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Prostitution Reform Feedback
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29 July 2011

Dear Attorney General,

Submission on the Western Australian Prostitution Bill 2011

Formed in 1989, Scarlet Alliance is the national peak body representing the interests of sex workers and sex worker organisations, projects, groups and networks in Australia. Through our programs, policies and objectives we aim to achieve social, legal, political, cultural, health and economic justice and equality for past and present sex workers. Our organisational membership, leadership, staff and volunteers are all sex workers. Our constitution specifically excludes owners and operators of sex industry businesses from our membership.

We believe that sex workers are the experts on our industry, and it is vital that sex worker voices are listened to regarding any reforms to the sex industry, as the group most affected by the proposed changes.

Whilst Scarlet Alliance welcomes the opportunity to provide input into this process we note that time and resources could have been saved by consultation with sex workers and inclusion of representative groups like Scarlet Alliance on the Attorney General's working party. Our organisation would have welcomed the opportunity to assist the Western Australian Government to develop legislation that supported improved Occupational Health and Safety outcomes for sex workers, continued strong public health outcomes for Western Australia and the development of workable legislation that results in high compliance at low cost to the taxpayer.

Unfortunately, the Western Australian Prostitution Bill 2011 is not a workable model of sex industry regulation for Western Australia, because of the significant barriers the laws themselves will create, and will be at significant expense to the taxpayer. The Prostitution Bill poses severe implications for the health, safety and rights of sex workers. It will also hinder the implementation of health promotion initiatives and is contrary to the objectives of the Australian Government's National Strategies on HIV and Sexually Transmissible Infections.

It is our usual approach to offer feedback that would improve draft legislation however in this case the model of sex industry regulation this legislation is based on (a licensing framework) has proven ineffective in other states and territories and this Bill adds to this flawed framework an excessive, unrealistic regulation of individual sex workers. It is with great disappointment that we find that we must recommend this draft be abandoned and a decriminalised model of regulation similar to New South Wales and New Zealand be introduced.

We would be pleased to meet to further discuss the attached submission on the Western Australian Prostitution Bill 2011 or available evidence on other effective models of sex industry regulation.

Sincerely,

A handwritten signature in black ink, appearing to read 'Elena Jeffreys'.

Elena Jeffreys

President

Scarlet Alliance, Australian Sex Workers Association

Scarlet Alliance Submission to the Western Australian Government on the Prostitution Bill 2011

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Scarlet Alliance, Australian Sex Workers Association

Scarlet Alliance is the Australian Sex Workers Association. Through our objectives, policies and programs, we aim to achieve equality, social, legal, political, cultural and economic justice for past and present workers in the sex industry, in order for sex workers to be self-determining agents, building their own alliances and choosing where and how they work.

Scarlet Alliance was formed in 1989 following the first National HIV and Sex Work Conference in 1988. Scarlet Alliance is Australia's national peak body of community-based sex worker organisations and projects, with membership made up of sex worker organisations and groups in each of the states and territories and individual sex workers from around Australia. Each year a National Forum and AGM is held, where key policies are developed, an Executive and spokespersons are elected and workshops on issues for sex workers are conducted.

Scarlet Alliance currently plays an active role in Australia's response to HIV/AIDS and has produced a range of resources in collaboration with AFAO, including: *A Guide to Best Practice, Occupational Health and Safety in the Australian Sex Industry (2000)* and *Principles for Model Sex Industry Legislation (2000)* (available at www.scarletalliance.org.au and used as the basis for *A Guide to Occupational Health and Safety in the New Zealand Sex Industry* published by the Occupational Safety and Health Service of the Department of Labour, New Zealand). Scarlet Alliance is a leader when it comes to advocating for the health, safety and welfare of workers in Australia's sex industry.

Australia has the lowest rate of HIV/AIDS amongst sex workers in the world, due to the work of community based sex worker organisations and projects who make up the membership of Scarlet Alliance, along with the response by those working in the sex industry. Scarlet Alliance member organisations and projects have the highest level of contact with sex workers in Australia of any agency, government or non-government. Our projects have close to 100% access to sex industry workplaces in the major cities. Many of our sex worker organisations and projects within Australia also have CALD (Culturally and Linguistically Diverse) or NESB (Non English Speaking Background) Projects employing bi-lingual project workers.

Scarlet Alliance has played a critical role in informing the Australian Government at all levels and informing the health sector, both in Australia and internationally, on issues affecting sex workers in the Australian sex industry. In addition, Scarlet Alliance has been active in promoting to other countries the models of service delivery which have been effective in minimising the transmission of HIV and STIs amongst Australian sex workers and their clients. Our representatives sit on the Commonwealth Attorney General's Roundtable on People Trafficking and the Commonwealth Ministerial Advisory Committee on Blood Borne Viruses and Sexually Transmissible Infections.

Many Scarlet Alliance member sex worker organisations/projects/groups provide an extensive outreach service to sex industry workplaces, thus ensuring a high level of contact with sex workers and other sex industry staff. Scarlet Alliance members also collect first hand anecdotal evidence and information about the impact of the laws in Australia to effectively inform policy development. Our associate member in Western Australia is Magenta, the Health Department-funded sex worker services organisation. Individual Western Australian sex workers are also members of Scarlet Alliance.

Scarlet Alliance Objectives

- (a) To promote the civil and human rights of past and present sex workers and to work toward ending all forms of discrimination against them;
- (b) To lobby for legal and administrative frameworks which do not discriminate against sex workers;
- (c) To challenge any government at any time when and where it implements legislation, regulations, rules, policies or law enforcement practices which are discriminatory and/or repressive to the rights and autonomy of sex workers;
- (d) To actively promote the right of all sex workers to work in whatever area of their chosen occupation, including street, brothel, escort, private and opportunistic work;
- (e) To actively work towards guaranteeing the right of all sex workers to optimum occupational health and safety provisions. This will promote conditions where safe sex and general health knowledge can be converted to safe work practices. Furthermore, challenge any legislation, policy or process which does not so promote the rights of the worker;
- (f) To strive to eradicate sex worker stereotypes and stigmatisation in the popular consciousness and to communicate the diversity of ideas, opinions and aspirations of past and present sex workers;
- (g) To liaise with international sex worker rights groups in the development of regional and international networks, programs and objectives;
- (h) To support sex workers and sex worker organisations to become more politically active;
- (i) To enhance the capacity of sex workers to participate in advancing their rights and build networks & organisations;
- (j) To gather and disseminate sex industry related information to members;
- (k) To play an active role in Australia's response to HIV/AIDS;
- (l) To provide training and education on issues relating to the Australian sex industry and the migration of sex workers into Australia; and
- (m) To present up to date information on sex work issues at national and international forums.

These objects are undertaken in order to advance sex worker rights.

Executive summary

The Western Australian Prostitution Bill has been developed without consultation with sex workers or our representative organisations, and as a result fails to address our needs and acts against sex workers' and sex worker organisations' best interests. The Bill works against Australia's whole-of-government approach to Social Inclusion, and is contrary to the Commonwealth Department of Health and Ageing's National Strategies on HIV and Sexually Transmissible Infections, developed through consultation between government and community sectors. Contrary to international best practice, which promotes decriminalisation as the optimal model for sex industry legislation, the Bill imposes heavy penalties, imprisonment, and rights violations upon sex workers.

