This article argues first that there is little to no evidence to support the criminogenic concerns articulated in the Report primarily by Kaldas. Second, even if these concerns existed, there is nothing to suggest that the proposed measures would provide a solution. Moreover, these proposed reforms reflect a worrying trend in criminal law reform of the expansion of police powers modelled on anti-terrorist legislation, despite existing police powers and criminal offences that are not prosecuted.

A regulatory void

A key underlying theme of the Report and justification for the proposed reforms is that aspects of the sex industry are almost completely deregulated:

> When the NSW Parliament decriminalised prostitution in the mid-1990s it went where no western government had previously gone. But in doing so sex work in NSW in 1995 was not only decriminalised, but almost completely deregulated — with its only regulation confined to planning controls (Select Committee on the Regulation of Brothels 2015:iv).

In 1995, most sex work-specific criminal laws were removed 'and the police force was removed as the industry regulator' (Select Committee on the Regulation of Brothels 2015:10). As a consequence of these reforms, brothels are legal and only require council planning approval (Crofts 2006). Street solicitation is allowed provided it is away from dwellings, schools, churches and hospitals.

The Committee accepted comments by Kaldas that, since the reforms in 1995, police have regarded the sex industry as 'under-regulated for some years'. Kaldas asserted that 'regulation is necessary because in that industry much could go wrong if unregulated and rules are not enforced' and:

> We do not accept that regulating the industry properly will force it underground, as some may argue. As it is right now, there exists next to no regulation, no enforcement and abuses are far more likely to go undetected with horrible consequences for individuals. Lax or non-existent checks and balances are not the answer to what is a very real problem (Kaldas quoted in Select Committee on the Regulation of Brothels 2015:11).

The Committee accepts Kaldas' portrayal of a 'laissez faire framework of decriminalisation' (Select Committee on the Regulation of Brothels 2015:87).

The comment that perhaps most closely captures Kaldas' conception of the (need for) regulation of the sex industry, quoted several times in the Report, is: 'It is probably harder to get a dog and get a dog licence than it is to work in the sex industry at the moment' (Select Committee on the Regulation of Brothels 2015:11). In this form of the quotation it is unclear who or what is being compared to dog ownership. It is clarified in another form: 'Under the current NSW system there is more regulatory control devoted to the ownership and registration of a dog than there is to the protection of sex workers' (Select Committee on the Regulation of Brothels 2015:iv).

This quotation from Kaldas provides insight into his perception of sex work. It is absurd and offensive to compare the supply of a service between consenting adults with ownership of an animal entirely at the whim of its owner. We note that Kaldas' statement is incorrect. (Getting a dog is regulated under the *Companion Animals Act 1998* (NSW) s 3A 'to provide for the effective and responsible care and management of companion animals'. It requires micro-chipping and registration with the local council. The rest of the regulations and legislation are concerned with ensuring a dog does not harm others and an owner does not

harm the dog. A dog could probably be purchased and registered over a weekend; this is nothing compared to what is required for the development application process for setting up a commercial sex services premises.)

Central to the Report and Kaldas' idea of regulation is that the only kind of regulation is by the police force. 'In this *regulatory void*, it is left up to councils and not the Police Force to look after brothels' (Select Committee on the Regulation of Brothels 2015:11, emphasis added).

Despite asserting a 'regulatory void', the Report then devotes many pages to articulating the post-1995 regulatory framework that already exists in relation to the sex industry (Select Committee on the Regulation of Brothels 2015:11–16). These include planning regulations, local council powers, work, health and safety legislation and some criminal legislation specific to brothels and sex work. Regulatory agencies include councils, Safework NSW, Health and the police force. Non-government agencies ('NGOs') also engage with the sex industry, including Scarlet Alliance (the peak national sex worker organisation in Australia), the Sex Worker Outreach Project ('SWOP') and ACON (AIDS Council of NSW). Ostensibly, some distinction might be made between brothels that have been authorised by councils and those that operate without authorisation. However, as we argue in more detail below, even in the absence of council authorisation, other regulatory agencies and non-government agencies continue to interact with sex workers and operators of sex services premises. For example, NSW Health and SWOP make no distinction in servicing authorised and unauthorised sex services premises. Moreover, the rules of planning and criminal law still apply regardless of whether a sex service premise is authorised by council. The issue of authorised and unauthorised premises is also complicated by home occupations (sex services) premises, which operate in a complex and ambiguous planning environment, but have limited impact on amenity.

Despite a 2012 NSW issues paper recognising the efficacy of the current regulatory regime (Better Regulation Office 2012), the Report makes little reference to the extent to which planning regulation does work. Quantitative and qualitative research asserts the success of the current regulatory regime in terms of amenity impacts, worker health and safety and the reduced association of the sex industry with crime (Crofts 2010; Crofts et al 2012; Donovan et al 2010; Donovan et al 2012; Prior and Crofts 2012; Prior, Crofts and Hubbard 2013). Kaldas asserts that 'there is no requirement for councils to consult with other public agencies, such as NSW Health or Police, as part of the assessment of a DA for a brothel' (Select Committee on the Regulation of Brothels 2015:25). However, this belies the extent to which conditions of consent are set by individual councils (Prior, Crofts and Hubbard 2013). Councils can 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 of environmental effects and management plans. Limits can be imposed on operating hours, on group bookings, and as a prohibition on serving intoxicated clients. The Land and Environment Court has demonstrated a preference for good structural design of brothels to reduce noise and negative amenity impacts, rather than relying solely upon management plans. All these aspects are required and imposed as part of the existing legal framework. This extends to issues such as workers' rights, taxes, health and safety, and discrimination law. A legalised industry also facilitates outreach programs by health professionals.

