

To regulate or not. Politicians, prostitution and the police

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Introduction

There has been a renewed interest by legislators in this State over the past year of reform of the law in relation to the sex industry. However, as there have been similar statements in the past by governments, in some instances well supported by the work of inquiries, we should anticipate little if any improvement will happen. If there is change, sex workers will be unlikely to be recognised as the key actors in the consultative process. This paper draws on materials that the author had gathered up to the end of 1980s, coinciding with a time when the former Burke Labor government had also flirted with the idea of reform. The research that follows is a reminder of the gap between rhetoric and reality when governments, regardless of political persuasion, investigate and toy with implementing reforms to better regulate of the sex industry.

The sex industry has existed in all its varied forms throughout recorded history. It is an activity that has generated an extraordinary diversity of opinion and scholarly analysis, for in the period 1539-1977 there had been 5,491 sex industry-related titles published, including anthropological, criminological, medico-legal and sociological studies, dissertations and discussions.¹ Though sex work has been frequently described as a 'social evil', it has been an enduring feature of Australian society since the arrival of the First Fleet. The seminal work of Robert Hughes, *The fatal shore*, drawing on the court records of convicts transported to Australia, reveals that a considerable number of the female convicts banished from Victorian England to the Antipodes involved sex industry-related offences.

The sex industry is a difficult area to research. Workers have little advantage in being interviewed - their experience has reinforced the wisdom of being discreet to avoid the harsh glare of a capricious and intolerant public. However, as the most difficult group to obtain information are the clients of sex industry workers, we should be cognisant that much of the literature is preoccupied with the motives and by implication the pathology of sex workers, rather than with their clients.² The bulk of this literature suffers from a further shortcoming, in that it is largely preoccupied with the female sex worker.

Regulation of sex workers in WA

Western Australia (WA), in common with other frontier states, has historically justified sex work as necessary for social harmony, because of gross disparities in the ratio of males to females in the population.³ Kalgoorlie is a well known example of a community which has tolerated sex work as a 'necessary' and integral facet of the social fabric of a goldmining town, in the belief that without this form of 'sexual outlet' for men, the incidence of rape and other forms of deviance would escalate. To quote Mona Maxwell, one of Kalgoorlie's former notable operators, "*places like this are a necessity where there a lot of men and few women.*"⁴

Support for the regulation of the sex industry is predicated on the belief that there are purported differences between men and women. "*What is seldom questioned is that it is men who must resist or*

¹ Travis G. *Prostitution: A descriptive literature review*. Sydney, New South Wales Bureau of Crime Statistics and Research, Department of Attorney General and Justice, 1983.

² Edwards, J. *Prostitution and human rights: A Western Australian case study*. Discussion Paper No. 8. Canberra: Human Rights Commission, 1986.

³ Davidson R. "Dealing with the 'social evil'. Prostitution and the police in Perth and on the Eastern Goldfields, 1895 - 1924." In Daniels K (ed). *So much hard work: Women and prostitution in Australian history*. Sydney, Fontana/Collins, 1984; Evans R. "Soiled doves: prostitution in colonial Queensland." In Daniels K (ed). *So much hard work: Women and prostitution in Australian history*. Sydney, Fontana/Collins, 1984.

⁴ Prior T. "Charity begins at Mona's - it's home to Australia's richest madam." *Daily News*. 20 February 1984.

indulge their sexual urges while women must resist or exploit the possibility of using their sexual attractiveness for profit ... men 'demand' sex and women 'supply' it."⁵

The sex industry is closely regulated in this State in spite of the fact there is no statutory basis for such a policy. It is argued that regulation as a policy contains a prescription as to desirable social relations between the two sexes, and accordingly creating a context in which a sex industry is both necessary and desirable. An important but not spelt out assumption is that such a policy is a recipe for social stability, in that a small number of (female) sex workers will ensure that in places in towns with gross disparities in the ratio of males to females, such as Kalgoorlie, the safety, dignity and social respect of the majority of women will be guaranteed. This recipe may even take the form of overt brutalisation of a small number of women, as has been the lot of Aboriginal women living in remote pastoral regions of WA and the Northern Territory.⁶

During the 1980s relative merits of decriminalising or regulating the sex industry was the subject of inquiries in New South Wales and Victoria. The former state conducted a review by a Select Committee of the Legislative Assembly, the 1986 Rogan inquiry, while the latter state commissioned an in-depth independent and comprehensive inquiry by Marcia Neave in 1985.⁷

The stimulus for a more explicitly publicly negotiated sex industry policy may be one of the outcomes of the Fitzgerald Inquiry in Queensland, set up in May 1987 to investigate police misconduct.⁸ As has been revealed in a number of inquiries, such as the Costigan Inquiry, there close links are inevitable between politicians, law enforcers and criminal groups when illegal activities are regulated without a legislative foundation.