The Bill criminalises the clients of sex workers, despite international evidence demonstrating that criminalising the purchase of sex has severe consequences on the rights and safety of sex workers themselves. The Bill criminalises street-based sex workers, despite no evidence of adverse amenity impacts caused by this sector of the industry, further contributing to stigma and discrimination towards street-based workers. Despite evidence demonstrating that police enforcement leads to corruption, misuse of personal information, and impeded access to justice, the Bill gives police powers to issue move-on notices, stop, detain and search anyone on suspicion that they have breached the law, and to order invasive cavity searches of sex workers. The Bill provides that all sex workers, managers and operators of sex industry businesses must be licensed, and must clearly display a licence featuring their legal name at all times in the workplace. This is despite evidence that there are serious implications for sex workers when our legal names and identities are made known, including harassment and vilification. Under the Bill, the names and addresses (and in some cases, the fingerprints and palm prints) of all licensed sex workers will be recorded on a register accessible by police, meaning that sex workers are singled out for surveillance and permanent stigma, affecting our opportunities for employment, further education and custody cases. The Bill then criminalises anyone working without a licence, despite evidence that stringent licensing requirements force sex workers to work illegally to protect our privacy, thus creating a two-tiered sex industry. An unlicensed sex worker under the Bill is expressly excluded from accessing Workers' Compensation, and is likely to suffer an absence of regulated workplace conditions and occupational health and safety standards.

The Bill prohibits sex work in any residential area, despite evidence that relegating individual sex workers to non-residential areas increases risks of violence against us, particularly where we are confined to isolated, poorly-lit industrial areas. The Bill then requires council approval for sex industry businesses, even though the requirement to notify neighbours of one's activities (usually a requirement of council approval) has been shown to result in harassment, blackmail and violence towards sex workers. The Bill also prohibits advertising for any staff relating to sex work services, preventing sex workers from advertising for drivers, receptionists or security, which presents obstacles to our health, safety and access to support.

The Bill mandates the use of condoms and dental dams, which fails to take into account the fact that sex workers already engage in safer sex practices, act as safer sex educators (of their clients), and are experts at identifying, assessing and managing risks. Using the criminal law to make safer sex mandatory takes away individuals' agency over their sexual decision-making and is out of step with public health approaches. The Bill further provides that a person who has an STI must not take part in an 'act of prostitution' involving STI-risk contact. The criminalisation of sex workers with STIs and HIV discriminates against sex workers on the basis of our health status, without reference to whether individual workers practice safer sex, cater specifically to HIV positive clients, or offer non-penetrative services. The low rates of STIs and HIV among sex workers illustrate that we are highly aware of safer sex practices and are skilled at negotiating and managing risks. However the Bill's requirement for managers and operators of 'a prostitution business' to minimise the risk of STI transmission effectively promotes mandatory testing for sex workers. Mandatory testing is contrary to best-practice models outlined in the National Strategies, creates an unnecessary, expensive burden on public health funds, leads to sex workers hiding our profession from medical experts, jeopardises sex worker privacy and can endorse a false sense of security among clients, leading to increased requests for unsafe practices. Voluntary testing remains the optimum approach to STI testing in Australia, as outlined in the National Strategies. Existing public health and criminal laws already cover the knowing, deliberate or malicious transmission of STIs or HIV.

The Bill criminalises migrant sex workers, providing that a licence can only be issued to an Australian citizen or permanent resident. This means that sex workers on student or temporary visas are immediately rendered

illegal, subject to heavy penalties, experience reduced access to health services, denied access to peer education programs, and increasingly marginalised. The Bill introduces heavy penalties (up to 3 years imprisonment) and fines (up to \$50,000) for non-compliance. Evidence shows that rather than acting as a deterrent, these laws will force sex workers underground to work illegally, and reduce our access to essential services, occupational health and safety, human rights and industrial rights.

The overall effect of the Bill is to reduce sex workers' autonomy, rights, health and safety in the workplace.

It is widely recognised that decriminalisation, such as is currently in operation in NSW, is the optimal model for sex work legislation. A decriminalised framework 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, and does not single out sex workers for specific legislation. In doing so, a decriminalised system removes barriers to health promotion, amplifies opportunities for outreach, and magnifies capacities for sex worker peer education.

Recommendations

Scarlet Alliance recommends:

- That the proposed licensing model be immediately abandoned as unworkable, counter-productive and expensive;
- That the Western Australian government recognise that licensing and criminal approaches to sex work law reform have *not* been proven to reduce the size of the sex industry, and that the bill will *fail* to have the desired effect of reducing the incidence of sex work and the size of the industry. By contrast, research shows that where sex work has been decriminalised, the size of the sex industry has *not increased*;
- That sex work be recognised as a legitimate form of work and that all aspects of the Western Australian sex industry, including brothel, private, escort and street-based sex work, be decriminalised;
- That any future legislation sits within a framework that recognises the civil and industrial rights of sex workers, and that the health, safety and wellbeing of sex workers is prioritised over all other industry or community concerns;
- That people working in the sex industry be afforded the same legal rights as other Western Australian citizens, including police protection and access to administrative law processes;
- That sex industry businesses be afforded the same legal rights as other businesses, without arbitrary and discriminatory restrictions on advertising, employment, service provision or business location;
- That the location of brothels be determined according to the same local council guidelines as other service-based businesses and that the relegation of brothels to isolated industrial areas be recognised as inappropriate and dangerous;
- That police be removed from any administrative or regulatory role in the sex industry and instead be charged with protecting sex workers from violence; and
- That the Western Australian Government recognise sex worker representatives as experts in their field that must be consulted directly on issues of sex work policy.

Comment on the Western Australian Prostitution Bill 2011

Antiquated and offensive terminology

The Prostitution Bill uses antiquated terminology such as ‘prostitution’ and ‘prostitute’ that is offensive and oppressive to sex workers. Since the late 1970s, ‘sex work’, ‘sex industry’ and ‘sex worker’ have been the preferred term of sex workers in Australia and are used internationally by media, academics, health providers and governments. The use of sex worker-preferred terminology is fundamental facet of sex worker self-determination, and reflects the central premise that sex work is a legitimate form of employment, deserving of the same rights and protections as other professions.

Social exclusion and lack of consultation

Sex worker organisations repeatedly contacted the Western Australian Attorney General seeking unsuccessfully to arrange consultation meetings in the lead up to drafting this Bill. Scarlet Alliance supported experts and researchers from New Zealand, where the sex industry has been decriminalised for several years, and Sweden, where the negative impacts of criminalising clients are widely recognised to visit Western Australia however a meeting request with the Attorney General’s office was denied. No sex worker organisations were represented in the Attorney General’s committee, and there was no consultation with sex worker organisations during the drafting. The Attorney General has referred to sex workers as ‘external stakeholders’.¹ Sex workers are not ‘external stakeholders’ – we are the *key stakeholders*. As a result, the Prostitution Bill does not treat sex work as a legitimate profession, or treat sex workers as deserving of legal protections, human rights or industrial rights. The Bill works against Australia’s whole-of-government approach to Social Inclusion, which aims to ensure that all Australians will have the resources, opportunities and capability to connect with people, use their local community’s resources and ‘have a voice so that they can influence decisions that affect them.’² The Prostitution Bill reflects a distinct lack of sex worker consultation, fails to reflect the needs of sex workers and works actively against our interests. Sex workers *are* the key stakeholders, and sex worker involvement is imperative to good, relevant policy development and law reform.

Criminalisation of clients

Scarlet Alliance is concerned that the Prostitution Bill proposes to criminalise the clients of sex workers.³ The Bill provides that ‘A person must not, in or in the view of or within hearing of a public place, seek another person to act as a prostitute.’⁴ The definition of ‘seek’ includes inviting another person to ‘act as a prostitute’ and loitering in or frequenting another place with the intention of receiving such invitation.⁵ It makes no difference whether the offender is the prospective client, or is seeking the services for someone else.⁶

International evidence shows that the criminalisation of clients seriously impacts upon the health and safety of sex workers themselves. In Sweden, where the *Sex Purchase Act 1999* criminalises clients of sex workers, Petra Ostergren and Susanne Dodillet report ‘serious adverse effects... 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.’⁷ Street-based sex workers in Sweden, fearful of losing their client base, have been spatially displaced and forced into more isolated, poorly lit industrial and outdoor areas where they are more vulnerable.⁸ The prohibition on the use of private apartments for sex work in Sweden has proved

¹ Legislative Council of Western Australia, Question on Notice, Thursday 6 May 2010.

