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A comment on John Scott, 'Prostitution and public health in New South Wales'

SANDRA EGGER and CHRISTINE HARCOURT

Introduction

John Scott has written a thought provoking analysis of prostitution policy in New South Wales (NSW) in the era of AIDS, describing how public health '...has enabled the regulation of prostitution in both "private" and "public" spaces, where technologies of control have often operated inconspicuously' (Scott 2003: 279). His analysis of public health management of prostitution hinges on the publicly perceived dichotomy between 'hygienic', 'normal', brothel based sex workers and 'unclean', 'dangerous', street-based prostitutes. He argues, uncontroversially, that 'public' prostitutes remain subject to official scrutiny and criminal sanctions, while 'private' (brothel) prostitutes have received more support and less invasive scrutiny because they are believed to have embraced the public health model evolved during the HIV/AIDS panics of the mid-1980s. While his argument has merit at a theoretical level, his specific references to NSW law reveals a disjunction between argument and evidence which challenges his thesis. Of particular concern are inaccuracies in the description of legislative reforms over the last 25 years in NSW and the claimed impact of those changes on the policing of prostitution and the structure and size of the sex industry.

The law relating to street prostitution

The first problem for his basic thesis is that street soliciting was the first offence to be decriminalized in New South Wales in 1979 with the repeal of s28 of the Summary Offences Act 1970 and the enactment of the Prostitution Act 1979. Under the Prostitution Act 1979, soliciting in or near a public place was not an offence. Four years later, street soliciting

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was partially re-criminalized by the Prostitution (Amendment) Act 1983. Section 8A made it an offence (although not punishable by imprisonment) to solicit in a public street 'near a dwelling, school, church or hospital'.

This prohibition was only slightly extended when the Prostitution Act 1979 was replaced by the Summary Offences Act 1988. Section 19 (1) of the Summary Offences Act 1988 increased the ambit of the offence to 'or within view' of the prescribed locations. This provision has continued in a substantially similar form until the present. Scott inaccurately represents the law in NSW as 'making it possible to charge prostitutes or their clients who solicited or committed a "public" act of prostitution "in", "near", or "within view" of a *public street*, dwelling, school, church, hospital or *public place*' (emphasis added). In this problematic description of the law in NSW, Scott combines two distinct offences:

S19 (1) A person ... shall not, near or within view from a dwelling, school, church or hospital, solicit another person for the purpose of prostitution ... (6 penalty units or imprisonment for 3 months).

S20 (1) Each of the persons taking part in an act of prostitution (a) in, or within view from, a school, church, hospital or public place; or (b) within view from a dwelling, is guilty of an offence ... (10 penalty units or imprisonment for 6 months).

Section 19 (1) prohibits street soliciting in the prescribed locations and is the most often prosecuted offence in NSW. It is the offence which has the greatest impact on the street prostitution market by confining it to locations outside those listed in the section.

In contrast, s20 (1) is a serious public order offence. The prohibited act is not soliciting for prostitution, but a public act of sexual intercourse or masturbation. Similar offences exist under the general criminal law, without any requirement of payment. For example, such conduct could equally be prosecuted under s5 of the Summary Offences Act 1988, which creates the offence of wilful and obscene exposure in or within view from a public place or school. The penalty under s5 is the same as the penalty under s20 (1). Prosecutions under s20 are less frequent than under s19 (1) and have relatively little impact on the street soliciting market. In general, street workers and clients use public places for soliciting and criminal provisions directed at this conduct have the greatest impact on the marketing of sexual services. Although some street workers also use public places to deliver those services there is no call by the advocacy services or workers to relax these prohibitions.

It is possible that Scott's analysis also incorporates the offence contained in s19 (3) of the Summary Offences Act 1988: 'soliciting in ... a public place ... in a manner that harasses or distresses'. However, the additional elements in this section (solicits in a manner that harasses or distresses) are not mere technical additions which slightly increase the ambit of the offence, they change its character entirely. The objective of street workers is to engage clients, not harass or distress them and, not surprisingly, the section is not often charged. The existence of the provision has little impact on the ability of a street worker to lawfully use public places to engage clients.

The confusion of street soliciting in s19 (1) with street sex in s20 (1)

has important implications for Scott's subsequent critique of the criminal law, policing, and the alleged impact of these provisions on the street based marketing of sexual services. In particular, he fails to recognise that street soliciting has been legal in NSW for approximately 24 years except in the few prescribed locations: near or within view of a school, church, hospital or dwelling. He also fails to acknowledge that 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.

In his paper, Scott makes a number of other assertions that suggest he considers all street soliciting (that is soliciting in a public place) is illegal in NSW. For example, on p.287 he states 'The Disorderly Houses Amendment Act sought to *address the problem of public prostitution*, popularly regarded as offensive and unhealthy, by decriminalizing brothel prostitution, while *retaining or increasing penalties associated with unregulated or public prostitution ...* Despite this, no one cared to question or debate the *continued illegality of street-work* and the effect this would have on the sex industry' (emphasis added).

