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Steph Key
Member for Ashford
South Australian Parliament
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23rd May 2012

Dear Ms Key,

Draft of Statutes Amendment (Sex Work Reform) Bill 2012

Thank you for the opportunity to comment on the draft Bill that you intend to introduce into South Australian Parliament on 31 May.

Moving forward with decriminalisation

We applaud the intended direction of the bill towards the decriminalisation of sex work which, as you are aware, is renowned as the best practice model for sex worker health and safety, as evidenced in both New South Wales and New Zealand. The removal of punitive laws against sex workers has been recommended by bodies such as the World Health Organisation, UNAIDS, UNFPA (the UN Population Fund), the International HIV/AIDS Alliance and United Nations Secretary General Ban Ki Moon.¹

Decriminalisation:

- Removes police as regulators of the sex industry;
- Repeals criminal laws specific to the sex industry;
- Regulates sex industry businesses through standard business, planning and industrial codes;
- Does not single out sex workers for specific regulation; and
- Is a whole-of-government approach to regulation.

¹ UNAIDS, Joint United Nations Program on HIV/AIDS, *UNAIDS Guidance Note on HIV and Sex Work*, Geneva, 2009, 2; UNAIDS, *Report on the Global AIDS Epidemic*, 2010, 137; Commonwealth HIV/AIDS Action Group and the International HIV/AIDS Alliance, *Enabling Legal Environments for Effective HIV Responses: A Leadership Challenge for the Commonwealth*, 2010, 23; UNAIDS and UNFPA, *Building Partnerships on HIV and Sex Work: Report and Recommendations from the first Asia and the Pacific Regional Consultation on HIV and Sex Work*, 2011, 13-15.

The Bill in its current form does not constitute decriminalisation

Scarlet Alliance has concerns however, about the Bill in its current draft form, in particular: retaining soliciting as an offence, location controls that prohibit sexual services within 50/200metres from children's services, the active ongoing role of police as regulators, and the introduction of criminal laws to regulate safer sex in the industry.

Currently, the Bill:

- Establishes Police as regulators of the industry;
- Continues criminal laws specific to the sex industry;
- Imposes discriminatory planning codes on sex workers and sex industry businesses; and
- Singles out sex workers for specific regulation.

Diverging from decriminalisation is dangerous

Ongoing problems are created when legislators attempt to move away from decriminalisation. The introduction of new offences and penalties involves drafting new requirements, definitions and identifying who will regulate non compliance, which inevitably leads to unintended consequences, unforeseen exceptions, and legislation that is convoluted, unworkable, and completely misses the public health and human rights rationales behind decriminalisation.

One of the central tenants of decriminalisation is the removal of police as regulators of the sex industry. As discussed below, this is due to a long history and evidence of police corruption, harassment and entrapment of sex workers throughout Australia. Such policing practices continue to hinder sex workers' access to our rights, health and privacy. One catalyst to the decriminalisation of sex work in NSW was findings of the Wood Royal Commission into corruption within the NSW Police Force showing 'a clear nexus between police corruption and the operation of brothels.'² Despite a plethora of evidence about the disastrous consequences of police as regulators of the sex industry, the current Bill continues to do so.

Another fundamental facet of decriminalisation is the removal of criminal laws specific to the sex industry. This Bill criminalises sex workers for practices that are legal for non-sex workers. Legislating which sex acts are acceptable is both inappropriate (draftspeople with specific sexual orientations/tastes/desires are defining what somebody else can do with their body) and contrary to public health objectives. Further, the process is fraught with error, inevitably impossible, will lead to low compliance. It is contrary to the intention of decriminalisation to treat sex work like every other occupation.

Soliciting offences will criminalise street-based sex workers

Scarlet Alliance welcomes the removal of laws making it unlawful to 'loiter in a public place for the purposes of prostitution'. It should be clarified that the definition of solicit does not include the act of loitering by default or interpretation. We also welcome the clarification that advertising for sexual services is permitted. However, we are disappointed that soliciting offences 'in a public place, or within the view or hearing of any person in a public place' remain at all for sex workers(Part 4, section 10).

² New South Wales Government (1997), Royal Commission into the NSW Police Service: Final Report – Corruption, 13.

