DEBBIE WONG

PROVIDING "COMMERCIAL SEXUAL SERVICES": NOT AN EASY AFFAIR FOLLOWING THE PROSTITUTION REFORM ACT 2003

LLM RESEARCH PAPER

LAWS 518: EMPLOYMENT LAW

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

2003

W872 WONG. D. Providing "commercial sexual services..."

LAW

741
UW
66
872
003

Victoria
UNIVERSITY OF WELLINGTON
Te Whare Wānanga
o te Ūpoko o te Ika a Māui

LIBRARY

CONTENTS

ABSTRACT		**6**
STATEMENT ON WORD LENGTH		**6**
I	**INTRODUCTION**	**7**
II	**NEW ZEALAND LAW REFORM ON PROSTITUTION**	**8**
A	Legal framework in New Zealand prior to the PRA	8
B	The Need or Reform	8
1	Conceptually Different Views Favouring the Regulation of Prostitution	8
(a)	Economic Concept	8
(b)	Feminist Views	10
(c)	Conclusion	10
2	Other Approaches to Reforming the Law Relating to Prostitution	11
C	Current legal situation in New Zealand	13
III	**PROSTITUTION REFORM ACT 2003**	**14**
A	Purpose	14
B	Main Changes	14
C	Summary of the Provisions	15
1	Commercial Sexual Services	15
(a)	Contracts for Commercial Sexual Services	15
(b)	Health and Safety Requirements	15
(c)	Advertising Restrictions	18
(d)	Resource Consent	18
(e)	Protections for Sex Workers	18
(f)	Protection for Persons Refusing to Work as Sex Workers	19
(g)	Prohibition on use in Prostitution of Persons Under 18 Years	19
(h)	Powers to Enter and Inspect Compliance With Health and Safety	

LAW LIBRARY
VICTORIA UNIVERSITY OF WELLINGTON

LAW LIBRARY
VICTORIA UNIVERSITY OF WELLINGTON

(b) Requirements 20
2 Operating Certificates 21
3 Miscellaneous Provisions 21
(a) Review of Operation of the Act and related Matters by Prostitution Law Review Committee 21
(b) Repeals, Amendments, and Transitional Provisions 21
D Outside the Scope of the Prostitution Reform Act 2003 22

IV OVERVIEW OF THE SEX INDUSTRY 22
A Number of People Involved in the Sex Industry 22
B Forms of Prostitution 23
1 Licensed Massage Parlours 23
2 Rap Parlours/Brothels 23
3 Escort Agencies 24
4 Street Workers 24
5 Private Workers 25
6 Strip Clubs 25
7 Ship Girls 25

V EMPLOYMENT LAW ISSUES-AN APPLICATION TO THE SEX INDUSTRY 25
A The Employment Status of Sex Workers 26
B Are Sex Workers Employees? 26
1 Distinguishing Employees From Independent Contractors 27
(a) Economic Reality Test 28
(b) Control Test 29
(c) Integration Test 30
(d) Additional Factors 31
(e) Application of Law to the Sex Industry 31
2 Application to the Types of Sex Workers 32
(a) Massage Parlours/Escort/brothel Sex Workers 32

(b) Street Workers/private Workers 35

3 Home Workers 35

VI LEGAL CONSEQUENCES 39

A Legal Implications for an Employee/Employer Relationship 39

1 Common Law Duties and Obligations 39

2 Employment agreement 40

3 Minimum Employment Conditions 43

(a) Working Hours and Wages 43

(b) Holidays and Leave 44

4 Disputes, Grievances and Enforcement 45

5 Discrimination and Equal Opportunity 46

6 Termination of the Employment Agreement 46

7 Health and Safety Issues 49

(a) Health and Safety in Employment 1992 49

(b) Prostitution Reform Act 2003 51

(c) Injury, Prevention, Rehabilitation and the Compensation Act 2001 52

8 Tax Obligations 53

9 Privacy 53

B Legal Implications for an Independent Contractor and Principal 56

1 Duties and Obligations 56

2 Health and Safety Issues 57

(a) Health and Safety in Employment Act 1992 57

(b) Prostitution Reform Act 2003 58

C Legal Implications for Self-Employed Persons 58

1 Duties and Obligations 59

2 Health and Safety Issues 59

(a) Health and Safety in Employment Act 1992 59

(b) Prostitution Reform Act 2003 59

VII HEALTH AND SAFETY 60

A General Overview 60
B Health and Safety Risks in the Sex Industry 60
1 Sexual Transmitted Infections 61
2 Back injuries, Occupational Overuse Syndromes 62
3 Infections from Sex Aids and Spa Baths 62
4 Drugs, Alcohol and Cigarette Smoke Within the Workplace 63
5 Violence 63
6 Stress 64

VIII ENFORCING THEIR RIGHTS 64

IX CONCLUSION 65

X BIBLIOGRAPHY 67

ABSTRACT

The object of this paper is to examine the employment law issues relating to the sex industry in New Zealand following the Prostitution Reform Act 2003. It does so by distinguishing between a contract of service and a contract for services. This distinction is important because it carries different rights and obligations for each party to the contract. The benefits derived from the growing number of employment law statutes are limited only to an employee working under a contract of services. It is for this reason that this paper will determine whether a sex worker is likely to be given the status of an "employee" under the Employment Relations Act 2000.

The paper evaluates circumstances where a sex worker is unlikely to be characterised as an "employee" and discusses the difference between the rights conferred and duties imposed upon an employee and an independent contractor; thus, providing those in the sex industry with information about the consequences of each service contract. The paper concludes by suggesting it is likely that the position prior to the position of the Prostitution Reform Act 2003 will continue to govern the employment dealings between sex worker and operator.

WORD LENGTH

The text of this paper (excluding contents page, abstract, bibliography and footnotes) comprises approximately 15,500 words.

I INTRODUCTION

Prostitution is one of the oldest professions, with legislation dating back to the Victorian times,[1] yet it has constantly been the subject of moral, economical and social debate throughout modern society. Only recently has the law reforming prostitution been the subject of controversy in New Zealand with Parliament deciding in favour of decriminalisation of prostitution.

Before delving into the substantive issues of this paper, a brief outline of the reasons behind reforming the law relating to the sex industry in New Zealand will be provided. This will be followed by a focus on the Prostitution Reform Act 2003 ("PRA"), looking at the purpose of the Act itself and its main provisions. In particular, the PRA has now made it possible for prostitutes to have employment contracts or work as independent contractors, depending on their workplace, since it is no longer illegal to "live off the earnings" of a prostitute.

This paper endeavours to provide those in the sex industry with an overview of the legal obligations and rights that exist for either a self-employed person or a person engaged in a contract of service or a person engaged in a contract for service. In particular, this paper will examine how rights and obligations differ and determine their applicability to the sex industry.

This paper primarily investigates the distinction between independent contractors and employees. On the one hand, sex workers will want to be classified as employees to benefit from the growing number of statutory rights and obligations driving off a contract of service. However, this right must be balanced against the sex workers' desire to control the use of their body and retain some independence.

[1] Editorial "Prostitution, if legal, in need of controls" (22 February 2003) *The Dominion Post* Wellington 14.

This paper will then conclude by discussing whether a sex worker's rights following the enactment of the PRA has been improved.

II NEW ZEALAND LAW REFORM ON PROSTITUTION

A Legal Framework in New Zealand Prior to the PRA

"Prostitution"[2] itself was not an illegal activity in New Zealand. However, a range of offences could have been committed in association with acts of prostitution,[3] including offering your services,[4] payment for services,[5] working for anyone who owns premises where such services are offered or paid for[6] and living on the earnings of prostitution.[7]

B The Need for Reform

1 Conceptually different views favouring the regulation of prostitution

(a) Economic concept

A report commissioned by the International Labour Organisation (ILO) in 1998, called for the economic recognition of the sex industry and recognition of prostitution as legitimate employment. One author supporting the normalisation of prostitution went so far as suggesting that we all do things with parts of our bodies for which we receive a wage in return.[8] Therefore prostitution is just another use of the body for the purposes of

---

[2] "Prostitution" was defined under the Massage Parlours Act 1978 as "the offering by a man or woman of his or her body for purposes amounting to lewdness for payment". The current definition for "prostitution" is defined in the Prostitution Reform Act 2003 as the provision of commercial sexual services. Section 4 of the Prostitution Reform Act 2003 interprets "commercial sexual services" to include the physical participation by a person in sexual acts with, and for the gratification of, another person; and are provided for payment or other reward.
[3] Justice and Electoral Committee *Prostitution Reform Bill: Commentary* (Wellington, 2003) 2.
[4] Summary Offences Act 1981, s 26.
[5] Crimes Act 1961, s 148(b).
[6] Crimes Act 1961, s147.
[7] Crimes Act 1961, s 148(a).
[8] Martha C Nussbaum "Whether from reason or prejudice: Taking Money for Bodily Services" (1998) 27 Journal of Legal Studies 693, 693.

earning a living, not especially different from other paid activities, such as singing, factory work, massaging or writing philosophical texts in ways that matter for purposes of social regulation. Such a belief views prostitution only from an economic context and characterises it purely as a product or commodity in the marketplace.[9]

A view expressed by one prostitute espouses such an ideal, "essentially you're there as a service industry. Let's face it – half of the thing in this job is to make others feel better. It doesn't matter whether you're a waitress or prostitute or typist – you're still doing things for other people. A secretary uses her hands and that's considered quite nice and normal. A prostitute merely uses another part of her anatomy."[10]

Applying a purely economic view, the level of pay a sex worker can demand for the provision of sexual services could be considered recompense for the lack of status and stigma associated with being a prostitute and the risk involved in this type of occupation. Therefore, any adverse consequences suffered by prostitutes are readily compensated by the amount of money which they receive for their services.

One author clearly rejects such an argument, saying that to "pretend prostitution is a job like any other job would be laughable if it weren't so serious"[11] and in order to accept such a commercial view of prostitution would lead to violations of already established societal views. More recently, society has erected a number of barriers between sex and commercial activity, recognising the sexual autonomy of the individual through legal protections against workplace sexual harassment.[12]

---

[9]Janice Raymond "Legitimating 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 9th July 2003).

[10]*Working Girls: Women in the New Zealand sex industry talk to Jan Jordan* (Penguin Books Ltd, Australia, 1991) 112.

[11] Vednita Carter and Evelina Giobbe "Duet: Prostitution, Racism and Feminist Discourse" (1999) 10 Hastings Women's LJ 37, 52.

[12] Scott A Anderson "Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution" <http://www.src.uchicago.edu/politicaltheory/Anderson 01.htm> (last accessed 28th June 2003).

On one side of the spectrum is the economic recognition of the sex industry, where prostitution is considered a gender-specific form of labour that serves the same economic functions for women as other low-paid income earning activities.

(b) Feminist view

An opposing view promulgated by more liberal feminist authors state that this is a somewhat naïve view of prostitution, which ignores the harsh realities that prostitutes face. Women often turn to prostitution in a desperate economic plight and where selling one's body seems to be the best of the worst economic options that many women have. Even in industrialised countries, a number of women in prostitution and related sex industries spend a large portion of their income to buy drugs to alleviate the pain, violence, violation and indignities of the acts that are perpetrated against them constantly.[13] Those who come from this school of thinking believe that it is society's job to do everything they can to help protect and empower those who – for whatever reason – have chosen to make prostitution their profession.[14]

Further, critics argue that women who find themselves in this situation should not be punished through criminalisation of their activities, but instead should be afforded the same protection as workers in other occupations.

(c) Conclusion

While accepting that both ideologies are very different conceptually, it is clear that they both acknowledge the need to recognise that prostitution presents significant social problems in virtually every Western country and society. Neither agrees that the solution is prohibition of prostitution. A prohibition on prostitution, which is experienced

[13] Janice Raymond "Legitimating 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 9th July 2003).
[14] Sue Bradford (19 February 2003) 15 NZPD 3621.

in Sweden[15], not only denies an individual's rights to sell sex for money, it also denies that anyone should be expected to make choices about sex just to escape economic hardship.

2 Other approaches to reforming the law relating to prostitution

This leads to two alternative approaches; decriminalisation or legalisation.

The Australian State of Victoria legalised prostitution, operating a dual licensing system which requires both prostitutes and prostitution service providers to obtain licences. There is also a need to obtain a planning permit in respect of the location of the brothel. Licences are necessary in order to legally carry on the business.[16]

The advantages of legalisation is that it brings prostitution under greater official control, enables the state to enforce strict health check requirements and to collect revenue from prostitution through licensing fees and taxation of earnings.[17]

Critics of legalisation argue that the high compliance costs have seen the majority of the sex industry operate in the illegal sector, thereby making the licensing requirements superfluous. Consequently this type of system was not advocated in New Zealand, as it was believed to create a two-tiered system of prostitution. Sex workers who cannot comply with the licensing requirements will move to a seedier underground sector. In conjunction with the licensing regime, street soliciting was made illegal, creating penalties for both clients and prostitutes.

---

[15] Sweden specifically refuses to recognise prostitution as work, being the first country to prohibit the purchase of sexual services. It is now a punishable offence in Sweden to obtain casual sexual relations in exchange for payment. The penalty is a fine or imprisonment for up to six months. The offence comprises all forms of sexual services, whether they are purchased on the street, in brothels or in massage parlours.

[16] In considering an application for a license the Business Licensing Authority can conduct any inquiries it thinks fit.

[17] Hilaire Barnett "Pornography and Prostitution" (extract) from Hilaire Barnett *Introduction to Feminist Jurisprudence* (Cavendish Publishing, London, 1998) 317, 317.

The preferred approach in New Zealand was to decriminalise prostitution ; this changes the status of prostitution. It repeals the criminal provisions relating to prostitution while allowing existing planning and zoning laws to regulate the location and signage of brothels, and existing labour, health and safety laws to regulate conditions.[18]

The National party members of the Prostitution Reform Bill ("PRB") select committee opposed the Bill asserting that decriminalisation leads to a growth in prostitution. NZ First supported this statement by saying that wherever laws that govern prostitution have been liberalised the activity of prostitution has flourished.[19] In the commentary to the PRB it was noted that there was no statistical evidence that law reform on its own leads to growth in the sex industry. A variety of reasons could account for the subsequent increase in prostitution.

