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Sex Work and Sexual Violence Laws in Each Jurisdiction

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Introduction

This chapter begins our analysis by outlining the formal laws that operate[1] in each of our case-study jurisdictions in relation to sex work and sexual violence. Looking at the varied and distinct legal contexts of

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the UK (England and Wales, Scotland, and Northern Ireland),[2] Aotearoa New Zealand, and the USA, we consider the formal laws, legal regulations and court cases that directly concern prostitution, sexual violence, and workers' rights in each of these sites.The chapter also looks in detail at the operation of consent and the growing recognition, in some jurisdictions, of conditional consent, before we go on to consider the real-life application and relevance of these legal norms. Taken together, these discussions provide necessary framing for our subsequent empirical chapters, in which we seek to understand whether and how legislative context affects sex workers' attitudes, perceptions of, and behaviours towards the formal law and their experience of the law.

Laws Concerning Prostitution and Workers' Rights

United Kingdom

England and Wales

In England and Wales, sex work is partially criminalised. This means that offering or providing sexual services for money is not illegal, but working in brothels, brothel keeping or paying for services from someone forced into sex work is against the law (Sexual Offences Act, 2003). Loitering and persistent public solicitation (trying to get clients) in a street or public place for the purpose of prostitution is an offence; meanwhile, 'kerb crawling' (driving to find a sex worker) is also now charged as soliciting (Policing & Crime Act, 2009). It is not illegal to advertise sexual services, although rules prohibit obscene publications (Obscene Publications Act, 1959, Section 2), indecent displays (Indecent Displays (Control) Act,1981, s.1) and 'carding' (Criminal Justice & Police Act, 2001, s.46).

[2] We use the word 'prostitution' in the context of legal regulations that deploy this term.

Scotland

Sex work is also partially criminalised in Scotland. Street prostitution is dealt with under the Civic Government (Scotland) Act 1982, Section 46(1). 'Kerb crawling', soliciting a prostitute for sex in a public place, and loitering for the same purpose are also criminal under the Prostitution (Public Places) (Scotland) Act 2007.

It is not illegal to advertise sexual services, though there have been attempts to make it so in the context of efforts to criminalise the purchase of sex. These have so far failed, but sex work has been increasingly defined across a number of Scots social policies as a form of commercial exploitation (Scottish Government, 2024).

A Prostitution Tolerance Zones Bill was introduced into the Scottish Parliament in 2003 but failed to become law.[3]

Northern Ireland[4]

Paying for sexual activity with a person became illegal in Northern Ireland in 2015, with the passing of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act. Offering or providing sexual services for money and public solicitation is not illegal, but paying for sexual services is a summary offence subject to a £1000 fine and/or a maximum sentence of one year in prison. Offences relating to forced or coercive prostitution and brothel keeping are not within the scope of the above legislation and are prosecuted separately, as is the case in the rest of the UK. Similarly, as in the rest of the UK, paying for sex with someone under the age of 18 is subject to a maximum penalty of imprisonment ranging from seven years to life. The Sex Workers Alliance Ireland (SWAI) is the main advocacy group for sex workers in Northern Ireland.

[3] The Bill was withdrawn in 2015: https://webarchive.nrscotland.gov.uk/20240327012607/https://archive2021.parliament.scot/parliamentarybusiness/Bills/24985.aspx

[4] As noted in the introductory chapter, due to small numbers and in order to protect anonymity we included Northern Ireland data as part of the UK in the analysis that follows. The distinction in legal systems should, however, be noted and could be the focus of future study.

Policing in the UK

Police enforcement of these laws is discretionary. National policy discourages enforcement against street workers and encourages protecting sex workers and focusing attention on exploiters (NPCC, 2024). Great Britain has 43 territorial police forces (39 in England, four in Wales), with Police Scotland constituting its own force. Within this, there is a diversity of approaches to sex work and differing practices in working with sex-worker-led organisations, including the largest, National Ugly Mugs (NUM). This has led to what Feis-Bryce describes as a 'patchwork' approach to policing (Feis-Bryce, 2017) and, while there are policy attempts to bring consistency across the forces through models such as the 'harm-reduction compass' (Sanders et al., 2020a), discretionary element in policing means a myriad of approaches still exists, from safeguarding to enforcement. Some areas provide special liaison officers to sex workers reporting rape and serious physical harm. These officers are trained to understand the stigma and structural barriers that sex workers face (see Brown et al., 2024). A few areas treat all crimes against sex workers as hate crimes, allocating additional police resources and procedures to facilitate access to justice (Sanders et al., 2022).

Workers' Rights Laws in the UK

Labour law currently offers some level of protection for the formally self-employed stripping sector (see *Nowak v Chandler Bars Group Ltd,* 2019 in Barbagallo & Cruz, 2022); in Scotland, *KR v Mick Costello and others* (2021); Cruz (2020), but these protections do not, as yet, extend to other forms of sex work—such as prostitution and pornography—currently considered 'illegal', despite the fact they resemble stripping's labour processes (Barbagallo & Cruz, 2022).

