



Submission in response to the Better Regulation Office Issues Paper

Regulation of Brothels in NSW

October 2012

ABOUT ACON and SWOP

ACON (formerly known as the AIDS Council of NSW) was formed in 1985 as part of the community response to the impact of the HIV/AIDS epidemic in Australia. Today, ACON is Australia's largest community-based gay, lesbian, bisexual and transgender (GLBT) health and HIV/AIDS organisation. ACON provides information, support and advocacy for the GLBT community and people living with or at risk of acquiring HIV, including sex workers and people who use drugs.

ACON is home to the Lesbian and Gay Anti-Violence Project (AVP), the Community Support Network (CSN), and the Sex Workers Outreach Project (SWOP). ACON has its head office in Sydney as well as branches in the Illawarra, Northern Rivers, the Hunter region and the Mid North Coast.

SWOP provides sexual health education, information and support for NSW sex industry workers. We run a variety of targeted health promotion programs and also provide sexual health information and peer-based education through outreach to sex industry workplaces

SWOP has been in existence for over twenty one years. It is Australia's largest and longest established HIV, STI and Hepatitis C education, prevention and health promotion, community-based sex worker organisation. Further details about SWOP and our work are at Attachment A (SWOP Fact Sheet)

Regulation of the NSW Sex Industry

ACON and SWOP welcome the production of the discussion paper on better regulation of the NSW Sex Industry and the commitment of the current NSW Government to protect the health and safety of sex workers, their clients and the wider community.

SWOP believes that decriminalisation of sex work has largely served the interests of sex workers and the wider NSW population well, resulting in very low rates of STI prevalence and incidence, high rates of access to health promotion and support services by sex workers, and increased capacity of sex workers, including those from Asian and other non-English speaking backgrounds, to look after their health and welfare. The process of decriminalisation has succeeded in addressing the issue of police corruption and helped to reduce criminality associated with the industry prior to 1995.

However, the current regulatory system is by no means perfect. Whilst the broad regulatory framework is good, some specific regulations have been problematic for sex workers. They include state wide policies and local government regulations regarding home based sex workers, zoning, anti-clustering requirements and the attempt by many local councils to ban brothels. Whilst lack of compliance with local planning requirements by some operators has been identified as a driving concern of this review, we would maintain that the lack of compliance of many local government authorities with the spirit and intent of the 1995 reforms and attempts to de facto ban sex services premises are as much a cause of the problems currently perceived to beset the issue of sex services premises regulation. Additionally, the issue of corruption has resurfaced in light of recent Independent Commission Against Corruption (ICAC) cases.

We believe the current system can be made to work better through increased collaboration and dialogue between regulatory authorities and those working in the sex industry, specifically by refocusing our efforts on supporting local councils to develop and implement regulations that support the objectives of reducing the potential for corruption, improving compliance and protecting public health. We therefore strongly support the options outlined under the heading of 'Option 1 – Improve the current regulatory system - in Chapter 6 of this report

Our responses to the questions provided for consideration are provided below

Chapter 4 Objectives of proposed regulatory system

The objectives of the regulatory system are sound and appropriate. However, we have some reservations about the way in which 'protection of sex workers' is defined. We agree that sex workers, as with all other workers, should be protected from physical and mental harm and from injury in the course of their occupation. However, the list of examples provided appears to promulgate a perception of excessive criminality associated with the sex industry, a perception which in itself exposes sex workers to risks resulting from the physical marginalisation of their workplaces and the social marginalisation arising from the resultant stigma associated with the profession.

The United Nations Special Rapporteur on Trafficking in Persons, especially Women and Children, Ms Joy Ngozi Ezeilo, noted in her report at the conclusion of her 2011 visit to Australia that the 'issue of trafficking in persons in Australia is sexualised and often conflated with prostitution' leading to an under recognition and lack of action against trafficking in other sectors, such as the agricultural, food processing and other sectors, to the detriment of trafficking victims in those industries (and, we would add, to the reputation of well-run sex service premises). She notes there remains 'a need to move away from over sexualising the discourse on trafficking, which invariably contributes to common stereotype of victims of trafficking as being women and girls forced into prostitution or other forms of sexual exploitation'¹.

Aside from furthering these unhelpful stereotypes, the addition of trafficking, drugs and organised crime to the list of presumed sources of potential workplace harms seems both presumptive and appears to extend the reach of the regulatory system beyond its remit and to usurp the role of the police – both state and Federal – whose role it is to ensure the protection of the entire community from the harms of such activities. As such, we believe it would be more appropriate to use a standard definition of workplace safety and protection and potential sources of likely harm, consistent with those enumerated in the WorkCover NSW 2001 Health and Safety Guidelines for Brothels.

