

The Law's Forgotten Profession: Why the Legal Framework on Prostitution is not fit for purpose

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Abstract

The law relating to prostitution in England and Wales is in urgent need of reform as it is not fit for purpose. One of the most crucial purposes of legislation is to protect the rights and liberties of citizens. However, the legal system fails to fulfil this objective when it comes to prostitution, instead serving to further amplify the vulnerabilities of sex workers. Increased levels of criminalisation have led to more hidden forms of prostitution that render workers at risk of violence and minimal protection from law enforcement agencies. Therefore, this article aims to highlight the necessity and strengths of more welfare-centred approaches to regulating prostitution, in contrast to criminalisation. While prostitution is lawful, various surrounding acts are criminalised creating a fragmented legal framework that regulates sex work, which treats prostitution as a nuisance. This uneven application reflects wider structural inequalities in society, with transgender and ethnic minority prostitutes often facing further vulnerabilities. Thus, the law needs to change to greater safeguard rights and reduce the risk of violence amongst sex workers. Central to this reform is the need to amplify the voices of sex workers and allow them to help shape policy making in this area, as they are who would be directly affected by the passing of legislation regarding prostitution. This article discusses New Zealand's use of a decriminalisation model that is often favoured or supported by sex workers, perhaps it is time that this approach is implemented in the UK. In comparison, some radical feminists argue for the criminalisation of the purchase of sex, overlooking how such an approach increases the vulnerability of sex workers. Ultimately, the law needs to be influenced

by the voices of sex workers directly and strive to sufficiently prioritise protecting the rights and safety of prostitutes.

Introduction

Prostitution is clearly defined in the Sexual Offences Act 2003 s.54(2), where “prostitute” means a person (A) who, on at least one occasion and whether or not compelled to do so, offers, or provides sexual services to another person in return for payment or a promise of payment to A or a third person; and “prostitution” is to be interpreted accordingly.”²⁴² The current law in this area treats sex work as a nuisance, with a framework of illegality surrounding prostitution, and serves to amplify the vulnerability of already at-risk members of our society. Evidence shows that in countries that have adopted a decriminalisation approach in this area, such as New Zealand through the Prostitution Reform Act 2003²⁴³, sex workers feel safer and have better control over their clients and practices. Thus, this article advocates for the adoption of a decriminalisation model in England and Wales. However, due to the gendered nature of discourse surrounding prostitution, some feminists, such as radical feminists, argue that sex work is about violence and power over women and therefore acts that surround prostitution should be criminalised, such as the purchase of sex.²⁴⁴ This argument, however, is flawed as increased criminalisation often serves to exacerbate the vulnerability of sex workers. On the other hand, there are some feminists who are more concerned with the rights of workers and

²⁴² Sexual Offences Act 2003 s54(2)

²⁴³ Prostitution Reform Act 2003

²⁴⁴ Noah D Zatz, ‘Sex Work/Sex Act: Law, Labour, and Desire in Constructions of Prostitution’ (1997) 22 Signs: Journal of Women in Culture and Society 277 <<https://www.proquest.com/docview/198653878?parentSessionId=eoUm%2FG3pWC4rX9sz8jTSc1o%2FMknt TS%2BIYwV1sNC%2B6TE%3D&pq-origsite=primo&accountid=12117&sourcetype=Scholarly%20Journals>> accessed 6 December 2023

greater access to justice. In summary, legislation relating to prostitution in England and Wales is inherently flawed as it fails to protect and uphold the rights of workers, meaning it is in urgent need of reform.

