REGULATING SEX WORK IN WESTERN AUSTRALIA: POLICE POWERS, MORALITY AND LAW-MAKING

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I. INTRODUCTION

Over the last century, every state and territory in Australia has developed and implemented its own approach towards the regulation of sex work, as well as the laws through which to achieve that.[1] These laws play a decisive role in shaping the sex industry of a particular jurisdiction, and significantly influence the conditions under which sex work takes place.[2] Notably, until the 1970s, the laws regulating sex work in Australia remained relatively homogenous, with most 'sex work-related activities' criminalised, but not the act of selling sex.[3] Today, Western Australia remains one of the only three Australian states in which that is still the case, and much of the sex industry remains criminalised under one piece of legislation: the *Prostitution Act 2000*.[4] Nevertheless, Western Australia is home to a thriving sex industry, from street-based to brothel-based, dating back to the early 1900s in the city of Kalgoorlie.

This article aims to discuss and analyse the laws regulating sex work in Western Australia. The analysis will support the argument that the provisions contained in the

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[1] Barbara Sullivan, 'When (Some) Prostitution Is Legal: The Impact of Law Reform on Sex Work in Australia' (2010) 37(1) *Journal of law and society* 85.
[2] Ibid 87.
[3] Ibid.
[4] *Prostitution Act 2000* (Western Australia) ('*Prostitution Act* ').

Prostitution Act 2000 are the result of debates on the morality of sex work, consistent with a 'tough on crime' approach that has failed to address the contemporary issues and circumstances under which the sex industry operates.[5] Specifically, this article examines the negative effects of extending powers to police through legislation as a response to regulate certain behaviours. Representative of this strategy, I argue, are the recently introduced Protected Entertainment Precincts (PEPs) provisions, amending the *Liquor Control Act 1988*.[6]

This article is structured as follows: section II will locate and analyse the laws regulating sex work in Western Australia, focusing on the *Prostitution Act 2000*. This section will demonstrate how most sex work is effectively criminalised in Western Australia, while also highlighting the rationale behind the adoption of the Act. At the heart of the critique are the powers afforded to police to deal with sex work-related offences. These powers will be the focus of section III, which will include the power to stop and search; the power to issue move-on notices; and the powers to enter without a warrant and to obtain information. This article will also address failed attempts at reforming the *Prostitution Act* (sections IV), while the concept of moral panic and how it motivates law-making will be the focus of section V.

II SEX WORK IN WA: LOCATION AND CRITICAL ANALYSIS OF THE LAW

Before the criminalisation of sex work was crystallised in legislation in the year 2000, sex work occurred in Western Australia largely under a so-called 'containment policy'. Essentially, it meant that the police would grant 'immunity' from prosecution to brothel-keepers (constituting a crime since 1829), so long as they were located within delineated areas established by police.[7] This policy was first introduced in the city of Kalgoorlie around the early 1900s, with Hay Street becoming the closest instance of a Western Australian 'red light district', where brothels remained unlawful, but nonetheless tolerated.[8] Soon enough, the same policy arrived in the city of Perth, where all tolerated brothels were located on Roe Street.[9] However, the policy attracted much criticism, mainly due to the lack of legal foundations and the potential corruption within the police force.[10] As a result, in 1958, all brothels operating in Roe Street were

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[5] Victoria Nagy and Anastasia Powell, 'Legalising Sex Work: The Regulation of 'Risk' in Australian Prostitution Law Reform' (2016) 28(1) *Current Issues in Criminal Justice* 1.

[6] *Liquor Control Act 1988* (Western Australia) ('*Liquor Control Act 1988*').

[7] Nagy and Powell (n 5) 6. Basil Donovan et al, 'The Sex Industry in Western Australia: A Report to the Western Australian Government' (2010) *National Centre in HIV Epidemiology and Clinical Research, UNSW*, 32. When the English common law offence of keeping a bawdy house was received into WA.

[8] Elaine McKewon, 'Proceedings : Public Forum on Prostitution Law Reform' Public Forum on Prostitution Law Reform, (21 October 1995). Raelene Davidson, "as good a bloody woman as any other bloody woman…' Prostitutes in Western Australia, 1895-1939' in Patricia Crawford (ed), *Exploring Women's Past : Essays in Social History* (Sisters Publishing, 1983).

[9] McKewon (n 8).

[10] Donovan et al (n 7) 33. *Prostitution Law Reform for Western Australia, Report of the Prostitution Law Reform Working Group* (Western Australia), (January 2007). Nagy and Powell (n 5) 6.

shut down, and the containment policy officially abandoned.[11] Subsequently, efforts were devoted toward understanding how to best regulate sex work in Western Australia, becoming more compelling in the face of the threat posed by HIV/AIDS.[12] Extensive reviews into the matter eventually led to the adoption of the *Prostitution Act 2000*, whose aims and impact will be analysed in the following section.[13]

The *Prostitution Act 2000* is therefore the principal legislation criminalising sex work in Western Australia.[14] Assented in June 2000, it is the result of extensive parliamentary debates on what was often described as 'the issue of prostitution'.[15] Notably, a small number of offences relating to sex work can also be found in the *Criminal Code*, the *Health Act 1911*, and the *Liquor Control Act 1988*.[16] However, the focus of this article will be on the *Prostitution Act* itself (hereinafter 'the Act'), with particular attention to its most problematic provisions extending powers to police.

This analysis argues that the Act was introduced as the government's response to pressures from communities at the time, who were frustrated with the 'laissez-faire' approach of the government towards sex work (legacy of the 'containment policy'), and, particularly, with the visibility of street sex work in residential areas.[17] The widespread 'moral panic' towards sex work and its supposed dangers to the community enabled the Act to afford extensive powers to police, as a means to contain and control street-based sex work, child prostitution, kerb-crawling and, to a lesser extent, advertising and sponsorship.[18] These powers will be further analysed in section *C* of this article, supporting the overarching argument that all the powers contained in the Act entail considerable discretion on the part of the police.

First and foremost, this section describes how the Act effectively criminalises most sex work in Western Australia. As previously mentioned, selling sex itself is not an offence under the Act; however, sections 5 and 6 contain all 'prostitution-related offences' for both the sex worker and the client 'seeking another to act as a prostitute in or within view or hearing of a public space'.[19]

Sections 5(5)(c) and 6(4)(c) further specify that the offence takes place –

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[11] Elaine McKewon, 'The historical geography of prostitution in Perth, Western Australia' (2003) 34(3) *Australian Geographer*, 303.

[12] McKewon, 'Proceedings : Public Forum on Prostitution Law Reform' (n 8).

[13] Nagy and Powell (n 5) 6. *Prostitution Act* (n 4).

[14] *Prostitution Act* (n 4).

[15] Emma Roberts, 'Prostitution Act 2000: Are the Police Powers Warranted?' (LL.B. HONS. Thesis, the University of Western Australia, 2000).

[16] *Prostitution Act* (n 4). *Criminal Code Act 1913* (Western Australia) ('*Criminal Code*'). *Health (Miscellaneous Provisions) Act 1911* (Western Australia) ('*Health Act 1911*'). *Liquor Control Act 1988* (n 6). Donovan et al (n 7) 21.

[17] Roberts (n 15). Neil P. McKeganey and Marina Barnard, *Sex Work on the Streets : Prostitutes and Their Clients* (Open University Press, 1996) 15.

[18] Roberts (n 15). Hansard (WA) Legislative Council Receipt and First Reading, *Parliamentary Debates*, 25 November 1999 (Hon. Peter Foss, Attorney General). Kerb-crawling is commonly defined as 'the activity of driving slowly along a road close to the path at the side in order to ask prostitutes for sex'.

[19] Donovan et al (n 7) 22. *Prostitution Act* (n 4) s 5, 6.

