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Regulation Review – Licence Reform
Independent Pricing and Regulatory Tribunal
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12 December 2012

Dear IPART,

Reforming licensing in NSW: Review of licence rationale and design

Thank you for the opportunity to comment on your Issues Paper on Reforming Licensing in NSW.

Scarlet Alliance, the Australian Sex Workers Association, is the peak national sex worker organisation in Australia. Formed in 1989, the organisation represents a membership of individual sex workers and sex worker organisations. Through our project work and the work of our membership we have very high access to sex industry workplaces in the major cities and many regional areas of Australia.

Scarlet Alliance has played a critical role in informing governments and the health sector, both in Australia and internationally, on issues affecting sex workers in Australia. Scarlet Alliance is represented on the Ministerial Advisory Committee on Blood Borne Viruses and Sexually Transmissible Infections, and the Blood Borne Virus and Sexually Transmissible Infections Sub-Committee (BBVSS) of the Australian Population Health Development Principal Committee (APHDPC).

Scarlet Alliance would like to be consulted throughout this review process as a key stakeholder, including any public hearings, roundtables or further consultation.

For any further information on this submission or its content please contact me at our organisations head office in New South Wales.

Regards,

Janelle Fawkes, CEO

Reforming Licensing in NSW: Review of Licence Rationale and Design

Scarlet Alliance Submission

Regulation of sex work in NSW

Sex work has been decriminalised in New South Wales since 1995. NSW is world renowned for its best-practice model, decriminalisation recognised by the United Nations Secretary General, United Nations Population Fund and UNAIDS as best for sex worker occupational health and safety, industrial rights and human rights. NSW has one of the healthiest sex industries ever recorded, including among migrant sex workers. Evidence from the Kirby Institute, Australia's National STI and HIV Strategies and case studies demonstrates that decriminalisation has brought improved work safety, high rates of safer sex practice, low rates of sexually transmissible infections, low incidence of trafficking, little to no amenity impacts and no evidence of organised crime. Evidence shows that these health outcomes are *because* of decriminalisation, community-driven health promotion and peer education.

The NSW Government is proposing a licensing model for sex work

In 2011, the Liberal Party announced an intention to introduce 'brothel police' as an election promise during their State Government election campaign. In September 2012 the NSW Government Better Regulation Office released an Issues Paper on brothel regulation in NSW.

Sex workers were not invited to participate in the inter-agency committee established by the Liberal Government to implement changes to the regulation of brothels in NSW. The concerns instigating this inquiry were not evidence-based, and a new regulatory system is not warranted.

There is no case for licensing of sex work

Scarlet Alliance does not support the introduction of a licensing system in NSW for sex work owners/operators or for businesses or individuals.

Experiences in other Australian states demonstrate that:

- licensing of sex work is ineffective, expensive and unworkable;
- licensing imposes unnecessary costs on businesses and community;
- the costs of the licence exceed its benefits;
- licensing involves high administrative costs, compliance costs, excessive fees and delay costs;
- there is no clear rationale for government action or intervention;
- there are more efficient regulatory alternatives; and
- licensing is not best practice.

The best opportunity to reduce red tape is to *prevent* a licensing system from being introduced in NSW.

Licensing has consistently failed in Australia

Evidence from Victoria and Queensland demonstrates that licensing models have consistently failed in Australia, and that licensing is ineffective, expensive and unviable. The attachment Appendix 1 details the enormous costs required by Government for a system that is not self-sustainable, and Appendix 2 illustrates how unviable these models are.

The LASH (Law and Sexual Health) report to the NSW Health Department in 2011 recommend the licensing of sex work should not be regarded as a viable legislative response. They state:

For over a century systems that require licensing of sex workers or brothels have consistently failed – most jurisdictions that once had licensing systems have abandoned them. Under licensing systems most sex workers remain unlicensed, so criminal codes remain in force, leaving the potential for police corruption. Licensing systems are expensive and difficult to administer, and they always generate an unlicensed underclass. That underclass is wary of and avoids surveillance systems and public health services: the current systems in Queensland and Victoria confirm this fact. Thus, licensing also represents a potential threat to public health.¹

Licensing has enormous administrative expense

States with licensing have *enormous administrative expense*. In Queensland it has cost nearly \$7 million in Government contributions to operate a licensing authority over a ten year period, and it still does not self-sustain through licensing fees.² This cost is in addition to the cost of operating a specialised Prostitution Enforcement Task Force (PET-F) within the Queensland Police Force to regulate the larger illegal (non-compliant) sector of the industry. Police have now replaced Consumer Affairs in Victoria as key regulators of the sex industry. The excessive legislative and regulatory requirements of a licensing model mean that large segments of the industry, both private and commercial, are forced to operate outside of the legal sector, maintaining their underground status.

