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Just do it: Decriminalisation as a best practice model for sex industry regulation – the Australian experience

A number of legal models currently regulate the sex industry around the world. Depending on the country or jurisdiction, sex work is either decriminalised, legalised or criminalised. In addition, the 'Swedish Model' has also imposed criminal sanctions against clients of sex workers. Legalisation and criminalisation are detrimental to sex workers' health, safety, civil, industrial and human rights. Australia's experience with the diversity of sex industry law reform has allowed for the negative consequences of legalisation and criminalisation to be well documented. Under both systems the 'harms' associated with sex work can continue to proliferate and flourish, leaving workers vulnerable to corruption, vilification and discrimination while compromising harm reduction strategies being implemented in that area. Decriminalisation is the only form of law reform that compliments best practice harm reduction strategies for sex worker populations.

This presentation is designed to bring the human element to an area of law reform that is - most often than not – debated and designed without any consideration of the affected population, namely sex workers. Sex workers' views, opinions, and expert advice must be incorporated at all stages of the process when developing and implementing policies, programs and services and it's imperative that it also occurs with legislative change. As the International Spokesperson for Scarlet Alliance – the Australian Sex Workers' Association, this overview of the Australian experience comes from many years of lived experience from our members – all current or former sex workers in Australia.

So what is the difference between 'illegal', 'legalised' and 'decriminalised'?

There is much confusion between the terms 'illegal', 'legalised' and 'decriminalised'. These terms are often used interchangeably but, when used to describe law reform in the sex industry, have completely different contexts.

When the sex industry is illegal it means that specific laws are written outlining all criminal activities that someone can be charged with. The regulators are the police.

When the sex industry is legalised the previous laws have been repealed and replaced with a new set of laws defining which particular activities are now allowable. These defined activities are therefore legalised. This has occurred in a number of locations around the world including certain states and territories in Australia, in certain counties in the State of Nevada (USA) and the Netherlands. The regulators are still the police.

While the general public may assume that legalisation of the sex industry would be our highest aspiration it is not. This is because it is highly prescriptive, creating conditions where only selected sections of the industry have been included in the legislation. In most cases legalisation has included a licensing model which, in Australia, has created strong barriers preventing participation in the legal sector of the industry by a large proportion of the sex industry in that State.

Decriminalisation is where the criminal laws in relation to sex work are repealed and the sex industry is regarded in the same way as any other business. There is no need for 'new' or 'special' laws to regulate the industry; instead it comes under the plethora of laws already in place. This can include taxation, planning and building codes, Occupational Health and Safety regulations, zoning laws, fire codes, employment laws and fair trading regulations. The basis of decriminalisation is equality. Exemptions, for special consideration from any usual regulations, are only sought if sex workers' privacy or health and safety would be compromised due to the high level of discrimination these individuals still face in society. The police are not the regulators.

The Australian experience with different law reform.

Sex work is recognised as a lawful occupation in Australia (at a Federal level) and sex workers are expected to pay tax on all earnings to the Australian Tax Office (ATO). All other regulatory powers for the sex industry are defined at State or Territory level. Below is a brief overview of how these different laws in Australia can affect how and where a sex worker can work.

Queensland

- Defined as operating under a 'legal framework'
- Regulators are still the police.
- Sex workers can only work in brothels or by themselves.
- Brothels licensed: allowed a maximum of five (5) rooms each and are not allowed to provide escort services.
- Private, independent sex workers: not licensed. ONLY allowed to work alone, with charges laid against them if they even share the same workplace or mobile phone. A worker can still be charged even if they advertise 'doubles' in another state on their website.
- Advertisements of all sex workers constantly under scrutiny and must submit to the Prostitution Licensing Authority (PLA) for approval. This must occur every time you change something on your website, even just one sentence or photo.

Australian Capital Territory (ACT)

- Defined as operating under a 'legal framework'
- Regulators are still the police.
- Sex workers can only work in brothels or by themselves.
- Brothels: licensed: only allowed in two particular industrial areas.
- Private, independent sex workers must register as a sole operator with the Office of Fair Trading two (2) weeks before advertising and working in the ACT
- Private, independent sex workers ONLY allowed to work alone but can employ a receptionist or security personnel.

Victoria

- Defined as operating under a 'legal framework'
- Regulators are still the police.
- Sex workers can work in brothels, independently or with one other.
- Brothels: licensed
- Private, independent sex workers must register with the police before advertising and working.
- Only allowed to own and operate one (1) brothel in Victoria.
- Application fees and annual license fees for running a brothel and/ or escort agency are incredibly high, with additional annual fees are charged for each "second and subsequent" room / business name / telephone

Northern Territory

- Defined as operating under a 'legal framework'
- Regulators are still the police.
- Sex workers can only work for escort agencies or independently.
- Brothels are illegal. All sex workers must travel to the client.
- Private, independent sex workers do not register with the police but can only provide escort services.
- Escort Agencies must register each sex worker they employ with the police.