> whether the offender makes or intends to make the invitation or request directly or through someone else to or intends to receive the invitation directly or through someone else from, the person whom the offender seeks to act as a prostitute/ as a prostitute's client.[20]

Intention is therefore an element of these offences. Prosecution is facilitated by section 52 of the Act, 'Intention presumed in some cases', which states that –

> a person loitering in or frequenting a place in circumstances giving reasonable grounds for suspecting that the person had an intention described in section 5(4)(b) or 6(3)(b) is to be presumed to have had that intention unless the contrary is proved.[21]

This constitutes a reversal of the onus of proof, meaning that the defendant must prove that there was no intention of inviting another to act as a prostitute.[22] In the case of offences concerning illicit drugs, sex work and sexual activities involving a child, in Western Australian legislation, it is not uncommon to find that the onus of proof is reversed, so that the accused is required to prove the belief on the balance of probabilities.[23] In the Act, this means that where the accused seeks to rely on mistake as to belief in the victim's age or mental capacity, the onus of proof is, once again, reversed.[24] Therefore, section 49 states that

If, in proceedings for an offence under this Act, it is relevant whether or not a person was a child, it is to be conclusively presumed that the accused knew that the person was a child unless it is proved that, having taken all reasonable steps to find out the age of the person concerned, the accused believed on reasonable grounds, at the time the offence is alleged to have been committed, that the age of the person concerned was at least 18 years.[25]

In terms of penalties for the offences contained in sections 5 and 6, we find a difference between clients and sex workers. For the client's offence (section 5) the maximum penalty is two years imprisonment, seven years if the person sought to act as a prostitute is a child; the maximum penalty for the sex worker's offence (section 6) is one year imprisonment, three years if the person sought is a child.[26]

These provisions were devised in order to deal primarily with street-based sex work, which was considered to be the principal cause of nuisances in the communities (e.g., increase in criminal activities, visibility, soliciting), and, as such, was deemed the main form of sex work to be controlled through legislation. Therefore, although the

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[20] *Prostitution Act* (n 4) ss 5(5)(c); 6(4)(c).
[21] Ibid s 52.
[22] Donovan et al (n 7) 22.
[23] John Devereux et al, *Kenny Criminal Law in Queensland and Western Australia* (LexisNexis Butterworths, 8th ed, 2013). Zahra Stardust, 'Protecting sex worker human rights in Australia', *(Scarlet Alliance*). It should be acknowledged that the fact that reverse-onus offences are common in Western Australian legislation is in itself problematic, however, a discussion on this issue is outside the scope of this paper. Kuan Chung Ong, 'Statutory Reversals of Proof: Justifying Reversals and the Impact of Human Rights' (2013) 32(2) *University of Tasmania Law Review* 248.
[24] Devereux et al (n 23).
[25] *Prostitution Act* (n 4) s 49.
[26] Donovan et al (n 7) 22. *Prostitution Act* (n 4) s 5, 6.

Prostitution Bill, as proposed by the Liberal government, attracted some criticism within Parliament (especially by the Opposition), it was widely accepted as a necessary response to a persisting issue, as expressed by the then Premier of Western Australia, Richard Court:

It took this Government nearly a year to get the Opposition's support for legislation to control streetwalkers and children operating in brothels. No country in the world has been able to come up with legislation that effectively outlaws and controls this activity. The increased powers that this Government has given to the Police Service will effectively control street prostitution.[27]

And again –

> Our most serious concern has been streetwalking […] I sat in this Parliament for 10 years while a Labor Government refused to do anything. As a Government, we have acted by introducing legislation to control that situation.[28]

These statements show the government's belief in the connection between increased police powers and effective control of street sex work. They are also representative of the law being used as a response to a perceived moral panic. This article argues that the connection made by the government between increased policing and better control over the sex industry has little foundation in criminological research on the subject and can be very harmful and misleading.[29]

Although the Act's main concern is with street sex work, 'children operating in brothels' is also mentioned in Mr Court's statement above, and it is mentioned again as another objective of the Act by Minister of Police at the time, Kevin Prince, who stressed the importance of the Act in dealing with both street sex work and illegal brothels:

> One change has been made to prostitution law in over 100 years. This Government made that change, which dealt with streetwalkers, kerb crawlers and children involved in prostitution. The Opposition fought that change all the way […] The police will prosecute any brothel if a complaint is received from neighbours, if there is evidence of drug dealing, if children are present or if other illegal activities occur. […] If somebody wants to establish a new brothel, he or she will run the gamut of police prosecution, and that will happen in the very near future.[30]

Notably, brothel-keeping as an offence is not mentioned in the Act, because it is already contained in the Western Australian *Criminal Code*, at section 190.[31] Entitled 'being involved with prostitution', section 190 targets any person who

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[27] Roberts (n 15). Hansard (WA) Legislative Assembly, *Parliamentary Debates*, 8 August 2000, 38b-38b (Hon. Richard Court, Prime Minister).
[28] Hansard (WA) Legislative Assembly, *Parliamentary Debates*, 8 August 2000 (n 27) 38c-38c.
[29] Roberts (n 15).
[30] Hansard (WA) Legislative Assembly, *Parliamentary Debates*, 8 August 2000 (Mr. Kevin Prince, Minister of Police).
[31] *Criminal Code* (n 16) s 190. The provisions were introduced in 2004 and proclaimed in 2005.

> a) Keeps or manages, or acts, or assists in the management of any premises for purposes of prostitution; or
> b) Being the tenant, lessee, or occupier of any premises, permits such premises, or any part thereof, to be used for purposes of prostitution; or
> c) Being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same, or any part thereof, or collects the rent with the knowledge that such premises, or some part thereof, are or is to be used for purposes of prostitution, or is a party to the continued use of such premises, or any part thereof, for purposes of prostitution.[32]

The Code also contains the offence of living off the earnings of prostitution, establishing that 'any person who lives wholly or partly on earnings that the person knows are the earnings of prostitution is guilty of a crime and is liable to imprisonment for 3 years'.[33] The offence does not apply exclusively to relations where exploitation occurs (such as pandering), but also to somebody who is dependent on the earnings of the worker, with no evidence of ongoing exploitation.[34] If found in breach of this section, this person would then have the burden of proving that they have independent and lawful means of support, as per sections 49 and 52 of the Act.[35] This can be extremely problematic if the person found to be dependent on the earnings of prostitution is a child, who can have no other means of independently supporting themselves.[36]

Interestingly, there is no explicit prohibition in the Act or elsewhere regarding the conduct of an independent escort business. In *Powell v. Devereaux (1987)*, the Supreme Court of Western Australia found that the brothel keeping offence under section 76 F of the *Police Act* (now section 190 of the *Criminal Code*) does not in fact extend to the running of an escort agency where the sex workers and the clients meet elsewhere.[37] However, it remains possible to prosecute those involved in the running of an escort agency for living off the earnings of prostitution, under section 190(3) of the *Criminal Code*.[38]

Therefore, while the Act does not concern itself directly with brothel keeping or the running of an escort agency, the offence of advertising to recruit sex workers and other employees who may be employed by a brothel (e.g., security guards, receptionists, cleaners) is included in section 9 of the Act, stating that –

> A person is not to publish or cause to be published a statement that is intended or likely to induce a person to —
> (a) seek employment as, or act as, a prostitute; or

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[32] Ibid s 190.
[33] Ibid s 190(3).
[34] Donovan et al (n 7) 25. Pandering is here defined as 'the act or crime of recruiting prostitutes or of arranging a situation for another to practice prostitution'.
[35] Ibid 25.
[36] Ibid.
[37] *Powell v Devereaux* (Supreme Court of Western Australia, No 1053, 12 June 1987) ('*Powell v Devereaux*').
[38] Law Reform Commission of Western Australia, *Police Act Offences* No 85.

(b) seek employment in any other capacity in any business involving the provision of prostitution.[39]

Hence, engaging in sex work constitutes an offence in Western Australia under the following circumstances:

a. If it takes place without the use of a prophylactic (section 8 of the Act).[40]
b. If it takes place with a child client (section 15 of the Act).[41]
c. If it takes place with a child worker (section 14(a) of the Act).[42]
d. If it takes place with a worker declared to be a drug trafficker (section 14(b) of the Act, and section 32A of the *Misuse of Drugs Act 1981*).[43]
e. If it takes place with a worker who is convicted of a Schedule 1 offence (section 14(c) of the Act). These offences are mostly from the *Criminal Code,* and they include murder, assault causing grievous bodily harm, kidnapping, deprivation of liberty, a number of serious sexual offences including child sexual assault offences and the possession of child pornography.[44]

However, as noted above, soliciting sex work by the sex worker or client in a public place is prohibited under the Act.[45]

As previously mentioned, some minor prohibitions related to sex work can also be found in the *Health Act 1911* and the *Liquor Control Act 1988*.[46] For instance, regarding venereal diseases, section 310 of the *Health Act 1911* provides that:

> (1) A person who knowingly infects any other person with a venereal disease or knowingly does or suffers any act likely to lead to the infection of any other person with a venereal disease commits an offence.
>
> (2) Where a woman who is a prostitute, and while residing in a brothel or in premises reputed to be a brothel has received notice under section 307(1), and after the receipt of such notice continues to reside in a brothel or in premises reputed to be a brothel, such woman shall by reason of such continued residence be deemed knowingly to be doing an act likely to lead to the infection of any other person with venereal disease within the meaning and for the purposes of this section.[47]

Since the *Health Act 1911* provides no definition as to what constitutes 'residing in a brothel', the ordinary meaning of 'to permanently or continuously occupy a domicile' applies.[48] However, the sex industry in Western Australia has evolved substantially since 1911, and very few sex workers now fully reside in brothels; thus, it can be argued that this offence has little application to today's context.[49]

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[39] *Prostitution Act* (n 4) s 9.
[40] Ibid s 8.
[41] Ibid s 15.
[42] Ibid s 14(a).
[43] Ibid s 14(b). *Misuse of Drugs Act 1981* (Western Australia) s 32(A) ('*Misuse of Drugs Act*').
[44] *Prostitution Act* (n 4) s 14(c). *Criminal Code* (n 16). Donovan et al (n 7) 28.
[45] *Prostitution Act* (n 4) ss 5-6.
[46] *Health Act 1911* (n 16). *Liquor Control Act 1988* (n 6).
[47] *Health Act 1911* (n 16) s 310(1)(2).
[48] Donovan et al (n 7) 31.
[49] Ibid.

