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THE LEGALISATION OF THE SEX INDUSTRY –
A COMPARISON BETWEEN NEW ZEALAND
AND THE FEDERAL REPUBLIC OF GERMANY

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1 INTRODUCTION

In recent times, several countries have taken legislative measures in order to decriminalise and legalise prostitution in an attempt primarily to improve the working conditions of sex workers and keep minors away from the sex industry. Among these countries were New Zealand and the Federal Republic of Germany.

ABSTRACT

Prostitution is generally known as the oldest existing profession. Notwithstanding the severe difficulties to which sex workers are often exposed, this industry has always "survived" and remains a firm part of all societies. This paper aims to analyse the current legal situation related to the sex industry both in New Zealand and in Germany. These countries have recently decriminalised and legalised the sex industry with the Prostitution Reform Act 2003 in New Zealand and the German *Prostitutionsgesetz* (Prostitution Act) of 2001. The main focus of this paper centres on the general criticism against the decriminalisation and legalisation of sex work and on whether these arguments are appropriate. In so doing, it also considers whether any practical changes took place or can be expected after the new legislation was passed by the Parliaments in both countries. Furthermore, it deals with the question whether New Zealand and / or Germany should adopt legislative measures taken in the other country in order to seek improvement of the living and working conditions of the people involved in this business field.

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For the purposes of this paper, prostitution is defined as the provision of commercial sexual services.

I INTRODUCTION

In recent times, several countries have taken legislative measures in order to decriminalise and legalise prostitution in an attempt primarily to improve the working conditions of sex workers and keep minors away from the sex industry. Among these countries were New Zealand and the Federal Republic of Germany.

The New Zealand and the German law reforms are quite different in relation to their extents. While the German *Prostitutionsgesetz – ProstG* of 2001 basically only aims to provide sex workers with a substantiated claim against their clients and legal employers that is enforceable by law, the Prostitution Reform Act 2003 (PRA) in New Zealand consists of a detailed body of laws that, pursuant to section 3 of the PRA, aims to safeguard the human rights of prostitutes, protect them from exploitation, promote their welfare, occupational health and safety, and create circumstances that are conducive to public health. In addition, it also aims to protect children from exploitation by prohibiting the use of persons under 18 years of age in the sex industry.

This analysis focuses on the critical arguments that are used against any legislative measures that decriminalise and / or legalise the sex industry and the way the law reforms in both New Zealand and Germany deal with these issues. The critical arguments are that prostitution is opposed to the prevailing morality in Western Countries, that it objectifies and dehumanises, that it is detrimental to families and society as a whole, that it does not give prostitutes more protection, that prostitutes would under no circumstances sue their clients, that it does not enhance women's job choices, that it reinforces the oppression of the affected women, that it leads to the promotion of sex trafficking and an increase of the demand for sex work, that it could lead to the immigration of numerous foreign prostitutes, that it could lead to an increase of child prostitution, that it is contradictory in terms of public health issues and that, finally, it is not desired by prostitutes.

For the purposes of this paper, prostitution is defined as the provision of commercial sexual services.

II CRITICISM REGARDING THE DECRIMINALISATION AND LEGALISATION OF THE SEX INDUSTRY: ARGUMENTS AND ANSWERS

The numerous arguments against the decriminalisation and / or legalisation of the sex industry are as follows:

A Prostitution is Opposed to the Prevailing Morality in Western Countries

An argument consists of the idea that the decriminalisation and legalisation of sex work is opposed to religious morality and the prevailing morality in Western societies.¹ According to this opinion, there is a lack of moral aspects in favour of the decriminalisation of an activity that has been considered immoral for centuries. Prostitution is contrary to the bible and therefore to God's law.²

The argument that sex work was considered immoral for centuries does not mean that it is therefore adequate and justified to continue as such. Societies' attitudes are subject to change in the course of time.

Nevertheless, the Prostitution Reform Bill in New Zealand was the subject of an intense moral and sociological debate within society. It was seen as the "most contentious moral issue debated by Parliament since the Homosexual Law Reform Bill 17 years ago".³ The very narrow majority in Parliament with which it was passed, a 60-to-59 vote with one abstention, underscores that numerous Parliamentarians were doubtful concerning the advisability of the PRA. However, the dishonesty in society, where brothels were run under the term of massage parlours and clients entered the premises officially only for a massage, belongs to the past. It even seemed that society was ignoring the existence of brothels, whereas, now it is recognised that brothels exist and that simply keeping or managing one is not *per se* punishable.

Is it the fact that prostitutes are "selling their bodies" the problem? But it can certainly be argued that it is not understandable why only prostitutes are seen as

¹ R. Barri Flowers *The Prostitution of Women and Girls* (McFarland & Company, Jefferson, 1998) 158; Christian Heritage NZ <<http://www.chp.org.nz/index.php?cid=38&mpid=12>> (last accessed 29 September 2003); BVerwGE 22, 286, 289.

² Flowers, above; Christian Heritage NZ, above.

³ Nick Venter "One vote makes sex trade legal" (26 June 2003) *The Dominion* Wellington A1.

selling their bodies and not construction workers, for example.⁴ Most employees use parts of their bodies to perform their work.

Nevertheless, it is also argued that people's selves are involved differently in sex work than in other professions.⁵ The difference consists in the circumstance that prostitutes need to distance themselves from what they are doing.⁶ Some of the prostitutes who were interviewed by Jan Jordan referred to a "switch off" mechanism that is necessary to perform sex work.⁷ However, this cannot be stated in general. Some sex workers have perceived their job as a positive experience,⁸ so that a general need for distance from one's work cannot be assumed.

The *ProstG* was not, on the contrary to the PRA, the subject of an intense debate within society. Society's perceptions regarding the morality of prostitution has changed in the last decades. A good example for this change is a survey conducted by the Administrative Court in Berlin in December 2000⁹. This Court had to decide over a litigation where the licence of a café in Berlin was revoked on the grounds of § 4 *Gaststättengesetz* for the reason that initial contacts with prostitutes took place there. The café was therefore seen as an immoral place, whereby immorality was defined as to be contradictory to the "decency of fair people"¹⁰. The Court initiated a survey involving 50 representatives of different associations questioning whether sex work was considered to be immoral in modern society. The result was that the absolute majority of those questioned did not consider that prostitution in general was immoral. Thus, the Court held that prostitution is no longer contradictory to the "decency of fair people", so the café was given its licence back.¹¹

In addition to the survey just mentioned, "Infratest dimap", which is a German company for political and election research, undertook a survey in Germany on

⁴ Arne Hoffmann "Tamara Domentat *Lass dich verwöhnen Prostitution in Deutschland* – Eine Rezension von Arne Hoffmann" available at <<http://www.maennerrat.de/prostitution.htm>> (last accessed 1 December 2003).

⁵ Roger Matthews and Maggie O'Neill (ed) *Prostitution* (Ashgate, Burlington, 2002) 423.

⁶ Matthews and O'Neill, above, 423.

⁷ Jan Jordan *Working Girls* (Penguin Books, Auckland, 1991).

⁸ Matthews and O'Neill, above, 119.

⁹ VerwG Berlin NJW 2001, 983.

¹⁰ RGZ 43, 114, 124.

¹¹ VerwG Berlin, above, 983; *Das Café Pssst macht Krach*

<<http://www.spiegel.de/sptv/extra/0,1518,druck-116357,00.html>> (last accessed 10 October 2003).

whether prostitution should be legalised in 1999. The result was that 68 per cent of those questioned were in favour of the legalisation of the sex industry.¹²

In relation to the argument of prostitution being contrary to the Bible and therefore to God's law, it is arguable that the intention of law reforms to address the harm of prostitutes is consistent with the religious tradition to take responsibility for the marginalised and oppressed.¹³

In conclusion, sex work is still sometimes burdened with the perception of immorality. However, new perceptions are emerging whereby individuals are accepting this activity as a part of our society.

B Prostitution Objectifies and Dehumanises

Another argument presented is that prostitution "objectifies and dehumanises" sex workers and that this situation would not improve by legalising prostitution.¹⁴ This point could be considered as one of the key questions when dealing with the legal aspects of prostitution. Is this activity degrading and are there reasonable grounds for this attitude from a modern perspective?

