THE INHERENT FAILURE OF CURRENT OCCUPATIONAL HEALTH AND SAFETY LEGISLATION IN PROSTITUTION

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Abstract

This article discusses the efficacy of current occupational health and safety ('OHS') frameworks in the context of prostitution. Both the legalisation and decriminalisation of prostitution require OHS principles and workers' compensation schemes to be applied to the recognised prostitution 'industry'. A new and dominant discourse has emerged in prostitution research which states that sex work is not unlike any other occupation and that labour normalisation and the introduction of OHS principles have notably improved the health and safety of sex workers. Examination of the available literature on OHS in prostitution however, evidences that, in those jurisdictions where OHS guidelines are in place, implementation and enforcement has proved to be poor. Additionally, any claim to improvements in health and safety, can only be made in the legal and regulated indoor brothels, while the majority of sex workers continue to operate outside this sector.

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I Introduction

An examination of the 'occupational hazard' of violence in sex work reveals that even within so-called 'safer' indoor brothel work, workers are exposed to significant levels of violence that are unique to the sex industry when compared with other occupations. The practices of prostitution, even in legal and regulated brothels, place workers in situations of danger to their health and safety that would be inconceivable in any other employment context. Within industry-specific OHS literature itself, violence is identified as an inevitable part of sex work, undermining the core principle of OHS, that is, that all workers, no matter what industry they work in, have the right not to suffer harm through carrying out the normal requirements of their work. In contrast to the argument that it is the legal setting which determines the health and safety of sex workers, this paper argues that prostitution is inherently harmful and involves significant levels of risk to mental and physical health for workers that has not been authentically addressed by current OHS principles, even where the industry has been legalised or decriminalised. Indeed this paper argues that a new model of legislation is needed in order to combat the inherent risks of the sex industry.

II The New Trend in Occupational Health and Safety Discourse

'Occupational health and safety' is a broad term used to refer to any issue, task or condition in a workplace that may impact on the health and wellbeing of the people who are working there. The core principle of OHS is that all workers, no matter what industry they work in, have the right not to suffer harm through carrying out the normal requirements of their work.[1] Article 23(1) of the Universal Declaration of Human Rights states that '[e]veryone has the right … to

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1 Occupational Safety and Health Service, Department of Labour New Zealand, *A Guide to Occupational Health and Safety in the New Zealand Sex Industry* (June 2004) WorkSafe New Zealand, 17 <http://www.osh.dol.govt.nz/order/catalogue/pdf/sexindustry.pdf>.

just and favourable conditions of work'. In accepting prostitution as a legal and legitimate form of employment, and in response to the high risk nature of sex work, governments and sex industry lobby groups have had to adopt harm minimisation approaches towards OHS in the sex industry.

Central to the discourse of OHS in prostitution is the argument that it is the context in which sex workers operate that is the most influential factor affecting health and safety, rather than the risk and harm inherent in prostitution itself. The sex industry is identified as the only industry in which laws can have the effect of minimising occupational health and safety risks.[2] Criminalisation of prostitution is said to set sex workers apart from the formal economy, leaving potential for workers in the sex industry to be exploited due to the uncertain legality of the industry's operations,[3] as well as minimising the degree of choice available to sex workers over workplace preferences and working conditions, possibly placing their personal safety in jeopardy.[4]

The proposed alternative to criminalisation is the regulation of the industry, whether by legalisation or decriminalisation, in order that industrial and legal recognition may be given to those working in the sex industry. Changing the legal status of prostitution from a criminalised practice to a legalised or decriminalised 'industry' is said

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2 Linda Banach and Sue Metzenrath, *Principles for Model Sex Industry Legislation* (2000) Scarlet Alliance, 8 <http://www.scarletalliance.org.au/library/model-principles>.

3 Robert Guthrie, 'Illegal Contracts: Impropriety, Immigrants and Impairment in Employment Law' (2002) 27(3) *Alternative Law Journal* 116, 120; Lauren Casey and Rachel Philips, *Behind Closed Doors: Summary of Findings* (November 2008), 29 <http://www.peers.bc.ca/education.html>.

4 Gamble & Mawulisa, *Occupational Health and Safety in the South Australian Sex Industry,* Scarlet Alliance, 6–7 <http://www.scarletalliance.org.au/library/gamble-mawulisa> citing Norah Fahy, Submission to the South Australian Health Commission, *Female Sex Workers in South Australia and Their Health Needs,* 1995, 6, 72.

to result in new rights and obligations which transform the debate from a moral concern to an issue relating to safety and health,[5] and remove constraints on harm minimisation approaches.[6]

Proponents of a regulated sex industry suggest that the following risks can be mitigated or eliminated by regulation:

- The location of sex work in a black economy;
- The stigmatised perception of those who provide the services;
- The often-limited power of sex workers to shape the terms and conditions of their employment; and
- The lack of practical means whereby abuse or exploitation can be exposed and remedied by legal means.

Within this new sex work paradigm, attention to the health and safety of all people working in the sex industry is said to enhance the quality of life of employees, while also improving the services offered to clients and the productivity and profitability of businesses in the industry overall.[7] Decriminalisation has been said to improve health and safety outcomes for sex workers,[8] while it is reported from

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5 Robert Guthrie, 'Sex in the city: decriminalisation of prostitution in Western Australia?' (2001) 7 *Journal of Contemporary Issues in Business and Government* 61, 69.

6 Priscilla Alexander, 'Sex Work and Health: A Question of Safety in the Workplace' (1998) 53(2) *Journal of American Medical Women's Association* 77, 77; Dr Antonia Quadara, 'Sex Workers and Sexual Assault in Australia; Prevalence, risk and safety' (2008) 8 *ACSSA Issues* 1, 7.

7 David Edler, *A Guide to Best Practice — Occupational Health and Safety in The Australian Sex Industry* (1999) Scarlet Alliance, 34 <http://www.scarletalliance.org.au/library/bestpractise>; David Edler, *Selling it in safety* Scarlet Alliance, 3 <http://www.scarletalliance.org.au/library/edler>.

8 Basil Donovan et al, Submission to the NSW Ministry of Health, *The Sex Industry in New South Wales,* (2012), 9; Prostitution Law Reform Committee, Gillian Abel, Cheryl Brunton and Lisa Fitzgerald, *The Impact of the Prostitution Reform Act on the Health and Safety Practices of Sex Work,* (2007) 15.

legalised jurisdictions that women in legal sex work appear to have better occupational health and are safer from the violence, harassment and intimidation that often exists in illegal or unregulated prostitution.[9]

The occupational exposures, hazards, injuries and diseases to be addressed within an industry-specific framework for OHS in sex work are wide-ranging and are not limited to sexually transmitted infections (STI) since sex work involves more than the direct acts of oral, vaginal and anal intercourse.[10]

A number of additional hazards identified in the research include:

- Repetitive stress injuries and other musculoskeletal problems;
- Bladder infections and the development of chronic cystitis;
- Kidney infections; and
- Physical injury.[11]

Other hazards attributed to sex work include emotional stress, alcohol and drug use, social stigma, discrimination, sexual assault, rape, violence and death.[12] The sex industry is also the only industry in

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9 Charlotte Woodward et al, *Selling Sex in Queensland 2003* (Prostitution Licensing Authority, 2004) 8.

10 Alexander, above n 6, 79.

11 Ibid 77, 79, 80–1; Sheryl Hann and John Wren, 'Decriminalisation: the key to health and safety in New Zealand sex industry' (2000) 7(12) *Safety at Work* 7, 8, citing Alexander, above n 6; J Cwikel, K Ilan and B Chudakov, 'Women brothel workers and occupational health risks' (2003) 57 *Journal of Epidemiology and Community Health* 809, 811; Sharon Pickering, JaneMaree Maher and Allison Gerard, Submission to Consumer Affairs Victoria, *Working in Victorian Brothels,* (2009), 19; Michael L Rekart, 'Sex-work harm reduction' (2005) 366 *Lancet* 2123, 2129.

12 Alexander, above n 6, 77, 79; Quadara, above n 6, 31; Hann and Wren, above n 11, 8, citing Alexander, above n 6; Cwikel, Ilan and Chudakov, above n 11, 811; Rekart, above n 11, 2129.

which unwanted pregnancy is considered to be an occupational hazard.[13]

In seeking to address these occupational hazards, industry-specific OHS guidelines for best practice have been developed by sex lobby groups and adopted by governments in jurisdictions where prostitution is regulated. Under these guidelines, the practice of safe sex is considered the basis upon which the workplace must operate.[14]

Guidelines created on this basis include:

- That employers are required to take all reasonable steps to provide information to employees regarding safe(r) sex;[15]
- Employees and clients are required to use adequate protection to minimise the risk of acquiring or transmitting a STI;
- Examination of all clients for visible signs of STI before service should be enforced as standard practice;[16] and that
- Employers should provide and maintain adequate supplies of personal protective equipment (PPE) free of charge to employees (including condoms, dams, water-based lubricants, latex gloves, disinfectant, and in the case of escort workers, items such as personal alarms and mobile phones).[17]

OHS also requires awareness of working conditions which will, over time, have an impact on a person's health and well-being, including:

- Making sure beds are in good repair and provide proper support;
- Ensuring that outfits worn by workers when seeing clients

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13 Edler, above n 7, 24.

