Precarious or Protected? Evaluating Work Quality in the Legal Sex Industry

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Abstract

Decriminalising (or legalising) sex work is argued to improve sex workers' safety and provide access to labour rights. However, there is a paucity of empirical research comparing how different regulatory approaches affect working conditions in the sex industry, especially in relation to venues that are managed by third parties. This article uses a mixed methods study of the Australian legal brothel sector to critically explore the relationship between external regulation and working conditions. Two dominant models of sex industry regulation are compared: decriminalisation and licensing. First, the article documents workplace practices in the Australian legal brothel sector, examining sex workers' agency, autonomy and control over the labour process. Second, it analyses the capacity of each regulatory model to protect sex workers from unsafe and unfair working conditions. On the basis of these findings, the article concludes that brothel-based sex work is precarious and substantively excluded from the protective mantle of labour law, notwithstanding its legality. It is argued that the key determinant of conditions in the legal brothel sector is the extent to which the state enforces formal labour protections, as distinct from the underlying regulatory model adopted.

Keywords: *Commercial Sex, Brothels, Precarious Work, Autonomy, Control, Australia*

Introduction

- 1.1 Sex industry regulation continues to be hotly debated, and there is considerable conflict over the appropriate form that regulation should take. Central to this debate are questions of sex workers' agency, autonomy and safety under different legal frameworks, and specifically, whether outcomes are better under decriminalisation or licensing.
- 1.2 Some academics and advocacy groups regard 'prostitution' as inherently exploitative, and a manifestation of the patriarchal oppression of women. Under this view, prostitution is something that can never be consented to, and 'prostitutes' are victims of sexual violence and cannot be considered workers (Sullivan 2007; Jeffreys 1997). Proponents of this view assert that prostitution undermines gender equality (Pateman 1988: 208), and advocate the abolition of prostitution, calling on governments to 'end demand' by either criminalising clients (buyers) (the so-called 'Nordic model'), criminalising sex workers (sellers), or both buyers and sellers.
- 1.3 More commonly, scholars and advocates recognise commercial sexual activity as a form of labour (Hardy 2013: 34). Here, commercial sex can be understood as 'work', and as context specific: sex workers' agency is shaped by variables such as the type of sex work that is being performed, the involvement of third party intermediaries, geographic location, physical setting, and role of regulatory authorities (Weitzer 2012; West and Austrin 2002). Those who accept that paid sexual services can constitute 'work' generally agree that sex workers should have access to the same labour rights and protections as other workers. Decriminalisation (or legalisation) is theorised as a means of achieving this. The terms 'decriminalisation' and 'legalisation' are sometimes used interchangeably, but in substance they connote different regulatory approaches: 'decriminalisation' refers to removing criminal penalties attached to an activity, leaving it regulated under laws of general application; 'legalisation' refers to making an activity 'legal', subject to specific state controls such as

- 1.4** In principle, decriminalisation or legalisation brings sex industry businesses within the auspices of labour regulation, enabling sex workers to exercise rights as worker citizens (Crofts and Summerfield 2006: 270). However, scholars have noted that both of these models are 'ambivalent' in recognising sex work as work: governments continue to express reluctance to recognise sex as a legitimate commercial activity (Perkins 1991: 27; Crofts *et al.* 2012: 394; Sullivan 2010: 103). Of the two approaches, some commentators contend that decriminalisation is preferable as it allows sex workers the freedom to work independently or in a collective, without risk of criminal record. This enables them to 'organize in protection of their safety and rights' (Sullivan 2010: 104). It is theorised that decriminalisation places 'worker rights, health and safety' more centrally in the 'regulatory sphere' than under licensing (Crofts *et al.* 2012: 395), and that decriminalisation may provide 'improved working conditions' via normalising the sex industry (Donovan *et al.* 2012: 9; Harcourt *et al.* 2005: 125). Scarlet Alliance, Australia's peak sex worker advocacy organisation, strongly endorses decriminalisation, describing it as the 'optimal model for sex work legislation' (Scarlet Alliance 2014: 10). Recently Amnesty International adopted decriminalisation as its official policy on sex work (Amnesty International 2016: 2).
- 1.5** The theory that decriminalisation (relative to licensing) offers improved safety and access to worker rights has not been adequately tested in the Australian context. Only one empirical study has compared Australian sex workers' labour rights under different models of regulation (Sullivan 2010). Sullivan considered sex workers' 'ability to negotiate optimal working conditions', 'seek advice and support (including from unions)' and 'obtain legal redress for injury or unfair treatment' in Queensland and New South Wales. The study focused on three types of sex workers: brothel, private and street-based. Ultimately, Sullivan concluded that New South Wales' decriminalised approach provided comparatively 'better outcomes' for sex workers than Queensland's licensing system (2010: 104). However, the relatively small sample size ($n = 12$) combined with the paucity of data on specific working conditions for the three different types of sex workers undermines the force of the findings. In particular, Sullivan's analysis of labour rights in the New South Wales brothel sector relied on a single interview, and offers limited insight into whether these sex workers have access to union support, or avenues of redress if treated unfairly by management or injured in the course of their duties (2010: 97). One further small-scale empirical study considered the application of labour law to sex industry workers in Victoria (Murray 2001), but did not consider whether the underlying model of sex industry regulation played a role in determining working conditions.
- 1.6** Internationally, a growing body of research has considered the interaction between different models of sex industry regulation and working conditions (Levy and Jakobsson 2014; Krusi *et al.* 2014; Pitcher and Wijers 2014; Wagenaar *et al.* 2013; Crowhurst 2012; Kotiswaran 2011; Sanders and Campbell 2007; Brewis and Linstead 2000) and the application of labour law to legal sex workers (Daalder 2007; Zuidema *et al.* 2007; Bruckert *et al.* 2003). None of these studies have compared licensing versus decriminalisation with respect to indoor sex workers, but general themes emerge in relation to brothel-based sex work across different jurisdictions: brothel-based sex workers are classified as 'self-employed' (Pitcher and Wijers 2014: 6-7), but in many instances managers have the capacity to exercise significant control over sex workers' labour (Bungay *et al.* 2010: 21; Bruckert *et al.* 2003). Employment rights are limited, and working conditions are poor (Bruckert *et al.* 2003: 32), even in legalised settings (Wagenaar *et al.* 2013: 42-43; Zuidema *et al.* 2007; Brents 2010: 57). Importantly, Daalder (2007) found evidence that an employment relationship exists between legal brothel operators and sex workers in the Netherlands. The present study contributes to this body of literature, providing an Australian perspective on how different legal frameworks impact outcomes for sex workers. Specifically and contrary to earlier Australian studies, this research finds some benefits to a licensing model when compared to a decriminalised one, but ultimately concludes that neither model of regulation has any substantive connection to improved labour rights for sex workers.
- 1.7** Drawing on a mixed methods study, this paper critiques the relationship between external regulation and labour practices in the Australian legal brothel sector. Two different models of regulation: decriminalisation and licensing are compared with respect to working conditions. The focus on brothel-based sex workers, rather than escort agency workers or sex workers generally, allows for in-depth analysis. Moreover, preliminary discussions with sex workers indicated that brothels provide an environment where there is the greatest potential for managerial control over sex workers' labour. The discussion is divided into three parts. The first part examines sex workers' job security, control over the labour process, working conditions and wages. Part two analyses the extent to which each regulatory model has the capacity to ensure safe and fair working conditions. Part three explores social factors that impact on brothel-based sex workers' access to workplace rights. This paper argues the purported benefits of decriminalisation have been over-generalised, and that brothel-based sex work is