Current law

To debate reform of legislation regarding prostitution, it is important to discuss the current legal framework in this area. There are three possible perspectives or approaches to prostitution: nuisance, work, and abuse.²⁴⁵ The law in England and Wales on sex work is largely liberal and is predominantly shaped by the treatment of prostitution as a public nuisance.²⁴⁶ This is further discussed by Feis-Bryce²⁴⁷ who uses the Wolfenden Report 1957²⁴⁸ to discuss how legislation is an attempt to reduce sex work and minimise its impact on the community, through the management of nuisance. While it is not illegal to sell sex in this country, there is a large framework of illegality surrounding the topic of sex work. For instance, the Street Offences Act 1959, s1(1)²⁴⁹ says that it is an offence to “persistently loiter or solicit in a street or a public place for the purposes of prostitution”, this clearly demonstrates the nuisance-based approach of the law as the act has to be persistent, which could potentially become annoying for residents, for it to be illegal. Another example is the Sexual Offences Act 2003, s53A²⁵⁰ which lays out

²⁴⁵ Nicole Westmarland, ‘From the personal to the political: shifting perspectives on street prostitution in England and Wales’ in Geetanjali Gangoli and Nicole Westmarland (eds), *International Approaches to Prostitution* (Policy Press, 2006)

²⁴⁶ Joanna Pheonix, *Making Sense of Prostitution* (Palgrave MacMillan London, 1999)

²⁴⁷ Alex Feis-Bryce, ‘Policing sex work in Britain’ in Teela Sanders and Mary Laing (eds), *Policing the Sex Industry* (Routledge, 2017)

²⁴⁸ John Wolfenden, (1957) Report of the Departmental Committee on homosexual offences and prostitution, Cmnd 247. London: HMSO.

²⁴⁹ Street Offences Act 1959, s1(1)

²⁵⁰ Sexual Offences Act 2003, s53A

the legislation regarding purchasers of sex; it is an offence for a person to purchase the services of a prostitute if the sex worker has been exploited by a third party, regardless of whether or not the purchaser was aware of the exploitation.²⁵¹ This statute was designed to be a deterrent for purchasers of sex, in an attempt to reduce the rate of prostitution, as liability falls on the buyer. Therefore, while there is a significant volume of legislation in this area, the criminal law is being used to tackle the issue of sex crime without giving rights to workers,²⁵² unless they have been exploited. According to radical feminist MacKinnon, “criminal prostitution laws collaborate elaborately in women’s social inequality”.²⁵³ This demonstrates that the limitation of the nuisance approach is that it fails to provide welfare provisions for workers and does not address wider structural issues, such as gender inequality. As a result, the law relating to the regulation of prostitution in England and Wales is in urgent need of reform as it is primarily concerned with deterrence and nuisance over the rights of individuals involved in the industry.

Welfare-centred approaches

The criminal justice-focused response to sex work is challenged by Graham,²⁵⁴ who compellingly argues that welfare-centred methods should be the primary focus concerning

²⁵¹ Sexual Offences Act 2003, s53A(2)

²⁵² Laura Graham, ‘Governing Sex Work Through Crime: Creating the Context for Violence and Exploitation’ (2017) 81 Journal of Criminal Law 201 <https://heinonline.org.liverpool.idm.oclc.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/jcriml2017&men_hide=false&men_tab=toc&kind=&page=201> accessed 27 November 2023

²⁵³ Catherine A. MacKinnon, ‘Prostitution and Civil Rights’ in D. Kelly Weisberg (ed), *Applications of Feminist Legal Theory* (Temple University Press 1999) (pg 225)

²⁵⁴ Laura Graham, ‘Governing Sex Work Through Crime: Creating the Context for Violence and Exploitation’ (2017) 81 Journal of Criminal Law 201 <https://heinonline.org.liverpool.idm.oclc.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/jcriml2017&men_hide=false&men_tab=toc&kind=&page=201> accessed 27 November 2023

