

## ARTICLE

## The Unsexy Truth of Migrant Sex Work in Aotearoa New Zealand: How Repealing s 19 of the Prostitution Reform Act 2003 Would Make a More Equitable Sex Work Industry

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Aotearoa New Zealand is internationally recognised for our progressive sex work policy framework arising from the Prostitution Reform Act 2003 (the Act). The effect of this legislation has been overwhelmingly positive for sex workers, having largely achieved its stated purpose of safeguarding the human rights of sex workers and promoting their occupational health and welfare. However, due to s 19 of the Act, migrants are unable to participate in the legal sex work industry, and migrant sex workers are not afforded the same protections as citizens and resident sex workers. This article argues that s 19 is contradictory to the purpose of the Act. While the Act takes a harm reduction approach, this article outlines the ways in which migrant sex workers are left vulnerable to harm. The common justification for s 19 is that it prevents human sex trafficking. However, this article refutes this justification as there is already a robust legal framework for preventing human trafficking. Ultimately, this article argues that s 19 of the Act must be repealed in order to extend migrant sex workers the same protections as all other people in Aotearoa New Zealand.

### I Introduction

In 2003, Aotearoa New Zealand became the first country to decriminalise sex work with the passing of the Prostitution Reform Act 2003 (the Act). Parliament justified the

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decriminalisation with harm reduction. By making the industry legal, sex workers would be afforded the same rights as all other workers. The Act does not provide a definition for sex work but defines a sex worker as “a person who provides commercial sexual services”.<sup>1</sup> The reform was heavily advocated for by the New Zealand Prostitutes’ Collective (NZPC). The industry reforms under the Act decriminalised the sale and purchase of sex work, with few exceptions.

This article focuses on the exclusion of migrant sex workers from the liberal reforms of the industry.<sup>2</sup> First, it examines the current legislative framework for sex work in Aotearoa New Zealand. It then explores the reasons for and against decriminalisation, specifically pertaining to migrants. Ultimately, this article advocates for the extension of the benefits of a decriminalised sex work industry in Aotearoa New Zealand to migrants, by removing s 19 of the Act. This article does not make a moral or ideological assessment on sex work or the agency of sex workers; instead, this article argues that the law as it stands is discriminatory and inconsistent. From an intersectional perspective, the effect of s 19 of the Act is the exclusion of predominantly migrant women of colour from seeing the benefits of Aotearoa New Zealand’s sex industry.

## II The Legislative Framework for Sex Work

Prior to 2003, sex work itself was not illegal in Aotearoa New Zealand. However, ss 147–149A of the Crimes Act 1961 criminalised brothel-keeping, living on the earnings of prostitution, and procuring sexual intercourse. These crimes carried a maximum sentence of five years’ imprisonment. The Summary Offences Act 1981 prohibited solicitation for the purpose of prostitution in public places, imposing a \$200 fine.<sup>3</sup> The Act legalised sex work for all Aotearoa New Zealand citizens over the age of 18. One of the stated purposes of the Act was to create a framework that protects sex workers and upholds their human rights.<sup>4</sup>

The Act created a regulatory framework for the sex work profession in Aotearoa New Zealand, which includes health and safety requirements and protections for sex workers. The health and safety requirements of the Act are set out in ss 8–10. Sections 8 and 9 impose obligations on brothel operators, sex workers and clients to adhere to safer sex practices, such as using condoms, providing health information and taking steps to prevent the transmission of sexually transmissible infections. Section 10 affirms that sex workers are entitled to the general protections of the Health and Safety at Work Act 2015. The Act also protects sex workers from being compelled to provide sex work services and allows them the right to refuse to provide services at any stage in an interaction with a client or prospective client.<sup>5</sup>

Section 19 of the Act criminalises sex work for student visa holders, work visa holders and visitor visa holders. It does so by preventing any person who has worked (or intends to work) as a sex worker, operator or investor in sex work services from being granted a visa under the Immigration Act 2009.<sup>6</sup> Furthermore, it imposes a condition upon any

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1 Prostitution Reform Act 2003, s 4(1) definition of “sex worker”.