Aotearoa New Zealand

Sex work has been decriminalised in Aotearoa New Zealand since the Prostitution Reform Act (PRA) was passed in 2003. Offering and providing commercial sexual services for money is legal and sex workers have the same employment, health, and safety rights as any other employee. Up to four sex workers can work together without the need to obtain a brothel operator's certificate. If there are more than four sex workers in a business entity, these workers need to obtain operators' certificates and must follow the same rules as other businesses, although, additionally, local councils can regulate location. In addition, there are specific protections just for sex workers.

In this decriminalised context, the police consider their role as one of providing support and preventing violence (Armstrong, 2017). The law is focused on concerns for worker and client health, and the welfare of trafficked people (although their legal status remains precarious), rather than on prosecuting people for participating in this trade. Under the PRA, sex workers are guaranteed the right to refuse to provide or continue to provide sexual services to any client. Section 17 of the PRA applies even when there is a previous agreement in place—the 'right to say no' supersedes contract law and the Consumer Guarantees Act (1993).

This guarantee was confirmed in the High Court decision of NR v MR (2014), in which the judge ruled that a sex worker had the right to end a two-hour booking early when she discovered the client had been looking up personal information about her. The client, who had refused to accept a refund, tried to argue that the worker had breached Section 28 of the Consumer Guarantees Act (CGA) (1993). The judge ruled that the respondent had no obligation to continue to supply sexual services and that she had a right under the Prostitution Reform Act to refuse to do so.

Introduced in part to address public health concerns, Section 8 and 9 of the PRA require both clients and workers to use prophylactic devices for oral, vaginal, and anal sex. Operators must promote this, and there is a $2000 fine for not practising safe sex.

As for migrant sex workers, Section 19 (PRA) was introduced as an anti-trafficking measure, to "ensure that in decriminalising the laws on prostitution, we do not unwittingly allow people to be brought into the country for the purposes of prostitution" (Dalziel, 2003). However, research indicates that s.19 is inconsistent with decriminalisation, as it creates two tiers of workers: legal (Aotearoa New Zealand citizens; permanent residents) and illegal (migrant workers with temporary visas). Temporary visa holders tend, therefore, to be more vulnerable to exploitation: unprotected by the PRA and fearing deportation, they are unlikely to report breaches or acts of violence (Armstrong, 2021; Bennachie et al., 2021; Harris, 2021; also see recent decision in case *AQ Thailand* [2022]).

Workers' Rights in Aotearoa New Zealand

Before the PRA passed in 2003, sex work was illegal. Post-PRA, sex workers no longer fear prosecution and can, accordingly, use criminal law to bring complaints about violence, theft, and other acts (Abel et al., 2010). As sex workers are independent contractors and not employees, however, they can be subjected to fines and other exploitative practices in contravention of the PRA, and have to take disputes with clients or brothel operators (e.g. over non-payment) to a mediation service, rather than employing labour law to enforce their rights. They can also report exploitation or abuse through various early resolution mechanisms provided by the Ministry of Business, and disputes with employers can be heard by the Human Rights Review Tribunal. Further information and support on criminal and breach-of-contract matters is available via the Aotearoa New Zealand Sex Workers' Collective.

United States of America

In most USA jurisdictions, governed by individual state laws, paying for services from someone forced into sex work is illegal, as is offering or providing sexual services for money, including keeping brothels, advertising, solicitation (public or private), and managing or controlling sex

workers. The penalties for sex workers include fines or small prison sentences; and, in many states, any third-party involvement is subject to long-term prison sentences and large fines. Third parties include anyone seen as facilitating prostitution—from managers to persons referred to as pimps, to taxi drivers, to accountants if they know or should have known about their client's involvement in prostitution. The laws are worded differently in each state, with different penalties, and local police departments also have much discretion. Police are encouraged to prioritise clients and exploiters, but frequently arrest sex workers to encourage them to turn in exploiters; they also pose as sex workers online, to lure unsuspecting clients (Fernandez, 2016, p. 26).

The Stop Enabling Sex Traffickers Act (SESTA) and The Fight Online Sex Trafficking Act (FOSTA) were passed in 2017, both intended to fight sex trafficking by making it illegal to assist, facilitate or support sex trafficking through advertising. These laws suspended Section 230 of the Communication Decency Act of 1996 that protected platforms from liability for actions by users. These laws, moreover, put pressure on platforms to censor users—or risk civil and criminal penalties. Researchers note, however, that, rather than preventing online exploitation of trafficked persons, the legislation has pushed sex workers and trafficking victims into more dangerous and exploitative situations, by hampering their access to communication (Blunt & Wolf, 2020; Decriminalise Sex Work, 2024).

Nevada

Prostitution is legal in only one state: Nevada. Its laws on prostitution are contained in the Nevada Revised Statutes ('NRS') Chapter 201—Crimes Against Public Decency and Good Morals. These define prostitution as "engaging in sexual conduct with another person in return for a fee, monetary consideration or other thing of value" (Nevada Revised Statutes, (NRS) 201.295). Throughout the state, it is illegal for any person to "engage in prostitution or solicitation therefor, *except in a licensed house of prostitution*" (NRS 201.354.1; original emphasis), and these "licensed houses", which are allowed only in counties with less than

700,000 people (NRS 244.345.8), currently exist in 10 of Nevada's 17 counties. Only brothel owners, brothel staff, and sex workers themselves can legally gain money from prostitution. Nevada health codes specify regular testing for HIV and sexually transmitted infections for legal sex workers, who must use condoms.

