **Living on**

6.98 Milton and Cowling note that this section is directed against the exploitation of prostitution.⁵⁰⁸ The notion of 'living on' is construed widely so as to include not only that which 'maintains the life of the recipient' but also other purposes.⁵⁰⁹ Proof of this element therefore requires evidence relating to the nature of the accused's relationship with the prostitute, the accused's personal domestic circumstances and the nature, source and amount of the accused's income and cost of living.

6.99 In terms of section 21(3) of the Act, a person who is proved to have no visible means of support and who -

- (a) resides in a brothel
- (b) lives with a prostitute; or
- (c) habitually is in the company of a prostitute -
is deemed to be knowingly living wholly or in part on the earnings of prostitution.

6.100 The effect of this presumption is not only to establish that the accused lived

⁵⁰⁷ Section 22(a) of the Act.

⁵⁰⁸ Milton & Cowling (*op cit*) at Par E3-99.

⁵⁰⁹ *Ibid.*

on the earnings of prostitution, but also that he or she did so *knowingly*.⁵¹⁰

C **Earnings**

6.101 While the 'earnings' referred to here are usually received directly from the prostitute, it is sufficient that the money is given in consideration of the act of prostitution and can therefore be given directly to the accused by the client of the prostitute.⁵¹¹

6.102 Milton and Cowling submit that the concept of earnings is not confined to the wages for the service rendered, but should be more widely construed as 'profits or income produced by prostitution'.⁵¹²

C **Of prostitution**

6.103 There must be evidence that the earnings were received at a time when the other person was working as a prostitute. There must also be some more or less direct nexus between the earnings and the activities of the prostitute.⁵¹³

Public indecency

6.104 Section 20(1)(b) of the Act provides that any person who in public commits any act of indecency with another person is guilty of an offence. The penalty is a fine not exceeding R4 000 or imprisonment for a period not exceeding two years or both such fine and imprisonment.⁵¹⁴

6.105 The offence consists of the following elements:

- C In public
- C Commits an act of indecency
- C With another person
- C *Mens rea*

6.106 In the context of prostitution, this provision is often utilised against prostitutes

⁵¹⁰ Milton & Cowling (*op cit*) at E3-100.

⁵¹¹ *Idem* at E3-103.

⁵¹² *Ibid.*

⁵¹³ *Idem* at E3-104.

⁵¹⁴ Section 22(g) of the Act.

and clients who complete the sexual transaction in public (e.g. in a car parked within public view). This section is not only used against prostitutes.

Receiving remuneration for commission of act of indecency

(a) The offence

6.107 Section 20(1)(c) of the Act provides that it is an offence for any person, in public or in private, to assist in bringing about, or receive any consideration for, the commission by any person of any act of indecency with another person. The penalty is a fine not exceeding R4 000 or imprisonment for a period not exceeding two years or both such fine and imprisonment.⁵¹⁵

C Receiving consideration

6.108 Milton and Cowling observe that the gist of the offence appears to be that the accused receives the consideration in return for providing a person, place or opportunity for the commission of an indecent act by others.⁵¹⁶

C Act of indecency

6.109 It must be alleged and proved that two persons engaged in an act that was of an indecent nature. The act of indecency must have actually taken place.

Aliens Control Act 96 of 1991

6.110 Sections 39 and 45 of this Act are relevant to prostitution. Section 39(2) sets out that certain persons who enter or have entered the Republic shall be 'prohibited' persons for purposes of this Act. Subsection (2)(c) includes 'any person who lives or has lived on the earnings of prostitution or receives or has received any part of such earnings or procured or has procured persons for immoral purposes' in the list of prohibited persons.

6.111 Section 45 provides that any person who has been convicted of an offence referred to in section 58 or Schedule I or II in respect of which he or she has been sentenced to a fine of not less than R4000, whether or not with imprisonment as an alternative, or to

⁵¹⁵ Section 22(g) of the Act.

⁵¹⁶ Milton & Cowling (*op cit*) at E3-132.

imprisonment of a period of not less than 12 months, whether or not as an alternative to a fine, may be arrested and removed from the Republic under a warrant issued by the Minister. Schedule I to the Act lists public indecency, while Schedule II lists contravention of any provision of the Sexual Offences Act that constitutes an offence under that Act.

The Immigration Bill, 2001

6.112 At the time of writing, it is envisaged that the Immigration Bill (2001) will replace the Aliens Control Act.⁵¹⁷ Since the Immigration Bill imposes a different classification structure, its provisions will be briefly examined here.

6.113 Clause 23 of the Bill deals with 'prohibited' persons. The provisions of the current section 39(20)(c) of the Aliens Control Act have been omitted from the list of prohibited persons.

6.114 Clause 24 of the Bill sets out the system for classification as an 'undesirable' person. A foreigner may be declared undesirable if he or she has previous criminal convictions 'without the option of a fine for conduct which would be an offence in the *Republic*'.⁵¹⁸

6.115 Clause 26 of the Bill also makes provision for the Department to withdraw a permanent residence permit (*inter alia*) if its holder (a) within four years of the issuance of such permit, has been convicted of any of the offences listed in Schedule 1;⁵¹⁹ or (b) within twenty years of the issuance of such permit has been convicted three times of any of the offences listed in Schedules 1 and 2.⁵²⁰

⁵¹⁷ The Immigration Bill B79-2001 is currently serving before the National Assembly Portfolio Committee on Home Affairs (29 January 2002).

⁵¹⁸ Clause 24(1)(g) of the Bill.

⁵¹⁹ Schedule 1 lists treason, murder, rape, indecent assault, robbery, kidnapping, child-stealing, assault when a dangerous wound is inflicted, arson and any conspiracy, incitement or attempt to commit an offence referred to in this Schedule.

⁵²⁰ Schedule 2 lists sedition, public violence, culpable homicide, bestiality, malicious injury to property, breaking and entering any premises, theft, receiving stolen property knowing it to have been stolen, fraud, forgery or uttering a forged document knowing it to have been forged, offences relating to coinage, any offence the punishment of which may be a period of imprisonment exceeding six months without the option of a fine, any offence relating to the illicit possession, conveyance or supply of dependence producing drugs, and any conspiracy, incitement or attempt to commit an offence referred to in this Schedule.

Liquor Act 27 of 1989

6.116 Section 160 of this Act provides that it is an offence for the holder of an on-consumption licence to allow the licensed premises to be used as a brothel or to be frequented by persons who are regarded as prostitutes.⁵²¹ In addition, it is offence for such a licence holder to allow any person –

- (a) to perform an offensive, indecent or obscene act; or
- (b) who is not clothed or properly clothed, to perform or to appear, on a part of the licensed premises where entertainment or any nature is presented or to which the public has access.⁵²²

The Businesses Act 71 of 1991

6.117 The Businesses Act presents the enabling legislative framework for the issuing of business licences. Section 2(4)(a) provides that a licensing authority shall, subject to the provisions of subsection (6), issue a licence which is properly applied for unless in the case of a business referred to in item 1(1) or 2 of Schedule 1, the business premises do not comply with a requirement relating to town planning or the safety or health of the public of any law which applies to those premises.⁵²³ Item 2 of Schedule 1 relates to the provision of ‘certain types of health facilities or entertainment’, and includes providing massage or infra-red treatment⁵²⁴ as well as making the services of an escort, whether male or female, available to any other person.⁵²⁵

6.118 In addition, section 2(4)(b) further stipulates that in the case of a business referred to in item 2 of Schedule 1, the licensing authority must be satisfied that the applicant, whether or not he is or will be in actual and effective control of the business or if another person is or will be so in control, that other person, is not an unsuitable person to carry on the business, whether by reason of his character, having regard to any conviction recorded against him, his previous conduct or for any other reason.

6.119 The Businesses Act therefore allows for the granting of business licences, for

⁵²¹ Section 160(c).

⁵²² Sections 160(d)(i) and (ii).

⁵²³ Section 2(4)(6) deals with the imposition of conditions when issuing such a business licence.

⁵²⁴ Item 2(b).

⁵²⁵ Item 2(c).

example, to escort agencies or massage parlours, provided that the requirements of section 2(4) (read with the relevant municipal by-laws of other legal provisions relating to town planning of the safety or health of the public) are met.

Municipal By-laws

6.120 Municipal by-laws play an important role in the legal regulation of especially outdoor prostitution. These by-laws are often aimed at addressing the more visible (and thus, socially undesirable) aspects of *outdoor* prostitution.⁵²⁶ Two categories of by-laws may be distinguished in this regard:

a. 'General' by-laws that may have the practical effect of penalising certain activities related to prostitution, e.g. 'loitering',⁵²⁷ creating a public disturbance,⁵²⁸ or dressing indecently in public.⁵²⁹ It is significant to note that although these by-laws would potentially affect all persons, they are frequently enforced solely against prostitutes.

b. By-laws specifically aimed at prostitutes, e.g. 'loitering for purposes of prostitution'.⁵³⁰

⁵²⁶ See also Par 4.43 *et seq* above.

⁵²⁷ For example: Reg 15 of the Cape Divisional Council: Regulations for the Prevention and Suppression of Nuisances (promulgated by PN 321/1957 dated 17 May 1957, applicable to the Southern Peninsula) provides that no person shall sit or lie in or on any street or footpath; not shall any person stand, walk, loiter or congregate or otherwise act in such manner as to obstruct free traffic along any street or footpath or to jostle or otherwise annoy the public. Similarly, s 26(1) of the Standard By-Law relating to Streets (promulgated by PN 562/1987 dated 2 October 1987) provides that 'no person shall cause a nuisance to other persons by loitering, standing, sitting or lying in a street or public place'.

⁵²⁸ For example: s 26(2)(b) of the Standard By-Law relating to Streets (promulgated by PN 562/1987 dated 2 October 1987) provides that no person shall 'fight or act in a riotous manner'. S 26(2)(d) of this By-Law provides that no person shall annoy or inconvenience any other person by yelling, shouting or making any noise in any manner whatsoever.

⁵²⁹ For example: s 3(11) of the City of Pietermaritzburg General Bylaws provides that no person shall be in any street, road, thoroughfare in any public place within the public view without being decently clothed. S 24 of the City of Tygerberg: By-Law relating to Streets (promulgated by PN 88/1999 dated 26 February 1999) provides that no person shall appear in any street without being clothed in such manner 'as decency demands'.

⁵³⁰ For example: s 3(17) of the City of Pietermaritzburg General Bylaws provides that no person shall loiter in any street, road, thoroughfare or public place for the purpose of prostitution or solicit or importune any other person for such purpose. S 26(2)(f) of the City of Tygerberg: By-Law relating to Streets (promulgated by PN 88/1999 dated 26 February 1999) provides that no person shall solicit or importune any person for the purpose of prostitution or immorality.

6.121 There are also municipal by-laws affecting **indoor** prostitution. Where an escort agency or massage parlour endeavours to operate as a 'licensed' business, the municipal by-laws regulating businesses (prescribing, for example, zoning regulations, business hours, health requirements, etc), have to be complied with.⁵³¹ Again, these by-laws would apply to all businesses, and not only to those related to prostitution.

Constitutional aspects

6.122 The scope of this Issue Paper does not permit a comprehensive analysis of the constitutional implications of the current criminal prohibition of prostitution. Instead, the two matters pending before the Courts at the time of writing will briefly be analysed.

6.123 The case of **S v Jordan and Others**⁵³² resulted from a police 'sting' operation carried out in a brothel in Jorissen Street, Pretoria. Police officials entered the brothel under the guise of being clients, and subsequently arrested a number of women employed at the brothel for allegedly contravening section 20(1)(aA) of the Sexual Offences Act. In addition, the owner of the brothel, Ms Jordan, was arrested and charged with contravention of section 2 of the Act.

6.124 The second appellant was a salaried employee of the first appellant; she did duty as a driver and receptionist of the brothel (with full knowledge that the business was a brothel). She was accordingly deemed to be keeping a brothel by virtue of the deeming provisions in sections 3(b) and (c) of the Sexual Offences Act.

6.125 The three appellants pleaded not guilty in the court *a quo* and admitted the factual allegations against them. They raised the defence that sections 2, 3(b) and (c) and 20(1)(aA) were unconstitutional. They were subsequently convicted, and appealed against the convictions.

6.126 The Transvaal Provincial Division of the High Court (*per* Spoelstra J)⁵³³ held that section 20(1)(a) was inconsistent with the Constitution and therefore invalid. The court reached this conclusion through strong reliance on the *dictum* of the Constitutional Court in **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others**.⁵³⁴ Spoelstra J referred to the conclusion reached in this matter that the common law

⁵³¹ See discussion of the Businesses Act above.

⁵³² 2001 (10) BCLR 1055 (T); 2002 (1) SACR 17 (T).

⁵³³ Webster J concurring.

offence of sodomy was inconsistent with the constitution, and noted as follows:

'I do not find any reference in the judgment suggesting that if a male consents to sodomy for reward or some pecuniary benefit, such conduct falls outside the scope of the judgment. This being so, it cannot be contended that sexual relations conducted between a man and a woman in private constitutes criminal conduct merely because money changes hands.'⁵³⁵

6.127 The court found that most of the motivations that moved the Constitutional Court to its conclusion apply *mutatis mutandis* to the offence created by section 20(1)(aA). It also held that this provision is 'discriminatory', because of the following distinction:

'In principle there is no difference between a prostitute who receives money for her favours and her sister who receives, for rendering a similar service, a benefit or reward of a different kind, such as a paid-for weekend, a free holiday, board and lodging for a shorter or longer period, a night at the opera, or any other form of *quid pro quo*'.⁵³⁶

6.128 Dealing with the position of the second appellant, the court held that a brothel owner and brothel employee cannot rely on the same considerations that apply when the rights of the prostitute as an individual are inquired into.⁵³⁷ Spoelstra J made the following distinction:

'When prostitution becomes an organised business venture conducted by persons who profit from the prostitutes' activities, it is no longer a private affair between a man and a woman (or nowadays between any two persons), which takes place in private without directly affecting third parties. When it becomes a business openly carried on in business or residential areas or the streets or in buildings, the rights of every other citizen and therefore the community are affected'.⁵³⁸

6.129 The evidence placed before the court showed conclusively that the general public regards any form of prostitution with repugnance and disgust. All persons therefore have the right to be free of –

'... the risk of being accosted on a street by a prostitute or a pimp or of having to tolerate not only the disturbance of their peace of mind, their ethical or moral

⁵³⁴ 1999 (1) SA 6 (CC); 1998 (2) SACR 556 (CC); 1998 (12) BCLR 1517 (CC).

⁵³⁵ 2002 (1) SACR 17 at 21d-e; 2001 (10) BCLR 1055 (T) at 1058C-D.

⁵³⁶ 2002 (1) SACR 17 at 21f-g; 2001 (10) BCLR 1055 (T) at 1058D-E.

⁵³⁷ *Ibid.* The court refers, with apparent approval, to a quotation contained in the state's heads of argument from Abraham Flexner *Prostitution in Europe* (published in 1919) discussing this difference.

⁵³⁸ 2002 (1) SACR 17 at 22d-e; 2001 (10) BCLR 1055 (T) at 1059B-C.

serenity, dignity and tranquility, but also of being exposed to and having to endure all the byproducts that accompany such business, such as disorderly, disgraceful or disgusting conduct, drunkenness and drug abuse – to name but a few'.⁵³⁹

6.130 Spoelstra J further noted in respect of the prohibition of brothel-keeping contained in section 2 that this provision was clearly designed to discourage organised prostitution and to dissuade third persons from commercial exploitation of a prostitute and from living on or parasiting on the income earned by the prostitute.⁵⁴⁰

'This amount to trading in the body of a human being... Such conduct may offend the religious beliefs of some people, a particular group's sense of morality, or another's views on health, hygiene and the risks associated therewith of perhaps a group's dignity or even another's views on the social or economic consequences thereof...'.⁵⁴¹

6.131 In the court's view, where the rights of a considerable segment of the community are affected, individuals' rights (to the extent that one may postulate such rights in this instance) must yield to the rights of the majority of the community.⁵⁴² The court further notes that a third party managing a prostitute or prostitutes with their consent amounts to 'virtual trafficking in human beings', and comes to the conclusion that it cannot be said that the prohibitions contained in sections 2, 3(b) and (c) offend any person's constitutional rights. The appeal against the conviction of the first and second appellants was accordingly dismissed.

6.132 At the same time, an application has been lodged seeking a declaratory order from the Witwatersrand Division of the High Court to the effect that certain sections of the Sexual Offences Act are unconstitutional. This matter has its origin in the police raid conducted on The Ranch on 2 February 2001. Pursuant to this raid, the Assets Forfeiture Unit of the National Directorate of Public Prosecutions sought and obtained a preservation order in relation to the assets of The Ranch / Mr Phillips in terms of section 38(2) of the Prevention of Organised Crime Act.⁵⁴³

6.133 The Unit also subsequently brought a forfeiture application in respect of certain assets in terms of sections 48, 50 and 53 of the Prevention of Organised Crime Act.

⁵³⁹ 2002 (1) SACR 17 at 22f; 2001 (10) BCLR 1055 (T) at 1059D.

⁵⁴⁰ 2002 (1) SACR 17 at 23e-f; 2001 (10) BCLR 1055 (T) at 1060C.

⁵⁴¹ 2002 (1) SACR 17 at 23f-g; 2001 (10) BCLR 1055 (T) at 1060C-D.

⁵⁴² 2002 (1) SACR 17 at 23g-h; 2001 (10) BCLR 1055 (T) at 1060E.

⁵⁴³ Act 121 of 1998.

This application is currently still pending. In addition, the Unit obtained *ex parte* a restraint order compelling surrender of assets in terms of section 26 of the Prevention of the Organised Crime Act. The Witwatersrand Local Division of the High Court (per Heher J) subsequently ruled against Philips.⁵⁴⁴

6.134 The basis of the declaratory order sought by Philips is his averment that the definition of ‘unlawful carnal intercourse’ violates certain provisions of the Constitution.⁵⁴⁵ This definition is at the core of the Act, and underlies various other provisions, including the definition of a ‘brothel’⁵⁴⁶ as well as the creation of certain offences such as soliciting⁵⁴⁷ and performing sexual acts for reward.⁵⁴⁸ Consequently, since the provisions creating these offences are inseparable from the definition of ‘unlawful carnal intercourse’, a finding that this definition is inconsistent with the Constitution also condemns the accompanying provisions.⁵⁴⁹

6.135 Apart from this attack based on the definition of ‘unlawful carnal intercourse’ the applicant also submits that the provisions in question ‘independently’ violate various rights as set out in the Constitution.⁵⁵⁰

Other legal principles relating to prostitution

(a) Claim for loss of breadwinner

6.136 The fact that prostitution is regarded as illegal implies that dependants of a prostitute would not have a claim for loss of the breadwinner in the event of the death of the prostitute through the intention or negligence of another person. This was stated clearly in ***Booyens v Shield Insurance Co Ltd***.⁵⁵¹

‘On the other hand it is difficult to conceive that our Courts would allow the husband or child of a deceased prostitute to recover compensation for loss of support based

⁵⁴⁴ See ***National Director of Public Prosecutions v Phillips and others*** 2001 (2) SACR 542 (WLD).

⁵⁴⁵ Par 13.1 of Phillips’ Founding Affidavit. The provisions in question are section 9(3), 12(2), 14 and 18 of the Constitution.

⁵⁴⁶ As contained in section 1 of the Sexual Offences Act.

⁵⁴⁷ Section 19(a).

⁵⁴⁸ Section 20(1)(aA).

⁵⁴⁹ Par 13.2 – 13.7 of Phillips’ Founding Affidavit.

⁵⁵⁰ *Idem* at Par 13.2 – 13.8.

⁵⁵¹ 1980 (3) SA 1211 (SE).

on the claim that during her lifetime she had maintained them - and would have continued to maintain them - on the proceeds of her prostitution.⁵⁵²

(b) Unemployment Insurance Benefits

6.137 Prostitutes who are employed in the formal sector (for the most part, in indoor agencies) cannot access unemployment insurance either for purposes of maternity benefits or for unemployment benefits as such.⁵⁵³

(c) Proof of income

6.138 The fact that prostitution is illegal also means that when prostitutes are called on to produce proof of income (for example, when applying for credit facilities or a home loan), they are unable to furnish such proof for fear of exposing themselves to prosecution.⁵⁵⁴

(d) Income tax liability

6.139 It is often assumed that since prostitution is criminalised in South Africa, prostitutes and managers of prostitution-related businesses are not liable for paying income tax. However, it is trite law that an amount obtained by illegal means is not *per se* immune from being gross income and therefore liable for tax.⁵⁵⁵ The current position is therefore that prostitutes *are* liable as tax payers (in spite of the illegal nature of their income).⁵⁵⁶ In practice, the fact that prostitution largely operates 'underground' implies that it is extremely difficult for the South African Revenue Service to hold workers in this industry accountable for income tax.

6.140 According to recent media reports, the SA Revenue Service has embarked on a strategy to investigate and 'sign up' new taxpayers in the higher-income part of the

⁵⁵² At 1217H.

⁵⁵³ See the definition of 'contributor' in section 2 of the Unemployment Insurance Act 30 of 1966. This Act has now been repealed by the Unemployment Insurance Act 63 of 2001 (which is not yet in operation).

⁵⁵⁴ See in this regard Pauw and Brener (*op cit*), Leggett (*op cit*).

⁵⁵⁵ 'It is trite law that an amount obtained by illegal means is not *per se* immune from being gross income but, we would submit, it must be obtained in the course of an operation of business in carrying out a scheme of profit making, ie receipts and accruals are revenue if they are not fortuitous but designedly sought for and worked for': **ITC 1624**, delivered by Wunsh J, President on 1 March 1996.

⁵⁵⁶ See e.g. **CIR v Delagoa Bay Cigarette Co Ltd** 1918 TPD 391, 32 SATC 47; **BC v COT** 1958 (1) SA 172 (SR), 21 SATC 353; **COT v G** 1981 (4) SA 167 (ZA), 43 SATC 159.

prostitution industry as part of a general strategy to target the informal sector.⁵⁵⁷ It is estimated that the prostitution industry is worth R250 million a year in taxes.⁵⁵⁸

(e) Defence to charge of contravention of section 14 of the Sexual Offences Act 23 of 1957

6.141 According to section 14(2)(a) of the Sexual Offences Act, it will be a sufficient defence to a charge under subsection (1)⁵⁵⁹ if 'it shall be made to appear to the court' that the girl at the time of the commission of the offence was a prostitute, that the person so charged was at the said time under the age of 21 years and that it is the first occasion on which he is so charged'.

6.142 Section 14(4) creates a similar defence where a woman is charged with contravention of section 14(3)⁵⁶⁰ (the latter section is the 'gender inverse' of section 14(1)).

6.143 It is significant to note that this defence is not included in the draft Sexual Offences Bill included in the Commission's Discussion Paper 85.⁵⁶¹

(f) Rules of evidence

⁵⁵⁷ See in this regard F Haffajee 'Pretty vatable woman' *Financial Mail* (8 December 2000) at 38.

⁵⁵⁸ *Ibid.*

⁵⁵⁹ Section 14(1) of the Sexual Offences Act creates the following offence:

'Any male person who -

- (a) has or attempts to have unlawful carnal intercourse with a girl under the age of 16 years; or
- (b) commits or attempts to commit with such a girl or with a boy under the age of 19 years an immoral or indecent act; or
- (c) solicits or entices such a girl or boy to the commission of an immoral or indecent act, shall be guilty of an offence.'

⁵⁶⁰ Section 14(3) of the Act reads as follows:

'Any female who-

- (a) has or attempts to have unlawful carnal intercourse with a boy under the age of sixteen years; or
- (b) commits or attempts to commit with such a boy or with a girl under the age of 19 years an immoral or indecent act; or
- (c) solicits or entices such a boy or girl to the commission of an immoral or indecent act, shall be guilty of an offence'.

⁵⁶¹ See Par 9.13.3.3 for the discussion of sexual offences with children, which includes the provisions of section 14 of the Sexual Offences Act.

6.144 Judicial officers historically regarded the credibility of evidence given by prostitutes with suspicion. Hoffmann and Zeffert note a number of judicial observations on the unreliability of the evidence of prostitutes.⁵⁶² The authors however explain that prostitution does not 'necessarily' involve dishonesty:

'[I]t is impossible to generalise about the extent to which a witness's credibility will be affected by her following this mode of life. All that can be said is that in matters affecting her own sex life it is a factor which should lead the trier of fact to be cautious in accepting her evidence.'⁵⁶³

6.145 While these remarks were made before the amendment of section 227 of the Criminal Procedure Act (which regulates the admissibility of the previous sexual history of the complainant in a charge related to sexual assault), it is submitted that this attitude towards the credibility of prostitutes in the past pervaded judicial assessment.⁵⁶⁴

Summary

6.146 The current provisions of the Sexual Offences Act are largely modelled on English statutes. Prior to the enactment of section 20(1)(aA) in 1988, the Act did not prohibit prostitution *per se*. This section was inserted in the Act subsequent to the decision in **S v H**,⁵⁶⁵ which dealt with the offence of living on the earnings of prostitution. (The Appellate Division held *in casu* that this offence did not apply to prostitutes themselves.)

6.147 In addition to proscribing the performance of sexual acts for reward, the Sexual Offences Act also prohibits brothel-keeping, and contains a number of 'deeming' or presumptive provisions aimed at facilitating the prosecution of the offence of brothel-keeping.

6.148 The Sexual Offences Act prohibits the recruitment of persons for purposes of prostitution in the form of various offences of procuring.

6.149 Furthermore, the Act also prohibits the following:

⁵⁶² LH Hoffmann & D Zeffert *The South African Law of Evidence* (1988) 4th ed at 584 n 19 and authorities cited there.

⁵⁶³ At 584.

⁵⁶⁴ See e.g. **S v M and Another** 1977 (4) SA 886 (A) at 892G.

⁵⁶⁵ 1988 (3) SA 545 (AD).

- C Facilitating prostitution
- C Soliciting
- C Indecent exposure
- C Living on the earnings of prostitution
- C Public indecency
- C Receiving remuneration for commission of act of indecency.

6.150 Section 14(2) of the Sexual Offences Act, which deals with sexual acts with young persons, states that it will be a defence to a charge of contravening section 14(1) that the girl at the time of the commission of the offence was a prostitute, that the person charged with the offence was under the age of 21 years and that it was the first time occasion on which he was so charged.⁵⁶⁶

6.151 The Aliens Control Act and the Liquor Act both contain provisions relating to prostitution.

6.152 Various aspects of prostitution are also regulated by means of municipal by-laws. These by-laws may take the form of either general or 'prostitution-specific' provisions. Municipal by-laws apply to both the indoor sector (usually in the form of measures relating to business licenses) and the outdoor sector.