Naturally, a distinction between voluntary and forced sex work has to be made. The latter is a completely different issue and constitutes a grave crime that needs to be addressed by criminal law. There are two aspects of the sex industry that should never be confused: the trade of women is a completely different issue from the decriminalisation and legalisation of the sex industry in general. The decriminalisation and legalisation of prostitution only focuses on those sex workers who have entered the sex industry voluntarily. Thus, the question is whether sex work on a voluntary basis is degrading or not.

¹² Erardo Cristoforo Rautenberg "Prostitution: Das Ende der Heuchelei ist gekommen!" (2002) 9 NJW 650, 651.

¹³ Heide Pusch "Theological and Moral Aspects of the Prostitution Reform Bill" (2002) 7 available at <http://www.timbarnett.org.nz/documents/heide_paper.pdf> (last accessed 8 December 2003).

¹⁴ R. Barri Flowers *The Prostitution of Women and Girls* (McFarland & Company, Jefferson, 1998) 159; Christian Heritage NZ <<http://www.chp.org.nz/index.php?cid=38&mpid=12>> (last accessed 29 September 2003).

When an informed adult decides to enter the sex industry, this decision should be respected. Other people's moral perceptions, even at State level, should not be decisive when asking how these situations should be legally handled. When mature, informed people make a decision about their lives without interfering in somebody else's rights, neither the State nor anyone else should have the right to interfere in this decision nor to make the realisation of this decision impossible.

Another question is how "voluntary" involvement in the sex industry should be defined. Entering the sex industry could seem to be an emergency solution for many women because of financial shortages. Some prostitutes are addicted to drugs and are in the sex industry in order to afford them. An emotional dependence on their "employers" can be the reason why prostitutes enter the sex industry as well. Furthermore, it has to be observed that a high percentage of prostitutes have been sexually and physically abused before entering the sex industry.¹⁵ However, also women who were abused can and should be able to decide over their lives.

One author submitted that the term "voluntary" in relation to prostitution has to be handled with care.¹⁶ Often, the victims of sexual violence say that they wanted what happened. This is consistent with the repressed attitudes that emerge from the insufferable living situations of the victims. Thus, the boundaries between voluntary and forced sex work are often difficult to find.¹⁷

Concerning this question, some prostitutes refer to the independence and the flexibility they have in the sex industry.¹⁸ Sex work can easily be combined with housework and the care of children.

Can it be stated that most prostitutes in New Zealand work voluntarily? In an interview with Jan Jordan, a prostitute in New Zealand said that no woman would remain in that job if there were other jobs where she could earn the same amount of money.¹⁹ Another sex worker stated that the job is "addictive", giving the freedom

¹⁵ Flowers, above, 159.

¹⁶ Beiträge zur feministischen Theorie und Praxis <<http://www.beitraege-redaktion.de/>> (last accessed 2 December 2003).

¹⁷ Beiträge zur feministischen Theorie und Praxis, above.

¹⁸ Roger Matthews and Maggie O'Neill (ed) *Prostitution* (Ashgate, Burlington, 2002) 411.

¹⁹ Jan Jordan *Working Girls* (Penguin Books, Auckland, 1991) 143.

and the wages related to it as reasons.²⁰ There are many prostitutes who, during their involvement in the sex industry or between it, had other "normal" jobs that did not satisfy them, with the result that they gave them up and returned to sex work. This demonstrates that the decision of many prostitutes to work in this field is voluntary. They often have other options, although they might have to move to another district in order to avoid running into their former clients in their new jobs. If, in comparison, an employee of a bank remains working in that bank because of the higher wage, despite preferring some other job, no one would come up with the idea that his decision was not voluntary. In conclusion, it can be said that the majority of prostitutes in New Zealand work on a voluntary basis.²¹

According to estimations, this only applies to about half of all prostitutes who work in Germany.²² Foreign women are frequently lured with the promise of the possibility of working as waitresses, secretaries or comparable jobs in Germany. Once they have arrived at their destination, they are frequently forced into prostitution and kept in the sex industry by criminal acts.²³ These offences consist of the theft of their documents and the threat to their own lives or physical condition and those of their families in their home-countries. In many cases, these prostitutes are kept in the underworld to work. Their existence and living conditions would not be improved at all by criminalising the sex industry. Instead, this problem has to be addressed by provisions that criminalise the trade of sex workers or the coercion of them. The *Strafgesetzbuch – StGB* (German Criminal Act) addresses this problem in its §§ 180b, 181.

Furthermore, the problem of prostitutes who are addicted to drugs and need money to afford them exists everywhere. These sex workers often suffer from the lack of options for work, accommodation, and their physical and psychological integrity.²⁴ Such options are not achievable with the criminalisation of the whole sex industry or

²⁰ Jordan, above, 29.

²¹ However, section 16 of the PRA seeks to ensure that no sex workers can be induced or compelled to provide commercial sexual services or its earnings (see below).

²² Dietmar Hipp, Carsten Holm and Andreas Ulrich "Rente im Rotlichtmilieu" (2001) 19 *Der Spiegel* available at <[http://premium-link.net/\\$62535\\$906254146\\$/0,1518,800_pkt_00150-132181,00.html](http://premium-link.net/$62535$906254146$/0,1518,800_pkt_00150-132181,00.html)> (last accessed 14 August 2003).

²³ Hipp, Holm and Ulrich, above; Beiträge zur feministischen Theorie und Praxis *Editorial* <<http://www.beitraege-redaktion.de>> (last accessed 1 December 2003).

²⁴ Isabelle Charles "Projekt DDD-F" (1999) 8 available at <<http://www.arud.ch/fachbeitraefe/charles.pdf>> (last accessed 1 December 2003).

parts of it, but with the fortification of the legal situation of sex workers.²⁵ This can provide them with the professional support needed, as well as the help in other areas provided by established social agencies.

In relation to sex work that is performed voluntarily, the issue of prostitution “objectifying and dehumanising” perhaps needs to be considered from an alternative point of view. It is arguable that if society imposes its moral standards on people who decide for themselves to have other standards and this stops them realising their decisions, *this* is what is dehumanising. Society then denies certain people the capacity of deciding over their own lives.

In conclusion, it is generally not objectifying nor dehumanising to work as a prostitute.

C Sex Work is Detrimental to Families and Society as a Whole

Furthermore, it is argued that a law reform focusing on sex work is detrimental to the central position of families and therefore society as a whole, as it condones promiscuous and extra-marital sexual intercourse.²⁶

It is an important political issue to support families, but this aim cannot be achieved by criminalising prostitution. Extra-marital sex is nowadays frequent, inside and outside the sex industry. Additionally, sex workers are often convinced that their activity does not endanger marriages or other relationships.²⁷ They believe, to the contrary, that their work helps to strengthen the relationship between their clients and their partners.²⁸ Another author refers to prostitutes as “valves on the pressure cooker”, arguing that they preserve marriages by minimizing the impact of a couple’s sexual contradictions.²⁹

²⁵ Charles, above.

²⁶ Christian Heritage NZ <<http://www.chp.org.nz/index.php?cid=38&mpid=12>> (last accessed 29 September 2003).

²⁷ Jan Jordan *Working Girls* (Penguin Books, Auckland, 1991) 89.

²⁸ Jordan, above, 89.

²⁹ Jill Nagle (ed) *Whores and Other Feminists* (Routledge, New York, 1997) 132.

On the other hand, prostitution is also seen as the source of an authentically emotional and erotic experience.³⁰ Therefore, it could be said that families might be endangered in some cases. Nevertheless, it is arguable that clients want to maintain the emotional, social and material security that a marriage or other long term relationship provides while “seeking compensation” that can be provided by seeing prostitutes in secrecy.³¹ The possibility that prostitution endangers relationships is quite unlikely. The clients often see sex workers in order to realise their fantasies, enjoy “diversity” or just for quick sexual relief, whereby an emotional attachment of sex workers to their clients or vice versa is very uncommon and unlikely. As sexual satisfaction can be gained without being emotionally involved, there is generally little danger for relationships or families. It is more likely that other extra-marital sexual relationships endanger families rather than the ones with prostitutes.

Nevertheless, families might not be endangered from an emotional attachment between prostitutes and their clients, but rather from the dishonesty in the relationship.³² This problem is not exclusively related to prostitution, many other sexual escapades have the same consequence.