One such reason is that it becomes less hidden: prostitutes no longer fear persecution. People did not know where prostitutes and brothels were located. As one author has suggested, "brothels are in a lot of places people don't expect to find them"[20]. The total number of prostitutes did not rise, the number of prostitutes did. Such a view was substantiated by surveys prepared by police in the Australian State of ACT. When ACT decriminalised many of its prostitution laws in 1992 police figures indicated numbers of sex workers remained the same with only an increase in smaller operations.[21]

Other commentators have expressed concern that decriminalisation could be seen as promoting prostitution as an acceptable profession. While the law may play a major part in determining the behaviour of those involved in the sex industry, decriminalisation will not necessarily mean that will lead to "more of it"[22]. It is unlikely that the change in law will see law-abiding females suddenly turn to prostitution as a career option as few people genuinely believe that the sex industry is a glamorous one. A proportion of

[18] Tim Barnett "The Prostitution Reform Bill –*Key questions and answers"* (February 2003) 3.
[19] Justice and Electoral Committee *Prostitution Reform Bill: Commentary* (Wellington, 2003) 34.
[20] Cass Avery "Unbearable laws on prostitution must be changed" (24 February 2003) *The New Zealand Herald* Auckland 17.
[21] Justice and Electoral Committee *Prostitution Reform Bill: Commentary* (Wellington, 2003) 6.
[22] Melissa Farley "Prostitution Debate" (25 June 2003) *The Dominion Pos* Wellington 17.

prostitutes, like other low income earning females do it in order to survive, pay the rent, feed themselves and keep their families.[23]

However, this was never the intention of the Prostitution Reform Bill. Its objective was to enable sex workers to have access to the same protections afforded to other workers.[24] Rather than ignoring an industry which is ingrained in modern society, the New Zealand government has sought to recognise that sex workers are vulnerable to exploitation and intimidation by clients and operators of businesses of prostitution. The law prior to the PRA denied sex workers protections other workers have a right to expect, such as, the right to negotiate terms and conditions of their employment, the right to a healthy and safe working environment and freedom from sexual harassment, the reform attempts to remedy that injustice.[25]

C Current Legal Situation in New Zealand

The Prostitution Reform Bill was passed by the slimmest of margins on Wednesday the 25th June; 60 votes to 59, with one MP abstaining[26]. It was a conscience vote that allowed them to choose for themselves rather than along party lines.

While 59 MPs voted against the Prostitution Reform Act ("PRA"), not all of them believed that the merits of the Act were totally wrong. Instead there were some who completely respected the motives of Tim Barnett,[27] but believed that the PRA "did not get to the core of the issues relating to prostitution, it only added a nightmare of regulation elevating sex work to the position of healthy, productive and fulfilling labour in our society".[28]

---

[23] Editorial "Prostitution, if legal, in need of controls" (22 February 2003) *The Dominion Post* Wellington 14.
[24] Justice and Electoral Committee *Prostitution Reform Bill: Commentary* (Wellington, 2003) 2.
[25] Public Health Association "Submission to the Justice and Electoral Select Committee on the Prostitution Reform Bill 2000" 2.
[26] Dr Ashraf Choudhary abstained from voting.
[27] Matt Robson (19 February 2003) 15 NZPD.
[28] Matt Robson (19 February 2003) 15 NZPD.

III PROSTITUTION REFORM ACT 2003

A Purpose

The PRA's purpose as stated in section 3 is to decriminalise prostitution by creating a framework that[29] safeguards the human rights of sex workers and protects them from exploitation;[30] promotes the welfare and occupational safety and health of sex workers;[31] is conducive to public health;[32] and prohibits the use in prostitution of persons under 18 years of age.[33]

B Main Changes

The overall aim of the PRA was to decriminalise certain activities associated with prostitution and make prostitution subject to certain provisions in addition to the laws and controls regulating other businesses. The legislation intends to achieve its purpose by decriminalising prostitution, owning a brothel and the living off earnings of prostitution by repealing provisions that make prostitution a criminal activity.[34]

It is proposed that decriminalising prostitution will make it easier to educate sex workers who have lived in a "criminal sub-culture", creating a safer environment and reducing potential risks to public health.

The law that previously existed favoured one side, placing the blame on sex workers by making demand for sexual services legal but supply of such services illegal. In other words, offering sexual services would break the law but to ask for sexual

---

[29] Justice and Electoral Committee *Prostitution Reform Bill: Commentary* (Wellington, 2003).
[30] Prostitution Reform Act 2003, s 3(1)(a).
[31] Prostitution Reform Act 2003, s 3(1)(b).
[32] Prostitution Reform Act 2003, s 3(1)(c).
[33] Prostitution Reform Act 2003, s 3(1)(d).
[34] The following provisions would be repealed: section 26 of the Summary Offences Act 1981 (soliciting), section 147 of the Crimes Act 1961 (brothel keeping), section 148 of the Crimes Act 1961 (living on the earnings of prostitution), section 149 of the Crimes Act 1961 (procuring sexual intercourse) and the Massage Parlours Act 1978 and related regulations.

services would not.[35] The new legislation removes the moral double standard inherent in the previous legal framework and now provides a framework which enhances a sex worker's rights. The new legal framework has shifted the focus of the prohibition away from prostitutes.

C Summary of Provisions

1 Commercial sexual services

(a) Contracts for commercial sexual services

Section 7 of the PRA states that no contracts for the provision of commercial sexual services are illegal or void on public policy or other similar grounds.

(b) Health and safety requirements

Sections 8, 9 and 10 provide different obligations for "operators"[36] of businesses of prostitution, sex workers and clients in respect of adopting and practising safer sex practices. The principle behind this section is to provide an environment which is more conducive to positive public health outcomes.[37]

---

[35] Cass Avery "Unbearable laws on prostitution must be changed" (24 February 2003) *The New Zealand Herald* Auckland 17.

[36] Prostitution Reform Act 2003, s 5: Definition of operator

(1) In this Act, operator, in relation to a business of prostitution, means a person who, whether alone or with others, owns, operates, controls or manages the business; and includes (without limitation) any person who –
- (a) is the director of a company that is an operator; or
- (b) determines-
  - (i) when or where an individual sex worker will work; or
  - (ii) the conditions in which sex workers in the business work; or
  - (iii) the amount of money, or proportion of an amount of money, that a sex worker receives as payment for prostitution; or
- (c) is a person who employs, supervises, or directs any person who does any of the things referred to in paragraph (b).

(2) Despite anything in subsection (1), a sex worker who works at a small owner-operated brothel is not an operator of that business of prostitution, and, for the purposes of this Act, a small owner-operated brothel does not have an operator.

Operators of businesses of prostitution must take all reasonable steps to ensure that prophylactic sheaths are used in providing commercial sexual services.[38] This positive requirement does not extend to "small owner operated brothels".[39] Operators of businesses of prostitution also need to take all reasonable steps to minimise the risk of sex workers and clients acquiring or transmitting Sexually Transmitted Infections (STI).[40]

Previously sex workers were unlikely to obtain health and safety information from their place of work. Fellow workers and the New Zealand Prostitutes Collective ("NZPC") were the main sources of educational health and safety material and equipment.[41] The PRA places obligations on operators of businesses of prostitution to take all reasonable steps to provide health information to sex workers and clients, and, if the business in question is a brothel,[42] that information must be prominently displayed in the brothel.[43] The requirement to display health information only applies to brothels because other businesses may not have a permanent place of business.

Operators of businesses are not permitted to state or imply that attendance at a medical examination means that a sex worker is not infected, or likely to be infected with a STI.[44] Any statement claiming to be "disease free" could be misleading as it provides a false sense of security as test results only remain valid for the time they are taken.[45] There is a possibility that statements as to a prostitute's sexual health could result in more pressure on sex workers to agree to unsafe sex, as clients can question why they should have to use a condom if workers are promoted as disease free.[46]

---

[37] Justice and Electoral Committee *Prostitution Reform Bill: Commentary* (Wellington, 2003) 11.
[38] Prostitution Reform Act 2003, s 8(1)(a).
[39] See Prostitution Reform Act 2003, s 4: Definition of small owner-operated brothel
[40] Prostitution Reform Act 2003, s 8(1)(e).
[41] Plumridge, L and Abel, G. "Services and information utilised by female sex workers for sexual and physical safety" (2000) 113 New Zealand Medical Journal 370, 371.
[42] Section 4 Interpretation, brothel means any premises kept or habitually used for the purposes of prostitution; but does not include premises at which accommodation is normally provided on a commercial basis if the prostitution occurs under an arrangement initiated elsewhere.
[43] Prostitution Reform Act 2003, s 8(1)(c).
[44] Prostitution Reform Act 2003, s 8(1)(d).
[45] New Zealand Prostitutes Collective "Submission to the Justice and Electoral Committee on the Prostitution Reform Bill 2000" 4.
[46] New Zealand Prostitutes Collective "Submission to the Justice and Electoral Committee on the Prostitution Reform Bill 2000" 4.

Any breach of the existing obligations will result in a fine not exceeding $10,000.[47] It is debatable whether the amount of this fine will act as a sufficient deterrent. The situation is made more precarious by the difficulty of establishing effective controls and monitoring as to whether these obligations have been met. The Fisheries Act 1986 recognised the difficulty in monitoring and enforcing the various fishery offences under the Act. Consequently, higher fines were imposed as a disincentive to breach any of the offences. It is suggested that higher penalties may have a similar effect to that set out in the Fisheries Act. The greater the penalty, the more likely it will act as an adequate deterrent to unscrupulous operators.

Conscious of the need to ensure equality and non-discrimination, the Act also imposes obligations on clients and sex workers to take all reasonable steps to ensure that a prophylactic sheath is used[48] and neither to state or imply that attendance at a medical examination means that they are STI free.[49]

The Health and Safety in Employment Act 1992 ("HSEA") is a key piece of legislation that aims to protect workers. Such a law, alongside the Human Rights Act 1993 and the Employment Relations Act 2000, contributes to New Zealand's employment environment. The provisions of the HSEA already apply to the sex industry; however, the PRA affirms that nothing in the PRA limits the application of HSEA, or any regulations or approved codes of practice under the HSEA.[50] Section 10 also states that a sex worker is at work for the purposes of the HSEA while providing commercial sexual services.

---

[47] Prostitution Reform Act 2003, s 8(2).
[48] Prostitution Reform Act 2003, s 9(1).
[49] Prostitution Reform Act 2003, s 9(2).
[50] Each year the Occupational Safety and Health Service ("OSH") draws up a work plan. The planning process includes considering if any industries should receive special attention. Factors which OSH takes into account in determining whether such an industry requires special attention, include: knowledge of the extent of harm occurring in the industry, the newness of the industry, the passage of new legislation that may affect an industry and emerging issues in the industry. A guideline is similar to a Code of Practice with formal statements of their health and safety obligations. Such a guideline would be useful to assess compliance and judge whether or not "all reasonable steps" were taken to meet health and safety obligations.

(c) Advertising restrictions

The PRA places a restriction on advertising commercial sexual services, sending a clear signal that the Act is not designed to promote prostitution. However, local authorities under the Local Government Act 1974 are able to make bylaws concerning signage relating to commercial sexual services. The bylaw can prohibit or regulate signage that is visible in a public place and advertises commercial sexual services in a way that the local authority is satisfied would unreasonably cause offence to the community. The bylaw-making power may apply to the whole or part of a district and councils may make different provision for different parts of a district. However, any territorial authority must take into account the interests of a business of prostitution, this is because a business that is not illegal should be able to advertise.

(d) Resource consent

In addition to the matters the territorial authority is required to consider; under the Resource Management Act 1991 for an application for land relating to a business of prostitution, it must also have regard to whether the business of prostitution is likely to cause a nuisance or serious offence to the public or is incompatible with the existing character or use of the area in which the land is situated.

(e) Protections for sex workers

Section 16 of the PRA deals with coercive behaviour, prohibiting certain acts with the intent to induce or compel someone into providing commercial sexual services or induce or compel another person to provide to any person any payment or other reward from commercial sexual services provided by person A. Coercive behaviour is any explicit or implied threat or promise that a person will: improperly use any power or authority arising out of an occupational or vocational position or any relationship between the parties; or commit an offence punishable by imprisonment; or make an accusation or disclosure about the misconduct of any person likely to damage the

reputation, or that a person is in New Zealand illegally; or supply, or withhold supply of, any controlled drug within the meaning of the Misuse of Drugs Act 1975.

In recognition of the power imbalance that exists between prostitutes and either brothel owners, clients or management, the PRA permits any person to refuse to provide commercial sexual services despite a contract to the contrary.[51] Another protection provided for sex workers is found in section 17(2), where the fact that there is a contract for commercial sexual services does not of itself mean that consent cannot be withdrawn in terms of the criminal law. Notwithstanding the protections afforded to sex workers, the PRA preserves the contractual rights[52] of persons entering into contracts for commercial sexual services to seek remedies if the contract is not performed.

(f) Protections for persons refusing to work as sex workers

Section 18 clearly states that refusal to undertake sex work or continue to work as a sex worker will not affect a person's entitlements under either the Social Security Act 1964 or the Injury Prevention, Rehabilitation and Compensation Act 2001. This applies to a general refusal to undertake sex work rather than a refusal of a particular job or at a particular time.

(g) Prohibition on use in prostitution of persons under 18 years

Sections 20-23 relate to offences in relation to child prostitution, providing protection of persons under the age of 18 years from exploitation in relation to prostitution. The criminal sanction for contravening any of the provisions relating to prostitution of persons under 18 years has a maximum penalty of imprisonment for a term not exceeding 7 years.

---

[51] Prostitution Reform Act 2003, s 17(1).
[52] See Contractual Remedies Act 1979.

(h) Powers to enter and inspect compliance with health and safety requirements

The PRA gives powers to health inspectors to ensure compliance with sections 8 and 9,[53] however the inspector[54] is permitted to report any other offence or suspected offence to the police or any other relevant agency.[55]

At any reasonable time an inspector may enter premises to carry out an inspection if they have reasonable grounds to believe that a business of prostitution is being carried on in the premises. An inspector may retain any thing that he believes on reasonable grounds will be evidence of the commission of an offence against section 8 or 9. The PRA provides wide statutory powers to inspectors which did not previously exist.