This offence will disproportionately target street-based sex workers. This is despite the fact that street-based sex work pose few to no amenity impacts. Street-based sex workers make up approximately only 2% of sex workers in Australia. And yet street-based sex workers face the most stringent penalties and regulation. The 'dangers' perceived to be involved in street-based sex work are in fact dangers towards street-based sex workers posed by criminalisation and police practices, rather than dangers created by the business of conducting or soliciting sex work. Elena Jeffreys writes that for street-based sex workers, 'Experiences with police range from disappointing to horrific.'³ She cites research from WA and NSW to show that in 'WA, 2002, half the street based sex workers answering a survey targeting women who have experienced sexual assault had been raped by police. [In] NSW, 2006, street based workers questioned in a survey said half of their contact with police included police harassment.'⁴ A NSW survey of street-based sex workers from 2009, showed that of street-based sex workers who had reported incidents to police, 53% reported negative experiences such as 'not being taken seriously', 'feeling uncomfortable', and 'having no outcome'. Other street-based sex workers cited reasons for not reporting to Police including 'previous bad experiences' and 'fear of prosecution for prostitution or for outstanding warrants'.⁵

Street based sex work is already criminalised in South Australia leaving street based sex workers vulnerable. Street based workers are often marginalised in the interests of keeping sex work invisible, which means that health professionals and outreach organisations face obstacles in identifying workers due to this invisibility.

In contrast, in New Zealand where sex work is fully decriminalised, the Prostitution Law Review Committee has found that instead of spending money on policing street-based sex workers 'Local Authorities should invest in street cleaning, lighting, and city ambassador schemes, and provide adequate rubbish bins and toilet facilities in and around street sex work areas.'⁶ In a survey by the Sex Workers Outreach Project NSW and Attorney General of street-based sex workers in Sydney, sex workers identified characteristics of a well-designed area for soliciting, including: good access for clients in cars and on foot; appropriate lighting; clear visibility; appropriate amenities (toilets, seats, shelter, food); close to or within commercial or entertainment areas; close proximity to safe houses; and be a pleasant environment in good repair.⁷ Scarlet Alliance supports the right of all sex workers to work in whatever area of their chosen occupation, including street, brothel, escort, private and opportunistic work. Instead of retaining soliciting offences in South Australia, financial resources and time would be more productively spent providing better services and amenities to support street-based sex workers.

Soliciting offences are broad and will make entire sections of the industry unworkable

³ Elaine Dowd, 'The Impact of Western Australian Legislation on Street Based Sex Workers', *Outskirts*, University of Western Australia, 2002, cited in Elena Jeffreys, 'Street-based Sex Workers' in *Provision: The Whore Stigma*, Issue 2, Scarlet Alliance, 2007, 28.

⁴ A Roxburgh, L Degenhardt and J Copeland, 'Post-Traumatic Stress Disorder Among Female Street-Based Sex Workers in the Greater Sydney Area, Australia', *BMC Psychiatry*, 6:24, 2006, cited in Elena Jeffreys, 'Street-based Sex Workers' in *Provision*, Issue 2, *The Whore Stigma*, Scarlet Alliance, 2007, 28.

⁵ Sex Workers Outreach Project NSW, Attorney General's Department NSW, Elton Consulting, 'Findings of the Street-Based Sex Work Research Project, Incorporating the Identifying Safety Issues for Transgender Street-Based Sex Worker Research Project', 2009.

⁶ New Zealand Prostitutes' Collective, Australasian Society for HIV Medicine Conference, 2010.

⁷ Sex Workers Outreach Project NSW, Attorney General's Department NSW, Elton Consulting, 'Findings of the Street-Based Sex Work Research Project, Incorporating the Identifying Safety Issues for Transgender Street-Based Sex Worker Research Project', 2009.

Because the definition of a public place within the Act is so broad, the Bill potentially also criminalises sex workers operating out of a privately owned place, as well as a place where a section of the public is permitted access upon payment. This potentially criminalises *all* sex workers and clients of *brothels* in addition to private sex workers working from *home*. Further, the definition of sexual service is similarly broad. The introduction of Part 4, section 9(3) means that soliciting for *any* sexual service in a public place is an offence. The combined definitions of public place and sexual service mean that it could potentially be an offence to offer/solicit lap dances (the drafting notes suggest this is intended to be covered) within a strip club where customers have paid to enter. The effects of soliciting offences may be damaging and wide-ranging.

It is unrealistic to expect that sex workers will go to work and not take pro-active steps to obtain business during our shifts – on the street or otherwise. The Bill means that sex workers will be required to make the effort of preparing for work, but not actually be permitted to source work once we arrive. It acts to make working unproductive at best and impossible at worst. Soliciting offences then act as a disguised attempt at eliminating sex services completely. Ultimately the effect of these sections is to make large – if not all – sections of the sex industry entirely unworkable (and criminalised).