The Report also claims a distinction between proactive (regular routine inspections) or reactive (complaint only inspections) as dependent on resources. However, this is contrasted by the bulk of councils stating that they inspect businesses on a needs basis — and, on the

whole, 'councils consistently advised the Committee that where council authorisation had been given to operate sexual services premises, complaints concerning those premises were few' (Select Committee on the Regulation of Brothels 2015:30). For example, Randwick City Council asserted:

> It is important to note that these premises over many years of operation have not generated community concern or given rise to any disturbances which have resulted in complaints to Council. In the absence of any regulatory regime that requires council to inspect these premises, the inference that is drawn is that these two brothels operate discreetly and would appear to be well managed (Select Committee on the Regulation of Brothels 2015:29).

Evidence from key stakeholders is that, contrary to a regulatory void, the sex industry is regulated by a range of overlapping government authorities, including the police force, with the support of non-government agencies, just not primarily by the police.

A criminogenic sex industry

The idea of a regulatory void existing in relation to the sex industry is incorrect. The 1995 reforms removed the automatic association of the sex industry with crime and the criminal justice system. Because of decriminalisation, the sex industry can be regulated in the same way as other lawful industries. Bestowal of legal status imports an existing legal framework of rights and responsibilities (Crofts 2010). With legalisation comes the opportunity to regulate, ranging from workers' rights, administering and paying taxes, occupational health and safety, to imposing planning requirements that minimise negative amenity impacts. Moreover, with legal status comes the opportunity to make claims upon the legal system for protection. However, Kaldas is heavily quoted in the Report as claiming that this (so-called) 'regulatory void' needs to be addressed because it has allowed, or would allow, crime to flourish. Similar claims have been made (and dismissed with research) in New Zealand (see Plumridge and Abel 2001). Kaldas did not provide concrete evidence, but spoke in general ominous terms of fears associated with an unregulated industry. His unsupported claims were accepted by the Committee because of the nature of the industry and its lack of regulation:

> In the course of the inquiry, it has been difficult to ascertain the extent to which many of the issues raised occur. One of the reasons for this is that the nature of the sex services industry, as private and discreet, means that offences committed are not immediately identified (Select Committee on the Regulation of Brothels 2015:52).

At the outset of this analysis we noted that NGOs and NSW Health provided a different picture of the sex industry, which was based upon engagement with the industry and concrete examples. For example, in 2014, SWOP visited 447 brothels in NSW (whether authorised or not), interacted with more than 6700 sex workers, distributed 270 000 safe sex items and approximately 20 000 pieces of educational material. These stakeholders did not support Kaldas' depiction of an unregulated industry allowing crime to flourish. Simple supply and demand economics also suggests that legalisation removes the primary incentive of large profits associated with an illegal industry.

Research has persuasively argued that the range of possible enforcement responses by police and other regulators such as planners and health professionals will be influenced by judgments as to where a business is perceived to exist on an 'illegal-legal spectrum' (Gill 2002). Despite concrete examples of the success of the legal regulation of sex industry since 1995, the Report (based on Kaldas) presents a broad conflation of anecdotal and unsupported criminogenic concerns, with slippage between categories, perceiving the sex industry as

illegal and/or focusing on unauthorised premises, and using this view to inform a return of policing powers as a primary regulatory practice that must be applied. Three key categories have influenced these proposed reforms, and we will deal with each and the efficacy of proposed reforms in turn.

Bikie gangs and brothels

One of the major justifications for increased police powers is the claimed link between brothels and bikies. Kaldas asserts:

> The results from our analysis and thinking indicated that there are clearly issues in the industry in terms of servitude, the use of illegal workers and extortion by or involvement of organised crime and outlaw motorcycle gang groups. Around 40 brothels have some recorded connection or ties to outlaw motor cycle gang groups in our intelligence holdings (Select Committee on the Regulation of Brothels 2015:11).

This is quoted several times and appears as fact elsewhere in the Report (Select Committee on the Regulation of Brothels 2015:47).

The Report recommends a series of reforms to respond to the 'bikie threat' modelled on the *Tattoo Parlours Act 2012* (NSW), which itself was modelled on anti-terrorist legislation (Ananian-Welsh and Williams 2014–15; Lynch 2009) — including the proposed licensing process (Recommendation 17), appeals against licensing decisions, the confidentiality of criminal intelligence reports (Recommendation 14), increased police powers of entry, search and seizure for brothels (Recommendation 27), and council powers to take evidence (Recommendation 34). This reflects and reinforces a worrying trend generally in law enforcement policy — where the threat of bikies provides a requirement and a justification for extreme legislative reforms (see, for example, Ananian-Welsh and Williams 2014–15; Lynch 2009).