In relation to the definition of 'safeguarding public health', we would suggest amending this to read 'A key contributor to this outcome is safe sex practice, and access to appropriate, peer-led health promotion and outreach services and professional clinical services.'

Chapter 5 – The current NSW experience

5.1 Protection of residential amenity

¹ <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11664>

Our experience is that the majority of sex service premises have limited residential – and commercial - amenity impacts. Owners, clients and workers all share a desire for discretion and thus act to limit the visible impact of their business activities. This experience is supported by recent empirical research (Crofts and Prior 2012) which shows that the majority of residents near sex services premises are unaware of the presence of these businesses or regard their impact as neutral or positive. Crofts and Prior also note that the nature and volume of negative responses to DA submissions for sex services premises differs markedly from the actual experiences of residents living in close proximity to such premises. They note that there are a range of verifiable amenity impacts identified, including parking, noise and traffic, and that these may be amenable to a mutually satisfactory resolution should they be identified in the development submission process. As such, we would strongly support the use by councils of only evidence based approaches relying on verifiable criteria to assess possible amenity impacts.

In the case of home based workers, the amenity impact is even less discernible. SWOP regularly receives complaints from home based workers about the impact of anonymous ‘resident complaints’ to councils regarding their activities, which they believe to have originated from other local sex service premises which perceive their activities to be commercially competitive. The vast majority of home based workers work discreetly, safely and largely unnoticed in their neighbourhoods. Unfortunately, few are offered the same treatment from councils as is offered to other home based occupations, with only a tiny proportion of councils offering ‘exempt’ or ‘complying’ development status to home based workers in residential areas. This results in home based workers either working ‘without consent’ or in areas that are unsuitable or unsafe. There is no justification for this ongoing discrimination of home based sex workers relative to other home based occupations.

SWOP has long advocated that the principles outlined in the Sex Services Premises Planning Guidelines (2004) be adopted and incorporated into Government policy, as we believe these would help to improve regulation and increase compliance with planning and OH&S requirements across the sex industry. However, these are now some years old and it may be preferable to revise them, especially in light of the recent review and overhaul on the NSW Planning Act. We would be happy to support and participate in a reconvened SSP working group should this be an outcome of the current review process.

Whilst many councils undoubtedly perceive that a requirement to permit sex service premises in their local area (on the same basis as other businesses are permitted to be established) results in undue costs and compliance activities on their part, many of these costs – both financial, political and in terms of human resources – are effectively ‘self-imposed’. This arises as a consequence of council attempts to impose a de facto ‘ban’ on sex services premises through complex and stringent requirements which many operators find onerous to comply with, or through expensive and – in many cases – futile attempts to block legitimate development through the Land and Environment Court. In any case, permitting councils to *not* allow sex services premises would create yet more problems with uncontrolled or ‘illegal’ premises, to the detriment of sex workers and the local community. Councils have a responsibility to support and service the business and social needs of their communities, which includes enabling a safe environment for a sex services industry and its local clientele and should therefore be required to permit sex services premises in their local area, consistent with their LEPs, on a fair and equitable basis.

We do not believe the State should be involved in placing restrictions on the location of sex services premises. This is, in effect, a non-evidence based approach which pre determines 'amenity impact' based on a series of presumptions rather than on local community values or verifiable impacts. Similarly, the exclusion of home based services from the LEP has been detrimental to the health and safety of home based operators, and the advice to councils regarding the restrictions of brothels to industrial areas has produced safety issues for sex workers and other employees, in terms of increased vulnerability to assault or other personal crimes whilst travelling to and from their workplaces.

We believe it would be advantageous to repeal the current advertising restrictions on the sex industry as these serve no useful purpose in terms of the objectives of this review. As noted in the report, there is little public concern at the current level of advertising, and it is a useful way for our outreach programs to reach sex workers, especially those new to the industry who might benefit most from our outreach services. However, current restrictions and regulations have led to market distortions, with the field dominated by a few players who charge a premium for placing adverts relating to the sex industry, resulting in sex workers, industry operators and agencies such as SWOP having to pay well above the rates paid by other legitimate businesses.

