

The Licensing of Sex Work: Regulating an Industry or Enforcing Public Morality?

THOMAS CROFTS[†] AND TRACEY SUMMERFIELD^{††}

*“To obviate the possibility of misapprehension, I remind the reader that I regard prostitution as an inevitable attendant upon civilized, and especially closely-packed populations. When all is said and done, it is, and I believe ever will be, ineradicable”.*¹

*“Acceptance of the inevitability of prostitution has prevented any serious questioning of the notion that men are entitled to sexual gratification, blinding law enforcers and policy makers to the sexual and economic inequalities which push women into the business”.*²

In late 2006 the Attorney-General of Western Australia announced that the State government would ‘investigate reforms to Western Australia’s prostitution laws in a bid to decriminalise the world’s oldest profession’.³ The government’s aim is to create a legal framework for regulating sex work which is acceptable to all parties in parliament after the failure of earlier reform attempts. With this in mind a Prostitution Law Reform Working Group was created to examine the principles upon which prostitution law reform should be based. Given that prostitution is often referred to as one of the oldest professions it is unsurprising that the question of how best to regulate the sex industry, if at all, is one which has been continually raised across jurisdictions and throughout history.⁴ The legal frameworks under which sex work

[†] Senior Lecturer, School of Law, Murdoch University.

^{††} Lecturer, Faculty of Law, University of Western Australia.

1. W Acton, *Prostitution Considered in its Moral, Social and Sanitary Aspects in London and Other Large Cities and Garrison Towns, with Proposals for the Control and Prevention of Its Attendant Evils*, 2nd edn (London: Cass, 1972, reprint) 3. See also GM Hall *Prostitution: A Survey and a Challenge* (London: Williams & Norgate, 1933) 17.
2. M Neave, ‘The Failure of Prostitution Law Reform’ (1988) 21 ANZ J Criminology 202, 205.
3. J McGinty, ‘Prostitution Laws to Face Reform’, Media Statement (12 Sep 2006). It is expected that the Bill will be introduced in Parliament in late 2007.
4. See also N Ringdal, *Love for Sale: A Global History of Prostitution* (New York: Grove Press, 2004); H Benjamin & REL Masters, *Prostitution and Morality: A Definitive Report on the Prostitute in Contemporary Society and an Analysis of the Causes and Effects of the Suppression of Prostitution* (London: Souvenir Press, 1965).

has operated include criminalisation, complete and partial decriminalisation, and legalisation.⁵ Throughout the last decade or two, a number of Australian States and Territories have introduced a licensing system in respect of various aspects of the sex industry, namely, Queensland, Victoria, Northern Territory and Australian Capital Territory.⁶ More recently, the New Zealand parliament passed the Prostitution Reform Act 2003, establishing a ‘minimalist’⁷ licensing regime, while in Western Australia and Tasmania attempts to introduce licensing have been unsuccessful. The Tasmanian government’s 2005 proposal to create a licensing system for brothels reverted to a complete ban following public opposition and because the government believed prohibition was preferable to inappropriate regulation.⁸ The Western Australian parliament debated the 2002 and 2003 Prostitution Control Bills which would have created a complex system for licensing sex workers. The 2003 Bill lapsed, however, because of a general lack of support from all sides of the debate. Concerns were expressed by many sectors of the community that the legislation posed a threat to human rights and was unlikely to lead to a better regulated industry. There were also objections from conservative sections of the community that the industry should not be legitimised through decriminalisation and regulation. In a marked deviation from the earlier Western Australian proposals, the Western Australian Prostitution Law Reform Working Group published a report in 2007 based heavily on the simpler New Zealand approach.⁹

The effectiveness of any licensing model is contingent upon its detail. With this in mind and in light of the ongoing reform efforts in Western Australia, we aim to compare the various licensing models in place in Australia and New Zealand as a contribution to the debate in Western Australia and elsewhere. However, we wish firstly to set a context for analysis, establishing some fundamental benchmarks for measuring the best approach to regulation generally. This leads us to conclude that

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5. The categories of regulation are variously described. Pinto, Scandia and Wilson refer to criminalisation, legalisation, decriminalisation and decriminalisation with controls. Jordan refers to criminalisation, criminalisation of the clients, legalisation and decriminalisation. See S Pinto, A Scandia & P Wilson, ‘Prostitution Laws in Australia’ (1990) 22 *Trends and Issues in Crime and Criminal Justice*; J Jordan, *The Sex Industry in New Zealand: A Literature Review* (Wellington: Ministry of Justice, 2005).
 6. The sex industry is prohibited in South Australia: Summary Offences Act 1953 (SA), whereas in New South Wales it is decriminalised, though with specific limits. For example, on the advertising of services, on living on the earnings of prostitution (aside from brothels), see Summary Offences Act 1988 (NSW) Pt 3; and on the use of certain premises as a brothel, see Restricted Premises Act 1943 (NSW).
 7. Prostitution Law Reform Working Group, *Prostitution Law Reform for Western Australia* (Perth, 2007).
 8. See Tasmania, *Hansard* (HA), 27 Oct 2005, 26–31 (Mrs Jackson, Minister for Justice and Industrial Relations). See also the Minister’s statements in A Andrews, ‘Working Girls to Have No Minders’, *Examiner* (Tasmania), 11 Oct 2005, http://www.scarletalliance.org.au/media/News_Item.2005-10-17.0256; M Paine, ‘Cheers and Jeers Over Brothel Ban’, *Mercury* (Tasmania), 7 Oct 2005, <http://www.scarletalliance.org.au/media/News_Item.2005-10-06.1912>.
 9. Prostitution Law Reform Working Group, above n 7.

licensing is the preferred approach. Given this preference, the final part of this paper will discuss the various licensing models in place in Australia and New Zealand, noting a distinction between what we term a 'social control model' and a 'pure licensing model'. As will become apparent, although licensing has the capacity to most effectively regulate the sex industry, this is undermined if the system is adopted and its processes have the goal of repressing the industry, built on a moral stance which finds its equivalence in the criminalisation model.

