

**Sozialwissenschaftliches FrauenForschungsInstitut
an der Evangelischen Fachhochschule Freiburg**

**The Act Regulating the Legal Situation
of Prostitutes – implementation,
impact, current developments**

**Findings of a study on the impact of the German
Prostitution Act**

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1. Introduction

The entry into force of the Prostitution Act at the beginning of 2002 was a milestone in the political discussion on improving the legal position and social situation of prostitutes in Germany that had gone on for decades.

This paper sets out the key findings of a comprehensive study on the impact of the German Prostitution Act. The study was commissioned by the BMFSFJ (Federal Ministry for Family Affairs, Senior Citizens, Women and Youth) and carried out by an independent research institute¹ from 2004 to 2006. When the Act came into force in 2002, the German Bundestag instructed the Federal Government to carry out a study after two years to look at the impact of the new regulatory situation. The Federal Government's report, which was submitted in 2007 and is also available in English, was based on this study.²

The German Federal Government places its policy on prostitution in the context of stepping up efforts to prosecute trafficking in human beings and correspondingly its conclusions prioritise better protection of victims of trafficking in human beings and protection of minors. It also stresses the importance of helping people to get out of prostitution.

In this summary of our study, we shall focus on the question of social security and working conditions for prostitutes. We see not only the combating of trafficking in human beings as a human rights issue, but also the tackling of working conditions that are harmful to health, unacceptable or dangerous. At stake here are the rights of those women and men who earn their living through prostitution based on an autonomous, rational decision and to some extent conditioned by serious personal difficulties such as violent backgrounds, predicaments such as debt, or very limited options caused by social exclusion, unemployment or social cleavages resulting from the EU enlargement. They are confronted with widespread discrimination and have no lobby unless they come into the "victim of trafficking" category. In the course of our study, we interviewed a large number of prostitutes about their life situations and what they expect of the Act. We would like this paper to give them a voice.

Our intent is to make our findings available for international discussion³; we have placed them in the context of political developments in Germany and compared them with regulations in other European countries.⁴

2. Parameters of prostitution in Germany before the Prostitution Act came into force at the beginning of 2002

Until the Act Regulating the Legal Situation of Prostitutes (Prostitution Act) came into force on 1 January 2002, there was no specific legislation on prostitution in the Federal Republic of Germany. Even before 2002, prostitution was a legal activity, but it was restricted by a host

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Whole report: www.auswirkungen-prostitutionsgesetz.de

² Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes, Berlin 2007, www.bmfsfj.de

³ We are grateful for the cooperation with the gender research unit in the department of education in the university of Osnabrück.

⁴ This paper is addressed explicitly to interested parties from other European countries or further afield. We have therefore tried, on the one hand, to describe any specific aspects of German law that are important to understanding the situation while, for the sake of simplicity, avoiding detailed citation of specialist legal literature. Anyone interested in exploring particular aspects in more depth can go to our website and contact us for bibliographical references and suggestions for further reading.

of different legal regulations. The Prostitution Act has brought about a legal re-evaluation of prostitution and altered the legal position of prostitutes. Nevertheless, prostitution is still subject to certain legal prohibitions and restrictions, contravention of which can entail fines, penalties or a custodial sentence.

2.1 Legal, but immoral and subject to numerous restrictions

Before the Prostitution Act came into force, neither prostitution itself nor running brothels or similar businesses was prohibited: however, based on supreme-court precedent, these activities were considered immoral and anti-social and as a consequence prostitutes had virtually no rights.

- All contracts related to prostitution were null and void.

Due to the assumed immorality, contracts related to prostitution were null and void.⁵ Prostitutes had no legal right to the remuneration agreed with the client. Prostitution was not recognised as a profession, form of work, or service. It was not possible to draw up legally valid employment contracts with prostitutes. Accordingly, prostitutes had no access to social insurance through their work (statutory health insurance, security in the event of unemployment). Private health insurance and pension funds also rejected prostitutes on the grounds of their work. They were thus able to obtain insurance only by illegal means, such as through a spouse or by citing a different occupation.

- It was a criminal offence for third parties to arrange or organise prostitution services.

Before the Prostitution Act came into force, the act of running a brothel was not in itself a criminal offence. What was a criminal offence was running a business in which prostitutes were kept in a state of personal or economic dependency, as was any supporting action in the field of prostitution that went beyond “merely providing housing or short- or long-term accommodation”. That was classified as “**promoting prostitution.**”⁶ An extensive body of case law and legal literature had developed for determining when an act of promotion in this sense had occurred. An example often cited is the case tried in a criminal court of “creating an elegant and discreet atmosphere” or the provision of condoms. That meant that any investment in good working conditions and protection for prostitutes could be prosecuted. The background to this regulation was the intention to make working in prostitution as unbearable as possible in order to force prostitutes to leave the profession as quickly as possible.

It was also a criminal offence to act as an intermediary between prostitutes and clients. This was defined as a form of pimping. Before the Prostitution Act came into force, anyone who promoted prostitution on a commercial basis by finding clients for sexual services was committing a criminal offence.⁷ This was true whether or not prostitutes were being exploited or coerced. It meant that acting as an intermediary for prostitutes in employment relationships and aspects of organising the work of prostitutes were criminal offences. That applied both to brothel owners/managers and to prostitutes, who, for example, organised clients not only for themselves but for also for other prostitutes.⁸

⁵ Under Article 138 I of the BGB (German Civil Code), legal transactions that are immoral are null and void.

⁶ Article 180a of the Criminal Code, old version

⁷ Article 181a II of the Criminal Code

⁸ Tröndle/Fischer Article 181, Margin No. 6 f.

- Prostitutes were not allowed to advertise their services

Article 120 I No. 2 of the Administrative Offences Act (OWiG) continues to impose an absolute **ban on advertising** for prostitution. This regulation prohibits all kinds of advertising for prostitution, irrespective of whether it is offensive or discreet, direct or disguised. The person liable to be fined under this clause is not only the person advertising, i.e. the prostitute or brothel operator, but also the person responsible within the advertising medium, e.g. the publisher of a newspaper.⁹ In practice, adverts for prostitution appear regularly in local newspapers and on the Internet. These contraventions of Article 120 I No. 2 of the Administrative Offences Act are rarely prosecuted. The police use these adverts to some extent to help their investigations of other crimes connected with prostitution.

Here the Prostitution Act has brought about a change in legal classification. In 2006, the Bundesgerichtshof (Federal Supreme Court) determined that the regulation must now be interpreted on the basis of the Prostitution Act. Under the Act, a total ban on advertising prostitution ceases to apply. Advertising is now only an administrative offence if it "does not respect the appropriate discreet form" and touches on, for example, youth protection issues.

- Prostitution was only allowed at certain designated places.

By-laws establishing exclusion zones as instruments for regulating prostitution and making it a criminal offence in certain parts of towns and cities have been the subject of, sometimes heated, debate for many years. The legal basis for issuing by-laws establishing areas where prostitution is not allowed is Section 297 of the Introductory Act to the Criminal Code, the aim of which is to "protect public decency and young people." The practice of prostitution can be banned or limited to certain hours of the day under a by-law in an entire municipality if the municipality has up to 50,000 inhabitants or, if it has more than 20,000 inhabitants, in part of the municipality. The extent to which use is made of this possibility of setting up exclusion zones for prostitution varies greatly from region to region. For example, Berlin does not use this legal instrument at all. By contrast, Munich regulates the practice of prostitution with a far-reaching by-law on exclusion zones. Contravention of an exclusion-zone by-law can be prosecuted as an administrative or criminal offence. Earlier reports¹⁰ have also pointed out the impact of exclusion zones on the life and work situation of prostitutes: artificially reducing the work opportunities makes competition amongst the prostitutes tougher and increases the influence of pimps. Tolerance zones in industrial areas or on the outskirts of towns and cities without any kind of infrastructure increase the risk that prostitutes may become victims of violence. Furthermore, there are no sanitary facilities in these areas. Alternation between tolerating and prosecuting prostitution in exclusion zones increases legal uncertainty for prostitutes.

In this respect the Prostitution Act has had no impact; nothing has changed in practice.

Another area of the law that placed geographical restrictions on prostitution was **planning law**. German planning law ensures that an urban plan is developed and adhered to. Planning law makes it possible to review whether and how building projects fit into an existing area. Areas are subdivided into different zones, such as residential, mixed use, industrial or commercial and light industrial.

⁹ Cf. Kurz in: KK OWiG, (Karlsruhe Commentary on the Administrative Offences Act), Article 120, Margin Note 30

¹⁰ See Leopold et al. 1997

Prostitution was generally classified as a disturbance to an area, with the consequence that all forms of prostitution from prostitution in private flats and houses through to large-scale brothels were officially allowed only in commercial and industrial zones. Unofficially, prostitution in private houses and flats and mini-brothels also exists in residential and mixed-use areas. This practice was to some extent tolerated by the planning authorities. That means that, on the one hand, prostitutes had no legally secure status in residential and mixed-use areas and were dependent on the attitude of individual civil servants within the planning authorities. On the other hand, planning law refused to allow a form of prostitution organised and determined by the women themselves at a venue that offered better working conditions and better protection than industrial areas, for example, that are out of the way and unpopulated at night.

Here, the Prostitution Act has not altered the legal position. The attention that the subject is currently attracting is even triggering negative trends in certain regions of Germany. Brothels or brothel-like businesses that in the past had been run discreetly and without causing disturbance are now being closed (see 8).

- Prostitution businesses had no secure legal status

The restrictions resulting from classifying prostitution as immoral also applied to businesses in which sexual services are offered. Although their business was not illegal, brothels and brothel-like businesses **could not be registered as businesses**. The consequence of classifying both the work of prostitutes and the businesses as immoral was that prostitution was not seen as a trade as defined in the Trade Regulation Act (*Gewerbeordnung*) and therefore a prostitution business could neither be registered nor granted a licence. Businesses were sometimes tolerated or included on the register of businesses (*Gewerberegister*) in a different category such as commercial room rental. Applications for a permit under the Restaurant Licensing Act (*Gaststättengesetz*) were refused or permits that had already been issued were revoked if a bar, restaurant, hotel or guesthouse showed any indications of being connected with prostitution. Businesses and pick-up bars could be either closed down or tolerated on the grounds that they were connected with prostitution, which meant that their legal status was very uncertain.

This area has become a key topic in the professional discussion since the Prostitution Act came into force. Government agencies still do not have uniform guidelines on the classification of prostitution, which means that practice varies from one state to another or even within the same state (see 5.3.2).

- Prostitution businesses are subject to police checks at any time

In Germany, police laws come under the jurisdiction of the states. A number of **police laws** include powers to intervene justified solely by the fact that prostitution is being practiced in a particular place. In these cases, the police have the right to enter a private home and search it, check the identity of a person if that person is found to be in a place in which prostitution is being practiced, or to order searches of individuals or property. These are all powers that date back to a time when it was considered necessary to give the police and agencies responsible for public order possibilities for monitoring the practice of prostitution.

The Prostitution Act has changed nothing in this respect.

The restrictions listed show two things: on the one hand, they have often led to prostitution at best being tolerated, under poor working conditions, confined to certain areas and subject to

police checks. On the other hand, they illustrate clearly how many areas of the law had some regulatory power in matters of prostitution and what scale of challenge the Prostitution Act was facing.

A gradually changing view of prostitution began to be reflected in case law a number of years before the Prostitution Act came into force. Clear doubts about the fundamental immorality of prostitution were expressed in December 2000 by the Berlin Administrative Court. The concept of "moral behaviour" was seen as being historically determined and a matter of social opinion. Prostitution that is practised voluntarily and without any accompanying criminal activities under conditions that the prostitutes themselves consent to, the court found, should no longer be fundamentally classified as immoral.

2.2 From health checks to prevention

At the same time, public health policy and its treatment of prostitutes gradually began to change from a repressive/controlling attitude to a preventive approach.

Until the end of 2000, the Act on Sexually Transmitted Diseases (*Gesetz zur Bekämpfung von Geschlechtskrankheiten*) was the basis for both the structure and profile of services working to combat sexually transmitted diseases in Germany. The philosophy of this Act was that the public health authorities had an unequivocal remit to monitor and control. In practice, individual sexual health checks were limited almost exclusively to prostitutes. It was basically assumed that prostitutes spread sexually transmitted diseases. They were the only group of people who were obliged to present health certificates, the only group of people for whom regular examinations were mandatory. If they missed an examination appointment they were liable to have to report to the police and undergo a compulsory medical examination. Prostitutes were given a certificate that they had undergone an examination of this kind, which they had to present at the request of the police or any other government agency.

