

# A DREAM OF DIGNITY: MIGRANT SEX WORKERS' RIGHTS TO WORK AND FREEDOM FROM FORCED LABOUR IN NEW ZEALAND

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## Abstract

*While international human rights law recognises the inherent dignity of human beings, full expression of human dignity is reliant on the realisation of human rights. This article considers how the current realisation of migrant sex workers' rights to work and freedom from forced labour impacts these workers' dignity in New Zealand. It identifies that the general vulnerability of migrants' economic, social and cultural rights and New Zealand's unique treatment of migrant sex workers under s 19 of the Prostitution Reform Act 2003 fail to protect these workers' rights, leaving this community living in fear and without full dignity. Legislative and policy changes addressing the vulnerability of migrants' economic, social and cultural rights generally and migrant sex workers' rights specifically could, however, transform these workers' dream of dignity into a hopeful future for this community. The onus therefore rests on New Zealand to demonstrate its respect for all individuals' dignity by taking action to realise migrant sex workers' rights to work and freedom from forced labour.*

Experience of being a migrant sex worker is like you always have the fear inside you that someone might get to know and someone might inform against you.... So living in a fear, like I got used to it.<sup>1</sup>

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<sup>1</sup> Sex worker interviewed in Gillian Abel and Michael Roguski *Migrant Sex Workers in New Zealand* (MBIE, 2018) at 6.

## I. Introduction

Immigration New Zealand's accidental placement of sex work on its skilled labour list in early 2018 moved migrant sex workers from ignominy to the spotlight in New Zealand,<sup>2</sup> sparking public interest in the migrant sex industry and a flurry of media reporting.<sup>3</sup> Removing the traditional secrecy shrouding this industry has, however, uncovered the exploitative conditions experienced by some migrant sex workers in New Zealand. One 2018 article reported that some New Zealand migrant sex workers worked 12-hour shifts, seeing more than nine clients a day.<sup>4</sup> Other media reporting and academic research has described incidences of migrant sex workers being forced to provide sexual acts<sup>5</sup> or unprotected sex without their consent<sup>6</sup> and being unable to refuse clients.<sup>7</sup> Brothel managers threatened workers with deportation if they protested<sup>8</sup> and many workers were "too terrified" to report their experiences to police.<sup>9</sup>

Exploitation within the migrant sex industry raises concerns not only as a breach of New Zealand labour law,<sup>10</sup> but also as a limitation on migrant sex workers' dignity. Dignity is a fundamental principle of international human rights law.<sup>11</sup> The Preamble to the Universal Declaration of Human Rights (UDHR) recognises the relationship between realisation of rights and dignity, stating:<sup>12</sup>

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ...

2 Lincoln Tan "'Sex worker' pulled from skilled employment list checker" *The New Zealand Herald* (online ed, New Zealand, 4 May 2018).

3 For example, Lincoln Tan "Migrant sex workers finding ways to evade visa crackdown" *The New Zealand Herald* (online ed, Auckland, 14 June 2018); Lincoln Tan "Revealed: Illegal sex workers access million-dollar health programme" *The New Zealand Herald* (online ed, Auckland, 31 May 2018); and Kate Nicol-Williams "Calls for foreigners to be able to legally operate in New Zealand's sex industry" *One News* (online ed, Auckland, 25 September 2018).

4 Madison Reidy "Illegal migrant prostitutes too 'terrified' to report exploitation" (18 March 2018) Stuff <www.stuff.co.nz>.

5 Reidy, above n 4.

6 Abel and Roguski, above n 1, at 11.

7 David Allan Jun-Rong Ting "Understanding the Experiences of Migrant Asian Sex Workers in New Zealand: An Exploratory Study" (Masters Dissertation, University of Auckland, 2018) at 86.

8 Reidy, above n 4.

9 Reidy, above n 4.

10 Such practices would be contrary to a number of provisions in the Employment Relations Act 2000 and the Prostitution Reform Act 2003.

11 Jack Donnelly *Universal Human Rights in Theory and Practice* (Cornell University Press, London, 2013) at 28.

12 *Universal Declaration of Human Rights [UDHR]* GA Res 217A (1948), preamble.

Migrant sex workers' dignity is undermined by the negative impact of exploitative conditions on workers' rights to work and freedom from forced labour. These rights, which protect workers' access to decent work<sup>13</sup> and freedom from the forced provision of services,<sup>14</sup> are clearly breached by exploitative conditions which require migrant sex workers to work long hours and provide sexual services without their consent. Without realisation of migrant sex workers' rights to work and freedom from forced labour, migrant sex workers cannot experience full dignity in New Zealand.

Despite the clear relationship between realisation of migrant sex workers' rights and workers' dignity, New Zealand has made little effort to assess its realisation of these workers' rights. The Prostitution Reform Act 2003 (PRA)'s effectively exclusive regulation of the sex industry means that the Ministry of Business, Innovation and Employment (MBIE)'s regular reviews of migrants' working conditions,<sup>15</sup> and subsequent legislative amendments,<sup>16</sup> have eschewed consideration of migrant sex workers' rights. Although the Prostitution Law Reform Committee reviewed the PRA in 2008, the Committee's consideration of migrant sex workers' rights under the Act was limited to one page entitled "Trafficking".<sup>17</sup> A further review of the Act, although recommended by the Committee to take place in 2018,<sup>18</sup> has not occurred and a date for any upcoming review has not been made public.

This article considers how migrant sex workers' rights to work and freedom from forced labour should be realised in New Zealand in order to ensure dignity is a reality for this community. To begin, Part II will consider key characteristics of migrant sex workers in New Zealand. Providing an accurate understanding of this community is necessary to ensure that evaluation of migrant sex workers' rights reflects workers' dignity and not a stereotyped understanding of these workers. Part III will then frame migrant sex workers' rights to work and freedom from forced labour under a dignity lens, describing how these rights should be viewed consistent with workers' dignity. The framing of these rights will provide a foundation for Part IV, which will examine how migrant sex workers' rights to work and freedom from forced labour are currently upheld under New Zealand's human rights framework and specific legislation and policies. Issues identified in Part IV with the current realisation of these rights means that Part V will explore how migrant sex workers'

13 UN Committee on Economic, Social and Cultural Rights *The Right to Work: General Comment No 18* UN Doc E/C.12/GC.18 (6 February 2006) at [7].

14 Convention Concerning Forced or Compulsory Labour [CCFCL] 39 UNTS 55 (opened for signature 28 June 1930, entered into force 1 May 1932), art 2(1).

15 "Temporary migrant worker exploitation review" Ministry of Business, Innovation and Employment <[www.mbie.govt.nz](http://www.mbie.govt.nz)>, MBIE position paper and MBIE Cabinet paper.

16 For example, see Immigration Amendment Bill (No 2) 2015 (156–3).

17 See Ministry of Justice *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Law Reform Act 2003* (May 2008) at 167.

18 At 168.

dignity can be fulfilled in New Zealand through legislation and policy developments which realise these workers' rights to work and freedom from forced labour. Part VI will conclude the article, identifying the need for New Zealand to respond to this article's recommendations. Through New Zealand's adoption of concrete actions to realise migrant sex workers' rights to work and freedom from forced labour, these workers' dreams of dignity can become reality.

## II. Migrant Sex Workers in New Zealand

Understanding migrant sex workers' social context in New Zealand is critical to evaluating these workers' rights to work and freedom from forced labour. Globally, popular discourse characterises migrant sex workers in several conflicting ways, describing such workers as: "law breakers ... undeserving victims, public order risk, menace to national sovereignty, problem of (organised) crime, [and] threat to cultural identity."<sup>19</sup> New Zealand media have characterised migrant sex workers both as victims<sup>20</sup> and greedy, law-breaking harlots.<sup>21</sup> However, moving beyond stereotypes and understanding migrant sex workers' individuality is necessary to reflect these workers' dignity. This part of the article will discuss the main sources for empirical research on migrant sex workers' experiences in New Zealand before describing key characteristics of this community, including workers' gender and age, national origins, prior experience in the sex industry and educational/professional backgrounds, motivations for entering the sex industry and levels of vulnerability and agency.<sup>22</sup>

### A. Research on Migrant Sex Workers' Experiences in New Zealand

Little academic research has considered New Zealand migrant sex workers, defined in this article as individuals who hold temporary New Zealand visas<sup>23</sup> and

19 Maggy Lee "Women's Imprisonment as a Mechanism of Migration Control in Hong Kong" (2007) 47 *Brit J Crim* 847 at 850.

20 Reidy, above n 4.

21 See Lincoln Tan "NZ sex workers lodge complaints over website advertisements" *Newstalk zB* (online ed, Auckland, 22 April 2018).

22 These key characteristics have been selected because it is hoped that understanding both demographic and personality characteristics of these workers provides a reasonably comprehensive understanding of the migrant sex community.