Criminalising clients and the failure of the Swedish Model

In the current draft of the Bill (Part 4, section 10), clients are also guilty of an offence for ‘accosting’ sexual services. We are assured by your Office that this offence will be removed. The removal of this offence is vital. The word ‘accost’ implies that it is illegal for the client to even approach a sex worker. Models that criminalise the clients of sex workers also act as a barrier to sex worker health and safety.

In Victoria, female police officers have dressed up and *impersonated* sex workers for the *purposes* of arresting potential clients, using a dictaphone to record conversations – they ‘caught’ 15 clients in their first week of operation in December 2011.⁸ Petra Ostergren and Susanne Dodillet report that in Sweden they have found ‘serious adverse effects of the *Sex Purchase Act* – especially concerning the health and well-being of sex workers – in spite of the fact that the lawmakers stressed that the ban was not to have a detrimental effect on people in prostitution.’⁹ The Prostitution Licensing Authority (PLA) Queensland reports that the prohibition on the purchase of sexual services in Sweden has ‘driven the sex industry underground’.¹⁰ The PLA reports, ‘sex workers feel less secure and consider themselves at greater risk of violence.’¹¹ Fearful of losing their client base, street-based sex workers

⁸ Jon Kalia, Police sting nabs kerb-crawlers: Female police officers have dressed up as sex workers in a unique sting on kerb-crawling creeps’, Sunday Sun Herald, 18 December 2011.

⁹ Susanne Dodillet and Petra Ostergren, ‘The Swedish Sex Purchase Act: Claimed Success and Documented Effects’ Conference paper presented at the International Workshop *Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges* The Hague, March 3 and 4, 2011, page 3, accessed at <http://www.petraostergren.com/upl/files/54259.pdf> on 17 May 2011.

¹⁰ Bob Wallace (Principal Policy Officer), *The Ban on Purchasing Sex in Sweden*, Office of the Prostitution Licensing Authority Queensland, 19 accessed at <http://www.pla.qld.gov.au/Resources/PLA/reportsPublications/documents/THE%20BAN%20ON%20PURCHASING%20SEX%20IN%20SWEDEN%20-%20THE%20SWEDISH%20MODEL.pdf> on 11 May 2011.

¹¹ Bob Wallace, *The Ban on Purchasing Sex in Sweden*, above n34 at 19.

have been spatially displaced, forced into more isolated, poorly-lit industrial and outdoor areas where they are more vulnerable.¹²

The introduction of any offences that criminalise clients for requesting sexual services are unrealistic, will result in low compliance, are based on flawed understandings of sex workers as victims and clients as perpetrators, will drive sex work into less visible and more isolated environments, will reduce sex workers' autonomy over our working place and conditions, and will have dangerous consequences for the health and safety of sex workers. ***Criminalisation is contrary to human rights and public health principles***

The Bill as it stands is contrary to principles of non-discrimination, human rights and public health. Criminalisation of sex work has significantly encumbered health promotion initiatives in Australia and overseas. In the meantime, sex work continues – research from Western Australia shows that criminal sanctions do not reduce the incidence of sex work.¹³ United Nations Secretary General Ban Ki-Moon states:

In most countries, discrimination remains legal against women, men who have sex with men, sex workers, drug users, and ethnic minorities. This must change. I call on all countries to live up to their commitments to enact or enforce legislation outlawing discrimination against people living with HIV and members of vulnerable groups... In countries without laws to protect sex workers, drug users, and men who have sex with men, only a fraction of the population has access to prevention. Conversely, in countries with legal protection and the protection of human rights for these people, many more have access to services. As a result, there are fewer infections, less demand for antiretroviral treatment, and fewer deaths. Not only is it unethical not to protect these groups: it makes no sense from a public health perspective. It hurts us all.¹⁴

The UNAIDS report on the Global AIDS Epidemic 2010 states that 'countries should now take action to decriminalize sex workers.'¹⁵ The Australian Government *Sixth National HIV Strategy 2010-2013* states that 'Australia's approach to HIV/AIDS has demonstrated the protection of human rights to be compatible with and *essential to* the effective protection of public health.'¹⁶ The Commonwealth HIV/AIDS Action Group and the International HIV/AIDS Alliance write:

Removing legal penalties for sex work assists HIV prevention and treatment programmes to reach sex workers and their clients. Rather than arresting sex workers and closing down brothels, the most effective approach to preventing HIV is to view sex workers as partners in prevention, and encourage them to engage in sexual health promotion as peer educators and advocates.¹⁷

¹² 'Michelle' cited in 'Sex Ban Puts Us at Greater Risk', *The Guardian*, 27 May 2009, cited in B Wallace, *The Ban on Purchasing Sex in Sweden*, above n34 at 15.

