

Prostitution in Austria and New Zealand

Comparison and important facts

Nina Hagenauer, University of Applied Sciences St. Poelten, Austria

Undergraduate Program for Social Work 2009

CONTENTS

1. History of Prostitution in Austria	3
2. The Legislation in Austria	4
2.1. The Federal Law on Health monitoring of prostitutes	4
2.1.1. Being employed as a Prostitute	6
2.1.1.1. <i>Residence and Work Permits for Migrants</i>	6
2.2. The Law in Vienna	7
2.3. Facts and Figures	12
2.4. Problems and Criticism	14
3. History of Prostitution in New Zealand	15
4. The Legislation in New Zealand	17
4.1. The Prostitution Reform Act 2003	17
4.1.1. Abstract of Part 1 Preliminary Provisions	17
4.1.2. Abstract of Part 2 Commercial sexual Services	19

4.1.3. Abstract of Part 3 Operator certificates	27
4.2. Facts and Figures	29
4.3. Problems and Criticism	30
5. Important differences and similarities	34
5.1. The Legislations in general	34
5.2. Health and monitoring issues	35
5.3. The powers of the Police	36
5.4. Immigrating as a sex worker	36
6. References	37

1. History of Prostitution in Austria

Until the 18th century

Prostitution in Austria has a long history. It was first prohibited under the regime of Maria Theresa of Austria. She used to ship all prostitutes together with other “asocial” people down the Danube to the Banat.

Abstract Banat: the Banat is a geographical and historical region in Central Europe currently divided into 3 countries: Romania, Serbia and Hungary. Maria Theresa shipped the prostitutes there in order to banish them.

19th century

Around the middle of the 19th century laws began to change, and people started to consider Prostitution as a necessary evil that had to be tolerated, but regulated by law. In 1850 the Police surgeon Dr. Nusser suggested that prostitutes should have to register with the police and receive medical examinations twice a week in order to achieve a health certificate. In 1873 the chief of the Vienna Police, Anton Ritter von Le Monnier, reformed the law and made it obligatory for prostitutes to achieve a health certificate. From that moment on every prostitute who complied with the requirements was not subject to prosecution by the Police. However, in 1885 Prostitution became illegal again and every prostitute was liable to imprisonment up to 8 days or had to pay a fine of 200 Kronen. In 1911 the Police Department enacted a new regulation on health control of prostitutes. Every prostitute had to get her health checked twice a week, and if a disease was diagnosed, the prostitute had to be taken to a hospital. (compare to: http://www.bmi.gv.at/oeffentlSicherheit/2000/11_12/artikel_12.asp).

20th and 21st century

Since 1984 Prostitution has been regulated by the Austrian Criminal Code. It is therefore not prohibited, but some restrictions apply to clients. Clients of under-age

prostitutes are liable for prosecution (Paragraph 207b), procurement of minors for sexual contacts (to minors) (P. 214), Advertising of Prostitution (P. 215), Procurement (P. 216), and cross-border Prostitution (P. 217).

Prostitutes have to undergo a weekly medical examination by the STD-Ambulatory. Furthermore, there are restrictions on the times and places where prostitution may occur.

In 1989 the OGH (Supreme Court) decided that Prostitution is an immoral contract. As a consequence, a Prostitute has no legal opportunity to demand payment if the client refuses to pay. In the same year, homosexual male prostitution was legalized (compare to http://en.sophie.or.at/category/basic_infos/steuern).

2. The Legislation in Austria

Prostitution in Austria is regulated through several laws. The acts on the health monitoring of Prostitutes can be found in the Federal Law, all the other regulations can be found in the Provincial Laws and therefore depend on the province in question. Concerning this report, firstly you can find a translation of the Federal Law on Health monitoring of Prostitutes, and after that you can find the Vienna Legislation as an example of a Provincial Law.

2.1. The Federal Law on Health monitoring of prostitutes

Paragraph 1

A Person, who provides commercial sexual services, has to undergo a weekly medical examination in order to prove they are clear of any sexually transmittable disease (STD), before starting business.

Paragraph 2

The District Administration Office has to issue an identity card with a photograph of the examined person, if this person has proved to be without any STD following the examination.

Paragraph 3

If a person, mentioned in Paragraph 1, proves to be without any STD during the weekly health checks, the District Administration Office has to certify this in the identity card (mentioned in Paragraph 2).

Paragraph 4

If during the weekly health check, a person mentioned in Paragraph 1, is diagnosed any STD, the District Administration Office must collect the identity card (Paragraph 2) of the person and return it only, if the person proves to be without any STD again.

Paragraph 5

Persons, as mentioned in Paragraph 1, must carry the identity card (Paragraph 2) with them when engaged in prostitution. The identity card (Paragraph 2) must be shown to an officer of the District Administration Office or a Police officer on request.

Paragraph 6

If the officer (Paragraph 5) notices a lack of weekly health checks (Paragraph 1), he has to confiscate the identity card and surrender it to the District Administration Office.

Paragraph 7

Every person who infringes the provisions is liable to be punished according to Paragraph 12, Article 2 of the Law on STD.

(<http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10010364>)

Law on sexually transmitted diseases (STD)

Paragraph 12, Article 2

This paragraph says, that everyone who infringes the provisions (stated at Paragraph 7 of the Federal Law on Health monitoring of Prostitutes), is liable to a penalty of Euro 70 or liable to imprisonment up to 2 months. In severe cases, penalty and imprisonment are eligible to be declared simultaneously (compare to <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10010244>).

2.1.1. Being employed as a prostitute

Prostitutes are registered as “new self-employed worker”. This means, that they have to register with the Business Social Insurance Fund and the Tax Authorities within 4 weeks after starting to work. The Business Social Insurance Fund provides health and retirement pension insurance, which helps to avoid high costs in the case of illness. Health insurance is obligatory in Austria for all residents.

