

property damage offence by creating graffiti. The Voluntary Industry Graffiti Strategy, developed in conjunction with the Australian Retailers Association, encouraged “the responsible sale of these tools of the graffiti trade” (Department of Fair Trading, “Scheme Makes it Harder to Get Tools of the Graffiti Trade”, Media Release, 3 December 2000, <<http://www.fairtrading.nsw.gov.au>>). Retail outlets participating in the scheme were asked to adopt the following practices:

- avoid putting spray-paint cans and felt pens in places where staff cannot see them;
- consider the display of only empty or dummy paint cans and pens;
- where commercially viable, remove self-service access to these products, only providing them when requested;
- secure products behind counters in glass display cabinets;
- where there is evidence of theft, request store security to focus on paints and pens; and
- display in the store, preferably adjacent to the products, a poster which tells consumers the penalties for misuse of paints and pens.

However, in September 2003 the *Summary Offences Amendment (Spray Paint Cans) Act 2002* came into operation. In NSW it is now an offence to sell spray paint cans to persons under the age of 18: SOA s 10C.

In February 2006 the NSW government announced that it planned to introduce further legislative restrictions on the sale of spray paints (A Mitchell, “Spray paint restriction in battle to erase graffiti”, *Sun-Herald*, 5 February 2006, 9).

8.6.3 Local Government Act offences

As with some of the offence categories we have looked at earlier in this chapter, there are many other property damage offences scattered through the legislation, covering property owned by the railways, the Commonwealth, local government, maritime authorities, and so on. For example, the *Local Government Act 1993* (NSW) contains summary offences of wilfully breaking bottles, glass or syringes in a public place (s 630, maximum fine of five penalty units); damaging, defacing or polluting a public bathing place (s 631, five penalty units); using a skateboard, roller blades or roller skates to obstruct or annoy another person in a public place (s 633A: five penalty units); and wilfully removing or destroying notices and signs (s 667: 20 penalty units).

8.7 Prostitution

8.7.1 Introduction

The legal regulation of prostitution ranges from complete prohibition of all activities associated with the market in sexual services through the provisions of the criminal law at one extreme to complete decriminalisation at the other, with a variety of half-way approaches in the middle, such as the regulation and/or licensing of brothels through planning laws. The industry remains, however, resistant to eradication, and criminal prohibitions largely operate to influence the way in which services are marketed. There is frequently a large gap between the formal provisions in the law and actual enforcement due to the high demand for services, social ambivalence about the behaviour, priorities in policing, and opportunities for corruption. Evidence at the Fitzgerald Inquiry in Queensland graphically demonstrated that even where the law on prostitution involved strict prohibition, the reality was widespread availability with extensive corrupt involvement in the industry by police and other government officials (*Report of a Commission of Inquiry Pursuant to Orders in Council* (1989)).

Criminal prohibitions typically focus on certain aspects of the industry, such as soliciting for the purposes of prostitution, living on the earnings of prostitution, and using or allowing the use of premises for prostitution (keeping a brothel). Rarely, if ever, is prostitution *per se* made an offence. Typically, the offences geared to exploitation and pimping (such as living on the earnings of prostitution) carry heavier penalties than the offences aimed at prostitutes themselves

(such as soliciting). However, in practice the enforcement of prostitution laws is mainly aimed at prostitutes. For example, between 1990 and 2000 in New South Wales, there were 3758 appearances for soliciting compared with only 59 for living on the earnings.

In recent years, the policy underlying prostitution laws has moved from a concern with moral issues and focused increasingly on issues such as health (including HIV transmission), police corruption, working conditions (including client violence) and public order. Associated with the change has been a widespread liberalisation of prostitution laws. As with some other areas of the criminal law, feminist analyses of prostitution laws have been highly influential in law reform in Australia. Feminist scholars have argued for the recognition of prostitution as work and, in doing so, have focused attention on the conditions under which prostitutes work, the exploitation of prostitutes as workers, the “invisibility” of clients in law enforcement and the corresponding discriminatory burden carried by female workers.

8.7.2 The history of prostitution law in NSW

An examination of the changes in prostitution laws in NSW over the 20th century illustrates several important themes. First, it shows that “legal measures designed to suppress prostitution usually produce a restructuring of the industry in ways that are conducive to the growth of organised crime and police corruption and detrimental to the interests of sex workers”: B Sullivan, “Feminist Approaches to the Sex Industry” in S Gerull and B Halstead (eds), *Sex Industry and Public Policy, Conference Proceedings AIC* (1992) 7 at 10. Secondly, it demonstrates the significance of public order concerns in the framing of prostitution laws. Finally, it demonstrates the extent to which the formal provisions of the law may be undermined by policing policy and practices.

8.7.2.1 *The intensification of criminal prohibitions: 1908 to 1979*

Soliciting for the purposes of prostitution in a public place was not an offence in NSW until 1908, when the *Vagrancy Act* 1902 was amended (by the *Police Offences (Amendment) Act*). Section 4(1)(i) created the offence of “being a known prostitute, [who] solicits or importunes for immoral purposes any person who is in any public street, thoroughfare, or place”. Before the enactment of this provision, prostitutes were prosecuted for “loitering” or “riotous or indecent behaviour” under successive *Vagrancy Acts*. For example, s 4(1)(c) of the *Vagrancy Act* 1902 contained an offence of “being a common prostitute, [who] wanders in any street or public highway, or is in any place of public resort, and in either case behaves in a riotous or indecent manner”.

The 1908 amendments also made it an offence for a male person to solicit or importune for immoral purposes, in a public place, but this referred to pimps rather than prostitutes or clients (s 4(2)(o)(ii)). Other offences in the *Vagrancy Act* were living on the earnings of prostitution (s 4(2)(o)) and being the owner, occupier or agent or manager of any premises who induced or suffered any female he knew to be a common prostitute to be in such premises for the purpose of prostitution (s 8B). The impact of the 1908 amendments was described by the Select Committee on Prostitution:

The workings of the 1908 Act provide a cautionary tale for prostitution law reformers and illustrate the shortcomings of a prohibitionist policy. Historians have concluded that the Act effectively reorganised but did not eliminate prostitution in Sydney. The stated aim of the reformers was to rescue women from the exploitation of male pimps and landlords; they ignored the argument that many women were recruited by economic conditions rather than male pressure. The demand for prostitution was unchecked and women continued to work but under changed conditions ... it is more likely that freelance prostitutes were ... driven indoors to become employees of big brothel operators. (at 243)

The next major changes in prostitution laws occurred in 1968. According to the Select Committee there was an expansion in the prostitution industry in Sydney in the 1960s, largely due to Sydney becoming an “R and R” centre for US servicemen. New soliciting and loitering offences were

created in s 28 of the *Summary Offences Act* 1970 (first enacted in the *Vagrancy Act* in 1968 and transferred in 1970). The requirement of being a known prostitute was deleted and the new offences simply prohibited soliciting or loitering for prostitution in or near a public place. A new offence was created of using, for the purpose of prostitution or soliciting, premises held out as a massage parlour, sauna etc (s 30 of the *Summary Offences Act* 1970) and the penalty for the offence of knowingly live on the earnings of prostitution was increased (s 31 of the *Summary Offences Act* 1970). Section 32 created the offence of being the owner, occupier, manager or person assisting in the management of any premises and knowingly suffer or permit premises to be used for prostitution or soliciting. The Select Committee described the effect of the 1968 changes as follows:

After the legislation prostitution became less visible, literally and figuratively. Prostitute witnesses whose experience goes back to 1968 alleged that these punitive measures increased the power of pimps and certain brothel owners ... one woman managed to operate a number of brothels in the area. According to those witnesses, the police protected her monopoly and she was able to dictate to her workers on pay and conditions.

Women who had worked as street prostitutes in this period also pointed out that 'weighing in' was customary. Women regularly paid police to cut down arrests, although they agreed to a number of often pre-arranged arrests. Not all prostitutes were critical of this system. Some saw their payment and official fines as a form of tax; in return the police provided some protection. By taking action against the newcomers and other people outside the system, the police kept down the number of workers and guaranteed the income of the regulars. The police also kept street prostitution within certain geographical limits.

It could be said that prostitution was under control, but many critics questioned the social, political and financial costs of that control ...

The main criticism of this system was that it touched the practitioners rather than the organisers of prostitution. Also it bore heavily on the most vulnerable sections of the workforce, notably those who could not or would not pay protection. (at 246)

8.7.2.2 Decriminalisation: 1979 to 1983

In 1979, reforms were enacted which decriminalised most of the key prostitution offences and which have continued, in substantially the same form, to the present day. The reforms recognised "first, that the present law discriminates unfairly against the prostitute as compared to the customer, and second, that wherever possible the law should be directed at preventing and punishing exploitation" (Frank Walker, *Hansard*, Legislative Assembly, 23 April 1979, at 4923). The major changes were:

- The two core offences of soliciting for the purpose of prostitution and being an owner etc who knowingly permits premises to be used for prostitution (keeping a brothel) were repealed and not replaced (ss 28 and 32 of the *Summary Offences Act* 1970, respectively).
- The offences of living on the earnings and using, for the purpose of prostitution or soliciting, premises held out as a massage parlour, sauna etc were transferred to ss 5 and 6 of the *Prostitution Act* 1979, respectively.
- New offences were created in the *Prostitution Act*: being the owner, occupier or manager etc of premises held out as a massage parlour, sauna etc and knowingly permitting the premises to be used for prostitution (s 7), and advertising premises or persons available for prostitution (s 8).

