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The Co-ordinator, Prostitution Control Bill  
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Minister for Police and Emergency Services  
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Dear Minister

### **Prostitution Control Bill 2002**

The Australian Federation of AIDS Organisations (AFAO) represents Australian HIV community based organisations at a national level. Our membership includes State and Territory AIDS Councils and Scarlet Alliance, the peak national organisation representing sex workers. Amongst AFAO's activities is the provision of HIV policy advice to the Commonwealth government, advocating for our member organisations at a Federal and State level, developing and formulating policy on HIV/AIDS issues, and promotion of medical and social research into HIV/AIDS and its effects.

AFAO welcomes your Government's commitment to sex industry law reform. The Government has a unique opportunity to improve the health and safety of sex workers by legalising adult sex work. However AFAO is concerned that the model of regulation proposed is seriously flawed and may result in a worsening of conditions for sex workers and an undermining of health promotion efforts with sex workers.

### **Context**

Australia has a National Strategy on HIV/AIDS which is recognised globally as a model public health response (*National HIV/AIDS Strategy 1999-2000 to 2003-2004* Commonwealth Dept. of Health and Aged Care 2000).

Key characteristics of the Strategy include a commitment to involving affected communities at every level including planning, delivery and evaluation of HIV programs and policies; the importance of protection of the rights of people affected by HIV; the creation of an enabling legal and policy environment for HIV prevention, treatment and care programs; and promotion of voluntary and confidential testing and treatment services. Under the Strategy, sex worker organisations are recognised as playing an important health promotion role and the current Strategy states the need to "expand sex worker organisations' capacity to design, manage and participate in the broader partnership response to the epidemic."

Prevalence of HIV has remained very low amongst sex workers in Australia, with levels maintained at less than 0.2% prevalence among female sex workers seen at sexual health clinics (*Annual Surveillance Report*, National Centre in HIV Epidemiology & Clinical Research 2002). This has largely been achieved through the voluntary development of a strong safe sex culture within the sex industry, promoted by sex worker organisations in each state and territory.

### **Principles to inform law reform**

AFAO believes that the following principles should guide the law reform process:

- 1 Sex work should be subject to the same legal frameworks as other industries and occupations. The sex industry should be regulated through standard business, planning and industrial law and policy.
- 2 Sex workers should be closely involved in the development and implementation of all new policies and laws affecting their industry. Both individual sex workers and organisations representing the interests of sex workers should be supported in fulfilling this role.
- 3 Laws regulating sex work should address health and safety objectives as a priority. The health of sex workers is best promoted through:
  - occupational health and safety standards developed in partnership with sex workers
  - peer based approaches to provision of health and safety information
  - requiring employers to provide condoms and lubricants for sex workers.
- 4 Laws and policies should be framed in a human rights context, and in particular should avoid measures which might contribute to the stigma associated with sex work or increase sex workers vulnerability to exploitation or disadvantage. Laws should be consistent with the *National Strategy on HIV/AIDS* which seeks to develop a non-punitive and supportive legal environment that encourages people whose behaviour might put them at risk to respond to education campaigns and to access testing and treatment services on a voluntary basis.

### **Specific comments on the Bill**

#### *Proposed licensing model (Parts 3 & 4)*

AFAO does not support the licensing provisions proposed. Imposition of harsh penalties for operating outside the licensing system effectively criminalises sex workers further than the present law. A licensing system should focus on businesses rather than individuals and aim to improve the occupational health and safety of sex workers by requiring licensed businesses to comply with health and safety standards and providing for the removal of licences where serious breaches of standards occur. It should not seek to screen, identify and monitor individual sex workers but rather engender a culture of the observance of industrial responsibilities towards sex workers.

AFAO is particularly concerned about the implications of proposed **s.29** which prescribes a penalty of 2 years imprisonment for individual sex workers acting as prostitutes without a licence. Onerous provisions requiring licensing of individual workers carry a high risk of driving segments of the industry underground and thereby risk defeating the purpose of the legislation. A licensing system that does not recognise the need for sex workers to maintain

their privacy is likely to be boycotted by many sex workers fearful of discrimination and other negative consequences of loss of privacy. The fact that licensed sex workers would be subject to intrusive provisions such as requirements to provide finger and palm prints (s38) and submission to medical examinations (s138, s189) provides little incentive to work legally.

No other jurisdiction in Australia has adopted an individual licensing system due to the costs of policing such a system and the negligible benefits to sex workers or the public. There is no justification for the high level of surveillance implied by such an approach.

