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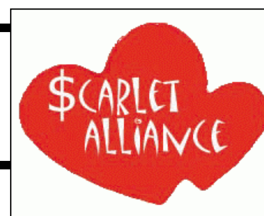

'*Australian Sex Industry Law-who has a say?*' has been adapted from the paper '*Decriminalisation, a best practice model, the Australian experience*' delivered by Janelle Fawkes, President, Scarlet Alliance at the *"Out in the Sun – Legal Constraints and Possibilities in Protecting the Rights of Sex Workers"* An International Conference on the Sex Industry and Workers' Rights Co-organised by Ziteng and the Department of Applied Social Studies, City University of Hong Kong May 2, 2004.

Australian Sex Industry Law - who has a say?

Janelle Fawkes, President

Decriminalisation = 'all laws criminalising the sex industry be removed and the industry be regulated through standard business, planning and industrial codes/laws'. (Metzenrath, 2000).

Australian sex industry laws are developed at a State and Territory level. This, along with the vast size and division of Australia into 6 States and 2 Territories, provides an ideal case study of a range of models of sex industry law reform and their outcomes. The various models range from Decriminalisation (except street work) through to complete Criminalisation, with Legalisation somewhere in between. Furthermore, each sector of the industry (brothel, massage parlour, private, escort and street based sex work) is dealt with differently and varies from the way that same sector is regulated in bordering states and territories.

In this paper I use the Australian experience to outline factors currently contributing to the development of sex industry law. I focus on recent law reform proposals by Australian State and Territory Governments and the involvement of sex workers and their organisations. Finally, I would like to share with you the ten issues which are not supported by fact and evidence, but recur each time another State or Territory considers developing Sex Industry laws. Finally I look at new trends impacting on Sex Industry law.

Many sex workers, sex worker organisations, projects, un-funded sex worker networks, lobby or activist groups and Scarlet Alliance as the national peak body, have lobbied for sex work laws which 'recognise sex work as legitimate employment' (SWAG 2000, Metzenrath 2000, Arnot 2002, Hudson-Rodd 2002) and recognise decriminalisation as the sex industry law reform model which would best support this outcome. However, decriminalisation, while recognised by Australian sex workers and recommended by Government inquiries (Intergovernmental Committee on AIDS Legal Working Party, 1991); supported by National peak health organisations (AFAO, 2004) and the International Committee for Prostitutes' Rights (ICPR 1989) has not been the model proposed for sex industry law reform by any Australian State or Territory Government since 1995.

'decriminalisation in NSW has been consciously and inadvertently undermined, driving small-scale business underground' *(Private Workers Alliance of NSW, 2003)*
Less than 10% of the sex industry in New South Wales complies with local council policies - meaning the majority are unauthorized.

Whilst most of the sex industry in New South Wales is decriminalised, councils have effectively prohibited the industry or over-regulated it to such an extent that only larger well funded brothels can afford the costs of application and court processes required for approval. Thus, the smaller operators unable to relocate are deemed unauthorised and closed down. This forces workers to then choose between the larger brothel or finding other ways to work (often in the illegal sector.) (For example Gosford, NSW.)

The experience of Scarlet Alliance, formed in 1989, is that four main elements are common to, and have the greatest impact on, the development of Sex Industry laws in Australia.

1. The ideology behind the push to reform laws. These ideologies inform the aims and objectives and the resulting laws aimed at achieving these objectives.

