

Ambivalent Regulation: The Sexual Services Industries in NSW and Victoria – Sex Work as Work, or as Special Category?

Penny Crofts, JaneMaree Maher, Sharon Pickering and Jason Prior*

Abstract

Despite continuing contests in Australian states over the validity of sex work as work, Victoria and New South Wales (NSW) have been part of a global trend for states to decriminalise and/or legalise the sex industry. This article argues that although Victoria and NSW are united by their ambivalence toward the legal validity of sex work as work for women, this ambivalence is expressed and organised in different ways in each state, with consequent differences in regulatory schemas, practices of enforcement and outcomes for workers and communities. In particular, this article focuses on the regulation of sex services premises as a key indicator of how the sex industry is regarded and embedded within broader business, social and regulatory contexts. The article examines some specific regulations that affect women's status as sex workers in each state. It concludes by arguing that the failure to fully recognise sex work as work impacts most sharply on the safety and inclusion of workers: those whom the legislative schemas of both states purportedly seek to protect.

Introduction

Concerns about deviance, social harm and immorality underpin and shape legislative responses to sex work, nationally and internationally. Questions about sex work as labour create both ambiguity and ambivalence in the regulation of sex work. West (2000:106) argues that the balance of 'prohibition, legalization and decriminalization' within regulatory schemas for sex work varies across national and within state jurisdictions, reflecting the dominant discursive constructions of sex work in these different jurisdictions. West (2000) suggests that the framing of sex work as labour, for example, has shaped legislative and regulatory responses to sex work in the Netherlands, while responses in Britain have been dominated by concepts of public nuisance. Despite continuing contests in Australian states

* Penny Crofts, University of Technology Sydney; JaneMaree Maher, Monash University; Sharon Pickering, Monash University; and Jason Prior, University of Technology Sydney.

over the validity of sex work as work, Victoria and New South Wales (NSW) have been part of a global trend for states to decriminalise and/or legalise the sex industry. This article argues that although Victoria and NSW have both moved towards legalising some forms of sex work, each jurisdiction demonstrates 'ambivalence' about the legal validity of sex work as work for women. This ambivalence is expressed and organised in different ways in each state, with consequent differences in regulatory schemas, practices of enforcement and outcomes for workers and communities. In particular, the article focuses on the regulation of sex services premises as a key indicator of how the sex industry is regarded and embedded within broader business, social and regulatory contexts. It examines some specific regulations that affect women's status as sex workers in each state. The article concludes by arguing that the failure to fully recognise sex work as work impacts most sharply on the safety and inclusion of workers: those whom the legislative schemas of both states purportedly seek to protect.

The term 'ambivalence' is used here as it captures the underlying hesitations and contradictions in the regulatory frameworks, especially in relation to women's capacity to act independently as workers within the industry in Victoria. The term is used by Sullivan (2010) to describe the underlying meanings and impacts of different Australian legislative schemas. It is indicative of the fact that full legalisation and decriminalisation of all types of sex work have not occurred, reflecting uncertainties about sex work as legitimate labour. While both Victoria and NSW have provisions that create legal options for sex work (in licensed locations or through exemptions for independent workers) and regulations that seek to protect workers, in Victoria in particular the existing schema does not fully recognise sex work as a legitimate business. The state's ambivalence about this type of work is shown in provisions that constrain women's capacity to act entrepreneurially.

This article first outlines the historical antecedents of the contemporary legislative and regulatory schemas for sex work in NSW and Victoria. These were the first two states to move towards decriminalisation and regulation (Perkins 1991). They have been chosen for comparison because there have been recent changes in the terminology and regulation in the area of sex work. The article discusses the different regulatory approaches in these two states, particularly in relation to premises in which sexual services are provided. Drawing on analyses of the regulatory frameworks in conjunction with recent empirical studies in both states on worker experiences, this article outlines the 'complex, unpredictable and controversial ways' (Munro and Della Guista 2008:1) in which existing regulations impact on worker and community safety. It explores the regulatory and legislative frameworks in conjunction with an analysis of the effects and impacts on working conditions. This critical analysis of regulatory provisions, their meanings and impacts is designed to contribute to a fuller understanding of how underlying social and political understandings create different forms of regulation, which in turn shape sex work in different jurisdictions. In particular, this article is interested in how ambivalences about sex work as work limit women's working conditions and may constrain their ability to benefit optimally from their work.

Brants (1998:622) argues that 'policy on prostitution in any country depends on the underlying ideology about the moral (un)acceptability of paid sex'. In Victoria, it is a deep-seated ambivalence about the legitimacy of sex work as work that determines the nature of regulations and, therefore, shapes and inhibits beneficial outcomes for all parties in regard to sex work. This ambivalence has given rise to the problematic categorisation of key aspects of sex work, with significant ramifications for workers. However, in NSW, the regulatory regime explicitly excludes morality from planning determinations. The focus is

on amenity impacts, rather than moral concerns; on businesses, rather than individual workers. Concerns about brothels must be articulated in a planning idiom, which greatly reduces the opportunity to regulate sex services premises based upon moral perspectives. While some ambivalence about 'sex work as work' is evident in NSW, this article demonstrates that the incorporation of sex services premises into an existing planning regime delivers advantages of legalisation to owners, workers and neighbourhoods. In turn, this allows for the promotion of worker inclusion and safety. Sullivan (2008:74) has argued that 'law and policy addressed to the sex industry has a significant impact on the making safe (or not) [of] working environments for sex workers, on their civil and labour rights, and their capacities as both human beings and workers'. This article contends that the more direct address articulated in NSW offers greater support to the security and wellbeing of workers, although it is recognised, following O'Connell-Davidson (2006), that enacting regulation does not automatically secure better worker outcomes.

