

university failed to take into consideration the plaintiff's skills and capabilities, in particular. Therefore, the appellate court mandated the university to take immediate action to adapt its admission process to allow the plaintiff take the admission tests, considering his skills and abilities.

Conclusion

The road to complete social inclusion of persons with disabilities is neither short nor free from obstacles. In recent years, the Argentine Republic has provided evidence of its long-standing commitment to achieving complete enjoyment of human rights by, *inter alia*, adopting an inclusive public policy, and ensuring its sustainability. Now, the challenge is to turn this public policy into social conduct and we, as lawyers and active members of our communities, will play a significant role in achieving this goal.

Notes

- * Madelaine Geuzi Karaian is an Associate at Beretta Godoy, a Member of the Employment Law Committee and Latin American Liaison Officer of the Human Rights Law Working Group of the International Bar Association.
- 1 'Far from the Tree', Andrew Solomon, p 32. Andrew Solomon is a writer and lecturer on psychology, politics and the arts. Winner of the US National Book Award and an activist in LGBT rights, mental health and the arts.
 - 2 Art 1.
 - 3 This is probably a consequence of the major characteristic of the Convention: it was developed with the participation of organisations that represent persons

- with disabilities who are the everyday witnesses of the lack of real inclusion.
- 4 Art 2.
 - 5 Art 5 of the Convention, which imposes on signatory states the obligation to assure that 'necessary and appropriate modifications and adjustments [to the accommodation are made] not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. Also, Article 24 imposes on States Parties the obligation to provide reasonable accommodation of the individual's requirements, to ensure full access to educational services.
 - 6 Art 16: 'All inhabitants are equal before the law, and entitled to employment without any other requirement than their ability.'
 - 7 Art 1 indicates that which establishes that 'anyone who arbitrarily impedes, obstructs, restricts or in any way impairs the full enjoyment on an equal basis of fundamental rights and guarantees recognised in the National Constitution shall be liable, at the request of the victim, to revoke the discriminatory act or to cease the conduct and repair the moral and material damage caused'.
 - 8 *Álvarez, Maximiliano y otros v Cencosud s/ acción de amparo* Federal Supreme Court, 7/12/2010.
 - 9 *Pellicori, Liliana Siloia v Colegio Público de Abogados de la Capital Federal s/ amparo*, Federal Supreme Court, 15/11/2011.
 - 10 *Sch, FM c/Laboratorios Temis Lostaló SA*, Court of Appeals on Labour Matters, Court Room VII, 08/21/2013.
 - 11 *SF, MC c/Mistucal SRL y otro*, Court of Appeals on Labour Matters, Court Room VII, 21/08/2013.
 - 12 *P, EC c/Toko Argentina SA*, Court of Appeals on Labour Matters, Court Room II, 28/02/2013.
 - 13 *GP, MA c/Actionline de Argentina SA y otro*, Court of Appeals on Labour Matters, Court Room V, 23/04/2013.
 - 14 *EPN v Universidad Nacional de La Matanza (UNLAM)*, Federal Court of Appeals on Civil and Commercial Matters, 17/03/2014.

Carolyn M Dearing*
Lawyer, Perth
legalsol9@gmail.com

Saul Isbister
Touching Base Inc,
Sydney
saul@
tantra-man.com.au

The right to say yes: upholding the dignity of sex workers and their clients with disability

The right to dignity is an intrinsic aspect of all human rights, and forms part of the protections provided under international human rights law. The jurisprudence of human dignity has evolved over time, reflecting advances in policy development and law reform concerning the human body and sexuality. These developments have resulted in the right to dignity of sex workers and people with disability being expressly

recognised and defended in law. In this article we explain how organisations supporting the right of people with disability to access sex workers under a human rights framework advance the achievement of human dignity in significant ways. We also present evidence drawn from Australia and New Zealand that demonstrates that, where the human rights of people with disability and sex workers intersect, decriminalisation of consensual adult

sex work is the best model for fulfilling each group's human rights and aspirations for a life of dignity.

Universal right to dignity

While human dignity has long been recognised as a fundamental concept, the importance of human dignity as a legal right has been increasingly recognised, with a number of authors tracing the evolution of this concept as a binding legal norm.¹ UN treaties such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) affirm that all people are born free and equal in dignity and rights,² have a right to human dignity and self-determination, and rights that include the freedom to determine one's political status, economic, social and cultural development³ and the right to work, health, education and participation in cultural life.⁴

More recently, the Convention on the Rights of People with Disability (CRPD) expressly protects the rights and dignity of persons with disabilities including the right to make choices about one's own life.⁵

Dignity of risk defined

The dignity of risk principle is derived from the right to self-determination, incorporating the notion of dignity as the right to independence and personal autonomy. Supported by the right to privacy, it includes the ability to make personal choices free from arbitrary intrusion or unlawful interference by government.⁶

Under the CRPD, the dignity of risk includes the right of all adults to make their own choices and preferences about their health, care and lifestyle, even if others – including healthcare professionals or other support providers – believe those choices will endanger a person's health or longevity, or otherwise disapprove. In the context of sexual rights of people with a disability,⁷ the dignity of risk supports the right of people with disability to a personal sphere of sexuality free from arbitrary or unlawful interference by third parties.