- Misinformation/moral beliefs rather than fact.
- Pressure on Government to be seen to address the incongruity of the situation which finds large numbers of workers in the sex industry not recognised by law for the purposes of workers compensation, industrial law etc but whose income is recognised by the department who enforces the payment of taxes (Cooke, 2003)
- Protection of public health and the perceived need for the protection of the community (from Sex Industry 'harm')
- The perceived need for the 'control' of the sex industry and it to be regulated by law.
- A measure to prevent police corruption, for example the NSW Royal Commission indicated police corruption and lack of action when it was known sex workers were being abused. (Final Report 1997)

'The Parliament considers it inappropriate for the control of persons involved in prostitution to be subject to the normal principles of administrative law.' (Prostitution Control Bill 2002, Western Australia)

2. The area of Government which handles the development and drafting of the legislation. (eg. Police, Attorney General, Health)

- Police - Even though Police corruption is a proven element of sectors of the Sex Industry which are regulated by police (Dowd 2003), and with Royal Commissions into Police Corruption recognising the need to remove police from this role (Arnott 2002, Neave 1995, Fitzgerald Inquiry), recent draft sex industry laws have included:
  - Increased involvement by Police in the industry including policing sexual activities. (QLD Police Powers and Responsibilities and other legislation amendment Bill, 2003)
  - High level Surveillance methods including: licensing, fingerprinting, individual sex workers forced to carry identification cards (Prostitution Control Bill,2002, proposed Western Australian)
  - Increased police powers, power to arrest without proof offence is committed, reduced human rights and civil liberties, to provide Police with greater powers over the individuals in the industry. To a point where police are no longer required to prove a person is guilty rather the prosecuted must prove they are innocent. (Prostitution Act 2000, WA)

- Recommendation to the courts for restraining orders (originally developed to protect women from violence) to be used by police in preventing street based sex workers entering an area of the city for up to twelve months. (Prostitution Act 2000, WA)

3. The level of sex worker involvement at each phase of law reform, (eg. Needs analysis or research on the current industry, consultation prior to and throughout development of model, drafting of Bill, further consultation, redrafting and introduction to parliament).
In practice, recent experience has shown:

- Development of Sex Industry draft legislation without consultation with sex workers, for example Western Australian Prostitution Control Bill 2003. (D'Anger 2003)
- Dismantling of the Queensland Prostitution Advisory Committee (PAC) (Police Powers and Responsibilities and other legislation Amendment Bill, 2003) which was pushed through parliament without consulting sex workers. The PAC was the only decision making structure which included sex worker and sex industry representation as part of the legal sex industry framework in Queensland; effectively removing the voice of sex workers from decision making structures.
- Powers to regulate the sex industry have devolved to local government level in NSW. Sex Industry representatives are rarely consulted yet the majority of local governments in NSW have developed policies that effectively ban the industry.
- Sex workers not consulted during the drafting of legislation and then asked to have input after an unworkable model has been developed.

4. The ability of sex workers to participate in processes of law reform.

- Legislation which is written in a legalistic style, many do not understand, restricts the ability for comprehension and feedback, for example Western Australian Prostitution Control Bill 2002 (Scarlet Alliance 2003).
- Sex workers who are criminalised, because their sector of sex work is illegal, are unlikely to be able to participate in formal processes of sex industry law reform.
- Defunding of Sex Worker Projects as a result of their comments against proposed laws results in a loss of intellectual property, reduction in capacity for sex worker input into policy development, and creates fear amongst other NGO's, preventing them speaking out. For example Phoenix, Western Australia, 2003. (Martin 2003)
- Community consultation occurring at the busiest time of the year for the sex industry shows ignorance/disrespect for sex industry workers. For example over the Christmas period, the busiest period for the Australian Sex Industry.
- Inclusion of specific clauses in core funding for Sex Worker organisations/projects, which prohibit their involvement in systemic advocacy, law reform or media representation on issues affecting sex workers.
- Government reneging on strategies to increase sex worker participation in law reform. For example in Western Australia when the Sex Worker Project, Phoenix received agreement from staff of the Minister for Police allowing individual sex workers to use their alias on submissions regarding proposed legislation, only for the Ministers office to later advise SWAG (Sex Worker Action Group) that some submissions were disallowed because they did not include contact details and a full name.