Legal brothels are highly regulated. State law requires that "houses of ill fame" cannot be within 400 yards of a school or place of worship (NRS 201.380.1) and brothels are not allowed to advertise in areas where prostitution is illegal (NRS 201.430.9). Additionally, brothels are not permitted to operate from a building that fronts, or has entrances/exits onto, a principal business street or thoroughfare anywhere in the state (NRS 201.390.1). Most of the regulations covering brothels are set and governed by each city or county government, and enforced by local police. Ordinances, which vary greatly, specify where brothels can be located, conditions for revoking licences, and restrictions on advertising and signage (Brents & Hausbeck, 2005). Applying for a licence is difficult, with detailed business and financial histories required, and licensing fees can be up to $200,000 annually. Sex workers must be at least 21 years old in some counties, and 18 in others, and all brothel employees must obtain work cards from the police department.

As in most USA jurisdictions, Nevada law criminalises the solicitation of prostitution; if offering or agreeing to commit prostitution, a person can be arrested for solicitation, even if the sexual act never actually happens. Penalties for solicitation and prostitution are the same: a client or provider arrested for solicitation will incur fines of up to $1,000 and/or up to six months imprisonment. 'Pandering' (NRS 201.300.1) and 'pimping' (NRS 201.320.1) are also considered offences in Nevada and other USA states. Pandering refers to inducing or encouraging another "*without* physical force or immediate threat" (emphasis added) to engage, or continue to engage, in prostitution, whether legal or illegal. It has a penalty of one to five years in prison and a fine of up to $10,000. Pimping—living off the earnings of a sex worker—incurs six months to three years imprisonment and up to $1,000 in fines, unless threat, force, or fraud is used, or if the potential sex worker is under 18: then it is prosecuted as sex trafficking (201.300). Nevada also has a vagrancy statute (NRS 207.030) that makes it a misdemeanour to "be a pimp".

Nevada has several laws designed to combat sex trafficking that blur the lines between trafficking and prostitution. The crime of "facilitating sex trafficking" (NRS 201.301.2) involves facilitating, arranging, providing, or paying transport of a person to induce that person to engage in unlawful sexual conduct or prostitution. Notably, the crime is helping to transport any sex worker, not just doing so by force. If the person is over 18, the penalty is one to six years in prison; if under 18, it is three to 10 years. Convicted sex traffickers are required to register as sex offenders.

Under state law, anyone arrested for prostitution must submit to an HIV test (NRS 201.356.1). Despite advances in HIV treatment, which can render the virus undetectable and therefore untransmittable, any sex worker engaging in legal or illegal prostitution who tests positive for HIV is liable to be charged with a felony offence (NRS 201.358).

Workers' Rights in the USA and Nevada

No workers' rights accrue due to prostitution being illegal in most states. No positive workers' rights accrue from working in a brothel in Nevada, bar the fact that working is not considered to be a crime.

Sexual Harassment

Feminist legal activism has meant that robust sexual harassment laws operate in the USA; but, as Schulhofer (2017) notes, these operate in narrow circumstances, and, in our study, we have not found them to be utilised by victims who have experienced sexual violence while sex-working.

While brothel employees could, theoretically, file complaints, there have been no known cases where EEOC (Equal Employment Opportunity Commission) complaints or civil lawsuits have been taken against brothel owners or customers. Also, in contrast to Aotearoa New Zealand, there are no special protections or avenues for brothel workers, only the same protections that apply to all workers. There has been concern that legal brothel workers, who are classified as independent contractors, are

not protected by employment law. However, as determined by a number of court cases, many adult industry contract workers meet the conditions of an employee and are, therefore, covered by discrimination law (Gwin, 2024).

Sexual Violence Laws and the Concept of Consent

United Kingdom

The Law in the Legal Systems of the UK

Sexual offences were only unified in the early part of this century, in the distinct legal systems of the UK. Prior to this, laws concerning rape and sexual assault had developed in a fragmented, piecemeal manner, governed largely by the common law. Moving away from the historical understanding of rape as requiring force, consent became part of the common law in the last century, and in statute since the 1976 (Sexual Offences (Amendment) Act, 1976 in England and Wales, where rape was defined as sexual intercourse without consent. The law, however, failed to provide a clear dividing line between 'real consent' and 'mere submission', leaving it to juries to give consent its 'ordinary meaning' (as per *R v Olugboja* [1981]). This left considerable space for interpretation and, it has been argued, for the utilisation of rape myths to fill the gaps between common sense understandings and facts presented (Ellison & Munro, 2010; 2013). Moreover, as Temkin and Ashworth (2004, pp. 336–337) note, without "a clear indication of what is meant by lack of consent, sexual acts obtained by abuse of trust or coercion other than violence may well go unpunished". Thus, while consent models seek to move beyond understanding sexual offences as a crime of violence and recognise them as a violation of sexual autonomy, the operation of the law means the reality is that, most often, only cases of 'real rape' (Estrich, 2018, pp. 1092,1170), i.e. a violent attack perpetrated by a stranger, make it through what is a well-documented process of attrition.

