

TAKING THE CRIME OUT OF SEX WORK

New Zealand sex workers'
fight for decriminalisation

Edited by Gillian Abel
Lisa Fitzgerald
Catherine Healy
with Aline Taylor



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Contents

List of tables and figures	iv
Notes on contributors	v
Acknowledgements	viii
one Introduction <i>Gillian Abel and Lisa Fitzgerald</i>	I
Part One: Lead-up to the passing of the 2003 Prostitution Reform Act	
two Of whalers, diggers and 'soiled doves': a history of the sex industry in New Zealand <i>Jan Jordan</i>	25
three History of the New Zealand Prostitutes' Collective <i>Catherine Healy, Calum Bennachie and Anna Reed</i>	45
four Lobbying for decriminalisation <i>Tim Barnett, Catherine Healy, Anna Reed and Calum Bennachie</i>	57
five The Prostitution Reform Act <i>Gillian Abel, Catherine Healy, Calum Bennachie and Anna Reed</i>	75
six Several sides to this story: feminist views of prostitution reform <i>Alison Laurie</i>	85
Part Two: Implementation and impact of the 2003 Prostitution Reform Act: the first five years	
seven Review of the Prostitution Reform Act <i>Paul Fitzharris with Aline Taylor</i>	105
eight Brothel operators' and support agencies' experiences of decriminalisation <i>Elaine Mossman</i>	119
nine The (continuing) regulation of prostitution by local authorities <i>Dean Knight</i>	141
ten Christchurch School of Medicine study: methodology and methods <i>Gillian Abel, Lisa Fitzgerald and Cheryl Brunton</i>	159
eleven Becoming inspectors of brothels: public health authorities' experience of implementing the Prostitution Reform Act <i>Cheryl Brunton</i>	173
twelve The media and the Prostitution Reform Act <i>Lisa Fitzgerald and Gillian Abel</i>	197
thirteen Risk and risk management in sex work post-Prostitution Reform Act: a public health perspective <i>Gillian Abel and Lisa Fitzgerald</i>	217
fourteen Decriminalisation and stigma <i>Gillian Abel and Lisa Fitzgerald</i>	239
fifteen Conclusion <i>Gillian Abel and Lisa Fitzgerald</i>	259
Index	265

List of tables and figures

Tables

8.1	Interviews conducted across research sites	120
10.1	Location and numbers of street, managed and private workers	166
12.1	Parties cited in the media	203
13.1	Condom use by sector	219
13.2	Sex workers' perceptions of rights under the Act and knowledge of health and safety publications, by sector	220
13.3	Ability to refuse clients in last 12 months, by sector	224
13.4	Ability to refuse clients in last 12 months, for Christchurch female 1999 and 2006 samples	224
13.5	Sex worker perceptions of police attitudes and policing, by sector of work	228
13.6	Self-rated perceptions of health, by sector	232
13.7	Self-rated perceptions of health for sex worker and general populations, by gender	232
13.8	Self-rated perceptions of health for the general population, by age	233
13.9	Self-rated perceptions of health for the sex worker populations, by age	233
14.1	Sex workers' confidants, by sector	245
14.2	Sex workers' confidants, by gender	245
14.3	Substance use, by sector	253

Figure

12.1	Themes from all articles	202
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Introduction

Gillian Abel and Lisa Fitzgerald

Prior to 2003, although sex work in New Zealand was not illegal, all associated activities, such as soliciting, brothel keeping, living on the earnings of prostitution and procuring, were criminalised. This created an environment in which violence, exploitation and coercion could flourish (Lowman, 2000; WHO, 2005). Sustained social action over nearly two decades, which involved advocacy and lobbying by the New Zealand Prostitutes' Collective (NZPC), politicians across the political spectrum, women's rights activists, academics and other volunteers, was effective in bringing about legislative change. In June 2003, New Zealand became the first country to decriminalise sex work when the 2003 Prostitution Reform Act (PRA¹) was voted on and passed by a majority of one vote in Parliament². This legislative approach differs to other international approaches as it represents a shift from regulating sex work from a moral perspective to acknowledging the human rights of this section of the population. Decriminalisation meant that prostitution was acknowledged as service work and sex workers in New Zealand were able to operate under the same employment and legal rights accorded to any other occupational group.