Finally, section 115(b) of the *Liquor Control Act 1988* prohibits the licensee or their employee to allow 'any reputed thief or prostitute or supplier of unlawful drugs to remain on the licensed premises'.[50] A maximum fine of $10,000 applies, however, similarly to section 310 of the *Health Act*, there is little application for this offence, and no prosecutions have been undertaken under this section since 2000.[51]

Upon first look, we can therefore conclude that the Act was created with the primary intention of criminalising most forms of sex work in Western Australia, with particular focus on street sex work, to be achieved by working in conjunction with existing provisions in the *Criminal Code*, the *Health Act* and the *Liquor Control Act*.[52] Secondly, the Act was meant to work as a tool for police officers on the ground to deal with sex workers through a 'tough on crime' approach towards sex work. This latter objective was to be achieved through a considerable increase in police powers, which are described in Part 4 of the Act.[53] As stated by Kevin Prince (then Minister of Police) before the passing of the Act: 'there will be extra powers that do not currently exist, for example, to enable police to deal effectively with street soliciting which is a major problem'.[54] The next section will analyse these powers. To understand their problematic nature, the concept of police discretion will be briefly introduced, as it is an element which every police power described in the Act inevitably entails.

A *Use and misuse of the power of discretion*

Assessing when and how police discretion is justifiably used is no easy task, and the often-reported abuse of this power risks undermining the true objectives of legislation, as well as damaging the public's trust in the police force.[55] Generally, a public officer is exercising discretion whenever 'the effective limits on his power leave him (or her) free to make a choice among possible courses of action or inaction'.[56] The use of discretionary powers by police is not illegitimate in any way; discretion is simply a choice given to the police officer by the law, and, as long as it is rational and made with regard to lawful criteria, it is legitimate.[57] Discretion is necessary to police for several reasons, including the fact that the law cannot possibly cover all human conduct intended to be made criminal.[58] As such, discretion is crucial in recognising and addressing criminal behaviour.[59]

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[50] *Liquor Control Act 1988* (n 6) s 115(b).
[51] Donovan et al (n 7) 32. *Liquor Control Act 1988* (n 6) s115.
[52] *Criminal Code* (n 16). *Health Act 1911* (n 16). *Liquor Control Act 1988* (n 6).
[53] *Prostitution Act* (n 4).
[54] Hansard (WA) Legislative Assembly Order of the Day, Introduction and First Reading, *Parliamentary Debates*, 23 November 1999 (Mr. Kevin Prince, Minister of Police).
[55] Simon Bronitt, 'Understanding Discretion in Modern Policing' (2011) 35(6) *Criminal law journal* 319, 329.
[56] Ibid 321.
[57] David Clark, 'Filling in the Doughnut? Police Operational Discretion and the Law in Australia' (2014) 14(2) *Oxford University Commonwealth Law Journal* 195, 200.
[58] Bronitt (n 55) 323.
[59] Ibid.

The critique around police discretion stems from the ongoing risk of misuse of their powers in the assessment of criminal conduct, especially when dealing with certain offences and certain population groups.[60] This is often exacerbated by a lack of guidelines and appropriate resources for police, as well as misinformation. It is particularly evident, for instance, in the mis-identification of sex workers with sex trafficking victims.[61] Indeed, evidence shows that misuse of the power of discretion often occurs as a result of the police officer's own existing biases, views and even prejudices toward a certain crime or a certain population group.[62] In many cases, sex work is considered an inherently 'moral' crime affecting the sensibilities of society; as such, the police officer's views on the morality of sex work will inevitably influence what course of action they might adopt when faced with a sex work-related offence.[63]

However, discretion occurs at every stage of the justice system. Consider the tendency of the courts and prosecutors to dismiss cases involving a sex worker's complaint of sexual assault.[64] This tendency is representative of not only the improper use of discretion, but also of the widespread notion that sex workers are 'un-rapeable', or that they do not suffer as much from a sexual assault as opposed to a 'caste' woman.[65] In the case of *R v Heros Hakopian*, for instance, the judge found it reasonable to assume that the victim, being a sex worker, suffered less psychological harm due to her being a sex worker than would have been suffered by other classes of victim of sexual offences.[66] This case shows how, in the judiciary system as a whole, women keep being categorised along a Madonna/whore continuum, thus rendering some 'more rapeable' than others.[67]

Therefore, how sex workers are perceived combines with their legal status in a specific jurisdiction to determine the extent to which discretion is used by police officers on the ground. The law has the power to mitigate the effects of police discretion, to the extent that it is created to protect sex workers and minimise the stigma. As noted, the WA laws have been implemented for moral panic reasons, thus embedding this moral bias into the actions of law enforcement. As the next section will demonstrate, the Act contains numerous provisions that allow for the use of discretion, especially in Part 4.[68] The analysis of some of these provisions will show

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[60] Celia Williamson et al, 'Police-Prostitute Interactions' (2007) 18(2) *Journal of Progressive Human Services* 15. Clare Farmer et al, 'The Steady Proliferation of Australia's Discretionary Police-Imposed Patron Banning Powers: An Unsubstantiated Cycle of Assertion and Presumption' (2018) 18(4) *Criminology & criminal justice* 431. Amy Farrell and Shea Cronin, 'Policing Prostitution in an Era of Human Trafficking Enforcement' (2015) 64(4-5) *Crime, law, and social change* 211.
[61] Farrell and Cronin (n 60).
[62] Farmer et al (n 60) 441.
[63] Williamson et al (n 60) 16.
[64] Ibid 18.
[65] *R v Heros Hakopian* [1991] VicSC ('*R v Heros Hakopian*'). Michelle Fisher and Fahna Ammett, 'Sentencing of Sexual Offenders When Their Victims Are Prostitutes and Other Issues Arising out of Hakopian' (1992) 18(3) *Melbourne University Law Review* 683.
[66] *R v Heros Hakopian* (n 65).
[67] Fisher and Ammett (n 65) 686.
[68] *Prostitution Act* (n 4) Part 4.

the detrimental effects of vague, criminalising laws, and use of discretionary powers on sex workers and their human rights.

III. POLICE POWERS IN THE PROSTITUTION ACT INVOLVING DISCRETION

A *The Power to Stop and Search*

One of the most problematic provisions in the Act affords police the power to 'stop and search a person' without a warrant. Sections 25 and 29(4) of the Act establish respectively that –

> S 25(1): A police officer may without a warrant stop, detain and search anyone whom the police officer suspects on reasonable grounds to be —
>
> (a) committing an offence; or
>
> (b) carrying anything that will afford evidence as to the commission of an offence.[69]
>
> S 29(4): A police officer may arrange for a medical practitioner or registered nurse nominated by the police officer to examine the body cavities of the person to be searched and may —
>
> (a) detain the person until the arrival of that medical practitioner or registered nurse; or
>
> (b) convey or conduct the person to that medical practitioner or registered nurse.[70]

Section 29(6) also legitimises a police officer to use 'any force that is reasonably necessary' to carry out the body cavity search laid out in section 29(4) to be performed, without further explanation as to what constitutes a force that is 'reasonably necessary', leaving that to the discretion of the police officer.[71] At least three problems can be identified in relation to the power of stop and search:

1) Their invasiveness: as with provisions contained in the *Health Act 1911* for the prevention of the spread of venereal diseases, they infringe on a person's privacy at a deep level and are conducted based on a mere suspicion.
2) The legal basis: provisions regarding the police right to conduct a body search on a person before or after arrest already exists in the *Misuse of Drugs Act 1981* (s 23) and, at the time the Act was adopted, also existed in the *Criminal Code* (s 236).[72] The crucial difference between section 236 of the Code and sections 25 and 29(4) of the Act is that, under the Code, the power was based on reasonable grounds

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[69] Ibid s 25(1).
[70] Ibid s 29(4).
[71] Ibid s 29(6).
[72] 'a police officer may, using such force as is reasonably necessary and with such assistance as he considers necessary, stop and detain the person and search him together with any baggage, package, vehicle or other thing of any kind whatsoever found in his possession, and for that purpose may stop and detain any vehicle'. *Misuse of Drugs Act* (n 43) s 23(1). *Criminal Code* (n 16) s 236. This section of the Criminal Code was repealed, as per act No 59 of 2006, s 22.

for *believing* an examination to be necessary; in the Act, the basis is on reasonable *suspicion*, which is much broader, and will be further discussed in the next section.[73]

3) The reversal of the onus of proof: section 52 of the Act places the burden of proof on the defendant, who must prove that there was no intention on their part to commit an offence under sections 5 or 6 of the Act.[74]

