

## **LAW REFORM COMMISSION FINDS – UNEQUIVOCALLY – PROSTITUTION SHOULD NOT BE FULLY DECRIMINALISED**

A burning question: what the best legal regime is for governing adult prostitution in South Africa – for both persons in prostitution and South African society in general.

With the prostitution law and policy process underway, it is more important than ever to understand how fundamental rights, especially human dignity, will be impacted by different legal responses to prostitution. It is equally important to understand the nature of prostitution – that, as research evidence and lived experiences show, it's inherently harmful and exploitative – and also the socio-economic circumstances that contributes to creating and sustaining the system of prostitution within the complex South African reality.

But how to answer this question. A good place to start is the Report on Adult Prostitution released by the [South African Law Reform Commission](#) in May 2017. In this blog, we will explore what this extensive and authoritative Report says about how the South African legal system should respond to prostitution and prostitution related activities – and most significantly, what law and policy reforms it recommends.

### ***Government set to reform South African prostitution law***

The Department of Justice and Constitutional Development (DOJ) has embarked on reforming South African prostitution law. Currently, adult prostitution, i.e. the selling or buying sexual services and all prostitution related activities, is criminalised in its entirety. Deputy Minister (DM) John Jeffery has been consulting with stakeholders in order to produce a draft Bill which will be submitted to Cabinet. If approved, broad public consultations are scheduled to take place across the Republic.

The legal status of prostitution has far-reaching implications not only for persons in prostitution but society as well: from families to communities to businesses. South Africans need to understand what the available policy options are – including the pros and cons of each – to make an informed decision about what is best for persons in prostitution and for society in general.

### ***The South African Law Reform Commission's Report on Adult Prostitution***

The SALRC is tasked with continuously renewing and improving South African law. This specialist advisory body thoroughly investigates matters approved by the Minister of Justice and Constitutional Development, providing government with well-researched reports which contain sound recommendations for law and policy reforms.

After conducting a broad public consultative process and considering both local and international law and research – including how to apply this knowledge to the unique South African context – the SALRC released its extensive [Report on Adult Prostitution](#).

The Commission's authoritative findings form a critical component of the prostitution law reform debate. It should only be departed from in the most exceptional of circumstances.

#### **Cause for concern**

A [media statement](#) recently released by the DOJ and DM, create the impression that the government is set on, or at least strongly favours, the full decriminalisation of prostitution. This apparent – and inexplicable – disregard of the Report's recommendations, is perplexing to say the least. Especially since the DOJ commissioned the SALRC's investigation into adult prostitution in the first place. It raises serious concerns and vexing questions how the DOJ's stance on the legal status of adult prostitution, which at this stage should be 'neutral', is being guided.

### ***What does the Report on Adult Prostitution say?***

The Report explores the need to reform adult prostitution law in the context of the complex socio-economic reality faced by many South Africans. It discusses the legal position, and makes legislative and policy recommendations, in respect of

- People who offer sexual services for payment (prostitutes),
- People who pay for sexual services (buyers), and
- So-called ‘third parties’ (those who profit or benefit from, or facilitate, the prostitution of others).

#### – Persons who offer sexual services for payment

The Report defines a ‘prostitute’ as “an adult person (i.e. someone older than 18 years) who voluntarily offers or provides sexual services for financial or other reward, favour or compensation (irrespective of whether sexual act occurs or not). [1] While the law does not criminalise being a prostitute, it does criminalise the ‘acts of the prostitute’, i.e. selling sexual services.

After analysing local and international legal principles and the lived experiences of persons in prostitution, the Commission concluded that prostitution is exploitation – i.e. it is not work (or ‘decent’ work). [2] The Report notes prostitution is simply not a reasonable means to secure a living, and any attempt to recognise prostitution as ‘formal employment’ is met by a host of contradictions neither law nor policy can resolve. [3]

The SALRC sees prostitution as primarily a ‘social phenomenon’ which reflects deep-seated economic and sexual inequality – and significantly, as ‘exploitation’ (especially of women). [4] It notes that this exploitation, which is connected to factors such as gender-based violence, inequality and poverty, seems inherent in prostitution itself, i.e. is not caused by the legal status of prostitution. [5] The implication is: fully decriminalising prostitution will neither reduce the harms of prostitution nor change its exploitative nature.