The particular historical, social and cultural context within New Zealand was influential in legislating for the decriminalisation of sex work. New Zealand is a young society and has less strict gendered, class and ethnic social structures than countries such as the United Kingdom. The dominant political ideology of New Zealand from the days of early colonisation has been liberalism and this has shaped the laws of this country (Duncan, 2007). New Zealand women in the 19th century had more freedom socially and physically and, in 1893, were the first to be enfranchised. New Zealand was also at the forefront of a raft of other social reforms such as the 1898 Old Age Pensions Act, which led some commentators to state that New Zealand was the 'sociological experiment station of the world' (Le Rossignol and Stewart, 1910, cited in Duncan, 2007, p 18). The principles of liberalism, such as respect for diversity, freedom of choice and human rights, continue to dominate the policy environment in New Zealand in the 21st century.

¹ www.legislation.govt.nz/act/public/2003/0028/latest/DLM197815.html

² New South Wales, Australia decriminalised non-street sex work in 1995, but some street-based workers remained criminalised. Other states of Australia have legalised sex work. New Zealand, as a nation, was the first to decriminalise all sectors of the sex industry.

The particularities of the history of prostitution in New Zealand, how it evolved and its acceptance in the new colony also set the scene for decriminalisation.

Regulation of sex work

Several approaches have been taken to regulate the sex industry, with most countries seeking to regulate rather than totally eliminate prostitution (Jordan, 2005). Legislation has taken the form of criminalisation, criminalisation of the client, legalisation or decriminalisation. There has been much confusion with the terms legalisation and decriminalisation and in some literature it is incorrectly claimed that countries such as Germany and the Netherlands have decriminalised sex work (for example, Harcourt et al, 2005). Currently, however, only the state of New South Wales in Australia and New Zealand have gone down the road of decriminalisation.

Moral perspectives have historically been drawn on in the regulation of sex work in countries where the activities associated with sex work are criminalised, but in recent decades other perspectives have been gaining ground. Radical feminist perspectives of sex work as violence against women are instrumental in legislation that criminalises the client, a situation currently in practice in Sweden. However, in some countries, liberal feminist, sex workers' rights and public health perspectives are being taken on board.

Criminalisation of the sex worker

Criminalisation may take the form of prohibition, where sex work is illegal, or, as is more often the case, of a modified form of abolition that allows for the sale of sex but bans all related activities. It is a legislative approach that draws heavily on 'public nuisance' and moral order discourses (Kantola and Squires, 2004) and this is evident in policy debates in many western countries, including the United Kingdom and Canada. The public nuisance discourse depicts sex workers as dirty, disease-ridden, having no morals and associated with a criminal underworld, a stereotype often fuelled by media reporting. Sex workers are constructed as a threat to public morality and hygiene with an emphasis on the need for measures of control to contain this threat (Kantola and Squires, 2004). They are framed as vectors of disease and hubs for dangerous activities such as drugs and crime, placing 'good' citizens in the community at risk.

In contrast to the public nuisance discourse, the moral order discourse constructs sex workers as innocent victims, requiring protection and relocation (Kantola and Squires, 2004). This discourse has arisen following an emerging debate about trafficking in people, particularly children, for sexual exploitation. It draws on elements of traditional morality, child welfare concerns, international human rights agendas and feminist perspectives of sexual domination (Kantola and Squires, 2004). There are overlapping elements of these discourses despite other areas of contention (Kantola and Squires, 2004), yet they all share a preoccupation with the

protection of innocent victims of trafficking and tend to ignore the voluntary sex worker. The trafficking rhetoric has gained momentum since the mid-1990s with reports worldwide of the millions of children and women trafficked both within and between countries (Sanghera, 2005). Women who migrate voluntarily, with the full knowledge that they will be working in the sex industry, are conflated with helpless women and children, forced against their will to a life of slavery and sex work, both acquiring the label of trafficked victims. The trafficking debate, as Weitzer (2007, p 467) contends, bears 'all the hallmarks of a moral crusade'.

Criminalised sex workers have none of the rights accorded to workers in other occupations and therefore they are open to coercion and exploitation by managers, pimps and clients. No health and safety guidelines govern working conditions and adverse experiences such as being physically assaulted, threatened with physical assault, being held against their will, being forced to have unprotected sex, having clients refuse to pay for their service and having money stolen are common occurrences in the lives of many sex workers, especially those working on the streets (Plumridge and Abel, 2001). There are also psychological consequences to criminalisation, as the arrest process itself is humiliating and degrading, the sex worker's occupation may have previously been unknown to family and friends and the stigma given to sex work can often have harmful psychological effects. The consequences of having a criminal record are also far reaching. It may make it even more difficult for sex workers to leave the industry, as they may not be able to find other employment. They also may have limitations put on travel and the ability to get home mortgages or other loans (Davis and Shaffer, 1994).