BACKGROUND

The gendered nature of sex work has been a critical aspect of debate on whether, and how, the sex industry should be regulated. Overwhelmingly, women comprise the labour force of the industry, and men the client base and industry managers.¹⁰ Thus, the industry reflects a 'gender asymmetry',¹¹ which should be borne in mind in the formulation of industry regulation. A consequence of this asymmetry is that much of the critical work on prostitution has derived from feminist scholars and many of the calls for reform from women aligned with the industry, the two often being at odds.

It is not within the scope of this paper to outline the various feminist arguments. Nor do we assume a particular viewpoint, although we are mindful of feminist positions¹² and are concerned with the protection of human rights of individual workers whatever their gender. Yet, even amongst those who share our concerns, there is disagreement over how a feminist and human rights position applies to the regulation of sex work. We take a pragmatic view. As Dowd¹³ implores:

Whilst we are waiting for a non-patriarchal society, it is essential for feminists to respond to abuses within prostitution, just as they respond to ... other abuses.... Current legislation and policy in WA, and in many other jurisdictions, supports potential police corruption and creates an environment in which the safety and security of sex workers is compromised.¹⁴

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10. See eg K Murray, 'Labour Regulation in the Legal Sex Industry in Victoria' (2003) 16 Aust J Labour Law 1; Neave, above n 2. This is implicit in many of the reports and articles relating to the sex industry: see eg A Arnot, *Legalisation of the Sex Industry in the State of Victoria, Australia: The Impact of Prostitution Law Reform on the Working and Private Lives of Women in the Legal Victorian Sex Industry* (Masters Thesis, University of Melbourne, 2002).
 11. Murray, *ibid* 2.
 12. Insofar as the majority of sex workers are women and the majority of clients are men. This is not to overlook the issues surrounding male sex workers, but a separate analysis is required of this group of workers and clients.
 13. E Dowd, 'Sex Workers' Rights, Human Rights: The Impact of Western Australian Legislation on Street Based Sex Workers' (2005) 10 *Outskirts Online J* <www.chloe.uwa.edu.au/outskirts/archive/volume10/dowd>. See also BA Sullivan, *The Politics of Sex, Prostitution and Pornography in Australia Since 1945* (Cambridge: CUP, 1997) 264.
 14. Dowd, *ibid*.

Like Dowd we advocate regulation which would advance rather than hinder the protection of workers, regardless of any particular view of the causes or cultural consequences of sex work.

Neave lays out four ‘principles’ underpinning a ‘blueprint for reform’ of the sex industry.¹⁵ They are:

1. A recognition that the social and economic inequality of women is at the root of the industry.¹⁶ This requires the pursuit of policies which improve women’s economic choices, reduce sexual inequality and challenge women’s objectification in public forums.
2. The repeal of criminal laws which penalise sex work and related activities, except to protect children from exploitation and adults from coercion.
3. The adoption of regulation aimed at empowering workers, enabling them to exercise increased control over their work conditions and to avoid exploitation. The alternative, criminalisation, arguably disempowers women.
4. Regulation which addresses social problems in a manner that is not hypocritical and which is consistent with the regulation of other problematic industries. (She cites town planning laws and public nuisance laws to protect communities from unruly behaviour from clients, in keeping with other facilities such as hotels.)

These principles raise the question which of the legal frameworks, discussed above, if any, would be best to regulate the industry. The issues surrounding criminalisation, complete and partial decriminalisation and legalisation have been widely canvassed, but are noted here as a backdrop to our support for the adoption of a simple licensing model in Western Australia. The principles outlined by Neave provide guidance in the analysis of approaches to regulation of the sex industry and highlight the need for transparent, fair, rational and efficient mechanisms within any system.

CRIMINALISATION

There are two alternative approaches to criminalisation: criminalising the provision of sex services or particular aspects of the industry, or criminalising clients. The traditional approach is the former, which is aligned with abolition of sex work and is

15. Neave, above n 2, 207–209.

16. This may also be true for men working in the industry, yet the nature of the economic and social oppression may have different roots.

supported variously on feminist, moral or religious grounds.¹⁷ The latter, an approach taken in Sweden, does not criminalise the sex workers but regards them as victims of crime. Instead, the demand is targeted with a view to reducing the number of sex workers.¹⁸

Advocates of criminalisation argue that sex work is immoral, threatens public health, victimises vulnerable women, attracts other criminal activity and is an immigration problem.¹⁹ On the other hand, criminalisation, in either of its forms, is criticised for reinforcing negative stereotypes of sex workers, avoiding the regulation of an ever-present industry and driving the industry underground. This is said to lead to greater risk to workers, an inability for government to control other criminal conduct that might attach itself to the industry and an inability for government to ensure positive health measures for workers and clients.²⁰ The criminalisation of worker conduct increases the risk of physical and sexual violence as workers are unable to safely negotiate conditions with clients or employers, to resist client abuses and to positively use law enforcement agencies and legal remedies.²¹ It also fosters an environment that is conducive to public and in particular police corruption,²² as was noted by the Wood Royal Commission's findings on the nexus between brothel operations and police corruption in New South Wales.²³ In particular, Neave warns against 'discretionary enforcement strategies', which increase the likelihood of exploitation by officials and further disempower and victimise workers.²⁴ It is, nevertheless, true, that in form at least, the Swedish model does not stigmatise

17. Jordan, above n 5, 78. A key feminist abolitionist in Australia is Sheila Jeffreys: see S Jeffreys, *The Idea of Prostitution* (Melbourne: Spinifex, 1997); M Sullivan & S Jeffreys 'Legalising Prostitution is Not the Answer: The Example of Victoria, Australia' (Paper on Coalition Against Trafficking in Women, 23 Nov 2006).