In 2008 the International Planned Parenthood Foundation developed a Declaration of Sexual Rights. This Declaration evidences the continuing development of

sexual rights as a component of human rights, and increased awareness of the interrelationship between sexual rights and the human rights to development, freedom, equality, privacy and dignity.⁸

The right to dignity of sex workers

Sex workers⁹ are equal in dignity and all other rights. The right to self-determination includes the right to make choices about one's occupation, health, sexual activities, reproductive choices and participation in cultural life. This includes the right to freely consent to engage in consensual sex work.

Decriminalisation of sex work and dignity

The right to self-determination has also informed the decriminalisation of sex work in New South Wales (NSW), Australia, and New Zealand. In 1995 NSW decriminalised sex work and brothel-keeping with the intention of eliminating corruption, protecting community amenity and protecting the health and safety of sex workers and their clients.¹⁰ Unfortunately the government failed to adequately implement this process.¹¹ Whilst achieving significant improvements in public health outcomes, and reductions in police corruption and public order issues,¹² the regulation of sex workers is fragmented with around 150 local government bodies¹³ applying separate planning policies that are rarely evidence based.¹⁴ As a consequence, unlike all other home-based occupations, sex workers are subject to a patchwork of regulation, exposed to significant risk of privacy breaches and vulnerable to corruption and harassment.¹⁵

In 2003 New Zealand decriminalised all aspects of sex work, leading to positive outcomes for sex workers' human rights.¹⁶ For example, in 2005 a man was convicted for putting a sex worker's life at risk by removing a condom during sex.¹⁷ In 2009 a sex worker complained that a police officer had coerced her into sex through the use of threats. This officer was prosecuted and sentenced to two years imprisonment. His appeal failed.¹⁸

Most recently, in 2014, a sex worker brought a claim against a brothel owner for sexual harassment. New Zealand's Human Rights Review Tribunal upheld this claim and awarded the sex worker damages of NZ\$25,000 for humiliation, loss of dignity

and injury to feelings.¹⁹ The High Court of New Zealand also struck out a claim against a sex worker for a breach of contract on the basis that she was entitled to refuse, at any time, to provide sexual services.²⁰

In Canada the Supreme Court affirmed a complaint that domestic laws aimed at preventing public nuisance and the exploitation of sex workers, which prohibited brothels, living off the earnings of prostitution and communicating with clients in public, were unconstitutional as the laws offended sex workers' rights to life, liberty and security of the person pursuant to section 7 of the Canadian Charter of Rights and Freedoms.²¹

Motivation of clients, including clients with disability, to access sex workers

Clients are motivated to access sex workers by a range of factors such as:

- opportunities to experience sexual activities not provided by their current partner;
- variety in sexual partners;
- convenience;
- seeking excitement;
- encounters with no emotional ties or conversely succour against loneliness; or
- to address inexperience in sexual relations that may be due to an inability to form sexual relationships.

Some clients also report visiting sex workers in order to address emotional needs for 'intimacy, warmth, validation or connection'.²² In Australia, men and women with disability have visited sex workers to lose their virginity or to learn about their sexual capacities.²³ Furthermore, for some people with significant mobility and dexterity impairments, paying sex workers may be their only way to achieve masturbation.²⁴

Interviews with male clients with disability in the United Kingdom show that for many 'the shame, guilt or embarrassment in seeking out commercial sex is rebuffed by the positive influences on quality of life, self-esteem and confidence that result from fulfilment of a range of emotional, psychological, sexual and social needs.'²⁵

In a recent Australian development, funds to support people with disability accessing sex workers after receiving catastrophic injuries in motor vehicle accidents were awarded by a court with the relevant insurer agreeing to fund a sex worker's services to address this person's ongoing needs for safe sexual expression.²⁶

Duty of care and dignity of risk

Duty of care obligations require disability service providers to identify potential risks to all parties and to take reasonable steps to avoid foreseeable harm.²⁷ However, this must be balanced against the concept of 'dignity of risk', which recognises people with disability have a right to make their own decision, and are entitled to take reasonable risks in their everyday life.²⁸

Consensual collaborations

Fundamental to the right to dignity is the notion of autonomy and consent. The work of Touching Base Inc ('Touching Base'), a profound alliance between sex workers and people with disability and their allies, embodies the human right of dignity and the dignity of risk. As such, the notion of consent for sex workers and people with disability is fundamental to the power and success of this human rights initiative.