6.153 The two constitutional challenges to the Sexual Offences Act current before the South African courts revolve around the provisions of sections 20(1)(aA), 2 and 3 of the Act and the definition of 'unlawful carnal intercourse' as contained in the definition clause respectively.

6.154 Other legal principles relevant to prostitution include tax liability, the implications of the illegality of prostitution and the evaluation of prostitutes' evidence.

⁵⁶⁶ The converse also applies to section 14(4)(a) in relation to the offences set out in section 14(3).

CHAPTER 7

FRAMEWORK FOR CONSIDERATION OF LEGAL OPTIONS: INTERNATIONAL AND COMPARATIVE REVIEW

Introduction

7.1 This Chapter attempts to establish a frame of reference for the consideration of different legal models to address prostitution. In the first section, the norms and principles of international human rights law relating to prostitution are set out. In the second section, the legal measures adopted in a number of foreign jurisdictions are explored.

Prostitution and international human rights law

7.2 Significantly, prostitution is predominantly addressed in instruments addressing various aspects of women's rights. This Chapter accordingly examines the Trafficking Convention as well as a number of specialised 'women's rights' instruments to establish how prostitution is addressed.⁵⁶⁷

(a) **The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)**⁵⁶⁸

7.3 This Convention set out to consolidate the preceding instruments on the suppression of the white slave trade and traffic in women and children.⁵⁶⁹ The Preamble sets the normative framework of the document by declaring that –

'... prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community'.

7.4 The Convention requires states parties to punish any person who, 'to gratify the passions of another' procures, entices or leads away another person, for purposes of prostitution, even with the consent of that person.⁵⁷⁰ Persons who exploit 'the prostitution of

⁵⁶⁷ This Chapter deals only with the treatment of *prostitution* in international human rights law; trafficking is examined in detail in Chapter 9 below. Some degree of overlap between the two concepts is unavoidable.

⁵⁶⁸ Hereinafter the 'Trafficking Convention'.

⁵⁶⁹ See also Par 3.28 *et seq* above.

⁵⁷⁰ Article 1(1).

another person' are also to be punished, even where this occurs with the consent of the exploited person.⁵⁷¹ Neither 'prostitution' nor 'exploitation' is defined. In addition, states parties agree to punish certain acts relating to brothel-keeping.⁵⁷²

7.5 In terms of article 6, states parties agree to take measures to repeal or abolish any existing laws or policies by virtue of which persons who engage in or are suspected of engaging in prostitution are subject either to special registration or to the possession of a special document or to any exceptional requirements for supervision or notification.

7.6 The Convention requires states parties to take or to encourage, through their public and private educational, health, social, economic and other related services, measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution.⁵⁷³

7.7 States parties undertake, in connection with immigration and emigration, to adopt or maintain such measures as are required, in terms of their obligations under the present Convention, to check the traffic in persons of either sex for the purpose of prostitution.⁵⁷⁴

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

7.9 The Convention has the subject of considerable criticism from various perspectives. On the one hand, it has been criticised for its predominantly abolitionist⁵⁷⁵ approach to prostitution.⁵⁷⁶ On the other hand, modern abolitionists have called for the amendment of the Convention in order to unequivocally define prostitution per se as a violation of human rights and to call for its complete abolition.

⁵⁷¹ Article 1(2).

⁵⁷² Article 2(1) and 2(2).

⁵⁷³ Article 17.

⁵⁷⁴ Article 17.

⁵⁷⁵ 'Abolitionism' is described below in Par 10.8 *et seq.*

⁵⁷⁶ See e.g. Bindman's analysis (*loc cit*).

7.10 The predominant point of difference between these two schools of thought appears to be around the ideological approach of the Convention, and the question as to whether the document makes a distinction between **forced** and **voluntary** prostitution. Reanda, for example, states that this distinction was formalised in international law through the 1949 Convention and its predecessors, which regard prostitution as a human rights violation only if it involves overt coercion or exploitation.⁵⁷⁷ According to this view, the Convention is limited, falling short of condemning all prostitution as a human rights violation.

7.11 On the other hand, Doezema argues that the distinction between forced and voluntary prostitution, as currently understood, had no relevance at the time of drafting of the international instruments concerned.⁵⁷⁸ The very notion of 'voluntary' prostitution was inimical to the abolitionist views prevailing at the time, and the notion of the prostitute as agent, who willingly chooses her occupation was unimaginable.⁵⁷⁹ This analysis supports the conclusion that the 1949 Convention, in line with abolitionist thinking, views prostitutes as victims; it does not recognise the right of an individual to work as a prostitute.⁵⁸⁰ The UN Special Rapporteur on Violence Against Women prefers this interpretation.⁵⁸¹

7.12 A further fundamental problem is that the Convention makes no provision for international supervision: it merely requests states parties to annually communicate to the Secretary-General of the UN laws and other measures adopted to give effect to the Convention.⁵⁸² Article 21 directs the Secretary-General to 'periodically' publish this information and send it to all member and non-member states of the UN.

7.13 In 1974, the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Economic and Social Council established a Working Group on Contemporary Forms of Slavery.⁵⁸³ The mandate of this Working Group includes the task of reviewing developments in the field covered by the slavery and trafficking conventions.⁵⁸⁴ Although the Working Group is empowered to receive and publicly review information on trafficking, it lacks a mandate to take action on the reports due to the fact that the Group is

⁵⁷⁷ Reanda (*op cit*) at 210. See also LL Lim 'The economic and social bases of prostitution in Southeast Asia' in LL Lim (ed) **The Sex Sector** (1998) at 15.

⁵⁷⁸ Doezema (*op cit* note 21) at 38.

⁵⁷⁹ *Ibid.*

⁵⁸⁰ Lim (*loc cit*).

⁵⁸¹ UN Special Rapporteur Report 2000 at Par 24.

⁵⁸² Article 21. See in this regard UN Special Rapporteur Report 2000 at Par 26.

⁵⁸³ Sub-Commission Res. 11 (XXVII) of 21 August 1974, cited in Reanda (*op cit*) at 213.

⁵⁸⁴ See Reanda (*op cit*) at 211-213 for an exposition of the preceding history.

not a mechanism for overseeing the implementation of the instruments concerned.

7.14 The potential impact of the Convention has been further reduced by the fact that it has received little international support: it has been ratified by only 73 states.⁵⁸⁵ Less than half of the states parties submit their annual reports as required in terms of Article 21.⁵⁸⁶

7.15 In addition to the points of criticism outlined above, the UN Special Rapporteur on Violence Against Women has also noted that by limiting the definition of trafficking to prostitution, the Convention excludes vast numbers of women from its protection (given the fact that trafficking is undertaken for a myriad of purposes, including but not limited to prostitution).⁵⁸⁷ This is symptomatic of a generally inadequate treatment of trafficking.⁵⁸⁸ In terms of the latter point of criticism, the recent development of the Trafficking Protocol is significant.⁵⁸⁹

(b) **Other Human Rights Instruments**

C **Convention on the Elimination of All Forms of Discrimination Against Women**

7.16 Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women reads as follows:

‘States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.’

7.17 It should be noted that this article does not require the suppression of **prostitution per se**, but rather of the **exploitation of prostitution**. This supports a reading that Article 6 does not regard all instances of prostitution as inherently coercive.⁵⁹⁰ In this regard, it is significant to note that when the text of the Convention was being drafted, Morocco put forward a proposal for the amendment of Article 6, which would call for the abolition of prostitution in all its forms (suppression of prostitution in addition to the

⁵⁸⁵ As of 15 June 2001. At present there are 13 signatories that have not yet ratified. South Africa signed the Convention on 16 October 1950 and ratified on 10 October 1951.

⁵⁸⁶ UN Special Rapporteur Report 2000 Par 26. See also Reanda (*op cit*) at 214.

⁵⁸⁷ UN Special Rapporteur Report 2000 at Par 22. See also Chapter 9 below.

⁵⁸⁸ See UN Special Rapporteur Report 2000 at 23-25.

⁵⁸⁹ The Protocol is discussed in Chapter 9 below.

⁵⁹⁰ Doezema (*op cit*) at 39.

suppression of the **exploitation** of prostitution, as the text currently reads).⁵⁹¹ The proposed amendment was opposed by Netherlands and Italy, and ultimately rejected.⁵⁹²

7.18 The interpretation that the Convention does not call for the suppression of prostitution *per se* is sustained by General Recommendation No 19 on violence against women prepared by the Committee on the Elimination of Discrimination Against Women.⁵⁹³ CEDAW remarks that in addition to established forms of trafficking in women, new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries and organised marriages between women from developing countries and foreign nationals have developed. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity, and put women at special risk of violence and abuse.⁵⁹⁴ It is significant that prostitution *per se* is not included in this list of exploitative practices.

7.19 CEDAW then proceeds to specifically address prostitution, and recognises the economic basis of prostitution:

‘Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalise them. *They need the equal protection of laws against rape and other forms of violence.*⁵⁹⁵

7.20 Again, the distinction between voluntary and forced prostitution is not expressly made in the text of the Recommendation. However, it is noteworthy that this document does not call for measures to eliminate the institution of prostitution, but rather focuses on the protection of individual rights of prostitutes.⁵⁹⁶

7.21 This theme of the protection of individual rights is further elaborated on where states parties are called on to describe in their reports the measures, including penal provisions, preventive and rehabilitation measures that have been taken to protect women engaged in prostitution or subject to trafficking and other forms of sexual exploitation.

⁵⁹¹ See Doezema (*op cit*) at 39, also UN Special Rapporteur Report at Par 28.

⁵⁹² Doezema (*op cit*) at 39.

⁵⁹³ This Committee [hereinafter referred to as ‘CEDAW’] oversees the implementation of the Women’s Convention.

⁵⁹⁴ Par 14.

⁵⁹⁵ Par 15. Our emphasis.

⁵⁹⁶ See in this regard also Doezema (*op cit*) at 40.

7.22 CEDAW has also commented on women in prostitution in the context of health. The Committee notes in its General Recommendation No 24 that while biological differences between women and men may lead to differences in health status, there are societal factors which are determinative of the health status of women and men and which can vary among women themselves.⁵⁹⁷ For this reason, CEDAW recommends that special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, which include women in prostitution.⁵⁹⁸

7.23 Furthermore, CEDAW identifies the issues of HIV/AIDS and other sexually transmitted diseases as central to the rights of women and adolescent girls to sexual health.⁵⁹⁹ As a consequence of unequal power relations based on gender, women and adolescent girls are often unable to refuse sex or insist on safe and responsible sex practices, and they are accordingly exposed to the risk of contracting HIV/AIDS and other sexually transmitted diseases. Women in prostitution are also particularly vulnerable to these diseases.

7.24 States parties should therefore ensure, without prejudice and discrimination, the right to sexual health information, education and services for all women and girls, including those who have been trafficked, even if they are not legally resident in the country.⁶⁰⁰

C Declaration on the Elimination of Violence Against Women

7.25 The Declaration on the Elimination of Violence Against Women includes 'trafficking in women and **forced prostitution**'⁶⁰¹ in its definition of violence against women.⁶⁰² The measures required of states under the Declaration do not expressly refer to prostitution, although some of the provisions may arguably have specific relevance for women prostitutes. For example, the Declaration requires states to take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitise them to

⁵⁹⁷ General Recommendation No 24, Par 6.

⁵⁹⁸ CEDAW also lists migrant women, refugee and internally displaced women, the girl child and older women, indigenous women and women with physical or mental disabilities as 'vulnerable and disadvantaged groups' in this context (at Par 6).

⁵⁹⁹ Par 18.

⁶⁰⁰ *Ibid.*

⁶⁰¹ Our emphasis.

⁶⁰² Article 2(b).

the needs of women.⁶⁰³

C **Beijing Declaration and Platform for Action**

7.26 The Beijing Platform for Action includes **forced** prostitution and trafficking in its definition of violence against women.⁶⁰⁴ The measures that should be taken by governments to address violence against women therefore apply to forced prostitution and trafficking as well. In addition, the UN Special Rapporteur on violence against women is invited to address, as a matter of urgency, the issue of international trafficking for the purposes of the sex trade, as well as the issues of forced prostitution, rape, sexual abuse and sex tourism.⁶⁰⁵

7.27 Doezema recounts that at the 1995 UN Fourth World Conference on Women in Beijing, activists from the Network on Sex Work Projects and the Global Alliance on Trafficking in Women lobbied to ensure that all mention to prostitution as a form of violence against women in the final conference document should be prefaced by the word 'forced'.⁶⁰⁶ She also explains that because the draft conference document did not make mention of 'sex workers' human rights', it was impossible to introduce this concept at the Conference.⁶⁰⁷

(c) **UN Responses to prostitution**

7.28 At present, there appears to be no integrated and co-ordinated UN policy regarding prostitution.⁶⁰⁸ Different UN instruments and bodies have taken different ideological stances, and contradictory positions are even encountered within the same body or agreement.⁶⁰⁹

7.29 Certain UN organisations, such as UNESCO and the Working Group on

⁶⁰³ Article 4(i).

⁶⁰⁴ Par 113(b) of the Beijing Platform.

⁶⁰⁵ The reports by the Special Rapporteur are dealt with below.

⁶⁰⁶ At 34.

⁶⁰⁷ *Ibid.* See in this regard also A Murray 'Debt-bondage and trafficking: Don't believe the hype' in Kepadoo & Doezema (eds) **Global Sex Workers: Rights, Resistance and Redefinition** (1998) at 51-52.

⁶⁰⁸ Doezema (*op cit*) at 41.

⁶⁰⁹ See Doezema (*op cit*) at 41 n 36. This statement is illustrated by the Beijing Platform: while the document itself notes only 'enforced prostitution' in its definition of violence against women, it also calls for the implementation of the 'abolitionist' 1949 Trafficking Convention.

Contemporary Forms of Slavery, argue that prostitution itself is a human rights violation.⁶¹⁰ Significantly, the 1949 Convention is placed alongside the Slavery Conventions for consideration by the latter Working Group.⁶¹¹

7.30 On the other hand, the UN Special Rapporteur on Violence Against Women has indirectly dealt with the issue of prostitution in her reports on trafficking in women.⁶¹² In her 1997 report, the Rapporteur observed that –

‘Some women become prostitutes through ‘rational choice’, other become prostitutes as a result of coercion, deception or economic enslavement.’

7.31 Although this is not stated explicitly in the Rapporteur’s reports, a careful reading of her reports shows a clear distinction between enforced and voluntary prostitution. In the case of the latter, states are not called on to take steps to eradicate or suppress prostitution *per se*. Rather, she noted with concern the impact of repressive legal measures on the rights of women working in prostitution. An example is the recent report on economic and social policy and its impact on violence against women, where the Rapporteur makes the following observation:

‘Where prostitution is not legal, women are unprotected by labour laws. This means that they have no guarantee of being able to work in a safe environment and they have no right to social security. They have no right to reject clients and if they experience abuse, they have no means to take action against the abusers. It may not be possible for the women to decide on the use of condoms and thus they may be exposed to sexually transmitted diseases (STDs).’⁶¹³

(d) **Summary: international human rights law**

7.32 The discussion above indicates that the Trafficking Convention remains the main instrument in international human rights law dealing with prostitution.

⁶¹⁰ The Working Group on Contemporary Forms of Slavery was established in 1974 by the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Economic and Social Council – Sub-Commission Res. 11 (XXVII) of 21 August 1974, cited in Reanda ‘Prostitution as a human rights question: Problems and prospects of United Nations action’ *Human Rights Quarterly* Vol 13 No 2 (May 1991) at 213. See Reanda *loc cit* at 204-205 for a brief exposition of the position taken by UNESCO.

⁶¹¹ Bindman *op cit* at Par 2b.

⁶¹² Ms Radhika Coomaraswamy was appointed as the Special Rapporteur on Violence Against Women to the Commission on Human Rights in 1993.

⁶¹³ Par 51.

7.33 The above analysis indicates that recent international human rights instruments distinguish between ‘forced’ and ‘voluntary’ prostitution. The former is regarded as a form of violence against women, and states are accordingly expected to take measures to punish and eradicate forced prostitution.⁶¹⁴ On the other hand, there is a recognition that women who voluntarily enter and remain in prostitution are rendered vulnerable to a range of violations of their basic rights.

7.34 At present, there is no international instrument that explicitly condemns as such the abuse of human rights of prostitutes who were not ‘forced’.⁶¹⁵ It is therefore significant that CEDAW, in addition to its implied recognition of the fact that not all prostitution is inherently exploitative, observes that the vulnerability of prostitutes to violence is exacerbated by the marginalisation that results from the fact that their status is unlawful.⁶¹⁶ The right to equal protection of the law is specifically enumerated.

7.35 The Special Rapporteur on Violence Against Women also makes this link between the increased marginalisation of prostitutes (due to the illegal status of prostitution) and the denial or violation of prostitutes’ rights in her recent report.

Foreign Jurisdictions

7.36 It should be noted as a point of introduction to this section that a comparison with other jurisdictions, which should normally be undertaken with caution, becomes even more difficult in the area of prostitution. This is due to the fact that certain of the jurisdictions bearing a similarity to South African in terms of their constitutional framework (for example, the United States, Canada and Germany) differ vastly from the South African scenario in terms of socio-economic environments.

7.37 Kilvington *et al* draw attention to the fact prostitution is not only affected by legislative reform but also by changes in the social and economic situation locally and internationally.⁶¹⁷ For example, the number of single parents and the reduction in state benefits to young persons and to refugees in many European countries are likely to increase

⁶¹⁴ The Women’s Convention, the Violence Declaration and the Beijing Platform (discussed above).

⁶¹⁵ Doezema (*op cit*) at 41.

⁶¹⁶ Although this statement is made in the context of the Women’s Convention, and therefore pertains to *women* prostitutes, the Committee accepts that is also applicable to the position of male and transgendered prostitutes.

⁶¹⁷ J Kilvington *et al* ‘Prostitution Policy in Europe: a time of change?’ at 4.

the number of persons available for work in prostitution.⁶¹⁸

7.38 Additional factors have altered the 'structure' of the prostitution industry, and create a broader context within which changes in policy in Europe must be understood:

- Increased mobility into and within Western Europe, partly as a result of greater freedom of movement within the European Union and with migration from poorer Southern and Eastern European countries has created a large and transient sector within the industry.
- Travel for work and pleasure, along with consumerism in general, has increased opportunities for clients to purchase sex.⁶¹⁹

7.39 The jurisdictions examined in this section were selected on the basis of the specific legal models employed, as well as the availability of information about the practical impact of these legal measures. Specific emphasis was placed on jurisdictions that have recently made changes in their legal approach towards prostitution,⁶²⁰ or where innovative strategies are under consideration (for example, in the case of San Francisco, US). This analysis was complicated by the fact that countries do not necessarily follow one system: 'hybrid' approaches occur, consisting of a combination of, for example, both criminalisation and legalisation.⁶²¹

7.40 Although recent literature setting out the impact of specific legal strategies followed in First World countries abounds, information about the legal aspects of prostitution in sub-Saharan Africa is far less readily available.⁶²² This has also had a limiting effect on this comparative section.

⁶¹⁸ While these observations were made in relation to Europe, they are also appropriate to the South African situation.

⁶¹⁹ *Ibid.*

⁶²⁰ The information in this section is based on A Meerkotter ***We Work with Our Bodies*** (Gender Project, SWEAT and Legal Resources Centre, In press).

⁶²¹ The US state of Nevada, discussed below, is a case in point.

⁶²² Kempadoo remarks: 'For the most part, contemporary writers on sex work construct the prostitute / sex worker from testimonies and analyses that are derived from struggles of "First World" women in the United States and Western Europe. While all these writings are important in uncovering prostitute politics and identities in some parts of the world, and certainly contribute to a fuller apprehension of sex work, without historicization and geo-political contextualization, they run the risk of universalizing the subject from bounded locations and experiences. Lacking any analysis of international relations and notions of differing cultural constructions and meaning of sexuality and gender, this body of literature appropriates the "non-western" women's experience without any investigation into the matter.' Kempadoo *op cit* at 13.

(a) **United States of America**

7.41 Prostitution is predominantly dealt with in legislation on **state** rather than federal level. At present, prostitution is criminalised everywhere in the US except in the state of Nevada.⁶²³ In spite of this prohibition, there is a proliferation of prostitution and related businesses across the US.

7.42 There are generally three types of prostitution statutes:⁶²⁴ those punishing the prostitute but not the client (for example, Kentucky),⁶²⁵ those that punish both but are stricter towards the prostitute (for example, Colorado),⁶²⁶ and those that criminalise the behaviour of prostitutes and clients alike (for example, Idaho).⁶²⁷

7.43 Where statutes are gender neutral or provide some punishment for clients, enforcement of these laws frequently occurs on a selective basis.⁶²⁸ Women continue to be arrested more often, and prosecuted and sentenced more harshly than their clients. Lefler points out that most states traditionally incarcerate or fine prostitutes, while merely issuing citations to the clients.⁶²⁹

C **Nevada**

7.44 Since 1973, local communities in Nevada have been allowed to legalise prostitution. This does not imply that prostitution in general is legal: prostitution, solicitation,

⁶²³ See Bingham *op cit* 69 n 1, listing the relevant state legislation.

⁶²⁴ J Lefler 'Shining the spotlight on johns: moving towards equal treatment of male customers and female prostitutes' *Hastings Women's Law Journal* (1999) at 17.

⁶²⁵ Prostitution is an offence in terms of Chapter 59 § 20 of the Kentucky Revised Statutes. Patronising a prostitute is not penalised. In terms of Chapter 529 § 90(1) of the Kentucky Revised Statutes (which came into effect in 1998) if a person is convicted of prostitution or procuring, they must undergo testing for HIV and other STI's. The results may be made available to medical personnel, the appropriate state agencies and the courts. § 90(3) provides that where a person commits, offers or agrees to commit prostitution whilst knowing that they tested positive for HIV and there is a chance of transmission, such person would be guilty of a Class D felony (as opposed to a Class B misdemeanour, which applies to a conviction of 'ordinary' prostitution in terms of § 20).

⁶²⁶ § 201 of Title 18, Article 7 of the Colorado Statutes provides that a person convicted of prostitution is guilty of a Class 3 misdemeanour. In terms of § 205 patronising a prostitute is a Class 1 petty offence.

⁶²⁷ § 13 of Title 18, Chapter 56 of the Idaho Statutes provide that prostitution is a misdemeanour offence. A third or subsequent conviction results in a felony conviction. § 14 contains the same provision in relation to the offence of patronising a prostitute.

⁶²⁸ Lefler *op cit* at 19.

⁶²⁹ *Ibid.*

pandering and living from the earnings of a prostitute remain criminal offences.⁶³⁰ An exception is made in respect of prostitution and solicitation of prostitution if it occurs within a licensed house of prostitution.⁶³¹ The cities of Las Vegas and Reno both prohibit prostitution within the city limits, and accordingly the operation of brothels near these cities has been very profitable.⁶³²

7.45 Given the fact that the choice whether or not to allow prostitution is left to individual counties, variations occur among the local ordinances regarding prostitution. Four counties prohibit prostitution, six ban prostitution in the unincorporated areas of the country, and seven counties permit prostitution in the county.⁶³³

7.46 There are also variations among the counties that permit prostitution in terms of the specific regulations applicable within each county. These regulations entail rules concerning health, licensing and other issues relating to prostitution.⁶³⁴ The most heavily regulated area is health.

7.47 Both the Nevada statutes and the Nevada Administrative Code⁶³⁵ require persons engaged in prostitution to submit to HIV testing. Anyone who is arrested for violating § 201.354 of the Nevada Revised Statutes (which prohibits engaging in prostitution or solicitation except in a licensed house) is required to submit to a State Board of Health HIV test and receive the results.⁶³⁶

7.48 In addition to these provisions, the Nevada Administrative Code contains a number of requirements specifically aimed at prostitutes. For example, the Code directs a person seeking employment as a prostitute in a licensed house of prostitution to submit to a series of tests for HIV, syphilis and gonorrhoea.⁶³⁷ Once employed, a prostitute must undergo monthly HIV and syphilis tests and weekly gonorrhoea and chlamydia tests.⁶³⁸ In

⁶³⁰ §§ 201.354, 201.300, and 201.320 of Nev Rev Stat.

⁶³¹ § 201.354. § 244.345(8) allows for a person to seek a licence to engage in the business of a house of prostitution in a county whose population is less than 400,000.

⁶³² Bingham *op cit* at 86.

⁶³³ *Idem* at 88 and authorities cited there.

⁶³⁴ *Idem* at 88.

⁶³⁵ The Administrative Code contains the rules and regulations for implementation of the statutes.

⁶³⁶ § 201.356(1). If the arrested person is subsequently convicted, he or she must pay \$100 to cover the costs of the test.

⁶³⁷ Nev Admin Code § 441A.800.

⁶³⁸ Nev Admin Code § 441A.805.

addition, the Code expects a person working as a prostitute in a licensed house to require clients to use a latex prophylactic.⁶³⁹

7.49 A person who engages in prostitution, including a prostitute in a licensed brothel, after testing positive for HIV is guilty of a class B felony and will be punished by imprisonment for a minimum of 2 and a maximum of 10 years, a fine of \$10,000 or both.⁶⁴⁰ This provision is clearly aimed at persons who continue to engage in prostitution after testing positive for HIV. (Bingham points out that the penalty of imprisonment will do little to protect a prostitute who works in a licensed brothel from being exposed to a client who is HIV positive and either does not know it, or does know but continues to frequent legal brothels).⁶⁴¹

7.50 In terms of the different legal models discussed below,⁶⁴² it is therefore clear that Nevada generally follows a policy of **criminalisation**, although local communities may permit a highly controlled type of prostitution to exist in a limited geographical area.⁶⁴³ Where counties do accordingly permit prostitution, this is done under a system of **legalisation**: prostitution is allowed only in licensed houses of prostitution, and prostitutes must comply with, for example, mandatory health tests. Bingham summarises the position as follows:

‘State and local statutory systems are not a recognition of prostitution as a viable employment option for anyone who chooses it. Instead, these systems are an attempt to control an illegal activity that will not be eradicated despite the efforts of officials.’⁶⁴⁴

7.51 It is significant to note that most of the prostitution occurring in Nevada takes place in the illegal sector. Street prostitutes in the large cities are still more numerous than legal prostitutes in brothels, indicating that the system of legalisation with its strict control has neither reduced prostitution nor brought the industry under state control.⁶⁴⁵

7.52 Prostitutes working within the legal brothels have to concede a considerable degree of personal autonomy. Since they are considered to be ‘independent contractors

⁶³⁹ New Rev Stat § 441A.805.