23 Although Julie Ham *Sex Work, Immigration and Social Difference* (Routledge, Oxon, 2017) at 12, has criticised the use of a binary distinction between "migrants" and "citizens" in discussing the experiences of migrant sex workers, for the purposes of the limited scope of this article this narrower definition of "migrant sex worker" has been adopted.

who perform commercial sexual services<sup>24</sup> in New Zealand. Nevertheless two recent studies provide insight into the key characteristics of this community.<sup>25</sup> In Gillian Abel and Michael Roguski's 2018 scoping study for MBIE, the authors interviewed both migrant sex workers and stakeholders in the sex industry,<sup>26</sup> examining these workers' unique characteristics and vulnerability.<sup>27</sup> David Ting's 2018 sociology masters' thesis<sup>28</sup> supplements this research, focussing on Asian migrant sex workers specifically, situating such workers' personal characteristics and experiences within the context of Asian migration to New Zealand.<sup>29</sup> Although both studies have their limitations,<sup>30</sup> their findings are broadly consistent and are therefore sufficient to understand key characteristics of the migrant sex worker community in New Zealand.

## B. Research Findings

Significant gender and age diversity is present in the migrant sex worker community in New Zealand. Although the exact population of transgender male and female, cisgender male and non-binary migrant sex workers in New Zealand is unknown,<sup>31</sup> Ting's successful recruitment of two transgender women and four cisgender men for his study<sup>32</sup> demonstrates the gender diversity of this community. Ting was also able to recruit participants with a wide variety of different ages, with participants' ages from ranging from 20–60.<sup>33</sup> While most participants were in their 20s or 30s,<sup>34</sup> one participant was aged 50 and another aged 60.<sup>35</sup> These two older participants did not work in brothels, instead working in sexual massage and other sexual services.<sup>36</sup>

In addition to displaying significant gender and age diversity, the migrant sex worker community in New Zealand has diverse national origins. While New Zealand

24 This definition of a sex worker comes from the Prostitution Reform Act, s 4. While Johanna Schmidt "The Regulation of Sex Work in Aotearoa/New Zealand: An Overview" (2017) 31 *Women's Studies Journal* 35 at 36 notes that it is "commercial sex work" is difficult to define, the limited scope of this article requires a simplistic approach to this issue.

25 An earlier study was also produced by Michael Roguski *Occupational Health and Safety of Migrant Sex Workers in New Zealand* (NZPC, 28 March 2013).

26 Abel and Roguski, above n 1, at 1–2.

27 Abel and Roguski, above n 1.

28 Ting, above n 7.

29 At 4–6. Note that Ting's study considered both sex workers working illegally and those working legally.

30 For example, both studies were reliant on workers self-selecting to participate in the studies.

31 Ting, above n 7, at 35.

32 At 58.

33 At 58.

34 At 58.

35 At 58.

36 At 109.

media typically characterises migrant sex workers as Asian nationals,<sup>37</sup> Abel/Roguski's study interviewed migrant sex workers from China, Germany, Singapore, Brazil and Britain.<sup>38</sup> One brothel manager interviewed in Abel/Roguski's study noted that many migrant sex workers come from English-speaking countries such as Canada, the US and Britain<sup>39</sup> and that brothels typically prefer such workers as workers' English fluency and Caucasian ethnicity do not attract Immigration New Zealand's attention.<sup>40</sup>

Migrant sex workers also have diverse educational and professional backgrounds.<sup>41</sup> No migrant sex workers interviewed in Ting's study had previously worked in the sex industry prior to coming to New Zealand.<sup>42</sup> Workers were typically recruited once they were in New Zealand, although workers were aware of some overseas recruitment.<sup>43</sup> In explaining why they chose to enter the industry, migrant sex workers reported a number of motives including the work's flexibility,<sup>44</sup> its high earnings<sup>45</sup> and the difficulties of gaining alternative employment.<sup>46</sup> Such research demonstrates that, contrary to some media assertions,<sup>47</sup> most migrant sex workers in New Zealand choose sex work for a period of time and are not "career" sex workers who work exclusively within the sex industry throughout their lives.<sup>48</sup>

Finally, Abel/Roguski identified significant variance in migrant sex workers' vulnerability to exploitation and overall agency. Although all migrant sex workers in Abel/Roguski's study expressed agency through voluntarily choosing to enter the industry,<sup>49</sup> workers with lesser English fluency and those working privately or in small brothels were more vulnerable to exploitation than those speaking English fluently and/or working in larger brothels.<sup>50</sup> While migrant sex workers might be perceived to be uniformly disempowered or empowered, Abel/Roguski's research

37 See Lincoln Tan "Illegal prostitution crackdown: 27 Asian sex workers deported" *The New Zealand Herald* (online ed, Auckland, 5 June 2018); Daisy Hudson "Queenstown resort brothel busted, sex workers deported" *Otago Daily Times* (online ed, Dunedin, 18 January 2019); Lincoln Tan "International student caught in police brothel raid told sex work is 'legal'" *The New Zealand Herald* (online ed, Auckland, 16 April 2018); and Jo McKenzie-McLean "More than 350 foreign sex workers turned away at New Zealand border" (18 January 2019) Stuff News <[www.stuff.co.nz](http://www.stuff.co.nz)>. All these articles refer to Asian sex workers.

38 Abel and Roguski, above n 1, at 3.

39 At 7.

40 At 7.

41 Ting, above n 7, at 70.

42 At 59.

43 At 78.

44 At 71–72, particularly in respect of international students.

45 At 69–70.

46 At 70–71. Note that Abel and Roguski, above n 1, at 5, identify similar motives for entry into the industry.

47 See Tan, above n 21.

48 See Tan, above n 21.

49 Abel and Roguski, above n 1, at 7.

50 At 8 and 10–11.

demonstrates that migrant sex workers' vulnerability to exploitation and overall agency differs on the basis of workers' personal characteristics.

### III. Framing Migrant Sex Workers' Rights to Work and Freedom from Forced Labour: The Dignity Lens

Although the principles of international human rights law of universality, indivisibility, inalienability, equality and non-discrimination<sup>51</sup> mean that migrant sex workers possess the same rights as other human beings, migrant sex workers' unique status both as migrants and sex workers requires these workers' rights to be framed in relation to this community specifically. In this article 'framing' refers to the identification of issues with the application of these rights to migrant sex workers and the application of a theoretical understanding (a theoretical lens) to resolve these issues. Framing rights is not equivalent to defining rights, with framing instead providing principles for understanding the parameters of these rights. Framing migrant sex workers' rights to work and freedom from forced labour provides an understanding of these rights which will underpin this article's consideration of how these rights should be realised in New Zealand.

In framing these rights, the relationship between migrant sex workers' rights and dignity requires the selection of a theoretical lens consistent with these workers' dignity. This article will, therefore, now discuss the lenses which are commonly used to frame sex workers' rights before introducing the dignity lens chosen to frame migrant sex workers' rights to work and freedom from forced labour.

#### A. Feminist Lenses

While many different lenses may be used to frame sex workers' rights,<sup>52</sup> feminist lenses dominate literature considering these workers' rights.<sup>53</sup> Within this literature, three feminist lenses are commonly used to frame sex workers' rights: the radical feminist lens (sometimes known as the "neo-abolitionist" lens), the liberal feminist lens (sometimes known as the "sex worker activist" lens) and a series of disparate feminist lenses which are neither radical nor liberal and are together known

51 Martin Ruhs *The Price of Rights: Regulating International Labor Migration* (Princeton University Press, Princeton, 2013) at 27.

52 See, for example Rayyan Ghuma "Situating Sex Work Within Globalized Capitalism: A Case for Decriminalization" (2013–2014) 5 *Human Rights & Globalization Law Review* 88.

53 Although feminist examinations of sex work have not typically been framed in the language of human rights, the concepts in these examinations share some commonalities with human rights discourse.

as third-way feminist lenses. Each feminist lens applies a different theoretical understanding of the relationship between sex work and human rights. A radical feminist lens views sex work as essentially incompatible with human rights through sex work's function as: "[a] form of sexual expropriation and exploitation rooted in sex inequality or patriarchal structural inequality".<sup>54</sup> In contrast, a liberal feminist lens views sex work as a potential conduit of individual autonomy and human rights that only becomes a human rights abuse where coercion is present.<sup>55</sup> The third-way feminist lens encompasses a number of different theoretical understandings including Marxist feminism<sup>56</sup> and materialist feminism,<sup>57</sup> as well as other different theoretical understandings.<sup>58</sup> Such theoretical understandings typically reject both radical and liberal feminist lenses of sex work,<sup>59</sup> adopting instead understandings of sex work and human rights that are more dependent on situational factors or reliant on additional theoretical understandings.<sup>60</sup>

Although feminist lenses are commonplace within academic literature considering sex workers' rights, this article will instead adopt a dignity lens to frame these rights. Two reasons underlie the selection of this lens. Firstly, dignity's foundational role in international human rights law means that a dignity lens is a logical choice for framing these rights. Although scholars have debated the nature of dignity's role in international human rights law,<sup>61</sup> regardless of its exact function, dignity is a foundational principle of international human rights law.<sup>62</sup> In framing migrant sex workers' rights, applying a dignity lens therefore ensures that rights are framed in a manner consistent with international human rights law's underlying principles. Secondly, the breadth of different feminist lenses creates substantial challenges for selection of a feminist lens to frame migrant sex workers' rights. Selecting a feminist lens to frame these rights would require definition of

54 See Katie Cruz "Beyond Liberalism: Marxist Feminism, Migrant Sex Work, and Labour Unfreedom" (2018) 26 Fem L S 65 at 74; Shelley Cavalieri "Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work" (2011) 86 Ind LJ 1409 for a general overview of these arguments; and Diane Post "Legalization of Prostitution is A Violation of Human Rights" (2011) 68 National Lawyers Guild Review 65.