18. Jordan, above n 5, 78, 80. See also J Bindel & L Kelly, *A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden* (London: Child and Woman Abuse Studies Unit, 2003) 25.

19. P Coontz & A Stahl, 'Revisiting Anti-Prostitution Sanctions: An Argument for Changing Policy' (2007) 43(3) *Crim Law Bulletin* 1, 1.

20. See L Banach & S Metznerath, *Principles for Model Sex Industry Legislation* (Scarlet Alliance and the Australian Federation of AIDS Organisations, 2000); Arnot, above n 11, 22–23; Crime and Misconduct Commission, *Regulating Prostitution: An Evaluation of the Prostitution Act 1999 (Qld)* (Brisbane, 2004) 29–30; Jordan, above n 5, 78–79. It should be noted that the evidence suggests that this is an industry that self-regulates its physical health issues, with the adoption of safe practices and the recording of low rates of sexually transmitted infections; some reports revealing a higher standard of sexual health amongst workers than amongst the general population. There are nevertheless differences in the practices of street-based and brothel-based workers and a reporting of high levels of violence in street-based work and non-licensed brothels: Crime and Misconduct Commission, 21–22; Prostitution Licensing Authority *Annual Report 2003–04* (Brisbane, 2004) 34; J Godwin, 'Two Steps Back?' (2003) 2(3) *HIV Australia – Legal Section* <www.afao.org.au>.

21. Neave, above n 2, 207; Banach & Metznerath, *ibid* 6–8.

22. Neave, above n 2, 208; Jordan, above n 5, 83–84.

23. Jordan, above n 5, 84.

24. Neave, above n 2, 205–208.

workers and so may address some feminist concerns over the inequality of traditional models which focus on workers' (primarily women's) conduct, without criminalising the client's involvement. However, it has been noted that this model may have simply reduced the visibility of sex work rather than actually leading to a reduction in the incidence of prostitution.²⁵ Sex workers have expressed similar concerns to those working under the conventional approach to criminalisation, namely, that they are endangered by the laws that purport to protect them.²⁶ Western Australia's and Tasmania's current approach to regulation is typical of the criminalisation model.

DECRIMINALISATION

The decriminalisation model typically involves repealing criminal offences and penalties and instead relying on existing regulations as they apply to the sex industry; in the same way as they might apply to any other enterprise.²⁷ Regulation is not tailored around the particular exigencies of the sex industry, although such particulars may be relevant considerations in the application of existing regulations. New South Wales has adopted this model. Decriminalisation removes the scope for public corruption and is often supported by governments concerned with public reaction because it does not suggest an endorsement of the industry in the same way as a licensing model might. However, it does not recognise the unique nature of sex work, which may need tailored legal responses, for example, to protect workers and give them more power in relation to clients and employers. Nor does it necessarily address issues of exploitation of particular sectors of the community, such as children.

LICENSING / LEGALISATION

Licensing is often seen as providing a better system of regulation than criminalisation or partial criminalisation.²⁸ It involves the legalisation of the sex industry (or parts of it – typically, street-based work has tended to remain within a criminal framework in Australia) and the creation of a licensing system for workers, operators and/or venues (as is evident from the discussion that follows, licensing is often not required of sole workers).²⁹ Licensing permits the exclusion from the industry of those deemed unsuitable as well as the criminal protection of vulnerable people such as children.

25. Prostitution Law Reform Working Group, above n 7, 12.

26. P Östergren, 'Sexworker's Critique of Swedish Prostitution Policy' (Feb 2004) <www.swop-usa.org/news/Swedish_critique_world_news.php>.

27. Jordan, above n 5, 78–79. This approach is generally preferred by sex industry advocates: see Banach & Metzenrath, above n 19.

28. According to Godden this change in approach reflects a transformation in the technologies of discipline in modern Western states: L Godden, 'The Bounding of Vice: Prostitution and Planning Law' (2001) 10 GLR 7. Edwards, writing to a UK audience, endorses the move towards licensing in Australia: S Edwards, 'In Praise of "Licensed" Brothels' [1999] New Law J 403.

29. Jordan above n 5, 78; Crime and Misconduct Commission, above n 20, 30–31.

It is perceived as a method of drawing the industry into a general and particularised regulatory framework, which in turn mainstreams it. This renders sex work liable to general legal regulation, crossing issues such as industrial rights, planning provisions, and occupational health and safety. As Olowu has noted, New Zealand's liberal legal approach permits the introduction of institutional mechanisms for regulation, control and management of matters relating to the sex industry.³⁰ Licensing can also permit regulation to be tailored to the particular industry either within its own provisions or through other external instruments, such as town planning laws.

In short, the licensing model permits a greater adherence to the principles outlined by Neave. To the extent that it decriminalises aspects of the industry, it permits the pursuit of social policies in tandem with regulation. It may create or enshrine existing generic rights, increasing worker empowerment in regards to clients and employers. Finally, insofar as it permits regulation that is consistent with other industries it minimises hypocrisy and stigmatisation.