This focus on 'real rape' remains the case, despite recent reforms which have sought to provide a clearer and more expansive statutory definition of consent in the legal systems of the UK. Sustained feminist campaigning inspired a series of governmental reviews of sexual offences, which focused primarily on legal reform. The most prominent, *Setting the Boundaries* (Home Office, 2000), stated that by "setting clear boundaries for society as to what is acceptable and unacceptable behaviour", reforms could bring coherence to the law, reflect changes in society, encourage victims to come forward and bring cases to court, and educate police and prosecutors towards a better understanding of the ambit of consent' (Home Office, 2000, p.18, p.18). These reviews led to the creation of Sexual Offences Acts in each jurisdiction, broadly similar in the sense that each contains a series of distinct sexual offences, all centred around the concept of consent.[5]

England and Wales

The Sexual Offences Act (SOA) 2003 created a series of distinct sexual offences: (s1) rape (s2) assault by penetration; (s3) sexual assault; and (s4) causing a person to engage in sexual activity without consent, the cornerstone of which is the concept of consent.[6]

Following a number of common-law jurisdictions, the SOA 2003, for the first time, creates a statutory definition of consent. Section 74 states "a person consents if he [or she] agrees by choice, and has the freedom and capacity to make that choice". This general definition of consent

[5] The commentary that follows is based around the law in England and Wales. The intention is not to be Anglocentric but, rather, to attempt to offer a clear statement of the law, in recognition of the fact that the SOA 2003 preceded and modelled reform in the other jurisdictions and that much academic debate has concerned the cases in English courts. On the substantive issues, the legal systems on this issue are largely similar, unless otherwise stated (see Appendix 1 for distinctions).

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is joined by a set of exhaustive (Temkin & Ashworth, 2004, p. 335),[7] rebuttable (s.75) and irrebuttable (s.76) evidential presumptions about consent and reasonable belief in consent, which are designed to give some indication of situations where consent is not present.

Section 75 outlines evidential presumptions about consent, including whereby, if circumstances are proved, consent cannot be provided if the victim was: unable to resist because of the use of violence or fear of violence, unlawfully detained, asleep, unconscious, had a physical disability or was too affected by substance. Section 76 outlines conclusive presumptions of consent vitiation, including whereby the defendant intentionally deceived the complainant, either about the nature and the purpose of the act or about the true identity of the perpetrator.

The maximum sentences for these offences are life (Section 1 [rape] and 2 [sexual assault by penetration], and Sect. 4 [causing sexual activity without consent] if it involves penetration) and 10 years (Sections 3 [sexual assault] and 4 [causing sexual activity without consent - without penetration).

Scotland

Sexual offences in Scotland are legislated under the Sexual Offences (Scotland) Act (SOSA) (2009). The first three sections of the SOSA, contained within Part 1, pertain to rape (Sections 1), sexual assault by penetration (Sections 2), and sexual assault "and other sexual offences" (Sections 3). Across these offences, there is understanding that a crime is committed if the victim does not consent and the perpetrator does not reasonably believe the victim is consenting. Consent is more specifically covered under Part 2 of the SOSA and is defined as 'free agreement'. Conditions, whereby an individual does not provide free agreement (noted in Sections 13), include where someone is incapacitated through alcohol or where someone is mistaken, through deception by the other,

[7] This means that only Parliament can add to the list of circumstances. There has been debate as to whether it should be non-exhaustive as per other jurisdictions (e.g. Canada and Australia) (Temkin and Ashworth 2004, p. 335), which means that case law could help develop the law beyond the stated examples. Doubt has also been expressed with regard to the current hierarchy of the presumptions.

"as to the nature or purpose of the conduct". Section 13 (e) also references where free agreement is not given due to the perpetrator impersonating a person known personally to the victim. Part 6 (and Schedule 2) of the SOSA outlines penalties for sexual offences, with the maximum sentences for rape and sexual assault by penetration being listed as "life imprisonment and a fine"; the maximum penalty on conviction on indictment for sexual assault is life imprisonment *or* a fine, or both.

Northern Ireland

Consent is not directly defined in The Sexual Offences (Northern Ireland) Order 2008. Its meaning is to be inferred by reading ss.9 and 10, which outline circumstances in which consent is absent. These are the same as the rebuttable and irrebuttable presumptions in the 2003 Act in England and Wales.

Consent in the UK: Concepts of Consent, Deceptions, and Conditional Consent

The reforms described in the previous section have achieved some positive changes. The definition of consent introduced in the Sexual Offences Acts puts the onus on the defendant to demonstrate a reasonable belief in consent, as opposed to the victim having to demonstrate an active denial of consent. Submission is no longer part of consent: belief in consent now has to be reasonable; and judicial directions now operate in an attempt to counter jury stereotypes and preconceptions with regard to sexual norms (Elvin, 2008, p. 530). Many commentators note, however, that despite the intention that statutory definition would help to clarify, and help to broaden out, the operation of consent, achieving a common understanding remains elusive and rape continues to be interpreted in law in a restricted manner.

Judicial guidance is minimal and circular, repeating statutory wording (Temkin & Ashworth, 2004, p. 336). There is currently remarkably little case law on the meaning of consent in sex offences; and the cases

that have been decided—in particular, around if and specifically how deception operates to preclude consent, and the ambit and operation of presumptions—has led to even more confusion. This has, in turn, led to calls for further statutory reform (Criminal Law Reform Network Now (CLRNN), 2023; Murray & Beattie, 2021, p. 16).

