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LEGAL REGULATION OF PROSTITUTION: WHAT OR WHO IS BEING CONTROLLED?

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Much of the law on prostitution is derived through indirect attempts to regulate or control prostitution through either invoking old laws or through gaps in laws. In New South Wales, the invocation of the Disorderly Houses Act 1942 to prosecute illegal brothels illustrates the use of outdated laws and reflects the frustration of law enforcers rather than the application of laws which reflect the changes in community attitudes to prostitution in the 1980s and 1990s. State inconsistencies and gaps in prostitution-related legislation expose the fact that the same behaviour might be permissible in one state but proscribed in another.

Against the backdrop of the legacy of English laws on prostitution, this paper looks at how prostitution laws in Australia presently stand and considers patterns of law enforcement and non-enforcement. It then focuses on who or what is being controlled by prostitution legislation and law enforcement and concludes with an appraisal of the present situation in Victoria.

The Legacy of English Laws

The history of legal regulation of prostitution in the United Kingdom and Australia is one of state intervention; which in Australia, dates from attempts to curb prostitution under public nuisance provisions in the early colonies of the 1850s and efforts to introduce the English Contagious Diseases Acts into some Australian states in the 1870s and 1880s.

From about 1910, all Australian states introduced criminal laws on prostitution, whereby the act of prostitution itself is not an offence, but certain prostitution-related activities are. These laws were based on English laws on soliciting, prohibiting under-aged persons on premises used for prostitution, brothel keeping and leasing accommodation to prostitutes.
The legacy of English law bequeathed four notable aspects to Australian laws on prostitution. First was the emphasis on control of prostitution under the guise of public nuisance controls or the prevention of annoyance. Under the Town Police Clauses Act 1847, it was an 'offence for a prostitute to solicit or importune in a public place for the purpose of prostitution'; and after the Street Offences Act 1959, it was assumed that the presence of prostitution in public places 'was likely to cause annoyance even though no particular person was annoyed' (Great Britain 1984, paragraphs 5 & 6).

Secondly, the pejorative term 'common prostitute'—which applies only to women—first appeared in the English Vagrancy Act 1822 and was legislated into Australian laws on prostitution. The implication being that police could side-step certain formalities in the arrest of common prostitutes.

Thirdly, the Contagious Diseases Acts 1864, 1866 and 1869 entrenched the view that women working as prostitutes—not their clients—were the purveyors of contagious diseases. These Acts bestowed coercive powers on state agents to control women suspected of having venereal disease. The 1864 and 1866 Acts were designed to prevent the spread of contagious diseases to Naval and Military stations and gave Justices of the Peace, inspectors, magistrates and medical practitioners power to apprehend and forcibly detain women suspected of carrying venereal disease upon threat of imprisonment (Moscucci 1990, p. 123).

Fourthly, the systematic application of the law and law enforcement has been to penalise prostitute women and not their clients. It was only in 1985 with the Sexual Offences Act, that English law made it an offence for a man to solicit a woman from or near a motor vehicle, but it excluded male pedestrians seeking prostitutes. Even then, a different level of proof applies to clients. 'Persistence or causing fear' is required to prove charges against male clients for soliciting but is not required to convict a woman of loitering for the purpose of prostitution (Sexual Offences Act 1985 (Eng.), Section 21(1)).

Australian laws, however, have permitted the prosecution of clients as well as prostitutes, but the focus of law enforcement has been overwhelmingly against prostitutes.

**Australian Laws on Prostitution**

For seventy years, it was vagrancy laws, contagious diseases legislation and criminal laws that regulated prostitution in Australia. More recently, in the 1980s, other legal regulation has been added; in the form of planning law (including town planning permits for brothels, licensing for brothel operators and licensing of individual sex workers); health regulations, particularly regarding AIDS and sexually transmitted diseases (STDs); and prostitution related provisions in force under liquor, health and local government legislation.

As the law stands in 1991, New South Wales and Victoria are the two states to have attempted to reform laws regulating prostitution. Western Australia and Queensland are both reviewing their laws and the Northern Territory has a new Act before Parliament. However, at present, Queensland, Western Australia, South Australia and Tasmania penalise most aspects of prostitution. (Although in practice, the Western Australian police policy of 'toleration and containment' maintains a police-controlled de facto licensing
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of sex industry workers and 'approved' brothels.) Notably, it is not an offence for workers to work from their own premises in Queensland, Western Australia and Tasmania and no states have legislation prohibiting the operation of escort agencies.

Irrespective of reform efforts, different Australian states are consistent in their efforts to control more visible forms of prostitution and, in particular, street prostitution. New South Wales is the only state to attempt some form of decriminalisation here with the Prostitution Act 1979 (Section 5) which repealed laws relating to soliciting and loitering for the purposes of prostitution, unless behaviour caused serious alarm or affront. Showing the power of the resident lobby, these reforms were overshadowed by the re-introduction of criminal penalties for street prostitution, and further restrictions on street prostitution in amendments in 1983, 1988 and 1989; in the attempt to confine prostitutes to brothels or escort agencies and keep them off the streets. Further complaints by inner city residents have resulted in increased arrests, higher mandatory penalties and use of the Bail Act to stop women convicted of prostitution from working in the same area (Hatty 1989).