Is Kaldas' claim of a bikie threat established? No detail is provided by Kaldas or in the Report on the nature of the alleged links of bikies with the sex industry. Are the bikies owners/operators, customers, sex workers or extortionists? 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 can turn to the law for protection. For example, in *Uky Huang v Parramatta City Council*, police presented evidence that an authorised brothel near the proposed brothel had been the subject of bikie gang threats accompanied by promises of 'protection' (Neal 2009:5). The officer relied upon this as evidence of the inherent unlawfulness of brothels. In contrast, this demonstrates an advantage of legal status. Rather than succumbing to bikie gang threats, the brothel owner could, and did, report the threats to the police and sought protection from existing legal institutions. More than two decades of decriminalisation has meant that workers and operators in the sex industry have gained confidence in using the legal system when crimes are committed against them. This would be undermined if police powers are increased. Rather than enhancing safety, police will again be seen as a threat.

The idea of a link between illegal bikie gangs and the sex industry is based in part on old conceptions of the inherent illegality of the sex industry. That is, that illegal industries will attract the attention and be accessible to other illegal people and/or groups (Crofts 2007). The sex industry in NSW is no different from any other legitimate business. There is absolutely no reason why bikies would be more involved with the sex industry than they would with other businesses. One argument is that brothels are attractive to organised crime because they

are cash-based businesses that facilitate money laundering (Select Committee on the Regulation of Brothels 2015:48). However, anecdotal information from brothel operators and sex worker representatives is that the industry is increasingly moving away from cash to the use of plastic — like almost every other business.[1]

Sex slavery/worker conditions

If bikies have been relied upon generally to require and justify increased powers and penalties, fears of sex slavery are a recurring theme in justifying tough regulation of the sex industry. These fears are so extreme that for some prostitution is treated as synonymous with sex trafficking. This argument is one of the justifications for the Swedish model, which criminalises the client of a sex worker (see Harrington 2012; Abel 2015; Phoenix 2009). Kaldas gave anecdotal evidence of recent reports of large-scale networks using Asian students as sex slaves throughout NSW and other states:

> There is some anecdotal evidence … of girls being forced to do things they do not want to do, including the taking of hard drugs with clients … Again anecdotally, it has been the case that brothel owners will keep the girls' passports and they are forced to work in the brothel to pay off their debt for travel costs etc … We have certainly seen some cases of very genuine sexual servitude … it may be in the minority, but I would suggest — and I do not think anyone would disagree — one woman held in sexual servitude is too many (quoted in Select Committee on the Regulation of Brothels 2015:7, 11).

These claims were also supported by Commander Glen McEwen, Manager, Victim Based Crime, Australian Federal Police: 'If we look at sexual [servitude] exploitation investigations that were conducted for the financial year 2014–15, there were 24 Australia-wide; that translated to being six in NSW' (Select Committee on the Regulation of Brothels 2015:8). That is, one-quarter of current sexual servitude investigations in Australia are in NSW.

In contrast, other stakeholders submitted that the problem is overstated and police are being manipulated (Donovan, quoted in Select Committee on the Regulation of Brothels 2015:57). Sex worker outreach groups and representatives and health providers such as Kirketon Road Centre have reported a drop in reports of sex worker exploitation since decriminalisation in 1995. Kaldas asserts that the difference between his claims and those of other stakeholders is that this type of sex work was 'underground' and out of view of established sex industry groups. Internationally, evidence suggests that the issue of trafficking has been grossly exaggerated (Harcourt and Donovan 2005; Hubbard, Matthews and Scoular 2008; O'Connell Davidson 2006; Weitzer 2007). The argument that sex worker exploitation has decreased with decriminalisation reflects economic arguments — decriminalisation has reduced the large profits associated with an illegal industry, thus decreasing the profitability of sex worker exploitation. Moreover, decriminalisation offers greater protection of sex workers' rights (and clients' rights) (Harrington 2012). Worker exploitation is more likely to be reported in a regulated, decriminalised industry than in a criminalised regime. This may in turn explain the higher proportion of (still very few) sex servitude cases in NSW. Worker exploitation is more likely to be reported by workers (and competitors). Thus, decriminalisation brings with it a form of natural surveillance.

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[1] Information provided to the authors by the Sex Worker Outreach Project and accountants for the adult industry 16 March 2016. Not all sex services premises have migrated to plastic, but, as is common with most businesses, sex services premises are increasingly accepting (and requiring) payment by credit card and/or EFTPOS — for all the advantages associated for clients and the business.

Wagenaar and Altink (2012) argue that regarding sex work as slavery leaves little capacity for legislative change to or sustain decriminalisation, as sex workers are framed as 'victims', not able to choose work in the sex industry. Trafficking and 'forced prostitution' should instead be reconceived as exploitation (see also Maher, Pickering and Gerard 2013). Exploitation allows comparison with other examples of worker exploitation across different occupations. When sex work was criminalised, it permitted worker exploitation to flourish. However, decriminalisation has meant that sex workers have the same employment and legal rights afforded to any other employment group (Abel 2014). Sex services premises are treated in the same way as all other workplaces, according to the *Work Health and Safety Act 2011* (NSW). Inspections by SafeWork NSW are available, focusing on safety and speaking with workers without the presence of owner/manager. SafeWork undertakes these visits on the basis of complaints, fatalities, injuries and serious incidents and has noted that brothels are not a high priority due to the minimal number of worker complaints and safe working conditions. Instead, information is provided via peers; for example, from the SWOP. No sex service premises have been prosecuted by SafeWork NSW or WorkCover NSW. Employees can make claims (like other employees) under the *Workers Compensation Act 1987* (NSW).