⁶⁴⁰ Nev Rev Stat § 201.358.

⁶⁴¹ Bingham *op cit* at 90.

⁶⁴² See Chapter 10 below.

⁶⁴³ Bingham *op cit* at 92.

⁶⁴⁴ *Idem* at 93.

⁶⁴⁵ *Ibid.*

(rather than full-time employees),⁶⁴⁶ they do not share the benefits of health care, vacation pay, retirement benefits or any of the other benefits and rights that 'workers' have.⁶⁴⁷

7.53 Prostitutes are required to live in the brothels while working,⁶⁴⁸ and they also have to pay for room and board, maid services, supplies (including condoms), mandatory tipping for house employees, laundry services and twenty dollars for the weekly venereal disease check-up.⁶⁴⁹

7.54 Prostitutes in legal brothels have little or no say in choosing their customers or deciding the number of hours they work.⁶⁵⁰ A typical shift in a brothel is twelve to fourteen hours a day, every day for three weeks. Baldwin refers to this legalised system as 'sex assembly lines'.⁶⁵¹

7.55 Bingham adds that while legal prostitutes in Nevada no longer suffer the stigma of being criminals, they are stigmatised by the licensing scheme and the widespread belief that prostitutes are the source of disease.⁶⁵² The regulations requiring mandatory testing for HIV and other STI's perpetuate the image of the prostitute as a transmitter of the disease, and constitute an ineffective method of reducing the spread of the disease.⁶⁵³ Anderson recounts that many brothels prevent prostitutes from seeing doctors of their own choosing, and her experience with the 'house' doctors has often been of rushed examinations for inflated prices.⁶⁵⁴

7.56 Although legal prostitutes and those arrested for illegal prostitution or solicitation are subjected to mandatory HIV testing, clients who make use of the services of licensed prostitutes are not subjected to any tests. While legal prostitutes may therefore have more medical check-ups than most illegal prostitutes and non-prostitutes, these mandated check-ups are intended to protect the client from infection by a prostitute, not the

⁶⁴⁶ Although most prostitutes are regarded as independent contractors by brothel operators, they do not have the control or freedom that independent contractors would ordinarily have – see L. Anderson 'Working in Nevada' [Internet].

⁶⁴⁷ Bingham *loc cit.*

⁶⁴⁸ Anderson *op cit.*

⁶⁴⁹ Bingham *op cit* at 94.

⁶⁵⁰ Baldwin *op cit* at 106-107. See also Anderson *op cit.*

⁶⁵¹ Baldwin *op cit* at 106.

⁶⁵² Bingham *op cit* at 94-95.

⁶⁵³ *Ibid.*

⁶⁵⁴ Anderson *op cit.*

other way round.⁶⁵⁵

C The San Francisco Task Force on Prostitution

7.57 The San Francisco Task Force on Prostitution was initially formed in March 1994 by a member of the San Francisco Board of Supervisors in order to consider options for legalisation of prostitution.⁶⁵⁶ The mandate was eventually widened to investigate 'prostitution patterns and practices' in the City, as well as current social and legal responses.⁶⁵⁷ The Task Force was further requested to recommend social and legal reforms that would best respond to the City's needs while using City resources more efficiently.⁶⁵⁸

7.58 The twenty-eight person Task Force consisted of Health Department representatives, legal advisors from the Public Defender and District Attorney's Offices, a representative from a State Senator's office as well as health outreach rights groups, neighbourhood/ merchant groups and prostitutes' rights activists.⁶⁵⁹

7.59 The final report, submitted to the Board of Supervisors in 1996, makes recommendations in the following areas: laws and law enforcement, costs of prostitution law enforcement in San Francisco in 1994, health, safety and services, quality of life concerns, labour policy issues, immigration and youth issues. While the recommendations made in each of these areas are of potential significance in the current discussion, the recommendations relating to laws and law enforcement are specifically instructive. These were –

C Repeal unconstitutional Municipal Police Codes.⁶⁶⁰

C Immediately stop enforcing and prosecuting misdemeanour and felony laws against

⁶⁵⁵ Bingham *op cit* at 96.

⁶⁵⁶ See Leigh *op cit* at 63 for a detailed account of the early history of the Task Force.

⁶⁵⁷ **San Francisco Task Force Final Report: Executive Summary**, reproduced in Leigh *op cit* at 65.

⁶⁵⁸ *Ibid.*

⁶⁵⁹ Leigh *op cit* at 63. When it became clear that the majority of the Task Force favoured decriminalisation over a 'law and order' approach, the six representatives from the neighbourhood / merchant groups resigned.

⁶⁶⁰ The City Attorney of San Francisco had been approached for an opinion on Municipal Code Sections 215 to 248. These provisions, many of which either duplicated state laws or were vague and archaically written, were occasionally used to arrest suspected prostitutes, although they were usually discharged before going to court. The City Attorney accordingly determined that the provisions were unconstitutional and should be repealed. See **San Francisco Task Force on Prostitution: Final Report**, reproduced in Leigh *op cit* at 67-68.

prostitution. Dismiss all current prosecutions in order to begin immediately reallocating resources.

- C Respond directly to complaints of excessive noise, littering and trespassing by enforcing ordinances specific to those complaints. The police should not use any laws to harass suspected prostitutes.
- C Vigorously enforce laws against coercion, blackmail, kidnapping, restraining individual's freedom of movement, fraud, rape and violence regardless of the victim's status of sex worker.
- C Redirect resources currently allocated to police investigation, incarceration, prosecution and defence of sex workers to augment resources for housing, outreach and other services for these populations.
- C Curtail expenditures for police investigations of prostitution venues where there are no accompanying complaints, including hotels, cafes and bars.
- C Remove authority for the licensing of massage parlours, masseuses and masseurs and escort services from the Vice Crime Division's jurisdiction and place it with agencies already qualified to grant other standard business licences.
- C Provide training and circulate directives to Police Department and Sheriff's Department personnel to eliminate harassment and abuse of prostitutes by law enforcement personnel.
- C Provide training to improve the ability of the District Attorney's office to successfully prosecute cases of rape and other assault in which prostitutes and other sex workers are the victims.
- C Authorise City lobbyists to identify legislators who will commit to carrying legislation towards the following goals:
 - Repeal state laws that criminalise engaging in, agreeing to or soliciting prostitution, or laws and policies which can be interpreted to deny freedom of travel, and the right to privacy of prostitutes.
 - Repeal state laws that can be interpreted to deny freedom of association, or which criminalise prostitutes who work together for safety.
 - Repeal mandatory HIV testing and felony enhancements of HIV positive prostitutes.
 - Repeal minimum mandatory sentencing laws for second and subsequent convictions.

7.60 The San Francisco Task Force therefore recommended **decriminalisation** of prostitution. While recognising that the state laws against prostitution could not be amended unilaterally by the city of San Francisco, the recommendation was to place an immediate moratorium on arrests and prosecutions in terms of such state legislation, and to also work

with the state legislature with a view to repealing the state laws.⁶⁶¹

7.61 The Task Force also dealt with community concerns relating to littering, traffic congestion and other forms of 'public nuisance' arising from outdoor prostitution. Neighbourhood and business association representatives on the Task Force sponsored two community forums, where residents expressed their views on street prostitution.⁶⁶² Interestingly, despite their concerns about traffic, noise and other problems, residents supported decriminalisation or legalisation of prostitution. They expressed frustration at the money spent on attempts to address prostitution that could not be used for much needed neighbourhood improvements.

7.62 The majority of the Task Force came to the conclusion that decriminalisation of prostitution would be the best way to address the concerns of both constituencies (i.e. residents and prostitutes). Residents' valid concerns about the quality of life could be resolved by focusing not on prostitution itself, but the perceived 'fallout' or side effects of street prostitution.⁶⁶³ However, no consensus was reached regarding mutually beneficial solutions: after the Task Force had been meeting for nearly a year, six neighbourhood / merchant organisation representatives resigned following a Task Force vote in favour of decriminalisation.

7.63 Certain of the 'legal' recommendations (set out above) also address quality of life concerns, e.g. the recommendations that law enforcement agents should respond directly to complaints of excessive noise, littering and trespassing by enforcing ordinances specific to those complaints.

(b) **Sweden**

7.64 The number of persons involved in prostitution in Sweden is relatively small: in Sweden there are approximately 2,500 prostitutes in a population of 8.5 million (0.3 per 1,000).⁶⁶⁴ The prostitution trade is barely visible, with most prostitutes working in massage parlours, escort agencies and private apartments. Outdoor or street prostitution is restricted to a few small areas.⁶⁶⁵ For the last twenty years, the approach in Sweden was to condone

⁶⁶¹ **San Francisco Task Force Final Report**, reproduced in Leigh *op cit* at 67.

⁶⁶² **San Francisco Task Force Final Report**, reproduced in Leigh *op cit* at 80-81.

⁶⁶³ **San Francisco Task Force Final Report**, reproduced in Leigh *op cit* at 82.

⁶⁶⁴ Kilvington et al *op cit* at 8.

⁶⁶⁵ A Pehrson and L Jessen *op cit* estimate that street prostitution makes up about 1/3 of the total amount of prostitution with the remaining 2/3 being accounted for by indoor prostitution –

the prostitute-client transaction, but to impose harsh-penalties on prostitution-related activities such as pimping.⁶⁶⁶ In addition, various (government funded) social service programmes were instituted for women who wanted to leave the industry. This policy has therefore concentrated on addressing prostitution as a social problem.⁶⁶⁷

7.65 In 1995 the Swedish Prostitution Commission proposed new legislation, and in 1998, after intensive public debate, a decision was made to target male clients buying sexual services only. The Swedish government argued that it was not reasonable to punish the person who sells the sexual service, since in most cases this person is in a weaker position and is exploited by those 'who want only to satisfy their own sexual drives'.⁶⁶⁸

7.66 Accordingly, in January 1999 Chapter 23 of the Swedish Penal Code came into effect, making it illegal to **buy** sexual services (thus criminalising clients). Paying or offering to pay for sex is regarded as illegal and punishable by a fine or 6 months' imprisonment.⁶⁶⁹ The new law forms part of a series of legislative changes targeting a reported increase in violence against women, particularly in the number of assaults and various forms of sexual offences.⁶⁷⁰ The government made the following statement:

'The government is however of the view that criminalisation can never be more than a supplementary effort in the efforts to reduce prostitution and cannot be a substitute for broader social exertions.'⁶⁷¹

7.67 While it may be somewhat premature to assess the full impact of the new legislation, early indications are that the new law has failed to keep prostitutes and their clients off the streets. Initially the law resulted in an immediate decline in the number of prostitutes working visibly on the streets: in cities such as Stockholm and Gothenburg, the numbers decreased from about 20-30 women per night to 1-3.⁶⁷² Kilvington *et al* caution that this reduction in numbers is unlikely to reflect a move out of prostitution altogether.⁶⁷³ This

EUROPAP Northern Region Report 2000.

⁶⁶⁶ Meerkotter *op cit* at 38.

⁶⁶⁷ Kilvington *et al loc cit*.

⁶⁶⁸ 'Violence Against Women: Government Bill 1997/98:55' Fact sheet from the Swedish Government Offices (September 1998) at 2. [Internet]

⁶⁶⁹ Meerkotter *op cit* at 39.

⁶⁷⁰ Fact sheet from the Swedish Government Offices at 1.

⁶⁷¹ Fact sheet from the Swedish Government Offices at 2.

⁶⁷² Kilvington *et al op cit* at 12.

⁶⁷³ *Ibid*.

assessment is borne out by an increase in prostitution in hotels and restaurants. Many prostitutes have been encouraged to switch to other 'high-tec' forms of client networking, such as working with cell phones and computers.⁶⁷⁴ Street prostitutes (who are now potential criminal witnesses) complain that they must now work later and more irregular hours in order to escape the attention of the police.⁶⁷⁵

7.68 It is instructive to note that the new legislation brought an allocation of \$1,5 million to police for enforcement. However, no extra allocations were made to social services. In practice, police and prosecutors have indicated that in spite of the large enforcement budget, they have difficulties in implementing the legislation due to the fact that entrapment is illegal. In the first nine months of 1999, only three clients were found guilty and fined.⁶⁷⁶

7.69 Swedish organisations commenting on the law reform process have said that repressive prostitution legislation neither deters women from entering prostitution, nor protects the fundamental rights of women in prostitution. On the contrary, it is claimed that the clandestine and illegal nature of prostitution as such denies women access to legal mechanisms to defend themselves against abuse and violence. They argue that the criminalisation of clients will only add to the stigmatisation and marginalisation of prostitutes and will make working conditions less safe. Project workers in Sweden offering support, advice, information and counselling to prostitutes have found it increasingly difficult to contact prostitutes.⁶⁷⁷

7.70 Significantly, the numbers of male clients attending the KAST project, a project that offers advice, support and counselling to the buyers of sexual services, have not changed since the commencement of the new legislation.⁶⁷⁸

7.71 The Swedish experiment has been widely discussed in other Nordic countries, and the Danish and Finnish governments recently decided not to adopt the new policy of criminalising clients.⁶⁷⁹

⁶⁷⁴ E Bernstein "Why can't the US be like Sweden (or Holland) II": Europe as social policy utopia' Europe 2020: 12th International Conference of Europeanists (2000).

⁶⁷⁵ *Ibid.*

⁶⁷⁶ Kilvington *et al loc cit.* Bernstein (*op cit*) recounts that two of these clients confessed after being literally caught in the act. (In one of the cases, the man went to the police himself after he claimed that a prostitute stole his car radio.)

⁶⁷⁷ Kilvington *et al (op cit)* at 14.

⁶⁷⁸ *Idem* at 12.

⁶⁷⁹ *Idem* at 16.

(c) **The Netherlands**

7.72 It is estimated that there are approximately 25,000 persons working in prostitution in the Netherlands (1,6 persons per 1,000).⁶⁸⁰ Prostitution is organised in a variety of ways. There is the well-known ‘window prostitution’, where workers sit behind a large window to be visible from the street, in Amsterdam and several other cities.⁶⁸¹ Window workers usually work independently, paying a fixed amount of rent to the window owner, who takes no further commission on earnings.⁶⁸²

7.73 Street prostitution occurs in several cities. A few cities have established ‘zones of tolerance’ where street prostitution may be practised. Outside these zones, or in cities where they have not been established, street prostitutes are often arrested by police and / or harassed by local residents. Doezema notes that the tolerance zones are located in remote areas of the city, far from amenities such as shops, cafes and public toilets or telephones.

7.74 Prostitutes also work in brothels, which vary from simple private houses with just a few women working where no alcohol is served to larger clubs with up to 20 women employed. The prostitutes work as ‘employees’ and are expected to adhere to rules on working times, dress and behaviour with clients.⁶⁸³

7.75 Until recently, the approach to prostitution in the Netherlands was one of ‘abolitionism’. Under the Brothel Prohibition Act of 1911, working as a prostitute was not punishable, but it was an offence to profit from the earnings of a prostitute.⁶⁸⁴ In practice, however, prostitution (even where illegally operated by a third party, such as a brothel owner or manager) was widely tolerated⁶⁸⁵ – hence the popular perception that prostitution is ‘decriminalised’ in the Netherlands.⁶⁸⁶ Since 1981, repeated (unsuccessful) attempts were made to bring the law in line with practice.⁶⁸⁷ In 1999, after intense debate over a decade on

⁶⁸⁰ *Idem* at 8.

⁶⁸¹ J Doezema ‘Country Overviews: The Netherlands’ in Bindman (*op cit*) at Par 3d.

⁶⁸² *Ibid.*

⁶⁸³ *Ibid.*

⁶⁸⁴ *Ibid.*

⁶⁸⁵ See Kilvington et al (*op cit*) at 6.

⁶⁸⁶ The gradual relaxation in the implementation of the legislation has effectively resulted in a position of *de facto* decriminalisation. – see Kilvington et al *loc cit.*

⁶⁸⁷ Doezema *loc cit.*

whether to follow legalisation or decriminalisation as a legal option to deal with prostitution, the government removed the 1911 ban on brothels.

7.76 The new legislation will legalise brothels as long as they don't interfere with or disrupt public life and, by regulating the commercial operation of prostitution in the same way as other businesses, it is hoped that the stigma of prostitution can also be addressed and gradually removed.⁶⁸⁸ The key elements of the new legal approach are:

- C The organisation of voluntary prostitution will be legalised.
- C A distinction is made between 'forced' and 'voluntary' prostitution. 'Trafficking' and other forms of coercion and violence remain offences in the penal code.
- C In the case of those involved in the exploitation of minors, the penalty is to be raised from one year to six years' imprisonment.⁶⁸⁹
- C The regulation of prostitution is delegated by the state to the various regional and city governments.⁶⁹⁰ (Cities can thus regulate, through the licensing of brothels, the number, if any, and type of commercial sex based businesses it will accept. Individual prostitutes will not be required to register.)

7.77 In terms of the new legal position, brothels must register with local authorities, meet health and safety standards and confirm that they do not hire illegal immigrants (viz. persons without a valid residence permit) and underage persons, before they are allowed to operate. This new legislation commenced on 1 October 2000.⁶⁹¹

7.78 The aim of the new legislation is to regulate prostitution in the same way as other businesses. A brothel or sex club will need a licence from the relevant town or city council and must meet the occupational health and safety conditions (for example, minimum dimensions of the working area, running hot and cold water)⁶⁹² applicable to other businesses. Brothels are further required to have condoms available and to protect prostitutes from being forced to provide services without condoms. They must also confirm that they do not employ illegal immigrants or under-age persons before they can operate. The provisions regarding overtime for workers will also apply to prostitutes, and if a prostitute gets ill, she will be able to apply for disability payments or register at an unemployment

⁶⁸⁸ Kilvington et al (*op cit*) at 7.

⁶⁸⁹ *Ibid.*

⁶⁹⁰ Doezeema *loc cit.*

⁶⁹¹ Meerkotter (*op cit*) at 45.

⁶⁹² Kilvington et al *loc cit.*

office.⁶⁹³

7.79 Again, it may be somewhat early to gauge the impact of the new legislation. Interestingly, it appears that the new legal dispensation has led to a decrease in the industry by 30-40%.⁶⁹⁴ Many of the windows in Amsterdam's red-light district now have 'for rent' signs. The reason for this is that prior to the new law, nearly 80% of the window prostitutes were illegal migrants. Now that the industry is regulated, only adult, legal residents can be employed. Also, before the new law, a multitude of brothels and sex clubs existed. Now, 35% of these businesses have closed because they don't want to or can't afford to pay taxes or to abide by the new labour guidelines.⁶⁹⁵

7.80 The situation for some prostitutes has already and will continue to improve. Health and safety regulations will be introduced as in any other job, and prostitutes will gain full social, legal and employment rights. Those working within this new legal framework will benefit in terms of access to health and other mainstream services.⁶⁹⁶ The new system therefore enables the normalisation of some forms of prostitution: prostitutes can operate visibly and become part of public life, and abuses can be prosecuted.

7.81 However, some prostitutes may not wish to register their employment or may not be eligible to: they may be under age, use drugs illegally or work as illegal immigrants. While it is difficult to estimate this number accurately, it is projected that about 50% of prostitutes working in The Netherlands are not nationals of the European Union.⁶⁹⁷ A significant proportion of prostitutes are therefore likely to be excluded from the new system, and may be adversely affected insofar as they may have to move underground and become effectively invisible to the authorities.

7.82 Early reports suggest that mobility within The Netherlands and in neighbouring countries has increased as a direct result of the new policies, with illegal prostitutes moving across the borders to Belgium and Luxembourg. This new mobility and increasing invisibility cause social and health workers acute problems of access to prostitutes.⁶⁹⁸

⁶⁹³ Meerkotter *loc cit.*

⁶⁹⁴ Bernstein *op cit.*

⁶⁹⁵ *Ibid.*

⁶⁹⁶ *Idem* at 10.

⁶⁹⁷ *Idem* at 14.

⁶⁹⁸ *Idem* at 15. See also H Kinnell and J Praats EUROPAP Central Regional Report (2000).

'In this way, a two tier system is bring created with a legal sector, in which workers may win the same employment, civil and other rights as all other nationals of the European Union, and an illegal sector, in which workers are excluded from civil society and have few rights to health care, social benefits or protection at work, and little recourse to the law should they suffer abuse.'⁶⁹⁹

7.83 Street prostitution is, as mentioned above, regulated by local authorities by means of, among other measures, establishing official zones where street prostitutes are allowed to work. Amsterdam has developed a 'model' zone: a street or area is assigned by the city where the nuisance for residential areas is minimised and a reasonable degree of safety for prostitutes can be arranged. Business hours are during the evenings every night, a shelter is established with the same opening hours where prostitutes can take a break, talk to staff and get condoms free. A medical doctor is often available and can be consulted in relation to STI's and general health issues. Medical examinations are voluntary. The zone of tolerance is monitored and the police can 'draw the line' on what is accepted and what it not.⁷⁰⁰

7.84 Another instructive development is that on 18 July 1997, a court in The Hague overruled a decision by the immigration office of the Ministry of Justice who had denied a Czech woman permission to reside in the Netherlands for the purposes of prostitution. The European Union has association treaties with Poland and the Czech and Slovak Republics, which give nationals the rights to self-employment in the Netherlands. The Ministry argued that prostitution could not be seen as labour in this sense and the Czech woman took the Dutch state to court with the above result. The court made it clear that prostitution is labour in the full juridical sense, and so, when nationals of these countries can prove that they are able to support themselves as self-employed (not employed) prostitutes, they must be given residents' permits.⁷⁰¹

(d) **Germany**

7.85 The current position is that adult prostitution in Germany is not prohibited: prostitution is tolerated under certain narrowly delineated conditions. Activities relating to, for example, the 'exploitation of prostitution'⁷⁰² is criminalised. Trafficking of women is

⁶⁹⁹ Klivington et al *loc cit*.

⁷⁰⁰ Meerkotter (*op cit*) at 46.

⁷⁰¹ Klivington et al (*op cit*) at 12. The case is reported as ***Aldona Malgorzata Jany and others v Staatssecretaris van Justitie*** (case C 268/99, judgment 20 November 2001).

⁷⁰² 'Ausbeutung von Prostituierten': StGB § 180.

severely penalised.⁷⁰³ When found guilty of pimping a penalty of between 6 months and 5 years' imprisonment can be imposed.⁷⁰⁴

7.86 Local communities are authorised to completely prohibit prostitution in districts that have less than 50,000 people. If however, a district has more than 50,000 residents, prostitution may only be prohibited in certain areas, for example residential areas, public parks, schools and some city centres.⁷⁰⁵

7.87 Prostitutes are taxed on their earnings and compelled to register with health agencies for monthly health checks. These health checks are governed by a 1943 law⁷⁰⁶ dealing with infectious diseases. Approximately 50,000 prostitutes have registered and are regularly seen by public health services.⁷⁰⁷ However, there are often complaints about the impersonal attitude and approach of health care workers, which undermine confidence and good health care. The implementation of the provisions requiring mandatory testing also varies widely: for example, in northern cities such as Hamburg, Bremen and Berlin, services are now anonymous and voluntary, but elsewhere obligatory examination still exists.⁷⁰⁸

7.88 Major problems are experienced by non-national prostitutes, who comprise about half of the prostitute population. Police often use repressive measures against them, including raids, mandatory HIV testing, police interrogation without a translator and deportation of prostitutes without work permits.⁷⁰⁹

7.89 The German prostitutes' rights movement is particularly strong.⁷¹⁰ Prostitutes' organisations such as Project Hydra have campaigned against the inconsistencies around prostitution: although registered prostitutes are taxed, they don't receive the same benefits

⁷⁰³ StGB § 180b; StGB § 181

⁷⁰⁴ StGB § 181a (1).

⁷⁰⁵ EGStGB Anh. 1 Art. 297. See also StGB § 184b which prohibits prostitutes from operating in the vicinity of schools or other facilities frequented by children or in a house where children live.

⁷⁰⁶ The *Gesetz zur Bekämpfung von Geschlechtskrankheiten zum Seuchenneuordnung*. This Act is under review.

⁷⁰⁷ Estimates place the total number of prostitutes in Germany at approximately 200 000 - see Wijers and Lap-Chew (*op cit*) at 116. See also **Drucksache 14/5958**, which puts the number of prostitutes in Germany at 400 000.

⁷⁰⁸ Kilvington et al (*op cit*) at 17.

⁷⁰⁹ Meerkotter (*op cit*) at 47.

⁷¹⁰ Kilvington et al (*op cit*) at 16.

as other taxpayers, such as social security payments or health insurance benefits.⁷¹¹

7.90 In December 2000, a Berlin court heard an application for closure of a bar that served as a meeting point for prostitutes and their clients. The court held that prostitution as a profession was now widely accepted, as long as it is freely entered into without force.⁷¹² This ruling came at a time when the German government had started to debate whether to acknowledge prostitution as a legitimate business with legally enforceable contracts between prostitutes and clients.⁷¹³

7.91 The current German ruling coalition (between the Social Democrats and the Greens) has adopted legislation that seeks to improve the social and legal standing of prostitutes. The Act,⁷¹⁴ dated 20 December 2001, came into operation on 1 January 2002. It treats prostitution as a 'normal service activity'.⁷¹⁵ In terms of the Act the offence of inciting prostitution, which was punishable by 3 years' imprisonment, would be scrapped. Prostitutes would be able to sign contracts with their clients and prosecute them for failure to pay for their services. Prostitutes would also have the right to unemployment benefits, sick pay and a pension.⁷¹⁶

7.92 The Act has however been criticised by prostitutes for not giving them the right to advertise and for failing to abolish the law which prevents prostitutes from working wherever they like, thus restricting them to 'red-light' districts.⁷¹⁷ Campaigners for prostitutes' rights have also objected to the exclusion of certain workers, such as illegal drug users and prostitutes without residence status whose access to health services, prevention initiatives and treatment would remain difficult under the proposed reforms.⁷¹⁸

⁷¹¹ *Ibid.*

⁷¹² 'Prostitution, die von Erwachsenen freiwillig und ohne kriminelle Begleiterscheinung ausgeübt wird, ist nach den heute anerkannten sozialetischen Weltvorstellung in unserer Gesellschaft – unabhängig von der moralischen Beurteilung – im Sinne des Ordnungsrechts nicht (mehr) als sittenwidrig anzusehen'. Verwaltungsgericht Berlin (Az.: 35 A 570.99, dated 1 December 2000). The ruling is not yet in force.

⁷¹³ See R Broomby 'Berlin prostitution no longer immoral' BBC News, 28 December 2000 [Internet]; C Francis 'German brothel given legal all-clear' CNN.com, 28 December 2000 [Internet]. See however 'Das bringt uns gar nichts' *Der Spiegel*, 18 March 2002.