precarious, irrespective of its legality. The findings outlined in this paper are relevant to contemporary debates about how best to govern commercial sexual activity.

Precarious Work

1.8 The concept of 'precariousness' provides a useful lens through which brothel-based sex work can be understood. A small but growing body of literature internationally has included sex workers as part of a broader category of workers described as being 'at the margins' of labour law (Sanders and Hardy 2014; Albin 2013; Stewart 2013; Cruz 2013; Lister 2012; Bruckert *et al.* 2003). The growth of the informal sector, decline in standard forms of employment and diversification of work relationships amount to what can be described as an increase in the number of 'precarious' workers.

1.9 This article draws on Vosko's (2010: 2) definition of precariousness as a mechanism for evaluating brothel-based sex work. Crucially, this conception avoids equating precarious work with 'atypical employment'. In other words, simply being self-employed as an 'independent contractor' or sub-contractor worker or working less than full-time hours as an employee does not in itself imply precariousness, provided income is sufficient (Vosko 2010: 3). Instead, precariousness has several dimensions. It incorporates consideration of job security, control over the labour process, working conditions and wages, plus the degree of regulatory effectiveness, including statutory protection of minimum conditions and the enforcement of those conditions. In addition, precariousness is shaped by the social context in which the work is performed (Vosko 2010: 2).

Regulatory Setting

1.10 It is currently legal to own, operate or work in a brothel in the majority of Australian jurisdictions; however, there is considerable variation between the regulatory approaches adopted by the different States and Territories. The two dominant regulatory approaches are decriminalisation, illustrated for the purposes of this study by New South Wales, and licensing, illustrated by Queensland.

Figure 1. Map of Australia, (map data ©2016 Google)

1.11 New South Wales is the sole Australian jurisdiction to adopt what is commonly described as a 'decriminalised' approach to sex industry regulation. Most of the criminal laws associated with commercial sex have been repealed. Brothels (and most forms of sex work) are lawful. There are no probity or licensing requirements for brothel operators; instead brothels are subject to the same commercial laws as other legal businesses. Municipal authorities (local councils) have the power to restrict the location of brothels and impose constraints on their size and hours of operation in order to minimise adverse impact on public amenity (Crofts 2012). There are no criminal penalties imposed on sexual service business operators who contravene planning

controls, however, non-compliant brothels can be forcibly shut down by local councils. There are an estimated 340 brothels throughout the State, ranging in size; many operate without council consent ([Select Committee on the Regulation of Brothels 2015](#): 5). Venues operating without council permission tend to be small so as to avoid scrutiny ([Donovan *et al.* 2012](#): 16). The New South Wales model allows for greater diversity of sex businesses, catering to different niches.

- 1.12** Queensland is one of several Australian jurisdictions that impose a licensing system on brothels.^[1] Brothel owners and managers are required to satisfy probity and criminal record checks, and licence-holders must pay various statutory fees. Brothels are restricted to industrial areas only, and may have a maximum of five rooms and eight sex workers on the premises at any given time. Operators must abide by strict licence conditions, and operating an unlicensed brothel attracts heavy criminal penalties. The licensing system is administered by a dedicated government agency, the Prostitution Licensing Authority (PLA). The PLA has the power to audit brothels and take disciplinary action against non-compliant licensees. Individual sex workers are permitted to provide in-call and outcall sexual services without obtaining a brothel licence, but must work alone or face criminal penalties including the possibility of imprisonment. This prevents workers banding together and working in collectives for safety. Notwithstanding active police enforcement, a small illegal brothel sector exists but is substantially underground ([Crime and Misconduct Commission 2011](#)). There are currently 22 licensed brothels in Queensland. The Queensland brothel sector is comparably smaller and more homogenous than the New South Wales brothel sector, it is therefore less accessible to some sex workers ([Harcourt *et al.* 2005](#): 124).