Every self-employed worker has to pay income taxes, if the income of one calendar year is 10.000 Euros or higher. If a person works as an employee and a self-employed worker, he has to submit a tax statement, if the profit from the self-employed work is 730 Euros or higher and if the total income is above 10.900 Euros (compare to http://en.sophie.or.at/category/basic_infos/prostitutions-gesetze).

2.1.1.1. Residence and Work Permits for Migrants

There are certain types of Visas a non-EU citizen may apply for if intending to come to Austria as a Sexworker.

- VISA C and D: these Visas are residence Visas and Visas for non-permanent gainful work (according to Article 24, Alien Police Act). They're granted to persons who enter Austria as a non-permanent short-term self-employed or employed (gainful) worker or as a seasonal worker. You're therefore allowed to stay and work for a maximum of 6 months per calendar year in Austria, and there is no way of applying for an extension.
- Residence Permit as an Artist: for working in a bar, club, disco or peep-show persons may apply for a residence permit as an artist. There are certain

documents one has to submit: evidence of previous work or training as a dancer, confirmation of manager or employment treaty with an agency, health insurance, valid passport, birth certificate, evidence of accommodation and of secured subsistence (statement on wage earned, job agreement,...). This type of Visa is granted for a maximum of 1 year and maybe extended in Austria.

(compare to: https://en.sophie.or.at/category/basic_infos/migration)

2.2. The Law in Vienna (Wiener Prostitutionsgesetz)

The law on prostitution in Vienna is quite broad but still specific. The most important sections are listed below. Some sections are only summarized to maintain a better overview, and therefore written in italic letters.

Explanation: § stands for Section

➤ Scope § 1

In Vienna the initiation and practice of prostitution are subject to criminal and sanitary regulations of the federal provisions of this Act.

➤ Definitions § 2

(1) Prostitution as defined in this Act is the toleration of sexual acts on one's own body or engaging in sexual acts in a commercial way.

(2) Initiation of prostitution occurs if a person clearly shows through his behaviour, that he wants to prostitute himself.

(3) Prostitution is commercial if the initiation, tolerance or action is done with the intention of an ongoing, though not regular income.

(4) Prostitution is intrusive if innocent third parties are harassed by explicit, the sexual sphere highlighting, physical acts or attitudes.

➤ Prohibition Regulations § 3

Prostitution is prohibited to be initiated or practiced by

- (1) Under-age persons,
- (2) Persons, where fosterage-governmental concerns occur,
- (3) Persons, who don't fulfil the sanitary requirements of the STD-Law, StGBI. No 152/1945, as amended by BGBl I No 98/2001, in conjunction with the Regulation of the Federal Minister for Health and the Environment on the Federal Law on Health monitoring of Prostitutes, BGBl No 314/1974, as amended by BGBl No 591/1993.

➤ Restriction on the initiation of prostitution § 4

- (1) The initiation should not be done intrusively,
- (2) The initiation of prostitution is prohibited in railway stations, station buildings and public transport station areas. Furthermore, the initiation of prostitution is prohibited at the following locations (protection objects) and also in a protected area of 150 m from these locations:

- 1. Buildings and building parts, which are dedicated to religious purposes;
- 2. Day children's homes;
- 3. Schools and pupils homes;
- 4. Youth centres;
- 5. Children- and youth playgrounds;
- 6. Hospitals and rehabilitation facilities;
- 7. Cemeteries.

The protection area is a circle with a radius of 150 m of linear distance, and the centre is the nearest entrance or exit of the protected object. Excluded from this

protection area are areas, where there is a boundary between the object of protection and the location of the initiation of prostitution, and if the protected areas are not connected through pathways and no line of sight is given, such as a railway line or a fence wall.

(3) Where it is necessary and in the interest of the public or uninvolved persons, the authority may also set up temporal or local restrictions for all types of initiation. It is important to keep the visibility of initiation of prostitution on a reasonable level, so that the public, especially children and adolescents, are not at the risk of being overstrained.

(4) To prevent or eliminate disturbing grievances, arrangements stated at paragraph 3 can be changed and completed.

➤ Limitation of Prostitution § 5

(1) Prostitution is prohibited in apartments. This prohibition also applies to other areas and rooms of a building, if they do not have direct and separate access from areas of public transport, or if the building is within the area described at Section 4 paragraph 2.

(2) The prohibition does not apply to the accommodation (apartment) of clients of prostitutes (home visit).

(3) The prohibition mentioned in paragraph 1 does not apply to buildings, where all the apartments are exclusively used or occupied by people, who practice prostitution, unless the building has a direct and separate access of public transport and if they are located outside of the § 4 Abs . 2 described area.

There are some more restrictions, requirements and obligations concerning Prostitution in buildings. To mention some of the most important:

- *The Authority has to prohibit prostitution in buildings or parts of buildings, if the protection of the neighbourhood due to harassment or other public considerations is required, particularly regarding the protection of minors.*

- *The buildings mentioned above have to fulfil the main requirements concerning sanitary facilities and safety precautions.*

- Reporting requirements § 6

(1) Persons who wish to pursue prostitution have to report in person to the authority (Section 9, paragraph 3). The declaration has to contain name and surname, any former surnames, date of birth, citizenship, residential address and any address within the meaning of Paragraph 5 section 1, second sentence of paragraph 3.

(2) Prostitutes have to report any changes to the local authorities within 1 week, as required under the Registration Act 1991, Federal Law Gazette No. 9 / 1992, as amended by BGBl I No. 101/2003.

(3) The authority has to report the received reports and changes to the Vienna City Administration - Public Health Section.

- Interruption and termination of prostitution § 7

(1) Persons who have reported and registered as a prostitute as stated in § 6 paragraph 1, are free to discontinue or end prostitution. The discontinuing or ending of Prostitution has to be reported to the local authorities.

(2) The notification of the interruption must indicate a certain period of time.

(3) Section 6, paragraph 3 shall apply.