Given that a significant number of sex workers are likely to seek to work outside the licensing system created by the proposed legislation, a two tiered industry of legal and illegal operations is likely to evolve. A significant factor in improving the welfare, occupational health and safety of sex workers is their level of access to health education, sex worker organisations and other health and welfare services. Under a system whereby licensed and unlicensed brothels are likely to be operating concurrently, sex workers could face a significant worsening of working conditions, a decrease in safety, and reduced negotiating power to ensure safe practices for themselves and their clients. Illegal brothels may be inaccessible to peer educators and outreach workers. Without proper access to safe sex information, safe sex products, training in work practices and counselling and emotional support, illegal sex workers are at a greater risk of exploitation, violence and sexually transmitted infections. This puts their clients, and thus the general community, at risk of infection as well.

An illegal environment is unsafe for sex workers and ultimately the general public as well. It creates opportunities for organised crime to become involved in the sex industry, and increases the chance of police corruption, standover tactics and bribery.

#### *Penalties for workers or clients with Sexually Transmitted Infections (STIs)*

Condom use for penetrative sex is now an almost universal practice in the Australian sex industry, and plays an educative role for clients of sex workers, and thus the general community. Excellent sexual health standards have been developed within the sex industry without criminalising the non-use of prophylactics or the involvement of sex workers with STIs in the sex industry.

Imposing special criminal provisions on sex workers who continue to work with an STI and managers, operators and agents who allow workers to continue to work with an STI (ss 108, 131) will serve only to further stigmatise sex work. Existing general criminal law penalties [*Criminal Code* s294 (doing an act that is likely to result in serious disease) and s297 (causing grievous bodily harm)] and Health Department policy on managing people with HIV who may be placing others at risk are adequate to address concerns about transmission of HIV within the sex industry. Specific offences send an inaccurate education message to clients and the general public by implying either that existing workers must be 'clean' so condoms are not essential, or that sex workers are a high risk category for HIV.

There are a number of practices within the sex industry that involve little or no risk of transmission of STIs. Revoking a sex worker's licence on the basis of an STI diagnosis denies them access to income from providing such services (e.g. massage and hand relief, bondage and discipline), and criminalises workers who continue to work.

Similarly the proposed offence for prohibiting people with an STI from using sex work services (s85) is inappropriate, and may have the consequence of deterring clients of sex workers from having sexual health check ups. This would have detrimental public health consequences.

### *Medical examinations and STI/HIV testing*

The Australian National Council on HIV/AIDS and Related Diseases issued a national HIV Testing Policy in 1998 which states that ‘voluntary testing with counselling and confidentiality is fundamental to Australia’s HIV/AIDS response’ and ‘testing should be voluntary and follow specific informed consent, with the results remaining confidential’. It is now accepted by health promotion experts that education campaigns should encourage all sexually active people to have periodic health checks for STIs on a voluntary basis. Measures which rely on compulsion and which target specific groups such as sex workers run counter to this policy and are likely to prove counterproductive.

AFAO has serious concerns about the negative public health implications of the provisions of the Bill which effectively require regular testing for STIs (**s189**), compel reporting of a person with HIV to the Prostitution Control Board (**s119**), prohibit sex workers from working with an STI (**s108, s131**), and provide for the power to compel medical examinations (**s138**). This regulatory scheme would effectively require brothel operators to enforce mandatory regular HIV and STI testing. Failure to require testing according to the regulations to be made under **s189(3)** would expose workers and management to heavy penalties should a worker be found to have an STI (given that, where a person fails to undergo such tests, it is conclusively presumed that the worker and operators/agents/managers knew that the worker was infected: **s189**). The effect of this is draconian, given that the penalties where a person continues to work whilst infected with an STI are imprisonment for 2 years for individuals and 5 years for operators, agents and managers. These provisions are unnecessary and inappropriate. AFAO urges that these provisions be deleted from the Bill.

Mandatory health requirements such as the health tests to be regulated under **s189** stigmatise sex workers whilst being largely irrelevant. Sex workers have very low rates of STIs and HIV and enjoy better sexual health than the general community. It is well recognised that there is a strong culture of safe sex in the sex industry. Requirements for mandatory sexual health testing and registration of sex workers are unnecessary to ensure sexual health of workers.

Sex workers should not be obliged to produce medical certificates to managers to prove they are ‘clean’ as suggested by proposed **s109(2)**. Such a practice sends a confusing public health message as it focuses on the health status of the sex worker, and not on the health status of the client. Tests for HIV and many other STIs cannot guarantee the absence of infection due to the window period prior to infection being detectable, and could lead to a false sense of confidence about freedom of infection and undermine the need for consistent safe sex practice.