Methods

- 2.1** This article draws on a comparative, mixed methods study examining working conditions in the Australian legal brothel sector. There were three phases to the research: interviews, weblog content analysis and document analysis. This was designed to evaluate sex workers' perceptions of their working conditions and rights at work, actual labour practices in the brothel sector, and indicators of precariousness. The fieldwork took place between 2013 and 2014.
- 2.2** The first phase of the research involved 30 in-depth semi-structured interviews with participants from three different groups: (i) current/former sex workers, aged 18 years and over, with experience working in a legal brothel in either New South Wales ($n = 14$) or Queensland ($n = 11$) (total: $n = 21$); (ii) people with experience operating or managing a legal brothel in either New South Wales ($n = 4$) or Queensland ($n = 2$) (total: $n = 6$); and (iii) key professionals, including employees of peer-based sex worker organisations ($n = 8$), people who were members of the now-defunct Sex Workers Union ($n = 6$), and a community lawyer experienced in providing industrial relations advice to sex workers ($n = 1$) (total: $n = 15$). All of the participants in the current/former sex worker group were female. Some participants gave dual interviews where they spoke as both a representative of a sex worker organisation and as a current or former sex worker, or as a sex worker and as a current or former brothel manager, so the total number of participants for each category adds up to greater than the number of interviews. Where a participant disclosed having a dual identity or role, each role was recorded separately and the data for each role decoupled to preserve anonymity. Participants were primarily recruited from the two focus States: New South Wales and Queensland (total: $n = 28$). Two additional participants were recruited from sex worker advocacy organisations in the States of Western Australia ($n = 1$) and South Australia ($n = 1$) in order to gain insight into potential differences between legal and illegal brothel working environments.
- 2.3** Sex worker participants were recruited through an advertisement disseminated by sex worker organisations in each of the two focus States, and by the national peak body, Scarlet Alliance. The language and format of the advertisement was formulated based on feedback from sex workers. It emphasised the ability to participate anonymously, and stated that interview questions would focus on interactions with management and reception staff rather than clients so as to allay any concern that participants could be required to answer sexually-intrusive questions or explicitly describe sexual acts. Brothel operators were recruited via a separate advertisement circulated in the PLA's newsletter and through personal contacts. Key professional participants were approached directly. Participants were provided with a \$20 department store voucher as a small token of appreciation for their contribution to the study. This may have facilitated in 'snowballing' the research as several participants were referred by their friends and specifically mentioned the voucher when they expressed interest in being interviewed.
- 2.4** The interview questions comprised a series of open ended non-leading questions so as to capture a wide range of information about workplace experiences ([Pollert 2012](#)). Specifically, questions focused on brothel working conditions, including safety, service expectations, pay, hours, breaks and appearance requirements (grooming and/or dress code). The questions used for the sex worker and brothel operator/manager groups were

designed to elicit indicators of the degree of economic independence of sex workers and the degree of control exercised by management. For other participants, the questions specifically related to their area of expertise such as brothel outreach, providing legal advice to sex workers about labour or industrial issues, or labour organising in the sex industry. The average length of the recorded interviews was 54 minutes; the shortest interview was 29 minutes, the longest 87 minutes. Each interview was transcribed and manually coded using QSR NVivo software, and a grounded theory approach was adopted to identify themes and refine the coding system as the interviews progressed (Charmaz 2014).

- 2.5 To overcome the limitations of having a largely self-selected sample, the interview data was triangulated through a qualitative content analysis of 54 sex worker weblogs ('blogs'). Primarily these blogs were hosted on the Tumblr microblogging platform ($n = 51$).^[2] Two were hosted on Wordpress and one on Livejournal^[3] An initial inspection revealed that these blogs were a rich source of information about everyday workplace experiences and the lived reality of brothel work. Online research is well-suited to studying a phenomenon that transcends geographical boundaries because it enables comparison across different locations (Hookway 2008: 93). In this respect, the blog posts offered an ideal source from which to triangulate the themes that emerged from the interviews, and thereby increase the reliability of the findings. The sample of blogs was drawn from a combination of Google and Tumblr hashtag searches, and was limited to publicly accessible blogs only – those visible via a web browser, without requiring a Tumblr account or password. All of the blogs in the sample were anonymous, but to ensure that the bloggers' anonymity remains protected, each blog was assigned a new pseudonym and the web addresses have been redacted in the written findings.^[4]
- 2.6 While it is possible for bloggers to embellish and/or misrepresent their experiences in order to gain 'status' or attention (Soothill and Sanders 2005), Tumblr has several features that deter dishonesty. In order to attract followers, users add content-specific hashtags to their blog entries so that the entries can be found by other users with similar interests. The fact that the *#sex work* and related tags are read by sex workers means that false narratives are likely to be detected. Additionally, Tumblr enables users to re-blog other users' posts and add their own commentary. This function allows users to 'call out' misinformation and publicly question the credibility of the author.
- 2.7 Each blog was systematically analysed for descriptions of brothel working conditions and references to work status and rights. Relevant entries ($n = 806$) were saved using NCapture and coded in NVivo using the same coding categories that previously emerged from the interviews (Hsieh and Shannon 2005). Not all of the bloggers made mention of their working location beyond the country they were from, so the blog sample likely included data relating to brothels in other Australian jurisdictions, in addition to New South Wales and Queensland. This did not appear to influence the findings as the accounts of brothel work disclosed in the blogs were broadly consistent with the interview participants' narratives. This consistency affirmed the authenticity of the bloggers' accounts of brothel-based sex work.
- 2.8 Written contracts, codes of conduct, and internal notices and signs provided a further source of evidence of brothel working conditions. Brothels use these documents to communicate 'house rules' to workers (Murray 2003; Brents and Hausbeck 2001:325). Examples of brothel documents were obtained from interview participants ($n = 23$). This included eight sample contracts from brothels in Queensland ($n = 3$) and New South Wales ($n = 5$). Each contract was redacted and de-identified before being added to the NVivo database and coded. Additionally, one participant provided a collection of brothel signs and notices that she had photographed on her mobile phone ($n = 4$). The weblog analysis yielded further examples of brothel signs and notices containing workplace rules and conditions ($n = 11$).
- 2.9 Approximately 50% of sex workers in Sydney metropolitan brothels are of 'Asian/non-English speaking background', 45% of whom speak 'poor' or 'fair' English (Donovan *et al.* 2012: 17-18). There is no comparable data available in relation to the Queensland sex industry, but approximately 34% of Queensland licensed brothel workers are foreign-born, comprising of 13% Europe, 12% New Zealand, 4% Asia and 5% other countries (Woodward *et al.* 2004: 26). Due to budgetary constraints, it was not possible to translate the research advertisement into other community languages or hire interpreters for the purpose of interviewing non-English speakers. Two of the sex worker participants self-identified as migrants. Interviews with key professionals, including Thai, Chinese and Korean-speaking outreach officers from sex worker advocacy organisations provided further insight into working conditions for migrant sex workers ($n = 8$). All of the blogs analysed were written in English, and none of the bloggers referred to their migration status.