(4) 6 months after receiving the notification of ending Prostitution the records specified in § 6 to 7 have to be destroyed. The expiry of this period is inhibited by initiating a penal administrative procedure due to suspicion of a criminal violation as stated in § 8 Section 1 row 3. In the event of closing of the proceedings the inhibition, in the event of punishment the notification is getting irrelevant.

- Authorization of entering (Betretungsrecht) § 8

This section actually authorizes the Police to enter any building, automobile and estate if there is a reasonable suspicion of violation of Sections 3, 4, 5 and 6. In addition, the Police are authorized to ask for identification and every person has to obey and answer all questions being asked, as long as the questions refer to criminal actions. The Police are also entitled, to use reasonable physical force against property if this action is necessary and had been announced before. Whilst using physical force against property it is mandatory for the Police to avoid any harm of humans. They are also asked to avoid attracting attention.

➤ Sanctions § 8a

(1) Whoever initiates or practices Prostitution

1. in contrary to the prohibition provisions of Section 3,
2. without being registered as required in § 6 paragraph 1,
3. During an interruption (Section 7, Paragraph 1),
4. For or in apartments or premises in which the practice of prostitution (§ 5 paragraph 1, 4 or 5) is prohibited

commits an administrative violation and is liable to a fine not exceeding 1.000 Euro, if uncollectable liable to an alternative sentence of up to 8 days, in case of recurrence liable to a fine up to 2.000 Euros, if uncollectable liable to an alternative sentence of up to 12 days.

This section contains 6 other paragraphs, which are mainly concentrating on the penalties the owner of a building is liable to, if not abiding sections 4, 5 and 6 (as mentioned above). The penalty can be up to a fine of 3.500 Euros, if it is a repeated offence the fine can be up to 7.000 Euros. All fines collected through this Section are spent on counselling and caring centres for the city Vienna.

(http://www.ris.bka.gv.at/Dokumente/LrW/LRWI_I450_000/LRWI_I450_000.pdf)

2.3. Facts and figures

Around 85–90% of registered Sexworkers in Austria are foreigners. Registered Austrian Sexworkers are found mostly in the bigger cities, as they provide a certain anonymous status compared to the not-urbanized areas. Unfortunately, there are no numbers and statistics of unregistered Sexworkers. There is only a hidden-number expectation which says, that there are 1.506 registered Sexworkers and around 3.000 unregistered Sexworkers in Vienna. The Police think that there are more illegal Austrian than migrant Sexworkers. Furthermore, the Police assume that most of the illegal Austrian Sexworkers are addicted to drugs, and they are using prostitution for the procurement of drugs. In addition a considerable part of those Austrian Sexworkers are using Prostitution only as an incidental income, and therefore attach importance to staying anonymous.

It is hard to figure out, how far the legal market for Sexworkers has grown. Nevertheless, since the 80's the number of the so called "controlled (registered) Sexworkers" in Vienna has increased from 700 up to 1.500. A nationwide overview concerning the change of legal Prostitution is not available.

The increase of legal Sexworkers can partly be explained through the new labour-law concerning EU-citizens and migrants. They now have the possibility to work legally as a Sexworker. Furthermore the present Social Work of the STD-Ambulatory and the counselling centres for Prostitution had an impact on the increasing number of legal Sexworkers. All these factors have caused an increased willingness of actually registering with the local authorities. That is to say, the illicit market of Prostitution has decreased through these measures.

Recognizable is the permanent changing of forms of appearance regarding Prostitution in Austria. Sexual Services are offered only partly at traditional places like the Streets, Brothels, Bars, Massage-Studios, SM (Sado-Masochist)-Studios etc. Initial business contacts are more often made through the Internet, Mobile Phones and other Sexmedia, and the actual business is made through so-called Escort Service Agencies. Provided are house-, apartment- and hotel visits, escorts to Swinger- and Homosexual Clubs, as well as special forms like "Sex in deluxe Cars" or "Sex at deluxe Yachts". In general, there is a continuing trend using deluxe Brothels discoverable. The majority of the owners are Austrian Citizens, a few small

Brothels are owned by EU-citizens or foreigners. The often-cited invasion of, for example, Russian Organisations, cannot be found in Austria (compare to: <http://www.frauen.bka.gv.at/DocView.axd?CobId=31425>).

2.4. Problems and criticism

There have been some reports and research done concerning the situation of Prostitution and the Law in Austria. They all found out, that in Austria Prostitution is not prohibited by Law, but nevertheless according to the OGH (Supreme Court) a violation of morality. Practising Prostitution is therefore subject to double standards. Sexworkers do have a lot of requirements to fulfil, but don't have a lot of rights (compare to http://en.sophie.or.at/category/basic_infos/prostitutions-gesetze).

Sexworkers have to register, have to undergo weekly health checks, have to pay taxes, and have to comply with many restrictions on Prostitution set up by the different provincial laws. On the other side, they have to observe a lot of obligations: providing sexual services is regarded as immoral, contracts between Sexworkers and Clients are not effectual which means Sexworkers have no right to seek payment through legal action. In addition Sexworkers are hardly covered by social services and there is the social stigma every person working in the sex industry has to deal with (compare to <http://www.frauen.bka.gv.at/DocView.axd?CobId=31425>).

One of the biggest problems concerning the law on Prostitution in Austria is therefore the judgement of sexual services being regarded as immoral and therefore a void act of legal significance (compare to: <http://www.frauen.bka.gv.at/DocView.axd?CobId=31425>).