Brothels have been outlawed but police-controlled in Western Australia (quasi-legally under the police policy of 'toleration and control') and Queensland (illegally under police protection as established by the Fitzgerald Inquiry). In New South Wales, the declaration of premises as a 'disorderly house' permits prosecution of owners and occupiers for using the premises for prostitution, whereas in Victoria, brothels with a valid town planning permit may operate without penalty. However, illegal brothels—which are on the increase—come under different legislation which requires a different and according to police, a more difficult burden of proof.

At the most discreet end of the industry, escorts are not illegal and no state has laws which penalise escort agencies—although managers or drivers taking a cut of takings can be prosecuted under 'living on earnings'.

In terms of law enforcement, three main conclusions may be drawn. Laws are enforced overwhelmingly against prostitutes rather than clients; against street prostitutes rather than those who profit from prostitution or those who work in licensed brothels or escort agencies; and against females working as prostitutes rather than males. For example, in Victoria, prosecutions for keeping a brothel constituted 3 per cent in 1983 and 1 per cent in 1984 of persons proceeded against for prostitution related offences and from 1980 to 1984 only three people were prosecuted for procuring (Victoria 1985, p. 132).

It is also important to look at non-enforcement of laws against rape and violence and the reported lack of police response when a criminal offence has been committed against a sex industry worker. Criminalising certain forms of prostitution work has the direct consequence of lack of protection for sex industry workers from violence, robbery and intimidation for those working illegally. Studies such as Hatty's (1989) suggest that violence against sex industry workers is both frequent and on the increase.

The English writer, Susan Edwards (1987, p. 56), observed that prostitutes in England are 'controlled, exploited, intimidated and assaulted beyond the reach of the law'. The negative stereotype of women working as prostitutes compounds their difficulty in establishing their right to fair treatment under the law. Invoking the shadow of the 19th Century Contagious Diseases Acts,
there have been moves to invoke the criminal law to forcibly detain sex
industry workers who are HIV-positive and still working.

Who or What is Being Controlled by Prostitution Legislation and its
Enforcement?

Is it public nuisance? Is it to control the spread of AIDS and STDs? Is it to
prevent police corruption and organised crime? Are there other symbolic
implications?

To address these questions, it is necessary to analyse the broader issue of
interests and values embedded in prostitution legislation and law
enforcement.

A public nuisance?

Law enforcement patterns illustrate the considerable discretionary power
vested in police and the selective application of the criminal law; against
women rather than men, against those working as prostitutes rather than
clients, and against particular prostitution workers.

The focus on particular women and on the most visible or autonomous
forms of prostitution should alert us to the fact that policing of prostitution
means more than the control of 'public nuisance'. The nuisance is shifted
around rather than eradicated. If public nuisance was the main issue, then
policing would not be selective but would be unilateral. If public nuisance
was the issue, there would be little opposition to the notion of one or two
women working discretely from their own premises—as was the case with the
rejection of the Neave Inquiry recommendation in Victoria and with recent
moves by a Perth council to request registration of owner-occupier businesses
in its area with a view to placing restrictions on some uses (namely
prostitution).

Prevention of AIDS and sexually transmitted diseases?

This has become a major focus of attention in recent times with some states
proposing compulsory health checks for sex industry workers. The need for
an education program on safe sex for sex industry workers in the late 1980s
led to government funding of the Prostitute's Collective. Because sex work is
their livelihood and because they realise the threat of AIDS, sex workers show
an exemplary record in terms of AIDS prevention in current Health
Department statistics. In view of the difficulty of reaching clients through an
educational program—since clients are anonymous and come from every
stratum of society—sex workers play a major role in educating clients about
safe sex. Given these factors, it would be hard to justify further regulation of
workers under the pretext of AIDS prevention.

Prevention of public nuisance and prevention of AIDS and STDs
represent major formal justifications for the focus of state policy, resources
and control of the industry and an unwarranted focus on prostitute workers
rather than clients or those who serve to gain from prostitution. In
comparison, other areas show a lack of state resources, a lack of monitoring
and a lack of investigation by law enforcement bodies.
Prevention of police corruption and organised crime?

There is a frequent saying in the industry: 'You cannot have sex and money without violence and corruption'. This was born out by the Queensland Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, chaired by Mr Tony Fitzgerald (Queensland 1989), which confirmed the involvement of drug distributors in Brisbane's parlours; links between parlour operators and officers of the Queensland Police Department Licensing Branch which were common knowledge to senior police; payments in money, sexual favours and goods by parlour and escort agency operators to police; and unequal enforcement of the law against industry operators who were out of favour (1989).

Does the absence of such inquiries in other states imply that Queensland is the exception? These are areas where there is minimal public investigation, minimal use of criminal sanctions and inadequate monitoring.