Worker exploitation is not specific to the sex industry. This can be seen with the recent 7Eleven scandal, with a large number of workers paid under minimum award wages.[2] This highlights the spurious nature of arguments regarding the sex industry as inherently raising issues of worker exploitation — especially that it is covert. The 7Eleven shops operate in plain sight and yet were still victims of worker exploitation. One common link that can and should be explored is the employment of foreign nationals with visa limits: for further analysis of the intersection of Australia's immigration and employment laws, see Clibborn 2015. A 2012 Kirby Institute report indicated that 66.7 per cent of NSW sex workers sampled were from Asian or non-English speaking background (Select Committee on the Regulation of Brothels 2015:7). These workers (like other foreign nationals) may be particularly vulnerable, due to difficulties in negotiating working conditions with managers and clients and lack of awareness about the existing regulatory framework. In response to the issue of foreign workers the Report recommended:

> That the NSW Government request the Commonwealth Government to consider whether a visa condition prohibiting foreign workers from being employed in the sex services industry (similar to New Zealand) should be introduced in order to assist with the prevention of sexual servitude, sex trafficking and the exploitation of foreign sex workers (Select Committee on the Regulation of Brothels 2015, Recommendation 25).

This is precisely the wrong reaction. Illegality exacerbates the likelihood and problem of worker exploitation, as shown by the 7Eleven scandal, where workers were afraid to report employment conditions because they were in breach of visa conditions. This is why it is important to ensure that NSW has in place good protection of workers' rights.

Operating without development approval

A recurring theme regarding sex industry regulation is concern about an 'illegal industry'. The Report states 'there is an underground sex services industry that is operating in NSW' (Select Committee on the Regulation of Brothels 2015, Finding 3). This concern about a

[2] See for example, <http://www.smh.com.au/interactive/2015/7-eleven-revealed/>; <http://www.abc.net.au/4corners/stories/2015/08/30/4301164.htm>; <http://www.smh.com.au/business/workplace-relations/7eleven-wage-fraud-coverup-from-head-office-20150828-gjahrc.html>; <http://www.abc.net.au/news/2015-08-29/7-eleven-half-pay-scam-exposed/6734174>.

flourishing illegal industry has been a recurring motif in some media reports, and also for some councils (see Duff 2015, 2016). This concern was probably the primary motivator for the proposed licensing scheme; however, it has become secondary in the Report to bikies and sex slavery. The conception of an illegal industry tends to conflate different concerns, analysed below.

Home occupations (sex services)

It has been consistently recognised that 40 per cent of sex workers work in private homes (Select Committee on the Regulation of Brothels 2015:7). Almost 60 per cent of the workers work in brothels, 5 per cent are street based, and less than 10 per cent work exclusively as escorts (Donovan et al 2012:16). The Report notes that a large proportion of the sex industry works from home, that this type of sex services premise has low amenity impacts, but otherwise neglects home occupations (sex services). This is problematic because the law regarding home occupations (sex services) premises ('HOSSP') is highly ambiguous. In some councils, HOSSP can operate without development consent; in others, HOSSP need to undergo the same development application procedure as a large commercial brothel. Some local government areas ban 'brothels' from residential areas (thus effectively prohibiting HOSSPs); in others, the exact legal position of HOSSP is not known (Crofts 2003; Crofts and Prior 2012). Media stories include HOSSP in their claims of a large illegal industry. However, given that HOSSP have low amenity impacts, generate next to no complaints, are safer for workers and can be regulated like any other home occupation (Crofts and Prior 2012; City of Sydney 2005),[3] they should be treated like any other home occupation — able to operate without development consent and subject to the same regulations as any other business, which is a long-term recommendation (Brothels Taskforce 2001). This would automatically and cleanly resolve most of the 'illegal' industry in NSW.

Erotic massage parlours

The second type of business contributing to concerns about an 'illegal' industry is erotic massage parlours. These are businesses that hold themselves out as massage parlours but do not have development approval to operate as a brothel and are providing sexual services. It is these businesses that some councils are particularly concerned about (while HOSSP do not cause any council concern). Evidence suggests that these businesses make up only a small proportion of the sex industry. For example, Sydney City Council states that 6 per cent of sex worker clients report working in a massage parlour or in bondage and discipline (they cannot be separated in their database) (Select Committee on the Regulation of Brothels 2015:31), and that it receives between 10–30 complaints per year about massage parlours operating as brothels without consent (Select Committee on the Regulation of Brothels 2015:30). These council concerns need to be analysed as they have been recurring since decriminalisation.

One of the arguments is that 'an underground sex services industry is operating in NSW that is not visible to local councils or other authorities (such as NSW Health, Police, SafeWork NSW, Immigration and the Australian Tax Office) thereby increasing risks to the welfare of sex workers within those premises' (Select Committee on the Regulation of Brothels 2015:41). The argument that an unauthorised erotic massage parlour avoids regulation and paying tax is incorrect. Erotic massage parlours tend to be authorised as massage businesses; this means that they fall within the existing regulatory regime for businesses. We could compare an unauthorised erotic massage parlour with a restaurant that is not licensed to serve

[3] Home occupations (sex services) are permitted in the United Kingdom and Ontario, Canada: see also *Bedford v Canada (Attorney General)* 2010 ONSC 4264 [300].

alcohol but does so. The business and its workers are still subject to, and able to access, the existing regulatory regime.