However, the latitude defined within the legislation made it possible for states and local authorities to organise their services differently. For example, since the mid-80s, many public health authorities no longer insisted on health certificates for prostitutes and set up services that could be accessed on a voluntary and anonymous basis. For special target groups outreach social work services were set up.

However, in the vast majority of German towns and cities compulsory examinations continued to be enforced; prostitutes were obliged to undergo these examinations at regular intervals that varied nationwide.

On 1 January 2001, the Protection against Infection Act (*Infektionsschutzgesetz*) came into force, replacing the Act on Sexually Transmitted Diseases. The new Act created for the first time in Germany a common legal basis for all STDs including HIV infection and AIDS. The heading of Article 3 of the Protection against Infection Act - "Prevention through information campaigns" - is indicative of the spirit of the entire Act. The focus is thus no longer on control but on promoting behaviour based on health awareness among individuals. Accordingly, the new legislation relies on prevention and education as a public task. The aim is to create in this way the foundation for providing sound information to the general public and therefore protect as many people as possible from infectious or contagious diseases tailored to their particular circumstances. Since it came into force, prostitutes are no longer obliged by law to undergo examinations. The services of the public health authorities can now be accessed by prostitutes on a voluntary basis.

2.3 Different forms of prostitution and different places of work

Prostitution in Germany takes many forms and can be differentiated by a number of criteria. For example, women and men practice prostitution either as a full-time job or sideline, which is a significant difference, especially in terms of social insurance. Another important criterion is whether people are working voluntarily as prostitutes or have been coerced into it. The reasons that people feel they have no choice but to be sex workers can vary greatly and often be very complex. It is often difficult to make a clear distinction between coercion and voluntary choice of profession. Even people who have chosen to be prostitutes may become caught up in situations of dependency due to a lack of support from their immediate environment, be it in social or material terms.

Prostitution is subject to geographic restrictions as a result of **by-laws on exclusion zones**. By-laws establishing exclusion zones are often ignored and are in practice not able to prevent prostitution in the areas in which it is banned. They nevertheless have a negative effect on prostitutes' working conditions: with only a few exceptions, prostitution is banned in city centres, which would be the most lucrative areas. The exceptions are usually typical red-light districts,¹¹ in which there is a high concentration of prostitution businesses and prostitutes, competition amongst the prostitutes is tough and pimps have a great deal of influence.¹² Tolerance zones in areas on the outskirts of town without any kind of infrastructure put prostitutes at a higher risk of becoming victims of violence.

The most public form of prostitution in Germany is street walking: prostitutes stand at particular spots – either officially designated places or places that are unofficially well known – and offer their services to potential clients. Variations on this kind of prostitution take place in hotel bars, motorway service stations or similar places. As a rule, the sexual service usually takes place in cars or hotels that rent out their rooms by the hour. Caravans are also used for prostitution: this kind of business is more prevalent on major roads outside of towns.

Prostitution takes place in a less visible form in special houses, i.e. brothels. In Germany there are a number of different kinds of brothel, including “sex malls,” massage salons, nudist clubs and sauna clubs, dominatrix studios, night clubs or “houses of boys.” Brothels often have a pick-up area, where the client can choose a prostitute and then go to a room with her or him for the sexual services. Variations on this are *Laufhäuser*¹³ or streets, where prostitutes sit outside their rooms or in ground-floor windows respectively and solicit potential clients.

Brothels are usually run as commercial room-rental services, i.e. the people who work there are not employees of the establishment but are self-employed. Prostitutes also work in what are known as “model's flats,” either in commercial premises, but also in rented accommodation, advertising in local newspapers or on the Internet as models to attract clients.

¹¹ Examples of typical red-light districts are the Reeperbahn in Hamburg or the area around the railway station in Frankfurt.

¹² See Leopold et al. 1997

¹³ The particular characteristic of *Laufhäuser* is that clients can wander at leisure past the prostitutes' rooms throughout the building before making their choice. One of the most famous *Laufhäuser* in Germany is “Pascha” in Cologne, which extends over seven floors.

Prostitutes also work on an “on call” basis, which is the origin of the expression “call girls” or “call boys.” The prostitutes are booked directly or via an agency. The desired services are performed at the client’s home, in a hotel, or an apartment specially rented for the purpose.

2.4 Advisory services, self-help organisations and political pressure groups by prostitutes

At the beginning of the 1980s, groups of prostitutes started to become active in what was known as the “whores’ movement”¹⁴ and called for legal equality. In 1990, the Green Party in the Bundestag tabled an anti-discrimination bill that included a proposal for equal rights for prostitutes. The Bill was never put to the vote because reunification caused the Bundestag’s term to be shortened.

Representatives of advisory services for prostitutes and STD advisory centres joined forces in the early 1990s in the “AG-Recht-Prostitution” and in January 1996, under the motto “The time is right,” presented to the public their own draft for an act on legal and social equality for prostitutes. Although the campaign for improvements to the legal status of prostitutes had a sympathetic reception in the media and support both politically and in parliament, it took until 2001 for the legislative process for today’s Prostitution Act to be initiated.

There are about 18 advisory centres for prostitutes working in a number of regions of Germany, as well as self-help groups offering social and legal advice and doing street work. Some offer help for people wanting to find a way out of prostitution.¹⁵ A number of STD centres run by the public health offices provide free health advice and support to prostitutes.

In March 2002, the “Bundesverband Sexuelle Dienstleistungen e. V.” (Federal Association of Sexual Service Providers) was founded in Berlin. It is an association of operators of prostitution businesses in Germany. In line with the aims set out in its articles of association, the association advocates the elimination of any legal obstacles affecting the sexual services sector and the development of quality standards, combined with the award of a seal of quality for brothel-like businesses.

For some years now, the service sector’s trade union has represented the concerns of prostitutes.¹⁶ Shortly after the Act came into force, a model employment contract for prostitutes and operators of prostitution businesses was developed and put forward for discussion.

3. Act Regulating the Legal Situation of Prostitutes in Germany

The Act Regulating the Legal Situation of Prostitutes (Prostitution Act – *Prostitutionsgesetz*) was passed in the German Bundestag on 20 December 2001 and came into force on 1 January 2002. It is an omnibus act and includes three new sections relating to civil and social insurance and two amendments to the Criminal Code.¹⁷ Its genesis must be seen in the context of the German legal system.

¹⁴ The “whores’ movement” is understood as the organisation for and political activities of prostitutes. For the history and demands of the international and German whores’ movement cf. HWG 1994, pp.12 ff.

¹⁵ This figure covers all centres offering advisory services irrespective of differences in staffing or funding.

¹⁶ Cf. ver.di: Arbeitsplatz Prostitution

¹⁷ Cf. the text of the Act and the Explanatory Memorandum annexed to it.

The German legal system and legislation relevant to prostitution

Germany has a federal structure; it is divided into 16 states. The legislature consists of two chambers: the Bundestag, which is elected directly by the people, and the Bundesrat, which consists of delegates from the state governments. Legislation can be proposed by Members of the Bundestag, the Federal Government, or the State Governments via the Bundesrat. Once the legislative process has been concluded, legislation is passed in the Bundestag. If the interests of the states are especially affected, the Bundesrat must approve legislation passed by the Bundestag.

The wide range of attitudes to prostitution taken by the states led to the Prostitution Act becoming a short Act. It was deliberately passed as a Federal Act not requiring the approval of the Bundesrat. To make this possible, the option to deal with issues that fall under the jurisdiction of the states - trading law, for example – was deliberately not chosen, because that would have made the Act subject to approval by the Bundesrat and it was considered unlikely that a majority vote in the upper chamber would be achieved.

This means that, on the one hand, the regulations that are valid under federal law that would have involved the interests of the states were not changed and, on the other, the states and local authorities still have regulatory powers relating to prostitution. For example, protection of public safety and order is a state matter and each state has its own police law. The third tier of government involved in regulating prostitution is the local authorities: they exert their influence on exclusion zones through by-laws or decisions taken when detailed development plans are drawn up, which in effect decide whether prostitution can be practised on certain streets or in certain neighbourhoods.

3.1 Content and intention of the Prostitution Act

The legislator had a number of aims in passing the Prostitution Act:

The political goals of the Prostitution Act

In the explanatory memorandum to the Act, the legislator cited a number of goals and expectations:

Improving the legal status of prostitutes

(“With this Bill, the legislator is seeking to improve the legal status of prostitutes – not that of clients, brothel owners/managers or others. “)

Improving the social position of prostitutes

(“At the same time, we are seeking to abolish social discrimination against prostitutes ...”)

Improving working conditions for prostitutes

(“This is associated with the expectation that poor working conditions will be abolished.”)

The intention is to cut the ground from under the criminal activities that accompany prostitution.

(“One of the intentions is that, by improving the legal status of prostitutes, the criminal activities that often surround prostitution and often have to be classified as organised crime, will have the ground cut from under them.”)

Making it easier for people to get out of prostitution

(“Prostitutes should have the possibility of exiting prostitution, for example, by taking up opportunities to join retraining schemes.”)

The legislator's aims and expectations are connected to specific changes in the law. The central change is what in common parlance is often referred to as "removing the immorality label."

Abolishing the classification of prostitution as immoral is intended to prepare the way for prostitution to be seen in law as a remunerated activity and to be treated on an equal footing with other jobs in terms of employees' rights. The term immorality or synonyms for it run through the German legal system. It can be found in different areas of the law and is used as a peg on which to hang restrictions. As a rule, the activity of prostitution is subsumed under it. To abolish the immorality classification, the legislator chose a central regulation in civil law: Section 1 of the Prostitution Act makes it clear that the contractual agreements that prostitutes enter into in the context of their work will no longer be judged immoral. This includes, for example, the contract between prostitute and client or the rental agreements between brothel operator and prostitute. The legislator assumed that this regulation would mean that prostitution may no longer be judged immoral in other areas of the law. The explanatory memorandum to the Act explains as follows: "Consequential amendments to aspects of the Restaurant Licensing Act concerned with immorality are not necessary. Section 1 of the Prostitution Act clearly states that sexual acts performed for financial remuneration will no longer be automatically assumed to be immoral." This is a makeshift solution that was chosen because of Germany's federal structure as explained above and it has proved to be a major weakness in the implementation of prostitutes' rights. An explanatory memorandum to the Act alone is not legally binding, so that individual states and local authorities continue to take a very varied approach to judging prostitution.

The Prostitution Act has regulated the following specific aspects:

- Since the Prostitution Act came into force, the legal relationship between client and prostitute is no longer considered in law to be immoral, which means it now has legal validity.

Article 1, 1st sentence of the Prostitution Act stipulates that the agreement to perform sexual acts is a unilateral contractual obligation between prostitutes and their clients. That means that after rendering their service prostitutes have a right to claim payment of the agreed fee from their clients. This right can be enforced by a court of law. However, clients or brothel owners/managers do not have the right to demand that a (specific) sexual service be performed. If the prostitute refuses the service agreed, she must refund the money to the client. This is intended to preserve sexual self-determination.

- The legal relationship between the brothel operator and prostitute is no longer considered in law to be immoral, which means it now has legal validity.

Article 1, 2nd sentence stipulates that an enforceable claim also exists in the relationship between the prostitute and the operator of prostitution businesses. The prostitute thus has a right to payment of a previously agreed remuneration if she is present within a business and available for the performance of sexual acts for a specified period of time.

- Only the prostitutes themselves have the right to take action to enforce payment.

Article 2 restricts the allowable objections and pleas against a prostitute's claim to remuneration and stipulates that the right to remuneration cannot be transferred to third parties. This means that only the prostitutes themselves can take legal action against clients to enforce payment. This is meant to prevent prostitutes from becoming dependent on brothel owners/managers or pimps.

- Prostitutes and brothel owners/managers can agree an employer/employee relationship. In this way, prostitutes can gain access to the statutory social insurance system (health insurance, pension funds).