2 The use of the term “migrant” in this article refers to temporary entry class visa holders in Aotearoa New Zealand.

3 Summary Offences Act 1981, s 26.

4 Prostitution Reform Act, s 3(a).

5 Sections 16–17.

6 Section 19(1).

holder of a temporary visa to not provide, operate or invest in commercial sex work.<sup>7</sup> Accordingly, none of the protections in the Act apply to visa holders in Aotearoa New Zealand. A breach of s 19 is a sufficient reason for the Minister of Immigration to order deportation.<sup>8</sup>

### III Why Decriminalisation of Sex Work Should be Extended to Migrants

Many of the arguments for the decriminalisation of sex work for migrants in Aotearoa New Zealand are the same as those that were put forward for the decriminalisation of sex work generally in the lead up to the Act. However, it is worth reiterating these reasons and demonstrating how they specifically relate to migrants, as there are some aspects of the migrant experience that are distinct. The reasons for decriminalisation of sex work for migrants include the potential for exploitation, health and safety concerns, stigmatisation, discrimination, and inconsistent restrictions for different types of sex work.

#### A *Potential for exploitation*

One of the primary issues facing migrant sex workers in Aotearoa New Zealand is the risk of exploitation. Reducing the potential for exploitation of sex workers was one of the driving forces behind the 2003 prostitution law reforms. Unfortunately, with the exclusion of migrants from the reforms, the risk of exploitation facing them has not been mitigated. A stated purpose of the Act is to protect sex workers from exploitation and safeguard their human rights.<sup>9</sup> When sex work is illegal, sex workers have little protection from exploitative clients or managers, as they are unable to go to the authorities without incurring negative legal repercussions for themselves.

Three years after the implementation of the Act, the Prostitution Law Review Committee (PLRC) was established to assess the efficacy of the legislation and report back to the Ministry of Justice. The PLRC's 2008 report on the operation of the Act surveyed sex workers and found that, after the commencement of the Act, 95.9 per cent of sex workers protected by the Act felt that they had legal rights, and 64.8 per cent felt more able to refuse a client than before the law change, with the legislation expressly empowering sex workers to refuse clients.<sup>10</sup> The PLRC also reported that "the majority [of respondents] felt sex workers were now more likely to report incidents of violence to the Police".<sup>11</sup> The report also found that, following the reforms, there was a "high level of awareness" of occupational health and safety requirements, although the PLRC noted compliance could not actually be measured.<sup>12</sup> Despite this, the report also acknowledged that the law reforms had not created a utopia for sex workers and that there were still issues of exploitation within the industry. However, the report concluded the Act "has had a marked effect in safeguarding the right of sex workers to refuse particular clients and practices".<sup>13</sup>

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7 Section 19(2).

8 Section 19(3)-19(4); and Immigration Act 2009, s 157.

9 Prostitution Reform Act, s 3(a).

10 *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (Ministry of Justice, May 2008) [*Prostitution Law Review Committee*] at 44 and 46.

11 At 14.

12 At 14.

13 At 14.

The report acknowledges these improvements were achieved by empowering sex workers through decriminalisation.

These positive results can be contrasted with the experiences of migrant sex workers. Under the current legislative framework, migrant sex workers face a risk of deportation, which can be used against them by clients or managers. There have only been two comprehensive studies into the experiences of migrant sex workers in Aotearoa New Zealand.<sup>14</sup> Both studies concluded that migrant sex workers face distinct vulnerabilities that should be addressed through legislative reform.