"The Work Report on Prostitution in Austria", set up by experts of ministries, representatives of the federal provinces, Non-Government Organisations with expert Know-How in the field as well as experts from the Chamber of Commerce and the Chamber of Labour, have put up a selection of important recommendations concerning the current situation:

- *Abolish the tenet that contracts regarding sexual services violate moral standards and consequently grant more rights and recognition to sex workers.*

- *Grant the same or similar legal status to contracts for work and services rendered (akin to employment contracts) that applies to contracts in other occupational fields and thereby grant corresponding protection under social and labour laws.*
- *Influence working conditions by establishing improved criteria for the licensing of brothels.*
- *Upgrade health check-ups and preventive measures in general, inter alia, by sensitising customers to risks inherent in unsafe sex practices.*
- *Draft clear-cut criteria for distinguishing bad working conditions from “exploitation” as defined under penal law.*
- *Ensure the lasting impact of this Work Report, e.g. through ongoing activities of the specialist group dedicated to the issue, by prompting the Austrian Trade Union Federation to take up the subject, and by evaluating implementation of the measures recommended after two years have elapsed.*

(Work Report: “Prostitution in Austria”, p. 2)

In addition, there are some concerns about under-age Prostitution in Austria. Although child prostitution is prohibited by law in Austria (Section 207b of the Criminal Code), there are around 200 minors estimated to be working as Prostitutes on the streets in Vienna. Most of them are financing their drug addiction with the sex work. One of the major problems is that the police are more likely to punish the children rather than the clients. The reason is the Criminal code which prohibits children under the age of 18 years to prostitute themselves. On the one side such legislation is recommendable and necessary, but on the other side it leads to punishing the children when being caught, as they are not allowed to undergo Prostitution. There are high fines for children being caught, which leads to a self-fulfilling prophecy, as most of the children are on the streets in order to earn money for buying drugs. Secondly, the clients are rarely punished, as hardly any evidence can't be proven, that he or she didn't know that the Sexworker was under-age (compare to: <http://ws4.orf.at/newspool/92274>).

3. History of Prostitution in New Zealand

“Street-based sex work is not a new phenomenon, nor are public and political concerns about street working a recent development. The earliest New Zealand legislation to address prostitution was the Vagrancy Act 1866. This legislation was based on the English Vagrancy Act 1824 ‘which could be invoked against a prostitute wandering the public street or in any place of public resort and behaving in a riotous or indecent manner’ (Jordan, 2005). The 1866 Act was repealed by the Police Offences Act 1884, which prohibited ‘common prostitutes’ propositioning passers-by.

In 1869, the Contagious Diseases Act allowed any woman suspected of being a ‘common prostitute’ to be detained and subject to forcible medical examination. No such action was taken against the woman’s clients. This uneven approach to prostitution, which penalised the workers but ignored the clients, continued (although in less extreme forms) under subsequent New Zealand legislation.

Under section 26 of the Summary Offences Act 1981, a person was liable to a fine not exceeding \$200 for soliciting in a public place. Case law established that massage parlours were public places; therefore, both indoor and street-based sex workers were liable to prosecution under the Summary Offences Act 1981.

Street-based prostitution was a feature of urban life in many centres during the nineteenth century. For several decades however, street-based sex workers have only been seen in Auckland, Wellington and Christchurch. During the 1990s, street prostitution areas developed in Manukau City (Manukau City Council, 2006).”

(Report of the Prostitution Law Review Committee on the Operation of the PRA 2003 2008:117)

4. The Legislation in New Zealand

The New Zealand Legislation concerning Prostitution is regulated by the Prostitutions Reform Act 2003.

“The purpose of this Act is to decriminalise prostitution [...]” (Prostitutions Reform Act 2003:4)

In addition, the Department of Labour New Zealand has published the paper “Sex industry - a guide to occupational health and safety in New Zealand”.

“It aims to provide practical means of achieving those duties by dealing with sex worker health, workplace amenities, and psychosocial factors arising out of the industry.” (<http://www.osh.govt.nz/order/catalogue/235.shtml>)

For the present paper, the most important parts of the Prostitutions Reform Act are Part 2 (Commercial sexual services) and Part 3 (Operator certificates). The Acts are themselves divided into several sections and subsections, like *Health and safety requirements*, *Protections for sex workers*, and so on.

In order to obtain a better overview in this report only the most important sections and subsections are mentioned.

4.1. The Prostitution Reform Act 2003

4.1.1. Abstract of Part 1 Preliminary Provisions

➤ Section 4 Interpretation

(1) In this Act, unless the context otherwise requires,—

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

business of prostitution means a business of providing, or arranging the provision of, commercial sexual services

client means a person who receives, or seeks to receive, commercial sexual services

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)

member means a member of the Prostitution Law Review Committee

premises includes a part of premises

prostitution means the provision of commercial sexual services

Prostitution Law Review Committee means the committee appointed under section 43

public place—

(a) means a place that is open to, or being used by, the public, whether admission is free or on payment of a charge and whether any owner or occupier of the place is lawfully entitled to exclude or eject a person from that place; and

(b) includes any aircraft, hovercraft, ship, ferry, or other vessel, train, or vehicle carrying or available to carry passengers for reward

sex worker means a person who provides commercial sexual services

small owner-operated brothel means a brothel—

- (a) at which not more than 4 sex workers work; and
- (b) where each of those sex workers retains control over his or her individual earnings from prostitution carried out at the brothel

territorial authority has the same meaning as in section 5(1) of the Local Government Act 2002.

(2) In this Act, a reference to providing or receiving commercial sexual services means to provide or receive those services personally (rather than arranging another person to provide the services or arranging for the services to be received by another person).

4.1.2. Abstract of Part 2 Commercial sexual services

Subsection Health and safety requirements

- Section 8 Operators of businesses of prostitution must adopt and promote safer sex practices

(1) Every operator of a business of prostitution must—

- (a) take all reasonable steps to ensure that no commercial sexual services are provided by a sex worker unless a prophylactic sheath or other appropriate barrier is used if those services involve vaginal, anal, or oral penetration or another activity with a similar or greater risk of acquiring or transmitting sexually transmissible infections; and
- (b) take all reasonable steps to give health information (whether oral or written) to sex workers and clients; and
- (c) if the person operates a brothel, display health information prominently in that brothel; and

(d) not state or imply that a medical examination of a sex worker means the sex worker is not infected, or likely to be infected, with a sexually transmissible infection; and

(e) take all other reasonable steps to minimise the risk of sex workers or clients acquiring or transmitting sexually transmissible infections.