The effectiveness of a licensing model, however, rests on the detail. As Arnot points out, negative outcomes can result from laws that focus on the control of individual workers rather than on planning and operational issues.³¹ Our view is that the principles underlying the legislation, the processes for obtaining licences and the extent to which a conservative moral perspective is maintained can all impact upon the desirability of this approach. The remainder of this paper undertakes an analysis of the aspects of the various licensing models in Australia and New Zealand, which we consider to be determinants of effective regulation.³²

LICENSING: REGULATING AN INDUSTRY OR ENFORCING PUBLIC MORALITY?

Licensing of the sex industry can encompass a wide range of approaches. There is a distinction between those models in which public policy and licensing remain separate and those where the two are conflated. At the one end of the regulatory spectrum, are those jurisdictions that distinguish markedly between the licensing of sex work and other businesses, such as the Queensland model and that proposed in 2003 for Western Australia. As will be shown later, the 'social control' approaches tend to carry over the attitudes underlying the criminalisation model, reflecting a

30. D Olowu, 'The Promise of the New Zealand Prostitution Reform Act' (2006) 31(2) *Alt LJ* 93.

31. Arnot, above n 11, 20.

32. Aside from the issue of the effectiveness of regulation, there are also important questions about the effect of licensing on the protection of human rights. For instance, the right to privacy is severely jeopardised in those systems where the licensing authorities are able to require any information they see fit and the right to personal liberty compromised by the powers to set any conditions on licences. As important as these issues are, they are not the focus of this paper.

negative moral stance on sex work. They are part of a wide agenda to reduce the incidence of prostitution. Essentially, the approaches posit prostitution as a social evil and workers as victims subject to exploitation who need to be protected, even from their own choice to work in the industry. At the other end of the spectrum, there are those jurisdictions that have adopted what we have coined a 'pure licensing model'. These jurisdictions take a neutral stance on prostitution, viewing the industry as a field of commercial activity, albeit perhaps a unique one, and license the sex industry in a similar way to other areas of business. This avoids the hypocrisy typical of traditional approaches to regulation and while not necessarily condoning the choice of workers does not further victimise them by rendering them liable to criminalisation and black market conditions. New Zealand epitomises this model, where a generic body is responsible for the licensing of a number of industries, including sex work. The 2007 Western Australian proposal relies heavily on the New Zealand position, a surprising turnaround from its earlier social control stance. The Australian Capital Territory, Victoria and Northern Territory are also best categorised as pure licensing models, although there are some variations in each.

ENSURING EFFECTIVE LICENSING

In order to minimise the scope for corruption and to maximise the potential for the industry to become legitimate any licensing system should be transparent, fair, rational and efficient. This in turn empowers workers, giving them more control and choice over their work and whether to work. Such processes increase public confidence in administrative bodies and are especially important in industries that are historically vulnerable to crime and corruption. As was noted in the 2007 Report of the Prostitution Law Reform Working Group, Western Australia's previous unofficial containment policy had been 'the subject of adverse comment and criticism due to its lack of clarity, the absence of legislative foundation and potential to afford opportunities for corruption'.³³

The administrative principles noted above have implications for the structure and constitution of the licensing body, its powers and objectives, and the processes for lodging and for granting applications.

POWERS AND FUNCTIONS OF LICENSING BODIES

Impartial decision-making requires a separation between policy and licensing functions to limit political influence and ensure fairness. The different licensing systems operating in Australia and New Zealand show that the degrees to which the licensing and social control functions converge can vary enormously. At one extreme is the system that was proposed in Western Australia in 2003 where the

33. Prostitution Law Reform Working Group, above n 7, 14.

Prostitution Control Board would be responsible for licensing, supervision of licencees, provision of Ministerial policy advice, dissemination of information on 'prostitution-related issues' and, most pointedly, the provision of alternatives to prostitution and advice to those wishing to cease prostitution.³⁴ Similarly, Queensland's Prostitution Licensing Authority has functions with policy overtones, including that of advising the Minister on programmes to help workers leave the industry and to raise awareness about issues relating to prostitution.³⁵ In neither State is there a separate advisory committee³⁶ with the licensing body performing the advisory and policy functions. These systems reflect what we would call a 'social control' model of licensing. It is a concern that where the body has a social control aspect, the social and moral agenda precedes the determination of licensing and may influence the exercise of the decision-making functions. A policy, for instance, of reducing prostitution may lead to difficulties obtaining licences and as a consequence the continued operation of unlicensed sex work,³⁷ a situation which would defeat the purpose of licensing.

Other jurisdictions have established licensing bodies that are distinct from the policy arm, with pure licensing functions (such as ACT) or a deferral of licensing to existing generic licensing bodies (such as New Zealand, Northern Territory and Victoria). The 2007 Western Australian proposal favours the minimalist approach to licensing taken by New Zealand. In Western Australia it is recommended that the Department of Racing, Gaming and Liquor be responsible for certification. Some generic bodies have additional functions relating to the sex industry, such as the Victorian Business Licensing Authority which has the responsibility to liaise with the police and to inform the advisory committee of industry issues and trends relevant to its functions.³⁸ However, such additional functions should not impact on decision-making because the link to policy is after-the-fact in its provision of information to relevant policy bodies. The pure licensing systems draw a distinction between the policy concerns of government and the administration of the licensing regime by creating a separate body responsible for advice, policy issues and review of the industry, such as the Prostitution Law Review Committee in New Zealand³⁹ or the Advisory Committee in Victoria.⁴⁰ This ensures that the social agenda need not impact on the decision-making process.