The major difference between the two states is that NSW has incorporated sex services premises within the existing planning regime, while Victoria has created a special category of sex services premises, requiring that brothel owner-operators obtain a licence. This licensing process is managed by the Business Licensing Authority (BLA) using a framework applicable only to sex services premises. In NSW, sex services businesses can be regulated and regarded like any other legitimate business, according to the central planning principles. While in some areas sex services premises have been regulated more restrictively than have other businesses, the inclusion of sex services premises within general planning frameworks means existing procedural and substantive legal structures — such as worker rights, health and safety — are more centrally located in the regulatory sphere.

In contrast, the creation of a special category of sex services premises in Victoria has meant that legality and the enforcement of safety standards both for workers and for the communities in which they work are compromised. The perception of the sexual services industry as a 'special' or particular case, where conventional assumptions about planning laws and labour laws either do not apply or are applied in an exceptional way, may inhibit or diminish precisely those benefits that are sought, such as worker protection and community safety. This ambivalence, as Maher and Pickering (2009) have argued, means that the 'regulatory space' (Freiberg 2010) of sex work is poorly defined. Morality, deviance and particular aspects of public health and worker vulnerability dominate discussions, while workplace practices and labour market conditions are left inadequately explored and articulated. The regulatory talk in Victoria privileges some discourses over others, prioritising those of social harm and community protection, while silencing critical issues for workers related to labour and employment autonomy (Maher and Pickering 2009). In Victoria, the creation of a special category of sex work regulation enables and encourages the ongoing expression of ambivalence about sex work, while in NSW the discourse and pragmatic aspects of planning have contributed more to the identification of sex services premises as legitimate businesses with rights and responsibilities. The framing of sex work as work and the positioning of sexual services within general business and planning schemas offers greater opportunity for the inclusion of sex workers as workers, which in turn enhances opportunities for worker security and safety.

Historic illegality of sex work

Historically, in NSW and Victoria, sex work and the premises in which it took place operated outside the framework of the law (Weitzer 2009), with vagrancy laws and public nuisance laws, as well as criminal provisions, used to control visible sex work particularly (Hancock 1992). This article directs particular attention to the regulation of the premises in which sex work is carried out, but questions over the legality of sex work are relevant to how the premises have been regarded and regulated historically. The contested nature of the work meant that the business premises in which it occurred could not operate legally. As Perkins (1991:10) contends, brothel keeping was considered a 'crime with serious consequences' in most Australian jurisdictions for much of the 20th century. Accordingly, brothels were constructed by the law as doubly deviant, because of the activities that took place within them and because the premises could not, therefore, operate as a legitimate business location.

In NSW, soliciting for the purposes of prostitution; living off the earnings of a prostitute; or being the owner, occupier or agent/manager of any premises who induced or suffered any female known to be a common prostitute to occupy such premises for the purpose of prostitution were offences from 1908 until 1979.¹ In 1979, reforms were enacted that decriminalised most key prostitution offences including solicitation (Frances and Gray 2007), although in 1983 the Government reintroduced soliciting offences in a restricted form, requiring that a person shall not solicit for the purpose of prostitution 'near a dwelling, school, church or hospital' (*Prostitution Act 1979* (NSW) s 8A). These provisions continue to apply under the *Summary Offences Act 1988* (NSW).

Prior to legislative reforms in 1995, brothels in NSW were illegal and subject to closure, regardless of whether or not they were well-run. In the 1980s and 1990s, police increasingly relied upon the *Disorderly Houses Act 1943* (NSW), which made it an offence to be an owner or occupier of a declared disorderly premise, in order to close brothels and prosecute any persons found on the premises. Under s 3 of this Act, a variety of grounds contributed to a premise being 'declared', including 'drunkenness or disorderly or indecent conduct or any entertainment of a demoralising character [which] takes place on the premises', and that premises are frequented by 'reputed criminals or associates of reputed criminals' or 'persons of notoriously bad character'. Police were aided, in particular, by the decision in *Sibuse Pty Ltd v Shaw*, where the Supreme Court declared that a brothel was a disorderly house regardless of whether or not it was well-run. In 1995, the *Disorderly Houses Amendment Act 1995* (NSW) repealed s 3(1)(e) of the *Disorderly Houses Act*, and provided in s 16 that a 'declaration under section 3 may not be made in respect of premises solely because ... the premises are a brothel'.²

In Victoria, prior to the mid-1980s, solicitation and brothel keeping were prohibited under the *Crimes Act 1891* (Vic) and the *Police Offences Act 1907* (Vic). In the late 1950s and early 1960s, amendments to the *Summary Offences Act 1966* (Vic), the *Crimes Act 1958*

¹ Amendments in 1908 to the *Vagrancy Act 1902* (NSW), s 4(1)(i), created the offence of 'being a known prostitute, [who] solicits or importunes for immoral purposes any person who is in any public street, thoroughfare, or place'. Prior to the enactment of this provision, sex workers were prosecuted for 'loitering' or 'riotous or indecent behaviour'.

² A new Part 3 relating to brothels was introduced, authorising the NSW Land and Environment Court (LEC), on an application by the local council, to make an order that the premises are not to be used to house a brothel (s 17). A local council cannot make an application to the NSW LEC 'unless it is satisfied that it has received sufficient complaints about the brothel ... to warrant the making of the application' (s 17(2)).

(Vic) and the *Vagrancy Act 1966* (Vic) expanded the reach of prostitution laws in regard to minors, and maintained offences for soliciting and brothel keeping.³ In the early 1980s, the election of a new Labor state government pushed the state towards decriminalisation (Sullivan and Jeffreys 2001). Legislation was introduced following the Neave Inquiry (Victoria 1985), which recommended decriminalisation of certain classes of sex work offences and proactive regulation of the sexual services industry throughout the state. However, the first legislation to emerge following the Neave Inquiry — the *Prostitution Regulation Act 1986* (Vic) — was far narrower in scope than that stipulated in the Neave Inquiry recommendations, particularly in three key areas (RhED 2009; Dobinson 1991): the decriminalisation of street sex work; the development of initiatives aimed at enhancing operations involving collectives of independent workers; and the rejection of the compulsory testing of workers for sexually transmitted diseases (STDs), now a requirement of the current Act.