8.7.2.3 Backsliding: 1983 to 1995

In 1983 the government responded to public and media pressure about street prostitution in residential areas, especially in the Kings Cross-Darlinghurst-East Sydney region and soliciting for prostitution was reintroduced in a restricted form. Section 8A was inserted into the *Prostitution Act*, which read, in relevant part:

(1) A person in a public street shall not, near a dwelling, school, church or hospital, solicit another person for the purpose of prostitution ...

(2) A person shall not, in a school, church or hospital, solicit another person for the purpose of prostitution.

The purpose of the amendment was

to ensure that persons who reside in basically residential areas are not subjected to the flagrant and unseemly aspects of prostitution, which cause severe inconvenience. Prostitution is an activity that has traditionally been confined to commercial areas. The effect of creating an offence of soliciting in the terms of the proposed section 8A will be to redirect what is essentially a commercial activity back into commercial and industrial areas. (NSW Parliament, *Hansard*, Legislative Assembly, 29 March 1983, at 5243, per Frank Walker)

At the same time, the New South Wales Legislative Assembly established a Select Committee to examine the legal regulation of prostitution. The Committee reported in 1986: *Report of the Select Committee of the Legislative Assembly Upon Prostitution*. The Committee described its approach as favouring “decriminalisation with controls”. The major recommendations included:

- (1) Decriminalisation of most aspects of brothel ownership, with regulation of brothels through planning law. Local councils would vet applications for development approval in the first instance. Brothels would not be permitted in residential areas, near schools, churches or hospitals, or at street level in commercial shopping centres. The person lodging a development application for a brothel would be required to be a person “of good fame and character”.
- (2) The offence of living on the earnings of prostitution should be replaced with an offence “for any person to use violence or coercion or other forms of exploitation against any person or to supply an illegal drug of addiction in order to live wholly or in part on the earnings of prostitution”.
- (3) “Discreet advertising of sexual services” in the print media should be permitted.
- (4) The police should be directed to enforce the soliciting offence against clients.
- (5) The repeal of the offence of being the owner, occupier or manager etc of premises held out as a massage parlour, sauna etc and knowingly permitting the premises to be used for prostitution.
- (6) The repeal of sections 3(1)(a) and (e) of the *Disorderly Houses Act* 1943.

In 1988, the new Greiner government repealed the *Prostitution Act* and transferred the provisions, without significant amendment, to the *Summary Offences Act* 1988.

The recommendations of the Select Committee were ignored for many years. Throughout the 1980s and the 1990s, much of the sex industry operated in a quasi-legal fashion. However, police action in two areas served to undermine the 1979 reforms. First, rarely used wartime legislation, the *Disorderly Houses Act* 1943, was revived and an increasing number of declarations were sought in the Supreme Court. A disorderly house declaration enabled prosecutions to be undertaken for the offences of owning, occupying or being found on such premises. The decision in *Sibuse Pty Ltd v Shaw* (1988) 13 NSWLR 98, that a declaration may be made on the mere ground that the premises are a brothel, made it easier to obtain declarations and paved the way for many further applications. Secondly, the police revived the common law offence of brothel keeping: *Rahme* (1993) 70 A Crim R 357.

8.7.2.4 Further reform: 1995 to the present

In 1991, the then Attorney-General, Peter Collins, introduced the Disorderly Houses Amendment Bill 1991 to overturn the decision in *Sibuse*, to abolish the common law offence, to cut down the ambit of the living on the earnings offence and to introduce a new offence relating to exploitation and coercion. The Bill was opposed by the then Labor opposition and it lapsed. After extensive lobbying by sex industry groups, health workers and HIV/AIDS organisations, the new Labor government introduced the *Disorderly Houses (Amendment) Act* 1995 which incorporated the provisions of the Collins Bill. The thrust of the 1995 Act was to reinforce the policy underlying the 1979 reforms by overturning the decisions in *Sibuse* and *Rahme* and to further involve planning laws in the regulation of brothel operation. In doing so, the Act implemented several of the key recommendations of the Select Committee, after a delay of nearly 10 years.

For the history of prostitution law and practice in New South Wales, see *The Report of the Select Committee of the Legislative Assembly Upon Prostitution* (1986); R Perkins, "Push and Pull Politics: Prostitution, Prejudice and Punishment" (1986) 74 *Arena* 90; H Golder and J Allen, "Prostitution NSW 1870-1932: Re-structuring an Industry" (1979) *Refractory Girl* 18; J Allen, "The making of a prostitute proletariat in early twentieth-century New South Wales" in K Daniels (ed), *So Much Hard Work – Women and Prostitution in New South Wales* (1984) at 192-232; B Sullivan, "Feminist Approaches to the Sex Industry" in S Gerull and B Halstead (eds), *Sex Industry and Public Policy*, Conference Proceedings, AIC (1992) at 7; R Perkins et al (eds), *Sex work and sex workers in Australia* (1994); B Sullivan, *The Politics of Sex: Prostitution and Pornography in Australia Since 1945* (1997). For an overview of the legal regulation prostitution laws in NSW, see S Egger and C Harcourt, *Prostitution in New South Wales: A Report to the Criminal Justice Commission, Queensland* (1991); S Smith, "The regulation of prostitution: a review of recent developments", *NSW Parliamentary Library Research Service, Briefing Paper*, No 21 (1999).

An attempt to provide a demographic profile of the prostitution trade in NSW Committee based on two surveys conducted in 1984-85 was made by the NSW Select Committee Upon Prostitution (1986). The Committee estimated (at 50-73) that on an average day, there were about 1500-2200 prostitutes working: 175 (adult) street prostitutes; between 1015-1510 working in brothels; 200-360 working for escort agencies; 60-100 working out of bars; and about 35 working from homes or units. The minimum number of clients on an average day in 1984-85 was 7041-9600, with 1640 utilising street prostitutes, 4800-6970 visiting brothels, 400-720 using escort agencies, 120-200 meeting prostitutes in bars, and 70 using prostitutes working from homes or units. The Committee estimated that the maximum number of clients could be double the minimum. The amount of money spent by customers on prostitution services on an average day was estimated at between \$170,920 and \$720,150. Taking the mid-point of this estimate (\$445,535), a very rough estimate of the money spent on prostitution services in NSW per annum in 1984-85 was \$163 million. It is likely that the industry has expanded from this time.

8.7.3 The current law

The law regulating prostitution is now contained in the *Summary Offences Act* 1988, the *Disorderly Houses Act* 1943 and, to a lesser extent, the *Environmental Planning and Assessment Act* 1979.

8.7.4 Soliciting

The soliciting offences are contained in s 19 of the *Summary Offences Act* 1988:

- 19** (1) A person in a road or road related area shall not, near or within view from a dwelling, school, church or hospital, solicit another person for the purpose of prostitution ...
- (2) A person shall not, in a school, church or hospital, solicit another person for the purpose of prostitution ...
- (3) A person shall not, in or near, or within view from, a dwelling, school, church, hospital or public place, solicit another person, for the purpose of prostitution, in a manner that harasses or distresses the other person ...
- (5) In this section:
- (a) a reference to a person who solicits another person for the purpose of prostitution is a reference to a person who does so as a prostitute, and
- (b) a reference to soliciting includes a reference to soliciting from a motor vehicle, whether moving or stationary.

All three offences contained in s 19 carry a maximum penalty of imprisonment for three months. Section 19(1) is largely as enacted in 1983 with three exceptions. The words "or within view" were added in 1988, and an amendment in 1997 changed the location of the offence from "a public place" to a "road or road-related area". The latter is defined in s 4 to mean a road or road-

related area “within the meaning of the *Road Transport (General) Act 1999*”. Section 19 was further amended by the *Crimes and Courts Legislation Amendment Act 1999* which added sub-s (5). The purpose of the amendment was stated in the second reading speech:

By expressly mentioning “motor vehicles” the new offence will operate to target “kerb crawlers”. Kerb crawlers are persons who seek the services of street prostitutes by driving slowly along the street. Their behaviour causes significant community concern in certain areas. The mere act of driving slowly in a non-dangerous manner is not criminalised by this proposal ...

