



Comment on:

Sex workers, rights and regulation in the ACT

June 2007

INTRODUCTION

ACTCOSS acknowledges that Canberra is built on the traditional lands of the Ngunnawal people. We pay our respects to their elders and recognise the displacement and disadvantage they have suffered since European settlement. ACTCOSS celebrates the Ngunnawal's living culture and valuable contribution to the ACT community.

The ACT Council of Social Service Inc. (ACTCOSS) is the peak representative body for not-for-profit community organisations, people living with disadvantage, and low-income citizens of the Territory. ACTCOSS is a member of the nationwide COSS network, made up of each of the state Councils and the national body, the Australian Council of Social Service (ACOSS).

ACTCOSS' objectives are representation of people living with disadvantage, the promotion of equitable social policy, and the development of a dynamic, collaborative and sustainable community sector.

The membership of the Council includes the majority of community based service providers in the social welfare area, a range of community associations and networks, self-help and consumer groups and interested individuals.

ACTCOSS receives funding from the Community Services Program (CSP) which is funded by the ACT Government.

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Introduction

This paper provides an overview of the legislative framework relating to sex work in the ACT. Its purpose is to identify the rights of sex workers and the legal restrictions on the sex industry. As such, it is hoped that this document will play a role in raising awareness about the rights and responsibilities of sex workers and brothel owners. It is also hoped that the recommendations below will be considered by government with a view to strengthening sex worker rights protections and improving sex worker safety and support in the ACT. At the outset, it should be acknowledged that the ACT currently leads the way nationally in protecting the rights, health and wellbeing of sex workers. However, this paper responds to reports that, despite legislative reform to prohibit discrimination against sex workers, few sex workers have sought to enforce their rights. It highlights a number of barriers to rights enforcement, including stigma, fear, scepticism and lack of awareness of rights mechanisms.

The legislative and regulatory framework

Sex work has been decriminalised in the ACT, and a minimum regulatory framework now operates under the *Prostitution Act 1992*.¹ Under this framework, brothels and sole operators are required to register with the Registrar of Brothels and Escort Agencies. This includes sole operators. Significantly, sole operators are afforded privacy protection under the Act, section 11(4) requiring that the registrar must not make the names or addresses of sole operators available for public inspection. However, section 11(5) states that the privacy protection does not prevent an authorised person in the exercise of their functions (e.g. police officers and public servants) from inspecting the list of sole operators registered. As a result, some private operators are reluctant to register for fear that police or other officials will access their record. In addition, there is no requirement under the Act that records be deleted after a period of time, leaving this to the discretion of the Registrar. The indefinite availability of the record is another disincentive to sole operators registering.

In light of these issues, Scarlet Alliance, the Australian Sex Workers Association, has expressed opposition to registration requirements on the basis that 'registration compounds stigma and otherness', creates a permanent record, thereby impeding exit options for sex workers and undermines privacy rights.² They have expressed concern that registration creates a barrier to sex workers working legally due to fears as to who might be able to access information and how the information is secured.³

Provided they are registered, the law allows for sex workers to work privately at home as sole operators. However, it remains illegal for two

¹ Linda Banach, *Unjust and Counter-Productive: The Failure of Governments to Protect Sex Workers from Discrimination*, Scarlet Alliance and Australian Federation of AIDS Organisations, November 1999.

² Ibid.

³ Ibid.

sex workers to operate from the same residential premises. This is an attractive option for some workers, as it enables them to have the flexibility and independence of private work, with the security provided by having another worker in the premises. Under current laws, this arrangement is not a legal option for sex workers, and those who work with another sex worker do so at risk of prosecution. We suggest that the proposal discussed by the Sex Industry Consultative Group to expand the definition of private worker to two operators be revisited.

In addition, the *Prostitution Act 1992* provides that it is an offence to:

- operate a brothel otherwise than in a prescribed location (with the exception of escort agencies and premises used by a single worker)⁴;
- solicit for the purposes of offering or procuring commercial sexual practices (maximum penalty of three years)⁵;
- fail to take reasonable steps, as a brothel owner, to ensure that a sex worker does not provide commercial sexual services if the sex worker is infected with an STD⁶;
- provide or receive sexual services if a person knows, or could be reasonably expected to know, that they have been infected with a sexually transmissible disease (STD)⁷; or to
- perform or receive certain sexual services without a prophylactic⁸. This applies to both sex workers and clients. There is a related obligation on brothel owners to ensure that this practice does not occur on the premises.