Given one of the major reasons for the Fitzgerald Inquiry was to investigate police regulation of the sex industry in Queensland, it is essential that governments ensure the police are beyond reproach, by legislating to invest implementation of the policy in an independent and accountable body with the obligations and rights of regulators and the regulated plainly specified.

Regulation of sex work and the police

There have been a number of inquiries in WA over the past two decades, all of which have been held because of controversies involving the police force and claims of corruption.⁹ The Norris inquiry in 1976 was as a consequence of the murder of a well known madam, Shirley Finn. A major issue considered by this inquiry was conflict within the police force over enforcement of the laws that prohibiting sex work. The conflict arose from a perception by a superintendent with operational responsibility for a unit of metropolitan police that the general police as well as the Vice squad should enter premises and charge the women working there, as well as their customers. Needless to say his beliefs attracted a lot of media attention and brought him into disrepute with the administration of the police force.

⁵ McIntosh M. "Who needs prostitutes? The ideology of male sexual needs." In Smart C & Smart B (eds). *Women, sexuality and social control*. London, Routledge Kegan Paul, 1978, 53.

⁶ McGrath A. "'Spinifex fairies': Aboriginal workers in the Northern Territory, 1911-39." In Windschuttle E (ed). *Women, class and history: Feminist perspectives on Australia 1788-1978*. Melbourne, Fontana/Collins, 1980; McGrath A. "'Black velvet': Aboriginal women and their relations white men in the Northern Territory, 1910-40." In Daniels K (ed). *So much hard work: Women and prostitution in Australian history*. Sydney, Fontana/Collins, 1984.

⁷ More recent inquiries, post 1989, include Goode M. *The law and prostitution, information and issues paper*. Adelaide, Attorney General's Office, 1991; Legislative Assembly for the Australian Capital Territory, Select Committee on HIV, Illegal Drugs and Prostitution. *Prostitution in the ACT: Interim report*. Canberra, ACT Legislative Assembly, 1991; Criminal Justice Commission. *Regulating morality? An inquiry into prostitution in Queensland*. Brisbane, Criminal Justice Commission, 1991.

⁸ Finnane M. "The Fitzgerald Commission: law, politics, and state corruption in Queensland." (1988) 42 *Australian Journal of Public Administration*, 332.

⁹ Royal Commission Into Matters Surrounding the Administration of the Law Relating To Prostitution. *Report*. (Norris JG Chair). Perth, WA Government Printer, 1976; Dixon OF. *Report On the Action Taken By the Police Regarding Allegations of Graft and Corruption Within the Police Force*. Perth, WA Government Printer, 1982.

The 1982 Dixon inquiry revolved around the efforts of a number of women to open premises not approved by the police. The women concerned sought the support of various public figures to have the policy reviewed.

In both inquiries the policy of regulation was reaffirmed. There was no attempt in either inquiry to question the secretive fashion in which police develop and enforce the policy. Both inquiries implicitly assumed there was a consensus that the sex industry was properly regulated by the police, because containment was an issue of controlling crime.

Serious shortcomings of both inquiries included failure to examine the employment conditions of workers in tolerated establishments, nor that the policy has the effect of stigmatising the workers and avoidance of mechanisms to contain demand. The lack of attention to demand reduction, for example, offences to covers the activities of those who seek out sex workers such as 'kerb crawling', is paradoxical given the justification for a sex industry is based on the proposition that it is the magnitude of male sexual needs which create the demand.