Job Security, Control over the Labour Process, Working Conditions and Wages

- 3.1** This section discusses interrelated factors relevant to assessing precariousness. Precarious work is characterised by uncertainty and a lack of job security. Labour performed on a temporary, casual or contract basis (where there is no guarantee of ongoing work) has the potential to be precarious. The extent to which a worker (or conversely, a manager) has control over the labour process is also a key factor in determining precariousness. A lack of control can manifest in respect of working time (including the right to refuse shifts and rostering decisions), economic dependence (inability to delegate work, generate outside income) and rules around personal appearance and behaviour. It may also involve the levying of 'fines' or 'bonds' on workers for a range of disciplinary or other infractions. Pay and conditions also shape precariousness; here it is relevant to consider the predictability of working hours, stability of income and whether workers are expected to perform unpaid labour. In respect of these indicators, this study reveals few differences between New South Wales and Queensland brothels.
- 3.2** Consistent with Murray's findings in relation to Victorian sex workers (2003), this research found that legal brothel operators describe sex workers as 'independent contractors' but typically maintain a high degree of managerial control the labour process. Sex workers receive none of the benefits associated with employment, such as guaranteed payment of at least the legal minimum wage for work performed, superannuation, reasonable working hours, paid leave, access to remedies for unfair dismissal and access to workers' compensation payments if they are injured on the job. However, the majority of brothel operators prevent sex workers from working as genuine independent contractors. In effect, many brothel-based sex workers in Queensland and New South Wales are 'disguised employees' (employees without benefits). By characterising sex workers as independent contractors, brothels are able to circumvent minimum labour standards and avoid responsibility for payroll tax, workers' compensation premiums and redundancy pay (Hunter 2006: 293). In accordance with their 'contractor' status, brothel-based sex workers have no job security.
- 3.3** This study found that brothel workers are remunerated on the basis of their timed interactions with customers, and typically do not receive a retainer or base wage. Instead, they are paid a percentage of the total fee for each client 'booking' they perform, 30-70% of the total. Income is unpredictable because competition for bookings is fierce, and there is no guarantee of bookings. Typically, bookings range from a 20 minute 'quickie' to one hour. Most brothels (with the exception of some B&D parlours^[5]) impose a standard pricing structure according to the length of the booking, and within this time workers are expected to perform a standard service which at a minimum comprises of a sensual massage, oral sex on the client and vaginal sexual intercourse. Sex workers are not permitted to set their own prices for this service, but some brothels allow workers to negotiate directly with the client to provide 'extras' (additional services), such as kissing, costumes, anal sex, fetishes, and the use of sex toys. Sometimes multiple extras are packaged as a 'deluxe' service and charged at a flat rate. Depending on the brothel, workers may be required to provide a percentage of any extras to the brothel, and some brothels cap the maximum amount that workers can charge for certain extras.
- 3.4** Brothels typically use a roster system to allocate shifts, and sex workers may nominate their preferred choice of shifts (Maher *et al.* 2012). However, managers have the final say over whether a sex worker is permitted to work on a particular shift. Such decisions impact significantly on workers' earning capacities as certain shifts are busier, and therefore more lucrative than others. Shift start and finish times are set by the brothel, and an average shift is between 8-12 hours long (Murray 2003; Maher *et al.* 2012), with no scheduled rest or meal breaks. Workers are generally not permitted to leave the brothel during their shift, even if the business is quiet: they are expected to remain on duty for the entirety of their shift, ready and willing to 'intro' (introduce themselves to) prospective clients and answer questions about their service, unless they are already in a booking. This component of the work is unremunerated. Managers monitor the time that sex workers spend in bookings. This is convenient for some sex workers, who prefer to receive a phone call or a knock on the door shortly before their booking is due to end rather than having to 'watch the clock' while they are with a client. However, some of the workers interviewed in this study stated that by 'keeping time', management exercise 'psychological pressure', creating an expectation that workers cannot terminate the booking early.
- 3.5** Commonly brothels impose appearance requirements, but there is considerable variation between venues. Sometimes dress or grooming requirements are communicated informally on *ad hoc* basis, for example, a manager might suggest to a worker that she would look better wearing something else. In other brothels, strict 'house rules' apply: certain clothing might be banned for being 'too casual' or not in keeping with the brothel's image, for example, some brothels do not permit workers to wear flat shoes, shorts or trousers. Brothels that market themselves as 'high class' typically require workers to wear stockings, suspender belts and eveningwear,