The powers given to the licensing body also reveal the extent to which they reflect the 'pure licensing' or 'social control' model. The 2003 Western Australian proposal

34. Prostitution Control Bill 2003 (WA) ss 15, 16.

35. Prostitution Act 1999 (Qld) s 101.

36. In Queensland there was originally a separately constituted Prostitution Advisory Council; however, its functions were incorporated into the Prostitution Licensing Authority following an amendment to the Act in 2003.

37. As was the experience in Queensland: see discussion below p 305.

38. Prostitution Control Act 1994 (Vic) s 25.

39. Prostitution Reform Act 2003 (NZ) pt 4.

40. Prostitution Control Act 1994 (Vic) s 67.

represented perhaps the most extreme version of a social control model. The functions of the Prostitution Control Board were not to be limited to licensing, but extended to investigatory and disciplinary action in regards to the sex industry generally. Aside from being responsible for granting, revoking, suspending or renewing licences⁴¹ the Board could also impose conditions on licences.⁴² Further powers were to include wide-reaching investigatory and disciplinary functions. For instance, a person who was reasonably suspected of being involved in prostitution could be ordered to undergo a medical examination. The Board could also nominate a member of staff to be an 'authorised person',⁴³ in doing so granting them extensive powers to interrogate and obtain information from a person, including the power to enter and search premises with warrant.⁴⁴ This would have been a worrying extension of policing powers to a body with a clear policy agenda to reduce the incidence of prostitution, creating an obvious conflict with the decision-making principles noted above. It is difficult to see how such functions would be of benefit to the licensing system as such extensive control could further disempower workers and increase the risk of corruption.

In contrast are those systems where the functions of the licensing bodies are more narrowly defined and confined to receiving and determining licence applications, such as in the Australian Capital Territory, the Northern Territory, New Zealand, Victoria and the 2007 proposal for Western Australia. Here the functions are focused on licensing rather than on wider policy issues. In other jurisdictions the licensing bodies may refer matters to, or liaise with, police, but this is to aid the processing of licences rather than as a means of scrutinising the industry. For example, in Western Australia it is now proposed that the Department of Racing, Gaming and Liquor liaise with police during the certification process only. This is appropriate to ensure that serious offenders are not involved in prostitution. In Victoria and the Northern Territory, aside from determining licences, the relevant bodies can refer matters to the police for investigation, but they do not have independent investigatory powers.⁴⁵ These are appropriate reporting functions in relation to licensing.

LICENSING BODY COMPOSITION

A licensing body need not have industry representation to be transparent, fair, efficient and natural. It is reasonable that those bodies that are generic in nature and which have narrow licensing functions, do not have specific industry representation, except insofar as representation from any other industry group is relevant in the

41. *Prostitution Control Bill 2003* (WA) ss 32, 49, 39.

42. *Ibid* s 43.

43. *Ibid* s 138.

44. *Ibid* ss 138–44.

45. *Prostitution Regulation Act 1992* (NT) s 22, *Prostitution Control Act 1994* (Vic) ss 25, 26.

determination of matters. In New Zealand, the Registrar of the District Court⁴⁶ accepts registration applications. This is purely procedural and highly transparent so does not necessitate industry participation. On the other hand, the New Zealand Prostitution Law Review Committee, which reviews matters related to the sex industry, has wide-reaching industry representation, nominated by both government and industry.⁴⁷ The approach is similar in Victoria where there is no industry-specific representation on the Business Licensing Authority (which determines licences) whereas the Advisory Committee is to have members with knowledge of the industry.⁴⁸

Conversely, where the licensing bodies' functions go beyond mere registration or licensing, industry representation should be expected to ensure industry views and issues are reflected in deliberations. However, in Queensland, where the Prostitution Licensing Authority has a policy agenda, industry representation is expressly excluded.⁴⁹ Similarly, the 2003 Western Australian proposals provided that the minister would appoint a person with specific experience or knowledge of the industry.⁵⁰ It seems, however, that this knowledge could be at arm's length, insofar as the person need not be a representative of the industry. The lack of provision for industry representation on a body created to regulate and make policy recommendations in regard to that industry suggests that the body is not concerned, or need not be concerned, with the views of people actually working in that industry. This reflects the moral overtones of the legislation and further perpetuates negative stereotypes about the industry and those involved.⁵¹ This lack of representation impinges on the bodies' ability to be open, rational and fair.

SUBJECT OF LICENCE

A key issue for licensing regimes is the question of which section of the industry is required to obtain a licence in order to operate lawfully. There is reasonable consistency across jurisdictions that street work is not eligible for licensing and is illegal; that sole workers can operate legally without a licence; and that brothels must apply for a licence to operate lawfully. What tends to distinguish the systems is how many workers may work together without needing a licence. Those systems that we would classify as reflecting the 'social control' model only allow sole operators to work legally outside the licensing system, whereas the 'pure licensing'

46. Or the registrar of any other District Court identified in the regulations made under the Act as a registrar who may accept applications.

47. Prostitution Reform Act 2003 (NZ) s 43.

48. Prostitution Control Act 1994 (Vic) s 67(3).

49. Prostitution Act 1999 (Qld) s 102.

50. Prostitution Control Bill 2003 (WA) s 10.

51. In 2007, the Prostitution Law Reform Working Group notes a concern with the stigmatisation of workers and the impact of this on the effectiveness of licensing: above n 7, 19.

systems generally allow at least two workers to work together. Exempting single or small groups of workers from the licensing requirements recognises the opportunistic and transient nature of sex work for some workers so that those who move momentarily in and out of the industry do not face the threat of criminalisation. As noted by the Western Australian Working Group, 'a requirement for individual certification would encourage many workers to work outside the requirements and safeguards of the established system'.⁵² However, where the exemption applies only to sole operators, workers are exposed to a greater safety risk than in systems where people may work in small groups. The 'social control' model pursues its mandate of reducing the incidence of prostitution rather than working with the practicalities of the industry.