To summarise, the Australian experience of law reform is that sex workers are often: provided with little more than tokenistic opportunities to participate; involved too late; provided with little incentive to participate because their experience of contributing to time-consuming working parties sees resulting recommendations not taken up by Government, such as the AGSPAG (Attorney General's Street Prostitution Advisory Group, Victoria, 2002); are targeted as 'difficult' when reaching agreement is hard or deemed politically risky (changes to Disorderly Houses Amendment Act); described as 'too vocal' when raising sex worker issues as women's issues (such as during the Women's Convention, Western Australia,2002).

Our experience indicates that the persistence of sex workers is branded as problematic when in fact sex workers are only trying to hold hard won ground. Thus, sex workers are not provided with the opportunity to have the issues which directly impact on their work, health and safety addressed by Government. Sex workers, their organisations/projects and Scarlet Alliance, have found ourselves outside of the process of law reform. We are often forced to organise or form alliances in order to prevent the introduction of proposed laws which our knowledge and experience indicates will negatively impact on the health and safety of sex workers, rather than being treated as the key stakeholders, working with Government on how to improve the Sex Industry through the recognition of sex work as a legitimate form of employment.

In effect sex workers are forced to react. Instead of debating the complexities of decriminalisation, we are still fighting for the right to be heard both in the community and within social/legal institutions. Resources, time and energy is wasted debating issues which are not those of most relevance to sex workers but those of relevance to other stakeholders who have a greater influence on law reform.

So, twenty years into the sex worker rights movement in Australia, there is little opportunity to be proactive on sex worker issues or to effectively work toward a model which is equitable and based on any real understanding of the sex industry. Instead we are re-forming, re-connecting and bracing ourselves to fight familiar and ongoing battles which are bred from poorly structured responses by Government when dealing with sex industry law reform along with new battles on the horizon.

At this point I would like to return to the 'snags in the stockings' of Australian sex workers; the ten issues which recur, often without logic, each time sex industry law reform debate occurs. At the beginning of the night 'a snag' might not be visible but quickly it develops into a ladder and the sex worker has little choice but to work without them. So is the case with badly formed sex industry laws which negatively impact on the working practices of sex workers to such a degree that sex workers have little choice but to work outside of the law in order to continue to make an income.

These issues are symptomatic of more importance being placed on fears, misinformation and myth rather than factors effecting sex worker health and safety.
They are:
Mandatory testing- Even though self regulation is a success, with low rates of STI's (sexually transmissible infections) and HIV, Governments still insist on laws which create a barrier to good health practice. Often also including mandatory condom use and presumption of knowledge of Sexually Transmissible Infection (STI) laws.
Licensing of brothels & owner/operators - often includes external licensing body, very difficult to get license, probity checks, creates a 2 tiered industry with small legal industry and larger illegal industry.
Licensing individual sex workers – often regulated by police, low compliance so resources are wasted attempting to enforce compliance, privacy issues for sex workers and related potential for corruption.
Lack of support for Private workers – forced to work alone and therefore less safe, unable to get council permission so trapped working in an illegal sector.
Prohibition of Street sex work- most criminalised, marginalised and voiceless sector of sex industry, heavily policed and most likely to be imprisoned, most susceptible to corruption, having children taken away, victims of violence, unable to report crime. Makes up 2% of the Australian Sex Industry.
Entrapment – Police posing as sex workers and/or clients to gain arrests. Increases potential of police corruption – Police are seen as *prosecutor* NOT *protector*, effecting sex workers liklehood of reporting crimes or harassment.
Reversal of onus of proof - rather than innocent until proven guilty – guilty until worker proves innocence. Almost impossible to prove innocence. Used to decrease the evidence necessary and workload needed to get an arrest by police.

Reduction of human rights for sex workers while law makers and enforcers prioritise the 'moral wellbeing' of the community, a community which mysteriously excludes sex workers.
Employer/employee or sub contractor – Lack of acknowledgement of sex workers as employees even though precedent in Australian Industrial Relations Commission has proven the relationship. Employers benefit from classing workers as sub contractors to avoid workers compensation, sick pay and superannuation.
Local councils – able to make moral rather than planning decisions about where sex industry businesses and individual sex workers can be located. Concealing moral objections by using council powers to overregulate the sex industry. For example one proposed condition on consent in Parramatta New South Wales, was that no part of the brothel except the entrance is to be visible from a public place or within 50 metres of taxi ranks, bus stops, train stations, hotels or any club. Thus Local councils do not treat sex industry businesses like any other business.

