



CASE

CENTRE AGAINST SEXUAL EXPLOITATION | SOUTH AFRICA

MAKING SENSE OF THE PROSTITUTION LAW REFORM DEBATE

The Department of Justice and Constitutional Development is [set to reform 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. The legal status of prostitution has far-reaching implications – not only for prostituted persons but society in general. South Africans are being called upon to make an informed decision about what the legal status of prostitution should be.

But to do this, the [Centre Against Sexual Exploitation, South Africa \(CASE-SA\)](#) says, we first need to make sense of the prostitution law reform debate.

Is There A Need For Law Reform?

According to CASE-SA, we need to start by taking one step back and asking ourselves whether we need to reform the law at all. Law reform will only be necessary – and justified – *IF* the *fact* of criminalising prostitution:

1. Is unconstitutional, and/or
2. There are policy considerations that militate so strongly in favour of legal reform, that a change in the law is necessary.

If neither of these two conditions are met, law reform is unnecessary.

To see whether the [South African legal and lived reality](#) actually meets either or both of these conditions, we will ask a series of questions to arrive at an answer.

Constitutional perspective: Is fully criminalising the system of prostitution constitutional?

In the seminal judgement of [State v Jordan \(2002\)](#), the Constitutional Court considered and found that the full criminalisation of prostitution, i.e. of both the supply and demand side, is constitutional.

In answering the question whether the criminalisation of prostitution violates the human dignity of prostitutes, South Africa's highest court said: (at para [74] of the judgment)

- *“Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified.”*

- *“To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself.”*
- *“The very nature of prostitution is the commodification of one’s body.”*
- *“[T]he dignity of prostitutes is diminished not by [the law’s criminalising of prostitutes’ actions, i.e. selling him/herself for sex] but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.”*
- *“All arrested and accused persons must be treated with dignity by the police. But any invasion of dignity, going beyond that ordinarily implied by an arrest or charge, that occurs in the course of arrest or incarceration cannot be attributed to [the law’s criminalising of prostitutes’ actions, i.e. selling him/herself for sex], but rather to the manner in which it is being enforced. The remedy is not to strike down the law but to require that it be applied in a constitutional manner.”*
- *“The fact that a client pays for sexual services does not afford the client unlimited license to infringe the dignity of the prostitute.”*

[Click here](#) to read the full para [74].

The court also found that criminalising prostitution does not unreasonably or unjustifiably infringe on prostitutes’ rights to equality, freedom and security of their person, privacy, or their freedom of trade, occupation and profession.

[Click here](#) to read the full judgment.

[Click here](#) to read a more in-depth discussion on the legal position (including, constitutional analysis) of prostitution in South Africa.

Public policy perspective: What public policy considerations would justify decriminalising prostitution?

From a public policy perspective, prostitution should only be decriminalised *IF* the following conditions are present:

- *IF* the harms and the socio-economic marginalisation of prostitution flow either solely or mainly from the fact that prostitution is fully criminalised, as opposed to from the nature/practice of prostitution itself and its underlying causes; and
- *IF* the decriminalisation of prostitution, whether fully or partially, would result in achieving the policy objectives of reducing or negating the harms of prostitution, including improving the quality of life of prostituted persons.

Research shows that [fully decriminalising prostitution does not reduce or eradicate the harms of prostitution](#), but rather exacerbate it. This is because the [harms of prostitution](#) are inherent to the activity of prostitution itself ([SALRC Report](#) at 204, 218 and 225):

- The fact that prostitution is a criminal offense is not the sole or main cause of the [harms, health risks, gender discrimination](#) and social/economic inequalities experienced by those in prostitution.
- The [decriminalisation of prostitution will not address its harms](#) or improve the socio-economic circumstances of prostituted persons, the vast majority of whom are women.

Prostitution is also closely [associated with gender-based violence and is intrinsically linked to racism, sexism, and class prejudice](#). The South African Law Reform Commission (SALRC) concluded that prostitution is not work in any conventional sense of the word, but a survival strategy ([SALRC Report](#) at 63).

[Click here](#) to read a more in-depth discussion of the harms of prostitution and relevant policy considerations.

Conclusion: Is law reform necessary?

It is clear, from both a constitutional and public policy perspective, that law reform is neither necessary nor justifiable. No human rights-based society can condone and tolerate [human rights violations that originate from the vulnerability of a group of persons which renders that group relatively powerless and easily exploitable](#) due to their desperate socio-economic circumstances:

"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."

– Rachel Moran, survivor of prostitution.

Defending prostitutes' dignity starts with [saying 'no' to full decriminalisation!](#)

If fully decriminalising prostitution does *NOT* address the harms, what does?