In this context, an author contributes a comparison with adultery, saying that it is an example of socially unacceptable behaviour that is not illegal.³³ The immorality of adultery does not cause people to consider its criminalisation. Therefore, morality and legality are handled as different aspects of adultery. However, this is different when looking for prostitution, where the moral concerns lead to demands to strengthen the laws against it.³⁴

With regards to the occurrence of crimes, sex work is believed to be an important factor in the prevention of criminal activities.³⁵ It is seen as adequate to keep men

³⁰ Arne Hoffmann “Tamara Domentat *Lass dich verwöhnen Prostitution in Deutschland – Eine Rezension von Arne Hoffmann*” available at <<http://www.maennerrat.de/prostitution.htm>> (last accessed 1 December 2003).

³¹ Eileen McLeod *Women Working: Prostitution Now* (Croom Helm, London, 1982) 59.

³² Nagle, above, 153.

³³ Heide Pusch “Theological and Moral Aspects of the Prostitution Reform Bill” (2002) 2 available at <http://www.timbarnett.org.nz/documents/heide_paper.pdf> (last accessed 8 December 2003).

³⁴ Pusch, above.

³⁵ Jan Jordan *Working Girls* (Penguin Books, Auckland, 1991) 85.

from molesting somebody and to alleviate domestic violence.³⁶ Thus, it cannot be said that sex work is detrimental for society as a whole. It might even be advantageous in terms of a lesser crime rate in society.

D Law Reforms do not Give Prostitutes More Protection

It is stated that the decriminalisation and legalisation of sex work would not give sex workers any more protection.³⁷ Based on two major studies on the sex industry, it is submitted that the protection for women working in the industry is poor regardless of whether the establishments are illegal or legal. According to a survey in five countries held by the Coalition Against Trafficking in Women International, 80 per cent of all prostitutes suffer from their "employer's" and clients' physical violence.³⁸ Violence is also used to coerce women into the sex industry.³⁹

On the other hand, this survey is criticised by another author saying that the interviewed prostitutes in South Africa, Zambia, Turkey, Thailand and the United States of America were all either addicted to drugs or absolutely miserable.⁴⁰ The results obtained can therefore not be seen as representative at all.⁴¹

However, especially when the facts described above are given, it is hard to understand why some feminists hold the opinion that the legislature should not adopt any or further legal steps to improve the circumstances of sex workers. The sex industry is by its nature exposed to a higher risk of violence than other business sectors, but provisions that penalise any kind of violence against prostitutes can address this problem.

Also, in consequence of the decriminalisation of their activity, sex workers could at any time call the police in cases of violence without having to fear their own

³⁶ Eileen McLeod *Women Working: Prostitution Now* (Croom Helm, London, 1982) 67; Jordan, above, 85.

³⁷ Coalition Against Trafficking in Women
<http://action.web.ca/home/catw/readingroom.shtml?sh_itm=67c1e4787e78ffa49d3d92987aeea6dd&A_EX_Session=4d9184fa77980b78f8702bb06b1c608e> (last accessed 26 November 2003).

³⁸ Coalition Against Trafficking in Women, above.

³⁹ Coalition Against Trafficking in Women, above.

⁴⁰ Arne Hoffmann "Tamara Domentat *Lass dich verwöhnen Prostitution in Deutschland – Eine Rezension von Arne Hoffmann*" available at <<http://www.maennerrat.de/prostitution.htm>> (last accessed 1 December 2003).

prosecution for activities that are related to their profession in the sex industry. The unwritten rule not to call the police but other "friends" when a client is violent could be repealed.

In New Zealand, section 16 of the PRA was enacted in order to address the problem of prostitutes who are coerced into the sex industry. This section declares it an offence to induce or compel a person into the sex industry and penalises such activity with up to 14 years imprisonment. It is therefore consistent with section 129A of the Crimes Act 1961 concerning its threat of punishment.

Germany has enacted similar provisions in §§ 180b I S.1, 240 *StGB* that penalise the coercion of prostitutes into the sex industry, but these provisions existed long before the *ProstG* was passed by the German Parliament.

Similarly to the problem of violence, the exploitation of prostitutes is a common problem in the sex business field as well. In order to seek more protection for sex workers in relation to this problem, there is a necessity for legal systems to address it.

In New Zealand, the possibility of the exploitation of prostitutes is addressed by the PRA in its sections 16 – 18 and 20 – 23. Section 17 of the PRA seeks to ensure that prostitutes can refuse to provide or continue to provide commercial sexual services. Section 18 of the PRA goes further seeking to ensure a general right of refusal to work, stating expressly that any benefit or entitlement to a benefit under the Social Security Act 1964 is not affected by a prostitute's refusal to work or to continue to work in the sex industry. Pursuant to this section, the same applies to possible entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001.

As prostitutes can, therefore, not be contractually obliged to the provision of their services and do not have to fear the loss of any benefits they are entitled to when leaving sex work, these detailed provisions of the PRA are suitable to facilitate the exit from sex work.

⁴¹ Hoffmann, above.

Germany has, in part, enacted quite similar provisions to those in New Zealand, but has some differences in relation to sections 17 and 18 of the PRA. The exploitation of prostitutes is a punishable offence according to § 180a *StGB*. Additionally, § 180b *StGB* and § 181 *StGB* penalise the act of compelling a person into prostitution.

Nevertheless, it is not expressis verbis ruled by the *ProstG*, as it is by the PRA, that prostitutes cannot be contractually obliged to the provision of commercial sexual services. The *ProstG* does not expressly deal with this question at all. However, the fact that prostitutes cannot contractually be obliged to sex work can be deduced from the provisions of the *ProstG*, the title of which "Act related to the regulation of the legal situation of prostitutes" suggests that it is complete in its ruling over the legal handling of prostitution.⁴² The circumstance that a claim for sex work that is enforceable by law is not mentioned in the *ProstG* is understood to mean that such a claim does not exist.⁴³ Furthermore, the reasons given by the legislature for the necessity of the *ProstG* included the idea that no such claim that is enforceable by law exists or should exist.⁴⁴

Germany has two possible sources of entitlement benefits for prostitutes. Firstly, the state-run obligatory social insurance that covers benefits in cases of disease, accident, nursing care, pension and unemployment. Secondly, everyone in financial need is entitled to benefits from the State in accordance with the *Bundessozialhilfegesetz* – *BSHG*. Pursuant to § 1 II 1 *BSHG*, these benefits cover the minimum of what is needed for a decent human life.

Before the *ProstG* was adopted, prostitutes had no access to the state-run obligatory social insurance.⁴⁵ This was, altogether, due to the ruling that prostitution is immoral. Nevertheless, the *BSHG* seeks to ensure that all people are provided with the absolute minimum for life. § 25 I 1 *BSHG* states that one of the few exceptions to this principle is when reasonable work is not accepted by the applicant for the benefit. Thus, it

⁴² Christian Armbrüster in *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten (Prostitutionsgesetz-ProstG)* (4 ed, C.H.Beck, München, 2003) § 1 ProstG 247.

⁴³ Armbrüster, above, 247.

⁴⁴ Armbrüster, above, 247; Deutscher Bundestag Drucksache 14/5958, 6 available at <<http://dip.bundestag.de/btd/14/059/1405958.pdf>> (last accessed 28 November 2003).

⁴⁵ Lena Dammann "Die Diskriminierung geht weiter" (2003) 1 Forum Recht online 15, available at <<http://www.forum-recht-online.de/2003/103/103dammann.htm>> (last accessed 10 December 2003).

could be argued that prostitutes who refused to work as such were not entitled to benefits from the State. Nevertheless, prostitution was understood to be immoral, so that, as expressly stated by section 18 (1) of the PRA, it could not be seen as "reasonable" work in terms of § 25 I 1 *BSHG*. Prostitutes who refused to work were therefore entitled to benefits in accordance with the *BSHG*.

As a consequence of the *ProstG*, prostitutes can now be beneficiaries of social insurance. § 3 *ProstG* states that even though employers have only a limited right of instruction, this does not deny prostitutes access to this insurance. However, the number of sex workers who have an employment agreement with the establishment they are working in is still small.⁴⁶ The consequence of working illegally is that they are not beneficiaries of social insurance. A reason for illegal work is that sex workers would have to disclose their identity in employment agreements. Besides, illicit work facilitates avoiding taxes.⁴⁷ Thus, harder controls by the German tax authorities might be necessary to entirely solve this problem.