55 See Cruz, above n 55, at 73, International Women's Rights Action Watch Asia Pacific *Framework on Rights of Sex Workers and CEDAW* (2017) at 11; Jane E Larson "Prostitution, Labor, and Human Rights" (2004) 37 UC Davis L Rev 673 at 681; and Christina Giordano "Reinventing the Wheel: Returning Sex Trafficking Discourse to Its Basic Human Rights Origins" (2014) 37 Suffolk Transnatl L Rev 347 at 351-352.

56 See generally Cruz, above n 55.

57 See discussion in Gabrielle Sim "Negotiating the United Nations Trafficking Protocol: Feminist Debates" (2004) 23 Aust YBIL 135 at 139.

58 Berta E Hernandez-Truyol and Jane E Larson "Sexual Labor and Human Rights" (2006) 37 Colum Hum Rts L Rev 391.

59 See generally Cruz, above n 55, and Hernandez-Truyol and Larson, above n 59.

60 For example, the feminist Marxist analysis in Cruz, above n 55.

61 See Tom Lowenthal "The Role of Dignity in Human Rights Theory: Constituent or Teleological" (2015) 18 TCLR 56.

62 Donnelly, above n 11, at 28.



“feminism”, a description of the assumptions underlying the lens, and clarification of the lens’ differentiation from other feminist lenses. The complexities in selecting this lens can be contrasted with the relative acceptance of the principles of the dignity lens.<sup>63</sup> On balance, therefore, the dignity lens is a more appropriate lens for framing migrant sex workers’ rights in this article.

## B. The Dignity Lens: A Lens with a Difference

Before a dignity lens can be applied, it is first necessary to explain the principles which underpin this lens. Although Bagaric and Mickelson have suggested that the concept of dignity lacks any substantive meaning,<sup>64</sup> several scholarly sources have identified three principles as underpinning this concept.<sup>65</sup> Autonomy, the first of these principles, provides that human beings are rational actors capable of making their own choices and that those choices should be respected by others.<sup>66</sup> Kant famously described this as the idea that human beings should only ever be an end, not a means to an end.<sup>67</sup> Individual autonomy is balanced with the second principle of relationality, recognising humans’ need for each other.<sup>68</sup> Dignity is reciprocal, requiring participation in a social environment,<sup>69</sup> and is not just a series of individual assertions.<sup>70</sup> Autonomy and relationality are accompanied by the third principle of fulfilment of basic needs.<sup>71</sup> Without fulfilment of basic needs, dignity

63 See discussion below.

64 Mirko Bagaric “So Which Rights Are Real?” (2008) 4 *Original Law Review* 78 at 90; Karin Mickelson “How Universal is the Universal Declaration” (1998) 47 *UNBLJ* 19 at 23; and Donnelly, above n 11, at 130.

65 Although different understandings of dignity have been suggested, this article has selected three principles for their commonality to many academic discussions of the concept.

66 Christopher McCrudden “In Pursuit of Human Dignity: An Introduction to Current Debates” in Christopher McCrudden (ed) *Understanding Human Dignity* (Oxford University Press, Oxford, 2013) 1 at 687; David Hollenbach “Human Dignity: Experience and History, Practical Reason and Faith” in Christopher McCrudden (ed) *Understanding Human Dignity* (Oxford University Press, Oxford, 2013) 123 at 129; and Aharon Barak “Human Dignity: The Constitutional Value and the Constitutional Right” in Christopher McCrudden (ed) *Understanding Human Dignity* (Oxford University Press, Oxford, 2013) 361 at 363.

67 Matthias Mahlmann “The Good Sense of Dignity: Six Antidotes to Dignity Fatigue in Ethics and Law” in Christopher McCrudden (ed) *Understanding Human Dignity* (Oxford University Press, Oxford, 2013) 593 at 598.

68 Hollenbach, above n 67, at 129.

69 Christopher Mollers “The Triple Dilemma of Human Dignity: A Case Study” in Christopher McCrudden (ed) *Understanding Human Dignity* (Oxford University Press, Oxford, 2013) 173 at 178–179.

70 Hollenbach, above n 67, at 130–131.

71 At 131.

cannot be upheld.<sup>72</sup> Social behaviours related to basic needs distinguish humans from other creatures without dignity.<sup>73</sup>

## C. Framing Migrant Sex Workers' Rights Under the Dignity Lens

In framing migrant sex workers' rights to work and freedom from forced labour under a dignity lens this article will follow a three-step process. Firstly, it will discuss the legal basis for these rights. Secondly, it will identify issues with the application of these rights to migrant sex workers. Finally, it will resolve issues with the application of these rights by examining the relationship between different understanding of the rights and migrant sex workers' autonomy, relationality and the fulfilment of workers' basic needs.

### 1. Migrant sex workers' right to work

The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides the most comprehensive definition of the right to work, with art 6(1) stating:<sup>74</sup>

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

Other human rights documents recognising the right to work include art 23 of the UDHR,<sup>75</sup> art 11(1)(a) of the Convention on the Elimination of Discrimination Against Women<sup>76</sup> (CEDAW) and art 52.1 of the International Convention on the Rights of All

<sup>72</sup> At 131.

<sup>73</sup> Michael Rosen "Dignity Past and Present" in Meir Dan-Cohen (ed) *Dignity, Rank and Rights* (Oxford University Press, New York, 2012) 9 at 96 takes this position: "Another characteristic demarcation, however (which goes back to Cicero's *De Officiis*) is that human dignity is expressed by behaviour that marks the distinction between human beings and animals – for example, in upright gait, through the wearing of clothes, in eating subject to a code of table manners, defecating (and copulating) in private, and, finally, by disposing of human remains according to prescribed rituals."

<sup>74</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR) (opened for signature 16 December 1966, entered into force 3 January 1976), art 6(1).

<sup>75</sup> UDHR, above n 12, art 23.

<sup>76</sup> Convention on the Elimination of Discrimination Against Women (CEDAW) (opened for signature 18 December 1979, entered into force 3 September 1981), art 11(1)(a).

Migrant Workers and Their Families (ICRMW).<sup>77</sup> These documents typically link the right to work with several other labour rights including the right to enjoyment of just and favourable work conditions,<sup>78</sup> the right to join trade unions<sup>79</sup> and the right to social security,<sup>80</sup> as well as the civil-political right to freedom from forced labour.<sup>81</sup>

The Committee on Economic, Social and Cultural Rights (CESCR) in *General Comment.No. 18* clarifies the scope of the right to work, noting that the right to work protects only activities constituting “decent work”. “Decent work” is:<sup>82</sup>

... work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration. It also provides an income allowing workers to support themselves and their families as highlighted in article 7 of the Covenant. These fundamental rights also include respect for the physical and mental integrity of the worker in the exercise of his/her employment.

Outside of this comment, however, there has been little discussion of the general nature of this right.

In respect of the right's application to sex workers, debate is primarily focussed on a single interpretative issue: whether sex work constitutes “decent work”. While some liberal feminists suggest that sex work forms decent work through its expression of workers' agency and autonomy,<sup>83</sup> some radical feminists argue that the lack of agency and autonomy in sex work precludes such work from being decent work.<sup>84</sup> A third group of scholars have criticised this emphasis on autonomy, suggesting that focus on this criterion ignores the impact of broader societal contexts on workers' autonomy.<sup>85</sup> Under such a view, the surrounding societal context determines the extent to which sex work may constitute decent work. The disparate views from

77 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) (opened for signature 18 December 1990, entered into force 1 July 2003), art 52.1.

78 ICESCR, above n 75, art 7.

79 ICESCR, above n 75, art 8.

80 Article 9.

81 Jeremy Sarkin and Mark Koenig “Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy” (2011) 33 Hum Rts Q 1 at 10.

82 UN Committee on Economic, Social and Cultural Rights, above n 13, at [7].

83 International Women's Rights Action Watch Asia Pacific, above n 56, at 11; Larson, above n 56, at 681, and Giordano, above n 56, at 351–352.

84 Cruz, above n 55 at 74; and Post, above n 55.

85 See Cruz, above n 55, at 66; Hernandez-Truyol and Larson, above n 59; and Janie A. Chuang “Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy” (2010) 158 U Pa L Rev 1655 at 1700–1701.

feminist lenses illustrate the necessity of determining whether sex work constitutes decent work in framing migrant sex workers' right to work.