The first and second points note that the power to stop and search is based on the standard of suspicion. The *Criminal Investigation Act* (WA) establishes, at sections 65 and 68(1) that, in the state of Western Australia, a person can be stopped and searched based on a reasonable suspicion that they possess things relevant to offences.[75] However, a distinction needs to be made between 'basic searches' and 'strip searches'.[76] Literature on sex workers' interactions with police shows that they overwhelmingly experience the latter type, including the even more intrusive 'body cavity searches'.[77] This kind of searches are of particular concern, and, in Western Australia, they may occur once a suspected sex worker has been arrested and is in police detention, which is a situation of relative vulnerability and power imbalance. Commonly, these searches are based on the police officer's reasonable suspicion that the person detained is 'hiding drugs or something else that might cause harm'.[78] Moreover, section 72 of the *Criminal Investigation Act* stresses the basis for necessity of a strip search, which is reasonable suspicion based on reasonable grounds.[79]

The reversal of the onus of proof described in the last point is also quite problematic when it comes to sex work-related offences and can have detrimental effects, particularly on the sex worker, who finds herself in the position of somehow having to prove that she was not about to commit an offence under the Act. Indeed, when it comes to evidence that a sex worker did have such an intention, the Act does not specify what items might constitute valid evidence, leaving that judgement to the discretion of the police officer.[80] In practice, one item that has reportedly been used as evidence by police is a condom, meaning the fact that the suspected sex worker is carrying one at the time of the body search.[81] This can hardly be considered proof that someone is about to engage in sex work, as any person could carry a condom.[82] The vagueness on this matter leaves ample space for discretion. Section 8 of the Act establishes that 'it is an offence for a person to engage in an act of prostitution without

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[73] Roberts (n 15).
[74] *Prostitution Act* (n 4) s 52.
[75] *Criminal Investigation Act 2006* (Western Australia) ss 65, 68(1) ('*Criminal Investigation Act 2006*'). Eric Colvin et al, *Criminal Law in Queensland and Western Australia, Cases and Commentaries* (LexisNexis Butterworths, 7th ed, 2015).
[76] *Criminal Investigation Act 2006* (n 75) ss 63-64.
[77] Elaine Dowd, 'Sex Workers' Rights, Human Rights: The Impact of Western Australian Legislation on Street Based Sex Workers' (2002) 10 *Outskirts (Nedlands)*, 4.
[78] Tim Newburn et al, 'Race, Crime and Justice? Strip Search and the Treatment of Suspects in Custody' (2004) 44(5) *British journal of criminology* 677.
[79] *Criminal Investigation Act 2006* (n 75) s 72.
[80] Dowd (n 77) 4.
[81] Ibid.
[82] Ibid 3.

using a prophylactic that is appropriate for preventing the transmission of bodily fluid from one person to another'; at the same time, carrying a prophylactic has been used as evidence of intention to engage in sex work, creating a legal conundrum for sex workers.[83]

As stated above, a 'suspicion' is a broad concept, and evidence suggests that rules are loosely followed by police officers on the ground, hence, their 'reasonable suspicion' might not always be based on 'reasonable grounds'.[84] In other words, there is a lot of police discretion involved in any situation in which this power can be applied.[85] People subjected to strip searches are somewhat protected under the *Criminal Investigation Act* by the mandatory provision which states that, unless the searcher is a doctor or a nurse, the searcher and the person searched must be of the same gender.[86] This requirement creates areas of uncertainty when it comes to people who are sex and gender diverse, particularly, transgender people that might be engaging in sex work.[87] Powers like strip searches do not exist in a vacuum; they are part of a larger system of power, which systematically discriminates against bodies and sexualities outside what is considered socially 'normal', and it does so by routinely subjecting them to discipline and punishment, as well as constraining and governing them.[88]

There is enough controversy surrounding the power to conduct a body search to suggest that it should either be more closely regulated or otherwise repealed.[89] With evidence-based studies indicating that the concept of reasonable suspicion is often too widely interpreted and discriminatorily applied by officers on the ground, a discussion on the necessity of this power is warranted within any democratic institution. Raising the standard from a reasonable suspicion to a genuine and reasonable belief that a crime is taking place would be a good starting point.[90] Human rights are at stake, including: humane treatment in detention; freedom from cruel, inhumane and degrading treatment or punishment; non-interference with privacy, including bodily integrity; protection of families and children; equality; these rights are protected under

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[83] *Prostitution Act* (n 4) s 8. Dowd (n 77) 4. 'COVID-19 and Sex Work in Australia', *(Scarlet Alliance*) <https://scarletalliance.org.au/library/COVID_Report>.
[84] Colvin et al (n 75).
[85] Williamson et al (n 60). Bronitt (n 55).
[86] *Criminal Investigation Act 2006* (n 75) s 72(3)(a).
[87] Sarah Winter, 'Are Human Rights Capable of Liberation? The Case of Sex and Gender Diversity' (2009) 15(1) *Australian Journal of Human Rights* 151.
[88] Kyle Kirkup, 'Indocile Bodies: Gender Identity and Strip Searches in Canadian Criminal Law' (2009) 24(1) *Canadian journal of law and society* 107, 114. Toby Miles-Johnson, 'Policing Transgender People: Discretionary Police Power and the Ineffectual Aspirations of One Australian Police Initiative' (2015) 5(2) *SAGE open*, 2.
[89] Ben Bowling and Coretta Phillips, 'Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search' (2007) 70(6) *Modern law review* 936, 961.
[90] Ibid. That was the standard applied in the Criminal Code s 236 regarding body searches, later repealed.

treaties to which Australia is a party.[91] A body search is an intrusion into a person's fundamental rights and civil liberties and, in many cases, it has been experienced as equivalent to sexual assault, especially if the gender identity of the suspect is not taken into proper consideration.[92]

B *Power to Issue A Move-On Notice*

The power to issue move-on notices, like the power to conduct body searches in the previous section, is based on the standard of reasonable suspicion. Hence, section 24 of the Act states that -

> A police officer who has reason to suspect that a person has committed, or intends to commit, an offence in or in the view or within hearing of a public place may, in writing in a form approved by the Commissioner, direct the person to move away from that place and a surrounding area specified in the direction, and stay away from it for a period of not more than 24 hours specified in the direction.[93]

Setting the standard as reasonable suspicion (instead of belief, for instance) is not at all uncommon when it comes to investigative powers that police can exercise. These powers are worth analysing for two main reasons:

a. The police are the 'gatekeeper' of the criminal justice process, meaning that they will largely determine who enters it, and how far they will move through its stages.

b. Discretion, as explained before, permeates the enforcement process; in making assessments, the police may be influenced by several factors, including any prejudices they might hold against certain groups or individuals. Therefore, despite the reasonable grounds on which suspicion should in theory be based, in practice there is little space for objectivity.[94]

Nonetheless, the legal standard of reasonable suspicion (or reasonable grounds for suspecting) is required for most investigative powers.[95] As established in *George v*

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[91] Rachel Ball and Adrianne Walters, 'Total Control: Ending the Routine Strip Searching of Women in Victoria's Prisons', *(Human Rights Law Centre Report 2017*). WA does not have a state-based human rights act; however, these rights are protected under international human rights treaties to which Australia is a party, including: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'). The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*'). The *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979 (entered into force 3 September 1981) ('*Convention on the Elimination of All Forms of Discrimination against Women*'). Furthermore, the UN General Assembly adopted the Mandela Rules, as a minimum international standard for the treatment of prisoners, with Rule 52 being particularly relevant for strip and body-cavity searches. UN General Assembly, *The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, A/RES/70/175, 70 sess, adopted 8 January 2016) ('*The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*').

[92] Kirkup (n 88) 123.

[93] *Prostitution Act* (n 4) s 24.

[94] Elizabeth Ellis, *Principles & Practice of Australian Law* (Thomson Reuters Professional Australia Pty Limited, 3rd ed, 2012).

[95] Colvin et al (n 75) 625.

Rockett, a suspicion constitutes 'a positive feeling of actual apprehension or mistrust', and, as such, it differs from a reasonable belief on which other powers are based.[96] Indeed, a belief can be defined as 'an inclination of the mind towards assenting to, rather than rejecting, a proposition' (regardless of whether it proves to be true or not).[97] As such, belief sets a higher standard than suspicion, even if based on reasonable grounds.[98] On the matter of the reasonable grounds on which suspicion needs to be based, it was noted in *Ruddock v Taylor* that 'what constitutes reasonable grounds for suspecting a person must be judged against what was known or reasonably capable of being known at the relevant time'.[99] However, this ultimately depends on the circumstances of the particular case.[100]

It is also established in the *Criminal Investigation Act*, at section 4, that 'a person reasonably suspects something at the relevant time if he or she personally has grounds at the time for suspecting the thing and those grounds (even if subsequently found to be false or non-existent), when judged objectively, are reasonable'.[101] Ultimately, the broad interpretation afforded to the standard of 'reasonable suspicion' runs the risk of being based on generalisations and/or stereotypes about certain population groups, and whoever the police believe to be more likely to be involved in criminal behaviour.[102] It is upon this base that the power to issue a move-on notice is applied under the Act.