¹³ Basil Donovan, C Harcourt, S Egger, K Schneider, J O'Connor, L Marshall, MY Chen, and CKFairley, *The Sex Industry in Western Australia: A Report to the Western Australian Government*, National Centre in HIV Epidemiology and Clinical Research, University of New South Wales. Sydney, 2010, vii.

¹⁴ UNAIDS, Joint United Nations Program on HIV/AIDS, *UNAIDS Guidance Note on HIV and Sex Work*, Geneva, 2009, 2.

¹⁵ UNAIDS, *Report on the Global AIDS Epidemic*, 2010, 137.

¹⁶ Australian Government Department of Health and Ageing, *Sixth National HIV Strategy 2010-2013*, Commonwealth of Australia, Canberra, 2010 at 6.4, emphasis added.

¹⁷ Commonwealth HIV/AIDS Action Group and the International HIV/AIDS Alliance, *Enabling Legal Environments for Effective HIV Responses: A Leadership Challenge for the Commonwealth*, 2010, 23.

UNAIDS and UNFPA state that '[v]iolence against sex workers, including by state actors, are human rights violations that should be taken up by human rights institutions':¹⁸ Perpetuating criminalisation of sex work, imposing special and discriminatory laws for sex workers, and sanctioning police involvement as regulators constitutes violence against sex workers.

Introduction of a new range of offences

Scarlet Alliance welcomes the abolition of the offence of prostitution (Part 2 s6).

However the Bill continues to introduce a whole range of new offences relating to sex work, which undermine the intended positive outcomes of decriminalisation. Rather than constituting decriminalisation, these new offences effectively criminalise both sex workers and clients. These new offences include: practising unsafe sex, offering unsafe sex, requesting unsafe sex, and unorthodox use of safer sex materials (Part 4, s12).

Decriminalisation is achieved by the *removal*, rather than *addition*, of special laws relating to the sex industry.

Scarlet Alliance is opposed to any law that attempts to define and enforce which kind of sex act is lawful.

Criminalisation is not an appropriate approach to health promotion

By mandating safer sex practice, this amendment makes acts which are legal between non-sex workers illegal for sex workers. Empowering sex workers to refuse requests for unsafe practices – through peer education – would be in line with a health promotion approach, rather than criminalising clients for practices they may not know is illegal. Existing laws already cover the knowing transmission of HIV and the *National Guidelines for Management of People with HIV Who Place Others at Risk* recognise that safer sex is a mutual responsibility.

Criminalisation is not the best approach to occupational health and safety or health promotion, and police are not the appropriate regulators. Research consistently illustrates that sex workers are highly aware of sexual health and safer sex practices and are skilled at identifying and assessing risks. The approach of Australia's HIV partnership is to treat sex workers as partners in prevention. These clauses further the stigma and discrimination against sex workers as vectors of disease.

There are serious issues with policing mandatory safer sex

There are serious issues with policing the requirement that sex workers must only provide and offer certain kinds of protected sex. In Queensland, where similar laws are in place, police regularly pose as clients, call and harass sex workers for 'natural' services, and then arrest the sex worker.¹⁹ Not only are such practices a waste of police time and resources, but they constitute entrapment and pose serious implications for the occupational health and safety of workers.

¹⁸ UNAIDS and UNFPA, *Building Partnerships*, above n7 at 29.

¹⁹ Katherine Feeney, 'Prostitutes fear police and their powers', 20 October 2011, *Brisbane Times*, <http://www.brisbanetimes.com.au/queensland/prostitutes-fear-police-and-their-powers-20111019-1m7vw.html>

While the intention may be that it is easier for sex workers to refuse requests from clients for unsafe sex, or reduce pressure from employers to provide such services (having the weight of the law behind us), the irony is that if these amendments become law, it will now be the police pressuring and requesting such services from sex workers, and the consequences will now be up to two years imprisonment. In fact, the Queensland Government attempted in 2011 to introduce amendments to provide *immunity* for police officers when requesting sexual services without prophylactics from sex workers.

This type of policing practice may have longer term impacts on safe sex practices. It is not unlikely that sex workers receiving calls/visits from police posing as clients requesting unsafe services may interpret these encounters (particularly to new workers or CALD workers) to mean that it is necessary to provide unprotected services in order to get clients to book, even though this is not the case.