If prostitutes refuse to work, they have, as described above, the right to do so.⁴⁸ However, this will affect their entitlements in terms of the obligatory social insurance, leading to, for example, a much lower pension than if they continued in their job. This is because contributions to the social insurance are no longer paid; therefore, their entitlements do not increase. Still, as in New Zealand, existing entitlements cannot generally be lost. Furthermore, the rights in accordance with the *BSHG* can, as a consequence of the right of refusal, not be affected. But as said above, these benefits cover only the absolute minimum to survive.

For this reason, it is arguable that the lower entitlements could in practice lead to prostitutes not really having the option of refusing to work. This is contrary to the aims of the *ProstG* to improve the general living conditions of prostitutes. On the other hand, this problem is not especially related to sex work. If employees of other

⁴⁶ Carsten Holm "Das bringt uns gar nichts" (2002) 12 *Der Spiegel* available at <[http://premium-link.net/\\$62535\\$906254146\\$/0,1518,800_pkt_00150-188503,00.html](http://premium-link.net/$62535$906254146$/0,1518,800_pkt_00150-188503,00.html)> (last accessed 14 August 2003).

⁴⁷ Holm, above.

⁴⁸ Christian Armbrüster in *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten (Prostitutionsgesetz-ProstG)* (4 ed, C.H.Beck, München, 2003) § 1 *ProstG* 247; Deutscher Bundestag Drucksache 14/5958, 6 available at <<http://dip.bundestag.de/btd/14/059/1405958.pdf>> (last accessed 28 November 2003).

business sectors give up their jobs for some reason, their entitlements will no longer increase. Even so, it has to be admitted that sex work is a business sector where a workers' exit should not be difficult. Nevertheless, prostitutes will at least be provided with the minimum and no one can expect taxpayers to pay for a former prostitute's comfortable life.

In conclusion, both the PRA and the *ProstG* ensure that the exit from the sex industry is not made more difficult.

E Prostitutes Would Under no Circumstances Sue Their Clients

If prostitutes were not entitled to sue their clients for payment of their services, this could indirectly lead to them seeking help and protection from their "employers". Thus, it is arguable that judicial systems can somehow be instrumental in making prostitutes more dependent on their exploiters. The legalisation of prostitution has the consequence that an agreement on the provision of sexual services is a valid contract that substantiates a prostitute's claim for payment of these services. This claim is enforceable by law. Nevertheless, what effect does such a valid contract have in practice? It is argued that sex workers' practice is often to demand payment before the services take place⁴⁹ and that they would under no circumstances sue their clients, so that a provision that governs over this theoretical possibility is unnecessary.⁵⁰ Sex workers often live in an environment with their families and / or friends not knowing that they are involved in the sex industry. Therefore it could be considered as probable that they would not risk their reputation in order to sue a client in court. A prostitute stated "we will never be free until women stop being afraid of being called a whore".⁵¹

On the other hand, sex workers would surely sue their clients if their profession was recognised in society. Under this premise, there would not be the risk of loss of reputation. Thus, the developments could result in sex workers openly going about their jobs and therefore also suing their clients in courts, when the agreed wages are not paid after the sexual services have been provided.

⁴⁹ Armbrüster, above, 249.

⁵⁰ Holm, above.

⁵¹ Roger Matthews and Maggie O'Neill (ed) *Prostitution* (Ashgate, Burlington, 2002) 332.

Nevertheless, the absolute recognition of sex work in society demands time and society nowadays is at the beginning of this rethinking. This can be observed on the above-mentioned surveys held by the Administrative Court in Berlin and by "Infratest dimap". One of the first steps in this ongoing process can be taken by legally declaring that sex work is not illegal and that it causes claims that are enforceable by law. This is only the beginning of a longer process that develops as perceptions change. But it is important that the first step is taken in order to reach the second. Such an important change in the perceptions of society about the moral classification of sex work can take decades. Once the process of change has been completed, the perception of embarrassment or inconvenience because of suing a client may not be relevant anymore. We have to allow modern societal developments to occur; but these processes demand a reasonable period of time. Thus, the argument that prostitutes would under no circumstances take their clients to court can be subject to change.

In New Zealand, section 7 of the PRA provides that no contract related to the provision of sexual services is, for any reason, void. The German § 1 *ProstG* expresses this issue differently, but with the same consequence. According to this provision, sex work substantiates a claim for payment that is enforceable by law. The same applies when a sex worker makes herself or himself available in a brothel or similar establishment in consequence of an employment agreement with the manager or operator of the premises.

However, not a single sex worker in New Zealand or Germany has sued a client for payment of the agreed wages so far.⁵² This might also partly be attributed to the custom of prostitutes to demand their wages before the provision of the agreed services. The possibility of suing clients requires the knowledge of their identity and, independently from that, it is much easier to be paid in advance than having to sue somebody in order to be paid.

§ 1 *ProstG* also influences the claims sex workers have as a consequence of any act from injury, illness or incapacity that prevents them from working. Before this provision came into force, the judiciary held that a prostitute's loss of wages

substantiates a claim that corresponds in its amount to the margin of subsistence. The judiciary based this decision on the immorality of sex work. In consequence of § 1 *ProstG*, the substantiated claim reaches the amount ruled by § 252 *Bürgerliches Gesetzbuch – BGB* (German Civil Code), which states that the amount to be paid includes the loss of profits.⁵³ Thus, the normal income of the affected sex worker is to be paid in such a case.

F The Legalisation of the Sex Industry Does not Enhance Women's Job Choices

It is also argued that the legalisation and decriminalisation of the sex industry do not enhance the working choices for women.⁵⁴ It is admitted that some sex workers chose voluntarily to enter this business sector, but this is compared with the fact that some people chose voluntarily to take dangerous drugs such as heroin. It is concluded that although these people voluntarily take drugs, no one seeks their legalisation.⁵⁵

This comparison is not entirely appropriate, as a questionable working field is not comparable to drugs that often lead to death. As observed above, sex work is often a voluntarily choice between different options.⁵⁶

Decriminalisation and legalisation facilitate diverse measures such as occupational counselling for prostitutes. If sex workers are supported, their chances of entry into another working sector are much higher than if they worked hidden in the shadows of the night. The decriminalisation and legalisation of the sex industry might therefore enhance prostitutes' job choices.

⁵² Carsten Holm, above. In relation to New Zealand, this allegation is based on the Butterworths database and on information given by the NZ Prostitutes Collective.

⁵³ Christian Armbrüster "Zivilrechtliche Folgen des Gesetzes zur Regelung der Rechtsverhältnisse der Prostituierten" (2002) 38 NJW 2763, 2764.

⁵⁴ Coalition Against Trafficking in Women

<http://action.web.ca/home/catw/readingroom.shtml?sh_itm=67c1e4787e78ffa49d3d92987aeea6dd&A_EX_Session=4d9184fa77980b78f8702bb06b1c608e> (last accessed 26 November 2003).

⁵⁵ Coalition Against Trafficking in Women, above.

⁵⁶ This statement is based on the interviews with sex workers published by Jan Jordan in *Working Girls* (Penguin Books, Auckland, 1991) and on Arne Hoffmann "Tamara Domentat *Lass dich verwöhnen Prostitution in Deutschland – Eine Rezension von Arne Hoffmann*" available at <<http://www.maennerrat.de/prostitution.htm>> (last accessed 1 December 2003).

G The Decriminalisation and Legalisation of Prostitution Reinforces the Oppression of the Affected Women

Another argument presented is that the decriminalisation and legalisation of the sex industry increases street prostitution and reinforces the oppression of prostitutes.⁵⁷ The reasons given are that decriminalising and legalising the sex industry is not erasing the stigma of it. For this reason, women often prefer not to enter employment agreements and keep their anonymity by working on the streets or somewhere else underground. Therefore, street prostitution increases as women try to evade being registered in this working field.⁵⁸ Another reason is that they want to avoid being exploited by their new legal employers and that the best place to avoid such a situation is working on the streets.⁵⁹

By the time prostitution is recognised as a commercial activity or profession like others in society, prostitutes will not feel the need of keeping their activity secret. Thus, they would not feel to be forced to work on the streets in order to maintain their double lives. Despite this, the argument presented above could also be questioned from the point of view that the performance of sex work on the streets is inappropriate in order to keep one's involvement in the sex industry secret. Street work is the sector of the sex industry that implies the highest risk of being discovered as a sex worker. It is always related to the risk of being seen by someone familiar. Instead, the circle of clients who visit brothels or make use of call centres for sexual services is limited. Additionally, street work implies the risk of being seen accidentally by someone who is not a client. Thus, one's involvement in the sex industry could more likely be discovered in the street-working scene. It seems that it is then more reasonable to work in brothels or for call centres.