(2) Every person who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding \$10,000.

(3) The obligations in this section apply only in relation to commercial sexual services provided for the business and to sex workers and clients in connection with those services.

(4) In this section, health information means information on safer sex practices and on services for the prevention and treatment of sexually transmissible infections.

➤ Section 9 Sex workers and clients must adopt safer sex practices

(1) A person must not provide or receive commercial sexual services unless he or she has taken all reasonable steps to ensure a prophylactic sheath or other appropriate barrier is used if those services involve vaginal, anal, or oral penetration or another activity with a similar or greater risk of acquiring or transmitting sexually transmissible infections.

(2) A person must not, for the purpose of providing or receiving commercial sexual services, state or imply that a medical examination of that person means that he or she is not infected, or likely to be infected, with a sexually transmissible infection.

(3) A person who provides or receives commercial sexual services must take all other reasonable steps to minimise the risk of acquiring or transmitting sexually transmissible infections.

(4) Every person who contravenes subsection (1), subsection (2), or subsection (3) commits an offence and is liable on summary conviction to a fine not exceeding \$2,000.

➤ Section 10 Application of Health and Safety in Employment Act 1992

(1) A sex worker is at work for the purposes of the Health and Safety in Employment Act 1992 while providing commercial sexual services.

(2) However, nothing in this Act (including subsection (1)) limits that Act or any regulations or approved codes of practice under that Act.

Subsection Protections for sex workers

➤ Section 16 Inducing or compelling persons to provide commercial sexual services or earnings from prostitution

(1) No person may do anything described in subsection (2) with the intent of inducing or compelling another person (person A) to—

(a) provide, or to continue to provide, commercial sexual services to any person; or

(b) provide, or to continue to provide, to any person any payment or other reward derived from commercial sexual services provided by person A.

(2) The acts referred to in subsection (1) are any explicit or implied threat or promise that any person (person B) will—

(a) improperly use, to the detriment of any person, any power or authority arising out of—

(i) any occupational or vocational position held by person B; or

(ii) any relationship existing between person B and person A:

(b) commit an offence that is punishable by imprisonment:

(c) make an accusation or disclosure (whether true or false)—

(i) of any offence committed by any person; or

(ii) of any other misconduct that is likely to damage seriously the reputation of any person; or

(iii) that any person is unlawfully in New Zealand:

(d) supply, or withhold supply of, any controlled drug within the meaning of the Misuse of Drugs Act 1975.

(3) Every person who contravenes subsection (1) commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding 14 years.

➤ Section 17 Refusal to provide commercial sexual services

(1) Despite anything in a contract for the provision of commercial sexual services, a person may, at any time, refuse to provide, or to continue to provide, a commercial sexual service to any other person.

(2) The fact that a person has entered into a contract to provide commercial sexual services does not of itself constitute consent for the purposes of the criminal law if he or she does not consent, or withdraws his or her consent, to providing a commercial sexual service.

(3) However, nothing in this section affects a right (if any) to rescind or cancel, or to recover damages for, a contract for the provision of commercial sexual services that is not performed.

Subsection Application of Immigration Act 1987

➤ Section 19 Application if Immigration Act 1987

(1) No permit may be granted under the Immigration Act 1987 to a person on the basis that the person—

(a) has provided, or intends to provide, commercial sexual services; or

(b) has acted, or intends to act, as an operator of a business of prostitution; or

(c) has invested, or intends to invest, in a business of prostitution.

(2) It is a condition of every temporary permit or limited purpose permit granted under the Immigration Act 1987 that the holder of the permit may not, while in New Zealand,—

(a) provide commercial sexual services; or

(b) act as an operator of a New Zealand business of prostitution; or

(c) invest in a New Zealand business of prostitution.

(3) A temporary permit or limited purpose permit granted under the Immigration Act 1987 may be revoked if the holder does any of the things listed in subsection (2)(a) to (c).

(4) If the holder of a residence permit is subject to a requirement under section 18A of the Immigration Act 1987, the requirement is deemed not to have been met (for the purpose of revoking the permit under section 20(1)(d) of that Act) if the permit holder acts as an operator of, or invests in, a New Zealand business of prostitution.

(5) This section applies with respect to every permit granted under the Immigration Act 1987, and to every requirement imposed under section 18A of that Act, whether granted or imposed before or after the commencement of this section.

Subsection Prohibitions on use in prostitution of persons under 18 years

- Section 20 No person may assist person under 18 years in providing commercial sexual services

No person may cause, assist, facilitate, or encourage a person under 18 years of age to provide commercial sexual services to any person.

- Section 21 No person may receive earnings from commercial sexual services provided by person under 18 years

No person may receive a payment or other reward that he or she knows, or ought reasonably to know, is derived, directly or indirectly, from commercial sexual services provided by a person under 18 years of age.

- Section 22 No person may contract for commercial sexual services from, or be client of, person under 18 years

(1) No person may enter into a contract or other arrangement under which a person under 18 years of age is to provide commercial sexual services to or for that person or another person.

(2) No person may receive commercial sexual services from a person under 18 years of age

- Section 23 Offence to breach prohibitions on use in prostitution of persons under 18 years

(1) Every person who contravenes section 20, section 21, or section 22 commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding 7 years.

(2) No person contravenes section 20 merely by providing legal advice, counselling, health advice, or any medical services to a person under 18 years of age.

(3) No person under 18 years of age may be charged as a party to an offence committed on or with that person against this section.

Subsection Powers to enter and inspect compliance with health and safety requirements

- Section 24 Purpose of inspection

(1) The powers of inspection in section 26 may be used only for the purpose of determining whether or not a person is complying, or has complied, with section 8 or section 9.

(2) This section does not limit the ability of an inspector to report any other offence or suspected offence to the police or any other relevant agency.