5.2 Protection of sex workers

It is SWOP's view that health and safety of sex workers is best served by a system of regulation which minimises the potential for de facto 'criminalisation' through the imposition of unnecessary restrictions and requirements with which workers and operators will struggle to comply. An 'open' system in which there is a high level of access to sex premises by our outreach programs and by regulators and in which sex workers are empowered to insist on their rights to health and safety is one most likely to produce high levels of compliance with occupational health and safety requirements. Further, the easier it is for services and workers to comply with regulations, and the more 'open' the system, the less opportunity arises for corrupt conduct or criminal involvement and activities such as extortion or trafficking. This has been demonstrated through 17 years of decriminalisation, which has seen the gradual but steady improvement of sex workers health, capacity and working conditions. In particular, research shows us that in NSW female workers of Asian background, generally perceived as most vulnerable to a range of health and safety concerns, have since 1992 seen an increase in their English language skills, testing rates and service engagement, and a concomitant decline in STI prevalence rates such that it equals those of non-Asian workers.

In relation to trafficking and organised crime, we are aware of regular and frequent allegations of criminality in the sex industry, but have seen little data to support many of the claims or any evidence of the rates of criminal involvement in the sex industry relative to other industries. As Crofts and others note, there is a tendency, perhaps as a consequence of the industry's pre 1995 criminal status, to see the sex industry as criminogenic. One widely held and oft repeated belief is that the sex industry is strongly associated with criminal gangs involved in money laundering. In fact, the Australian Government report 'Money laundering in Australia 2011' (Australian Transaction Reports and Analysis Centre 2011) lists a number of other legal industries – such as the banking and gaming sectors, taxi services, and money transfer services – as the focus of money laundering activities, but makes no mention of the sex industry. The experience of our workers is that the

perceptions of criminal involvement are not matched by the reality of the sex industry, with the majority of sex services premises being run by business people in a business-like manner. The home based industry, in particular, sees no criminal involvement – and the many smaller sized brothels often run by former workers offer little of value to criminals or criminal networks.

We note also the discussion of the ‘Swedish model’ in this section and refer the authors to the comments of the UN Special Rapporteur on Trafficking in Persons that ‘there remains no conclusive link between the legalization or criminalization of prostitution and the existence of trafficking for sexual exploitation’. We also draw the committee’s attention to the recent issues paper produced by the Program on Human Trafficking and Forced Labour at the Center for Human Rights and Humanitarian Law of the American University Washington College of Law in which the authors point out that early claims of success of the Swedish model were based on readings of a limited English language summary of the Swedish government’s findings and that the government, in fact, ‘had no evidence that fewer men are purchasing sex, that fewer women are selling sex and that fewer people are being trafficked into prostitution’².

5.3 Safeguarding public health

Condoms are utilised in over 99% of anal and vaginal sex undertaken in the NSW sex industry³, with equivalent rates of use amongst the general population and workers with an Asian background. The rates of STI’s amongst female sex workers in NSW are lower than that of other sexually active females in NSW. Demand and pressure to perform unsafe sex has also fallen⁴.

There has not been one recorded case of HIV transmission due to commercial sex work in NSW. This along with the rates of STI’s have only been achievable since decriminalisation⁵ and represents a positive public health outcome that is acknowledged internationally as being world leading.

These achievements have only been possible through concerted peer outreach programs, especially peer based education undertaken by people with targeted language skills⁶ and the consistent and enthusiastic uptake of these education programs by sex workers themselves. This level of engagement has arisen as a result of the decriminalised environment created in NSW, in which there has been no creation of a ‘second tier’ unlicensed sex industry, as has occurred in Victoria and Queensland under their licensing regimes.

These results are not only outstanding in themselves, but compare favourably to those data that can be obtained for other states – bearing in mind that researchers have found obtaining comparable samples of sex workers from a range of types of premises to be severely hampered by the unlicensed, illegal nature of a large part of the Victorian and Queensland sex industries. Nonetheless, there are some comparable data points. While comparisons with other jurisdictions are hampered

² Jordan, Ann ‘The Swedish Law to Criminalise Clients: A Failed Experiment in Social Engineering’ (Issue Paper #4 April 2012) American University Washington College of Law

³ Donovan, B et al *Improving the health of sex workers in NSW: Maintaining Success* NSW Public Health Bulletin Vol. 21, 2010.