14 Ibid 16.

15 Ibid; Abel, Brunton and Fitzgerald, above n 8, 24; Gamble & Mawulisa, above n 4, 9.

16 Edler, above n 7, 17.

17 Ibid 21; Gamble & Mawulisa, above n 4, 9; Occupational Safety and Health Service, Department of Labour New Zealand, above n 1, 35.

are comfortable and do not restrict circulation or affect posture; and

- That workers receive adequate breaks between clients and between shifts to avoid stress and fatigue.[18]

Industry guidelines also address ways to avoid repetitive and overuse injuries as well as the development of operational policies for members of staff who are pregnant to minimise harm to the worker and their baby.[19]

Regarding workers' safety, the stated purpose of OHS 'should be to eliminate potentially abusive situations, violence or intimidation from the workplace, whatever the source'.[20] The guidelines provide that employers and operators have an obligation to ensure workers' physical and emotional safety by identifying areas and tasks associated with risk, empowering and training workers to recognise and respond to potentially dangerous situations and supporting workers following a violent or dangerous experience.[21] 'Designing out risk' is considered the preferred action in all work place environments and 'the least preferred action is sole reliance on staff training as the causes of workplace violence are multi-factorial'.[22] Designing out risk in sex work involves strategies relating to effective environmental design including; solid security doors, peepholes and other means of viewing clients, safety devices, intercom communication and CCTV.[23] Employers and operators are required to identify high-risk procedures and areas and to develop control strategies to combat violence.[24]

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18 Edler, above n 7, 1.

19 Ibid 23, 24; Occupational Safety and Health Service, Department of Labour New Zealand, above n 1, 41.

20 Quadara, above n 6, 18.

21 Ibid.

22 Quadara, above n 6, 29, citing Claire Mayhew and Duncan Chappell, 'Violence in the workplace' (2005) 183(7) *Medical Journal of Australia* 346.

23 Ibid.

24 Rekart, above n 11, 2128.

III Examples of Current OHS Frameworks and Their Failings

Since legalised and decriminalised sex work is considered 'an occupation or trade involving exchange of sexual services for economic compensation',[25] sex workers possess the right not to suffer harm through carrying out the normal requirements of their work. Whether or not this right can at all be exercised in the context of prostitution, however, is rarely considered.

Consideration of this industry-specific framework of OHS and the practicalities of its application in various jurisdictions, including Victoria, Queensland, New South Wales and New Zealand, reveals that such a framework does not deliver a 'safe' workplace. It is not the intention of the authors to suggest that sex workers should be denied the right to a safe and healthy work environment. On the contrary, if a safe and healthy work environment *cannot be realised* for sex workers, a re-examination of the legal approach toward prostitution is necessary. The value of any OHS framework lies in its capacity to be implemented and enforced. In the case of sex work, failures are evidenced in both legalised and decriminalised jurisdictions.

A *Failures Under a Legalised Model*

Examples of the failure of OHS in legalised jurisdictions are found in Queensland and Victoria. In Queensland, the main focus of the regulatory regime has been the vetting of brothel owners and managers, with little capacity in the system for attention to the important workplace issues encountered by sex workers as licensed brothels have been established.[26] Provision is made for worker complaints to the Queensland Prostitution Licensing Authority (PLA), but there is little evidence that the PLA is able to respond

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25 Alexander, above n 6, 77.

26 Leslie Ann Jeffrey, 'Canadian Sex Work Policy for the 21st Century: Enhancing Rights and Safety, Lessons from Australia' (2009) 31(1) *Canadian Political Science Review* 57, 65.

meaningfully to those complaints.[27] Licensed brothels have been described as 'oppressive work environments' where significant power over brothel workers has been handed to the PLA and to brothel operators.[28]

In Victoria, Quadara notes that it is unclear how OHS protocols are actually implemented and monitored, despite being legally required.[29] Failure of the legalised system in Victoria is attributed in part to the lack of clear regulatory principles and different enforcement roles assigned to different agencies, where each agency has their own resourcing priorities and systems.[30] In a 2010 inquiry conducted by the Victorian Parliament into people trafficking for sex work, a submission was made by Project Respect[31] which highlighted that all women known to the organisation had been trafficked into *legal* brothels and that Victorian court cases to date concerned trafficking into *legal* brothels. The submission concluded that the *Prostitution Control Act (1994)* (Vic) is not meeting a number of its objectives, including:

- to seek to ensure that criminals are not involved in the prostitution industry (s 4(c));
- to maximise the protection of prostitutes from violence and exploitation (s 4(f)); and
- to promote the welfare and occupational health and safety

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27 Ibid.

28 Ibid.

29 Quadara, above n 6, 18–19.

30 Drugs and Crime Prevention Committee, *Inquiry into People Trafficking for Sex Work — Final Report June 2010* (2010) 144.

31 Project Respect is a non-profit, community-based organisation that aims to empower and support women in the sex industry, including women trafficked to Australia. Established in 1998, Project Respect began as a direct service conducting outreach and offering support to women in the sex industry across Victoria. Project Respect continue to be involved in outreach, education, supporting women in alternative employment pathways and advocacy.

of prostitutes (s 4(h)).[32]

Clearly the legalisation of prostitution in Victoria has not seen the improvement in OHS for sex workers that is claimed by advocates of legalisation.

Adding further weight to the findings about the failures of OHS within the Victorian system is a 2009 report published by Consumer Affairs Victoria (CAV). The report notes OHS efforts in Victoria are not supported by the current regulatory and compliance environment that exists in the State.[33] OHS within brothels seems to be informed by very limited compliance inspections rather than by any broadly informed best practice model of operation.[34] The CAV report confirms that WorkSafe Victoria, who manage Victoria's workplace safety system including the Occupational Health and Safety Acts, does not run a compliance and enforcement program specifically in relation to sex work.[35] Given the high risks to both physical and mental health associated with sex work, this omission on the part of WorkSafe Victoria is significant.

Surveys of licensed sexual service providers within the CAV report demonstrated varying levels of knowledge of the relevant regulations, Act and licensing arrangements. Compliance aspects of engaging with regulators and enforcement were clear (such as requiring certificates, panic buttons and the like), however the broader remit of the *Prostitution Control Act (1994)* (Vic) that focused upon harm minimisation, particularly in relation to protecting workers from exploitation, was not so well understood.[36] Licensees reported that lack of enforcement, including a low prosecution rate for illegal activity and few closures of unlicensed operations, lessened pressure for good practice.[37] Both licensees and survey respondents working

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32 Drugs and Crime Prevention Committee, above n 30, 145.

33 Pickering, Maher and Gerard, above n 11, vi.

34 Ibid.

35 Ibid 2.

36 Ibid 39.

37 Ibid vi.

for regulation and enforcement agencies in Victoria confirmed that the focus of enforcement or compliance measures was not firmly on the important issues of illegal activity that compromises worker autonomy and safety.[38]

B *Failures Under a Decriminalised Model*

Sex workers' lobby groups such as Scarlet Alliance argue that decriminalisation, rather than legalisation, enhances health and safety for sex workers. The examples of New South Wales and New Zealand, however, do not support this argument.

Despite prostitution having been decriminalised in New South Wales in 1995, compliance structures and enforcement of OHS principles remains poor. Various suggestions have been put forward to improve compliance, including that WorkCover manage compliance by implementing a system of active staff and performance management and developing a rigorous review and audit system for its compliance function overseen by high-level management, however any suggestions are yet to be implemented.[39] Local governments are also currently not resourced for the role of enforcing OHS.[40] Disinterest from industry operators and management continues to be an obstacle to the implementation of OHS and improvements to health and safety are limited by the 'one hazard approach' that equates OHS with safe sex practices and the prevention of sexually transmitted infections, rather than addressing other wide-ranging health and safety risks involved.[41] A decriminalised sex industry has now been operating in New South Wales for almost two decades without OHS enforcement, despite known risks to health and safety in sex work.

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38 Ibid 52.

39 Donovan et al, above n 8, 7.

40 Christine Harcourt et al, 'The decriminalisation of prostitution is associated with better coverage of health promotion programs for sex workers' (2010) 34(5) *Australian and New Zealand Journal of Public Health* 482, 486.