How have local councils responded to decriminalisation ?
In our experience, many local councils developed brothel policies, either formal or informal, which aim at discouraging the sex industry. This is despite the fact that the intention of reforms was to ensure well run brothels could operate legally and local councils could effectively regulate the industry. (SWOP NSW, 2003)

Law reform of any industry which is undertaken for reasons which exclude or conflict with improving the occupational health, safety and rights of the workers in that industry and fail to provide incentive for the industry to participate in a new legal framework, will result in ineffective and costly outcomes with those worst affected being the individuals workers in the industry. The sex industry is no different.

Our diverse laws in Australia show us the elements of models of sex industry legislation which are effective and those that are not. Decriminalisation in Australia is a success, however, it has been undermined ever since its introduction. Unless there are major changes it will be heralded as a failure by (anti-sex work) lobbyists because it was never given the opportunity to succeed. Hopefully New Zealand may provide us with a working example of decriminalization on which to base future debates.

A paper discussing issues impacting on sex industry law reform would not be complete without reference to the global trend threatening to affect the rights of sex workers and to inform sex industry legislation. The anti-trafficking lobby is understood by many to have been railroaded by abolitionists, whose agenda in this debate is more intent on stopping the sex industry globally than assisting women who are trafficked against their will. There is not the opportunity in this paper to explore the extensive examples of laws and policy which seek to address trafficking but which negatively impact on sex workers, however the *Leadership Against HIV/AIDS, Tuberculosis and Malaria Act* passed in the United States in 2003 provides some indication of the direction these debates may take.

The Act outlines the areas and support that the US administration is prepared to endorse in the fight against these diseases. The act includes the limitation that "No funds made available to carry out this Act........may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." The outcome of this move by the US may not be immediately obvious as many of the South East Asian based organisations which provide HIV/AIDS prevention education to sex workers have only recently been forced to make their choice to either continue to receive this core funding and change their philosophy, agreeing to an anti-sex work agenda (risking the loss of connection with the community they seek to educate) or seeking alternative funding. What this means in practice is not yet clear.

Of course, it is not only South East Asia that is affected. In Australia we are also beginning to see the effects of the abolitionist agenda. In May 2004, an ABC television program, 'Lateline', reported Kathleen Maltzen from Project Respect calling for the 're-criminalisation' of the sex industry as the answer to ending trafficking. This call, along with a push by abolitionists in

Australia for the introduction of the Swedish sex industry laws, which target and criminalise the clients of sex workers in an attempt to end the sex industry by stopping demand, are yet to have an impact on state based sex industry law in Australia. However, we can assume that both of these factors are set to shift sex industry law reform debate further away from improving the occupational health and safety of sex workers and closer to a abolitionist driven agenda to end the sex industry and discussions of whether female sex workers are exploited in their work. (Paine, 11/09/04)

Whilst there is strong research on the negative impacts resulting from the Swedish model of sex industry law reform, the voices and experiences of sex workers go unheard. Some feminists continue to uncritically accept the notion that criminalization of clients will stop demand in the face of research which clearly indicates the negative impacts on sex workers as working practices and work sites change to avoid prosecutions.

What is clear, is when the sex industry is criminalised, sex workers are much more vulnerable to exploitation and have less ability to report crime or harassment.

Until the objective of Australian sex industry law reform is to endorse sex work as a legitimate form of work and to provide the workers of this industry with the same entitlements as workers in other industries, including equitable access to safe working environments, we will continue to endure laws which do little more than endorse discrimination against sex workers by the implication that sex workers are different and as such can be treated differently. (Arnot, 2003)

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