⁷¹⁴ Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten (Prostitutionsgesetz – ProstG).

⁷¹⁵ 'Eine rechtswirksame Forderung'.

⁷¹⁶ Meerkotter *loc cit.*

⁷¹⁷¹⁴⁹ See e.g. 'Das bringt uns gar nichts' *Der Spiegel*, 18 March 2002. The latter issue was allegedly deliberately left out to ensure the Bill's passage through Parliament.

⁷¹⁸ Kilvington *op cit* at 17.

(e) **Thailand**

7.93 Thailand's position on prostitution can at best be described as contradictory. The sex industry is 'highly visible, economically successful, internally differentiated'⁷¹⁹ – and illegal. Although Thailand has officially adopted an approach of criminalisation, with prostitution technically illegal and many acts related to prostitution criminalised, prostitution is widely accepted by society.⁷²⁰

7.94 Boonchalaksi and Guest note that a complex set of interrelated factors associated with economic development and gender roles has operated to provide 'an increasing supply of women for the sex sector'.⁷²¹ These factors include the poor income-earning opportunities for women with low levels of education, the desire to provide substantial support for their families and a relatively tolerant attitude towards prostitution in some segments of Thai society. The demand for prostitution exists because of the social acceptance of men buying sexual services, the increased disposable income of a large and growing segment of the Thai population and the development of tourism.⁷²² (Contrary to popular belief, foreign tourists appear to constitute only a small proportion of prostitution clients. Although they may dominate as clients for certain relatively small sectors of the industry, most clients of prostitutes in Thailand are Thai men.)⁷²³

7.95 Most of the prostitution industry in Thailand consist of businesses: brothels, hotels, massage parlours, restaurants and bars of various types, such as karaoke or 'go-go' bars.⁷²⁴ These establishments are generally registered by the Sexually Transmitted Disease section of the Ministry of Health, which may attempt to provide health services to prostitutes.

7.96 Bindman remarks that local police are generally on very good terms with sex establishments, from whom they receive regular remittances.⁷²⁵ The operation of the sex industry through businesses shields prostitutes from exposure to the authority of the police (contacts with the police may include demands for cash or sexual favours or detention in a 'rehabilitation centre'), although prostitutes may pay for this security via deductions from their

⁷¹⁹ W Boonchalaksi and P Guest 'Prostitution in Thailand' in Lim (ed) *op cit* at 131.

⁷²⁰ Meerkotter *op cit* at 18.

⁷²¹ Boonchalaksi and Guest (*op cit*) at 131.

⁷²² At 131-132.

⁷²³ At 136-137.

⁷²⁴ Bindman (*op cit*) at Par 3e.

⁷²⁵ At Par 3e.

pay to cover the police bribes that are part of 'management overhead'.⁷²⁶

7.97 Straightforward brothels, which offer no services aside from sex, represent the lower end of the market. These are most common outside Bangkok, serving low-income Thai men, and relying on high turnover for profits. Although many of these brothels employ only adult prostitutes, who are not confined to the brothels and can choose which and how many shifts to work, this is the sector where labour and human rights violations are most common. These include the exploitation of illegal migrant workers from neighbouring countries, such as Burma, and the practice of debt-bondage in closed brothels.⁷²⁷

7.98 The Prostitution Prevention and Suppression Act replaced the Prostitution Suppression Act (1960) in 1996. This new Act was the result of a growing awareness of the weaknesses of past legislation⁷²⁸ and the concern for more effective measures to eradicate child prostitution.⁷²⁹ In terms of the Act, the selling of sexual services is illegal. However, prostitutes are subject only a small fine. The focus is on those responsible for drawing women and children into prostitution, rather than on the prostitutes themselves.⁷³⁰

7.99 Procurement, trafficking, pimping and advertising are punishable by terms of imprisonment and heavy fines, which are even more severe in cases where physical force or any form of threat is used to detain, confine or force a person to perform prostitution activities. Where such offences are committed by an administrative, government or police official, the Act provides for a heavy term of imprisonment (from 15 to 20 years) and a fine of 300,000 to 400,000 baht. Owners or managers of brothels of other prostitution establishments are also liable for conviction and fines. Soliciting is an offence, but the fine provided for is a small one.⁷³¹

7.100 The Act is intended particularly to punish those involved in the commercial sexual exploitation of minors, with severe penalties for owners of sex service establishments, recruitment agencies, clients and even parents, if they can be shown to have knowingly sent their children into prostitution. The 1996 law also has special penalties where coercion is used to put others into the sex industry, although abuse of persons

⁷²⁶ *Ibid.*

⁷²⁷ These practices are recounted in detail by Bindman (*loc cit*).

⁷²⁸ The current Act was preceded by the Prostitution Suppression Act (1960).

⁷²⁹ Boonchalaksi and Guest (*op cit*) at 164.

⁷³⁰ *Ibid.*

⁷³¹ Section 6 of the Act. The penalty is a fine not exceeding 1,000 baht.

already in the industry is not addressed.⁷³²

7.101 The Act also makes provision for the rehabilitation of prostitutes via a Primary Admittance Centre. The Act gives the Director of the Welfare Department the discretion to send apprehended prostitutes to a rehabilitation centre for medical treatment or skills training for one year. Such 'rehabilitation' means hardship for the prostitutes and their families that they support, and is of little value where unemployment is rife. The rehabilitation centres are regarded as little different from a prison.⁷³³

7.102 In addition, the Act also provides for the appointment of a Protection and Occupational Development Committee, consisting of officials from various government departments, to determine policies with regard to the protection and occupational development, including the development of the quality of life, of prostitutes.

7.103 The Prevention of Traffic in Women and Children Act (1928) prohibits bringing women and girls into Thailand for the purpose of sexual intercourse with others or illegally trading in women and girls brought into the country. It is illegal to buy sex from someone under 18 and although the legal age of consent is 16, police discourage prostitutes between 16 and 18 years from prostitution. Underage prostitutes are sent to education camps.⁷³⁴

(f) **New Zealand**

7.104 At present, prostitution (as defined in the Massage Parlours Act 1978)⁷³⁵ is not an offence, but soliciting,⁷³⁶ brothel-keeping,⁷³⁷ living on the earnings of prostitution⁷³⁸ and procuring sexual intercourse⁷³⁹ are prohibited.

7.105 The Prostitution Law Reform Campaign, a coalition of groups including the New Zealand Prostitutes Collective, has identified various key problems with the current

⁷³² Bindman (*op cit*) at 3e.

⁷³³ Bindman (*op cit*) at Par 3e.

⁷³⁴ Meerkotter (*op cit*) at 19.

⁷³⁵ This Act defines prostitution as 'the offering by a man or woman of his or her body for purposes amounting to common lewdness for payment'.

⁷³⁶ Section 26 of the Summary Offences Act 1991.

⁷³⁷ Section 147 of the Crimes Act 1961. Brothel-keeping is prohibited; all massage parlours must be licensed and operators must keep a register of all current workers.

⁷³⁸ Section 148 of the Crimes Act 1961.

⁷³⁹ Section 149 of the Crimes Act 1961.

legislation:⁷⁴⁰

- C The law promotes a double standard of morality in terms of which prostitutes, and not their clients, are arrested.
- C The law supports the exploitation of prostitutes, since it does nothing to address the unequal power relations between operators and workers. Practices such as unfair dismissals, bonding, fining and withholding payment to prostitutes are common. Since prostitutes fear arrest, they have no way of acting against unfair labour practices.
- C The law creates a barrier to sexual health education, making the dissemination of safer sex information difficult. The police have used such literature and the presence of condoms as evidence in prosecution of alleged prostitution-related offences. Conviction also limits a prostitute's ability to travel, obtain alternative employment or obtain mortgage finance.
- C The law means that effectively prostitutes have no access to legal support and protection where, for example, they are forced to provide services they do not wish to.

7.106 In September 2000, the Prostitution Reform Bill was launched in parliament. This Bill was the product of a decade of discussion by politicians from across the political spectrum, supported by the New Zealand Prostitutes Collective and a coalition of women's and health organisations.⁷⁴¹ The Bill seeks to decriminalise soliciting and remove the rest of the industry from 'a legal grey area'.⁷⁴²

7.107 The purpose of the Prostitution Reform Bill is to decriminalise prostitution and to create a framework which safeguards the human rights of prostitutes and protect them from exploitation, ensures the legislative framework of welfare and occupational health and safety protections is able to apply to prostitutes, creates an environment which is conducive to public health and protects children from exploitation in relation to prostitution.⁷⁴³

7.108 In order to safeguard the human rights of prostitutes and protect them from exploitation, the Bill provides that prostitutes may refuse to provide any commercial sexual service, and that it will be an offence to coerce another person into providing a commercial

⁷⁴⁰ New Zealand Prostitutes Collective [Internet].

⁷⁴¹ Media Release: Prostitution Bill launched (19 September 2000) [Internet].

⁷⁴² *Ibid.*

⁷⁴³ Clause 3.

sexual service.⁷⁴⁴

7.109 Operators of brothels and prostitution businesses are required to promote safer sex practices, including taking all practical steps to ensure use of condoms by clients, giving information on safer sex practices to prostitutes and displaying information on safer sex practices prominently in the premises used as part of the brothel or business or prostitution.⁷⁴⁵

7.110 Finally, the Bill also prohibits various activities relating to the provision of commercial sexual services by children.⁷⁴⁶

7.111 At the moment the Bill is still being considered by the Justice and Electoral Select Committee of parliament, and a report is due by 8 August 2001. There has been considerable public and parliamentary debate regarding the Bill.

(g) Australian Capital Territory⁷⁴⁷

7.112 In 1992, the Australian Capital Territory effected major changes to its legal approach to prostitution. It moved from a criminalised system (characterised in practice by limited enforcement)⁷⁴⁸ to a regime of legalisation with a minimalist regulatory framework. The Prostitution Act of 1992 has as its stated objectives to –

- C Safeguard public health;
- C Promote the welfare and occupational health and safety of prostitutes;
- C Protect the social and physical environment of the community by controlling the location of brothels; and

⁷⁴⁴ Clauses 7 and 8 respectively. 'Coerce' is defined in Clause 4 to mean 'knowingly to act to prevent another person from exercising freedom of choice or action, or to induce or compel another person to undertake any action against his or her will, including actual, or implied or explicit threats of physical harm, sexual or psychological abuse, intimidation, harassment, damage to another person's property, supplying of a controlled drug, withholding of supply of a controlled drug, withholding of money or property owed, imposing a pecuniary or other penalty or taking disciplinary action otherwise than in accordance with a person's agreed conditions of employment.

⁷⁴⁵ Clause 6.

⁷⁴⁶ Clause 9.

⁷⁴⁷ For the position in Queensland, Australia, see Godden 'The bounding of vice: Prostitution and planning law' *Griffith LR* (2001) 77; the Prostitution Act 1999 (Qld), and the Prostitution Regulation 2000 (Qld). The position in Victoria, Australia, is regulated by the Prostitution Control Act, 1994, as amended, and the Prostitution Control (Planning) Act 2000.

⁷⁴⁸ See Meerkotter (*op cit*) at 28.

C Protect children from exploitation in relation to prostitution.

7.113 The Act provides that owners and managers of brothels and escort agencies are required to register business operations with the Registrar of Brothels and Escort Agencies within 7 days of commencing business. Prescribed industrial areas have been designated for operation of such businesses and it is illegal to operate outside zoned areas. Single prostitutes may work from their own premises, but are required to register with the above Registrar. Street soliciting remains an offence under the Act.

7.114 The Act includes provisions relating to STI's, condom use and safe sex practices that –

- C Require operators of brothels and escort agencies to take reasonable steps to ensure that sexual services are not provided by prostitutes infected by STI's;
- C Make it an offence for a prostitute to provide or receive certain services without a condom; and
- C Prohibit operators from using the fact that a prostitute has had a medical examination for the purpose of inducing a person (client) to believe that the prostitute is not infected with an STI.

7.115 The effect of these provisions is that although prostitutes are not compelled to submit to sexual health testing, the introduction of offences relating to the exclusion of prostitutes with STI's effectively encourages mandatory testing and provision of medical certificates to employers.⁷⁴⁹

7.116 Prostitutes employed by brothels and escort agencies are entitled to industrial benefits. However, Banach observes that in practice prostitutes are often not classified as employees, but as independent contractors.⁷⁵⁰ It therefore appears that legal clarification as to their status through the courts is required.

7.117 Banach comments that the intention of the Act was to limit the barriers to open participation in registering business interests in the sex industry. The absence of

⁷⁴⁹ L Banach **Unjust and Counter-Productive: The Failure of Governments to Protect Sex Workers from Discrimination** (1999) notes that the impact of these provisions is not as serious as in, for example, Victoria, since legislative requirements in the ACT exclude the provision of medical certificates to employers – at 25.

⁷⁵⁰ At 25.

'probity' checks⁷⁵¹ has facilitated the entry of persons who have previously operated illegally (and may therefore have criminal records for prostitution-related offences) into a legal framework. Consequently, there is a high level of compliance with registration requirements. The absence of provisions relating to compliance with strict planning requirements and the number of approved premises means that an 'illegal' brothel sector has been avoided.⁷⁵² Privacy concerns among private prostitutes are believed to have hindered their registration. The only illegal operations in the ACT appear to be limited incidence of small two-person operations in residential areas.⁷⁵³

7.118 The Act also allows for the establishment of a Sex Industry Consultative Group that advises the government on the effective operation of the Act and other matters pertaining to the sex industry. Law reform initiatives are raised at the Sex Industry Consultative Group level. Recent initiatives have included discussion to expand the definition of 'private' prostitute to two operators, the application of occupational health and safety codes and privacy concerns for registration of individual prostitutes.⁷⁵⁴

7.119 The ACT system has certain weaknesses. The relegation of prostitution businesses to industrial areas is likely to place prostitutes at risk, since these areas are generally unpopulated at night and therefore few safety mechanisms exist. They are also unlikely to meet occupational health and safety standards in the prostitution industry as the buildings and facilities are designed for industrial purposes.⁷⁵⁵

Summary: Foreign jurisdictions

7.120 The brief discussion of foreign jurisdictions above allows for the identification of certain trends.

7.121 The USA follows the route of *criminalisation*, with the exception of the state

⁷⁵¹ Probity requirements exclude, for example, persons with previous convictions for prostitution-related offences from obtaining licences to operate prostitution businesses.

⁷⁵² In Victoria, for example, prospective brothel operators have to comply with prohibitively strict planning requirements in terms of the Prostitution Control Act of 1994. The detailed and complicated nature of acquiring planning and licensing permission has dissuaded many potential operators from obtaining approval (Banach *op cit* at 34). This has resulted in the creation of a two-tier industry, with a relatively small legal sector (offering few work opportunities for prostitutes wishing to work legally) co-existing with an illegal sector. See in this regard also L Banach and S Metzenrath *Principles for Model Sex Industry Legislation* (2000) at 28-29; Davis (*op cit*) at Par II.2.

⁷⁵³ Banach (*op cit*) at 24.

⁷⁵⁴ *Ibid.*

⁷⁵⁵ Banach and Metzenrath (*op cit*) at 30.

of Nevada, where prostitution as a general rule is prohibited except for the provision that counties with fewer than 400,000 residents may allow licensed brothels. A strict regulatory system is followed, including mandatory health checks. This system is an example of **legalisation**. In practice, the personal autonomy of prostitutes working in these brothels is severely constrained, and the fact that they are seen as ‘independent contractors’ rather than employees implies that they are not entitled to benefits usually accruing to employees. In spite of the high level of regulation, the size of the illegal sector of the prostitution industry far exceeds that of the legal sector.

7.122 The legal system in Thailand also **criminalises** all aspects of prostitution. Due to a constellation of factors including economic developments, gender relations and the relatively tolerant attitude towards prostitution prevailing in Thai society, prostitution and related businesses are visibly proliferating and flourishing. The current legal provisions appear to neither impact significantly on prostitution, nor enable government agencies to address the human rights violations such as debt-bondage occurring in the industry. The present position in practice amounts to *de facto* decriminalisation.

7.123 New Zealand currently follows an **abolitionist** approach (also referred to as **partial criminalisation**). Although prostitution as such is not a criminal offence, all related activities are penalised. Proposals for law reform, which would effectively decriminalise adult prostitution in New Zealand, are currently under consideration.

7.124 Law reform in Sweden has extended **criminalisation** to the clients of prostitutes, along with a ‘more sympathetic’ approach to those considered to be victims, i.e. prostitutes.⁷⁵⁶ Early indications are that these strategies have not been overwhelmingly successful: at best, the new measures have forced outdoor prostitution (which constitutes a smaller sector of the overall industry) to operate in a more clandestine manner. At worst, they have limited access to legal mechanisms and support services, added to the stigmatisation and marginalisation of prostitutes and made working conditions less safe. Enforcement of the new provisions appears to be difficult.

7.125 The recent reforms in the Netherlands, which shifted the legal status of prostitution from *de facto* decriminalisation (with brothel-keeping technically against the law since 1911) to a system of **legalisation**. These reforms were intended to ‘normalise’ aspects of the industry and remove the criminal sanction from both prostitutes and indoor

⁷⁵⁶ See Kilvington et al (*op cit*) at 19.

businesses.⁷⁵⁷ The new measures were intended to dissolve a flourishing black market, with exploited workers who lacked rights and wealthy managers whose revenue was invisible to the state.⁷⁵⁸ However, prostitutes who continue to work ‘informally’ outside the new regulations will face more intense criminal penalties and may also operate outside the reach of health care providers.⁷⁵⁹ Street prostitution also remains illegal, except for the ‘zones of tolerance’ operating in certain cities.

7.126 The German system has until now been a fairly strictly regulated **legalised** system, with zoning requirements, registration and mandatory health checks. Prostitutes are taxed on their earnings; however, they are not eligible for health care insurance or social security. In terms of the Bill currently under consideration, prostitution will be seen as a normal business activity. However, some of the characteristics of the current system, for example, the zoning requirements, may remain in place.

7.127 The Australian Capital Territory currently follows system of **legalisation** with a minimal regulatory framework. Operators of brothels and escort agencies, as well as single prostitutes working from their own premises, must register their businesses. The law contains provisions relating to STI’s, condom use and safer sex practices. The operation of indoor prostitution is limited to industrial areas. A Sex Industry Consultative Group advises the government on the effective operation of the Act.

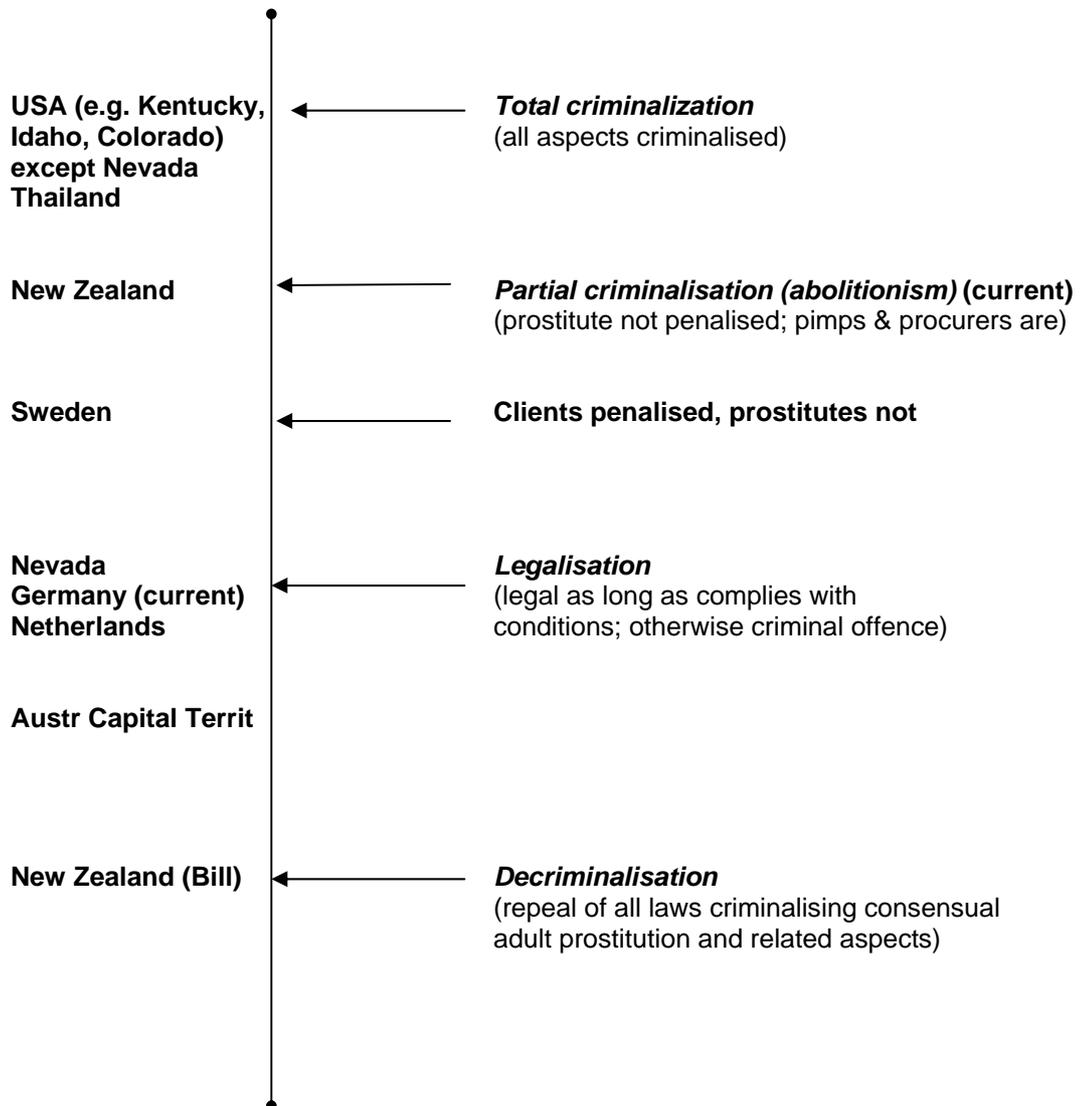
7.128 The different legal systems discussed above may be represented as follows:

⁷⁵⁷ *Idem* at 19-20.

⁷⁵⁸ According to Petra Urban, Chair of *De Rode Draad*, Dutch and EU prostitutes recognise the benefits accompanying the new legislation, such as better working conditions and opportunities to report violence and abuse, but they are also concerned that in return they may lose their anonymity. Cited in Kilvington et al *op cit* at 20.

⁷⁵⁹ *Ibid.*

DIAGRAM 2: LEGAL SYSTEMS IN FOREIGN JURISDICTIONS
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CHAPTER 8

PROSTITUTION AND HIV/AIDS

Introduction

8.1 Historically, legal measures aimed at the regulation and control of prostitution were often located around public health concerns, such as the prevention of the spread of sexually transmitted diseases. The scapegoating of prostitutes for disease is therefore not a new phenomenon.⁷⁶⁰

8.2 The regulationist approach adopted in Britain (and subsequently emulated in South Africa) in the form of the Contagious Diseases Acts during the latter half of the nineteenth century was motivated by attempts to halt the spread of, *inter alia*, syphilis and gonorrhoea.⁷⁶¹ The legislation implied drastic limitations of the bodily integrity and personal liberty of (alleged) 'common prostitutes' in the form of compulsory medical testing and extended periods of quarantine.

8.3 The motivation for the imposition of invasive measures in the interest of public health lost significant ground with the discovery of penicillin and antibiotics.⁷⁶² However, the development and rapid growth of the HIV/AIDS pandemic, especially in sub-Saharan Africa, has resulted in renewed demands for stringent legal measures to address the perceived connection between prostitutes and HIV/AIDS.⁷⁶³

'Much of the current debate on the sex sector, especially on whether to legalize prostitution, centres on the health concerns'.⁷⁶⁴

8.4 In this Chapter, the presumed connection between prostitutes and HIV/AIDS will be examined. The legal measures that are employed in an attempt to prevent HIV infection resulting from prostitution are evaluated. Finally, the link between the legal status

⁷⁶⁰ See P Alexander 'Response to AIDS: Scapegoating of Prostitutes' (1988) cited in MN Mensah ***Legal and Ethical Issues raised by HIV/AIDS in the context of Prostitution: Annotated Bibliography*** (2000). See also R Jurgens ***HIV Testing and Confidentiality: Final Report*** 2nd ed (2001) Part 2 [Internet].

⁷⁶¹ See Par. 3.24 *et seq* above.

⁷⁶² Milton (*op cit*) at 143.

⁷⁶³ Jenness (*op cit*) at 89; Bastow (*op cit*); M Kandel 'Whores in court: judicial processing of prostitutes in the Boston Municipal Court in 1990' ***Yale Journal of Law & Feminism*** (1992), cited in Balos & Fellows (*op cit*) at 519-520.

⁷⁶⁴ Lim (*op cit*) at 19.

of prostitution and effective HIV prevention is considered.

Prostitutes as 'pools of contagion'

8.5 Pauw and Brener observe that its association with the often taboo and highly complicated issue of sexuality has complicated an understanding of HIV/AIDS.⁷⁶⁵ Due to the fact that HIV/AIDS was first observed in persons whose lifestyle made the transfer of blood, blood products or bodily fluids relatively likely, initially gay men and subsequently intravenous drug users were identified as 'at risk' groups.⁷⁶⁶ Throughout the 1980s, HIV/AIDS was popularly understood as a fatal disease associated with homosexuality, intravenous drug use and indiscriminate, promiscuous sex.⁷⁶⁷ This resulted in the disease becoming inextricably linked in popular consciousness to behaviour regarded as deviant, and with individuals regarded as deviants.

8.6 As HIV/AIDS began to be understood as a threat to the population at large, it gradually became a disease of the 'normal'. However, it has not lost its original connection to deviant lifestyles and 'aberrant' sexual behaviour.⁷⁶⁸

8.7 It is therefore not surprising that prostitutes are often held responsible for the spread of the pandemic. They are implicated as a primary bridge through which HIV/AIDS has been transmitted to the general population,⁷⁶⁹ and are thus perceived as 'vectors of disease'.⁷⁷⁰

8.8 This attitude still dominates the popular understanding of HIV/AIDS.⁷⁷¹ However, while prostitutes are at an increased risk of STI or HIV infection because of their having sex with multiple partners, research has shown that adult prostitutes are generally more aware of the need for safer sex practices (including condom use) than non-prostitute populations.⁷⁷² Bastow remarks, for example, that studies have shown that prostitutes use

⁷⁶⁵ Pauw and Brener MRC Study at 2.

⁷⁶⁶ Jenness (*op cit*) at 86.