Many national and international sex worker advocates oppose limitations on the sectors which sex workers may work on the basis that they limit sex workers' choice of preferred working environment. It is unclear whether there are similar concerns among the ACT sex worker community; however anecdotal evidence suggests that very few sex workers currently solicit illegally. Whether more wish to and would do so were this sector of the industry to be decriminalised is not known.

Discrimination

The ACT is the only Australian jurisdiction to protect all sex workers from discrimination on the grounds of their occupation. Section 7(1)(m) of the *Discrimination Act 1991* (ACT) prohibits discrimination on the grounds of profession, trade, occupation or calling. In Queensland, there is more limited protection against discrimination for *legal* sex workers.⁹ In all other states and territories, sex workers continue to lobby for discrimination

⁴ Section 18.

⁵ Section 19.

⁶ Section 24.

⁷ Section 25.

⁸ Section 27.

⁹ Discrimination on the grounds of 'lawful sexual activity' is prohibited under section 7 of the *Anti-Discrimination Act 1991* (Qld).

laws¹⁰. Complaints of discrimination under the ACT *Discrimination Act* are to be made to the Discrimination Commissioner. The matter can then be referred by the Commissioner to the Discrimination Tribunal. A party may appeal a Tribunal decision to the ACT Supreme Court on a question of law.

Discrimination affects sex workers in a myriad of ways in their professional and personal lives; in judgments made by family and friends, the provision of goods and services, planning laws and decisions, the response of some police to sex worker complaints and in the differential application of sexual assault laws. Many sex workers are reluctant to tell their family and friends how they are employed. Fear of discrimination can also limit sex worker participation in community activities. For some women, there is an additional fear that revealing their occupation may jeopardise custody of their children. Fear of discrimination is a key impediment to sex worker complaint-making to the police and to human rights and other regulatory bodies. In addition, for sex workers working illegally, either as unregistered sole operators or as two workers in one premises, there is an added fear of being prosecuted if they report a violent incident to police. This group may be at heightened risk of abuse as clients may know of their reluctance to report crime.¹¹

Labour rights and OH&S

The work status of sex workers remains difficult to determine due to the lack of legal testing. Most sex workers are treated as independent contractors by brothel owners, rather than employees. When treated as contractors, sex workers do not receive a base rate of pay, are not paid for hours spent waiting for clients, are not paid for other work done on brothel premises (e.g. welcoming clients, cleaning). It also means that many sex workers are not entitled to superannuation, leave entitlements or workers compensation.¹² It has been suggested that, in fact, the reality in these workplaces is that sex workers are employees, with employee rights and obligations.¹³ Consultation feedback suggests that sex workers, like many other Canberrans, are struggling with the rising price of rents, housing and fuel. As a consequence, and partly due to the status of sex workers as independent contractors, workers are having work longer hours to meet living costs.

ACTCOSS suggests that further research is needed into current labour practices in the ACT sex industry. Such research should seek to identify

¹⁰ See for example, a recent protest on 3 June 2007 at Sydney Opera House calling for anti-discrimination laws in NSW. 'Sex workers want anti-discrimination laws', *The Australian*, June 3 2007.

¹¹ Linda Banach & Sue Metzenrath, *Principles for Model Sex Industry Legislation*, produced by the Scarlet Alliance and the Australian Federation of AIDS Organisations, Sydney, 2000, at 21.

¹² Linda Banach, *Unjust and Counter-Productive: The Failure of Governments to Protect Sex Workers from Discrimination*, Scarlet Alliance and Australian Federation of AIDS Organisations, November 1999 at 15.

¹³ David Edler, *A Guide to Best Practice: Occupational Health and Safety in the Australian Sex Industry*, produced by the Scarlet Alliance, accessed at: <http://www.nswp.org/pdf/AU-OHSGUIDE.PDF>.

the employment status of sex workers and the consequences of this status in terms of rights and entitlements. Sex workers should be meaningfully consulted in this process to ascertain priorities and preferred employment relationships.