A second argument is that unauthorised erotic massage parlours have an unfair competitive advantage over authorised sex services premises. They can offer sexual services in areas where they are not permitted and have the advertising freedoms that a non-brothel is permitted. 'This gives them an unfair competitive advantage over approved brothels and means they are in unsuitable locations' (Select Committee on the Regulation of Brothels 2015:41). They are also a diversified business and can reach a wider customer base. This raises again the possibility of natural surveillance — erotic massage parlours are likely to be reported by their authorised competitors to local councils.

A third argument is that councils are ill equipped to get evidence that a business is offering sex services and that the process is very expensive. For example, Hornsby Shire Council spent A$60 000–$70 000 to obtain physical evidence through a private investigator, but was then rejected by the local court on the grounds that only one sex worker had provided a sexual service, and this was not a brothel under the legislation (Select Committee on the Regulation of Brothels 2015:37–8). Councils argued that they did not have sufficient powers or capacity to investigate and prosecute, and the Report recommends providing increased powers to councils. In fact, councils already have extensive powers of entry and investigation under the *Local Government Act 1993* (NSW), and some councils have relied on these powers for regular entry into brothels (Crofts, Prior and Hubbard 2013).

A key recommendation by the Report in response to an illegal industry is licensing. However, there is no evidence provided in the Report that a licensing regime would resolve the issue of (unauthorised) erotic massage parlours. There is a great deal of variation of the extent to which a massage parlour may provide erotic services. Is it a one-off that is provided in response to a (pushy) client requesting a happy ending? If the service is a one-off, then the business (and the worker), is unlikely to perceive itself as a sex services premise and thus is unlikely to apply for a licence. On the other hand, if the erotic service is an integral part of the massage business and the business has not sought approval under existing planning regulations, why would this change with licensing? The business would remain, as it currently is, outside of the sex services regulatory regime but within the existing commercial premises regulatory regime.

The Report asserts that, under the proposed licensing regime, 'enforcement responsibility would shift to include a greater role of the NSW Police Force in a state government regime with suitable expertise (investigatory and prosecutorial) and resources' (Select Committee on the Regulation of Brothels 2015:44). There is, however, no need to establish a licensing regime for this to occur. Police have the powers already and offences exist under the *Summary Offences Act 1988* (NSW), they are just not applying or enforcing them (ss 16 and 17 of that Act). The Department of Justice indicated that these provisions are currently not being used to complement the planning laws in relation to unauthorised brothels. There have been no prosecutions for these offences in the last five years. Justice also clarified that the NSW Police Force has primary responsibility for investigating and prosecuting offences under the *Summary Offences Act 1988* (NSW) (Select Committee on the Regulation of Brothels 2015:35).

If unauthorised massage parlours are such a problem, then police should use these existing powers to investigate and prosecute. A more nuanced account of the issues, distinguishing between types of sex services premises, if and whether they generate any problems, and possible solutions needs to be provided.

Policing key recommendations

The Report conflates and slips between the different ways in which the sex industry is perceived as criminogenic, implying a complex web of interlinking elements. The Report states that under the current system there is no restriction on the type of person who can own or operate sex services premises:

> There is evidence that unsuitable people may be involved in running sex services premises and the NSW Police Force, Victorian Police, Australian Federal Police and Ballina Shire Council made reference to criminal organisations being involved in the sex services industry. A number of other stakeholders also alerted the Committee to the risks of organised criminal activity and sex trafficking in the sex services industry, and concerns about use of drugs, employment of underage workers and sexual servitude involving sex services premises in NSW were also raised … Add to this the fact that there is no central register of authorised sex services premises across the state, and that there is evidence many businesses are operating without planning approval, and there is the potential for serious consequences that go completely unchecked by the authorities (Select Committee on the Regulation of Brothels 2015:92–3).

Although the Report argues that decriminalisation should be retained, for the Committee these criminal problems require and justify a criminal legal solution. Reflecting the accepted dominance of policing evidence throughout the Report, the police force is accorded a central perspective and role in the proposed reforms. Chapter Six details a range of reforms including a proposed licensing scheme and background and probity checks for people who wish to run a sex services premise. The applicant's associates should be vetted to ensure that the applicant is not a front for a criminal/group. The licensing rules are to be modelled on the *Tattoo Parlours Act 2012* (NSW) with police powers of entry and enforcement expanded. The Report draws upon the rights of entry specified in that Act (ss 30A, 30B and 30C), recommending that police 'should be able to enter at any reasonable time any licensed brothel, or any other premises they reasonably suspect are being used to provide sexual services, without a warrant, to determine whether there have been any breaches of the licensing system' (Select Committee on the Regulation of Brothels 2015:118). The Report asserts: 'This greater visibility of regulatory enforcement should be a deterrent to sex slavery and the exploitation of workers' (Select Committee on the Regulation of Brothels 2015:105).

Because it is claimed that the true owners are often disguised, all non-sex workers will have to be identified to a regulator — including cleaners (who may be running the brothel) (Select Committee on the Regulation of Brothels 2015:105). Kaldas also recommended the licensing of individual sex workers, but this was not accepted by the Committee. Licensing decisions will be reviewable by the NSW Civil and Administrative Tribunal. The penalty for operating an unlicensed or unapproved brothel should be imprisonment (Select Committee on the Regulation of Brothels 2015, recommendation 20).