and/or red lipstick and nail polish. In some venues, sex workers must cover any visible tattoos. In addition, some brothels impose conduct rules. For example, one Queensland brothel contract requires sex workers to 'promote the establishment in a positive light at all times', prohibits swearing and 'crude behaviour', mandates the use of breath freshener for workers who smoke, and requires workers to reapply their makeup after every booking. The contract goes so far as to dictate the conversations that workers may have with clients: 'do not give out information about yourself or your private life' and do not discuss 'emotional issues or how you are feeling' with guests as this 'can be very off-putting'. The imposition of appearance and behavioural requirements suggests that rather than running their own business as independent contractors, sex workers are in fact highly integrated into the brothel's business model.

3.6 Brothels also impose restrictions on sex workers' ability to work independently. For example, sex workers are usually prohibited from delegating work to someone else; personal service is required. Some brothels permit workers to swap shifts with each other, but the work cannot be sub-contracted. Further, some brothels require exclusive service and forbid sex workers from working privately, and/or at other brothels owned by different operators in the same city or locality. Even where exclusive service is not required, 'stealing' clients (arranging bookings with brothel clients outside the brothel) is strictly forbidden. Brothels employ a range of measures to prevent workers from working independently. These include inspecting workers' handbags for client business cards or phone numbers, eavesdropping on bookings via the use of intercom microphones to ascertain whether details are being exchanged, and even monitoring online escort websites to ensure that 'their' workers are not working elsewhere.

3.7 Managers maintain control over sex workers via the use of economic sanctions. These sanctions are used to force workers to adhere to the 'house rules' and punish workers who disobey. Sanctions range from adverse shift allocation (depriving workers of the opportunity to work on lucrative shifts), through to fines and loss of bond, withholding wages, taking shifts away for a set period of time (suspension), and permanent removal from the roster (dismissal). Sanctions may be communicated verbally, contained in written contracts, or wall signs. Six of eight sample brothel contracts examined in this study contained provisions relating to discipline. For example, one New South Wales brothel contract states that any worker who fails to attend their shift without notice will 'forfeit their entire fortnight of shifts' and be forced to 'negotiate replacement[s]'. The interviews and blogs analysed revealed substantial evidence of suspension and dismissal being used to discipline workers for seemingly trivial matters. For example, one blogger described having a shift taken away because she failed to clean her room properly. Another blogger expressed fear that she could be fired for asking a manager to vary her roster:

'I think I may be getting fired... I asked to work an earlier shift on wednesday as I have a client coming in but the manager needs to talk to me because apparently I'm not allowed to do that.' (Piper, Australian sex worker, Tumblr weblog post).

3.8 In New South Wales, some brothels use fines and bonds to discipline workers. Fines range from \$10-\$200, with \$50 being the most common, and may be expressed as a percentage of pay. For instance, one brothel contract states that a '\$50 penalty' is payable for failure to attend a shift or submit availability to be included on the roster. Another brothel contract states that workers 'must accept' a rate of 5% less for each booking if they arrive late or leave early. Sex workers interviewed in this study reported receiving fines for various acts of misconduct including refusing to do 'intros', having chipped nail polish, wearing the wrong clothing, and failing to clean the room properly after a booking. Sometimes bonds are used in conjunction with fines. For instance, some brothels require that sex workers pay a 'bond' of \$300-600 before they are placed on the roster. Any fines the worker receives are then deducted from their bond, reducing the amount they are eligible to receive back when they leave the brothel. Problems frequently arise when workers attempt to recover their bond: management may refuse to return the money. Sometimes no reason is given and the worker is simply 'fobbed off' until they give up. Alternatively, management may assert that the worker's bond has been 'forfeited' due to non-compliance with house rules. Only one of the sex workers interviewed in this study reported receiving her full bond back from a brothel.

3.9 Maintaining a high degree of control over the labour process is financially rewarding for brothel operators. To provide clients with the appearance of 'choice' it is vital for the brothel to have a selection of sex workers available at all times. Requiring sex workers to adhere to a set roster ensures that there are a minimum number of workers on duty, minimising the risk of a potential customer leaving because there are no suitable workers available. Enforcing the time that sex workers spend in bookings ensures that managers have the maximum selection of workers available to meet new clients. In the absence of an hourly wage, sex workers have no financial incentive to remain in the brothel when business is quiet, so economic sanctions such as

unfavourable shift allocation or loss of shifts compels workers to stick to their roster. Requiring personal service, and setting prices, grooming and behavioural standards serves to maintain consistency and encourage repeat business. Finally, restricting sex workers' economic independence by discouraging outside work (and competition) ensures that the brothel retains the maximum benefit of sex workers' labour.