Move-on notices are not a new concept in Australia; commonly, the focus of policing on subjects that are considered 'disorderly' (such as, sex workers, First Nations people, drug-users and homeless people) has resulted in the implementation of measures such as police-imposed public area bans (or simply 'banning orders').[103] Similarly to move-on notices applicable under the Act, these bans effectively allow for the discretionary punishment of individuals by exclusion from often extensive public areas for extended periods of time.[104] Typically established as a reverse onus offence in legislation, they not only carry a presumption of guilt, but, in most jurisdictions, they can lawfully be imposed pre-emptively in anticipation of criminal or undesirable behaviour, based solely on the officer's discretion.[105] Such instruments are already present in the *Liquor Control Act 1988* regarding licensed premises, however, they have been considerably expanded in scope by the introduction in 2022 of so-called 'Protected Entertainment Precincts'.[106]

During the time in which the Prostitution Bill (which later became the Act) was being discussed in Parliament, affording power to police to issue a move-one notice

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[96] Ibid 623. *George v Rockett* (1990) 170 CLR 104 ('*George v Rockett*').
[97] *George v Rockett* (n 96).
[98] Ibid. Colvin et al (n 75) 626.
[99] Colvin et al (n 75) 626. *Ruddock v Taylor* [2005] HCA 48 ('*Ruddock v Taylor*').
[100] Colvin et al (n 75) 626.
[101] *Criminal Investigation Act 2006* (n 75) s 4.
[102] Bowling and Phillips (n 89) 937.
[103] Bronitt (n 85) 324. Farmer et al (n 60).
[104] Farmer et al (n 60) 432.
[105] Ibid 441.
[106] *Liquor Control Act 1988* (n 6) Part 5A.

was considered necessary to combat street prostitution, as Minister Prince expressed concern for the lack of such power for dealing with sex work:

> Currently the police have no power to stop a person, male or female, who is simply walking the streets unless they have reasonable grounds to suspect an offence has been, or is about to be, committed. The move-on power will enable the police to say, "We believe you are touting for business as a prostitute; you move on. If you don't do that and keep away from a particular area, that's *prima facie* evidence to support a presumption that your behaviour leads to or gives rise to a belief that soliciting is being committed." Written notice will be issued, and these people can be prosecuted if they breach it. That is intended to get prostitutes off the streets.[107]

This view is problematic because, firstly, having 'a reason to suspect' that someone is about to commit an offence means that police officers usually target known sex workers, regardless of whether they are committing an offence at the time or not.[108] Secondly, leaving the definition of what constitutes a 'surrounding area' to the discretion of the police officer means not only that the area may be as extensive as they wish (for instance, can it include an area as big as Northbridge?), but also that this provision can be enforced even if the sex worker's residence is situated in that area.[109] It is hard to imagine that this power would satisfy the test of proportionality when it comes to preventing the crime of soliciting.

C *Entry Without A Warrant and the Power to Obtain Information*

Lastly, the powers of 'entering and searching premises' and 'obtaining information' under the Act will be addressed, as they involve extensive use of discretion, and can be deeply problematic when police are targeting sex workers and sex work premises. In Western Australia, an extensive range of investigative powers can be exercised by police without requiring a warrant, based on their reasonable suspicion, and these include the power to stop and search persons and vehicles, and the power to enter and search public spaces.[110] Under the Act, police are granted power to enter and search a premise both with and without a warrant.[111] For this purpose, section 26(1) states that –

> A police officer may, without a warrant, at any time, enter any place at or from which a business involving the provision of prostitution is being, or is suspected of being, carried on and inspect any articles and records kept there.[112]

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[107] Hansard (WA) Legislative Assembly, *Parliamentary Debates*, 12 May 1999 (Mr. Kevin Prince, Minister of Police).
[108] Roberts (n 15).
[109] Dowd (n 77) 3.
[110] *Criminal Investigation Act 2006* (n 75) ss 38-39, 65, 67-69. Ibid s 33.
[111] *Prostitution Act* (n 4) s 26 'Entry of, and seizure at, place of business without warrant'; s 27 'Search and seizure with warrant'.
[112] Ibid s 26(1).

However, because the primary purpose of these provisions is to address child prostitution, section 26(2) establishes that subsection (1) does not apply unless there is 'reason to believe' that any offence under section 7 (namely, seeking to induce person to act as prostitute), or any offence involving a child 'has been, is being or may be committed'.[113] Therefore, section 14, prohibiting under-age prostitution, is combined with section 26 to give police the powers that are considered necessary in order to remove children from the sex industry and put them in adequate care.[114] Giving police the right to exercise this power without a warrant is problematic, especially considering that, when there is a suspicion that a child is engaging in sex work, police also have the power to authorise a body cavity search on that child.[115] Moreover, section 26 allows for police entrance without a warrant, as a matter of urgency, as a result of the argument made in Parliament by then Attorney General, Hon. Peter Foss:

> We do not believe that the police should have to chase around for evidence after the event. They should be able to enter premises as soon as information is received. If a child is present while prostitution is taking place, it should be an offence and it is the sort of offence that one does not wait to do something about until a warrant is obtained. I do not know how long some members take for sex but I will bet them that it would take less time for them to complete the act than it would take to get a warrant.[116]

The right of police to act without a warrant was, therefore, based on the assumption that the problem of children operating in sex work premises is pervasive in Western Australia, and that giving police the capacity to act without having to 'chase around for evidence' is the way to address it. There is in fact little evidence to suggest that there is such an extensive number of children operating in brothels in Western Australia.[117] Moreover, Mr. Foss' above statement does not refer necessarily to children *operating* in brothels (as sex workers), rather to the mere presence of children in brothels, thus implying that if a child is found inside a sex work premise, with no proof of involvement in sex work, that per se constitutes an offence.

Section 27 further establishes that a warrant may be granted if there are 'reasonable grounds for suspecting that there is in place anything that will afford evidence as to the commission of an offence'.[118] The problem lies, once again, in the vulnerable position in which the sex worker, possibly under-age, is placed. These provisions create a situation by which a police officer may enter any premise, without a warrant, on the basis of their own suspicion of there being an under-age person acting as a prostitute.[119] They may then proceed to search them (and possibly authorise a body cavity search) to seek a non-specified form of 'evidence' of their engagement

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[113] Ibid s 26(2).
[114] Roberts (n 15) 24.
[115] Ibid 25. *Prostitution Act* (n 4) ss 25(1), 29(4).
[116] Hansard (WA) Legislative Council Second Reading, *Parliamentary Debates*, 8 December 1999 (Hon. Peter Foss, Attorney General).
[117] 'WA Gov "Prostitution Law Reform Working Group" 07', *Scarlet Alliance-Australian Sex Workers Association*) 32 <https://scarletalliance.org.au/library/wa_lwp_07/view>.
[118] *Prostitution Act* (n 4) s 27(1).
[119] Roberts (n 15).

in sex work, which might then result in that person entering the justice system.[120] Since section 26 deals with issues that are fundamentally related to child welfare, the unchecked application of these powers is problematic, especially if they are carried out without a warrant, based on the discretion of the police officer, and may have negative consequences on a person's (possibly a minor) mental and physical wellbeing.[121]

Finally, sections 23(1)(a) and (1)(b) of the Act give the police 'powers to obtain information'.[122] Under this provision, a person is required to 'produce to the police officer any document or other thing that is in the possession or under the control of the person', and in turn the police officer may 'inspect any document or other thing produced to the police officer and retain it for such reasonable period as the police officer thinks fit, and make copies of a document or any of its contents'.[123] In Parliament, the justification for the inclusion of this power was strongly related to arguments about white slavery and child prostitution, as evidenced by the following comment by the Hon. Peter Foss:

> Both crimes [white slavery and child prostitution] are iniquitous and difficult to prove. I believe they are of such abhorrence to the community that unless we accept these powers, we will not be able to deal with them. I find it hard to think that we can support these powers to control the misuse of drugs and weapons, and give them to chicken inspectors and fisheries inspectors, but we cannot support them for police seeking to prevent child prostitution and white slavery.[124]

Again, the assumption is that 'white slavery' and 'child prostitution' are pervasive problems in Western Australia, that justify affording extensive powers to police. There is, however, little evidence to support the argument that practices such as white slavery or child prostitution were or are prominent in any jurisdiction in Australia.[125]

Regardless, three months after the Act became law, Minister for Police Kevin Prince reported the 'impressive results' achieved by police through the new powers conferred to them under the Act.[126] These included: 54 charges for offences against the Act; nine charges for offences against the *Criminal Code*; eight charges against the *Misuse of Drugs Act*; six charges against the *Police Act*; two charges against the *Road Traffic*

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[120] Ibid. Dowd (n 77) 4.
[121] Roberts (n 15) 27.
[122] *Prostitution Act* (n 4) s 23(1)(a), (b).
[123] Ibid.
[124] Hansard (WA) Legislative Council, *Parliamentary Debates*, 9 December 1999 (Hon. Peter Foss, Attorney General). White slavery is defined as the transportation of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." *White-Slave Traffic Act 1910* (United States) ('*Mann Act*').
[125] 'WA Gov "Prostitution Law Reform Working Group" 07' (n 117) 34. Jo Doezema, 'Loose Women or Lost Women? The Re-Emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (1999) 18(1) *Gender issues* 23. Kay Daniels, *So Much Hard Work : Women and Prostitution in Australian History* (Fontana/Collins, 1984). Roberta Perkins, *Working Girls : Prostitutes, Their Life and Social Control* (Australian Institute of Criminology, 1991). Davidson (n 8). Marcel Winter, *Prostitution in Australia : a Sociological Study* (Purtaboi Publications, 1976).
[126] Hansard (WA) Legislative Assembly, *Parliamentary Debates*, 11 October 2000).

