

**Submission  
No 133**

## **INQUIRY INTO THE REGULATION OF BROTHELS**

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The Chair  
Committee on the Regulation of Brothels  
Parliament House  
Macquarie Street  
Sydney NSW 2000

19 August 2015

**RE: Inquiry into the Regulation of Brothels**

Thank you for your letter, dated 21 July 2015, inviting us to make a submission to this inquiry. We note that sex workers are the *key stakeholders* in the process of evaluating the regulation of brothels in NSW. Scarlet Alliance has played a critical role in informing policy through work with governments and the health sector, both in Australia and internationally, on issues affecting sex workers in the Australian sex industry.

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. Scarlet Alliance and our member organisations and projects have the highest level of contact with sex workers in Australia of any agency, government or non-government. Through our project work and the work of our membership we have high levels of access to sex industry workplaces in the major cities and many regional areas of Australia. Scarlet Alliance and many of our member sex worker organisations and projects within Australia have CALD (culturally and linguistically diverse) projects employing bi-lingual project workers. It is these experiences and the high level of contact and support provided by our membership to sex workers, including CALD communities within the sex industry, which informs our submission.

Each state and territory of Australia has taken a different approach to regulation of the sex industry. Scarlet Alliance and our membership have reviewed, documented and analysed the impact of different models of regulation in Australia and other parts of the world since the late eighties. This has included analysis of available research, government and non-government reports, consultation with our membership and consideration of the lived experiences of sex workers working within different models of regulation. Scarlet Alliance is therefore well placed to understand and advise on many aspects of sex industry regulation, including but not limited to: occupational health and safety

impacts, levels of compliance with the regulatory structure, reasons for non-compliance, the cost of regulation, and models that support (or those that create barriers to) BBV & STI prevention. The Scarlet Alliance resource Principles for Model Sex Work Legislation collates current evidence on these issues and can be accessed at [http://www.scarletalliance.org.au/library/principles\\_2014](http://www.scarletalliance.org.au/library/principles_2014).

Decriminalisation has been highly successful for NSW communities, government, and sex workers. Please consider our submission attached, and as part of the committee's deliberations we ask that the positive outcomes of decriminalisation in NSW, and what could be lost by a change to regulation, remain foremost in the minds of the Select Committee throughout this inquiry.

Scarlet Alliance notes that this is the second consecutive review/inquiry into NSW brothel regulation by this government. The Better Regulations Office (BRO) called for submissions on the Brothel Regulation in NSW issues paper in 2012; however the final report from the 2012 inquiry has not been released, even though it was the outcome of a comprehensive consultation. The rationale for a 2015 inquiry is unclear.

More concerning, the terms of reference for this inquiry ignore the significant submissions and data provided to the 2012 process, as well as the findings of significant NSW government inquiries undertaken since the 2012 process on the exact issues this inquiry seeks to consider. Three examples are: the inclusion in the terms of reference of a licensing model of regulation when the Final report from the Independent Pricing and Regulation Tribunal (IPART) *Review Of Licence Rationale And Design* released in 2015 does not make a recommendation for licensing; the IPART *Local Government Compliance And Enforcement Regulation Review* Draft Report released in October 2013 (Final Report pending) that outlines systemic failure by councils to effectively regulate different industries and did not recommend licensing of brothels; the inclusion of trafficking in the terms of reference when the NSW Community Relations Commission *Inquiry into the Exploitation of Women through Trafficking Report* was released in 2013. The executive summary states:

"The focus of the media is typically on exploitation of women in the sex industry, in particular Asian women migrants working in brothels. In contrast, the Inquiry heard from community groups and service providers that exploitation more frequently occurs in family homes and businesses."

As the issues outlined in the terms of reference have been reviewed within the last five years and there has been no demonstrated need for change to regulation of brothels in NSW, and there is also no call from police, health, planning, justice or sex workers to change the laws, we see no reason for this inquiry. The only possible reason for this inquiry is that it may, for a few years, postpone political pressures from removing what is a highly effective model of regulation - maintaining NSW as a leader in providing a model of sex industry regulation that supports low rates of HIV and STIs amongst sex workers, and the efficient and effective provision of health promotion information, testing and treatment resulting in world renowned public health outcomes.

Scarlet Alliance recognises that the media, fuelled by anti-competition practices within the sex industry, has managed to incorrectly frame non-compliant brothels in NSW as 'illegal' and has provided a platform for a small number of councils to claim there is a need for a review of the regulation of brothels in NSW. Our submission will show that some councils have demonstrated a failure, or refusal, to effectively regulate the zoning, planning and location controls and environmental health of the sex industry in NSW. While other councils exhibit appropriate regulation of sex industry businesses, provided they understand their role, and operate fairly within that role. This matter does not demonstrate a failure of decriminalisation as we have argued in our submission.

All of the regulatory guidance and power that is required is already in place; it is up to councils to properly exercise that power to regulate sex industry businesses in the same way they do other businesses, without discrimination, in line with the intention of the law when introduced in 1995. Our recommendations address this issue.

We look forward to providing further information as part of the hearing process. Current sex workers and sex worker peer organisations should be recognised as experts, and key stakeholders and contributors to the hearings. In the meantime, if you require further information please contact our Chief Executive Officer Janelle Fawkes on [REDACTED]

Regards,

A large black rectangular redaction box covering the signature area.

Ryan Cole  
President

## CONTENTS

<b>Executive Summary .....</b>	<b>5</b>
 <b>Appropriate Local and State Government Regulatory and Compliance Functions .....</b>	<b>8</b>
Decriminalisation Works .....	8
Local Councils Role .....	9
 <b>Demarcation in Local and State Government Roles and Responsibilities .....</b>	<b>18</b>
 <b>Possible Reform Options .....</b>	<b>19</b>
Licensing .....	19
Swedish Model .....	23
 <b>Myths and Misinformation .....</b>	<b>25</b>
 <b>Recommendations .....</b>	<b>28</b>
 <b>Appendix 1 .....</b>	<b>30</b>
<b>Appendix 2 .....</b>	<b>31</b>

## **EXECUTIVE SUMMARY**

In NSW, decriminalisation has delivered exceptional public health outcomes, minimal opportunities for police corruption, increased transparency, improved safety for sex workers, and far higher levels of compliance than any other model of regulation. Rather than no regulation, decriminalisation is a whole-of-government system of regulation, whereby a number of government authorities and agencies play a role in contributing to the effective regulation of different components of businesses, making for a highly transparent sex industry. The regulation of sex industry businesses occurs in the same manner as regulation of many other businesses. Councils are responsible for regulation of zoning, planning and location controls, and environmental health in regard to sex industry businesses

### **Appropriate Local and State Government Regulatory and Compliance Functions**

The key issue that councils appear to have with the current regulations is they are unable to exclude sex workers entirely from their districts and cannot shut down premises they suspect of being used as a brothel without producing evidence of that premises being used as a brothel before they are able to cut off utilities and close down the business. The fact that councils are not able to wield power over local businesses unchecked, and make judgment calls on the nature of a business, does not reveal a need for greater regulation of brothels or a licensing scheme.

Brothels that are non-compliant operate outside of council approval and regulation largely due to the reluctance of councils to approve brothel development applications (DAs). For private, independent sex workers, local planning laws can have significant effects on anonymity and security. Individual sex workers may still be classed as a 'brothel' by law and may be prohibited in residential zones, or required to apply for a DA - which can include placing signage outside of the home, effectively 'outing' sex workers to other residents and passersby, and/or the publication of the sex workers name in local papers, which leads to further harassment and stigma.

It is important to recognise that some councils have effectively regulated the sex industry, demonstrating that it is possible. Key to effective regulation is an approach that does not attempt to prohibit the sex industry but to regulate sex industry businesses in the same way other businesses are regulated.

### **Demarcation in Local and State Government Roles and Responsibilities**

An integral part of decriminalisation is moving regulation of the sex industry away from policing or licensing bodies. Councils are the most appropriate regulators of zoning, planning and location controls, and environmental health in regard to sex industry businesses; when sex industry businesses are regulated like other businesses, sex work is treated as legitimate work which brings transparency and accountability. This inquiry should not use council mismanagement as an excuse to introduce licensing and take away the best-practice model of decriminalisation. Using council failure to end 20 years of decriminalisation punishes sex workers for council discrimination and misconduct.

Maintaining councils as regulators of the NSW sex industry brings a range of benefits. When fairly regulated in accordance with decriminalisation, council regulation means a high rate of voluntary compliance, low amenity impacts, low levels of complaints, reduced appeals to the Land and Environment Court, improved public health outcomes, minimal opportunities for corruption, and improved safety for sex workers

### **Possible Reform Options**

#### Licensing

In comparison to a decriminalised model of regulation that promotes compliance, the licensing model promotes the development of a two-tiered industry whereby many are excluded from operating legally – often because meeting the requirements of licensing is excessive or unreasonable. In this way non-compliance is an inherent flaw of the licensing model – creating an ongoing and costly problem for government as it requires a high level of administration to ensure compliance exacerbated by the complexity of the system which itself acts as a barrier to compliance. It also requires a high level of police involvement in enforcing regulation, which maximizes the risk of corruption. The NSW model of decriminalisation was introduced in response to high levels of police corruption, and has been found to have reduced police corruption.