These outcomes outweigh any perceived benefit of such a clause. Sex workers already enjoy lower rates of STIs than the general population, and have very high rates of prophylactic use.²⁰ Both the *Sixth National HIV Strategy 2010-2013* and the *Second National STI Strategy 2010-2013* note that 'the incidence of HIV/STIs in sex workers in Australia is among the lowest in the world. This is largely because of the establishment of safe-sex as a norm, the availability of safe-sex equipment, and community-driven health promotion and peer-based interventions.'²¹ The *National Strategies*, to which South Australia is a signatory, recognise that some policing practices create barriers to health promotion and safe sex practice. This is one of those areas. Police are not well qualified to undertake a role as the 'safe sex police' nor that current epidemiology supports the need for this approach.

Peer education amongst sex workers provides a far more useful, cost-effective, empowering and rights-based approach to sex worker uptake of safer sex practices. Street-based sex workers during the 1980s were some of the first sex workers in Australia to use condoms and play a pivotal part in Australia's HIV response. Sex workers often put condoms on with their mouths without clients even knowing, and share tips and strategies on negotiating services at work. There is no evidence to indicate punitive or policing approaches are successful in promoting safe sex practices.

Making reference to South Australia's Occupational Health and Safety Act and providing further funding to sex worker organisation outreach programs is a more appropriate approach than

²⁰ Roberta Perkins and Francis Lovejoy, *Call Girls*, University of Western Australia Press, 2007; Basil Donovan, C Harcourt, S Egger, L Watchirs Smith, K Schneider, JM Kaldor, MY Chen, CK Fairley, S Tabrizi, *The Sex Industry in New South Wales: A Report to the NSW Government*, Kirby Institute, University of New South Wales, Sydney, 2011, vii, Preliminary findings presented at the Sex Workers Outreach Project Policy Meeting, Australian Society for HIV Medicine, 9 September 2011; Christine J Sturrock et al., 'Community-Based Sexual Health Care Works: A Review of the ACT Outreach Program', *Sexual Health*, 2007, 4, 201–204 at Table 1 and Table 3; Francis J Bowden et al., 'Screening for *Chlamydia Trachomatis* at the Time of Routine Pap Smear in General Practice: A Cluster Randomised Controlled Trial' *MJA* Volume 188 Number 2, 21 January 2008 at Table 6; Basil Donovan et al., 'Improving the Health of Sex Workers in NSW: Maintaining Success', (2010) *Public Health Bulletin*, Vol 21 (3-4), 74; Basil Donovan, C Harcourt, S Egger, K Schneider, J O'Connor, L Marshall, MY Chen, CK Fairley, (2010). *The Sex Industry in Western Australia: a Report to the Western Australian Government*. Sydney: National Centre in HIV Epidemiology and Clinical Research, University of New South Wales, vii; D Wilson, K Heymer, J Anderson, J O'Connor, C Harcourt and D Donovan (2009), 'Sex workers can be screened too often: a cost-effective analysis in Victoria, Australia', *Sexually Transmitted Infections*, October 2009

²¹ Australian Government Department of Health and Ageing, *Sixth National HIV Strategy 2010-2013*, Commonwealth of Australia, Canberra, 2010, 16; Australian Government Department of Health and Ageing, *Second National STI Strategy 2010-2013*, Commonwealth of Australia, Canberra, 2010, 16.

resourcing police with the weight of the law to arrest sex workers. ***Directions on how to use prophylactic sheaths***

The amendments not only make it mandatory to practice safer sex, but introduce further requirements on how sex workers are to use prophylactic sheaths. According to the Bill (and the drafting notes), a sex worker is only taken to be using a prophylactic sheath if it is used in accordance with the manufacturers recommendations or in a way 'generally accepted as a standard practice by the sex work industry'. Former drafting notes suggested standard practice be defined by a 'legitimate part of the industry', a specific 'agency' or 'relevant area of the medical profession' (Part 4, s12).

Giving sex workers instructions on how to implement safer sex practices is problematic for a number of reasons. Firstly, it fails to recognise that sex workers are experts on safer sex. We practice safer sex as part of our daily occupational health and safety. Secondly, sex workers report from our experiences with the medical profession that doctors and nurses are rarely well-informed on the proper use of gloves, dams and condoms (let alone have wider knowledge about other important occupational skills, such as finding phthalate free sex toys, hypoallergenic lubricant, non-latex barriers, medical grade silicone and how to clean toys). Thirdly, this section implies a misunderstanding that there is a 'legitimate' part of the industry, while others are illegitimate or confused as to how to practice safer sex. Fourthly, and importantly, sex workers often use innovative means to improve existing prophylactics to meet our own safer sex needs. For example, sex workers often choose to create a barrier used similarly to a dam when practising oral sex, by cutting up a condom or gloves, because it is far superior to the quality of the dams available, if indeed there are dams available (some safe sex products are difficult to obtain from anywhere but specialised providers, such as dams). Under this legislation, this sex worker may be seen to be using the equipment improperly (out of line with the manufacturer's instructions), 'wilfully damaging or interfering' with a barrier, failing to practise safer sex and able to be prosecuted (Part 4, s12). Although the worker may not have damaged the 'efficacy' of the barrier, they may still know the 'barrier is damaged', which is enough on its own to warrant penalty. This legislation is not going to assist in maintaining sex worker's low rates of STIs.