In an effort to synthesise what is a voluminous and, at times, complex academic debate, a series of contradictory judgments on the scope of what forms of deception can constitute rape, and on the emerging concept of conditional consent, reveals a lack of clarity in the current law. A conflict has emerged between restrictive (Laird, 2014; Rogers, 2013) and expansive approaches (see, for e.g. Herring, 2005; Murray & Beattie, 2021), revealing differing perspectives on where it is appropriate to draw the line in order to constitute the legal 'wrong of rape' (Gardner & Shute, 2000). This is crucial for our research, as our study shows that many forms of unwanted sexual contact fall within this legal grey area.

Restrictive

Before the 2003 Act reforms, the common law distinguished between deception in inducement (deception used to induce another into having sex) and deception in ad factum (deception to the nature of the act or regarding identity) (*R v Clarence* [1889]). The law only recognised the latter as deceptions capable of violating consent (*R v Clarence* [1889]). This approach was confirmed by the Court of Appeal (COA) in the 1995 case of R v Linekar (1995), which considered whether the non-payment of a sex worker could be rape. According to the COA, Linekar's deception related neither to his identity nor to the nature of the act, but to the collateral matter of payment and, thus, did not negate consent. The COA stated that "The sex worker knew that she was engaging in sexual intercourse with the appellant and consented to it", and reaffirmed the previous common-law restrictive view: "[it] is the absence of consent and not the existence of fraud which makes something rape" (COA in Linekar, at 75; and see Syrota, 1995, p. 338).

Some later decisions would appear to support presumptions in the 2003 Act, in reiterating a limited set of deceptions (nature of act, identity) as undermining consent. For example, R v Dica (2004) (failure to disclose HIV status was not considered rape, as B was not deceived as to the 'nature' of the sexual act); *R (Monica) v DPP* (2018) (judicial review upheld the CPS decision not prosecute a rape case where consent to sex was obtained by an undercover police officer and this deception was considered insufficiently connected to the nature and purpose of sexual activity); and R v Lawrence (2020) (appeal allowed against a conviction of rape where consent relied on the assurance that the accused had undergone a vasectomy and the COA stated that B was not deceived as to the "sexual intercourse itself" but only as to the "broad circumstances" surrounding it).

Expansive

In contrast to these cases, the 2003 Act's more affirmative definition of consent, and a number of subsequent decisions, suggest a more expansive approach. The discussion of deceptions ad factum mentioned in s.76 of the 2003 Act refers to conclusive evidential presumptions (Temkin & Ashworth, 2004, p. 338) rather than to the general definition of consent (s.74). These presumptions state categorically where consent is absent, but do not exclude situations where there is no free agreement (Murray & Beattie, 2021). The SOA introduced a more general meaning under s.74, which, as a number of academics argue, allows for a wider recognition of deceptions that undermine free agreement[8]: a person consents if they agree by choice, and have the freedom and capacity to make that choice. This "offers a richer recognition of the right to make decisions about one's sexual conduct" (Murray & Beattie, 2021, p. 571). Cases such as R v Jheeta (2007) confirm this approach: deceptions in the form of anonymous, threatening texts from someone posing as a police officer did not pertain to the nature or purpose of

[8] This is also the view of the Scottish Law Commission (2006).

sexual intercourse (s.76), but also did not preclude a charge under s.74, as the threats rendered the victim not 'free' to make her own decision.

This broader understanding of consent was also affirmed by the case of Assange v Swedish Prosecution Authority (2011). In connection with proceedings relating to charges faced by WikiLeaks founder Julian Assange in Sweden, the High Court had to decide if two separate complaints by women, that the accused penetrated each of them without a condom, despite their consent relying on his agreement to wear one, would also constitute a criminal offence under English law (in order to fulfil the dual criminality test). Assange argued that this was not a known offence under English law because the deception did not go to the nature of the act. The High Court disagreed, finding that each complainer was deceived about a sufficiently important aspect of the act so as to negate her consent under s.74 of the SOA (*Assange*, at 86). The case's importance lies in the observation that s.74 operated separately from s.76. It has also been described as an authority for an emerging concept of conditional consent (Doig & Wortley, 2013, p. 291).

Assange has been followed by increased media reporting of the crime of 'stealthing' (Bond 2023; Stonehouse, 2021) and a number of successful cases, including one in Scotland[9] and an unreported case involving a sex worker, this second example being one to which we now briefly turn our attention. In 2019, Lee Hogben from Bournemouth was found guilty of rape and two counts of assault by penetration, and sentenced to 12 years in prison. Consent for sexual intercourse was given by the victim, on the condition that a condom was used; these terms were agreed upon beforehand and also clearly stated on her website. The accused removed the condom and continued to have sex with the victim despite her protests, assaulted her, and left without paying. While the case also involved other acts of physical violence, the prosecuting lawyer, Jodie Mitchell, in press reports noted: "Hogben went beyond what was consented to by removing the protection, which the complainant will say was a condition of intercourse" (Aspinall, 2019).

[9] https://www.thescottishsun.co.uk/news/10663712/guilty-rape-stealthing/. Interviews with prosecutors in Scotland revealed that, while there was no similar guidance in Scotland, they would follow *Assange*; and this case, as reported in the *Scottish Sun*, suggests stealthing is covered by the SOA Act.

