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03/11/2021

Department of Justice
Office of the Secretary
GPO Box 825 Hobart TAS 7001

RE: Proposed amendments to the *Sex Industry Offences Act 2005* in the *Justice and Related Legislation (Miscellaneous Amendments) Bill 2021*

To the Department of Justice,

Thank you for the opportunity to respond to the draft *Justice and Related Legislation (Miscellaneous Amendments) Bill 2021* and raise our deep concern about the proposed amendment to the definition of 'sexually transmissible infection' under the *Sex Industry Offences Act 2005*. We are disappointed that there has been no consultation or contact with Scarlet Alliance Tasmania Project regarding this amendment as the body representing sex workers in Tasmania.

Scarlet Alliance, Australian Sex Workers Association is the national peak body representing a membership of individual sex workers and sex worker networks, groups, projects, collectives and organisations from around Australia since 1989. Through our objectives, policies and programs, Scarlet Alliance aims 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, build their own alliances and choose where and how they work. Scarlet Alliance represents sex workers on a number of government and non government committees and advisory mechanisms.

The Tasmanian Sex Worker Project is a state-based project of Scarlet Alliance. This project has the highest level of contact with sex workers in Tasmania and is best positioned to consult with Tasmanian government as to best practice and policy around sex worker rights, health and safety.

Please do not hesitate to contact CEO, Jules Kim on [REDACTED] if you have any further questions or require any clarifications.

Sincerely,

Jules Kim
CEO

EXECUTIVE SUMMARY

The *Justice and Related Legislation (Miscellaneous Amendments) Bill 2021* proposes to amend the definition of ‘sexually transmissible infection’ (STI) within s 3(1) of the *Sex Industry Offences Act 2005 (the Act)*. This definition affects the operation of section 12 of the *Sex Industry Offences Act*, which establishes safer sex practices that must be adopted in a sex work setting. This section is already problematic for sex workers, as the criminalisation and penalisation of STI and BBV is a direct barrier to testing, treatment and prevention. Excessively broadening the STI definition increases that burden, and is impractical and out of step with other jurisdictions.

The proposed amendment is not grounded in public health evidence and extends beyond any other definition of STI within Australia. In effect, the amendment is so broad and unspecific that it will be impractical, if not impossible, for Tasmanian sex workers to comply. Further, a definition that relies on common terminology and is not based on accepted public health definitions is dangerous and impractical.

Broadening the definition of STI for the purposes of the Act will not promote the health and safety of sex workers or the community. Instead, the amendment will extend the scope of punitive regulations that are already creating barriers for Tasmanian sex workers seeking healthcare. There is a complete lack of evidence-based reasoning as to how the amendment will benefit sex workers or the wider community. Further, the introduction of ‘herpes’ and ‘genital warts’ complicates the ‘reasonable steps’¹ that sex workers can take when preventing the ‘acquiring and transmission’ of these infections. This is because workers can not take reasonable steps to prevent these infections through prophylactic use, these infections are common amongst the general population and often, these infections are undetectable. Further they are not routinely tested for within standard sexual health testing. Introducing them into the definition of STIs is highly discriminatory, given that they are not criminalised nor penalised within the general Tasmanian population.

We strongly recommend that the government re-draft the amendment to omit its current definition, in particular the inclusion of herpes and genital warts and introduce the current STI identified by the National Notifiable Disease Surveillance System.²

ISSUES WITH THE PROPOSED AMENDMENT TO THE *SEX INDUSTRY OFFENCES ACT 2005*

The proposed amendment is too broad

The *Justice and Related Legislation (Miscellaneous Amendments) Bill 2021* proposes to amend the definition of ‘sexually transmissible infection’ (STI) within s 3(1) of the *Sex Industry Offences Act 2005*. The need for amendment is understandable as the current definition references Table 1 of the *Guidelines for Notifiable Diseases*, which is no longer in force. However, the proposed amendment

¹ *Sex Industry Offences Act 2005* s 12(3).

² Communicable Diseases Network Australia, *Australian national notifiable diseases and case definitions*, Department of Health, Commonwealth Government of Australia, 30 June 2021, accessed 27 October 2021 <<https://www1.health.gov.au/internet/main/publishing.nsf/Content/cdna-casedefinitions.htm#foreword>>.

does not reference the STI in the current Tasmanian *Guidelines for Notifiable Diseases*,³ nor the Communicable Disease Network Australia's (CDNA) current definition of STI.⁴ It instead imports the definition from the Macquarie Dictionary. Adopting a dictionary definition is a reckless and troubling choice given the wealth of existent public health evidence and guidelines as to best practice around defining notifiable STI.