Act; and six charges against the *Bail Act*.[127] Moreover, he reported that six summons had been issued, as well as 180 move-on notices and 40 cautions, for a total of 220 contacts with people on the streets.[128] All of this had the reported effect of tackling the 'most offensive and objectionable parts of prostitution' that were, allegedly, making the lives of people in Perth an 'absolute misery'.[129] Increased police activity was equated with successfully dealing with street-based sex work and the problems it caused. However, we should question whether that is the most appropriate way of measuring success in implementing a new legislation. This article argues that, ultimately, the containment policy was replaced by increased police activity and control, and there has been little progress in the enhancement and protection of sex workers' human rights, health and safety.[130]

Considering that most of the powers that the Act affords to the police are already contained in the *Criminal Code* or elsewhere in legislation (e.g., the *Criminal Investigation Act*), the Act has arguably become a redundant and outdated piece of legislation, that seeks to respond to certain issues which were deemed pervasive, in an unnecessarily heavy-handed manner.[131] This is often the result of legislation motivated by moral panics, and sensationalist claims. The concept of moral panics is further discussed in section *E* of this article. The following section will focus on attempts which have been made at amending the Act.

IV. FAILED ATTEMPTS AT REFORMING THE PROSTITUTION ACT

Three notable attempts have been made at law reform on sex work in Western Australia, and their aims will be briefly discussed. In 2003, a *Prostitution Amendment Bill 2003* was introduced by the Labor Government with the purpose of repealing the expiry provision of the *Prostitution Act 2000*.[132] Specifically, section 63 of the Act was to be repealed, so that it would officially expire on the 29th of June 2003.[133] Consequently, unless the *Prostitution Control Bill 2003* (also proposed by the Labor Government) was enacted by that time, there would be no law regulating street sex work in Western Australia.[134] The Bill sought to introduce a licensing scheme for sex work in Western Australia, similar to that existing in Victoria and Queensland before decriminalisation.[135] However, the Bill never received royal assent and lapsed in

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[127] Ibid. *Prostitution Act* (n 4). *Criminal Code* (n 16). *Misuse of Drugs Act* (n 43). *Police Act 1892* (Western Australia) ('*Police Act*'). *Road Traffic Act 1974* (Western Australia) ('*Road Traffic Act*'). *Bail Act 1982* (Western Australia) ('*Bail Act*').

[128] Hansard (WA) Legislative Assembly, *Parliamentary Debates*, 11 October 2000 (n 126).

[129] Ibid.

[130] Roberta Perkins and Frances Lovejoy, *Call Girls: Private Sex Workers in Australia* (UWA Press, 2007).

[131] Roberts (n 15).

[132] Prostitution Amendment Bill 2003 (Western Australia) ('Prostitution Amendment Bill'). Bill received Royal Assent on 23 June 2003 (as Act No 33 of 2003) (Explanatory memorandum).

[133] Ibid.

[134] Prostitution Control Bill 2003 (Western Australia) ('Prostitution Control Bill').

[135] Thomas Crofts and Tracey Summerfield, 'Red Light on Sex Work in Western Australia' (2008) 33(4) *Alternative Law Journal* 209.

2005.[136] The lack of support for this Bill was not exclusively within Parliament; major sex workers' national organisation Scarlet Alliance criticised the Bill for failing to propose a decriminalising model for the regulation of sex work.[137]

The issue of amending the Prostitution Act was once again raised in 2006 when the new Labor Government established a Prostitution Law Reform Group to examine potential industry reforms.[138] The Group released a report in 2007, which formed the basis for proposed *Prostitution Amendment Bill 2007*.[139] The Bill suggested a minimalist decriminalised model along the lines of New Zealand, with additional safeguards.[140] The aim of the Bill was therefore threefold: firstly, it sought to provide a framework for addressing the regulation of sex work in a public health-conducive manner; secondly, it sought to protect sex workers from exploitation; and thirdly, it sought to protect children from being involved in or exposed to sex work.[141] While the Bill received Royal Assent on 14 April 2008, it was not proclaimed before the state election, and thus remained inactive.[142] The criticism surrounding this Bill (and the reason it failed) centred around three main concerns:

1) The inherent immorality of sex work.
2) The exploitation of women.
3) The harm caused by sex work to the community.[143]

Ronald Weitzer explored the political debates over the legalisation model proposed by the Bill, defining them as 'morality politics'.[144] Weitzer quotes the leader of the Opposition, Mr. Paul Omodei, who, during legislative assembly on 25 September 2007, made the following exaggerated statement:

> The next thing we will have is compulsory training in schools for young girls so that they know whether they can go into a brothel. It is unthinkable. What we should be doing is making it harder for young girls and young boys to become prostitutes and to create exit packages to help young girls get out of the business. The Labor Party has got it exactly

[136] Ibid. Prostitution Control Bill (n 134). Parliament was prorogued due to the state election.
[137] Ronald Weitzer, 'Legalizing Prostitution: Morality Politics in Western Australia' (2009) 49(1) *British journal of criminology* 88.
[138] 'WA Gov "Prostitution Law Reform Working Group" 07' (n In late 2006 the West Australian Attorney General, Jim McGinty, announced that the sex industry laws would be changed. He formed a working party, including Giz Watson Greens MLC, Sue Ellery Labor MLC, Lisa Bastain of the WA Health Department, Kim Porter of the WA Police, and others.
[139] Prostitution Law Reform Working Group 2007, *Prostitution Law Reform for Western Australia, Report of the Prostitution Law Reform Working Group* (n 138). Crofts and Summerfield (n 135). Prostitution Amendment Bill 2007 (Western Australia) ('Prostitution Amendment Bill').
[140] *Prostitution Reform Act 2003* (New Zealand) ('*Prostitution Reform Act*').
[141] Nagy and Powell (n 5). 'Prostitution Amendment Bill 2007 (Long Title)', *(Parliament of Western Australia*)
<https://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=6C025665A6543C9FC82573460019CB31>.
[142] Prostitution Amendment Bill (n 139). Crofts and Summerfield (n 135).
[143] Crofts and Summerfield (n 135) 2.
[144] Weitzer (n 137) 88.

> wrong when it comes to this legislation. This will place an intolerable burden on local government.[145]

Furthermore, sex work has often been equated by abolitionist feminists and radical feminists with male domination and the exploitation of women; however, the main critique against the Bill was based on the connection between the legalisation of sex work and increase in human trafficking.[146] During the same legislative assembly, Mr Colin Barnett, then Premier of Western Australia, asked:

> […]how can the individual men and women of the Labor Party, as representatives of their constituency, vote in this Parliament for what will inevitably be an increase in prostitution in legal and illegal brothels, as well as an increase in the criminal elements that are associated with illegal brothels, the likely increased trafficking of women and, perhaps, the abuse of children? Those factors may not be a direct result of this legislation, but they will be the consequences of the government's attempt to legislate to legitimise prostitution and brothels in Western Australia.[147]

Ultimately, existing literature from jurisdictions which have decriminalised sex work, such as New Zealand (which was the first full country to implement that model in 2003), does not indicate either an increase in criminal activities associated with sex work, or an increase in human trafficking victims.[148]

The last and most notable attempt at reforming the Prostitution Act occurred in 2011, with the *Prostitution Bill 2011*.[149] The semi-decriminalising model proposed by the previous Bill was abandoned and the focus shifted on prohibiting sex work within identified residential areas through a strict licensing scheme regulating a small number of sex work businesses.[150] Many provisions contained in the Act would be maintained, with police enjoying extensive powers, including conducting probity checks on permitted sex work businesses, and closing down illegal premises.[151] During the second reading, the then Attorney-General of Western Australia, Mr Christian Porter, highlighted the Liberal Government's intention of extending powers to police to deal with sex workers:

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[145] Ibid 94. Hansard (WA) Legislative Assembly Second Reading, *Parliamentary Debates*, 25 September 2007 (Mr. Paul Omodei, Leader of the Opposition).

[146] Weitzer (n 137) 99.

[147] Hansard (WA) Legislative Assembly Second Reading, *Parliamentary Debates*, 25 September 2007 (Hon. Colin Barnett, Prime Minister).