If the inspector wishes to inspect a home they must have the consent of the occupier or a warrant issued under section 24 unless an inspector is authorised to do so by a warrant issued under subsection (2).[56] When entering the premises and when reasonably requested the inspector must produce certain documents.[57] The PRA makes an offence punishable by a fine not exceeding $2,000 where somebody intentionally obstructs, hinders or deceives an inspector in the execution of his or her duties under the PRA.[58]

The Act also gives powers of entry to police to ensure compliance with the relevant provisions relating to prostitution by persons under 18.

---

[53] These sections place obligations on operators of businesses of prostitution, sex workers and clients in respect of safer sex practices.

[54] See Prostitution Reform Act 2003, s 25: Inspectors under the PRA are people designated as a Medical Officer of Health under the Health Act 1956. Also, Medical Officers of Health may appoint persons as inspectors under this Act, if they are suitably qualified or trained to carry out that role. Any such appointment must be made in writing.

[55] Prostitution Reform Act 2003, s 24.

[56] Prostitution Reform Act 2003, s 27(1).

[57] See Prostitution Reform Act 2003, s 28(1): An inspector must, on entering premises under section 9F and when reasonably requested at any subsequent time, produce – (a) evidence of his or designation as a Medical Officer of Health; and (b) evidence of his or her identity; and (c) a statement of the powers conferred on them and the purpose for which those can be used; and (d) if entering under a warrant, the warrant.

2 *Operator certificates*

Part 3 provides a statutory framework requiring operators of businesses of prostitution to hold certificates. Section 35 sets out the items that must be provided by an applicant for an application to become an operator of a business of prostitution under the Act.

3 *Miscellaneous provisions*

(a) Review of operation of Act and related matters by Prostitution Law Review Committee

The PRA also establishes a review committee to assess the operation of the PRA. The PRA itself details a number of issues that the Prostitution Law Review Committee will assess when it reviews the operation of the PRA.

(b) Repeals, amendments, and transitional provisions

Sections 48 and 49 of the PRA effectively decriminalise the sex industry by repealing the key statutory and regulatory provisions[59] that can be committed in association with the act of prostitution. As a result of the PRA being enacted, sex workers can now solicit for sex instead of "hinting at sex with a client, because once the client said the initial words (*for sex*), it is only then can you go into prices".[60]

---

[58] Prostitution Reform Act 2003, s 9I.

[59] The following provisions would be repealed: section 26 of the Summary Offences Act 1981 (soliciting), section 147 of the Crimes Act 1961 (brothel keeping), section 148 of the Crimes Act 1961 (living on the earnings of prostitution), section 149 of the Crimes Act 1961 (procuring sexual intercourse) and the Massage Parlours Act 1978 and related regulations.

[60] Jan Jordan *Working Girls Women in the New Zealand sex industry talk to Jan Jordan* (Penguin Books Ltd, Australia, 1991) 20.

D Outside the Scope of the Prostitution Reform Act 2003

The legislation is silent as to the location and planning matters relating to the sex industry, which are governed by the Resource Management Act 1991 ("RMA") and district plans made under that Act. The legislation leaves any potential sex work venue to be determined under the RMA as the controlling of land is assessed by looking at the social, economical and cultural conditions that affect people and their communities, and it also includes amenity values.[61] This suggests that the RMA can sufficiently deal with undesirable prostitution activity and planning matters relating to the sex industry. However, some contend that it is likely that only those "neighbourhoods who can afford the legal battle of keeping it out of their backgrounds" will be a "prostitute" free zone.[62]

IV OVERVIEW OF THE SEX INDUSTRY

A Number of People Involved in the Sex Industry

There is very little qualitative data available on the numbers of people involved due to the hidden nature of the sex industry.[63] It is estimated that the number of sex workers is approximately 8,000;[64] these range in age from teenage to late middle age, with the majority between 18-30.[65] In June 2001 a New Zealand Police assessment reported that a total of just fewer than 4500 individual sex workers were identified over the areas canvassed.[66] Although the assessment stresses that it does not purport to provide

---

[61] Justice and Electoral Committee *Prostitution Reform Bill: Commentary* (Wellington, 2003) 32.
[62] Melissa Farley "Prostitution Debate" (25 June 2003) *The Dominion Post* Wellington 17.
[63] Justice and Electoral Committee *Prostitution Reform Bill: Commentary* (Wellington, 2003) 53.
[64] Special Audit memorandum *Sex workers and the withholding payment regime* (Wellington, Inland Revenue, 1997).
[65] New Zealand Prostitutes Collective "Submission to the Justice and Electoral Committee on the Prostitution Reform Bill 2000" 4.
[66] All four metropolitan centres were canvassed, but only a sampling regime was conducted in respect of provincial areas. The centers canvassed were Auckland City, Christchurch, Dunedin, Hamilton, Henderson, Invercargill, Masterton, New Plymouth, Napier, Nelson, Otahuhu, Palmerston North, Queenstown, Rotorua, Takapuna, Timaru, Wanganui, Wellington, Whangarei. The report recognised that any attempt to accurately define the scale of the sex industry would be problematic for the following reasons: many businesses and individuals operated in a non-regulated environment without official oversight and knowledge; the industry is fluid in nature and cross over occurs in terms of individual workers in the indoor industry.

any accurate quantitative measure of the total number of sex workers in New Zealand it is the only recent research providing numerical data on those implicated in the sex industry.[67]

It is almost impossible to provide a complete analysis which is representative of the entire sex industry due to it once being an essentially illegal industry. However, identifying the several different forms of prostitution operating in New Zealand can serve as a general overview of the New Zealand sex industry.[68] This will provide the factual background that is necessary for analysing the legal impact of the PRA.

B Forms of Prostitution

1 Licensed massage parlours

Massage Parlours were regulated under the Massage Parlous Act 1978 ("MPA"). These businesses that comprise the largest sector of the sex industry,[69] employ persons who legitimately offer a service as a masseuse or masseur or offer themselves as prostitutes by providing commercial sexual services on the premises in question.[70] The most common system within massage parlours is for the client to pay an up front "all inclusive" entry fee at the reception. The fee goes to the operator who then decides what proportion will be given to the masseuse for the amount of time she spends with the client. Another common arrangement is when a client pays a fee at the desk to the parlour's proprietor upon entry. The sex worker is not paid any commission for the massage, instead any payment for sexual services provided by the sex worker is paid directly to the sex worker. Therefore, a prostitute only receives money if a client requests sexual services above and beyond the massage.

---

[67] Justice and Electoral Committee *Prostitution Reform Bill: Commentary* (Wellington, 2003) 53.
[68] Justice and Electoral Committee *Prostitution Reform Bill: Commentary* (Wellington, 2003) 53.
[69] New Zealand Prostitutes Collective "Submission to the Justice and Electoral Committee on the Prostitution Reform Bill 2000" 4.
[70] Justice and Electoral Committee *Prostitution Reform Bill: Commentary* (Wellington, 2003) 54.

This form of prostitution is no longer regulated by the MPA. The PRA repeals this Act and revokes the Massage Parlour Regulations once Part 3 of the PRA comes into force.

2 Rap parlours/brothels

These are unlicensed premises, which are basically brothels offering in-house services on the premises in question. This form of prostitution may increase because businesses providing commercial sexual services will no longer have to hide behind the façade of a massage parlour.

3 Escort agencies

These businesses do not operate from a fixed premise, instead services are provided on an 'out-call' basis in either short-term accommodation or the client's own address. The agency sets up a meeting between the client and collects an agency fee for arranging the meeting. Some escort agencies also receive an additional fee according to the services provided.

4 Street workers

These workers offer themselves as prostitutes by advertising themselves physically on street corners and known "red light" districts, For example, Vivian Street in Wellington, Manchester Street in Christchurch and Karangahape Road in Auckland. Although the most visible, they make up the smallest sector in the industry.[71]

The law previously banned anyone who had been convicted of a prostitution-or drug related offence from working in a parlour, therefore forcing them to work on the street. Street workers are now able to work in parlours and take advantage of the protections that the PRA provides.

---

[71] Plumridge, L and Abel, G. " Services and information utilised by female sex workers for sexual and physical safety" (2000) 113 New Zealand Medical Journal 370.

5 *Private workers*

These sex workers choose to manage their own business of prostitution through telephone contact with potential customers and regularly advertise in various local newspapers and magazines. They work alone or with one or two people sharing expenses and a venue. Private workers usually work from home or an apartment.[72]

6 *Strip clubs*

While strip clubs are not directly involved in prostitution, there is often linkage between massage parlours and strip clubs. Often operations are operated in tandem from adjoining or nearby premises, in which female employees are often concurrently involved in both activities.

7 *Ship girls*

Ship girls provide sexual services to visiting seamen at most port cities around the country.

V EMPLOYMENT LAW ISSUES – AN APPLICATION TO THE SEX INDUSTRY

Prostitutes are now within the ambit of the generic employment protections provided by the law. Previously sex workers had no ability under law to work under an employment contract, since the employer would be defined as "living off the earnings" of a prostitute and would therefore be breaking the law. Under the PRA it is now possible for prostitutes to have employment contracts or work as independent contractors, depending on their workplace, since it is no longer illegal under the PRA to "live off the earnings" of a prostitute.

---

[72] New Zealand Prostitutes Collective "Submission to the Justice and Electoral Select Committee on the Prostitution Reform Bill 2000" 8.

In many situations sex workers have put up with working conditions unacceptable to employees in other industries.[73] The inherent power imbalance between many operators or owners of brothels and sex workers is something which the law seeks to redress through the enactment of the PRA and other employment related legislation.

A The Employment Status of Sex Workers

A sex worker can be given the status of an independent contractor engaged in work for a principal, employee engaged in work for an employer or a self-employed person. The distinctions are important because the rights conferred and the duties imposed on each party are different. These obligations will be the focus of the latter part of this paper.

B Are Sex Workers Employees?

"Employee" is now defined in the ERA. The relevant parts of section 6 are set out:

> 6 **Meaning of Employee**
>
> (1) In this Act, unless the context otherwise requires, **employee** –
> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service;
> (b) includes –
> (i) a homeworker; or
> …
> (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them
> (3) For the purposes of subsection (2), the Court or the Authority –
>
> (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

[73] Tim Barnett "Prostitution Reform Bill" <http://www.timbarnett.org.nz/prostitution.htm> (last accessed June 30th 2003).

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship

...

1 Distinguishing employees from independent contractors

The law distinguishes an employee who has a contract of service from an independent contractor who is engaged under a contract for services. Both contracts are binding on the employer and the worker, however the benefits accompanied by certain statutes[74] are limited solely to a contract of service.[75]

It is clear from section 6 that it is the totality of the circumstances of the relationship which is important when considering the nature of the employment relationship. The present position is radically different to the approach taken by courts under the Employment Contracts Act 1991 ("ECA"). The ECA paid scant regard to the inequality of the bargaining inherent in many employment relationships.[76] In contrast, one of the ERA's primary objectives is "to acknowledge and address the inherent inequality of bargaining power in employment relationships and the subsequent objective of 'protecting the integrity of individual choice' must be read in this light"[77].

In particular, the Department of Labour was concerned with the power imbalances and disproportionate bargaining skills recognised in employment relationships. These could eventually lead to employers dictating the terms of the contract to vulnerable groups of individuals. [78] Essentially, sex workers may have an employment contract classified as an independent contract when their job is identical in nature to an employee/employer relationship. Such a scenario is undesirable as unscrupulous employers could subvert their responsibilities as an employer to sex workers and remove the statutory protections afforded to employees.[79]

---

[74] These include, the Employment Relations Act 2000, Minimum Wages Act 1983, Holidays Act 1981.
[75] Richard Rudman *New Zealand Employment Law Guide* (CCH New Zealand, Auckland, 2002) 14.
[76] *LexisNexis Employment Law Guide* (6ed, LexisNexis Butterworths, Wellington, 2002) 116.
[77] *LexisNexis Employment Law Guide* (6ed, LexisNexis Butterworths, Wellington, 2002) 117.
[78] *LexisNexis Employment Law Guide* (6ed, LexisNexis Butterworths, Wellington, 2002) 113.
[79] *LexisNexis Employment Law Guide* (6ed, LexisNexis Butterworths, Wellington, 2002) 111.

Subsection 3 attempts to stop employers from doing this by ensuring that the Court or Authority give prominent consideration to the reality of the relationship, and is required not to treat any nominal label given by the parties as a decisive factor. For example, a provision in a contract stating "… a business operating through the provision of facilities and services to, and through the engagement of, independent prostitutes working as *private operators and not as employees*, (no "employer-employee" relationship as defined by the Employment Relations Act 2000 exists*)…"*[80] will not be decisive in determining the nature of the relationship. Such statements cannot, however, be disregarded if they reliably indicate the real nature of the relationship.[81]

Subsection 3 requires the Court to consider matters indicating the intention of the parties. Thus intention is still relevant, but under the ERA, it is no longer decisive. Parliament has also directed the Employment Court and Employment Authority to determine the "real nature of the relationship" by considering "all relevant matters". This means that the established tests, such as control, economic reality and integration already used by the Authority and the Court to distinguish between a contract of service and a contract for service are still pertinent under the ERA.[82]

However, as previously discussed, the object of the ERA will require greater emphasis on the relative bargaining position of the parties at the inception of the relationship and the various tests will need to be viewed in light of the new statutory regime.

(a) Economic reality test

The economic reality test was formulated by Cooke J in *Market Investigation Ltd v Minister of Social Security.*[83] Cooke J asked:

---

[80] Information provided by the New Zealand Prostitutes Collective.
[81] *Curlew v Harvey Norman Stores (NZ) Pty Ltd* Employment Court, Auckland (AC46/02).
[82] *Koia v Carlyon Holdings Ltd* [2001] 1 ERNZ 585.
[83] [1969] 2 QB 173.

> Is the person who has engaged himself to perform the services performing them as a person in business on his own account? If the answer to that question is 'yes' then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service.