Regulatory frameworks: or the halfway houses of sex work?

The main rationale offered in both the Victorian and NSW jurisdictions for the partial decriminalisation (that is the removal of sanctions for certain activities), and the move towards the regulation of sex work and brothels, was the need for harm minimisation. This argument is consistent with the rationale for decriminalisation in Western Australia (Crofts and Summerfield 2008) and Queensland, which has recently included brothels in a range of legal sex work options (Sullivan 2010). In the late 1970s and early 1980s in Victoria and NSW, parliaments and inquiries provided sound reasons for the decriminalisation of sex services premises based on a harm minimisation model, in line with emerging international discussion and research. The potential ‘harms’ of allowing a flourishing and complex sexual services industry to operate outside a regulatory framework and the fact that most prosecutions were against workers (Hancock 1992) were recognised in both jurisdictions, but the responses of the NSW and Victorian governments were quite different.

The NSW Legislature justified its 1995 reforms by pointing to the link identified by the Wood Royal Commission (into the NSW Police Service) between an illegal sex industry and police corruption. The threat to close brothels led to the potential for law enforcers to demand and receive the payment of bribes (Whelan 1995). In addition, it was asserted that a harm minimisation approach should be adopted in relation to health and safety, by addressing public health risks and the more undesirable aspects of prostitution (Gaudry 1995:1937). The decision in *Sibuse v Shaw* offered no encouragement to owners to run orderly brothels, and poorly run brothels impacted upon workers, clients and nearby neighbours (Moore 1995:1952). Moreover, it was recognised that brothel closures resulted in an increase in street prostitution, amplifying negative impacts upon workers and nearby residents. Reforms to allow brothels to operate as legitimate businesses were introduced at a time when sex work had already been decriminalised.

In Victoria, the first legislation to recommend the decriminalisation and greater regulation of the sex industry was introduced following the Neave Inquiry (Victoria 1985). Drawing on the Inquiry’s recommendations, the Victorian approach to the regulation of the sex industry is said to prioritise harm minimisation, although, as the following analysis will show, the concept of harm minimisation adopted in this context defines worker and community safety in quite limited ways. Initially, the introduction of the *Prostitution*

³ See Perkins (1991) for an extended discussion of these legislative developments.

Regulation Act legalised some limited forms of sexual service work. Street work remained criminalised and initial proposals for a licensing board were not enacted (Hancock 1992), although this board was later established as the BLA. Large brothels proliferated for two key reasons. The first was that the Neave recommendation to support small worker-operated brothels (one or two workers together, rather than one single exempt worker) was not promulgated in legislation, which meant that smaller brothels of this type were forced to operate outside the regulatory framework. The second reason for the proliferation of larger premises was the reluctance of local councils to approve applications: Hancock (1992:169) suggests that councils' repeated refusals meant that the 'Administrative Appeals Tribunal state planning mechanism ... [became] a defacto state-wide planning board' for brothels. These barriers to obtaining a licence, the difficulties of criminal prosecutions and local council reluctance to enforce planning regulations effectively (even as they refused licences) led to a growth in the number of unlicensed sex services premises (Hancock 1992), which has continued in Victoria (Chen et al 2010; McKenzie and Maris 2011; Pickering, Maher and Gerard 2009).

In Victoria, planning controls and licensing procedures were adopted as a mechanism to manage sex work, criminality and the public interest, but 'the reformers' case for legitimising prostitution as just another employment sector had yet to win widespread support' (West 2000:111). Brants (1998:622) has argued for a distinction between 'regulationist', where protection of society (rather than workers) is the key objective of regulation, and 'legalised', where the sex services industry is treated as simply another labour market with no specific defining features. Using this distinction, it could be argued that Victoria has adopted a mixed approach, whereby the protection of workers is important, as the provisions of the *Prostitution Control Act 1994* (Vic) ('PCA') (later renamed the *Sex Work Act 2006* (Vic)), suggest, but full legitimisation of the industry has not occurred (see Dobinson 1991). The PCA⁴ was introduced with a stated focus on vulnerable workers and exploitative managers. Offences related to 'living off' the earnings of working women, with particular emphases on the protection of children and on medical testing, were enshrined in the law. Street work, although prevalent in particular areas of Victoria's capital city, Melbourne, was not decriminalised. The emerging regulatory framework was very complex and operated across a range of key stakeholders; the limitations of the licensing, regulatory and enforcement structure that emerged were recognised in the *Prostitution Control Regulations 2006* (Vic) (later renamed the *Sex Work Regulations 2006* (Vic)), which sought to address gaps and inconsistencies in the existing legislation.

The following section examines the current regulatory schemas in NSW and Victoria more closely. It argues that the schemas in operation in both states reveal ambivalence about offering full recognition of sex work as work. However, the emphasis in NSW on including sexual service premises within existing planning frameworks and expressly excluding moral considerations from planning has yielded quite different outcomes for sex services premises and workers than have occurred in Victoria.

Regulating Victorian sex work

The ambivalence surrounding the legality and validity of sex work as work can be most directly observed in the regulatory regimes established in Victoria, and the complex, inchoate and often ineffective ways in which enforcement practices and structures have

⁴ In 2010, the *Prostitution Control Act 1994* (Vic) was renamed the *Sex Work Act 1994* (Vic). This change is discussed in greater detail below.

developed. In particular, planning regulations that cover premises have only been partially implemented, rather than fully recognising the sexual services industry and associated premises as a legitimate form of business. It is suggested that these regulatory approaches could better be characterised as producing halfway houses, where harms, anxieties and questions about the genuine legitimacy of the industry are often unresolved. In the state of Victoria, brothels are regarded and regulated as part of a special category of business.