(a) *Migrant sex work: "decent work"?*

As described above, CESCR's definition of "decent work" provides that "decent work" is work demonstrating two characteristics: firstly, providing an income allowing workers to support themselves and their families; and, secondly, respecting the fundamental rights of the person, including workers' physical and mental integrity.<sup>86</sup> In considering whether migrant sex work is "decent work", it is then necessary to consider whether this work meets these two criteria. Since it is difficult to comment generally whether sex work provides an income allowing migrant sex workers to support themselves and their families,<sup>87</sup> this article will therefore focus on whether migrant sex work respects workers' physical and mental integrity. If migrant sex work supports workers' physical and integrity, then it is decent work protected by the right to work.

(i) Migrant sex work's impact on workers' physical and mental integrity

In assessing whether migrant sex work respects workers' physical and mental integrity, a definition of "physical and mental integrity" is required. Although *General Comment No. 18* does not define "physical and mental integrity", it is arguable that "physical and mental integrity" should be defined as: "the condition of physical and mental wholeness resulting from the fulfilment of individuals' dignity". Such an understanding of "physical and mental integrity" is consistent with other statements in the Comment. Within the Comment, CESCR explicitly draws a connection between the right to work and workers' dignity in stating that:<sup>88</sup> "every individual has the right to work, allowing him/her to live in dignity." Logically if the right to work is essential to upholding dignity, then the work protected by the right should itself be consistent with workers' dignity. It would be incongruous to suggest that undignified work can lead to workers experiencing dignity.

In determining whether migrant sex work respects workers' physical and mental integrity, it is therefore necessary to assess migrant sex work's consistency with workers' autonomy, relationality and the fulfilment of workers' basic needs. For migrant sex work to support migrant sex workers' autonomy, this work must support workers' exercise of control over their bodies and ability to freely choose

86 UN Committee on Economic, Social and Cultural Rights, above n 13, at [7].

87 Naturally this would vary from nation to nation and from worker to worker and depend on the worker's individual needs.

88 UN Committee on Economic, Social and Cultural Rights, above n 13, at [1].

sex work. Part II illustrates that many migrant sex workers in New Zealand choose to enter the sex industry because of its perceived benefits and do not perceive themselves as trafficking victims.<sup>89</sup> Migrant sex workers' perception of free selection of sex work in New Zealand means that this work likely supports workers' autonomy. Suggesting that migrant sex work never supports workers' autonomy replaces workers' individual perception of choice with the assumption that sex work can never be freely chosen.

For migrant sex work to respect workers' physical and mental integrity, this work must also further workers' relationality. In the context of migrant sex work, relationality refers to migrant sex workers' ability to use their bodies in a manner equal to other individuals. In New Zealand, individuals commonly use their bodies in order to gain financial reward in a number of different contexts, including manual labour and care environments. As migrant sex work allows workers to use their bodies for financial reward in a manner arguably equivalent to workers in other industries, migrant sex work likely supports workers' relationality.

Finally, migrant sex work must help fulfil workers' basic needs for this work to respect workers' physical and mental integrity. Although it might be argued that sex work's sexual health risks may compromise migrant sex workers' basic need for physical health, safe sex practices may effectively manage such risks.<sup>90</sup> Migrant sex work, therefore, does not inherently undermine workers' basic need for health. It is also important to acknowledge that migrant sex work in New Zealand may provide opportunities for workers to receive fulfilment of their basic needs through its high wages.<sup>91</sup> As a result, migrant sex work likely helps fulfil workers' basic needs.

Migrant sex work respects workers' physical and mental integrity through its respect for workers' autonomy, relationality and the fulfilment of workers' basic needs. Under a dignity lens, migrant sex work therefore constitutes decent work and the right to work should be framed as protecting workers' right to work in the migrant sex industry in New Zealand.

## **2. Migrant sex workers' right to freedom from forced labour**

Dating back to the International Labour Organisation (ILO) Convention Concerning Forced or Compulsory Labour (CCFCL) in 1930, the right to freedom from forced labour has a long history.<sup>92</sup> Several core human rights conventions

89 See Part II.

90 See Abel and Roguski, above n 1, at 1, where they report that migrant sex workers typically do not have high rates of sexually transmitted illnesses.

91 The high wages of the sex industry are a key motivation for workers' entrance into the industry – see Part II.

92 CCFCL, above n 14.

recognise the right to freedom from forced labour today including the International Covenant on Civil and Political Rights (ICCPR)<sup>93</sup> and the ICRMW.<sup>94</sup> Article 8(3) of the ICCPR states the right succinctly: “No one shall be required to perform forced or compulsory labour.”<sup>95</sup>

Although the ICCPR does not define “forced labour” further, the CCFCL defines “forced labour” as: “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”<sup>96</sup> European Court of Human Rights jurisprudence has also adopted this definition of “forced labour”.<sup>97</sup>

While the right to freedom from forced labour is often associated with the rights to freedom from slavery and not to be held in servitude, it is important to emphasise that the right to freedom from forced labour is distinct from these other rights. Although the terms “slavery” and “forced labour” are often used interchangeably,<sup>98</sup> the concept of “slavery” requires the creation of property rights over an individual.<sup>99</sup> The concept of “servitude” also refers to broader control than slavery, distinguishing this concept from both slavery and forced labour.<sup>100</sup> Despite the substantial overlap between these rights in practice,<sup>101</sup> the rights’ significant conceptual differences mean that this article will focus exclusively on the right to freedom from forced labour.

In framing this right, this article will proceed on the basis that sex work constitutes labour.<sup>102</sup> However, a significant interpretative issue remains: namely, whether sex work inherently constitutes forced labour. According to a radical feminist perspective, sex work is a patriarchal institution that must always be seen as a form of forced labour.<sup>103</sup> While sex workers may state that they choose sex work

93 International Covenant on Civil and Political Rights (ICCPR) (opened for signature 16 December 1966, entered into force 23 March 1976), art 8(3).

94 ICCPR, above n 94, art 8(3) and ICRMW, above n 78, art 11.

95 ICCPR, above n 94, art 8.

96 CCFCL, above n 14, art 2(1).

97 *Chitos v Greece* [2015] ECHR 529 (ECHR) at [79]. Note that although an additional element of a: “degrading or dehumanizing aspect of the specific labour performed” was required by the Human Rights Committee in Human Rights *Committee Communication No. 1036/2001* UN Doc CCPR/C/85/D/1036/2001 (23 November 2005) at [7.5], this dissertation will adopt the more common understanding of the right outlined in the Convention Concerning Forced or Compulsory Labour and consistent with European Court of Human Rights jurisprudence.

98 Yasmine Rassam “International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach” (2005) 23 Penn State International Law Review 809 at 838.

99 Vladislava Stoyanova “United Nations Against Slavery: Unravelling Concepts, Institutions and Obligations” (2017) 38 Mich J Intl L 359 at 423 and Rassam, above n 99, at 838.

100 Stoyanova, above n 100, at 423.

101 Rassam, above n 99, at 838.

102 See discussion above.

103 Simm, above n 58, at 138. See also discussion in Natalie Thorburn “Practitioner Knowledge and Responsiveness to Victims of Sex Trafficking in Aotearoa/New Zealand” (2017) 31 Women’s Studies Journal 77 at 79.

voluntarily, such workers are victims of a “false consciousness”.<sup>104</sup> Liberal feminists contest this position, arguing that sex work is an occupation freely chosen like any other.<sup>105</sup> Consequently sex work only constitutes “forced labour” when situational factors limit sex workers’ autonomy.<sup>106</sup> The contentious nature of the relationship between forced labour and sex work means that determining whether sex work inherently constitutes forced labour is vital for framing migrant sex workers’ right to freedom from forced labour.

*(a) Migrant sex work: inherently forced labour?*

For the purposes of this article, forced labour will refer to individuals’ inability to freely choose their labour in a manner consistent with their dignity. In determining whether migrant sex work inherently constitutes forced labour, it is therefore necessary to determine whether sex work may be freely chosen as an expression of dignity. This requires consideration of whether migrant sex workers may select the sex industry as an act expressing autonomy, relationality and fulfilment of their basic needs.

Since migrant sex workers perceive themselves as having freely chosen to enter the sex industry in New Zealand,<sup>107</sup> workers’ selection of migrant sex work is likely an expression of workers’ autonomy. As discussed above, it is inconsistent with migrant sex workers’ autonomy to suggest that sex work cannot be freely chosen as an act of autonomy.

Selection of the migrant sex industry is likewise consistent with workers’ relationality. Relationality, the second of the dignity principles, requires that migrant sex workers’ choice to enter the sex industry is not distinguished from workers’ choices to enter other industries. In New Zealand, workers regularly choose to enter a number of different industries. Migrant sex workers’ choice to enter the sex industry can therefore be seen as an act of relationality, allowing migrant sex workers to choose work in a manner equivalent to other workers. Unless it is argued that all workers regularly perform “forced labour” as a result of underlying social structures, finding that migrant sex workers cannot choose sex work because of underlying patriarchal structures marks these workers as uniquely disempowered and vulnerable.