⁷⁶⁷ *Ibid.*

⁷⁶⁸ *Idem* at 87.

⁷⁶⁹ Bastow (*op cit*), Jenness (*op cit*) at 87.

⁷⁷⁰ Bastow (*op cit*).

⁷⁷¹ Jurgens ***HIV Testing and Confidentiality: Final Report*** (Part 2).

⁷⁷² South African Law Commission Working Paper 58 (Project 85) ***Aspects of the Law relating to AIDS*** at Par 3.99 - 3.104; S Davis 'Prostitution in Canada' (1994) at Par I.1b [Internet]; COYOTE 'Decriminalization vs. Legalisation' [Internet]; Jenness (*op cit*) at 92; Banach and

condoms more consistently than other populations similar in age, race and sex.⁷⁷³ Prostitutes attending a conference on prostitution and health in February 2001 made the following statement:

'The [safer sex] programs are focusing on us, but we all know the general public needs the education. We know about safe sex and condoms'.⁷⁷⁴

8.9 The fact that women are more vulnerable than men to HIV infection is also significant here. On a biological level, women have a bigger surface area of mucosa exposed during intercourse to their partner's sexual secretions.⁷⁷⁵ The relatively large mucosal surface of the female vagina, where microlesions (injuries) can occur during sexual intercourse, may offer easy entry points for the virus.⁷⁷⁶ Semen infected with HIV typically contains a higher concentration of virus than vaginal secretions. Furthermore, women are at least four times more vulnerable to other STI's, and the presence of untreated STI's is a risk factor for HIV. Finally, the many forms of violence against women expands the likelihood of coerced sex, which in turn increases the risk of injuries and accordingly of HIV infection.⁷⁷⁷

8.10 Given the fact that prostitutes are predominantly women, the increased susceptibility of women to HIV/AIDS (compared to that of their male sexual partners) and the concomitantly lower transmission rate from women to men than vice versa,⁷⁷⁸ would imply that women prostitutes are far more at risk of contracting the virus from their male clients than the converse. This role of women prostitutes as the infectees rather than the infectors is usually neglected in discussions around prostitution and HIV/AIDS.⁷⁷⁹

What are the risk factors for HIV infection in prostitutes?

Metzenrath *Principles for Model Sex Industry Legislation* (2000) at 25; Mak 'General Conclusions and Recommendations' in *Final Report EUROPAP 1994*.

⁷⁷³ Bastow (*op cit*). See also Mak (*op cit*).

⁷⁷⁴ Sex workers from the Muthusimpilo Project, HTA, SWEAT, Danzine, COYOTE and AIM (*op cit*).

⁷⁷⁵ See S A Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* (Project 85) Par 3.47.1, fn 290.

⁷⁷⁶ World Health Organization 'Women and HIV/AIDS' (2000); Quirk K and DeCarlo P 'What are women's HIV prevention needs?' (1998).

⁷⁷⁷ *Ibid*.

⁷⁷⁸ Statistics show that a woman having unprotected sex with an infected male runs a risk more than double that of an uninfected male having unprotected sex with an infected female - S A Law Commission *Fifth Interim Report* (Project 85) Par 3.47.1 p 59.

⁷⁷⁹ MN Mensah *Legal and Ethical Issues Raised by HIV/AIDS in the Context of Prostitution: Literature Review* (2000). See also Chapter 4 above.

8.11 The infection risk for prostitutes may vary greatly, since a broad range of variables appears to impact on this risk. The following main risk factors can be identified:⁷⁸⁰

- C Clients may offer substantially more money for sex without condoms, which may be a compelling option especially in the case of 'subsistence' prostitution. As Decarlo et al point out, 'desperation and lack of resources can override prevention concerns'.⁷⁸¹
- C Clients may use violence to enforce unsafe sex.
- C Police may confiscate or destroy condoms when they stop or arrest prostitutes, and prostitutes may not be able to obtain more condoms immediately.⁷⁸²
- C Prostitutes may find it difficult to discuss condoms or safer sex practices with their partners at home.⁷⁸³
- C The presence of other STI's increases the risk of HIV infection.⁷⁸⁴
- C The nature of the services offered may enhance the risk of infection.⁷⁸⁵ The provision of, for example, oral sex implies a lower risk than receptive anal intercourse.⁷⁸⁶
- C Injection drug use has been noted as the main risk factor for HIV infection for women prostitutes.⁷⁸⁷ (The relatively low incidence of injection drug use in the South African context should obviously be factored in here.⁷⁸⁸)

8.12 The above risk predictions imply that prostitutes who are most vulnerable to HIV infection are street prostitutes who are generally poorer, younger and more likely to be

⁷⁸⁰ See also in this regard the list of factors identified by the World Health Organisation - WHO **Statement on HIV Epidemiology and Prostitution** (1989) at Par A.1.

⁷⁸¹ DeCarlo P, Alexander P and Hsu H 'What are sex workers' HIV prevention needs?' (1996); see also Mak (*op cit*) at 4.

⁷⁸² DeCarlo *et al* (*op cit*).

⁷⁸³ DeCarlo *et al* (*op cit*) cite the results of a study showing that although 94% of the sample group of prostitutes had used condoms with their clients at some point, only 25% had used condoms with their partners. See also Pauw and Brener MRC Study at 12-14; Eur Net.

⁷⁸⁴ Lim (*op cit*) remarks that while it is true that prostitutes often suffer from STI's, this may actually be due to inadequate health services or because prostitutes cannot afford private medical services - at 19.

⁷⁸⁵ Banach and Metzenrath (*op cit*) at 26.

⁷⁸⁶ See Bastow (*op cit*).

⁷⁸⁷ Prepared by Pamela DeCarlo, Priscilla Alexander, Henry Hsu DeCarlo *et al*. See also Mak (*op cit*) at 4.

⁷⁸⁸ See also Par 5.72 *et seq* below. However, the use of crack cocaine has increased rapidly since 1996, and the use of crack has been equated with the same level of risk as injection drug use.

drug or alcohol dependent.⁷⁸⁹ Street prostitutes are also considerably more vulnerable to violence from clients and police.

8.13 Although data pertaining to male and transgendered prostitutes is not as readily available as for women prostitutes,⁷⁹⁰ there are indications that these groups of prostitutes may be particularly vulnerable to HIV infection.⁷⁹¹ Some of the factors that determine women's vulnerability also affect male prostitutes, and are compounded by factors such as sexual identity issues and homophobic repression.⁷⁹² The relative invisibility of male prostitutes may also be a further factor.⁷⁹³

8.14 While this Issue Paper does not address the question of child prostitution as such, it should be borne in mind that age is also significant in determining the risk of HIV infection. Children are at greater risk, due (*inter alia*) to increased biological vulnerability to STI's, their smaller physical size and their lack of power in negotiating safer sex behaviour.⁷⁹⁴ A high incidence of children in a particular prostitute population may therefore have an impact on the spread of HIV infection.

8.15 Overs cautions that it is difficult to quantify HIV infection among prostitutes and clients, partly because it is almost impossible to identify how many sell or buy sex, how many of them have HIV, and how many are likely to transmit it to others.⁷⁹⁵ Prostitution is usually clandestine, prostitutes and clients are often mobile and many people work as

⁷⁸⁹ See DeCarlo *et al* (*op cit*).

⁷⁹⁰ Antenatal surveys are the recommended surveillance tool to estimate HIV in populations. Due to the fact that these surveys focus on pregnant women attending antenatal clinics, this tool has certain inherent limitations, especially in terms of extrapolation of findings to the general population. See Department of Health **National HIV and Syphilis Sero-Prevalence Survey of Women Attending Public Antenatal Clinics in South Africa** (2000) Preamble and Par 4.1.4.

⁷⁹¹ C Overs **Technical Review: Prevention and the Commercial Sex Industry** (2000) at 7. See also Mak (*op cit*) at 4; M Laffont, S Day and H Ward 'HIV infection: Screening, treatment and support' in **Final Report of the European Network for HIV/STD Prevention in Prostitution 1998 - 2000**.

⁷⁹² Overs (*loc cit*).

⁷⁹³ See D Allman **M is for Mutual A is for Acts: Male Sex Work and AIDS in Canada** (1999) at 9.

⁷⁹⁴ Lim (*op cit*) at 20. Younger women are at greater biological risk, since the physiologically immature cervix and scant vaginal secretions put up less of a barrier to HIV - S A Law Commission **Fifth Interim Report** (Project 85) Par 3.47.1 n 290. There is also an increased risk of trauma and micro-lesions. See also Alexander P 'Sex work and health: A question of safety in the workplace' **Journal of the American Medical Women's Association** (1998) 77.

⁷⁹⁵ Overs (*op cit*) at 6.

prostitutes only occasionally. Very little information is available about *clients*.⁷⁹⁶

HIV/AIDS and prostitution in South Africa

8.16 The current confluence of the hidden nature of the prostitution industry in South Africa (and the concomitant lack of accurate information)⁷⁹⁷ [endnote] and the social stigma that still attaches to HIV/AIDS makes it impossible to venture predictions about the HIV prevalence of persons working in prostitution. A number of studies have shown varying levels of prevalence.

8.17 The central hypothesis of Leggett's research conducted in Durban, Cape Town and inner city Hillbrow was that an association existed between use of hard drugs and HIV seroprevalence.⁷⁹⁸ However, the research results showed the opposite to be the case. A far more accurate predictor of HIV seroprevalence was ethnicity, and a strong association existed between being black and being HIV positive. (The prostitutes least likely to be using drugs - the poor black women situated outside of the drug-driven CBD's - were most susceptible to HIV/AIDS.)

8.18 Sixty six percent of black prostitutes included in this study were HIV positive, compared to 18% of whites and 17% of coloured women. Areas of prostitution that were exclusively or almost exclusively black had by far the highest rates of HIV infection.⁷⁹⁹

8.19 The introduction of new drugs, most notably crack cocaine, into the prostitution scenario in South Africa has dramatic implications for the spread of HIV.⁸⁰⁰ Although intravenous drug use is relatively rare, the use of crack by prostitutes has exploded since 1996.⁸⁰¹ Studies have shown that crack users are just as likely to be HIV positive as intravenous drug users.⁸⁰²

⁷⁹⁶ *Ibid.* Overs (*op cit*) notes that this lack of information may be because the prostitution industry is usually structured to preserve client anonymity - at 7.

⁷⁹⁷ See Chapter 4 above.

⁷⁹⁸ ODCCP at Par 4.5.

⁷⁹⁹ *Ibid.*

⁸⁰⁰ Leggett 'Poverty and sex work in Durban, South Africa' *Society in Transition* Vol 30(2) (1999) at 162.

⁸⁰¹ *Ibid.*

⁸⁰² *Ibid.* Leggett describes the following synergy between crack and prostitution: crack is a stimulant (allowing long work hours) and an appetite suppressant (leading to weight loss). It is highly addictive and short-lasting (providing a need for an immediate cash income), it is a mood elevator (potentially softening the stresses of the work) and has a pro-sexual effect in some users. (Leggett ODCCP at Par 2.5.) Crack use has also been correlated with other

8.20 When assessing the risk of HIV infection for prostitutes, it is also important to consider the rate of infection among the general population.⁸⁰³ Where a markedly high or low infection rate is detected or predicted among prostitutes, this must be evaluated against the general infection rate.⁸⁰⁴

Legal measures targeting prostitutes

8.21 Different legal measures operating within the framework of the criminal law and specifically targeting prostitutes have been employed in attempts to prevent the spread of HIV through prostitution.⁸⁰⁵ These criminal law measures can be divided into the following broad categories:

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

8.22 These three options will be discussed in more detail below.

(a) Mandatory testing

8.23 Mandatory testing regimes have been employed as part of a legalised system in a number of jurisdictions, as discussed above.⁸⁰⁶ These testing requirements may take a

STI's, thus increasing the risk of HIV transmission, and has been found to cause blisters, sores and cuts in the mouths of users, increasing the risk of oral transmission of HIV. In addition to increasing the number of sexual encounters and the organic susceptibility to HIV, crack use also has a demoralising effect on an already vulnerable group, and may erode the capacity for prudent choice in sexual matters. See Leggett ODCCP at Par 2.2 and authorities cited there.

⁸⁰³ Laffont *et al* (*op cit*).

⁸⁰⁴ For example, research has indicated a high prevalence of STI infection, including HIV infection, in prostitutes working at truckstops in the KwaZulu-Natal midlands (see Ramjee *et al* (*op cit*) at 348). At the same time, the HIV prevalence in KwaZulu-Natal is currently estimated to be the highest in South Africa - see Department of Health (*op cit*) at Par 4.1.2.

⁸⁰⁵ This does not refer to policy initiatives.

⁸⁰⁶ See Chapter 7 above. See also the (Australian) Intergovernmental Committee on AIDS, Legal Working Party **Legal Issues relating to HIV/AIDS, Sex Workers and their Clients Discussion Paper** (July 1991) and **Final Report** (November 1992) on the same issue; Snell 'Mandatory HIV testing and prostitution: The world's oldest profession and the world's newest deadly disease' **Hastings LJ** (August 1994) 1565; Metznerath 'To test or not to test' **Social Alternatives** (1993) 25.

number of forms, including –

- C testing as a prerequisite for employment in a legal brothel (e.g. in Nevada)
- C periodic testing as one of the conditions for continued employment in legal brothels (e.g. Nevada, Germany)
- C testing upon arrest for a prostitution-related offence (e.g. Kentucky, US).

8.24 The arguments in favour of mandatory testing usually revolve around public health concerns, most specifically the spread of HIV infection to the ‘general’ population by means of infected prostitutes transmitting the virus to their clients, who may in turn transmit it to their wives, girlfriends or non-paid casual sexual partners.

8.25 Contemporary commentators are virtually unanimous in their condemnation of mandatory testing regimes.⁸⁰⁷ The criticism of mandatory testing relates to the following issues:

C **Unreliability of tests**

8.26 One of the major objections against mandatory testing is that test results are unreliable. The presence of a ‘window period’, during which test results may be inaccurate, implies that the STI status of an individual cannot be assured even at the time of testing.⁸⁰⁸

C **False sense of security**

8.27 Opponents of mandatory testing point out that testing may be detrimental to HIV prevention, since it creates a false sense of security in both clients and prostitutes.⁸⁰⁹ Clients, believing that a prostitute is free from STI’s because he or she has been tested, are more likely to request sex services without the use of prophylactics.⁸¹⁰

⁸⁰⁷ See S A Law Commission *Fifth Interim Report* (Project 85) Par 2.39 and authorities cited there. See also Mensah *Legal and Ethical Issues raised by HIV/AIDS in the Context of Prostitution: Literature Review* (2000) and authorities cited.

⁸⁰⁸ Banach and Metzenrath (*op cit*) at 25. For a comprehensive discussion of the current testing methodologies and their efficacy, see SA Law Commission *Discussion Paper 84: Aspects of the Law Relating to AIDS: Compulsory Testing of Persons Arrested in Sexual Offence Cases* (Project 85) (1999) Par 3.25-3.41.1.

⁸⁰⁹ Banach & Metzenrath (*op cit*) at 25.

⁸¹⁰ See also S A Law Commission *Discussion Paper 84: Aspects of the Law relating to AIDS: Compulsory HIV testing of persons arrested in sexual offence cases* (Project 85) Par 8.14.

C **Focus on *ex post facto* detection rather than prevention**

8.28 Mandatory testing has been criticised for focusing on detection rather than prevention.⁸¹¹ As it only tells the subject's STI status after an exposure event, it is not effective as a preventative tool.

C **Focus on prostitutes rather than clients**

8.29 Banach & Metzenrath point out that mandatory testing does not assist prostitutes in avoiding STI's, since the client's sexual health status remains unknown.⁸¹² Legal measures enforcing mandatory testing for prostitutes are based on the assumption that prostitutes are the infectors, rather than the infectees.⁸¹³ This premise fails to take account of the lower probability of female-to-male transmission or to recognise the fact that prostitutes are generally more conversant with safer sex practices.

C **Violation of right to privacy and the principles of medical confidentiality**

8.30 Mandatory testing may constitute a serious violation of the right to privacy, as well as the principles of medical confidentiality. Legislation in certain jurisdictions requires test results to be made known to police or court officials. Commentators also point out that in some instances, doctors hand test results directly to brothel operators rather than to the worker without regard to privacy.⁸¹⁴

C **Stigmatisation of prostitutes**

8.31 The use of mandatory testing as a legislative tool perpetuates stereotypes of prostitutes as 'diseased'.⁸¹⁵

International approach to mandatory testing

8.32 The possibility of mandatory testing of prostitutes has received attention in a

⁸¹¹ Jillian Gardner 'Legalisation / Regulation of Adult Commercial Sex Workers - Indoor Sex Workers', paper delivered at the South African Conference on Commercial Sex Work: The Health Issues, 19 - 20 February 2001.

⁸¹² Banach & Metzenrath (*op cit*) at 25.

⁸¹³ See also Lim (*op cit*) at 19.

⁸¹⁴ Banach and Metzenrath (*op cit*) at 25.

⁸¹⁵ Banach & Metzenrath (*op cit*) at 25. See also Intergovernmental Committee on AIDS (*op cit*) at 47.

number of foreign jurisdictions.

8.33 The Ontario Law Reform Commission, for example, has found that it is not clear that mandatory testing of prostitutes can deter high-risk activity.⁸¹⁶ The Commission noted that it is not clear that a woman prostitute's clients are at a significantly increased risk of infection, since a large percentage of women prostitutes report using condoms with clients, thus reducing the risk of infection. It also pointed out that the risk of female-to-male transmission is lower than the risk of male-to-male transmission, and that this might explain why the rate of infection among male clients of women prostitutes is low. (This also suggests that female prostitution, by itself, is not a significant factor in the transmission of HIV.)⁸¹⁷ The Ontario Law Reform Commission concludes that in the absence of a cure for AIDS, it is not clear how involuntary testing could be useful in preventing HIV transmission in the prostitution industry.⁸¹⁸

8.34 The Canadian HIV/AIDS Legal Network and the Canadian AIDS society have made the following recommendation regarding mandatory testing of prostitutes:

'Mandatory or compulsory testing of sex workers and other coercive measures directed at them will do little to prevent the spread of HIV among sex workers and to clients. Rather than undertake such measures, policymakers must consult with sex workers to develop policies that will truly prevent and reduce the spread of HIV.'⁸¹⁹

8.35 In spite of the rejection of proposals for mandatory testing of prostitutes, Canadian courts have on occasion required the testing of prostitutes as part of sentencing measures.⁸²⁰ In **R v Cornier**, for example, a British Columbia prostitute was convicted of solicitation and sentenced to undergo monthly mandatory HIV and other STI testing.⁸²¹ The prostitute appealed against his sentence, arguing that it constituted a violation of his right to be free from unreasonable search and seizure (as set out in section 8 of the Canadian Charter of Rights and Freedoms). The British Columbia Court of Appeal held, on appeal, that monthly examinations were excessive. However, one examination was reasonable and would promote 'good conduct'.

8.36 The AIDS and Civil Liberties Project of the American Civil Liberties Union

⁸¹⁶ Ontario Law Reform Commission **Report on Testing for AIDS** at 53, cited in Jurgens (*op cit*)

⁸¹⁷ *Idem* at 54.

⁸¹⁸ *Ibid.*

⁸¹⁹ *Idem* Recommendation 9.1.

⁸²⁰ See **R v GDM** (1987), 2 WBC (2d) (BC Prov Crt) cited in Jurgens (*op cit*).

⁸²¹ **R v Cornier**, unreported, 1991 CA 12803 BCCA cited in Bastow (*op cit*).

(ACLU) has pointed out that on a practical level, mandatory testing of prostitutes will not work, since prostitutes are likely to be driven underground by such a policy.⁸²²

8.37 As noted above, a number of US states have passed legislation requiring mandatory testing of prostitutes convicted of prostitution.⁸²³ Courts in California and Illinois have upheld the constitutionality of testing convicted prostitutes, characterising the government interest in 'promoting public health and slowing the spread of AIDS' as compelling.⁸²⁴ Jurgens criticises these judgments for their failure to undertake an inquiry into whether the HIV tests were truly necessary to serve the government interest in promoting public health, or whether other less restrictive means were available.⁸²⁵

(b) **Preventing prostitutes from working if HIV infected**

8.38 As discussed above,⁸²⁶ certain legal systems include measures aimed at prohibiting persons who have tested positive for HIV from working as prostitutes. In Nevada, for example, a person who engages in prostitution, including a prostitute in a licensed brothel, after testing positive for HIV is guilty of a class B felony and liable for imprisonment for a minimum of 2 and a maximum of 10 years, a fine of \$10,000 or both.⁸²⁷

8.39 In the same way as mandatory testing, measures aimed at preventing HIV positive prostitutes from working can also create problems by encouraging prostitutes to 'hide away' from the authorities if they think they may be infected. Access to health care is therefore limited, since prostitutes will be liable for prosecution if they disclose their work.⁸²⁸

8.40 Banach and Metzenrath point out that this prohibition is premised on the assumption that penetrative intercourse will be part of every service, when prostitutes offer many services that do not expose clients to a high risk of STI contraction.⁸²⁹

⁸²² AIDS and Civil Liberties Project, American Civil Liberties Union Foundation 'Mandatory HIV testing of female prostitutes: policy statement of the American Civil Liberties Union' in M Blunberg (ed) *AIDS: The Impact on the Criminal Justice System* (1990) cited in Jurgens (*op cit*).

⁸²³ In some instances, the testing requirement also extends to persons charged, but not yet convicted of, prostitution - see Jurgens (*op cit*).

⁸²⁴ *Love v Superior Ct*, 276 Cal Rptr 660 (Ct App (1990)); *People v Adams*, 597 N.E. 2d 574 (Ill 1992) cited in Jurgens (*op cit*).

⁸²⁵ *Ibid*.

⁸²⁶ See Chapter 6 above.

⁸²⁷ Nev Rev Stat § 201.358.

⁸²⁸ Mak (*op cit*) at 2.

⁸²⁹ Banach and Metzenrath (*op cit*) at 26.

8.41 The Asia-Pacific Sex Workers Network has developed a policy statement on the rights of HIV-positive prostitutes. The Network (*inter alia*) advocates the following:

- C Ensure that HIV status alone does not prevent a person from choosing and undertaking prostitution as an occupation;
- C Ensure that testing for HIV is not a mandatory requirement for work;
- C Ensure an individual's right to privacy and confidentiality is championed and upheld, irrespective of occupation and / or HIV status;
- C Ensure that education programs and campaigns foster an environment of understanding, acceptance and support for all prostitutes, and in particular HIV positive prostitutes.⁸³⁰

8.42 Where prostitutes do not have access to unemployment insurance, social security or viable prospects for alternative employment, prohibiting them from working may exacerbate the financial situation that caused them to enter in prostitution in the first place.

(c) **Increased penalties**

8.43 Examples of these measures are to be found in US jurisdictions, such as Kentucky, where state legislation provides that a persons who commits prostitution whilst knowing that they tested positive for HIV and there is a chance of transmission would be guilty of a Class D felony (as opposed to a Class B misdemeanour, which applies to a conviction of 'ordinary' prostitution).⁸³¹

8.44 Bastow criticises such measures on the basis that they will result in an increased seriousness of the prostitute's criminal record, thus reducing the employment opportunities for those who wish to leave prostitution.⁸³²

8.45 A further point of concern is that this measure does not take into account whether or not the prostitute complied with acceptable safer sex precautions. It is therefore conceivable that a prostitute who is HIV positive, but nevertheless takes all reasonable precautions to prevent HIV transmission to clients, will face the increased penalties in spite

⁸³⁰ Policy Statement on the Rights of HIV Positive Sex Workers for the Asia-Pacific Network of Sex Worker Projects *HIV/AIDS Legal Link* (1998) at 13 cited in Jurgens *op cit*.

⁸³¹ § 90(3) of the Kentucky Revised Statutes.

⁸³² Bastow *op cit*.

of such diligence.⁸³³

Are these measures appropriate to address HIV infection?

8.46 The legal measures outlined above raise a larger principle issue, viz. the question of whether such mechanisms are appropriate for addressing concerns around prostitution and the prevention of HIV. Certain authors suggest that in attempting to criminalise certain behaviours by people infected with HIV, the criminal justice system has largely ignored the conclusions of public health officials.⁸³⁴ They note that laws under which prostitutes may be required to refrain from specific conduct, undergo specific treatment or counselling or submit to supervision, may be counterproductive.⁸³⁵

‘To prevent HIV infection among prostitutes, it is essential to address the context in which sex work is transacted, as well as the specific practices of the prostitutes. Placing the major burden for HIV prevention on prostitutes themselves may not be the most effective tactic. Economic dependence and gender power imbalances can make it nearly impossible for prostitutes to demand safer sex’.⁸³⁶

8.47 The suitability of criminal law measures to address ‘high risk’ HIV-related behaviour is closely linked to the Commission’s enquiry into the enactment of specific statutory offences to penalise harmful HIV-related behaviour.⁸³⁷ In reaching its conclusion that the recommendation of legislative intervention would not be principled, the Commission noted, *inter alia*, that it is generally believed that the creation of HIV-specific statutory offences would be counter-productive to public health efforts to curb the spread of the disease, and will entrench further discrimination and stigmatisation of persons with HIV.⁸³⁸ In addition, it will drain away scarce resources from the most effective HIV prevention programmes such as targeted education campaigns, condom distribution initiatives, and the provision of voluntary, accessible testing, counseling and medical treatment.

⁸³³ An analogous example is cited by Bastow *op cit*. In Florida, US, an HIV-positive prostitute was charged with manslaughter despite the fact that all her customers tested seronegative and she had used condoms consistently.

⁸³⁴ See Par 5.67 *et seq* above. See also S A Law Commission **Fifth Interim Report on Aspects of the Law relating to AIDS** (Project 85) Par 2.27, 8.11, 12.10.8.

⁸³⁵ See also S A Law Commission **Fifth Interim Report on Aspects of the Law relating to AIDS** (Project 85) Par 2.27.

⁸³⁶ DeCarlo et al (*op cit*).

⁸³⁷ **Fifth Interim Report on Aspects of the Law relating to AIDS** (Project 85).

⁸³⁸ *Op cit*, Par 12.10.8.

Legal dispensation and effective HIV prevention

8.48 The discussion above focused on the impact of specific measures enforced through the criminal law. These measures may operate in the context either of total criminalisation or of a legalised system (for example, in Nevada). It is essential to not only consider the suitability of specific mechanisms, but to also look at the 'broader picture' of how the legal status of prostitution may impact on HIV/ AIDS prevention.