In line with the aim of making it possible for prostitutes in employment relationships to have access to social protection, amendments were made to the Criminal Code. The clause on “promoting prostitution,” which, until the Prostitution Act came into force, was a criminal offence under Article 180a, paragraph 1, no. 2 of the Criminal Code, was removed. Commercial promotion of prostitution by facilitating introductions (previously a form of pimping) is now a criminal offence only if the prostitute’s personal or economic freedom of movement is curtailed (Article 181a II of the Criminal Code). That means that it is no longer a criminal offence to hire prostitutes as employees in brothels. The right of the employer to give instructions is nevertheless restricted by the Prostitution Act. Article 3 of the Act clearly states that, even when working as employees, prostitutes should retain a high degree of autonomy and the explanatory memorandum to the Act clearly states that this relates particularly to the choice of client and type of sexual service.

4. Study of the impact of the Prostitution Act

4.1 Research task and the subject of the research

The idea behind the study of the impact of the Prostitution Act was to gain an overview of the practical consequences of the Act. The repercussions and effects on other areas of the law relevant to the lives and circumstances of prostitutes were to be included in the study. Of particular interest, were the impact on legal practice, the practice of government agencies, and the views of prostitutes and operators of prostitution businesses.¹⁸

The subject of the study was the impact of the Prostitution Act on practice, not the phenomenon of prostitution *per se* or the life situation of prostitutes in general. Thus, we studied primarily how the Prostitution Act has impacted on **the parameters of prostitution as it is practiced voluntarily**, looking particularly at the law, government agencies and work practicalities. It is for these areas that the regulations of the Prostitution Act have the most relevance. **Other areas such as child prostitution, drug-related prostitution and trafficking in human beings were not subjects of this study.** Other legislation, such as special protective regulations, criminal law and immigration legislation are most relevant to these areas; the Prostitution Act will have hardly any effect for groups of people in these areas. But even prostitution engaged in voluntarily is not a clearly delineated area.

Prostitution can be differentiated by a range of different criteria. One criterion is the self-understanding of women and men as prostitutes. Whether they work full-time or part-time in prostitution is a significant difference, impacting particularly on their social protection. Another key criterion is the degree of self-determination involved in the decision to work as a prostitute. The reasons underlying people’s decision to be sex workers, or the reasons they see themselves forced to do so, can often be complex and can vary greatly. The dividing line between coercion and free choice of this occupation is often a difficult one to draw.

¹⁸ The data was collected between summer 2004 and summer 2005. Court decisions up to August 2005 were included.

The self-determination criterion may be subdivided as follows:

Voluntary prostitution	Grey area	Forced prostitution involving violence
Decision to engage in prostitution after considering several possible professions and genuine options for earning a living.	Decision to go into full-time or part-time prostitution out of dire necessity (e.g. debt) or (emotional) dependency, a lack of alternative ways of earning a living after considering very limited options.	Forced prostitution or being forced to remain in prostitution; exploitation and violence.

This classification into three patterns of prostitution is based on latitude for action and decision-making in determining working conditions and employment relationships: while, for the prostitutes classified in the first of these patterns, these options are open and many people in this group stand up for their rights with self confidence, these same options are limited for the second group. Anyone who relies urgently on their earnings cannot afford to be so choosy with regard to clients and prostitution businesses. Many people in this group compromise their own safety (work without condoms, accept all clients, even those who are unpleasant or dangerous) or accept compromises in working conditions (give a cut of their earnings to pimps or partners; work under poor conditions in terms of space, hygiene, finances or working hours).

Our study covered women and men in the voluntary and grey areas. The survey included different kinds of prostitution in private flats and houses, brothels, or on the street.

As a rule, the prostitutes in our survey had experience in several areas of prostitution.

4.2 Research design and methodology

The study consisted of a number of individual studies that complemented each other and also overlapped. This was a reflection of the complexity of the topic and of the fact that a great number of individuals and institutions are involved in the implementation of the Act and that implementation differs from region to region.

The following studies were carried out as part of the overall study:

- *Legal expertise on the impact of the new legislation*: analysis of legal literature and court judgements relating to the various areas of the law affected
- *Research and survey on the consequences of the new legal situation in practice*: survey of ministries, courts, public prosecution services, state criminal investigation authorities, other government agencies and health insurance companies
- *Analysis of eight model regions*: Berlin, Dortmund, Frankfurt/Main, Leipzig, Munich, Rostock and parts of Hannover and Stuttgart
- *Surveys on the impact of the Act on the practice of prostitution*: female and male prostitutes, operators of prostitution businesses, employees of advice centres for prostitutes

Both quantitative and qualitative methods were used in the surveys. Questionnaires of varying degree of detail and tailored to different target groups were developed for the quantitative surveys. The qualitative surveys were carried out in the form of individual guided interviews tailored to each target group, telephone surveys and theme-centred group discussions.

Due to their high need for anonymity, prostitutes as a target group are difficult to reach. One possible approach was through the advice centres and prostitutes' organisations. In order to reach prostitutes who are not members of organisations or users of advisory centres, we also used the public health agencies as a way of distributing questionnaires, accompanied streetworkers to enable us to conduct interviews in brothels, and made the questionnaires available on the Internet.

In all, individuals and experts from the following institutions and government agencies were surveyed:

	Written questionnaire	Face-to-face interviews
Prostitutes	305	20
Operators of prostitution businesses	22	11
Advisory centres for prostitutes	80	31
Ministries	117	5
Law courts	644	2
Public prosecution services	65	6
Police	42	11
Local authorities and agencies	42	45
Other experts	-	16
Print media	-	15
Total	1,317	162

In addition, about 50 court judgements and decisions were analysed.

The study was carried out only two years after the Prostitution Act came into force. It is important therefore to bear in mind that the findings depict a very early stage of implementation.

5. Findings of the study and insight gained

The advocates of the Prostitution Act had high expectations of it, in particular that it would bring about a noticeable improvement in the lives and work situation of prostitutes by ensuring better social protection and better working conditions. However, there were great fears that it would become more difficult to prosecute pimping and trafficking in human beings. Since the Act came into force, neither the benefits expected nor the negative effects feared have manifested to the extent originally assumed. Nevertheless, the Act has had a direct and indirect impact on various levels.

5.1 Findings of the surveys of prostitutes, operators and advisory centres

5.1.1 Awareness of the Prostitution Act

The vast majority of **prostitutes** surveyed said they were aware of the Prostitution Act. Awareness was sometimes confined to the mere existence of the act; the legal possibilities provided for in the Act were far less well known. Of 305 prostitutes who completed written

questionnaires, 241 (79 %) said they knew that the Prostitution Act existed. Respondents who worked full-time as prostitutes were significantly more likely to know of the existence of the Prostitution Act than those working in prostitution as a sideline. Respondents who had been given the questionnaire at an advisory centre knew significantly more often about the impact of the Act on their work situation than others. The most important sources of information were advisory centres, colleagues, print media and information material on the Act.

However, only some of the respondents were familiar with the detailed possibilities provided for by the Act.

Of 241 prostitutes surveyed:

63.5 % . knew that they had the right to join a statutory health insurance company.

62.7 % . knew that they had the right as prostitutes to conclude an employment contract.

59.3 % . knew that they had the right to initiate proceedings against clients for non-payment.

57.7 % . knew that prostitutes could join statutory social and pension insurance schemes.

If we assume that our survey predominantly reached the group of prostitutes who are in contact with advisory centres, therefore have support and are probably better informed than the average, these figures would have to be seen as over-estimating the level of awareness.

Other deficits were revealed in terms of knowledge about the individual scope within the Act for the individual to use its provisions to their advantage or about potential benefits for their own personal area of work. The details of the responses show that there is a great deal of misinformation that leads to unrealistic expectations and concerns.

It is no wonder there is such an uneven level of knowledge, bearing in mind that since the Prostitution Act there has not been any systematic attempt to disseminate information. The information provided by the associations and federations involved is left to the initiative of individuals.

5.1.2 Views and expectations

“Justice. Being accepted like anyone else. Recognition by society.”

“More respect and equal rights for us as women.”

“Improved working conditions and lives for prostitutes, health and social insurance, protection from pimping, more justice.”

“That things might get a bit easier for us. Things are still made very, very difficult for us.”

(Comments made by prostitutes responding to the survey in interviews and questionnaires)

The vast majority of prostitutes and operators of prostitution businesses surveyed had a positive view of the existence of the Prostitution Act. Only a few considered it unnecessary. At the time of the survey, most prostitutes felt the Act had very little impact. Operators of prostitution businesses tended to answer the question on initial impacts in the affirmative. Both groups were hoping for further improvements in their situation. Prostitutes are primarily hoping for a reduction in discrimination; operators of prostitution businesses are first and foremost hoping for legal security for their businesses.

Table 1: Opinions of prostitutes and operators of prostitution businesses on the Prostitution Act¹

	Prostitutes (N = 305)				Brothel operators (N = 22)			
	Definitely yes	Probably yes	Probably no	Definitely no	Definitely yes	Probably yes	Probably no	Definitely no
I think the Prostitution Act is a good thing.	62 %	24 %	6 %	3 %	77 %	14 %	4 %	4 %
You can already see the Act starting to have an impact.	14 %	17 %	34 %	20 %	27 %	27 %	27 %	18 %
I think the Prostitution Act is unnecessary	7 %	9 %	24 %	43 %	-	9 %	9 %	77 %
The Act has already brought about some improvements.	12 %	20.0 %	31 %	22%	32 %	32 %	18 %	9 %
I am hoping it will lead to further improvements.	46 %	27 %	11 %	6 %	46 %	27 %	9 %	9 %

¹ "No comment" entries have not been listed in the Table.

Prostitutes evaluate the impact of the Prostitution Act on their future employment prospects very differently. There is still great uncertainty. The greatest effect was seen as being the improvement in their legal position.

Table 2: Impact of the Prostitution Act on future employment prospects for prostitutes (n = 275)

	Improve	Remain the same	Get worse	I don't know
My opportunities for improving my professional position in prostitution will:	21.8 %	21.5 %	4.7 %	28.4 %
My chances of getting out of prostitution will:	22.2 %	25.1 %	5.1 %	22.2 %
My opportunities for changing profession will:	16.4 %	22.5 %	13.5 %	20.0 %
My opportunities for retraining, gaining qualifications or education will:	16.0 %	18.5 %	11.3 %	23.6 %
My possibilities for asserting my rights will:	43.3 %	11.6 %	2.2 %	18.2 %

Similarly, the vast majority of employees of advisory centres responding to the survey saw the existence of the Prostitution Act as positive. However, their expectations of the Act tended to be cautious. 55 % expected better conditions for the lives of the prostitutes; significantly fewer (38 %) expected a reduction in discrimination or expected prostitutes to have equal treatment with people in other forms of employment (23%).

"An important level that the Prostitution Act has opened up is that it has triggered a social discourse on the subject, and that is, in my view, the most important thing." (Advice centre employee)

A need for change was seen first and foremost in the general parameters for working in prostitution: more legal certainty for potential employers, abolition of restrictions in the law on catering establishments and trading law and lifting the ban on advertising for prostitution. Furthermore, 90 % of respondents felt there was a need for implementation guidance for government agencies.

5.1.3 *The advice centre's remit has broadened*

“As an advice centre, we come into contact with people who have problems of some kind; that is why they come to us. The Act has meant that we are now seeing more and more women who have questions about the Act, are working independently for themselves and are not weighed down with problems. That is something I find very positive.” (Employee of an advice centre for prostitutes)

People working in advice centres for prostitutes and STD advisory centres run by the public health agencies talked of changes in their work and an increased workload. Their remit has changed particularly as a result of their committedness to providing information about the Prostitution Act.

The advice centres provided information on the Act and the possibilities it opens up not only to their clients; other institutions and government agencies also approached them with a clear need for information. Since the Prostitution Act came into force, many advisory centres have also broadened their spectrum of cooperation partners and established links with government agencies and institutions such as trades unions with whom they had no prior contact. There has been no change in the financial or personnel situation of the advisory centres.

5.2 Impact of the Prostitution Act on the work situation for prostitutes

5.2.1 *Employment contracts in the prostitution business and access to statutory social insurance*

- **Employment contracts**

“What are you supposed to put in one of these employment contracts? How many clients have to be served and that you have to offer full sexual intercourse and blow jobs? That can't be what it's about.” (Prostitutes)

“The employer's right to give instructions to employees is limited. What do I do if she says: so, I am not going up to the room with the next three guests? What then? Do I still have to pay her? Can I throw her out?” (Brothel operator)

Changes to the Criminal Code¹⁹ triggered by the Prostitution Act make it possible to conclude employment contracts and to register for social insurance. The findings of the survey illustrate that at the time the survey was carried out neither operators of prostitution businesses nor prostitutes found this an attractive option.