Finally, selection of sex work may also be consistent with fulfilment of migrant sex workers’ basic needs. As described above, selecting migrant sex work allows

<sup>104</sup> Simm, above n 58, at 138.

<sup>105</sup> See discussion throughout Simm, above n 58, and Thorburn, above n 104.

<sup>106</sup> Cruz, above n 55, at 73.

<sup>107</sup> See discussion above.

workers to fulfil their basic needs in New Zealand.<sup>108</sup> Selection of migrant sex work may therefore be a pragmatic decision taken by workers for this work's ability to fulfil workers' basic needs.

Since migrant sex workers can choose sex work in a manner consistent with workers' autonomy, relationality and the fulfilment of their basic needs, a dignity lens suggests that migrant sex work in New Zealand does not inherently constitute forced labour. Such a finding, however, does not preclude the existence of forced labour within the migrant sex industry wholly, with forced labour continuing to exist where migrant sex workers cannot select sex work in a manner consistent with their dignity.

## IV. The Undignified Reality: Migrant Sex Workers' Rights to Work and Freedom from Forced Labour in New Zealand

With a framing of migrant sex workers' rights to work and freedom from forced labour in place, this article will now examine how these rights are realised in New Zealand. This part will begin by considering how New Zealand's human rights framework and specific legislation and policies contribute towards or detract from the realisation of migrant sex workers' rights to work and freedom from forced labour in New Zealand. It will then conclude by identifying the impact of these legislation and policy frameworks on migrant sex workers' dignity, revealing these workers' undignified reality in New Zealand.

### A. Migrant Sex Workers' Rights Under New Zealand's Human Rights Framework

Despite New Zealand's strong acceptance of human rights generally, demonstrated in its ratification of most core human rights conventions<sup>109</sup> and regular reporting to treaty bodies,<sup>110</sup> three aspects of New Zealand's human rights framework pose issues for migrant sex workers' rights generally.

Firstly, New Zealand has not ratified core conventions specifically addressing migrants' human rights. While New Zealand has ratified the ILO Migration for

<sup>108</sup> See discussion in Part II.

<sup>109</sup> For more information, see "International Covenant on Civil and Political Rights" (18 May 2018) Ministry of Justice <[www.justice.govt.nz](http://www.justice.govt.nz)>; and "International Covenant on Economic, Social and Cultural Rights" (11 May 2018) Ministry of Justice <[www.justice.govt.nz](http://www.justice.govt.nz)>.

<sup>110</sup> See Committee on the Elimination of Discrimination against Women *Concluding observations on the eighth periodic report of New Zealand* UN Doc CEDAW/C/NZL/CO/8 (25 July 2018); and Human Rights Council *Draft Report of the Working Group on the Universal Periodic Review: New Zealand* UN Doc A/HRC/WG.6/32/L.1 (5 February 2019).



Employment Convention (Revised) 1949,<sup>111</sup> it has not ratified the ILO Migrant Workers (Supplementary Provisions) Convention 1975.<sup>112</sup> New Zealand has also not ratified the ICRMW and seems hesitant to do so, stating that it has already recognised the convention's rights under core human rights conventions.<sup>113</sup> Regardless of any recognition of these rights in this way, lack of specific recognition of these rights increases their vulnerability in New Zealand.<sup>114</sup> The lower visibility of these rights both increases the risk of right breaches, whether by the state or by third parties, and creates barriers for migrants asserting their rights.

Secondly, New Zealand commonly imposes limitations on migrants' economic, social and cultural rights. Although the ICESCR requires that its rights are exercised without discrimination on the basis of national origin,<sup>115</sup> New Zealand national policies commonly limit access to social services for non-nationals.<sup>116</sup> Superannuation is only available to individuals who have lived for a number of years in New Zealand,<sup>117</sup> while migrants on some kinds of work visas must pay for healthcare in New Zealand.<sup>118</sup> Although New Zealand may argue that such policies are justified on economic grounds, restricting access to social services clearly weakens protection for migrants' economic, social and cultural rights in New Zealand.

Finally, New Zealand has not provided remedies for breaches of economic, social and cultural rights. New Zealand has not ratified the ICESCR Complaints Protocol<sup>119</sup> and the New Zealand Bill of Rights Act 1990 (NZBORA), New Zealand's primary human rights legislation, only protects civil and political rights.<sup>120</sup> Although the lack of remedies for breaches of economic, social and cultural rights in New Zealand is not migrant-specific, this lack of remedies compounds with migrants' existing vulnerability.<sup>121</sup>

111 Paul Roth "Migrant Labor in New Zealand" (2009) 31 *Comparative Labor Law and Policy Journal* 67 at 73.

112 At 104.

113 New Zealand Human Rights Commission *Summary of Human Rights in New Zealand* (2010) at 329. Note that this position is disputed by Roth, above n 112, at 74–75.

114 New Zealand Human Rights Commission, above n 114, at 329.

115 ICESCR, above n 75, art 2(2).

116 New Zealand Human Rights Commission, above n 114, at 325.

117 At 325.

118 "Paying for healthcare services" New Zealand Immigration: New Zealand Now <[www.newzealandnow.govt.nz](http://www.newzealandnow.govt.nz)>.

119 Natalie Baird "The International Human Rights Framework" in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017) 149 at 179.

120 See the contents of the New Zealand Bill of Rights Act 1990. Part 2 of the Act is entitled "Civil and Political Rights".

121 Claire Breen and Margaret Bedggood "The Rights to Equality and Non-Discrimination" in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017) 257 at 301.

The migrant status of migrant sex workers means that these workers face general legal vulnerability. This is reflected in the negative impact of some legislation and policies on these workers' rights to work and freedom from forced labour specifically.

## B. Migrant Sex Workers' Rights Under Specific Legislation and Policies

### 1. The impact of legislation and policies on migrant sex workers' right to work

#### (a) *Section 19 of the Prostitution Reform Act 2003*

The Prostitution Reform Act 2003 (PRA) decriminalised sex work in New Zealand by repealing existing offences relating to the sex industry and creating a legalised sex industry subject to government and local authority regulation.<sup>122</sup> However despite the Act's general decriminalisation of sex work, s 19 of the PRA provides:<sup>123</sup>

- (1) No visa may be granted under the Immigration Act 2009 to a person on the basis that the person—
  - (a) has provided, or intends to provide, commercial sexual services; or
  - (b) has acted, or intends to act, as an operator of a business of prostitution; or
  - (c) has invested, or intends to invest, in a business of prostitution.
- (2) It is a condition of every temporary entry class visa granted under the Immigration Act 2009 that the holder of the visa may not, while in New Zealand,—
  - (a) provide commercial sexual services; or
  - (b) act as an operator of a New Zealand business of prostitution; or
  - (c) invest in a New Zealand business of prostitution.
- (3) It is sufficient reason for the Minister of Immigration or an immigration officer to determine that a temporary entry class visa holder is liable for deportation under section 157 of the Immigration Act 2009 if the Minister or the officer believes, on reasonable grounds, that the holder is engaged in any of the things listed in subsection (2)(a) to (c) of this section.

<sup>122</sup> Prostitution Reform Act 2003, s 3.

<sup>123</sup> Section 19.

By rendering temporary visa holders liable for deportation should they engage in sex work, s 19 effectively prohibits these migrants from working in the sex industry.

Although s 19 is a clear *prima facie* breach of migrant sex workers' right to work, it is a general principle of international human rights law that rights may be justifiably limited in order to protect community interests<sup>124</sup> or other rights.<sup>125</sup> In fully evaluating the impact of s 19 on migrant sex workers' right to work, it is therefore necessary to consider whether s 19 may justifiably limit this right in order to protect other interests or rights.

(i) Limiting migrant sex workers' right to work to protect individuals from trafficking

Concern for human rights was at the forefront of Parliament's purpose in drafting the PRA<sup>126</sup> and underpinned the introduction of s 19. Section 19 does not appear in the first draft of the Prostitution Reform Bill<sup>127</sup> and was seemingly added in a last-minute supplementary order paper during the Bill's second reading to address MPs' concerns about human trafficking.<sup>128</sup> The supplementary order paper containing the future s 19 states that:<sup>129</sup>

This Supplementary Order paper lends support to New Zealand's obligations under the United Nations Convention against Transnational Organised Crime and its Protocols on the Smuggling of Migrants and Trafficking of Persons. These obligations are aimed, amongst other things, at suppressing the trade of women and children for the purposes of prostitution, an activity closely associated with transnational organised crime.

Although the supplementary order paper passed narrowly with 69 ayes and 48 noes,<sup>130</sup> opposition was seemingly centred in the potential unenforceability of the

124 For discussion of this both generally and in relation to New Zealand jurisprudence see Andrew Butler "Limiting Rights" (2002) 33 VUWLR 537.