The use of the term 'any other prescribed infection' allows far too much scope and is far too ambiguous and discretionary. It also lacks clarity for those seeking to comply with the legislation. Additionally, the use of the term 'herpes' without specificity as to the infection site is incredibly broad, and the inclusion of 'genital warts' broadens the definition to such an extent that its application is impractical and ambiguous for sex workers to navigate in compliance. It is essential that we have clarity around the laws that penalise and criminalise aspects of our work. Without this clarity, it will become increasingly difficult for sex workers to navigate and comply with Tasmania's already complex regulatory system.

The decision to implement this definition is not supported by reason or evidence. This approach also goes against the guiding principles of the *Fourth National Sexually Transmissible Infections Strategy* which support a 'high-quality, evidence-based and equitable response to STI'.⁵ These principles require that sex workers are meaningfully involved in government responses to STI, that we can participate fully in society without stigma and discrimination, and that we have equitable access to healthcare.⁶ The government's decision to import a dictionary definition that will affect the health and lives of sex workers in Tasmania without any meaningful consultation with sex workers or Scarlet Alliance stands in violation of these nationally-recognised guiding principles. The process and language of this proposed amendment ignores the extensive advocacy of Tasmanian sex workers, whose expertise in STI prevention strategies is an integral part of our workplace health and safety knowledge.

In effect, this definition will undermine the government's intent to reduce rates of STI amongst sex workers and the general population by creating barriers to prevention, testing and treatment by legally enforcing broad and routinely untested for infections through the Act.

The proposed amendment is burdensome, discriminatory, out-of-step with other jurisdictions, and lacks evidence base

Broadening the definition of STI will not promote the health and safety of sex workers. Instead, the amendment will extend the scope of punitive regulations that are already burdensome, unnecessary

³ Director of Public Health, *Guidelines for Notifying Diseases and Food Contaminants*, Department of Health and Human Services, Tasmanian Government, 18 January 2016, accessed 26 October 2021 <https://www.dhhs.tas.gov.au/_data/assets/pdf_file/0003/53319/Guidelines_for_Notifying_Diseases_and_Food_Contaminants_FINAL_ISSUED.pdf>.

⁴ National Notifiable Disease Surveillance, *Australian national notifiable diseases by disease type*, Department of Health, Commonwealth Government of Australia, 2021, accessed 26 October 2021 <<https://www1.health.gov.au/internet/main/publishing.nsf/Content/cda-surveil-nndss-casedefs-distype.htm>>.

⁵ Department of Health, *Fourth National Sexually Transmissible Infections Strategy*, 2018, Commonwealth Government of Australia, p.8.

⁶ Ibid.

and discriminatory. There is a complete lack of evidence-based reasoning as to how the amendment will benefit sex workers or the wider community.

Sex workers are as concerned about our health and that of our communities as non-sex workers, if not more so. Enforcing public health provisions that apply only to sex workers, such as under the *Sex Industry Offences Act 2005*, is discriminatory as it implies that sex workers need to be treated punitively to care about and implement safer sex strategies in our workplaces. In fact, we are experts in sexual health testing, treatment and prevention. This is evidenced by our high levels of PPE use and STI and BBV testing⁷ and that rates of BBVs and STI within our community are equal to or lower than the general population⁸. The success of the public health response for sex workers has been due in no small part to the work of sex worker peer organisations, projects and groups providing formal and informal peer education, community development and health promotion services to sex workers, including outreach and distribution of PPE - not through government and law enforcement intervention. The federal government recognises this in its current *STI Strategy*⁹ that Scarlet Alliance plays a critical role in maintaining the low rates of STI amongst sex workers. It is integral that the Tasmanian government afford the Scarlet Alliance and the Tasmanian sex worker community the same recognition and consultation.

The amendment is also out of step with other Australian jurisdictions and accepted public health definitions of STI. While only the Queensland and Victorian sex work legislation currently include genital warts and genital herpes in their definitions of STI, these provisions are more specific than the proposed Tasmanian amendment: '*genital and anal herpes (when lesions are visible)*' and '*genital and anal warts (when lesions are visible)*'.¹⁰ This specificity is significant, because it acknowledges the uncertainty in detecting herpes infections, which are often asymptomatic. No other jurisdictions include genital warts or herpes in their definitions, and the Victorian government is currently in the process of repealing this framework from the sex work legislation. The lack of infection site (such as genital and anal) in the proposed Tasmanian definition's reference to herpes and the lack of specificity as to the presence of visible lesions is highly problematic for sex workers.

If this amendment is passed in Tasmania, it will be the most broad and unspecific definition of STI across all Australian jurisdictions. This is clearly out of step with the increasing recognition that punitive public health measures are not effective or safe ways of achieving public health goals or improving the health of sex workers and the broader community. Broadening the scope of punitive regulations also increases the risk that sex workers will face vexatious complaints, which in turn places an unnecessary burden on the public health system.