The court in *Market Investigations* used the economic reality test to classify the relationship as a contract of service despite the contract stating the contrary. Essentially the test asks whether the risks borne by the employee provide her with the opportunity for profit or loss.[84] Specifically, the court in *Market Investigations* focused on the employee's liability for social security payments and the workers access to workers compensation, both of which did not relate to the opportunity to profit.

Whether a person is in business on their own account will require asking whether the sex worker's performance related to the opportunity to profit and what degree of financial risk and responsibility they have taken in performing sexual services. Regard must also be given to whether sex workers provide their own insurance, meet the expense of overheads and advertising[85] and lastly, whether it is normal to employ independent contractors in that industry.[86] If the answer to the questions are yes, then the contract is likely to be a contract for services.

(b) Control test

It is submitted that the control test is a useful tool in assessing a sex worker's employment status. The test asks whether the alleged employer had the right to control the alleged an employee, not only as to what that person must do but also as to how and when he or she must do it.[87] While a certain degree of control may be exercised in various situations, the relationship will only be that of principal and independent contractor if the degree of control is necessary for an efficient and profitable business of

[84] David Snelling "The Contract of Service: One Stone for Several Birds" (LLM Research Paper, Victoria University of Wellington, 2002) 9.
[85] *CORO Trading Ltd v Commissioner of Inland Revenue* [1996] 2 ERNZ 320.
[86] "Independent Contractor or Employee? IRD Explains" (Siren, May 2002) 29.
[87] *Short v J W Henderson Ltd* (1946) 62 TLR 427.

prostitution.[88] A contract stating that a sex worker is not free to engage in sexual services for other brothels/massage parlours is not determinative even though a contractor is normally able to work for more than one person.[89]

An affirmative answer to the following questions will constitute evidence of a contract for services.[90] Does the sex worker supply his or her own materials? Can the sex worker refuse a job? Is the sex worker bound by the rules and policies put in place by the brothel? Can the sex worker take time off whenever he or she desires? Can the sex worker decide what hours he or she will work? Does the sex worker have a substantial degree of autonomy? Were the hours dictated to the sex worker? Does the sex worker pay a notional rental and share of charges for the room? Does the sex worker wear his or her own clothes? The more independence a sex worker exerts the more likely the status given is independent contractor/principal.

(c) Integration test

The integration test set out in *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans*[91] by Lord Denning suggested that "under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it". Nonetheless, it is often the case that services provided by sex workers are integrated with the organisation because without the sex worker, a business of providing commercial sexual services would not exist. Therefore, this test does not serve a useful purpose in determining the employment status of sex workers.

---

[88] See *Cunningham v TNT Express Worldwide (NZ) Ltd* [1993] 1 ERNZ 695. Cooke P held that, while the Employment Court had rightly attached much weight to the control factor, that factor could no longer be regarded as the sole determining factor. Case and Hardie Boys JJ say the tight control exercised over the presentation and organisation by the company as simply reflecting the need for a standardised "image" and efficient management which was to the mutual advantage of both businesses.

[89] *Cunningham v TNT Express Worldwide (NZ) Ltd* [1993] 1 ERNZ 695. The fact that they were tied to the company was not determinative, but it is a factor the courts will consider.

[90] "Independent Contractor or Employee? IRD Explains" (Siren, May 2002) 29.

(d) Additional factors

Using the well-established tests to assess the status of the relationship may not provide an obvious answer. In such a situation, it is essential that the Court or Authority goes beyond the rigid tests and consider other factors, including the method of payment and taxes applicable to the individual. For example, factors pointing to an independent contractor/principal relationship include the responsibility for paying one's own income tax and ACC levies and receiving no holiday pay or sick leave. These factors, along with the assessment of the tests, provide the Court or Authority with enough evidence towards a particular classification of the contract.

(e) Application of law to the sex industry

The NZPC has noted that most operators of massage parlours and escort agencies operate on the condition that sex workers are independent contractors rather than employees. This distinction was made to avoid the accusation of living off the earnings of a prostitute. Another reason is related to taxation issues: as an independent contractor, each sex worker is individually responsible for their own tax arrangements. However, while the person in control of the place of work may decide the relationship is to be that of principal and independent contractor, it is entirely possible that a court may decide that the true nature of the relationship is one of employer/employee.

The provisions in the ERA and the relevant case law act as a guideline from which principles can be extracted. Although, it is not entirely easy to distil the principles for application to the sex industry "because the Courts deciding these cases have relied on those principles as were most closely relevant to the particular factual situation and legal environment".[92] Nevertheless, the question must always be whether the arrangement that the parties have made is more consistent with a contract of service than a contract for

---

[91] [1952] 1 TLR 101.
[92] *Koia v Carlyon Holdings Ltd* [2001] 1 ERNZ 585, 594 (EC) Goddard CJ.

service.[93] In addition, no great emphasis is to be placed on any one test, instead the ERA demands a balancing exercise of all the relevant factors.

2 *Application to types of sex workers*

The principles of law will now be applied to the four main identified forms of prostitution; brothel workers/massage parlour girls, escort workers, street workers and private workers to determine an individual's employment status. Only broad assumptions can be made, because in the end, the employment status of a particular sex worker will depend upon the facts of each case.

(a) Massage Parlour/escort/brothel sex workers

Factors pointing to a contract for service include the possibility that a worker will make a loss from the activities, as sex workers need to pay parlour's shift fees, towel fees and dress hire.[94] Another feature is the financial risk of not getting paid, one prostitute claimed that 'there was no one … no one came in today. I'm here and there's no one so I haven't made anything.'[95] One prostitute argued that they could not even afford to go to work, as she reported she had to pay $86 week in transport and $40 in advertising.[96]

Additionally, the reality of how sex workers are paid indicate that a contract for service is operating. For instance, at massage parlours a client comes into the parlour and pays at the desk for a massage. The masseuse (sex worker) does not receive any of the money that the client pays the massage parlour, instead anything that is requested by the client is paid directly to the sex worker. The massage parlour does not receive a share of the payment between the sex worker and client; instead the sex worker keeps it all. A

---

[93] *Koia v Carlyon Holdings Ltd* [2001] 1 ERNZ 585, 595 (EC) Goddard CJ.
[94] Plumridge, L "Rhetoric, reality and risk outcomes in sex work" (2001) 3 Health, Risk & Society 199, 204.
[95] Plumridge, L "Rhetoric, reality and risk outcomes in sex work" (2001) 3 Health, Risk & Society 199, 203.
[96] Plumridge, L "Rhetoric, reality and risk outcomes in sex work" (2001) 3 Health, Risk & Society 199, 203.

prostitute in this scenario is taking substantial business risks by operating in this manner, as they are not assured a minimum income.

Many parlour and escort operators also remove tax liabilities from themselves by informing sex workers that they are responsible for organising their tax arrangements.[97] Prima facie, sex workers could be characterised as independent contractors because they appear to be "in business on their own account" due to the degree of financial risk exerted by most prostitutes. In fact, contracts often expressly stated that most operators of massage parlours and escort agencies "take on" sex workers as "independent contractors". Yet, on the other side of the coin "no further independence is reflected in the daily attitudes of parlour and escort operators toward the sex workers who work from their own premises".[98]

A number of examples illustrate the existence of an employee/employer relationship. Sex workers are highly vulnerable to the pressures of management as they rely on them to provide adequate shift work. In some parlours "managers could isolate workers who did not acquiesce to client demands"[99], while some managers "make you feel guilty if you don't want to do the job". These women challenge an ideal that they are "given the choice" about what services they would provide, and to whom, when in reality there was no choice, instead it was "assumed that co-operation would be inevitable".[100] Brothel owners and massage parlours can be said to deny a sex worker of their autonomy, and at the same time depriving them of any benefits afforded to employees and "pushing them in the direction of personal risk".[101]

---

[97] New Zealand Prostitutes Collective "Submission to the Justice and Electoral Select Committee on the Prostitution Reform Bill 2000" 6.
[98] New Zealand Prostitutes Collective "Submission to the Justice and Electoral Select Committee on the Prostitution Reform Bill 2000" 7.
[99] Plumridge, L "Rhetoric, reality and risk outcomes in sex work" (2001) 3 Health, Risk & Society 199, 206.
[100] Plumridge, L "Rhetoric, reality and risk outcomes in sex work" (2001) 3 Health, Risk & Society 199, 205.
[101] Plumridge, L "Rhetoric, reality and risk outcomes in sex work" (2001) 3 Health, Risk & Society 199, 206.

Further examples where sex workers appear to be unable to exert the type of independence which is commonly understood to be implied by the phrase "independent contractor" was where sex workers "were dependent upon the overall initiative and marketing strategy of the business for clientele." Many sex workers were treated like overly controlled employees, for example, many escort workers were not in a position to decline a client[102] or set their own hours of work. Often this control exerted by brothel owners was over and above what is necessary for a profitable and efficient business of prostitution. An example is described by a sex worker who said that on "the first night I went to Cleopatra's, I was given a list of rules to read about the do's and don'ts of working there, fines for lateness, all that sort of thing"[103]. Another prostitute likened the owner of the brothel to a boss, saying that "you have someone to answer to and you have rules that you have to follow" [104], thus taking away a sex worker's independence.

Although the relationship between operators of massage parlours/brothels, escort agencies and sex workers has some of the hallmarks of an employment relationship, a Court may still decide that the relationship falls within the ambit of an independent contractor/principal relationship. The Employment Court in *Koia* was prepared to give little weight to factors pointing to a contract of services. These were outweighed by the fact that Koia had to pay goodwill in order to utilise the contract which was inconsistent with a contract for services. Consequently, courts may follow the full court decision in *Koia,* placing greater importance on the economic reality test over the other established tests. The likely result would be that sex workers are categorised as independent contractors. However, this level of "flexibility renders the classification of employment contracts indeterminate,"[105] thus no conclusion as to the employment status of a sex worker can be made in the absence of any clear rule. Therefore, the paper will examine the legal issues relating to both independent contractor and employee.

---

[102] See Part III C 1 (e) Protections for sex workers.
[103] Jan Jordan *Working Girls Women in the New Zealand sex industry talk to Jan Jordan* (Penguin Books Ltd, Australia, 1991) 129.
[104] Jan Jordan *Working Girls Women in the New Zealand sex industry talk to Jan Jordan* (Penguin Books Ltd, Australia, 1991) 145.

(b) Street workers/Private workers

In most cases there is no identifiable employer or principal. Street workers and private workers exercise a certain degree of autonomy because they are not under the control of anybody. There is a lot more choice for both street workers and private workers. Sex workers "can wave goodbye if they don't like the look of him"[106], whereas escort workers are not afforded the same alternative. Unlike their overseas counterparts, New Zealand prostitutes do not appear to have pimps.[107] Therefore street workers and private workers who work independently are most likely to be categorised as 'self employed'.

3 *Homeworkers*

Even if a sex worker cannot meet the necessary requirements to be classified as an employee under section 6(1)(a), a sex worker may still qualify as an employee under section 6(1)(b)(i) as a "'homeworker".

"Homeworkers" are included within the definition of employee in section 6, regardless of their employment status.[108] A declaration that certain sex workers have the status of "homeworkers" is important because the result deems them to be employees and will entitle sex workers to the protections the ERA offers. The definition of "homeworker" is identical to that in the ECA and the Labour Relations Act 1987. The leading decision that considered the definition of a "homeworker" in relation to those Acts, *Cashman v Central Regional Health Authority*[109] is relevant.

---

[105] David Snelling "The Contract of Service: One Stone for Several Birds" (LLM Research Paper, Victoria University of Wellington, 2002) 11.
[106] Jan Jordan *Working Girls Women in the New Zealand sex industry talk to Jan Jordan* (Penguin Books Ltd, Australia, 1991) 121.
[107] Cheney, B. "Prostitution – A feminist jurisprudential perspective (1988) 18 VUWLR 239, 243.
[108] See *LexisNexis Employment Law Guide* (6 ed, LexisNexis Butterworths, Wellington, 2002) 138: In the case of homeworkers, the nature of the contract – that is, whether it is a contract of service or a contract for services – will be irrelevant to coverage.
[109] [1996] 2 ERNZ 156 (CA).

A homeworker is defined as follows:[110]

5 **A Homeworker:**

> "(a) means a person who is engaged, employed, or contracted by another person (in the course of that other person's trade or business) to do work for that other person in a dwellinghouse (not being work on that dwellinghouse or fixtures, fittings, or furniture in it); and
> (b) includes a person who is in substance so engaged, employed, contracted even though the form of the contract between the parties is technically that of vendor and purchaser."

Private sex workers, or those who work for an escort agency, whose main place for sexual encounters are at a client's residence, will prima facie be a homeworker for the purposes of the ERA. Yet, on a closer analysis, a sex worker working privately would need to prove that the client was employing them in the course of the client's trade or business.[111] Clients will normally acquire the services of a sex worker on a domestic basis, thus excluding private workers from the definition of a homeworker.

On the other hand, a sex worker working for an escort agency may be contracted by the agency in the course of its business to perform work for a client in a dwellinghouse.[112] Whether this type of work results in a sex worker being deemed a homeworker will be a question of fact and degree.

It is unlikely that the legislature envisaged that an escort worker would fall within the definition of "homeworker". The class of people perceived by the legislature as requiring protection included those "whose work would customarily be carried out within a factory, commercial premise or customarily designated place of work, but where because of the particular situation of workers, the workers needed to work from their own

---

[110] Employment Relations Act 2000, s 5.
[111] Employment Relations Act 2000, s 5: definition of "homeworker".
[112] A sex worker provides a service to the client, but a sex worker is also doing work for the escort agency because it is the escort agency that arranges, as part of its business, for a sex worker to provide her services. The escort agency must agree that the commercial sexual services be provided to the client before a sex worker is allocated. Richardson P analogises this situation to "any other contract where A engages B to provide services to C. In performing the contract B also supplies services to A."

home"[113]. However, an extended definition of homeworker first appeared in the Green Paper issued by the Government as part of the consultative process which preceded the Labour Relations Act 1987. In this Paper, it was recognised that a diverse occupational range may face the same problems as those in the traditional areas of homework.

