

COMMENTARY

Decriminalisation and the rights of migrant sex workers in Aotearoa/New Zealand: Making a case for change

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Abstract

In 2003, New Zealand passed the Prostitution Reform Act (PRA), becoming the first country in the world to decriminalise sex work. Aotearoa/New Zealand's model of decriminalisation is internationally regarded as an ideal model for prioritising sex workers' rights and safety, and is understood to have had several positive impacts in these areas. The decriminalised model is often described as 'full decriminalisation', to distinguish it from legal frameworks which decriminalise sex workers while still criminalising clients and/or third parties. However, an infrequently discussed aspect of the Aotearoa/New Zealand model of 'full' decriminalisation is that it prohibits migrant sex work as an anti-trafficking measure. In this paper I discuss the contradictory nature of Aotearoa/New Zealand's sex work law in relation to the precarious legal status of migrant sex workers. I explore the disconnect between the intention and consequences of this policy, outlining the challenges this poses for sex workers, and those committed to the full realisation of sex worker rights.

Keywords

Sex work, decriminalisation, exploitation, Prostitution Reform Act, migration, trafficking

Introduction

Prostitution law reform remains an intensely debated issue internationally, with experts and organisations in many countries considering Aotearoa/New Zealand to showcase a progressive and promising legislative model (Amnesty International, 2016; Hubbard, Sanders and Scoular, 2016; Radačić, 2017; WHO, 2012). Aotearoa/New Zealand decriminalised sex work in 2003, becoming the first country in the world to adopt a policy of full decriminalisation. Many countries have adopted various versions of either partial or full criminalisation (such as the UK, the USA, and several European countries such as Sweden and Norway), or have heavily regulated sex work through legalisation (such as Germany and the Netherlands) (Outshoorn, 2012; Pates, 2012; Vanwesenbeeck, 2017). The Aotearoa/New Zealand model of decriminalisation is unique in decriminalising the sale and purchase of sexual services involving consenting adults over the age of 18. The overall rationale for decriminalising sex work was to improve sex workers' lives by affording them rights to challenge those who seek to exploit them and improving their access to justice (Abel, Fitzgerald and Brunton, 2007). The specific focus on affording rights to sex workers, along with the role played by the country's sex worker-led organisation, the New Zealand Prostitutes Collective (NZPC), makes the rationale and process of law reform particularly distinctive (Benoit, Jansson, Smith, and Flagg, 2017). For example, in Sweden the voices of sex workers were marginalised in the process of law reform, with the rationale for law reform driven by radical feminist discourse defining sex work as a form of violence against women (Armstrong, 2010; Östergren, 2004). In the UK, sex work law reform has in part been driven by a desire to manage public nuisance (Armstrong, 2010;

Boynton and Cusik, 2006). In Germany, while the intent for the 2002 reform was to improve sex workers' working conditions, this was pursued not through affording rights to sex workers, but through strict state regulation and control (Pates, 2012). The rationale for law reform in Aotearoa/New Zealand and the process through which this was pursued is, therefore, unique. The numerous benefits of decriminalisation for sex workers' health, wellbeing and rights, are well documented (Abel, Fitzgerald and Brunton, 2007; Abel, 2014; Armstrong, 2014, 2017). However, it is critical to consider the ways in which sex worker safety and rights could be strengthened further in the decriminalised context, and how this may be achieved.

In this paper, I outline the precarious legal status of migrant sex workers in Aotearoa/New Zealand, discussing the contradictions inherent in the existing legal framework and the implications this has for the vulnerability of migrant workers. I argue that current immigration law relating to migrant sex work is incompatible with the purposes of the PRA, which seeks to safeguard the health, safety and human rights of sex workers. I consider the potential harms of current laws relating to migrant sex work, and make a case for change to enable a context which prioritises the safety and rights of all sex workers.

Sex work policy in Aotearoa/New Zealand

Prior to 2003, Aotearoa/New Zealand was largely insignificant in the context of debates regarding sexual commerce. While prostitution has been documented since the early days of colonisation (Jordan, 2005), up until 2003 the laws surrounding sex work in Aotearoa/New Zealand mirrored those in place in the UK, where selling sex is not technically a crime, but activities associated with it, such as pimping and procuring, are (Armstrong, 2010). With the passing of the PRA in 2003, Aotearoa/New Zealand moved into a prominent position in international debates regarding sex work laws.

