

# COMMERCIAL SEXUAL SERVICE CONTRACTS AND PUBLIC POLICY: SECTION 7 OF THE PROSTITUTION REFORM ACT 2003

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## Introduction

Section 7 of the Prostitution Reform Act 2003 states: “No contract for the provision of, or arranging the provision of, commercial sexual services is illegal or void on public policy or other similar grounds.”

In essence, the section facilitates “freedom of contract” in respect of sexual service contracts by abrogating the court’s common law jurisdiction to refuse to enforce sexual service contracts on public policy ground. However, in enacting section 7, did Parliament intend to facilitate “freedom of contract” to such an extent that the courts will be required to enforce contracts in cases where the qualitative nature of the sexual service contracted for constitutes a sexually immoral act or one that borders criminal assault?

### A. Contracts contrary to Public Policy

It is well established at common law that a court can hold a contract invalid or illegal because it is contrary to public policy.<sup>1</sup> The jurisdiction is embodied in the maxim: *ex turpi causa non oritur action* (from an immoral consideration an action does not arise).

In New Zealand, the Illegal Contracts Act 1970 augments the consequences of this doctrine.<sup>2</sup> In order to be triggered, the *ex turpi causa* rule does not require a contravention of law; it can be triggered by consideration that is immoral but not illegal.

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<sup>1</sup> *Smith v White* (1866) L.R. 1 Eq. 626.

<sup>2</sup> The common law is still relevant to determine whether a contract is illegal. However, the common law consequences have been replaced with broad discretion powers of the court to grant relief where appropriate under s 7 of the Illegal Contracts Act 1970.

For centuries, the act of prostitution has been held to be contrary to public policy and sufficient to justify the refusal of enforcement. The sheer weight of immorality justified holding the contract to be invalid without the need to contemplate other factors like the qualitative nature of the sexual service contracted for. Prostitution was so intensely immoral that it could taint a contract by association, even if the contract's consideration did not involve the act of prostitution.<sup>3</sup>

Today, the countervailing weight of public policy is less intense. Public policy is temporally dependent; it is not immutable.<sup>4</sup> Societal opinion of sexual immorality has changed over time<sup>5</sup> and this has been reflected in the courts. It appears that the act of prostitution is no longer sufficient to defeat a contract on public policy grounds. The Hong Kong High Court in *Chuang Yue Chieng Eugene v Ho Yau Kwong Kevin*<sup>6</sup> expressed doubt that the taint of prostitution could justify a strike-out application. Comparably, the Federal Court of Australia, in *Barac (t/as Exotic Studios) v Farrell*<sup>7</sup> has held that an employment contract's association with prostitution was insufficient to refuse a claim for worker's compensation.

These cases suggest that the current common law position regarding sexual service contracts is that the act of prostitution is insufficient to refuse to enforce a sexual service contract: other factors are necessary to 'tip the balance'. As the courts have not been required to consider the qualitative nature of the sexual act in their determination, it is possible that in certain cases the immoral nature of the sexual act contracted for would tip the balance. This would leave sexual service contracts that require the performance of a sexually deviant act open to defeat.

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<sup>3</sup> *Pearce v Brooks* (1866) LR 1 Exch 213; *Smith v White* (1866) L.R. 1 Eq. 626.

<sup>4</sup> See H. Guest (ed.), *Chitty on Contracts*, 28th ed (1999) Vol. I, Para. 17-004.

<sup>5</sup> Examples of such changes in opinion include the reduction of social stigma attached to: adultery, homosexuality and some alternative sexual acts.

<sup>6</sup> *Chuang Yue Chieng Eugene v Ho Yau Kwong Kevin* [2002] 4 HKC 245.

<sup>7</sup> *Barac (t/as Exotic Studios) v Farrell* (1994) 125 ALR 241.

### **B. Section 7 of the Prostitution Reform Act 2003**

The Prostitution Reform Act 2003 was enacted for the purpose of decriminalizing prostitution and providing a framework to safeguard the human rights of sex workers and for the promotion of their safety and welfare.<sup>8</sup> However, notwithstanding this intention, section 7 does not apply to employment contracts for sex workers. Nor does it cover other ancillary contracts like lease agreements for brothel premises or contracts of insurance.