² Australian Government, Overview of the Social Inclusion Agenda, accessed at <http://www.socialinclusion.gov.au/SlAgenda/Pages/Overview.aspx> on 26 May 2011.

³ Western Australian Government, Prostitution Bill 2011, Part 2, Section 9.

⁴ Western Australian Government, Prostitution Bill 2011, Part 2, Section 9(1).

⁵ Western Australian Government, Prostitution Bill 2011, Part 2, Section 9(3).

⁶ Western Australian Government, Prostitution Bill 2011, Part 2, Section 9(4).

⁷ 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.

⁸ ‘Michelle’ cited in ‘Sex Ban Puts Us at Greater Risk’, *The Guardian*, 27 May 2009, cited in B Wallace (Principal Policy Officer), *The Ban on Purchasing Sex in Sweden*, Office of the Prostitution Licensing Authority Queensland, 15 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.

to have an overall effect of reducing sex workers' control over their workplace.⁹

While the Western Australian Prostitution Bill disproportionately targets the clients of street-based sex workers, the definition of a 'public place' in the Bill is very broad. It includes a privately owned place occupied by someone other than the owner, as well as a place where a section of the public is permitted access upon payment.¹⁰ This potentially criminalises all clients of brothels and private sex workers working from home where we do not have permission from the landlord. The criminalisation of clients is catastrophic for the health and safety of sex workers; forcing workers to be invisible and limiting our access to essential services. The Prostitution Licensing Authority (PLA) Queensland reports that the criminalisation of clients in Sweden has 'driven the sex industry underground',¹¹ with the result that 'sex workers feel less secure and consider themselves at greater risk of violence.'¹²

Criminalisation of sex workers

The Prostitution Bill continues the criminalisation of street-based sex workers, providing that 'A person must not, in or in the view or within hearing of a public place, seek another person to be a prostitute's client.'¹³ The penalty for soliciting is imprisonment for one year.¹⁴ Because the definition of a public place is so broad¹⁵ - including a privately owned place occupied by someone other than the owner, as well as a place where a section of the public is permitted access upon payment - the definition potentially bans all forms of sex work, including street-based, brothel and private sex work.

The criminalisation of sex workers has serious impacts on our health and safety. Criminalisation means that health professionals and outreach organisations will face obstacles in identifying sex workers due to our invisibility. It means that sex workers will be unlikely to disclose their sex work experience to health care workers for fear of prosecution, hindering the quality of care we receive. In their study, Harcourt et al. state that while the primary objective of law enforcement is often 'to keep prostitution invisible,' in practice such policies disproportionately target street-based sex workers.¹⁶ This provision clearly targets and permits police harassment of street-based sex workers, and perpetuates the vilification, social exclusion, and discrimination against street-based sex workers. This is despite the fact that street-based sex workers often have better flexibility, greater choice in clients, more control over their working conditions and less occupational overheads than sex workers operating privately, through agencies or from brothels.

Police enforcement and regulation

Scarlet Alliance submits that maintaining the role of police as regulators of the sex industry in Western Australia is contrary to decades of health research in Australia and disastrous for the rights, health, safety and wellbeing of sex workers. The Prostitution Bill enables police, for compliance purposes, to enter a place at any time and without a warrant 'if the officer reasonably suspects that a prostitution business is being conducted'.¹⁷ The officer – or other authorised person – may search the place and inspect any articles and records; stop, detain and search anyone; and seize anything that the police officer suspects on reasonable grounds will afford evidence as to the commission of an offence.¹⁸ If a person refuses to provide proof of their identity they can be fined \$24,000 or receive 2 years imprisonment.¹⁹ The Prostitution Bill enables police to issue move-on notices based on *suspicion* of sex workers seeking clients in a 'public place', preventing a person from returning to an area for 24 hours.²⁰ If a sex worker is found back in that area, we can be fined \$6000 for a first offence and one year imprisonment for a second offence.²¹ Potentially, this means a private sex worker

⁹ Susanne Dodillet and Petra Ostergren, 'The Swedish Sex Purchase Act' above n7 at 4.

¹⁰ Western Australian Government, Prostitution Bill 2011, Part 2, Section 8.

¹¹ B Wallace (Principal Policy Officer), *The Ban on Purchasing Sex in Sweden*, Office of the Prostitution Licensing Authority Queensland, above n8 at 19.

¹² *Ibid* at 19.

¹³ Western Australian Government, Prostitution Bill 2011, Part 2, Section 10(1).

¹⁴ Western Australian Government, Prostitution Bill 2011, Part 2, Section 10(1).

¹⁵ Western Australian Government, Prostitution Bill 2011, Part 2, Section 8.

¹⁶ Christine Harcourt, Sandra Egger and Basil Donovan, (2005) 'Sex Work and the Law', *Sexual Health*, 2, 122.

¹⁷ Western Australian Government, Prostitution Bill 2011, Part 7, Section 92(1).

¹⁸ Western Australian Government, Prostitution Bill 2011, Part 7, Section 92(4).

¹⁹ Western Australian Government, Prostitution Bill 2011, Part 7, Section 93(2).

²⁰ Western Australian Government, Prostitution Bill 2011, Part 7, Section 96(1).

²¹ Western Australian Government, Prostitution Bill 2011, Part 7, Section 96(2).

working residentially without the permission of their landlord, can be issued a move on notice from their own home. Police can strip search or instruct another person to search a person suspected under this section, or order an invasive cavity search by medical officer.²² A police officer may use reasonable force to exercise power under the Bill.²³

Ongoing evidence clearly illustrates that police regulation of the sex industry leads to corruption, the misuse of power and the violation of sex worker rights, and means that sex workers are less likely to seek police assistance in unsafe situations.²⁴ Scarlet Alliance and the Australian Federation of AIDS Organisations (AFAO) state that the criminalisation of sex work has acted to 'erode relations with the police and judicial system.'²⁵ Experiences of police entrapment (posing as potential clients before charging sex workers for sex work related offences,²⁶ as well as police violence, raids and harassment of sex workers, has led to a fear of public retribution and a perception that crimes against sex workers are not taken seriously by the police. The Prostitution Bill provides that the police can, without warrant, detain and search a sex worker where the police *suspect* 'there is anything that will afford evidence as to the commission of an offence.'²⁷ This broad legislative approach makes sex workers vulnerable to corruption by police and by people posing as police officers. The use of condoms by police as evidence of a crime is one of the most illustrative examples of how police regulation hinders incentives for sex workers to practice safer sex. The positioning of police as industry regulators means that sex workers have limited access to justice and legal remedies to address crimes of violence. In contrast, the Prostitution Law Reform Committee in New Zealand found that the decriminalisation of sex work meant 'the majority [of sex workers interviewed] felt sex workers were now more likely to report incidents of violence to Police'.²⁸

Licensing

The Prostitution Bill provides that all individual sex workers, as well as operators and managers, must hold a licence.²⁹ The licence application must be accompanied by official documentation of the applicant's age and identity and may involve a fee, meaning that sex workers may now have to pay to work.³⁰ Licences for operators, managers or self-employed sex workers – in our legal names – must always be displayed so they are visible to a person entering the premises at all times.³¹ Where a sex industry business is in operation without displaying their licence, the fine is \$12,000, and for individual sex workers, the fine is \$2,000.³²

There are serious implications for sex workers when our legal names and identities are known or made public. In March 2011, a California-based health clinic leaked information exposing the names, birth dates, stage names and HIV status of more than 12,000 current and former adult performers.³³ The 'outing' of sex workers has significant ramifications on our lives, families and safety. It places sex workers at risk of discrimination, harassment, exploitation, stalking, vilification, and the misuse of our personal information. Privacy is crucial to sex worker safety, and the requirement for sex workers to disclose our legal identity will have severe consequences. The provision will force sex workers to operate illegally in order to protect our own identities and safety.

²² Western Australian Government, Prostitution Bill 2011, Part 7, Section 100(5) and (6).

²³ Western Australian Government, Prostitution Bill 2011, Part 7, Section 83.