South Australia

- It's not illegal for sex workers to work independently, as an escort.
- Brothels are illegal.
- Regulators are still the police.

Tasmania

- Sex workers can only legally work independently, or in pairs.
- Brothels are illegal.
- Regulators are still the police.

Western Australia (WA)

- Sex workers can work in brothels, escort, or in their own home, alone.
- It is illegal to own or manage a brothel.
- Police are the regulators.

➢ Legislation was passed in April 2008 which will decriminalise brothel ownership and allow private sex workers to work in pairs.

To be informed of recent changes to law reform in any part of Australia please go to the Scarlet Alliance website: www.scarletalliance.org.au

As you can see, registration of sex workers, and/ or special licensing of brothels often go hand in hand with legalisation. This is a completely unnecessary, discriminatory practice which in effect continues the role of the police force as regulators of sex workers. Legalisation occurs without adequate consultation of all sectors of the sex industry, which in turn, leads to prescriptive laws placing the majority of the industry outside the new 'legal' framework. This further marginalises and criminalises the very people the legal changes should aim to protect.

Decriminalisation in NSW

Currently only New South Wales (NSW) operates under a decriminalised framework.

Sex work, in NSW, became a legal occupation in 1979. At this time NSW became the only state in Australia that amended legislation allowing street based sex work to legally operate in certain areas (which is still regulated by the police under the Summary Offences Act). [1]

In 1995 the Disorderly Houses Amendment Act (DHAA) [2] was passed allowing people to run and operate a 'brothel' as a legitimate land use - equal to any other commercially viable business. This Amendment was passed with bipartisan support, meaning that both Liberal and Labor – the two main parties in parliament – voted for these Amendments.

There were two main reasons for this support of decriminalisation. The first was to **eliminate corruption** from within the police force. The Wood Royal Commission into corruption of the NSW Police Force ran for three years (May 1994- May 1997), conducted by the Honorable Justice Wood. The Royal Commission Final Report stated evidence showed "*a clear nexus between police corruption and the operation of brothels*".[3] The second reason was to **increase the health and safety of sex workers and their clients**. It is important to note here that legislative changes were made using an evidence based approach instead of moral judgement and personal bias against the nature of the industry.

Positive outcomes of decriminalisation

Since 1995 the NSW sex industry has been able to operate without the fear of police corruption or arrest. The regulation of the sex industry was taken out of the criminal jurisdiction and became a planning issue at a local council level. Positive outcomes from this include:

Demarcation between the police as protector and enforcer.

This is incredibly important as sex workers are only now beginning to feel that they can seek police assistance without fear of prosecution or arrest and actually come forward and report incidences of rape, assault, theft and other crimes against them, like any other person.

[1] Summary Offence Act 19.
[2] Disorderly Houses Amendment Act 95, now found under the Restricted Premises Act 1943 (No 6).
[3] NSW Government (1997) "Royal Commission into the NSW Police Service: Final Report – Corruption", p13.

Equality

Sex workers can work on a 'level playing field' having their occupation recognised as an occupational choice without becoming criminalised. A criminal record for 'prostitution' can negatively impact a person for the rest of their lives: denying them access into other countries, impeding their ability to pursue other occupational choices in the future, deeming them 'unfit parents', denying them the right to gain a loan, rent or purchase a house and can result in accumulated debt from fines related to 'prostitution' charges. In addition to this, the 'level playing field' means that the sex worker and their client have the same status in terms of rights, and justice.

Increased empowerment of sex workers

Decriminalisation allows sex workers to choose which section of the sex industry they wish to work. This can include escort, working privately with another worker, in a small or large establishment ('brothel') or in an escort agency. It allows flexibility of employment according to the individual worker and also caters for the varying needs and requirements of their client base.

Decrease in the amount of tax payers' money being used on law enforcement of the sex industry.

There is currently no accurate research on the total amount spent on law enforcement of the illegal - or legal - sectors of the sex industry on either an Australian or global level. However it must be noted that it would be significant and we believe that public money would be better utilised by allowing police to minimise crime in the community rather than investigating and arresting people in the sex industry. This has definitely been a positive outcome in NSW.

Decreased corruption from police

The days when sex workers and owners of brothels had to 'pay off' the police are long gone in NSW. Police are now only involved in the sex industry in the same way they are with other businesses, such as when there is a robbery or an assault. The industry does not need to operate 'underground' where they can be 'stood over' by someone who will threaten their health and safety unless they are given favours and / or money.