Section 5(j) of the Acts Interpretation Act 1924[114] required an enactment to "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of [its] object...according to its true intent, meaning and spirit". Adopting a liberal approach to the definition of homeworker, the Court of Appeal concluded in *Cashman* that homecare workers are in a vulnerable position of the kind contemplated by those responsible for promoting the definition in 1987, thereby extending the class of people deemed to be 'homeworkers'.

More importantly, the extension, subject to certain limitations[115] could be applicable to escort workers as they are subject to similar exploitation by escort agencies. The factors which persuaded the court in the *Cashman* case to find that the homecare workers were homeworkers for the purposes of the ERA included the isolation of homecare workers and their peculiar susceptibility to exploitation due to the nature of what they do.[116]

[113] *Cashman v Central Regional Health Authority* [1996] 1 ERNZ 1, 39 per submission from counsel for appellant, Mr. Crotty.
[114] The Acts Interpretation Act 1924 was repealed by the Interpretation Act 1999.
[115] See the limitations expressed in *Cashman v Central Regional Health Authority*[1996] 2 ERNZ 159, 167: first, the requirement for a term demanding that the work be done in work in a dwellinghouse would exclude persons in respect of whose place of work the other party was genuinely indifferent (for example, artists, journalists, or designers who worked from home by choice). Secondly, traditional outworkers whose workplace was not referable to a dwellinghouse would not be covered, although such workers were likely to be properly classified as actual employees. Thirdly, it did not follow that family members, neighbours, or friends would be regarded as homeworkers, where paid under home support schemes to care for another person, but not otherwise engaged in similar work.
[116] *Cashman v Central Regional Health Authority* [1996] 2 ERNZ 159, 164: Home care workers are more susceptible to exploitation due to working on a one-to-one basis with sick and dependent people in circumstances where a strong personal bond is likely to develop which may lead them "out of the milk of human kindness" to continue to render their services even when being exploited by an "employer".

Similarly, escort workers are "isolated and given less support"[117] than sex workers in a brothel. They are told to go to houses even though "they may not know who's going to be at the other end until you get there and that can be quite freaky".[118] It is also the nature of the industry, because sex workers may not feel that they can refuse a client, otherwise the escort agency will not provide sex workers with clients, thereby taking away what is potentially their main source of income and creating a further dimension of exploitation by escort agencies. This type of work also involves long hours, erratic pay and an "inability to control the type of work".[119]

The possibility of escort workers being exploited by escort agencies provides a valid reason for permitting escort workers to be 'homeworkers' within the definition of the ERA. However, the courts will want to ensure that an expansive approach will not "inappropriately encompass" a growing range of occupations far removed from traditional outworkers.[120] Thus, a commonsense approach must be taken when analysing the facts of each scenario. The circumstances of an escort worker can be easily distinguished from a homecare worker, and therefore lead to a different result to the Court of Appeal decision in *Cashman*. In particular, unlike a homecare worker, an escort worker is paid directly by the client and will then give a set proportion to the escort agency.

Further, Blanchard J believed that it would be "ridiculous to apply employment legislation" where the employment lacks the sufficient continuity to be categorised as a "homeworker".[121] An escort worker is not confined to "dwellinghouses": instead they may, for example, be sent to a five star hotel or motel. Because they don't operate from a fixed location, they lack the necessary continuity in their job to be given the status of a "homeworker". Therefore, while escort workers may be subject to exploitation in their

---

[117] Jan Jordan *Working Girls Women in the New Zealand sex industry talk to Jan Jordan* (Penguin Books Ltd, Australia, 1991) 193.
[118] Jan Jordan *Working Girls Women in the New Zealand sex industry talk to Jan Jordan* (Penguin Books Ltd, Australia, 1991) 121.
[119] Jan Jordan *Working Girls Women in the New Zealand sex industry talk to Jan Jordan* (Penguin Books Ltd, Australia, 1991) 193.
[120] *Cashman v Central Regional Health Authority* [1996] 2 ERNZ 159, 162.
[121] *Cashman v Central Regional Health Authority* [1996] 2 ERNZ 159, 167.

job, the limitations placed on the definition have meant that sex workers working for escort agencies are not "homeworkers". Any other result would lead to anomalous consequences, such as those suggested by Blanchard J in *Cashman.*[122] For example, a medical practitioner making occasional house calls in the course of general practice, was not considered by Blanchard J to be a situation contemplated by the legislature to give the medical practitioner the status of "homeworker".

VI LEGAL CONSEQUENCES

Because it is now possible for prostitutes to have employment contracts[123] or work as independent contractors depending on whether they can fall within the scope of 'employee' in the ERA, sex workers and operators of the different forms of prostitution need to be aware of the rights and obligations flowing from their employment status.

A Legal Implications for an Employee/Employer Relationship

Sex workers engaging in commercial sexual services for brothels, massage parlours and escort agencies may be party to an employee/employer relationship.

1 Common law duties and obligations

The underlying objective of the ERA is to build productive employment relationships.[124] Therefore operators and sex workers must deal with each other in good faith,[125] and not to mislead or deceive each other directly or indirectly.

Both employer and employee have duties imposed on them by common law. However, the ERA establishes that these terms may be expressly excluded if agreed upon by both parties to the agreement.

---

[122] *Cashman v Central Regional Health Authority* [1996] 2 ERNZ 159, 167.
[123] It is no longer illegal under sections 48 and 49 of the PRA to "live off the earnings of a prostitute".
[124] The discussion of collective bargaining and unions are outside the scope of this paper. The paper will only focus on individual employment agreements.

An employer must pay remuneration in exchange for services received. Where a sex worker has not agreed on a rate or amount of remuneration, the employer must pay the worker reasonable remuneration or a minimum amount which is imposed by statutory requirements.[126]

Where a sex worker is paid on commission, the employer has an obligation to provide work. Previously, some sex workers who refused to "co-operate" with the operators "were deliberately starved of bookings"[127], and in some circumstances they did not receive enough shifts on which to survive. This could be seen as a breach of the employer's duty to provide work.

Employers are required to provide a safe workplace. Employers must also take responsibility for employees' actions as they remain responsible for what the employee does, even if the employee's actions are unlawful, provided the actions are carried out on the employer's instructions and the employee believes them to be lawful.[128]

An employee must be present for work, in particular, a sex worker must be present at the workplace, ready and willing to carry out the work required of them, in accordance with the agreements.[129] An employee is also under a common law duty to obey reasonable and lawful work instructions, to take reasonable care when carrying out work for the employee and to act honestly and in good faith.

2 *Employment agreement*

The ERA requires individual agreements to be in writing. A sex worker must accept the terms of the contract. All employment agreements are required to contain:[130]

---

[125] For individual employment relationships, good faith is expected to reflect the common law principle of mutual trust and confidence.
[126] Richard Rudman *New Zealand Employment Law Guide* (CCH New Zealand, Auckland, 2002), 22.
[127] Plumridge, L "Rhetoric, reality and risk outcomes in sex work" (2001) 3 Health, Risk & Society 199.
[128] Richard Rudman *New Zealand Employment Law Guide* (CCH New Zealand, Auckland, 2002), 22.
[129] Richard Rudman *New Zealand Employment Law Guide* (CCH New Zealand, Auckland, 2002), 23.

- The names of the employee and employer: This should be clearly stated at the very beginning of the contract. This will be important for sex workers as it indicates whom the requisite duty is owed to and by whom.
- A description of the work to be performed: It is suggested that those drafting the contract should not be overly descriptive as jobs which do not fit accurately in the description may not be performed by sex workers. For example, a contract should be drafted which states that a sex worker must provide "commercial sexual services" as defined under section 4 of the PRA.[131] This clause is wide enough to include most situations that will arise in the course of a sex worker's employment.
- An indication of where the work is to be performed: Sex workers working in brothels or massage parlours will often have a fixed location from which they operate. This site should be mentioned in the contract. If, on the other hand, operators only provide an outcall visiting service, a clause should specify that the location will be dependent on the client's place of choice.
- An indication of the hours of work: The nature of the industry means that the amount of hours will vary depending on the number of girls working for the same employer and the circumstances of each of the girls. However, the employment agreement should set a minimum number of shifts per week, an agreement for additional shifts, length and time the shift starts and finishes.
- Wages or salary to be paid: The amount and how a sex worker will be paid varies remarkably across the industry. Sex workers will most likely be paid on commission depending on what services they have provided. For example, an employment agreement may state "the parties agree that the sex workers shall be paid $80.00 for every half hour of commercial sexual services provided to clients".
  - A plain language explanation of the services available for the resolution of employment relationship problems: A provision should be included in the contract for a "disputes resolution procedure".

---

[130] Employment Relations Act 2000, s 65.

[131] Prostitution Reform Act 2003, section 4 commercial sexual services means sexual services that –
(a) involve physical participation by a person in sexual acts with, and for the gratification of, another person; and
(b) are provided for payment or other reward (irrespective of whether the reward is given to the person providing the services or another person).

The ERA states that an individual agreement must not contain anything that is contrary to law or inconsistent with the Act.[132] However, under the Illegal Contracts Act 1970 such a provision would not necessarily make the entire contract illegal or unenforceable.[133]

A non-competition and restraint of trade clause is common in contracts between brothel and massage parlour operators and sex workers. This type of clause seeks to restrain employees from working for competing businesses in the sex industry. In general, contractual provisions seeking to restrain trade or competition are void and unenforceable. However, they are not illegal. To enforce such a provision a party to the contract will need to prove that is reasonable in terms of the parties' interest and the public interest.[134] The Illegal Contracts Act provides for the High Court, District Court, the Employment Court or the Employment Relations Authority to delete or modify a restraint of trade provision.[135]

There is no statutory requirement for a contract to include meal breaks or tea breaks, however most organisations allow time for rest and refreshment. Typically, the sex industry has a more causal working environment and it may not be necessary to include a clause in the contract stating the meal breaks. Although sex workers may get breaks between clients, this is not always the case. Expedient operators may provide that sex workers are entitled to two fifteen-minute refreshment breaks and one half hour meal break. Such a provision ensures that sex workers are not exhausted throughout the shift and will provide optimal work levels for the operator.

[132] Employment Relations Act 2000, s 65.
[133] Illegal Contracts Act 1970, s 5.
[134] Richard Rudman *New Zealand Employment Law Guide* (CCH New Zealand, Auckland, 2002), 69.
[135] Illegal Contracts Act 1970, s 8.

3 *Minimum employment conditions*

(a) Working hours and wages

Employers of sex workers have to meet the minimum terms and conditions for employment which is laid down in various "floor of rights" legislation. Operators and sex workers can negotiate on more favourable terms in their employment agreement.

Minimum rates of pay are set by the Minimum Wages Act 1993 ("MWA") and rates of pay lower than the set minimum standard cannot be negotiated for. The Wages Protection Act 1983 ("WPA") requires employers to pay wages in full, although deductions may be made at the employee's request or with the written consent of the employee[136] or by an order of court or, as in the case of PAYE tax, to meet the requirements of law. Operators are not permitted to withhold payment from sex workers, or deduct part of their pay "for any behaviour that they deem inappropriate"[137].

Sex workers reported that where clients used credit cards, businesses routinely deducted a fee and could delay payment. In one case, a sex worker recalled how her parlour made her wait for several days for the cash.[138] However, it is a breach of the employment agreement to withhold wages when they are due. A sex worker or a labour inspector acting on behalf of the sex worker may take action in the Employment Relations Authority under the ERA to recover any unpaid wages.[139] Under the WPA an employee may take action in the Authority for the recovery of any deduction from wages that has been made without the sex worker's willing consent.[140]

---

[136] Wages Protection Act 1983, s 5.
[137] New Zealand Prostitutes Collective "Submission to the Justice and Electoral Committee on the Prostitution Reform Bill 2000" 4.
[138] Plumridge, L "Rhetoric, reality and risk outcomes in sex work" (2001) 3 Health, Risk & Society 199, 204.
[139] Employment Relations Act 2000, s 131.
[140] Wages Protection Act 1983, s 11.

It is also illegal for operators to have different rates of pay for men and women who are employed on the same or substantially similar work or on work requiring the same or substantially similar knowledge, skills and abilities.[141]

The MWA sets a maximum number of hours that can be worked in a week before overtime rates are paid must be set at not more than 40, unless the operator and sex worker agree on a higher number. Where the ordinarily weekly hours are not more than 40, the parties must try to arrange them over not more than five days.

(b) Holidays and leave

Employees must be allowed at least 11 paid holidays in addition to their annual holidays.[142] It is permissible for an agreement to provide for other days to be taken other than those the Holidays Act 1981 ("HA") specifies.

An employee is entitled to an annual holiday of three weeks for each completed year of service with an employer. A contract may be negotiated to allow sex workers to take holidays in advance. Part-time, causal or temporary employees are entitled to holiday pay which is calculated in accordance with the HA.

After six months' service with one employer, an employee is entitled to at least five days' special leave for each subsequent year of service. Special leave may be taken when the employee is sick, or when a spouse or dependent child or parent of the employee or the employee's spouse is sick or when the employee suffers bereavement. When on special leave, an employee is paid at ordinary time rates.[143]

An unpaid leave of absence from work is available to both parents when a child is born to them or adopted by them. The Parental Leave and Employment Protection Act

---

[141] See Equal Pay Act 1972.

[142] The normal public holidays are New Year's Day, 2 January, Waitangi Day, Good Friday, Easter Sunday, Easter Monday, Anzac Day, Queen's Birthday, Labour Day, the province's anniversary day, Christmas Day and Boxing Day.

1987 does not cover employees whose employment agreement addresses of all the matters set out in section 72.[144]

4 Disputes, grievances and enforcement

Part 9 of the ERA sets out the procedures for resolving disputes and grievances, and enforcing the provisions of the legislation. Parties to an employment agreement are already required to have a plain language explanation of the services available for the resolution of employment relationship problems. The Act defines "employment relationship problem" to include "a personal grievance,[145] a dispute[146] or any other problem relating to or arising out of an employment relationship."[147]

A best practice or industry standard contract for the sex industry between employers and employees should ensure that that any dispute or grievance arising from the employment agreement by either party to the agreement should be subject to voluntary mediation.[148] Mediation should take place within [a specific number of days] of the notification of the dispute or grievance to the other party.[149] Mediation is an optimal dispute resolution procedure because of its high rate of settlement, availability of prompt mediation[150] and mediators provided by the Labour Department come at no cost to the parties.[151]

---

[143] Holidays Act 1981, s 30A.