8.49 Research demonstrates that laws criminalising sectors of the prostitution industry create an impediment for HIV/AIDS education and prevention programmes, by making prostitutes less accessible through their fear of police harassment, identification and discrimination associated with being publicly labelled a prostitute.⁸³⁹ Punitive measures aimed at controlling prostitution further erode prostitutes' ability to negotiate safer sex and alienate them from public health initiatives.⁸⁴⁰

8.50 Prostitutes working illegally in a criminalised or legalised system are unlikely to disclose their occupation when accessing health care, and therefore they forego a range of required sexual health care services.⁸⁴¹ In addition, street prostitutes may opt not to carry condoms for fear of police seizure and subsequent arrest,⁸⁴² and businesses may be reluctant to keep material regarding safer sex practices on premises.⁸⁴³ Furthermore, health and occupational safety standards can not be implemented in those sectors that remain illegal as they are unenforceable.⁸⁴⁴

8.51 The World Health Organisation recommended in 1989 that interventions aimed at changing HIV-related risk-taking practices associated with prostitution must urgently be promoted among all prostitutes and their clients.⁸⁴⁵ Such interventions should be designed in consultation with sex workers and should be cost-effective and not impeded by

⁸³⁹ Intergovernmental Committee on AIDS (*op cit*) 'Legal Issues' at 49. See also Mensah ***Legal and Ethical Issues raised by HIV/AIDS in the Context of Prostitution: Annotated Bibliography***; DeCarlo et al (*op cit*); San Francisco Task Force Report on Prostitution in Leigh (*op cit*) at 78.

⁸⁴⁰ Bastow (*op cit*); European Network for HIV/STD Prevention in Prostitution 'Policies on sex work and health'; Mak (*op cit*); Abdool Karrim et al (*op cit*) at 1524; Monitoring the AIDS Pandemic (MAP) ***The Status and Trends of the HIV/AIDS Epidemics in the World*** (2000) at 15.

⁸⁴¹ Banach & Metzenrath (*op cit*) at 22.

⁸⁴² Bastow (*op cit*).

⁸⁴³ Banach & Metzenrath (*op cit*) at 23.

⁸⁴⁴ *Ibid.*

⁸⁴⁵ WHO ***Statement on HIV Epidemiology and Prostitution*** (1989) at Par B.1.

legal structures. The WHO proposes that a meeting with appropriate representation from the international legal and civil rights communities should be organised to ‘address issues such as laws which impinge on social, economic, and legal rights of prostitutes and therefore impede HIV prevention efforts’.⁸⁴⁶

8.52 According to the Australian Intergovernmental Committee on AIDS, some of the desirable features of a decriminalised industry in terms of public health objectives are the following:

- C encouraging responsible behaviour by prostitutes and clients and others who have control over their activities, e.g. brothel owners;
- C allowing free flow of information and education on public health preventive measures by removing fear of prosecution and harassment, thereby encouraging attendance for advice, counseling, information, testing and treatment;
- C alleviating the stigma associated with prostitution, which attaches to prostitutes (thereby making it more difficult for them to leave the industry);
- C combating the fear of identification which inhibits some prostitutes from seeing themselves as part of the industry, thereby making it harder to reach them by targeted education and prevention strategies; and
- C promoting conditions within the ‘culture’ of the prostitution industry to permit and encourage safer sex activities that must facilitate HIV/AIDS prevention, and generally improving working conditions within the industry currently contributing to disease transmission.⁸⁴⁷

8.53 A system of legalisation, on the other hand, represents the same difficulties that criminalisation does, especially since criminalisation is the inevitable ‘default’ position where prostitutes do not comply with the conditions for working within the parameters of the legal sector.⁸⁴⁸ The inclusion of mandatory HIV testing as one of the conditions for legalisation compounds the difficulties created by criminalisation.

8.54 Several authors point out that, rather than coercive measures, there are interventions that would give prostitutes the means to protect themselves against HIV transmission and empower them to use them.⁸⁴⁹ These interventions may include –

⁸⁴⁶ *Idem*, at Par B.12.

⁸⁴⁷ Intergovernmental Committee on AIDS (*op cit*) at 46-47.

⁸⁴⁸ See in this regard also Mensah ***Legal and Ethical Issues raised by HIV/AIDS in the Context of Prostitution: Annotated Bibliography*** (2000).

⁸⁴⁹ *Ibid.*

- C the development of educational strategies for reaching prostitutes, giving them accurate information about prevention of transmission, and supporting them in their efforts to utilise these measures consistently;⁸⁵⁰
- C peer-based education conducted through prostitutes' organisations,⁸⁵¹ and
- C condom distribution initiatives.

8.55 In Thailand, for example, the government initiated a policy of '100% condom use' for brothel based prostitutes in 1990.⁸⁵² The initiative consisted of a set of policies that included a mass media campaign, condom and information distribution to brothels, regulations to make condom use compulsory in all penetrative prostitution transactions as well as access to STI screening for prostitutes. The programme aimed to gain the agreement of owners and managers of all prostitution establishments to enforce condom use as a condition of prostitution. (The underlying principle is that if all businesses enforce this policy, clients have no choice but to comply - they must either use condoms or not have sex.) The incidence of condom use in prostitution is reported to have risen from 14% to more than 90% in the first four years of the programme.⁸⁵³ By 1996, infection rates among women in antenatal clinics had declined substantially.⁸⁵⁴

8.56 This initiative not only demonstrates the potential value of '100% condom use' initiatives, but also highlight an additional component of recommended HIV interventions, i.e. imposition of certain duties on brothel owners and managers. Authors propose that clients and operators of brothels and escort agencies should be targeted, rather than focusing only on prostitutes.⁸⁵⁵ The provisions of the New Zealand Bill are instructive in this regard.⁸⁵⁶

8.57 The International Guidelines on HIV/AIDS and Human Rights advise against mandatory testing of prostitutes and recommends a broader prevention approach:

⁸⁵⁰ *Ibid.*

⁸⁵¹ Banach & Metzenrath (*op cit*) at 26.

⁸⁵² Overs (*op cit*) at 16.

⁸⁵³ *Ibid.*

⁸⁵⁴ *Ibid.* Overs (*loc cit*) also notes that recent information from Thailand identified risk behaviours in 'non-commercial' casual sex as an emerging risk, prompting one health official to comment that 'one night stands' are now more dangerous than visiting prostitutes. These emerging patterns were predicted early in the epidemic, when some observers speculated that targeting prostitutes as a risk might contribute to a (false) sense of invulnerability in others. See also Leggett **Crime & Conflict** No 13 (1998) at 24.

⁸⁵⁵ DeCarlo et al (*op cit*).

⁸⁵⁶ See Par 7.104 *et seq* above.

'With regard to adult prostitution that involves no victimization, criminal law should be reviewed with the aim of decriminalizing, then legally regulating occupational health and safety conditions to protect sex workers and their clients, including support for safe sex during sex work. Criminal law should not impede provision of HIV/AIDS prevention and care services to sex workers and their clients'.

8.58 However, Leggett cautions that these kinds of programmes imply having access to prostitutes and their clients, and the illegal status of the industry provides a major impediment to education campaigns.⁸⁵⁷ Abdool Karrim *et al*, for example, demonstrate that efforts to educate prostitutes at truck stops have been impeded by frequent police harassment, which has made them a 'hard-to-reach' group.⁸⁵⁸ An additional concern is the reluctance of prostitutes to use condoms with their personal partners, and South African researchers have noted that in order to address this, 'extensive outreach' is necessary.⁸⁵⁹

'But the kinds of interventions necessary are nearly impossible to implement in a climate where the sale of sex is illegal.'⁸⁶⁰

Summary

8.59 The purported connection between prostitutes and public health concerns (most notably, the spread of sexually transmitted diseases), is not a recent one. Legal measures aimed at controlling prostitution were historically often motivated by attempts to prevent such diseases. Currently, calls for the imposition of invasive measures in the interest of public health are increasingly heard in the context of the global explosion of the HIV/AIDS pandemic.

8.60 Prostitutes are often held responsible for the spread of the HIV/AIDS. While persons working in prostitution constitute a 'high risk' population in terms of HIV and other STI infection, there are also certain aspects militating against a linear understanding that prostitutes are a primary bridge through which HIV/AIDS is transmitted to the general population. These aspects include –

- C the fact that prostitutes are generally more aware of the need for safer sex practices (including condom use) than non-prostitute populations;
- C the fact that women are biologically and culturally more vulnerable than men to HIV

⁸⁵⁷ Leggett *Crime & Conflict* No 13 (1998) at 24.

⁸⁵⁸ Abdool Karrim *et al* (*op cit*) at 1521. Prostitutes working at truck stops are typically at the upper end of the scale of risk for HIV infection.

⁸⁵⁹ *Ibid.*

⁸⁶⁰ *Ibid.*

infection; and

- C the lower transmission rate from women to men than vice versa.

8.61 A broad range of variables appears to impact on the infection risk for prostitutes, and this risk may therefore vary greatly. Risk predictions indicate that the prostitutes most vulnerable to HIV infection are street prostitutes who are generally poorer, younger and more likely to be alcohol or drug dependent as well as more vulnerable to violence.

8.62 While information on male and transgendered prostitutes is not as readily available as for women prostitutes, there are indications that these groups may be particularly vulnerable to HIV infection. Age is also significant in risk prediction, since children are at greater risk of infection than adults.

8.63 Studies conducted in South Africa have shown varying levels of HIV prevalence. Research recently conducted in Cape Town, Durban and inner city Hillbrow was that ethnicity was a more accurate predictor of HIV than the use of hard drugs, and that a strong association existed between being black and being HIV positive.

8.64 When assessing the risk of HIV infection, it is important to also consider the rate of infection among the general population, for example in the case of the high HIV prevalence among prostitutes working at truck stops in KwaZulu-Natal. The general HIV prevalence in KwaZulu-Natal is the currently the highest in South Africa.

8.65 Three categories of measures operating in the context of criminal law have been employed to prevent the spread of HIV through prostitution. These categories are the following:

- C mandatory testing requirements;
- C prohibiting persons who have tested positive for HIV from working as prostitutes;
- C enhancing the penalties for prostitution-related offences when committed by a person with HIV

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

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

8.68 The Ontario Law Reform Commission, the Canadian HIV/AIDS Legal Network and the Canadian AIDS Society as well as the AIDS and Civil Liberties Project of the American Civil Liberties Union have examined and rejected proposals for mandatory testing of prostitutes. On the other hand, Canadian courts have on occasion required the testing of prostitutes as a part of sentencing measures, and courts in California and Illinois have upheld the constitutionality of mandatory testing measures.

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

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

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

8.72 A broader question is how the legal status of prostitution may impact on HIV/AIDS prevention. Research demonstrates that laws criminalising prostitution create an impediment for HIV/AIDS education and prevention programmes. Punitive measures also erode prostitutes' ability to negotiate safer sex and alienate them from public health initiatives. Prostitutes may be reluctant to carry condoms for fear of police, and businesses may similarly be reluctant to keep and display safer sex material on premises. Health and

occupational safety standards cannot be implemented where prostitution is illegal.

8.73 The Australian Intergovernmental Committee on AIDS has listed some of the potential advantages of a decriminalised system. These include the alleviation of the stigma associated with prostitution and the encouragement of safer sex activities in the industry.

8.74 Commentators point out that rather than coercive measures, there are interventions such as peer-based education and condom distribution initiatives that would give prostitutes the means to protect themselves against HIV. However, they also caution that these kinds of programmes imply being able to access prostitutes and their clients, and the current illegal status of the industry impedes such health and education campaigns.

CHAPTER 9

TRAFFICKING AND PROSTITUTION

Background

9.1 The question of trafficking in persons⁸⁶¹ has recently received considerable attention, both in South Africa⁸⁶² and in the international context. In the international context,⁸⁶³ interest in trafficking re-emerged during the 1980's after the initial campaigns against the 'white slave trade' at the turn of the century had culminated in the 1949 Trafficking Convention.⁸⁶⁴

9.2 Although the original focus of contemporary campaigns was on the traffic from Latin America and Asia to Western Europe, the emphasis is increasingly on women from Russia, the Newly Independent States and Eastern Europe being trafficked to Western Europe, the United States and Asia.⁸⁶⁵ There is also an increasing focus on inter-regional traffic such as from Nepal to India, and Burma to Thailand, as well as rural to urban trafficking within one country.⁸⁶⁶ It has been noted that little information is available on trafficking to and from African countries.⁸⁶⁷

9.3 During the 1990's, the issue received attention on international level at major human rights conferences.⁸⁶⁸ In 1997, the UN Special Rapporteur on Violence Against Women included a section on trafficking in women and forced prostitution in her report on violence in the community,⁸⁶⁹ and also produced a report on her visit to Poland on the issue

⁸⁶¹ While trafficking occurs in respect of men, women and children, the vast majority of persons subjected to trafficking are women and children. In this Chapter, the Commission therefore predominantly refers to trafficking of 'women' in order to emphasise the fact that the majority of victims are women.

⁸⁶² See Molo Songololo *The Trafficking of Women into the South African Sex Industry* (2000).

⁸⁶³ See also Jyoti Sangera 'In the belly of the beast: Sex trade, prostitution and globalisation', discussion paper for South Asia Regional Consultation on Prostitution, 17 - 18 February 1997.

⁸⁶⁴ See A Murray 'Debt bondage and trafficking: don't believe the hype' in Kempadoo and Doezema (eds) *op cit* at 51.

⁸⁶⁵ Doezema *Gender Issues* (Winter 2000) at 31.

⁸⁶⁶ *Ibid* at 31.

⁸⁶⁷ S Altink *Stolen Lives: Trading Women into Sex and Slavery* (1995) at 31-32; UN Special Rapporteur Report 2000 at Par 75.

⁸⁶⁸ Most notably the 1993 World Conference on Human Rights in Vienna and the 1995 UN Fourth World Conference on Women in Beijing.

⁸⁶⁹ E/CN.4/1997/47.

of trafficking and forced prostitution.⁸⁷⁰ More recently, the Special Rapporteur completed a comprehensive analysis of trafficking in women, women's migration and violence against women.⁸⁷¹

9.4 On 9 December 1998, the UN General Assembly decided to establish an intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organised crime and of discussing the elaboration of, *inter alia*, an international instrument addressing trafficking in women and children.⁸⁷²

9.5 In December 2000, the UN General Assembly adopted the Convention Against Transnational Organised Crime. The Convention is currently supplemented by two protocols, one on trafficking in persons and one on smuggling in persons. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children constitutes an important development in international human rights law.

9.6 Due to the perceived close link between trafficking and prostitution, an analysis of prostitution in South Africa would be incomplete without an examination of recent developments around trafficking. However, it should be noted that the scope of this Issue Paper does not allow for a comprehensive treatment of the topic.

9.7 This Chapter accordingly attempts to formulate a definition of trafficking, and examines the link between trafficking and migration. It looks at different perspectives on trafficking, and analyses the treatment of trafficking in international human rights law. It briefly considers government responses to trafficking, and finally discusses the current legal position in South Africa.

Definition of trafficking

9.8 The Special Rapporteur on Violence against Women has pointed out that the term 'trafficking' is used to describe activities that range from voluntary, facilitated migration, to the exploitation of prostitution, to the movement of persons through the threat or use of force, coercion, violence etc for certain exploitative purposes.

⁸⁷⁰ E/CN.4/1997/47/Add.

⁸⁷¹ E/CN.4/2000.68, dated 29 February 2000.

⁸⁷² GA Res 53/111 of 9 December 1998. See Preamble to the Trafficking Protocol.

9.9 She observes that increasingly, it has been recognised that historical characterisations of trafficking are ‘outdated, ill-defined and non-responsive’ to the current realities of the movement of and trade in people and to the nature and extent of the abuses inherent in and incidental to trafficking.⁸⁷³ New understandings of trafficking should therefore be developed in order to protect and promote the human rights of trafficked persons, with specific emphasis on gender-specific violations and protections.

9.10 The Special Rapporteur further explains that trafficking is a dynamic concept, the parameters of which are constantly changing to respond to changing economic, social and political conditions.⁸⁷⁴ Although the purposes for which women are trafficked, the ways in which women are trafficked and the countries from which and to which they are trafficked change, the constituent elements remain constant. At the core of any definition of trafficking must be the recognition that trafficking is never consensual.

9.11 It is the non-consensual nature of trafficking that distinguishes it from other forms of migration. While all trafficking is, or should be, illegal, all illegal migration is not trafficking. It is important to refrain from telescoping together the concepts of trafficking and illegal migration.⁸⁷⁵

9.12 Trafficking is undertaken for numerous purposes, including but not limited to prostitution or other sex work, domestic, manual or industrial labour, and marriage, adoptive or other intimate relationships. The common elements in all of the trafficking patterns are:

- C lack of consent;
- C brokering of human beings;
- C transport; and
- C exploitative or servile conditions of the work or relationships.⁸⁷⁶

9.13 Against this background, the definition adopted for purposes of the Trafficking Protocol is therefore significant. This definition is discussed in more detail below.

⁸⁷³ Report 2000 at Par 11.

⁸⁷⁴ At Par 12.

⁸⁷⁵ *Ibid.*

⁸⁷⁶ *Ibid*, Par 17.

Trafficking and migration

9.14 The UN Special Rapporteur observes that the root causes of trafficking and migration greatly overlap.⁸⁷⁷ Trafficking in women flourishes in many less developed countries because of the vulnerabilities arising from women's lack of access to resources, poverty and gender discrimination.

9.15 Women's lack of rights and freedoms is exacerbated by external factors such as the ever-widening gap between rich and poor countries, and within those countries, between rich and poor communities. The failure of existing economic, political and social structures to provide equal and just opportunities for women to work has contributed to the feminisation of poverty, which in turn has led to the feminisation of migration, as women leave their homes in search of viable economic options.⁸⁷⁸

9.16 The Special Rapporteur cautions that globalisation may have dire consequences for human rights generally and women's human rights particularly, in terms of eroding political, economic, social and cultural rights in the name of development and macro-level economic restructuring and stability.⁸⁷⁹ The economic crisis in East Asia, for example, has resulted in many women being trafficked to escape from sudden poverty. Political instability, militarism, internal armed conflict and natural disasters also exacerbate women's vulnerabilities and may result in an increase in trafficking. According to recent reports, trafficking networks responded to the war in Kosovo and consequent exodus of refugees by increasing recruitment of Kosovars.⁸⁸⁰

9.17 The UN Special Rapporteur notes that women move and are moved, with and without their consent, for a myriad of reasons.⁸⁸¹ Trafficking in women must be understood within a continuum of women's movement and migrations. Other reports also emphasise the inter-connection of trafficking and migration.⁸⁸²

⁸⁷⁷ *Ibid*, at Par 54. See also in this regard S Skrobaneck *et al* ***The Traffic in Women*** (1997) at 12-18.

⁸⁷⁸ *Ibid*, at Par 58. See in this regard also Wijers and Lap-Chew (*op cit*) at 43-47.

⁸⁷⁹ *Ibid*, at Par 59. The Special Rapporteur notes that in the countries in the South, structural adjustment programmes have led to increased impoverishment, particularly amongst women, displacement and internal strife resulting from the political instabilities caused by devaluing national currencies, increasing debt and dependence on foreign direct investment.

⁸⁸⁰ *Ibid*.

⁸⁸¹ Report 2000 at Par 3.

⁸⁸² See e.g. GAATW, Human Rights Watch / Asia ***Owed Justice*** (2000) at 27.

9.18 Four types of situations that result in women's involvement in the sex trade and other forms of labour associated with migration and trafficking can be identified.⁸⁸³

- C The first group includes women who have been completely deceived and coerced. Such women have no idea where they are going or the nature of work they will be doing.
- C The second group comprises women who are told half-truths by their recruiters about their employment and are then forced to do work to which they have not previously agreed and about which they have little or no choice. Both their movement and their power to change their situation are severely restricted by debt bondage and confiscation of their travel documents or passports.
- C In the third group are women who are informed about the kind of work they will be doing. Although they do not want to do such work, they see no viable economic alternative, and therefore relinquish control to their trafficker who exploits their economic and legal vulnerability for financial gain, while keeping them, often against their will, in situations of debt bondage.
- C The fourth group is comprised of women who are fully informed about the work they are to perform, have no objections to performing it, are in control of their finances and have relatively unrestricted movement. This is the only situation of the above four that cannot be classified as trafficking.⁸⁸⁴

9.19 Certain authors question the reported incidence of trafficking in women, and suggest that a significant component of allegedly 'trafficked' persons is in reality migrant workers.⁸⁸⁵

Different perspectives on trafficking

9.20 There are at least two divergent perspectives on trafficking.⁸⁸⁶ On the one hand, the neo-abolitionist view proposed by the Coalition on Trafficking in Women (CATW)

⁸⁸³ Report 2000 at Par 35.

⁸⁸⁴ *Ibid*, at Par 36.

⁸⁸⁵ See, for example, Doezema ***Gender Issues*** (Winter 2000) at 44-46 (drawing a parallel between the contemporary concern with trafficking and the earlier pre-occupation with 'the white slave trade'; Murray (*op cit*) at 51-64; Bindman (*op cit*) at 66-68; M Wijers 'Women, labor and migration: the position of trafficked women and strategies for support' in Kempadoo and Doezema (eds) *op cit* at 70-72.

⁸⁸⁶ Murray (*op cit*) distinguishes **three** schools of thought: the neo-abolitionist CATW, the GAATW which opposes 'forced' prostitution, and various prostitutes' rights activists who dismiss the free/forced distinction and claim that the 'harms' of prostitution are actually caused by moral attitudes and their legal consequences - at 52.

holds that trafficking is part of the general exploitation of women, and that all prostitution is coercive.⁸⁸⁷ Prostitution is explicitly named as a violation of women's human rights, and is also held responsible for subordinating women as a group.⁸⁸⁸ The CATW assumption that all prostitution is violence against women implies that any migration of prostitutes can become trafficking.⁸⁸⁹ According to this definition, there can be no such thing as 'voluntary' prostitution, as all prostitution is a violation of human rights, and 'trafficking in women' is taken to mean any migration for purposes of prostitution.⁸⁹⁰

9.21 In 1993, the CATW developed a Convention on the Elimination of All Forms of Sexual Exploitation of Women, which was intended as a replacement for the 1949 Trafficking Convention.⁸⁹¹ One of the goals of the anti-trafficking lobby at the Beijing Conference in 1995 was for the 1949 Trafficking Convention to be replaced by the draft CATW Convention.⁸⁹² However, this goal was not achieved.

9.22 The second position in the campaign against trafficking is one that makes a distinction between 'trafficking in women' and 'forced prostitution' on the one hand, and 'voluntary prostitution' on the other.⁸⁹³ The Global Alliance Against Traffic in Women (GAATW), based in Thailand, is the primary exponent of this position, and their approach can be summarised as follows:

'[T]raffic in persons and forced prostitution are manifestations of violence against women and the rejection of these practices, which are a violation of the right to self-determination, must hold within itself the respect for the self-determination of adult persons who are voluntarily engaged in prostitution.'⁸⁹⁴

9.23 In 1997, the UN Special Rapporteur Violence commissioned the GAATW to compile a report on trafficking.⁸⁹⁵ In its report, the GAATW placed the emphasis on the

⁸⁸⁷ Murray (*op cit*) at 53.

⁸⁸⁸ Doezema (*op cit*) at 37.

⁸⁸⁹ Murray (*op cit*) at 53.

⁸⁹⁰ Doezema (*op cit*) at 33.

⁸⁹¹ *Ibid* at 47 n 12.

⁸⁹² Murray (*op cit*) at 51.

⁸⁹³ Doezema (*op cit*) at 33.

⁸⁹⁴ Cited in Doezema (*op cit*) at 33.

⁸⁹⁵ Doezema (*op cit*) sees the fact that the Special Rapporteur commissioned GAATW, rather than the neo-abolitionist CATW, as the most convincing evidence of the displacement of the abolitionist discourse - at 41.

coercion to which women are subjected in the context of trafficking.⁸⁹⁶

Trafficking and international human rights law

9.24 Prior to the development of the Trafficking Protocol, the 1949 Trafficking Convention was the sole international instrument on trafficking. The Trafficking Convention has been the subject of considerable criticism.⁸⁹⁷

9.25 However, the protection of the rights of trafficked persons is not confined to the Trafficking Convention (and the new Trafficking Protocol).⁸⁹⁸ States have a duty to provide protection to trafficked persons pursuant to a number of human rights instruments.⁸⁹⁹ Certain specialised instruments on women's rights also address trafficking.

Trafficking Protocol

9.26 The Trafficking Protocol has been developed to supplement the UN Convention Against Transnational Organised Crime, and must therefore be interpreted together with the Convention.⁹⁰⁰ This implies that the definitions of concepts such as 'organised criminal group' as used in the Protocol are to be found in the Convention.⁹⁰¹

9.27 The purposes of the Trafficking Protocol are set out as follows in Article 2:

To prevent and combat trafficking in persons, paying particular attention to women and children;
 To protect and assist the victims of such trafficking, with full respect for their human rights; and
 To promote cooperation among States Parties in order to meet those objectives.

⁸⁹⁶ Bindman (*op cit*) at Par 2b.

⁸⁹⁷ See Chapter 7 above.

⁸⁹⁸ Par 20.

⁸⁹⁹ The Universal Declaration of Human Rights; The International Covenant on Civil and Political Rights; The International Covenant on Economic, Social and Cultural Rights; The Convention on the Elimination of All Forms of Discrimination Against Women; The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; The Convention on the Rights of the Child; The Convention on the Protection of the Rights of Migrant Workers and Members of their Families (not yet in force); The Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery; International Labour Organisation Conventions No 29 concerning Forced Labour and No 105 concerning the Abolition of Forced Labour.

⁹⁰⁰ Article 1 of the Protocol.

⁹⁰¹ See article 2 of the Convention. This concept is discussed below.

9.28 The Protocol applies to the prevention, investigation and prosecution of the offences established in accordance of Article 5, where those offences are transnational in nature and involve an organised crime group, as well as to the protection of victims of such offences. The term 'organised crime group' is defined in the Convention as 'a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit'.⁹⁰²

9.29 Article 5(1) requires States Parties to adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set out in article 3, when committed intentionally. For the convenience of readers, Article 3 is reproduced here in full:

- (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) "Child" shall mean any person under eighteen years of age.