The actions that constitute soliciting are well established in the law and the actions of persons in motor vehicles who are charged with soliciting will reflect the action of propositioning, pestering or similar relevant behaviour as well as being in the motor vehicle. (*Hansard*, Legislative Council, 25 November 1999, at 3710, per Ian MacDonald)

Client specific offences were created in s 19A by the *Crimes and Courts Legislation Amendment Act 1999*. Section 19A duplicates the three offences (and penalties) contained in s 19 but substitutes sub-s (5)(a): “a reference to a person who solicits another person for the purpose of prostitution is a reference to a person who does so as a prospective client of a prostitute ...”.

An ongoing problem with the enforcement of soliciting laws has been the prosecution of prostitutes but rarely clients. The Select Committee commented that there was no “logical or legal reason” for the failure to prosecute clients under the soliciting provisions and recommended that police be directed to enforce the soliciting provisions against clients (262). The purpose underlying the confining of s 19 to prostitutes and the creation of client offences in s 19A was stated in the second reading speech:

Whilst it appears that the offences contained in section 19 apply equally to prostitutes and clients of prostitutes, in practice only prostitutes are charged by police with offences under section 19 ...

By clearly criminalising the behaviour of persons seeking the services of prostitutes in the proscribed public places, the creation of the new offences should have a deterrent effect on such persons and thus reduce the incidence of street prostitution.

The creation of a separate offence for clients will guide police discretion by providing police with an explicit policy statement and clear direction about the desirability of charging clients of sex workers with prostitution offences ... The offence will be non-gender specific so that it will equally apply to heterosexual, homosexual and transgender street prostitution. (*Hansard*, Legislative Council, 25 November 1999, at 3710, Ian MacDonald)

The meaning of solicit in s 19(1) was considered in *Coleman v DPP* [2000] NSWSC 275. The defendant was convicted of soliciting in Forbes Street, Darlinghurst within view of SCEGGS boarding school. On appeal, the defendant contended that soliciting involves “persistence, pestering, pressure” and that her conduct was no more than a simple request. O’Keefe J upheld the conviction and concluded:

[S]olicit involves a personal approach, for the purpose of, or which is accompanied by, or which constitutes or conveys, an offer that some form of sexual activity will be engaged in by the person making the approach in return for monetary gain.

It is unnecessary ... for there to be any element of aggressive persistence, pestering, pressure, or harassment or annoyance to the person approached. Nor is there a need for distress or embarrassment to be caused by or result from the approach or offer ... The mere approach by a prostitute to a person who is a potential customer, when she is dressed in a suggestive manner, perhaps with appropriate gestures or words, or is presented in a particular way is sufficient to constitute an offer of services as a prostitute. (at [41]-[42])

Section 20 creates an offence of “public acts of prostitution”, punishing “each of the persons taking part in an act of prostitution in, or within view from, a school, church, hospital or public place; or within view from a dwelling”. Where the act of prostitution takes place in a vehicle which is in or within view from a school, church, hospital or public place or within view from a dwelling, each of the persons is guilty of an offence “whether or not the act of prostitution can be seen from outside the vehicle”. The maximum penalty for an offence under s 20 is 10 penalty units or six months’ imprisonment.

Street soliciting has thus been legal in NSW for approximately 27 years except in the few prescribed locations: near or within view of a school, church, hospital or dwelling. There has been a decline of approximately 95% in the number of prosecutions for street soliciting from the high point of the early 1970s under the *Summary Offences Act 1970* to the present (from 4288 charges in 1972 to 274 charges in 2001). In various parts of Sydney there is a thriving legal street “market place” in sexual services. The most well known area is a stretch of William St near King’s Cross in the inner city. The policing of this area is undertaken in consultation with both sex workers and local residents and combined with road closures to limit the expansion of the market into the areas surrounding a private girl’s school which is located nearby. Other well known street markets are located at Canterbury Road in the suburbs of Campsie, Lakemba and Belmore and the Great Western Highway at Minchinbury and Mt Druitt. From time to time, tensions erupt between local residents, sex workers and other interested parties such as local government representatives. Often police are called upon to conduct a saturation policing exercise to contain the market to the prescribed locations and, as a result, the tensions ease, at least for a while.

Street-based sex workers represent only approximately 10% of the sex industry population. Most of the remaining 90% of the sex industry comprises various kinds of “indoor” work – in brothels (with or without council planning approval), private premises involving one or two women working independently (legally defined as brothels but rarely seeking council planning approval) and phone-based escorts (B Donovan and C Harcourt, “The Female Sex Industry in Australia: A Health Promotion Model” (1996) 9(1) *Venereology* 63).

Soliciting can only be committed by women in England. In *DPP v Bull* [1995] QB 88 at 93-4, Mann LJ (within whom the Laws J agreed) held that s 1(1) of the *Street Offences Act 1959* (UK), which makes it an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution, was limited to female prostitutes and did not extend to male prostitutes notwithstanding the use of non-gender specific language. Mann LJ observed that “it is plain that the ‘mischief’ that the Act was intended to remedy was a mischief created by women”.

8.7.5 Living on the earnings of prostitution

Section 15 of the *Summary Offences Act 1988* prohibits living on the earnings of prostitution:

15(1) A person shall not knowingly live wholly or in part on the earnings of prostitution of another person.

Maximum penalty: 10 penalty units or imprisonment for 12 months.

(2) For the purposes of subsection (1), a person who is of or above the age of 18 years and who:

- (a) lives with or is habitually in the company of, a reputed prostitute, and
- (b) has no visible lawful means of support,

shall be taken knowingly to live wholly or in part on the earnings of prostitution of another person unless he or she satisfies the court before which he or she is charged with an offence under that subsection that he or she has sufficient lawful means of support.

(3) A person does not contravene subsection (1) by living wholly or in part on earnings derived from a brothel if the person owns, manages or is employed in the brothel.

The offence was transferred from the *Prostitution Act* in substantially the same form. The s 15 offence was amended in 1995 by the *Disorderly Houses Amendment Act 1995*, belatedly implementing the recommendation of the Select Committee. Subsection (3) was added to prevent its application to persons owning, managing or employed in a brothel. Although the former version of the offence was generally understood to be aimed at pimps and others who exploit prostitutes, there was nothing in the section to restrict the application to exploitative relationships. It applied to co-workers of the prostitute, such as, for example, the cleaner or the receptionist in a brothel. However, the 1995 amendments did not address the problem of the dependent relationships of the prostitute and, as s 15 presently stands, it could be used against the adult child or other dependant of the prostitute even in the absence of any exploitative relationship. Indeed an adult dependant who lives with the “reputed” prostitute is presumed to be in breach of the section and must affir-

matively establish that he or she has independent lawful means of support. Furthermore, s 15(3) only exempts those involved in brothels and thus the support workers of street workers (for example, those who record client car numbers or hold safe sex equipment) may still be prosecuted for living on the earnings.

The Select Committee recommended that the ambit of the offence be cut down to restrict its application to circumstances of “violence or coercion or other forms of exploitation ... or to supply an illegal drug of addiction”. Instead, a new offence was created:

15A(1) A person must not, by coercive conduct or undue influence, cause or induce another person to commit an act of prostitution.

(2) A person must not, by coercive conduct or undue influence, cause or induce another person to surrender any proceeds of an act of prostitution.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

The offence of living on the earnings was considered in *Shaluga* (1958) 75 WN (NSW) 120. The appellant was described as “working and receiving substantial remuneration from honest and lucrative employment”. On one occasion, he drove a man and two women to and from Holsworthy Military Camp, where the women engaged in prostitution. Shaluga was summarily convicted of living partly on the earnings of prostitution in relation to the fee he earned for driving. The Court of Appeal unanimously quashed the verdict, noting that there was only one isolated incident. The court held that there must be some continuous association and some habitual receipt of money from the earnings of prostitution.

In *Thomas* [1957] 2 All ER 181, it was held that the offence may be established in circumstances where the accused sub-let a room of the house he was renting to a woman whom he knew was using the room for the purposes of prostitution for a grossly inflated rent (£3 a night). In the much-criticised English case of *Shaw v DPP* [1962] AC 220 (HL), the appellant was convicted of living on the earnings by publishing a booklet, the “Ladies Directory”, which advertised the services of prostitutes. The House of Lords dismissed the appeal. Viscount Simonds considered that:

[A] man who advertises prostitutes and receives payment from them for doing so embarks with them on a joint venture the object of which is that they may earn money by prostitution and in turn pay him for his services. No doubt, all that he is paid is not profit, for he has the expenses of publishing. But his net reward is the direct and intended result of their prostitution. (at 264)

Sections 91A-91B of the *Crimes Act* contain serious, but rarely utilised, prostitution-related offences of procuring. Section 91A makes it a crime punishable by up to seven years’ imprisonment “to procure, entice or lead away any person (not being a prostitute)”, with or without that person’s consent, for purposes of prostitution. Section 91B makes it a crime punishable by up to 10 years’ imprisonment where procurement for the purpose of prostitution is done “by means of any fraud, violence, threat, or abuse of authority, or by the use of any drug or intoxicating liquor”.

