



HUMAN RIGHTS & DISCRIMINATION COMMISSIONER

ACT Human Rights Commission

Standing Committee on Justice and Community Safety
Legislative Assembly for the ACT

By email

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	A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE
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Dear Committee Members

Thank you for the opportunity to provide the attached submission to the inquiry into the operation of the *Prostitution Act 1992*.

We have informed ourselves in a number of ways including discussions with a range of community service providers and relevant organisations. In drafting this response, the need for individual voices to be heard from all sections of the community and the commercial sexual services sector has become even more apparent. Experiences of people who have or currently work in the sector ought to be encouraged. To ensure privacy and safety, the Committee could seek these views using alternative methods. To that end, we recommend that the any public hearings also provide for anonymous input, for example, via an electronic survey which could be circulated by relevant organisations.

Yours sincerely

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Human Rights and Discrimination
Commissioner

Mary Durkin
Health Services
Commissioner

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Children and Young People
Commissioner

22 March 2011





**ACT HUMAN RIGHTS
COMMISSION**

Australian Capital Territory

**Submission to the inquiry into the operation of the
*Prostitution Act 1992***

22 March 2011

1. The ACT Human Rights Commission

The ACT Human Rights Commission was established by the *Human Rights Commission Act 2005* in November 2006. The Commission consists of the three Commissioners of equal status who hold the roles of the Human Rights and Discrimination Commissioner; Health Services Commissioner, Disability and Community Services Commissioner; and the Children and Young People Commissioner.

The issues raised in the Inquiry are relevant to the work and focus of all Commissioners, who are each informed by a human rights framework under the *Human Rights Act 2004* (ACT) (HR Act). In this brief submission we focus on the human rights and health considerations, as well as the implications for children and young people in the ACT.

2. International Treaties and Decriminalisation

The Commission supports the continued decriminalisation of sex work provided adequate safe guards are enforced, to ensure no victimisation is involved; so that children and young people under the age of 18 years are protected; the health of workers is protected; and people are not subjected to coercion and trafficking. The Commission draws the Committee's attention to Australia's international human rights treaty obligations regarding commercial sexual services; the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime*. It specifically targets sexual exploitation, has a particular focus on preventing sexual slavery and the international trafficking of women and children.

While it has been reported that many people providing commercial sexual services do so entirely as a matter of personal choice and report high degrees of job satisfaction,¹ this is not the universal experience. Sex work may not be undertaken voluntarily by the person providing the service for a number of reasons and particular groups are more vulnerable to exploitation, including children, young women and persons who are dependent upon illicit drugs.

It is vital therefore, that the Committee is mindful that commercial sexual services are often raised at the international level within the context of crime and preventing abuse. In the Commission's view there are risks of exploitation and to personal safety and well-being in the commercialisation of sexual services that the *Prostitution Act 1992* (the Act) could better address through amendments which are set out below.

3. Relevant Human Rights

The rights in ACT *Human Rights Act 2004* relevant to commercial sexual services are outlined below:

- Section 10(1) - Prohibition against torture and cruel, inhumane or degrading treatment
- Section 11 - Protection of Children (these issues are addressed below at point 4.)
- Section 12 – Protection of Privacy and Reputation
- Section 13 – Freedom of Movement

¹ Perkins, R. (1994). *Sex Work and Sex Workers in Australia*, and Bailey, J. (2003). *Conversations in a Brothel*.

- Section 17 – Right to Participate in public life
- Section 18 – Right to Liberty and Security of the person
- Section 26 - Freedom from Forced work

4. Exploitation

The Act currently contains one section which seeks to ensure freedom from forced work, namely section 17 headed “Duress”. This section creates several offences prohibiting a person from inducing another to provide or to continue to provide commercial sexual services through violence or threats of violence; by supplying certain drugs or medicines or through fraud. It is also an offence to obtain money from commercial sexual services using similar tactics.