²⁴ Scarlet Alliance Executive Committee, *Sex Worker Registration: Privacy and Ethical Concerns*, Australian Federation of AIDS Organisations, accessed at http://www.afao.org.au/view_articles.asp?pxa=ve&pxs=103&pxsc=127&pxsgc=139&id=582 on 11 May 2011.

²⁵ 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, 12, accessed at <http://www.scarletalliance.org.au/library/unjust-counterproductive> on 19 May 2011.

²⁶ *Ibid* at 12.

²⁷ Western Australian Government, Prostitution Bill 2011, Part 7, Section 97(3).

²⁸ New Zealand Government, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003*, Ministry of Justice, Wellington, 2008, 14.

²⁹ Western Australian Government, Prostitution Bill 2011, Part 6, Sections 42-44.

³⁰ Western Australian Government, Prostitution Bill 2011, Part 6, Sections 47-48.

³¹ Western Australian Government, Prostitution Bill 2011, Part 3, Section 17.

³² Western Australian Government, Prostitution Bill 2011, Part 3, Section 17.

³³ Fox News, 'Porn Actors' Personal Information, HIV Status Released Through California Health Clinic, Report Says', 31 March 2011, accessed at <http://www.foxnews.com/entertainment/2011/03/31/california-health-clinic-reportedly-releases-porn-actors-personal-information/> on 12 July 2011.

Criminalisation of unlicensed sex workers

The Prostitution Bill criminalises operators, managers and sex workers who work without a licence.³⁴ For operators and managers working without a licence the penalty is a fine of \$50,000 or imprisonment for 3 years.³⁵ For individual sex workers working without a licence the penalty is a fine of \$6,000.³⁶ If a brothel operator employs a sex worker who does not hold a licence there is a fine of \$50,000.³⁷ A place (home or business) can be closed if unlicensed sex work is taking place, and entering or remaining in a place under a closure order entails a \$12,000 fine or imprisonment for one year.³⁸

Evidence demonstrates that licensing systems of regulating the sex industry have low compliance, breach sex workers' rights and have detrimental effects on sex worker health. Studies of licensing models show that 'usually they "capture" only a minority of sex industry workers.'³⁹ Sex workers and businesses avoid licensing because of the stringent requirements and burdens attached. In Queensland, 11 years of licensing has resulted in only 23 brothels being registered, while the majority of workplaces operate outside the licensing system.⁴⁰ Licensing creates a two-tiered sex industry and a group of 'clandestinas' who fall outside health interventions and miss targeted health programs because we operate outside the system.⁴¹ By comparison to NSW where 'decriminalisation has helped to ensure that the benefits gained in one sector are not denied to people working in less well-tolerated sectors,'⁴² Harcourt et al. illustrate that the licensing systems are 'inappropriate'.⁴³ Further, the Bill deepens the disparity between what sex workers and non-sex workers can do with their bodies. It imposes heavy penalties and incarceration for sex workers engaging in consensual adult activity that is legal for non-sex workers. Punitive and arbitrarily applied laws do not act as a deterrent to people engaging in sex work – rather they result in low compliance and force sex workers underground.

Criminalisation removes occupational health and safety for sex workers

In jurisdictions where sex work is criminalised or licensed, sex workers are forced to break the law in order to protect our privacy, health, safety, human rights and industrial rights. The research findings of Scarlet Alliance and Australian Federation of AIDS Organisation's *Unjust and Counter-Productive* study 'strongly indicate that sex workers who operate under highly restrictive or criminalised frameworks have the least opportunity to utilise existing remedies to address discrimination.'⁴⁴ Scarlet Alliance asserted in our submission to the National Consultation on Human Rights that 'Discrimination and illegality creates a culture of self-censorship, shame, isolation and stigma.'⁴⁵ These factors mean that sex workers may suffer an absence of workplace conditions, occupational health and safety protections, and industrial rights such as leave entitlements, superannuation and workers' compensation, or they may be classed as contractors rather than employees. Under the Prostitution Bill, an unlicensed sex worker is excluded from accessing Workers' Compensation.⁴⁶ Research shows that sex workers who have been unfairly dismissed or experienced unfair work practices (like non-payment of wages) may not pursue their employer due to a fear of being 'outed' as a sex worker, and may not use available legal mechanisms for fear of attracting publicity.⁴⁷ Sex workers may be discouraged from contacting police when a crime is committed if they are working in unlicensed places, so as not to attract unwarranted attention to the business.⁴⁸ Similarly, the fear of being 'outed' may prevent sex workers from

³⁴ Western Australian Government, Prostitution Bill 2011, Part 6, Sections 42-44.

³⁵ Western Australian Government, Prostitution Bill 2011, Part 6, Sections 42-43

³⁶ Western Australian Government, Prostitution Bill 2011, Part 6, Section 44.

³⁷ Western Australian Government, Prostitution Bill 2011, Part 3, Section 20.

³⁸ Western Australian Government, Prostitution Bill 2011, Part 7, Section 127.

³⁹ Christine Harcourt et al., 'Sex Work and the Law', above n16 at 126.

⁴⁰ Prostitution Licensing Authority Queensland, *Licensed Brothels*, <http://www.pla.qld.gov.au/brothels/licensedBrothels.htm> accessed on 26 May 2011.

⁴¹ C Harcourt et al., 'Sex Work and the Law', above n16 at 125.

⁴² Ibid at 126.

⁴³ Ibid at 125.

⁴⁴ Scarlet Alliance and the AFAO, *Unjust and Counter-Productive*, above n25 at 11.

⁴⁵ Scarlet Alliance, *Submission to the National Consultation on Human Rights in Australia*, Sydney, 2009, 6, accessed at http://www.scarletalliance.org.au/library/humanrightsconsultation_09/ on 25 May 2011.

⁴⁶ Western Australian Government, Prostitution Bill 2011, Part 12, Section 175.

⁴⁷ Scarlet Alliance and the AFAO, *Unjust and Counter-Productive*, above n25 at 15.

⁴⁸ Scarlet Alliance, *Submission*, above n45 at 5.

being candid with health professionals.⁴⁹ Criminalisation and licensing continue to impinge the health, safety, human rights and industrial rights of sex workers.

Registration and finger printing of sex workers

The Prostitution Bill establishes a register recording the legal name and address of each individual sex worker.⁵⁰ The list is accessible by police officers and other officials.⁵¹ The Bill further provides that the CEO may require operators of sex industry businesses to have their finger prints and palm prints taken during their licence application,⁵² as well as individual sex workers where matters relating to our identity is not 'disclosed in the application.'⁵³ The requirement for finger and palm printing of licence holders will further stigmatise the industry, due to the implication of criminality insinuated by such a practice.

The obligation for sex workers to register our legal name and address means that, in effect, sex workers are singled out for surveillance and acquire a permanent stigmatising record, which affects our opportunities for employment, further education and custody cases. As Harcourt et al. write, 'Depending on the severity of the regime, licensed sex workers may have their movements restricted, their travel documents identified and their choice of medical care limited to approved clinics.'⁵⁴ Registration does nothing to improve the occupational health and safety of sex workers, but rather violates human and civil rights to privacy, to work in an occupation of choice and to live and work free from harassment and discrimination.⁵⁵ Registration affects the quality of health advice sex workers receive because sex workers may not be candid with our health professional for fear of 'outing' ourselves, or may actively avoid health services for fear of prosecution.⁵⁶ As Ally Daniel writes,

The police register acts similarly to a criminal database and once a person's name is listed it can never be removed, even after they have left the sex industry. The stigmatisation of this lasts a lifetime and sex workers, past and present, may avoid health professionals for fear of being discriminated against or of having to disclose their name.⁵⁷

Disclosing our previous or current profession may restrict sex workers when we seek to travel, study, work or become involved in community activities, limiting our mobility across employment, geographic and social spheres. At an international level, sex workers can be prevented from entering certain countries if we list our occupation on our visa or passport, while those who work in unlicensed/illegal sectors risk sex-industry related offences, which may significantly restrict our movement between countries.⁵⁸ Having our personal details on a government register and made available to police puts sex workers in serious danger.