Occupational Health and Safety (OH&S)

WorkCover NSW is the Government Department who promote workplace health and safety, and provides a workers' compensation system for the employers and workers of NSW. In 1998 they funded a project based at the Sex Workers Outreach Project (SWOP-NSW) to develop a resource for the sex industry, and provide training workshops to sex workers and owners of sex industry workplaces. This project created *Getting on Top of Health and Safety in the NSW Sex Industry* resources which included a detailed booklet and a video. It also revised the WorkCover NSW and NSW Department of Health 1997 joint publication *Health and Safety Guidelines for Brothels in NSW* and measured the effectiveness of this document. This document is still referenced to outline clear and concise guidelines for establishments to adhere to when setting up and operating their business. These resources clearly outline both the rights and responsibilities of everyone involved in the sex industry in regard to

OH&S including free provision of Personal Protective Equipment (PPE) – condoms, lube, gloves, dams, as well as secure beds and massage tables, clean linen etc. It is a clear example of government recognising the importance of supporting the OH&S needs of the sex industry as a recognised occupation and the benefits of doing so.

Opportunity for sex workers to pay appropriate tax

While many people in the sex industry have always paid tax from their income derived from the sex industry, decriminalisation allows them to be open about their occupation and enables them to claim expenses incurred from operating their business on an equal level to any other occupation. Having to 'hide' behind another occupation denied them this right to claim for correct expenses which could previously 'out' them as a sex worker in an illegal environment (such as PPE, speciality costumes, wigs and advertising costs).

Sex services for people with a disability: Touching Base Inc: www.touchingbase.org

Touching Base Inc. is a not-for-profit association that has been active since October 2000. It developed out of the need to assist people with disabilities and sex workers to connect with each other, focusing on access, discrimination, human rights and legal issues and the attitudinal barriers that these two marginalised communities can face.

People with a disability have an intrinsic right to sexual expression. This right enables people to develop relationships, have sex, explore and express their sexuality and achieve intimacy without personal or systemic barriers. Decriminalisation of the sex industry has allowed people with a disability to be able to choose seeing a sex worker as one of many options to address and explore these issues. It has also allowed Touching Base to produce and deliver specialised training workshops to sex workers (Professional Disability Awareness Training) and service providers for people with a disability (Service Provider Awareness Training) to increase the experience, knowledge and awareness of providing services to people with a disability.

Terminology and cultural changes

In 2005 the NSW Planning Department reviewed and altered its terminology describing the industry. Instead of 'prostitutes' they now refer to 'sex workers'; instead of 'brothel' they use 'sex services premises'. This is an important step forward, with the NSW government acknowledging and recognising the sex industry's preferred language and terms. The previous terms are seen as derogatory words that often induce fear and moral assumptions. This is particularly problematic for an industry that is so repeatedly misrepresented by the media, resulting in stereotypes and the correlation between derogatory terminology and organised crime, disease, corruption and disgust. The term 'sex work' is recognition of the occupation, without the attachment of derogatory ideology and the term 'sex services premises' allows for the recognition and inclusion of other forms of sex work establishments, such as massage parlours and Bondage and Discipline (B&D) houses, within future policy.

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Impediments to Decriminalisation in NSW working efficiently

While there have obviously been many positive outcomes from decriminalisation in 1995, there were a number of laws that were overlooked at the time that still need to be changed or repealed in order for the industry to gain complete equality. There are also additional things that the government should have done at the time to assist the industry in complying with the new legislation.

- definition of a 'brothel'

Currently in NSW the legal definition of a brothel states "***brothel*** *means premises habitually used for the purposes of prostitution, or that have been used for that purpose and are likely to be used again for that purpose. Premises may constitute a brothel even though used by only one prostitute for the purposes of prostitution*"[4]. This does not differentiate between the larger scale establishments and private independent sex workers working from a shared location or from home.

- Regulation occurs at a local level – there is no state wide consistency.

The original intentions of the DHA Act 1995 only allowed local councils to go to the Land and Environment Court to have a brothel closed if there were sufficient complaints, made by residents, based only on amenity impacts[5] not moral grounds. At the time the power to 'regulate the use of a building' or require Development Applications (DA's) from brothels were within the Local Government Act, 1993 (LGA 1993). However, in 1998 these "orders" were transferred from the LGA 1993 to the EP&A Act.

This meant that there were suddenly 172 local councils with the ability to write their own policies dictating where and how the industry could operate, ignoring the original intentions of the DHA Act 1995. There were many councils who stated that 'brothels' could ONLY operate in industrial areas – pushing private workers and small scale premises back into the illegal sector. Unable to comply they are left vulnerable to corruption and standover tactics by authorities and other members of the public. From this the sex industry has become a political football – especially at local election times, with politicians using the industry as a way of generating 'easy' votes by speaking out against it.[6]

[4] Restricted Premises Act 1943 (6) http://www.legislation.nsw.gov.au/maintop/scanact/inforce/NONE/0

[5] Planning NSW describes amenity impacts for any type of building, not only sex services premises, as interference with the amenity of the neighbourhood, for example noise, waste products, traffic generation or exposure to view of any unsightly matter.