In Victoria, the original legislation — the *Prostitution Regulation Act 1986* (Vic) — was much narrower than that proposed in the Neave Inquiry recommendations, particularly in three key areas (RhED 2009; Dobinson 1991), as earlier noted. As Hancock (1992:169) argues, the Neave 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’. Yet much of the proposed Bill was blocked through amendment, which meant that while the licensing structure (and the associated Neave Inquiry Recommendation 3 that operators of unlicensed brothels be punished under licensing laws, rather than under the provisions of the Vagrancy Act, as they had previously been) was developed, the ‘trade-off’ of worker autonomy was significant.

Despite the stated ambition to adopt a harm minimisation approach to the regulation of the sex industry, the Victorian system enshrined by legislation reveals a great deal of ambivalence about the desirability of allowing the sex industry to operate lawfully. This ambivalence has been most directly expressed through the creation of a licensing system that is specific to the sex industry and through the development of complex and partial frameworks for regulation and enforcement that are widely recognised as ineffective. The Victorian licensing system is supplemented by prescribed planning controls. It contains provisions for the licensing of brothels and escort agencies. In Victoria, currently there are approximately 95 licensed brothels, the majority of which are clustered in metropolitan Melbourne, with three in Geelong. Estimates of the number of unlicensed brothels in Victoria vary considerably, from under 70 (Chen et al 2010) to over 300 (media claims from 2003 onwards). Up until early 2011, several regulatory agencies and departments were involved in the management of the government’s sex work regulation scheme. Consumer Affairs Victoria (CAV) administered the PCA (newly renamed — see below), and the regulations under the Act, which set out the majority of sex work-specific government controls. Responsibility for enforcement falls jointly on CAV, Victoria Police and local councils, according to the regulatory framework.

In reality, CAV primarily monitors licensed sexual service providers’ compliance with the regulations that apply to licences, and any licence conditions that the BLA may impose on individual licensees. Since late 2008, CAV has been the lead coordination agency in the enforcement of provisions relating to sexual service provider businesses operated by an unlicensed person and/or operating without a permit. However, Victoria Police may lead enforcement action against such operators at the local level, depending on local policing priorities. All action aimed at more serious criminal offences under the PCA (for example, offences related to underage workers) has, to date, been led by Victoria Police. Local councils may lead enforcement action against a brothel operating without the necessary permit, depending on their priorities and resources. Yet, despite the development of two memoranda of understanding — between CAV and Victoria Police, and between CAV and the Municipal Association Victoria (on behalf of signatory councils) — that set out

arrangements for a coordinated, integrated enforcement approach to illegal brothels, it is widely recognised that the system does not operate effectively and cohesively (Pickering, Maher and Gerard 2009).

The small number of studies that have investigated the effectiveness and responsiveness of the Victorian licensing system in meeting the challenges generated by a regulated sexual services system have highlighted numerous gaps and lacunae that are arguably consequent on the particular forms of regulation and enforcement adopted, which are beset by ambivalence. The devolution of key regulatory activities against brothel premises to councils that have limited resources has constrained options for enforcement: for example, councils could not address illegal acts carried out *within* brothels (Kotnik, Czymoniewicz-Klippel and Hoban 2007), which significantly limited enforcement action on unlicensed or problematic premises where worker safety might be compromised. In addition, the lack of shared state-wide knowledge (or even shared urban knowledge in Melbourne, where most of the premises are clustered) has reduced the likelihood of prosecutions and of a consistent approach being adopted (Pickering, Maher and Gerard 2009). Recent changes announced by the newly elected Victorian Government, which give key operational responsibility for enforcement to Victoria Police (Tomazin 2011), coupled with investigations that have evidenced continuing issues of criminality among licensee holders and a crossover between licensed and unlicensed sexual services owner-operators, reveal a system that continues to operate partially outside the protections and scrutinies applicable to regular businesses. A clear example here is the failure of Workplace Victoria to attend to basic workplace safety breaches that impact on workers in licensed brothels (such as inadequate bathroom facilities, and a lack of secure, safe workers' rooms), which were raised as early as 1991 (Dobinson 1991; RhED 2004), yet remain an issue more than a decade later (Pickering, Maher and Gerard 2009).

By creating a licensing system that is solely applicable to the sex industry, the State Government is expressing its view, through legislation, that the sex industry in and of itself occupies a special category that requires special regulation. Assumptions about the perceived immorality and disorderliness of the sex industry are inherent in this notion of a special category. Through the creation of special regulations the sex industry is prevented from automatically slotting into existing legal structures, and accordingly, workers, clients and businesses are precluded from many of the advantages of legality, and are lumbered with the disadvantages of regulations that are applicable solely to the sex industry. Owner-operators have suggested that while licence fees are applied (and have increased significantly in recent years), the industry development seminars, information packages and professional support provided by the BLA to all other industries it licences are never offered to brothel operators (Pickering, Maher and Gerard 2009).