Section 7 contemplates two types of contract: commercial sexual service contracts<sup>9</sup> and contracts for the arrangement of a contract for commercial sexual service. It applies to contracts that are directly related to the provision of physical participation by a person in sexual acts with, and for the gratification of another person for which payment or other reward is provided.

As the ambit is restricted to contracts directly related to the act of prostitution, one could assume that section 7 is a statement that the provision of sexual services is not contrary to public policy to such a degree that contracts should be refused enforcement. However, if this is the case, the courts would be required to enforce contracts in cases where the qualitative nature of the sexual service contracted for constitutes a sexually immoral act or one that borders criminal assault.

Whether this is the true interpretation and effect of section 7 will turn on whether “public policy” should be interpreted as merely public policy against prostitution or whether it should be interpreted as public policy against commercial sexual service contracts in general. If the former is adopted, then section 7 precludes commercial sexual service contracts from being refused enforcement for the mere reason that they are contracts for prostitution, which leaves the option open in respect of contracts requiring the performance of a sexual act which is independently immoral and contrary to public policy. If the latter interpretation is adopted, then all sexual service contracts will be capable of enforcement, regardless of the qualitative nature of the sexual act contracted for, subject to the commission of illegal acts.

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<sup>8</sup> S 3 Prostitution Reform Act 2003.

<sup>9</sup> S 4(1) Prostitution Reform Act 2003.

## C. Possible Interpretations of Parliament's intention

### 1. Affirmation of the Common Law Position

If public policy is interpreted as merely public policy against prostitution, section 7 will have the effect of affirming the common law position taken by the courts in recent years. As this position is not conclusive, an affirmation in the form of section 7 would provide a degree of certainty for New Zealand courts if asked to determine whether prostitution is a sufficient justification to refuse enforcement of a sexual service contract.

Two issues arise with this particular interpretation. Firstly, it requires a significant reading down of the term 'public policy' which is very restrictive in the light of the term's wide interpretative capability. It is also inconsistent with the addend 'other similar grounds' at the end of section 7, which suggests a wider ambit.

Secondly, the interpretative ambit of public policy only addresses policy against public policy and does not extend to public policy concerns flowing from the sexual acts contracted for. Therefore contracts involving "immoral sexual acts" would be open to defeat and sex workers who provide such services would be without contractual rights. This would be inconsistent with the aim of the Prostitution Reform Act 2003 being the promotion of safety and welfare of sex workers. It would also be an illusory interpretation that ignores the reality of the sex industry; being that alternative or deviant sexual practices are commonly demanded.<sup>10</sup> The reality of the industry extends well past the comfort zone of acts occurring within the marital bed or those appearing upon our television screens. Specialist acts like slave and master, group sex, human defecation, and sado masochism<sup>11</sup> are all commonly engaged in by consenting adults. No doubt there are numerous other acts in the light of the infinite ambit of human gratification and imagination.

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<sup>10</sup> J Jordan, *The Sex Industry in New Zealand* (2005) Wellington: Ministry of Justice.

<sup>11</sup> The legal issues surrounding sado masochism and criminal liability are discussed below.

## **2. Contracts for Sexually Deviant Acts that are not Illegal**

The issues identified above could be addressed by taking a wider interpretation of public policy. This would require “public policy” to bear the meaning of countervailing public policy against sexual service contracts generally, meaning that all public policy considerations surrounding sexual service contracts would be insufficient to refuse the enforcement of a sexual service contract.

Although this interpretation is wider and more consistent with the aims of the Act and the reality of the context it is being applied to; it is not absolute. Obviously section 7 could not be used to protect sexual service contracts that require the performance of an illegal act. To allow such an interpretation would result in absurdity with an extreme example being that a person could enforce another to commit murder under a sexual service contract. But would all contraventions of law be considered outside the protection of section 7?