Zoning of individual sex workers

The Bill restricts sex workers' freedom of movement by providing that sex work may only take place in prescribed, approved areas. The Bill provides that 'land in a residential area or special use area must not be used for the purposes of a prostitution business.'⁵⁹ Any 'prostitution business' operating outside a residential area requires a development application.⁶⁰ As a condition of every licence, there must be no change in the location of the place from which sex work is conducted without the approval of the CEO.⁶¹ The CEO can impose any further licence conditions which the CEO believes are 'in the public interest' or 'desirable'⁶² to minimise the amenity impacts of the business upon places of worship, hospitals or schools.⁶³ The penalty for anyone

⁴⁹ Jan Jordan, *The Sex Industry in New Zealand: A Literature Review*, Ministry of Justice, 2005, 62-3.

⁵⁰ Western Australian Government, Prostitution Bill 2011, Part 6, Section 64.

⁵¹ Western Australian Government, Prostitution Bill 2011, Part 6, Section 65.

⁵² Western Australian Government, Prostitution Bill 2011, Part 6, Section 49 (1)-(2).

⁵³ Western Australian Government, Prostitution Bill 2011, Part 6, Section 49 (3).

⁵⁴ Christine Harcourt et al., 'Sex Work and the Law', above n16 at 124.

⁵⁵ Scarlet Alliance Executive Committee, *Sex Worker Registration: Privacy and Ethical Concerns*, Australian Federation of AIDS Organisations, accessed at http://www.afao.org.au/view_articles.asp?pxa=ve&pxs=103&pxsc=127&pxsgc=139&id=582 on 11 May 2011.

⁵⁶ Ministry of Women's Affairs cited in Jan Jordan, *The Sex Industry in New Zealand: A Literature Review*, Ministry of Justice, 2005.

⁵⁷ Ally Daniel (2010) 'The Sexual Health of Sex Workers: No Bad Whores, Just Bad Laws', *Social Research Briefs*, NSW Health, 19, 1.

⁵⁸ Scarlet Alliance and the AFAO, *Unjust and Counter-Productive*, above n25 at 15.

⁵⁹ Western Australian Government, Prostitution Bill 2011, Part 6, Section 74.

⁶⁰ Western Australian Government, Prostitution Bill 2011, Part 6, Section 75.

⁶¹ Western Australian Government, Prostitution Bill 2011, Part 6, Section 57.

⁶² Western Australian Government, Prostitution Bill 2011, Part 6, Section 60.

⁶³ Western Australian Government, Prostitution Bill 2011, Part 6, Section 60.

contravening a condition of their licence is \$50,000.⁶⁴ A licensed sex worker or manager must give the CEO notice in writing within 7 days of changing address, and fail to do so incurs a \$24,000 fine.⁶⁵ A person must not operate more than one 'prostitution business' from any place in this State at the same time.⁶⁶ The penalty for a first offence is a \$24 000 fine, and for a second or subsequent offence, imprisonment for 3 years.⁶⁷ These punishments far outweigh the crimes – sex workers must seek approval before changing workplaces, cannot work multiple jobs, and if they breach any licence conditions they are faced with significant, disproportionate and irrecoverable fines.

Relegating individual sex workers to non-residential areas increases risks of violence against us, particularly where we are confined to isolated, poorly lit industrial areas. A Development Application process often involves placing a sign at the front of one's premise and advising neighbours that the land will be used for sex work purposes. Such requirements clearly impact on sex worker safety, confidentiality and the likelihood of experiencing harassment.⁶⁸ As Penny Crofts notes, this can 'excite a great deal of community opposition and may well place the sex worker in danger.'⁶⁹ The requirement for Development Application in other states has resulted in significant violence, attempted blackmail and harassment of sex workers. In New South Wales, where development approval is required, sex workers continue to work discreetly without development consent to avoid detection and harassment. Requirements for Development Application approval, as well as the prohibition of sex work from residential areas, places sex workers in danger of harassment and violence. Further, the Bill precludes sex workers from working privately and in a brothel, curtailing sex workers freedom of movement and choice of employment. This is despite the fact that amenity impacts on the community of sex industry businesses have proved to be minimal to nil.

Zoning of sex industry businesses

The Prostitution Bill introduces high level of control over the operation of sex industry businesses, including restrictions on the size and number of employees. A brothel may not have more than six rooms and nine sex workers,⁷⁰ but these numbers are arbitrary and no rationale is given for the limit. The Bill provides that the CEO may limit the number of each kind of licence that can be issued.⁷¹ These provisions attempt to control the size of the sex industry, reflecting unfounded myths about an expanding sex industry. However, licensing and criminal approaches to sex work will *fail to* reduce the incidence of sex work and the size of the sex industry in Australia. Instead, these approaches harm sex workers, drive us further underground, and hinder health promotion and peer education initiatives. By comparison, research from New Zealand provides evidence that decriminalisation does not lead to an increase in the size of the sex industry – rather the numbers of sex workers have stayed approximately the same.⁷²

Considerable discretionary powers can be exercised by the licensing body, raising concern about the potential for corruption. The Bill limits zoning and does not allow sex industry businesses in residential or special use areas. Advertising for sex workers, managers, receptionists, drivers and cleaners effectively incurs a \$50,000 fine.⁷³ No other industry is subject to such discriminatory controls. Not only does this provision discriminate against sex industry businesses and sex workers, it effectively makes those businesses incredibly difficult to operate. It prevents sex workers from advertising drivers, receptionists or security, which erodes the safety of sex workers and our access to support. The Governor may make an order that the CEO must not issue a licence to an applicant,⁷⁴ and the Bill provides that those orders 'may not be challenged, appealed against, reviewed, quashed or called into question on any grounds whatsoever before any court, tribunal, body or person in any

⁶⁴ Western Australian Government, Prostitution Bill 2011, Part 6, Section 61.

⁶⁵ Western Australian Government, Prostitution Bill 2011, Part 6, Section 67(2).

⁶⁶ Western Australian Government, Prostitution Bill 2011, Part 3, Section 18.

⁶⁷ Western Australian Government, Prostitution Bill 2011, Part 3, Section 18.

⁶⁸ Sex Services Premises Planning Advisory Council, Sex Services Premises: Planning Guidelines, NSW Department of Planning, 2006, accessed at http://www.scarletalliance.org.au/library/ssppg_04 on 26 May 2011.

⁶⁹ Penny Crofts, 'Brothels: Outlaws or Citizens?' (2010), *International Journal of Law in context*, 6:2, 151-166 at 155.

⁷⁰ Western Australian Government, Prostitution Bill 2011, Part 6, Section 58.

⁷¹ Western Australian Government, Prostitution Bill 2011, Part 6, Section 45.

⁷² New Zealand Government, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003*, Ministry of Justice, Wellington, 2008, 13.

⁷³ Western Australian Government, Prostitution Bill 2011, Part 2, Section 15.

⁷⁴ Western Australian Government, Prostitution Bill 2011, Part 6, Section 79.

legal proceedings'.⁷⁵ These provisions place extraordinary burdens upon sex workers and sex industry businesses that are not placed on workers and businesses in other industries.

Mandating safe sex

The Prostitution Bill provides that sex workers must use a 'sheath' (condoms, dams or other physical barrier) during vaginal, anal and oral sex.⁷⁶ The penalty for breaching this section is a fine of \$10 000.⁷⁷ Under the Bill, each person who operates or manages a 'prostitution business' must take all reasonable steps to ensure that a sex worker does not take part in an 'act of prostitution that involves a particular kind of STI-risk contact unless the prostitute uses a sheath that is a suitable for that kind of contact.' The penalty for breaching this section is a fine of \$12 000.⁷⁸

This section is not supported by current epidemiology. This requirement does not take into account the fact that sex workers already engage in safer sex practices, act as safer sex educators, and are experts at identifying, assessing and managing different degrees of risk. Although sex workers are often seen to be a high-risk group for STIs, research shows that sex workers have successfully implemented and consistently maintained safer sex practices. Australia has never recorded a single case of HIV transmission from sex worker to client and sex workers have consistently low rates of sexually transmissible infections,⁷⁹ with very high rates of prophylactic use.⁸⁰ This low rate of STIs among sex workers is due to sex worker peer education, not punitive laws.