125 Andrew Clapham *Human Rights: A Very Short Introduction* (Oxford University Press, New York, 2007) at 87.

126 See Prostitution Reform Act 2003, s 3.

127 See Prostitution Reform Bill 2000 (66-1), and Prostitution Reform Bill 2002 (66-2).

128 For MPs concerns about trafficking, see Prostitution Reform Bill 2002 (66-2) (select committee report) at 41 (United Future comments) and 35 (NZ First comments); Peter Brown (25 June 2003) 609 NZPC 6604; Larry Baldock (25 June 2003) 609 NZPC 6595; and Murray Smith (11 June 2003) 609 NZPC 6171.

129 Supplementary Order Paper 2003 (69) Prostitution Reform Bill (66-3) at 2.

130 (11 June 2003) 609 NZPC 6158.

clause and opposition to the Bill more generally.<sup>131</sup> Section 19 was a non-controversial addition to the Prostitution Reform Bill, with nearly all MPs supporting its clear intention to protect individuals from human trafficking.

Section 19's laudable intention, however, stands in contrast to its actual effect. Abel/Roguski's 2018 research has challenged the rationale underpinning s 19, suggesting that s 19 may in fact indirectly increase migrant sex workers' risk of trafficking and exploitation. As a result of s 19, migrant sex workers face deportation if their occupation and visa status is revealed. The risk of deportation forms a significant barrier for workers' reporting of both crime<sup>132</sup> and workplace exploitation.<sup>133</sup> Abel/Roguski comment that:<sup>134</sup>

Migrant participants chose not to seek help from the police and described going to often extraordinary lengths to circumnavigate threats from those in their personal life. For some this meant moving to a new location in the same city, for others it meant an urgent move to another city. In all scenarios it is notable that the migrant had to surrender many of their belongings as well as their support networks.

Staff of the New Zealand Prostitutes' Collective (NZPC), writing about s 19, comment:<sup>135</sup>

[Section 19's] discriminatory approach in the law creates vulnerabilities for some of these sex workers. They feel they cannot report incidents directly to support services and authorities without compromising their ability to remain in Aotearoa/New Zealand, either as students or on a working holiday visa. NZPC outreach services to migrant sex workers build trust among them. NZPC has worked with the police and other authorities to create a safe space where these sex workers can speak up. Nevertheless, the fear remains they will be outed as sex workers and deported.

131 See Lianne Dalziel (14 May 2003) 608 NZPC 5747.

132 New Zealand Prostitutes Collective *CEDAW Shadow Report* at 10; and Abel and Roguski, above n 1, at 9.

133 New Zealand Prostitutes Collective *New Zealand Prostitutes' Collective Report to NSWP on CEDAW 70th Session* (August 2018) at 6–7; and Abel and Roguski, above n 1, at 12.

134 Abel and Roguski, above n 1, at 15.

135 Catherine Healy, Ahi Wi-Hongi and Chanel Hati "It's Work, It's Working: The Integration of Sex Workers and Sex Work in Aotearoa/New Zealand" (2017) 31 *Women's Studies Journal* 50 at 57.

Section 19's creation of deportation liability for migrant sex workers discourages workers from reporting exploitation out of fear of deportation and, in this way, effectively facilitates the exploitation of migrant sex workers.

Although s 19 was intended to protect individuals from trafficking, its real-world impact is to increase the risk of trafficking and exploitation for migrant sex workers. Section 19's failure to protect individuals from trafficking means that its rationale for restricting migrant sex workers' right to work is lost and s 19 cannot justifiably limit this right in order to protect individuals from trafficking.

(ii) Limiting migrant sex workers' right to work to protect national sex workers' right to earn a livelihood

Although the legislature has never publicly considered whether s 19's limitation on migrant sex workers' right to work is justifiable to protect national sex workers' right to earn a livelihood, high-profile sex worker Lisa Lewis has publicly presented this argument to justify calls for increased enforcement of s 19 by Immigration New Zealand (INZ). In 2018, Lisa Lewis publicly demanded INZ investigation of migrant sex workers working illegally in New Zealand,<sup>136</sup> claiming that migrant sex workers were limiting national sex workers' ability to earn a livelihood through offering cut-rate fees and sexual services breaching health and safety regulations.<sup>137</sup> While Lewis did not use the language of human rights, her argument implicitly assumes the necessity of limiting migrant sex workers' right to work to realise national sex workers' right to earn a livelihood.

Closer examination of Lewis' argument, however, suggests that her claims are baseless. While one sex worker attributed a halving of her weekly income from \$12,000 to \$6,000 to migrant sex workers' participation in the industry,<sup>138</sup> with the average income in New Zealand in 2018 coming in at \$997 weekly, an income of \$6,000 is still significantly above the national average.<sup>139</sup> It is difficult to see how an income of \$6,000 weekly could limit national sex workers' right to earn a livelihood and produce the catastrophic effects Lewis described.

Migrant sex workers' exercise of their right to work has realistically minimal impact on national sex workers' right to earn a livelihood. Consequently, in contrast to Lewis' arguments, s 19 cannot justifiably limit migrant sex workers' right to work in order to protect national sex workers' right to earn a livelihood.

136 Tan, above n 21.

137 Tan, above n 21.

138 Tan, above n 21.

139 "Labour market statistics (income): June 2018 quarter" (15 August 2018) Stats NZ <[www.stats.govt.nz](http://www.stats.govt.nz)>.

(iii) Discriminatory effect of s 19

Section 19 may also unlawfully discriminate against migrant sex workers' right to work. As the PRA legalises sex work generally,<sup>140</sup> s 19's restriction on migrant sex workers' right to work in New Zealand is a form of migrant-specific discrimination. Section 19(2) clearly limits the provision's application exclusively to migrants who hold temporary visas in New Zealand,<sup>141</sup> meaning that migrants who hold permanent resident visas are not prohibited from working in the sex industry in New Zealand. In this way, s 19 discriminates against migrant sex workers on the basis of visa status.

Whether s 19's discriminatory effect is a breach of the right to freedom from discrimination, however, differs on the application of domestic and international human rights law. Under domestic law, visa status is not a recognised ground of unlawful discrimination, suggesting that discrimination on this basis is permissible. Section 21 of the Human Rights Act 1993 lists the prohibited grounds of discrimination under New Zealand law: sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origin, disability, age, political opinion, employment status, family status and sexual orientation.<sup>142</sup> The omission of "visa status" from this list suggests that this status is a legitimate ground of discrimination, a conclusion which is further supported by domestic immigration legislation. Section 392(1) of the Immigration Act 2009 limits the power of the Human Rights Commission in respect of immigration matters,<sup>143</sup> and s 392(2) provides that no complaint may be made to the Human Rights Commissioner in respect of an immigration matter.<sup>144</sup> The justification for the non-jurisdiction of the Human Rights Commission is given in s 392(3), which states: "This section recognises that immigration matters inherently involve different treatment on the basis of personal characteristics."<sup>145</sup> New Zealand's domestic immigration legislation explicitly permits discrimination in the immigration context, supporting the omission of visa status as a ground of prohibited discrimination under the Human Rights Act 1993. Under domestic law, discrimination on the basis of visa status is likely legitimate.

At the international level, however, discrimination on the basis of visa status is a potential form of unlawful discrimination. Although specific exceptions in the ICRMW and the ICESCR allow for limitations of non-nationals' right to

140 Prostitution Reform Act 2003, s 3.

141 Section 19(2).

142 Human Rights Act 1993, s 21.

143 Immigration Act 2009, s 392(1).

144 Section 392(2).

145 Section 392(3).

work,<sup>146</sup> core human rights conventions contain broad protection against migrant-specific discrimination. Articles 2 of the UDHR,<sup>147</sup> ICCPR<sup>148</sup> and ICESCR<sup>149</sup> all prohibit discrimination on the basis of any “other status”. As visa status is a form of “other status”, discrimination on this basis could seemingly breach the right to freedom from discrimination. Although such a finding would have wide-reaching implications for both international and domestic law, s 19’s effective prohibition on migrant sex work may constitute unlawful discrimination against migrant sex workers’ right to work under international law.

*(b) Unavailability of decent work*

Section 19, however, is not the sole legislative provision impacting migrant sex workers’ right to work in New Zealand. As the right to work protects free selection of decent work<sup>150</sup> and the natural meaning of “selection” involves the taking of one object from many objects, migrant sex workers’ right to work must protect workers’ ability to freely choose sex work from a variety of different decent work opportunities. Without availability of different decent work opportunities, migrants’ entrance into the sex industry is potentially a breach of their right to freely choose decent work. Realisation of migrant sex workers’ right to work therefore requires legislation and policies which encourage the availability of decent work opportunities in New Zealand.