A 2013 study surveyed 124 migrant sex workers.<sup>15</sup> Participants were recruited when they visited a NZPC site or interacted with NZPC staff, and were guaranteed confidentiality.<sup>16</sup> 70 per cent of respondents reported having a boss, but the majority did not have an employment contract.<sup>17</sup> Furthermore, around 10 per cent were under the impression that it was legal for them to be fined in the course of their work.<sup>18</sup> Concerningly, five per cent of participants said they were unable to refuse clients, and five per cent of respondents reported that they did not have easy access to their passports.<sup>19</sup> While the study was unable to determine whether the passports of some sex workers were confiscated or just difficult to access, the lack of access is concerning and indicates a lack of autonomy.<sup>20</sup> These survey results show that there is a portion of migrant sex workers who are facing significant power imbalances in their working relationships, leaving them vulnerable to exploitation.

The 2018 study surveyed thirteen participants, and provided anecdotal insights into the risks of exploitation for migrant sex workers.<sup>21</sup> Notably, respondents reported high levels of stress and fear over the risk of deportation. One worker explained that “you always have the fear inside you that someone might get to know and someone might inform against you”.<sup>22</sup> Migrant workers’ fear of deportation is an obvious lever for employers or clients to exploit.

The study also detailed the differing levels of exploitation across working conditions. As is the case for non-migrant workers, migrant sex workers reported having mostly good experiences in mainstream brothels with respect to brothel managers and clients.<sup>23</sup> Migrant sex workers who work privately reported more concerning experiences. The majority of these workers stated that they feared clients threatening them with deportation.<sup>24</sup> Private workers had experienced unsafe sexual practice, unwanted sexual activities, non-payment and rape under the threat of being reported to Immigration New Zealand.<sup>25</sup> The most concerning working environments were non-mainstream brothels that operate less visibly, where exploitation regularly occurs. Practices occurring at these brothels include overworking, denial of access to services such as the NZPC and

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14 See Michael Roguski *Occupational Health and Safety of Migrant Sex Workers in New Zealand* (New Zealand Prostitutes’ Collective, 28 March 2013); and Gillian Abel and Michael Roguski *Migrant Sex Workers in New Zealand* (New Zealand Prostitutes’ Collective, 2018).

15 See Roguski, above n 14.

16 At 25.

17 At 57.

18 At 57.

19 At 57.

20 At 57.

21 See Abel and Roguski, above n 14.

22 At 6.

23 At 7.

24 At 9.

25 At 9.

sexual health check-ups, removal of passport access, being forced to engage in unprotected sex, having money withheld, and being subject to rape from brothel owners.<sup>26</sup>

These working conditions are what the Act aims to cure. The research conducted in this area shows that while some migrant workers have good experiences working in the industry, the fear that these women face over potential deportation leaves them vulnerable to exploitation. This research shows that the exclusion of migrant sex workers from the legal sex work industry leaves migrant sex workers at risk of financial and sexual exploitation.

### B *Health and safety*

Similar to preventing exploitation, protecting sex workers' health and safety is a key objective of the Act. The PLRC's research found that condom usage within the industry was very high, although this was mainly attributable to the strong HIV/AIDS prevention campaign that began in the late 1980s.<sup>27</sup> This high condom usage rate is reflected among migrant sex workers. In Michael Roguski's survey, only two respondents out of 124 reported that they did not always use condoms.<sup>28</sup>

A health and safety issue that has been mitigated by the Act is violence against sex workers. The PLRC report found that a majority of sex workers would be more likely to report incidents of violence to the police as a result of the Act. On the other hand, most migrant workers are wary of contacting the authorities and are too concerned about potential deportation to seek assistance from the police, leaving those workers vulnerable to violence.<sup>29</sup> In Gillian Abel and Roguski's 2018 study, all respondents reported they would generally not seek help from the police for any matter due to concerns that it would be reported to immigration authorities.<sup>30</sup> There is anecdotal evidence that the immigration status of migrant sex workers can dissuade them from seeking medical assistance, meaning they present with more serious conditions that could have been easily treated had they sought help earlier.<sup>31</sup> There may also be financial barriers to healthcare for these workers. Non-residents can incur additional fees for treatment. Decriminalising sex work for migrants will not address all of the health and safety issues that workers currently face. However, it would help migrants overcome their fear of seeking help from health professionals or the police.