prostitution. She posits that by treating sex work as a crime issue, society sees sex workers as simultaneously criminals and victims. This analysis demonstrates the high levels of stigmatisation regarding prostitution in Britain which places sex workers at a greater risk of violence or harassment than other professions.²⁵⁵ Some feminists, such as Carol Pateman, argue that prostitution is a job like any other and so should have trade unions and worker's rights.²⁵⁶ This would more greatly protect sex workers from certain vulnerabilities (such as targeted violence), as they would have easy, unobstructed access to justice. The fact that this is not the case currently in England and Wales further demonstrates that the law is not fit for its purpose as it fails to award these workers their rights and it is used to separate or differentiate the common sex workers from the rest of society and other citizens.²⁵⁷ Furthermore, access to justice for sex workers is minimal and violence against prostitutes often goes unreported because they are reluctant to go to the police for fear of being prosecuted.²⁵⁸ MacKinnon²⁵⁹ argues that women in sex work do not have civil rights, though disagrees with the premise sex work is work. Those who are concerned with the rights of sex workers support this point arguing that they should receive labour and social safeguarding.²⁶⁰ As a result, the current law

²⁵⁵ Rosie Campbell, 'Not Getting Away With It: Linking Sex Work and Hate Crime in Merseyside' in Neil Chakraborti and Jon Garland (eds), *Responding to Hate Crime: The Case for Connecting Policy and Research* (Bristol University Press, Policy Press 2014)

²⁵⁶ Carol Pateman, *The Sexual Contract* (Cambridge, U.K.: Polity, 1988)

²⁵⁷ Laura Graham, 'Governing Sex Work Through Crime: Creating the Context for Violence and Exploitation' (2017) 81 Journal of Criminal Law 201 <https://heinonline.org.liverpool.idm.oclc.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/jcriml2017&men_hide=false&men_tab=toc&kind=&page=201> accessed 27 November 2023

²⁵⁸ Samantha Pegg and Anne Davies, *Sexual Offences: Law and Context* (1st edn, 2016)

²⁵⁹ Catherine A MacKinnon, 'Prostitution and Civil Rights' in D. Kelly Weisberg (ed), *Applications of Feminist Legal Theory* (Temple University Press 1999)

²⁶⁰ UN HRC Eliminating Discrimination Against Sex Workers and Securing Their Human Rights (7 December 2023) A/HRC/WG.11/39/1

in this area is not sufficient in providing safety measures and welfare provisions for those engaged in sex work, to promote fairness and justice more efficiently. Some of those who sell sex had difficult childhoods which makes them even more vulnerable,²⁶¹ thus if the law in this area is strictly deterrence focused then the vulnerability of at-risk members of society is amplified. This is because there is little formal safeguarding in place. Furthermore, the Crown Prosecution Service (CPS)²⁶² argues that the emphasis should not be on the prosecution of those who sell sex but on providing services that support them exiting prostitution. There needs to be more help and support for those in the sex work industry (both those choosing to remain and those attempting to leave this line of work) and greater access to justice for sex workers. Consequently, there is an urgent need for reform in this area to better protect people and create a clear set of provisions allowing a direct route to justice.

The need for amplification of sex workers' voices

In England and Wales, the existing approach to regulating sex work is inherently flawed as policymakers often neglect the voices of sex workers themselves.²⁶³ This is incredibly damaging as there is no one experience of being a prostitute²⁶⁴ and the law should reflect this.

²⁶¹ Samantha Pegg and Anne Davies, *Sexual Offences: Law and Context* (1st edn, 2016)

²⁶² CPS, 'Prostitution and Exploitation of Prostitution' (CPS, 04 January 2019) <<https://www.cps.gov.uk/legal-guidance/prostitution-and-exploitation-prostitution>> accessed 27 November 2023

²⁶³ Cecilia Benoit, Roisin Unsworth, Priscilla Healey, Michaela Smith, and Mikael Janson, 'Centring Sex Workers' Voices in Law and Social Policy' (2021) 18(4) Sexuality Research and Social Policy, 897 <doi:10.1007/s13178-021-00576-9> Accessed 21 December 2023

²⁶⁴ Noah D Zatz, 'Sex Work/Sex Act: Law, Labour, and Desire in Constructions of Prostitution' (1997) 22 Signs: Journal of Women in Culture and Society 277 <<https://www.proquest.com/docview/198653878?parentSessionId=eoUm%2FG3pWC4rX9sz8jTSc1o%2FMknt TS%2BIYwV1sNC%2B6TE%3D&pq-origsite=primo&accountid=12117&sourcetype=Scholarly%20Journals>> accessed 6 December 2023