Australia is a party to several international agreements containing references to prostitution. All are concerned with coercion and exploitation, rather than prostitution per se. *The International Agreement for the Suppression of the White Slave Trade* 1904 (amended in 1910 and 1949) provides that: “Whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes, shall be punished ...” (Art 1) and “Whoever, in order to gratify the passions of another person, has, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or girl over age, for immoral purposes, shall also be punished ...” (Art 2). The *Protocol Additional to the Geneva Conventions, 12 August 1949 and relating to the Protection of the Victims of International Armed Conflicts [Protocol 1]* 1977 provides, in Art 75, that persons who are in the power of a party to the conflict are to be treated humanely and certain acts are prohibited at any time. Amongst the acts listed in Art 75 is “enforced prostitution”. The *Convention on the Elimination of All Forms of Discrimination Against Women* 1979 provides in Art 6 that parties are to take “all appropriate measures,

including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women". The *Convention on the Rights of the Child* 1989 provides in Art 34 that parties shall take all appropriate measures to prevent "the exploitative use of children in prostitution". Article 7 of the *Rome Statute of the International Criminal Court* 1998 includes "enforced prostitution" in the list of acts which "when committed as part of a widespread or systematic attack directed against any civilian population" constitute "crimes against humanity". The Statute has been signed and ratified by Australia.

8.7.6 Premises used for prostitution

8.7.6.1 The Summary Offences Act 1988 provisions

Section 16 creates the following offence (punishable by up to five penalty units or imprisonment for three months):

- 16** A person shall not use, for the purpose of prostitution or of soliciting for prostitution, any premises held out as being available:
- (a) for the provision of massage, sauna baths, steam baths or facilities for physical exercise, or
 - (b) for the taking of photographs, or
 - (c) as a photographic studio,
- or for services of a like nature.

In *Franklin v Durkin* (unreported, NSWSC, 21 October 1994), Levine J ruled that the section created two offences: using premises for the purpose of prostitution, and using premises for the purpose of soliciting for prostitution. In respect of the first, an act of prostitution is a necessary ingredient. An offer to perform in future a sexual service for payment falls within the second offence. The meaning of prostitution was also considered in *Franklin v Durkin*. Section 3(1) of the *Summary Offences Act* provides:

- prostitution** includes acts of prostitution between persons of different sexes or of the same sex, and includes:
- (a) sexual intercourse as defined in section 61H of the *Crimes Act 1900*, and
 - (b) masturbation committed by one person on another, for payment.

Levine J held that the definition, although only inclusive, contemplates the performance of a sexual act and that, as a matter of statutory construction, the wider meaning of prostitution at common law referred to in *Samuels v Bosch* (1972) 127 CLR 517 does not apply. In *Samuels v Bosch*, Gibbs J stated that "[t]he ordinary meaning of 'prostitution' is the offering of the body to indiscriminate lewdness for hire" (at 524). In *Begley v Police* (1996) 188 LSJS 326, it was held by the Full Supreme Court of SA that a "nude Thai massage", which involved a massage conducted by a masseuse with her body coming into contact with a male customer while both naked, for a fee, was an act of prostitution (within the meaning of the *Summary Offences Act* 1953 (SA) s 28(1)). The court held that the massage was intended to and likely to provide sexual gratification to the customer and that sexual intercourse is not necessary for prostitution to occur.

Section 17 creates a corresponding offence for owners, occupiers and managers, punishable by a maximum of 50 penalty units or imprisonment for 12 months. Both offences are directed at the deception involved in the labelling of the premises, rather than the prostitution. The justification for including such offences in the criminal law may be questioned, given that their primary purpose appears to be consumer protection.

As noted earlier, in 1990, the police charged and successfully prosecuted a person for the common law misdemeanour of keeping a brothel, notwithstanding that there had been no prosecutions for this offence "in living memory" (McHugh J in *Sibuse Pty Ltd v Shaw* (1988) 13 NSWLR 98 at 122). Further prosecutions ensued. In *Rahme* (1993) 70 A Crim R 357, the appellant appealed his conviction, arguing that brothel keeping was no longer an offence known to law given the "perceptible changes in the mores of society" (and reliance was placed upon Street CJ's dissenting opinion in *Sibuse*, see next section). However, in the Court of Criminal Appeal, Grove J (with whom James and Campbell JJ agreed) noted that:

[T]he legislature reaffirmed its recognition of the existence of the common law misdemeanour in the passage of s 17(2) of the *Summary Offences Act* [1988] shortly after those views [in *Sibuse*] had been published ... it is for the legislature to regulate social conduct if this is deemed desirable. It is not the function of the court to assess the merit of competing views about changes in society. The offence of keeping a brothel has been and is part of the law of New South Wales and I reject the submission that the court should discard it. (at 361)

The common law offence of keeping a brothel was abolished in 1995 by the *Disorderly Houses Amendment Act 1995*: see s 580C of the *Crimes Act*.

8.7.6.2 Disorderly houses/restricted premises

The *Disorderly Houses Act 1943* was enacted to deal with the “wartime growth of gambling, sly grog and prostitution” (*Report of the Select Committee of the Legislative Assembly Upon Prostitution* (1986) at 244). The Act creates offences of being the owner (s 8) or occupier (s 9) of declared premises. Under s 3, premises may be declared premises on a variety of grounds including that “drunkenness or disorderly or indecent conduct or any entertainment of a demoralising character takes place on the premises” or “liquor or a drug is unlawfully sold or supplied”, or it is frequented by “reputed criminals or associates of reputed criminals” or “persons of notoriously bad character”. Once declared, the premises may be searched at any time by police, without warrant.

In 1968, the Act was amended as part of the Askin government’s attempt to eradicate prostitution, and s 3(1)(e) was added to the grounds: premises that are “habitually used for the purposes of prostitution, or ... have been so used for that purpose and are likely again to be so used for that purpose” (*Vagrancy, Disorderly Houses and Other Acts (Amendment) Act 1968*). According to the Select Committee, even after the amendments, the legislation was “slow and rarely used” (*Report of the Select Committee of the Legislative Assembly Upon Prostitution* (1986) at 245). However, after the repeal of the two key prostitution offences in 1979 (soliciting and owning or managing premises used for prostitution) “the NSW Police Department began a number of actions under the Disorderly Houses Act as they perceived that there was a ‘lack of effective legislation to control the activities of prostitutes’” (*Report of the Select Committee of the Legislative Assembly Upon Prostitution* (1986) at 264, quoting from a police service submission). The Act was increasingly used by police in the 1990s to close brothels and prosecute persons found on the premises (R Perkins, “Working Girls” *Crime and Justice Series*, AIC (1991); and S Egger and C Harcourt, *Prostitution in New South Wales: A Report to the Criminal Justice Commission, Queensland* (1991)).

Declarations were more readily obtained following the decision in *Sibuse Pty Ltd v Shaw* (1988) 13 NSWLR 98. The NSW Court of Appeal, by a 2-1 decision, upheld a Supreme Court ruling which declared that a brothel on Canterbury Road, Belmore, was a disorderly house notwithstanding the fact that it was “clean, neat and tidy”. Priestley JA (with whom McHugh JA agreed) held that the declaration should not be lifted. McHugh JA stated (at 121) that it “would be strange, if under the guise of exercising a discretion, the Supreme Court was expected to distinguish between well run and badly run houses of prostitution”. While accepting the appellant’s submission that “no person in New South Wales in living memory had been charged with the offence of keeping a brothel” (at 122), McHugh JA nevertheless considered that the common law misdemeanour of “keeping a common bawdy house or brothel” still existed and was not displaced by the *Prostitution Act 1979* or other legislation.

In dissent, Street CJ stated that “some element of disorder over and above the mere breach of the law” was required (at 102-3). The Supreme Court had “found, in effect, an absence of any disorder in the actual use of the premises as a brothel”. Street CJ also stated (at 103) that the use of premises for prostitution was decriminalised by the *Prostitution Act 1979* (except where the premises were advertised as a massage parlour etc) and doubted the continued viability of the common law misdemeanour, at least after the legislative activity of the past 20 years:

The days must surely be coming to an end when ancient judge-made law in the protection of public morality will continue to regulate social conduct through the mechanism of common law misdemeanours. The legislature, reflecting as it does the wishes and standards of the people, is the democratic organ for this purpose. Common law misdemeanours in matters of the public morality, created by judges, not by parliaments, centuries ago, and involving restraints on freedoms, are to be approached with considerable circumspection. (at 107-8)

An application for special leave to appeal to the High Court by Sibuse was refused. According to R Perkins the police applications under the Act increased after the decision in *Sibuse* and there were 50 applications in 1990: “Working Girls”, AIC *Crime and Justice Series* (1991).