Evidence consistently demonstrates that police are inappropriate regulators of the sex industry

Sex workers have reported police harassment in a number of jurisdictions throughout Australia.²² Policing practices, fear of prosecution, stigma and forced invisibility have acted as barriers to safe sex practices, human rights, OHS and the management of blood-borne viruses (BBVs) and STIs. Police corruption and violence towards sex workers has been consistently documented.²³ Criminalisation increases sex worker contact with police, which means that sex workers – predominantly women, men who have sex with men, and sex and gender diverse communities – are then regulated by a

²² Scarlet Alliance and the Australian Federation of AIDS Organisations, *Unjust and Counter-Productive: The Failure of Governments to Protect Sex Workers From Discrimination*, Sydney, 1999, 19, accessed at http://www.scarletalliance.org.au/library/unjust-counterproductive_on_19_May_2011; Testimonial, Centre for Refugee Research, Australian National Committee on Refugee Women, and Human Rights and Equal Opportunity Commission, *Women's Human Rights Workshop*, University of New South Wales, Sydney, 17-19 June 2004.

²³ Reuters, 'Police Violence: Policemen in Paris Found Guilty of Gang Raping Albanian Sex Workers', Sex Workers' Rights Advocacy Group, 7 September 2007, accessed at http://swannet.org/en/node/896_on_31_August_2011; Zi Teng Newsletter, Message From the Editor, Issue 37, June 2011, accessed at http://www.ziteng.org.hk/newsletter/37_e.pdf on 31 August 2011.

predominantly cis-male, 'straight', conservative authoritarian police force. At the Women's Human Rights Court held in June 2004, one sex worker gave a testimonial of her experiences with police harassment in Perth.²⁴ As another sex worker writes, 'Historically and globally, police have been the source of continued abuse, rape, violence and harassment of sex workers. They are not our protectors.'²⁵ In criminalised regimes, such as Western Australia, Harcourt et al. have found that individual sex workers' ability to seek information, support and health care is 'severely limited by the risk of prosecution.'²⁶

For any form of payment (monetary or otherwise) In Part 4, s11, the introduction of s27(4) provides that a reference to the provision of sexual services on a commercial basis includes a reference to the provision of sexual services for any form of payment (whether monetary or otherwise).

This effectively means that the offences mandating condoms/gloves/dams and prohibition on requesting/offering 'natural' services applies to people who have traded sexual services for a range of kind. This may potentially include those who have traded sex for a dinner date, bunch of flowers, engagement ring, happy marriage or promotion. This is an example of some of the problems associating with introducing new definitions and offences instead of removing criminal laws as required by decriminalisation.

In a decriminalised framework, penalties need not apply

The lack of maximum penalties to be drafted is concerning. Drafting notes indicate that penalties 'must not exceed 2 years imprisonment' (Part 4, s12). There is no clause guaranteeing that penalties will be for employers rather than workers. The rationale behind decriminalisation is that there *are no penalties* because sex work is not criminalised.

Defining sexual services is unnecessary

Scarlet Alliance is concerned that people largely inexperienced and unqualified in practicing safe commercial sex are deciding how sex workers should provide safer services.

The definition of sexual services includes any activity involving indirect physical contact between 2 or more persons for the purpose of the sexual gratification of 1 or more of those persons. It is unclear what distinctions and assumptions are being made here between different types of sex work. The proposed definition of high risk sexual activity includes sexual intercourse (regardless of whether safer sex practice is used) (Part 4, s12). There is no need to define sexual services. We recommend the entire of Part 4, s12 (Offences relating to sex work) be deleted.

Changes to the definition of contract of service

There is little indication of the intention behind amendments to the *Workers Rehabilitation and Compensation Act* that define a contract of service (Part 5), or the purpose this section desires to serve. We welcome the clarification that the WorkCover Corporation cannot, when considering

²⁴ Centre for Refugee Research, Australian National Committee on Refugee Women, and Human Rights and Equal Opportunity Commission, *Women's Human Rights Workshop*, University of New South Wales, Sydney, 17-19 June 2004.