#### Swedish Model

Recently there has been an increased push for the ‘Swedish Model’ despite evidence this model of sex industry regulation has had a negative impact on the human rights of sex workers, in particular on our right to freedom of association. In Sweden, it is illegal to rent a room to a sex worker, meaning that sex workers’ autonomy is impacted and legal rights reduced for fear of detection. Adult children living at home supported by their parents’ earnings have been charged with ‘pimping’. Sex workers cannot work together for greater safety, advertise so they can screen clients before meeting them, or hire security – all measures that improve sex worker safety. Police stake out sex workers’ workplaces and, as a result, clients will only meet in public locations of their choosing to avoid detection. In Sweden, laws criminalising clients are actively and maliciously used against sex workers.

### **Myths and Misinformation**

The Terms of Reference for this inquiry demonstrate that the government is operating under a number of false assumptions and fundamental misunderstandings of how brothels, and the sex industry at large, operate.

This inquiry is based on the idea that there needs to be a special way to deal with non-compliant brothels additional to government processes for dealing with other non-compliant businesses. Sex industry businesses are not different to other business and there is no basis for the assumption that special laws and regulations are required to manage non-compliant brothels differently to other non-compliant businesses.

Often comments about the existence of organised crime in the sex industry come from moral viewpoints and misperceptions of the sex industry from people who do not actually engage with the

majority of sex workers, if any. Large scale organised crime and 'pimping' is not a characteristic of the sex industry in Australia.

Despite the significant financial resources invested into identifying trafficking in Australia, consistently low government statistics show that the media estimated incidence of trafficking in Australia is inflated.

Scarlet Alliance submits that there are minimal to nil amenity impacts of sex industry businesses, and this has been demonstrated in NSW, through experience and research.

## APPROPRIATE LOCAL AND STATE GOVERNMENT REGULATORY AND COMPLIANCE FUNCTIONS

### Decriminalisation works

Decriminalisation is recognised worldwide as a best practice approach to regulating the sex industry.<sup>1</sup> In NSW, decriminalisation has delivered exceptional public health outcomes, minimal opportunities for police corruption, increased transparency, improved safety for sex workers, and far higher levels of compliance than any other model of regulation.

Decriminalisation is a whole-of-government approach, whereby a number of government authorities and agencies play a role in contributing to the effective regulation of different components of businesses, making for a highly transparent sex industry. The regulation of sex industry businesses occurs in the same manner as regulation of many other businesses.

### Police corruption reduced

The model was first introduced in NSW after the Wood Royal Commission into police corruption found excessive levels of corruption. The time before decriminalisation in NSW is often referred to as the 'paper bag days' when, in order to continue to operate, a brothel or individual sex worker would hand over a paper bag of money to police in order to avoid closure. For individual sex workers this meant providing money, or sexual services without payment, in order to not be closed down by police.<sup>2</sup> Decriminalisation has been highly successful in addressing this significant problem and in doing so has removed many barriers to sex workers reporting crime, as under decriminalisation sex workers are not at risk of prosecution or corruption through being known to police.

### Good public health outcomes

Decriminalisation has achieved significant public health outcomes for the NSW community. Epidemiology and research show that rates of HIV and STIs amongst sex workers are extremely low and in fact lower than the general community. Rates of condom use are high with one study finding condom use in NSW brothels is close to 100%.<sup>3</sup> This is a significant outcome that demonstrates decriminalisation has created an 'enabling environment' whereby sex workers who work individually and sex workers that work in sex industry businesses, are effectively implementing safe sex practices with clients. In public health terms this cannot be overlooked. Significant research into BBV & STI

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<sup>1</sup> A. Daniel, 'The sexual health of sex workers: no bad whores, just bad laws' (2010) 19(4) *Social Research Briefs*, Sydney, National Centre in HIV Social Research.

M. D. E. Goodyear and L. Cusick 'Protection of sex workers: Decriminalisation could restore public health priorities and human rights' (2007) 334 *British Medical Journal* 52.

C. Harcourt, J. O'Connor, et al. 'The decriminalisation of prostitution is associated with better coverage of health promotion programs for sex workers' (2010) 34(5) *Australian and New Zealand Journal of Public Health* 482-486.

A. McDonald, 'Health experts want sex work decriminalised nationwide' (2008) *City News*, Sydney, Alternative Media Group of Australia.

*The Lancet*. (2015) HIV and sex workers series [online]. Available at: [www.thelancet.com](http://www.thelancet.com)

<sup>2</sup> R. Perkins, 'Call Girls' (2007) UWA Press.

<sup>3</sup> B. Donovan, et al. *The Sex Industry in New South Wales: A Report to the NSW Ministry of Health*, Kirby Institute, University of New South Wales, Sydney, 2012.

prevention demonstrates that decriminalisation is the model of regulation that provides the supportive legal and working environment that licensing does not.<sup>4</sup>

### Sex Industry Regulation

The sex industry in NSW is far from unregulated. It is, in fact, a whole-of-government model whereby a number of agencies are responsible for different components. This is described in part in the recent IPART *Reforming Licensing in NSW* final report:

“The existing regulation of sex services premises and workers includes:

- ② Local councils utilising planning powers under the Environmental Planning and Assessment Act 1979 to decide the number and location of sex services premises in their area. Sex services premises must comply with a local council’s planning policies and may need to make a development application to council for permission to operate the business.
- ② Requirements for owners and operators of sex services premises to provide safe and healthy work environments. The Health and Safety Guidelines for Brothels issued by WorkCover NSW and NSW Health outline the required acceptable standards.”<sup>5</sup>

### **Local Council Role**

Local councils are responsible for zoning, planning and location controls, and environmental health. Unfortunately, the majority of local councils have not implemented decriminalisation effectively. Evidence shows that the majority of local councils have not made consistent and fair decisions regarding sex industry businesses.<sup>6</sup> This has resulted in unnecessary costs in the Land and Environment court, unnecessary regulatory burdens upon sex industry businesses, potential dangers for sex worker health and safety, and significant barriers to compliance.

Decriminalisation is impacted when councils refuse to implement decriminalisation in line with the original intent of the legislation, and instead sex industry businesses are “perceived as outlaws” and “regarded as inherently awful, disorderly, and hence warranting and requiring exclusion from the community.”<sup>7</sup>

Hansard records the Disorderly Houses Amendment Bill second reading speech by Paul Whelan (Ashfield - Minister for Police):

“It is not the intention of the bill that brothels be permitted to operate unregulated. To this end, the bill also provides an avenue for the community to make complaints to local councils when a brothel is having a significant detrimental effect upon a neighbourhood. Councils will be

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<sup>4</sup> B. Donovan, et al. ‘Improving the health of sex workers in NSW: maintaining success’ (2010) 21(3-4) *NSW Public Health Bulletin*, 74-77.

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

<sup>5</sup> Independent Pricing and Regulatory Tribunal of New South Wales, *Reforming Licensing in NSW: Review of licence rationale and design*, Regulation Review Final Report, September 2014.

<sup>6</sup> Touching Base Inc and Urban Realists, Planning and Health Consultants, *Submission in Response to the Draft Sydney Local Environmental Plan 2011*, April 2011.

<sup>7</sup> Penny Crofts, ‘Brothels: Outlaws or Citizens?’ (2010) 6(2) *International Journal of Law in context*, 151.

empowered through these provisions to apply to the Land and Environment Court to have a brothel closed down. **It is not our intention with the introduction of these measures to limit those applications appropriately based on planning controls vested under the Environmental Planning and Assessment Act 1979.”**

#### Councils overstepping their role

Regulatory problems have occurred when councils have overstepped their roles in relation to regulation of the sex industry. In her presentation at the Australian Institute of Urban Studies 2012 Seminar Series on Planning and Brothels, Janelle Fawkes notes that local councils in NSW regularly misunderstand their role in the regulation of the sex industry. [REDACTED]

[REDACTED] Fawkes notes that addressing organised crime is the role of police, addressing migration compliance is the role of DIAC [now Department of Immigration and Border Protection], and addressing corruption is the role of ICAC.<sup>8</sup>

The level of visa compliance and council compliance checking in NSW has been disproportionate to the risk of non-compliance, and also out of step with the significant barriers put in place by local government. While councils make it difficult to comply with onerous or discriminatory regulations, media hysteria surrounds non-compliant brothels. Media attention to these brothels, incorrectly referred to as ‘illegal brothels’, then provokes further government surveillance, compliance and enforcement activities that ultimately do not serve to assist sex workers or ratepayers.

A shift in approach by local councils to the effective implementation of decriminalisation would significantly reduce non-compliance and therefore the level of compliance checking necessary. A shift toward removing unnecessary barriers to compliance for sex industry businesses and private sex workers (such as excessive compliance requirements, unsafe zoning, and morality based planning and DA decisions) would result in a manageable level of enforcement activity, and a significant saving of local government resources currently wasted in Land and Environment Court disputes.

#### Councils have significant power to close non compliant brothels

In 2007 in NSW, the *Brothels Legislation Amendment Act* expanded the powers of the Land and Environment Court and local councils to close non compliant brothels.<sup>9</sup> This legislation provides councils with powers in excess to those they have to close other non compliant businesses.

The amendments made brothel closure laws effective within five working days rather than the previous twenty-eight days, and reduced the requirement that would support taking action from ‘sufficient complaints’ to only one complaint. In addition, if the non compliant business fails to

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<sup>8</sup> Janelle Fawkes, Planning in NSW, ‘Sex Workers Deserve Safe Workplaces’ (April 2012) Australian Institute of Urban Studies 2012 Seminar Series – *Planning and Brothels*.