The easiest way to create a legislative framework that improves the lives of those in the prostitution industry is by listening to those whom the laws would impact the most. Campbell discussed the effects of the Armstead Street Project 2005, which amplified the voices of sex workers.²⁶⁵ This project led to greater support for workers and those wanting to exit prostitution, created community-based services, and addressed welfare needs. This further supports the claim for greater representation of sex workers' voices, as it demonstrates that when their experiences are heard, there is greater access to justice. In addition to the law excluding the voices of sex workers, the general public often does too due to the high levels of stigma surrounding the industry. This further perpetuates the vulnerability of sex workers as they are often looked down upon and treated as the 'other'.²⁶⁶ Therefore, to promote fairness and equality of opportunity for those engaged in sex work, their voices need to be further amplified, to provide people with a better understanding of prostitution and eradicate stigmatisation. Consequently, the law in this area needs to be reformed to properly encapsulate the lives of those in the industry so that it can more effectively protect and safeguard them.

Proposed reform: New Zealand model

When discussing legislative reform, it can be beneficial to look at the models adopted by other jurisdictions. New Zealand was the first country to decriminalise sex work fully.²⁶⁷ This was

²⁶⁵ Rosie Campbell, 'Not Getting Away With It: Linking Sex Work and Hate Crime in Merseyside' in Neil Chakraborti and Jon Garland (eds), *Responding to Hate Crime: The Case for Connecting Policy and Research* (Bristol University Press, Policy Press 2014)

²⁶⁶ Maggie O'Neill and Rosie Campbell, 'Street sex work and local communities: creating discursive spaces for genuine consultation and inclusion' in Maggie O'Neill and Rosie Campbell (eds), *Sex Work Now* (1st edition, 2006)

²⁶⁷ Chris Bruckert and Stacey Hannem, 'Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work' (2013) 28 (1) Canadian Journal of Law and Society, 43 <DOI: 10.1017/cls.2012.2> accessed 12 December 2023

achieved through the Prostitution Reform Act 2003 (PRA) s3, which clearly states that the purpose of the statute is to decriminalise prostitution while also creating a human rights framework for workers, welfare provisions and promoting safe sex practices.²⁶⁸ There is a clear contrast between this approach and that of the legislation in England and Wales; the decriminalisation model in New Zealand strives to protect/ensure the rights of prostitutes and creates a safe space for those in sex work, rather than treating them as a nuisance. The change in legislation arguably created more access to justice and allowed for violence against sex workers to be taken more seriously,²⁶⁹ which supports the claim that the law in England and Wales is in urgent need of reform to protect vulnerable members of society, as these provisions are severely lacking in Britain. Furthermore, evidence suggests that due to the PRA²⁷⁰ sex workers now feel safer and the relationships between the police and prostitutes have improved.²⁷¹ Therefore, it is clear that decriminalisation has the potential to improve the lived experiences of sex workers and the law in Britain needs to be reformed to protect the rights of the vulnerable as it is currently not fit for purpose. However, the New Zealand model has not gone far enough and has not managed to completely combat the stigma,²⁷² therefore sex workers still face some limitations to fairness in New Zealand, as they often face stigmatisation from the public. Additionally, despite sex workers, in general, feeling safer since the change in

²⁶⁸ Prostitution Reform Act 2003 s3

²⁶⁹ Dame Catherine Healy, Annah Pickering, and Chanel Hati, ‘Stepping Forward into the Light of Decriminalisation’ in Lynzi Armstrong and Gillian Abel (eds), *Sex Work and the New Zealand Model* (Bristol University Press 2021)