In Queensland the cost of licensing, both in licensing fees and in maintaining premises during a lengthy application process when the business is not open, is a significant barrier to becoming licensed. A study of why potential applicants did not apply for a license showed *because of the information required, privacy invasion and fees too expensive* as the top three reasons to not apply.³ In 2010, the application fee for a brothel licence in Victoria was \$3,999.50 and the annual licence fee was \$2,285.40 per year.⁴ In Queensland in 2001-2 the average time to process a brothel license application was 231 days.⁵

Licensing has extremely low compliance

Sex workers and businesses avoid licensing because of the onerous burdens involved. In Queensland, 11 years of licensing has resulted in only 24 brothels being registered, while the majority of workplaces operate outside the licensing system.⁶ In Queensland, councils are granted permission to refuse brothel development applications. Within two years of implementation, 201 towns in Queensland ‘banned’ brothels, forcing them to operate outside the licensing system.⁷ Under the Victorian licensing model, there were 95 licensed brothels and up to 70 unlicensed brothels in 2006.⁸ The 2012 Kirby Institute to the NSW Ministry of Health estimates that 90% of the

¹ Basil Donovan et al, *The Sex Industry in New South Wales: A Report to the NSW Ministry of Health*, Kirby Institute, 2012.

² Prostitution Licensing Authority, Queensland, *Annual Reports 2001-2011*, Statements of Financial Performance. When calculated, the Government Contributions across each year in the first ten years of licensing have added to \$6,959,000. In 2010-11, the PLA received \$561,565 in licensing fees, but the total expenditure for that year was \$1, 339, 663.

³ Prostitution Licensing Authority, Queensland, *Annual Report 2001-2*, Table 9, page 63.

⁴ NSW Government, Better Regulation Office, *Issues Paper: Regulation of Brothels in NSW*, September 2012, 22-3.

⁵ Prostitution Licensing Authority, *Annual Report 2001-2*, Queensland, 15, accessed at <http://www.pla.qld.gov.au/Resources/PLA/reportsPublications/annualReport/2002/documents/annualReport2002.pdf> on 21 March 2012.

⁶ Prostitution Licensing Authority Queensland, *Licensed Brothels*, <http://www.pla.qld.gov.au/brothels/licensedBrothels.htm> accessed on 8 September 2011.

⁷ Prostitution Licensing Authority, Queensland, *Annual Report 2001-2*, 15.

⁸ Chen MY, Donovan B, Harcourt C, Morton A, Moss L, Wallis S, Cook K, Batras D, Groves J, Tabrizi SN, Garland S, Fairley CK, ‘Estimating the number of unlicensed brothels operating in Melbourne (2010), *Australia and New Zealand Journal of Public Health* Vol 34(1), 67.

Queensland sex industry and 50% of the Victorian sex industry operate illegally under a licensing framework.⁹

Licensing creates a two-tiered industry and impinges health promotion

Licensing creates a two-tiered sex industry where a small percentage of the industry can meet compliance requirements while the majority of the industry cannot and is forced to operate outside of the legal framework.¹⁰ Licensing thereby inevitably creates a criminal underclass. Licensing implicitly makes certain kinds of sex work *illegal*.

There is no evidence of a large number of 'illegal' brothels in NSW and a significant amount of evidence that licensing has created a large number of 'illegal' brothels in Victoria and Queensland. Sex workers working within the larger illegal sector of the industry are not covered by anti-discrimination law.

Sex workers avoid licensing because the excessive conditions in place pose a threat to our safety. Licensing may require:

- working alone (reducing access to support);
- disclosure of our legal names to clients or the public (increasing risk of harassment);
- forced medical testing (impinging human rights, confidentiality and privacy);
- onerous advertising restrictions;
- excessive limitations on work locations;
- being legal in industrial areas but not from one's own home (posing a threat to our safety);
- permanent registration on a government or police register (limiting ability to travel, limiting access to justice and limiting the ability to work in other sectors).

Licensing will limit sex workers' choices over their working environment and style of work, by providing incentives and punishments to effectively coerce sex workers into Government-approved work. Licensing will mean reduced options for sex workers and reduced control over working environments and safety.