➤ Section 26 Powers to enter and inspect compliance with health and safety requirements

(1) An inspector may, at any reasonable time, enter premises for the purpose of carrying out an inspection if he or she has reasonable grounds to believe that a business of prostitution is being carried on in the premises.

(2) For the purposes of the inspection, the inspector may—

(a) conduct reasonable inspections:

(b) take photographs and measurements and make sketches and recordings:

(c) require any of the following persons to provide information or assistance reasonably required by the inspector:

(i) a person who operates the business of prostitution, or an employee or agent of that person:

(ii) a sex worker or client of the business of prostitution:

(d) take copies of the information referred to in paragraph (c).

(3) An inspector may seize and retain any thing in premises entered under this section that the inspector has reasonable grounds to believe will be evidence of the commission of an offence against section 8 or section 9.

(4) Nothing in this section limits or affects the privilege against self-incrimination.

(5) An inspector may take any person acting under the inspector's direct supervision into the premises to assist him or her with the inspection.

➤ Section 27 Entry of homes

(1) An inspector may not enter a home under section 26 unless he or she—

(a) has the consent of an occupier of that home; or

(b) is authorised to do so by a warrant issued under subsection (2).

(2) A District Court Judge, Justice, Community Magistrate, or Registrar of a District Court (who is not a member of the police) may issue a warrant to enter a home or part of a home if, on application made on oath, he or she is satisfied that there are reasonable grounds for believing that—

(a) a business of prostitution is being carried on in the home; or

(b) the home or the part of the home is the only practicable means through which to enter premises where a business of prostitution is being carried on.

(3) The warrant must be directed to an inspector by name and must be in the prescribed form.

Subsection Powers of entry

➤ Section 30 Warrant for police to enter

(1) A District Court Judge, Justice, Community Magistrate, or Registrar of a District Court (who is not a member of the police) may issue a warrant to enter a place if he or she is satisfied that—

(a) there is good cause to suspect that an offence under either of the following provisions is being, has been, or is likely to be committed in the place:

(i) section 23 (which concerns using persons under 18 years in prostitution);

(ii) section 34 (which concerns being an operator while not holding a certificate); and

(b) there are reasonable grounds to believe that it is necessary for a member of the police to enter the place for the purpose of preventing the commission or repetition of that offence or investigating that offence.

(2) An application for a warrant must be made in writing and on oath.

(3) The Judge, Justice, Community Magistrate, or Registrar may impose any reasonable conditions on the exercise of the warrant that he or she thinks fit.

4.1.3. Abstract of Part 3 Operator certificates

➤ Section 34 Operators of businesses of prostitution to hold certificates

(1) Every operator of a business of prostitution (other than a company) must hold a certificate issued under section 35.

(2) Every person who, while required by subsection (1) to hold a certificate, does not hold a certificate commits an offence and is liable on summary conviction to a fine not exceeding \$10,000.

(3) If a person who is charged under subsection (2) claims that he or she is not an operator because he or she is a sex worker at a small owner-operated brothel and is not an operator of any other business of prostitution, it is for the person charged to prove that assertion on the balance of probabilities.

(4) Despite subsection (2), no person may be convicted of an offence under that subsection if the period during which the person does not hold a certificate is the first 6 months after this section comes into force.

➤ Section 35 Application for, and grant of, certificates

- (1) An applicant for a certificate must apply to the Registrar.
- (2) In this Part, Registrar means the Registrar of the District Court at Auckland, or the Registrar of any other District Court identified in regulations made under this Act as the, or a, Registrar who may accept applications under this section.
- (3) The application must be in the prescribed form and be accompanied by the prescribed fee.
- (4) The application may require the applicant to provide no more than the following:
 - (a) the applicant's full name, date of birth, and gender:
 - (b) any other names by which the applicant is, or ever has been, known:
 - (c) the address to which the applicant wishes any certificate and related correspondence to be sent:
 - (d) a photocopy of any form of official identification that contains a photograph of the applicant, such as a passport or driver licence, that is authenticated in the prescribed manner:
 - (e) 1 or more recent photographs of the applicant that comply with the prescribed requirements and are authenticated in the prescribed manner:
 - (f) if an order has been made under section 37, a copy of the order.
- (5) The Registrar must issue a certificate to an applicant if—
 - (a) the applicant pays the prescribed fee, supplies a properly completed application form, and attaches the required photocopy and photographs; and
 - (b) the applicant is aged 18 years or older; and

(c) the applicant is either—

(i) not disqualified under section 36 from holding a certificate; or

(ii) is disqualified, but has been granted a waiver of disqualification under section 37 and the waiver has not been cancelled.

(6) Every certificate must be in the prescribed form and must contain a photograph of the holder.

(7) If a certificate is refused, the Registrar must notify the applicant in writing, with reasons, and give information about how to apply for a waiver of disqualification under section 37.

(http://www.legislation.co.nz/act/public/2003/0028/latest/whole.html?search=ts_all%40act%40bill%40regulation_prostitution_resel#DLM197889)

4.2. Facts and figures

In May 2008 a Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003 was published. In this report (<http://courts.govt.nz/prostitution-law-review-committee/publications/plrc-report/index.html>) it is stated, that one of the reasons for the law reform was neither to decrease, nor increase, the number of people involved in the sex industry, but to provide sex workers the same protections enjoyed by other workers in New Zealand.

All figures concerning the number of sex workers in New Zealand are only estimated, as it is hard to make research in this field. Since decriminalization, sex workers don't have to register with the police anymore, so it is hard to compare the research done before and after it. Also resources previously used to monitoring the sex industry have been reallocated. In fact in 2005 there were an estimated number of sex workers in Auckland of 3390. This numbers is distinguished into street workers,

massage parlours, escorts, rap/escort parlours, private and ships. The highest amount of sex worker in this research can be found in massage parlours (estimated number of 1880). The smallest number can be found working private (estimated number of 350). Another research was done in February/March 2006 which found out, that there were an estimated number of sex workers in Auckland of 1513. So the numbers actually decreased, if we compare the figures of 2005 (at the time of decriminalization) and 2006. The last research done in 2007 found an estimated number of sex workers of 1451 (in Auckland) (compare to <http://courts.govt.nz/prostitution-law-review-committee/publications/plrc-report/index.html>).