- 3.10** Although the standard brothel business model is predicated on maintaining managerial control over workers, there are exceptions. Three of the sex worker participants in this study described working in brothels where they enjoyed considerable autonomy over their working conditions and genuine economic independence. For example, they were permitted to see private clients and/or work in other brothels at the same time, and were allowed to see brothel clients privately. They were not required to adhere to a roster, could decide when and how long they wanted to work for, and cancel without notice. They could decline to perform 'intros' or accept bookings for any reason, and were not expected to remain 'on duty' in between bookings, so they could leave the brothel to run errands. Dress and appearance requirements in these brothels were minimal or non-existent, and there were no disciplinary measures such as bonds, fines or adverse shift allocation. Participants stated that they relied on 'word of mouth' and 'trial and error' to find a good brothel to work at.

Regulatory Protectiveness

- 4.1** Regulatory protectiveness is a crucial factor in determining precariousness (Vosko 2010: 2). Here, it is necessary to consider the existence of formal labour protections and whether these protections are enforced in practice. This section begins by providing an overview of formal labour protections governing the legal brothel sector. Next, it discusses whether these formal protections meaningfully impact on working conditions in New South Wales and Queensland brothels, examining enforcement. Significant differences between the two jurisdictions are noted.

Formal Labour Protections

- 4.2** Relevant labour protections fall into two categories: (i) workplace health and safety (WHS), and (ii) core labour standards (minimum employment conditions). These laws apply to all Australian businesses, including legal brothels and are designed to ensure safe and fair conditions of work. Under WHS law, persons who control a brothel have a legal duty to ensure workers' health and safety, 'so far as is reasonably practicable'. This requires taking active steps to identify safety risks and implementing measures to reduce risks (Foster 2012: 362-363). The same WHS obligations apply irrespective of whether brothels choose to engage sex workers as independent contractors or employees. While WHS is regulated on a national basis, each jurisdiction has a local enforcement agency. In contrast, core labour standards apply in respect of employees only; where a worker is engaged as a genuine independent contractor their conditions are governed by the terms of the contract. Employee sex workers are entitled to be paid at least the national minimum wage, plus 9% superannuation, including wages for time 'on duty' but not in a booking. Pay deductions (fines, bonds and shift fees) and withholding wages is prohibited. Employees have a right to refuse to work 'unreasonable' hours, and subject to certain eligibility requirements, cannot be arbitrarily terminated. Importantly, it is illegal to engage employees under 'sham contracts'. These minimum labour standards are subject to oversight by a national regulatory agency.

Enforcement

- 4.3** In New South Wales there is limited regulatory oversight of WHS in the sex industry, and therefore very little risk of non-compliance being detected. The relevant WHS enforcement agency in New South Wales is SafeWork. On paper, SafeWork is responsible for overseeing compliance across all sectors of the New South Wales economy. In practice, SafeWork has minimal engagement with sex industry businesses; inspections of sex industry businesses are infrequent and have fallen substantially in past four years. In 2012 SafeWork conducted 14 brothel inspections, reduced to nine in 2013, six in 2014 and one visit in 2015 (Select Committee on the Regulation of Brothels 2015: 66). In the past, SafeWork's predecessor 'WorkSafe' co-developed a WHS management guide for brothels (WorkSafe 2001). This guide is now substantially out of date and does not reflect current safety obligations.
- 4.4** Several factors contribute to SafeWork's low level of regulatory engagement with this sector. First, brothels are perceived as 'low risk' workplaces, and thus less of a priority for WHS inspectors (Select Committee on the Regulation of Brothels 2015: 66). Second, inspectors are assigned to a specific region, with no specialist compliance officers dedicated to the sex industry, so inspectors may not be attuned to the kinds of risk factors that arise in a sex work setting. Third, sex workers are unlikely to contact SafeWork directly without a referral

from a trusted organisation, such as the peer-based Sex Workers Outreach Project NSW (SWOP).