41 Michelle Toms, 'Health and workplace safety in the NSW sex industry' (2000) 7 *Safety at Work* 4, 5.

New Zealand provides another example of the failed implementation of OHS in sex work. Prior to decriminalisation, sex work was described as an 'invisible occupation' which meant that NZ's Occupational Safety and Health Service was unable to do anything about safety in the industry.[42] Following decriminalisation and the enactment of the *Prostitution Reform Act (2003)* (NZ) ('*PRA*'), the sex industry was required to operate under the same health and safety rules as any other industry operating in New Zealand. The Department of Labour's Occupational Safety and Health department went a step further to develop industry-specific guidelines intended for sex industry owner/operators, the self-employed, employers, managers and workers.[43] These guidelines included information on the roles and responsibilities of these groups under the relevant legislation, the *PRA* and the *Health and Safety in Employment Act 1992 (*NZ) ('*HSE Act*'). These guidelines also outlined requirements for sex worker health, workplace amenities and psychosocial factors such as security and safety from violence, alcohol, drugs, and smoking in the workplace, complaints, employee participation and workplace documents.[44]

Given these deliberate steps taken at a government agency level to address OHS, quite beyond those taken in the other jurisdictions previously mentioned, New Zealand might therefore be expected to demonstrate significant improvement in OHS compliance and workplace health and safety in the sex industry. This, however, is not the case. Research shows that improvement in employment conditions has generally been limited, with those brothels which had treated workers fairly prior to the enactment of the *PRA* continuing to do so,

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42 Hann and Wren, above n 11, 7–8.

43 Abel, Brunton and Fitzgerald, above n 8, 23–4, citing Occupational Safety and Health Service, Department of Labour New Zealand, above n 1.

44 Ibid.

while those with unfair management practices continuing with them.[45] Research indicates that there is a high level of awareness of OHS requirements in the sex industry; however, compliance is difficult to measure as there is currently no system of regular inspections of brothels by Medical Officers of Health and the Department of Labour.[46]

Public health services and Medical Officers of Health have not been resourced to take on their new statutory functions in monitoring the sex industry and almost all public health services have taken a largely reactive approach to implementation of the public health role under the *PRA*.[47] As well as underfunding, proactive monitoring of brothels is also hampered by the *PRA* which precludes the identification of licensed operators and premises.[48] This abject failure to identify brothels stands in contrast to other issues in relation to which Medical Officers of Health have responsibilities. For example under the *Sale of Liquor Act 1989* (NZ) the location of licensed premises and the contact details of owners and operators are readily available.[49] In this sense, despite decriminalisation, sex work can still be described as an 'invisible occupation' in New Zealand.

Confusion between agencies as to responsibility for OHS compliance and enforcement under the *PRA* has also emerged. The Labour Department's Occupational Safety and Health Service ('OSH Service') is responsible for administering legislation relating to the health, safety and welfare at work of all employees and other people

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45 New Zealand Prostitution Law Review Committee, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (2008), 17.

46 Ibid 14.

47 Ibid 53–4; Abel, Brunton and Fitzgerald, above n 8, 151–2.

48 Section 41(1) of the *PRA* restricts access to information held by the Registrar of the Auckland District Court regarding successful applications for brothel certification. Inspectors wishing to go beyond a complaints-based regime must find brothels themselves: Prostitution Law Review Committee, above n 45, 54.

49 Ibid; Abel, Brunton and Fitzgerald, above n 8, 153–4.

affected by work activities more generally, but does not enforce the requirements of the *PRA*.[50] Instead the Ministry of Health is responsible for the inspectorate and health and safety requirements under ss 8 and 9 of the *PRA*.[51] As already mentioned, however, the public health services have not been resourced for this role and are prevented from identifying the brothels they are to inspect. So in summary, the OSH Service is not responsible for administering the industry-specific OHS framework and the Ministry of Health has not been resourced to do so. Therefore, sex workers in New Zealand are expected to and continue to, work in an OHS vacuum.

Since proactive inspection of brothel premises is not possible under the current scheme, Medical Officers of Health have acted reactively, responding to complaints as they have arisen. Complaints have, however, been infrequent and those complaints that have arisen have been about either unsafe sex practices or matters of hygiene, such as the unavailability of washing facilities, dirty sheets or towels.[52] Almost all complainants are anonymous, making it difficult for Medical Officers of Health to take action unless adequate detail has been provided.[53] None of the complaints that were investigated by Medical Officers of Health between 2003 and 2007 resulted in a prosecution.[54] Lack of complaints does not, however, indicate compliance with OHS requirements.[55] Brothel workers indicated that they would be unlikely to report a work related injury to the OSH Service, despite nearly one fifth of survey participants having experienced a work-related injury while doing sex work.[56] Reporting of violent attacks on sex workers to police in New Zealand also remains limited, despite decriminalisation.[57]

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50 Occupational Safety and Health Service, Department of Labour New Zealand, above n 1, 62.

51 Ibid 29.

52 Ibid 154.

53 Prostitution Law Review Committee, above n 45, 55.

54 Abel, Brunton and Fitzgerald, above n 8, 155.

55 Contra Prostitution Law Review Committee, above n 45, 55.

56 Abel, Brunton and Fitzgerald, above n 8, 161–2.

57 Ibid 167.

Additionally, many of the recommendations in sex industry specific OHS literature are unworkable. For example, the NZ Department of Labour's *Guide* states:

> Damage to reproductive health can be caused by factors in the work environment, including the work environment of the sex industry. Any occupational health and safety hazard that damages the fertility of people working in the sex industry must be removed from the workplace.[58]

Rekart notes that STI complications are common in sex workers, including pelvic inflammatory disease and ectopic pregnancy, and these complications have been linked to fertility issues.[59] How this hazard can be 'removed from the workplace' is unclear when such hazards are an unavoidable risk intrinsic to sexual intercourse. The limited value of inspecting clients for visual signs of STIs is highlighted by the statement contained in OHS guidelines that:

> Clients may have a sexually transmissible infection and not be displaying any visible signs of infection. Checking of clients by sex workers should not be seen as a guarantee that the client does not have an STI. Sex workers and clients need to be aware that most STIs are invisible to the naked eye.[60]

It therefore appears that the only way to 'remove' such a hazard from the workplace would be to remove sexual intercourse from sex work.

A further example of an unworkable OHS requirement is found in the NZ Department of Labour's *Guide*, as follows:

> Body fluids such as blood, vomit, urine, faeces, saliva and semen may contain infectious organisms. Special care must be taken in cleaning up spills of these fluids to avoid transmission of viruses such as Hepatitis A, B or C, HIV and others. All employees, not only cleaning staff, should be required to take the following precautions:

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58 Occupational Safety and Health Service, Department of Labour New Zealand, above n 1, 40.

59 Rekart, above n 11, 2124.

60 Occupational Safety and Health Service, Department of Labour New Zealand, above n 1, 85; Edler, above n 7, 41.

- Protective gloves must always be worn when dealing with these body fluids.
- Should any of these fluids come in contact with a person's skin, they should wash the area with warm water and soap.[61]

According to this OHS requirement, a significant proportion of sex work activity would require the wearing of protective gloves, a precaution which is unlikely to be accepted by clients, and implementation is therefore likely to be very low.

While hypothetically, the wearing of protective gloves to prevent viral transmission may seem a reasonable inclusion in sex industry specific OHS requirements, the futility of such a precaution is highlighted by the recommended action to be taken when a condom breaks, slips, is removed or broken by a client or when a sex worker is forced by the client to have sex without a condom. OHS guidelines advise sex workers to stop the service immediately and remove excess semen from the vagina by squatting and squeezing it out using vaginal muscle exertion. It is advised that fingers can be used to scoop out any excess semen that remains, however care must be taken to avoid scratching the lining of the vagina with nails or jewellery. It is advised that excess semen can be removed from the anus by sitting down on the toilet and bearing down, but that fingers should not be used in the anus.[62]

The occupational health and safety requirements considered above illustrate that OHS in sex work does not radically alter the inherent danger to health and safety involved in sex work. What OHS in sex work does do is place an expectation upon sex workers to modify their behaviour to adapt to this dangerous work environment. Sullivan explains it in this way:

> It can be argued that any measure that may minimise or at least decrease the harm of prostitution is beneficial. However … contemporary OHS research and policy is increasingly

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61 Occupational Safety and Health Service, Department of Labour New Zealand, above n 1, 45.