⁴ Pell, C et al *Demographic, migration status, and work related changes in Asian female sex workers surveyed in Sydney 1993 and 2003* Australian and New Zealand Journal of Public Health, Vol 30 No 2, 2006

⁵ Harcourt, c et al *The decriminalisation of prostitutions is associated with better coverage of health promotion programs for sex workers* Australian and New Zealand Journal of Public Health, Vol 34 No 5, 2010

⁶ Donovan, B et al *Improving the health of sex workers in NSW: Maintaining Success* NSW Public Health Bulletin Vol. 21, 2010.

by the large proportion of unlicensed, 'illegal' premises limiting access to a truly representative cross section of workers, a comparison of STI rates among NSW sex workers and Victorian workers (from licensed premises only) for the period 2004 – 2006 shows a similar rate of STIs except for Chlamydia, which was present at an incident rate of 7.4 per 100 person years among clients of Melbourne Sexual Health Clinic⁷, compared to 2.3 per 100 py at Sydney SHC over the same period⁸. This was achieved at much greater cost in Victoria due to compulsory monthly testing. In NSW, approximately 83% of sex workers report being tested at regular intervals, of their own volition. Thus, a system involving enforced and frequent testing and the extra administrative burdens associated with this appeared unable to produce a better health outcome than NSW's system of decriminalisation coupled with effective outreach, education and network of publicly funded sexual health clinics. It is significant to note that the Victorian authorities have recently reduced the frequency of testing required of registered sex workers, from monthly to three monthly.

In conclusion, data regarding the frequency of health seeking behaviours and safe sex practices suggests this is high across the entire NSW sex industry, including among those historically regarded as most vulnerable. This behavioural outcome has undoubtedly produced the health impact evident in the low rates of STIs among NSW sex workers and the continued lack of transmission of HIV as a result of sex work in NSW. The lack of a comparable workforce from other states makes it difficult to make a definitive statement on comparative results, but what data there is indicates a better result across the NSW industry as a whole compared to even the selective sample produced by the licensed brothel workforce in other jurisdictions.

Chapter 6 Possible reform options

It is difficult to clearly identify any significant impact arising from the different regulatory regimes in NSW, Victoria, Queensland and the ACT on sex services premises and communities in NSW towns on either side of relevant borders. This is in large part due to the fact that border towns with a population large enough to support a local sex industry beyond itinerant individual sex workers are restricted to the NSW/Queensland border at Tweed Heads. There are a number of establishments operating in Tweed Heads with whom SWOP has regular contact and which appear to offer appropriate health and safety environments for their workers. Whether this number is proportionate or disproportionate due to NSW's regulatory system being more 'favourable' is hard to determine, given the large proportion of unlicensed - and therefore inaccessible - premises which the Queensland system appears to engender, making valid comparisons difficult. However, SWOP workers have ready access to the NSW premises and are able to offer comprehensive outreach coverage to workers in those establishments. SWOP workers also receive a number of calls from workers confused or unsure about the different regulations across borders, and it is our impression that many workers find compliance with systems such as that of the ACT and Victoria onerous and confusing. The impact of this on the likelihood of compliance with requirements such as registration and testing is difficult to ascertain.

Of the options presented, we are strongly in support of Option 1, to improve the current regulatory system. Our primary reason is that, despite ongoing challenges in implementation, the current

⁷ Lee, D et al *STI 2005*

⁸ Donovan, B et al, 'Sex Work in a decriminalised and unlicensed environment – a 15 year study in Sydney' presentation at 2011 ASHM Conference

system has manifestly produced excellent outcomes in terms of sex worker health and safety and the broader public health. A recent study comparing the decriminalised framework in NSW with the licensing framework in Victoria and the criminalised framework in WA showed that the NSW decriminalised framework enabled the widest reach of health services targeting sex workers.⁹

In terms of residential amenity impacts, research would seem to suggest that these are minimal, vary from area to area but are amenable to being addressed through a more rational, evidence based planning approach. This is best carried out on a case by case basis at the local level. Thus, an improved version of the current system, involving greater dialogue between regulators and improved local planning processes, is in our view the ideal strategy to protect the very significant public health gains made under decriminalisation, while addressing the remaining concerns and imperfections of the system which result in some level of resident concern in some areas. A revisit of the 2004 Sex Services Premises Planning Guidelines Review process, in the light of recent amendments to the NSW Planning Act, may be an ideal vehicle for producing a better system which works in the interests of local governments and communities, sex workers and the public health.