<sup>9</sup> *Brothels Legislation Amendment Act* 2007, No 29, NSW.

comply with the closure order the Land and Environment Court and local courts can then direct amenities (water, electricity and/or gas) to be switched off from any premise.<sup>10</sup>

The key issue that some councils appear to have with the current regulations is they are unable to exclude sex workers and sex industry businesses entirely from their districts and cannot shut down premises they suspect of being used as a brothel without producing evidence of that premise being used as a brothel, before they are able to cut off utilities and close down the business. **The fact that councils are not able to wield power over local businesses unchecked, and make judgment calls on the nature of a business, does not reveal a need for greater regulation of brothels or a licensing scheme.**

It is hard to imagine what additional powers a council could need to address non-compliant businesses considering the current need for a mechanism to prevent indiscriminate acts by councils. This is particularly necessary considering the high level of discriminatory treatment toward sex industry businesses demonstrated by research already noted above.

#### Councils effectively regulating the sex industry

It is important to recognise that some councils have effectively regulated the sex industry, demonstrating that it is possible. Key to effective regulation is an approach that does not attempt to prohibit the sex industry but to regulate sex industry businesses in the same way other businesses are regulated.

It is clear that decriminalisation as a model can be successful when effectively implemented. There are clear opportunities to ensure an improved and consistent planning approach for sex service premises across local government. The City of Sydney provides evidence that significant numbers of sex industry businesses can be regulated and integrated effectively when planning and zoning considerations permit various types and scales of sex service premises in their natural locations (for example, brothels in commercial and mixed-use zones and home-based services in residential zones).<sup>11</sup>

In 2008 Armidale Dumaresq council also adopted the planning principle of equity in their LEP.<sup>12</sup> Penny Crofts notes that the City of Sydney council, which includes Kings Cross, has nuanced planning principles that cater to various kinds of sex industry businesses and permit individual private sex workers to work at home without development consent:

“The planning principles differentiate between sex services premises types based on size, nature and potential amenity impacts rather than the ‘catch-all category’ of brothel. Specific regulations are developed for different business types of brothels, safe house brothels, sex on

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<sup>10</sup> Penny Crofts, ‘Brothels: Outlaws or Citizens?’ (2010) 6(2) *International Journal of Law in context*, 156.

<sup>11</sup> Scarlet Alliance, *Submission on Issues Paper: Brothel Regulation in NSW*, October 2012, 5.

<sup>12</sup> Armidale Dumaresq LEP 2008, cited in Touching Base Inc and Urban Realists, Planning and Health Consultants, *Submission in Response to the Draft Sydney Local Environmental Plan 2011*, April 2011, 4.

premises venues, swingers' clubs, bondage and discipline parlours and sex services (home occupations) premises.”<sup>13</sup>

In 2010 Janelle Fawkes and Saul Isbister cited the areas City of Sydney, Canada Bay and Armidale Dumaresq, noting that “A significant number of sex workers operate lawfully, discreetly and most importantly – anonymously, as exempt and complying developments in various and diverse local government areas.”<sup>14</sup> In line with its approach to other home occupation businesses, City of Sydney does not require development consent for home occupation sexual services.

#### Council approaches promote non compliance

The failure of some councils in NSW to implement decriminalisation has resulted in significant barriers to compliance. Rather than address these barriers, it seems a small number of the 152 NSW councils participate in a cyclical process calling for increased powers to shut down non-compliant brothels. This happened in 2007 resulting in significant closure powers and again in 2012 and many times in between. However the root problem, whereby councils' own actions are creating a high percentage of non-compliance, will not be address by increased powers. Scarlet Alliance considers three factors of critical importance: improved knowledge amongst councils and councillors of both their role in the implementation of decriminalisation and how to break the cycle that promotes non compliance, provide comprehensive guidelines, like the *Sex Services Premises Planning Guidelines* to support better practice approaches, and finally prevent discriminatory approaches through education.

**Councils' failure to effectively regulate the sex industry in their local areas does not demonstrate a failure of decriminalisation. Rather it demonstrates a systemic, long term failure, or in some cases wilful refusal, by councillors and/or councils to not discriminate against the sex industry. At some point it must be recognised that it is in fact councils themselves that are directly creating the problems they seek further powers to address.**

How councils create barriers to compliance:

- Lack of recognition or provision for the different scales and sizes (and therefore necessary regulation) of sex work businesses and private sex workers (including home occupation sex services).
- Not providing effectively for sex industry businesses and individual sex workers (including home occupation sex services) within LEPs, or banning types of sex work – leaving little option but to remain non-compliant.

For example a recent review on behalf of Touching Base of 40 metropolitan councils shows an alarming trend:

- All metropolitan councils allowed commercial sex services premises with consent in at least one zone. However, only 20% (8/40) of councils allow private sex workers or Home

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<sup>13</sup> Penny Crofts, 'Brothels: Outlaws or Citizens?' (2010) 6(2) *International Journal of Law in context*, 157.

<sup>14</sup> Janelle Fawkes, Planning in NSW, 'Sex Workers Deserve Safe Workplaces' (April 2012) Australian Institute of Urban Studies 2012 Seminar Series – *Planning and Brothels*.

- Occupation (Sex Services) with consent in at least one zone, leaving 80% (32/40) of metro councils prohibiting or banning home occupation sex services entirely.
  - Only one council treated Home Occupation (Sex Services) the same as other types of home occupations allowed to operate without consent as an exempt development.
  - 15 of the 40 metro councils allow commercial sex services premises or sex worker home occupations in industrial zones only.
- Councillors advising sex industry businesses to apply for a massage development application in order for councillors to avoid community outcry and an impact on votes.
- Refusal of sex industry business applications based on moral objection or fear of losing local government votes even when planning staff advise the application is in line with council requirements.
- Excessive requirements when a Development Application (DA) is for a sex industry business (extra parking, opening times, notification requirements and zoning restrictions); on a number of occasions the requirements would mean the commercial viability of the business is removed. For example requiring so many car parks that the space available for rooms in the sex industry business are so limited the business would not be commercially viable or the location of a brothel in a industrial location is both unsafe for workers and clients arriving or departing in the evening.
- Expectation that individual sex workers will be able to meet development application requirements including advertising their intent to work from home, which is a requirement not applied to other home occupation businesses.
- It is understood within the industry, in some council areas, that applying to council will not result in approval and that compliance is not an option.
- Councillors inappropriately share politicised information about brothel development applications with local media. This media attention, along with quotes from Councillors in the media that are misleading or incorrect, lead to confusion about brothel legality. It is the case that brothels should be able to have their development application assessed fairly, yet local media coverage gives the impression that applying for an application will only result in public shaming. The negative media, incorrect information, and disrespectful media coverage of these issues have created yet another potential barrier to compliance.

**The 2012 Better Regulation Office Issues Paper notes that the City of Sydney and Marrickville councils accounted for two-thirds of sex services premises approvals between 1996 and 2007, and that eleven councils had not approved *any* brothels. Apart from Sydney or Marrickville, in the 19 other councils where approved brothels were operating, 50 per cent were approved by the Land and Environment Court.<sup>15</sup>**

A significant amount of rate payers' funds would be saved and available for local community amenities if councils did not incorrectly refuse development applications for businesses that already meet planning requirements. The expensive Land and Environment Court cases that councils have

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<sup>15</sup>Kirby Institute (2012) cited in NSW Government, Better Regulation Office, *Issues Paper: Regulation of Brothels in NSW*, September 2012, 32.

engaged in have been totally unnecessary and quite simply a waste of money. Additionally there is no logical excuse for councils to spend tens of thousands of dollars paying private investigators to have sex with women in a failed attempt to prove that a premise is operating as a brothel.<sup>16</sup>

### Private Sex Workers

A considerable percentage of NSW sex workers operate privately, without any link or relationship with a third party business. This includes sex workers who are home-based (owning or renting a property), and those sex workers that rent a property or own a property for the purposes of doing sex work. A small number of private sex workers work in pairs or small collectives to cover costs and for peer support. For private sex workers, local councils that apply excessively restrictive planning laws can have significant effects on anonymity and security. Individual sex workers may still be classed as a 'brothel' by law and may be prohibited in residential zones, or required to apply for a DA.<sup>17</sup> This can include placing signage outside of a home, effectively 'outing' sex workers to other residents and passersby, and/or the publication of the sex worker's name in local papers, which leads to further harassment and stigma. In September 2011, all other types of home occupations were permitted as exempt developments across all councils in NSW. This means that they did not require development approval from council.<sup>18</sup> Sex workers, however, have been singled out for discriminatory over regulation.

Touching Base Inc and Urban Realists, Planning and Health Consultants, note that 'there are no known advantages in requiring a DA from private sex workers, only disadvantages.'<sup>19</sup> They cite the Sex Services Premises Planning Guidelines that "there is no evidence that a home-based sex worker has any more impact than other home occupations, e.g. an architect working from home, and accountant, tax agent, photographer, etc."<sup>20</sup> Touching Base and Urban Realists note that "many clients with disability prefer to access the services of home-based sex workers."<sup>21</sup>

It is in the interest of sex workers to provide a discreet service. Clients seek out discreet services and most sex workers protect their privacy as a safety precaution, an attempt to prevent discrimination

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<sup>16</sup> E Duff, 'Show me more sex, judge tells council in landmark legal case' *Sydney Morning Herald* 9 March 2015.

<sup>17</sup> For the purposes of the *Restricted Premises Act 1943*, brothel is defined to mean premises:

- (a) habitually used for the purposes of prostitution, or
- (b) that have been used for the purposes of prostitution and are likely to be used again for that purpose, or
- (c) that have been expressly or implicitly [advertised or represented] as being used for the purposes of prostitution, and that are likely to be used for the purposes of prostitution.