The only way to protect prostituted persons and society from prostitution's harms, is to eradicate the system of prostitution itself by all available means – and [not by legalising it!](#) This includes:

- [Socio-economic interventions](#): Pro-actively establishing viable opportunities to exit prostitution, or to not enter prostitution in the first place; and
- [Effective law enforcement](#): Effective prosecution and enforcement of criminal prohibitions and sanctions to [eradicate demand and supply systems](#) (both systems of abuse and exploitation).

The South African Law Reform Commission Recommendations

The SALRC issued its [Report on Adult Prostitution](#) in 2017. It came to its conclusions and recommendations after a thorough process of investigation, public participation, consideration of research and law on a global scale and proper application of all its observations to the South African context.

Findings based on such extensive work by a specialist body designated and mandated to make recommendations to government, should only be departed from in the most exceptional of circumstances – for example, if it could be proven conclusively that to follow the recommendations would result in grave injustice.

The SALRC recommends only two alternative options ([and full decriminalisation is not one!](#)):

Preferred option: Full criminalisation (with diversion)

The SALRC prefers the option of full criminalisation with diversion. This option criminalises all aspects of prostitution and prostitution-related activities and is coupled with the important imperative of diversionary programmes to help prostituted persons exit prostitution. The full criminalisation with diversion option recognises that:

- Legally, prostitution is undesirable since it is a human rights violation and inherently violent and exploitative.
- As is the case with drugs, society through the legislature has a duty to protect its people from harmful practices.
- Prostituted persons need help to exit prostitution as the majority are victims of their circumstances to a significant degree. Provision should also be made for the criminal records of prostitutes who successfully exit prostitution to be expunged, as far as their records relate to prostitution and prostitution-related activities.

The importance of socio-economic interventions and exit programs

Since prostitution originates in dire and desperate socio-economic circumstances coupled with the commodification/devaluation of mainly women, the only way to effectively eradicate the harms of prostitution is to address the socio-economic circumstances that give rise to it ([SALRC Report](#) at xviii). [The challenge to eradicate prostitution is ultimately a developmental one.](#)

Alternative option: Partial decriminalisation (prostitute not criminalised)

The SALRC Report regards partial decriminalisation as an alternative to its preferred option of full criminalisation with diversion. This option, known as the Nordic or Equality model, focuses on addressing the demand side (sex buyers) of prostitution and is garnering significant support in an increasing number of jurisdictions. The partial decriminalisation option recognises that:

- [Prostitution is harmful](#) and needs to be eradicated.
- Prostitutes are [victims of sexual exploitation](#).

To be practically effective, this option requires law enforcement to proactively and effectively address the demand side of prostitution – otherwise, prostitution and prostitution-related activities (and its accompanying harms) will continue unabated or even increase.

An important consideration is that the demand side of prostitution is already not deterred by the criminalisation of prostitution. It is well-known that the South African Police Service faces challenges relating to management, resources and staff. Unless specialised prostitution units can be established and maintained, ensuring effective implementation, this option will likely do more harm than good.

The bottom line: Sexual exploitation cannot be condoned or legalised

If the South African state decriminalises prostitution fully, it will be doing so in spite of the fact that nothing beneficial will be achieved for either prostituted persons or society. What is more, it would also mean that our law and policy makers, inexplicably, are disregarding the authoritative recommendations of the [Report on Adult Prostitution](#) and large body of research evidence showing that full decriminalisation will only exacerbate the already detrimental impact of the system of prostitution.

From a human rights perspective, the position cannot more clear: criminalising prostitution is constitutional. In fact, any violation of human dignity suffered by prostituted persons is not caused by the law, but by prostitution itself ([S v Jordan \(2002\)](#) at para [74]).

The truth is prostitution is sexual exploitation. It's [not work](#) and more often than not, it's [not a real choice](#) either. No compassionate society – let alone one that prides itself on being based on human dignity, equality and freedom – can legalise (and institutionalise) an [inherently exploitative system that preys on the vulnerable and marginalised](#).

CASE-SA can reach no other conclusion: the full decriminalisation of prostitution is simply not an option!

**TAKE ACTION NOW – Stand with us FOR HUMAN DIGNITY
and AGAINST SEXUAL EXPLOITATION!**

Want to help stop the legalising of sexual exploitation? Stand *for* human dignity and *against* sexual exploitation by supporting the [Collective Against Sexual Exploitation](#) (CASE) in opposing the full decriminalisation of prostitution in South Africa!

SIGN OUR PETITION

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

Want to know more?

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