An example of the more restrictive approach is Queensland where sex work can only legally be provided by a sole worker or at a licensed brothel. A brothel is defined as 'premises made available for prostitution by two or more prostitutes at the premises'.⁵³ Similarly, under the system proposed in Western Australia in 2003 a licence would be required to carry on or manage a sex work business⁵⁴ unless the person providing the service was a sole operator (defined as a person who owns and operates their own business).⁵⁵ In 2003, in light of the proposed reforms in Western Australia, Godwin warned that requiring the licensing of individuals could drive those workers underground for fear of public disclosure.⁵⁶ The effect, then, is that these workers operate illegally, attracting the problems of criminalised industry.

A more liberal approach is taken in New Zealand where only an operator of a business of prostitution needs a certificate, which means that up to four people can work together at a brothel without the need to apply for a certificate, provided that each of these workers retains control over their individual earnings.⁵⁷ The 2007 Western Australian proposal closely follows the New Zealand position in recognition of the difficulty of bringing individual workers within a licensing system. However, it recommends reducing the number of co-workers who may operate without a licence to two on the basis of a perceived potential nuisance to the community, particularly in residential areas, of groups of more than two people working together.⁵⁸ Allowing two workers to work together without a licence is in line with the approach taken in other Australian licensing jurisdictions, for example, Victoria.⁵⁹

52. Prostitution Law Reform Working Group, above n 7.

53. Prostitution Act 1999 (Qld) sch 4. In addition to the licensing of brothels, the Act provides for the licensing of 'approved managers': Pt 3, Div 2. This will not be covered here.

54. Prostitution Control Bill 2003 (WA) ss 30, 31.

55. Prostitution Control Bill 2003 (WA) s 30.

56. Godwin, above n 20.

57. Prostitution Reform Act 2003 (NZ) ss 34(4)–(5).

58. Prostitution Law Reform Working Group, above n 20.

59. Prostitution Control Act 1994 (Vic) s 22.

In addition to the distinction between sectors of the industry the literature suggests that in any licensing model a distinction should also be drawn between small and large operators and the manner of licensing as a matter of practicality. Some commentators, including representatives of sectors of the sex industry, have warned that licensing, if attached to strict conditions and overly bureaucratic process, operates as a barrier to regulation⁶⁰ and may tend to favour large businesses at the expense of small localised operations,⁶¹ with large operators creating monopolies and controlling working conditions.⁶² For example, location restrictions may effectively require brothels to operate in industrial and commercial zonings, at a cost that is prohibitive to small operators.⁶³ Such systems have tended to create a two-tiered industry, with a large unlicensed and therefore illegal component usually comprised of small operators.⁶⁴

Even where the industry is regulated (eg, through licensing), the scope remains for local government planning processes to operate as a means of circumventing the scope for the industry to operate legally, through prohibitive planning requirements.⁶⁵ Perhaps with a view to such quasi-prohibition of the industry, the New South Wales Brothels Task Force recommended the creation of a Brothels Planning Advisory Panel to assist local government to resolve planning issues in regard to brothels⁶⁶ and Tasmania proposed the adoption of a State Planning Policy as part of its licensing model, to develop consistent location criteria and to prevent local councils from refusing planning permission on a moral basis.⁶⁷ Similarly, Local Government New Zealand indicated an intention to develop a model by-law for use by local councils in the spirit of the country's regulatory framework.⁶⁸ However, as local government in New Zealand was enabled but not required to enact by-laws to regulate the location of sexual services there, it is reported that there have been difficulties for some operators to obtain approval to set up business.⁶⁹ The Western Australian Working Party recognises that a 'significant impediment to the effective implementation of the proposed model is that of sexual services businesses obtaining

60. Scarlet Alliance, the peak body in Australia for sex workers rights, argues that the sex industry is no different from other service industries and should not be subject to complicated regulation: Banach & Metzenrath, above n 20.

61. B Simpson, 'Storm in a Wine Glass: Politics of Prostitution Law Reform in South Australia' (2000) 25(2) *Alt LJ* 79, 80–81, citing S Mawulisa, SA Sex Industry Network spokesperson, quoted in *City Messenger* (Adelaide) 2 Feb 2000, 5.

62. As is reported to be the case in Victoria as a result of the conditions attached to licensing: Jordan, above n 5, 81–82.

63. Simpson, above n 61; Neave above n 2, 211, commenting on an earlier Victorian model.

64. Arnot, above n 11, 20–21.

65. Banach & Metzenrath, above n 20, 27–30.

66. Jordan, above n 5, 85.

67. R Johnson & E Sullivan, 'Tasmania Prepares to Move from Criminalisation to Regulation of Its Sex Work Industry' (2000) 8 *Aust Health Law Bulletin* 97, 99.

68. Jordan above n 5, 74.

69. Prostitution Law Reform Working Group, above n 7, 22.

local government planning approval to conduct their businesses'.⁷⁰ It therefore recommends that the Western Australian Planning Commission ensures that the planning policy framework supports the proposed reforms and provides assistance to local government in regulating sex industry land use.⁷¹

TRANSPARENCY AND ACCOUNTABILITY IN DECISION-MAKING

There are key protections against arbitrary executive power, such as clearly delineated powers, open and transparent processes and accountable decisions. These protections can be achieved through the creation of clear guidelines and limits on the exercise of the decision-making power and by providing stakeholders with a hearing, reasons for decisions and recourse to appeal mechanisms. There appears to be a correlation between those systems reflecting a 'social control' model and a willingness to compromise these protections.