The weight of evidence reveals, contrary to the prohibition contained in the law, the police and law makers have not considered it feasible to eliminate the sex industry, but instead to regulate it, by what is described as a 'policy of containment'. The first acknowledgment that there was a containment policy was a statement made by the Commissioner of Police in February 1982 to the Dixon inquiry into police corruption in WA. The Commissioner stated in his letter to the inquiry that because

*"prostitution itself is not unlawful, and is inevitable in any society, police have for many years endeavoured to minimise the evils of the oldest profession by following a policy of conditional toleration directed towards achieving the containment of the number of premises used for the purpose of prostitution and an acceptable standard of conduct of participants. The conditions entailed, whilst variable in some areas, are designed to keep this nefarious 'trade' as free of criminal participation, venereal disease, drug abuse, minimise public nuisance, and to prevent the exploitation of juveniles and the exploitation of females by males as far as possible, all of which principles I believe have public acceptance and endorsement."*¹⁰

However, in spite of the need for a legislative framework, experience from other fields, such as trade practices, media standards, and regulation of environmental pollution, remind us of the limits of statutory regulation. In these examples, regulators are hampered as they require specialist knowledge to adequately monitor and deal with excesses and breaches, yet the principle source of information is frequently available from the regulated. This dependence is fertile ground for cosy relationships between the regulated and the regulators.

There is no reason to believe that the sex industry is particularly different from other kinds of business activities that necessitate some form of regulation. Indeed, a recent discussion paper postulates that because sex work is concerned with the provision of a commodity, the sale of sexual services by women to men, it should be regarded as being governed by the same principles that apply to other commodities in a market economy. *"It is a business of supply and demand - men create the demand and the women who meet it are punished."*¹¹

There seems to have been an understanding reached in WA between the police, health authorities and government, built up over many years, that the sex industry should consist of a number of preferred key operators granted a monopoly position, in return for which a degree of self-regulation will be permitted if police have prerogatives in some matters. This arrangement has never been sanctioned by any enabling legislation.

¹⁰ Dixon OF. *Report On the Action Taken By the Police Regarding Allegations of Graft and Corruption Within the Police Force*. Perth, WA Government Printer, 1982, 13.

¹¹ Byrski L. *Prostitution - the options: A community discussion paper*. Perth, Western Australian Women's Advisory Council to the Premier, 1988.

The conditions and guidelines are not published, the state does not exact specific taxes in the form of licenses and new entrants do not have rights to enter the market. Some may argue that the sex industry should not be regulated, as it constitutes private conduct between consenting adults and when this conduct is criminalised it gives rise to attendant noxious forms of criminal activity.

Why regulate sex work?

Another argument contends that sex work is an artefact of the unequal relationships between men and women, a feature of patrilineal societies like Australia, because women's reproductive function is absolutely controlled by men, sexual rights are regarded as a commodity. This latter perspective gives rise to the proposition that women ought to be able to derive a legitimate means of living from sex work, if they so wish. However, there are problems with this argument, as it may be rather too optimistic to claim *"giving women control over their own lives and reducing the inequalities which exist between the sexes is part of the wider process of raising the status of women (so that if) ... men and women are afforded equal status ... industries which rely on the sale of women's bodies could not survive."*¹²

Other jurisdictions have, like WA, followed a similar policy of toleration and regulation of the sex industry by the police, in spite of posturing to the contrary.¹³ Prohibition has been justified because sex work is regarded as morally repugnant, degrades women and undermines traditional values such as the sanctity of marriage and sexual fidelity. There has been an acute awareness by government that if the sex industry were to be regulated by legislative authority it would cast the state in the invidious position of sanctioning behaviour that may offend much of the community. The West Australian Minister for Police was quoted in June 1985 as saying that

*"The Government is not happy with the present police system because it places the police in the invidious position of being seen to be administering activities which are illegal. ... The difficulty is to find a better way of dealing with it and I wouldn't rule out any possibilities."*¹⁴

A legislative agenda was announced in 1988 to implement a form of licensing and regulation by a board.¹⁵ The proposed legislation was described in terms of having a principal function to protect children from involvement.

There are also concerns about privacy, as regulation would require an intricate system of surveillance to ensure compliance as well as appropriate powers to punish transgression. As was sagely observed by a Mayor of Kalgoorlie in 1901, it would be *"unwise to give a body of men absolute powers over the females engaged in the traffic."*¹⁶

However, it remains to be seen whether any government could balance the competing interest groups, to ensure that an appropriate legislative framework could be put into place. Operators of the containment establishments are certainly opposed to regulation as it would mean their monopoly would be eroded.¹⁷ Sex workers have recognised advantages in regulation of the industry, though many have reservations about whether this would be established under the control of the police or through a health oriented approach.