The sex industry is bound by the *Occupational Health and Safety Act 1989* (ACT). In addition, Occupational Health & Safety (OH&S) standards have been developed for the ACT sex industry.¹⁴ These standards were originally developed by the Sex Industry Consultative Group, an advisory body to the Attorney General which included a sex worker representative. It was updated in consultation with the Sex Worker Outreach Program (SWOP), among other interested parties. We understand that ACT Workcover carries out workplace OH&S inspections of brothels. Inspections of sole operator premises are not carried out. Although employers owe obligations to employees and 'deemed employees' under the Code of Practice, they also have a duty in relation to the health and safety of third parties who are not employees.¹⁵ However, as long as sectors of the sex industry remain illegal, for example, unregistered sole operators and paired sex workers, occupational health and safety standards cannot be comprehensively implemented.¹⁶

Making rights a reality

By comparison to other Australian states and territories, the ACT provides a less hostile work environment for sex workers due to decriminalisation, discrimination laws, limited police interference and good OH&S practices. However, this does not mean that sex workers feel informed of their rights and empowered to enforce them. Indeed, there are numerous obstacles to the enforcement of rights. Principally, there is a lack of awareness of the existence of rights under the *Discrimination Act* and of complaint and enforcement mechanisms. Additionally, many sex workers are not 'out' as sex workers. Fear of exposing one's occupation as a sex worker is likely to act as a major deterrent to complaint making.

As far as we can ascertain, there have been very few discrimination actions brought by sex workers under the *Discrimination Act* (ACT). We understand there have been several complaints made against the *Canberra Times* in relation to advertising space. In one case, the complainant alleged that the *Canberra Times* had discriminated against her on the basis of her occupation as a sex worker by requiring that she pre-pay for advertising and by precluding her from placing 'spot' advertisements throughout the newspaper.¹⁷ Although on appeal the Supreme Court found that the complainant had been treated unfavourably on the basis of her occupation, it was held that the conditions which had the effect of causing disadvantage were reasonable in the circumstances.

¹⁴ See ACT Workcover, *ACT Sexual Services Industry Code of Practice*, March 2005.

¹⁵ See ACT WorkCover, *ACT Sexual Services Industry Code of Practice*, March 2005 at 10.

¹⁶ Linda Banach & Sue Metzenrath, *Principles for Model Sex Industry Legislation*, produced by the Scarlet Alliance and the Australian Federation of AIDS Organisations, Sydney, 2000, at 22.

¹⁷ *Judith Edgley v Federal Capital Press of Australia Pty Limited* [1999] ACTSC 95.

Discussions with sex worker advocates suggest that the outcome of this case has discouraged other sex workers from bringing actions. A comparison was made with the situation in Queensland, which has a similar provision. In that state, a number of complaints have been made and successfully resolved between the parties, with resulting changes in policy or practice. One hypothesis suggested to explain this difference is that there is a greater level of support provided in Queensland to sex workers during the complaint process by the Discrimination Tribunal. ACT sex workers are reportedly also concerned about privacy, with no guarantee that a suppression order will be made in the Tribunal or later in the appeal process to protect their confidentiality.

Lack of awareness, particularly affecting CALD workers

It is difficult to ascertain levels of awareness among sex workers about rights and entitlements. However, it seems likely that many sex workers are unaware of their rights under the *Discrimination Act*, particularly those from interstate, given that the ACT is the only Australian jurisdiction to recognise discrimination on the grounds of 'occupation'. Further, there are challenges involved in distributing information to sex workers, particularly those working privately and those from culturally and linguistically diverse (CALD) backgrounds. SWOP has produced a number of health related brochures in key Asian languages for distribution throughout Asian sex worker networks. It would be useful for information on rights and entitlements to be similarly distributed. Other challenges are reported to arise due to the transient nature of the Asian sex worker population in the ACT.

At present there is no designated CALD sex worker outreach program in the ACT. However, SWOP ACT provides health information and advice to CALD workers through its website and the translated pamphlets mentioned above. The lack of a specific CALD outreach service is partly due to the challenges involved in recruiting peer based CALD outreach workers in the ACT, where many sex workers are unwilling to publicly identify as such. It also reflects some of the more general workforce and recruitment challenges facing the community sector. As a consequence of this service gap, CALD sex workers may be less informed of their rights and have lower rates of accessing sex worker health and welfare services. A CALD sex worker outreach program has been established in South Australia within the Sex Industry Network (SIN) with great success. We recommend that attempts be made to address identified barriers to the establishment of an ACT peer- based CALD sex worker program.