In relation to the alleged exploitation of prostitutes by their new legal employers, it seems to ignore that the exploitation of sex workers is much more likely to be extreme if their activities have an illegal status. The general provisions that are related to contract and employment law should normally ensure that employees are not

⁵⁷ R. Barri Flowers *The Prostitution of Women and Girls* (McFarland & Company, Jefferson, 1998) 161; Coalition Against Trafficking in Women, above.

⁵⁸ Coalition Against Trafficking in Women, above.

⁵⁹ Coalition Against Trafficking in Women, above.

exploited. But when the performance of somebody's job is illegal, exploitation is easier as the legal system in question does not protect the interests of sex workers. Then the protection needs to be sought from somewhere else, often from exploiting pimps.

H The Decriminalisation and Legalisation Leads to the Promotion of Sex Trafficking and an Increase of the Demand for Sex Work

Some support the idea that the decriminalisation and legalisation of sex work leads to the promotion of and an increase in the demand for sex trafficking.⁶⁰ It is conducive to men demanding commercial sexual services as this is then socially more accepted.⁶¹ Once the step of legalisation is taken, all barriers are gone.

This argument is related to the perception that sex work is not necessarily related to life in society,⁶² but is avoidable. Prostitution is understood as an activity that results in an extreme psychological pressure, experienced not only in the working lives of prostitutes, but also in their private lives.⁶³ It is even seen as an act of violence against prostitutes that, in 67 per cent of all cases, has the consequence of sex workers suffering from the posttraumatic stress disorder (PTSD), a percentage similar to those of rape victims and state-sponsored torture survivors.⁶⁴ From this point of view, it is wrong to assume that the main problem related to prostitution is the social stigma. Sex work could be assumed to be inevitable and therefore normal because men want to buy sexual services and the demand creates the supply.⁶⁵

These perceptions absolutely ignore that criminal sanctions on prostitution do not remove the sociological factors that are the reasons for prostitutes entering the sex industry.⁶⁶

⁶⁰ Beiträge zur feministischen Theorie und Praxis *Editorial* <<http://www.beitraege-redaktion.de>> (last accessed 1 December 2003); Coalition Against Trafficking in Women, above.

⁶¹ Coalition Against Trafficking in Women, above.

⁶² Prostitution aus feministischer Sicht <<http://mitglied.lycos.de/Feminismus>> (last accessed 10 October 2003); Annette Langer "Prostitution ist überflüssig" (2001) *Spiegel online* <<http://www.spiegel.de/sptv/extra/0,1518,116093,00.html>> (last accessed 9 October 2003).

⁶³ Isabelle Charles "Projekt DDD-F" (1999) 8 available at <<http://www.arud.ch/fachbeitraefe/charles.pdf>> (last accessed 1 December 2003).

⁶⁴ Prostitution aus feministischer Sicht, above.

⁶⁵ Prostitution aus feministischer Sicht, above.

⁶⁶ The Prostitution Reform Bill <<http://www.timbarnett.org.nz/prostitution.htm>> (last accessed 10 October 2003).

Also, these perceptions can only develop when the opinion that sex work is immoral and undesirable is upheld or when it is even understood as an obstacle in relation to the equality of genders. But as said above, the sex industry cannot in general be perceived as harmful for the people working in it.

If prostitution is seen as a legal job it is only consequential that a higher demand would not be problematic. Law reforms that decriminalise and legalise the services that are provided by the sex industry focus on sex work as a job that is inevitably part of our society. The legislature and society should not unrealistically aim to abolish sex work, but to improve the working and living circumstances of those who are involved in this industry.

Furthermore, it is arguable that a law reform that focuses on sex work does not promote sex trafficking or increase the demand for sex work.⁶⁷

The Justice and Electoral Committee ordered an investigation on whether legalisation would lead to such a growth. The result obtained was that there is no statistical evidence to support this allegation.⁶⁸ However, some people still believe that decriminalisation and legalisation of the sex industry leads to a growth in the sex industry. This is merely a result of the whole industry becoming more visible.⁶⁹

I The Decriminalisation and Legalisation of the Sex Industry Could Lead to the Immigration of Numerous Foreign Prostitutes

Some see the decriminalisation and legalisation of sex work as being conducive to the immigration of significant numbers of foreign prostitutes.⁷⁰

⁶⁷ Justice and Electoral Committee *Prostitution Reform Bill 2000: Commentary* (Wellington, 2000) 4 <<http://www.butterworthsonline.com/lpBin20/lpext.dll?f=templates&fn=bwaltmain-hit-j.htm&2.0>> (last accessed 2 December 2003).

⁶⁸ Justice and Electoral Committee, above, 4.

⁶⁹ Justice and Electoral Committee, above, 4.

⁷⁰ Sex bosses warn of new law's dangers <<http://transhelp.net.nz/27.06.2003%20Sex%20bosses%20warn%20of%20new%20law's%20dangers.htm>> (last accessed 24 October 2003); Coalition Against Trafficking in Women <http://action.web.ca/home/catw/readingroom.shtml?sh_itm=67c1e4787e78ffa49d3d92987aeea6dd&A_EX_Session=4d9184fa77980b78f8702bb06b1c608e> (last accessed 26 November 2003).

This allegation is based on the increasing numbers of foreign sex workers in the Netherlands, Germany and in the State of Victoria, Australia, where prostitution was legalised. Since then, up to 85 per cent of all prostitutes working in these countries are originally from Central and Eastern European Countries (Netherlands and Germany) or from East Asian Countries (State of Victoria).⁷¹ It is argued that the government of the Netherlands is being cynical by saying that it is effective in anti-trafficking policies while legal impediments to pimping and brothels have been removed.⁷²

This argument overlooks that despite the long-lasting existence of accordant legal impediments, these did not lead to the non-existence of foreign prostitutes, pimping, brothels or the sex industry as a whole. Instead of that, most prostitutes who were working in the sex industry in the Netherlands or in Germany before its legalisation were also foreigners. If they were often from South American Countries before the legalisations, their origin changed to be mainly the Central and Eastern European Countries afterwards.⁷³ Thus, it is arguable that the decriminalisation and legalisation of the sex industry in these countries did not have a major impact on the percentage of foreign prostitutes working in their sex industries.

However, law reforms can address the possibility of the occurrence of this problem with provisions that control or prohibit the immigration of foreign sex workers.

The PRA expressly addresses the possibility of foreign sex workers entering the New Zealand market in section 19. This provision states that no permit will be granted under the Immigration Act 1987 either to prostitutes or their employers.

The legal situation in Germany is different due to its membership in the European Union. In accordance with the European principle of the free movement of workers, all citizens of a member country can establish themselves in the country of the confederation of their choice. Other foreigners do normally not have the right to immigrate to Germany, independently from their profession. If they are on German territory for some reason, they can be deported to their home countries in accordance

⁷¹ Coalition Against Trafficking in Women, above.

⁷² Coalition Against Trafficking in Women, above.

⁷³ Nadeshda <<http://www.nadeshda.org/foren/cl.soziales.frauen/p67s82a20.html>> (last accessed 11 December 2002).

with § 49 *Ausländergesetz*. In consequence of the eastward enlargement of the European Union in 2004, it is likely that numerous prostitutes of the new member States will enter the German sex industry because of its comparatively high wages.

J The Decriminalisation and Legalisation of the Sex Industry Could Lead to an Increase of Child Prostitution

Some feminists also argue that the decriminalisation and legalisation of sex work could lead to an increase in child prostitution.⁷⁴ This allegation is solely based on the factual increase of children prostituting themselves in the Netherlands and in Australian States that have legalised sex work.⁷⁵

Law reforms that are related to sex work should face the possibility of the occurrence of this problem. An idea to deal with the problem that might be satisfactory is to partially follow the Swedish model. The Swedish Parliament passed a law reform in 1998 that states that the clients of all, not only child, prostitutes commit an offence that is punished with up to six months imprisonment.⁷⁶ Sweden has, therefore, declared that sex work is undesirable. With a provision that penalises only the involvement in commercial sexual services of children, it could appear likely that the sex work of children will effectively be reduced. At the same time, adult prostitution could slightly increase as a consequence, as the clients' demand could be displaced as a consequence of the legal circumstances. Undoubtedly, the current legal situation in Sweden led to a decrease of "visible" prostitution.⁷⁷ Nevertheless, there is conflicting evidence concerning the question whether the number of prostitutes has really decreased.⁷⁸

In relation to this idea, it has to be considered whether the arguments against the Swedish model would also apply with such a provision. The criticism against the Swedish model consisted of the idea that clients who already run the risk of HIV

⁷⁴ Coalition Against Trafficking in Women, above.