The centrality of police is further reinforced by the recommendation for a central record of authorised brothels and co-ordination between the various regulators and stakeholders: 'Co-ordination protocols between local, state and federal government agencies can be co-ordinated by a body similar to the Victorian Police's Sex Industry Co-ordination Unit' (Select Committee on the Regulation of Brothels 2015:105).

Kaldas claims that currently it is difficult to know where authorised and unauthorised brothels are located. However, local councils would already have the addresses of authorised brothels and police would be able to access this information from local councils if needs be. Without clarifying the law with regard to home occupations (sex services) premises, it would be difficult and inappropriate to have a list of unauthorised sex services premises.

The proposed reforms are consistent with trends in policy and legislative reforms of increasing police powers to be 'tough on crime'. Police already have extensive powers of entry, search and seizure and there are extant criminal offences in relation to the claimed problems that they are not prosecuting. These offences include sexual servitude or the conduct of a business involving sexual servitude (*Crimes Act 1900* (NSW) ss 80D, 80E), promoting or engaging in acts of child prostitution or using premises for child prostitution (*Crimes Act 1900* (NSW) ss 91C–91F), and procuring or enticing a person who is not a prostitute for the purposes of prostitution (*Crimes Act 1900* (NSW) ss 91A, 91B). There are also offences under the *Summary Offences Act 1988* (NSW) regarding advertising of sex work (ss 18, 18A) and street sex work within view of a dwelling, school, church or hospital (ss 19, 19A). The *Summary Offences Act 1988* (NSW) also prohibits using or owning or managing, for the purposes of prostitution, premises held out as being available for massage, steam baths etc to be used for the purposes of prostitution (ss 16, 17). The police can also apply for a brothel to be closed if they suspect any 'disorderly conduct', including the sale of liquor or drugs or the involvement of criminals in the control or management of the brothel (*Restricted Premises Act 1943* (NSW)).

The *Criminal Code Act 1995* (Cth) also sets out various offences concerned with sexual servitude, people trafficking and debt bondage. The Australian Federal Police work in close coordination with the Department of Immigration and Border Protection and the NSW Police Force to police these offences. Police claim that they need greater powers of entry; in order to enter a premise they need a search warrant which requires reasonable suspicion. However, police can lend assistance to other agencies when they conduct compliance inspections, including the Department of Immigration, Border Protection, SafeWork NSW and local councils. These agencies have broader rights of entry that allow police to enter with them (Crofts, Prior and Hubbard 2013).

The reforms are modelled on anti-bikie laws introduced in the *Tattoo Parlours Act 2012* (NSW). These reforms were based on anti-terrorist legislation introduced in response to the extraordinary threat of terrorists (Ananian-Welsh and Williams 2014–15). At the time the various pieces of anti-terrorist legislation were introduced, concerns that they derogated from basic constitutional and criminal justice principles were met by the following:

> First, using rhetoric such as the 'war on terror', they claimed that the threat posed by terrorism was both extraordinary *and* temporary. As soon as the threat was eliminated — a question of 'when' and not 'if' — anti-terror laws would cease to be necessary and could be repealed. Second, legislators distinguished between terrorism and 'ordinary' criminal activity (McGarrity and Williams 2010:131).

Theorists have noted the ways in which extreme measures introduced in response to extreme threats can then be used to tackle much lesser risks, but the extreme measures pose a great threat to basic liberties (Zedner 2007:264). The *Tattoo Parlours Act 2012* (NSW) was introduced with a rhetoric of urgency, framed as part of a 'war on terror' (Ananian-Welsh and Williams 2014–15). What is interesting is that the proposed reforms in response to the association of brothels is framed with less urgent rhetoric. The problem of bikies is assumed and accepted in the Report, with no detail of the threat provided. Based only on anecdotal and unsupported evidence, the Report accepts bikies as present within the sex services industry, and this thin evidence is regarded as providing sufficient justification for previously extreme measures that were only to be used in response to extraordinary threats. The absurdity of the assumption that these reforms are appropriate for the sex services industry is in the importation of the idea that, like the anti-terrorist legislation it is modelled on, there is no need to disclose the existence or content of a criminal intelligence that the authorities have used to

reach that refusal decision (Ananian-Welsh and Williams 2014–15:6.116, 6.112). While there is some justification for secrecy around national security information given the increased reliance upon the intelligence-led approach adopted by governments in response to the terrorist threat (Ananian-Welsh and Williams 2014–15; Lynch 2009), it is difficult to justify in relation to perceived bikie involvement in the sex industry.

When commenting on the earlier anti-bikie laws, Ananian-Welsh and Williams stated: '[R]emoved from the national security context, it is less apparent why such a high and pervasive degree of secrecy is required, as opposed to existing principles and doctrines such as public interest immunity' (2014–15:380). Anti-terrorist legislation should not be imported to domestic legislation without a thorough case justifying its importation. No such justification has been made in the Report.

The Chair of the Report notes that the recommendations are not novel. The reforms are modelled not only on the *Tattoo Parlours Act 2012* (NSW) (with all the associated concerns that we have detailed above), but also on licensing schemes that have been introduced in Victoria, Queensland and New Zealand. The Committee supports licensing and regulation only in so far as it is necessary to deal with those who unfairly exploit sex workers through servitude or otherwise and in order to effectively deal with organised crime (Select Committee on the Regulation of Brothels 2015:101).