62 Ibid 86; Edler, above n 7, 43.

> developed within a human rights framework. This has meant that OHS standards must reflect the rights of all workers to a safe and healthy work environment based on the assumption that the workplace is not inherently harmful. When it was established that the use of asbestos in buildings lead to asbestosis, authorities recognised that workplaces where asbestos existed could not be made hazard free. As a result its further use was banned. OHS strategies must not expect workers to modify their behaviour so that dangerous work practices can continue. What other categories of workers have to accept STIs as an 'inevitable' rather than an accidental consequence of simply going to work? Defining STIs as an occupational health hazard does nothing to ameliorate the physical and psychological harm they cause to prostituted women.[63]

Sex work stands alone when compared to all other forms of employment in the risks to which its workers are exposed and the level of responsibility for which those workers are expected to bear for their own personal safety. Given this level of risk and the obvious unworkability of OHS measures in sex work, it appears counter-intuitive to the authors that governments have chosen to legislate, decriminalise and subsequently regulate this industry without considering this issue more comprehensively.

The response to these examples of failure in various jurisdictions might be that OHS could be 'done better' to improve health and safety for sex workers, and that what these jurisdictions evidence is not the failure of OHS in sex work but the failure of governments, agencies and operators in enforcing and implementing OHS. The authors of this paper argue, however, that OHS in sex work is unable to meaningfully improve working conditions for sex workers given the risks to safety and physical and mental health inherent to sex work. No jurisdiction can evidence significant improvement in health and safety through the introduction of an OHS framework and arguably 'full health and safety benefits' cannot be realised for sex workers. This is not solely evidence of government or management failure, but of the failure of OHS to translate into a 'safe' workplace in the sex industry, no matter how enthusiastically supported.

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63 Mary Lucille Sullivan, *Making Sex Work* (2007) 278.

IV The Inherent Risks of Prostitution

A *The Occupational Hierarchy*

When considering the efficacy of OHS frameworks in sex work it is important to recognise that the sex industry is made up of various sectors that sit within what some researchers have described as an 'occupational hierarchy'.[64] The ability of OHS to operate within the sex industry decreases the further down the hierarchy a sector is found. Much of the literature on the topic of sex work identifies legal indoor sex work, particularly in brothels, as being the safest option for sex workers,[65] with street work considered the least safe for workers.[66] This demonstrates that the preceding discussion of failures

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64 Jacqueline Lewis et al, 'Managing risk and safety on the job: The experiences of Canadian sex workers' (2005) 17(1/2) *Journal of Psychology and Human Sexuality, Special Issue* 147; Contra Woodward et al who state that 'In reality, there are two sex industries, and workers in only one are currently being protected': Woodward et al, above n 9, 14. There the authors are referring to legal indoor sex work ('safer' sex work) and street work (the riskiest sex work), however in practice there are many sectors ranging from legal/regulated indoor brothel work, legal/regulated private indoor work, escort services, illegal/unregulated brothel work, illegal/ unregulated private indoor work and street or outdoor sex work.

65 Jeffrey, above n 26, 64–5, citing Woodward et al, above n 9; Roberta Perkins, *Working Girls. Prostitutes, Their Life and Social Control* (Australian Institute of Criminology, 1991); Barbara G Brents and Kathryn Hausbeck, 'Violence and Legalised Brothel Prostitution in Nevada' (2005) 20(3) *Journal of Interpersonal Violence*, 270; Woodward et al, above n 9, 8, 14, 55, 57; Queensland, Crime and Misconduct Commission, *Regulating Prostitution: A Follow-Up Review of the Prostitution Act 1999* (2011), 44; Pickering, Maher and Gerard, above n 11, 3, citing Priscilla Pyett and Deborah Warr, 'Women at Risk in Sex Work: Strategies for Survival' (1999) 35(2) *Journal of Sociology* 183; J Groves et al, 'Sex Workers Working Within a Legalised Industry: Their Side of the Story' (2008) 84 *Sexually Transmitted Infections* 393.

66 Crime and Misconduct Commission, above n 65, 43; Woodward et al, above n 9, 55; Prostitution Law Review Committee, above n 45, 16.

in various jurisdictions relates to the ability (or inability) of OHS frameworks to be implemented within a limited sector — that of indoor legal or regulated prostitution — while the remaining sectors, including illegal or unregulated prostitution and outdoor sex work, fall entirely outside current OHS frameworks, in part perhaps because of a lack of focus by regulators on these sectors. Limited implementation of OHS principles is only possible in those sectors found at the top of the hierarchy, while the majority of sex workers continue to operate in sectors where OHS is not able to be formally implemented or enforced at all.

Putting aside, for the moment, any consideration of mental health, sex workers in legal indoor brothels are considered much less vulnerable to violence and sexual assault because of the presence of other staff, the increased possibilities for screening clients and the provision of alarms, adequate lighting and personal protective equipment.[67] The situation is very different, for example, for escort workers. Escort work is potentially more hazardous for the sex worker than other forms of indoor prostitution because the sex worker operates alone in a space that is controlled by the client.[68] Limited provision is made in the OHS literature relating to escort work for harm minimisation,[69] leaving the worker otherwise completely responsible for their own safety.

Other OHS provisions are entirely unworkable, for example, the provisions made for escort worker safety in *A Guide to Occupational Health and Safety in the New Zealand Sex Industry* introduced by the Department of Labour in New Zealand. That document provides that a 'principal' to a contract (in terms of the *HSE Act*) may also include a client who engages sex workers to provide services in a place other than a brothel, such as in a hotel room, vehicle or home.[70] A client of an escort worker may therefore be under a duty, under s 18 of the

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67 Jeffrey, above n 26, 65.

68 Donovan et al, above n 8, 20; Quadara, above n 6, 13.

69 Donovan et al, above n 8, 20; Edler, above n 7, 47–8.

70 Occupational Safety and Health Service, Department of Labour New Zealand, above n 1, 26.

HSE Act, to take all practicable steps to ensure that the sex worker is not harmed while carrying out their work, in addition to the 'safer sex' requirement of s 9 of the *PRA* and other protections under the criminal law.[71] How such duties are enforceable against a client is unclear. The *PRA* also provides that Medical Officers of Health have the power to enter and inspect any place where commercial sex services are being offered, to check that the *HSE Act* is being complied with.[72] *A Guide to Occupational Health and Safety in the New Zealand Sex Industry* provides that a home may be a 'place of work'.[73] Again, a provision for the inspection of a private home is unworkable and provides no real protection for the sex worker.

While proponents of legalisation and decriminalisation herald the introduction of OHS as an improvement for sex workers and the conditions they work in, this argument fails to acknowledge that a significant proportion of sex workers in any jurisdiction continue to work outside legislative or regulatory bounds and therefore outside any OHS framework. As such, research claiming the success of OHS in legalised and decriminalised jurisdictions is silent on the experiences of these sex workers.[74] The conditions under which sex

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71 Ibid.

72 Prostitution Law Review Committee, above n 45, 53.

73 Occupational Safety and Health Service, Department of Labour New Zealand, above n 1, 24.

74 For example, Harcourt et al acknowledged that their research was limited to urban female brothel-based sex workers and that data from unlicensed Melbourne brothels was restricted by the small number that they were able to access. Findings were therefore considered biased toward the licensed 'upper end' of the market: Harcourt et al, above n 40, 485. Woodward et al also admitted that their sample of women interviewed was largely made up of women from legal brothels and that very little contact was made with women from illegal brothels: Woodward et al, above n 9, 12. Casey and Philips acknowledge that persons working for abusive or controlling third parties are less likely to participate in research: Casey and Philips, above n 3, 22.
Quadara argues that there is not enough differentiation between sectors in research on prostitution and that too little is known about the experiences of violence in legal brothels, illegal brothels, escort work

workers operating outside legislative and regulatory frameworks are working is of concern. Illegal and unregulated industries continue to present a threat to workers because of the hidden nature of their operations, the barriers to sex workers disclosing assault and other hazards because of the sector they are involved in, and the fact that operators do not need to comply with any regulations for sex workers' safety.[75]

Illegal and unregulated sectors are found in both legalised and decriminalised sectors and represent a significant threat to worker health and safety, as the jurisdictions of Victoria and New South Wales illustrate. In Victoria, unlicensed brothels involving temporary facilities, a high rotation of workers between premises and the compromising of worker autonomy and safety are reported.[76] In particular, the health, employment and advertising restrictions imposed by legalisation has been said to force many operators and workers into the illegal sector.[77] Unlicensed brothels in Victoria represent a significant proportion of the sex industry and remain almost invisible and inaccessible for health promotion and support services.[78] Various reports identify a high level of interdependence between licensed and unlicensed sexual service providers and mobility of sex workers between sectors.[79] It is reported that within unlicensed brothels unsafe sex practices are more likely to be available.[80] Larger scale, loosely networked operations are seen as a significant threat to the licensed

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and private work in comparison to street-based work: Quadara, above n 6, 31. Arguably the illegal and unregulated brothel industry, being less visible than street work, would be the most difficult to engage in research, given the fact that these brothels operate outside legislative bounds.