Three respondents had concluded an employment contract as prostitutes, nine had an employment contract through a different job in the area of prostitution (housekeeper, hostess and others).

A reason for not concluding a contract was said to be the fact that people have no idea what an employment contract that would be accepted would actually look like.

¹⁹ See 3.1

The great need to preserve anonymity was decisive.

“When it comes to this Act, no-one considered the fact that it would be impossible to ever find a normal job again if your official documents say you had been a prostitute.”

“I am not interested in everyone knowing that I work as a prostitute; I don’t want an official stamp.”

(Prostitutes in interviews and questionnaires)

There was uncertainty among brothel owners/managers about whether specifying place of work, hours of work and prices for particular services was classed as exploitation of prostitutes. In 2003, the Federal Supreme Court clarified that this is not the case if prostitutes are working voluntarily in a brothel or brothel-like business. However, this fact was not sufficiently well known.

The main concern prostitutes have about employment contracts is that they will lose their sexual autonomy – they want to be able to turn down certain clients and certain practices – and that they will lose their freedom to choose their hours and place of work.

“You have to be very careful with employment contracts because they can give rise to exploitation of women in a totally different way. Okay, you get an employment contract, but the downside is you have to do blow jobs without a condom or offer every service the client wants. If women are offered this as the price of social security protection, I would advise every woman not to accept.”

(Prostitute)

Questions of social protection such as sick pay were important particularly to those people who earned their living solely from prostitution.

A key argument from owners/managers of prostitution businesses against employment contracts was the restricted right to give instructions to employees. They saw themselves as shouldering the entire economic risk. An employment contract would oblige them to pay a salary without giving them the right to instruct their employees to serve a client.

Owners/managers of prostitution businesses and prostitutes saw financial losses in setting up an employment relationship subject to compulsory insurance as a problem, because in Germany that would entail both employer and employee paying contributions to health insurance, old age pension and unemployment funds.

Furthermore, issues of social security had been dealt with by the majority of prostitutes outside a waged employment relationship in prostitution.

Many respondents find the idea of social protection through a waged employment relationship in prostitution hard to imagine and not very attractive in the light of the deductions from their earnings it would entail. However, there is definitely a need for more extensive social security. Some of the prostitutes who responded to the survey (29 %) said they would welcome an employment contract under certain conditions, but only 6 % would definitely conclude an employment contract as prostitutes. In interpreting these findings it is important to take into account that the prostitutes had little prior knowledge or had been misinformed about the Act.

- **Health insurance**

Of the 305 prostitutes who took part in the written form of the survey the vast majority had some kind of health insurance. Only a small section did not have health insurance²⁰.

Table 3: Health insurance status of prostitutes

	All respondents	Full-time prostitutes¹	Part-time prostitutes¹
Have health insurance	265 (86.9 %)	145 (84.8 %)	119 (89.5 %)
Do not have health insurance	40 (13.1 %)	26 (15.2 %)	14 (10.5 %)
Total	305	171	133

¹ Information on prostitution as a full-time job or sideline was given by 304 respondents.

The slightly higher level of health insurance coverage for people working in prostitution as a sideline is primarily explained by the fact that they had health insurance through their main occupation or as recipients of social security benefits.²¹

Table 4: Type of health insurance company

Health insurance company	All respondents¹	Full-time prostitutes¹	Part-time prostitutes¹
AOK, local health insurance fund	91 (37.0 %)	44 (32.4 %)	47 (43.1 %)
Approved alternative health insurance fund	50 (20.3)	22 (16.2 %)	28 (25.7 %)
Company insurance fund	35 (14.2 %)	21 (15.4 %)	14 (12.8 %)
Private health insurance	70 (28.5 %)	49 (36.0 %)	20 (18.3 %)
Total	246	136	109

¹ We did not have details of the health insurance company or employment status for all the respondents who had health insurance.

A disproportionate number of prostitutes who responded to the survey were insured in private health insurance companies rather than statutory health insurance funds. By way of comparison: 89 % of the general population are in a statutory health insurance fund and 9 % have private health insurance.²² Premiums charged by private health insurance companies are higher and are risk-based. Prostitutes are classed as a high-risk group.

²⁰ Of these, 34 were women, 4 were men and 2 were transsexuals.

²¹ Quarter (25.2 %) of the respondents who worked part-time in prostitution also had other salaried employment, or were still at school or in vocational education. Another eighth (12.5%) were recipients of social security benefits, which gave them health insurance provision.

²² <http://www.bmgs.bund.de/deu/gra/themen/gesundheit/index.php>, 3 July 2005

Table 5: Health insurance status of prostitutes

Insurance status	All respondents ¹	Full-time prostitutes ¹	Part-time prostitutes ¹
Voluntary insurance in their own right	110 (44.9 %)	80 (58.8 %)	30 (27.8 %)
Compulsory insurance in their own right	57 (23.3 %)	14 (10.3 %)	42 (38.9 %)
Insured through another family member	78 (31.8)	42 (30.9 %)	36 (33.3 %)
Total	245	136	108

¹ We did not have details of the insurance status or employment status for all the respondents who had health insurance.

Only 13 respondents had insured themselves giving prostitute as their official job title. The reasons for giving a different occupation included the wish to remain anonymous and the fear that the health insurance company would not accept them otherwise.

- **Old-age provision**

Provision for old age is a significantly more serious problem. 47 % of the prostitutes surveyed had some kind of old-age provision (pension funds or another type of private arrangement). However, people working full-time in prostitution were significantly less likely to have provision for their old age than those involved in prostitution on a part-time basis. Many people had the option of making voluntary contributions to a pension fund, but did not make use of it.

“I think how much social security a woman needs varies from one woman to another. She will choose the option of getting it that involves the least effort.”
(Prostitutes)

The majority of prostitutes assumed that their activity in this area would be of limited duration.

Table 6: Status regarding old-age provision by full- and part-time prostitutes*

	Full-time prostitutes	Part-time prostitutes
With old-age pension insurance	68 (43.3 %)	69 (61.1 %)
Without old-age pension insurance	89 (56.7 %)	44 (38.9 %)
Total	157	113

* $\chi^2 = 8.282$, $P = 0.004$

However, whether any old-age provision that is in place will be able to cover the actual living costs after retirement is questionable. It cannot be ruled out that even those people who did make provision for their old age will have to rely on state benefits after retirement or when they leave prostitution.

However, there was a clear desire on the part of respondents working full-time to acquire pension rights on the basis of their work as prostitutes. Almost half the full-time prostitutes

(65 = 47.4 %) intended to acquire pension rights in the future on the basis of their work in prostitution.

Three years after the Prostitution Act came into force, it is not yet possible to claim that adequate social security has been provided to prostitutes through employment relationships entailing compulsory social insurance. Being bound by an employment contract does not appear very attractive to the majority of prostitutes in view of the dependency and the financial deductions associated with a contract. However, at the same time, there is a need for social security. Here, prostitutes face the typical difficulties of people who are self-employed or on a low income. An additional obstacle that prevents many people from making social provision for themselves as prostitutes is their great need to keep their activity confidential and not have their secret discovered by their family or social milieu.

It became clear that the route to social security is currently not so much to be found in waged employment relationships but rather through improving working conditions and above all continuing to reduce stigmatisation.

5.2.3 Legal action taken for non-payment of agreed fees

“To take legal action against a client you have to have their personal data and the only way you might be able to get that is if you do a home visit. And if someone leaves without paying what can I do? It’s difficult. And apart from that all court cases require you to pay the lawyer in advance and that is, of course, a deterrent.” (Prostitutes)

“First the money, then the service. More service: first the money, then more service.” (Prostitutes)

The Prostitution Act has made it possible for prostitutes to take clients to court to enforce payment of the agreed fee. The courts surveyed had not had any civil law proceedings against clients of prostitutes. Staff of advisory centres and government agencies knew of only isolated cases. Of the prostitutes responding to the survey, four said they had started legal proceedings against a client for non-payment of the agreed fee. The main reasons for the low number of court cases were the fact that it is still the norm to insist on payment in advance, the anonymity of clients and the expense involved in legal proceedings.

Despite the fact that the number of legal proceedings brought so far is low, the possibility of taking a client who does not pay to court was seen by the surveyed prostitutes as an improvement. 63 % said they would generally speaking take legal action against a client who refuses payment.

5.3 Facilitating better working conditions for prostitutes

The Prostitution Act represents the start of a process to take prostitution out of its unregulated circumstances and place it in the context of the normal regulations that apply to economic life and employment. In the past, ways of working and working conditions in the field of prostitution were regulated either by Article 180a I no. 2 of the Criminal Code, under which anything beyond letting rooms was classed as “promoting prostitution” and therefore a criminal offence, or by the internal rules of the prostitution business itself and the milieu. The latter includes both practices that reduce stressful aspects of the work (self-determination about the type and extent of physical contact and sexual practices) and protect prostitutes’

health (use of condoms) and others that put them at risk, e.g. by forcing them to consume alcohol or work without a condom.

The Prostitution Act does not regulate working conditions, but by removing the Section of the Criminal Code on “promoting prostitution,” it simply creates a framework for conditions to be improved. The Act does refer to working conditions in that it stipulates that employers have only a limited right to give instructions to employees. This was intended to ensure that prostitutes retain their right to sexual self-determination.

Prostitution is characterised by maximization of profits for operators of prostitution businesses within uncertain legal parameters. It is a sector without works councils or occupational insurance associations. The trades union for the service industry, ver.di, has only recently started to represent prostitutes. People who go into prostitution out of desperation have no means of putting pressure on brothel owners/managers, whereas the opposite is very much the case. There are still examples of exploitation and degrading working conditions in this industry – even in registered businesses. Prostitution on the street or in illegal circumstances has its own set of rules and is subject to conditions of duress that people working in this milieu are forced to accept. The Prostitution Act has opened up ways of putting health and safety and working conditions on the agenda – at least in brothels and private homes. Because hardly anyone works as a waged employee in this field, appropriate alternative methods to establish health and safety at the workplace must be found.

Health and safety at the workplace is subject to extensive regulation in Germany. A range of primary and secondary legislation is in place and standards covering areas such as working hours, breaks, access to daylight, indoor temperature, hygiene, maternity protection, handling dangerous substances etc. are defined in detail. Despite their broad sweep, the regulations do not cover people working in the field of prostitution. They apply only to employees and the conditions they impose are for the employer to comply with. The consequence of limiting the protective regulations to waged employment relationships is that the relevant authorities and government agencies are not responsible for monitoring prostitution.

Other areas of the law are not subject to these restrictions and could influence the working conditions in prostitution. For example, building and planning law in Germany regulates, on the one hand, the use of buildings and what uses are allowed in what areas and, on the other hand, has the authority to impose conditions on the design of buildings and interiors. In other words, building and planning law has an influence on where prostitution is permitted and under what conditions it is practised in terms of the actual buildings. These are both essential aspects of working conditions.

5.3.1 Building and planning law

“Prostitution businesses were not treated any differently in the past. Before the Prostitution Act came into force they were commercial operations that caused a public nuisance and that is what they still are.” (Planning authority)

Case law produced the idea of prostitution businesses causing “nuisance as a result of the “milieu.”” What is meant by that is nuisance caused by noise, refuse, high volume of traffic etc.); all types of prostitution business, whether in large brothels or individual flats and houses, were classified as causing a public nuisance. Prostitution businesses were therefore

not permitted under planning law in residential areas or mixed-use areas and were predominantly allowed in commercial and industrial areas only. This legal classification has not changed as a result of the Prostitution Act.

The survey of planning authorities in the model regions showed that when examining an application from prostitution businesses they predominantly take their cue from case law in deciding whether to grant permission. However, in individual cases, official practice has been patchy. For example, prostitution was tolerated in private flats and houses in residential areas and in exceptional situations permission was granted.