[148] Lynzi Armstrong et al, 'Fear of Trafficking or Implicit Prejudice? Migrant Sex Workers and the Impacts of Section 19' in Lynzi Armstrong and Gillian Abel (eds), *Sex Work and the New Zealand Model - Decriminalisation and Social Change* (Bristol University Press, 2020). Lynzi Armstrong, 'Decriminalisation of Sex Work in the Post-Truth Era? Strategic Storytelling in Neo-Abolitionist Accounts of the New Zealand Model' (2021) 21(3) *Criminology & criminal justice* 369. Gillian Abel, 'A Decade of Decriminalization: Sex Work "down Under" but Not Underground' (2014) 14(5) *Criminology & criminal justice* 580.

[149] Prostitution Bill 2011 (Western Australia) ('Prostitution Bill').

[150] Ibid.

[151] Hansard (WA) Legislative Assembly Second Reading, *Parliamentary Debates*, 3 November 2011 (Hon. Christian Porter, Attorney General). Prostitution Bill (n 149).

> The government's priority with this legislation is to ensure that police are properly empowered and supplied with sufficiently clear laws to ensure that they can respond to public complaints and close down nuisance brothels in residential areas.[152]

This statement highlights the legislators' focus on law and order, and a 'tough on crime' approach, which also characterises the existing Act. The main critique towards this Bill regards its very notable shift in focus from the previous Bill: from a model conducive to public health and the protection of all sex workers, including children, from any form of exploitation to a stringent licensing system concerned with the preservation of morality, law and order, and the fight against organised crime.[153] This is also evident in Mr Porter's words:

> In moving this bill, it is not the Liberal–National government's intention to normalise or in any way promote prostitution as an ordinary, socially acceptable activity. It is a reality that prostitution is an activity that carries significant risks to the health and safety of the participants, the potential for the involvement of organised crime and the capacity to cause harassment and nuisance to ordinary Western Australians. Any responsible law regarding prostitution must address these risks and potential harms.[154]

Indeed, there was little in this Bill to suggest a focus on better health and safety outcomes for sex workers and the people involved in the sex industry. The parliamentary debates that took place over this Bill were, similarly to those opposing the Labor government's 2007 Bill, largely focused on the risk that sex work poses over the 'moral fabric' of Western Australian society.[155] The underlying idea is that women need to be protected from themselves and from choosing to engage in sex work.[156] The overall argument is that decriminalising sex work will lead to the destruction of marriages, as the use of sex workers by husbands will increase with more availability.[157] As research shows, restricting sex workers and sex work businesses to certain delineated industrial areas (often called 'zoning') does nothing in terms of ensuring sex workers' safety and reducing stigma.[158] As such, the 2011 Bill received very little support from sex worker-based organisations, including Scarlet Alliance.[159] In the end,

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[152] Hansard (WA) Legislative Assembly Second Reading, *Parliamentary Debates*, 3 November 2011 (n 151).

[153] Nagy and Powell (n 5).

[154] Hansard (WA) Legislative Assembly Second Reading, *Parliamentary Debates*, 3 November 2011 (n 151).

[155] Nagy and Powell (n 5) 8. Hansard (WA) Legislative Council Second Reading, *Parliamentary Debates*, 13 March 2008 (Hon. Donna Faragher, Member of the Legislative Council).

[156] Nagy and Powell (n 5) 9.

[157] Ibid 9. Hansard (WA) Legislative Council Second Reading, *Parliamentary Debates*, 13 March 2008 (n 155) (Hon. Anthony Fels, Member of the Legislative Council).

[158] Elizabeth Taylor and Tegan Larin, 'Zoning Damned Whores and God's Police: Maintaining Prostitution through Land Use and Euphemism in Victoria, Australia' (2022) 21(1) *Journal of Planning History* 28.

[159] 'Submission in Response to Proposed Sex Industry Law Reform in Western Australia 2011', *(Scarlet Alliance-Australian Sex Workers Association*, 27 January 2011) <https://scarletalliance.org.au/library/subwa_2011>.: 'We consider it untenable for the WA Government to consider such radical and hostile legislation for sex workers without seeking input from the Australian Sex Workers Association.'

the Bill failed to pass and, at the time of writing, there has been no further attempt at reforming sex work legislation in Western Australia.[160]

V. DISCUSSION: MORAL PANIC LEGISLATION AND THE REGULATION OF SEX WORK IN WA

As previously mentioned, parliamentary debates that led to the adoption of the Act show elements typical of moral panic. In analysing how moral panics originate, Weitzer identifies the concept of moral crusades as the starting point.[161] Moral crusades arise in reaction to a perceived social problem, and its participants see their mission as a righteous enterprise, with both symbolic and practical goals.[162] Moral crusades may, in turn, transform into moral panics if the evil they target is blown out of proportion; this is arguably what happened with sex work.[163] The leading groups of these crusades may change in time but, when it comes to sex work, they are consistently composed of Christian-rights members and radical feminists, who make unrealistic, unscientific and often unverifiable claims about the harms generated by the sex industry.[164] For instance, they might claim that legalising or decriminalising sex work leads to more harm and an increase in the size of the industry, as well as organised crime, but seldom will these claims be supported by actual evidence.[165]

It is therefore possible to identify three elements typical of a moral panic:

1) *Concern* raised over the supposed behaviour of a certain group and especially the consequences of such behaviour on society as a whole.
2) *Hostility* towards members of the targeted group designated as the enemy of otherwise respectable members of society. They are demonised and marginalised, as well as deprived of their agency and credibility.
3) *Disproportionality*, as the initial concern is blown out of proportion and sober empirical evaluation and material evidence are forgotten.[166]

Moral panics can arise in response to phenomena which have nothing to do with sexuality. The Covid-19 pandemic is an example of how health-related scares and

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[160] Nagy and Powell (n 5) 5.
[161] Ronald Weitzer, 'Moral Crusade Against Prostitution' (2006) 43(3) *Society (New Brunswick)* 33.
[162] Ibid 33.
[163] Ibid. Not only street-based, and not just sex work, but also pornography, as argued by MacKinnon and Dworkin in Andrea Dworkin and Catharine A. MacKinnon, *In Harm's Way : the Pornography Civil Rights Hearings* (Harvard University Press, 1997). Erich Goode and Nachman Ben-Yehuda, 'Grounding and Defending the Sociology of Moral Panic' in Sean Patrick Hier (ed), *Moral Panic and the Politics of Anxiety* (Taylor and Francis, 2012), 27.
[164] Weitzer, 'Moral Crusade Against Prostitution' (n 161) 33. We find this tendency in Sheila Jeffreys, *The Idea of Prostitution* (Spinifex, First ed, 1997). Kathleen Barry, *The Prostitution of Sexuality* (NYU Press, 1994).
[165] Nagy and Powell (n 5). Mary Sullivan and Sheila Jeffreys, ' Legalising Prostitution is Not the Answer: The Example of Victoria, Australia' (2001) *Coalition Against Trafficking In Women (Australia)*.
[166] Lesley Rae Hamilton, 'Sex Trafficking Legislation Under the Scope of the Harm Principle and Moral Panic' (2016) 67(2) *The Hastings law journal* 531, 555.

anxieties can also turn into moral panics.[167] In some cases, episodes of acute health anxieties intersect with moral regulation processes.[168] They may, under certain circumstances, lead to the construction of 'folk devils', who are deemed at least in part responsible for the outbreak and/or the spread of the disease.[169] Indeed, the Covid-19 pandemic was soon racialised and, as a result, Asian communities worldwide were targeted and became victims of outrage and violent attacks against them.[170] Racism coupled with health scares is capable of producing very powerful moral panics, the consequences of which can be disastrous for entire communities.[171]

Moral panics relating to sexual behaviour have occurred so often in history that some have developed the term 'sex panics' to represent a self-standing category of moral panics.[172] British sociologist Stanley Cohen has claimed that 'societies are subjected, every now and then, to periods of sex panic'; these are significant because they constitute the 'political moment of sex', which translates into the transmogrification of moral values into political action.[173] In the context of the regulation of sex work in Western Australia, concerns about the visibility of street-based sex work, and the dangers associated with white slavery, sex trafficking and the presence of children in brothels formed the basis for the adoption of the Act.[174] Therefore, the Act, as it is, constitutes an example of morality-driven legislation, motivated by the need to respond to a perceived threat posed by sex work and its detrimental effects on the moral fabric of society.[175]

The criminalisation of practices and behaviours that are considered unacceptable is still very common. Representative of this attitude are the recently introduced provisions establishing Protected Entertainment Precincts (PEPs) around Perth, mentioned above. These provisions took effect on 24 December 2022 and amended the *Liquor Control Act 1988* to establish areas that fall under the definition of PEP, meaning an area with a number of licensed premises close together, and where the

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[167] Daniel Beland, ' The Unhealthy Risk Society, Health Scares and the Politics of Moral Panic' in Sean Patrick Hier (ed), *Moral Panic and the Politics of Anxiety* (Taylor and Francis, 2012).