The legislated, mandatory use of condoms and/or dams is not applied to the general community, who have higher rates of STIs than sex workers. This creates a disparity in legislation for sex occurring in private compared sex occurring professionally. Imposition of excessive fines for not using protection takes away individuals' agency over their sexual decision-making and is out of step with public health approaches. Criminal approaches to condom use ignore the diversity of settings and services within the sex industry and the range of STIs and varied transmission risks, but more importantly set a dangerous precedent to the use of criminal law in place of education and proven public health approaches.

Criminalising sex workers with an STI

The Prostitution Bill provides that a person who has an STI must not take part in an 'act of prostitution' involving STI-risk contact,⁸¹ and imposes penalties ranging from a \$20,000 fine to 3 years imprisonment.⁸² STI means a prescribed sexually transmissible infection or a prescribed blood borne virus.⁸³ Under the Bill, it makes no difference whether or not a 'sheath' is used in the act.⁸⁴

The criminalisation of sex workers working with STIs and HIV is far removed from the ways that sex workers successfully manage risks. In practice, sex workers are more likely to undergo STI/HIV testing than the general population, have greater awareness of what constitutes risk behavior, and competently negotiate safe relationships. Laws which criminalise sex workers working with STI or HIV discriminate against sex workers on the basis of their health status, without reference to whether individual workers practice safer sex, cater specifically to HIV positive clients, or offer non-penetrative services. Research reveals that men who have sex with men already undertake a range of non-condom based HIV risk reduction strategies, including strategic positioning (the use of serostatus to determine sexual roles during sex), serosorting (the restriction of unprotected sex to partners of concordant HIV status), and undetectable viral load (the use of viral load test results to assess the risk of HIV among non-concordant partners).⁸⁵ Janelle Fawkes has noted that the high

⁷⁵ Western Australian Government, Prostitution Bill 2011, Part 6, Section 81.

⁷⁶ Western Australian Government, Prostitution Bill 2011, Part 4, Section 28(2).

⁷⁷ Western Australian Government, Prostitution Bill 2011, Part 4, Section 28(2).

⁷⁸ Western Australian Government, Prostitution Bill 2011, Part 4, Section 28 (4).

⁷⁹ Australian Government, *National HIV/AIDS Strategy: Revitalising Australia's response 2005-2008*, Australian Government, Canberra, 2005, 19.

⁸⁰ Roberta Perkins and Francis Lovejoy, *Call Girls*, University of Western Australia Press, 2007.

⁸¹ Western Australian Government, Prostitution Bill 2011, Part 4, Section 30(1).

⁸² Western Australian Government, Prostitution Bill 2011, Part 4, Section 30(1)(a) and (b).

⁸³ Western Australian Government, Prostitution Bill 2011, Part 4, Section 27.

⁸⁴ Western Australian Government, Prostitution Bill 2011, Part 4, Section 30(4).

⁸⁵ Martin Holt and Jeanne Ellard, *HIV Risk Reduction Strategies Among Gay Men*, Discussion Paper, Australian Federation of AIDS Organisations, Sydney, April 2011, 1.

number of sero-discordant relationships in which the HIV negative partner does not acquire HIV 'demonstrates that protected sex with an HIV-positive person does not necessarily lead to transmission.'⁸⁶ There is no recorded case of HIV transmission in a sex industry setting in Australia,⁸⁷ and the annual national surveillance report between 2001–2009 demonstrates prevalence of HIV among sex workers has remained consistently low – less than 1%.⁸⁸ This low rate illustrates that HIV positive sex workers are highly aware of sexual health and safer sex practices and are skilled at negotiating and managing risks.

Laws criminalising people with STIs and HIV instead inflict further stigma and marginalisation upon those who already bear dual social stigmas attached to sex work and HIV. The National Needs Assessment of Sex Workers who Live with HIV in 2008 found that many health organisations 'are judgmental and critical of the involvement of HIV positive people in sex work and often attempt to dissuade them from continuing.'⁸⁹ Participants in the study reported that '[i]nstances of disclosure of both HIV status and sex work generally lead to very poor treatment and harassment, and in one reported case included physical violence by a health care worker.'⁹⁰ Others reported 'misinformation' being provided to them about the legality of participating in commercial sex,⁹¹ or felt health services were 'taking on more of a law enforcement role.'⁹² Criminalisation then acts as a deterrent to sex workers seeking health care or medical testing. When a sex worker was prosecuted and jailed in the Australian Capital Territory in 2008 for 'knowingly providing a sexual service while HIV positive' even though no evidence of unsafe behaviour was presented, there was a dramatic drop in sex worker attendance at a outreach medical services. Elena Jeffreys, Kane Matthews and Alina Thomas report, 'In the four-week period following the court case, the numbers attending the service dropped from an average of 40 per night to three.'⁹³ In this sense, the effect of criminalisation is to potentially *increase*, rather than *decrease*, STI and HIV transmission rates overall.⁹⁴

Mandatory testing

The Prostitution Bill provides that managers and operators of 'a prostitution business' must take reasonable steps to minimise the risk of sex workers and clients from acquiring or transmitting an STI, with a penalty of \$12,000 for non-compliance.⁹⁵ As we have seen in other states, this kind of clause commonly results in a form of mandatory STI and HIV testing, as sex industry businesses force the provision of monthly 'certificates' from staff as the only way to prove they have taken steps to ensure sex workers do not have an STI.

Mandatory testing is contrary to best practice models outlined in the National Strategies and is not evidenced by current epidemiology in Australia.⁹⁶ Compulsory testing creates an unnecessary and expensive burden on public health funds, leads to sex workers hiding their profession from medical experts, jeopardises sex worker privacy and can endorse a false sense of security among clients, leading to increased requests for unsafe practices.⁹⁷ Evidence indicates that current testing rates in jurisdictions with mandatory testing are 'excessive',⁹⁸ and in their study, Samaranayake et al. found that the use of resources in screening sex workers

⁸⁶ Janelle Fawkes, 'Pos Worker Won't Get Fair Trial' Scarlet Alliance Media Release, 31 January 2008, cited in Elena Jeffreys, Kane Matthews and Alina Thomas, 'HIV Criminalisation and Sex Work in Australia', *Reproductive Health Matters*, 2010, 18:35, 129 – 136.

⁸⁷ Scarlet Alliance and Nothing About Us Without Us, *Submission to Shadow Attorney General Chris Haatcher on Sex Industry Regulation in NSW*, September 2010, 10.

⁸⁸ National Centre in HIV Epidemiology and Clinical Research, *HIV/AIDS, Viral Hepatitis and Sexually Transmissible Infections in Australia Annual Surveillance Report 2010*, National Centre in HIV Epidemiology and Clinical Research, The University of New South Wales, Sydney, NSW; Australian Institute of Health and Welfare, Canberra, ACT. 2007 at 26 and Figure 36.

⁸⁹ Kane Matthews, *The National Needs Assessment of Sex Workers who Live with HIV*, Scarlet Alliance, Australian Sex Workers Organisation, Sydney 2008, 24.

⁹⁰ *Ibid* at 32.

⁹¹ *Ibid* at 24.

⁹² *Ibid* at 32.

⁹³ Elena Jeffreys, Kane Matthews and Alina Thomas, 'HIV Criminalisation and Sex Work in Australia', above n86 at 130.

⁹⁴ Ally Daniel (2010) 'The sexual health of sex workers: no bad whores, just bad laws', *Social Research Briefs*, NSW Health, 19, 1.