The Queensland Act does not provide the conditions under which a licence will be issued; only a set of criteria for determining the suitability of an applicant⁷² and the conditions under which an application must be refused.⁷³ One of the grounds of refusal is that the applicant 'is not a suitable person to operate a licensed brothel', although suitability is not defined. Despite this wide discretion, the applicant is not afforded a hearing and a non-disclosure order may be made in respect to the Prostitution Licensing Authority's reasons. Further, although it is obliged to consider every application there is no prescribed time-frame for a decision to be made. Similarly, wide discretionary powers were to be given to the Prostitution Control Board under the earlier Western Australian proposal. There was to be no limit on the information that could be required to accompany an application; there would be no time-frame for determining applications, and the Board was not bound to provide a licence if all requirements were satisfied, leaving scope for arbitrary demands and decisions. Furthermore, according to the 2002 Western Australian proposal the rules of natural justice and the right of review were expressly excluded. The government's reasoning was that those in the sex industry should not be subject to principles of administrative law. This was reflected in the overall tenor of the proposals. In a revised version of the Bill in 2003 appeals were to be available to the State Administrative Tribunal, as is the case under the 2007 proposals. In Victoria, the prostitution legislation does not specifically provide that an applicant is entitled to a hearing⁷⁴ but the Business Licensing Authority may establish its own procedures for considering matters, as is the case regarding any other industry.⁷⁵

70. *Ibid.*

71. *Ibid.* 23.

72. Prostitution Act 1999 (Qld) s 17.

73. *Ibid.* s 16.

74. Prostitution Control Act 1994 (Vic) s 36A(6).

75. Business Licensing Authority Act 1998 (Vic) s 10.

In some jurisdictions there are few limits on the sort of information which the licensing body may require.⁷⁶ Indeed, even the information which was specifically mentioned in the 2003 Western Australian Bill, which included palm and finger prints,⁷⁷ was particularly invasive. The concern is that such procedures have requirements which go beyond what is necessary to perform the function of licensing and open up the possibility of human rights violations. This is legitimatised under a social control model as being in the public interest.

New Zealand, on the other hand, represents a pure licensing model, insofar as its processes are in keeping with those that would be ordinarily expected of any administrative system. There is a prescribed application form and the information which may be required is clearly identified and limited to what can be reasonably expected when applying for any certificate. Only non-invasive identifying information can be required, such as the applicant's name, address and photo identification.⁷⁸

Further, the Registrar does not have discretion over the provision of the certificate so long as the prescribed conditions are satisfied. A person is to be granted a certificate *unless* they are disqualified from holding one, which occurs if they have committed a relatively serious criminal offence.⁷⁹ The disqualified person may apply for a waiver, with the matter determined by a District Court judge. Hence, the process for applying and the basis for any determination is clear, with independent review available to the applicant where a certificate is denied.

The 2007 Western Australian Working Group generally favours a process based on New Zealand's minimalistic approach, utilising a generic licensing body, the Department of Racing, Gaming and Liquor.⁸⁰ While it recommends a higher level of scrutiny than is the case in New Zealand, this is consistent with the regulation of other industries by the Department and involves referring investigations to police. Hence, the proposal generally limits the powers of the licensing body, entrusting the main investigative functions to a more appropriate arm of government, which itself has checks on its powers.⁸¹

It is proposed that in Western Australian decisions of the Department of Racing, Gaming and Liquor will be reviewable by the State Administrative Tribunal. A specific compromise to general principles of procedural fairness is the recommendation that the State Administrative Tribunal be able to direct that information not be disclosed

76. Eg Prostitution Act 1999 (Qld) s 15 provides that the Prostitution Licensing Authority may conduct any inquiries it considers appropriate and require, without limit, any further information it considers relevant from an entity.

77. Prostitution Control Bill 2003 (WA) s 36.

78. Prostitution Reform Act 2003 (NZ) s 35(4).

79. Prostitution Reform Act 2003 (NZ) s 36(2).

80. Information on the details of the process, such as whether there will be a prescribed form, and the information required in support of an application, have not yet been released.

81. Prostitution Law Reform Working Group, above n 7, 18, 20.

to an applicant.⁸² Further, following a request by the police or the Department, ‘public interest protected information’ may be reviewed in private without disclosure to the applicant.⁸³

The transparency and accountability of decision-making is, in our view, a key indicator of whether a system represents a pure licensing model or a social control model. In the former, the application and decision-making processes are clear and publicly available. The conditions which must be satisfied are easily identified, and the determining body has limited discretion and clearly delineated powers. In contrast, in those jurisdictions which reflect the social control model, application procedures are often complex and opaque, with the decision-making body having wide powers. The award of a licence is discretionary and there is no entitlement to a licence.

LICENCE CONDITIONS

A body’s ability to impose conditions on licences is reflective of whether the regulatory system is a pure licensing or a social control model. Again, New Zealand clearly fits the former category with no provisions made in the legislation for conditions to be attached to the certificate. In contrast, all Australian jurisdictions, except the ACT, provide for conditions and restrictions to be imposed on licences.⁸⁴ This gives the licensing bodies wide discretionary powers to attach any conditions and restrictions they deem necessary to the licence. This is highly problematic in those jurisdictions that have adopted social control models, that is, where the conditions may be based on a moral rather than rational basis, or where there is limited scope for hearings or reviews. Although breach of such conditions generally does not lead to an automatic cancellation of the licence it may be a ground for discretionary cancellation or suspension (eg, in the Northern Territory⁸⁵) or may lead to disciplinary action (eg, in Queensland⁸⁶).

