



16 November 2011

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The Honourable Stephanie Key MLC  
Parliament House  
North Terrace  
ADELAIDE SA 5000

Dear Ms Key

**Draft Sex Work Industry Bill 2011**

I refer to your letter of 5 October 2011 and thank you for inviting the Society's feedback in relation to the draft *Sex Work Industry Bill 2011*.

The draft Bill was referred to the Society's Women Lawyers, Criminal Law, Children and the Law, and Industrial Relations Committees. This response is a compilation of their comments.

Generally speaking, the Bill strikes a good balance between protecting vulnerable persons (under 18 year olds etc) while putting in place rules that allow adult women (and men) who choose to engage in this work to do so in a legitimate way.

*Industrial relations perspective - Relevance and Coverage*

1. Commercial sex arrangements are currently void for illegality. This results in a sex-worker not being covered by important industrial protections in relation to workplace health and safety, industrial entitlements and workers compensation (all of which are discussed in further detail later in this letter). Whilst not entering into the debate as to whether commercial sex arrangements should be legalised, the reality of their existence is such that protection needs to be considered.
2. It is appropriate that the Bill cover all "commercial sex" arrangements to ensure comprehensive coverage for all workers in this industry, including those working in brothels, street workers and those who attend at a client's home or hotel. Other jurisdictions have limited coverage to brothels. In our view this is inappropriate as it leaves further gaps in the regulation of this industry, a problem this Bill is seeking to avoid.

*Work Health and Safety ("WHS")*

3. The sex industry has traditionally had low levels of compliance with workplace health and safety. This is a significant concern in what is already an inherently dangerous industry.

4. Clause 11 of the Bill addresses these concerns to some degree. It provides that all sex workers must use a prophylactic sheath, take all reasonable steps to ensure that health information is provided to sex workers and clients, and displayed at any premises and take all reasonable steps to minimise the risk of sex workers or clients acquiring or transmitting sexually transmissible infections. The Society strongly supports this clause as it is for the benefit of sex workers and the community as a whole.
5. However, clause 11 of the Bill could be expanded to provide the relevant Minister with the express right to create, by way of regulations, a WHS Code of Practice for the Sex Industry. A statutory code would then operate in conjunction with the wider WHS laws. This is the procedure adopted in Victoria where the *Sex Work Regulations 2006 (Vic)* deal with WHS matters unique to sex-workers. These regulations then operate in conjunction with “ordinary” WHS duties. This has worked well in Victoria and is appropriate given the unique nature of the sex industry and the lack of regulation in the sex industry.
6. In addition to the WHS issues already addressed by clause 11, consideration should be had to whether the Bill (or the accompanying regulations) should include measures in relation to:
  - a. protecting sex workers from physical and/or verbal assault including duress alarms and adequate lighting;
  - b. written procedures for Escorts who engage in commercial sex outside of traditional brothels, for example at private premises or a hotel;
  - c. ensuring that facilities and personal protective equipment are, as far as reasonably practicable, sanitary and safe; and
  - d. ensuring that, for the purposes of the regulations, a “workplace” extends beyond a brothel to those places where commercial sex may take place.
7. In addition to the Victorian Regulations noted above, we also refer you to the following example Codes of Conduct, with the latter being particularly detailed:
  - a. *Health and Safety Guidelines for Brothels* in New South Wales; and
  - b. *National OHS Guidelines* prepared by the Scarlet Alliance.

#### *Spent Convictions*

8. Section 6 of the Bill, which provides that the conviction of a person from an offence relating to prostitution will be taken to be immediately spent is supported by the Australian Industrial Relations Commission (AIRC). This provision is particularly important for those workers who are seeking to exit the sex industry and seek alternative employment outside of the sex industry. Discrimination can and often does occur if an employee had such a conviction on their record.
9. However, in respect of the amendments to the Equal Opportunity Act 1984, we are concerned that discrimination is prohibited only against those who have been a sex worker in the past. We are of the view that discrimination should also be prohibited against persons who are presently sex

workers. Making this change would make these amendments consistent with the other grounds of discrimination identified in section 85T, which are all expressed in the present tense. In the event employers such as schools and religious bodies do not wish to employ a sex worker, such institutions can apply for an exemption under the Equal Opportunity Act.

#### *The Employment Relationship and the Fair Work Act*

10. The Bill seeks to amend the *Fair Work Act 1994* (SA) to include a specific provision concerning sex workers coming within the definition of contract for employment. As currently drafted, **the Bill will not be effective** for the reasons set out below.
11. We understand that most brothels in South Australia comprise what may essentially be a partnership of 2 or 3 sex workers in a small premise. Those involved in a partnership may not come within the proposed addition to the definition of "contract of employment" as they are not effectively "employing themselves". However, an employee of a partnership or an employee of a sole trader would come within this definition. Presumably such employers would be a "national system employer" under the *Fair Work Act 2009* (Cth).
12. For the Bill to be effective there must be a complimentary provision under the *Fair Work Act 2009* (Cth) to ensure that sex workers are properly covered under that Act. Given the referral of South Australia's powers to the Commonwealth, and the inconsistency provisions in section 26 of the *Fair Work Act 2009* (Cth), this clause will be effectively worthless as it will only regulate the public sector and local Councils. The cooperation of the Commonwealth will be critical.
13. Assuming the *Fair Work Act 2009* (Cth) can be amended to accommodate the Bill, it is extremely unlikely that a Modern Award would regulate commercial sex work. However, the National Employment Standards would apply and would entitle permanent workers to (amongst other things) reasonable hours of work, paid and unpaid leave and notice of termination.
14. Finally, we note that studies suggest that there is a very common misunderstanding in the sex industry in relation to the employee/contractor dichotomy. Many sex-workers are seen to be sub-contractors who "rent out a room". We query whether the Bill ought to address this issue by making it an offence to misrepresent an employment relationship as a contractor relationship, comparable to the sham contracting laws that exist in the *Fair Work Act 2009* (Cth).