¹² Byrski L. *Prostitution - the Options: A Community Discussion Paper*. Perth, Western Australian Women's Advisory Council to the Premier, 1988.

¹³ *Weekend News* "Crack-down on vice: 'There are certain rules ... and they broke them'." 28 November 1981; *West Australian* "Police get tough on prostitution." 7 January 1982.

¹⁴ Fife-Yeomans J. "Govt to review brothel policy." *West Australian*, 15 June 1985.

¹⁵ Callander D. "Brothel legislation aims to protect children." *West Australian*. 10 December 1987.

¹⁶ Cited in Davidson R. "Dealing with the 'social evil'. Prostitution and the police in Perth and on the Eastern Goldfields, 1895 - 1924." In Daniels K (ed). *So much hard work: Women and prostitution in Australian history*. Sydney, Fontana/Collins, 1984.

¹⁷ Brophy L. "Brothel staff like things as they are." *Daily News*. 20 July 1981.

“Legislation would ensure strict hygiene controls and improve the appalling conditions in some brothels... The Australian Prostitutes Collective WA representative, Susanne Devereux, said the containment policy should be scrapped. ‘Many madams do not want it to be legalised because they’d be out. Conditions would have to improve dramatically’, she said.”¹⁸

Public health argument for regulation

The use of contagious diseases legislation in WA and the other states has been one of the major instruments of policy to regulate sex workers.¹⁹ There may be rational reasons to require periodic health checks of sex workers, given the risk to their own health from sexually transmitted diseases (STDs) from infected customers.

However, the policy seems to have been based on the misconstrued perception that regulation is necessary to prevent sex workers becoming a reservoir of infectious disease that may spread to the wider community, rather than with a primary concern that STDs represent a serious occupational hazard. The latter approach would require regular screening of both sex workers as well as their clientele. Presently this is not the case.

Rather than adopt sex work specific legislation, as was the case in Britain and some Australian states in the nineteenth century and the earlier part of this century, WA like the other states has for some years included STDs in a schedule of infectious diseases of the Health Act so that if a STD is detected a medical practitioner is required to notify the Department of Health. This legislation is not directed specifically at sex workers.

Because there has been considerable community disquiet that legislation which is sex industry-specific could be used to extend social control over a larger group of women whose behaviour in some way offend conventional morality, governments have resorted to less obvious techniques of regulation. *“With the exception of the English Contagious Diseases Acts of the late nineteenth century, most types of regulation have been developed by more or less arbitrary action on the part of the police and without the deliberate and express sanction of a competent legislative authority.”²⁰*

The Vice squad, who are responsible for the enforcement of containment policy, have been criticised for having substantial power over workers employed in a small number of approved establishments, known as massage parlours.²¹ All women who work at such establishments are required to be screened weekly for STDs as a condition of continued employment, with a positive result meaning an individual is ‘forbidden’ to work in approved establishments. Before being employed at an approved establishment all women must first be interviewed by the Vice squad, including having a photograph taken.

As the policy will exclude some women from the approved establishments, this has meant that a significant number of women work in riskier areas of the industry outside of the direct reach of a containment policy such as, soliciting in public areas, working from own home, escort work, etc. The impact on HIV on the sex industry is uncertain. One madam has claimed that the policy of rigorous screening of workers for STDs will increase have a positive benefit. (!)

“A brothel boom will result from the AIDS crisis, a madam predicts. And it will mean a new lease of life for Kalgoorlie’s world-famous Hay Street. Kalgoorlie’s leading madam, Irene, said AIDS

¹⁸ Guild F. “Prostitutes: legalise our jobs.” *Daily News*. 13 April 1987.

¹⁹ Murnane A & Daniels K “Prostitutes as ‘purveyors of disease’: venereal disease legislation in Tasmania, 1868-1945.” (1979) 5(1) *Hecate*, 5.

²⁰ Davidson R. “Dealing with the ‘social evil’. Prostitution and the police in Perth and on the Eastern Goldfields, 1895 - 1924”. In Daniels K (ed). *So much hard work: Women and prostitution in Australian history*. Sydney, Fontana/Collins, 1984.