75 Quadara, above n 6, 14.

76 Pickering, Maher and Gerard, above n 11, 12.

77 Peter Richardson, 'The Victorian brothel owners' perspective' (2000) 7 *Safety at Work* 12, 19, 20.

78 Harcourt et al, above n 40, 485–6.

79 Pickering, Maher and Gerard, above n 11, 42; Drugs and Crime Prevention Committee, above n 30, 133.

80 Pickering, Maher and Gerard, above n 11, 12, 19, 20.

industry by licensees, since worker safety is often perceived to be compromised, wages are lower and turnover is higher.[81] Licensees of legal brothels in Victoria report that these operations are not structured to promote worker autonomy or the ability to deliver effective worker safety yet may in fact be favoured by clients.[82]

Advocates of a decriminalised system criticise these legalised jurisdictions and proponents in New South Wales argue that the introduction of a legalised system naturally creates an illegal system where sex worker health and safety is compromised. In New South Wales, however, the decriminalisation of sex work has also seen the introduction of a system of regulation, where brothels must gain development approval from the local government. Due to difficulties in gaining development approval from local councils, many Sydney brothels operate without approval, masquerading as massage parlours, with poor occupational health and safety standards.[83] A significant proportion of the NSW sex industry comprises brothels operating without planning approval and private premises involving one to three women working independently. While these are legally defined as brothels they rarely seek council planning approval.[84] Despite decriminalisation, a large unregulated sector still exists in New South Wales where little is known about OHS conditions.

The introduction of legalisation or decriminalisation of sex work and the attendant introduction of OHS frameworks does not automatically mean that workers will move from the unsafe sectors into the safe(r) sectors. The New Zealand Prostitution Law Reform Committee considered that the purpose of the *Prostitution Reform Act (2003)* (NZ) could not be fully realised in the street-based sector and therefore considered that the street-based workers should be encouraged to either move to a safer, indoor setting, or leave sex work altogether.[85] In a similar vein, when the licensing of brothels was

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81 Ibid 40.

82 Ibid 40, 41.

83 Donovan et al, above n 8, vi.

84 Ibid 31.

85 Prostitution Law Review Committee, above n 45, 16.

first proposed by the Victorian government, it was argued that the availability of legal indoor work would encourage women to leave the street and illegal establishments.[86] The expectation of movement from unsafe to safe sectors is, however, not realistic. In the case of Victoria, licensed brothels only offer a small amount of employment in the sex industry.[87] Sanders and Campbell write:

> the growing recognition that indoor work (if well managed) is safer than street work often leads to calls for legalisation of indoor sex work with an assumption that women on the street will be directed to working indoors. This assumption misunderstands the dynamics of street sex work including the advantages it has for some people (eg, the lack of time and routine restrictions).[88]

Despite the introduction of OHS frameworks within higher tiered sectors, sex workers continue to operate in higher risk sectors further down the occupational hierarchy.

Mobility within and across venues is reported to be high in the sex industry.[89] The industry does not have a recognisable 'career ladder', with workers beginning in street work and then moving into 'safer' indoor sex work. Rather, sex workers may work in a variety of sectors at the same point in time or move from one sector to another.[90] Movement between licensed and unlicensed premises and into and out

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86 Jeffrey, above n 26, 66.

87 Ibid.

88 Teela Sanders and Rosie Campbell, 'Designing out vulnerability, building in respect: Violence, safety and sex work policy' (2007) 58(1) *The British Journal of Sociology* 1, 14, quoted in Quadara, above n 6, 13.

89 Casey and Philips, above n 3, 20, citing Cecilia Benoit and Alison Millar, Submission to the BC Health Research Foundation, *Dispelling Myths and Understanding Realities: Working Conditions, Health Status and Exiting Experiences of Sex Workers,* (2001).

90 Cecilia Benoit and Alison Millar, *Short Report: Dispelling Myths and Understanding Realities: Working Conditions, Health Status and Exiting Experiences of Sex Workers* (2001), 7 <http://www.peers.bc.ca/education.html>.

of private and/or escort work is not uncommon.[91] Notably, when faced with economic needs, the shift between occupations is most often from work in sectors further up the hierarchy to those lower down, which also means moving from 'safer' to more dangerous work.[92] Therefore pointing to the introduction of OHS frameworks in sectors at the top of the sex work hierarchy as an advance in sex work health and safety is misrepresentative, not only because the majority of sex workers operate outside those upper tiered sectors, but also because most sex workers do not work exclusively in one 'safe' sector but are exposed to various levels of health and safety risk depending upon factors such as economic necessity.

B *Violence in Prostitution*

While the transmission of sexual diseases is considered an important safety concern for sex workers (and their clients), the physical, verbal, sexual and emotional violence experienced by sex workers also presents a significant health and safety issue.[93] Violence in sex work represents what might be considered to be the most serious threat to the physical and mental health of sex workers and may include physical, verbal and sexual abuse; gang rape; traumatic intercourse; emotional trauma; robbery; confinement and murder.[94] The following section examines the causes of violence in sex work and how OHS frameworks inevitably fail to address that violence. Examples of OHS recommendations to avoid violence in and of themselves provide evidence that sex work is like no other profession. Even in the higher tiered sectors, where OHS frameworks are said to have been introduced and implemented, violence is experienced by sex workers at rates significantly higher than in any other profession.

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91 Pickering, Maher and Gerard, above n 11, 9.

92 Lewis et al, above n 64, 155.

93 Hann and Wren, above n 11, 8, citing Alexander, above n 6.

94 Rekart, above n 11, 2124.

Proponents of decriminalisation argue that violence in sex work is encouraged by criminalisation and the illegal status of sex work.[95] Sex workers are said to be forced to work from hidden locations where they have little control over their personal safety. The degree of choice available to sex workers over workplace preferences and working conditions is also said to be minimised.[96]

However, despite legalisation and decriminalisation in some jurisdictions, violence against sex workers continues to occur. Prostitution itself is an inherently high risk activity since most commercial sex contacts are between strangers and therefore contain a large element of unpredictability.[97] The process of identifying and 'training' new clients always carries some risk of violence because of interpersonal struggles over who, ultimately, controls the prostitution transaction.[98] Whittaker and Hart note that male client violence seems to occur as a result of conflicting notions about the exchange. That is, because a payment has been made, some clients believe that this entitles them to control over the sex worker's body and entitlement to services not paid for, to services that the sex worker is not willing to engage in, or to be as rough as they like.[99] Therefore the power

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95 Abel et al, above n 8, 133, citing Priscilla Alexander, 'Health care for sex workers should go beyond STD care' (1999) 2 *Research for Sex Work* 1; Hilary Kinnell, 'Murder made easy: The final solution to prostitution?' in Rosie Campbell and Maggie O'Neill (eds), *Sex work now*, (Willan Publishing, 2006).

96 Benoit and Millar, above n 90, 8–9; Gamble & Mawulisa, above n 4, 6–7, citing Fahy, above n 4, 6, 72.

97 Marina A Barnard, 'Violence and vulnerability: conditions of work for streetworking prostitutes' (1993) 15(5) *Sociology of Health & Illness* 683, 700.

98 Alexander, above n 6, 78.

99 Dawn Whittaker and Graham Hart, 'Research note: Managing the risks: the social organisation of indoor sex work' (1996) 18(3) *Sociology of Health & Illness,* 399 cited in Quadara, above n 6, 11; Martin Monto, 'Female prostitution, customers, and violence' (2004) 10(2) *Violence Against Women* 160, cited in Quadara, above n 6; Maggie O'Neill, *Prostitution and feminism: Towards a politics of feeling* (Cambridge, 2001); Resourcing Health and Education *Power*

relationship between the client and worker is considered a crucial factor in the safety of commercial sex encounters.[100]

Recognition that sex work is a type of labour is said to facilitate law reform objectives and lend a focus to human rights, occupational health and safety, and working conditions.[101] The institutional, legal and occupational organisation of sex work is also said to have a significant impact on shaping the safety or unsafety of commercial sex encounters.[102] This position was not supported in a survey of sex workers in New Zealand following the decriminalisation of sex work and introduction of an OHS framework, where the majority interviewed felt that the legislation could do little about violence that occurred in sex work.[103] In another survey, similarly relating to the effectiveness of the new legislation, a majority of NGOs, brothel operators and community groups also agreed that the legislation could do little about the violence that occurred, with one brothel operator quoted as saying that '[c]lients getting stroppy will always happen. This was the case before the Act and after it' and a health worker acknowledged that '[t]here has been no impact. There will always be ugly mugs.'[104] A cross-jurisdictional survey conducted by the authors of the NSW Kirby Report found that 8% of the survey participants reported being assaulted by clients, 10% had been threatened by clients and 33% reported being pressured by a client to do something

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(2002) Sex Worker, <http://www.sexworker.org.au/uploads/documents/RHED_ power.pdf>; Barnard, above n 97, 695.