⁹⁵ Western Australian Government, *Prostitution Bill 2011*, Part 4, Section 31(2).

⁹⁶ Australian Government Department of Health and Ageing, *Second National Strategy on Sexually Transmissible Infections 2010-2013*, Commonwealth Australia, Canberra, 2010, 6.2.

⁹⁷ Scarlet Alliance, *Mandatory or Compulsory Testing of Sex Workers for HIV and/or Sexually Transmissible Infections in the Australian context*, Briefing Paper for HASTI Committee of MACASHH, 1st August 2007, 1.

⁹⁸ *Ibid* at 2.

could be better spent.⁹⁹ Sex worker peer education initiatives remain highly effective, with a proven track record in health promotion and prevention of STI and HIV transmission. In comparison, Harcourt et al. note, 'Pressure on resources can lead to poor medical standards; including insensitive or inhumane treatment of sex workers, poor-quality examinations, and breaches of confidentiality.'¹⁰⁰

Voluntary testing remains the optimum approach to STI testing in Australia as outlined in the National Strategies. The National STI Strategy recommends voluntary patient initiated testing as a successful approach to detecting STIs, and warns that mandatory testing has 'potential to limit access to services for higher risk groups'.¹⁰¹ The National HIV Strategy states that 'principles for informed consent and confidentiality underpin high rates of voluntary testing', and aims to increase the number of people voluntarily seeking testing.¹⁰² Further, research illustrates that despite more frequent testing in Victoria, STI prevalence is uniformly low among sex workers in Sydney and Perth where screening is voluntary and negotiated between the worker and their clinician on an individual basis.¹⁰³ A sex worker's decision to seek STI and HIV testing should be an individual one, based on their workload, practices and level of risk, rather than mandated at law in a way that bears no relevance to the sex worker's own personal and professional practices.

Existing laws cover deliberate transmission

States and territories have existing public health and criminal laws that cover the knowing, deliberate or malicious transmission of STIs or HIV. These laws are already sufficient to cover the knowing or reckless transmission both in private and professional contexts. As one sex worker in the National Needs Assessment stated, 'If you go around deliberately giving people HIV it is a criminal offence and you do go to jail for it. Which I think is fair enough.'¹⁰⁴ There is no need to single out sex workers or people living with HIV as requiring separate legislation.

In comparison to the harsh legislation affecting sex workers (prison sentences and forced testing), consensual sexual activity among non-sex workers is barely regulated. As Scarlet Alliance writes, 'This creates a situation where sexual activities that are lawful within the wider community, become a criminal act when performed by a sex workers (e.g. having sex without a condom, oral sex without a condom, or having sex while HIV positive).'¹⁰⁵ The National Needs Assessment instead recommends that legislation for HIV positive sex workers reflect legislation relating to private sex.¹⁰⁶ All sexually active people should be educated to have periodical health screening for STIs and HIVs in a way that is appropriate to their type and incidences of sexual activity. As Janelle Fawkes commented during the high profile ACT case, 'HIV is transmitted by unsafe sex, not because money changes hands'.¹⁰⁷ In addition, as Kane Matthews, Elena Jeffreys and Alina Thomas write, 'Having HIV is not a death sentence and neither should it be a prison sentence.'¹⁰⁸

Criminalisation of migrant sex workers

The Prostitution Bill provides that a licence can only be issued to an Australian citizen or a permanent resident.¹⁰⁹ This means that the many sex workers on student or temporary visas who are not Australian citizens or permanent residents are immediately rendered illegal, subject to heavy penalties, experience

⁹⁹ A Samaranayake, M Chen, J Hocking, C Bradshaw, R Cumming and C Fairley (2009) 'Legislation Requiring Monthly Testing of Sex Workers with Low Rates of Sexually Transmitted Infections Restricts Access to Services for Higher Risk Individuals' *Sexually Transmitted Infections*, 85:7, 540 - 542.

¹⁰⁰ C Harcourt et al., 'Sex Work and the Law', above n16 at 124.

¹⁰¹ Australian Government, Department of Health and Ageing, Second National Strategy, Sexually Transmissible Infections, 2010-2013, Commonwealth Australia, 2010, 6.2.

¹⁰² Australian Government, Department of Health and Ageing, Sixth National Strategy on HIV, 2010-2013, Commonwealth Australia, 2010, 6.2

¹⁰³ 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.

¹⁰⁴ Elena Jeffreys, Kane Matthews and Alina Thomas, 'HIV Criminalisation and Sex Work in Australia', above n22 at 133.

¹⁰⁵ Scarlet Alliance and Nothing About Us Without Us, *Submission to Shadow Attorney General Chris Haatcher on Sex Industry Regulation in NSW*, September 2010, 5.

¹⁰⁶ Elena Jeffreys, Kane Matthews and Alina Thomas, 'HIV Criminalisation and Sex Work in Australia', above n86 at 135.

¹⁰⁷ Janelle Fawkes, 'Pos worker won't get fair trial' Scarlet Alliance Media Release, 31 January 2008, cited in Elena Jeffreys, Kane Matthews and Alina Thomas, 'HIV Criminalisation and Sex Work in Australia', above n86.

¹⁰⁸ Elena Jeffreys, Kane Matthews and Alina Thomas, 'HIV Criminalisation and Sex Work in Australia', above n86 at 135.

¹⁰⁹ Western Australian Government, Prostitution Bill 2011, Part 6, Section 52(2)(c).

reduced access to health services, denied access to peer education programs, and increasingly marginalised. New sex workers to Australia, or culturally and linguistically diverse sex workers may require targeted translated information and multilingual sex worker peer education on the support services available. Criminalising these sex workers will not reduce the prevalence of sex work, but will create significant barriers to access for outreach and sex worker peer education services. In Australia, Elaine Pearson writes in GAATW's report *Collateral Damage*:

Government attention to trafficking, as far as sex workers are concerned, has meant increased immigration raids on brothels, harassment of Asian sex workers in particular and disruption of their work. Three sex worker organizations providing outreach to migrant sex workers stated that non-trafficked migrant sex workers working legally in Australia have been wrongly detained in raids at workplaces under the suspicion that they are trafficked. Sex workers who are Australian citizens of Asian descent have also been subjected to increased harassment.¹¹⁰

Anti-trafficking raid and 'rescue' operations, and harassment and detention of Asian sex workers in visible brothels and massage parlours, have forced sex workers to adapt and change the way we work and have acted to force the industry underground. Studies of and by migrant sex workers found that in the early 2000s anti-trafficking responses in Australia were causing an increase in private, escort and lower-profile work to avoid raid activity in brothels.¹¹¹ Research shows that criminal justice approaches to trafficking rarely affect anyone other than individual sex workers. Instead, they act to curtail sex workers' freedom of movement, restrict our choice of occupation, create barriers to migrant sex workers accessing essential services, undermine opportunities to negotiate suitable workplace conditions and impede access to outreach and community service providers, who have far more difficulty gaining sex workers' trust.¹¹²

Childcare and access to knowledge

The Prostitution Bill provides that a person must not participate in 'an act of prostitution' in a place where the person knows that a child is present. The penalty for a first offence is \$24,000 and for a second or subsequent offence, imprisonment for 3 years.¹¹³ Sex workers, like the general population, take steps to ensure minors do not see or hear sex acts taking place. However, the Bill singles out sex workers for special legislation and penalty based on misinformation about who sex workers are and who our clients are. In the process, it places unnecessary burdens on working parents. Under the Bill, a person must not allow a child to enter or remain in a place from which the person knows a prostitution business is being conducted.¹¹⁴ Rather than easing the burden on working parents, these provisions make it difficult for sex workers with carer responsibilities to continue employment or to raise children. Further, the Bill provides that a person must not 'act as a prostitute for a client who is a child,'¹¹⁵ carrying a penalty of 9 months imprisonment, despite that the legal age of consent in Western Australia being 16. Heavy penalties offer nothing towards improving young people's access knowledge, information, education and safer sex equipment in order to improve their health and safety.