²⁷⁰ Prostitution Reform Act 2003

²⁷¹ NSWP, ‘Case Studies: How Sex Work Laws are Implemented on the Ground and Their Impact on Sex Workers’ (NSWP Global Network of Sex Work Projects, 12 December 2019) <<https://www.nswp.org/resource/nswp-briefing-papers/case-studies-how-sex-work-laws-are-implemented-the-ground-and-their>> accessed 27 November 2023

²⁷² Chris Bruckert and Stacey Hannem, ‘Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work’ (2013) 28 (1) Canadian Journal of Law and Society, 43 <DOI: 10.1017/cls.2012.2> accessed 12 December 2023

the law, there are differences between the accounts of cisgender and transgender workers,²⁷³ with prostitutes who are transgender feeling less safe and less respected by the police than their cisgender counterparts. Despite the efforts made in New Zealand to safeguard the rights of workers, this model is not perfect and there is arguably not equal access to opportunities for all sex workers. Therefore, while it is useful to draw inspiration from the decriminalisation model in New Zealand, reform in England and Wales needs to be taken even further to ensure that there is equal treatment among all workers in the sex industry and protect their rights.

Structural inequalities

As aforementioned, not all sex workers have the same experiences, with transgender people, ethnic minorities and street-based workers often facing harsher treatment as a consequence of the industry frequently reflecting the structural inequalities of wider society, such as racism, classism, and within the patriarchy.²⁷⁴ This is further amplified by what Pegg and Davies call a “hierarchy” within prostitution, with those who say they chose sex work tending to work at the higher end of the industry,²⁷⁵ which implies that those who work at the bottom of the trade are highly vulnerable. As previously discussed, the law fails to provide safeguarding provisions, which only serves to further amplify this vulnerability as they have very limited access to justice. The inequalities within prostitution are additionally heightened by individuals’ financial situations, with a lack of money limiting women’s ability to exit sex work

²⁷³ NSWP, ‘Case Studies: How Sex Work Laws are Implemented on the Ground and Their Impact on Sex Workers’ (*NSWP Global Network of Sex Work Projects*, 12 December 2019) <<https://www.nswp.org/resource/nswp-briefing-papers/case-studies-how-sex-work-laws-are-implemented-the-ground-and-their>> accessed 27 November 2023

²⁷⁴ UN HRC Eliminating Discrimination Against Sex Workers and Securing Their Human Rights (7 December 2023) A/HRC/WG.11/39/1

²⁷⁵ Samantha Pegg and Anne Davies, *Sexual Offences: Law and Context* (1st edn, 2016)

and fines placed upon sellers of sex keeping them in a cycle of poverty.²⁷⁶ As a result, it is important to not treat sex work as a simple, clear-cut issue. However, people's perspectives on sex work are largely influenced by the media, which often create a very simplistic, and thus unrealistic, representation of prostitution.²⁷⁷ Again, this highlights the urgent need for reform to the law relating to the regulation of prostitution in England and Wales, as it demonstrates the need for the law to address structural inequalities both in wider society and within the sex work industry, to better protect those most at risk or most vulnerable.

Safer when not hidden

Finally, the discussion surrounding prostitution largely refers to sellers as women and buyers as men, due to the incredibly gendered nature of discourse in this area.²⁷⁸ This has resulted in the CPS saying prostitution falls within the CPS Violence against Women and Girls (VAWG) portfolio.²⁷⁹ Radical feminists adopt the idea that this is an issue predominately affecting women, thus arguing for the abolition of sex work, due to the idea that prostitution is more about power and subordination over women rather than simply sex or money.²⁸⁰ The gendered

²⁷⁶ Catherine A MacKinnon, 'Prostitution and Civil Rights' in D. Kelly Weisberg (ed), *Applications of Feminist Legal Theory* (Temple University Press 1999)

²⁷⁷ Maggie O'Neill and Rosie Campbell, 'Street sex work and local communities: creating discursive spaces for genuine consultation and inclusion' in Maggie O'Neill and Rosie Campbell (eds), *Sex Work Now* (1st edition, 2006)

²⁷⁸ Lenore Kuo, *Prostitution Policy: Revolutionizing Practice Through a Gendered Perspective* (New York University Press, 2002)