There are more effective or efficient regulatory alternatives: Decriminalisation is best practice

Local councils have been the regulators of sex industry businesses in New South Wales since sex work was decriminalised in 1995. Evidence shows that decriminalisation is the world-renowned, best practice model for sex work regulation, and that it has brought high rates of compliance, minimal opportunities for corruption, increased transparency and improved safety for sex workers.

The UNAIDS, UNFPA, & UNDP Report *Sex Work and the Law in Asia and the Pacific* was released in October 2012, and recognises the value of decriminalisation and the failure of licensing models in effectively regulating the sex industry. The report states that '[t]o enable sex workers to fully enjoy legal rights to health and safety at work requires decriminalization.'¹¹

⁹ Basil Donovan, C Harcourt, S Egger, L Watchirs Smith, K Schneider, JM Kaldor, MY Chen, CK Fairley, S Tabrizi, *The Sex Industry in New South Wales: A Report to the NSW Ministry of Health*, Kirby Institute, University of New South Wales, Sydney, 2012, Table 1.

¹⁰ Christine Harcourt et al., 'Sex Work and the Law', *Sexual Health* 2(3) 121–8 at 125.

¹¹ UNAIDS, UNFPA, UNDP, *Sex Work and the Law in Asia and the Pacific*, 2012, UNDP Thailand, accessed at <http://www.snap-undp.org/elibrary/Publications/HIV-2012-SexWorkAndLaw.pdf> on 23 October 2012, page 7.

The best opportunity to reduce red tape is to *prevent* a licensing system from being introduced in NSW.

APPENDIX 1

Cost of Licensing in Queensland			
Figures taken from Queensland Prostitution Licensing Authority Annual Reports			
Statements of Financial Performance			
Year	User charges and fees	Government contributions	Total expenses from continuing operations
2000-1	34,500	1,059,000	647,888
2001-2	177,361	871,000	883,152
2002-3	205,425	755,000	1,015, 185
2003-4	281, 272	653,000	1,074,710
2004-5	341,171	806,000	1,009, 459
2005-6	380,733	376,000	1,070, 538
2006-7	502,743	574,000	1,050,443
2007-8	797,743	405,000	1,146,549
2008-9	842,228	590,000	1,396,819
2009-10	733,598	429,000	1,317,300
2010-11	561,565	441,000	1,339, 663
Total	4, 577, 067	6, 959,000	7,516,861

APPENDIX 2



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Why licensing will not work in NSW

22nd March, 2012

Scarlet Alliance does not support a licensing model of sex industry regulation for NSW. The Queensland and Victorian licensing models have provided comprehensive evidence of the model's failure.

After ten years implementation, the Queensland licensing model:

- has resulted in extremely high levels of non-compliance. Only 23 legal brothels in ten years in Queensland;ⁱ
- is inherently expensive and requires long-term commitment by Government to resource the Licensing Authority. In 2002, approximately 80% of the Prostitution Licensing Authority (PLA) income was provided by Government grants. In 2006, approximately 45% of the Prostitution Licensing Authority was still carried by Government grants. Annual reports show more than \$6million of tax payer's funds have been spent on the cost of the Licensing Authority alone;
- although the Queensland Government had expected the cost of maintaining the licensing model to be covered by sex industry licensing fees, this has never been realised;
- has required the development of a Police Prostitution Enforcement Taskforce (PET-F). In 2005, 74% of complaints received by the PLA were referred to PET-F for response. Police are now the regulators of a large section of the Queensland sex industry. Scarlet Alliance has consistently received complaints from sex workers about police treatment;
- requires a high level of police involvement in regulation of the industry, maximising corruption risk. Note: the NSW model of regulation was decriminalised in response to high levels of Police corruption and is recognised to have reduced corruption;
- requires a high level of administration and compliance function as the model is complex and does not promote compliance;
- has created a two-tier sex industry; the legal sector or those that can comply, and the illegal sector made up of the majority who are unable to meet the excessive conditions of compliance. By 2005 only 15 brothels had been approved. In 2012 only 25 brothels are legal;
- does not support best practice occupational health and safety for sex workers (number of rooms, private workers unable to work in pairs, escort agencies illegal, street based sex work illegal, etc.);
- is extremely costly to the licence applicant and creates extreme barriers to compliance. In 2001-2 the average time to process a brothel licence application was 231 days. During this time the property has to be leased or owned and have planning permission. A study of why potential applicants did not apply for a license showed *because of the information required, privacy invasion and fees too expensive* as the top three reasons to not apply;ⁱⁱ and
- banning of brothels by councils remains a barrier to sex industry businesses operating within the legal, licensed systems. Within two years of implementation, 201 towns or areas were granted permission to refuse brothel development applications.