[168] Judith R. Walkowitz, *Prostitution and Victorian Society : Women, Class, and the State* (Cambridge University Press, 1980). Carol Smart, *Feminism and the Power of Law* (Routledge, 1989).

[169] Beland (n 167) 225; think about AIDS and sex workers/the gay community.

[170] 'Covid-19 Fueling Anti-Asian Racism and Xenophobia Worldwide', *Human Rights Watch*, (12 May 2020) <https://www.hrw.org/news/2020/05/12/covid-19-fueling-anti-asian-racism-and-xenophobia-worldwide>. 'President Trump calls coronavirus 'kung flu'', 24 June 2020) <https://www.bbc.com/news/av/world-us-canada-53173436>.

[171] Beland (n 167) 225.

[172] Janice M. Irvine, 'Transient Feelings: Sex Panics and the Politics of Emotions' (2008) 14(1) *GLQ: A Journal of Lesbian and Gay Studies* 1.

[173] Ibid 2. Gayle Rubin, 'Thinking sex: notes for a radical theory of the politics of sexuality' in Richard G. Parker and Peter Aggleton (eds), *Culture, Society and Sexuality: a Reader* (Taylor and Francis Group, 1 ed, 1999). Jeffrey Weeks, *Sexuality and its Discontents* (Routledge and Kegan Paul, 1985).

[174] Hansard (WA) Legislative Assembly, *Parliamentary Debates*, 11 October 2000 (n 126). Hansard (WA) Legislative Assembly Second Reading, *Parliamentary Debates*, 25 September 2007 (n 147). Hansard (WA) Legislative Council, *Parliamentary Debates*, 9 December 1999 (n 124).

[175] Hansard (WA) Legislative Council Second Reading, *Parliamentary Debates*, 13 March 2008 (n 155).

government recognises safety as a priority.[176] Essentially, under the amended *Liquor Control Act*, the police have been given the power to ban any person within those areas who they consider to be acting in an antisocial, violent, or threatening way.[177] An exclusion order effectively stops a person from entering or remaining in all PEPs, and it can be short-term (up to 6 months) or extended (up to 5 years, applicable only to adults).[178] It is a criminal offence to breach an order, however, you can still enter a PEP for work, residential, study, health and other approved purposes.[179]

Mechanisms prohibiting someone from entering a licensed premise already existed under the *Liquor Control Act 1988*, in the form of prohibition orders.[180] However, the government considered them to be too limited in scope, as they omitted public areas.[181] Thus, part 5AA has been added to the *Liquor Control Act*, and its object is to 'minimise, in areas with a concentration of licensed premises, harm to people; adverse effects on safety or welfare; adverse effects on the atmosphere, ambience, character or pleasantness of the areas; and public disturbances disorder'.[182] The enforcement of these provisions lies in the hands of the police who, pursuant to section 152NI, have developed guidelines regarding the type of behaviour that would elicit an exclusion order.[183] However, these guidelines have not been made public.[184] Especially concerning in such context is the resulting unfair targeting of Indigenous People, as well as other already marginalised populations.[185] Considering that police guidelines are unlikely to become public, significant discretion is afforded to police officers to decide what amounts to 'antisocial' conduct.[186] Not unlike many of the provisions contained in the *Prostitution Act*, the dangers of this legislation lie in the impact it will have on marginalised communities, including street-based sex workers, and the overwhelming amount of discretion afforded to police in deciding who to

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[176] 'Protected Entertainment Precincts', *Department of Local Government, Sport and Cultural Industries*) <https://www.dlgsc.wa.gov.au/racing-gaming-and-liquor/liquor/protected-entertainment-precincts>.
'Exclusion from Protected Entertainment Precincts', *(Legal Aid Western Australia*) <https://www.legalaid.wa.gov.au/index.php/find-legal-answers/crime/under-arrest-and-police-powers/exclusion-protected-entertainment-precincts>. *Liquor Control Act 1988* (n 6).

[177] 'Protected Entertainment Precincts' (n 176). Liquor Control Amendment (Protected Entertainment Precincts) Bill - Explanatory Memorandum 2022 (Western Australia) ('Liquor Control Amendment (Protected Entertainment Precincts) Bill - Explanatory Memorandum').

[178] 'Exclusion from Protected Entertainment Precincts' (n 176).

[179] The defences for someone entering a PEP after having been issued an order are provided at S 152NK(3) of the *Liquor Control Act 1988* (n 6). 'Protected Entertainment Precincts' (n 176).

[180] *Liquor Control Act 1988* (n 6) Part 5A.

[181] Hansard (WA) Legislative Council - Receipt and First Reading, *Parliamentary Debates*, 16 November 2022, 5403 (Hon. Stephen Dawson, Minister for Emergency Services).

[182] Ibid. *Liquor Control Act 1988* (n 6) Part 5AA.

[183] Hansard (WA) Legislative Council - Receipt and First Reading, *Parliamentary Debates*, 16 November 2022 (n 181) 5404.

[184] Keane Bourke, 'Protected Entertainment Precincts to Be in Place Within Weeks in Five Areas Including Northbridge', *AbcNews*, (30 November 2022).

[185] Ibid. Peter Collins (Aboriginal Legal Service) said it is an absolute certainty that Aboriginal People will be disproportionately impacted.

[186] Ibid.

target.[187] For this reason, future research will need to be conducted to ascertain the impact of these PEPs on marginalised and vulnerable populations, including sex workers.

VI. CONCLUSION

The *Prostitution Act* was created with two main intentions: rendering street-based sex work in Western Australia less visible, especially in residential areas; and tackling allegedly pervasive by-products of sex work in the state, including white slavery, sex trafficking and child prostitution.[188] Notably, at the international level, State parties to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, are obligated to criminalise sex trafficking within their domestic legislation.[189] Australia has officially ratified the Protocol in 2005 and is thus bound to its obligations.

This article has argued that the Act failed to ensure the protection and promotion of sex workers' human rights, health and well-being in Western Australia while instead focusing on the moral panic around sex work. The overwhelming use of criminal law to regulate, control and punish certain individuals and conducts has concerned several human rights organisations who, on the matter of sex work, have spoken out in favour of a decriminalised approach.[190] Indeed, criminal law is one of the harshest tools in the hands of the state, and should be used as a last resort, after other less punitive means have failed.[191] Addressing the tendency to overcriminalisation, the International Commission of Jurists has recently published the 8 March Principles, in order to set out a human rights-based approach to criminal law penalising various conducts,

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[187] Ibid. Brad Pettit (Greens MP), one of the only two politicians who opposed the Bill.

[188] Hansard (WA) Legislative Assembly, *Parliamentary Debates*, 11 October 2000 (n 126). There was mention of petitions which were brought to Parliament, asking the Government to do something about prostitution. The communities mentioned to be most affected included Highgate, parts of Northbridge, and the Town of Vincent.

[189] *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, opened for signature 2 December 1949, A/RES/317 (entered into force 25 July 1951) ('*Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*'). *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*., opened for signature 12 December 2000, GA/RES 55/25 (entered into force 25 December 2003) ('*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*.'). Also, Australia's laws criminalising human trafficking and slavery are contained in Commonwealth legislation. Divisions 270 and 271 of the *Criminal Code Act 1995* (Australia) ('*Criminal Code Act 1995*').

[190] UNAIDS, WHO, Amnesty International, Human Rights Watch, GAATW, to name a few. Sex Worker Inclusive Feminist Alliance (SWIFA), 'Impact of Criminal Law on the Health, Safety and Human Rights of Sex Workers', *Opinio Juris*, 21 June 2023) <https://opiniojuris.org/2023/06/21/impact-of-criminal-law-on-the-health-safety-and-human-rights-of-sex-workers/>.

[191] 'The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty', *(International Commission of Jurists*).

including sex, reproduction, drug use, and HIV.[192] Principle 17 addresses the exchange of sexual services between consenting adults and stresses the importance of its decriminalisation.[193] The document argues that criminalisation is often used to indicate which groups are considered deserving of protection and which deserve condemnation, thus reinforcing structural inequalities and stigmatisation.[194] As this analysis has shown, Western Australia is not exempt from such uses of criminal law.

For this reason, future research on sex work legislation in Western Australia should focus on the possibility of reform, and especially on re-evaluating the efficacy of criminal law and police powers as a means of regulating the sex industry. Political debates around sex work have put too much emphasis on perceived socio-cultural risks that it poses to concepts such as morality, social order and respectable neighbourhoods.[195] There is, however, enough evidence to claim that this legislation was largely motivated by moral panic over the visibility of street sex work and the dangers that a decriminalised sex industry poses to society.[196] More research on sex work in Western Australia is needed, which would help highlight the diverse nature of the sex industry and the experiences of sex workers.[197]

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[192] Ibid.
[193] Ibid Principle 17.
[194] Ibid 11.
[195] Nagy and Powell (n 5) 7.
[196] Weitzer, 'Moral Crusade Against Prostitution' (n 161).
[197] Nagy and Powell (n 5) 13.