Recognising sex workers in Victoria

The Victorian Government has recently amended the principal legislation governing the sexual services industry to include 'sex worker' terminology. Effective from 1 November 2010, the former PCA became the *Sex Work Act 1994* (Vic). All references to 'prostitute' or 'prostitution' have been replaced with 'sex worker' and 'sex work', respectively. The change, introduced by the *Consumer Affairs Legislation Amendment Act 2010* (Vic), was one of a number of amendments to the legislation governing sex work in Victoria. The Ministry for Consumer Affairs was curt in responding to the question of why the government opted to introduce new terminology to replace 'prostitute' and 'prostitution'. The Minister for Consumer Affairs, Tony Robinson MP, in his Second

Reading speech to the *Consumer Affairs Legislation Amendment Act*, stated that the change in terminology reflects ‘the changing nature of the industry’ (Robinson 2009:4329). This linguistic shift can be regarded as a symbolic indicator of the possibility of regarding sex work as work, and a shift away from the stigma associated with the words ‘prostitution’ and ‘prostitute’. It is well-established that the use of the term ‘sex work’ is preferred among those who focus on sex work as work (O’Neill 2001; Jenness 1993; Vanwesenbeeck 2001). Yet, despite this reorientation, the autonomy of workers remains critically compromised in Victoria. Neave (Victoria 1985) recommended that two women be allowed to establish themselves as small, cottage industry-type sexual services providers, such that, operating out of their homes or in shared premises, they would be able to ensure their own safety and working conditions, and maximise their earnings. This recommendation was never enacted. The independent worker exemption, through which workers are able to register as sole operators, remains in place, but means that women are very unlikely to be able to develop their labour into large-scale, profitable and effective business ventures. A review of the licence holders in Victoria revealed that less than 10 per cent of licences are held by women, and few of these are held by former workers (Pickering, Maher and Gerard 2009).

The systematic failure to support the development of a licensing framework that offers professional opportunities and upskilling for women working in the industry represents a key barrier to the recognition of women’s work and, in particular, of their autonomy as workers. The workers interviewed for a large-scale study conducted by Pickering, Maher and Gerard (2009) perceived their autonomy as a worker as a key aspect of the value of sexual service industry labour. The ability to make their own decisions about private client lists, security and work conditions were valued by women operating independently or in the brothels in which they chose to work (Pickering, Maher and Gerard 2009). However, the failure to allow for legal ‘cottage’ brothels diminishes women’s capacity to use their skills and autonomy to create better financial outcomes while maintaining safety by working in pairs.

The regulatory spaces of NSW

In NSW, as a consequence of amendments to the *Restricted Premises Act 1943* (NSW),⁵ sex services premises are regulated under the existing planning regime. Local councils now have the power to regulate brothels through their planning powers, governed by the *Environmental Planning and Assessment Act 1979* (NSW). Accordingly, since 1996, local councils have had the power to regulate brothels by amending Local Environmental Plans (LEPs) and Development Control Plans (DCPs) (Ratcliff 1999). While there is a great deal of variation across the local councils in how sex premises are regulated, incorporating sex services premises within the existing planning regime allows for these types of businesses to be regarded as legitimate.

Despite this potential to regard and regulate brothels as legitimate businesses, a degree of ambivalence can be witnessed at the state level, where some have suggested that brothels fall, or should fall, within a special category of business. This is revealed in the amending legislation — the *Disorderly Houses Amendment Act 1995* (NSW) s 20:

The enactment of the *Disorderly Houses Amendment Act 1995* should not be taken to indicate that Parliament endorses or encourages the practice of prostitution, which often involves the exploitation and sexual abuse of vulnerable women in our society.

⁵ The *Disorderly Houses Act 1943* (NSW) was renamed the *Restricted Premises Act 1943* (NSW) by the *Disorderly Houses Amendment (Commercial Supply of Prohibited Drugs) Act 2002* (NSW).

Thus, even reforming legislation reflected concerns about sex services premises operating lawfully.

Concerns about sex services premises were expressed in the *Brothels Amendment Act 2007* (NSW). This legislation expanded the powers of councils and the Land and Environment Court (LEC) to close ‘disorderly and unlawful brothels’. Under this Act, councils are able to make brothel closure orders that can be made effective within five working days rather than 28 days, as had previously been the case. Councils no longer require ‘sufficient’ complaints; instead only one complaint is needed to warrant a brothel closure order (*Restricted Premises Act 1943* (NSW) s 17(2)). Under the new legislation, the LEC and local courts can now direct that water, electricity and/or gas be cut off to premises that have failed to comply with a brothel closure order. These reforms were aimed at brothel operators who ‘persistently flout the law’.

The legislation reflects and reinforces a perception of brothels as inherently unlawful and disorderly. This is communicated particularly in the *Environmental Planning and Assessment Act*, which, under s 124AB(2), limits the capacity of the LEC to grant adjournments:

The Court may not adjourn proceedings under section 124(3) unless it is of the opinion that the adjournment is justified because of the exceptional circumstances of the case. The fact that it is intended to lodge a development application, or that a development application has been made, is not of itself an exceptional circumstance.

This subsection expresses the doubt that brothels would ever wish, or be able, to operate legally. A development application is regarded as a stalling tactic to prevent closure, with an owner going through the motions of seeking registration, rather than expressing a desire to operate legally (Whan 2007).

The reforms provide no incentive for the operators of brothels that have been operating without authorisation and without the knowledge of the surrounding community to make a development application. Under this schema, if brothel owners apply for development approval, not only would they draw (unwanted) attention to themselves and face the high likelihood of council refusal, but the local council would be able to impose closure orders and potentially shut off the utilities to the brothel while the LEC considers an appeal against council refusal.

Accordingly, there is broad variation within the NSW regulatory regime in how sex services premises are regulated and in attitudes towards such regulation. Ambivalence is expressed around whether brothels are (potentially) legitimate businesses, or whether they are inherently unlawful and disorderly, despite legislative reforms. This ambivalence is reflected in the different ways in which councils regulate sex services premises. However, as argued below, the importation of an existing planning framework limits the opportunities for overly restrictive approaches to sex services premises.