- 4.5** Neither municipal authorities, nor SWOP have the capacity to supervise WHS in the brothel sector. Local councils can require brothel operators to agree to a 'plan of management' as a condition of granting development consent, and this plan can include safe operating procedures (Crofts et al. 2012: 404). In reality, once operating approval is granted, council engagement with sex industry businesses is minimal unless the brothel attracts complaints from local residents (e.g. complaints relating to noise, parking, drunk patrons). There is no ongoing compliance program to ensure that brothels adhere to the plan and brothels that operate discretely are left alone. SWOP plays an important role in sexual health promotion in the New South Wales sex industry: SWOP outreach staff perform regular brothel visits to distribute condoms and safer sex supplies, and information about STIs/HIV (Harcourt et al. 2010). However, SWOP has no independent enforcement powers and its outreach activities rely on maintaining the goodwill of operators in order to gain access to their venues for the purposes of health promotion.
- 4.6** Queensland has much stronger oversight of WHS through its brothel licensing system. In Queensland the primary agency responsible for enforcing WHS in legal brothels is the PLA. WHS obligations are expressly included in Queensland's mandatory brothel licence conditions, enabling the PLA to supervise compliance. The PLA conducts regular scheduled and unscheduled audits of brothel premises and records, and has the power to suspend or revoke a licence if conditions are breached. In addition to monitoring compliance, the PLA provides brothel operators with a range of guidance material to inform them of their legal obligations. Its guide to developing policies and procedures reflects contemporary WHS responsibilities and provides a template for brothel licensees to create an individualised risk-management system for their venue. Queensland brothel licence conditions also prohibit operators charging workers shift fees and 'unfair penalties' which is interpreted to include fines and bonds. The interview and blog analysis findings indicate that Queensland brothels no longer charge shift fees, fines or bonds – only one Queensland brothel worker reported that she had been required to pay a shift fee in recent years. Other participants confirmed that these pay deductions had been a 'fairly normal' practice in the Queensland brothel sector previously. This evidence of normative change appears to be linked to the PLA's active regulatory approach.
- 4.7** In respect of core labour standards, the agency responsible for enforcement is the federal labour inspectorate, the Fair Work Ombudsman (FWO). The FWO has run a single campaign working conditions of administrative staff in the Victorian legal brothel sector, but has not extended its focus to sex workers. In other sectors, the FWO raises compliance through campaigns, education, dialogue with employers and business operators and escalating levels of sanctions, including prosecuting business operators who contravene statutory protections (Hardy and Howe 2013). Prosecutions serve as 'test cases', signaling the need to comply to other businesses in the sector (Hardy et al. 2013: 582). They also provide opportunities for judicial consideration of labour laws and their applicability in specific industries. With respect to sex work, the FWO remains missing in action and the extent to which the FWO is even aware of problems in the sex industry is unclear. A 2009 submission to the Minister from the Sex Workers Union (SWU) appealed for 'regulation of employment conditions' for Australian sex workers, explaining that sex workers are 'greatly disadvantaged' in their employment conditions due to a combination of stigma, the historic criminalisation of the sex industry, and the 'unchallenged' practice of brothel owners describing sex workers as 'sub-contractors' instead of employees (SWU 2009: 2-3).
- 4.8** In the absence of FWO intervention, responsibility for enforcing minimum labour standards in the brothel sector is left to individual sex workers. This is problematic because the sex industry has not developed a culture of workplace rights, and awareness of labour protections is limited. The Australian Government has a website designed to inform workers about their labour rights, however this kind of general advisory information is not easily adaptable to the sex industry, and some relevant issues, such as illegal bonds and fines, are not covered at all. Further, even where sex workers are aware that they have labour rights, they are unlikely to pursue legal action without union support. This is confirmed by a search of Australian industrial relations cases: between 1996 and 1998 a small number of cases were brought to the labour courts involving sex workers. This coincides with the period of time that the Liquor, Hospitality and Miscellaneous Workers Union was actively involved in organising the sector and advocating on behalf of sex worker members (Gall 2006; Murray 2003); the union also negotiated a number of 'sizeable out-of-court settlements' (Walsh 1996: 48). Studies of other sectors confirm that vulnerable workers are less likely to access individual remedies and advocate for their industrial rights (Arup and Sutherland 2009; Pollert 2012).
- 4.9** In the absence of trade union coverage and collective action to address unfair working conditions, the

key determinant of labour rights is the enforcement role played by the state (Hardy and Howe 2009). Thus, the lack of FWO intervention in the legal brothel sector leaves sex workers significantly marginalised, vulnerable to unfair managerial practices and exploitative working conditions. This lack of external oversight enables brothels owners to maintain the fiction that sex workers are independent contractors, and thereby circumvent employment standards. More fundamentally, the absence of regulatory scrutiny serves to prevent a consciousness of labour rights from developing. As one of the interview participants commented:

'There are laws around what our work rights should be in New South Wales, and there's not a single brothel... that complies with any of [those laws]. And there's no history of compliance, and no history of people understanding that.'
(Elena Jeffreys, sex worker and former SWU member).

Social Context

- 5.1** The social context in which brothel-based sex work is performed contributes to its precariousness. Poor working conditions are not unique to the sex industry. What differentiates the sex industry from other sectors is the intense degree of stigma that it attracts. Stigma reinforces unequal bargaining power between sex workers and brothel operators as most sex workers are reluctant to challenge unfair managerial practices due to the perceived risk of being 'outed', either by the brothel operator or through the complaints/court process:

'You might be legally allowed to access these things, but again, do you want to out yourself to your friends and family? It's I guess very difficult for most girls to want to do that because of the private nature of the work to start with.' (Donna, sex worker).

- 5.2** Many of the sex workers interviewed in this research expressed a distrust of government authorities, and a fear that their personal information could be misused or disclosed to others without their consent if they were to lodge a formal complaint about a workplace issue. In addition, participants perceived regulators such as the FWO and SafeWork as being prejudiced against sex workers. For example, one sex worker participant stated she would 'expect judgement or some kind of revulsion' if she attempted to seek assistance from the federal labour inspectorate, and described 'all government agencies' as 'probably whorephobic'. The fear of being 'outed' and/or being adversely treated by labour authorities operates as a powerful barrier to sex workers accessing individual complaints mechanisms, further undermining the protectiveness of the minimum labour standards regime.

- 5.3** Fear of prosecution operates as a deterrent to challenging exploitative management practices. Being paid on a 'cash in hand' basis enables sex workers to selectively declare their taxable income. Sex worker participants in this research expressed different approaches to compliance: some paid tax on the entirety of their income, some under-declared income, and some paid no tax. A number of participants explicitly acknowledged the potential for 'double-dipping' – claiming welfare payments in addition to undeclared sex work income. Government welfare payments are means tested, cutting off once income reaches above a certain threshold. The potential loss of these payments is a strong disincentive for sex workers to report their income as these payments provide a small 'safety net' to offset unpredictable earnings from sex work. Bringing a complaint about working conditions is a daunting prospect for any worker who underreports income, as it is assumed that the involvement of regulatory authorities will necessitate an investigation into tax and/or social security compliance:

'When I confronted management about the contract I was told that it was never intended as a legal document anyway. When I questioned them on the illegal fines, [they said] the fines were just there to encourage (scare) girls to turn up to work, and I was told straight out that they don't care that it breaches employment law because none of us would out ourselves or risk being done for fraud ourselves by going to [Fair Work] because there is such a high rate of non-reporting of income.' (Ella, sex worker, by email).