Several different statutes and policies protect decent work opportunities for migrants in New Zealand. Under New Zealand law, migrant workers are entitled to the same employment rights as national workers,<sup>151</sup> including minimum workplace standards supporting decent work protected by the Employment Relations Act 2000,<sup>152</sup> the Minimum Wage Act 1983,<sup>153</sup> the Holidays Act 2003<sup>154</sup> and the Health and Safety At Work Act 2015.<sup>155</sup> Policies give this legislation real-world effect,

146 ICESCR, above n 75, art 2(3) (the right to work is an economic right) and ICRMW, above n 78, art 52.

147 UDHR, above n 12, art 2.

148 ICCPR, above n 94, art 2.

149 ICESCR, above n 75, art 2.

150 Article 6.

151 See “Migrant exploitation” New Zealand Immigration <[www.immigration.govt.nz](http://www.immigration.govt.nz)>.

152 Employment Relations Act 2000.

153 Minimum Wage Act 1983.

154 Holidays Act 2003.

155 Health and Safety at Work Act 2015.

maintaining decent work standards through labour inspectors' regular inspection of workplaces<sup>156</sup> and prosecutions of employers breaching employment law.<sup>157</sup>

However, despite legislative and policy protection, poor conditions are common in many migrant industries and, as a result, many migrants are only able to obtain decent work in the sex industry. One sex worker, interviewed in *The New Zealand Herald* in 2013, explained that while she was paid only \$10 per hour at a Chinese restaurant,<sup>158</sup> in breach of minimum wage regulations,<sup>159</sup> she was paid at least \$80 per hour working at a brothel.<sup>160</sup> Participants in Ting's 2018 study gave similar accounts. One participant in Ting's study, paid only \$50 per day working as a hairdresser, was able to earn \$120 an hour as a sex worker.<sup>161</sup> Another participant earned \$700 per day working as a sex worker, in contrast to \$50 per day in exploitative conditions on a construction site where she was sexually harassed.<sup>162</sup> The non-availability of other decent work is particularly significant for transgender migrant sex workers.<sup>163</sup> The poor conditions in many migrant industries demonstrate that New Zealand's legislation and policy framework ultimately fails to ensure that migrants can access a number of different decent work opportunities in New Zealand.

Although sex work itself is a form of decent work, if this is the only decent work opportunity available to migrants in New Zealand then this should be understood as a breach of migrant sex workers' right to work. Without access to a number of different decent work opportunities, migrant sex workers cannot be said to have freely selected sex work. The failure of legislation and policies to ensure access to a variety of different decent work opportunities for migrants likely constitutes a breach of migrant sex workers' right to work.

*(c) General vulnerability of migrants' economic, social and cultural rights in New Zealand*

The negative impact of s 19 and decent work legislation and policies reflects the overall vulnerability of migrant sex workers' right to work in New Zealand described in Part IV. As a migrant-specific economic, social and cultural right, migrant

156 "Labour inspectorate" Employment New Zealand <[www.employment.govt.nz](http://www.employment.govt.nz)>.

157 For a recent example, see Sam Hurley "We might die from overwork": Auckland business owners jailed for exploiting migrant workers" *The New Zealand Herald* (online ed, Auckland, 10 May 2019).

158 Lincoln Tan "Prostitutes kept out despite visas" *The New Zealand Herald* (online ed, Auckland, 5 June 2013).

159 At the time of this news report in 2013 the minimum wage was \$13.50 per hour. See "Minimum wage to increase by 25c" *The New Zealand Herald* (online ed, Auckland, 26 February 2013).

160 Tan, above n 159.

161 Ting, above n 7, at 69.

162 At 69.

163 At 74–75.



sex workers' right to work reflects the three characteristics of vulnerable rights described in Part IV. The failure of s 19 and decent work legislation and policies to realise migrant sex workers' right to work demonstrates New Zealand's continued neglect of migrants' economic, social and cultural rights generally.

## **2. The impact of legislation and policies on migrant sex workers' right to freedom from forced labour**

### *(a) Impact of criminal provisions*

Several legislative provisions criminalise forced labour in the sex industry in New Zealand and protect migrant sex workers' right to freedom from forced labour. Section 16 of the PRA creates an offence of inducing or compelling persons to provide commercial sexual services,<sup>164</sup> while s 98D of the Crimes Act 1961 creates offences of organising or procuring the entry of a person into New Zealand for the purposes of exploitation or the "reception, recruitment, transport, transfer, concealment, or harbouring of a person" in New Zealand for exploitation or involving coercion or deception.<sup>165</sup> Section 98D(4) defines "exploitation" as including the provision of commercial sexual services.<sup>166</sup> Additionally, s 129A of the Crimes Act 1961 prohibits sexual connection induced by threats.<sup>167</sup> Criminal provisions offer the primary means of protecting migrant sex workers' right to freedom from forced labour in New Zealand, with multiple provisions criminalising forced labour in the migrant sex industry.

Practically, however, migrant sex workers' deportation liability under s 19 of the PRA limits the impact of this strong legislative framework. Research shows that migrant sex workers frequently fail to report forced labour, choosing to flee or ignore exploitative situations out of fear that reporting forced labour will result in their deportation.<sup>168</sup> Workers' unwillingness to report forced labour allows clients and brothels to force migrant sex workers to provide sexual services without payment<sup>169</sup> or work long hours<sup>170</sup> with impunity, as without workers' cooperation with the police, prosecutions cannot occur.<sup>171</sup> Workers' deportation liability under s 19 of the PRA inhibits the ability of New Zealand's legislation to protect migrant sex workers from breaches of their right to freedom from forced labour.

164 Prostitution Reform Act 2003, s 16.

165 Crimes Act 1961, s 98D. Note that s 98 also creates a series of offences relating to slaves.

166 Section 98D(4).

167 Section 129A.

168 Abel and Roguski, above n 1, at 15.

169 At 9 and Ting, above n 7, at 99.

170 Abel and Roguski, above n 1, at 10–11.

171 At 13. For example, the migrant sex workers would not provide the evidential video interview.

## C. The Undignified Reality

Analysis of New Zealand's legislation and policy framework demonstrates that migrant sex workers' rights to work and freedom from forced labour are not realised in New Zealand. Despite New Zealand's positive human rights rhetoric, the lack of realisation of migrant sex workers' rights means that these workers face an undignified reality in New Zealand.

## V. A Dream of Dignity: Realising Migrant Sex Workers' Rights to Work and Freedom from Forced Labour in New Zealand

While migrant sex workers currently face an undignified reality, taking action to realise migrant sex workers' rights to work and freedom from forced labour will create a dignified future for these workers. This part will now consider what actions New Zealand might take to better realise migrant sex workers' rights to work and freedom from forced labour, before concluding by summarising the impact of these actions on migrant sex workers' dignity in New Zealand.

### A. Realising Migrant Sex Workers' Rights Under New Zealand's Human Rights Framework

Part IV identified that migrant sex workers' rights' general vulnerability arises from three aspects of New Zealand's human rights framework: firstly, New Zealand's lack of specific recognition of migrants' rights; secondly, the frequent limitations on provision of social services to migrants; and thirdly, the lack of remedies for breaches of economic, social and cultural rights.

As a first step, New Zealand should specifically recognise migrants' rights by ratifying the Migrant Workers (Supplementary Provisions) Convention and the ICRMW. Although some of the rights contained in these conventions are already acknowledged under other human rights conventions,<sup>172</sup> ratifying these conventions would give greater visibility and protection for migrants' rights in New Zealand. With increased visibility of migrants' rights, migrant sex workers would become more aware of their rights and better able to assert these rights. Regular reporting to international bodies on migrants' rights specifically would also increase New Zealand's accountability, ensuring that legislation and policies respect migrant sex workers' rights.

172 See discussion above in Part IV.

Secondly, New Zealand should remove restrictions on the provision of social services to migrants. While economic reasons may preclude the immediate removal of these restrictions, progressive removal would ensure that migrants' economic, social and cultural rights are realised in New Zealand. Improving access to social services would protect migrant sex workers' economic, social and cultural rights from being breached by third parties and, if limitations on migrants' economic, social and cultural rights were not generally accepted, scrutiny of limitations on these rights (including the impact of s 19 on migrant sex workers' right to work) would also be heightened. This would lead to greater willingness to consider the justifications behind migrant-specific limitations on economic, social and cultural rights.

Finally, New Zealand should develop effective remedies for breaches of economic, social and cultural rights by ratifying the ICESCR Optional Protocol and amending the New Zealand Bill of Rights Act 1990 to include economic, social and cultural rights. In Andrew Butler and Geoffrey Palmer's recent book, *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand*, the authors recommended recognition of workers' rights in a proposed new constitution for New Zealand.<sup>173</sup> Although the authors acknowledged their hesitation with economic, social and cultural rights generally, they commented that:<sup>174</sup>

[Workers' rights, including the right to freely choose work] have a substantial legal heritage in New Zealand [and] have a hard-edged, individual focus to them, similar to classic civil and political rights; they are of a kind that courts feel comfortable policing ... Workers' rights are judicially enforceable under many overseas constitutions. They do not cause particular concern there and it is hard to believe they would do so in New Zealand.