Local concerns in NSW

In NSW, local councils are the primary regulators of sex services premises, utilising their planning powers under the *Environmental Planning and Assessment Act*. Councils across NSW have adopted a broad range of approaches to regulating sex services premises in their areas, and the differences between these approaches are apparent at the formal level (Crofts 2003). Approximately half the councils in NSW have developed planning principles that are

specific to brothels. These councils tend to rely upon location-based restrictions, limiting brothels to commercial and/or industrial areas. A small number of councils have developed planning principles regarding the sex industry that differentiate between sex services premises types. For example, the City of Sydney's *Adult Entertainment and Sex Industry Premises DCP 2006* and various existing LEPs (eg *South Sydney LEP 1998*) distinguish between types of sex services premises based on differences in amenity and environmental impacts, ranging from commercial sex services premises to home occupations. The remaining councils have not developed any policies with regard to sex services premises. This may reflect a perception that no sex services premises exist in the respective local government areas. However, some councils have no specific planning policy on sex services premises, despite having received development applications for such premises in the past 15 years. These councils have relied successfully upon general planning principles to respond to sex services premises development applications. For example, Waverley Council has developed very few provisions that are sex industry specific; instead, it has successfully relied upon existing provisions to regulate sex services businesses.

While the NSW regulatory regime permits councils to adopt highly restrictive planning policies with regard to brothels, local councils do not possess unfettered discretion in the form or content of their LEPs. Local councils are required to take into account the views of members of the community and any other public authorities that may be affected. Moreover, the Planning Minister has a right of veto over the implementation of LEPs. The Department of Planning has gazetted a 'standard' LEP that all local governments are required to adopt. The Department has been clear that councils may not prohibit brothels from operating in their local government area (Department of Urban Affairs and Planning 1996). In constructing policies to regulate sex services premises, local councils must use the idiom of planning — that is, they must focus on the impact of this industry in terms of the impact of this form of land use upon other land users (*Environmental Planning and Assessment Act* s 79C). This impact assessment must include concerns such as parking, noise, signage and lighting.

There are many advantages to incorporating sex services premises within the existing planning regime; for example, it means that all the planning procedures can be automatically applied, including the right to appeal to the LEC against (deemed) refusals by councils. While some LEC decisions about sex services premises have been criticised for being overly restrictive (see Crofts and Prior 2011), on the whole, the LEC adopts a pragmatic approach to planning. The Court requires clear and concrete evidence of detriment, rather than generalised fears or unsupported concerns to justify restrictive policies. The LEC also interrogates restrictive policies to determine whether they are appropriately applied to sex services premises. For example, councils tend to impose strict parking restrictions upon brothels. When considering such parking regulations, the Court has in the past accepted that clients tend not to park near sex services premises (see *Hang v Strathfield Municipal Council* and *Sun v Campbelltown City Council*) and that sex services premises have different operating hours from existing businesses in the area (*Vassallo v Blacktown City Council*), and has compared the parking requirements imposed on brothels with those of other businesses that have a similar or greater parking impact (*Davis v Parramatta City Council*). For these reasons, the LEC has approved development applications for sex services premises even though they may not meet the council's parking requirements. Accordingly, where negative perceptions of sex services premises are expressed in overly restrictive planning policies, a business owner can appeal to the LEC as may any other business. This reduces the opportunity for, and efficacy of, the overly restrictive regulation of sex services premises.

Another advantage of including sex services premises within existing planning structures is that well-established legal frameworks developed over long periods of time can be applied to the industry. Councils are able to impose health and safety requirements, such as requiring a shower and basin in each room, and the development of security measures. Development applications must include a statement outlining the environmental effects of the proposed development and the management plans for the business. Limits can be imposed in relation to operating hours and group bookings, and a prohibition on serving intoxicated clients. The LEC has demonstrated a preference for sound structural design of brothels that reduces noise and negative amenity impacts, rather than relying solely upon management plans. All of these aspects are required as part of entering the existing legal framework. Issues such as workers' rights, taxes, health and safety, and discrimination law become part of business practice at this juncture.

A legalised industry also facilitates the adoption of outreach programmes run by health professionals. The focus is on the sex services premises as a business, and all the consequent rights and responsibilities associated with running a business, rather than on individual workers or concerns about the validity of sex work as work. The effect of the inclusion of brothels within the legal framework of businesses was demonstrated in *Zhang v Ashfield Municipal Council*. In that case, the brothel had been operating without development consent for some time before seeking council approval. The Court noted that whilst operating without authorisation the business had breached various legislative and regulatory requirements including building and health standards, however, the operator was now seeking to 'regularise the illegal' and to operate in accordance with law (*Zhang v Ashfield Municipal Council* [48]–[55]). Conditions of consent imposed by the Council included compliance with the *Occupational Health and Safety Act 2000* (NSW), which goes toward the protection of workers generally and sex workers specifically. The operator had to provide a plan of management detailing: length of worker shifts and breaks; screening of clients to minimise violence on premises; security systems for workers including panic buttons; and training to deal with sexually transmitted infections and violent clients. The operator would have to comply with pieces of legislation such as the *Public Health Act 1991* (NSW), *Injury Management and Workers Compensation Act 1998* (NSW), and allow access by the Sex Workers Outreach Project and any other relevant health services. Safe sex equipment was to be provided to workers at all times and for free. A condition of development consent was that the operator had to comply with the *Health and Safety Guidelines for Brothels* developed by WorkCover (2001) at all times. In addition, the conditions of consent required compliance with general requirements such as building regulations. Council consent, thus, imported the existing legislative and regulatory requirements and systems of enforcement and protection.

The planning approach also constitutes what is and is not relevant when regulating sex services premises. The LEC has been clear that morality is not a relevant planning consideration:

Morality is concerned with abstract matters of right and wrong, good and evil. Generally, [section 79] is concerned with concrete planning matters. The capacity of councillors to inquire into and determine a predominant public standard on a matter of morality must be doubted. It would be surprising if a council acting as consent authority under [section 79] was required to consider matters ranging as far from concrete planning matters as might issues of morality (*Liu v Fairfield City Council*:233).