There is no evidence provided in the Report of how licensing will assist with worker exploitation or deal effectively with organised crime. There is also little analysis of the effects of these approaches provided in the Report. It has been recognised that the licensing schemes in Victoria and Queensland have resulted in a two-tier industry, with a heavily regulated licensed tier and an unregulated, unlicensed tier (Crofts 2012; Crofts and Summerfield 2006; Schloenhardt and Human Trafficking Working Group 2009). Accordingly:

> To much the same degree that the submissions to the inquiry from academics, health experts, outreach service providers, government service providers and regulators, and sex workers supported decriminalisation, they did not support licensing (Select Committee on the Regulation of Brothels 2015:80).

The adverse affects of existing licensing schemes in Australia were acknowledged in 2001 by the NSW Government when it rejected an approach by the Local Government and Shires Association arguing for the introduction of a licensing regime in NSW (NSW Legislative Assembly 2001:19297). Similar licensing schemes in other states have not worked. Sex workers avoid licensing to protect their privacy. Unlicensed workers are less likely to participate in occupational health and safety programs, and this has impacts on public health. Unlicensed workers would also be vulnerable to corrupt conduct on the part of licensing authorities.

The emphasis in the Report on police involvement in all regulatory aspects, particularly licensing, is undermined by the limited reference to available academic analysis or prior government knowledge on the topic. In their analysis of licensing schemes, Crofts and Summerfield (2006) emphasised that details must be provided of the bodies responsible for licensing, functions of licensing body, membership of licensing body, process for obtaining license and transparency of decision making. The proposed licensing model is largely influenced by the unsuccessful Victorian model, with police at the centre, aims of dealing with crime, and a lack of transparency of decision-making based on the *Tattoo Parlours Act 2012* (NSW). In contrast, under the New Zealand model, the police force plays a much lesser role. Licensing decisions are made by a registrar of the court and the Prostitution Law Review Committee in New Zealand, which reviews matters relating to the sex industry and the

operation of the Act consisting of eleven members — two persons nominated by Minister of Justice, two by the Minister for Commerce to represent operators of businesses of prostitution, one each nominated by the Minister for Women's Affairs, the Minister of Health, Minister for Local Government and Minister of Police, and three nominated by the New Zealand Prostitutes Collective (Crofts and Summerfield 2006).

Conclusion

Despite all the evidence supporting decriminalisation as delivering best-practice outcomes in terms of worker health and safety, amenity impacts and crime, decriminalisation is constantly under challenge, whether from application, enforcement, policy changes or legislative reform (Abel 2014; Crofts et al 2012; Weitzer 2010). These challenges are informed in part by moral concerns that view prostitution as exploitative and a form of violence against women and that should accordingly be criminalised (Farley 2004, 2006; Jeffreys 1997), despite (or because of) evidence that criminalisation worsens the lives of workers. This has been shown most recently in the Swedish approach criminalising the clients of sex work (Levy 2011).

The idea that the sex industry is somehow different from other commercial businesses because of assumptions of immorality underlies Kaldas' evidence. There is a perception that the industry inherently attracts criminality. In contrast, we regard the criminality of the industry as a law-made problem — the industry was associated with crime because of criminal legislation — and decriminalisation has removed this automatic relationship. Regarding and regulating the sex industry as legal requires and encourages the industry to act in a lawful manner where workers and businesses are brought within the existing legal regime with all the associated responsibilities, duties and rights. The Report fails to recognise the regulatory framework that already exists in relation to the sex industry. These include planning regulations, local council powers, work, health and safety legislation and some criminal legislation specific to brothels and sex work. Regulatory agencies include councils, Safework NSW, Health and the police force and non-government organisations.

The Report demonstrates a combination of this underlying concern about sex work coupled with acceptance of the requirement for increased police powers generally. The proposed reforms are particularly problematic because not only do police already have extensive powers and associated criminal offences that they are not drawing upon or prosecuting, but the proposed reforms accept increased powers that are based upon anti-terrorist legislation that greatly undermines civil liberties on the basis of what was initially justified as a unique and extraordinary threat. The proposed reforms suggest a 'new normal' in policy and policing responses — despite the absence of any clear or present (threat of) danger.

Despite more than two decades of decriminalisation, the Report fails to recognise that the sex industry can and should be regulated in the same way as other legitimate commercial businesses supplying services that are not inherently dangerous or disorderly. The emphasis upon crime and policing undermines the advantages of decriminalisation. Instead of police being regarded as someone to turn to for assistance when a citizen is victimised, the proposed reforms increase the role of police where they are again seen as a threat. While the Report is careful to recognise the agency of sex workers, there is apprehension expressed that the most vulnerable workers are not protected. These concerns about sex worker exploitation can and should be framed as a critique of workers' rights generally that is by no means specific or restricted to the sex industry. The Report provides little persuasive evidence of criminal problems associated with the industry, nor is there any evidence that, even if true, the proposed

reforms would provide a solution to these ‘problems’. There is no need for increased policing of the sex industry and this approach would undermine the advantages of legality.

Postscript

After submission of this article for review but prior to publication the NSW Government responded to the Select Committee recommendations (2016). The response notes that, in 2015, the Government granted councils stronger powers of entry to inspect brothels without notice and introduced the toughest penalties in Australia for planning breaches. The Report notes that the Government rejects the licensing scheme recommended by the Select Committee Report.