#### **What about ‘choice’?**

According to the Report, the so-called ‘choice’ to sell sexual services, is most often made in the context of severely limiting and unequal socio-economic circumstances. [6] It is highly questionable whether ‘choices’ made under circumstances characterised by extreme vulnerability and marginalisation, are truly ‘voluntary’ at all.

The Report affirms the Constitutional Court’s insightful findings regarding the fundamental dignity of the human body, in the matter of [S v Jordan](#). In this landmark decision, South Africa’s highest court confirmed: [7]

- The human body is not something to be commodified (the Constitution requires the human body to be respected).
- The very nature of prostitution is the commodification of the human body (and thus devalues respect that the Constitution regards as inherent in the human body).
- It’s the very character of prostitution itself that diminishes the dignity of prostitutes.

The implication is: laws that criminalise acts of prostitution does not violate the human dignity of persons in prostitution – prostitution itself is a violation of human dignity.

While admitting that legal mechanisms have limited ability to address social phenomenon, the SALRC nonetheless regards legal intervention as necessary and warns “*changing the legislative framework could create an extremely dangerous cultural shift juxtaposed against the high numbers of sexual crimes already committed against women*”, potentially leading to “*women being considered even more expendable than at present*”. [8]

### **What about law enforcement officers and health care practitioners who mistreat prostituted persons?**

The Report also addressed certain human rights violations (including discrimination and prejudice) experienced by persons in prostitution relating to treatment by law enforcement officials and access to health care services. It correctly notes that these human rights violations are already against the law, meaning certain officials and practitioners are to blame – and not the law criminalising prostitution. [9]

#### **– Persons who pay for sexual services**

The Commission recognises that criminalising buyers is necessary to address the economic and sexual inequality of persons in prostitution: it sends a clear message that buying sexual services, which are provided largely as result a person in prostitution' socio-economic vulnerability and marginalisation, is exploitative – and therefore should be illegal. [10]

While criminalising prostitution will not eradicate demand, it will significantly decrease prostitution (because it targets demand). [11] Research shows that decriminalising demand does not address the power imbalance between buyers and prostitutes, meaning it will not address the systemic inequality between men and women in South Africa but rather affirm and exacerbate it. [12] Neither will it reduce the existing high levels of violence (including sexual violence), physical and psychological trauma, and severe health consequences (due to demand for high-risk sex) faced by persons in prostitution. [13] On the contrary, the experience in jurisdictions where demand is legal, has been that the prostitution – and sexual coercion and exploitation of persons – has been normalised, and linked to increases in 'child prostitution' and sex trafficking. [14]

#### **Real life experience**

According to [Rachel Moran](#), a survivor of prostitution, *“to be prostituted is humiliating enough; to legalize prostitution is to condone that humiliation, and to absolve those who inflict it. It is an agonizing insult.”*

#### **– Persons who profit or benefit from the prostitution of others**

Selling sex exposes women in prostitution to risks which only entrap them further into poverty and inequality, exacerbating existing their socio-economic difficulties and increasing dependence on and abuse and exploitation by (some) men. [15] This is the 'gendered reality' of prostitution: it's the 'best of worst' economic options women have – and that their desperate economic plight should not be manipulated against them (or taken advantage of) by institutionalising and legitimising businesses and other activities facilitate and profiteer from the sale of sex. [16]

Research shows that non-criminalising or regulating the 'sex industry' (for example, brothels) does not address the core problems of ubiquitous abuse and violence against prostituted persons – i.e. it does not make prostitution 'safe' and human rights violations continue unabated (or even increase). [17]

Neither does it promote the achievement of equality between men and women: on the contrary, legitimising the 'sex sector' and prostitution as form of labour (which it is not) only reinforces women's subordination and increases their objectification, which entrenches their economic inequality. [18] Changing the law will not automatically improve prostituted persons' 'working' environment or unequal power relations with third parties.