[6] Briefing paper on Private Worker Home Based Businesses (PWHBB) prepared by the Private Worker Alliance (PWA) and the Sex Workers Outreach Project (SWOP), October 2001

• Poor implementation and lack of knowledge about decriminalisation of the sex industry.

While legislative change happened at the end of 1995 most people still do not know that this has occurred[7]. There was no positive media about the changes nor were there detailed guidelines for local councils to refer to when making policies about the sex industry. Only after the Brothels Taskforce in 2001 and the formation of the Sex Services Premises Planning Advisory Panel (2002-2005) were the Sex Services Premises Planning Guidelines[8] created. They were publicly released – though not endorsed – by the NSW Planning Department in 2006. It is pleasing to note though that sex workers, and SWOP – NSW, were appointed to the Panel, as a means of consultation on the content of the Guidelines.

Because of the lack of an implementation program for the first 10 years, the original intentions for legal reform have not been adhered to nor implemented in the formation of local council planning policies made since 1995 and the level of discrimination directed towards the industry remains high.

• Advertising laws

The Summary Offences Act 18 and 18A were not repealed in 1995, therefore it remains an offence to advertise premises for use of prostitution or to advertise for staff. While not generally enforced, this unequal treatment of the sex industry compared to other legitimate businesses allows for discrimination resulting in increased advertising costs charged by publications to run sexual services advertisements.

• No anti-discrimination laws in place

While sex work is recognised as a legitimate occupation there is currently no anti-discrimination law in place for 'occupation, trade or calling' in NSW. This allows the industry to be openly discriminated against across a broad range of areas in society. Sex workers are denied access to banking facilities, credit cards, loans, rental accommodation, health and medical services, fair and equitable treatment in both criminal and family courts, based purely on their occupation as a sex worker.

[7] An unpublished SWOP survey of 553 people, including 151 self identified clients, at SEXPO in 2003 AND 2004 showed that 29% did not know that the sex industry was legal.
[8] *Sex Services Premises Planning Guidelines*, December 2004. NSW Department of Planning. www.planning.nsw.gov.au

Conclusion

Harm reduction strategies are most effective when sex work is recognised as a form of labour, with the same civil, industrial and human rights as other occupations. Decriminalisation is the only regulatory model which recognises and protects these rights. Drawing from the Australian experience, New Zealand, in 2003, became the first country in the world to implement decriminalisation at a national level. It is hoped that, in time, other countries will also take an evidence-based approach and recognise sex work as work. Until then, all harm reduction strategies will continue to be undermined by unjust and discriminatory regulation and practices.

An evidence-based approach – not a knee jerk reaction to myths and moral judgements about the sex industry – is what is needed in order to truly recognise the human rights and the health and safety of those working in the sex industry around the world.

I always say that I would never try to create policy or procedures for dentists as I am not a dentist myself. Please give sex workers the same respect. The industry has a wealth of practical knowledge in dealing with our needs and issues and has the right to be respected and consulted as the primary stakeholders in any matters relating to the provision of sexual services.

Nothing about us, without us.

Useful References

► Scarlet Alliance – Australian Sex Workers Association.
www.scarletalliance.org.au

► Scarlet Men – the site for Australian Male sex workers: http://www.scarletmen.org.au/

► Touching Base Inc. www.touchingbase.org
Touching Base Inc is a not-for-profit project that has been active since October 2000. Touching Base developed out of the need to assist people with disabilities and sex workers to connect with each other, focusing on access, discrimination, human rights and legal issues and the attitudinal barriers that these two marginalised communities can face.

► NSW Government Department of Planning
Sex Services Premises Planning Guidelines, December 2004
www.planning.nsw.gov.au

► Available OH & S resources from Australia
www.scarletalliance.org.au

- click on 'publications'
- you can now download:

1. A Guide to Best Practice for Occupational Health and Safety in the Australian Sex Industry (2000)
2. Principles for Model Sex Industry Legislation (2000)
3. Unjust and Counter-productive: the Failure of Governments to Protect Sex Workers from Discrimination (2000)

▪*Health and Safety Guidelines for Brothels in NSW* (2001), WorkCover. www.workcover.nsw.gov.au

▪ *The Australian Capital Territory (ACT) OH&S Code of Practice for the Sex Industry* (1998) WorkCover

▪ *Victorian Health Standards for the Management of Registered Brothels and Related Premises* (1992)

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http://www.legislation.nsw.gov.au/maintop/scanact/inforce/NONE/0

The Prostitution Licensing Authority (PLA): www.pla.qld.gov.au