100 Libby Plumridge and Gillian Abel, 'A "segmented' industry in New Zealand: Sexual and personal safety of female sex workers' (2001) 25(1) *Australian and New Zealand Journal of Public Health* 78, 78, cited in Quadara, above n 6, 33.

101 Banach and Metzenrath, above n 2, 4, citing Linda Banach, 'Sex workers and the official neglect of occupational health and safety' (1999) 18(3) *Social Alternatives* 17; Sue Metzenrath 'Prostitution law reform: Towards a human rights based Model' (1997) *Prostitution Law Reform in Queensland: Forum.*

102 Quadara, above n 6, 33.

103 Prostitution Law Review Committee, above n 45, 14.

104 Ibid 57.

they did not want to do. *These results did not vary significantly between a decriminalised jurisdiction, a legalised jurisdiction and a criminalised jurisdiction*.[105] This shows that the legal status of sex work does not impact as greatly upon violence in sex work as some would suggest. Violence in sex work is clearly a risk in all legal settings. The question then arises: how great is this risk?

1 *Rates of Violence Not Comparable With Any Other Industry*

While there is a potential for violence in any workplace, it is more likely in the retail and service industries where service providers come into direct contact with clients.[106] Quadara also notes that women who work alone, attend to the needs of others, or deal with difficult people are more likely to experience violence in their workplace.[107] She explains that it is possible that the sexual assault of sex workers is part of a continuum for women fulfilling the expectations of others and who are in close physical proximity to their clients.[108]

But what distinguishes sex work is the rate at which that violence occurs. For example, while the indoor sex work sector may be considered less violent than other sectors within this industry,[109]

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105 Donovan et al, above n 8, 26.

106 Woodward et al, above n 9, 21.

107 Quadara, above n 6, 12.

108 Ibid.

109 For example, Donovan et al compare reports of violence among brothel and private workers at 5% to 10% against street worker reports of upward of 50% having experienced violence at work: Donovan et al, above n 8, 13 citing Roberta Perkins and Francis Lovejoy, *Call Girl* (University of Western Australia Press, 2007); Frances Boyle et al, 'Psychological distress among female sex workers' (1997) 21(6) *Australian New Zealand Journal of Public Health* 643; Christine Harcourt et al, 'The health and welfare needs of female and transgender, street sex workers in New South Wales' (2001) 25 *Australia and New Zealand Journal of Public Health* 84; Amanda Roxburgh, Louisa Degenhardt and Jan Copeland, 'Posttraumatic stress disorder among female street-based sex workers in the greater Sydney area, Australia' (2006) 6(24) *BioMed Central Psychiatry* 12; Charlotte

a comparison of sexual assault rates with women in employment other than sex work shows that the rate of sexual assault of sex workers in this 'safer' sector is still *significantly higher* than in other occupations in which women are employed. Quadara cites a number of statistics relating to the forms of violence experienced by women in occupations other than sex work and notes that 0.2% had been sexually assaulted at work.[110] When this figure is compared with conservative sexual assault rates in indoor prostitution the results are significant:

- 3% of all brothel workers surveyed in Woodward et al (2004) reported having been raped — this figure is 15 times the 0.2% of women who have been sexually assaulted in employment outside of sex work;
- 13.4% of private workers surveyed in Woodward et al (2004) reported having been raped — this figure is 67 times the rate of sexual assault experienced by women in employment generally.

Relative to other sectors, Woodward et al argue that the main perceived benefits of working in a legal brothel are related to improved safety and security, confirmed by data showing the low rates of violence experienced by this group when compared with other sectors.[111] However, the above comparison evidences that sex

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Seib, Jane Fischer and Jackob Najman, 'The health of female sex workers from three industry sectors in Queensland, Australia' (2008) *Social Science and Medicine*. Donovan et al state that in respect to violence experienced in the workplace 'brothel workers appear to be much better off … than street-based sex workers': Donovan et al, above n 8, 26. Quadara also confirms that available comparative research indicates that street-based workers are the most vulnerable to all forms of workplace violence, including sexual assault: Quadara, above n 6, 8.

110 Quadara, above n 6, 12, Department of Victorian Communities, *Safe at work? Women's experience of violence in the workplace: Summary report of research* (2005) <http://www.wholewoman.org.au/resources/SafeatWorkPDF.pdf>.

111 Woodward et al, above n 9, 55.

workers employed in 'safer' legal brothels are at significantly higher risk when compared to rates of sexual violence in other employment contexts.

Research also shows that *attempted* rape is more common in indoor brothel work than the offence of rape itself and therefore a conclusion is drawn that the indoor brothel sector is the 'safer' workplace. Church et al found that women working outdoors experienced more violence overall from clients, while indoor workers cited more incidents of attempted rape, which Quadara suggests may mean that the elements of indoor work prevents sexual assault or at the very least interrupts it.[112]

In their survey of Queensland sex workers employed in legal brothels, Woodward et al also note that while 3.0% of brothel workers reported having been raped by a client more than once, 10.9% of brothel workers reported attempted rape (defined in the survey as 'Man attempted sexual intercourse when you didn't want him to by using force but intercourse did not occur').[113] However, attempted rape remains a criminal offence and still presents a significant risk to worker health and safety. The positive fact that rape is avoided because of the introduction of OHS recommendations such as alarms/security/setting does not diminish the significance of attempted rape for the sex worker. The experience of attempted rape carries with it its own consequences to mental health.

2 *Responses to Violence in OHS Frameworks*

Calls have been made for the potential for threats and assaults by clients to be addressed in the management plans of brothels and in the provision of OHS education and information to owners, managers and

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112 Stephanie Church et al, 'Violence by clients towards female prostitutes in different work settings: Questionnaire survey' (2001) 322 *British Medical Journal* 524, cited in Quadara, above n 6, 10.

113 Woodward et al, above n 9, 47.

workers in the sex industry.[114] A Queensland Prostitution Licensing Authority report, after noting the consistently high rate of violence against sex workers, called for an urgent examination of the specific work practices that are associated with increased and decreased rates of violence.[115] In response, an attempt has been made within OHS frameworks to address the high risk of violence inherent in sex work.

OHS guidelines hold employers, owners or managers responsible for eliminating potentially abusive situations, violence or intimidation from their workplace whatever the source.[116] These guidelines recommend employers carry out this responsibility by (amongst other things):

- identifying tasks or circumstances where employees may possibly be exposed to some form of abuse or violence;
- providing communication skills training as part of employee induction;
- organising training for employees on how to identify potentially dangerous situations and how to protect themselves;
- installing safety devices such as accessible alarm buttons in all rooms; and
- acknowledging that employees have the right to refuse particular clients on the basis of prior violent, abusive or threatening behaviour by that client.[117]

However the effectiveness of an OHS framework in addressing violence in sex work is impacted by a number of factors including:

- sex worker unwillingness to report violent incidents to enforcement and health agencies;
- the difficulty in distinguishing between sexual assault or simply whether a client has 'gone too far'; and
- the role of management and operators in accepting,

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114 Donovan et al, above n 8, 26.

115 Woodward et al, above n 9, 21.

116 Edler, above n 7, 25.

117 Ibid 25–6; Rekart, above n 11, 2128.

excusing, condoning and perpetrating sexual assault against workers.

Each of these issues is dealt with in turn below in assessing the ability of OHS frameworks to make any meaningful progress in creating a safe working environment for sex workers.

A *Reporting of Violent Incidents*

Despite the introduction of OHS frameworks together with reporting and investigation structures in some jurisdictions, reporting of violent incidents remains low, contributing to the inefficacy of OHS frameworks in sex work. An example of this is found in New Zealand where decriminalisation legislation provides that employers, the self-employed and principals have a duty to record accidents and must notify the Department of Labour's Occupational Safety and Health Service of occurrences of harm.[118] The purpose of the notification is so that the Occupational Safety and Health (OSH) Service can determine whether or not to investigate the harm and so that they can authorise the release of the accident scene.[119]

The Accident Compensation Scheme ('ACC') applies to all workers in New Zealand, including sex workers, and provides cover for injuries suffered at work including physical and some mental injuries. This may extend to sexually transmitted infection or infestation if the tests set out, in the *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) ('*IPRC Act*') for workplace injury caused by work-related gradual process, disease or infection injury, are met. The ACC can also cover claims under the *IPRC Act* for mental or physical injury arising out of sexual abuse.[120]

Despite provision for these reporting and compensation structures, reporting of incidents and the making of complaints and claims for

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118 *HSE Act* (NZ) s 25(2), (3); Occupational Safety and Health Service, Department of Labour New Zealand, above n 1, 67.