[144] See the Parental Leave and Employment Protection Act 1987, s 72: These matters are the eligibility for parental leave; duration of parental leave; employment protection during and after parental leave; the employer's obligation (or lack of obligation) to pay remuneration during parental leave; and the procedural requirements for parental leave.

[145] See Employment Relationship Act 2000, s 103: A personal grievance action may be taken against an employer or former employer when an employee claims to be unjustifiably dismissed; disadvantaged in employment by an unjustifiable action of the employer; discriminated against; sexually harassed; racially harassed; or subject to duress in relation to union membership.

[146] A "dispute" is defined by the Employment Relations Act 2000, s 5 as "a dispute about the interpretation, application or operation of the employment agreement".

[147] Employment Relations Act 2000, s 5.

[148] Consistent with the emphasis on good faith the ERA promotes mediation as the preferred method of resolving any employment relationship problem.

[149] Information provided by the New Zealand Prostitutes Collective

[150] Peter Churchman "The Employment Relations Act: Twelve Months On" Law Conference 2001 <http://www.nzls.org.nz/conference/churchman.pdf > (last accessed 29 April).

5 *Discrimination and equal opportunity*

It is unlawful for an operator to discriminate on specified grounds[152] in the Human Rights Act 1993 ("HRA") in relation to employing a person, or providing an employee with different terms or employment, conditions of work, fringe benefits and opportunities for training, promotion and transfer as other similarly qualified people employed on similar work; or to dismiss that person or treat that person differently from others. Therefore, operators need to ensure that any employment policies are not discriminatory.

For example, a policy that limited the number of "dark" girls who worked in the parlours and sent "dark" girls home when the ratio of dark girls to white girls was too high for management policy, is discriminatory. Limiting the number of "dark" employees is a different matter from limiting the number of women with blond or brunette hair and large and small busts as there is no provision in the HRA prohibiting discrimination on the latter grounds but there is an express provision limiting discrimination against employees on the ground of race or colour.[153]

6 *Termination of the employment agreement*

A sex worker may voluntarily terminate the employment agreement. A sex worker will not need to give an employee a reason for resigning. However, they must give the employer whatever notice is required under their employment agreement. If the agreement does not state a particular period then reasonable notice must be given. Reasonableness will depend on factors such as the nature of the contract, the type of work, the level of the position, the salary level, the industry, personal factors and

---

[151] Richard Rudman *New Zealand Employment Law Guide* (CCH New Zealand, Auckland, 2002), 117.

[152] See the Human Rights Act 1993, s 4; The specified grounds include race, colour, national or ethnic origin, gender or sexual orientation, religious belief, employment status, age, marital or family status, political opinion or if the employee has a disability.

[153] *Andrew v Jacklum Holdings Limited* (3 January 2003) Employment Relations Authority Auckland AEA 809/02 King 4.

common practice.[154] Reasonableness is to judged by the time the agreement was entered into and not at the point the notice was given[155] During the period from which a sex worker gives notice till when the notice period has expired, both the employer and employee are obliged to honour the terms of their agreement.

Where a sex worker leaves without giving the required or reasonable notice they are in breach of their employment agreements. Drafters would be best advised to include a clause which provides for termination where a sex worker has been absent for an extended period without authority or good reason.

The employer and employee may agree upon shortening the notice period. In the absence of any agreement to the contrary the employee is required to work the full notice period. If the employer cuts short the notice period, then the employee is entitled to payment for the full period.[156]

Equally, an employer has a right to terminate the employment agreement with the requisite notice given to the employee. However, the ERA permits employees to challenge a dismissal on the grounds that it is "unjustifiable". The onus is placed on the employer to show that a dismissal was justifiable. Employers need to have good and sufficient reasons for their actions.[157] The ERA also gives employees the rights to be provided with a statement of reasons for dismissal.[158]

For example, if an employer considers a sex worker is performing unsatisfactorily because clients are dissatisfied with the service, an employer must discuss the performance with the sex worker, provide a clear statement of the standard expected and

---

[154] Richard Rudman *New Zealand Employment Law Guide* (CCH New Zealand, Auckland, 2002), 136.
[155] *Cain v HL Parker Trusts* [1992] 3 ERNZ 777
[156] Richard Rudman *New Zealand Employment Law Guide* (CCH New Zealand, Auckland, 2002), 139.
[157] Richard Rudman *New Zealand Employment Law Guide* (CCH New Zealand, Auckland, 2002), 139. Common grounds for dismissal include: unsatisfactory work performance; incompatibility with the organisation or other employees; persistent absenteeism or other attendance problems; breaches of duty of loyalty, trust or confidence; negligence; incompetence, where a person hired for particular skills turns out not to have those skills; and misconduct.
[158] Employment Relations Act 2000, s 120.

warn the sex worker of the consequences if performance does not improve.[159] More importantly, it may be considered unreasonable to cut a sex worker's roster because the sex worker was not requested on a sufficient number of occasions. In this scenario, the sex worker must be given a reasonable opportunity to improve.[160] Dismissal under the ERA is seen as a last resort, this is the case even if her "employment is no longer considered a profitable venture for the business",[161] unless it is a justified summary dismissal.

In some businesses prostitutes recounted numerous summary dismissals[162] from parlours for reasons described as trivial, and they argued that management routinely sided with clients against workers.[163] Where summary dismissals were once used as a device to control women, with workforces kept competitive and "very bitchy", employers will only be justified in dismissing a sex worker without warning in cases of serious disobedience of a lawful and reasonable order given by the employer; or in a case of serious misconduct amounting to a fundamental breach of the employment agreement.[164]

Employees who resign because they are pressured to do so by the employer are said to be constructively dismissed.[165] In *Auckland etc Shop Employees IUOW v Woolworths (NZ) Ltd*[166], the Court of Appeal referred to the non-exhaustive categories of constructive dismissal.[167] Often, the brothel operator's behaviour will have the purpose of coercing an employee to resign by giving them unfavourable clients or treating them differently from other sex workers. However, a Court or Authority will need to be satisfied that the resignation was caused by a breach of duty by the respondents:[168] that involves deciding whether the resignation was caused by something done by the operator

---

[159] Richard Rudman *New Zealand Employment Law Guide* (CCH New Zealand, Auckland, 2002), 140.
[160] Richard Rudman *New Zealand Employment Law Guide* (CCH New Zealand, Auckland, 2002), 140.
[161] *Andrew v Jacklum Holdings Limited* (3 January 2003) Employment Relations Authority Auckland AEA 809/02 King 4.
[162] This is an instant dismissal or dismissal without warning.
[163] Plumridge, L "Rhetoric, reality and risk outcomes in sex work" (2001) 3 Health, Risk & Society 199.
[164] Richard Rudman *New Zealand Employment Law Guide* (CCH New Zealand, Auckland, 2002), 142.
[165] Richard Rudman *New Zealand Employment Law Guide* (CCH New Zealand, Auckland, 2002), 145.
[166] [1985] 2 NZLR 372 (CA).
[167] See Richard Rudman *New Zealand Employment Law Guide* (CCH New Zealand, Auckland, 2002), 145.

of the brothel and whether the brothel operators' actions amounted to a breach of any express or implied duty. Next, a sex worker must satisfy a Court or Authority that any breach of duty was serious enough to make it reasonably foreseeable that the employee would resign.[169]

7 *Health and safety issues*

(a) Health and Safety in Employment 1992

Assuming an employee/employer relationship is operating a sex worker would have an obligation under section 19 of the HSEA. A sex worker has an obligation to take all practicable steps[170] to ensure their own safety, including using suitable protective equipment provided by the employer and to ensure that nothing they do or fail to do while at work causes harm to any other person.[171] Consequently, sex workers must demonstrate an initiative for safer sex by using, for example, condoms provided by the operator.

A sex worker's duty as an employee under the HSEA is unaffected by the physicality of where they are working because section 10(1) of the PRA deems a sex worker to be "at work" for the purposes of the HSEA while providing commercial sexual services. Therefore, if a sex worker is providing commercial sexual services at either a client's home, a hotel or at the premises of a brothel, the duty under s 19 remains.

An employer has general duties under section 6 of the HSEA. Employers must: take all practicable steps to provide and maintain for employees a safe working environment; provide and maintain for employees while they are at work, facilities for

---

[168] *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 1 ERNZ 168.

[169] *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 1 ERNZ 168.

[170] The Health and Safety in Employment Act 1992 does not "all practicable steps". See Part VII Health and Safety for a discussion on the possible hazards of prostitution and what practical steps can be taken to ensure that these hazards and isolate or eliminate the hazards.

[171] Health and Safety in Employment Act 1992, s 19.

their safety and health; ensure that equipment used by any employee at work is maintained safe for the employee to use; ensure that employees are not exposed to hazards in their place of work and develop procedures for dealing with emergencies that may arise while employees are at work.[172]

In addition to these general duties, an employer has a duty to ensure that employees have information about:[173]

- what to do if an emergency arises;
- all identified hazards[174] to which employees might be exposed, and the steps taken to minimise the likelihood that those hazards would cause harm;
- all identified hazards which employees might create while working, and the steps they should take to minimise the likelihood that those hazards would cause harm; and
- where safety clothing, devices, equipment and materials are kept.

Employers must also ensure that employees have sufficient knowledge and experience of the work they are doing, or are supervised by a person with sufficient knowledge and experience, so that they are not likely to cause harm to themselves or others. Furthermore, employees must be adequately trained in the safe use of equipment in the place of work.[175]

Lastly, employers must take all practicable steps to ensure that their employees do not cause harm to any other people who might be in the place of work.[176]

If the employer operates a brothel or massage parlour he/she will owe a duty of care to the client under the HSEA because the Act imposes duties on people who control places of work.[177] This duty extends itself beyond employers and can impose duties on

[172] Health and Safety in Employment Act 1992, s 6.
[173] Health and Safety in Employment Act 1992, s 12.
[174] Health and Safety in Employment Act 1992, s 2(1) definition of hazard.
[175] Health and Safety in Employment Act 1992, s 13.
[176] Health and Safety in Employment Act 1992, s 15.
[177] Health and Safety in Employment Act 1992, s 16.

"the owner, lessee, sublessee, occupier or person in possession of the workplace or any part of it" [178] to take practicable steps to ensure the safety of people in the vicinity of the place, people who are lawfully at the work in the place, people who are in the place with the implied or express consent of the person and those are undertaking to do an activity at the place in question.[179]

Prima facie a client will not have obligations under the HSEA as they cannot be said to be an employer for the purposes of the HSEA. In this situation the employer would be the operator of the brothel or escort agency. The client has no contractual relationship with the sex worker. The only contract that the client is a party to will be the contract which exists between him and the operator for the provision of commercial sexual services.

However, a client may have a duty as a person in control of a place of work for the purposes of the HSEA. For example, where sexual services take place in the client's car, the client will owe a duty to the sex worker to take all practicable steps to ensure that no hazards that arise in the client's car harms the sex worker because a "place of work" [180] includes a vehicle where any person is working. For instance, if there is broken glass in the car, the client would need to take practicable steps to ensure that the sex worker would not suffer any abrasions from the broken glass. On the other hand, a client has no requisite duty to a sex worker if the sexual services are provided at the client's home because 'a home occupied by the person' is explicitly excluded under section 16(1).

[178] Health and Safety in Employment Act 1992, s 2.
[179] Health and Safety in Employment Act 1992, s 16.
[180] Health and Safety in Employment Act 1992, s 2(1): "place of work" means a place (whether or not within or forming part of a building [, structure, or vehicle]) where any person is to work, is working, for the time being works, or customarily works for gain or reward.

(b) Prostitution Reform Act 2003

The duty of sex workers to adopt safer sex practices, which already existed under section 19 of the HSEA[181], is enhanced under the PRA. However, the PRA places a corresponding duty on clients where no duty previously existed under the HSEA. Similarly, if the employer is an operator for the purposes of the PRA they will need to adopt and promote safer sex practices.[182] In addition, operators of brothels[183] must prominently display health information in the brothels.

(c) Injury, Prevention, Rehabilitation and Compensation Act 2001

Before the enactment of the PRA the accident compensation scheme already applied to sex workers. Section 28(7) of the Injury Prevention, Rehabilitation and Compensation Act 2001 ("IPRCA") deemed it irrelevant when determining whether a person suffered a "work related personal injury" that he or she may have been acting under an illegal contract when the event causing the injury occurred. The only impact of the PRA is that a sex worker will no longer be working under an illegal contract.[184]

The IRPCA provides for the rehabilitation and compensation on a no-fault basis of those who suffer accidental personal injury that has "cover".[185] A decision on whether there has been an accident causing personal injury involves questions of both fact and law. The ramifications arising from questions of cover will be significant for all

---

[181] Health and Safety in Employment Act 1992, s 19 requires employees to take all practicable steps to ensure their won safety at work. This means that sex workers should follow safe sex practices.
[182] See Part III C 1 (b) Health and safety requirements.
[183] Prostitution Reform Act 2003, s 4(1): brothel means any premises kept or habitually used for the purposes of prostitution; but does not include premises at which accommodation is normally provided on a commercial basis if the prostitution occurs under an arrangement initiated elsewhere.
[184] Richard Braddell "Impact of the Prostitution Reform Act" (26 June 2003) <http://www.acc.co.nz/about-acc/press-releases/impact-of-the-prostitution-reform-act > (last accessed 27 August 2003).
[185] To make a successful claim under the IRPCA involves two separate inquiries. The claimant must first be able to prove that they suffered a "personal injury". A personal injury is defined under section 26 in the IRPCA to include "physical injuries suffered by a person, including, for example, a strain or sprain". Having established a physical injury, the next issue is whether this physical injury is covered by the IRPCA. The IRPCA covers personal injuries that are caused by an accident; medical misadventure; treatment given for personal injury; and a work-related gradual process, disease or infection. In the absence

prostitutes, especially in terms of providing sex workers with compensation for unwanted pregnancies, the contraction of STIs and any physical injuries that are work-related.[186]

In 2003/04, sex worker employers will be required to pay a levy on their earnings to cover income replacement while injured. In addition, employees will need to pay a levy on their earnings up to $15,000 to cover medical and rehabilitation costs.[187]

8 *Tax obligations*

Sex workers will need to fill out an IR330 Tax Code Declaration when they start work, showing real name, IRD number, tax code, and be signed. Otherwise PAYE, which must be deducted from wages and paid to the IRD on a monthly basis, will be deducted at the non-declaration rate.