The *Disorderly Houses Amendment Act 1995* repealed s 3(1)(e) and provided in s 16 that a s 3 declaration “may not be made in respect of premises solely because ... the premises are a brothel”. A new Pt 3 relating to brothels was introduced. Section 17 authorises the NSW Land and Environment Court, on the application of a local council, to make an order that premises not be used for the purpose of a brothel. A local council may not approach the Land and Environment Court to make such an application “unless it is satisfied that it has received sufficient complaints about the brothel [from residents who live in the vicinity of the brothel or whose children use facilities in the vicinity of the brothel] to warrant the making of the application”. In making an order, the Land and Environment Court is to consider whether:

- the brothel is operating “near or within view from a church, hospital, school or any place regularly frequented by children for recreational or cultural activities” (s 17(5)(a));
- the brothel “causes a disturbance in the neighbourhood” (including by reason of noise, or vehicular and pedestrian traffic) (s 17(5)(b));
- “sufficient off-street parking” and “suitable access” have been provided (s 17(5)(c), (d)); and
- the operation of the brothel “interferes with the amenity of the neighbourhood” (s 17(5)(f)).

The Act was amended by the *Disorderly Houses Amendment (Brothels) Act 2001* No 125 in response to a recommendation of the Brothel Task Force (established by the government in 2000). The objective was to clarify the evidence needed to determine that a premise is operating as a brothel. A new s 17A was inserted into the Act:

17A Evidence of use of premises as brothel

(1) This section applies to proceedings before the Land and Environment Court:

- (a) on an application under section 17 for premises not to be used as a brothel, or
- (b) under the *Environmental Planning and Assessment Act 1979* to remedy or restrain a breach of that Act in relation to the use of premises as a brothel.

(2) In any proceedings to which this section applies, the Court may rely on circumstantial evidence to find that particular premises are used as a brothel.

(3) However, the presence in any premises of articles or equipment that facilitate or encourage safe sex practices does not of itself constitute evidence of any kind that the premises are used as a brothel.

Note. Examples of circumstantial evidence include (but are not limited to) the following:

- (a) evidence relating to persons entering and leaving the premises (including number, gender and frequency) that is consistent with the use of the premises for prostitution,
- (b) evidence of the premises being advertised expressly or implicitly for the purposes of prostitution (including advertisements on or in the premises, newspapers, directories or the Internet),
- (c) evidence of appointments with persons at the premises for the purposes of prostitution that are made through the use of telephone numbers or other contact details that are publicly advertised,
- (d) evidence of information in books and accounts that is consistent with the use of the premises for prostitution,
- (e) evidence of the arrangement of the premises, or of the furniture, equipment or articles in the premises, that is consistent with the use of the premises for prostitution.

The *Disorderly Houses Act* 1943 was renamed the *Restricted Premises Act* 1943 by the *Disorderly Houses Amendment (Commercial Supply of Prohibited Drugs) Act* 2002.

The operation of brothels is now regulated by the law in three primary ways, only one of which involves the application of the criminal law. First, it is still possible for the police to apply to the Supreme Court for a declaration that a brothel is a disorderly house under s 3 of the *Restricted Premises Act*. The mere fact that the premises are a brothel will not be sufficient grounds for a declaration and it is necessary for one of the other grounds in s 3 to be established. Once a declaration is made, prosecutions may be undertaken for the offences of owning or occupying the premises. Secondly, a local council may attempt to stop a brothel from operating by applying under s 17 of the *Restricted Premises Act* to the Land and Environment Court for an order that the premises are not to be used as a brothel. Finally, under the *Environmental Planning and Assessment Act* 1979, a development application to establish a brothel may be rejected by a local council. The matters to be considered in determining a development application are laid down in s 79C of the *Environmental Planning and Assessment Act* 1979 and include the provisions of “any environmental planning instrument”. The Department of Urban Affairs and Environment has informed all local councils that Local Environment Plans will not be approved by the Minister for Urban Affairs and Planning if they contain a blanket prohibition on brothels (Department of Urban Affairs and Planning, *Council Circular – Planning Control of Brothels*, 29, 1995), although they are permitted to restrict them to industrial zones (Department of Urban Affairs and Planning, *Council Circular – Planning Control of Brothels*, 16, 1996).

The relationship between the two Acts was considered in *Fairfield City Council v Taouk* [1998] NSWLEC 132. Lloyd J stated:

The activity with which the two Acts are concerned is different. The *Environmental Planning and Assessment Act* is concerned with brothels which breach relevant planning laws, while the *Disorderly Houses Act* is concerned with brothels which breach the various criteria established in s 17(5). It is therefore clear, with the aid of the Minister’s second reading speech, that the Parliament intended that the Acts operate together and that they are complementary in operation. (at [19])

Several local councils have criticised the new scheme, claiming that they do not have adequate resources to investigate and litigate in the Land and Environment Court, where necessary: *SMH*, 30 August 1999. Some councils have been reluctant to include brothels in their Local Environment Plans and some have criticised the decisions of the court as favouring brothels rather than councils. Between late 1995 and June 1998, the Land and Environment Court heard 27 appeals from brothel applicants who were refused development consent; 20 were upheld: S Smith, “The regulation of prostitution: a review of recent developments” *NSW Parliamentary Library Research Service, Briefing Paper*, No 21 (1999). Other councils have assumed the new responsibilities with minimal adverse comment. A notable success was the former South Sydney Council, one of the first councils to incorporate brothels in its Local Environment Plan and to establish clear brothel policies. Of interest is the fact that the former South Sydney Council probably had the greatest concentration of brothels and sex workers in NSW and was at the same time undergoing considerable “gentrification”. According to S Smith (“The Control of Prostitution: An Update”, *NSW Parliamentary Briefing Paper* 14, 2003), approximately half of the local councils in NSW had prepared Local Environment Plans to identify the location of brothels by 2003. Most councils had prohibited brothels from operating in residential areas. A Sex Services Premises Planning Advisory Panel was established by the government in 2002 to provide advice and assistance to councils in the development and management of brothel planning.

8.7.7 Advertising prostitution services

Section 18 of the *Summary Offences Act* 1988 prohibits advertisements for prostitution, with a maximum penalty of six penalty units or three months’ imprisonment:

- 18 A person shall not, in any manner:
- (a) publish or cause to be published an advertisement, or
 - (b) erect or cause to be erected any sign,

indicating that any premises are used or are available for use, or that a person is available, for the purposes of prostitution.

However, this has not stopped many newspapers (especially suburban dailies) from running pages of advertisements in the “personal” columns which are obviously for the purpose of prostitution. The Select Committee surveyed the English language press in NSW in the week of 9-15 September 1984, and found 1424 listings for prostitution services. Sixty per cent of the advertisements were for establishments (brothels, massage parlours and escort agencies), 31% for individuals, and the remainder for “small groups”. Only 7% of the listings advertised services outside of the Sydney Metropolitan area. Prostitution advertisements were relatively rare in the “ethnic” or non-English language press.

The *Summary Offences (Prostitution) Amendment Act 1988* inserted a new s 18A into the Principal Act, prohibiting advertising for prostitutes, with a maximum penalty of 10 penalty units or imprisonment for three months, in the following terms:

18A (1) A person shall not, in any manner, publish or cause to be published an advertisement for a prostitute ...

(2) In this section, *advertisement for a prostitute* means an advertisement that indicates, or that can be reasonably taken to indicate, that:

- (a) employment for a prostitute is or may be available, or
- (b) a person is required for employment as a prostitute or to act as a prostitute, or
- (c) a person is required for employment in a position that involves, or may involve, acting as a prostitute.

Thus while s 18 refers to the advertisement of prostitute services, s 18A deals with advertising for the purposes of *recruitment* of a person to act as a prostitute.

8.7.8 Child prostitution

The *Crimes (Child Prostitution) Amendment Act 1988* inserted a number of new provisions into the *Crimes Act*. Section 91C defines an “act of child prostitution” very broadly, including “sexual intercourse” (as defined in s 61H), and also “any sexual service, whether or not involving an indecent act ... that can reasonably be considered to be aimed at the sexual arousal or sexual gratification of a person”.

Section 91D(1) creates offences of causing or inducing a child to participate in an act of child prostitution, or participating as a client in such an act. The penalty is a maximum of imprisonment for 10 years, or 14 years if the child is under 14 years of age.

Section 91E creates an offence, punishable by up to 10 years’ imprisonment, where any person “receives money or any other material benefit knowing that it is derived directly or indirectly from an act of child prostitution”. It is a defence where the accused person satisfies the court that the money or material benefit was received by the person for the lawful provision of goods or services, or was paid or provided in accordance with a judgment or court order or legislative requirement: s 91E(2). Section 91F makes it an offence to be a “person who is capable of exercising lawful control over premises at which a child participates in an act of child prostitution”. Section 91G creates offences relating to using, causing or procuring or, having care of a child, consenting to the using of a child for pornographic purposes. Use for pornographic purposes is defined as the child engaging in sexual activity or being placed in a sexual context or is subjected to torture, cruelty or physical abuse for the purpose of the production of pornography.

Section 43 of the *Children and Young Persons (Care and Protection) Act 1998* authorises police to enter premises and remove children, or remove children from a public place, where it is suspected on reasonable grounds that the child is in danger and need of care, particularly where acts of child prostitution or child pornography are taking place.