Through regulation under a planning regime, the focus is accordingly placed on the amenity impacts of sex services premises as businesses, and little attention is given to moral concerns.

Moreover, the regulation of sex services premises through planning demonstrates and constitutes the capacity of these types of businesses to operate like any other legitimate business. As a consequence of the effective regulation of sex services premises in the City of Sydney over more than a decade, the number of objections to brothel development applications has dropped dramatically. For example, a development application from an existing brothel in the City of Sydney area received only one objection, related only to general concerns over graffiti in the area.⁶ The local community has faith that sex services premises will be well-regulated and subject to the law. The City of Sydney has also demonstrated that it is willing to pursue the operators of authorised sex services premises who are not adhering to the planning requirements. Thus, in *Sydney City Council v De Cue Pty Ltd*, the Council successfully applied to the LEC for an erotic massage parlour to be shut down, on the grounds that its clients had engaged in public anti-social behaviour, such as urinating in vegetation and propositioning neighbours. Giving sex services premises legal status results in a capacity to regulate them and ensure that they are orderly subjects. There is limited research available about the amenity impacts of sex services premises in NSW, but Prior and Crofts (forthcoming) recently surveyed 401 people living within 400 metres of a sex services premise and found that more than 70 per cent of the respondents were either unaware of the nearby business, or if they were aware of it, regarded it as having no impact on their neighbourhood. The study also found that the longer people had been aware of a nearby sex services premise, the less likely they were to regard it as having any negative impact. This suggests that negative perceptions of sex services premises can change with experience, and that, over time, neighbours will tend to regard these types of businesses in the same light as they would any other businesses in the community.

The granting of legal status imports a right to governmental protection of liberty, safety and property. This means that sex services premises and their workers and clients are able to turn to the law for protection. In *Huang v Parramatta City Council*, the Senior Constable's (2009:5) Statement of Evidence asserted that an existing authorised brothel near the proposed brothel had been the subject of bikie gang threats accompanied by promises of 'protection'. The officer relied upon this as evidence of the inherent unlawfulness of brothels. In contrast, it is argued that this demonstrates an advantage of legal status, albeit in its infant form. Rather than succumbing to bikie gang threats, the brothel owner was able to report the threats to the police and seek protection from existing legal institutions.

In summary, in NSW bestowal of legal status imports an existing legal framework of rights and responsibilities. With legalisation also comes the opportunity to regulate various aspects of the industry, ranging from workers' rights, administering and paying taxes, and occupational health and safety, to imposing planning requirements that minimise negative amenity impacts. Moreover, legal status brings the opportunity to make claims upon the legal system for protection. The benefits of the NSW approach were recently recognised in a study that compared the decriminalised framework in NSW with the licensing framework in Victoria and the criminalised framework in Western Australia, revealing that the decriminalised framework in NSW enabled the widest reach of health services to target sex workers (based on a study of commercial sex premises in major cities) (Harcourt et al 2010). Furthermore, as Donovan et al (2010:74) have noted: 'Decriminalisation of sex work

⁶ Information received from the City of Sydney, Sex Industry Policy Officer.

enabled NSW to become a global leader in [workplace] policy, [through the creation of] the first published workplace standards for brothels’.

The treatment and regard of individual sex workers has improved through the bestowal of lawful identity and, thus, legal protection. Research has consistently shown that sex workers experience high levels of violence and are more at risk of harm than are other citizens across all jurisdictions in Australia (Prior 2010; Quadara 2008). Legal status ensures that legal avenues are available for protection and redress. It facilitates research into how best to protect sex workers, for example, through the sound design of brothels and the introduction of ‘safe houses’ (City of Sydney 2006) and challenges stigma and silence, which is recognised as a key contributor to women’s potential vulnerability (Quadara 2008). Safe houses are privately owned commercial premises that provide short-term room rental to clients to enable the provision of sexual services by a sex worker. These safe houses provide workers with a cheap, easily accessible, legal, clean and safe environment in which to service their clients. They also mean that workers can rely less on having to provide their services in a client’s car or another isolated private venue, risking their safety in doing so (City of Sydney 2006).

Working women at home

Although inclusion within the existing planning regime has delivered positive benefits in terms of regulating sex work as work, there is still room for improvement in the NSW system, particularly with regard to Home Occupation Sex Service Premises (HOSSPs). HOSSPs are treated by councils in NSW in one of three ways (Prior 2010). A few councils have regarded HOSSPs as an ‘exempt development’ (that is, one that is permitted to operate without a development application), as long as they comply with the requirements for other ‘Home Businesses’. For sex services premises to be deemed an ‘exempt development’, councils place limits on the number of sex workers that may be employed at the premises. For example, the South Sydney Local Environmental Plan 1998 and South Sydney Development Control Plan Exempt and Complying Development 1999 states that while more than one worker is able to be on the premises at any one time, only one person is permitted to work at any one time.

Some councils have classified HOSSPs as a ‘Home Business’, allowing them to operate within residential areas, but have required HOSSPs to submit development applications. Other councils have sought to classify HOSSPs using a unitary category of ‘brothel’ — as such, HOSSPs may constitute a brothel even though they are used by only one prostitute for the purposes of prostitution (Parramatta City Centre LEP 2007). These councils tend to regulate with large-scale brothels in mind (Crofts and Prior 2011) and, accordingly, develop highly restrictive planning regulations that prohibit HOSSPs from residential areas and do not allow them to be classified as ‘home businesses’.