Criminalisation disempowers sex workers

The World Health Organisation acknowledges that 'Legislation criminalising prostitution-related activities has frequently been identified as a barrier to the promotion of safer sex practices'¹¹⁶ and research illustrates that 'health promotion for the sex industry is much easier when the target group is not covert and is working without the daily fear of a criminal prosecution.'¹¹⁷ In Sweden, the overall effect of laws criminalising the purchase of sex has been to reduce sex workers' autonomy in the workplace. As Susanne Dodillet and Petra Ostergren reflect:

The overall implications of these laws is that no one can operate a brothel, rent an apartment, room or hotel room,

¹¹⁰ Elaine Pearson, 'Australia', *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World*, Global Alliance Against Traffic in Women, October 2007, 52.

¹¹¹ Elena Jeffreys, 'Migrant Sex Workers Research in Australia', Presentation to the 4th Australian National Symposium on Sex Work: Nothing About Us Without Us, 2008 at 8; Jeffrey Dabhadatta et al., 'Changes in Migration Status and Work Patterns in Asian Sex Workers attending a Sexual Health Centre', 2008, 43; Scarlet Alliance, *Submission to Commonwealth Attorney General's Department*, 2004, 4.

¹¹² Elaine Pearson, *Collateral Damage*, above n110 at 52.

¹¹³ Western Australian Government, Prostitution Bill 2011, Part 5, Section 36.

¹¹⁴ Western Australian Government, Prostitution Bill 2011, Part 5, Section 37.

¹¹⁵ Western Australian Government, Prostitution Bill 2011, Part 5, Section 39.

¹¹⁶ Ministry of Women's Affairs cited in Jan Jordan, *The Sex Industry in New Zealand: A Literature Review*, Ministry of Justice, 2005 at 62.

¹¹⁷ C Harcourt et al., 'Sex Work and the Law', above n16 at 126.

assist with finding clients, act as a security guard or allow advertising for sex workers. This in turn implies that sex workers cannot work together, recommend customers to each other, advertise, work from property they rent or own or even cohabit with a partner (since that partner is likely to share part of any income derived from sex work).¹¹⁸

Decriminalisation is the proven best-practice model for sex industry legislation

It is widely recognised that decriminalisation is the optimal model for sex work legislation. The majority of research clearly demonstrates that health promotion initiatives are best supported by the decriminalisation of sex work.¹¹⁹ A decriminalised framework 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, and does not single out sex workers for specific legislation. In doing so, a decriminalised system removes barriers to HIV and STI prevention, amplifies opportunities for outreach and magnifies capacities for sex worker peer education. Decriminalisation not only supports strong public health outcomes, including negligible incidences of STIs and HIV, but also provides a sustainable regulatory approach to wider health issues, including physical and emotional health, occupational health and safety, and human, civil, and industrial rights of sex workers, enhancing our capacity to engage in health promotion within the broader community. Following favourable experiences in New Zealand, decriminalisation supports sex worker self-determination in a manner that maximises compliance, increases transparency, reduces police corruption and minimises discrimination against sex workers.¹²⁰

Evidence-based research demonstrates that harsh legislation and law enforcement is not justified, but rather 'breed[s] corruption and seriously damage[s] public health'.¹²¹ In their report, Harcourt et al. note that 'most prohibitionist regimes only achieve their aim through the suppression of democratic and human rights'.¹²² Decriminalisation is the only model to protect sex worker human rights, industrial rights, civil rights, health and safety. The continued criminalisation of sex workers, particularly street-based and HIV-positive sex workers, in addition to licensing practices of mandatory STI and/or HIV testing and police registration, continue to have adverse consequences upon these rights. The Department of Health and Ageing's 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'.¹²³ The total decriminalisation of sex work across all states and territories is consistent with the approach of the National Strategies and remains the optimal model for the wellbeing of sex workers, clients and the community.

Research evaluating the impact of decriminalisation in New Zealand, five years after the enactment of the Prostitution Reform Act 2003, provides evidence that decriminalisation does not lead to an increase in the size of the sex industry. The New Zealand Prostitution Reform Committee, noting that the purpose of the Act was to decriminalise prostitution, safeguard the human rights of sex workers, promote the welfare and occupational health and safety of sex workers and contribute to public health, found that the public fear about an expanding sex industry failed to manifest – rather the numbers of sex workers in Christchurch had stayed approximately the same between 1999 and 2006 despite the decriminalisation of sex work.¹²⁴ Instead, decriminalisation has proved to bring enormous benefits for community health, safety and rights.

¹¹⁸ Susanne Dodillet and Petra Ostergren, 'The Swedish Sex Purchase Act' above n7 at 4.

¹¹⁹ C Harcourt, J O'Connor, S Egger, C Fairly, H Wand, M Chen, L Marshall, J Kaldor, B Donovan, (2010), 'The Decriminalisation of Prostitution is Associated with Better Coverage of Health Promotion Programs for Sex Workers', *Australian and New Zealand Journal of Public Health*, 34:5 at 482.

¹²⁰ Scarlet Alliance and Nothing About Us Without Us, *Submission to Shadow Attorney General Chris Haatcher on Sex Industry Regulation in NSW*, September 2010 at 4.

¹²¹ C Harcourt et al., 'Sex Work and the Law', above n16 at 126.

¹²² *Ibid.*

¹²³ Australian Government Department of Health and Ageing, *Sixth National HIV Strategy 2010-2013*, Commonwealth of Australia, Canberra, 2010 at 6.4, emphasis added.

¹²⁴ New Zealand Government, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003*, Ministry of Justice, Wellington, 2008, 13.

Scarlet Alliance, Australian Sex Workers Association submission on the Western Australian Prostitution Bill 2011, 29th July, 2011

Conclusion

Scarlet Alliance strongly opposes the Western Australian Prostitution Bill 2011 as out of touch with available evidence, current epidemiology, public health approaches, and Australian and international best practice for sex industry regulation. Scarlet Alliance advocates that the Bill will result in low compliance and a two-tiered sex industry with the majority of the industry operating underground. The approach will hinder important health promotion service delivery and will result in excessive compliance costs. Scarlet Alliance recommends that the Western Australian government adopt decriminalisation as the model of sex industry regulation, which is proven to have positive public health outcomes for sex workers and the wider community, and low-cost high compliance. Decriminalisation also supports the development of industry occupational health and safety standards. Scarlet Alliance submits that it is crucial that the Western Australian government actively includes sex worker representatives in the drafting, monitoring and evaluating of any law reform.

Recommendations

Scarlet Alliance recommends:

- That the proposed licensing model be immediately abandoned as unworkable, counter-productive and expensive;
- That the Western Australian government recognise that licensing and criminal approaches to sex work law reform have *not* been proven to reduce the size of the sex industry, and that the bill will *fail* to have the desired effect of reducing the incidence of sex work and the size of the industry. By contrast, research shows that where sex work has been decriminalised, the size of the sex industry has *not increased*;
- That sex work be recognised as a legitimate form of work and that all aspects of the Western Australian sex industry, including brothel, private, escort and street-based sex work, be decriminalised;
- That any future legislation sits within a framework that recognises the civil and industrial rights of sex workers, and that the health, safety and wellbeing of sex workers is prioritised over all other industry or community concerns;
- That people working in the sex industry be afforded the same legal rights as other Western Australian citizens, including police protection and access to administrative law processes;
- That sex industry businesses be afforded the same legal rights as other businesses, without arbitrary and discriminatory restrictions on advertising, employment, service provision or business location;
- That the location of brothels be determined according to the same local council guidelines as other service-based businesses and that the relegation of brothels to isolated industrial areas be recognised as inappropriate and dangerous;
- That police be removed from any administrative or regulatory role in the sex industry and instead be charged with protecting sex workers from violence; and
- That the Western Australian Government recognise sex worker representatives as experts in their field that must be consulted directly on issues of sex work policy.