9.30 In addition, State Parties are required to establish as criminal offences any attempting to commit any of the offences established in terms of Article 5(1), participating as an accomplice in such offences, and organising or directing other persons to commit such

⁹⁰² Article 2(a) of the Convention. 'A structured group' is in turn defined as 'a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure' - Article 2(c). According to Article 3(2) of the Convention, an offence is transnational in nature if:

- (a) It is committed in more than one State;
- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- (d) It is committed in one State but has substantial effects in another State.

offences.⁹⁰³

(a) Protection of victims of trafficking

9.31 Articles 6-8 describe the specific duties of States Parties regarding the victims of trafficking. These duties relate to -

- C assistance to and protection of victims of trafficking,⁹⁰⁴
- C the status of victims of trafficking in persons in receiving States,⁹⁰⁵ and
- C the repatriation of victims of trafficking in persons.⁹⁰⁶

(b) Prevention, cooperation and other measures

9.32 Additional measures to be taken by States Parties are detailed in Articles 9-13. These measures include -

- C steps to prevent trafficking;⁹⁰⁷
- C information exchange and training;⁹⁰⁸
- C border measures;⁹⁰⁹
- C security and control of documents;⁹¹⁰ and
- C legitimacy and validity of documents.⁹¹¹

(c) Entry into force of the Protocol

9.33 The Protocol was opened for signature on 12 December 2000. According to Article 17(1) of the Protocol, it will enter into force after the date of deposit of the fortieth instrument of ratification.⁹¹²

⁹⁰³ Art 5(2)(a) - (c).

⁹⁰⁴ Art 6.

⁹⁰⁵ Art 7.

⁹⁰⁶ Art 8.

⁹⁰⁷ Art 9.

⁹⁰⁸ Art 10.

⁹⁰⁹ Art 11.

⁹¹⁰ Art 12.

⁹¹¹ Art 13.

⁹¹² The Protocol shall not enter into force before the entry into force of the Convention - art 17(1) of the Protocol.

9.34 At the time of writing, 80 states have signed the Convention. South Africa has signed the Convention and both Protocols.

(d) **Monitoring of implementation**

9.35 According to Article 33, a Conference of the Parties to the Convention is established to promote and review the implementation of the Convention.⁹¹³ The UN Secretary General must convene the Conference at the latest one year after the entry into force of the Convention. This Conference will then decide on mechanisms to achieve the objectives of the Convention.⁹¹⁴

(e) **Discussion of the Trafficking Protocol**

9.36 The Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, which was responsible for drafting the Convention as well as the Trafficking Protocol, prepared a set of interpretive notes that are intended to form the basis for the *travaux préparatoires* for the Convention and its Protocols. These interpretive notes provide some background to understanding the Trafficking Protocol.⁹¹⁵ These notes are specifically useful when examining the terms used in the Protocol.

9.37 Firstly, the notes recount that the reference to the ‘abuse of a position of vulnerability’ must be understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.⁹¹⁶

9.38 Furthermore, the interpretive notes explain that the Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms ‘exploitation of the prostitution of others’ or ‘other forms of sexual exploitation’ are not defined in the Protocol, which is therefore without prejudice to how States Parties address prostitution in their respective domestic laws.⁹¹⁷

⁹¹³ Art 33(1).

⁹¹⁴ See in more detail Art 33(3)-(5).

⁹¹⁵ Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions : Addendum Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, A/55/383/Add.1 dated 3 November 2000.

⁹¹⁶ Par 63.

⁹¹⁷ At Par 64.

9.39 A caucus⁹¹⁸ of non-governmental organisations that attended all meetings and negotiations leading up to the new protocol comments that the phrase ‘exploitation of prostitution of others or other forms of sexual exploitation’ was intentionally left undefined, since government delegations to the negotiations could not agree on a common meaning.⁹¹⁹ While all delegates agreed that involuntary forced participation in prostitution would constitute trafficking, the majority of governments rejected the idea that voluntary, non-coercive participation by adults in prostitution constitutes trafficking. In order to ensure the greatest number of signatories to the Protocol, delegates therefore agreed to leave the phrase undefined and add the interpretative note set out above.

9.40 According to the NGO caucus, the Trafficking Protocol therefore expressly permits states to focus only on forced prostitution and does not require governments to treat **all** adult participation in prostitution as trafficking.⁹²⁰ Governments that want to focus on crimes involving force or coercion in prostitution and other forms of labour do not even need to include the phrase ‘exploitation of prostitution of others or other forms of sexual exploitation’ in their domestic laws, since the terms ‘forced labour or services, slavery or practices similar to slavery, servitude’ cover all situations including forced participation in the sex industry. These terms are defined in international law and those definitions can therefore be incorporated in domestic legislation.⁹²¹

9.41 However, the phrase ‘exploitation of prostitution of others or other forms of sexual exploitation’ is not defined in international law, and governments wishing to include this phrase in domestic legislation would therefore have to develop clear definitions for inclusion in their statutes.⁹²²

9.42 In her report on trafficking, the UN Special Rapporteur on Violence

⁹¹⁸ The GAATW, Foundation Against Trafficking in Women, the International Human Rights Law Group and La Strada, Poland, formed a ‘Human Rights Caucus’ to lobby for the inclusion of a human rights framework in the Protocol. [Information sheet.]

⁹¹⁹ Information sheet.

⁹²⁰ *Ibid.*

⁹²¹ *Ibid.*

⁹²² The NGO caucus advises that if governments ‘insist’ on using language such as ‘sexual exploitation’, they are encouraged to use the following definition so that sexual exploitation, like any other forms of labour exploitation, requires the use of force, coercion etc: ‘Sexual exploitation’ means the participation by a person in prostitution, sexual servitude, or the production of pornographic materials as a result of being subjected to a threat, deception, coercion, abduction, force, abuse or authority, debt bondage or fraud. Even in the absence of any of these factors, where the person participating in prostitution, sexual servitude or the production or pornographic materials is under the age of 18, sexual exploitation shall be deemed to exist’.

congratulated UN Member States for their effort to develop a protocol to address trafficking in persons.⁹²³ However, she also expressed her concern that the first modern international instrument on trafficking is being elaborated in the context of crime control, rather than with a focus on human rights.⁹²⁴

The Women's Convention

9.43 Article 6 of the Women's Convention requires states parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women.⁹²⁵

9.44 In its General Recommendation No 19 on violence against women, CEDAW remarks that practices such as trafficking in women and sex tourism are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. In addition, these practices also put women at special risk of violence and abuse.⁹²⁶ Wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.⁹²⁷

9.45 CEDAW points out that specific preventive and punitive measures are necessary to overcome trafficking and sexual exploitation.⁹²⁸ States parties are called on to describe in their reports the measures, including penal provisions, preventive and rehabilitation measures that have been taken to protect women subject to trafficking and other forms of sexual exploitation. The effectiveness of these measures should also be described.⁹²⁹

9.46 In the context of health, CEDAW perceives the prevention and treatment of HIV/AIDS and other sexually transmitted disease to be central to the rights of women and adolescent girls to sexual health.⁹³⁰ States parties are required to ensure, without prejudice and discrimination, the right to sexual health information, education and services for all women and girls, including those who have been trafficked, even if they are not legally

⁹²³ Report 2000 at Par 7.

⁹²⁴ *Ibid.*

⁹²⁵ See also Par 7.16 *et seq* above.

⁹²⁶ General Recommendation No 19 at Par 14.

⁹²⁷ *Idem* at Par 16.

⁹²⁸ *Idem* at Par 24(g).

⁹²⁹ *Idem* at Par 24(h).

⁹³⁰ General Recommendation No 24 at Par 18.

resident in the country.⁹³¹

South Africa's first country report to CEDAW

9.47 In its first country report to CEDAW, the South African government noted the following:

'The Sexual Offences Act makes it an offence for South Africans to exploit women and traffic in women in the country. There is, however, no explicit legislation controlling "sex tourism" or trafficking in women across borders of South Africa.'⁹³²

9.48 In its concluding comments on the report, the Committee remarked that it regretted that insufficient attention was being devoted to the problem of trafficking in women.⁹³³ It recommended that both the legal situation and the reality with regard to trafficking in women be addressed, and requested that information on this issue be contained in South Africa's next report.⁹³⁴

Beijing Declaration and Platform for Action

9.49 The definition of 'violence against women' contained in the Beijing Declaration and Platform for Action incorporates trafficking in women (as well as forced prostitution).⁹³⁵ The Platform acknowledges the effective suppression of trafficking in women and girls for the sex trade as a matter of pressing international concern, and calls for the review and strengthening of the implementation of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, as well as other relevant instruments.⁹³⁶

9.50 The use of women in international prostitution and trafficking networks has become a major focus of international organized crime. Women and girls who are victims of this international trade are at an increased risk of further violence, as well as unwanted pregnancy and sexually transmitted infection, including infection with HIV/AIDS.⁹³⁷

⁹³¹ *Ibid.*

⁹³² SA Report Article 6.

⁹³³ Report 19th Session at Par 125.

⁹³⁴ *Idem* at Par 126.

⁹³⁵ *Idem* at Par 113(b). The Declaration on the Elimination of Violence Against Women also includes trafficking in its definition of 'violence against women' - Article 2(b).

⁹³⁶ *Idem* at Par 122.

⁹³⁷ *Ibid.*

9.51 The Special Rapporteur of the Commission on Human Rights on violence against women, who has explored acts of trafficking as an additional cause of the violation of the human rights and fundamental freedoms of women and girls, is invited to address, within her mandate and as a matter of urgency, the issue of international trafficking for the purposes of the sex trade, as well as the issues of forced prostitution, rape, sexual abuse and sex tourism.⁹³⁸

9.52 The elimination of trafficking in women and provision of assistance to victims of violence due to prostitution and trafficking are identified as one of the Strategic Objectives within the area of violence against women.⁹³⁹ Governments of countries of origin, transit and destination and regional and international organizations are called on to -

- C Consider the ratification and enforcement of international conventions on trafficking in persons and on slavery;
- C Take appropriate measures to address the root factors, including external factors, that encourage trafficking in women and girls for prostitution and other forms of commercialized sex, forced marriages and forced labour in order to eliminate trafficking in women, including by strengthening existing legislation with a view to providing better protection of the rights of women and girls and to punishing the perpetrators, through both criminal and civil measures;
- C Step up cooperation and concerted action by all relevant law enforcement authorities and institutions with a view to dismantling national, regional and international networks in trafficking;
- C Allocate resources to provide comprehensive programmes designed to heal and rehabilitate into society victims of trafficking, including through job training, legal assistance and confidential health care, and take measures to cooperate with non-governmental organizations to provide for the social, medical and psychological care of the victims of trafficking; and
- C Develop educational and training programmes and policies and consider enacting legislation aimed at preventing sex tourism and trafficking, giving special emphasis to the protection of young women and children.⁹⁴⁰

⁹³⁸ *Ibid.*

⁹³⁹ Strategic Objective D3.

⁹⁴⁰ Par 130(a) - (e).

Draft Protocol on the Rights of Women in Africa

9.53 The African Union (formerly known as the Organisation of African Unity) has completed a draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. In terms of Article 4 of the draft Protocol, women are entitled to respect of their lives and their integrity of their person. Accordingly, States Parties are enjoined to protect girls and women against rape and all other forms of violence, 'including the trafficking of girls and women'.⁹⁴¹ (Prostitution as such is not mentioned in the Protocol.)

Rome Statute of the International Criminal Court

9.54 Article 7.1(c) of the Rome Statute of the International Criminal Court⁹⁴² includes **enslavement** in its list of crimes against humanity. 'Enslavement' is defined in article 7.2(c) as the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular woman and children.

Government responses to trafficking and migration

9.55 In the past few years, the international community and governments have consistently expressed their concern about trafficking in women. However, while governments have been seeking ways and means to combat trafficking, they have simultaneously been taking measures to 'fortify their external borders against the perceived threat of unfettered immigration'.⁹⁴³ Such policies may conflict with strategies to effectively combat trafficking and protect the rights of trafficked persons.

9.56 Governments overwhelmingly adopt a 'law and order' approach, with concomitant strong anti-immigration policies. Such an approach is often at odds with the protection of human rights.⁹⁴⁴ Despite the fact that trafficked women, and more generally undocumented migrant women, are often the victims of crime, they are often perceived and treated as criminals in countries of destination.⁹⁴⁵

⁹⁴¹ Art 4(c).

⁹⁴² UN Doc. A/CONF.183/9. The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Statute on 17 July 1998. In accordance with its article 125, the Statute was opened for signature on 17 July 1998. South Africa ratified the instrument on 27 November 2000.

⁹⁴³ Report 2000 at Par 42.

⁹⁴⁴ Report 2000 at Par 43.

⁹⁴⁵ *Idem* at Par 44.

9.57 This implies that states, through their equation of illegal migration (particularly migration of prostitutes) with trafficking in women,⁹⁴⁶ effectively fail to comply with their duties and obligations in terms of international human rights law.

9.58 The Global Alliance Against Trafficking in Women⁹⁴⁷ has compiled a set of standards for the treatment of trafficked persons,⁹⁴⁸ which *inter alia* sets out certain areas aspects to be addressed by states to ensure that national legislation conforms with international human rights standards. These critical areas include: the principle of non-discrimination, safety and fair treatment, access to justice, access to private action and reparations, resident status, health and other services, repatriation and reintegration, and state cooperation.⁹⁴⁹

Current legal position in South Africa

9.59 The extent of trafficking in South Africa is unknown. A recent research report indicates that South Africa is a destination country rather than a source for trafficked women, and that Namibia and Botswana are used as transit countries in the transport of women from other parts of Africa.⁹⁵⁰ Women are procured from within South Africa, elsewhere in Africa, Southeast Asia (particularly Thailand and the Republic of China), Eastern Europe and the former Russia.⁹⁵¹

9.60 At present, South Africa does not have any legislation specifically addressing trafficking. While a number of existing provisions of the Sexual Offences Act, most notably those relating to procurement and abduction,⁹⁵² may be employed to prosecute certain of the acts that form part of the trafficking 'chain', there are no specialised measures to firstly, facilitate the investigation and prosecution of offences relating to trafficking, and secondly, to protect and assist the victims of such trafficking. It is especially in the latter area where the current South African situation seriously lags behind international standards as well as the duties imposed under the human rights instruments set out above.

⁹⁴⁶ *Idem* at Par 45.

⁹⁴⁷ In association with the Foundation Against Trafficking in Women and the International Human Rights Law Group.

⁹⁴⁸ Global Alliance Against Traffic in Women et al ***Human Rights Standards for the Treatment of Trafficked Persons*** (January 1999) [Internet].

⁹⁴⁹ Global Alliance Against Trafficking in Women et al (*op cit*) Section II at Par 1-29.

⁹⁵⁰ Molo Songololo (*op cit*) at 1, 4.

⁹⁵¹ *Ibid* at 24.

⁹⁵² See Chapter 6 above.

9.61 In terms of the Trafficking Protocol, there are specific duties on the South African government to address various aspects of trafficking.

9.62 The Commission therefore recommends the formulation of specialised legislation to address trafficking, not only for prostitution but also for other purposes, including domestic, manual or industrial labour as well as marriage or other intimate relationships. Current standards in international human rights law should be employed as the foundational principles for the drafting of such legislation.

CHAPTER 10

LEGAL MODELS FOR ADDRESSING ADULT PROSTITUTION

10.1 Introduction

The purpose of this Chapter is to discuss and evaluate the various legal options for addressing adult prostitution. As such the discussion would revolve around 'criminalising', 'decriminalising' and 'legalising' adult prostitution. Questions related to the options presented are posed.

Terminology

10.2 The current debate on the legal status of prostitution centres mainly around three models, viz '**criminalisation**', '**decriminalisation**', and '**legalisation**'. Since each of these models has distinct characteristics and implications on the levels of both legal provisions and social policies, it is important to establish a common understanding regarding the meaning of these terms before embarking on a more detailed discussion.

10.3 The terms 'decriminalisation' and 'legalisation' are especially problematic due to their apparent similarity, and this conceptual difficulty is compounded by the fact there are no 'official' definitions of legalised or decriminalised prostitution.⁹⁵³ The analysis of these models below will also show that there are variations of meaning within each term.

Criminalisation

10.4 **Criminalisation** implies that certain or all aspects of prostitution are prohibited as criminal offences. A person charged with and convicted of such a criminal offence will face punishment in the form of (usually) a fine and / or imprisonment. The criminal provisions are usually enforced by police officials and other state law enforcement agencies (for example, municipal law enforcement officials) that are authorised to apprehend and, where appropriate, arrest persons suspected of committing these offences.

10.5 The rationale for criminalisation is that restrictive laws will deter individuals from taking part in the activity, or failing that, that they will be punished for their actions.⁹⁵⁴ A

⁹⁵³ See Carol Leigh *Hastings Women's Law Journal* Vol 10 No 1 (1999) 59.

⁹⁵⁴ Levick (*op cit*) at 29 and authorities cited there.

decision to criminalise prostitution is generally motivated by two major concerns: the moral agenda (which holds that prostitution sanctions immorality and promotes crime and drug use) and health considerations, including the perceived role of prostitution in the spread of sexually transmitted infections.⁹⁵⁵

10.6 A distinction can be made between **total** and **partial** criminalisation. Partial criminalisation, or abolitionism, penalises the activities of those persons seen to be exploiting or coercing prostitution while leaving prostitutes themselves free from criminal sanction.⁹⁵⁶ It entails that while the performance of sexual acts for reward in itself is not illegal, all other activities related to prostitution (for example, soliciting, brothel-keeping, and living off the earnings of prostitution) are prohibited.⁹⁵⁷ Abolitionist movements define prostitution as inherently exploitative.⁹⁵⁸

‘While not endorsing prostitution, [abolitionism] seeks to protect prostitutes from abusive treatment by ‘pimps’ or brothel owners, while it works towards the final abolition of prostitution itself’.⁹⁵⁹

10.7 Total criminalisation, as the term implies, penalises **all** acts relating to prostitution.

10.8 The current legal position in South Africa is that the performance of sexual acts for reward and various prostitution-related activities are criminalised under the Sexual Offences Act as well as under various municipal by-laws.

Partial criminalisation (the abolitionist approach)

10.9 The approach of partial criminalisation was followed in South African prior to the enactment of the present section 20(1)(aA) of the Sexual Offences Act.⁹⁶⁰ It is also the approach currently in place in New Zealand.⁹⁶¹

10.10 The main criticism of this approach is that the laws aimed at, for example,

⁹⁵⁵ See Chapter 4 above.

⁹⁵⁶ Davis (*op cit*) at Par III.

⁹⁵⁷ The so-called ‘procuring’ and ‘pimping’ laws.

⁹⁵⁸ Prostitution Law Reform: Defining Terms.

⁹⁵⁹ Davis *loc cit*.

⁹⁶⁰ See Par 6.5 above.

⁹⁶¹ See Par 7.104 *et seq* above.

pimps, are too broad, targeting all individuals who have contact with prostitutes, rather than only those who do them harm.⁹⁶² It is argued that the legal provisions against pimping (usually framed in terms of prohibition of living off the earnings of prostitution) can be used against domestic partners and children.⁹⁶³ These provisions may ironically have the unintended effect of increasing the likelihood that the only relationships that a prostitute will be able to have 'are with those who see her as an easy source of money' - ie the pimp.⁹⁶⁴

10.11 Prostitutes' groups have accordingly argued for the removal of exploitative third party laws, stating that such removal would not leave prostitutes unprotected, since abusive or exploitative behaviour would still be controlled under the general criminal offences aimed against kidnapping, assault or extortion.⁹⁶⁵

10.12 Supporters of abolitionism, on the other hand, claim that the general criminal laws will not adequately address the special nature of prostitution, and argue for the narrowing of the laws against exploitation (e.g. living off the earnings of prostitution) so that they will affect only negative or exploitative relationships. However, as Davis points out, this exercise results in provisions that are not significantly different from the general criminal sanctions against kidnapping or extortion.⁹⁶⁶

Punishment of clients

10.13 The punishment of *clients* (as opposed to punishment of prostitutes) has been implemented in Sweden.⁹⁶⁷ Early indications of the practical impact of these measures are that the new legislation has not reduced the incidence of prostitution and has made access to prostitutes by health care and other support workers more difficult. Enforcement of the new provisions also appears to be problematic.

Impact of criminalisation in South Africa

10.14 The current legal approach to prostitution in South Africa is one of total

⁹⁶² Davis *loc cit.*

⁹⁶³ Prostitution Law Reform: Defining Terms.

⁹⁶⁴ Davis (*op cit*) at Par I.1a.II and III.

⁹⁶⁵ *Idem* at Par III.

⁹⁶⁶ *Ibid.* This statement is made in the context of Canadian criminal law.

⁹⁶⁷ See Par 7.64 *et seq* above. In certain jurisdictions in the US, both clients and prostitutes are punished (see Par 7.41 *et seq* above).

criminalisation.⁹⁶⁸ However, this legal dispensation does not appear to have had an inhibiting effect on prostitution. While it remains arguable whether the criminal law is the most appropriate mechanism to curb prostitution, the existing criminal law provisions can be strengthened by focussing on the conduct of both parties, ie the prostitute and the client, and by clear policy prescripts regarding the enforcement of such laws.

10.15 Much depends, however, on the outcome of the Constitution Court's decision in the **Jordan** matter.⁹⁶⁹ Should the Constitutional Court confirm the decision of the court *a quo* and find section 20(1)(aA) of the Sexual Offences Act 23 of 1957 which prohibits the performance of a sexual act for reward inconsistent with the Constitution of 1996 and therefore invalid, then the Legislature will have to reconsider its position on prostitution. Should the Legislature wish to persist in its use of criminal law measures to prohibit the performance of sexual acts for reward, an alternative formulation will have to be found.⁹⁷⁰

10.16 Posel argues that legislation against prostitution has not succeeded in eliminating the sex market primarily because it has failed to address the determinants of this market. This is not to suggest that legislation has had no effect on prostitution, but that its effect has been counterproductive, namely, to divert demand from legal to illegal sources of supply. In the process, criminalising prostitution has aggravated the working conditions of prostitutes and the environment of prostitution itself.⁹⁷¹

10.17 Criminalisation has had the result that persons working as prostitutes are not eligible for the protection of labour legislation and has exacerbated the vulnerability of prostitutes to exploitation by management, violence from clients and harassment by police.

10.18 In order to placate community concerns regarding public nuisance that arises from outdoor prostitution, law enforcement officials utilise municipal by-laws, rather than the existing provisions of the Sexual Offences Act, to effect the arrests of prostitutes. These

⁹⁶⁸ See Par 2.1, 5.5, and Chapter 6 above.

⁹⁶⁹ See Par 6.136 *et seq* above for a discussion of the case.

⁹⁷⁰ See in this regard the *obiter* comments by Spoelstra J in **S v Jordan and others** 2002 (1) SACR 17 at 20j -21b: 'It must also be noted that sexual intercourse or the commission of an indecent act between two persons of the opposite sex who are not married is an offence only if it is practised 'for reward', that is for pecuniary gain by the female partner Why the latter elements should convert otherwise lawful carnal intercourse into an offence is difficult to comprehend. One is also at a loss to understand why only the recipient of the money is guilty of a crime whilst the party paying for the services is not. There is no moral or legal justification for these distinctions. It is obviously unjustified discrimination between not only sexes but also persons'.

⁹⁷¹ Posel (*op cit*) at 29.

arrests do not result in prosecution or conviction, and do not deter prostitutes from returning to their usual places of work after release from custody.

10.19 It appears that the criminalisation of prostitution adversely affects the access of prostitutes to health care services. Due to the illegal status of the industry, they are also penalised in a number of other ways, ranging from an ineligibility to obtain bank accounts due to a lack of formal employment documentation to the disqualification of dependants to claim for loss of breadwinner in the event of death.

10.20 It is significant that the enactment of section 20(1)(aA) was motivated predominantly by moralistic concerns.⁹⁷² Current calls for continued criminalisation are also often based on this motivation. For example, immediately prior to the recent judgment of the Transvaal High Court in the *Jordan* matter, Adv Frank Kahn SC, Director of Public Prosecutions of the Western Cape, stated that his office intended to continue the prosecution of prostitutes, and reiterated the view that prostitution was 'against public morals'.⁹⁷³

10.21 It is also important to note that in respect of *child* prostitution the Commission has adopted the total prohibition approach where the abuse of children through prostitution is explicitly criminalized.⁹⁷⁴ While such children are regarded as victims in need of protection and therefore not subject to criminal sanction, the Commission has recommended that a criminal offence be created whereby any person who intentionally invites, persuades or induces a child to allow him or her or any other person to commit a sexual act with that child for financial or other reward to the child or to any other person will be guilty of an offence.⁹⁷⁵

10.22 Pending the outcome of the Constitutional Court challenge in the *Jordan* case, and in the event of continued criminalisation being considered as the appropriate legal option in South Africa, the following aspects should be borne in mind:

- C Integration of the existing provisions of the Sexual Offences Act dealing with adult prostitution with the proposed measures to address child prostitution;⁹⁷⁶ and
- C Consolidation of existing provisions of the Sexual Offences Act.

⁹⁷² See Par 6.7 above.

⁹⁷³ 'City's booming streets of sex: Kahn vows prostitution crackdown' *Cape Argus*, 20 July 2001.

⁹⁷⁴ See Par 1.20 above.

⁹⁷⁵ See Clause 9 of the draft Sexual Offences Bill in Discussion Paper 85.

⁹⁷⁶ The shift from a total prohibition in respect of child prostitution to prostitution becoming a career option at age 18 years seems difficult.

QUESTION 1:

If you are of the opinion that **criminalisation** of adult prostitution is appropriate, please indicate:

- 1.1 Which form should this system of criminalisation take?
 - Total criminalisation: all aspects of adult prostitution are criminal offences
 - Partial criminalisation: the performance of sexual acts for reward in itself is not illegal, but all other activities related to prostitution (such as soliciting, brothel-keeping, and living off the earnings of prostitution) are prohibited.
- 1.2 Should the clients of prostitutes be guilty of a criminal offence?
- 1.3 Which measures would you suggest to address the concerns arising from the current system of criminalisation in South Africa?