Premises may constitute a brothel even though used by only one prostitute for the purposes of prostitution.

<sup>18</sup> State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 under the *Environmental Planning and Assessment Act 1979*, Part 2, sub division 22.

<sup>19</sup> Touching Base Inc and Urban Realists, Planning and Health Consultants, *Submission in Response to the Draft Sydney Local Environmental Plan 2011*, April 2011, 5.

<sup>20</sup> Sex Services Premises Planning Advisory Panel, *Sex Services Premises Planning Guidelines*, NSW Department of Planning (2004) 54, cited in Touching Base Inc and Urban Realists, Planning and Health Consultants, *Submission in Response to the Draft Sydney Local Environmental Plan 2011*, April 2011, 5.

<sup>21</sup> Touching Base Inc and Urban Realists, Planning and Health Consultants, *Submission in Response to the Draft Sydney Local Environmental Plan 2011*, April 2011, 6.

from community members, and in order to attract clients. There are a number of cases whereby local residents have letterboxed the area to out a sex worker in the neighbourhood, resulting in harassment and in some cases violence.

In 2007, the Standard Local Environment Plan redefined the term 'sex services premises' to mean a 'brothel' and changed its meaning to explicitly exclude 'home occupations (sex services)'. This meant that instead of referring to 'sex services premises' as a range of scales and types of premises, home-based sex work became a new category and could not include more than two permanent residents. This is contrary to the way in which all other home occupations are permitted to have an unlimited number of permanent residents unless they impact on residential amenity. Sex work is the only work in which the number of workers is regulated because of the work, rather than the amenity.

#### The Cost of Council Discrimination

It is important to recognise that some councils have effectively regulated the sex industry, demonstrating that it is possible. Key to effective regulation is an approach that does not attempt to prohibit the sex industry but to regulate sex industry businesses in the same way other businesses are regulated. Further regulatory problems have occurred when councils have misunderstood or overstepped their roles in relation to regulation of the sex industry.

Unnecessary regulatory burdens imposed by councils involve financial and administrative costs – but also human costs for sex worker safety and rights. Discriminatory decision-making is not justified – there are little to no amenity impacts of sex industry businesses on surrounding communities, and no evidence of an association between sex work and organised crime.

Inappropriate council policy may:

- restrict sex industry businesses to industrial zones, which isolates workers and clients by segregating the sex industry into poorly lit, under-resourced and unsafe areas.
- prohibit private sex workers from working from residential areas or require a Development Application (DA) that publically 'outs' sex workers to neighbours. This can lead to the harassment of individual sex workers, driving sex workers underground.
- require sex industry businesses to be less visible by only approving premises above ground level. This makes sex services less accessible to people with a disability.
- excessively restrict sex industry business signage resulting in customers being unclear on location and knocking on the wrong door.
- include anti-clustering laws, which forbid sex industry businesses from being located close to one another, act to limit networking and support among sex worker businesses.

Discriminatory decision-making by local councils has a number of negative effects. Discriminatory council practices make it difficult for brothel owners to access and gain council approval. Sex industry businesses may be unwilling to make applications for approval fearing it is likely they will be rejected by the local council. If their application is rejected, to avoid closure they must embark on expensive and lengthy appeal procedures in the Land and Environment Court, with no guarantee of success.

The Private Workers Alliance noted that most of the larger, 'authorised' brothels in NSW have won their DA through the Land and Environment Court, with costs ranging from \$15,000 - \$100,000.<sup>22</sup> Appeals to the Land and Environment Court because of discriminatory local council decisions waste resources and place high expense on the rate payer and sex industry business owners.

As Penny Crofts writes, "these highly restrictive regulations do not encourage brothel owners to seek authorisation, particularly if they have been operating without authorisation and without complaint. A development application would draw attention to their existence. This compels many brothels to operate outside the law."<sup>23</sup> Discriminatory council practices provide no incentive for sex work businesses to comply with the law; rather, they necessitate businesses breaking the law so they can protect their livelihoods, leaving them vulnerable to corruption by council officers and other standover tactics.

While councils make it difficult to comply with onerous or discriminatory regulations, media hysteria surrounds non-compliant brothels. Media attention to these brothels, incorrectly referred to as 'illegal brothels', then provokes further government surveillance, compliance and enforcement activities that ultimately do not serve to assist sex workers at all. Instead of guiding councils in implementing decriminalisation, the state government then becomes complicit in continuing discrimination.

Despite the intention of decriminalisation to make brothels a legitimate land use, the NSW Ministerial Taskforce on Brothels in 2001 noted that restrictive planning and zoning regulations mean instead that "it can be difficult for brothel operators to operate legally."<sup>24</sup> Some local councils prohibit brothels from existing in commercial zones and require them to re-locate to industrial areas, which can be an expensive, inconvenient and dangerous burden upon sex workers and sex industry businesses. Some may have operated in mixed-use and commercial zones without amenity impacts for many years and find they are unable to submit a DA as this land use is no longer permissible in the zone they are located in. As stated by Scarlet Alliance and NAUWU:

"These businesses, due to limited suitable zoned and available land, coupled with the perceived dangers of locating their businesses in industrial zones and the prohibitive cost of fit-out of former warehouse spaces; remain non-compliant."<sup>25</sup>

### Planning and Amenity Impacts

Scarlet Alliance submits that there are minimal to nil amenity impacts of sex industry businesses, and this has been demonstrated in NSW through experience and research. Research from 2008 demonstrates that after 13 years of decriminalisation in NSW, only one brothel owner had been

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<sup>22</sup> Erica Red and Saul Isbister, 'Why Sex Workers Believe Smaller is Better: The Faulty Implementation of Decriminalisation in NSW' (2004) 3(3) *HIV Australia*.

<sup>23</sup> Penny Crofts, 'Brothels: Outlaws or Citizens?' (2010) 6(2) *International Journal of Law in context*, 154.

<sup>24</sup> Brothels Taskforce, *Report of the Brothels Taskforce* (2009) NSW Department of Planning, 9.

<sup>25</sup> Scarlet Alliance and Nothing About Us Without Us, *Submission to Shadow Attorney General Chris Haatcher on Sex Industry Regulation in NSW*, September 2010, at 7-8.

ordered to cease operation due to amenity impacts, and there had been no complaints relating to amenity impacts for private sex work. Penny Crofts states, “most people are unaware that they have been living next to a home occupation (sex services). [Private sex workers] need to be discreet – to keep clients and also for personal safety.”<sup>26</sup> Her research with Prior suggests that brothels have a neutral or positive effect on neighbourhoods.<sup>27</sup> Many brothels are also small-scale – those visited by the Law and Sex Worker Health team for their 2012 Report to the NSW Ministry of Health had an “average of seven workers per brothel, with about four workers employed on day shifts and up to six during evening shifts.”<sup>28</sup>

Saul Isbister notes that in Marrickville Local Council, town planners checked with neighbouring Councils and Police Local Area Commands in 2002, covering a population of half a million people, and found that “no complaints had been recorded in any police area command and corresponding council.”<sup>29</sup> Feminist sociologist Eva Cox supervised students at the University of Technology, Sydney, surveying residents in blocks in Marrickville and Woollahra which “showed quite clearly that local residents were unaware of home based sex workers in their immediate neighbourhood.”<sup>30</sup>

Prior and Crofts’ 2010 study illustrates that of 400 residents living in close proximity to commercial sex services in City of Sydney and Parramatta, 43.1% were unaware they lived within 400m, and of those who did know, 48.2% believed the business had no overall impact in the local area, and 24.1% rated it positively.<sup>31</sup> Prior and Crofts’ research suggests that communities come to accept sex services premises as they become more familiar with them and the longer they are in the neighbourhood: “residents become more accepting of a nearby sex premises the longer they are familiar with its presence.”<sup>32</sup> Importantly, the findings suggest that where individuals or community groups put in submissions about a council’s proposed land use, the planning process tends to attract participation by those who have negative views.<sup>33</sup>

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<sup>26</sup> City of Sydney (2005) Home Occupation Sex Services Premises Research Project Final Report, cited in Penny Crofts, ‘Brothels: Outlaws or Citizens?’ (2010) 6(2) *International Journal of Law in context*, 164.

<sup>27</sup> Prior and Crofts, ‘Effects of sex premises on neighbourhoods: Residents, local planning and the geographies of a controversial land use’ (2012) 68 *New Zealand Geographer*, 130.

<sup>28</sup> NSW Government, Better Regulation Office, *Issues Paper: Regulation of Brothels in NSW*, September 2012, 10.

<sup>29</sup> Saul Isbister, ‘Corruption and Associated Risks in NSW Development Approval Processes of Local Government’, (2006) 1 *Provision: Defining Sex Worker Space*, 28.

<sup>30</sup> Lauren Jamieson, ‘UTS Students’ Research on Home Occupations’ (November 2003). Findings presented by Eva Cox to commissioners at the Sydney of City Council, 15 March 2004, cited in Erica Red and Saul Isbister, ‘Why Sex Workers Believe Smaller is Better: The Faulty Implementation of Decriminalisation in NSW’ (2004) 3(3) *HIV Australia*..

<sup>31</sup> J. Prior and P. Crofts, ‘Effects of Sex Services Premises on Neighbourhoods: Residents, local planning and the geographies of a controversial land use’ (2012) 68 *New Zealand Geographer*, 134.