### C *Stigma*

Many sex workers face stigma.<sup>32</sup> However, there is a distinctive nature to the stigma faced by migrant sex workers. They are stereotyped as diseased, immoral criminals or victims of abuse.<sup>33</sup> Asian sex workers in particular are framed as victims in many anti-trafficking

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26 At 11.

27 *Prostitution Law Review Committee*, above n 10, at 14.

28 Roguski, above n 14, at 47.

29 Abel and Roguski, above n 14, at 13.

30 At 13.

31 At 33.

32 Lynzi Armstrong "Sex work discrimination unacceptable" (July 2020) Victoria University of Wellington <[www.wgtn.ac.nz](http://www.wgtn.ac.nz)>.

33 Matilda Neyland "The Sexual Other: Discursive constructions of migrant sex workers in New Zealand media" (Master of Arts in Linguistics Dissertation, Victoria University of Wellington, 2019) at 1.

narratives, suggesting that these women are exploited.<sup>34</sup> The stigma associated with migrant sex work is damaging for women who are in the industry. In 2017, a website encouraged New Zealanders to “Stop getting STIFFed”.<sup>35</sup> STIFF is an acronym for Sexwork Tourists Immigration-Flouting Freeloaders, referring to migrant sex workers in Aotearoa New Zealand. The website name and acronym usage perpetuate stereotypes and misinformation. The website gives instructions for “how to find and identify illegal workers in NZ”, listing a number of places where these women may be working and where they can be reported. Further, there are racist connotations with some of the language and statements made on the website.<sup>36</sup> Decriminalising sex work for migrants will not eliminate all of the stigmas they face. However, decriminalisation would mitigate the specifically anti-immigrant and racist stigma currently faced by migrant sex workers.

#### D *Discrimination*

One of the clearest reasons supporting the decriminalisation of migrant sex workers is the discriminatory nature of s 19. The United Nations Human Rights Committee has defined discrimination as:<sup>37</sup>

... any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

Put simply, discrimination is treating someone differently because of one (or more) of their characteristics. The discrimination for migrant sex workers operates in two ways. First, individuals on temporary visas are the only individuals in Aotearoa New Zealand who are prohibited from engaging in the sex work industry. All New Zealand citizens and residents who are over the age of 18 are free to participate in sex work. Secondly, sex work is the only industry in which individuals on student or work visas are expressly prohibited from working.<sup>38</sup> Freedom from discrimination is a protected right under the New Zealand Bill of Rights Act 1990.<sup>39</sup> However, the Immigration Act prevents any complaints that relates to the content or application of the Immigration Act (or any immigration instructions made in accordance with the Act) from being brought under the Human Rights Act 1993.<sup>40</sup> Furthermore, visa status is not one of the specified prohibited grounds of discrimination set out in s 21 of the Human Rights Act, suggesting it may be a legitimate ground of discrimination under domestic law in Aotearoa New Zealand. Hence, migrant sex workers are not protected from the discrimination they face. Decriminalising sex work

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34 Lynzi Armstrong “Decriminalisation and the rights of migrant sex workers in Aotearoa/New Zealand: Making a case for change” (2017) 31 *Women’s Studies Journal* 69 at 74.

35 “STIFF = Sexwork Tourists Immigration-Flouting Freeloaders” (August 2017) Stop getting STIFFED! <stopgettingstiffed.blogspot.com>.

36 “STIFF = Sexwork Tourists Immigration-Flouting Freeloaders”, above n 35.

37 United Nations Human Rights Committee *Non-discrimination: Compilation of general comments and general recommendations adopted by human rights treaty bodies* UN Doc HRI/GEN/1/Rev1 (1994) at 26.

38 Madison Reidy “Illegal migrant prostitutes too ‘terrified’ to report exploitation” (18 March 2018) Stuff <www.stuff.co.nz>.

39 New Zealand Bill of Rights Act 1990, s 19.

40 Immigration Act, s 392(1).

for migrants would rectify the current wrong caused by the Act whereby migrants are discriminated against on the basis of their nationality.