Subsequent legal judgments appear to confirm the approach in *Assange* and suggest that it is possible for someone to consent to sexual intercourse on the condition that their partner does not ejaculate inside them (*R (on the application of F) v DPP and A* [2013]) or on the condition that their partner is a cisgender man (*R v McNally* [2013]).[10]

Importantly, the dicta from *Assange* is reflected in and informs new Crown Prosecution Service guidance, which reflects an expanded notion of conditional consent:

- There must be ostensible consent at the relevant time, usually at penetration,
- There must be a deception, other than one which falls within Sections 76 of the Sexual Offences Act, 2003, or a condition upon which the complainant agreed to the act,
- Prosecutors should avoid defining the 'concept' of conditional consent by reference to the topic or subject matter of the condition or deception in question, as these cases are no more than examples of the need to apply all relevant context when deciding issues of free choice under Sections 74,
- A condition or deception is an important part of the context but not all of it. Whether consent was absent may well depend on other contexts,
- The evidence relating to 'choice' and the 'freedom' to make any particular choice must be approached in a ['] *broad common-sense way*,' [Lord Judge CJ in ***F***], and
- The imposition of conditions embodies personal sexual autonomy which Sections 74 was intended to provide. Their contextual importance derives, in part, from the fact they represent positive choices made by a participant to sexual acts about which another participant can be in no doubt.

[10] The case of *McNally* is controversial. Treating a trans person's gender identity as deceptive has been described as transphobic (Sharpe, 2018). A careful discussion of this issue is not possible in the space permitted but it should be noted that suggested reforms which create a new category of deceptive relations, would offer a more satisfactory legal solution, as this would allow for the defence of a reasonable excuse to be utilised (see Gibson, 2019).

(Crown Prosecution Service, 2021a; original emphasis)

While this CPS guidance suggests a "developing concept of conditional consent", it also notes the "absence of clear authority as to how far the concept extends" (Crown Prosecution Service, 2021b). Moreover, reference to "broad common sense way" and "contextual" approaches does not seem to be particularly helpful given the current uncertainty that exists in this area of law.

Is Payment an Issue of Conditional Consent?

The question of whether the concept of conditional consent extends to non-payments is unclear. It would seem that the new statutory definition of consent, which includes freedom and capacity to consent, coupled with the case of *Assange*, which recognises a richer sense of sexual autonomy, could also apply to other conditions that are important to sex workers, such as payment (Kotiswaran, cited in Mirren, 2019; Palmer, 2023). However, while arguments for a more expansive reading post-2003-Act are compelling, courts and legal personnel may be reluctant to extend the law beyond stated law in Linekar, and thus law reform is required to clarify this grey area.

Fraud

The Linekar case describes non-payment as fraud, and while criminal fraud charges could apply in these cases (especially in Scots law, which has a broader test), in practice this has not been charged. Civil claims have also not been pursued, likely due to the quasi-illegal status of sex work and the principle *ex turpi causa non oritur action* (from a dishonourable cause an action does not arise) (see *Pearce v Brooks* [1866]).[11]

[11] A carriage had been hired for a woman in which to undertake prostitution business. Action has been taken for payment of rental of the carriage. It is held that the owners knew the underlying immoral purpose and that, therefore, the claim was unenforceable: "Anyone who

Charging and treating deceptions, whether around payment or condom use, as either criminal fraud or civil cases do not address the sexual nature of the crime. The previous crime of procurement (Sexual Offences Act, 1956, Part 1, Sections 22–31: "It is an offence for a person to procure a woman, by false pretences or false representations, to have unlawful sexual intercourse in any part of the world"), abolished by the 2003 SOA, would have addressed this, and reformers must have assumed new definition s.74 would cover these cases. That it has not has instigated calls for (de-gendered) reinstatement of the previous procuring offence, or a new offence of inducing sexual activity by deception (such as a series of 'deceptive sexual relations crimes' that would mirror the main sexual offences [Gibson, 2023]). This would help clarify the law, overcome the binary between expansive and inclusive approaches to deception, and offer more justice options to victims and prosecutors.

Aotearoa New Zealand

Sexual offences are contained in Part VII of the Crimes Act 1961. Sexual violation is the most serious sexual offence, defined in Sections128 as the act of sexual connection without consent and without a reasonable belief in consent. Depending on how the sexual connection is effected, sexual violation amounts either to rape (Sections 128 (2) (where there is penetration of a person's genitalia by a penis)) or unlawful sexual connection (Sections 128 (3)). The crime of sexual violation is liable to imprisonment for a term not exceeding 20 years.

Additionally, Sections 129A (1) renders sexual activity induced by threats a crime, punishable by imprisonment for a term not exceeding 14 years. In Connolly v R (2009), a former police officer was found guilty of this crime, as he had made improper use of his powers to make express or implied threats that induced a sex worker to have a sexual connection with him.

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contributes to the performance of an illegal act by supplying a thing with the knowledge it will be used for that purpose, cannot receive the price for that thing so supplied".

The Meaning of Consent

In terms of defining consent, there is no clear statutory definition. Sparse judicial interpretations state that consent should be "full, voluntary, free and informed" to be "real, genuine or true" consent (legal consent) (R v Cook (1986)). Similarly, as Jackson notes, a model direction frequently used by judges in directing juries states: "consent means true consent if it is freely given by a person who is in a position to give it" (Bishop et al., 2018, at CRI128.4). The New Zealand Police website states "[a] person consents to sexual activity if they do it actively, freely, voluntarily and consciously without being pressured into it" (New Zealand Police, n.d.).

