

Making sex work legal

What are the options?

The South African Law Reform Commission (SALRC) asked South African society about its views on sex work during one of its investigations. **Dellene Clark** discusses what they found out.

The South African Law Reform Commission (SALRC) has opted to refer to prostitution and not sex work in its investigation on adult prostitution. This has been done in an effort not to associate with a particular position with respect to law and policy.

At different points the media has reported that the SALRC was proposing the decriminalisation of prostitution, for example in the run up to the FIFA Football World Cup in 2010. This is not an accurate picture of what the SALRC is doing.

BACKGROUND

In 1998 the SALRC published an Issue Paper on 'Sexual Offences By and Against Children'. In 1999 the SALRC expanded the scope of the investigation originally titled 'Sexual Offences By and Against Children' to include all sexual crimes by and against adults effectively amounting to a review of all common law and statutory sexual offence crimes. The investigation was renamed 'Sexual Offences' and expanded at the request of the (then) Deputy Minister of Justice and the Justice Parliamentary Portfolio Committee.

By way of explanation the SALRC

process starts with an Issue Paper, progresses to a Discussion Paper and ends in a Report, with draft legislation where necessary.

A Discussion Paper on the Substantive Law was published in 1999, followed by a Discussion Paper on the Procedural Law in 2001 and a Report at the end of 2002. A Bill was tabled in 2003 and then re-introduced in 2004 after the elections.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Amendment Act) is the outcome of the first and second leg of the investigation. This Act has brought about the codification of all sexual offences with the exception of adult prostitution offences still contained in the 1957 Sexual Offences Act. This codification includes criminalisation of child prostitution under the title sexual exploitation of children (under 18).

This brings us to the third leg of the investigation. In June 2002 the SALRC published an Issue Paper on Sexual Offences: Adult Prostitution and on 6 May 2009 it published the Discussion Paper on Sexual Offences: Adult Prostitution. This Discussion Paper forms the third in this quartet of Discussion

Papers and concentrates on adult prostitution. Child prostitution was comprehensively dealt with in the first and second sexual offences discussion papers.

PURPOSE OF INVESTIGATION

The purpose of the broader Sexual Offences investigation (Project 107) is to change the criminal justice system in relation to sexual offences by evaluating existing statutory and common law crimes. The project also seeks to make non-legislative recommendations for the reform of the processes employed by the criminal justice system in its response to sexual violence to ensure that the proposed legislative changes are implementable.

The sub-investigation of adult prostitution aims to review the fragmented legislative framework (which includes the outdated language) which currently regulates adult prostitution. It will also consider the need for law reform in relation to adult prostitution against the requirements set by South Africa's constitutional democracy and to identify alternative policy and legislative responses that might regulate, prevent, deter or reduce prostitution.

PROSTITUTION AND CURRENT LAW

Under South African legislation voluntary selling and buying of adult sexual services, as well as all prostitution related acts are criminal offences. These acts are criminalised in terms of the Sexual Offences Act of 1957 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 includes severe penalties for those who sexually exploit or prostitute children and the recognition of a child prostitute as a vulnerable person who will not be arrested and be taken to court for engaging in prostitution.

DISCUSSION PAPER

In its Discussion Paper of 2009 the SALRC found that adult prostitution has been the subject of considerable public debate in South Africa. The topic remains an emotive one and opinions on prostitution are strongly divided. 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.

In South Africa the socio-economic causes of prostitution suggest that it is driven by a complex intersection of social and economic factors in which poverty and inequality are key drivers. Therefore despite the current criminalisation of the selling and buying of sexual services and of the living off the earnings of prostitution, a growing number of people, for different reasons, are doing so.

Two of the important questions we are faced with is why is adult prostitution currently subject to the criminal law and what does it seek to achieve? In the Constitutional Court case *S v Jordan* it was argued that the law criminalising

prostitution assists in preventing social ills such as child prostitution, trafficking in women and children, public nuisance, public health and other related crimes. The majority of the submissions have focused on the harm linked to prostitution.

Within this context the Commission posed *four alternative legal options* in its Discussion Paper that might be employed in South Africa in respect of adult prostitution. These are non-criminalisation although it should be noted that this does not provide automatic coverage into labour legislation, regulation, partial criminalisation, and total criminalisation.

In respect of all the proposed options the Commission requested the public to comment on many questions on prostitution. These included questions on how:

- prostitution should be defined and how their preferred option would reduce the demand for prostitution;
- harm and vulnerability to abuse and exploitation of prostitutes could be reduced;
- prostitutes could be helped to enforce their rights to equality and access to health;
- stigmatisation and discrimination of prostitutes could be avoided;
- to address concerns regarding prostitution and crime;
- to address concerns regarding public health and HIV;
- to assist in creating an environment for prostitutes to exit prostitution;
- and finally how the issue of a criminal record for selling sex for reward should be addressed when leaving prostitution and seeking alternative employment.

The Discussion Paper was widely published and distributed. Eight workshops were held throughout South Africa, both in urban and rural settings to discuss the content of the paper. A number of meetings were held with adult prostitutes

and other role players. The aim of the workshops and meetings was to assist the Commission to arrive at an appropriate legal solution suitable for South Africa. In addition to written and verbal submissions during the workshops and meetings, over 2 600 submissions were received by email in response to the Commission's call for submissions.

Submissions were received from local and international legal experts, prostitutes, ex-prostitutes, brothel keepers and ex-brothel keepers. Non-governmental organisations (NGOs) involved in assisting prostitutes to exit prostitution, NGOs involved in making the environment that adult prostitutes sell sexual services safe from abuse and discrimination, health care officials, religious organisations as well as ordinary South Africans expressed their views on this matter.

The purpose of these submissions has been to get responses from as broad a spectrum as possible to serve as a base for the Commission's deliberations. It has also been informative as a tool to gauge public opinion. It would however be irresponsible of the Commission to merely tally votes and make a decision based on the number of submissions made in favour of or against a particular legal framework. People's views or moral standpoints are not the test for legal reform. The Constitution is the standard against which any reform needs to be measured.

The Commission is mindful that the manner in which a country chooses to legislate in respect of adult prostitution ultimately amounts to the implementation of a policy decision. Government is not bound to a Constitutional mandate to follow a particular model in respect of adult prostitution. It has to be alive to the fact that the impact of the existing law as it currently stands is problematic.

The Commission shares the

view that the ideal would be a transformed society where no person is faced with the choice of engaging in prostitution to combat poverty. Unfortunately society is not transformed and the best that can be done is to decide which vulnerabilities need to be addressed by the law, including non-legislative or practical recommendations.

The Commission has found that despite isolated cases of private and state run and funded programmes there is no national strategy to assist people out of prostitution. The Commission notes that irrespective of the policy option chosen, that a national strategy should be implemented to deal with prostitution.

This national strategy should seek to offer viable alternatives to prostitution. These will include assisting a person to exit prostitution should he or she express a willingness to do so, and to support re-skilling. Health and education initiatives for prostitutes and economic independence should be promoted. Sexual health and safer sexual practices and providing for a review system and body to evaluate the effectiveness of the legislation in order to make recommendations for its improvement are some of the issues that should be in the strategy.

CONCLUSION

A report is being written on the SALRC Project 107: Sexual Offences and specifically the sub-project: Adult Prostitution. The report will be submitted to the Minister of Justice and Constitutional Development for consideration. ^{LB}

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Working on the streets in downtown Johannesburg.