It is prohibited to work as a sex worker if not a New Zealand Citizen. Therefore, no numbers and figures concerning foreigners involved in sex work can be found.

4.3. Problems and criticism

Since the establishment of the Prostitution Reform Act in 2003 a lot of criticism appeared, especially concerning the numbers of sex workers. There have been some claims that the number of sex workers has increased since the decriminalization of prostitution.

“A 400% increase in the numbers of sex workers was predicted prior to the passage of the PRA, and was also claimed in relation to the law reform in New South Wales. This may be the original source of the idea that numbers of sex workers will, or have, increased by such a margin as a result of law reform. Officials advising the Select Committee were unable to find any statistical evidence to support the claim. In addition, the Select Committee noted that ‘there may appear to be a growth in the industry because it becomes less hidden in nature’ (Select Committee, 2002).” (Report of the Prostitution Law Review Committee on the Operation of the PRA 2003, 2008:40)

However, it is noticeable that there is a small increase of numbers of sex workers. This can partly be explained by the different methodologies used to estimate

numbers of sex workers in 2006 and 2007. In addition, the committee considers that it is too early to say if the apparent slight increase is an upward trend or only normal fluctuation in a fluid industry (compare to: Report of the Prostitution Law Review Committee on the Operation of the PRA 2003 2008:40).

“One of the consequences of decriminalization has been the illumination of the workings of an industry which have historically been hidden. Sex workers and brothel operators can now be more open about their occupation. Similarly, street-based sex workers are now able to be more visible since soliciting in a public place is no longer illegal. Greater visibility of the sex industry is not indicative of growth of that industry. Further, the Committee considers increased visibility to be a desirable consequence of decriminalization for those who are most at risk in the industry, namely street-based workers and under age people involved in prostitution.” (Report of the Prostitution Law Review Committee on the Operation of the PRA 2003, 2008:41)

A main point of criticism in New Zealand is the fact that the Police have no right to control brothels, brothel operators or even sex workers themselves. The Committee therefore recommended that the Police should obtain the right of inspecting and searching the brothels any time, and that a list of certificate holders should be available to the Police, Immigration, OSH, and Medical Officers of Health. In addition the Committee thinks that the certification system as established now is not working satisfactorily.

“The fitness of character test appears to be robust, in that the Committee has no evidence that people have attempted to circumvent the system by using a ‘front person’ with no disqualifying convictions to apply for a certificate, as some members of the Select Committee feared might occur.” (Report of the Prostitution Law Review Committee on the Operation of the PRA 2003, 2008:93)

Besides that the Committee says that the certification system does not have any attributes which would enable it to meet the criteria of protection sex workers. Since the establishment of the certification system, no enforcement procedure has been developed to check that brothel operators obtain and maintain current certification. In addition no regime can be found which ensures that the brothel operators promote the welfare and occupational health and safety of the managed workers.

Furthermore, in New Zealand there has been lots of concern that the change of the legislation in 2003 has caused an increase of underage prostitution. However, based upon several research and information being provided, the Committee doesn't consider that the PRA has increased prostitution of under aged (compare to: Report of the Prostitution Law Review Committee on the Operation of the PRA 2003, 2008:94).

In balance, a major problem seems to be the role of the Police. Officers may request, but actually have no power to ask for age identification from a person who they suspect to an underage person providing commercial sexual services. They also have no right to enter a brothel or other premises, and brothel owners are not required to maintain a record of the age identification of the sex workers (compare to NZ Police 2007 cited in Report of the Prostitution Law Review Committee on the Operation of the PRA 2003, 2008:109).

“Police reported that if officers believe that an underage person is being used in prostitution, they can use section 48 of the Children, Young Persons and Their Families (CYPF) Act 1989 to remove the young person from the situation. However, under the CYPF Act, a young person is defined as being aged between 14 and 16 years. This means that Police cannot remove 17 year olds, as they fall outside the scope of the CYPF Act.” (Report of the Prostitution Law Review Committee on the Operation of the PRA 2003, 2008:110)

The Committee has set up a list of recommendations. The most important ones are listed below:

- The Occupational Safety and Health service of the Department of Labour consider supplementing the OSH guidelines for the sex industry with smaller, user friendly pamphlets.
- The government provides additional funding to the Ministry of Health to enable Medical Officers of Health to carry out regular inspections of brothels.
- The government make available adequate funding for the establishment/continuation of NGOs that can provide a range of services

to the sex industry, including assistance with exiting for those who wish to exit.

- Relevant government agencies should have an ongoing duty to provide NGOs with information on services available to sex workers wishing to exit, who could then have access to this information from a 'one stop shop'.
- Support for those who wish to leave the industry should be based on best practice principles that are tailored to meet the needs of the individual worker.
- Sex workers who do not wish to leave the industry should also be offered support and advice from NGOs. Provision of advice and information on health and safety, professional best practice, rights and responsibilities and available government services should be available to all sex workers.
- The current certification system be maintained, but the PRA be amended to extend the period of certification validity to three years.
- The PRA be amended to ensure the list of certificate holders be available to be searched by Police, Immigration, OSH, and Medical Officers of Health for the purpose of facilitating the inspection of brothels and brothel operators.
- A collaborative approach between Police, the Ministry of Social Development, the Ministry for Youth Development and relevant NGOs should be taken to assist at risk youth.
- The Ministry for Youth Development and the Ministry of Social Development deliver increased funding to NGOs working with at risk youth.
- Section 48 of the Children, Young persons and Their Families Act 1989 be amended to include young people aged 17 years.
- The Ministry of Social Development should ensure when approached by, or on behalf of, young persons at risk, that they are adequately supported to prevent the young person being used in prostitution in order to survive.
- Legislative approaches that aim to criminalise street-based sex workers should be avoided.