119 Occupational Safety and Health Service, Department of Labour New Zealand, above n 1, 68.

120 Ibid 96–7.

compensation in the NZ sex industry remain extremely low. In a survey of sex workers in New Zealand, nearly one fifth (18.1%) of survey participants had experienced a work-related injury, with most injuries sustained through violent altercations with clients, or clients who had been too rough, causing vaginal or anal trauma.[121] Half of the participants who indicated that they had experienced a work related injury had reported this to someone, with managed workers the most likely (64.3%) to report an injury.[122] Three quarters of the managed workers said that they would report a work related injury to the owner, manager or receptionist at their work.[123] However, these notifications to employers and management are not translating into reports of harm to OSH Service, despite the duty to do so provided under the *Health and Safety in Employment Act 1992* (NZ).

Workplace incidents are not converting into compensation claims for sex workers, for either criminal injuries compensation or workplace accident compensation. Despite a willingness to report incidents to managers or receptionists, very few sex workers surveyed reported that they would approach the OSH Service for help.[124] Reporting of violent attacks on sex workers to the police also continues to be limited, despite decriminalisation.[125] Decriminalisation of the sex industry was intended to make it more likely that sex workers would report violent behaviour by clients to the police, increasing their safety as clients realised that they could no longer 'get away with it'. However, the problems that deter sex workers from reporting violent incidents still exist in New Zealand.[126]

Quadara notes that a principal reason why sex workers do not disclose sexual assault to police and other agencies is because of a rhetoric that accepts violence as part of the job.[127] She states that this rhetoric can

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121 Abel, Brunton and Fitzgerald, above n 8, 161.
122 Ibid.
123 Ibid 161–2.
124 Ibid.
125 Ibid 135.
126 Ibid; Prostitution Law Review Committee, above n 45, 58.
127 Quadara, above n 6, 22.

be expressed by police and other agencies in the criminal justice system, and in some instances by sex workers themselves who have taken on this dominant discourse.[128] Arguably the acceptance of violence as part of the job exists within the very principle of 'harm minimisation' central to OHS frameworks in sex work. For example, the NZ Department of Labour's *Guide to Occupational Health and Safety in the New Zealand Sex Industry* states the following:

> Employers, owners or operators are responsible under the HSE Act for managing hazards in the workplace, including violence. Their object should be to eliminate potentially abusive situations, violence or intimidation from the workplace, whatever the source. Where a hazard cannot be eliminated, it should be isolated; and if it cannot be isolated, it should be minimised.[129]

Abuse, violence and intimidation should not exist in any workplace. And yet, in sex work every interaction with a client carries with it the risk of harm and it is suggested that the best that can be done is to minimise how much of this harm occurs. In some sense then harm minimisation also contributes, unintentionally, to the discourse that violence is an unavoidable part of sex work.

Take, for example, this excerpt also from the Guide to Occupational Health and Safety in the NZ Sex Industry:

> Unfortunately, incidents occur where workers are forced by clients to have sex without a condom against their will (ie, rape). Sex without a condom can result where the client removes or breaks the condom during the service without the worker's knowledge.[130]

Rape is identified as, 'unfortunately', a part of the job. The *Guide* then refers readers to Fact Sheet 3 which provides information on action to be taken in the event of condom breakage or slippage in order to minimise the risk of STI and pregnancy. Even within industry-specific OHS literature, violence is identified as an inevitable part of sex work, undermining the core principle of OHS

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128 Ibid.

129 Occupational Safety and Health Service, Department of Labour New Zealand, above n 1, 52.

130 Ibid 37.

itself, that is, that all workers, no matter what industry they work in, have the right not to suffer harm through carrying out the normal requirements of their work.

B *Naming Sexual Violence*

Another challenge for the implementation of OHS frameworks in sex work is the identification of sexual violence as an occupational hazard, since it is difficult to distinguish between sexual violence and what may generally be expected to occur in a commercial sexual transaction. This difficulty in naming sexual violence has been addressed within OHS literature produced by sex worker organisations. For example, in *9 Lives: Surviving Sex Assault in the Sex Industry*, produced by the NSW Sex Workers Outreach Project (SWOP), the author writes 'Learning to recognise violence is the first step we can take in protecting ourselves'.[131] And yet further in the document it is acknowledged that 'it can sometimes be difficult to immediately tell the difference between when a client has "gone too far" and when a sexual assault has occurred'.[132]

The difficulty in identifying harm such as rape in sex work is also acknowledged in other research. In discussing the rape of sex workers by clients, Barnard notes that the potential always exists and cites the example that a client could refuse to pay and then try to force the worker into providing sex. She goes on to state that not all women would define such situations as rape.[133] For example, a sex worker surveyed in Barnard's research did not identify a client's refusal to pay and still expect sex to occur as rape. Further an incident she did define as rape involved a violent attack and the sense of being physically overpowered and not in control.[134] Barnard notes that research on rape victims has consistently shown a tendency for women to blame

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131 Madeleine Bridgett, *9 Lives: Surviving Sexual Assault in the Sex Industry*, Darlinghurst (Sex Workers Outreach Project, 1997) 2, quoted in Sullivan, above n 63, 319.

132 Ibid 5, quoted in Sullivan, above n 63, 320.

133 Barnard, above n 97, 696.

134 Ibid.

themselves for being raped and that this is no less likely to be the case among female prostitutes, particularly given the importance that is attached to the worker being in control.[135]

In a survey of sex workers in Queensland, Woodward et al report that 3.0% of legal brothel workers had been raped more than once by a client. This data was collected in a table entitled 'Number of respondents reporting ever having been raped or bashed by a client by current type of work'.[136] In a separate table entitled 'Unwanted sexual experiences during sex work by current sex industry sector', 5.0% of legal brothel workers identified themselves as having experienced 'Sexual intercourse when you didn't want to because you were overwhelmed by continual argument and pressure', 1.0% of legal brothel workers identified themselves as having experienced 'Sexual intercourse when you didn't want to because someone used their position of authority' and 4.0% of workers identified themselves as having experienced 'Sexual intercourse when you didn't want to because someone used force'.[137] Like Barnard's research, this demonstrates how sex workers are more likely to identify their experiences as 'unwanted sexual intercourse' than 'rape'.

Quadara argues that the naming of experiences as sexual assault or sexual abuse is significantly affected by the social support available and depends on how disclosure is received and responded to.[138] Efforts to identify and name sexual abuse in sex work is also hampered, however, by attitudes held by the sex industry as well as those organisations seeking to promote OHS and improve the health and safety of workers. In particular, OHS frameworks are hampered where workplace violence is indistinguishable from what is considered a common workplace experience.

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135 Ibid 697.

136 Woodward et al, above n 9, 47.

137 Ibid.

138 Quadara, above n 6, 20, citing Denise Lievore, *No longer silent: A study of women's help-seeking decisions and service responses to sexual assault* (Australian Institute of Criminology, 2005) 11.

C *The Role of Management and Operators*

Without the strength to enforce OHS requirements against employers, operators and managers, 'sex worker safety ends up depending on the benevolence of the manager rather than any consistent framework'.[139] Quadara notes that OHS principles are not consistently applied across the sex industry and that it is unclear how protocols are actually implemented and monitored. Using the example of Victoria, Quadara highlights that workers are still entering into highly problematic 'contracts' or agreements with management about the extent of their duties, to the point that they have little room to refuse a client.[140] This is occurring despite the fact that, as a legal industry, the sex industry is subject to occupational health and safety requirements. Sullivan reports that owners of licensed brothels in Victoria deny any employer-employee relationship and claim no obligation to implement OHS improvements for their workers' safety and most operators do not have workers' compensation coverage.[141] Quadara also confirms that denial exists among owners and operators that they have any OHS obligations to their staff.[142]

Consumer Affairs Victoria has also confirmed that workers in the licensed environment may still face coercion by employers which has the potential to compromise worker safety and the ability for the worker to regulate their own work.[143] For example, it is reported that some workers in licensed brothels are unable to insist on condom use.[144] In contrast to the claims made by owners and operators that sex workers are independent contractors not employees, it was noted in the 2009 Consumer Affairs Victoria report that '[w]orkers often described work conditions in this research, such as the obligation to work a full shift or to provide certain types of services, which indicate

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139 Quadara, above n 6, 19.
140 Ibid 18–19.
141 Sullivan, above n 63, 272.
142 Quadara, above n 6, 19.
143 Pickering, Maher and Gerard, above n 11, 3.
144 Ibid, citing Pyett and Warr, above n 65.

that these workers are treated as employees and not as independent contractors'.[145]

In New South Wales a needs assessment was conducted to measure the effectiveness of the WorkCover NSW and NSW Department of Health 1997 joint publication *Health and Safety Guidelines for Brothels in NSW*. This needs assessment found that sex industry owners and managers also considered their workers to be 'sub-contractors' rather than 'employees', as the above case in Victoria highlights, despite evidence to the contrary.[146] Additionally, sex workers identified disinterest from managers and owners as the most common obstacle to implementing health and safety in the workplace.[147] Clearly, improved health and safety standards are impossible to achieve under OHS frameworks where implementation and breaches cannot be enforced against operators and managers.