In the UK, sex work itself is not illegal but many offences associated with it are, including soliciting, brothel keeping, living on the earnings of prostitution, procuring sexual intercourse and non-licensing of massage parlours, bawdy houses or brothels. In most cases, the laws regulating these activities are invoked through old laws (Hancock, 1991). Some of these laws seek to protect sex workers from third parties and some are meant to protect the public from the 'nuisance' effects of prostitution (Lowman in Davis and Shaffer, 1994). These laws make it impossible for sex workers to provide commercial sex without committing a number of offences. The regulations tend to increase the vulnerability of sex workers by driving them underground, where fear of detection and arrest override concerns for health and safety (Davis and Shaffer, 1994; Jordan, 2005).

Prior to 2000, the UK was principally concerned with the public nuisance effect of sex work. Persistent soliciting in a street or public place was penalised through a fine of up to £1,000. Then in 2002, kerb crawling was made an arrestable offence, and in 2004 further stringent steps were taken by making it possible to disqualify a kerb crawler from driving (Westmarland, 2006). In this way, government sought to 'disrupt the market' by focusing on the demand side of sex work (Westmarland, 2006).

More recently, the trafficking debate has also been influential in amendments to the regulation of sex work in the UK. In December 2000, the UK signed the United Nations Convention against Transnational Organized Crime and in

2001 became a signatory to the European Union draft framework decision on combating trafficking in human beings (Kantola and Squires, 2004). Whereas kerb-crawling and soliciting legislation was brought about through community activism, trafficking then emerged as an issue through international and European influence (Kantola and Squires, 2004). Although the Home Office has made unsubstantiated claims of between 140 and 1,400 women and children per year being trafficked into the UK to work in the off-street sector of the sex industry, few victims of trafficking have been identified by police, vice squad and immigration service visits to massage parlours (O'Connell Davidson, 2006). In 2003, although 295 women were found to be immigrants working illegally in the sex industry, only five were found to be victims of trafficking (O'Connell Davidson, 2006). In their critique of the strategy adopted by the Home Office, Boynton and Cusick (2006) commented on the lack of understanding shown concerning risk and the implications the laws would have on health outcomes for sex workers and their ability to access healthcare. They highlighted the negative consequences the policing of kerb crawling would have, most notably that displacing workers would increase the prevalence of acquisitive crime and that there would be a reduction in sex workers' negotiation powers leading to increased violence, unsafe sex practices and increased public disorder.

Criminalisation of the client

Criminalisation of the client seeks to reduce the demand for sex work and in the process either reduce or eliminate the sex industry altogether (Jordan, 2005). Radical feminists' claim that prostitution is an institutionalised form of male violence towards all women has been influential in policy debate in Sweden, where legislative changes have ensured that clients and not sex workers are criminalised (Hunter, 1991). Inequality and subordination of women are seen as the underpinnings of 'prostitution'. Radical feminists do not recognise 'prostitution' as work and resist more liberal calls to define 'prostitution' as 'sex work' (MacKinnon, 2001; Sullivan, 2007). In viewing sex work as violence, radical feminists never see this as a 'choice', but a violation of human rights (Sullivan, 2007).

Barry (1995) asserts that whether or not there is consent, when a human body is objectified to sexually service another, violation has occurred. She contends that sex work is 'structured to invoke women's consent', given the condition of class domination that promotes oppression (1995, p 24). She leaves no place for individual agency or choice for women to consent to sex work, arguing that although agreeing to go with a client and exchange sex for money appears to be a choice, it is in fact merely an 'appearance of choice' as an act of survival (1995, p 33). Sex workers are thus seen as passive victims with no control over the commercial sexual transaction and any arguments that are presented by sex workers to the contrary are met with claims of a 'false consciousness' or 'false sense of control' (Barry, 1995; Jeffreys, 1997; Farley, 2004).

Radical feminists argue for abolition of the sex industry to counter the victimisation of 'prostitutes' in a patriarchal society through decriminalisation of sex workers and criminalisation of the clients, while strengthening laws that repress the procurement and pimping of sex workers. It is believed that if there were no customers there would be no market for the victims of the trade, i.e. the sex workers, and thus sex work will ultimately be eliminated (Farley and Barkan, 1998; Svanstrom, 2006).