⁷⁵ Coalition Against Trafficking in Women, above.

⁷⁶ Janice Raymond "Legitimizing prostitution as sex work: UN Labor Organisation (ILO) calls for recognition of the sex industry" (December 1998) <<http://www.hartford-hwp.com/archives/26/119.html>> (last accessed 12 November 2003).

⁷⁷ Justice and Electoral Committee *Prostitution Reform Bill 2000: Commentary* (Wellington, 2000) 7 <<http://www.butterworthsonline.com/lpBin20/lpext.dll?f=templates&fn=bwalmmain-hit-j.htm&2.0>> (last accessed 2 December 2003).

infection when seeing prostitutes will hardly be put off by the risk of being imprisoned.⁷⁹ Furthermore, street prostitution is made much more difficult. Prostitutes then depend on avoiding places where the police might arrest their clients.⁸⁰ This exposes them to a higher risk of violence or threats. Additionally, cases of extortion could occur more often. It is also probable that such hidden places will often not provide facilities such as public telephones or toilets and therefore will be very inconvenient to work in. These circumstances can lead to women seeking for “employers” who make the contacts with clients and provide accommodation.⁸¹

Considering the first argument consists of the idea of the risk of contracting sexually transmitted diseases, this risk is minimal when safer sex is practised. Thus, there is a difference between committing a punishable offence and practising safer sex with a minimal risk of the contraction of diseases.

Secondly, it is argued that prostitutes need to hide from the police in order to avoid the arrest of their clients. If child prostitutes end up working in inadequate areas where their clients do not risk being arrested by the police, the justification for a provision that penalises the clients of child prostitutes is more than questionable.

Certainly, there is a certain demand for child prostitution that might not be “transferred” to adult prostitutes. It is arguable also in this area that the demand creates the supply. As the demand is made much more difficult and dangerous, it should decrease. Nevertheless, it is not going to be extinguished.

A provision that penalises the demand for child prostitutes could therefore result in at least some child prostitutes working under much harder conditions. But are there any alternatives that would ensure that no child prostitution could continue to exist? Surely, the legalisation of child prostitution is not debatable as an option. Nobody would consider that as desirable. However, a provision that penalises the demand for

⁷⁸ Justice and Electoral Committee, above, 7.

⁷⁹ Reinhard Wolff (30/31 May 1998) *TAZ* Hamburg 14.

⁸⁰ Arne Hoffmann “Tamara Domentat *Lass dich verwöhnen Prostitution in Deutschland – Eine Rezension von Arne Hoffmann*” available at <<http://www.maennerrat.de/prostitution.htm>> (last accessed 1 December 2003).

⁸¹ Hoffmann, above.

child prostitution could, and is likely to, reduce the number of children who are involved in the sex industry.

Such a provision should also include possible "employers" who contract for children's activities as prostitutes with third parties. Nevertheless, it has to be questioned whether a difference between children's pimps and their landlords should be made. If people just act as landlords providing child prostitutes with accommodation without exercising the "functions" of pimps, they should not be classified as such. It could be better to tolerate the concession of premises for the purpose of the provision of commercial sexual services, with the restriction that any person conceding them should give notice about the circumstances to a competent authority.⁸² This would ensure that minors are assisted, that they have someone to get back to and that they are not left on their own on the streets. It would be easier for them to find accommodation.

Aggravating the working circumstances of sex workers does not prevent sex work, even when the sex workers involved are children. On the contrary, it may in some cases have the opposite effect. Furthermore, due to the delicate nature of sex work, its workers do not need aggravation in their already difficult job. It is really important to support sex workers and this should be absolutely independent of their ages. It is understandable that this idea might often be seen as "shocking", but the reality of the existence of child prostitutes has to be faced and dealt with.

Thus, it is recommended that law reforms that focus on the decriminalisation and legalisation of prostitution include a provision that penalises the demand for child prostitutes. In addition, the concession of premises to child prostitutes for the purpose of prostitution should be tolerated provided that any person conceding them gives notice about the circumstances to a competent authority.

In New Zealand, section 22, in conjunction with section 23 of the PRA, penalises being a client of prostitutes who are under the age of 18 years. The provision includes the constellation of a contract for commercial sexual services of prostitutes under the age of 18 years. Thus, the "employers" of such prostitutes also commit an offence.

Any contravention is penalised with up to seven years imprisonment. Section 22 of the PRA is comparable to the former section 149A of the Crimes Act 1961 that penalised being a client in an act of prostitution by a minor with up to five years imprisonment. The seven-year penalty in the PRA was adopted to reflect the seriousness of child prostitution.⁸³ Such an activity was, therefore, already penalised before the coming into force of the PRA. Therefore, it is almost certain that the decriminalisation and legalisation of sex work in New Zealand will not lead to an increase of children involved in the sex industry. At the most, it could happen that the PRA will have no major impact on children prostituting themselves at all, so that the numbers of children involved in child prostitution could remain mainly constant.

In relation to the prostitution of minors, the PRA also contains section 20 that penalises the activities of causing, assisting, facilitating, or encouraging a person under the age of 18 years to provide commercial sexual services. Furthermore, section 21 of the PRA states that no person may receive a payment knowing that it is derived from sex work of a person under the age of 18 years.

When premises are rented to a person under the age of 18 years for the purpose of prostitution or as a residence that is also used for prostitution, this obviously facilitates the sex work of that minor. Thus, the provision of accommodation to a child prostitute represents an offence pursuant to section 20 of the PRA. Additionally, the payment of the rent for premises in such cases consists of a payment that is derived from prostitution of a person under the age of 18 years. Therefore section 21 of the PRA applies in the cases of the provision of accommodation. Thus, it is a punishable offence in New Zealand to provide prostitutes under the age of 18 years with accommodation for rent. As described above, the consequences can be that these sex workers are left alone "outside in the rain"⁸⁴ - that is street work

In relation to commercial sexual services of minors in Germany, § 180 II *StGB* states that anybody who determines a person under the age of 18 years should provide

⁸² Ulrich Leo *Die strafrechtliche Kontrolle der Prostitution – Bestandsaufnahme und Kritik* (Kiel 1995) 161.

⁸³ Justice and Electoral Committee *Prostitution Reform Bill 2000: Commentary* (Wellington, 2000) 12 <<http://www.butterworthsonline.com/lpBin20/lpext.dll?f=templates&fn=bwalmart-main-hit-j.htm&2.0>> (last accessed 2 December 2003).

⁸⁴ Leo, above, 159.

commercial sexual services or arranges for this commits a punishable offence. Thus, it is not an offence being a client, but a pimp of a prostitute under the age of 18 years in Germany.

A questionable provision in relation to child prostitution consists of § 180a II Nr.1 *StGB*, declaring it an offence to concede any premises for the purpose of the provision of commercial sexual services to any person under 18 years of age. As said above, this provision can lead to child prostitutes left alone “outside in the rain”⁸⁵. The legislature was well aware of this circumstance during the parliamentary discussions, but opted for not abrogating it.⁸⁶ It was said that such an abrogation could be more harmful and that it is easier to pull minors away from the streets. § 180a II Nr.1 *StGB* was seen as an important instrument in order to remove minors from any premises of the sex industry.⁸⁷ However, a provision that is comparable to section 22 of the PRA seems to be more promising.

In conclusion, a provision like section 22 of the PRA that penalises the involvement of minors in commercial sex agreements is a promising method in order to combat child prostitution. For the reasons given above, the term of “facilitate” in section 20 of the PRA should be abrogated as well as section 21 of the PRA. The penalisation of pimps is ensured by section 22 of the PRA, in addition to the other terms included in section 20 of it. § 180a II Nr.1 *StGB* should be abrogated and a similar provision to section 22 of the PRA should be adopted in Germany.