Legalisation

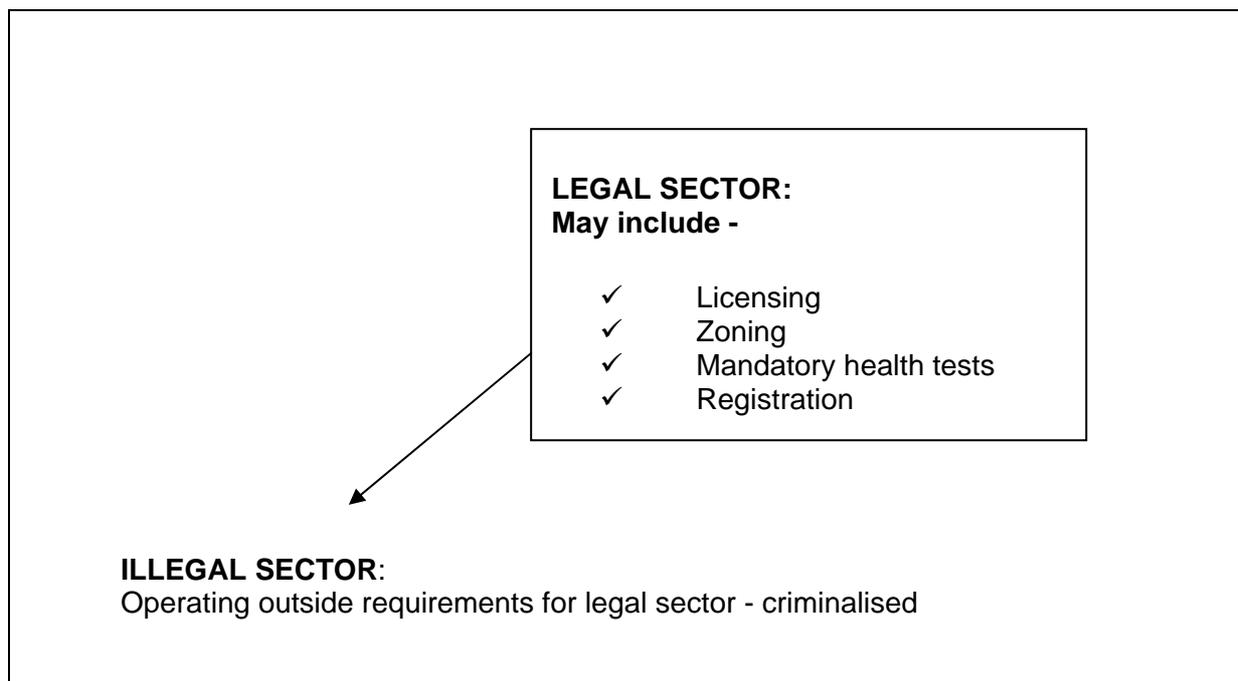
10.23 Legalisation can be described as the tolerance of prostitution provided that it complies with certain narrowly circumscribed conditions. These conditions, usually⁹⁷⁷ aimed at state control of the industry⁹⁷⁸ typically include zoning requirements, mandatory health testing requirements, registration of prostitutes and the licensing of brothels and agencies. The penalty for working outside this controlled legal sphere system is usually of a criminal nature. For example, an unregistered prostitute working outside a 'legal' zone would be liable for arrest and prosecution. Examples of legalized systems are Nevada and Germany.⁹⁷⁹

10.24 Legalisation may therefore be represented as follows:

⁹⁷⁷ The measures can also protect communities who request such protection from their perception of the consequences of exposure to prostitution and related activities and / or to protect the health of both the prostitute and his or her client.

⁹⁷⁸ See Levick (*op cit*) at 30; Bingham (*op cit*) at 91.

⁹⁷⁹ See Chapter 7 above.

DIAGRAM 3: LEGALISATION OF SEX WORK

10.25 Legalisation essentially represents a *compromise* position.⁹⁸⁰ It reflects a state attitude that accepts that prostitution will never be eradicated, and assumes that it is in the best interest of state authorities to implement ways of controlling and containing the industry.⁹⁸¹

10.26 Historically, this recognition has typically led to intricate systems of control measures based on prevailing social norms and conditions.⁹⁸² These control mechanisms were aimed at, for example, ensuring that prostitutes would be easily distinguishable from 'respectable' women through the prescription of specific forms of dress.⁹⁸³ Another mechanism was the limitation of prostitution to specific geographic districts or areas, both in order to facilitate law enforcement and also to confine the more visible aspects to areas where they would least offend. This is still employed in the form of zoning or 'red light areas', as discussed below.

⁹⁸⁰ Combrinck (*op cit*).

⁹⁸¹ See Jordan (*op cit*) at 206.

⁹⁸² An interesting example is the rules that operated in 12th century England in relation to 'public bath houses'. These establishments were allowed, subject to an intricate system of regulation, including rules prohibiting the women working in the bath houses from swearing, grimacing or throwing stones at passing men. (*Ibid.*)

⁹⁸³ See Chapter 3 above for a discussion of these measures in Ancient Greece and Rome.

10.27 Apart from the potential for control that a system of legislation provides the state, an additional consideration favouring legalisation of prostitution (from a state perspective) is that this option allows the state to share more easily in the profits of the industry.⁹⁸⁴ Once again, there are early historical precedents for this accommodation - including, for example, the Roman Empire, where the lucrative prostitution industry was taxed by the emperor.

10.28 The control measures associated with prostitution are often aimed at limiting the more visible (and therefore, socially less acceptable) manifestations of prostitution, while tolerating the less visible aspects. For this reason, outdoor prostitution usually remains illegal in most legalised systems, such as the Australian Capital Territory, the Netherlands (with the exception of the so-called zones of tolerance) and Nevada, US.⁹⁸⁵

‘Legalisation’ and ‘Regulation’

10.29 The phrase ‘regulation of prostitution’ is often used interchangeably with the term ‘legalisation’. However, ‘regulation’ is also on occasion used in a more specific sense to refer to instances of civil law regulation or self-regulation by the prostitution industry.⁹⁸⁶ For purposes of this paper, the term ‘legalisation’ will be employed to indicate the specific legal model discussed here.

Self-regulation

10.30 A policy of decriminalisation may also facilitate self-regulation of the prostitution industry. Such self-regulation might entail the establishment of an overseeing or monitoring body similar to the regulatory bodies operating in, for example, the building industry.⁹⁸⁷

10.31 An attempt at such self-regulation in the South African context was made in October 1999 in the form of a code of conduct for male escort agencies in Cape Town. This code sets out standards agreed to be agency management, prostitutes and SWEAT.⁹⁸⁸ It

⁹⁸⁴ See Par 6.153 *et seq* for a discussion of the tax liability of prostitutes under SA law.

⁹⁸⁵ See Chapter 7 above.

⁹⁸⁶ Carol Leigh ***Prostitution Law Reform***. Regulation in terms of civil law would operate in the context where prostitutes have recourse to remedies in terms of labour law (such as laying a complaint arising from the employment contract against a brothel owner / manager employer with the Department of Labour).

⁹⁸⁷ Leigh ***Prostitution Law Reform***.

⁹⁸⁸ J Soal ‘Setting sex work standards’ ***Cape Times***, 12 October 1999.

was suggested that violations of this code should ideally be dealt with by a regulatory body.

10.32 Banach and Metzenrath are of the opinion that prostitution businesses do not require unnecessary and complicated regulations to comply with conditions of legal operations.⁹⁸⁹ The authors explain that ‘the task of law reform is lessened by seeking parallels to other industries and applying similar legislative obligations’.⁹⁹⁰

Characteristics of legalisation

10.33 While it is possible to distinguish certain legal measures that are characteristically associated with legalisation, there are no ‘set’ rules, and each jurisdiction develops in accordance with conditions prevalent there. However, in the section below, an attempt is made to draw out certain general trends.

(a) Licencing of prostitution businesses

10.34 A legalised system may require the licensing of brothels, escort agencies and other prostitution-related businesses. Examples of such licensing requirements are found in Nevada, US, as well as in the Netherlands. In these jurisdictions, the issuing of licences is dealt with on the level of local government.⁹⁹¹

10.35 The impact of such licensing measures will depend *inter alia* on whether these businesses are subjected to the same requirements as other business establishments, or whether additional requirements specific to prostitution are imposed. Banach and Metzenrath observe, for example, that where the granting of a licence is subject to ‘probity checks’ (i.e. contingent upon a finding that the applicant is a ‘proper’ person to operate such business), prostitutes who have a criminal record of past prostitution-related convictions may be excluded due to such criminal records.⁹⁹² Where the granting of licences are subject to complex and expensive application procedures, as in the case of Victoria, Australia, many businesses have refused to comply with these processes and continue to operate ‘illegally’.⁹⁹³

⁹⁸⁹ *Principles for Model Sex Industry Legislation* (2000) at 11.

⁹⁹⁰ *Ibid.*

⁹⁹¹ The role of local authorities in legalised systems is discussed in more detail in Chapter 7 below.

⁹⁹² *Op cit*, at 12. See also 28-29.

⁹⁹³ Banach and Metzenrath (*op cit*) at 13, 28.

(b) Zoning requirements

10.36 'Zoning', or the limiting of prostitution to specific areas, may occur as a necessary implication of subjecting prostitution businesses to general business licensing requirements (as may currently be the case in South Africa) where these establishments would be tolerated in the same areas as other businesses. Prostitution businesses may therefore operate where other businesses do, but not, for example, in residential areas, on the same basis that other businesses are excluded from such areas. Alternatively, zoning requirements could also entail the creation of specific 'red-light' districts, with all prostitution businesses restricted to this specific area in the city or district.

10.37 The experience in other jurisdictions has shown that the demarcation of specific districts for prostitution is not uniformly successful in limiting prostitution to these areas. In Nevada, for example, it is estimated that the majority of prostitutes still continue working illegally outside the 'legal' areas.

10.38 One reason for this may be the fact that the occurrence of prostitution in a specific area may to a large extent be governed by prevailing 'market forces'. Prostitutes may have an established clientele in areas that are conducive for practising prostitution, for example, near military bases or truck stops.

10.39 The existence of zoning requirements (and the frequent non-compliance therewith by prostitutes) may result in prostitutes who fear arrest for working outside the legal areas moving to more isolated and therefore dangerous areas. In an attempt to strike the 'invisibility compromise' referred to above, the so-called 'red light' areas are often situated in industrial areas (in an attempt to move outdoor prostitution from residential areas). Working in these areas, which are typically sparsely populated and badly lit, exposes prostitutes to greater risks.⁹⁹⁴

(c) Registration of prostitutes

10.40 The registration of prostitutes is often coupled to other control measures within a legalised system, e.g. mandatory health testing.

10.41 Banach and Metzenrath point out that when registration occurs within other

⁹⁹⁴ *Idem* at 30.

industries, it tends to apply to professional associations with the purpose of ensuring that the persons practising in that field have the necessary skills.⁹⁹⁵ Professional registration also protects the client base as only registered persons may offer such services. For example, lawyers and medical practitioners are members of their own professional bodies. When registration is applied to prostitution-related businesses or individual prostitutes, the intention is usually as a form of government surveillance. The authors contend that registration should never apply to individual prostitutes, as it constitutes an invasion of basic human rights (most notably privacy concerns) and perpetuates the stigmatisation of prostitutes.⁹⁹⁶

10.42 An example of this stigmatisation in its most extreme form is found in Turkey. Registered prostitutes are required to carry a special card identifying them as prostitutes, and while registered women can renounce prostitution and get an ordinary identity card, the police maintain records. This means that an employer or prospective husband can establish whether the woman in question previously worked as a prostitute.⁹⁹⁷

(d) Mandatory health testing

10.43 Mandatory health testing features as an element of the legalised system in, for example, Nevada and Germany.⁹⁹⁸ The arguments in favour of mandatory health testing generally revolve around public health concerns and the perceived need to prevent the spread of HIV infection through prostitution.⁹⁹⁹

(e) Role of local governments and municipal by-laws

10.44 Legalisation also represents a compromise between the prostitution industry and the interests of local communities.¹⁰⁰⁰ A legalised system typically authorises local communities to decide whether or not to allow prostitution in a particular area. Where local government structures are given broad discretionary powers to decide whether or not to allow prostitution-related businesses, the number of legal brothels may be sharply limited as

⁹⁹⁵ *Op cit* at 10.

⁹⁹⁶ *Ibid.*

⁹⁹⁷ Registered prostitute, Istanbul, quoted in J Bindeman 'Redefining Prostitution as Sex Work on the International Agenda' (1997) [Internet] at Par 6.b.ii. The implications of being a registered prostitute go beyond the individual: for example, the children of registered prostitutes may not rise to high rank in the army or police (health project worker, Human Resource Foundation, Istanbul, quoted in Bindeman *op cit* at Par 6.b.ii).

⁹⁹⁸ See Para 7.47, 7.86.

⁹⁹⁹ See Chapter 8 above.

¹⁰⁰⁰ See also Davis (*op cit*) at Par II.1.

communities seek to limit the existence of prostitution in their areas.¹⁰⁰¹

10.45 This typically results in a shortage of 'legal' employment, forcing many prostitutes to continue to work illegally.¹⁰⁰² Because legal prostitution is then limited to a few businesses, brothel owners / managers gain extraordinary control over their employees as the supply of prostitutes wishing to work illegally by far exceeds the demand.¹⁰⁰³ In practice this often implies deplorable working conditions for those prostitutes who do manage to obtain legal employment.¹⁰⁰⁴

10.46 In the few instances where **outdoor** prostitution is legalised, the role of municipal by-laws in effecting control over the industry is significant.¹⁰⁰⁵ Both France and New South Wales, Australia, have gone through periods when street solicitation was decriminalized. However, general (municipal) nuisance laws were used to such an extent that the arrest rates of street prostitutes equalled those made when street solicitation was illegal.¹⁰⁰⁶

Potential Impact of Legalisation in South Africa

10.47 In order to consider the potential impact of legalisation in South Africa, it should be borne in mind that this model of control has the effect of creating a 'two tier' industry with 'legal' and 'illegal' sectors.¹⁰⁰⁷ The 'legal' sector is usually limited to the **indoor** industry, as seen in the state of Nevada (USA), where prostitution is legalised in certain counties, provided that it is limited to brothels complying with certain narrow conditions.¹⁰⁰⁸ Street prostitution remains illegal. In spite of the existing prohibitions, it is estimated that the largest component of prostitutes work outside the legal sector, either in illegal brothels or escort agencies or on the streets.¹⁰⁰⁹

¹⁰⁰¹ See Davis (*op cit*) at Par II.2. (This is referred to as the 'not in my backyard' phenomenon, where each local authority attempts to deflect the establishment of prostitution-related businesses in that particular area.)

¹⁰⁰² Davis (*op cit*) at Par II.2. Examples: Victoria, Australia and Nevada.

¹⁰⁰³ Davis (*op cit*) at Par II.2.

¹⁰⁰⁴ Davis (*op cit*) Par II.2.

¹⁰⁰⁵ Combrinck Conference paper.

¹⁰⁰⁶ *Ibid.*

¹⁰⁰⁷ *Ibid.*

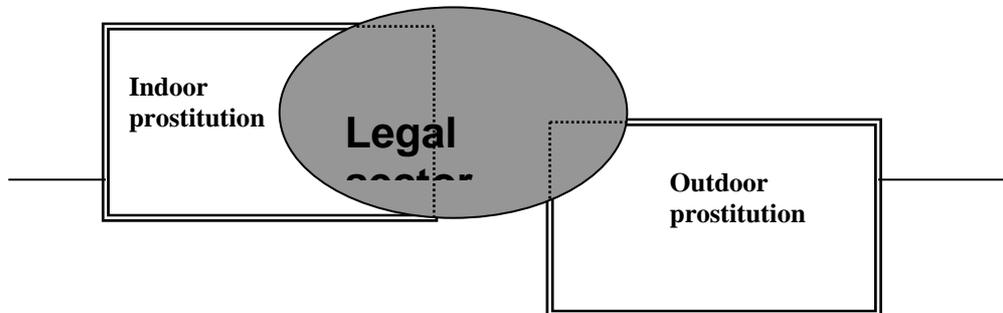
¹⁰⁰⁸ Par 7.50 above.

¹⁰⁰⁹ Par 7.51 above.

10.48 The probable impact of legalisation can therefore be represented as follows:

DIAGRAM 4: PROJECTED IMPACT OF LEGALISATION IN SA

FORMAL SECTOR



INFORMAL SECTOR

10.49 In considering the potential impact of the control mechanisms associated with legalisation in the South African context, the general comments set out above apply *mutatis mutandis*. However, due to certain existing provisions of South African Law, licensing, mandatory health testing and tax liability deserve closer attention.

(a) Licensing of brothels and other prostitution businesses

10.50 The current position in practice is that many of the businesses operating in South Africa have obtained business licenses from local municipalities and are therefore in effect 'licensed'.¹⁰¹⁰ One of the results of this licensing system has been an automatic zoning effect, in the sense that in order to obtain a valid business licence, the applicant would have to comply with existing zoning requirements.

10.51 In terms of the provisions of the Businesses Act, businesses resorting under Item 2 of Schedule 1 of the Act that provide 'certain health and entertainment services' must not only comply with the prescribed regulations regarding business premises, but in addition, the applicant must be a suitable person to carry on such business.

10.52 The list of enterprises set out in Item 2 (obviously) does not at present include prostitution as such, although escort agencies and massage services are listed. The practical implication of this is that in the event of prostitution being legalised, prostitution-

¹⁰¹⁰ See Chapter 5 above.

related businesses, for example, brothels that wish to obtain a licence would not be subject to the same provisions as escort agencies and others listed in Item 2. This would (arguably) create an anomalous position that may require the amendment of the Businesses Act to include brothels and similar enterprises not currently covered by Item 2. Alternatively, escort agencies and massage services could be removed from Item 2, thus relieving such businesses from the requirement of compliance with the additional requirements applicable to Item 2.

b) Mandatory health testing

10.53 The provisions of section 7 of the Employment Equity Act¹⁰¹¹ prohibits the testing of an employee to determine that employee's HIV status unless such testing is determined justifiable by the Labour Court.¹⁰¹² In addition, employers are prohibited from demanding the medical testing of an employee unless legislation permits or requires the testing or it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.¹⁰¹³

c) Tax liability

10.54 Prostitutes are liable to pay tax on their income earned, despite prostitution being illegal in South Africa.¹⁰¹⁴ One of the implications of legalisation is that it may become easier for the South African Revenue Service to hold prostitutes liable for payment of income tax. Haffajee notes that it would 'make little sense' to attempt to tax street prostitutes, who would be almost impossible to assess due to the extremely informal nature of this sector.¹⁰¹⁵ However, the more visible establishments such as brothels, massage parlours and escort agencies would be easier targets for tax enforcement, especially where a system of registration for prostitutes form part of a scheme of legalisation.

¹⁰¹¹ Act 55 of 1998.

¹⁰¹² Section 7(2) of the Employment Equity Act 55 of 1998. If the Labour Court declares that the medical testing of an employee is justifiable, the court may make any order that it considers appropriate in the circumstances, including imposing conditions relating to the provision of counselling, the maintenance of confidentiality, the period during which the authorisation for any testing applies, and the category or categories of jobs or employees in respect of which the authorisation for testing applies - section 50(4) of the Employment Equity Act 55 of 1998.

¹⁰¹³ Section 7(1) of the Employment Equity Act.

¹⁰¹⁴ See Par 6.153 above regarding the question of tax liability.

¹⁰¹⁵ Haffajee (*op cit*) at 40.

QUESTION 2

If you are of the opinion that **legalisation** of adult prostitution is appropriate, please indicate :

2.1 Which **conditions** should be imposed -

2.1.1 Licensing requirements: the licensing of brothels, escort agencies and other businesses related to adult prostitution;

2.1.2 Zoning: the limiting of prostitution to certain areas;

2.1.3 Registration of individual prostitutes (usually coupled to other control measures, such as mandatory health testing);

2.1.4 Mandatory health testing for HIV and other STI's of all adult prostitutes;

2.1.5 Mandatory health testing for HIV and other STI's of all clients of adult prostitutes.

2.2 If you are of the opinion that **licencing requirements** should be imposed, please indicate-

2.2.1 Should prostitution-related businesses be subjected to the same requirements as other business establishments, or should additional requirements specific to prostitution be imposed?

2.2.2 if additional requirements should be imposed, what should these requirements entail?

2.2.3 Should the granting of licences be dealt with on the level of local government?

2.2.4 How should businesses that are currently the holders of valid business licences be dealt with?

2.3 If you are of the opinion that **zoning requirements** should be imposed, please indicate-

2.3.1 Should prostitution-related businesses be subjected to the same zoning requirements as other businesses, or should prostitution be limited to certain specific streets or areas (so-called 'red-light' districts)?

2.3.2 Should outdoor prostitution be allowed within the demarcated zones?

2.4 If you are of the opinion that adult prostitutes should be subject to **registration**, please indicate-

- 2.4.1 What the purpose of registration should be?
- 2.4.2 Which official body or institution should be responsible for the management of the registration system?
- 2.4.3 Whether registration should be conditional on compliance with specific requirements?
- 2.4.4 Which measures should be taken to protect the privacy of persons registered as prostitutes?
- 2.5 If you are of the opinion that mandatory health testing requirements should be imposed, please indicate-
- 2.5.1 What the purpose of such testing requirements should be?
- 2.5.2 To whom such testing requirements should apply (the prostitute or the client)?
- 2.6 Are there any additional conditions that should be imposed under a legalised system? Please specify.

Decriminalisation

10.55 Decriminalisation can be defined as the removal of laws that criminalise prostitution. None of the activities related to **consensual adult** prostitution would be regarded as a criminal offence,¹⁰¹⁶ although child prostitution and forced participation in prostitution would remain criminalised. The effect of decriminalisation would therefore be to erase at least the legal distinction between adult prostitutes and the rest of society.¹⁰¹⁷

10.56 *De facto* decriminalisation occurs where criminal sanctions penalising sex work are in place, but are not enforced (either through the police not making arrests or the prosecuting authorities not instituting criminal proceedings against arrested persons). In many instances, the current South African situation is an example of *de facto* decriminalisation.

10.57 The major implication of decriminalisation is that the prostitution industry is recognised as a legitimate form of work. This means that prostitution will be subject to the regulatory measures that operate in respect of all other forms of labour.

¹⁰¹⁶ Prostitution Law Reform: Defining Terms. See, however, Davis et al (op cit) at Par IV contra. She asserts that decriminalisation entails the complete removal of prostitution and prostitution related offences, including those offences dealing with the exploitation or coercion of prostitutes.

¹⁰¹⁷ Davis (op cit) at Par IV.

Potential Impact of Decriminalisation in South Africa

10.58 In the South African context, decriminalisation would imply the removal of the provisions of the Sexual Offences Act that specifically related to prostitution, with the exception of the provisions dealing with procurement.

10.59 The decriminalisation of prostitution and related activities will require the repeal of the following provisions of the Sexual Offences Act:

- C Section 20(1)(Aa) - sexual acts for reward
- C Section 2 - (brothel-keeping, including the presumptions and other mechanisms set out in section 2-6)
- C Section 12A(1) - enabling communication for purposes of prostitution
- C Section 19(a) - soliciting
- C Section 20(1)(a) - living off the earnings of prostitution
- C Section 20(1)(c) - receiving remuneration for acts of indecency

10.60 The offences of indecent exposure (contravention of section 19(b))¹⁰¹⁸ and public indecency (contravention of section 20(1)(b))¹⁰¹⁹ are not included in the above list, due to the fact that these provisions are not solely aimed at prostitutes.

10.61 The offence of 'procurement' in its various forms as set out in sections 10¹⁰²⁰ and 12(1)(a)¹⁰²¹ is not included in the list of offences to be removed. This is done to ensure the continued prohibition of all coercive acts aimed at forcing persons to enter into or remain in prostitution. The present formulations of the offence of procurement include certain of

¹⁰¹⁸ 'Any person who ... wilfully and openly exhibits himself or herself in an indecent dress or manner at any door or window or within view of any public street or place or in any place to which the public have access, shall be guilty of an offence'.

¹⁰¹⁹ 'Any person who ... in public commits any act of indecency with another person ... shall be guilty of an offence. 'Indecency' is not defined in the Sexual Offences Act.

¹⁰²⁰ The section prohibits procurement 'to have unlawful carnal intercourse with any person other than the procurer', the enticement of any female to a brothel for the purpose of unlawful carnal intercourse or prostitution, the procurement of any female to become a common prostitute, the procurement of any female to become an inmate of a brothel, and the application or administration of drugs or liquor to a female with intent to stupefy or overpower her so as thereby to enable any person other than the procurer to have unlawful carnal intercourse with her.

¹⁰²¹ The section makes it a criminal offence for any person to take or detain any female against her will to or in or upon any house or place with intent that she may be unlawfully carnally known by any male, whether a particular male or not.

these coercive acts (e.g. 'procurement by stupefaction' or 'procurement by abduction').¹⁰²²

10.62 However, the existing provisions also include the prohibition of activities where coercion is not necessarily employed to recruit a person into prostitution, for example, 'procurement of sexual intercourse',¹⁰²³ 'procurement for a brothel'¹⁰²⁴ and 'procurement for prostitution'.¹⁰²⁵ In cases where the latter forms of procurement do not entail more coercive tactics than 'recruitment' or 'enticement', the acceptance of prostitution as a legitimate form of labour and the decriminalisation of brothel-keeping implies that these instances of procurement should no more be subject to criminal sanction than any other forms of job recruitment.

10.63 Decriminalisation would therefore imply the removal of provisions that prohibit 'non-coercive' forms of procurement, and the consolidation of existing prohibition of coercive procurement into a new offence targeting all acts of coercion employed to force persons to enter into or remain in prostitution.

10.64 The removal of these criminal sanctions would imply that where prostitutes work as 'employees', the terms of the employment contract would no longer be regarded as illegal, and the provisions of labour legislation would apply.¹⁰²⁶ It is foreseeable that it is predominantly in the indoor sector where the impact of this shift would be most apparent.

10.65 The relevant provisions of the Aliens Control Act¹⁰²⁷ as well as the Liquor Act¹⁰²⁸ discussed in Chapter 6 above would also have to be amended.

10.66 Municipal by-laws that are exclusively aimed at the prohibition of activities related to prostitution (e.g. where they prohibit 'loitering with intent to commit prostitution') would similarly have to be repealed.

¹⁰²² See sections 10(e) and 12(1)(a) of the Sexual Offences Act.

¹⁰²³ Section 10(a).

¹⁰²⁴ Sections 10(b) and (d).

¹⁰²⁵ Section 10(c).

¹⁰²⁶ This would not apply where the prostitute works as an 'independent contractor' rather than as an 'employee'.

¹⁰²⁷ Section 39(2)(c) of this Act declares as 'prohibited' any person who lives or has lived on the earnings of prostitution or receives or has received any part of such earnings or procured or has procured persons for immoral purposes.

¹⁰²⁸ Section 160 of this Act makes it a criminal offence for the holder of an on-consumption liquor licence to allow the licensed premises to be used as a brothel or to be frequented by persons who are regarded as prostitutes.

QUESTION 3:

If you are of the opinion that **decriminalisation** is appropriate, please indicate -

- 3.1 Whether there are any acts related to adult prostitution that should remain criminalised, for example, procurement?
- 3.2 How should existing municipal by-laws targeting prostitution be dealt with?
- 3.3 Should any specific measures be enacted (for example, the imposition of duties on the management of prostitution-related businesses to promote safer sex practices)?