The PRA decriminalised sex work by repealing existing laws which criminalised it, as well as providing sex workers with rights to challenge exploitation. Aotearoa/New Zealand and New South Wales in Australia are the only places in which sex work has been decriminalised, although there are still elements of state regulation within these systems. For example, in Aotearoa/New Zealand people who wish to operate brothels require operators' certificates, and in New South Wales street-based sex work is prohibited (Mossman, 2007). Aotearoa/New Zealand's model of law reform was a consequence of years of lobbying by sex workers within the NZPC. The NZPC was also directly involved in developing a draft of the eventual law (Healy, Bennachie and Reed, 2010). As Abel (2017) has argued, the uniqueness of the PRA is encompassed by the legislation's core aim of minimising harm in sex work, in the interests of fairness and social justice; this sets Aotearoa/New Zealand apart in a global context in which neo-abolitionist discourse has often silenced sex workers' voices and influenced the direction of law reform (Abel, 2017).

Research conducted since the PRA was passed largely indicates that this aim has been achieved (Abel, Fitzgerald and Brunton, 2007; Armstrong, 2017; Prostitution Law Review Committee, 2008; Schmidt, this issue). Key findings of the research conducted to evaluate the impacts of the PRA include sex workers in indoor settings being less likely to report feeling pressured to see a client after the law change. In the same study, over 90% of sex worker respondents reported feeling as though they had increased rights under the PRA (Abel, Fitzgerald and Brunton, 2007). While there is still reluctance among some sex workers to report violence to police, qualitative research conducted with street-based sex workers has revealed a rebalancing of power dynamics between police and sex workers, with police now having a responsibility to support sex worker safety (Armstrong, 2017).

Decriminalisation has arguably had the most benefit for those sex workers who are particularly at risk of experiencing violence and being exploited, such as street-based sex workers, who bear the brunt of sex work stigma and are exposed to a multitude of risks because of working in open spaces (Sanders, 2004). Research undertaken with street-based sex workers indicates that the change in law better supports risk management strategies, since sex workers can take their time to ‘screen’ clients and can openly discuss the services that they do and do not offer (Armstrong, 2014). The significant gains that have been made by decriminalisation were also illustrated in a 2014 sexual harassment case, *DML v Montgomery*, in which the Human Rights Review Tribunal ruled in favour of a sex worker who had been repeatedly harassed by a brothel operator (see *DML v Montgomery and MT Enterprises Ltd* (2014); see also Sweetman, this issue). The Tribunal stated that:

Sex workers are as much entitled to protection from sexual harassment as those working in other occupations. The fact that a person is a sex worker is not a licence for sexual harassment – especially by the manager or employer at the brothel.
(Duff, 2014)

The sex worker was awarded \$25,000 in compensation and the former brothel operator was ordered to attend training with the Human Rights Commission (Duff, 2014). This outcome would not have been possible prior to decriminalisation, since there are far more barriers to sex workers disclosing violence, exploitation and unfair treatment when sex work is criminalised.

A contradictory policy

The evidence overwhelmingly suggests that the decriminalisation of sex work in Aotearoa/New Zealand has been beneficial for sex workers (Abel, Fitzgerald and Brunton, 2007; Prostitution Law Review Committee, 2008; Armstrong, 2014, 2017). The PRA is a useful piece of legislation that foregrounds sex workers’ rights and safety. In addition to removing risks of arrest and allowing a degree of openness and transparency that is not possible in a criminalised environment, sections 16 and 17 of the PRA contain provisions specifically intended to support sex workers to challenge exploitation and violence (Parliamentary Council Office, 2003). For instance, the law makes it an offence to induce or compel an individual to do sex work, and explicitly states that sex workers have a right to withdraw consent to sexual acts at any time, in line with other legislation (NZPC, 2013). Aotearoa/New Zealand’s framework is often referred to as a policy of ‘full decriminalisation’, to distinguish it from policy frameworks that purport to decriminalise sex workers but continue to criminalise aspects of sex work.

However, one infrequently discussed aspect of Aotearoa/New Zealand’s model of decriminalisation is that it excludes holders of temporary visas from working in the sex industry. Section 19 of the PRA relates to the Immigration Act 2009, which states that no one who holds a temporary visa can provide commercial sexual services, operate a business of prostitution, or invest in a business of prostitution. If an individual does become involved in sex work while holding a temporary visa, they can be deported. The prohibition on migrant sex work was not part of the original intent of the PRA, but was introduced through a Supplementary Order Paper (SOP) in the months leading up to the passing of the Act. The purpose of this clause was to act as a safeguard against human trafficking – specifically, to prevent people from countries other than Aotearoa/New Zealand being forced to do sex work (Martin, 2016). However, prohibiting sex work by temporary visa holders means that migrant sex workers who are in Aotearoa/New Zealand on a temporary basis do not benefit from its otherwise progressive, rights-based legal framework. It is also possible that rather than preventing human trafficking, this policy

of exclusion may place migrant sex workers at greater risk than they would be if they were legally permitted to do sex work (Martin, 2016). Indeed, this policy of prohibiting temporary visa holders from doing sex work has several important implications for the safety, health, and human rights of migrant sex workers that merit further attention.