Case

Bedford v Canada (Attorney General) 2010 ONSC 4264

*Uky Huang v Parramatta City Counc*il [2009] NSWLEC 1331 (8 October 2009)

Legislation

Companion Animals Act 1998 (NSW)

Crimes Act 1900 (NSW)

Criminal Code Act 1995 (Cth)

Local Government Act 1993 (NSW)

Restricted Premises Act 1943 (NSW)

Summary Offences Act 1988 (NSW)

Tattoo Parlours Act 2012 (NSW)

Work Health and Safety Act 2011 (NSW)

Workers Compensation Act 1987 (NSW)

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Contemporary Comment

Serious Crime Prevention Orders

Elyse Methven* and David Carter†

Abstract

Successive reforms in New South Wales ('NSW') have established far-reaching powers to curtail the liberties of those who were once convicted of various serious sexual and violent offences. Now, these powers have been significantly expanded, with the Executive Government asserting the ability to control the free movement, speech, association and work of NSW citizens and businesses via Serious Crime Prevention Orders ('SCPOs') under the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW). This Comment surveys substantive and procedural aspects of SCPOs. We situate the orders as part of a continuing expansion of administrative detention and supervision regimes of a hybrid, quasi-criminal nature. We question whether the powers go too far by increasing the State's powers to surveil and control a person's or business's activities under the justification of preventing crime. We also canvass the possibility that SCPOs will operate in a punitive (not merely preventative) manner.

Keywords: Serious Crime Prevention Orders – preventive detention – risk-based jurisprudence – New South Wales – administrative detention

Introduction

> [T]he assumption today is that there is no such thing as an ex-offender — only offenders who have been caught before and will strike again (Garland 2002:180).

The *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) ('the Act') represents a watershed extension of state power in New South Wales ('NSW'). The 'tough new powers' (New South Wales 2016:8034) contained in the Act mirror powers in the United Kingdom ('UK') in the *Serious Crimes Act 2007* (UK) ('the UK Act') and significantly extend the existing regime of post-custodial and serious crime powers held by the executive. Simply put, the Act enables the NSW District or Supreme Courts to order 'such prohibitions, restrictions, requirements and other provisions as the court considers appropriate for the purpose of

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protecting the public by preventing, restricting or disrupting involvement by the person in serious crime related activities' (s 6(1)).

Like serious crime prevention orders ('SCPOs') in the UK, the Australian orders consist of two stages. The first is a civil power, allowing for application to the NSW District or Supreme Courts to impose *any* conditions considered appropriate (limited by statutory safeguards) for a term of up to five years (ss 5 and 7). As explained below, these orders may consist of positive requirements, such as an obligation to report to a police station, or negative 'prohibitions' or 'restrictions' (s 6(1)), for instance, a prohibition on travelling beyond a certain location. The second attaches a criminal offence to failing to comply with the order, carrying a maximum penalty of five years' imprisonment (s 8). For example, if a person is subject to an SCPO preventing her from travelling outside Australia for a five-year period, and then travels outside of Australia within that period of time, she will be liable to a maximum of five years' imprisonment under s 8.

Passed in under two weeks, the Crimes (Serious Crime Preventions Orders) Bill 2016 ('the Bill') received stinging criticism from the legal community. The NSW Bar Association labelled the Bill 'draconian' (NSW Bar Association 2016:6) and accused the NSW Government of hurriedly introducing its 'unprecedented' (NSW Bar Association 2016:2) provisions without consulting key stakeholders. The rapid passage of the Bill allowed the Government to evade legislative scrutiny processes and, according to the Bar Association, introduced laws that interfere with the liberty of private persons in NSW in an extraordinarily broad way 'not subject to any substantial legal constraints or appropriate judicial oversight' (NSW Bar Association 2016:2[a]). The SCPO regime pushes well beyond the existing boundaries of an already controversial apparatus of post-custodial preventive detention and supervision powers. The State can now impose extraordinary restrictions upon the activities of people who may never have served a custodial sentence and may never have been found guilty of, nor been charged with, a crime. In short, the Act extends the preventive control regime to *any* person in NSW believed to have been 'involved' or 'engaged' in serious crime-related activity.

Serious Crime Prevention Orders are an example of what Ian Dennis has termed 'civil preventative orders': 'civil legal orders, backed by coercive sanctions for breach of the order, which are directed to identified individuals relating to their future behaviour' (Dennis 2012:169). These forward-looking orders regulate behaviour to prevent harm that a person is considered to be at risk of perpetrating (Dennis 2012:169). They are thus 'hybrid' in nature (Tulich 2012); although applied for by the executive and made by a civil court (applying the civil standard of proof), the court's orders create a criminal offence targeted at the person subject to the order. This means conduct that by itself would not constitute a crime, nor cause (or be likely to cause) any identifiable harm, could be subject to up to five years' imprisonment. In this regard, SCPOs circumvent traditional protections and procedural safeguards of the criminal justice system (Wade 2007:241).

This comment surveys the SCPO regime, identifying procedural and substantive concerns. We review amendments that were proposed but not adopted in the final text of the Act. Following this, we contextualise the orders and suggest possible applications of the SCPO regime, drawing on the UK experience of almost identical powers contained in the UK Act. There we find that SCPOs can restrict individuals' activities 'to a very significant degree' (Crown Prosecuting Service 2015). Further, the UK orders have been publicised in a way that intrudes extensively on 'defendants'' and third parties' privacy. Finally, we engage with three key concerns with this extension of administrative powers: the low standard of proof required