²⁵ Because I'm a Whore, 'An Open Letter to Australian Feminists Concerned about Sex Worker Exploitation', *Feminaust: Contemporary Australian Feminism*, 20 August 2011, accessed at <http://feminaust.org/2011/08/20/open-letter-to-australian-feminists-concerned-about-sex-worker-exploitation/> on 31 August 2011.

²⁶ Christine Harcourt et al., 'Sex Work and the Law', above n7 at 123.

whether to extend the protections of the Act to a self-employed sex worker, refuse the person's application simply because they are engaged in sex work. However, in deciding whether a contract of service exists, the requirement that 'the value of any materials supplied, or reasonably be expected to be supplied, by the worker does not exceed an average of \$50 per month' is an ad hoc and arbitrary number. It is not clear whether this figure is based on another piece of legislation, or how this fits with existing common law tests of employees and contractors. This requirement will create limits on what work expenses sex workers can then claim as a tax deduction if they are also to be recognised as an employee for rehabilitation/compensation purposes. Sex work may require sex workers to spend significantly more than \$50 per month on work, but if we do, this may be used to indicate that we are not under a contract of service and cannot access compensation if we are injured at work. It is our understanding that there is no quantitative limit imposed on other professions in the *Workers Rehabilitation and Compensation Act* in order to determine whether someone is a contractor or employee.

Common law tests already exist for determining if someone is an employee and include consideration of a person's degree of control over their working conditions, pay, rosters, hours, equipment, tax, supervision, insurance, superannuation cover, place of work and exclusivity.²⁷ It is possible for legislation to specify that 'employee has its common meaning', which will change over time with new cases. While it is important that sex work is classified accurately and we obtain the associated entitlements, flexibility and conditions – and it is important that private workers and contractors are covered for workers compensation purposes – legislating requirements for who constitutes an employee or contractor is restrictive and may lead to unintended exclusions. There is no need for the introduction of 6C 'additional provisions in respect of sex work'.

The section also provides that employers of sex workers will need to be registered under the *Workers Rehabilitation and Compensation Act 1986* in the same way as other employers. The maximum penalty for non-compliance is \$10 000 for each worker employed. Because there is no distinction made in the Bill between private operators (including small groups of workers) and larger sex industry businesses (brothels and agencies), it is unclear whether a small group of sex workers working together would need to register under this section. This section requires clarification that it does not include such groups.

Location controls and prescribed distances from children's services

The new section 29 creates an offence of providing sexual services on a commercial basis at premises located within a prescribed distance from premises at which a prescribed children's service is operated.

There is no evidence to suggest that sex workers or our clients pose any level of danger to children from proximity. As you will be aware, many South Australian sex workers (and our clients) are parents, siblings, children and families. The requirement of 200 metres (and 50m within the CBD) is excessive and would result in significant barriers to compliance. The basic premise that proximity causes harm is not supported by evidence.

²⁷ Sue Ellery, *Phillipa v Carmel: Article for Phoenix*, LHMWU, 24 September 1998, accessed at <http://www.scarletalliance.org.au/library/carmel-case96> on 18 July 2011.

This is also the case where sex work is prohibited within a distance of a 'place of worship'. The term 'place of worship' may be very broad, and defining it problematic. Such a clause implies that spiritualities or religions necessarily have a negative view of sex work, or that sex work and religion are mutually exclusive – in fact in some religions sex workers are key historical figures/archetypes/deities. Sex workers may live near places of worship, which means that such a provision would prohibit sex workers operating from home. Where private sex work is prohibited, evidence from the Private Workers Alliance and the Sex Workers Outreach Project NSW reports men posing as council officers demanding free sexual services in return for not disclosing their home business.²⁸ Evidence shows that there are nil amenity impacts of private sex work. Student researchers of feminist sociologist Eva Cox at the University of Technology, Sydney, 'showed quite clearly that local residents were unaware of home based sex workers in their immediate neighbourhood.'²⁹ There is no evidence that any kind of sex work interrupts or negatively impacts upon places of worship or children's services. To legislate these zoning controls gives weight to existing stereotypes and does nothing to redress stigma and discrimination. Introducing these sections to meet the demands of single Members of Parliament will have disastrous consequences for sex workers in the long-term.