²¹ Edwards, J. *Prostitution and human rights: A Western Australian case study*. Discussion Paper No. 8. Canberra, Human Rights Commission, 1986.

had signalled the end of the free-love era. 'People will be turning to us rather than looking for one-night stands with people they cannot be sure of,' she said."²²

The features of the containment policy may be summarised as follows:

- wide discretionary power by police as to approval of an individual's suitability for employment in an establishment;
- wide discretionary power by police to which persons are permitted to operate establishments;
- there is no formal means of application to operate premises;
- males are excluded from the management or ownership of premises;
- unclear scope of local government planning powers, eg compliance with minimum building standards; and
- workers do not have the same rights as enjoyed by other service workers, ie no sick leave, no worker's compensation, no controls over employers as to reasonable conditions of employment.

While there has been a shift in towards more tolerant attitudes towards sex industry work, it is unclear whether the stigma associated with this type of work has diminished. For instance, sex work has been described by some commentators as an 'occupation' and that the nature of the work may well be enjoyable, as well as financially profitable for women.²³ A recent publication adopted the terminology of 'entertainers' in presenting the case studies of a number of women portrayed as having a good time while working at a famous establishment in Sydney.²⁴ This more favourable perception seems to involve a stratification of sex workers. One magazine read by young people described sex workers in the following terms.

*"Those pale, nauseous-looking ladies who sway around the seedier parts of town in fishnets and vinyl or sit in smacked-out stupors on milk crates account for maybe 5% of prostitutes. ... The street pros have slipped through society's safety net; once they've got there, it's hard to get back again. The girls from the up-market brothels don't look like prostitutes. If you met one of them at a party and she told you what she did you'd think she was joking."*²⁵

There is also a contrast between this contemporary narrative of sex workers and earlier accounts which were usually couched in terms of the stoicism, struggle, oppression and victimisation of the women through sex work.²⁶

Male sex workers

There has been little discussion of the phenomenon of male sex workers in WA or the other states. This is a major shortcoming of the paper released by the Women's Advisory Council in 1988. There has been an emphasis in a small number of commentaries about teenagers, male and female, involved in sex work in Perth.²⁷ A shortcoming of this recent discourse is that it fosters a continuation of paternalistic policy precepts, enabling interventions to 'rescue' young people from what is seen as a tragic situation.²⁸

²² *Daily News*. "Aiding the brothels." 6 May 1987.

²³ See also Perkins R. *Working girls - prostitutes, their life and social control*. Canberra, Australian Institute of Criminology, 1991; Perkins R, Prestage G, Sharp R & Lovejoy F (eds). *Sex work and sex workers in Australia*. Sydney, University of New South Wales Press, 1994.

²⁴ Reines R & Powell, Z. *Memories of A Touch of Class. Life in Australia's best-known bordello*. Ringwood, Victoria, Pelican, 1987.

²⁵ Norman J. "Working girls." *The Edge*. 25 April 1989.

²⁶ Cordelier J. *The life*. London, Pan, 1976; Jaget C (ed). *Prostitutes: Our life*. Bristol, Falling Wall Press, 1980; Millett K. *The prostitution papers*. London, Paladin, 1975; Sandford J. *Prostitutes*. London, Abacus, 1977; Winter M. *Prostitution in Australia*. Balgowlah, New South Wales, Purtaboi Publications, 1976.

²⁷ Le Tourneau R. "Boy whores racket grows." *Daily News*. 11 January 1985; McNamara G. "Modest Perth street is a den of sin." *Daily News*. 29 January 1988.

²⁸ Fife-Yeomans J. "For sale: boys' bodies, much abused." *West Australian*. 26 January 1985

Conclusion

It is difficult to accept that legalisation of the sex industry is an entirely satisfactory policy. Significant numbers of workers will resist registration, and will instead circumvent the rules, as they do at present, by refusing to work in designated establishments. We might anticipate that operators of establishments would be opposed to a system that encouraged women to work on their own, and would only support a form of regulation that protected their monopoly powers.

Should we consider broadening the opportunities for female employment, so that in situations where there is very limited employment opportunities for females, as in many mining towns? Should we require that mining industries, for example, invest in the social infrastructures to ensure men and women are provided with a comfortable environment with adequate social facilities?

As it is likely that concern about contagion will remain important in the debate about the regulation of the sex industry, we must ensure that any policy of regulation is not driven by fear of disease, as on past performance it is likely women will bear the brunt of any restrictions and invasions of privacy. The arrangements that have operated for many years in Kalgoorlie, whereby sex workers are segregated and confined in a 'red light' area, and thereby treated as second class citizens, must be considered an indictment of the containment policy.