The great variation in how the authorities deal with prostitution and the area where the need for change was mentioned most is prostitution in private flats and houses. In isolated cases, the administrative courts and ministries have pointed to a need for improvement in this area. In the main, the suggestions for change focused on reviewing the possibility of permitting prostitution in flats and houses in residential areas. This concurs with the demands of advice centres and brothel owners/managers, who point to the necessity to take a more differentiated approach. For example, large brothels are open until the early hours of the morning and this form of prostitution involves a high turnover of clients, increased traffic volume and typical behaviours that accompany alcohol consumption. Prostitution in flats and houses requires a high degree of discretion to meet the needs of clients. Here prostitution takes place mainly in the daytime, there is no visible advertising and anti-social behaviour aggravated by alcohol is a seldom occurrence.

These considerations have so far been paid little attention in practice. On the contrary, the current trend seems to be to close mini-brothels in flats and houses in residential areas that were previously tolerated.

In the past, planning authorities have looked at working conditions in prostitution in isolated cases only. However, the conditions in a building such as sanitary facilities, the size of the rooms people work in, the same bed used for working and sleeping, provision of space for people to rest and enjoy privacy, access to daylight etc. are all issues that come under building and planning law, and planning authorities can impose conditions in these areas. In isolated cases we have found initiatives by individuals in the model regions who, in their particular function in the planning authority, have triggered a discussion about acceptable working conditions.

The latitude and possibilities allowed within building and planning law to influence and improve working conditions in prostitution have scarcely been used in the past. How they should be defined and evaluated in the field of prostitution` has to date not been officially determined and is an issue for future discussion.

5.3.2 Trading law

“The situation before the Act came into force was simply not satisfactory. What we now have is an opportunity for change in that we can get the people who work in this field out of the “grey area,” which I also call the “tolerance area.”
(Trade Licensing Office (*Gewerbeamt*))

That is a political decision.” (Trade Licensing Office)

Since the Prostitution Act came into force, the licensing of prostitution businesses under trading law has been dealt with differently by the different German states. There have been

developments here. According to the state ministries, prostitution businesses may now register as businesses without prosecution in 14 of the 16 German states; “pick-up establishments” will be eligible for a restaurant permit (*Gaststättenerlaubnis*). Only in two states is prostitution still considered as a socially unacceptable activity for trading law purposes as it was before the Prostitution Act came into force. This view negates an impact of the changed classification of prostitution in civil law on the concept of what is socially unacceptable in commercial law.

There is no state in Germany in which prostitutes can register their business.

The survey of trade licensing offices in the model regions has shown that below ministerial level the practice from one state to another varies greatly. This means that, depending on the state, region or local authority, brothels and brothel-like businesses:

- Are either recognised as businesses and listed in the business register as brothels or brothel-like businesses
- Accepted and listed under the classification “commercial room letting” or “erotic massage”
- Not accepted under any classification. The application to register the business is rejected.

The ways of dealing with the activity of individual prostitutes also vary greatly and it is difficult to gain any kind of overview of practice.

Here it becomes clear just how little legal certainty brothel owners/managers have. Legal views and interpretations by the authorities differ from one place to another. A lack of planning certainty for businesses, for example if they are only tolerated in the district where their business operates, or if they are not able to register their business, prevents them from being to officially act as an employer. They remain in the role of “landlords letting rooms” and only in rare instances take any responsibility of their own accord for the working conditions of the prostitutes who use their rooms. Good cooperative practices between institutions at local level have proven to be helpful in promoting change.

The few trade licensing offices that accept that brothels are legitimate businesses are split in their views. There are those that believe it is sufficient to recognise them as businesses and include them on the register of businesses. There are, however, individual representatives of model regions who find the status quo inconsistent. Consistent equal treatment of prostitution businesses and other types of business would, in their opinion, mean defining prostitution as a trade and at the same time introducing a statutory licensing obligation²³ for operators of brothels. For example, a restaurant operator in Germany currently has to apply for a licence under trading law and provide proof of his or her personal reliability, whereas brothel operators simply have to register their brothels at the trade licensing office:

²³ A number of commercial activities require a permit from the relevant authority. The only grounds for refusal are personal unreliability or non-fulfilment of the objective conditions required for the particular activity. If an applicant fulfils all the personal conditions required to practice the profession in question (e.g. no criminal record in any area relevant to the trade or profession in question, no tax arrears, no illegal employment of personnel) and all the objective conditions (e.g. suitable premises), he or she has the right to receive a permit resulting from the basic freedom to take up any profession or trade. Permits may be time-limited, or be contingent on particular restrictions or conditions. Under certain circumstances, permits may be rescinded or withdrawn.

“With brothels we are dealing with a highly criminal milieu and yet we allow ourselves as the state to scrutinize them less than we do a restaurateur who runs an eight-star restaurant. This contradiction alone makes the situation untenable for me. We are deluding ourselves here, because we simply don’t want to deal with these things.” (Trade licensing office)

This group sees the introduction of a licensing obligation as a way of completing a further step towards distinguishing between legal and illegal kinds of prostitution. To be granted a licence, an operator might, for instance, have to prove that he has no criminal record in the field of exploitation or pimping. It would be possible to impose conditions on his business, stipulating provision of good working conditions for the prostitutes working there. Employing minors or women without proper residents’ status could be grounds for closing down the business.

This is the point where the proposal concurs with a demand often voiced by police representatives. From this point of view, dealing with crimes connected with prostitution requires a level of monitoring that the police cannot provide and that could be addressed by additional checks under trading law.

Despite this development, the authorities’ implementation practice based on the instructions given to them from the relevant ministries has “frozen.” Here the situation with the trade licensing offices paints a picture that is also typical for other kinds of government agency. The legislator included very few instructions in the Prostitution Act relating to the impact of the Prostitution Act on other areas of the law. Although the ministries have responded to questions that the Prostitution Act left open, they are currently taking a heterogeneous position. How things developed has been left to practitioners. That has meant the progress the Prostitution Act has made in the area of trading law has been confined to the fact that, in the majority of states, owners/managers of brothels can register their brothels and apply for a licence to sell alcohol. So far there have been no improvements in working conditions for prostitutes as a result of this. Anything that could bring progress on this point is connected with monitoring owners/managers of brothels and with corresponding work and organisational decisions by government agencies. Furthermore, no monitoring standards have so far been passed under subject-specific legislation.

5.3.3 Standards for acceptable, decent working conditions

Until now there were no stipulations applicable to brothels and brothel-like businesses concerning the conditions under which prostitute’s work – conditions relating to the building, working hours and other aspects. If planning authorities and the trade supervisory authorities are to become involved in working towards the objectives of the Prostitution Act, they will need a catalogue of criteria and standards for decent working conditions, on which they can base their decisions and protect themselves against accusations of moral judgement or arbitrary decision-making.

In Germany there are already examples of standards of this kind that have been developed at local authority level in cooperation forums²⁴ with the involvement of advice centres, relevant government agencies, the police and prostitutes. Authorities are already carrying out checks in brothels relating to fire protection regulations and certain aspects of hygiene in

²⁴ E.g. in Dortmund and Frankfurt/Main

saunas or whirlpools. However, there are no criteria specific to working in prostitution which could be used to issue licences and monitor businesses.

- For prostitution in private flats and houses, clubs and small brothels, the criteria required would relate to hygienic work practices and safety.
- For street prostitution, hygiene (e.g. access to toilets and running water) and protection against violence are of paramount importance.
- For large brothels, additional criteria relating to buildings and standards of interiors, such as access to daylight, access to privacy in segregated spaces, separate living and working space.
- For brothels with saunas and nudist clubs, there is also the question of the obligation to be naked during working hours.

Experts consulted as part of our study named constant protection against infection (obligatory use of condoms) and banning forced alcohol consumption with clients as absolute minimum standards for all areas of prostitution.

On the part of the prostitutes themselves, the need for good working conditions often took second place to the wish to earn enough money quickly.

The 80 staff working in advice centres for prostitutes who responded to the survey did feel there was a chance of the Prostitution Act making it possible to improve working conditions in the future, but they were ambivalent about the necessity of checks to ensure compliance with standards for better working conditions. Transparency and monitoring of prostitution businesses do mean improvements for prostitutes who have a certain level of self-confidence. However, others who are living below the poverty line and therefore do not want to have to pay tax or do not have a residence or work permit will try and avoid the checks and go underground.

The question arises as to what legal instruments - other than regulations on health and safety at the workplace that relate only to waged employment relationships – can be used to oblige operators of prostitution businesses to create certain basic conditions that will have the effect of protecting people working in prostitution. Many experts are discussing the introduction of obligatory licensing for brothels based on the example of the Netherlands, in order to make better standards compulsory and be able to monitor them more closely.

The Prostitution Act's stated aim is to improve the situation of prostitutes, not of brothel owners/managers. However, our study has shown that it is an obstacle to achieving better working conditions if, for fear the Act might be seen as a "Pimping Act," great care is taken to avoid improving the situation of operators of brothels. Only if brothel owners/managers have planning certainty can they be obliged to create better working conditions.

Another reason that ideas about how to regulate health and safety in prostitution are still not well defined is that there are scarcely any possibilities for comparing prostitution with other types of work. Prostitution is a service that is concerned with the body and physicality of clients to a degree of intensity similar to that experienced in the care of the sick people or the elderly. Protection regulations for these professions should be examined to see if they are transferable to prostitutes. However, the comparison has its limits: there is no other

profession in which an individual uses their own body and sexual intimacy in a comparable way.

5.3.4 Interim conclusion

The question of immorality remains contentious. The Prostitution Act has not abolished the immorality verdict as desired by the legislator as unequivocally as was its stated aim expressed in the explanatory memorandum to the Act. The regulation in Article 1 of the Prostitution Act has not achieved that aim. Both in the case law and in the literature, the immorality verdict continues to be upheld or at least its abolition by the Prostitution Act is negated. A topic of discussion that is equally controversial is the question of whether the change to the immorality verdict within civil law affects the interpretation of immorality within public law.

This has created legal uncertainty for prostitutes, owners/managers of prostitution businesses and government agencies. How prostitution is classified has remained subject to the various stipulations issued by state ministries and even the moral sensibilities of individual representatives of government agencies. The legal uncertainty is currently blocking the implementation process and with it any improvement in working conditions in prostitution. The legislator's intention has thus far not been put into practice here.

Without further external impetus nothing will change. Neither operators of prostitution businesses nor government agencies will take the initiative because changes may entail cost. In some government agencies, committed staff have taken the initiative and tried to use existing scope for discretionary decision-making to bring about better working conditions for prostitutes. To ensure that other government agencies also take action, it is crucial that policymakers send the right signals. The implementation of the intention of the Prostitution Act will have to be brought about by the responsible agencies on behalf of the prostitutes. The majority of them are not able to fight for good working conditions themselves.

5.4 The impact of the Prostitution Act on prosecutions

"I personally do not understand why we should have to prosecute someone who does nothing other than make arrangements to ensure that things run properly in his business. That is what every bar and every club does. And am I supposed to prosecute him just because sexual services also happen to be included on the menu?" (State criminal investigation authority)

"Nevertheless, when we had statements from prostitutes describing these payment arrangements (fixing prices), we had something to work with that substantiated our original suspicion. We were then able to carry out searches, for example, and possibly in that way obtain on-the-spot statements from women during these surprise raids. We were able to get some really good results like that, which we were able to pursue further and eventually get to the men who are actually behind it all. We can no longer work like that; we can no longer search a brothel on suspicion of promotion of prostitution and find witnesses to interview." (Public prosecution service)

Sceptics and opponents of the Prostitution Act fear that the Act will make it more difficult to bring prosecutions for pimping and trafficking in human beings. The new definition of the crime of "dirigiste pimping"²⁵ and exploitation of prostitutes²⁶ (formerly promotion of

²⁵ Article 181 a II of the Criminal Code

prostitution) and the way it has been fleshed out by case law means that the evidence needed to prove it is far more stringent. Police and public prosecution services, they argue, now predominantly have to provide evidence that prostitution is being practised under coercion, which is difficult to prove without the ability to make recourse to objective indications such as stipulating prices, working hours and places of work.²⁷ Furthermore, the offence as it was defined in the past provided an important way into investigating structures of organised crime.²⁸ As part of our study, representatives from a total of 52 public prosecution services and 42 police stations were interviewed.

The study has once more highlighted an old problem with regard to prosecuting exploitation, pimping and trafficking in human beings. The fragility of the evidence from witnesses and the instability of the witnesses, combined with a lack of alternative possibilities for providing evidence, has always been one of the core problems of bringing prosecutions in this area of crime; it is not a problem that has arisen since the Prostitution Act came into force. The subject has shifted back to the centre of public discussion as a result of the political and legal developments that have occurred. However, it is clear that simply laying blame at the feet of the Prostitution Act falls short of the mark.