9 *Privacy*

The Privacy Act 1993 imposes legal obligations on employers who collect, use or disclose information about employees and other people.[188] At the same time it gives employees a right relating to access and to correction of personal information.[189] The Privacy Act sets out 12 information privacy principles dealing with the collection, holding, use and disclosure of personal information, and the assigning of unique identifiers to which employers are expected to adhere.

Privacy is of special concern to those in the sex industry, as intimate details of sex workers are often revealed at the commencement of their employment. For example, questions may include; whether they have tattoos, whether they smoke, their nationality,

---

of a personal injury or if the personal injury is not covered under section 20 of the IRPCA, no cover is provided for the claimant under the ACC scheme because it would fall outside the purview of the Act.

[186] There are many ACC issues in relation to the sex industry. It is a complex area of law which is outside the scope of this paper.

[187] ACC "Impact of the Prostitution Reform Act – 26 June 2003" <http://www.acc.co.nz/about-acc/press-releases/impact-of-the-prostitution-reform-act---26-june-2003/index.html > (last accessed 24th September 2003).

[188] Richard Rudman *New Zealand Employment Law Guide* (CCH New Zealand, Auckland, 2002), 206.

[189] Privacy Act 1993, Part V.

LAW LIBRARY
VICTORIA UNIVERSITY OF WELLINGTON

their star sign, whether they are currently taking any illegal drugs/substances, whether they are taking any prescription medicine and whether sex workers will engage in sexual services involving fantasy, kissing, couples or light bondage.[190]

The privacy principles most applicable to employers in the sex industry are principles one, five, nine, ten and eleven.

Principal one requires that an agency should not collect information unless it is for a lawful purpose connected with a function or activity of that agency. Operators are providing sex services to clients, therefore they must have information as to what services their employees are willing to undertake. A description of a sex worker's physicality is important because often this is used as a selling point for operators. For example, brothels offering sexual services disseminate information on each sex worker based on their individual characteristics taken from a "sex workers profile". For example, one girl was described as "every man's dream come true. Green eyed and 5'6" tall. She is fun loving and possesses an outgoing nature."[191]

Operators need to ensure they only collect information that is relevant and necessary to the employment relationship. A question asking sex workers whether they have at any time taken illegal drugs or substances is probably not justified, because an individual's history of drugs is irrelevant to their performance as a sex worker. However, an operator has a duty under the HSEA to take all practicable steps to ensure that an employee's action or inaction will not harm any client.[192] Because it is possible for a sex worker to contract the HIV/AIDS virus from sharing needles with other intravenous users, which in return, places clients at risk, it may warrant questions relating to a sex worker's history of drug usage. It is advisable that operators of brothels ask whether sex workers are currently infected with an STI, rather than a generic question on past drug usage to safeguard against compliance with privacy principle one.

---

[190] Information provided by the New Zealand Prostitutes Collective.
[191] Information provided by the New Zealand Prostitutes Collective.
[192] Health and Safety in Employment Act 1992, s 15.

Information relating to whether a sex worker's was *currently* taking any illegal drugs/substances is "connected with the agency" because it may affect a sex worker's ability to carry out their employment.

Because some of the questions relate to highly sensitive information it is essential employers comply with principle five to keep this information safe and secure. Principle nine requires employers to hold personal information for no longer than is required. A sex worker who has terminated her employment with a brothel for over a year may expect the operator to have discarded personal information specifically relating to her. However, there may be a lawful justification or reasonable excuse for retaining certain records.[193]

Principle ten requires employers who obtain personal information to only use it for the purpose for which it was acquired. The personal information retrieved from sex workers is often used by operators to provide prospective clients with details of each sex worker to see whether the sex workers are suitable for their needs. A sex worker must realise that their personal information will be used to compile a profile on them. Therefore, it is inherent that when a sex worker discloses intimate details of what sexual services they are willing to provide and other personal information they are implicitly authorising operators to use it in this manner. Likewise, sex workers impliedly consent to operators disclosing personal information to the client on the same basis. As a result, principle eleven which requires employers not to disclose personal information to another person or agency will not be breached if the information is used to produce "sex worker" profiles for clients.

A sex worker can make a complaint to the Privacy Commissioner if two preconditions are met. First, the agency must have breached an information privacy principle and secondly, the breach must:

- have caused loss, detriment, damage or injury to you; or
- have adversely affected your rights, benefits, privileges, obligations or interests; or

[193] See Richard Rudman *New Zealand Employment Law Guide* (CCH New Zealand, Auckland, 2002), 216; For example, tax records must be kept for seven years, and wages and time records for at least six years.

- have resulted in significant humiliation, significant loss of dignity, or significant injury to your feelings; or; may do so.[194]

B Legal Implications for an Independent Contractor and Principal

1 Duties and obligations

The statutory protections given to employees do not extend to independent contractors, thus a large emphasis is placed on the terms of the contract. For example, unlike sex workers engaged in a contract of services, the personal grievances procedure under the ERA is not available to people who work under contracts for services. They can only seek redress through common law actions or by using any dispute resolution procedures that might be included in their contracts.

Nevertheless, some statutes are not dependent on the employment status of the sex worker. The Privacy Act 1993 principles dealt with under the employee and employer relationship are equally applicable to a principal and independent contractor. This is because the Act applies to "agencies", which can include a person or body of people in the public or private sectors, so an independent contractor is included in the definition.

The Human Rights Act also applies to independent contractors as section 2 states that in Part II of the Act the term employer includes the employer of an independent contractor and that employment in Part II has a corresponding meaning.

A sex worker is responsible for paying own income tax and filing annual IR3 return and can claim expenses against their incomes. They will also be entitled to a GST reduction for payments made to independent contractors who are also GST registered. In addition, a sex worker will be responsible for paying his or her own ACC levies. The applicability of the IRPCA does not depend on employment status of the worker.[195]

---

[194] The Office of the Privacy Commissioner "The Privacy Act and You" <http://www.privacy.org.nz/people/peotop.html> (last accessed 20th September 2003).
[195] See Part VI A 7 (c) Injury, Prevention, Rehabilitation and Compensation Act 2001.

2 *Health and safety issues*

In a decriminalised context, regardless of the form of employment relationship, the HSEA would cover the health and safety of sex workers. The only difference would be the varying levels of obligation imposed upon those in charge of the workplace, depending on whether the sex workers are categorically described as independent contractors or employees.[196] However, the general health and safety issues facing the sex industry as a whole are set out in the latter part of my paper.

(a) Health and Safety in Employment Act 1992

The sex worker would have an obligation under s 17 of the HSEA to take all practicable steps to ensure their own safety and health and that of people affected by work.

A principal has a duty under section 18 of the HSEA to take all practicable steps to ensure that no contractor is harmed while providing commercial sexual services they were engaged to do. A principal would not owe a duty of care to the client under HSEA except in the case of brothels and massage parlours, where a duty as a person in control of a place of work would be owed to clients under section 16(2) of the HSEA. This duty extends itself beyond principals and can impose duties on "the owner, lessee, sublessee, occupier or person in possession of the workplace or any part of it" [197] to take practicable steps to ensure the safety of people in the vicinity of the place, people who are lawfully at the work in the place, people who are in the place with the implied or express consent of the person and those are undertaking to do an activity at the place in question.[198]

---

[196] OSH "Submission to the Justice and Electoral Committee on the Prostitution Reform Bill 2000" 3.
[197] Health and Safety in Employment Act 1992, s 2.
[198] Health and Safety in Employment Act 1992, s 16.

The HSEA does not directly impose a duty on the client, however a client will have a duty as a person in control of a place of work[199] if, for example, the provision of sexual services were performed in the client's car.[200]

A client is unlikely to be deemed a principal under section 18 of the HSEA as the definition of "principal" means a person who or that engages any person to do any work for gain or reward. A client does not engage a sex worker to perform sexual services, instead clients deal with the operator of a business of prostitution for the provision of commercial sexual services, and as a result of the dealings a sex worker is made available.

(b) Prostitution Reform Act 2003

The duty of sex workers and clients, regardless of their employment status, is to adopt safer sex practices under the PRA. Similarly, if the employer is an operator[201] for the purposes of the PRA they will need to adopt and promote safer sex practices.[202] In addition, operators of brothels[203] must prominently display health information in the brothels.

C Legal Implications for Self Employed Persons

If there is no identifiable employer or principal, a sex worker will be considered self-employed for the purposes of employment law. Self-employed sex workers, which are most likely to be street workers and private workers, have very few obligations or rights imposed on them.

---

[199] Health and Safety in Employment Act 1992, s 16.
[200] See Part VI A 7 (a) Health and Safety in Employment Act 1992.
[201] Prostitution Reform Act 2003, s 5: A sex worker who works at a small owner-operator is not an operator of that business of prostitution, and for the purposes of this Act, a small owner-operated brothel does not have an operator.
[202] See Part III C 1 (b) Health and safety requirements.

1 Duties and obligations

A self-employed sex worker must pay their own income tax, file an annual IR3 return, but the upside is that sex workers can claim expenses against their incomes. They are also entitled to a GST reduction for payments made to self-employed persons who are also GST registered. In addition, a sex worker will be responsible for paying his or her own ACC levies. The applicability of cover under the IRPCA for self-employed sex workers is the same as discussed for employees and independent contractors.

2 Health and safety issues

(a) Health and Safety in Employment Act 1992

A sex worker who is self-employed would have an obligation under the HSEA to take all practicable steps to ensure that no action or inaction on their part, while at work, harms the self-employed person or any other person.[204] A sex worker who visits the client's home would not impose any duty on the client because the HSEA does not apply to work carried out in private homes by a person employed or engaged by the home occupier.[205] As previously mentioned, a client may, in some situations, have a duty as a person in control of a place of work.[206]

(b) Prostitution Reform Act 2003

Both a sex worker and client will have a duty under the PRA to adopt safer sex practices.[207]

---

[203] Prostitution Reform Act, s 4(1) brothel means any premises kept or habitually used for the purposes of prostitution; but does not include premises at which accommodation is normally provided on a commercial basis if the prostitution occurs under an arrangement initiated elsewhere.
[204] Health and Safety in Employment Act 1992, s 17.
[205] Health and Safety in Employment Act 1992, s 16(1).
[206] See Part VI A 7 (a) Health and Safety in Employment Act 1992.
[207] See Part VI A 7 (a) Health and Safety in Employment Act 1992.

VII HEALTH AND SAFETY

A General Overview

Previously sex workers were unlikely to obtain health and safety information from their place of work. Fellow workers and the NZPC were the main sources of educational health and safety material and equipment for sex workers around New Zealand. The NZPC, which is partially government funded, also provides one-on-one advice about sexual health and avoiding workplace violence, educates the media and public about issues affecting sex workers, releases various publications specifically for those in the industry, provides free health checks, free condoms, lubricant, dental dams and helps liase with the police.[208]

However, the HSEA and the implementation of certain health and safety provisions under the PRA have placed the burden on sex workers, clients and operators of businesses of prostitution instead.[209] Nevertheless, the NZPC will continue to be an essential organisation in meeting the needs of sex-industry workers.

B Health and Safety Risks in the Sex Industry

Depending upon the work site and whether the worker is female, male or transgender,[210] the risks will differ, as a result the sex worker should adapt the safety and health precautions to suit their specific needs.

In practice a code needs to be developed in consultation with organisations involved in the sex industry,[211] and individual sex workers from the different aspects of the industry. Such a code would provide the basis for assessing compliance with the statutory duty to

---

[208] Sheryl Hann and John Wren "Decriminalisation: the key to health and safety in the sex industry" (2001) 1 ELB 9, 9.
[209] See Part III C 1(b) Health and safety requirements
[210] Sheryl Hann "Decriminalisation: the key to health and safety in New Zealand sex industry" (12 December 2000) *Safety at Work* 7.

protect workers and any other person, in certain circumstances, from hazards and accidents.

Not only are sex workers susceptible to a wide range of health and safety hazards evident in other New Zealand industries, they are also exposed to risks prevalent in the sex industry. OSH has identified the following as a mixture of general and specific hazards faced by sex workers and their clients.[212] This paper will provide some guidance as to what procedures and work practices should be put in place to eliminate or control the risks identified by OSH.

1 Sexually transmitted infections

The most obvious occupation health concerns for prostitutes include the transmission of sexual infections such as herpes, genital warts, chlamidia and HIV, with one Auckland gynaecologist estimating that within five years of entry into prostitution, 95 per cent of female prostitutes have abnormal or pre-cancerous pap tests.[213]

In addition, both clients and sex workers increase the risks related to health when not practising safe sex. A qualitative study showed that clients did not consider they had any responsibility for ensuring protected sex.[214] However, a recent study reports that there is a high level of condom use in the sex industry, with none of the women interviewed thinking it was safe to have vaginal or anal sex without a condom. The fourteen women who reportedly failed to use condoms did so because clients had either refused them or had offered more money for unprotected sex.[215] This is particularly important to public health as the "behaviour of sex workers and their clients will be influential in determining the spread of sexually transmitted infections within the general

---

[211] This includes the NZPC, the AIDS Foundation, the Salvation Army, a number of Sexual Health Service, Community Law Centres, Family Planning, Women's Refuge and Wellington Independent Rape Crisis

[212] OSH "Submission to the Justice and Electoral Select Committee on the Prostitution Reform Bill 2000" 3.

[213] Melissa Farley "Prostitution Debate" (25 June 2003) *The Dominion Post* Wellington 17.

[214] Plumridge E, Chetwynd J and Reed A "Control and condoms in commercial sex: client perspectives." (1997) 19(2) Sociology of Health & Illness 228.