K Law Reforms on Prostitution are Contradictory Concerning Public Health Issues

In relation to public health issues, the opinion is given that States often promote the prevention of sexually transmitted diseases while adopting a law reform that tolerates the promiscuity that may cause such risks.⁸⁸

This understanding ignores that promiscuity as a public health risk is not exclusively a problem of the sex industry. In accordance with the 2003 Durex Global Sex Survey,

⁸⁵ Leo, above, 159.

⁸⁶ Deutscher Bundestag Drucksache 6/1552, 27.

⁸⁷ Leo, above, 159.

⁸⁸ Christian Heritage NZ <<http://www.chp.org.nz/index.php?cid=38&mpid=12>> (last accessed 29 September 2003).

37 per cent of New Zealanders, for example, had practised unsafe sex with a new partner in the past 12 months.⁸⁹ If sex work is not tolerated, the legislature cannot make any contributions to the safety of prostitutes and their clients in this regard. For this reason it is not advisable to ignore health issues related to these jobs, and a legal system should address them.

In New Zealand, the PRA provides quite extensive and detailed provisions in order to guarantee safer sex practices. Section 8 (1) of the PRA demands that all reasonable steps are taken by the operators of the businesses of prostitution in order to ensure that neither sex workers nor clients acquire or transmit sexually transmissible infections. It is required that health information be displayed in brothels. According to section 8 (2), it is an offence to infringe against this provision. The PRA goes even further in section 9 by declaring it an offence to provide or receive commercial sexual services unless all reasonable steps are taken in order to ensure safer sex practices. These "reasonable steps" consist of the use of a "prophylactic sheath or other appropriate barrier". Additionally, pursuant to section 9 (2) of the PRA, it must not be stated or implied that a person's medical examination means that that person is not infected.

This progressive approach of the PRA is promising. Some feminists argue that numerous men still insist on not using condoms and extra money is offered for such a service.⁹⁰ In addition to the already existing serious health risks that people who do not wear prophylactic sheaths expose themselves to, they now also commit an offence by not using these barriers. When people commit a punishable offence by not using prophylactic sheaths there is an additional reason to initiate a rethinking process in relation to this matter.

The German *ProstG* does not deal with sex workers' or their clients' health issues. It is still a private issue of sex workers and their clients to ensure they practise only safer sex. As Germany presents a lack of comparable provisions to sections 8 and 9 of the PRA, it is recommended to adopt these in order to seek to ensure safer sex practices and therefore contribute to public health.

⁸⁹ Marianne Betts "Unsafe sex habits worry health service" (26 November 2003) *The Dominion* Wellington A3.

⁹⁰ Coalition Against Trafficking in Women
http://action.web.ca/home/catw/readingroom.shtml?sh_itm=67c1e4787e78ffa49d3d92987aeea6dd&A_EX_Session=4d9184fa77980b78f8702bb06b1c608e (last accessed 26 November 2003).

Another argument of the Christian Heritage Party in relation to the issue of public health is related to the PRA in particular. They argue that brothel managers or operators have the obligation to employ HIV positive sex workers and that this is opposed to the aim of the reform to promote public health.⁹¹

The reasons given for this allegation are the following: under section 21 (1) (h) (vii) of the Human Rights Act 1993, somebody's infection with pathogens is not a permissible ground of discrimination in employment matters. An exception is ruled by section 29 (1) (b) for the cases where the activity of the employee carries the risk of infecting other people. Thus, it could be thought that employers would not be obliged to employ HIV positive sex workers as sex work could lead to clients being infected.⁹²

Nevertheless, the Christian Heritage Party's submission that they are obliged to employ such prostitutes is based on section 6 of the Health and Safety in Employment Act 1992 in conjunction with the provisions of the PRA that aim to promote public health. Section 6 of the Health and Safety in Employment Act 1992 requires employers to provide their employees with facilities at work for their safety and health. If the PRA considers that the utilisation of sheaths is a reasonable measure in order to prevent sex workers from contracting sexually transmitted diseases from their clients, sheaths are such a facility for the safety and health of prostitutes.⁹³ It is also reasonable to rely on the utilisation of these sheaths in order to prevent clients being infected with such diseases from prostitutes. It can then be concluded that clients are not exposed to the risk of contracting sexually transmitted diseases when attending the sex industry. Thus, they conclude that employers cannot discriminate against sex workers who have contracted AIDS.⁹⁴

This issue can also be seen from a completely different perspective. The PRA focuses on prostitution as a social reality that exists independently from any measure of the legislature, and the latter should make the best of this circumstance. Prophylactic sheaths are considered as an appropriate protection from the transmission of sexually transmitted diseases. Nevertheless, an appropriate protection does not

⁹¹ Christian Heritage NZ, above.

⁹² Christian Heritage NZ, above.

⁹³ Christian Heritage NZ, above.

mean that it is 100 per cent secure. The wording of the PRA also refers to "safer sex practices", not to absolutely *safe* sex. Thus, there is still a minimal risk contracting sexually transmitted diseases when visiting prostitutes. If clients are exposed to such a minimum risk, the above-described exception ruled by section 29 (1) (b) of the Human Rights Act 1993 could apply. Therefore there would be no obligation on the part of the new legal employers to employ HIV positive prostitutes.

Nevertheless, the result obtained by the Christian Heritage Party can also be obtained by relying on section 29 (2) of the Human Rights Act 1993. This provision states that subsection (1) (b) shall not apply if reasonable measures reduce the risk of an infection to a normal level. Such a reasonable measure could be the utilisation of prophylactic sheaths. These are suitable to effectively reduce the risk of contracting any sexually transmitted disease to a minimum. Therefore, this provision can result in an obligation of employers to employ HIV positive prostitutes.

Can this be acceptable? The general circumstances concerning public health issues are much better in consequence of the PRA. Beforehand, there was no legal obligation to use prophylactic sheaths. Despite the fact that numerous sex workers had regular health checks while working,⁹⁵ no one could assure that sex workers were not infected with sexually transmitted diseases. Thus, the situation in this regard was not affected by the law reform related to the sex industry. Numerous prostitutes maintain that they would not be working in the sex industry if they contracted a sexually transmitted disease,⁹⁶ independently from any obligation of brothel managers or operators to employ them. However, this just cannot be guaranteed.

The Christian Heritage Party also criticises that the PRA does not promote the sexual health of children.⁹⁷ But a law reform that aims to protect children from sex work and exploitation cannot easily rule over their health issues. Children are not supposed to be involved in sex work.

⁹⁴ Christian Heritage NZ, above.

⁹⁵ This allegation is based on the interviews with sex workers in New Zealand that were published by Jan Jordan in *Working Girls* (Penguin Books, Auckland, 1991).

⁹⁶ This allegation is based on the interviews with sex workers in New Zealand that were published by Jordan, above.

⁹⁷ Christian Heritage NZ, above.

L Law Reforms are not Desired by Prostitutes

Finally, some feminists also refer to the argument that prostitutes do not desire the decriminalisation and legalisation of sex work themselves. This allegation is based on an interview of 146 prostitutes in the United States of America.⁹⁸ Surely, this number is not representative of the entire sex industry and their workers, but the working conditions of sex workers in the USA can be presumed to be comparable to those in New Zealand and in Germany. The decriminalisation and legalisation of the sex industry are quite different issues that should be treated as such.

1 The decriminalisation of the sex industry

Most sex workers are absolutely in favour of decriminalising their work.⁹⁹ It would make it easier for them to report crimes that were committed against them, as they would not need to fear their own prosecution. The practical consequences of the criminalisation of the sex industry's typical activities are often inappropriate, sometimes even ridiculous.

In New Zealand, it was almost impossible to be a sex worker and stay within the law before the PRA was adopted.¹⁰⁰ One of the consequences of the decriminalisation of prostitution is that section 26 of the Summary Offences Act 1981 was abrogated. Pursuant to this provision, soliciting represented a punishable offence. Prostitutes incurred a penalty when they offered sexual services for commercial purposes in public places.

In relation to these public places, this term was defined by section 2 (1) of the Summary Offences Act 1981 as any "place that, at any material time, is open to or is being used by the public, whether free or on payment of a charge, ...". The public areas of massage parlours were seen as such a public place as well as the individual

⁹⁸ Coalition Against Trafficking in Women
<http://action.web.ca/home/catw/readingroom.shtml?sh_itm=67c1e4787e78ffa49d3d92987aeea6dd&A_EX_Session=4d9184fa77980b78f8702bb06b1c608e> (last accessed 26 November 2003).