The majority of respondents did not see any relevant changes in their area of work. The question of the Prostitution Act being to blame did not even arise. However, it is striking that about 20% of representatives of the police - that figure may be slightly lower or higher depending on the precise nature of the question - did note changes in what scope for action they have and described those changes as having a restrictive effect on their ability to carry out investigations and bring prosecutions in the field of pimping, exploitation and trafficking in human beings.

Changes perceived to be negative were mentioned for all areas of police work: from carrying out checks, causes for investigation, through to providing evidence of offences. In cases where people believed there was a connection to the Prostitution Act coming into force, representatives of the police unanimously mentioned the loss of the objective criteria for establishing evidence of offences cited in Articles 180a and 181a II of the old version of the Criminal Code. Here our empirical findings concur with the criticism in professional circles of the changes to criminal law brought about by the Prostitution Act.²⁹

Our study has shown that the respondents who mentioned the fact that investigations had become more difficult had very particular work routines before the Prostitution Act came into force³⁰ and understood their remit as being to monitor and limit prostitution. The view of those who defined their goal as being exclusively to prosecute pimping or trafficking in human beings connected with prostitution was different.

²⁶ Article 180 a I of the Criminal Code

²⁷ Before the Prostitution Act entered into force, the existence of these circumstances could be used as evidence of dirigiste pimping.

²⁸ As a representative of this view, see Schmidbauer NJW 2005, p. 871ff.

²⁹ As an example, see Schmidbauer 2005, p. 873

³⁰ For example, in *Der Kriminalist* 2005, Paulus describes a police practice that has been increasingly prevalent in Germany in recent years “of dispensing with the necessary protracted investigations into structures – where the chances of success are not certain and high costs are involved in terms of time, personnel and money - to arrest perpetrators and groups of perpetrators and instead treating the victims of trafficking as the sole perpetrators due to the offences against immigration law they have committed, a situation which the perpetrators often deliberately cause.” This “is a quick and simple way of achieving an apparently successful balance sheet and the statistics the police are looking for.”

In cases where it was thought that investigations had been made more difficult and at the same time representatives of the police and public prosecution service had a positive attitude to the Prostitution Act, the difficulties were not seen as impossible to overcome, the connection was accepted as logical and other legal channels for procuring information and carrying out information campaigns and checks were discussed.

Furthermore, our study has provided clear indications that, in ascribing cause and effect, other factors that are totally unconnected to the Prostitution Act, such as the EU's eastern enlargement and the Immigration Act, play a role and often concur with the view taken by experts. Now that Eastern European countries are part of the EU, investigation approaches that in the past used the illegal residence status of women as pegs have had the ground pulled from under them. Since the impact of the Prostitution Act and the Eastern enlargement fall within the same time frame, it is difficult to distinguish between the different causes.

Ultimately only one of 52 public prosecution services and five of 42 police stations called for the reintroduction of the Article in the Civil Code on promotion of prostitution in its old form. The vast majority saw the change in the definition of an offence here as a step in the right direction towards better working conditions for prostitutes.

Half of the representatives of the police who responded to the survey called for the Trade Regulation Act to be dealt with differently or re-drafted. Behind that desire was the wish for additional monitoring possibilities. Where brothels are registered as businesses, the trade licensing offices have access, irrespective of whether there is any initial suspicion of a crime or of danger for public safety. Furthermore, it would be possible to issue licences that are contingent on certain conditions being fulfilled, which would make it possible to monitor establishments more closely. Although there was almost total consensus that nothing has changed for the police with regard to raids and checks on prostitution businesses as a result of the Prostitution Act, representatives of the police evidently would like to see an expansion of the monitoring possibilities available to the authorities. That could be pointing to monitoring deficits that are unconnected with the impact of the Act. This example also indicates that, in the discussion about the impact of the Prostitution Act on the practice of prosecution, aspects have an effect that, irrespective of the Prostitution Act coming into force, are based on general difficulties in bring prosecutions in the whole area surrounding prostitution.

As far as the question of appropriate future measures for bringing prosecutions in the red-light milieu, there were signs that the police were moving away from the idea of tightening up options available under criminal law and seeking other solutions. For example, in a more in-depth study carried out in 2006, almost all 20 respondents (93%) voted instead for new strategies for dealing with victim/witnesses. Representatives of the police favoured gaining access to victims through more raids (79%), additional ways of monitoring through government agencies and the increased use of prostitution liaison officers (89%). In particular the practice of using police liaison officers, which is at present common in only a few cities and regions, is a topic that is being increasingly discussed in police circles in Germany.

5.5 Exiting prostitution

The legislator explicitly stated that one of the aims of the Prostitution Act was to facilitate retraining and support people wishing to leave prostitution. The aim was for prostitutes to have the opportunity to give up this work at any time, by signing up for retraining schemes, for example.

Exit support has been offered in recent decades mainly from advice centres, although the survey of state ministries showed that state funding has been cut back in recent years so that there is now only one German state that is still running a programme of this kind. Otherwise the service is confined to provision of individual advice. This development is not linked to the Prostitution Act; cuts are also noticeable in other social areas and other issues.

The Act Regulating the Legal Situation of Prostitutes Act and its aim to provide protection to prostitutes resulted in the Bundesagentur für Arbeit (Federal Employment Agency) acquiring the responsibility of making its job-finding and advisory services available to people wishing to leave prostitution. Prostitutes wishing to leave their former profession can use the job-finding and advisory services of the employment agencies. However, prostitutes are not a separate target group for employment promotion and retraining schemes. The Federal Employment Agency assumes that many prostitutes belong to the groups of people, like the long-term unemployed, needing special help in finding employment and to the group of jobseekers without formal skills and qualifications who are eligible for funding for further training, but there are no special implementing regulations stipulating statutory funding of training for people seeking to exit prostitution.³¹

The German and international press has carried reports alleging that employment agencies in Germany have sought to place women looking for employment in prostitution or prostitution-like jobs. Our research has shown this to be untrue.

Exit programmes and individual exit support schemes are confronted with a range of problems: on the one hand, the labour market currently does not offer any realistic job possibilities for women leaving prostitution, who often do not have any kind of vocational experience and very little experience in any other kind of work. Secondly, the decision to stop working as a prostitute is part of a protracted process that is often fraught with setbacks. The decision is often taken at a time when the woman no longer feels physically and emotionally capable of coping with the stress and strains involved in prostitution. As a rule, her state of health makes her not able to cope with the other kinds of demands that are associated with retraining. Options that assume that a woman no longer works as a prostitute are often not accepted because they usually involve social decline into immediate poverty and dependency on state benefits. The chances of success are significantly poorer for those women who reached this point some time ago and are involved in prostitution because they are not able to live on social security benefits.

Exit programmes have a greater chance of success if they include debt counselling, can offer real employment prospects and are available while people are still working as prostitutes.

5.6 Problems in implementing the Prostitution Act

Obstacles to implementing the Act were identified both with the people working in the field of prostitution and with responsible government agencies and institutions.

The implementation of the Prostitution Act has come up against a self-contained system that has developed over decades and in which different forces join together, despite conflicting interests, to form a consolidated front. What is therefore needed is a process of adjustment that will require a lot of time and adequate supportive measures. In evaluating the problems

³¹ Communication from the Federal Employment Agency of 12 April 2005

and successes, it is important to bear in mind how little time has passed since the Act entered into force.

- *A lack of political will to implement the intention of the Prostitution Act*

Since the idea of a Prostitution Act began to be debated, the political arena has presented a very heterogeneous picture. There was ambivalence within the Federal Government and among the Bundestag members of the political parties that voted for the Act. This ambivalence related both to individuals' own fundamental attitude to prostitution as an activity that cannot morally be sanctioned and to dissatisfaction with the compromise that was reached.

- *A lack of an overall concept for an implementation strategy*

By comparison with other subject areas, the points of contact between government agencies and prostitution are relatively few. Predominantly therefore government agencies do not see any necessity to be proactive and take the initiative in implementing the Act. At managerial level, scarcely any guidelines have so far been developed; in fleshing out their practice, government agencies continue to rely on case law, of which there is still very little. There have thus far been only a small number of court decisions that point in a new direction.

Only a number of individual representatives of government agencies have formulated a vision for implementing the intentions of the Prostitution Act. They advocate transparency in the prostitution industry and healthier, more dignified working conditions and seek to use the latitude that their government agencies have to contribute to turning those ideas into reality.

- *The low degree of regulation of the Prostitution Act*

The Prostitution Act is confined to regulating individual situations in civil, social and criminal law. A central problem here is that the intention behind the Act – that prostitution should no longer be generally evaluated as immoral – is only explicitly described in the explanatory memorandum to the Act, not in the actual text of the Act. The only aspect that is explicitly mentioned as being no longer considered immoral is the legal relationship between clients and prostitutes and between owners/managers of brothels and prostitutes. Terms from other areas of the law such as “immorality,” “offending public decency,” or “aiding and abetting immorality,” which the authorities in practice use in connection with prostitution and which entail both restrictions and bans, remain unchanged.

From the outset there were therefore uncertainties about the legal consequences of the Prostitution Act for other areas of the law that also regulate prostitution as an area of employment.

This has opened up vast scope for interpretation and made it possible to fall short of the intention of the Act. There is still latitude for making a legal assessment that sexual services are immoral on the basis of moral sensibilities and the interpretation of individuals in government agencies and authorities.

There is a need for clarification, in particular with regard to harmonisation with other areas of the law – trading law, the Restaurant Licensing Act, planning law, public order.

- *Regulatory focus on waged employment relationships*

A further reason for the Act's low degree of impact stems from the option the legislator chose of linking provision of social security and improvement in working conditions in prostitution to the formation of employment contracts. So far, people working in prostitution have not made use of this possibility, and the expectation that, when the Act came into force, employment relationships subject to compulsory insurance would be created in prostitution, has not been fulfilled. Apart from isolated cases, which were difficult to track down, no employment contracts in prostitution were concluded. The majority of prostitutes prefer to be self-employed. Owners/managers of prostitution businesses have not taken on the role of employer. Neither group has any idea about how waged employment relationships subject to compulsory insurance could be set up in this sector. There are no feasible models that take account of the specific features of the field of prostitution.

The intention to convert this unregulated form of work into a legally regulated type of employment has not been achieved.

- *Lack of information*

How well informed people are has a direct effect on the extent to which a piece of legislation is implemented and used. Our surveys showed that both the prostitutes group and the brothel owner/manager group described themselves as well informed about the Act. Nevertheless, there are indications that for many respondents it was more a case of being generally informed about the existence of the Act rather than detailed knowledge.

The degree of awareness in a group that is difficult to gain access to such as prostitutes depends on the level of activity of the advice and support organisations. The advice centres for prostitutes that aim their services at the target groups of female and male prostitutes describe themselves as well informed and actively pass this information on to their client group. However, interviews revealed that even these specialised service providers had clear gaps in their knowledge and/or had misinterpreted certain provisions of the Act. Furthermore, advice centres of this kind exist in only a handful of cities. On the whole, other institutes seldom have contact with prostitutes or have different remits or different target groups to work with. It is also likely that the majority of prostitutes do not have any contact with advisory centres.

We found little systematic information on the prostitution trade and advisory service providers.³² Unlike in the Netherlands, government agencies and town and city councils were not given systematic information or training about the consequences of the new Act for their practice or about appropriate options for action.

- *The impact of traditional, established practices*

Practices that structure a prostitute's working life, such as frequent change of workplace, the practice of payment in advance and the self-employed nature of the work, are reasons why the new legal possibilities – such as court proceedings to enforce payment, conclusion of employment contracts – are used only rarely. The familiar working practices are adapted to

³² An exception is the brochure published by the Bundesverband Sexuelle Dienstleistungen (2004); there are also a handful of regional publications in Hamburg and Hannover, for example.

the field of work of prostitution; they have been proven to work from the point of view of prostitutes, clients and brothel owner/managers. No-one has any experience with a different practice.

- *The effect of stigmatisation*

Holding on to the traditional ways of working that ignore legal regulations is to some extent seen as “compensation” for the disadvantages suffered due to state and social discrimination. The fact that equal treatment by government agencies goes hand in hand with equal obligations has been viewed for the most part with ambivalence or outright rejection.