[215] Plumridge, L and Abel, G. "A 'segmented' sex industry in New Zealand: sexual and personal safety of female sex workers" (2001) 25 Australian and New Zealand Journal of Public Health 1.

population if the use of condoms is inconsistent"[216]. To ease the risk of STIs in the sex industry, the practice of safe sex should be promoted.[217] Also, the availability of good lighting should ensure that a physical examination of clients will help detect any visible evidence of STIs.

2 *Back injuries, occupational overuse syndromes*

Sex workers are also liable to suffer repetitive stress injuries, respiratory infections, emotional stress and alcohol and drug dependence.[218] In particular, sex workers can suffer back pain from unsuitable beds and wrist injury from constant massage. The prevalence of OOS can be minimised through ensuring all beds support the back and allow for a variety of sexual services to be performed comfortably; adjustable massage tables; and sex workers are taught how to use bondage and discipline equipment properly and that the equipment is adjustable and not too heavy.[219]

3 *Infection from sex aids and spa baths*

Reasonable steps that could be taken in respect of hygiene control include, for example changing of bed linen and towels for each client. These items should be properly laundered after each use to prevent the spread of infection. Operators should ensure the safe disposal of condoms by providing liners, enclosed bins and waste management. Regular maintenance and cleaning of spas, sex aids and bondage equipment should be in place.[220] Single usage items must be used wherever possible and discarded after each

---

[216] Plumridge, L and Abel, G. "A 'segmented' sex industry in New Zealand: sexual and personal safety of female sex workers" (2001) 25 Australian and New Zealand Journal of Public Health 1.
[217] There is now a requirement for clients and sex workers to practice safe sex, and a requisite duty for an operator to promote the practice of safe sex.
[218] Sheryl Hann "Decriminalisation: the key to health and safety in New Zealand sex industry" (12 December 2000) *Safety at Work* 7.
[219] WorkCover "Health and Safety Guidelines for Brothels" (2001) WorkCover NSW Health and Safety Guide, 8.
[220] WorkCover "Health and Safety Guidelines for Brothels" (2001) WorkCover NSW Health and Safety Guide, 6.

client. Additionally, sex workers should attend a sexual health centre or private doctor for sexual health assessment, counselling and education to appropriate individual needs.[221]

4 Drugs, alcohol and cigarette smoke within the workplace

Drugs and alcohol are prevalent in the sex industry; therefore the issue is significant to both sex workers and clients. It is suggested that employers develop a policy dealing with this issue and provide employees with a written document outlining when it is considered appropriate to consume alcohol; acceptable standard of work performance; use of prescribed drugs; and prohibition of being under the influence of illegal substances at work. Smoking should also be eliminated from all indoor areas. Signs should be posted indicating to sex workers and client that the indoor areas are non-smoking.

5 Violence

Physical, verbal, sexual and emotional violence are often associated with the sex industry.[222] While overseas studies report that 68% to 70% of women in prostitution have been raped,[223] the climate in which sex workers operate in New Zealand is noticeably different from its overseas counterparts. In a report done by Libby Plumridge and Gillian Abel on female sex workers in Christchurch, 59 per cent of the sample of 303 women suffered from verbal abuse while working, 36 per cent experienced threats of physical violence and 26% suffered actual physical assault, and 12.5 per cent had been raped.[224] While the figures are markedly different from overseas research, the numbers are significant enough to raise concerns that the sex industry lacked the necessary health and safety guidelines conducive to a safe work environment. Specifically, operators should

---

[221] WorkCover "Health and Safety Guidelines for Brothels" (2001) WorkCover NSW Health and Safety Guide, 7.
[222] P Alexander, "Sex work and health: a question of safety in the workplace" (1998) Journal of the American Medical Women's Association 77.
[223] M Silbert, "Compounding factors in the rape of street prostitutes," in A.W. Burgess, ed., Rape and Sexual Assault II, Garland Publishing, 1988; Melissa Farley and Howard Barkan, "Prostitution, Violence, and Posttraumatic Stress Disorder," 1998, Women & Health.

ensure adequate controls such as screening of clients on admission to the premises and security systems, such as panic buttons, should be installed.

6 Stress

Stress in the workplace can be minimised by providing reasonable length shifts with adequate rest breaks for sex workers.

VIII ENFORCING THEIR RIGHTS

Accepting that the purpose of the PRA is to ensure that those involved in the sex industry have full access to health care without discrimination and are given the same employment opportunities afforded to other workers, the current legislative regime governing those aspects of the law may, in practice, be less than satisfactory due to the unique circumstances of the sex industry. The New Zealand Association of Citizens Advice Bureaux CEO Nick Toonen said "employment related issues is one of our top five categories of enquiry, with 30,000 enquiries over the past two years. However, it is not surprising that the Citizens Advice Bureaux receive few known enquiries from sex workers in relation to their work. This is because sex workers are unfamiliar with their rights and are fearful of disclosing their occupation."

The problem is further exacerbated because many prostitutes have been abused as children, they frequently also become involved in prostitution at early ages and lack the ability to defend their interests against other opportunistic abusers even if they know their rights.[225]

However, both sex workers and clients have an interest in not enforcing their legal rights and obligations for a variety of reasons, including the stigma associated with sex

---

[224] Plumridge, L and Abel, G. "Services and information utilised by female sex workers for sexual and physical safety" (2000) 113 New Zealand Medical Journal 370, 371.
[225] Rosemarie Tong *Women, Sex and the Law* (Rowman and Allanheld, New Jersey, 1984) 51, 53.

work and the fear of being ostracised by society and rejected by friends and partners if they disclose their involvement in the sex industry.

IX CONCLUSION

While respecting the merits of the PRA, it is difficult to see whether the PRA achieves one of its purposes of "enabling sex workers to have and access the same protections afforded to other workers".[226] The partial success of the PRA will be determined by the willingness of brothel owners, massage parlour operators, escort agencies and sex workers to enter into contracts of services. More importantly, sex workers will receive minimum employment protection law under a contract of service, including the right to take a personal grievance against an employer for unjustified dismissal. However, the rights and obligations imposed upon employers under a contract of service could serve as a disincentive for operators of businesses of prostitution, thus leaving sex workers in the same position prior to the PRA. Therefore, contract law would continue to govern the dealings between the sex worker and operator. This is an unsatisfactory outcome for sex workers who will continue to be subjected to unfair conditions and terms arising under a contract for the provision of commercial sexual services.

However, the ERA makes it clear that even where an operator of a business of prostitution may decide the relationship to be that of principal and independent contractor, it is entirely possible that a court may decide the true nature of the relationship is one of employee/employer. This provides no greater protection for sex workers because of the complexities arising from Courts drawing upon indeterminate concepts[227] to determine whether a contract of service exists, while still deciding each case upon its own distinctive facts.

[226] Justice and Electoral Committee *Prostitution Reform Bill: Commentary* (Wellington, 2003) 2.
[227] See Part V A 1 Distinguishing employees from independent contractors.

In addition, the scope of the HSEA is especially broad and all those involved in the sex industry should be aware of the varying levels of obligations and duties imposed upon those in charge of the workplace, depending on whether the sex workers are categorically described as independent contractors or employees. One redeeming feature of the PRA for sex workers is that is not concerned with the employment status of the sex worker and therefore the health and safety requirements are equally applicable to independent contractors, employees and self-employed persons.

BIBLIOGRAPHY

A Legislation

Contractual Remedies Act 1979.
Crimes Act 1961.
Employment Relations Act 2000.
Equal Pay Act 1972.
Health and Safety in Employment Act 1992.
Holidays Act 1981.
Human Rights Act 1993.
Illegal Contracts Act 1970.
Massage Parlours Act 1978
Parental Leave and Employment Protection Act 1987.
Privacy Act 1993.
Prostitution Reform Bill 2000.
Prostitution Reform Act 2003.
Summary Offences Act 1981.
Wages Protection Act1 1983.

B Cases

Andrew v Jacklum Holdings Limited (3 January 2003) Employment Relations Authority Auckland AEA 809/02 King 4.

Auckland Electric Power Board v Auckalnd Provincial District Local Authorities Officers IUOW (Inc) [1994] 1 ERNZ 168.

Auckland etc Shop Employees IUOW v Woolworths (NZ) Ltd [1985] 2 NZLR 372 (CA).

Cain v HL Parker Trusts [1992] 3 ERNZ 777.

Cashman v Central Regional Health Authority[1996] 1 ERNZ 1.

Cashman v Central Regional Health Authority[1996] 2 ERNZ 159.

CORO Trading Ltd v Commissioner of Inland Revenue [1996] 2 ERNZ 320.

Cunningham v TNT Express Worldwide (NZ) Ltd [1993] 1 ERNZ 695.

Curlew v Harvey Norman Stores (NZ) Pty Ltd Employment Court, Auckland (AC46/02).

Koia v Carlyon Holdings Ltd [2001] 1 ERNZ 585.

Market Investigation Ltd v Minister of Social Security [1969] 2 QB 173.

Short v J W Henderson Ltd (1946) 62 TLR 427.

Stevenson, Jordan and Harrison Ltd v MacDonald and Evan [1952] 1 TLR 101.

C Hansard

Sue Bradford (19 February 2003) 15 NZPD.

Matt Robson (19 February 2003) 15 NZPD.

D Other Resources

ACC "Impact of the Prostitution Reform Act – 26 June 2003" <http://www.acc.co.nz/about-acc/press-releases/impact-of-the-prostitution-reform-act---26-june-2003/index.html > (last accessed 24th September 2003).

Alexander, P "Sex work and health: a question of safety in the workplace (1998) Journal of the American Medical Women's Association.

Anderson, Scott A "Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution" <http://www.src.uchicago.edu/politicaltheory/Anderson 01.htm> (last accessed 28th June 2003).

Avery, Cass "Unbearable laws on prostitution must be changed" (24 February 2003) *The New Zealand Herald* Auckland 17.

Barnett, Hilaire "Pornography and Prostitution" (extract) from Hilaire Barnett *Introduction to Feminist Jurisprudence* (Cavendish Publishing, London, 1998) 317.

Barnett, Tim "The Prostitution Reform Bill –*Key questions and answers"* (February 2003) 3.

Barnett, Tim "Prostitution Reform Bill" <http://www.timbarnett.org.nz/prostitution.htm> (last accessed June 30th 2003).

Braddell, Richard "Impact of the Prostitution Reform Act" (26 June 2003) <http://www.acc.co.nz/about-acc/press-releases/impact-of-the-prostitution-reform-act > (last accessed 27 August 2003).

Carter, Vednita and Giobbe, Evelina "Duet: Prostitution, Racism and Feminist Discourse" (1999) 10 Hastings Women's LJ 37.

Cheney, B. "Prostitution – A feminist jurisprudential perspective (1988) 18 VUWLR 239.

Churchman, Peter *The Employment Relations Act: Twelve Months On* Law Conference 2001 <http://www.nzls.org.nz/conference/churchman.pdf > (last accessed 29 April).

Editorial "Prostitution, if legal, in need of controls" (22 February 2003) *The Dominion Post* Wellington.

Farley, Melissa "Prostitution Debate" (25 June 2003) *The Dominion Post* Wellington.

Farley, Melissa and Barkan, Howard "Prostitution, Violence, and Posttraumatic Stress Disorder," (1998) Women & Health.

Hann, Sheryl "Decriminalisation: the key to health and safety in New Zealand sex industry" (12 December 2000) *Safety at Work*.

Hann, Sheryl and Wren, John "Decriminalisation: the key to health and safety in the sex industry" (2001) 1 ELB 9.

Independent Contractor or Employee? IRD Explains" (Siren, May 2002).

Jordan, Jan *Working Girls Women in the New Zealand sex industry talk to Jan Jordan* (Penguin Books Ltd, Australia, 1991).

Justice and Electoral Committee *Prostitution Reform Bill: Commentary* (Wellington, 2003).

LexisNexis Employment Law Guide 6th ed. (LexisNexis Butterworths, Wellington, 2002).

Marianne Lexen, Director, Division of Gender Equality in the Sweden Ministry for Equality, "Maxim Prostitution Summary Position on the Prostitution Reform Bill' (January 2003).

New Zealand Prostitutes Collective "Submission to the Justice and Electoral Committee on the Prostitution Reform Bill 2000".

Nussbaum, Martha C "Whether from reason or prejudice: Taking Money for Bodily Services" (1998) 27 Journal of Legal Studies 693.

OSH "Submission to the Justice and Electoral Committee on the Prostitution Reform Bill 2000".

Plumridge, L "Rhetoric, reality and risk outcomes in sex work" (2001) 3 Health, Risk & Society 199.

Plumridge, L and Abel, G. "A 'segmented' sex industry in New Zealand: sexual and personal safety of female sex workers" (2001) 25 Australian and New Zealand Journal of Public Health.

Plumridge, L and Abel, G. "Services and information utilised by female sex workers for sexual and physical safety" (2000) 113 New Zealand Medical Journal 370.

Plumridge E, Chetwynd J, Reed A. "Control and condoms in commercial sex: client perspectives" (1997) 19(2) Sociology of Health & Illness 228.

Public Health Association of New Zealand "Submission to the Justice and Electoral Select Committee on the Prostitution Reform Bill 2000".

Pyett P, Haste B, Snow J "Who works in the sex industry? A profile of female prostitutes in Victoria" (1996) 20(4) Australian New Zealand Journal of Public Health 431.

Raymond, Janice "Legitimating 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 9th July 2003).

Rudman, Richard *New Zealand Employment Law Guide* (CCH New Zealand, Auckland, 2002).

Silbert, M "Compounding factors in the rape of street prostitutes," in A.W. Burgess, ed., Rape and Sexual Assault II, Garland Publishing, 1988.

Special Audit memorandum *Sex workers and the withholding payment regime* (Wellington, Inland Revenue, 1997).

The Office of the Privacy Commissioner "The Privacy Act and You" <http://www.privacy.org.nz/people/peotop.html> (last accessed 20th September 2003).

Tong, Rosemarie *Women, Sex and the Law* (New Jersey, Rowman and Allanheld, 1984).

LAW LIBRARY
A Fine According to Library Regulations is charged on Overdue Books.

VICTORIA UNIVERSITY OF WELLINGTON
LIBRARY

au 243463 8

PLEASE RETURN BY
22 SEP 2006
TO W.U. INTERLOANS

AS741
VUW
A66
W872
2003