#### *Workers Compensation*

15. For similar reasons to those raised above in the context of WHS, the interaction between the sex industry and the South Australian workers compensation scheme will need to be carefully considered. Putting aside the issue of compensation from illegal activities, we make the following comments.
16. As but one example, Workcover (and the appropriate Minister) will need to consider whether (and to what extent) certain "disabilities" arising in the sex industry are compensable under the *Workers Rehabilitation and Compensation Act 1986* (SA). Although all injuries sustained by a sex worker in the course of commercial sex services should be compensable, it will be difficult in practice to determine whether certain "disabilities" are compensable. For example, if a sex-worker contracts HIV or another serious STI, will their employer (or WorkCover) be able to assess whether the STI

was contracted in the course of employment? Should a certain “class” of injuries therefore be excluded from coverage (or conversely deemed to be included) where causation is almost impossible to determine? Although we do not, at this stage, have answers to these questions, the workers compensation implications must be considered further.

### *Anti-Discrimination*

17. The provisions preventing discrimination on the ground of a person having been a sex worker are supported by the Society. This will enable people to exit the industry without suffering an ongoing stigma and discrimination on the basis of their previous work.

### *Prostitution and Minors*

18. Part 3 sections 8-10 are important and appropriate inclusions in the Bill as they provide an explicit prohibition on the involvement of persons aged under 18 years as workers in the sex work industry (section 8), that no clients are to be under the age of 18 (section 9) and restrict premises used for sex work from being in close proximity to children’s facilities. However we consider that 200m is still in close proximity to children’s facilities (Section 10(1)(a))
19. A “small (worker-based) sex business” as defined is likely to be a home based business, yet there is no provision in the Bill to ensure that children are not present or living at the premises at any time during the operation of the sex business. We regard this as an oversight and request that penalties be introduced to ensure that children are not present during any aspect of the operations of the “sex business” or “sex work”.
20. We understand that alternative submissions have been made to the effect that prostitution should be permitted at the age of 17 because the age of consent is 17. However, in our view this is not appropriate given the nature of the work undertaken and the contractual issues which would arise by virtue of the contracting party being a minor. As but one example, parental consent would be unlikely and unrealistic.

### *Criminal Law*

#### *Section 11(a)*

We recommend deletion of the words “or greater” on the basis that they are otiose and potentially confusing. The lower threshold of the “similar risk” is all that is required to fix the minimum level at which reasonable steps must be taken to prevent transmission of an infection.

#### *Section 15*

We do not support s15 in the event that it includes a reversal of onus requirement. If it does not then it should be re-worded to make that clear.

On a proper reading of the provision, and bearing in mind the practicalities of proving the offence and the prosecution’s responsibility to call relevant witnesses, we believe s15 does not reverse the onus. Assuming, however, that it does, we say that it unfairly reverses the onus. Holding an individual responsible for the actions of another individual is a civil concept. It is more commonly imported into the criminal law in criminal responsibility provisions for corporations.

Generally speaking, the onus of proof of an element or critical aspect of an offence should not be reversed unless that element/aspect is peculiarly within the knowledge of the defendant. This is not the case with s15. As currently framed, an individual ("the defendant") will be responsible for the actions of another individual unless the defendant proves that that individual acted beyond the scope of his/her authority.

This is clearly a matter about which the prosecution could and should call evidence. The prosecution should call the individual and lead evidence to prove that the individual acted within the scope of the defendant's authority. Failure to do so will mean that the offence is not made out.

Not only is it unfair to require the defendant to prove this element, it will often be difficult, if not impossible, for the defendant to so prove. An obvious scenario where this will occur is when the individual does not attend court. The other factor of great practical significance is that the individual is often likely to be estranged from the defendant. This places an almost insurmountable hurdle on the defendant, particularly where the effect of the evidence the defendant is seeking to lead is that the individual committed the offence.

With appropriate modification, we recommend s12.3 Criminal Code (Cth) as an appropriate corporate responsibility provision.

In our view, in section 17 of the Bill, which introduces a general defence, "all reasonable and practicable measures" is insufficient as it relates to the determination of the age of a person involved in the operation of a sex business as either a worker or a client. We ask that the Bill include a requirement for proof of age/identification to be provided where a person declares themselves to be a person aged over 18 years.

### *Conclusion*

Thank you for providing the Society with the opportunity to consider this matter. As you will appreciate, we have raised a number of issues/comments. Please do not hesitate to contact me, should you wish to discuss any aspect of this submission.

Yours sincerely



Ralph Bönig  
**PRESIDENT**