The fundamental fear of negative consequences resulting from dealings with state institutions acts as an obstacle to people taking advantage of the possibilities offered by the Act.

Many of the prostitutes who responded to our survey, but also employees of advisory centres and government agencies, said that they felt rather disillusioned and resigned about the question of whether there will be a fundamental change in the moral attitude to prostitutes and prostitution.

- *Weighing up the pros and cons of the Act*

People take decisions on whether to take advantage of legal regulations after weighing up the pros and cons of doing so or not doing so. If taking advantage of a legal provision entails a financial burden, for example, it would be a powerful obstacle. This would be relevant, for example, if brothel owner/managers or prostitutes were thinking about employment relationships subject to compulsory insurance, which would entail deductions for both parties and therefore a decrease in earnings that are traditionally “cash in hand.” On the other hand, when considering currently the pros and cons of working as an employee, the long-term security provided by social insurance, such as acquiring pension rights, offers only a small advantage. This is particularly true for people who intend to work only temporarily in prostitution and for migrant women who are in Germany primarily to earn money but plan to live in the long term in their country of origin.

- *Lack of an independent organisation to represent the interests of prostitutes*

The starting point of the Prostitution Act was the desire to regulate the legal relationship between prostitutes and clients, on the one hand, and prostitutes and brothel owners/managers on the other. Thus far, the person in the weakest negotiating position in both cases has had to take action to assert their rights: the individual prostitute. The question of how an organisation to represent prostitutes’ interests might be formed - and above all invested with authority - remains open. The Federal Association of Sexual Services Providers (*Bundesverband sexuelle Dienstleistungen*) has begun to exercise this function for brothel owners/managers.

6 Outlook and recommendations on how to implement the intention of the Prostitution Act

Any evaluation of the Act must be based on the objective expressed in the explanatory memorandum to the Act. There is little evidence of the intention that can be inferred from it - to improve the life and working conditions of prostitutes and facilitate more transparency and thus better monitoring of the industry - having been implemented in practical terms.

This evaluation has revealed that the new regulations have been treated by the civil service with reservation – or even rejected out of hand. Government agencies do not see the Prostitution Act as being addressed to them, since none of the regulations directly affect administrative conduct. There are only isolated examples of initiatives by government agencies to implement the intention of the Act and they are due to the commitment of individuals. There are grounds for this caution that were already laid during the legislative process. For example, the Federal Government never visibly supported the legislative process, which was initiated by the parliamentary parties.

This ambivalence continues to characterise administrative conduct to this day. There is a lack of clear direction on implementation of the Act, there is a lack of clear political will to change, and the general stagnation gives the impression that, although politicians passed the Act, ultimately they did not really want it.

The recommendations outlined here are a result of our study. However, they can only be based on the intention of the Prostitution Act as it is expressed in the explanatory memorandum to the Act. First it must be clarified whether these intentions actually reflect the political will. Unless the agenda is set in the political arena nothing will change.

If anything more than minimum success is to be achieved, the following steps should be considered.

6.1 Short-term recommendations (steps to be initiated over the next three years):

- In the short term, the legislator should initiate a process to clarify the legal position in the field of trading law. The introduction into trading law of a statutory permit to run prostitution businesses, which has already been discussed, would be an appropriate way of achieving the clarification required.
- The legislator must clarify whether and to what extent existing restrictions on the practice of prostitution, such as by-laws on exclusion zones and the ban on advertising, are legally compatible with the regulations and values expressed in the Prostitution Act.
- Secure funding must be provided for advice centres for prostitutes, for migrants working in prostitution and for victims of trafficking.
- An inter-disciplinary discussion forum at federal level should be set up at the invitation of the relevant federal ministries. This should be used to develop expert reports on topics such as social protection, improvement and monitoring of working conditions and creating transparency in prostitution businesses. Representatives of federal and state ministries, the German Association of Towns and Cities (*Deutscher Städtetag*), advice centres, representatives of a prostitutes' association (which would have to be set up) and of an association of operators of prostitution businesses should be involved. Here, it would be useful to draw upon the positive experience of the joint federal/state working groups on trafficking in women or domestic violence that have been developing successful strategies for several years now.

- Cooperation models should be encouraged to develop good policies on prostitution at local authority level. Here, there is the possibility of drawing on the positive experience of a number of regions, such as the Dortmund model.
- Representatives of government agencies, the police, the public prosecution service and the Association of Towns and Cities should initiate an exchange of experience with their counterparts in other European countries, with a view to familiarising themselves with the experience in implementation practices of government agencies at local authority level. If the avenue of incorporating prostitution into trading law is to be explored, it would be advisable to obtain information about the experience of the Netherlands.
- Moves to set up an independent prostitutes' association as a negotiating partner for state agencies in the implementation process should be supported.

6.2 Medium-term recommendations (steps to be initiated in the course of three to six years):

- On the basis of the expert reports acquired in the first stage, minimum standards for good working conditions in prostitution should be developed. A second stage should clarify how statutory implementation can be anchored in law. This would make it possible to classify prostitution businesses by the quality of working conditions they provide. Specific criteria for good working conditions for the different fields of work involved in prostitution will have to be developed by experts with the participation of prostitutes and brothel owners/managers, but they will essentially be comparable with conditions in other forms of employment. In a third stage, an appropriate monitoring and checking procedure should be developed and trialed regionally as part of a model scheme funded by the responsible federal ministry. Development of a model for good practice for government authorities could also be considered.
- On the basis of existing examples and preliminary discussions, models for employment contracts could be developed, which would be appropriate for the specific characteristics of prostitution and could be disseminated as workable examples to prostitution businesses through local government agencies, advice centres and prostitutes' and operators organisations.
- In the discussion forums, a strategy for local authority policy on prostitution and a procedure for following up its implementation should be developed. The findings should be made available to local authorities via the Association of Towns and Cities.
- Carefully targeted public relations campaigns by the responsible federal ministry and state ministries would need to make the findings accessible to government agencies, advice centres, prostitutes and operators.

6.3 Long-term recommendations (steps to be initiated after about six years):

- The responsible federal ministry should commission a concept for a coordination centre at federal level. The centre could ensure consolidation of information, a nationwide flow of information and dissemination of examples of best practice, and take on the role of mediating between the field of prostitution and any institutions and organisations located there, on the one hand, and government agencies on the other.
- After at least six years of implementation practice, a further study on the impact of the Prostitution Act and on the living and work situation of prostitutes should be commissioned.

7 The German Prostitution Act in a European comparison

Our study on the impact of the Prostitution Act compared the German regulatory situation with the legal situation in other European countries, in order to explore whether anything could be learnt from their approach that would be useful for further developments in Germany. The following three examples – the Netherlands, Sweden and France – were selected because these countries already have experience in implementing new legal practice and also because they represent opposite poles in the European discussion:

- In the Netherlands, prostitution is seen as a social phenomenon that probably cannot be abolished and must be dealt with pragmatically. Prostitution is understood as the sale of sexual services and therefore as a form of gainful employment. A distinction is made between voluntary prostitution, which is legally accepted, and forced prostitution, which is prosecuted and the victims of which receive protection and support from society. Prostitution with minors is considered to be sexual exploitation and as such a criminal offence. Forced prostitution is classed as organised crime. The aim is better monitoring of the industry.
- In *Sweden*, prostitution is seen as the sale and purchase of women and therefore as a sex-specific act of violence. Underlying this is the basic assumption that prostitution cannot be voluntary. Prostitution is seen as a serious social problem, which should and can be abolished. Prostitution tends here to be a collective term that covers both voluntary and forced prostitution, trafficking in women, prostitution by minors and drug-related prostitution. In Sweden, a new criminal offence was incorporated into the Criminal Code: the purchase of sexual services. This led to the introduction of regulations to “punish the punters.” The aim is to curb and, in the long term, abolish prostitution.
- In *France*, prostitution is seen as a threat to internal security and public order, and the country’s Domestic Security Law of 2003 takes a tougher line on prostitution, making various aspects of it a criminal offence. Not only pimping - directly and indirectly – but also any form of soliciting of clients in public – directly or indirectly – is also a criminal offence. Prostitutes are defined, on the one hand, as victims of trafficking or victims of violence and exploitation, and, on the other hand, as a threat to internal security. The country’s aim in combating prostitution is to increase the public’s sense of security and curb the problem of illegal immigration.

7.1 Legal regulation of prostitution in the Netherlands and its impact

The abolition of the ban on brothels

On 1 October 2000, the general ban on brothels, which had been in existence in the Netherlands since 1912, was lifted. Article 250 of the Dutch Criminal Code was amended accordingly. Tougher penalties were introduced for the crime of abuse of minors, which is also regulated under this Article (Article 250a).³³ At the same time, prosecution of exploitation, trafficking in human beings and forced prostitution was stepped up, the range of sentences expanded and the police trained accordingly.³⁴ National legislation to regulate prostitution was not considered necessary; instead, operating a brothel became a trade

³³ Daalder 2004, p. 8

³⁴ Daalder 2004, p. 18ff

requiring a licence. The local authorities have discretionary powers to develop a legal framework for regulating prostitution and issuing licences accordingly.³⁵

Political aims in the Netherlands

The Ministry of Justice has formulated six key aims:

- 1) Better possibilities of monitoring and regulating legal prostitution and where it takes place by issuing licences for the operation of prostitution businesses;
- 2) Curbing illegal prostitution/stepping up efforts to combat exploitation and forced prostitution;
- 3) Protection of minors from sexual exploitation;
- 4) Safeguard and assert prostitutes' rights;
- 5) Separate prostitution from the criminal activities associated with it;
- 6) Stamp out prostitution of illegal immigrants and individuals without valid residence permits.³⁶

The licensing procedure

Guidelines for licensing prostitution businesses are passed under the municipal code governing the individual local authorities and are developed and recorded in writing by the mayor's office, the public prosecution service and the police department.

In cases of contravention of guidelines they have issued, the local authorities have a range of possible sanctions at their disposal: warnings, temporary closure of businesses, changes in permitted opening hours, withdrawal of licences or closure of businesses for unspecified times. On behalf of the local authorities, the police check that the licensing requirements have been fulfilled. If they discover contraventions, they involve the public prosecution service.

Implementation measures and initial experience with implementation

The changes in the law were accompanied by flanking measures intended to promote implementation and provide guidance to the institutions affected. Within the police force, training courses were held on the problems of trafficking in human beings and forced prostitution.

The Dutch Association of Local Authorities, in collaboration with the Ministry of Justice and Internal Affairs, developed a model for implementing the Prostitution Act, which was sent out to all local authorities. At national level, the "National working group on local authorities' prostitution policies" began work. Furthermore, in collaboration with advisory centres for prostitutes, self-help organisations and the organisation representing the owners/managers of prostitution businesses circulated an information brochure for prostitutes on the application of health and safety regulations in the field of prostitution. Exit programmes were financed, although most of them have now been wound up due to funding shortfalls.³⁷

The number of brothels in the Netherlands has halved as a result of the licensing procedure. Firstly, it is not clear whether the brothels that disappeared did not meet the quality standards set by the local authorities or whether they were not granted a licence as a result of the

³⁵ Report 2004, p. 31

³⁶ Daalder 2003, p. 2; Report 2004, p. 28

³⁷ Conversation with Jan Visser, coordinator of De Rode Draad, 8.6.2005

possibility of setting quotas open to local authorities. Secondly, no-one knows whether the brothels migrated into the illegal sector or whether they really no longer exist.

Indications of improvements aimed for

The impact of the changes in the law was evaluated in 2001 – thus a short time after they came into force.³⁸ The findings are cautious: the new legal position has brought about positive changes, but a good deal more time will be needed to solve some of the problems. The implementation process is not yet completed, but is nevertheless making gradual progress.

The best results in terms of decriminalisation of the prostitution industry and improvements in working conditions in the brothels were noted in the local authorities that consistently imposed sanctions for contravention of the conditions of the licence, going as far as closure of businesses. The threat that a business might be closed down proved far more effective than imposing a fine.

Legalisation and the transparency resulting from it have boosted prosecutions of trafficking in human beings and checks on brothels have improved the chances of getting a successful prosecution. The police report that they are now able to work in a more focused way.