### E *Inconsistency*

An interesting quirk in Aotearoa New Zealand's sex work laws is the exclusion of internet sex work from legislation. The Act defines "commercial sexual services" as applying only to physical participation in sexual activity with another person, excluding online sex work.<sup>41</sup> Online sex work is becoming increasingly popular and can take many forms, including via social media platforms such as Snapchat and Twitter, and more traditional pre-recorded or webcam pornography. New social media platforms dedicated explicitly to x-rated entertainment are becoming increasingly popular. For example, OnlyFans is a subscription-based platform where sex workers upload pornographic content for subscribers. The online sex industry is a behemoth and worth more than the Hollywood film industry as a whole.<sup>42</sup>

Further, the COVID-19 pandemic saw the online sex industry explode, as sex workers were unable to see clients in person. Many sex workers who lost their jobs turned to this line of work.<sup>43</sup> OnlyFans reported that its user base grew over tenfold in the first year of the pandemic, with an increase from 7.5 million users in November 2019 to 85 million users by December 2020.<sup>44</sup> Anecdotally, there have been reports of New Zealand sex workers increasingly turning to the OnlyFans platform.<sup>45</sup> Dame Catherine Healy, the national coordinator of the NZPC, has warned of the dangers that can arise from the platform, particularly with the potential for your identity to be exposed.<sup>46</sup> Dame Healy also explains that using platforms like OnlyFans is undeniably sex work, as there is a commercial sex component to the transactions.<sup>47</sup> It is an interesting contradiction that there is no restriction on migrants from participating in online sex work, but they are prohibited from participating in physical sex work. The law around sex work in Aotearoa New Zealand has failed to keep up with the times and needs to be reconsidered. Decriminalising sex work for migrants would at least amend this clear inconsistency in the law.

## IV Human Trafficking: Justification Offered against Decriminalisation

The main justification used for s 19 of the Act is the prevention of human trafficking. Human trafficking is the recruitment, transportation, transfer, harbouring or receipt of people through force or deception, with the aim of exploiting them for financial gain.<sup>48</sup> Sex trafficking specifically involves the trafficking of people into forced sex work.

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41 Prostitution Reform Act, s 4(1)(a).

42 John Naughton "The growth of internet porn tells us more about ourselves than technology" *The Guardian* (online ed, London, 30 December 2018).

43 Matilda Bosely "'Everyone and their mum is on it': OnlyFans booms in popularity during the pandemic" *The Guardian* (online ed, London, 22 December 2020).

44 Bosely, above n 43.

45 Emily Writes "OnlyFans is for sex workers, not attention-hungry celebrities" (31 August 2020) *The Spinoff* <[www.thespinoff.co.nz](http://www.thespinoff.co.nz)>.

46 Reidy, above n 38.

47 Reidy, above n 38.

48 United Nations Office on Drugs and Crime "Human Trafficking" <[www.unodc.org](http://www.unodc.org)>.

Proponents of s 19 argue that legalising sex work for migrants would make it easier for women to be brought into the country for the purposes of prostitution, against their will.

Section 19 was not originally included in the Act. It was introduced through a Supplementary Order paper while the Bill was progressing through Parliament. The Minister of Immigration at the time, Lianne Dalziel, explained that s 19 was designed “to ensure that in decriminalising the laws on prostitution, we do not unwittingly allow people to be brought into the country for the purposes of prostitution”.<sup>49</sup> It is important to recognise that Aotearoa New Zealand has other legal protections to prevent human trafficking. The government has an inter-agency working group on people trafficking, comprising nine government agencies.<sup>50</sup> Amendments were also made to the Crimes Act in 2002 to add provisions for anti-trafficking.<sup>51</sup> The Immigration Act also provides for the prosecution of employers who exploit unlawful employees or temporary workers.<sup>52</sup> The existence of robust legal protections against trafficking weakens the anti-trafficking rationale for s 19.