²⁷⁹ CPS, 'Prostitution and Exploitation of Prostitution' (CPS, 04 January 2019) <<https://www.cps.gov.uk/legal-guidance/prostitution-and-exploitation-prostitution>> accessed 27 November 2023

²⁸⁰ Noah D Zatz, 'Sex Work/Sex Act: Law, Labour, and Desire in Constructions of Prostitution' (1997) 22 *Signs: Journal of Women in Culture and Society* 277 <<https://www.proquest.com/docview/198653878?parentSessionId=eoUm%2FG3pWC4rX9sz8jTSc1o%2FMknt>>

discussion of sex work is perhaps most obvious in academic study, where the primary focus is on women who sell sex and the majority of people who comprise the sex industry are disregarded.²⁸¹ This means that much of the stigma falls onto the women in the industry, not the men paying for services or even those who may be controlling the workers. As aforementioned, this represents wider structural issues in society regarding the patriarchy and demonstrates how the law overlaps with certain power dynamics that make up society.²⁸² Therefore, from a radical feminist perspective, the law relating to the regulation of prostitution should be reverted to full criminalisation/illegalisation of the industry to prevent violence against women. A serious limitation of this argument, however, is that evidence suggests that women in the industry feel safer when their work is decriminalised or at least regulated. For instance, when interviewed, a sex worker who had worked in a Managed Zone in Leeds said that she felt safer and more respected by the police so “people aren’t getting away with as much as they were getting away with”.²⁸³ Therefore, to criminalise prostitution is to make it more hidden, meaning that there can be no framework or intervention to maintain human rights. Those engaged in prostitution deserve to be protected from harm in the same way as other more conventional professions. As a result, though reform to prostitution legislation is needed, it

²⁸¹ Laura Maria Augustin, ‘New Research Directions: The Cultural Study of Commercial Sex’ (2005) 8(5) *Sexualities*, 618 <<https://doi-org.liverpool.idm.oclc.org/10.1177/1363460705058400>> accessed 06 December 2023

²⁸² Jane Scouler, ‘What’s Law Got to Do with It? How and Why Law Matters in the Regulation of Sex Work’ (2010) 37(1) *Journal of Law and Society*, 12 <<https://doi-org.liverpool.idm.oclc.org/10.1111/j.1467-6478.2010.00493.x>> accessed 06 December 2023

²⁸³ Jason Roach, Kate Wood, Ashley Cartwright, Barry Percy-Smith, Michelle Rogerson and Rachel Armitage, ‘An Independent Review of the Managed Approach to On-Street Sex Working In Leeds 2014-2020’ (Commissioned by Safer Leeds, University of Huddersfield, June 2020)

<<https://democracy.leeds.gov.uk/documents/s208220/Managed%20Approach%20Independent%20Review%20Report%20Appendix%20080720.pdf>> accessed 22 November 2023

should be changed to create safe spaces for workers not to push sex work into the shadows, through increased criminalisation and heightened stigmatisation.

Conclusion

In conclusion, evidently, the law relating to prostitution in England and Wales is in urgent need of reform as it is not fit for purpose. It fails to adequately safeguard those engaged in sex work and does not provide provisions for those attempting to leave the industry. Furthermore, the voices of sex workers are often neglected in both policy-making and academic study, this means that intersectionality and the real experiences of prostitutes are left unheard or under-researched, thus they cannot freely express their concerns. Feminist perspectives are often in disagreement regarding prostitution, with some in favour of decriminalisation and others calling for the full abolition of the sex work industry. However, from looking at New Zealand's decriminalisation approach to prostitution, it is clear that sex workers experience greater safeguarding and access to justice than in Britain as they have a voice and better relationships with law enforcement. Therefore, Britain should adopt a similar decriminalisation model to ensure a safer experience for sex workers. It is imperative that England and Wales go further to promote fairness for those engaged in prostitution through reform of the legal framework in this area to promote the rights of workers.