<sup>32</sup> J. Prior and P. Crofts, ‘Home Occupation or Brothel? Selling Sex from Home in New South Wales’ (2012) 30(2) *Urban Policy and Research*, 137.

<sup>33</sup> NSW Government, Better Regulation Office, *Issues Paper: Regulation of Brothels in NSW*, September 2012, 31.

## DEMARCATIION IN LOCAL AND STATE GOVERNMENT ROLES AND RESPONSIBILITIES

An integral part of decriminalisation is moving regulation of the sex industry away from policing or licensing bodies. Councils are the most appropriate regulators of zoning, planning and location controls, and environmental health in regard to sex industry businesses; when sex industry businesses are regulated like other businesses, sex work is treated as legitimate work which brings transparency and accountability. This inquiry should not use council mismanagement as an excuse to introduce licensing and take away the best-practice model of decriminalisation. Using council failure to end 20 years of decriminalisation would be punishing sex workers for council discrimination and misconduct.

The Guiding Principles in the Sex Services Premises Planning Guidelines include a recognition that planning regulations and enforcement have direct implications on the health and safety of workers, and that reasonable, rather than restrictive, planning controls are likely to result in compliance.<sup>34</sup> The Guiding Principles provide that:

- Appropriate planning for [sex industry businesses] can provide councils with greater control over their location, design and operation;
- Planning regulations and enforcement actions have direct implications for the health and safety of workers and their clients;
- [Sex industry businesses] should be treated in a similar manner to other commercial enterprises, and planning provisions should acknowledge a types of [sex work] and ensure that controls relate to the scale and potential impact of each [kind];
- Reasonable, rather than unnecessarily restrictive, planning controls are likely to result in a higher proportion of [sex workers and sex industry businesses] complying with council requirements, with corresponding benefits to council, the local community and health service providers;
- Provision and consideration of sound information enables appropriate policy and decision-making processes; and
- Engaging the community, including the sex industry, and developing professional strategies can assist the community and professionals to understand the nature of [sex work and sex industry businesses] and recognise that they are a legitimate land use to be regulated through [state and territory] planning systems.<sup>35</sup>

In March 2009 the Department of Planning issued a directive to local councils titled "*Model local clauses for Standard Instrument LEPs (20090324): 6.6 Restriction on consent for particular sex services premises (local)*", which specified that:

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<sup>34</sup> Sex Services Premises Planning Advisory Panel, *Sex Services Premises Planning Guidelines*, NSW Department of Planning, 2004, cited in Touching Base Inc and Urban Realists, *Submission in Response to the Draft Sydney Local Environmental Plan 2011*, April 2011, 5.

<sup>35</sup> Sex Services Premises Planning Advisory Panel, *Sex Services Premises Planning Guidelines*, NSW Department of Planning, 2004, 1.3 Planning Guidelines.

*"LEPs [Councils] should provide for sex services premises somewhere in the LGA [Local Government Area] and the area (or zones) selected needs to reflect how the Council will adequately provide for this use."*

Maintaining councils as regulators of the NSW sex industry brings a range of benefits. When fairly regulated in accordance with decriminalisation, council regulation means a high rate of voluntary compliance, low amenity impacts, low levels of complaints, reduced appeals to the Land and Environment Court, improved public health outcomes, minimal opportunities for corruption, and improved safety for sex workers

It is the role of the State Government, in collaboration with sex worker organisations and the Local Government Association of NSW, to provide leadership, guidance, direction, sensitivity training, education and support for local councils to better participate in the regulation of sex work. Councillors, councils, local resident associations and other relevant community groups would benefit from education programs that would explain decriminalisation and the community wide benefits. Bringing sex worker organisation SWOP NSW in to educate people at a local council level would have a positive impact on council ability to do their work related to the sex industry.

## **POSSIBLE REFORM OPTIONS**

**Licensing** (See additional information in Appendix 2)

In comparison to a decriminalised model of regulation that promotes compliance, the licensing model promotes the development of a two-tiered industry whereby the larger percentage of the sex industry is excluded from operating legally – often because meeting the requirements of licensing is excessive or unreasonable. In this way non-compliance is an inherent flaw of the licensing model – creating an ongoing and costly problem for government as it requires a high level of administration to enforce compliance exacerbated by the complexity of the system which itself acts as a barrier to compliance. It also requires a high level of police involvement as police are positioned as the regulators of the licensing system, particularly non-compliance, which maximizes the risk of corruption. The NSW model of decriminalisation was introduced in response to high levels of police corruption, and has reduced police corruption.

### Licensing models create illegal brothels-high levels on non-compliance

While definite levels of compliance are difficult to measure, in Queensland and Victoria numerous studies have agreed that a greater percentage of the sex industry in both jurisdictions operate outside of the legal framework. In Queensland, 14 years of licensing has resulted in only 24 brothels being registered, while the majority of workplaces operate outside the licensing system.<sup>36</sup> In Queensland, 201 towns 'banned' brothels within 2 years of implementation, forcing sex industry businesses to operate outside the licensing system.<sup>37</sup> Under the Victorian licensing model, there were

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<sup>36</sup> Prostitution Licensing Authority Queensland, *Licensed Brothels*, <http://www.pla.qld.gov.au/brothels/licensedBrothels.htm>

<sup>37</sup> Prostitution Licensing Authority, Queensland, *Annual Report 2001-2*, 15.

95 licensed brothels, up to 70 unlicensed brothels and an immeasurable number of individual sex workers working outside of the legal model in 2006.<sup>38</sup> Fifty per cent of Victorian sex workers still operated illegally in 2012, and 90% of the Queensland industry operates illegally.<sup>39</sup>

#### Victoria's licensing model – high levels of illegal brothels

One of the stated catalysts to this inquiry is a desire to address non-compliant brothels in NSW. However, licensing which inevitably creates illegal brothels is also stated as an alternative regulatory model.

As part of a crackdown on unlicensed brothels in Victoria, local councils have hired undercover private investigators to solicit sex from sex workers, and then shut down their brothels.<sup>40</sup> Operators of brothels in “leafy, residential” streets such as Fairfield have faced civil and criminal charges for operating without a permit.<sup>41</sup> In 2008, the Victorian state government assisted local councils in discriminating against sex industry businesses, by introducing new laws to allow councils to close down unlicensed brothels where they could prove sexual services were *offered*, regardless of whether they were actually provided.<sup>42</sup> As *The Age* suggested, “instead of entering a suspected illegal brothel, council officers or hired investigators could sit across the road from a premises and note the number and gender of visitors” to draw their conclusions.<sup>43</sup> In 2009 the Victorian *Consumer Affairs Legislation Amendment Bill* proposed that people entering or leaving buildings suspected of being illegal brothels could be forced to answer questions by investigators or risk hefty fines up to \$1000.<sup>44</sup> The Bill proposed to double the maximum penalty for operating an illegal brothel to more than \$140,000 and meant operators could face five years imprisonment.<sup>45</sup>

Clearly the Victorian licensing model exacerbates, rather than reducing the issues the Committee seeks to address.

#### IPART Report – Reforming Licensing in NSW

The Independent Pricing and Regulatory Tribunals report *Reforming licensing in NSW: Review of licence rationale and design* did not find or include a recommendation for licensing of Sex Industry Businesses but stated that on the evidence receive **“alternatives to licensing may be more appropriate to address the NSW Government’s policy objectives in this area.”**

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<sup>38</sup> Chen, MY et al. ‘Estimating the number of unlicensed brothels operating in Melbourne’ (2010) 34(1) *Australia and New Zealand Journal of Public Health*, 67.

<sup>39</sup> Donovan, et al. *The Sex Industry in New South Wales: A Report to the NSW Ministry of Health*, Kirby Institute, University of New South Wales, Sydney, 2012.

<sup>40</sup> Julia Adler, ‘Agents Go Undercover to Snare Northcote Prostitutes’, *True Local News*, 11 November 2008.

<sup>41</sup> Ibid.

<sup>42</sup> Melissa Fyfe, ‘Sex Called Off in Hunt for Illegal Brothels’, *The Age*, 19 October 2008.

<sup>43</sup> Ibid.