Another important issue to consider regarding human trafficking is the common conflation between trafficking and prostitution, a narrative which is perpetuated by the media. Dame Healy has described the constructed narrative of trafficked sex workers as: “this nebulous kind of fanciful scenario about sex workers who are sex slaves, who are chained to the bed and they’re going to be found in somebody’s attic somewhere”.<sup>53</sup> This narrative means that migrant sex workers are often assumed to be trafficked even where there is no evidence of coercion.<sup>54</sup> Furthermore, despite stereotypes around human trafficking and prostitution, trafficking occurs across many different industries in Aotearoa New Zealand. To date, the only prosecution for trafficking in Aotearoa New Zealand has been in *R v Matamata*,<sup>55</sup> where the defendant was convicted of trafficking people from Samoa to Hastings for horticultural work.<sup>56</sup> However, for other industries where trafficking could occur, there are no express prohibitions for migrant workers. On the contrary, migrant workers are actively encouraged to participate in the agricultural and horticultural industries through the Recognised Seasonal Employer Limited Visa and the Supplementary Seasonal Employer Work Visa schemes.<sup>57</sup>

Further, sex workers in Aotearoa New Zealand have explained that the anti-trafficking discourses have implications for all sex workers.<sup>58</sup> Anti-trafficking discourses portray exploitation in sex work in an extreme manner that eclipses the ways in which sex workers are more commonly exploited. A representative for the NZPC explained how this narrative could make officials ignore the real issues of coercion that may be occurring within the

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49 (30 April 2003) 608 NZPD 5739.

50 Department of Labour “Plan of Action to Prevent People Trafficking” (July 2009).

51 Crimes Amendment Act 2002.

52 Immigration Act, s 351.

53 Linzi Armstrong *Sex Workers Organising for Change* (Global Alliance Against Traffic in Women, 2018) at 87.

54 Tim Barnett and others “Lobbying for decriminalisation” in Gillian Abel and others (eds) *Taking the Crime out of Sex Work: New Zealand sex workers’ fight for decriminalisation* (Bristol University Press, Bristol, 2010) 57 at 71.

55 *R v Matamata* [2020] NZHC 677.

56 Tom Kitchin “Man convicted of human trafficking and slavery to be sentenced” (27 July 2020) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)>.

57 Immigration New Zealand “Information about Recognised Seasonal Employer Limited Visa” (2020) <[www.immigration.govt.nz](http://www.immigration.govt.nz)>.

58 Armstrong, above n 53, at 87.



industry, while they search for a fantasy scenario that does not exist.<sup>59</sup> In light of the real-life implications of s 19 of the Act, the Government's perpetuation of an anti-trafficking narrative as a justification for s 19 of the Act obfuscates its role in facilitating the exploitation of migrant workers.

## V Conclusion

The effect of s 19 of the Act is contradictory to the broader purpose of the Act. Tim Barnett MP, the Act's sponsor, accepted the "inevitability of prostitution".<sup>60</sup> In light of this, he proposed the Act to reduce harm to sex workers. The same rationale should be extended to migrant sex workers in Aotearoa New Zealand. Evidence shows that s 19 creates opportunities for exploitation rather than prevent it. Migrant sex workers face social stigma, discrimination and barriers to healthcare. Furthermore, there is an inconsistency within Aotearoa New Zealand's legal framework that allows for migrant workers to engage in some types of sex work legally, but not others. The United Nations Committee on the Elimination of Discrimination against Women (CEDAW) has formally recommended that s 19 be reformed to reduce its negative impact on migrant women.<sup>61</sup> Like CEDAW, this article concludes that s 19 must be repealed to allow migrant sex workers the same protections of legalisation as all other people in Aotearoa New Zealand.

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59 At 87.

60 Tim Barnett "Challenge of prostitution is to minimise harm" (29 September 2003) NZHerald <[www.nzherald.co.nz](http://www.nzherald.co.nz)>.

61 Committee on the Elimination of Discrimination against Women *Concluding observations on the eighth periodic report of New Zealand* CEDAW/C/NZL/CO/8 (20 July 2018) at [28(a)].