LICENSING AS A PREFERRED APPROACH

After the Tasmanian government unsuccessfully sought to introduce a licensing model it decided instead to criminalise brothels. The view was held that regulation through licensing is the best approach to ensure the protection of the health and safety of workers and the community, and that in the absence of regulation, criminalisation is the next best option.⁸⁷ Sex industry representatives are concerned

82. Ibid 22.

83. Ibid.

84. Prostitution Regulation Act 1992 (NT) s 29; Prostitution Act 1999 (Qld) s 18(1)(a); Prostitution Control Act 1994 (Vic) s 39 (2); Prostitution Control Bill 2003 (WA) s 43.

85. Prostitution Regulation Act 1992 (NT) s 32(3)(a)(i).

86. Prostitution Act 1999 (Qld) s 27(c).

87. See Tasmania, *Hansard* (HA), 27 Oct 2005, 26–31 (Ms Jackson, Minister for Justice and Industrial Relations).

that further criminalisation will increase the dangers to workers.⁸⁸ However, the evidence suggests that the same may be true of complex, intrusive and administratively opaque licensing systems. The question is whether such systems are in fact effective in regulating the industry.

The differences in licensing approaches can dramatically impact on the scope for effective regulation of the industry. If the aim is to reduce prostitution, and this goal is reflected in the licensing processes, many workers will not be able or willing to work within the legal framework. In jurisdictions in which licensing reflects a social control model, the evidence is that regulation has been less than effective. During debate on the 2003 Western Australian Bill, it was argued that two years after the Prostitution Licensing Authority in Queensland was established, only 10 legal brothels existed and in Victoria 80 per cent of the brothels operated illegally.⁸⁹ These claims were bolstered by findings of the Queensland Crime and Misconduct Commission in its evaluation of the Queensland Act in December 2004. The major concerns that emerged were the extent of, and issues surrounding, illegal prostitution.⁹⁰ In particular, the Commission noted that 'illegal prostitution activities in Queensland have continued unabated since the [Act's] implementation'.⁹¹ Licences had been issued to only 14 brothels (operated by 24 licencees) throughout Queensland,⁹² with around 75 per cent of sexual services in the State being provided as escort or outcall services, generally operating illegally. A further, significant component of the illegal industry arose from the situation where two workers work together for safety reasons and who, for commercial reasons, did not wish to establish a two-person brothel.⁹³ Hence, even those parts of the industry that have the capacity for licensing have not, in fact, come under the licensing regime. Industry representatives argue that this is because of the onerous requirements. As we have seen, some of the Australian licensing bodies have wide discretionary powers and little guidance on how these are to be used. This means that there is either no entitlement to a licence even if conditions are fulfilled or that conditions are so vague that a person may find them difficult to satisfy. Hence, those licensing systems which are administratively complex, intrusive and open to morality based decision-making, as indicated by their lack of adherence to established protocols for fair decision-making, are arguably as inefficient in regulating the industry as models of criminalisation. Both enable a continuation of black markets and act as a barrier to regulation, criminalising and further disempowering workers, and failing to address any social problems that might be attached to this particular industry.

88. Hobart Community Legal Service and Scarlet Alliance reported in M Paine 'Cheers and Jeers Over Brothel Ban' *Mercury* (Tasmania), 7 Oct 2005.

89. Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 May 2003, 7065 (C Edwards).

90. Crime and Misconduct Commission, above n 20, 80.

91. *Ibid.*

92. *Ibid.* xii.

93. *Ibid.* 80.

CONCLUSION

There is no doubt, given the divergent community viewpoints on the operation of the sex industry, that its regulation is a vexed issue for government. However, the dominant view within Australia and New Zealand seems to be that a licensing system can best ensure the health and safety of the community and those working in the sex industry. It is not, however, the case that all licensing systems are the same. For example, although Western Australia has not changed its preference for a licensing system between 2002/03 and 2007, the content of the proposals is vastly different. To be effective the system adopted should reflect a pure licensing model, guided by principles of fairness, transparency, rationality and efficiency.

A strict and invasive registration system is not beneficial for those in the industry or the community. Difficulty in obtaining a licence because of onerous requirements or the discretionary basis for the grant may lead to the continuation of illegal work and the perpetuation of poor working conditions for such workers. Licensing models which conflate social control and regulation do not necessarily lead to effective regulation of an industry, as indicated by the extent to which parts of the industry remain unregulated. This creates the danger of a two-tiered system, in which a large section of the industry continues to operate under a model of criminalisation. This is suggested by the Western Australian Working Party in its decision to exclude small owner-operator premises from the need for licensing, thereby acknowledging that such workers would be likely to work outside formalised requirements.

Of course, licensing reform goes only part way to address the social and economic inequalities which might lead workers into this particular industry. But attacking the industry from a moral standpoint, an approach shared by criminalisation and a 'social control' licensing system, does nothing to improve the lot of workers. Nor does it increase the potential for safeguarding the community from the perceived risks of the industry. The pure licensing approach, on the other hand, enables workers to exercise industrial and other legal rights in respect to employers and clients, reduces the influence of criminal and corrupt elements on the industry, and has a greater chance of safeguarding worker and community health and safety.

A model like that operating in New Zealand protects the community as well as the individuals involved in the industry not only from the industry but from the power of the state and its representatives. It is argued that New Zealand offers a pragmatic model in places 'where the values of genuine popular democratic participation, transparency, and objectivity are treasured'.⁹⁴ It is pleasing to note that while retaining its support for a licensing system Western Australia has moved from a 'social control' model to a 'pure licensing' system.

94. Olowu, above n 30.