⁹⁹ This allegation is based on the interviews with sex workers in New Zealand that were published by Jordan, above, and on R. Barri Flowers *The Prostitution of Women and Girls* (McFarland & Company, Jefferson, 1998) 155.

¹⁰⁰ Jordan, above, 10.

massage rooms.¹⁰¹ The reasoning given for this was that a member of the public taken into a massage room remained a member of the public who was going to a place that was being used by the public.¹⁰²

In consequence of section 26 of the Summary Offences Act 1981, sex workers and their clients could spend hours in the private rooms of massage parlours talking round and round the provision of commercial sexual services.¹⁰³ If the clients did not state what they wanted, they would go home without having received the desired services because it was a punishable offence for sex workers to offer their services. Another very problematic aspect related to soliciting was that the finding of condoms could be used to contribute to a pattern of evidence to achieve conviction against the operators of such places and the prostitutes.¹⁰⁴ Thus, the criminalisation of activities that are related to prostitution could have had the consequence of being detrimental to public health as prophylactic sheaths needed to be hidden. It is arguable that they were in consequence often not used. This cannot fulfil the expectations to a modern society. Furthermore, it has to be observed that "soliciting is a victimless crime with two consenting adults" and that "the law should not favour one of the parties", creating a double standard of morality.¹⁰⁵

In addition to these problems, the consequences of a conviction of sex workers could have been severe, affecting them throughout their lives. A conviction could complicate matters like getting into another working field, travelling overseas, and obtaining credit and mortgage finance.¹⁰⁶ Even if still difficult, the sex workers' exit from the industry is now facilitated by not being burdened with any police records derived from their previous activity.

In consequence of the abrogation of section 26 of the Summary Offences Act 1981, sex workers can now offer their services to their clients. Nevertheless, this does not mean that they can cause any nuisance to the public. If sex workers harass the public

¹⁰¹ *Gavin v Police* (29 July 1988) High Court Wellington AP 46/88, 4 Jeffries J.

¹⁰² *Gavin v Police*, above, 4.

¹⁰³ Jordan, above, 20.

¹⁰⁴ The Prostitution Reform Bill <<http://www.timbarnett.org.nz/prostitution.htm>> (last accessed 10 October 2003).

¹⁰⁵ Heide Pusch "Theological and Moral Aspects of the Prostitution Reform Bill" (2002) 9, 10 available at <http://www.timbarnett.org.nz/documents/heide_paper.pdf> (last accessed 8 December 2003).

¹⁰⁶ The Prostitution Reform Bill, above.

or act in an offensive manner, they can still be prosecuted in accordance with the Summary Offences Act.

In Germany, the problems related to the criminalisation of the sex industry were different to those in New Zealand. Soliciting did not represent an offence in Germany, but there was another questionable section in § 180a I 2 *StGB* (old version). Pursuant to this provision, any activities that were conducive to women prostituting themselves represented a punishable offence. The judiciary developed the “theory of entrenchment”, stating that the “nicer” the overall working circumstances, the higher the likelihood that prostitutes remain in this job.¹⁰⁷ This meant that all activities that were making prostitution more “comfortable”, such as the provision of hygienic working places and condoms, were considered as conducive to women prostituting themselves and therefore represented a punishable offence. The practical consequences of this ruling were that sex workers had to be kept almost like animals in order for their “employers” not to incur a penalty.

In consequence of the abrogation of § 180a I 2 *StGB* (old version), it no longer constitutes an offence to create a pleasing working atmosphere for prostitutes.

In conclusion, it can be observed that the decriminalisation of the activities related to sex work have been favourable for both New Zealand and German prostitutes. The punishable offence of soliciting was abrogated in New Zealand and creating a pleasant working atmosphere for prostitutes in Germany does not represent an offence anymore. Thus, there is not much prostitutes can object to in relation to the decriminalisation of the sex industry.

2 The legalisation of the sex industry

The legalisation of the sex industry might be a different issue from a prostitute’s perspective. Some sex workers are less supportive of legalisation since “legalisation is understood to mean decriminalisation accompanied by strict municipal regulation of prostitution”, which they consider might reduce their independence.¹⁰⁸

¹⁰⁷ BGH NJW 1986, 586.

¹⁰⁸ R. Barri Flowers *The Prostitution of Women and Girls* (McFarland & Company, Jefferson, 1998) 155, 156.

Certainly, the legalisation might lead to less independence of prostitutes in some cases, but, on the other hand, it provides all of them with more rights and safety. It should, therefore, be worth their while to support the legalisation.

It is also feared by some sex workers that their incomes will significantly decrease in consequence of them being subjected to employment and tax law.¹⁰⁹ Even where prostitution is already subjected to tax law, sex workers often avoid their obligations in this area. Nevertheless, it is much harder for prostitutes to evade paying taxes after the legalisation of their work.

Most people would probably not mind evading taxes. However, everybody who lives in a certain State, including prostitutes, is a recipient of State expenses. Therefore, the obligation of paying taxes is a general and not particular one.

Additionally, some prostitutes fear that in consequence of more competition their incomes could reach an amount that is only insignificantly higher than the minimum salary.¹¹⁰ Nevertheless, this problem is not merely related to the sex industry. More competition often leads to lower prices also in other business sectors. But the occurrence of lower prices is not an argument against more competition in these other sectors. On the contrary, competition is a desired phenomenon that ensures the quality of services and adequate prices. We have to admit that the sex industry is a special business sector, but, still, the main idea of competition also applies here. Nevertheless, the sex industry has normally maintained its relatively high level of wages despite the increasing competition.

The advantages of legalisation of the sex industry are significant as they improve the general working and living conditions of sex workers. Thus, not only the decriminalisation, but also the legalisation of the sex industry should be welcomed.

¹⁰⁹ This allegation is based on the interviews with prostitutes in New Zealand that were published by Jan Jordan in *Working Girls* (Penguin Books, Auckland, 1991) and on Carsten Holm "Das bringt uns gar nichts" (2002) 12 *Der Spiegel* available at <[http://premium-link.net/\\$62535\\$906254146\\$/0,1518,800_pkt_00150-188503,00.html](http://premium-link.net/$62535$906254146$/0,1518,800_pkt_00150-188503,00.html)> (last accessed 14 August 2003).

¹¹⁰ This allegation is based on the interviews with prostitutes in New Zealand that were published by Jordan, above.

VII CONCLUSION

Legislative measures that aim to ban prostitution are not recommendable – prostitution has always “survived” these attempts. This paper dealt with common arguments against the decriminalisation and legalisation of the sex industry, observing how the recently enacted law reforms in New Zealand and in Germany address these concerns.

It was found that society’s perceptions are moving towards the acceptance of prostitution. One of the practical consequences of this change is a more tolerant attitude towards prostitutes and their clients. This will result in prostitutes being more protected and covered by mainstream laws. As a result of this, prostitutes in the future may take advantage of the legal system and sue their clients for payment of their services.

Additionally, prostitution on a voluntary basis cannot be considered as objectifying or dehumanising. Prostitution is, generally, not detrimental for society as a whole. It might in some cases even lead to a lower crime rate.

The decriminalisation of the sex industry is an important factor in terms of more safety and protection for its workers. Both the PRA and the *ProstG* ensure that the exit from the sex industry is not made more difficult.

In New Zealand, section 22 of the PRA is a promising method in order to combat child prostitution. It is recommended that the term of “facilitate” in section 20 of the PRA be abrogated as well as section 21 of the PRA. The German § 180a II Nr.1 *StGB* should also be repealed and a similar provision to section 22 of the PRA should be adopted in Germany.

Furthermore, it is found that law reforms that focus on prostitution do not necessarily increase sex trafficking.

However, it is likely that the number of foreign prostitutes in Germany will increase in consequence of the eastward enlargement of the European Union. This cannot be expected in New Zealand due to section 19 of the PRA.

It is recommended also that Germany adopt comparable provisions to sections 8 and 9 of the PRA in order to contribute to public health.

Finally, the decriminalisation of the sex industry is very advantageous for its workers, so there should be few objections to the decriminalisation. As the legalisation leads to an improvement of the general working and living conditions of prostitutes, it should also be welcomed.

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