## **3. Mere Contraventions of Law**

The phrase ‘or similar grounds’ at the end of section 7 suggests a category of circumstances that are similar or related to public policy, but are distinctive enough to be afforded a separate category. It may be that this separate category intends to cover circumstances where the execution of the contract contravenes a law that does not expressly or impliedly invalidate the contract. In substance, this refers to breaches of laws that are regulatory in nature. This is the circumstance envisaged by section 5 of the Illegal Contracts Act 1970, which states:

A contract lawfully entered into shall not become illegal or unenforceable by any party by reason of the fact that its performance is in breach of any enactment, unless the enactment expressly so provides or its object clearly so requires.

If this interpretation is adopted, mere contraventions of law resulting from the performance of a commercial sexual service contract would be shielded by section 7. For example, in the context of the Prostitution Reform Act 2003, if the performance of the sexual service or arrangement of the sexual service breached sections 8 or 10 of that

Act,<sup>12</sup> sections which are merely regulatory in nature, this would, with reference to section 5 of the Illegal Contracts Act 1970, be insufficient justification to refuse enforcement of the contract.

Conversely, a breach of section 23 of the Prostitution Reform Act 2003 would fall outside of this ambit. That section prohibits the use of persons under eighteen years in a commercial sexual service contract and imposes a term of imprisonment of up to seven years. In light of the proviso in section 5 of the Illegal Contracts Act 1970, the offence's 'object clearly so requires' that the contract be illegal.

#### D. Sexual Service Involving Bodily Harm

It is arguable whether Parliament intended for section 7 to apply to commercial sexual service contracts, the performance of which requires the intentional infliction of bodily harm with the consent of a 'victim' who is *sui juris*.<sup>13</sup>

In England, the House of Lords in *R v Brown*<sup>14</sup> held by a 3:2 majority, that a person cannot lawfully consent to criminal assault for the purpose of sexual gratification because there is no public interest justifying the commission of the harm.<sup>15</sup> The New Zealand Court of Appeal in *R v Lee*<sup>16</sup> considered *Brown* and identified numerous problems and exceptions to the application of the rule, ultimately favouring the minority position and judgment of Lord Mustill in *Brown*. The Court of Appeal held:<sup>17</sup>

[T]here is an ability to consent to the intentional infliction of harm short of death unless there are good public policy reasons to forbid it and those policy reasons outweigh the social utility of the activity and

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<sup>12</sup> s 8 of the Prostitution Reform Act 2003 requires the taking of reasonable steps to adopt safe sex practices. s 10 requires compliance with the Health and Safety in Employment Act 1992.

<sup>13</sup> Obviously there would be no issue if the party was not *sui juris* or if the contract could be avoided due to lack of consent on general principles of contract law.

<sup>14</sup> *R v Brown* [1993] 2 All ER 75.

<sup>15</sup> *Ibid* 75; In *R v Wilson* [1997] QB 47 the English Courts held that activities involving bodily harm engaged upon within the confines of the marital bed were justifiable.

<sup>16</sup> *R v Lee* [2006] 3 NZLR 42.

<sup>17</sup> *Ibid* 116.

the value placed by our legal system on personal autonomy. A high value should be placed on personal autonomy. Any constraints on human activity must be justified ... In cases where grievous bodily harm is intended, however, there may be policy reasons for criminalising such conduct despite consent, even on the test we propose.

In the light of *Lee*, it follows that not all intentional inflictions of bodily harm for the purposes of sexual gratification will constitute criminal assault. Therefore, the validity of a commercial sexual service contract, the performance of which constitutes intentional infliction of bodily harm, will turn on the degree of harm intended and relevant policy considerations.

If “public policy” is given the meaning of public policy against commercial sexual service contracts in general then it is possible that section 7 would protect sexual service contracts involving the intentional infliction of bodily harm provided the harm does not constitute criminal assault. It is likely that this would represent the interpretative high water mark of section 7.

### **Conclusion**

The operation of section 7 of the Prostitution Reform Act 2003 lies dormant awaiting its use as a defence against claims that a commercial sexual service contract should be suppressed or struck down on public policy grounds. The conservative interpretation of Parliament’s intention is that the provision merely affirms the common law. Given the issues of this approach, a pragmatist would suggest a wider interpretation to include contracts that involve sexually deviant conduct that may ‘tip the balance’. The pragmatic approach is the preferred interpretation in the light of the purpose of the Prostitution Reform Act 2003 and the context to which section 7 is to be applied.