V Evidence of the Failure of OHS in Prostitution

That sex work is unlike any other form of employment is evidenced in the OHS guidelines adopted in jurisdictions where sex work is accepted as a legal industry. One of the personal strategies said to be employed by sex workers to minimise the risk of sexual assault and other assaults from occurring is 'always being aware of potential for violence'.[148] However, no further detail on what to do should that violence occur is provided. Well-kept floors in brothels are also recommended, for example, 'no bits of floorboard sticking up or fraying carpet that could hinder a worker escaping a violent encounter'.[149] Safety tips include 'Wear shoes that you can run in' and 'Avoid scarves, necklaces and bags that can be used to hold or choke you'.[150] That *any* of these risk reduction strategies are considered normal safety procedures for women in sex work exposes how this

145 Pickering, Maher and Gerard, above n 11, 21.
146 Toms, above n 41, 5.
147 Ibid.
148 Quadara, above n 6, 28–9.
149 Ibid 18.
150 Rekart, above n 11, 2127.

work environment is an inherently unsafe and high risk work environment that cannot be compared to other workplaces.[151]

Barnard argues that given the links between gender and power and its manifestation in violence, violence in the context of commercial sexual encounters may well have features in common with other kinds of violence against women.[152] She states that it is worthwhile pointing out that the potential for violence is not unique to the commercial sexual encounter, and in this she is correct. Where the similarity ends is in how the state addresses these forms of violence. Violence against women outside of sex work is identified as such, is not tolerated and is criminally sanctioned.

Domestic violence, sexual assault, sexual harassment and rape are not accepted by society in any public environment, although of course incidents do still occur. And yet, in sex work, despite the known and unacceptable risk of violence, the state fails to focus on its elimination. Instead OHS frameworks are introduced as a means of 'harm minimisation', with the understanding and acceptance that some harm will inevitably occur. This is contrary to other work environments where the starting principle when implementing OHS standards surrounds the elimination of the risk, not the minimisation.

In some cases the inevitability of harm occurring appears to have been ignored entirely, or in the very least inadequately considered. Despite Queensland Prostitution Licensing Authority data that up to 5.0% of sex workers in legal brothels are pressured or coerced by clients to provide 'unwanted sexual intercourse' (or what is better described as rape), that 3.0% of workers reported that they had been raped more than once by a client, and that sex workers are at least 15 times more likely to experience sexual assault in a legal brothel than in any other employment setting, the Queensland Crime and Misconduct Commission found that licensed brothels 'provide a healthy environment in which prostitution takes place' and 'provide a

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151 Sullivan, above n 63, 22.

152 Barnard, above n 97, 684.

safe workplace'.[153] They conclude, 'We are satisfied that the licensed brothel industry continues to provide the safest working environment for sex workers in Queensland'.[154] The 'safest', possibly, when compared with other sectors such as street work. But that the licensed brothel industry should be considered a 'safe workplace' is entirely unwarranted.

Of concern is that the Queensland Prostitution Licensing Authority note:

> The fact that many women viewed a safe work environment, good atmosphere and working conditions as advantages of working in legal brothels further suggests that *some women entered the industry because of the development of legal brothels*. It is relevant that women working in legal brothels continue to work in that sector despite the lower income they receive when compared to other sex workers.[155]

They also note that '[o]ver half the respondents working in legal brothels had started work in that sector, suggesting that *the introduction of legal brothels may have allowed a significant number of women to enter the sex industry*'.[156] What these comments from the PLA fail to recognise is that, as already discussed above, mobility between sectors of the industry is high, and what is more, when forced by financial or other circumstances, sex workers will move from 'safer' sectors to even more high risk workplace environments in other sectors lower down the occupational hierarchy. What these comments also reveal is an assumption at a government agency level that the introduction of OHS frameworks following legalisation has created an opportunity that would otherwise not have existed for women to work 'safely' in the sex industry, and an acceptance that women can be expected to work in conditions currently experienced in legalised brothels, despite the PLA's own data on the occurrence of rape in licensed brothels.

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153 Crime and Misconduct Commission, above n 65, 42.

154 Ibid.

155 Woodward et al, above n 9, 57 (emphasis added).

156 Ibid 56–7 (emphasis added).

The adverse impacts of violence and sexual assault on the physical and mental health of sex workers are serious. Violence results in morbidity, disability, emotional scarring, psychological distress and low self-esteem.[157] Quadara notes that sexual assault impacts on sex workers in the same way it impacts on other victim/survivors, including issues relating to multiple traumatisation, posttraumatic stress and substance abuse.[158] The experience of sexual assault is a source of significant trauma resulting in anxiety, depression, poor physical and reproductive health and an inability to trust or engage with others, as a large body of research has shown.[159] Returning to sex work following sexual assault, not having any 'time out' from the nature of the work, and barriers to disclosure and support are all reported to amplify the impacts of sexual assault.[160]

In a survey of Sydney brothel workers, 10.0% of sex workers were found to be severely distressed and likely to have a serious mental illness, based on psychological testing, a rate twice that of the general population.[161] Likewise, in a cross-jurisdictional study of brothel workers, respondents were asked a series of questions to assess their emotional well-being using the internationally-standardised Kessler 6 scale. Of the 154 respondents, 11.7% scored 13 or higher on the K6

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157 Rekart, above n 11, 2124.

158 Quadara, above n 6, 19–20.

159 Ibid 19.

160 Ibid 20.

161 Donovan et al, above n 8, vi, 26. The authors go on to rationalise the indoor brothel worker results by stating:

> Nevertheless brothel workers appear to be much better off in this respect than street-based sex workers where the majority report serious lifetime traumas, and a large number also report adult sexual assault and work-related violence, as well as drug dependence and depression. In one recent study nearly half had symptoms that met DSM-IV criteria for post-traumatic stress disorder (PTSD) and one third reported current PTSD.

Citing Harcourt et al, above n 109; Roxburgh, Degenhardt and Copeland, above n 109. Is the rate of mental illness among brothel workers, which is twice the rate of the general population, therefore more acceptable or of less concern because street workers experience much higher rates of mental illness?

scale, indicative of 'extreme distress', a rate that was similar between sex workers in Perth, Melbourne and Sydney but considerably higher than the general population (~4%).[162] This rate of extreme distress was consistent between criminalised, legalised and decriminalised legal settings.

Sex work is unlike any other profession and the high risk of sexual assault and rape, even in legal or decriminalised brothels, remains despite efforts to introduce OHS frameworks. Given the serious adverse health outcomes associated with sexual assault in sex work, a greater focus on elimination rather than harm minimisation should certainly be considered by OHS agencies.

VI Conclusion

The core principle of OHS, that all workers have the right not to suffer harm through carrying out the normal requirements of their work, is incapable of being effected in the sex industry under current legislation. In creating a legal sex industry governments are required to introduce OHS frameworks in order to somehow address the health and safety risks involved in prostitution. The authors of this paper argue that current OHS frameworks cannot provide a meaningful reduction in risk to the health and safety of sex workers, and that therefore legislators have a responsibility to reconsider legalising or decriminalising the industry and normalising prostitution as labour, at least until the inherent risks of the industry can be addressed. Recognition of the risks attendant to sex work should be acknowledged and whether persons involved in sex work should be expected to bear these risks in a legalised should be questioned.

It has been argued that under a criminalised system, the state contributes to the murder and harm of sex workers by promoting stigmatisation and exploitation of sex workers while alienating them

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[162] Basil Donovan et al, *The Sex Industry in Western Australia: A Report to the Western Australian Government* (National Centre in HIV Epidemiology and Clinical Research, 2010) 16.

from the security that should be provided by the police.[163] And so, where the state adopts a legalised or decriminalised model of sex work, and introduces OHS frameworks in an attempt to minimise risk to health and safety, the failure of those frameworks and the continuing harms experienced by sex workers should also be seen as the responsibility of the state. In arguing against the labour normalisation of prostitution as sex work, and identifying the failure of these industry specific OHS frameworks, the authors of this paper are not suggesting that persons involved in sex work should be denied the right to a safe and healthy work environment. Rather, the authors suggest that to continue to argue in favour of legalisation or decriminalisation of sex work ignores the violence and risk to the physical and mental health of sex workers that is inherent in prostitution, and fails to acknowledge that the right to a safe and healthy work environment cannot be met by current industry-specific OHS frameworks. As such the authors strongly believe that rather than the focus being on the legalisation or decriminalisation of the industry, attention should be turned to eliminating the inherent risks associated with prostitution and that a new model of legislation must be considered before health and safety standards in the industry will improve.

163 Donovan et al, above n 8, 13.