Sweden has been unique in prohibiting the buying of sex and supporters of this stance have heralded Sweden as signalling to the world that sex work is not acceptable in a gender-equal society (Gould, 2001). The fact that legislation to this effect was passed in 1998 is due to a particularly strong women's movement in Sweden (Kulick, 2003; Svanstrom, 2006). Although a Commission set up in 1993 to investigate options for regulation had recommended both the criminalisation of the client and the sex worker, this stance was criticised by some experts and taken up by the media. It was claimed that such legislation would obscure the fact that sex work was about men's power over women and that punishing the sex workers would mean punishing the victims of sex work (Gould, 2001; Svanstrom, 2006). The idea that sex work was voluntarily chosen as a profession was totally rejected as an argument, with claims made that 'nobody willingly sells their body for money' and that women enter the industry either because of poverty, dependence on drugs or because they are trafficked (Gould, 2001). No input from sex workers or sex work organisations was sought in any of the debates informing the legislation (Gould, 2001; Kulick, 2003; Ostergren, 2006).

A 'fear of the foreign' added impetus to legislative change when it was apparent that Sweden was about to join the European Union (EU). Media reports at this time sensationalised the invasion of foreign sex workers from Eastern Europe into western cities (Gould, 2001; Kulick, 2003). Although Sweden's sex worker population was low³, there were fears that this influx would greatly increase the number of workers in Sweden.

Although many groups in Sweden opposed to criminalisation⁴ put forward arguments that such legislation would drive the sex industry underground, leading to an increase in violence, unsafe sex practices and exploitation of sex workers, proponents claimed that much of the industry was already underground and the law would decrease the demand for paid sexual services. There were also arguments that there would be complications in implementing the law. As sex with a sex worker was not illegal but the purchasing or attempt to purchase a 'temporary sexual relation' was, it would be a difficult action to prove if both parties denied

³ Estimates of the number of sex workers in Sweden prior to the enactment of the 1999 law were about 2,500 workers in a population of 8.5 million (0.3 per 1,000) with an estimated 1,000 working on the street (Kilvington et al, 2001; Kulick, 2003; Svanstrom, 2006).

⁴ Groups opposing the criminalisation of the client were the National Board of Police, the National Social Welfare Board, the Attorney General and the National Courts Administration (Kulick, 2003).

it (Kulick, 2003). Indeed, since the law has been in force, very few offences have reached the courts (Kulick, 2003).

The legislation had the immediate effect of reducing the number of workers on the streets of Stockholm and Gothenburg, but numbers have since started to increase (Kilvington et al, 2001). Government reports evaluating the law have all concluded that there has been no significant drop in numbers (Kulick, 2003). Commentators have proposed that the initial reduction in the number of workers seen on the street did not mean that the number of sex workers had decreased but that they had chosen less visible ways of making contact with clients (Kilvington et al, 2001; Ostergren, 2006). This posed a number of threats to sex workers' health and safety by driving the industry underground where sex workers were vulnerable to exploitation and abuse and less easily accessed by health and social workers.

The limited research coming out of Sweden that is available in English highlights that sex workers are finding it difficult to adequately assess clients prior to going with them as clients are more nervous and wish to conduct business in a more rapid manner (Ostergren, 2006). Sex workers are also reporting more emotional stress under the current legal system. The implications of criminalising people living on the earnings of sex work means that some workers are reluctant to reveal what they are doing to landlords or alternatively, are exploited by landlords and having to pay exorbitant rents (Ostergren, 2006). This clause also means that it is illegal to work indoors under a system of management or work with others, environments that are safer than working on the streets. Non-Swedish workers are deported immediately if found with a client (Kulick, 2003). Proponents of the law, however, defend the stance that has been taken, saying that it sends a message to society that sex work is unacceptable and does not belong in Sweden (Kulick, 2003).

Legalisation

Reducing harm to sex workers is not necessarily the reason why legalisation of the sex industry is often advocated; rather, drawing on moral rhetoric, it can be an attempt to control the industry by keeping it limited to certain areas where it will not offend the wider population (Davis and Shaffer, 1994; English Collective of Prostitutes, 1997; Arnot, 2002). Some European countries, such as the Netherlands and Germany, and some states of Australia, including Victoria, Queensland and South Australia, have legalised sex work. Legalisation permits sex work in certain forms, but it is usually heavily regulated through the licensing of sex workers and sex work establishments within zoned areas (English Collective of Prostitutes, 1997; Jordan, 2005). Municipalities have complete control over the granting or refusing of licenses and thus the number of legal brothels and sex workers has generally been greatly limited (Lewis and Maticka-Tyndale, 2000; Jordan, 2005). Many sex workers are unwilling to work in the legal brothels where brothel owners are often exploitative (Scambler and Scambler, 1997). Instead, they elect to work illegally, which creates a two-tier system. Illegal workers are vulnerable