Despite s.17, there is evidence that exploitation persists. As recently as December 2010, the Department of Immigration discovered a number of Thai women illegally working at registered Canberra brothels. Section 17 appears not to have been raised by the officials, and all but one of the women was deported. The Commission recommends that the Act be amended to specifically incorporate the freedom from forced work and movement (protected under s.26 and s.13 of the *Human Rights Act 2004*), and that the heading of the section use those terms, with existing penalties reassessed.

It is noted that Police have prosecuted under the *Crimes Act 1900* for behaviour amounting to assault, including sexual assault on behalf of sex workers.² In this regard, it seems that the prohibition against torture and cruel, inhumane or degrading treatment, under s.10 of the *Human Rights Act 2004* (HR Act), is able to be upheld through an existing although different law than the Prostitution Act.

The Commission has already recommended under the 5 year review of the HR Act, that torture in s.10 be an absolute prohibition, and not subject to limits, under s.28 of the HR Act.

The right to privacy and reputation (s.12 of the HR Act) is not fully addressed in the Prostitution Act. The name of the Act itself is problematic from this perspective as the terms “prostitution” and “prostitutes” imbue stigma, negative attributes and poorly affects reputation. It is recommended that the name of the Act be changed in order to reflect the right to reputation, as well as changed cultural values eg Commercial Sexual Services Act.

5. Regulation

The Commission has not had the resources to consult the community and stakeholders sufficiently about the operations of the legislation, such as low rates of registration, to form a view on its overall effectiveness. The Commission does not support the public identification of individual sex workers, but understands that records about workers (including date of birth) should already be kept by employers under taxation and other laws. In order to ensure compliance with the Act and in particular to protect the rights of children and young people, it seems reasonable for requirements about age of workers to be expressly stated in the Act. However, given the real risk of non-consensual privacy breaches (which has been noted as a factor for the low numbers of sole operators registered under

² See ACT Policing Media Release: Man fails to pay for sex; charges laid, October 28 2010

the Act), the Commission recommends that it be an offence for any person to disclose these records to any other party, except as specifically authorised by law. It would appear that the Federal *Privacy Act 1988* would not apply to private employer records, but would apply to registration records held by ACT agencies such as the Office of Regulatory Services.

The right to privacy is engaged in relation to regulatory record keeping highlighted by the Committee. The Committee has asked specifically whether it would be desirable to require commercially operated brothels to maintain records of workers and relevant proof of age, to ensure that all workers are over the age of 18 years.

The Commission has had the benefit of reading the submission of the AIDS Action Council of the ACT and Scarlet Alliance, and shares their views about the merit in allowing up to two individuals to operate from the same premises. We note in particular the AIDS Action Council of the ACT's views regarding the increased safety which would be afforded:

'The most commonly reported health and safety concerns from sex workers include overwork and security. These issues are experienced particularly by sole operators, unable to share the rent of the premises with another worker or work together to provide support in the event of an emergency or aggressive client. It is our view that allowing two sex workers to operate from the same premises where neither worker is employed by the other would provide occupational health and safety benefits...'

The Commission supports the recommendation of the AIDS Action Council of the ACT and the Scarlet Alliance to allow two sole operators, each not employed by the other, to work from the same premises as is currently allowed in Tasmania.³ Already s.12(2) provides that where there are 2 or more operators, it is sufficient if one complies with certain registration requirements. The Commission also notes this is a position which ACTCOSS has also supported.⁴ This amendment may have the benefit of enhancing the right to security of the person, protected under s.18 of the HRA. The Commission recommends that the protection in s.11(4) of the Prostitution Act be extended to two sole operators, so that the Registrar of Brothels and Escort Agencies would not make the names and addresses of such operators available for public inspection. We understand that individual workers think that it is not safe to register, possibly because the disclosure exception in s.11(6) may be too wide. It authorises police, public servants and others prescribed under the Regulations who wish to inspect the workers' names and addresses 'in the exercise of the person's functions.' It is recommended that stronger privacy protections be included in s.11(4)-(6).