The decriminalisation of sex work and brothel-keeping in NSW created an enabling legal environment for Touching Base to openly and lawfully pursue its aims of linking people with disability, their support organisations and the sex industry under a human rights framework. This small charitable organisation has been highly effective in dismantling barriers to human rights by providing online resources and training for disability organisations and sex workers, and by operating a referral list of disability-friendly sex workers and accessible commercial establishments.

In 2011 Touching Base published a policy guide for disability service providers supporting clients to access sex services which incorporates Articles 9, 16, 19, 21 and 22 of the CRPD.²⁹

Consent for people with disability

Drawing upon Australian case law³⁰ the Touching Base policy explains that a person must have the capacity to provide informed consent to access sex services. 'Meaningful consent' means a person has knowledge and understanding of the sexual nature of the act and gives their consent freely, and the relationship of the two parties is equal. That is, there is no force, threats or power used. In addition, consent is invalid if a person agrees to sexual activity under the mistaken belief that it is required for medical or hygienic purposes.³¹

In Canada the Vancouver Coastal Health Authority³² recommends three extra criteria should be considered to maximise safety and further ensure an adult with cognitive disability has capacity to consent to sex acts:

- the basic consequences and risks of sexual activity;
- appropriate times and locations for sexual activity; and
- signs of distress and refusal in others, for example, demanding a stop to the activity.

While consideration of these factors is not compulsory in order to determine a person's capacity to provide meaningful consent in Australia, Touching Base is in the process of developing new resources incorporating these criteria as best practice when supporting a person with cognitive disability to access sex services.

Is there conflict between the dignity of personal freedom and efforts to eliminate the trafficking of women and sexual slavery?

The UN Convention on the Elimination of All Forms of Discrimination Against Women expressly requires States Parties to take all appropriate measures, including legislation, to suppress all forms of trafficking in women and the exploitation of prostitution of women.

The UN Convention Against Transnational Organised Crime, its supplementing Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,³³ and the Council of Europe's Convention on Action against Trafficking in Human Beings, have chosen to identify prostitution as a form of human exploitation.³⁴ Importantly, under these instruments human trafficking (including prostitution) is defined as the use of force, fraud or coercion to recruit, obtain or provide a person for exploitation.

The prohibition on human trafficking for prostitution properly reflects the fact that there can never be valid consent to sex work in circumstances where force, fraud or coercion is used. Despite this important distinction between consensual sex work and sexual slavery, there is a growing international phenomena where domestic laws are being propounded that re-criminalise prostitution by criminalising purchasers of commercial sex services.

This regulatory model (often referred to as the 'Swedish Model') assumes all sex workers are passive victims of violence, sexual assault, sexual slavery or trafficking, are unable

to exercise free will, and can never freely consent to sex work.

However, this construct of sex worker as victim denies the fact that the majority of freely consenting sex workers are not victims³⁵ and wish to exercise their human right to dignity, autonomy, self-determination and the right to work under the UCHR, ICPPR, ICESCR and CRPD, as evidenced by the multitude of sex worker organisations calling for the decriminalisation of sex work around the world.³⁶

Attitudes of sex workers around victimhood, exploitation and rights

Proponents of the Swedish Model regarding the criminalisation of clients tend to promulgate their arguments using narrowly-framed research on street-based sex workers to reinforce notions of victimhood;³⁷ this research is usually undertaken in jurisdictions where street-based sex work is illegal.

Research into lawful sex work indicates different power dynamics between sex workers and clients. For example, a majority of male, female and transgender escorts interviewed on the relationship between vulnerability and exploitation of sex workers responded that their relationships with their clients were no more exploitative than any other relationship between people.³⁸

Far from identifying as victims of male domination, Jenkins' research found female sex workers' position of strength manifested in various ways and noted that 'assumptions about women's subordination are simply not applicable'.³⁹ In addition, most male, female and transgender escorts thought 'any assumptions about their victimisation were misguided and made little sense'.⁴⁰

Five years after the full decriminalisation of sex work in New Zealand, a report by the New Zealand government-appointed Prostitution Law Review Committee (PLRC) acknowledged that a vast majority of sex workers claimed awareness of their legal rights (95.9 per cent), employment rights (92 per cent) and occupational health and safety rights (93.8 per cent) leaving them feeling 'more legitimate'.⁴¹

Further evidencing the case for decriminalisation, the PLRC concluded that decriminalising sex work in New Zealand has 'had a marked effect in safeguarding the right of sex workers to refuse particular clients and practices, chiefly by empowering sex workers through removing illegality of their work'.⁴²

The Committee also observed that: 'While there is a common perception that sex workers are in the industry through desperation or lack of choice, most are not, and some may be offended by being offered assistance to leave.'⁴³

Conclusion

Human dignity as a legal right has been evolving into a binding legal norm underpinning and informing many aspects of human rights including the right of self determination. By balancing a duty of care against the principle of dignity of risk, the interrelationship between sexual rights and human rights to development, freedom, equality, privacy and dignity is enhanced for sex workers and people with disability. Resources developed by organisations such as Touching Base identify best practice in supporting access to sex workers under a human rights framework, and advance the right to dignity of sex workers and their clients, service providers, patrons and supporters of this work.