### *Use of prophylactics*

AFAO supports **s187** which prohibits possession of prophylactics being used as evidence of involvement in prostitution. The use of possession of condoms as evidence of an offence is contrary to public health. In the past police have intimidated sex workers through threatening the use of condoms and lubricant as evidence to support prosecutions. Police may need to be educated to comply with this provision.

There should be no crime related to failure to use prophylactics during sex work. AFAO opposes the offences proposed in **s86** (prophylactic to be used) & **s130** (businesses strict liability for breach of s86) which are likely to be impractical to police and difficult to enforce. Experience elsewhere in Australia has been that the objective of promoting universal condom use in the sex industry is more efficiently achieved through promoting a system of development of occupational health and safety standards which include comprehensive consideration of measures to promote safe sex practices. Such an approach is more likely to enlist the co-operation of sex workers than reliance on the threat of prosecutions and fines.

### *Police powers (Part 8)*

AFAO is concerned that police powers under Part 8 relating to street work are excessive and could be misused by police.

It is of great concern that the Bill does not provide a process for challenging move-on notices issued under **s165**. Broad discretionary powers based on suspicion and which are not subject to review are liable to misuse. For example, a sex worker known to police who is in an area for reasons other than sex work could be presented with a notice even though they are not working. This type of provision lends itself to selective policing, for example targeting of young or indigenous people in inner-city areas.

The inclusion of special powers such as **s170** to conduct body searches including examination of body cavities is unnecessary for laws dealing with sex work. Ample powers of search and seizure exist under Drugs Misuse legislation.

### *Reversal of onus of proof (Part 9)*

AFAO opposes the provisions of Part 9 Division 1 of the Bill which effectively reverse the onus of proof in relation to a range of offences. For example, **s186(1)** operates to place the burden on sex workers to prove their innocence of the offence in **s75** of seeking a client in a public place, as they are presumed to be loitering or frequenting a place with the intention of inviting clients. Given the importance in human rights terms of maintaining the presumption of innocence, particularly where a jail penalty of up to 2 years is imposed, it is difficult to see any public interest rationale for reversing the onus of proof. This provision is likely to lead to miscarriages of justice and should be removed.

### **Community consultation and involvement**

AFAO is concerned that there is no formal process for participation of sex workers themselves in oversight and implementation of the regulatory scheme. Of particular concern is the exclusion of sex worker representation on the Prostitution Control Board. Ensuring such representation would build the confidence of the industry in the licensing process. Developing consultative processes enables government to more effectively regulate sex industry businesses. Experience in other jurisdictions has demonstrated that where government has involved the sex industry and the community in developing policies and processes to enable fair consideration of applications on planning grounds, brothel operators have co-operated in seeking to license their operations and comply with health and safety requirements.

We are also disappointed that the level of involvement of sex worker organisations in development of the Bill has so far been minimal. We trust that the Government will engage in a constructive partnership with sex worker organisations in finalizing legislative proposals over coming months.

### **Recommended options for reform**

A preferable model for addressing sex industry law reform issues is to establish a legal framework which facilitates the development of occupational health and safety standards for sex work through a consultative process with the sex industry. This is more likely to result in improved public and occupational health outcomes rather than reliance on a punitive approach.

AFAO urges the consideration of options which positions adult sex work on an equal basis to other occupations. Such options include general decriminalisation of the adult sex industry, such as has occurred in New South Wales where brothels are approved as any other business through a planning application at local government level; or a less onerous registration system

coupled with a planning scheme such as the model adopted in the Australian Capital Territory. Such models are more consistent with the general approach of treating sex work as a lawful occupation to be regulated so far as possible under legislation that applies to other types of lawful business.

Decriminalisation facilitates the breakdown of stereotypes and myths about sex work, whilst assisting sex workers to take a fuller role in challenging unfair and discriminatory practices in the industry.

AFAO recommends that, in addition to decriminalisation, policies be put in place which:

- protect sex workers from discrimination and promote equality of opportunity for people who are or have been sex workers,
- reduce the stigma which is associated with the industry (eg through community education to counter myths associated with sex work such as the labeling of prostitutes as deviant, immoral and a health risk),
- protect the privacy and confidentiality of individual sex workers, and
- support sex worker organisations to operate effectively in representing the sex industry, participating fully in the development and implementation of industry policy as equal partners with government and vigorously promoting safe sex practices which benefit sex workers and their clients – and thus the general community.

Thank you for the opportunity to respond to the Bill.

Yours faithfully

Don Baxter  
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