Butler and Palmer's comments emphasise the ease with which workers' rights can be made justiciable, suggesting that there would be no barrier to the inclusion of such rights under domestic legislation. Ratifying the ICESCR Optional Protocol and amending the New Zealand Bill of Rights Act 1990 to include economic, social and cultural rights would create opportunities for both migrants and nationals to challenge breaches of these rights internationally and domestically. Granting

173 Geoffrey Palmer and Andrew Butler *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand* (Victoria University Press, Wellington, 2018) at 159–160.

174 At 161–162.

domestic courts and the committee on economic, social and cultural rights oversight into economic, social and cultural rights in New Zealand would also increase domestic scrutiny of new legislation, ensuring that new legislation continues to realise migrant sex workers' economic, social and cultural rights.

Specifically recognising migrants' rights, removing limitations on the provision of social services to migrants and developing effective remedies for breaches of economic, social and cultural rights would address the current vulnerability of migrants' rights, especially migrants' economic, social and cultural rights, under New Zealand law. Providing a rights-affirming context for migrants' economic, social and cultural rights would strongly support the amendment and development of specific legislation and policies to protect migrant sex workers' rights to work and freedom from forced labour, as this article will now consider.

## B. Realising Migrant Sex Workers' Rights to Work and Freedom from Forced Labour under Specific Legislation and Policies

In order to realise migrant sex workers' rights to work and freedom from forced labour, New Zealand must address the specific legislation and policies which negatively impact on migrant sex workers' rights. This article will give four recommendations for better realisation of these rights through amendment and development of specific legislation and policies.

### 1. Amendment or repeal of s 19 of the Prostitution Reform Act 2003

Part IV identified that s 19 of the PRA forms an unjustifiable limitation on migrant sex workers' right to work, constitutes a possible breach of migrant sex workers' right to freedom from discrimination under international human rights law and contributes towards breaches of migrant sex workers' right to freedom from forced labour. Amending or repealing s 19 is therefore a necessary step in realising migrant sex workers' rights in New Zealand.

Although there are several options for possible legislative reform of this provision,<sup>175</sup> scholars, sex worker activist groups and the Committee on the Elimination of Discrimination Against Women<sup>176</sup> have all recommended complete

<sup>175</sup> For example, amending s 19 to preserve a prohibition on migrants working in the sex industry in New Zealand but removing deportation liability for this offending or amending s 19 to only prohibit migrants on visitor visas engaging in the sex industry in New Zealand.

<sup>176</sup> Lynzi Armstrong "Decriminalisation and the Rights of Migrant Sex Workers in Aotearoa/New Zealand: Making a Case for Change" (2017) 31 *Women's Studies Journal* 69 at 75; New Zealand Prostitutes Collective, above n 133, at 1; New Zealand Prostitutes Collective, above n 134, at 6-7; and Committee on the Elimination of Discrimination Against Women, above n 111, at [28].

repeal of s 19. Such a step is arguably necessary to fully realise migrant sex workers' rights, as amendment of s 19 would likely fail to address the provision's negative impact on both migrant sex workers' rights to work and freedom from forced labour and its possible negative impact on migrant sex workers' right to freedom from discrimination. For example, while removing s 19's deportation liability for migrant sex workers may encourage reporting of exploitation, reducing s 19's negative impact on migrant sex workers' right to freedom from forced labour, such an amendment would result in s 19 continuing to breach migrant sex workers' right to work. Moreover, continuing to distinguish between migrant sex workers and national sex workers may constitute a breach of the right to freedom from discrimination under international human rights law. Repealing s 19 would remove a fundamental barrier to workers' participation in the migrant sex industry, encourage increased reporting of breaches of workers' right to freedom from forced labour and ensure all sex workers in New Zealand are treated equally.

## **2. Possible amendment of criminal provisions**

In addition to repealing s 19, reform of existing provisions criminalising forced labour may also be necessary to realise migrant sex workers' right to freedom from forced labour in New Zealand. Although the small number of prosecutions under these provisions makes it difficult to understand these provisions' effectiveness, the Committee on the Elimination of Discrimination Against Women has expressed concerns with the high proof threshold for these offence provisions and their "demanding" nature.<sup>177</sup> If s 19 is repealed and problems with these provisions become apparent in the subsequent increase in prosecutions for forced labour, amending these provisions may be necessary to effectively protect migrant sex workers' rights.

## **3. Ensuring availability of decent work**

As discussed in Part IV, the non-availability of a variety of different decent work opportunities for migrants breaches migrant sex workers' right to work by limiting workers' ability to freely choose sex work. Developing legislation and/or policies which encourage the availability of decent work opportunities for migrants is therefore vital to ensure that migrant sex workers' right to work is realised in New Zealand.

Although the non-availability of decent work for migrants is a complex economic, policy and legal issue, two policy/legal changes could potentially improve the availability of decent work opportunities for migrants in New Zealand. Firstly, New

<sup>177</sup> Committee on the Elimination of Discrimination Against Women, above n 111, at [17].

Zealand could implement recommendations from MBIE's current multi-year review of migrant worker exploitation.<sup>178</sup> While it is unclear what MBIE will recommend,<sup>179</sup> its policy suggestions to counteract migrant worker exploitation may help ensure that more workplaces provide decent work to migrants in New Zealand. Secondly, New Zealand has recently indicated that it will ratify the ILO Convention on Forced Labour.<sup>180</sup> Ratifying this Convention and making any appropriate legislative changes may increase the scrutiny of poor conditions in migrant workplaces, resulting in increased availability of decent work opportunities for migrants. Despite the complexity of ensuring a variety of decent work opportunities for migrants, a mix of legislation and policy developments may ensure that migrant sex workers' right to work is realised in New Zealand.

#### 4. Increased funding for research and the NZPC

Fourthly, New Zealand should increase funding for research into the migrant sex industry. The small amount of current research into migrant sex workers' experiences in New Zealand makes it difficult to fully understand exploitation within this industry.<sup>181</sup> Further research could identify how often exploitation is occurring within the migrant sex industry and, additionally, provide suggestions for predicting and identifying exploitation. With increased understanding of exploitation within the migrant sex industry, more targeted legislation and policy actions can be taken to realise migrant sex workers' rights to work and freedom from forced labour in New Zealand.

Increased funding for the New Zealand Prostitutes' Collective (NZPC) should accompany increased funding for research into the migrant sex industry. The NZPC is a peer advocacy group for New Zealand sex workers which provides a number of services to workers including advocacy in respect of workers' rights, sexual health services and education.<sup>182</sup> In particular, the NZPC plays a valuable role in educating migrant sex workers on their employment rights and entitlements.<sup>183</sup> The NZPC has acknowledged that it is currently unable to reach all migrant sex workers due to workers' hesitancy to engage with the organisation out of fear of deportation.<sup>184</sup> If s 19 were repealed, it seems likely that migrant sex workers would be more willing

178 See "Temporary migrant worker exploitation review", above n 15.

179 MBIE has not yet concluded this review, with consultation feedback due for publication in the first half of 2020. See "Temporary migrant worker exploitation review", above n 15.

180 Beehive "Ratifying convention to prevent forced labour, and taking steps to end harassment and violence at work" (press release, 21 June 2019).

181 Abel and Roguski, above n 1, at 13.

182 "About" New Zealand Prostitutes' Collective <[www.nzpc.org.nz](http://www.nzpc.org.nz)>.

183 Ghuma, above n 53, at 101, citing an interview with NZPC.

184 Abel and Roguski, above n 1, at 11–12.

to engage with the organisation. Providing additional funding to the NZPC would enhance their ability to support migrant sex workers, ensuring that all migrant sex workers are empowered to assert their rights.

## VI. Conclusion

With realisation of migrant sex workers' rights integral to workers' dignity, this article has considered how these workers' rights to work and freedom from forced labour are, and should be, realised in New Zealand. Beginning with consideration of migrant sex workers' individual characteristics and framing migrant sex workers' rights to work and freedom from forced labour under a dignity lens, this article then demonstrated that New Zealand's human rights framework creates a legal environment where migrants' rights, especially migrants' economic, social and cultural rights, are highly vulnerable. Without strong protection for migrants' rights generally, migrant sex workers' rights to work and freedom from forced labour are systemically breached under specific legislation and policies.

Yet, while migrant sex workers' reality may be undignified, hope lies in the possibility of a dignified future for this community in New Zealand. Part V has demonstrated that, with actions to secure greater protection for migrants' rights generally, especially migrants' economic, social and cultural rights, the foundation is laid for specific legislation and policy developments which can realise migrant sex workers' rights to work and freedom from forced labour.

With a dignified future close at hand, the onus is on New Zealand to acknowledge the importance of all individuals' dignity and take steps to realise migrant sex workers' rights to work and freedom from forced labour in New Zealand. Without action to realise these rights, dignity will remain a dream for migrant sex workers in New Zealand.