- 5.4** Several of the sex workers interviewed in this study expressed concern that any attempt to improve brothels' compliance with core labour standards could lead to unwanted regulatory scrutiny of sex workers' taxation and social security compliance. These participants stated that it is 'better' for brothels to remain invisible to the federal labour inspectorate, because the current absence of regulatory attention, coupled with the fact that workers receive their pay on a 'cash in hand' basis, allows sex workers to underreport their taxable income. According to former members of the SWU, this issue has divided the sex worker rights movement and undermined prior attempts to unionise the Australian sex industry and improve working conditions. Arguably, this issue will continue to neuter sex worker industrial activism unless countered by extensive education, awareness-raising and targeted FWO intervention.

- 5.5** Finally, due to the contentious status that sex work occupies in public discourse, politicians remain

reticent in describing sex workers as having the same labour rights as other workers. Ultimately, it is unlikely that contemporary political leaders (at least those within Australia's two major parties) would publicly position themselves as champions of labour rights in the sex industry (Brents *et al.* 2010: 37). Sex worker advocacy organisations provide an important voice for sex workers, and have successfully lobbied Australian governments for beneficial policy reform and greater inclusion in law reform processes (Scarlet Alliance 2014). However, sex worker advocates are placed in the difficult position of having to constantly defend decriminalisation (or licensing) from attempts to reintroduce criminalisation. Arguably, this makes it difficult to engage in activism around industrial issues because any acknowledgement of exploitative work practices in the legal sex industry has the potential to be cited by abolitionists as 'evidence' to support disadvantageous law reform.

Conclusion

- 6.1 This article has compared work practices in New South Wales and Queensland legal brothels, using mixed methods to analyse working conditions, applicable formal labour protections, enforcement mechanisms and the role of regulatory authorities. This analysis revealed that sex workers in the legal brothel sector are vulnerable to disguised employment and coercive management practices. Consistent with the findings of Murray (2003), this study has shown that genuine independent contracting arrangements in the Australian brothel sector are uncommon. While brothel operators describe sex workers as independent contractors, managers typically exercise a high degree of control over the labour process via rostering (including setting start and finish times), fixing service prices, imposing conduct and appearance rules, monitoring bookings, and using financial sanctions to discipline workers.
- 6.2 This paper also examined whether the underlying model of sex industry regulation adopted impacts on brothel labour practices. Differences between two regulatory models were discussed. In summary, Queensland's brothel licensing system promotes stronger compliance with occupational health and safety law; safety obligations are embedded in mandatory brothel licence conditions, and these conditions are enforced by an active local regulator whose powers include the ability to suspend or cancel the licence in the event of failure to comply. Further, Queensland has successfully eliminated the practice of brothels imposing unfair penalties (fines, bonds, shift fees), another licence requirement. New South Wales' decriminalised approach to the sex industry is comparably less effective in promoting adherence to WHS law. In the absence of a licensing authority, brothels in New South Wales fall within the purview of the generalist work safety inspectorate, which in practice, has limited regulatory engagement with the sex industry. Consequently, there is minimal risk of non-compliance being detected, and thus comparatively less incentive for New South Wales brothel operators to comply. These findings challenge the assumption that decriminalisation, relative to licensing, offers improved safety and access to worker rights.
- 6.3 Finally, and most importantly, the forgoing analysis has demonstrated that *neither* regulatory model confers fair minimum working conditions and addresses the problem of disguised employment in the brothel sector. Core labour standards are regulated on a federal basis, and to date, the federal labour inspectorate has not displayed a willingness to enforce minimum labour standards in the legal brothel sector. Coupled with this, there has been no sustained union involvement in the Australian sex industry and the intense stigmatisation of commercial sex poses a barrier to individual workers using complaints mechanisms and legal processes to challenge unfair management practices. Consequently, the brothel sector currently operates unchecked in relation to core labour standards, including laws regarding pay, hours, leave, and dismissal. This benefits brothel operators, who are able simultaneously to use the cloak of legality to operate openly and claim legitimacy, without having to adhere to the same requirements as other businesses.
- 6.4 This research illustrates that decriminalising sex work is not a panacea. In any industry without an organised labour movement, the key determinant of workplace bargaining power is the degree to which the state enforces formal labour protections. The findings of this study confirm that in designing sex industry policy, it is vital to consider the capacity of the regulatory framework to address issues of labour exploitation. Unless the regulatory framework mandates effective supervision of core minimum labour standards and occupational health and safety, sex industry businesses will be regulated by market forces. In the absence of state supervision, brothel operators are able to shift economic risk onto sex workers in order to reduce overheads and maximise profit, while at the same time, denying sex workers the freedom to operate as genuine independent contractors. In summary, this study has demonstrated that brothel-based sex work has the potential to be precarious, irrespective of whether it is legal or decriminalised.

Notes

- 1 Victoria and the Australian Capital Territory also require brothel operators to be licensed.
- 2 <http://www.tumblr.com>.
- 3 <http://www.wordpress.com>; <http://www.livejournal.com>.
- 4 Using online content such as weblog material for research raises ethical issues relating to consent and anonymity. Although Tumblr is not a private community, some Tumblr users may not be aware that non-Tumblr users can read their blog. Further, because sex work is stigmatised, and blog entries are personal in nature, there is an obvious potential for a sex worker blogger to be adversely affected if they were to be identified.
- 5 Brothels specialising in bondage and discipline services.

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