Migrant sex workers in Aotearoa/New Zealand

There is a significant gap in evidence regarding the experiences of migrant sex workers in Aotearoa/New Zealand. Only one sex work study has specifically focused on their experiences (Roguski, 2013). One reason for the low representation of migrant sex workers in research is the context-specific focus of individual studies; for instance, focusing specifically on street-based sex work when in Aotearoa/New Zealand sex workers commonly work indoors (Armstrong, 2014). Other studies have focused specifically on evaluating the impacts of the PRA, with no specific focus on migrant sex workers (Abel, Fitzgerald and Brunton, 2007).

The legal status of migrant sex workers in Aotearoa/New Zealand means that there are barriers to them taking part in research, since there are significant repercussions if their sex work comes to the attention of authorities. Although ethical researchers prioritise the privacy and wellbeing of their participants, any reluctance to participate in research is understandable, particularly for migrant workers who are in Aotearoa/New Zealand for a short period of time and have little to gain from research in this area. As a consequence of this evidence gap, there are no existing estimates regarding the size of the migrant sex worker population in Aotearoa/New Zealand, although anecdotal reports suggest that they are a minority – it is thought that most sex workers in Aotearoa/New Zealand are not temporary migrants. Thus, more research is important in the future to better understand the size of the migrant sex worker population and their experiences in Aotearoa/New Zealand.

The only study specifically on migrant sex work to date was undertaken in 2013 by Dr Michael Roguski, in collaboration with NZPC. The research involved 12 in-depth semi-structured key informant interviews, a review of anonymised migrant sex workers' sexual and reproductive health records, and a survey of migrant sex workers (N=124). The findings highlighted the problematic nature of current laws relating to migrant sex work, in that migrant sex workers have fewer rights than other sex workers and may be less likely to seek needed help from authorities, because they fear the risk of deportation. This research also highlighted the unique needs of some migrant sex workers, such as those who speak limited English, and those who avoid accessing health services due to fear of having to disclose their immigration status.

The review of clinical records suggested proactive self-management of sexual health among migrant sex worker participants, with no evidence of unsafe sex practices. The survey results indicated that a majority of participants (94%) knew that they were coming to New Zealand prior to leaving their home country, and there was no indication of debt bondage. Furthermore, the survey findings indicated that most participants felt that their working conditions either met or exceeded their expectations. The survey also highlighted some concerning issues, such as 5% (N=6) of respondents reporting that their workplace did not allow them to refuse to see clients and/or that they did not have easy access to their passport, and 10% mistakenly believing that it was legal for workplaces to fine sex workers (Roguski, 2013).

Internationally, migrant sex work is often conflated with sex trafficking (Kapur, 2005). However, this research found no evidence of migrant sex workers being forced or tricked into entering the sex industry, nor any evidence of widespread exploitative working practices being

experienced by migrant workers. It did, however, raise concerns regarding the potential for exploitation, since migrant sex workers are essentially driven underground by the prohibition of migrant sex work (Roguski, 2013). Prohibiting temporary visa holders from lawfully working in the sex industry, and putting them at increased risk of exploitation as a result, is contrary to one of the core purposes of the PRA, to 'safeguard the human rights of sex workers and protect them from exploitation' (Parliamentary Council Office, 2003). In the next section of this paper I further unpack the ways in which existing policy relating to migrant sex work is problematic, before considering how this situation may be improved to promote the safety and wellbeing of all sex workers.

Implications of an exclusionary policy

Discrimination

To fully convey the implications of Aotearoa/New Zealand's policy on migrant sex work, it is important to outline the implications that temporary visas have for migrant sex workers. Those entering Aotearoa/New Zealand with visitor visas are not permitted to engage in any form of work. However, migrants may hold different temporary visas which do allow them to work. For example, holders of student visas are typically allowed to work for up to 20 hours per week, and holders of working holiday visas can work full time for up to 12 months (Immigration New Zealand, n.d.).

A particularly pertinent point when considering the implications of the existing policy is that those temporary visa holders who do have a right to work are explicitly prohibited from engaging in sex work. Section 19 of the PRA refers to the Immigration Act 2009, and states that no person may be granted a visa if they have provided or intend to provide commercial sexual services (Parliamentary Council Office, 2003). Thus, temporary visa holders with working rights can engage in an array of different kinds of work, such as fruit picking, cleaning, dishwashing, or waiting tables in restaurants and bars, while being prohibited from doing sex work. Sex work is thus singled out and set apart from other forms of work.

As previously mentioned, the rationale for prohibiting migrant sex work was to safeguard against trafficking. However, trafficking can occur in the context of any form of work. The only confirmed case in Aotearoa/New Zealand occurred in the agricultural industry, but cases of significant exploitation have also been identified in the hospitality industry (Carville, 2016; Dennett, 2015). A desire to prevent trafficking is therefore not a logical reason to prohibit migrant sex work in Aotearoa/New Zealand, unless other forms of work in which trafficking can also occur are similarly prohibited. Prohibiting migrants who hold valid visas which enable them to work from doing sex work, without a clear, evidence-based rationale, can be viewed as discriminatory.