Stigma and discrimination

Issues of discrimination and stigma have been raised above and represent key impediments to complaint making. As suggested below, one necessary response to these issues is the funding of community education programs in the ACT as well as strategies to empower sex workers to make complaints.

Lack of unionisation

Although sex workers are able to join trade unions, our research suggests that there are currently very few, if any, sex worker union members in the ACT. The Liquor, Hospitality and Miscellaneous Union (LHMU), although the relevant ACT union, reported that it did not have any sex worker members, despite some efforts to unionise the industry several years ago. For their part, sex workers expressed some scepticism about the willingness of unions to advocate on their behalf once they are members, fearing that discrimination might operate to impede advocacy. This perception was supported by anecdotal evidence relating to other unions where those involved in the adult entertainment industry, for example, were treated differently from other retail workers who were union members. There may also be concerns about confidentiality, with unions required to make their membership available. Despite these challenges, a union could play an important role in ensuring that OH&S standards were being observed by brothel owners, and seeking better industrial entitlements for sex worker members.

No ACT sex worker advocacy body

There is no designated funding in the ACT for broad sex worker advocacy. SWOP ACT is funded to provide health support and outreach to sex workers, but not to engage in law and policy advocacy. It manages to perform an educative role, with some support from the AIDS Action Council of the ACT, publishing health information in a number of key Asian languages and giving talks in educational settings on issues of sex worker health, stigma and legal status. Scarlet Alliance, a national representative body for sex workers, includes state based sex worker organisations and programs as members. While it is active on national, state and territory issues, Scarlet Alliance does not have the capacity to provide direct support to workers, a role better suited to a local peer based sex worker organisation. Finally, the ACT Sex Industry Consultative Group, which had a sex worker representative, was disbanded more than five years ago. There is currently no government consultative body that represents the interests of sex workers.

The lack of funding for sex worker advocacy in the ACT has two consequences. One is that there is no vehicle for issues affecting sex workers to be highlighted and discussed with the ACT government. The other is that no body is adequately funded to perform a broad educative role around sex workers, their rights and entitlements, both to the sex work industry and to the broader community. Although SWOP attempts to do this on limited funding, it is currently not resourced to conduct broader community education campaigns. We suggest that advocacy funding should be drawn from, at least, health and justice funding sources, to facilitate advocacy on legal rights and industrial rights as well as around health issues.

Conclusion and recommendations

The ACT currently leads the way nationally in the protection of sex worker rights, health and wellbeing through decriminalisation, good OH&S practices and the recognition of occupation as a ground of discrimination. However, there is more work to be done in removing barriers to rights enforcement and enhancing sex worker safety, health and wellbeing. The following recommendations seek to address these issues.

Recommendations

ACTCOSS recommends that:

- A sex worker consultative body be established to represent sex worker interests, inform government of current issues and provide input into government legislative and policy processes.
- The Government revisit proposals to expand the definition of 'private worker' to include two operators, to enhance sex worker safety, improve OH&S and enable sex workers to choose their preferred working environment. This issue should be explored in consultation with sex worker representatives.
- Information be provided to sex workers about the sex worker registration process and the level of confidentiality of all information obtained. A review of the registration process should also be undertaken, in order to improve privacy protection and provide for the deletion of records on request or after a period of time, to thereby reduce obstacles to registration.
- Government funding be allocated to enable the publication and broad distribution of information about sex worker rights and complaint mechanisms, in English and relevant other languages, in consultation with sex worker representatives or services.
- Additional support services be provided to sex workers during discrimination complaints processes.
- The Government review and strengthen privacy protections for sex workers involved in discrimination complaint proceedings.
- Research be conducted into labour issues in the sex industry, to discuss the employment status of sex workers and the consequences of this status in terms of rights and entitlements. Sex workers should be meaningfully consulted in this process.
- Further resources be directed to the provision of support services to CALD sex workers, with attempts to address some of the workforce and social barriers to establishing a peer-based, CALD sex worker outreach program.
- Sex worker advocacy and community education be resourced, such that peer based community organisations are able to represent local sex workers and raise concerns with government. This is essential to raise awareness among sex workers of rights but also to combat discrimination and stigma in the community.