The distinction we seek to draw is not a fine or technical legal distinction. It is of fundamental significance to the working life of prostitutes who choose to work in this part of the industry. In most parts of the common law world, soliciting in a public place is prohibited. This means that all street soliciting is prohibited and workers risk prosecution at all times. In NSW, soliciting in a public place is legal, except near or within view of the prescribed locations. This means that street soliciting is legal, except near or within view of the prescribed locations, and there is a thriving legal street 'market place' in sexual services.

The law relating to brothel prostitution

The second problem for his basic thesis is that the law relating to brothel prostitution was actually more prohibitive for most of the last 24 years than the law relating to street prostitution. The central offence of brothel keeping, s32 of the Summary Offences Act 1970, was repealed and not replaced in 1979 with the repeal of the Summary Offences Act 1970. However this attempt at decriminalization was short lived.

In the early 1980s, the NSW police revived rarely used wartime legislation enacted to deal with the 'wartime growth of gambling, sly grog and prostitution', the Disorderly Houses Act 1943 (Report of the Select Committee of the Legislative Assembly Upon Prostitution 1986: 244). Under this Act, police could apply to the Supreme Court for a declaration that premises were a disorderly house. Once a declaration was made, a person could be charged with the offences of owning, occupying or being found in a disorderly house. According to the Select Committee, the police had initiated a number of actions by 1986. The task for police was made easier by the decision in *Sibuse Pty Ltd v Shaw* (1988) 13 NSWLR 98 in which it was held that a brothel may be declared a disorderly house

on the sole ground that it was a brothel and notwithstanding that it was 'clean, neat and tidy'.

Armed with this partial success in re-criminalizing brothel keeping, the police also revived the common law offence of keeping a brothel and laid a number of common law charges in the late 1980s (Brown *et al.* 2001). There had previously been no prosecutions for this offence 'in living memory' (McHugh J in *Sibuse Pty Ltd v Shaw* (1988) 13 NSWLR 98 at 122). In *Rahme* (1993) 70 A Crim R 357, it was confirmed that the common law offence was still in existence. By these two initiatives, the NSW police had successfully undermined the objectives of the Parliament in 1979 in which it was said that the Prostitution Act 1979 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 Disorderly Houses (Amendment) Act 1995 represented a somewhat belated move by the Parliament to deal with the police initiatives of the 1980s and to largely restore the law to the position intended in 1979. The common law offence of brothel keeping was repealed and a new provision (s16) was added to the Disorderly Houses Act prohibiting a declaration 'solely because ... the premises are a brothel'.

Scott's analysis and conclusion that the Summary Offences Act 1988 'increased police discretionary powers' and that in the associated Parliamentary debate and newspaper reports, 'the street worker became a signifier of vice, disease and immorality' fails to accurately reflect the substance of the legal position at that time. For street workers, the Summary Offences Act 1988 only marginally increased the ambit of the soliciting prohibition to 'within view' of the prescribed locations. For those working in or managing brothels, the Summary Offences Act 1988 made no changes and they were increasingly subject to potential prosecution under the Disorderly Houses Act, the common law offence of brothel keeping or other Summary Offences Act 1988 provisions such as live on the earnings (re-enacted from the Prostitution Act 1979). It was not until 1995 that some of the important prohibitions against brothel prostitution were finally repealed.

The size and structure of the sex industry in NSW

The failure to accurately document the changes in the law governing 'public' versus 'private' prostitution in recent history in NSW has implications for the analysis of the structure and policing of the industry. Street-based sex workers represent only approximately 10% of the sex industry population and (outside of Kings Cross/Darlinghurst) work in a limited number of discrete, suburban locations. Most of the remaining 90% of the sex industry comprises various kinds of 'indoor' work—in brothels (with or without council approval), private premises (legally

defined as brothels but rarely seeking council approval) and phone-based escorts (not requiring any approval) (Donovan and Harcourt 1996).

Contrary to Scott's claim (which was based on a newspaper report) there is no evidence to suggest that brothel numbers have increased by 200–300% since 1995. The Sex Workers Outreach Project (SWOP), which has a demonstrated ability to deliver outreach to nearly all commercial brothels in the metropolitan area, had 513 premises on its outreach list in 1994 (Harcourt 1999). In June 2003, it had approximately 600 and outreach workers reported a number of brothels were closing down because they had become unviable during the winter months (Personal communication from SWOP Information Officer 12 June 2003). This is supported by information from South Sydney Council which has approved over 50 brothels since 1995, most of which had been operating for many years before seeking approval. Changes of ownership and temporary closures during business declines mean that the total number of operating brothels is rarely as great as the number of approvals recorded.