Location controls, generally, are part of government efforts to make what is deemed an undesirable practice 'invisible'. This is clear from the fact that the offence operates regardless of whether there are any children at the premises, whether the premises is open or closed, and whether the place is a secondary college with students who are an age legally able to hire sex workers. Invisibility creates barriers to access for outreach and health promotion organisations.

Private workers and small groups of workers should be exempt from planning controls

We are also concerned that there is no distinction made in the Bill between private workers (and small groups of worker-based businesses) and larger employees (such as brothels and agencies). The offences prescribing distances from children's services are aimed at both 'owner or occupier of premises' and an individual 'person'. This section will disproportionately target and further criminalise street based sex workers. The clause effectively shifts the fine for street based sex work (the offence of soliciting in a public place) from \$750 to an exorbitant \$2,500 or 3 months imprisonment.

Scarlet Alliance believes it is important for this Bill to include a clause that exempts private sex workers and sex worker co-operatives from being liable for offences.

Scarlet Alliance hopes to work collaboratively with Steph to introduce planning guidelines for Local Government to ensure that sex industry businesses and independent sex workers are treated fairly. Sex workers and sex work businesses should not be subject to special provisions that set them apart from other businesses. There must be consistency and continuity in local authority planning decisions.

²⁸ Sex Services Premises Planning Advisory Panel, *Sex Services Premises Planning Guidelines*, NSW Department of Planning, 2004, 54, cited in Touching Base Inc and Urban Realists, 'Submission in Response to the Draft Sydney Local Environmental Plan 2011', April 2011, 5.

²⁹ Lauren Jamieson, 'UTS Students' Research on Home Occupations' November 2003, Findings presented by Eva Cox to commissioners at the Sydney of City Council, 15 March 2004, cited in Erica Red and Saul Isbister, 'Why Sex Workers Believe Smaller is Better: The Faulty Implementation of Decriminalisation in NSW' *HIV Australia*, Volume 3 No. 3, March-May 2004.

Who is an appropriate regulator?

In its current form, the Bill continues to place Police as regulators of sex work in South Australia.

Under a decriminalised framework, sex work businesses would be treated like other businesses, subject to existing regulatory mechanisms such as local council planning and zoning regulations, Work Cover and the Australian Taxation Office, and the police would not be involved as regulators unless there is a breach of law.

In Victoria, Equal Opportunity and Human Rights Commission staff may inspect workplaces to ensure sex workers are protected from discrimination or harassment at work.³⁰ Work Cover may conduct similar inspections in workplaces to ensure employers are maintaining occupational health and safety standards. These illustrate that there are viable alternatives to police regulation that support worker's health, safety and human rights.

Where police are not regulators of the industry, there are important benefits. In one New Zealand case study, one sex worker complained that a police officer was pressuring her into providing sexual services to the police officer for free. She approached NZPC who supported her to lay a complaint with the police. Police charged him with misusing his authority to get sex from a sex worker. He was convicted and imprisoned for 2 years.³¹ This incident illustrates that decriminalisation clearly provides sex workers with opportunities for access to justice that criminalisation does not.

Terminology

There has no amendment to change the language of the legislation from 'prostitute' to 'sex worker'. In the notes there are references to sex workers using only female pronouns. Recently in the Australian Capital Territory, a report from the Inquiry into the Prostitution Act recommended that the terminology in their Act be updated accordingly. Sex workers in Australia reject the term 'prostitute'. Today, the gender and value-neutral term 'sex worker' is used internationally by media, academics, health service providers and advocates. The use of sex worker-preferred terminology is fundamental to sex worker self-determination, and reflects the central premise that sex work is a legitimate form of occupation, deserving of the same rights and protections as other professions.

Thanks again for opportunity to provide feedback, and we look forward to working with you more in the future.

Again, we commend the core premise of decriminalisation underpinning this Bill but request that you give serious consideration to the amendments recommended within this submission. The further the Bill strays from decriminalisation to suit different political agendas the greater likelihood that it reinforces police in a regulatory role – reversing all benefits.

³⁰ Consumer Affairs Victoria, 'Sex Work Regulators', accessed at <http://www.consumer.vic.gov.au/businesses/licensed-businesses/sex-work-service-providers/legislation-and-regulation-sex-work/sex-work-regulators>, accessed at on 15 August 2011.

³¹ Ibid.

If you would like further information on these recommendations or on amendments to the Bill please do not hesitate to contact me.

We would also be happy to facilitate a teleconference meeting to further discuss the concerns outlined above.

A handwritten signature in cursive script that reads "K Matthews". The signature is written in black ink and is underlined with a single horizontal line.

Kane Matthews
President
Scarlet Alliance