As previously noted, Sections 17 of the PRA states that the fact that a person has entered into a contract to provide commercial sexual services does not, of itself, constitute consent for the purposes of the criminal law, if he or she does not consent, or withdraws his or her consent, to providing a commercial sexual service. The Crimes Act is silent on the meaning of consent, providing only a legal definition of what it is not (see s.128A, below). Section 128A provides a list of non-exhaustive and rebuttable presumptions similar to those under 2003 SOA in England and Wales. The statute also notes that this section does not limit the circumstances in which a person does not consent to sexual activity.

As with the reforms in the UK, these definitions are circular (consent is defined as "true consent freely given"), self-referential and fail to answer the fundamental question of what consent is (Jackson, 2020). The latter two subsections of s.128A would appear to limit the scope of deceptions to the common-law position, permitting deceptions ad factum only as per the previous common law (following cases of *Clarence* and *R v Linekar*, which are cited with authority in Aotearoa New Zealand). While 'mistakes as to identity' remains narrow (Sections 127 (6)),[12] the interpretation of 'mistaken about its nature and quality' (Sections 128A (7)) has been subject to some extension in recent years, beyond a misunderstanding of the act's sexual nature as it was ruled in the case of KSB v

[12] Mistakes as to identity are restricted to the actual identity of the other person, or are interpreted narrowly. In R v Papadimitropoulos (1957), where consent was obtained by a fictitious marriage ceremony, it was held that mistakes as to the status of a person were not contemplated by the provision.

Accident Compensation Corporation (2012). The New Zealand Court of Appeal held that a non-disclosure of HIV was sufficient to constitute rape.[13]

In addition, and of considerable importance to our research, a recent case, R v Campos (2021), involving a sex worker has introduced the notion of conditional consent into Aotearoa New Zealand law, following the English case of *Assange*. In this case, Mr Campos eventually agreed to wear a condom when the victim explained that he was required to do so by law, but, in a second encounter during the booking, Mr Campos removed the condom and ejaculated inside the victim. A District Court (Wellington) jury held that, where condoms/prophylactic devices are removed without a sex worker's consent, this should be classified as sexual violation by rape under the Crimes Act 1961, s.128A. The offender received a sentence of three years and nine months' imprisonment, and both the decision and the sentence were later upheld by the Court of Appeal (*Campos v R* [2022]).

The decision has been hailed as "a long-awaited extension of the law and an affirmation that these practices undermine an individual's dignity, sexual autonomy and security" (Goh, 2021). This wider construction of consent appears to be gaining ground in a number of jurisdictions (see, for e.g. *DPP v R (Yeong) (a pseudonym)* (2022), although there are criticisms that this approach goes too far (for example, Noakes, 2022).

This means that cases involving condom refusal/ removal could potentially be charged as sexual violation (rape as per *R v Campos*), indecent assault, or breach of Sections 9 (requirement to use a prophylactic). All are criminal charges, but penalties vary widely, from discharge without conviction, to a fine (maximum penalty of a fine of $2,000), to imprisonment.

[13] The majority approved the dicta of the Canadian Supreme Court in *R v Cuerrier* (1998) at 47, per McLachlin J., that the deception went to the nature of the sexual act and differed from other statuses "in a profoundly serious way that merits the criminal sanction" (*R v Cuerrier*, at 72). This is a departure from previous case law; and common-law jurisdictions now all point in different directions, raising important issues of the interaction between criminal law and public health policy (Weait, 2007).

Non-payment as Rape

The question remains whether *R v Campos* can be extended to cases involving non-payment, given the restrictive authority of *R v Linekar*. It should be noted that a 2015 case in Australia (R v Livas, 2015) did recognise as rape a case in which Mr Livas pretended to pay a sex worker $850 with an envelope containing folded-up paper. The offender pleaded guilty to one offence of sexual intercourse without consent and was sentenced to 25 months' imprisonment. The judge Penfold J stated: "it must be clearly understood that something that looks like a consent to sexual intercourse, if obtained by fraudulent activity as this one clearly was, is not a consent".

United States

Rape and Sexual Assault Legislation

Historically, rape and sexual assault were considered a serious felony under common law (judge-made law) in the States of America. Rape was defined as sexual intercourse by a man, with a woman, not his wife, by force and against her will. To prove sexual assault, the American criminal justice system required evidence of force through corroborating evidence and evidence of a victim's resistance (Estrich, 1987). Beginning in the 1970s, reformers have sought to address the limitations in approaches to sexual violence, through a series of statutory reforms, which include definitional changes of rape and sexual assault that eliminated or modified corroboration and resistance requirements (Bachman & Paternoster, 1993; Clay-Warner & Burt, 2005; Horney & Spohn, 1991; Spohn & Horney, 1993; 1996).