Regulation has improved working conditions in the licensed brothels. The prostitutes who were interviewed for the evaluation reported that hygiene conditions are now good to very good and that overall developments are positive.³⁹ Prostitutes are now also better protected: it is illegal to force them to consume alcoholic drinks with their clients, to have unprotected sex, or perform particular sexual acts. The department of public health and advisory centres have unobstructed access to the brothels.⁴⁰ The police report that prostitutes' awareness that violence and exploitation are unacceptable has been strengthened by the Act.⁴¹

Unresolved problems and undesired side effects

Some local authorities rescinded permits for street prostitution. That led to prostitutes who had until then been self-employed and working on the streets being forced into the brothels and thus into a situation of dependency on brothel owners/managers. In some cases, it also led to prostitutes being forced out of the busy city centres onto the periphery of the city, putting them at higher risk.

There are still illegal brothels, exploitation and forced prostitution and a market that cannot be fully controlled by the police, e.g. in the field of escort services or prostitution in private flats and houses. The fact that government agencies concentrated on the licensed sector at the beginning of the implementation process had the undesired effect of creating a greater gap. Until the change in the law, prostitution took place in a grey area. Whereas working conditions have now improved significantly in the legalised sector of the business and situations where people were being coerced have been uncovered and combated, "De Rode Draad" – a prostitutes' organisation – has observed the opposite effect in the sector that is more inscrutable and is under the control of traffickers and pimps who have had to avoid licensing.⁴² The poor working conditions of migrants without a legal residence status have become even worse.⁴³

³⁸ Cf. Handlungsplan (Plan of Action) 2004

³⁹ Report 2004, p. 56

⁴⁰ FAQ Prostitution 2004, p. 5

⁴¹ Report 2004, p. 25

⁴² Report 2004, p. 34

⁴³ Report 2004, p. 34

7.2 Legal regulation of prostitution in Sweden and its impact

The Act banning the purchase of sexual services

On 1 July 1998 a package of legislative reforms to protect women's integrity came into force in Sweden.⁴⁴ Abuse, rape and sexual harassment of women are the subject of this Act. As part of the law reforms, prostitution was criminalised, although only clients of prostitutes face the threat of punishment.⁴⁵ Prostitutes are seen as a victim group. The rationale for the change in the law was that prostitution damages society as a whole in that it is contrary to the endeavours to achieve equal rights for men and women. "Gross violation of a woman's integrity" is seen as punishable in law.

Political aims in Sweden

The Swedish legal reform set itself a number of goals:

- Promotion of equality for women;
- Protection of women from violence by men;
- Win public support for the endeavours to combat prostitution, win over public opinion;
- Abolition of prostitution in the long term.

Seeing prostitutes as a group of people who are in a predicament and in need of help can be classed as typically Swedish. It reflects the understanding that has become established there of equality between the sexes as something that has a high social value and can be an instrument for liberating both sexes in the future. The legislation is based on the discourse of gender equity. The fact that it is mainly women who work as prostitutes and men who are the clients produces a sex-specific way of seeing the situation and underlies the goal of ending this situation of inequality irrespective of what the people themselves who work in prostitution think of it. The Swedish public expects its government to lead public opinion through symbolic legislation that does not necessarily have to be free of moral judgement. The Act Prohibiting the Purchase of Sexual Services was able to build on great public support as soon as it was introduced.⁴⁶

Implementation measures and initial experience with implementation

At the forefront of the implementation process were police measures to eliminate street prostitution and thus publicly visible prostitution. The predominant ways of doing this involved the law relating to public order and road traffic. But raids and undercover officers as well as special police units were also used. Significant levels of public funds were used to do this. Overall efforts to combat trafficking in human beings and violence against women were also stepped up.

In order to support implementation, public relations campaigns were launched early on – posters, films and information events, financed through public funds – which attracted great attention.

⁴⁴ LAG (1998:408) om förbud mot köp av sexuella tjänster.

⁴⁵ The range of sentences ranges from a fine to six months imprisonment. However, in the course of the legislative process, it was made clear that as a rule the penalty should be a fine.

⁴⁶ If this is taken as an indicator, both Germany and Sweden have legislation that reflects the will of the majority of the population.

So far, few reliable statements on impact and implementation can be made and no simple answer to the question of effectiveness can be given because no evaluation has been carried out. In Sweden, it is seen as a success that levels of street prostitution have dropped, court proceedings relating to trafficking in human beings have not increased as they have in other European countries and there are indications that organisers of trafficking are tending to avoid Sweden.

Powerful effect as a symbolic piece of legislation

The greatest success of the Swedish Act seems to be that it has fulfilled its intended purpose as a piece of symbolic legislation and reinforced Swedish society's rejection of prostitution – the Act now has the support of over 80% of the population. Indications that some men have reconsidered their behaviour and stopped visiting prostitutes can be taken as evidence for the Act starting to have an effect. Prosecution is failing largely due to the fact that it is difficult to prove that an offence has been committed if a man and a woman deny that the contact between them was of a commercial nature.⁴⁷

Reducing street prostitution

According to official estimates, the number of prostitutes on the street since the Act came into force has dropped by about 41%. However, since it is not known where they have disappeared to, this finding is not definitive. It could simply be that they have been driven underground, which would mean that the problem has merely shifted elsewhere rather than being solved. The police stress that monitoring prostitution in private homes and clubs takes a great deal of time and personnel, which is why they do not do it. Since two-thirds of prostitution does not take place on the street, the major area has not been impacted on.⁴⁸

Unresolved problems and undesired side effects

Prostitutes, but also the police, report that a negative effect of the legislation is that working as a prostitute is now a higher risk occupation. Individual prostitutes and representatives of the police who were interviewed reported that “normal” clients have been deterred by the Act, whereas clients with a high potential for aggression and violence continue to take the risk involved in visiting prostitutes.⁴⁹ Above all, prostitutes who cannot find any other alternative – drug users and migrants – now feel forced by the decline in the market to accept clients who seem dubious and to work more often without a condom. Clients are aware of the difficult situation prostitutes are facing and are taking advantage of it.⁵⁰

7.3 Legal regulation of prostitution in France and its impact

The Domestic Security Act

In 2003, the new Domestic Security Act came into force in France, regulating, amongst other things, questions of trafficking in human beings and prostitution (Ministère de la Justice

⁴⁷ 51 % of all investigations from 1999 – there were a total of 91 charges made – were discontinued for lack of evidence, in another 35% no criminal act could be proven, and in 11 % the suspects could not be found. Report 2004, p. 18 ff.

⁴⁸ On the displacement effect triggered by repressive policies on prostitution in Britain cf. Hester/ Westmarland 2004, p. 137 ff

⁴⁹ Ibid., p. 14

⁵⁰ Studies in Canada confirm the assumption that a law under which establishing contact with and negotiating with prostitutes in public is a criminal offence – in Canada the “communicating law” introduced on 20.12.1985 – but purchasing or selling sexual services is not increases violence against street prostitutes. (Lowman 2000). Cf. also *Süddeutsche Zeitung* No. 145, 27 June 2005.

2003).⁵¹ The Act criminalises both pimps and traffickers as well as prostitutes themselves if they solicit for business – either directly or indirectly. Clients face criminal prosecution if they approach groups of people in need of protection such as minors.

Political aims in France:

- “Punir par protéger” – “Punish in order to protect”
- Repression as a means of prevention
- Combat trafficking in human beings by criminalising prostitution
- Curb undesired immigration

Since the end of the 1990s, increasing numbers of prostitutes from Eastern Europe have become involved in street prostitution in France. Attitudes to this change in the traditional milieu have been ambivalent. On the one hand, these women were seen as victims of trafficking, who were promised assistance and support if they testified as witnesses in a criminal trial, but, on the other hand, this influx has caused serious tension among prostitutes. The response of residents in areas of street prostitution was not only to see them as victims; they were also ill at ease with their presence.

France’s political goal is similar to the Swedish goal: to curb and abolish prostitution, but different strategies were used here. Unlike in Sweden, the repressive measures target the prostitutes not their clients. The fact that the regulation has been incorporated into legislation on internal security shows that this is not just about an abolitionist attitude; it is also about seeing prostitution as a disturbance of public order and about an attempt to abolish at least its publicly visible forms. It is also a measure to combat unwanted immigration. For example, the Act makes it possible to arrest and deport prostitutes if they contravene regulations making it illegal to solicit clients: the offence is punishable with a two-month custodial sentence, a 3750-euro fine and loss of their residence permit (Tränkle 2007, cf. also Ministère de la Justice 2003)

The Act is seen as a preventative measure against exploitation and trafficking in human beings. The threat of punishment for the activities of prostitutes is intended to remove the source of income of pimps and traffickers.

Indications of the impact on prostitutes

Practice has shown that the Act is being implemented in that increased numbers of checks are being carried out leading to arrests of prostitutes and women suspected of prostitution. Charges of soliciting and deportation are the consequences.

Like in Sweden, concerns have been voiced about the situation in France, in particular that the criminalisation of prostitution has led to a higher risk of violence, lower prices and increased exploitation. To date, no evaluation of the impact of the Act has been carried out.

8. Current developments in Germany

The current situation in Germany in the summer of 2007 - five years after the Prostitution Act came into force and two years after the evaluation was completed - is characterised by stagnation and contradictions. The debate on the implementation of the Prostitution Act and the improvement of the situation of prostitutes is overlaid by a controversial and often emotionally charged discussion on forced prostitution and trafficking in human beings.

⁵¹ CRIM 2003-07 E8/03-06-2003, NOR: JUDD033008C

Particularly before and during the football World Cup in summer 2006, this topic was the main talking point in the country.

When the Federal Government presented its report on the Prostitution Act⁵² to the Bundestag at the beginning of 2007, it became clear that they too saw a close link to forced prostitution. There was no interest in the life and working conditions of full-time and part-time prostitutes. A model funding scheme for exit programmes has been announced. Although the Federal Government's report spoke of a concerted will to retain the Prostitution Act, there are still political forces who want to see a return to the former legal situation before the Prostitution Act came into force. Conservative parties have not changed the adverse attitude they clearly held and expressed during the legislative process. Nevertheless, the states with Conservative governments have taken no action to fund programmes to help people find a way out of prostitution.

These developments do little to implement the intentions of the Act; on the contrary they are currently leading to restrictions that are causing concern to prostitutes, brothel owners/managers, advice centres and prostitutes organisations. In March 2007, a large charity organised a conference entitled: "Rollback? Experiences with and impact of the Prostitution Act," at which this concern was voiced.

The committee on trading law, which works at federal level and draws up practice guidelines for the states and local authorities, has recently looked at the possibilities of using methods of monitoring prostitution that are based on trading law. They did not identify any necessity to change trading law or practice. However, in the view of the joint federal/state committee, the options available under trading laws do not offer an appropriate set of instruments for controlling work in the field of prostitution as a commercial activity.

Any activities that can currently be observed are predominantly restrictive interventions in a stagnating status quo:

- One current problem is the debate on taxation of prostitution. Outrage and bewilderment among prostitutes has been triggered by the fact that some German states have introduced flat-rate taxation irrespective of actual earnings, the level of which varies considerably from state to state. In Berlin, for example, it is currently set at 35 euros per day. There are no suitable standards by which to determine a level of taxation that would be appropriate for the very different levels of income and working hours of prostitutes.
- In some regions, planning authorities have begun to proactively drive prostitution out of residential areas and in the process are closing down long established brothels and other prostitution businesses run from private flats and houses in which self-employed prostitutes had created good and safe working conditions for themselves. They are now being forced to move to commercial and industrial zones on the outskirts of towns and work without any connection to the urban infrastructure, which in turn means higher risk levels.

On the other hand, some movement towards implementing the intentions of the Prostitution Act can also be observed:

⁵² The report can be downloaded at <http://www.bmfsfj.de/Kategorien/Forschungsnetz/forschungsberichte.did=93304.html>

- Few local authorities have set up round tables to discuss how to deal appropriately with prostitution and get everyone involved – including in some cases representatives of the milieu – around the same table.
- The trade union for the service industry ver.di is working for the concerns of prostitutes and its “special services” department is collaborating with representatives from advice centres and the milieu to organise information events on current topics such as taxation and building and planning law.

The kinds of change envisaged by the Prostitution Act that aim to improve the work situation and health and safety of prostitutes are still only happening on a small scale, mainly at local authority level and as a result of the efforts of committed individuals. There is still no consolidated political will across the board to implement the Act.

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