Only two audit and inspection programs for brothels in the ACT have been conducted by the Office of Regulatory Services since 1992. The most recent in 2009, was undertaken after significant notice was provided. It is welcome that the Office of Regulatory Services indicated a level of compliance by licensees in relation to workplace safety through those audits.⁵ However, it is unknown what if any compliance programs are conducted by the Office of Regulatory Services or ACT Policing to ensure compliance with the Act and to protect the rights of children and young people in particular.

³ See *Sex Industry Offences Act 2005* (Tas).

⁴ See ACTCOSS "Comment on: Sex workers rights and regulation in the ACT" June 2007 available at: http://www.actcoss.org.au/publications/Publications_2007/1107CMT.pdf

⁵ Brothel Inspection Program Report 2009 "Engage Educate Enforce" Office of Regulatory Services, 13 November 2009. Available at: http://cdn.justice.act.gov.au/resources/uploads/Worksafe/Publications/Audit_Reports/Brothel_Inspection_Program_Report_November_2009.pdf

The Commission is only aware of two prosecutions (neither for underage workers) under the Act, which does not guarantee that there are no problems with compliance, as demonstrated by the 2008 death of a 17 year old young woman, working at a Fyshwick brothel which was subject of an inquest by the Coroner in 2010.⁶

The Act is complemented by other regulations including:

- Public Health Regulations 2000
- Work Safety Regulations 2009
- Work Safety (ACT Code of Practice for the Sexual Services Industry) Code of Practice 2010
- Commonwealth employment law standards and the *Fair Work Australia Act 2009*.

These complementary regulations increase the opportunity for the human rights of sex workers to be protected. To be effective, regulations require systematic and adequately resourced monitoring. It is recommended that the Act require the Office of Regulatory Services conduct a minimum number of unannounced audits per annum to ensure compliance with relevant health, safety and all other aspects of the Act and related regulations and that the Office be adequately resourced to do so.

6. Rights of Children and Young People

As noted above, subsection 11(2) of the Human Rights Act requires the protection of children:

Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

The Prostitution Act reflects this right through four sections (ss.19, 20, 21, 23) which specifically prohibit children or young people working at or attending a commercial sex service and prohibit a person from accosting a child in a public place to procure or offer commercial sexual services. Contravening these sections is an offence and criminal penalties apply including imprisonment. The Commission believes it is appropriate to highlight the protection of children through these specific offences.

However, the different burden of proof and level of seriousness attached to the offences set out in section 20 based upon age of the child involved is concerning. Section 20 states:

- (1) A person commits an offence if—
- (a) the person causes, permits, offers or procures a child to provide commercial sexual services; and
 - (b) the child is under 12 years old.

⁶ See N. Towell, "Coroner to reopen brothel inquest" *The Canberra Times*, 23 September 2009; N. Towell and V. Violante "Death of innocence: Janine 17, lost to the night" *The Canberra Times*, 1 November 2008.

Maximum penalty: 1 500 penalty units, imprisonment for 15 years or both.

(2) *Absolute liability applies to subsection (1) (b).*

(3) *A person commits an offence if—*

(a) *the person causes, permits, offers or procures a child to provide commercial sexual services; and*

(b) *the child is 12 years old or older.*

Maximum penalty: 1 000 penalty units, imprisonment for 10 years or both.

(4) *Strict liability applies to subsection (3) (b).*

It is noted that under sections 55 and 61 of the *Crimes Act 1900*, sexual offences against children distinguish between children 10 years of age (a higher penalty applies) and young people 16 years of age (being the legal age of consent). The Commission notes differential treatment in terms of age of the child exists, and recommends that the Committee seek specific advice on the existing inconsistency between the *Crimes Act* and the *Prostitution Act*.

In the Commission's view, section 20 of the *Prostitution Act* should be amended to specify that it applies to children and young people up to the age of 18 years, to remove any ambiguity between this Act and the *Crimes Act*. The Commission also recommends the Committee consider extending absolute liability in section 20 to apply up until 16 years of age, and strict liability between 16 and 18 years of age.