- Street-based sex workers should be encouraged to find alternatives to street-based sex work. NGOs should be adequately funded to facilitate this.

(Report of the Prostitution Law Review Committee on the Operation of the PRA 2003, 2008:18-19)

5. Important differences and similarities

5.1. The Legislations in general

New Zealand and Austria have the decriminalization of Prostitution in common. Nevertheless, there are some major differences, especially when it comes to powers of Police.

The most important difference is the legislation itself. In New Zealand there is one common Law for the whole country, whereas in Austria every province has its own Law on prostitution. Due to the 9 different provinces in Austria 9 different laws can be found and they all vary a lot, especially when it comes to the age of prostitutes and the operating of brothels. As an example:

In Vorarlberg it is not prohibited to own a brothel, but the requirements to operate one are very strict. Besides that it is prohibited to perform prostitution on the streets. As a result, there are no brothels at all established in Vorarlberg. In Vienna the situation is not that narrow and strict. Brothels are very common in the city, and at some spots one can find sex workers on the streets as well. The minimum age for being employed as a sex worker is 18 years, whereas in Vorarlberg it is 19 years.

Another major difference is the protection of sex workers. In New Zealand sex workers are protected through Section 17 in the PRA, which deals with refusal to provide commercial sexual services. In fact, any sex worker can refuse providing commercial sexual service, even if the client has already paid for it.

In Austria the situation is completely different, as Prostitution is an “immoral contract” and an “offence against morality”, according to the OGH (Supreme Court 1989). As a result sex workers are not protected by law and have no right to sue a client if s/he for example refuses to pay for the sexual services.

5.2. Health and monitoring issues

Another difference can be found concerning the Law on health of prostitutes and its monitoring. There is a Federal Law (despite the provincial laws) in Austria which states how often a sex worker has to undergo health checks and where this should be documented. In addition, the sex workers in Austria hold an identity card (informally called “the Deckel”), which they have to carry with them every time they are at work. The Police have the right to ask for the identity card and if the sex worker is not able to present it, s/he is liable to paying a penalty.

In New Zealand no equal legislation can be found. There are health requirements concerning brothels stated in the PRA 2003 as well as safer sex practices sex workers and their clients have to adopt. Anyhow, the Department of Labour New Zealand has published “A Guide to Occupational Health and Safety in the New Zealand Sex Industry”:

“This guide has been written for everyone involved in the New Zealand sex industry: sex workers both employed and self-employed, operators, owners and others such as sex worker organisations. As all these groups have different information needs, this is a lengthy document. Rather than trying to read and absorb all the information in this Guide, we suggest you browse through it initially and decide which sections are most relevant to you.”

(<http://www.osh.dol.govt.nz/order/catalogue/pdf/sexindustry.pdf>)

Compared to New Zealand the Austrian legislation has no section which deals with safer sex practices for sex workers and their clients.

5.3. The powers of the Police

In Austria, every police officer is entitled to ask any person for identification. This is very important when it comes to topics like child or under age prostitution. Police officers are eligible to ask for an ID anytime, which makes it possible for them to put young people under the age of 18 years away from the streets. In Austria most of the under-age sex workers are substance abusers and therefore trying to finance their addiction through prostitution.

In New Zealand, the Police don't have any rights to ask for an ID if there is no suspicion. Even if a police officer thinks something is suspicious and therefore asks for an ID, sex workers don't have to carry a specific ID with them as they don't have to be registered. As a result, the Police experience lack of power when it comes to child prostitution and putting children away from the streets.

5.4. Immigrating as a sex worker

New Zealand has compared to Austria established a totally different Law.

In Austria, certain types of Visas are available for European Union (EU) and non-EU citizens who intend to work as sex workers. Some are limited for a certain period of time (Visas C and D) others like the "Residence Permit as an Artist" are valid for 1 year and are eligible to be extended. As a result of this regulation, the percentage of foreign sex workers in Austria is around 90%, at which the bigger part are EU-citizens. However, it is quite hard to achieve these kinds of Visas, as there are a lot of obligations combined with the application. The Austrian Foreign Ministry (BMeiA) is also aware of the risk of sexual exploitation and therefore has developed a handout for potentially endangered persons. Nevertheless, those groups are at high danger for being sexually exploited and recommendations concerning better

protection for those at risk have been published by the “ExpertInnenkreis Prostitution” (body of experts for prostitution).

In New Zealand, the situation is completely different. Persons who are not New Zealand citizens are not allowed to work as sex workers or to operate a brothel at all. This prohibition applies to holders of all types of Visas, including residence permits.

6. References

Literature

- ExpertInnenkreis “Prostitution” im Rahmen der Task Force Menschenhandel 2008: “Prostitution in Austria. Legal situation, impact, recommendations”, Work Report, Vienna.
- New Zealand Government 2008: Report of the Prostitution Law Review on the Operation of the Prostitution Reform Act 2003. Wellington.

Internet

- Website des Bundesministeriums fuer Inneres, <http://www.bmi.gv.at/>, March 2009
- Website von Sophie, Bildungsraum fuer Prostituierte, <http://en.sophie.or.at/>, March 2009
- Website des Bundeskanzleramtes fuer Rechtsinformation, <http://www.ris.bka.gv.at/>, March 2009
- Website des Bundeskanzleramtes fuer Frauen und oeffentlichen Dienst, <http://www.frauen.bka.gv.at/>, March 2009

- Website des ORF, <http://ws4.orf.at/newspool/92274>, am 2.4.2009
- Website of the Department of Labour, <http://www.osh.govt.nz/>, March 2009
- Website of the New Zealand Legislation, <http://www.legislation.co.nz/>, March 2009
- Website of the Ministry of Justice, <http://www.justice.govt.nz/default.asp>, March 2009