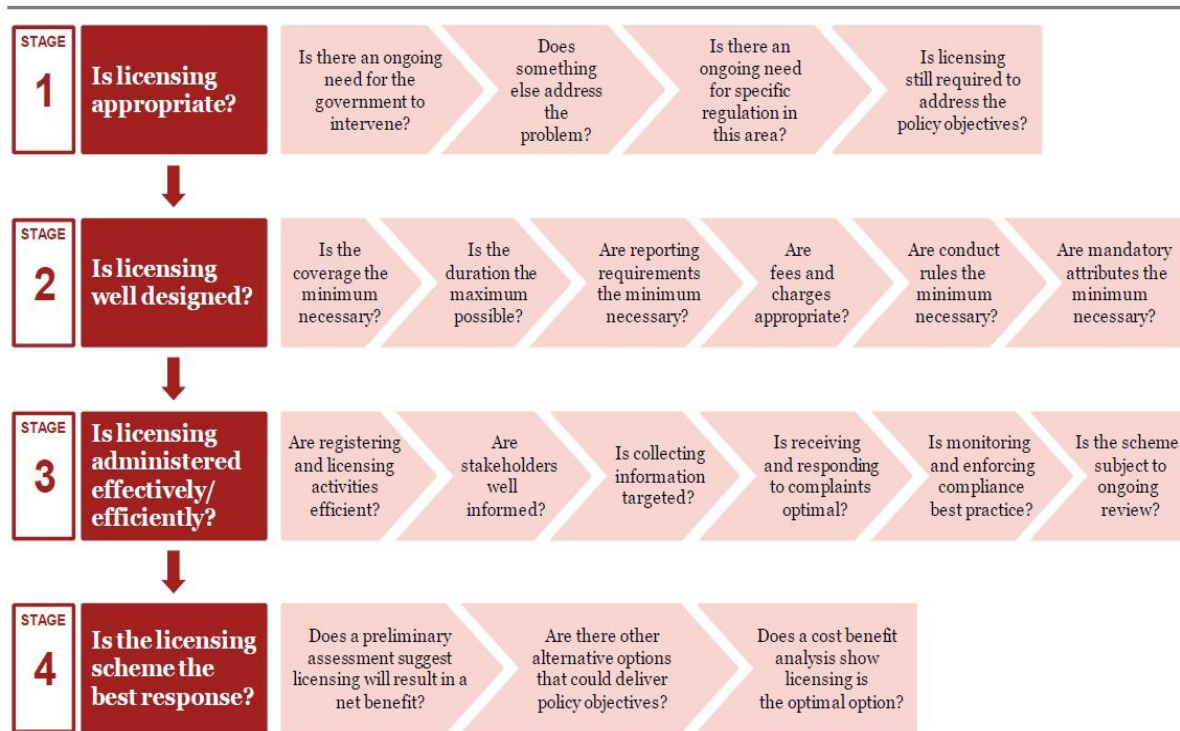
<sup>44</sup> M Marshall, ‘State Crackdown on Illegal Brothels’ *True Local News*, 8 December 2009.

<sup>45</sup> Ibid.

It is also noted the focus on licensing in the previous inquiry and warns that any consideration of a licensing scheme should be assessed as to whether it would be an appropriate mechanism using the provided Licensing Framework tool.

Scarlet Alliance’s assessment of licensing as an effective regulatory approach to brothels using the Licensing Framework assessment tool provided in the IPART Final Report demonstrates licensing would not be an appropriate mechanism against any of the criteria.

**Figure 3.1 The Licensing Framework**



Data source: PricewaterhouseCoopers (PwC) (2013), *A best practice approach to designing and reviewing licensing schemes – Guidance material*, p 8.

Stage 1 Is licensing appropriate?	Response
Is there an ongoing need for the government to intervene?	<p>No, there has been a range of committees and inquiries in New South Wales to look at this issue, none have recommended increased State Government intervention. There is irregular intervention by Federal agencies including Department of Immigration and Border Protection and the Australian Federal Police, in regards to exploitation and trafficking. State licensing would not assist in this issue.</p> <p>Councils are not needed to intervene in regards to home based sex workers. Standard Development Application and Council Certification are the two areas that require council attention, however no more or less than required for any other industry.</p>

Does something else address the problem?	<p>Yes, there are already brothel closure laws, not utilised effectively by councils. Education, training and improved skills development within council staff and elected councillors would result in a more effective use of the current laws. Improving knowledge among councils and councillors about how to break the cycle of non-compliance will also address this. A more nuanced understanding of sex work would result in councils being less likely to undertake unnecessary Land and Environment Court challenges to compliant sex industry businesses.</p> <p>Anti-discrimination protections for sex workers would resolve some of the existing anti-competition behaviour and discrimination by councils.</p>
Is there an ongoing need for specific regulation in this area?	<p>No, sex work is already regulated by Council Certification, LEP's, Occupational Health and Safety, general tax compliance and Fair Work Australia. Guidelines to assist councils to better understand their role in the decriminalisation of sex work would result in current regulations being utilised more successfully.</p>
Are there other alternative options that could deliver policy objectives?	<p>Yes, there is a whole of government response that is already delivering all policy objectives.</p> <p>"Policy Objective - Low Impact on Residents" - This policy is already being delivered across the state. Amenity impact of sex work and sex workers is incredibly low in NSW. Most people don't even realise that their neighbours are sex workers, or that there is a brothel on the main street of their suburb.</p> <p>"Policy Objective - OH&amp;S for Sex Workers" - This policy is already successfully delivered by NSW WorkCover and Fair Work Australia. NSW is recognised as having the best OH&amp;S for sex workers in the world.</p> <p>"Policy Objective - Public Health Outcomes" - The Kirby Institute, among others, recognise that public health outcomes are one of the key successes of decriminalisation in NSW. Voluntary, confidential and government funded testing and treatment for sex workers is now understood as international best practise for public health outcomes.</p>

#### Public health outcomes not supported by licensing

The Kirby Institute's 2012 report on the Sex Industry in NSW to the NSW Ministry of Health, which followed a three state comparative study including NSW and Victoria, states that "licensing is a threat to public health" and recommends that licensing should not be regarded as a viable legislative response for NSW.

### Administrative cost of licensing

States with licensing have enormous administrative expense (see appendix 1). In Queensland it 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.<sup>46</sup> 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. Victoria has also developed a Police Sex Industry Coordination Unit (SICU) who is specifically tasked with addressing the section of the industry that cannot or will not comply with the licensing requirements.

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.<sup>47</sup> Currently, the application fee for a brothel licence in Victoria is \$5,704.20 and the annual licence fee is \$3,259.50 per year.<sup>48</sup> In Queensland in 2001-2 the average time to process a brothel license application was 231 days.<sup>49</sup>

### **Swedish Model**

Recently there has been an increased push for the 'Swedish Model' despite evidence this model of sex industry regulation has had a negative impact on the human rights of sex workers, in particular the right to freedom of association and the right to access justice. The 'Swedish Model' has proven to be dangerous to the mortality of sex workers, with increases in sex worker deaths since the laws were implemented and resulted in high levels of isolation and social exclusion.<sup>50</sup>

This model of laws is regularly incorrectly, and interchangeably, referred to as the 'Nordic' model, even though of the Nordic countries only Sweden, Iceland and Norway have adopted a variation of the model with Norway in the process of reversing this decision.<sup>51</sup>

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<sup>46</sup> Prostitution Licensing Authority, Queensland, *Annual Reports 2013-2014*, Statements of Financial Performance. The report claims the PLA made \$339,518.00 income in 2014, however a large part of their reported revenue is comprised of a \$700,000.00 government grant. Without the government's contribution, the PLA operates at a significant loss.

<sup>47</sup> Prostitution Licensing Authority, Queensland, *Annual Report 2001-2*, Table 9, page 63.

<sup>48</sup> Consumer Affairs Victoria, *Fees and Forms: Sex Work Service Providers*  
<http://www.consumer.vic.gov.au/businesses/licensed-businesses/sex-work-service-providers/fees-and-forms>

<sup>49</sup> Prostitution Licensing Authority, *Annual Report 2001-2*, Queensland, 15,  
<http://www.pla.qld.gov.au/Resources/PLA/reportsPublications/annualReport/2002/documents/annualReport2002.pdf>

<sup>50</sup> Jay Levy and Pye Jakobsson, 'Sweden's abolitionist discourse and law: Effects on the dynamics of Swedish sex work and on the lives of Sweden's sex workers' (2014) *Criminology and Criminal Justice*

<sup>51</sup> May-Len Skilbrei and Charlotta Holmström, 'The 'Nordic model' of prostitution law is a myth' *The Conversation* 16 December 2013 <https://theconversation.com/the-nordic-model-of-prostitution-law-is-a-myth-21351>

In Sweden, it is illegal to rent a room to a sex worker, meaning that sex workers' autonomy is impacted and legal rights reduced for fear of detection. Sex workers are unlikely to report crime for fear of attracting police attention to their location. Adult children living at home supported by their parents' earnings have been charged with 'pimping'. Sex workers cannot work together for greater safety, advertise so they can screen clients before meeting them, or hire security – all measures that improve sex worker safety. Police stake out sex workers' workplaces and, as a result, clients will only meet in public locations of their choosing to avoid detection. In Sweden, laws criminalising clients are actively and maliciously used against sex workers. Petra Ostergren and Susanne Dodillet report that in Sweden they have found "serious adverse effects" of the legislation despite the fact that the lawmakers stressed that it would not have a detrimental effect on sex workers.<sup>52</sup> In a paper studying the Swedish system of sex work regulation, The Prostitution Licensing Authority Queensland reported that the prohibition on the purchase of sexual services in Sweden has "driven the sex industry underground" leaving sex workers "at greater risk of violence."<sup>53</sup>

There is no doubt the 'Swedish Model' has failed in all of its originally stated aims. For example:

- Sex workers are more isolated than ever before
  - Sex workers choose to work alone in order to avoid the pimping laws. This marginalises sex workers from their families, friends and colleagues.
  - The anti-client laws are used maliciously against sex workers. For example ex-partners, neighbours and others who may wish to harass a sex worker will use the laws to do so.
  - It is widely accepted that these laws aim to severely reduce a sex workers income. There were to be replacement income support programs provided – these have not eventuated.
  - Police resources are spent on following clients to sex workers homes, staking out such homes, and waiting for the 'event' to take place so that the client can be charged.
- 'Rehabilitation' is non-existent
  - Social work services for sex workers are contingent on sex workers breaking down and saying that they dislike their work, they don't want to do sex work, and they are willing to enter therapy to stop doing sex work.
  - When sex workers do not denounce their profession they are seen as having mental health issues. They are viewed as mentally unstable because they view sex work as a job that does not victimise them.
  - There are no reliable numbers produced by these services, it is unknown how many sex workers they assist and how many sex workers are turned away.
  - The laws view sex work as a 100% victimising profession. The law sends a message that no sex worker can ever choose to do sex work.