The international prohibition on human trafficking for sexual servitude properly reflects the law regarding consent. There can never be valid consent to sex work in circumstances where force, fraud or coercion is used. However, blunt legislative instruments such as the Swedish Model, which criminalise all clients of sex workers, fail to consider the majority of freely consenting sex workers are not victims, and disregard clients' wide-ranging and deeply human motivations to have their emotional, psychological, sexual and social needs met by sex workers.

It is apparent from evidence in NSW and New Zealand that, where human rights of people with disability and sex workers intersect, decriminalisation of consensual sex work is the best model for fulfilling each group's aspirations to a life of dignity.

Notes

- * Carolyn M Dearing is a lawyer that works in Perth, Western Australia. She can be reached at legasol9@gmail.com. Saul Isbister is President of Touching Base Inc, Sydney, NSW, Australia. For any questions related to this article, he can be contacted at saul@tantra-man.com.au.
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 - Art 1.1 of the ICCPR.
 - Arts 6, 12, 13 and 15, ICESCR.

- Preamble CPRD and various articles including Art 12.
- Lawrence v Texas*, 539 US 558 (2003).
- Articles 22 and 23, CPRD.
- www.ippf.org/resource/Sexual-Rights-IPPF-declaration. Note specific references to sex workers in Arts 3 and 7.
- In this article, consistent with the Australian and New Zealand context, the term 'sex worker' means prostitute. In other jurisdictions the term 'sex worker' may also be defined to include 'strippers, dancers, phone sex operators, porn actresses/actors, etc.' See *The Sex Worker Outreach Programme USA*, www.swopusa.org/zh-hans/taxonomy/term/61, accessed 15 May 2014.
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- 29 See n 27 above.
- 30 Australian capacity to consent test case law: *R v Morgan* [1970] Vic Rp 43; [1970] VR 337, also see: *R v Mueller* [2005] NSWCCA 47; and *R v P, LB* [2008] SADC 6.
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Protecting sex worker human rights in Australia

Zahra Stardust

Scarlet Alliance,
Sydney*
policy@scarletalliance.org.au

2014 will be a pivotal year for sex workers around the globe. With increasing international visibility, the movement for sex worker rights is rapidly gaining momentum. Simultaneously, regressive laws, discrimination and abolitionist agendas pose real dangers to our communities, our work, our health and our safety. We are witnessing an international commitment to ending stigma and discrimination. However, every win for our human rights has been an uphill battle and significant barriers face us ahead. This article outlines the human rights issues affecting sex workers in Australia and makes recommendations for reform.

Sex worker human rights are of international concern

Australia, as a signatory to the 2011 UN Political Declaration on HIV and AIDS (the Declaration), has committed to protecting and promoting human rights, and the elimination of stigma and discrimination for sex workers as critical elements in combating the global HIV epidemic. The Declaration also commits Australia to 'intensify national efforts to create enabling legal, social and policy frameworks'.¹ The UNAIDS Guidance Note on HIV and Sex Work 2009 (UNAIDS is the Joint UN Programme on HIV/AIDS) recognises that criminalisation

poses substantial obstacles in accessing HIV prevention, treatment and support.² The UN Population Fund, the UN Development Fund and UNAIDS support the decriminalisation of sex work, and note that legal empowerment of sex worker communities underpins effective HIV responses.³ UN Secretary-General Ban Ki-Moon calls for change in countries where discrimination remains legal against sex workers.⁴ Former Australian High Court Judge, the Hon. Michael Kirby, insists upon rights for sex workers as a matter of public morality.⁵ At a national level, Australia's Department of Health's *Sixth National HIV Strategy 2010–2013* recognises the protection of human rights to be 'essential' to the effective protection of public health.⁶ The legal and discrimination subcommittee of the Commonwealth Ministerial Advisory Committee on Blood Borne Viruses (BBV) and Sexually Transmissible Infections (STI) (MACBBVS) recommends aligning sex work laws with human rights and evidence.⁷

Sex workers experiences of discrimination

In 1999 a national survey was conducted by Scarlet Alliance assisted by the Australian Federation of AIDS Organisations to identify discrimination in the employment conditions and personal lives of sex workers in Australia. The subsequent report, *Unjust and counter-*