There is no defending legitimising the exploitation of others. The sex industry cannot be left to self-regulate – or worse, unregulated. Its associated harms – systematic abuse, violence and exploitation – are endemic and its links to other criminal activities, widely documented. [19]

### – The only two recommended options

The Commission recommends only two options (and full decriminalisation is not one).

- **Total criminalisation coupled with diversion (preferred option):** [20] Its primary recommendation is that prostitution and all prostitution related activities remain fully criminalised while providing prostituted persons with options to divert out of (or ‘exit’) prostitution through access to supportive resources and systems that address vulnerability and marginalisation through skilling and education – rather than facing prosecution and imprisonment. Successful diversion includes the expungement a criminal record as far as prostitution related activities are concerned.
- **Partial criminalisation (alternative option):** [21] It’s secondary recommendation, which recognises that most prostituted persons are victims of sexual exploitation and extreme socio-economic vulnerability, is ‘partial decriminalisation’ (also known as partial-decriminalisation or the so-called ‘Equality Model’). This entails decriminalising the conduct (i.e. the acts of prostitution) of prostituted persons only, while the acts of buyers and third parties remain criminalised.

### ***Implications for the prostitution law reform process***

A successful law reform process will be guided – and is characterised – by properly considering which human rights are implicated (and how) and what the research evidence says about how different policy options will impact these rights and socio-economic realities.

#### **We can’t afford to deny the truth**

The truth is that prostitution is in itself a gross violation of human dignity and is inherently exploitative. It exploits the vulnerability of those who are desperate and socio-economically marginalised. It turns women into merchandise and entraps them in servitude to a system built on and perpetuated by gender inequality.

The only way to stop the abuse and exploitation experienced by prostituted persons is by eradicating the system of prostitution. This means that full decriminalisation is simply not an option. This is exactly what the South African Law Reform Commission found after a thorough and wide-ranging research and public consultation project spanning thirteen years: based on the best evidence and research: either retaining ‘total criminalisation’ coupled with diversion, or ‘partial criminalisation’.

The findings and recommendations of the Report on Adult Prostitution are insightful – and the South African government (and public) would be wise to heed them.

### ***Get involved: Stand for human dignity and against sexual exploitation***

You can help stop the legalising of exploitation by standing *for* human dignity and *against* sexual exploitation – get ready to take action and get involved by supporting the [Collective Against Sexual Exploitation](#) (CASE) in opposing the full decriminalisation of prostitution in South Africa!

**Start by taking a minute to sign our Petition.**



**Say NO to Legalised Sexual Exploitation, Brothel-Keeping, and Pimping in South Africa.**

[Click here to sign our Petition](#)

**Don't forget to check out the [CASE campaign page](#):**

- Learn more about the [Centre Against Sexual Exploitation, South Africa \(CASE-SA\)](#) and [CASE](#) – who we are and what we do.
- Have a look at resources to arm yourself with the necessary facts to speak up for the truth about prostitution and debunk harmful myths
- Follow and support us on social media.

**Notes: unless indicated otherwise, notes refer to SALRC Report paragraph and page numbers**

1. [2.3] on p 45
2. [2.44] on p 59
3. [4.285] on 383
4. [8] on p ix
5. [34] on p xvii
6. [2.8] on p 47 and [2.496] on p 218
7. S v Jordan 2002 (6) SA 642 (CC) at [74]
8. [2.496] on p 218
9. [2.467] and [2.468] on p 207 to p 209
10. [3.132] on p 285
11. [3.132] on p 285
12. [2.496] on p 218 and p 219
13. [2.496] on p 219
14. [2.458] on p 204 and [2.463] on p 205 and p 206
15. [4.284] on p 383
16. [4.284] on p 382 and p 383
17. [2.457] on p 203
18. [4.284] on p 383
19. [4.290] on p 386
20. On p 418
21. On p 434