The issues represented here remain consistent barriers to the success of licensing models to regulate the sex industry. In 2012, licensing has been in place in Queensland for more than 10 years and there are still only 23 legal brothels leaving the majority of sex industry businesses operating illegally.ⁱⁱⁱ

Under the Victorian licensing model:

- there were 95 licensed brothels and up to 70 unlicensed brothels in 2006;^{iv}
- 50% of Victorian sex workers still operate illegally in 2012;^v
- sex workers face mandatory STI and HIV testing. Victorian studies indicate that current testing rates are 'excessive'^{vi}, placing an unnecessary burden on sexual health clinics which are already beyond capacity;
- it costs over AU\$90,000 in screening costs for every chlamydia infection averted. Comprehensive Victorian studies state that 'screening intervals for sex workers should be based on local STI epidemiology and not locked by legislation';^{vii}
- Studies show that the use of resources in screening and providing certificates to sex workers could be better spent;^{viii}
- licensing in Victoria has created a group of 'clandestinas', who fall outside health interventions and miss targeted health programs;^{ix}
- sex workers living with HIV or working with an STI are criminalised in Victoria, increasing isolation, discrimination and stigma;
- private sex workers are required to register their legal names and address on a permanent register, interfering with privacy, limiting ability to travel, and affecting access to justice in court;
- private sex workers can only work with a maximum of one other person, reducing sex workers' opportunities for peer education and reducing control over working conditions and safety;
- there are over 2000 names recorded on the register, despite that many of those sex workers are no longer working;^x
- sex workers report that some agencies refuse to sign them up if they have an existing individual license, creating a lack of incentive to obtain a licence;
- police have now replaced Consumer Affairs as key regulators of the sex industry following the Inquiry into People Trafficking for Sex Work. Anti-trafficking was used as a platform to push this change despite substantial evidence that police are inappropriate regulators of the sex industry; and
- the LASH (Law and Sexual Health) report in 2012 recommends that the licensing of sex work should not be regarded as a viable legislative response. It states that licensing is a 'threat to public health'.^{xi}

ⁱ Queensland Prostitution Licensing Authority, *Annual Report 2010-11*, Queensland. Accessed on 22nd March, 2012 at <http://www.pla.qld.gov.au/Resources/PLA/reportsPublications/annualReport/2011/documents/The%20environment%20in%20which%20we%20operate.pdf>.

ⁱⁱ Queensland Prostitution Licensing Authority, *Annual Report 2001-2*, Queensland. Accessed on 22nd March, 2012 at <http://www.pla.qld.gov.au/Resources/PLA/reportsPublications/annualReport/2002/documents/annualReport2002.pdf>.

ⁱⁱⁱ Queensland Prostitution Licensing Authority, *Annual Report 2010-11*, Queensland, *above n1*.

^{iv} Chen MY, Donovan B, Harcourt C, Morton A, Moss L, Wallis S, Cook K, Batras D, Groves J, Tabrizi SN, Garland S, Fairley CK, 'Estimating the number of unlicensed brothels operating in Melbourne (2010), *Australia and New Zealand Journal of Public Health* Vol 34(1), 67.

^v Donovan B, Harcourt C, Egger S, Watchirs Smith L, Schneider K, Kaldor JM, Chen MY, Fairley CK, Tabrizi S (2012) *The Sex Industry in New South Wales: A Report to the NSW Ministry of Health*, Kirby Institute, UNSW.

^{vi} 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.

^{vii} D Wilson, K Heymer, J Anderson, J O'Connor, C Harcourt and D Donovan (2009), 'Sex workers can be screened too often: a cost-effective analysis in Victoria, Australia', *Sexually Transmitted Infections*, October 2009.

^{viii} A Samaranyake, 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 individual' *Sexually Transmitted Infections*, 85:7, 540 – 542.

^{ix} Christine Harcourt, S Egger, B Donovan (2005), 'Sex Work and the Law', *Sexual Health* 2(3) 121–8 at 125.

^x Business Licensing Authority, *Prostitution Control Act 1994*, Information, 6 February 2006.

^{xi} Basil Donovan, C Harcourt, S Egger, L Watchirs Smith, K Schneider, JM Kaldor, MY Chen, CK Fairley, S Tabrizi, *The Sex Industry in New South Wales: A Report to the NSW Ministry of Health*, Kirby Institute, University of New South Wales, Sydney, 2012, Recommendation 2.