As noted in Chapter 7, the *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth) added a part to the *Crimes Act 1914* (Cth) creating a number of offences relating to the sexual exploitation of children *outside* of Australia, committed by permanent residents of Australia, Australian citizens or bodies incorporated in Australia (see Chapter 7).

8.7.9 Sexual servitude and trafficking

The *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) inserted a number of prostitution offences into the *Criminal Code* (Cth). Section 270.6(1) creates the offence of intentionally or recklessly causing another person to enter into or remain in sexual servitude, punishable by 15 years' imprisonment. Section 270.6(2) creates the offence of conducting a business that involves sexual servitude, punishable by 15 years. Section 270.7 creates the offence of inducing another person into an engagement to provide sexual services by deception about the fact that sexual services are required. The penalty is increased to 19 years for these offences if the other person is under the age of 18 years. Sexual servitude is defined in s 270.4 as "the condition of a person who provides sexual services and who, because of the use of force or threats ... is not free to cease providing sexual services; or ... is not free to leave the place or area where the person provides sexual services". Under s 270.5, either the conduct constituting the offence (or part of it) and/or the sexual services must occur outside Australia. The Model Criminal Code Committee referred in the Report, *Chapter 9, Offences Against Humanity, Slavery* (1998) to examples of women recruited overseas to work as prostitutes in Australia under conditions of "debt bondage". According to newspaper reports, brothels in Sydney involved in the importation of young Thai women require them to service 400 to 500 men for free before they are allowed to earn money: *SMH*, 31 August 1999. For an examination of Federal Government initiatives in "human smuggling and trafficking", see F David, "Human Smuggling and Trafficking: An Overview of the Response at the Federal Level" *AIC Research and Public Policy Series* No 24 (2000); R Tailby, *Organised Crime and People Smuggling/Trafficking to Australia*, *AIC Trends and Issues* No 208 (2001); K Carrington and J Hearn, "Trafficking and the sex industry: from impunity to protection" (2003) Department of the Parliamentary Library, *Current Issues Brief No 28*; Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the trafficking of women for sexual servitude* (2004).

In 2005, the first two trials under the sexual servitude laws occurred in the District Court in Sydney. In the first case, brothel owner Sally Cui Mian Xu, receptionist Lin Qi and alleged brothel owner Ngoc Lan Tran were charged with causing a young Thai woman to remain in sexual servitude, conducting a business involving sexual servitude, and detaining her for advantage. Xu and Tran were also charged with trading her as a slave. The victim claimed that she was recruited in Thailand on the promise of work in Australia as a waitress but, on arrival, she was forced into sex work. She was discovered by police after she made a '000' call whilst working at a brothel in Rozelle. The jury deliberated for two days and acquitted Xu of the slave trading charge, but was unable to reach a verdict on the remaining charges against Xu or her two co-accused: "Hung jury in 'sex slave' case", *SMH*, 26 May 2005. The victim declined to return to Australia for a second trial and the charges have been no billed.

In the second case, Danny Kwok, Jenny Ong, Raymond Tan and Hoseah Yoe were charged with conspiracy to cause a number of women to be placed into sexual servitude, pursuant to ss 11.5 and 270.6(1) of the *Criminal Code* (Cth). The four accused allegedly conspired to bring eight women from Thailand and Indonesia to Australia to work as sex workers under conditions of debt bondage in NSW and Victoria. Three of the women were recruited under the misapprehension that they were coming to work in restaurants or in public relations and, according to the prosecution case, they were detained in a home unit in Auburn and escaped and went to the police. The remaining victims were detained from brothels in Victoria and were aware that they would be working as prostitutes, but not the conditions of debt bondage. The trial was aborted after 70 days for reasons relating to the non-disclosure of certain evidence regarding the AFP investigation: see M Brown, "Women bought for \$18,000, sex slave trial hears", *SMH*, 30 June 2005; *Kwok, Ong, Tan and Yoe* [2005] NSWCCA 245.

Considerable public interest was directed towards the death of a 27-year-old Thai woman, Puontong Simaplee, at the Villawood Detention Centre in Sydney in 2001. Much of the focus was on the allegation that she had been sold as a sex slave and smuggled into Australia in the mid-1980s and that this was in some way related to her death (eg, M Devine, *The Sun-Herald*, 4

May 2003). Project Respect Inc (a Victorian NGO involved in advocacy against sexual servitude and trafficking) was granted standing at the coronial inquest. However, no evidence was available on the date and circumstances of her entering Australia notwithstanding evidence and information from two former boyfriends (from 1995 in Australia) and her parents in Thailand. The Coroner stated that “whether this happened to Ms Simaplee is not clear”.

The facts were that Ms Simaplee was a heroin addict and working as a prostitute in a brothel in Surry Hills, “A Touch of Surry Hills”. She was detained by immigration officers during a raid on the brothel at 2.30 am on 23 September 2001 and taken to Villawood. At 7.30 am on 23 September it was noted that she appeared to be suffering from the effects of drug withdrawal. Over the next three days, her condition deteriorated and she vomited repeatedly. She died in the detention centre at 1.00 am on 26 September 2001. A medical expert at the inquest stated that he had concerns “that over the three day period from the time of her admission to death no person has made a decision that this woman was too ill to be in a detention centre and needed on going care in a hospital ... ultimately she lost nearly 20% of her body weight in a short period of time ... all of these issues could, I think, have been reasonably well looked after as an in patient in hospital”. The Coroner commented on the failures in the medical observations and treatment and the failure to consider transportation to a hospital, noting that “there are a number of public hospitals within 30 minutes of the Centre”. The Coroner made recommendations regarding the inadequacy of the medical services at Villawood and the practice of using detention staff to be responsible for vital medical observations: *Inquest into the Death of Puongtong Simaplee*, Westmead Coroners Court, 24 April 2003. It is questionable whether the emphasis on the unsubstantiated claim that Ms Simaplee was a victim of trafficking for sex work should be the primary focus of public concern. The serious inadequacies in the medical treatment provided to people detained in immigration detention centres in Australia appear to be of greater immediate relevance.

8.7.10 Enforcement

The court figures show a large decline in the policing of all forms of prostitution in NSW. Table 1 (*see over*) presents the number of charges prosecuted in the Local Court for the most frequently prosecuted prostitution offences in the periods before and after the 1979, 1983, 1988 and 1995 amendments.

Prosecutions for all the key prostitution offences have declined. Prosecutions for soliciting declined to zero following the repeal of the soliciting offence in 1979. They increased to 419, when the offence was partially re-criminalised by introduction of defined prohibited locations in 1983. There was a slight increase around the introduction of the *Summary Offences Act* 1988 (which increased the ambit from “near” to “near or within view” of the prescribed locations) followed by a steady decline throughout the 1990s. The other, brothel related and advertising offences are less frequently the subject of prosecution. No data are presented for the *Restricted Premises Act* 1943 because charges may arise from premises declared disorderly for reasons other than prostitution.

Table 2 (*see over*) focuses in more detail on public soliciting and the related offences associated with the street market in sexual services in recent times under the *Summary Offences Act*. It presents the prosecutions for all soliciting and public act of prostitution offences between 1993 and 2001. Soliciting near or within view of a dwelling, school, church or hospital is the most heavily prosecuted offence. Of interest is the growing number of clients charged with the new client specific soliciting offence introduced in 1999. In 2001, 37% of soliciting prosecutions were directed at clients.

The NSW prostitution prosecution figures generally provide a dramatic illustration of the decriminalisation of prostitution in NSW and show the declining involvement of police in all aspects of the industry. Appearances for all prostitution-related offences have declined from over 4000 per year in 1972 to 522 in 2001. The main penalty for prostitution is a fine. Of the 175 persons found guilty of a prostitution offence in the Local Courts in 1999, 149 received a fine.

CRIMINAL LAWS

Table 1: Charges in the Local Court for the most common brothel and soliciting offences 1972-2001

Year	Soliciting	Live on earnings	Own, manage parlour	Use massage parlour	Advertise
1972	4288	46	-	-	-
1974	3301	17	-	-	-
1976	1930	20	-	-	-
1978	1804	13	-	-	-
1980	6	35	28	94	4
1981	0	53	21	84	0
1982	0	39	17	66	0
1983	210	40	21	26	8
1984	419	33	17	27	166
1986	180	11	7	11	0
1988	376	32	4	6	68
1990	522	1	3	12	2
1991	805	8	8	10	0
1992	712	6	3	21	2
1993	462	7	4	16	2
1994	312	14	11	42	2
1995	346	15	4	34	1
1996	264	4	2	3	10
1997	278	2	0	2	5
1998	256	0	0	1	0
1999	165	1	1	0	0
2000	158	2	0	0	0
2001	274	0	0	0	0

Source: BOCSAR unpublished court statistics

Table 2. Charges in the Local Court for all soliciting and public acts of prostitution offences 1993-2001

Year	Solicit near or within view of prescribed locations: s 19(1)	Solicit in proscribed locations: s 19(2)	Solicit in a manner that harasses or distresses: s 19(3)	Solicit by client near or within view of prescribed locations: s 19A(1)	Public Act of Prostitution: s 20(1) (in view of public place or other prescribed locations)	Public Act of Prostitution: s 20(2) (in a car within view of prescribed locations)
1993	462	2	35	-	2	15
1994	312	2	13	-	3	17
1995	346	3	17	-	2	3
1996	264	3	8	-	5	51
1997	278	3	7	-	7	16
1998	256	3	6	-	5	28
1999	165	2	3	-	2	25
2000	158	1	2	11	3	35
2001	274	0	0	164	9	74

Source: BOCSAR unpublished court statistics

Only one person received a gaol term; seven received some form of recognisance; two received nominal sentences (rising of the court); and 16 were discharged without a conviction being recorded under s 556A.