The development of these diverse approaches reflects the ambivalence that exists across NSW councils towards the relationship between commercial sex and residential communities, and also towards commercial sex as a form of legitimate work. Those councils that prohibit sex services businesses from residential areas usually argue that such services are criminogenic, have negative impacts on neighbourhoods and are harmful to the workers (particularly women). Councils that make decisions based on an assumed link between sex work and crime have been scrutinised on appeal by the NSW LEC, as found in *Martyn v Hornsby Shire Council*: ‘There is no evidence that [commercial premises] in general are associated with crime or drug use’ (at 285). Councils that have sought to regulate HOSSPs

as ‘Home Businesses’ (either with or without development approval) argue, on the contrary, that HOSSPs can operate lawfully with minimal amenity impacts, and that this type of business can provide a positive work environment, especially for women.

A growing body of local empirical research (some commissioned by councils in NSW) highlights the way in which HOSSPs can provide their workers with a sense of increased wellbeing compared to larger commercial sex industry premises, particularly for older sex workers (see, for example, Urbis JHD 2005; Prior 2010). Further benefits include increased control and freedom, increased financial independence, flexibility of work hours, personal autonomy, and increased self-esteem. As one HOSSPs operator noted:

[working in HOSSPs is] not so brutal as being an older worker [in a brothel], and you’re not as beautiful as you used to be and you’re sitting in a parlour all day having clients pick other women (cited in Prior 2010:9).

Furthermore, over time those councils that support the development of HOSSPs within residential areas have amassed a growing body of research that indicates that HOSSPs have a minimal impact on residential amenities, primarily due to the high priority placed on discretion by their operators, a finding that is also evidenced by the fact that council complaints databases show few resident complaints relating to HOSSPs (see, for example, Urbis JHD 2005; Prior 2010). The high levels of anonymity and privacy associated with HOSSPs is further supported by the results of research conducted by Eva Cox in 2003, which revealed that: ‘There was limited awareness of home business [HOSSPs] generally, with some respondents citing the benefits of home businesses for neighbourhood safety’ (Cox 2003).

Within NSW, at least in some councils, the management of sex premises through planning has permitted the emergence of a more pragmatic approach to the development of such premises, which not only concentrates on the impacts of sex premises on communities, but also seeks to understand the distinct environment generated by different sex service premises types (Crofts and Prior 2011). In so doing, this approach has gained insight into the potential benefits of HOSSPs to workers, and how the prohibition of HOSSPs not only has the potential to move workers underground, resulting in negative health outcomes, but could also shift them towards more dangerous modes of sex work such as street-based sex work or towards larger sex service premises that offer them lesser work conditions and outcomes. The existing planning regime facilitates arguments that HOSSPs can and should be appropriately regulated like any other home business, that is, able to operate without development consent. The home work option recommended by Neave (Victoria 1985) has not been seriously revisited for Victorian workers by policy and lawmakers in Victoria.

Conclusion: The real ambivalence – recognising working women

In 1991, Roberta Perkins in her groundbreaking *Working Girls* (1991:27) described the situation for sex workers in Victoria and New South Wales in the following terms:

Two states have become consciously aware of [problems of criminality: extortion and coercion in sex work] and attempted legal reforms to reduce the exploitation and criminal connections which had become part of prostitution since the introduction of criminal laws. But, as we have seen, neither Victoria’s ‘legalisation’ nor New South Wales’ ‘decriminalisation’ successfully freed prostitutes from the stigma of criminals because these ambiguous systems remain

strongly rooted in an overall legal system that continues enforcing laws that thinly disguise the ideologies of nineteenth century moralism.

Two decades following Perkins work, the regulatory schemas in these two states continue to reflect ambivalence and ambiguity, particularly in regard to women's autonomy as workers. Sullivan (2010:103) argues this is characteristic in some way of all Australian states:

While we see some economic "integration" of the sex industry, particularly in strategies designed to legalize or decriminalize brothels, this is also shot through with a deep and ongoing "social ambivalence" towards both prostitution and all parties who participate in selling and buying prostitution services.

This 'ambivalence' manifests in two ways in these Australian jurisdictions: through regulatory schemas that fail to fully recognise sexual services premises as legitimate businesses, and through the existence of significant limitations on women's capacity to benefit fully from their labour in the industry. While the linguistic shift in Victoria away from the terminology of prostitution within all regulatory and legislative instruments may suggest that the Victorian Government is now regarding sex work as work, this shift has been accomplished only at the formal level. In terms of substance, the nature of the existing specialised licensing system indicates that the Government does not regard sex work as work in the same light as other paid labour is perceived, even though there is general agreement that licensed indoor premises do provide safer environments for sex work (Pyett and Warr 1999; Weitzer 2009; Woodward et al 2003). The current licensing arrangements demarcate the industry by requiring specialised enforcement, rather than developing a tiered regulatory schema with a focus on labour law protections and achievable targets in relation to professionalisation. The regulatory regime in Victoria enables the Government to come closer (and profit from via licensing fees), but not too close, to the sexual services industry.

In contrast, in linguistic terms, NSW appears further behind Victoria. NSW continues to utilise terms such as 'prostitute' and 'brothel' in state legislation, LEC decisions and council regulations. However, the state legislation also offers councils the opportunity to use terms such as 'sex services premises' and 'home occupation (sex services)', and some councils such as the City of Sydney council have developed nuanced policies that differentiate between types of sex work premises. These opportunities to describe accurately the different types of sexual service work secure the position of sex workers as workers. Despite the absence of a complete transition from the historic language of 'brothel' and 'prostitute', the regulatory regime in NSW delivers better rights to sex workers in substantive terms than does that of the linguistically correct Victoria. Whilst the regulatory frameworks in both states express some ambivalence about sex work as work, by including sex work within the existing business planning regime in NSW, the opportunities for expressing this ambivalence are more restricted than in Victoria, where sex work is regarded and regulated primarily as a special category.

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