Section 22 provides for a defence to section 20 and to soliciting a child in a public place contrary to section 19(2) as follows:

Age of child—burden of proof

It is a defence to a prosecution under section 19 (2) or 20 if it is established that the defendant—

(a) *took reasonable steps to ascertain the age of the child concerned; and*

(b) *believed on reasonable grounds that the child had attained 18 years of age.*

The Commission recommends that the Committee seek specific advice on section 22 in terms of its adequacy and consistency with the new mental elements contained in the *Criminal Code 2002*.

7. Public Health & Discrimination

The health of both users and providers of commercial sexual services continues to be a preeminent argument in favour of the legalisation of these services. The 1992 *Inter-Governmental Committee Legal Working Party Final Report* stated that:

'Laws...penalising prostitution impede public health programs promoting safer sex to prevent HIV transmission, by driving underground many of the people most at risk of infection...'⁷

These recommendations are reflected in the *International Guidelines on HIV/AIDS and Human Rights* (1996) at 4(c):

'With regard to adult sex work that involves no victimization, criminal law should be reviewed with the aim of decriminalizing, then legally regulating occupational health and safety conditions to protect sex workers and their clients, including support for safe sex during sex work. Criminal law should not impede provision of HIV prevention and care services to sex workers and their clients. Criminal law should ensure that children and sex workers who have been trafficked or otherwise coerced into sex work are protected from participation in the sex industry and are not prosecuted for such participation but rather are removed from sex work and provided with medical and psychosocial support services, including those related to HIV.'

Since both of these documents were published treatment of HIV has advanced, making it more of a chronic rather than fatal condition. The ACT Attorney-General Simon Corbell noted in 2008 that the ACT prostitution law was written when people with HIV had a very short life expectancy and stated:

'The question is, should be a complete prohibition on people operating as commercial sex workers if they have HIV. Because we know that with appropriate safe-sex measures in place, the risk of transmission is negligible.'⁸

Further, the current *Sixth National HIV Strategy 2010-13* states:

'In relation to sex workers, some data suggest that under a decriminalised and deregulated legislative framework sex workers would have increased control over their work and be able to achieve similar or better outcomes without the expense and invasiveness of mandatory screening. The priority to ensure that legislation, police practices and models of regulatory oversight support health promotion, so sex workers can implement safer sex practices and the industry can provide a more supportive environment for HIV prevention and health promotion.' (section 6.4)

'Despite the occupational risks, the incidence of HIV in sex workers in Australia is among the lowest in the world. This is largely because of the establishment of safe-sex as a norm, the availability of safe-sex equipment, and community driven health promotion and peer-based interventions.' (section 5.5)

The *Second National Sexually Transmissible Infections Strategy 2010-13* also states:

'Different legal environments can facilitate or hinder health promotion and education initiatives. ...Support for safe sex work practices and cultural change to reduce stigma and

⁷ Department of Health, Housing and Community Services, *Final report of the Legal Working Party of the Intergovernmental Committee on AIDS*, November 1992 at 46.

⁸ N. Rudra "Prostitutes Afraid to Check for HIV", *Canberra Times*, 5 September 2008 and K. Matthews "Magistrate's ruling undermines public health" ABC News 23 September 2008.

discrimination towards sex workers are other important features of health promotion interventions. (Section 6.1.4)

The Commission believes the legalisation of commercial sexual services in the ACT has enabled regulation of the industry from an Occupational Health & Safety perspective as well as from a public health perspective. The Work Safety (ACT Code of Practice for the Sexual Services Industry) Code of Practice 2010 under the *Work Safety Act 2008* specifies duties of employers and/or operators in relation to Personal Protection and Safety Equipment, as well as record-keeping. The Prostitution Act contains several sections which specifically deal with health related issues including the requirement that 'prophylactics' are used in the provision and receiving of certain acts. Failure to do so is an offence punishable by a fine under section 27.

However, section 27 fails to specify who is responsible for the provision of prophylactics (such as condoms); sex workers themselves, brothel owners or clients. The Commission is concerned that the Act is silent on this issue. The Commission is also concerned to ensure this section is strengthened to prohibit sex workers being pressured into not using prophylactics as the current penalties in this section are small. The provision of prophylactics ought to be considered an essential safety issue by all sexual service operators, as other safety equipment is treated in other high risk jobs.