One of the terms of reference to the Royal Commission into the NSW Police Service was to investigate “the existence, or otherwise, of systemic or entrenched corruption within the NSW Police Service” (*Final Report*, Vol 1 (1997) at 1). The Commission concluded “that a state of systemic and entrenched corruption existed within the Service” (*Final Report*, Vol 1 (1997) at 84). An exhaustive examination of the 956 pages of the Royal Commission reports into police corruption (*Interim Report* (1996) and Vols I to III of the *Final Report* (1997), but excluding the paedophile inquiry, separately reported in Vols IV-VI)) reveals few instances of police corruption involving prostitution. The following constitutes the total prostitution-related evidence reported by the Commission pursuant to the police corruption reference:

- a statement by D Demol that on his first day on duty (no date was provided) he was drinking at a brothel with naked prostitutes (*Final Report*, Vol 1 at 95);
- statements by MV6 and JJ (the proprietor of a Marrickville brothel) that free alcohol and sexual services were provided to local police to “maintain good relations” (Vol 1 at 95 and 184);
- a statement by MV4 that he received money from the owner of a Marrickville brothel during “a gaming and vice inspection” (Vol 1 at 188);
- an unelaborated statement by KN1 that he was involved in the “sexual exploitation of a prostitute” (Vol 1 at 99);
- a statement by GW that he had cashed a cheque for \$8000 with a drug-dealer and brothel operator which was then dishonoured (Vol 1 at 100);
- statements by KX9, KX10, KX7 and KX8 that drugs were supplied by certain brothel owners in Kings Cross to prostitutes and clients, that staff were physically abused and that police gave limited attention to those premises (Vol 1 at 121);
- a statement by S Hardas that regular payments were paid to police for the protection of “clubs and vice operators” (undefined and unelaborated) (Vol 1 at 123);
- a statement by T Haken that he became aware of the selective policing of illegal gaming and prostitution in 1974 (Vol 1 at 167);
- an unelaborated statement of “the alleged procurement by a police officer of a former student police officer to work as a prostitute” (*Interim Report* (1996) at 44).

On the basis of this inadequately described and documented information, the Commission claimed that it had found “compelling evidence of the existence of an interdependence between police on the one hand, and drug dealers, and the proprietors or managers of strip shows, brothels, nightclubs, and ‘shooting galleries’ on the other” (*Interim Report* at 37) and “evidence showing a clear nexus between police corruption and the operation of brothels” (*Final Report* at 16). In fact the evidence described by the Royal Commission was striking in its failure to demonstrate police corruption in the market for sexual services, as compared, for example, to the extensive corruption documented in relation to the market in illegal drugs. Many of the above incidents involving brothels were related to the use and sale of illegal drugs on the premises, not the trade in sexual services. The low level of prosecution documented in the table above and the findings of the Royal Commission suggest that the decriminalisation in NSW has resulted in a substantial reduction in police involvement in the sex industry, including police involvement in corruption.

8.7.11 Decriminalisation in other Australian jurisdictions

A variety of different statutory schemes apply in the different States and Territories of Australia.

8.7.11.1 Licensing

The Victorian government established an inquiry into the regulation of prostitution, conducted by Professor Marcia Neave (*Report of the Committee of Inquiry into Prostitution* (1985)). The

approach subsequently adopted in Victoria differed from NSW. The approach in NSW is best described as partial decriminalisation in which the criminal law plays a reduced role. In contrast, the Victorian approach was to legalise the industry by a series of measures designed to license and register brothels with the criminal law continuing to play a significant role in prosecuting brothels and workers operating outside the licensing framework. The Victorian law is contained in the *Prostitution Control Act 1994* (significantly amended by the *Prostitution Control (Amendment) Act 1999*). The Act preserves most of the prostitution-related criminal offences: soliciting, living on the earnings, being found in an unlicensed brothel and carrying on a business which is an unlicensed brothel. Licences are not required if only two persons work as prostitutes in an owner-operated business. The Business Licensing Authority determines licence applications and grants manager approvals. Licences are refused to persons whom the Authority considers are not "suitable persons" or have been convicted of a disqualifying offence within the last five years (s 37). Disqualifying offences are indictable offences. Under s 38(2), the Authority must not class a person as not being a suitable person only because he or she has worked as a prostitute. Provision is made for licence cancellation and disciplinary action. Manager approvals are not granted to persons not of good repute, having regard to character, honesty and integrity or if the person has been convicted of a disqualifying offence in the last five years. In considering a development application for a brothel, the relevant authority must consider, among other issues, the location of other brothels in the neighbourhood, the effect of the operation of a brothel on children in the neighbourhood and other land use in the neighbourhood.

Extensive criticisms have been made of the Victorian scheme: M Neave, "The Failure of Prostitution Law Reform" (1988) 21(4) *ANZ J of Criminol* 202; L Hancock, "Legal Regulation of Prostitution: What or Who is being controlled?" in Gerull and Halstead (above) at 165; C Pickles, "Legal Perspectives in Clarifying the Issues of the Sex Industry" in Gerull and Halstead (above) at 23; S Dobinson "Victorian Situation with Legalisation" in Gerull and Halstead (above) at 117; P Pyett and D Warr, "Women at risk in sex work: strategies for survival" (1999) 35(2) *J of Sociology* 183. In the early years of the scheme, the government failed to set up the Prostitute Licensing Board (the responsible body under the legislation at that time) and applications were first considered by local councils. Few licences were granted, and then only to the well resourced "mega-brothels". The majority of sex workers continued to operate outside the licensing provisions and were subject to criminal prosecutions, as they had been before the reforms. In the early 1990s, it was estimated that only 25% of the sex industry in Melbourne operated within the legal framework: P Richardson "The Victorian Brothel Owner's Perspective" in Gerull and Halstead (above) at 135. Illegal street prostitution is still widespread in areas of St Kilda, Melbourne and Footscray. In 1999, Victoria Police estimated that there were more than 100 illegal brothels operating in Melbourne alone: *The Age*, 15 March 1999.

In the wake of the Fitzgerald Inquiry findings of widespread police corruption in the prostitution industry in Queensland, the Criminal Justice Commission held an inquiry into prostitution law reform: *Regulating Morality* (1991). The Commission recommended an approach based on the Victorian licensing model, but the recommendations were ignored by successive governments. The Queensland criminal laws continued to prohibit most prostitution-related activities and the illegal sex industry continued to thrive. In 1999, the Beattie government introduced legislation to legalise and license brothels: the *Prostitution Act 1999* (Qld). The Act creates a Prostitution Licensing Authority to grant licences for legal brothels and approve certificates for managers. Licences and approvals are not to be granted to people convicted of disqualifying offences. Employed prostitutes are required to undergo regular health examinations. Brothels are limited to a maximum of five working rooms. Single prostitutes working from their own premises do not require a licence. Development approvals for brothels are to be granted by local councils and only in non-residential areas. A 200-metre exclusion zone applies around homes, schools, hospitals, churches and places frequented by children. Street soliciting continues to be an offence (with increased penalties) and it is an offence to operate an unlicensed brothel. The scheme commenced operation in July 2000. In November 2000, claims were made that the licensing scheme contained too many restrictions and the Prostitution Licensing Authority stated that few

brothel applications had been approved by local councils: *Courier-Mail*, 9 November 2000. Newspaper reports suggest that there are now 18 legal brothels in Queensland.

In the Northern Territory, prostitution is regulated by the *Prostitution Regulation Act 1992* (NT). Escort agencies are subject to strict licensing requirements, but most other offences are retained: brothel keeping, deriving financial support by threats and intimidation and soliciting.

8.7.11.2 Minimal regulation

The ACT has adopted a minimal regulation approach in the *Prostitution Act 1992* (ACT). Operators of brothels or escort agencies must notify the Registrar of Brothels of the names and addresses of the owner, manager and the business (s 12) and pay a registration fee. The offences of soliciting and loitering in a public place are retained (s 19) and it is an offence to operate a brothel outside a prescribed location (s 18). The prescribed locations are the industrial suburbs of Fyshwick and Mitchell.