The policing of prostitution

Most importantly, Scott's conclusion that '...arrests and convictions for prostitution have remained high in New South Wales' is not borne out by the crime statistics. We agree that the police interpretation of soliciting law is sometimes problematic and still too often results in unjustified harassment of street-based sex workers (Edwards 1999), but it is also important to recognize the improved position of street workers as well as other sex workers in NSW in recent history. SWOP has tried to counter police harassment of street workers through its Sex Industry Legal Kit (SILK) (Miles 1999) which provides accessible information about the law and its interpretation to all sex workers including those on the street. The court figures show a large decline in the policing of all forms of prostitution in NSW. Table 1 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 reforms.

Charges for soliciting declined to zero following the repeal of the soliciting offence in 1979. They increased to 419 when the 1983 amendments were introduced, and increased again around the introduction of the Summary Offences Act 1988. They have steadily declined throughout the 1990s. The comparison between the thousands of charges prosecuted annually in the 1970s under the Summary Offences Act 1970 (when soliciting in a public place was an offence *per se*) and the much smaller numbers in the last decade is striking.

Since the early 1990s, charges for all prostitution offences have remained low or declined. Table 2 presents the charges 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. Relatively few charges are laid for the other soliciting offences and for public acts of prostitution.

Table 1. Charges in the Local Court for the most frequently prosecuted brothel and soliciting offences 1972–2001.¹

Year	Soliciting ²	Live on earnings	Own/manage parlour	Use massage parlour
1972	4288	46	0	0
1974	3301	17	0	0
1976	1930	20	0	0
1978	1804	13	0	0
1980	6	35	28	94
1981	0	53	21	84
1982	0	39	17	66
1983	210	40	21	26
1984	419	33	17	27
1986	180	11	7	11
1988	376	32	4	6
1990	720	1	3	12
1991	851	8	8	10
1992	767	6	3	21
1993	462	7	4	16
1994	312	14	11	42
1995	346	15	4	34
1996	264	4	2	3
1997	278	2	0	2
1998	256	0	0	1
1999	165	1	1	0
2000	158	2	0	0
2001	274	0	0	0

Source: unpublished statistics from the NSW Bureau of Crime Statistics and Research.

Notes:

1. No data are presented for the Disorderly Houses Act 1943 because charges may arise from premises declared disorderly for reasons other than prostitution.

2. Between 1972 and 1979: s28 of the Summary Offences Act 1970; between 1979 and 1982 there were no soliciting offences; between 1983 and 1988: s8A of the Prostitution Act 1979; between 1988 and the present: s19 (1) of the Summary Offences Act 1988.

Overall, the figures presented in tables 1 and 2 provide ‘a dramatic illustration of the decriminalisation’ of prostitution in NSW and show the declining involvement of police in all aspects of the industry (Brown *et al.* 2001: 1067).

These figures challenge Scott’s argument insofar as he relates his analysis specifically to NSW. Comparative rates of prosecutions/arrests for prostitution in NSW, Victoria and Queensland show NSW ‘with significantly lower rates (in the order of 50%) ... than ... either Victoria or Queensland’ (Sullivan 1999: 13). Sullivan specifically refers to the comparatively low figures for street soliciting offences in NSW, which largely account for the disparities in state statistics. She suggests that by decriminalising brothel prostitution and making legal space for street soliciting NSW has reduced the public/private trade-off used in most regulatory systems and moved some way toward improving the civil and human rights of all sex workers in this state. This is not the case in other Australian states where street soliciting is illegal under all circumstances

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: s19 (1)	Solicit in proscribed locations: s19 (2)	Solicit in a manner that harasses or distresses: s19 (3)	Solicit by client near or within view of prescribed locations ¹ : s19A (1)	Public Act of Prostitution ² : s20 (1)	Public Act of Prostitution ³ : s20 (2)
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: unpublished data from the NSW Bureau of Crime Statistics and Research

Notes:

1. These new client specific offences (s19A of the Summary Offences Act 1988) were enacted in 1999. They mirror the prohibitions contained in s19. The only charges laid to date are those under s19A(1): solicit near or within view of a dwelling, school, church or hospital.

2. This offence applies to acts of sexual intercourse in or within view of a school, church, hospital or public place.

3. This offence applies to acts of sexual intercourse in a vehicle in or within view of a school, church, hospital or public place.

and brothel prostitution is either completely prohibited or heavily regulated through a costly and restrictive licensing system.

Whilst we agree with Scott's general thesis that law and law enforcement is directed more often against those working in the 'street market' than those working in other 'private' forms of prostitution, we consider that his choice of NSW to illustrate his thesis was somewhat inappropriate. NSW law is unusual in common law jurisdictions in that soliciting in a public place is legal and street workers who do not solicit near or within view of the prescribed locations are free to solicit in the street market without fearing prosecution. The public/private distinction is of considerably less significance in this legal framework than it is, for example, in England, where it is an offence under s1 of the Street Offences Act 1959 (Chapter 57) to loiter or solicit in a street or public place for the purpose of prostitution and consequently, there is no legal street market.

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