The Commission recommends amending section 27 to clarify this issue, placing the onus on the commercial sexual service operator/owner to make a wide range of prophylactics available to sex workers and clients free of charge. An absolute liability offence and increased penalty should be imposed in order to reflect the seriousness of the risks involved.

The Commission recommends that sections 24 and 25 are not in keeping with what is known about the prevention of sexually transmissible diseases and notes the *Public Health Regulation 2000* already sufficiently addresses these matters. Section 21 of the Regulation provides as follows:

- (1) *A person who knows or suspects that the person has a transmissible notifiable condition, or knows or suspects that the person is a contact of such a person, must take reasonable precautions (appropriate to that condition) against transmitting the condition.*

Maximum penalty: 10 penalty units.

- (2) *If a person responsible (the **responsible person**) for another person (the **other person**) knows or suspects that the other person has a transmissible notifiable condition, or knows or suspects that the other person is a contact of such a person, the responsible person must take reasonable precautions (appropriate to the condition) to prevent the other person from transmitting the condition.*

Maximum penalty: 10 penalty units.

- (3) *In this section:*

"reasonable precautions" includes precautions taken on the advice of a doctor (including an authorised medical officer) or an authorised officer.

Part 6 of the *Public Health Act 1997* enables tailored interventions in the form of Health Directions and Orders to be made with appropriate protective requirements. Also s.23 of the *Crimes Act 1900*

makes it an offence to intentionally or recklessly inflict actual bodily harm. These provisions comply with Guideline 4(a) of the *International Guidelines on HIV/AIDS and Human Rights*:

‘Criminal and/or public health legislation should not include specific offences against the deliberate or intentional transmission of HIV, but rather should apply general criminal offences to these exceptional cases.’

Presently, section 24 and section 25 are discriminatory within the meaning of section 8 of the *Discrimination Act 1991* and may not meet the proportionality test in section 28 of the Human Rights Act. With greater strength given to section 27 of the Prostitution Act, and the offences contained in the *Public Health Regulations 2000*, *Public Health Act 1997* and *Crimes Act 1900*, sections 24 and 25 are unnecessary. The Commission recommends that section 24 and section 25 be removed, in combination with strengthened provisions in section 27.

8. List of Recommendations

1. The Act be amended to specifically incorporate the freedom from forced work and of movement and that the heading of that section use those terms with existing penalties reassessed.
2. The name of the Act be changed (eg to the Commercial Sexual Service Act).
3. A requirement on management to maintain relevant records of workers and proof of age be expressly stated in the Act.
4. An offence be inserted for disclosure of employee records held by a commercial sexual service operator, except as specifically authorised by law.
5. The Act should be amended to enable up to two sole operators to work from the same premises, each not employed by the other.
6. If a Register of Brothels and Escort Agencies is continued, then the protection in s.11(4) of the Prostitution Act should be extended to two sole operators so that the Registrar of Brothels and Escort Agencies not make the names and addresses of such operators available for public inspection and that privacy be more strongly protected by tightening the list of people authorised to access this personal information.
7. The Prostitution Act be amended to contain a provision requiring the Office of Regulatory Services to conduct a minimum number of unannounced audits per annum.
8. Section 20 of the Prostitution Act should be amended to specify the prohibition applies to children and young people up to the age of 18 years. The Commission recommends that the Committee consider extending absolute liability in section 20 to apply up until 16 years of age, and strict liability between 16 and 18 years of age.
9. The Committee should seek specific advice on the inconsistency between sections 55 and 61 of the Crimes Act and section 20 of the Prostitution Act in relation to differential treatment in terms of age.
10. The Committee should seek specific advice on section 22 of the Prostitution Act, in terms of its adequacy and consistency with the new mental elements contained in the *Criminal Code 2002*.

- 11. Section 27 of the Prostitution Act should be amended to place the onus on the commercial sexual service operators to make a wide range of prophylactics available to sex workers and clients free of charge. Penalties for failure to do so should be increased.**
- 12. Sections 24 and 25 should be removed.**