8.7.11.3 Prohibition

In South Australia, the law prohibits most prostitution-related activities. The Prostitution (Regulation) Bill was defeated in the SA Parliament in 2001. The approach adopted in the Bill was closer to the ACT or NSW approach in that it proposed minimal government regulation. The Bill repealed the offences concerned with brothel keeping and living on the earnings, but retained the soliciting offence. With the defeat of the Bill, offences in South Australia include soliciting, living on the earnings, brothel keeping, and allowing premises to be used for prostitution: *Summary Offences Act 1953* (SA) ss 25-32.

The position in Tasmania is somewhat similar. In mid 2005, the government introduced the Sex Industry Regulation Bill 2005. The terms of the Bill introduced a licensing scheme (referred to as “registration” in the Bill) similar to that in Victoria. The government withdrew the Bill when it became clear that it would not be passed in the Legislative Council. A second Bill was introduced in late 2005 which adopted a prohibition stance: the Sex Industry Offences Bill 2005. The *Sex Industry Offences Act* was passed in late 2005 and proclaimed in early 2006. It is an offence to operate a commercial sexual services business (s 4) and it is an offence to receive commercial sexual services (s 5). Self-employed sex workers working alone or with one other person are exempt from these provisions. It is also an offence to solicit in a public place (s 8).

The laws in Western Australia formally prohibit most prostitution-related activities in the face of widespread breach. There is a quasi-official policy of “containment” where, notwithstanding the existence of serious criminal offences prohibiting brothel prostitution, police allow certain brothels to operate in various locations, free from the risk of prosecution. The most well known examples are the brothels in Hay St, Kalgoorlie, where the police decide who can operate and work in the area without prosecution. It is claimed that under the containment policy, 13 brothels had been permitted to operate since the mid-1970s in Perth and Kalgoorlie: *West Australian*, 12 August 1999. The potential risk of police corruption associated with such a policy is substantial. In June 2000, legislation was proclaimed which further increased the penalties and criminal prohibitions: the *Prostitution Act 2000*. The Act contained a sunset clause of two years. Under the Act, soliciting is an offence carrying a maximum penalty of 12 months’ imprisonment (s 6). The kerb crawling offence carries a sentence of two years’ imprisonment (s 5). The offences prohibiting brothel keeping or living on the earnings were retained and additional powers were granted to the police to stop, search and detain street prostitutes and to direct a person to move on and stay away from an area for up to 24 hours, if the officer has reason to suspect that a person has committed or intends to commit an offence in a public place (s 26). Provision is also made for the granting of restraining orders by a court if it finds that the person has committed a s 5 or s 6 offence or is likely to commit an offence of a similar kind (s 39). The terms of the order include any restraints on lawful activities and behaviour that the court thinks fit (s 43) and the order may exist for up to 12 months (s 43). A breach of a restraining order is punishable by a fine of up to \$5000 (s 48). These provisions represent the most punitive soliciting laws in Australia and appear

to further entrench the police “containment” policy. The Act has been condemned by workers in the sex industry as making them more vulnerable to attack (by forcing them to work away from the traditional inner city beats) and to victimisation by the police: *Nationwide General News*, 20 September 2000. In 2002, the new Labor government introduced the Prostitution Control Bill 2002. The Bill created a licensing scheme similar to Victoria but contained a large number of criminal prohibitions. Soliciting remained illegal. There was widespread opposition to the Bill and it was withdrawn. Instead, the government removed the sunset clause on the *Prostitution Act 2000* (WA).

8.7.11.4 Health, welfare and working conditions

The decriminalisation of prostitution in NSW has been associated with a significant decrease in sexually transmitted infections (STI) amongst female sex workers. Research into the sexual health of female sex workers in Sydney in the early 1980s “revealed gonorrhoea incidence rates which are expected in the developing nations of Africa or Asia. An average sex worker would acquire over four new gonococcal and two new chlamydial infections each year”: B Donovan and C Harcourt, “The Female Sex Industry in Australia: A Health Promotion Model” (1996) 9(1) *Venerology* 63 at 63. Research in the early 1990s found reported condom use in “over 95% of commercial sex encounters. This has translated into zero prevalence rates for chlamydial and gonococcal infections at first presentation to our Centre, an extraordinary achievement” (Donovan and Harcourt at 66). Between 1985 and 1990, a significant reduction was found in gonorrhoea in female sex workers in Sydney (from a five yearly rate of 58% to 38%), and in herpes (51% to 25%) and trichomoniasis (52% to 29%): C Philpot, C Harcourt and J Edwards, “A Survey of female prostitutes at risk of HIV infection and other sexually transmissible diseases” (1991) 67 *Genitorurin Med* 384. HIV transmission in the sex industry in NSW has been confined to one unpublished case involving an international prostitute.

These positive sexual health outcomes arose from a combination of policies, including decriminalisation. The AIDS epidemic in Australia resulted in the introduction of a broad range of public health policies and programs. From the mid-1980s, peer outreach services were funded by the NSW Health Department to address education and STI prevention in the sex industry, to encourage safe sex practices and to distribute condoms and information on health. The NSW Sex Workers Outreach Project (SWOP) is the largest such service in Australia. The fact that most facets of the industry were no longer illegal made it easier for the outreach and health services to contact sex workers and to gain entry into premises. In addition, the number and scope of sexual health services was increased and sex workers were able to use Medicare for regular STI examination (denied before 1986). Needle exchange programs were introduced and have been highly successful in containing the spread of HIV. Improvements in population sexual health have also been documented throughout Australia in this period. See C Harcourt, I van Beek, J Heslop, B Donovan, “The health and welfare of female and transgender sex workers in New South Wales” (2001) 25 *Aust NZ J Public Health* 84; S Egger and C Harcourt, “A comment on John Scott, ‘Prostitution and public health in New South Wales’” (2005) 6 *Culture, Health and Sexuality* 1; S Egger, “Book Review Essay: Hard Lessons: Reflections on Governance and Crime Control in Late Modernity Edited By Richard Hil and Gordon Tait (2004)” (2005) 28 *MULR* 736; C Harcourt, S Egger and B Donovan, “Sex work and the law” (2005) 2 *Sexual Health* 121.

Research in Victoria has identified health problems amongst illegal street workers. Whilst legal brothel workers are required by law to have monthly certification of STI screening, street workers “are a marginalised group in Melbourne, whose work, ... remains illegal ... [and they] do not attend medical services for regular screening and treatment” (A Morton et al, “An outreach programme for sexually transmitted infection screening in street sex workers using self-administered samples” (1999) 10 *International Journal of STD and AIDS* 741 at 741). The researchers found that the street workers had “a disturbingly high proportion with infection”, notably gonorrhoea and trichomoniasis. The reported infection levels remain lower, however, than the levels found in the early 1980s.

In NSW, brothels are subject to occupational health and safety laws. Guidelines have been published by Workcover New South Wales (NSW Workcover, *Health and Safety Guidelines for Brothels* (2001)). The suggested obligations for employers include the installation of security systems including panic buttons, adequate lighting to examine clients for the presence of STIs, the provision of safe sex equipment and education, the provision of clean towels and linen and other hygiene controls, the development of procedures to reduce violence and for workers to receive regular STI screening.

Harcourt et al summarised the impact of decriminalisation in NSW on the health and welfare of workers in the following terms:

Decriminalisation permits and encourages greater industry self-regulation, as well as health and welfare improvements for all sex workers, their clients, and the wider community. In New South Wales it has been shown to significantly reduce the level of policing required, including the policing of street prostitution. Police corruption involving street workers seems to have disappeared. Street prostitution remains a contentious issue of public debate in parts of Sydney but generally, a balance has been struck which permits the adoption of a holistic approach to the management of health and welfare within the sex industry and ensures that the benefits gained in one sector are not denied to people working in less well tolerated sectors. Decriminalisation has also allowed street sex workers to be properly represented in ongoing public discussions about concerns relating to residential amenity, worker's entitlements to occupational health and safety measures, harm reduction measures, policing and reforms to the law.

Where there are already effective laws protecting minors and adults from sexual abuse, coercion, exploitation, and related harms, the legal regulation of the sex industry can be confined to relatively simple modifications to generic planning laws rather than through the cumbersome and expensive framework of a licensing regime. Under laws which decriminalise the activities associated with prostitution, sex workers are no longer marginalised by the law (although much of the stigma attached to prostitution remains), and they are unhindered in their access to health and welfare services. Moreover, sex workers are enabled to develop skills and build community strengths to advocate for general improvements in health and occupational health and safety. Movement into alternative employment is far easier without the stigma of a criminal conviction or known criminal association. From the health professional's perspective health promotion for the sex industry is much easier when the target group is not covert and is working without the daily fear of a criminal prosecution. (C Harcourt, S Egger and B Donovan, "Sex work and the law" (2005) 2 *Sexual Health* 121 at 126)