Reforms operated at the state level, meaning that there are significant differences in the laws relating to rape and sexual offences across the United States. Because the legal definition of sexual assault varies by state, it can have an impact on formal reporting of victimisation (Kahn et al., 2003; Weiss, 2011) and public perceptions of the severity of sexual crimes (Pinchevsky et al., 2024). Statutes also vary nationally in how

consent is defined and the interpretation, with regard to the importance of force and fear in undermining consent in the crime of rape, highlights difficulties in interpreting sexual assault statutes. California statutory provisions use an affirmative consent model, whereas Pennsylvania legislation only describes non-consent in relation to forcible compulsion and incapacitation (Blanco, 2018).

Currently, sexual assault laws in the USA do not recognise a conditional consent standard, as established as a result of the case of *Assange* in England and Wales (Blanco, 2018) and in the Aotearoa New Zealand case of *R v Campos*. Conditional consent standards are essential for protecting against unwanted sexual contact such as stealthing, and, in the absence of common-law development in this area, statutory reform would seem necessary. California has implemented such a law (California Penal Code 261 PC)[14] and there are calls for other states to follow. Note, however, that its statute only provides civil penalties (financial compensation), not criminal sanctions (Hernandez, 2021). Blanco (2018) discusses the importance of adopting a conditional consent standard into pre-existing sexual assault laws, as opposed to the creation of new, stealthing-specific, legislation that could, she argues, overly criminalise sexual conduct. The American Law Institute's recent draft Model Penal Code[15] seeks to establish an affirmative consent standard and recognise the impact of coercion, but conditional consent remains restricted to the current common-law position with regard to deception (Schulhofer, 2017).

[14] 'Consent' is defined to mean positive cooperation in act or attitude, pursuant to the exercise of free will. The.

person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved (California Penal Code § 261.6).

[15] Due to the federally fragmented nature of USA law reform, the American Law Institute (ALI) is necessary. It is an unofficial, self-appointed group of leading lawyers, professors, and judges. Its mission is to promote uniformity and sound standards in American law. One of the most successful ALI products is its Model Penal Code (MPC), which it completed in 1962, more than 60 years ago. The MPC does not have the force of law, but states have widely enacted it. See: https://www.ali.org/publications/show/sexual-assault-and-related-offenses/

USA, Nevada

In the state of Nevada, the term sexual assault is used and defined as the subjection of another to sexual penetration,[16] or the forcing of another to sexually penetrate themselves or another or a beast, "against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct" (NRS 200.366.1.).

Here, non-consensual sexual touching that falls short of penetration—such as groping—is not rape. In these cases, possible charges would be for open and gross lewdness (NRS 201.210) or lewdness with a minor (NRS 201.230), depending on the victim's age.[17]

The law in Nevada is less nuanced than that in the other case-study jurisdictions and goes into significantly less detail about the specifics of different 'types' of sexual violence, or the meaning of consent. In interpreting the phrase "against the will of the victim", Nevada courts have developed a 'totality of the circumstances' test (*McNair v State* [1992]). In a jury trial, the jury must determine whether "(1) the circumstances surrounding the incidents indicate that the victims had reasonably demonstrated their lack of consent and (2) it was reasonable from the point of view of the perpetrator to conclude that the victims manifested consent" (McNair v State (1992)). This approach to consent continues to place the victim's actions as central to the analysis of consent/non-consent.

Case law has established that it is not necessary to prove overt force and physical force (Dinkens v State, 1976), which ruled that there is no consent where the victim is induced to submit to the sexual act through fear of death or serious bodily injury (*State v Denton* [1966]; *State v Thomas* [1973]).

[16] 'Sexual penetration' is defined (NRS 200.364.9) as "cunnilingus, fellatio, or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including sexual intercourse in its ordinary meaning. The term does not include any such conduct for medical purposes".

[17] Under NRS § 200.481, Nevada law defines the crime of battery as "any willful and unlawful use of force or violence upon the person of another". A simple battery that does not cause injury is treated as a misdemeanour. The punishment includes up to six months imprisonment and fines of up to $1,000. Domestic violence is a separate crime.

Deception

Nevada's Supreme Court ruled, in *McNair v State*, that the language of Nevada's sexual assault statute "is sufficiently broad and explicit to encompass conduct … occurring as a result of fraud and deceit" (Christopher & Christopher, 2007, p. 92), but also confirms the currency of the narrow common-law interpretation of rape by deception. This means that Nevada has one of the most restrictive definitions in the jurisdictions we examined, in relation to any recognition of rape by deception. It follows the narrow common-law approach, which only recognises deception in ad factum (i.e. relating to the sexual nature of the act and the identity of the accused) (Licea, 2022). This is similar to the English case of *R v Linekar*.

In this case (of *McNair v State*), the victim was a medical patient who was penetrated under the pretext of medical treatment. The court considered whether fraud and deceit were sufficient to vitiate the victim's consent in law. The court found that the physician's deception vitiated the victim's consent because the victim was "not in a position to exercise an independent judgement concerning the act of sexual penetration" [57].

This common-law approach to rape by deception would not accommodate the experience of sex workers who consent to sex based on fraud, such as non-payment or reduced payment, as, following the reasoning in Linekar, this deception does not relate to the nature of the act but to the circumstances surrounding it.

Conclusion

The purpose of this chapter has been to sketch the laws that operate in relation to sex work and sexual violence. In the next chapter, we document sex workers' experiences of setting up the conditions of consent and we consider what they do when these conditions are breached. We also consider, in subsequent chapters, the extent to which the 'law' informs these sex workers' experiences and responses to unwanted sexual contact.

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