We believe a licensing system would be a dangerous and retrograde step, as experience elsewhere shows it to almost inevitably produce a second tier (often larger than the official licensed tier) of sex industry premises which are difficult for outreach programs to access, increase the potential for crime and corruption and do little to increase public health outcomes or improve sex worker health and safety. It is notable that recent reports of alleged trafficking in Victoria arise from licensed, rather than unlicensed brothels in that state. This does not suggest that trafficking is inevitably a feature of the sex industry – any more than it is a feature of other industries – but rather that licensing is not a solution to this issue. Licensing is also likely – again based on the experience of Queensland and Victoria – to result in a net cost to the state. The experiences of other states reveal significant cost outlays associated with a licensing regulatory system. In Queensland, the Prostitution Licensing Authority (PLA) for the financial year 2009-2010 levied around \$735,000 in fees and charges; however it had costs of \$1.3 million.¹⁰ Over time, this represents a significant cost to the government, brothel operators and sex workers. Total costs for the period 2000 – 2011, based on a reading of the PLA's annual reports, would appear to be as follows

- \$4.5 million revenue from licensing fees
- \$7.5 million expenses to run the PLA (not including the dedicated police branch called the PET-F)
- \$6.9 million income from government grants and contributions

Given the rate of compliance seen in practice with licensing systems elsewhere, it appears unlikely a fee could be set which would recover costs borne by the state. As noted in the discussion paper, a licence fee may also have the effect of favouring larger commercial operators over small private worker co-operatives and other similar establishments, with a subsequent impact on industry diversity and – potentially – amenity impacts. On this note, we would argue that any system of registration or licensing – inadvisable as both seem to be – should exempt home based workers and

⁹ C Harcourt, J O'Connor, S Egger, *et. al.*, 'The decriminalisation of prostitution is associated with better coverage of health promotion programs for sex workers', *Australian and New Zealand Journal of Public Health*, vol 35 (5), (2010).

¹⁰ Prostitution Licensing Authority, *Annual Report 2009-2010*, (2010).

private workers, including those working in small co-operatives, in the manner of the differential treatment afforded SOOBs in the New Zealand model referred to in the document.

However, given the limited measurable benefits of licensing and the risk of undermining SWOP's outreach programs and level of access across the industry, we feel any licensing system- or any process that produces a two tier system with subsequent issues of illegality and corruption – is a step in the wrong direction. We note that the 2007 changes which gave councils greater powers over non-compliant sex services premises led to a higher incidence of reports of corruption. We would therefore argue that a system which is more open and transparent, where councils are aware of and responsibly use their significant powers to properly regulate sex premises, and possibly with the more active role of an independent body such as Work Cover to inspect premises for compliance, would be an ideal recipe for ensuring fuller compliance with planning regulations and high levels of health and safety across the NSW sex industry.

We see no benefit in a registration system for brothel operators, as outlined in the paper. This appears to add another burden of administration for no specific advantage in terms of meeting the objectives of the regulatory system, and is likely to meet with limited or minimal compliance, especially where a 'broader focus', requiring 'an active role for Police alongside the Ministry of Health and community-based peer programs' is taken. The level of information required – as best as can be ascertained – is no different to that provided under a DA, yet produces no outcomes for the operator in terms of planning permission, health and safety issues or access to outreach services. It is equally difficult to see what a registration system for sex workers could offer in terms of improved health and safety outcomes. While it may be true that the ACT system 'works well' – although this is arguable – it is acknowledged that this is due to the small population of the territory and its sex services workforce. NSW enjoys no such advantage. Given the substantial population of sex workers and the transient nature of the workforce, a system of registration would come at a high administrative cost. If the goal of such a system is to ensure regular testing of the majority of sex workers, with a view to reducing prevalence of STIs, the evidence would suggest that this has already been achieved in NSW.

SWOP would have little interest in participating in such a process, as it appears likely to divert resources from activities which more effectively support the stated objectives of a regulatory system.

In our view, Option 1, involving a reconvening of the Sex Services Premises Working Group – perhaps on an ongoing basis – to review and update the 2004 report and recommendations and oversee council and operator compliance with the guidelines issued, would be an ideal solution. The role of such a group could be augmented on an ongoing basis to include community and council education and awareness raising, in the interests of supporting easier compliance and reduced amenity impacts in the longer term; and the option of an independent inspection team overseen by Work Cover, in order to reduce the possibility of corruption where non-compliant premises are found to be operating, could also be examined. Finally, we believe it is well overdue to afford home based and private workers the same rights to gainful employment and quiet enjoyment as other small home based businesses, and to ensure that they are exempt or complying development on all LEPs.

Thank you for the opportunity to make this submission. Enquiries and requests for further information should be directed in the first instance to

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