⁷ E. Jeffreys, J. Fawkes and Z. Stardust, 'Mandatory Testing for HIV and Sexually Transmissible Infections among Sex Workers in Australia: A Barrier to HIV and STI Prevention', *World Journal of AIDS*, 2012, 2, p. 203-211, accessed 02 November 2021 <<https://www.scirp.org/html/22595.html>>.

⁸ Kirby Institute. HIV, viral hepatitis and sexually transmissible infections in Australia: annual surveillance report 2018. Sydney: Kirby Institute, UNSW Sydney; 2018.

⁹ Department of Health, *Fourth National Sexually Transmissible Infections Strategy*, 2018, Commonwealth Government of Australia, p.6.

¹⁰ *Sex Work Regulations 2016* (VIC) s 6 and *Prostitution Act 1999* (QLD) Schedule 4.

The proposed amendment is impractical for sex workers to comply with

Under the *Sex Industry Offences Act 2005*, the definition of STI is mentioned only in section 12, which sets out the safer sex practices that must be adopted in a sex work setting. Section 12 requires that sex workers and clients must:

- use prophylactics when there is a risk of acquiring or transmitting an STI¹¹ and;
- take all reasonable steps to minimise the risk of acquiring or transmitting an STI.¹²

The additions of herpes and genital warts in the proposed amendment makes this section of the *Sex Industry Offences Act* impossible for sex workers, and indeed the rest of the Tasmanian community, to comply with. This is due to the epidemiological characteristics of both infections.

Genital warts are caused by the human papilloma virus (HPV), which is carried by 90% of the population. Transmission can occur whether or not warts are visibly present, so sex workers conducting client health checks may not actually be able to detect such an infection in a client, nor may they know they are themselves infected. Because HPV is so common and treatment only occurs where warts are present and visible. HPV is not part of the sexual health testing offerings in Tasmania, except in the cause of concern for cancerous strains. This eliminates another prevention pathway for sex workers, and places an unnecessary burden upon us to do something that not even the health system itself has undertaken. The logic used to arrive at this proposed inclusion is not apparent, and goes against the recommendations and practices of sexual health experts.

Herpes is also incredibly common and can be transmitted with or without the presence of visible lesions. Like HPV, the herpes simplex virus is not part of routine STI testing in Tasmania, and while a test may accompany visible lesions, viral shedding may already have occurred before these present. There are simply no 'reasonable steps' a sex worker can take to prevent transmission in these cases.

Enforcing mandatory prophylactic use is a barrier to health for sex workers. Better health outcomes are achieved in jurisdictions where mandatory prophylactic use is not in place within legislative frameworks. While this provision should be challenged and the *Sex Industry Offences Act* should be repealed in Tasmania, this is outside the scope of this submission. What is most relevant here is that mandatory condom use **will not prevent the transmission of HSV or HPV in all cases**, and thus has no place in the definition of STI for the purposes of the *Sex Industry Offences Act 2005*.

RECOMMENDATION

Re-draft the proposed amendment to align with the CDNA's definition of STI.

We recommend that the government re-draft the proposal so that it reads:

Section 3(1) is amended by omitting the definition of sexually transmissible infection and substituting the following definition:

¹¹ *Sex Industry Offences Act 2005* (TAS) s 12(1).

¹² *Ibid* s 12(3).

sexually transmissible infection means a disease specified as a notifiable sexually transmissible infection in the National Notifiable Disease Surveillance System.¹³

Alternatively import the STI definition provided by the National Notifiable Disease Surveillance System:

Section 3(1) is amended by omitting the definition of sexually transmissible infection and substituting the following definition:

sexually transmissible infection means an infection that is transmitted through sexual contact between people, including the following:

- (a) Chlamydia
- (b) Donovanosis
- (c) Gonococcal infection
- (d) Syphilis-congenital
- (e) Syphilis-less than 2 years duration
- (f) Syphilis-more than 2 years duration or unspecified duration

At minimum the proposed definition of STI in the Bill must remove 'genital warts', 'herpes' and 'any prescribed infection' so it would read as follows:

Section 3(1) is amended by omitting the definition of sexually transmissible infection and substituting the following definition:

sexually transmissible infection means an infection that is transmitted through sexual contact between people, including the following:

- (a) syphilis;
- (b) gonorrhoea;
- (c) chlamydia;
- (d) human immunodeficiency virus.

¹³ National Notifiable Disease Surveillance, *Australian national notifiable diseases by disease type*, Department of Health, Commonwealth Government of Australia, 2021, accessed 26 October 2021
<<https://www1.health.gov.au/internet/main/publishing.nsf/Content/cda-surveil-nndss-casedefs-distype.htm>>.