Potential for exploitation

While no prosecutions have occurred for trafficking into sex work in Aotearoa/New Zealand, the prohibition of migrant sex work and the lack of rights afforded to migrant sex workers arguably increase their vulnerability to experiencing exploitative working practices. It is well documented that repressive laws, which force sex workers underground, undermine harm reduction efforts and have negative impacts on sex worker safety and health (Maher et al., 2015). The precarious legal status of migrant sex workers means that their ability to report

any adverse experiences at work to police or other authorities is constrained significantly. They are disempowered by current laws, and this disempowerment creates ideal conditions for exploitation.

While no cases of sex work trafficking have been prosecuted in Aotearoa/New Zealand, cases of exploitation have been reported. In a recent study, one participant described coming to Aotearoa/New Zealand to work as a therapeutic massage therapist, but after a period of time she was asked to provide commercial sexual services. It was reported that when she refused, her employer threatened to report her to Immigration New Zealand, which would result in her being deported (Stringer, 2016). This situation exemplifies how the current framework empowers individuals who intend to exploit migrant sex workers. While sex workers with New Zealand citizenship can use their rights, which are afforded by the PRA, to challenge attempts to exploit them, migrant sex workers cannot access these rights, and as such are driven underground – again, providing ideal conditions for exploitation to occur.

Stigma and stereotyping

Prohibiting migrant sex work sets migrant sex workers apart as being fundamentally different from other sex workers. An over-reliance on racialised stereotypes frames dominant understandings of migrants in general. While this is not confined to sex workers, migrant sex workers are stereotyped in multiple and diverse ways. For example, as Ham (2017) has noted, in Western societies Asian sex workers in particular are often framed by anti-trafficking narratives as more vulnerable and lacking in agency (Ham, 2017). This framing may lead to an assumption that these sex workers are more likely to be victims of trafficking. Such assumptions about migrant sex workers, based on stereotypes, may subsequently inform how they are responded to by employers, co-workers, clients, and authorities.

The legal status of migrant sex workers may also lead to the construction of this group as deviant and problematic. For example, it is possible that some sex workers who can lawfully engage in sex work feel threatened by migrant workers, and resent their presence in the local sex work environment. A recently established Aotearoa/New Zealand based website uses the acronym ‘STIFF’ to describe migrant sex workers. This stands for ‘sex work tourists immigration flouting freeloaders’ and urges sex workers to inform on migrant sex workers to Immigration New Zealand, using their online advertisements (Anonymous, 2017).

Prohibiting temporary visa holders and visitors from engaging in sex work in Aotearoa/New Zealand arguably stigmatises migrant sex workers by othering them through their legal status and bolstering stereotypes. This othering has the *potential* to create a dehumanising effect, where migrant sex workers are constructed as one homogenous group, rather than as individuals with their own specific motivations, histories and experiences. This dehumanisation is evident in the wording of the website mentioned above. Such dehumanisation arguably increases the vulnerability of migrant sex workers to exploitation and violence, through promoting what Lowman (2000) has termed a ‘discourse of disposability’, in which ‘getting rid’ of certain sex workers is deemed desirable (Lowman, 2000). However, as previously noted, further research with this population is critical to understanding explicitly how existing laws impact on them.

Making a case for change – concluding points

The decriminalisation of sex work in 2003 was a unique change, whereby Aotearoa/New Zealand became the first country in the world to decriminalise sex work. This was intended to minimise harm in sex work and safeguard the rights of sex workers. The prohibiting of

temporary visa holders from engaging in sex work is incompatible with the purposes of the PRA, and thus the policy on sex work can be described as contradictory. On the one hand this policy is very progressive, and sets Aotearoa/New Zealand apart in affording rights to sex workers to challenge exploitation and violence. However, the prohibition of migrant sex work means that migrant sex workers are marginalised and excluded, even when they can lawfully undertake other forms of work.

While the exclusion of migrant sex workers was intended to protect against trafficking, the consequence is that migrant sex workers are forced to work illegally, creating conditions in which exploitation is arguably more likely. While the decriminalisation of sex work has provided an environment that enables openness and transparency, and is therefore conducive to preventing exploitation, this does not extend to all sex workers. To strengthen Aotearoa/New Zealand's position as pioneering in sex work policy, the right to engage in sex work must be extended to individuals with temporary visas which allow the holder to work. At the very least, migrant sex workers must be enabled to challenge exploitation without risking legal repercussions. Such changes would enable migrant workers to benefit from this progressive framework.

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