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<sup>52</sup> Susanne Dodillet and Petra Ostergren, 'The Swedish Sex Purchase Act: Claimed Success and Documented Effects' Conference paper presented at the International Workshop *Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges* The Hague, March 3 and 4, 2011, 3.

<sup>53</sup> Bob Wallace (Principal Policy Officer), *The Ban on Purchasing Sex in Sweden*, Office of the Prostitution Licensing Authority Queensland, 19.

- Social work services for sex workers are contingent on sex workers breaking down and saying that they dislike their work, they don't want to do sex work, and they are willing to enter therapy to stop doing sex work.
- Sex workers have been fired from the health sector (i.e. from being nurses or public health officials), from the education sector (i.e. fired from being teachers) and from the police force.
- The size of the industry is the same as prior to the introduction of the laws
  - The estimated number of sex workers in Sweden is the same now as it was prior to the criminalisation of behaviours related to sex work.<sup>54</sup>

## MYTHS AND MISINFORMATION

### Illegal brothels

It is concerning that the Terms of Reference for this inquiry demonstrates that the government is operating under a number of false assumptions and fundamental misunderstandings of how brothels, and the sex industry at large, operate.

The primary myth is that there is such a thing as an 'illegal' brothel in NSW. Brothels are not criminalised, and describing brothels as illegal is inflammatory and incorrect. Those brothels that do not following local council planning and regulation requirements are better described as being non-compliant.

This inquiry is based on the idea that there needs to be a special way to deal with non-compliant brothels additional to government processes for dealing with other non-compliant businesses. Sex industry businesses are not different to other business and there is no basis for the assumption that special laws and regulations are required to manage non-compliant brothels differently to other non-compliant businesses.

Even though the Land and Environment Court has confirmed that offensiveness and morality are not relevant planning considerations,<sup>55</sup> brothels continue to be "perceived as outlaws" and "regarded as inherently awful, disorderly, and hence warranting and requiring exclusion from the community."<sup>56</sup>

### Organised Crime

Large scale organised crime and 'pimping' is not a characteristic of the sex industry in Australia. Research and anecdotal evidence from the Scarlet Alliance member organisations, who actually work with sex workers, and our membership of sex workers supports this. The practice of peer sex worker organisations providing peer support to sex workers and outreach to sex worker workplaces has successfully supported a culture of occupational health and safety whereby sex workers can access information and support when needed. Various government inquiries have also been unable to find

<sup>54</sup> Scarlet Alliance and Rose Alliance, *The Swedish Model of Criminalising Sex Worker Clients Since 1999* (2011).

<sup>55</sup> *Liu, Lonza and Beauty Holdings Pty Limited v Fairfield City Council* (1996).

<sup>56</sup> Penny Crofts, 'Brothels: Outlaws or Citizens?' (2010) *International Journal of Law in context*, 6:2, 151.

the presence of organised crime in the sex industry; instances identified in the 1980's in the Wood and Fitzgerald Inquiries led to reforms, and subsequent investigations have been unable to find any evidence of organised crime in the sex industry.

There is no evidence that organised crime is associated with the sex industry, or that crime is relatively more prevalent in the sex industry compared to other businesses. In *Martyn v Hornsby Council*, the Senior Commissioner of the Land and Environment Court noted that “there is no evidence that brothels in general are associated with crime or drug use.”<sup>57</sup> Penny Crofts states that “there is nothing inherently criminogenic about premises used for sex services.”<sup>58</sup> There is also no evidence of any link between trafficking and organised crime. Fiona David writes in her report on Organised Crime and Trafficking in Persons that “It is frequently assumed that organised criminal groups are heavily implicated in trafficking in persons. However, this assumption remains relatively untested.”<sup>59</sup>

Council practices of imposing onerous requirements on sex industry businesses do not protect communities from criminality or violence, but ironically put sex workers in more dangerous working environments (e.g. industrial zones), with negative effects on our safety and rights. Evidence clearly illustrates that it is sex workers who are in need of protection (from bad planning decisions), not communities in need of protection (from sex work or sex workers).

### Sex Trafficking

Anti-trafficking interventions focusing on the sex industry in Australia have been disproportionate to the extent and nature of trafficking in the sex industry. Despite the significant financial resources invested into identifying trafficking in Australia, consistently low government statistics show that the media estimated incidence of trafficking in Australia is inflated. In 2003, Chris Ellison, then Minister of Justice, said, ‘no significant’ sex slavery problem existed in Australia. Despite enormous surveillance, heavy police investigation and substantial investment in a criminal justice approach, there have been only 14 cases successfully convicted under Australia’s anti-trafficking legislation. These relate to charges obtained in 9 schemes, 7 relating to the sex industry. In all the finalised trafficking cases that have involved migrant sex workers, no one had been deceived as to the fact they would be sex working and they had all consented to working as a sex worker in Australia. Some had sex worked previously. None of the cases involved deception or trickery of the fact they would be working as a sex worker. It is our belief that this is not due to difficulties in surveillance, prosecution or laws being inadequate.

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<sup>57</sup> *Martyn v Hornsby Shire Council* [2004] NSWLEC 614.

<sup>58</sup> P. Crofts, ‘The Proposed Licensing of Brothels in NSW’ 17 *LGLI* cited in NSW Government, Better Regulation Office, *Issues Paper: Regulation of Brothels in NSW*, September 2012, 39.

<sup>59</sup> Fiona David, ‘Organised Crime and Trafficking in Persons’ (2012) 436 *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology.

### Migrant and CALD Sex Workers

Consultation with the Scarlet Alliance Migration Project Steering Committee (comprised of migrant sex workers) has affirmed the findings of government inquiries, including the recent CRC *Inquiry into the exploitation of people through trafficking, in all its forms in NSW*, that is, that trafficking is a relatively isolated phenomenon for sex workers in NSW. Further evidence shows that increasing regulation, policing and surveillance are not effective approaches to combating trafficking or exploitation for the small number of cases that have been identified. This approach has been adopted for years with the stated aim of investigating trafficking in the sex industry but with no positive outcomes. Instead it has shown to increase stigma and discrimination against migrants and decrease their willingness to access support in the event of exploitation and trafficking. Any approaches to trafficking must be rights based and support prevention of the circumstances that create vulnerabilities to trafficking such as access to safe migration, translated information and services. Workplace rights and safety are best supported through the decriminalisation of sex work.

Positive health outcomes for migrant sex workers have been supported by decriminalisation in NSW, with consistent findings of research demonstrating low rates of STIs and high rates of condom use for migrant sex workers in NSW. This is supported by current epidemiology that shows migrant sex workers demonstrate similarly high rates of condom use as non-migrant sex workers. A Sydney Sexual Health Centre study of Asian female sex workers surveyed in Sydney in 1993 and 2003 demonstrated that 92.5% of Thai sex workers had consistent condom use with clients for vaginal sex in 2003. In 2007, a survey by Zi Teng (Hong Kong) and Scarlet Alliance of Chinese sex workers in Sydney, Adelaide, Melbourne and Canberra demonstrated that 97% of Chinese sex workers always use condoms. In 2010, a study from the National Centre in HIV Epidemiology and Clinical Research, Sydney Sexual Health Centre, UNSW Faculty of Law and School of Population Health at the University of Melbourne demonstrates similar rates of condom use between Asian and non-Asian sex workers, stating:

“The prevalence of sexually transmissible infections is at an historic low; for example, the incidence of gonorrhoea has fallen from 440 per 100 woman years in 1980-1981 to 0.24 per 100 woman years in 2004-2006 among brothel-based workers in Sydney. Less than 1% of these women arrive with HIV infection and to date there are no documented cases of HIV transmission to or from these women resulting in their work from Australia.”

NSW is recognised internationally for the success of decriminalisation of sex work. No evidence has shown that decriminalisation increases the size of the sex industry or incidences of exploitation. On the contrary, the evidence supports that decriminalisation improves health, safety and OH&S for sex workers and reduces barriers in all sex workers accessing services. The decriminalisation of sex work allows for more transparent operation of the sex industry, increasing access to health promotion initiatives, and enables access to police and support programmes to protect sex workers human rights —whether migrant or local—and improves workplace safety.<sup>60</sup>

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<sup>60</sup> Richard Steen et al. ‘Trafficking, sex work, and HIV: efforts to resolve conflicts’ (2014) 385 *The Lancet*, 94-96.

## RECOMMENDATIONS

1. Scarlet Alliance recommends the continuation of decriminalisation of sex work, sex workers' workplaces and clients in NSW supported by anti-discrimination coverage for all sex workers in NSW.