Why then the preoccupation with regulating and controlling sex industry workers? Women workers, in particular, and gay men become an easily identifiable target for law enforcement. The symbolic value of such control is that laws on prostitution become a means of controlling women's sexuality and women's autonomous work, whilst at the same time, the industry is shaped by the prevailing conceptions of men's sexual needs and the continuing control of the industry by men. Even in Western Australia (where it is claimed that the industry is all-female with police insistence that brothel managers and workers are women) under the policy of 'toleration and control', the Vice Squad—who register all workers and impose conditions of operation on brothel managers—are predominantly men and the owners or company directors of some brothel premises are men. Furthermore, the state's stance on the inevitability of prostitution has implications for consolidating dual standards of morality for men and women, the objectification of women and reinforcing a masculine ideology of women's sexuality. Drawing on Mackinnon, the state institutionalises male power through the law: she says the state 'treats women the way men see and treat women' (Mackinnon 1983, p. 644).

The Victorian Situation

The Neave Inquiry (Victoria 1985) recommendations entailed a package of trade-offs; decriminalisation of criminal law with the recommendation that one or two workers be permitted to work from their own premises; the use of planning law to regulate the location of premises; a Licensing Board to regulate the industry and vet brothel owners for criminal convictions; and health regulations to control AIDS and STDs.

As a consequence of radical amendments made to the Bill in the Upper House, much of the Prostitution Regulation Act 1986 was not proclaimed. The basic outcomes in May 1991 are that the government would not accept the proposal that one or two workers be permitted to work from their own premises. Thus, street work is still criminalised and bears the brunt of discretionary law enforcement. Amongst the sixty or so licensed brothels, we have seen the growth of large brothels—some owners with multiple shares, inadequate attention to issues of ownership and control of brothels, and
neglect of worker safety and employment conditions. The Licensing Board was not set-up, reputedly because if this section of the Act was proclaimed then independent workers would be compelled to register. The devolution of planning-related issues to local government has not worked, and councils' repeated refusals of planning permit applications has resulted in the Administrative Appeals Tribunal state planning mechanism for brothel applications becoming a defacto. Given the reputed difficulties of proving the offence of illegally running a brothel, illegal brothels have increased, with police estimates at around 150 to 200 illegal brothels in the Melbourne metropolitan area.

On health issues, action has been slow to say the least. The Act was proclaimed in 1987, the Health Regulations came out in May 1990 and to May 1991, guidelines for interpreting these regulations were still being developed. There also appears to be an extreme lack of coordination between the authorities charged with enforcing health regulations—the local government environmental health officers and health department officials. Within the Health Department, officers with the task of enforcing the regulations are under-resourced and reticent to enforce regulations. (Health standards on condom use, clean towels, shower and toilet facilities and so on are the obvious casualties here).

For sex industry workers, the new legislation and continued focus of law enforcement on street workers has forced them into more hidden and dangerous sectors of the industry. Inaction on the Neave Inquiry recommendation for a special police unit to deal with workers' complaints of violence has left sex industry workers vulnerable to sexual exploitation and violence. Worker representatives claim that work conditions in some brothels exploit workers (such as expecting unpaid socialising with clients) and contravene workers' civil liberties. The Government's Interdepartmental Monitoring Committee on Prostitution has not met for twelve months. Enforcement of prostitution-related laws and regulations in Victoria show a dismal lack of coordination and a breakdown of any inspectorial system; and local government resistance to brothels has rendered the Australian Administrative Tribunal a defacto state-wide planning board.

The Future

The area of prostitution law reform is epitomised by ignorance, fear and lack of communication. Prostitution is a difficult area to regulate, since it spans a multitude of state bureaucracies and because prostitution has such symbolic significance.

In Victoria, there will be regulation of prostitution, but the mechanisms and the implications are less clear. Given local governments' antipathy to allowing prostitution under planning guidelines, and because prostitution activities are often concentrated in some local government areas rather than others, it appears that a model of decriminalisation with a state-wide Licensing Board would be more appropriate than devolving planning issues to local government. Such a Board could combine representation from planning, health, sex industry worker, employment and training, police and brothel-owner sections of the industry, and could combine tasks of investigation, education, monitoring worker health and safety and other work
conditions, enforcement of health regulations and could become a mechanism for dealing with complaints.

Additionally this Board could adopt principles of minimising the spread of AIDS and STDs, of ensuring workers are accorded dignity, rights and protection in their work, and ensuring the minimisation of corruption and exploitation.

In the long term, however, we need to look more closely at gender, power and sexuality within western industrialised society. Two issues in particular need to be addressed: men's demand for prostitution and the inherent vulnerability of women when their power rests on their attractiveness or appeal to men.

References


Postscript

In August 1992, the Victorian Police Minister, Mr Mal Sandon, set up a working party to consider whether further sections of the Prostitution Regulation Act 1986 should be proclaimed in order to better control the legal and illegal prostitution industry.