The outcomes of decriminalisation in NSW are significant and cannot be assured under any alternative model. They include:

- a. Exceptionally good public health outcomes and low rates of STIs and HIV (recognised by Australia's National Strategies and the Kirby Institute Annual Surveillance Report);<sup>61</sup>
  - b. Better access to health promotion (finding of the Law and Sex Worker Health Study, which compared the health impacts of legal frameworks across Victoria, NSW and WA);<sup>62</sup>
  - c. Little to no amenity impacts (recognised by Crofts and Prior);<sup>63</sup>
  - d. No evidence of organised crime (recognised by the Land and Environment Court);<sup>64</sup>
  - e. Better access to Occupational Health and Safety (WorkCover and NSW Health worked with sex workers to create the Health and Safety Guidelines for Brothels, which has been translated to Thai, Chinese and Korean);<sup>65</sup> and
  - f. No increase in the size of the sex industry (Kirby Institute report to Ministry of Health)<sup>66</sup>
2. Scarlet Alliance recommends that maintaining decriminalisation is essential to maintaining the current positive public health outcomes. This is supported by current evidence from The Lancet states that the decriminalisation of sex work would have the greatest impact on the HIV epidemic, reducing HIV by up to 46% in the next decade and result in cost saving thresholds of tens of millions of dollars globally.<sup>67</sup>
  3. Scarlet Alliance does not support a change to the regulatory framework in NSW however we recognise council's require further support to effectively undertake their role in regulating zoning, planning and location controls and environmental health and the ability to differentiate between the differing scales and types of sex industry businesses. This includes the likely impacts, if any, and appropriate planning, zoning and location controls for private, home based and commercial sectors of sex industry businesses. Our recommendations to address this are:

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<sup>61</sup> Australian Government Department of Health and Ageing, *Sixth National HIV Strategy 2010-2013*, Commonwealth of Australia, Canberra, 2010, 16; Australian Government Department of Health and Ageing, *Second National STI Strategy 2010-2013*, Commonwealth of Australia, Canberra, 2010, 16. Kirby Institute, HIV, Viral Hepatitis and Sexually Transmissible Infections in Australia Annual Surveillance Report, University of New South Wales, 2011, p8, Figure 46, Figure 34.

<sup>62</sup> Christine Harcourt, J O'Connor, S Egger, C Fairly, H Wand, M Chen, L Marshall, J Kaldor, B Donovan, (2010), 'The Decriminalisation of Prostitution is Associated with Better Coverage of Health Promotion Programs for Sex Workers', *Australian and New Zealand Journal of Public Health* 34:5, 482.

<sup>63</sup> Prior and Crofts, 'Effects of sex premises on neighbourhoods: Residents, local planning and the geographies of a controversial land use' (2012) *New Zealand Geographer* 68, 130.

<sup>64</sup> *Martyn v Hornsby Council*, cited in Nothing About Us Without Us, 'North Sydney Council Prohibits Home Occupation (Sex Services) in All Zones under the New Draft LEP'.

<sup>65</sup> NSW Government and Workcover, 'Health and Safety Guidelines for Brothels'.

<sup>66</sup> B. Donovan, et al. *The Sex Industry in New South Wales: A Report to the NSW Ministry of Health*, Kirby Institute, University of New South Wales, Sydney, 2012.

<sup>67</sup> The Lancet. HIV and Sex Work, <http://www.thelancet.com/series/HIV-and-sex-workers> July 2014.

- a. The update, adoption and implementation of the Sex Services Premises Planning Guidelines, a tool to promote consistency and continuity in local planning decisions.
  - b. Development of a clear and consistent approach to Home Occupation (Sex Services) that ensures that private sex workers do not need to submit to a DA and can operate as any other home business.
  - c. Education and training to support council staff and councillors to understand the role of council and to promote uptake and implementation of the guidelines.
  - d. A moratorium on compliance actions against sex industry businesses, other than substantiated amenity impact complaints, until the guidelines are in place and implementation has been achieved.
4. Remove private and home occupation sex workers from brothel definitions and regulatory codes. This includes changes to the:
    - a. State Environmental Planning Policy Codes
    - b. The Standard Instrument Local Environmental Policy
    - c. The Environmental Planning and Assessment Act
    - d. Restricted Premises Act
  5. Scarlet Alliance recommends that Local councils are required to cease the resourcing of private investigators paid to engage in sex with sex workers as a obviously flawed method of detection of non-compliant businesses.
  6. Scarlet Alliance recommends specifically against:
    - a. Licensing - licensing is not supported for regulation of brothels in NSW. This recommendation is based on: significant compliance problems and a high cost to manage the system in other jurisdictions in Australia, as well as the experiences of sex workers working within a licensing system; review of suitability of licensing using the Licensing Framework Assessment tool developed as part of the Independent pricing and regulatory tribunal review of licensing rationale and design in NSW.
    - b. Swedish or 'Nordic' laws which significantly undermine sex workers autonomy, independence and control over workplaces, contribute to isolation and social exclusion.
    - c. Registration of individual sex workers, including systems that require registration for the purpose of advertising, as unnecessary, stigmatising and dangerous for sex workers safety.
    - d. An increase to council powers, which are already significant within the Brothels Legislation Amendment Act 2007.

## APPENDIX 1

<b>Cost of Licensing in Queensland</b>			
<b>Figures taken from Queensland Prostitution Licensing Authority Annual Reports</b>			
<b>Statements of Financial Performance</b>			
<b>Year</b>	<b>User charges and fees</b>	<b>Government contributions</b>	<b>Total expenses from continuing operations</b>
<b>2001</b>	34,500	1,059,000	647,888
<b>2002</b>	177,361	871,000	1,093,206
<b>2003</b>	205,425	755,000	1,000,700
<b>2004</b>	281,272	653,000	1,074,710
<b>2005</b>	341,171	806,000	1,009,459
<b>2006</b>	380,733	367,000	1,070,538
<b>2007</b>	502,743	574,000	1,050,443
<b>2008</b>	797,403	405,000	1,146,549
<b>2009</b>	842,228	590,000	1,396,819
<b>2010</b>	733,598	429,000	1,317,300
<b>2011</b>	561,565	441,000	1,339,663
<b>2012</b>	753,826	701,000	1,360,091
<b>2013</b>	802,871	703,000	1,272,219
<b>2014</b>	981,781	708,000	1,395,095
<b>Total</b>	<b>\$7,396,477</b>	<b>\$9,062,000</b>	<b>\$16,174,680</b>

## APPENDIX 2

### Why licensing will not work in NSW

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.

The Victorian licensing model:

- has resulted in extremely high levels of non-compliance. There were 95 licensed brothels and up to 70 unlicensed brothels in 2006.<sup>i</sup> In 2015 there are 88 licensed brothels and an unknown number of unlicensed brothels (police estimate that there could be up to 350 businesses operating as unlicensed brothels)<sup>ii</sup>; 50% of Victorian sex workers were still operating illegally in 2012;<sup>iii</sup>
- has resulted in police replacing Consumer Affairs as key regulators of the sex industry in Victoria. The Sex Industry Coordination Unit (SICU) is charged with addressing the high level of illegal brothels;
- has created a group of '*clandestinas*', who fall outside health interventions and miss targeted health programs;<sup>iv</sup> 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';<sup>v</sup>
- requires private sex workers 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;
- prevents private sex workers seeing clients at their own home/apartment or at a hotel room booked by the sex worker meaning sex workers must visit clients in their homes or a hotel room the client has booked;

After 14 years implementation, the Queensland licensing model:

- has resulted in extremely high levels of non-compliance. Only 24 legal brothels have been licensed in fourteen years in Queensland;<sup>vi</sup>
- within two years of implementation, 201 towns or areas were granted permission to refuse brothel development applications – giving sex industry businesses in those areas no option but to operate illegally.
- 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. In 2014 just over 40% of the Prostitution Licensing Authority revenue continued to be comprised of Government grants;<sup>vii</sup>
- 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 2013-2014, 69% of complaints received by the PLA were referred to Queensland Police for response.<sup>viii</sup> 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;
- is extremely costly to the licence applicant and creates extreme barriers to compliance. Processing times for license applications are long, and during this time the property has to be leased or owned and have planning permission. Licensing fees are extremely costly,<sup>ix</sup> and the long processing time exacerbates the cost of applying for a license. A brothel with only 3 rooms and 1 licensee will pay \$26, 828 for a license in 2015, costing a small business over \$500 a week in licensing fees.<sup>x</sup>

The issues represented here remain consistent barriers to the success of licensing models to regulate the sex industry. Licensing models in Queensland and Victoria have created a two-tier sex industry; the legal sector or those that can comply, and the illegal sector made up of the majority of the industry, who are unable to meet the excessive conditions of compliance.

In both states licensing has resulted in high levels of non compliance, returning the industry to regulation by police.

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- <sup>i</sup> 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.
- <sup>ii</sup> Carnovale, M, 'Trading in Lives' *Police Life* Autumn 2015, 11.
- <sup>iii</sup> 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.
- <sup>iv</sup> Harcourt C, Egger S, Donovan B, 'Sex Work and the Law' (2005) *Sexual Health* 2(3) 125.
- <sup>v</sup> 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, Recommendation 2.
- <sup>vi</sup> Queensland Prostitution Licensing Authority, *Licensed Brothels*, <http://www.pla.qld.gov.au/brothels/licensedBrothels.htm>
- <sup>vii</sup> Queensland Prostitution Licensing Authority, *Annual Report 2013-2014* [http://www.pla.qld.gov.au/Resources/PLA/reportsPublications/annualReport/2014/documents/financialStatements2013\\_14.pdf](http://www.pla.qld.gov.au/Resources/PLA/reportsPublications/annualReport/2014/documents/financialStatements2013_14.pdf)
- <sup>viii</sup> Queensland Prostitution Licensing Authority, *Annual Report 2013-2014* <http://www.pla.qld.gov.au/Resources/PLA/reportsPublications/annualReport/2014/documents/monitoringCompliance.pdf>
- <sup>ix</sup> Queensland Prostitution Licensing Authority, *Apply for a Brothel Licence*, <http://www.pla.qld.gov.au/licencesCertificates/brothelApplication.htm>
- <sup>x</sup> Queensland Prostitution Licensing Authority, (July 2015) *Fees Matrix: Licence and Certificate Fees*.