ACT Government
Health

Mrs Vicki Dunne MLA, Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mrs Dunne

Health Directorate input to the Inquiry into the *Prostitution Act 1992*

I am writing in response to your letter of 5 May 2011 to the Minister for Health, Ms Katy Gallagher MLA, requesting the Health Directorate to contribute specific advice to the Standing Committee on Justice and Community Safety's Inquiry into the *Prostitution Act 1992*. The Minister has asked that I communicate the Health Directorate's advice to the Standing Committee.

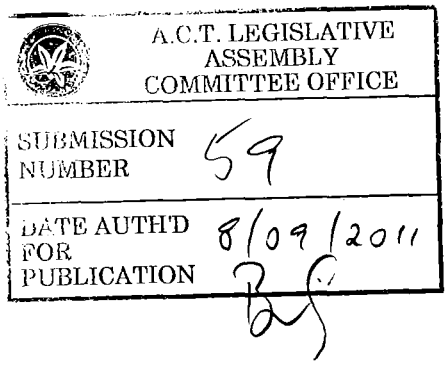
As per your request I have sought advice from the Chief Health Officer in relation to the matters that you have raised, specifically as to whether there are areas of redundancy and overlap between the provisions of the *Prostitution Act 1992* and the *Public Health Act 1997*, insofar as they have implications for sex work. Our input is at Attachment A.

We hope that our contribution will be useful to the Inquiry process.

Yours sincerely

Mr Ian Thompson
A/g Director-General

29 August 2011



Attachment A – ACT Health Directorate input

Health issues in relation to the *Prostitution Act 1992* and its overlap with other health-related ACT legislation which has implications for sex work.

Scope

We note that the Standing Committee on Justice and Community Safety would "value the opinion of the ACT's Chief Medical Officer on the operation of the *Prostitution Act 1992* and any other legislation, such as the *Public Health Act 1997*, which have implications for sex work".

We understand that a previous ACT Government submission to the inquiry, and a number of submissions received from the community, have canvassed the issue of health in a broader context, including for example the effect of the experience of discrimination in producing poor health outcomes.

Consistent with our understanding of the request that we have received from the Standing Committee, this advice will be specifically confined to more narrowly defined health-related issues such as the prevention of infectious disease.

This response will first discuss specific health-related provisions within the *Prostitution Act 1992* (the Act). We note that the main health-related legislation that may have implications for sex work is the *Public Health Act 1997* (the Public Health Act) and the associated *Public Health Regulation 2000,* as well as the *Occupational Health and Safety (Sexual Services Industry) Code of Practice 2005 (No 1)*.This response will then go on to provide a commentary about issues in relation to areas of potential overlap between these and the *Prostitution Act 1992.*

The Prostitution Act 1992

The main area in which the Act has implications for, and intersection with, health is in relation to the public health issues associated with sexually transmissible infections (STI). These issues are specifically covered in sections 24 to 27. We offer the following commentary on these sections:

Section 24 – Infected persons

Section 24 states that *'Each operator and owner of a brothel or escort agency shall take reasonable steps to ensure that a prostitute does not provide commercial sexual services at the brothel or from the escort agency if the prostitute is infected with a sexually transmissible infection'.*

The issues associated with a worker operating with an STI are covered more fully in discussion under section 25. We understand that the effect of section 24 is to place

an additional responsibility on a brothel operator, over and above that imposed on sex workers by section 25.

Section 25 - Providing or receiving commercial sexual services if infected

Section 25 states that *'A person shall not, at a brothel or elsewhere, provide or receive commercial sexual services if the person knows, or could reasonably be expected to know, that he or she is infected with a sexually transmissible infection'.*

We note that this section places obligations not only on sex workers, but also on their clients. Thus it is an offence under section 25 for a *client* to seek a commercial sexual service *'if the person knows, or could reasonably be expected to know, that he or she is infected with a sexually transmissible infection'.*

We support the concept of reciprocal responsibility as it promotes norms of behaviour that support healthy workplace practices. As commercial sexual transactions involve at least two parties, placing responsibility to enact the transaction safely on both workers and clients is appropriate.

Issues of STI definition in sections 24 and 25

We note that the dictionary at the end of the Act states that:

sexually transmissible infection *means—*
(a) chancroid, chlamydial infection, donovanosis, gonorrhoea, HIV/AIDS, lymphogranuloma venereum or syphilis; or
(b) an infection prescribed by regulation.

Associated with the *Public Health Act 1997,* on the other hand, is the *Public Health Notifiable Conditions determination 2005 (Disallowable Instrument DI 2005 – 220).* This lists the range of notifiable conditions under the Public Health Act as well as providing an indication of whether a condition is transmissible.

STI may be **notifiable** (chlamydia, gonorrhoea, syphilis, HIV/AIDS and donovanosis, the latter being exceedingly rare in Australia) or **non-notifiable** (examples include, but are not limited to, herpes simplex virus infections, genital human papilloma virus infections and genital infection with molluscum contagiosum).

There is no distinction between notifiable or non-notifiable STI in either Section 24 or Section 25. Herpes simplex infections, genital human papilloma virus infections and genital infection with molluscum contagiosum are common **non-notifiable** sexually transmitted viral infections in the sexually active Australian population. Whilst symptoms of each of these viral infections can be treated, the underlying infection cannot be cured and non-infectivity cannot be ascertained.

The lack of differentiation between notifiable and non-notifiable STI in Section 24 and Section 25 could be problematic and warrants review. We suggest that should

Section 24 and Section 25 be retained, a more feasible approach could be to include **notifiable** STI rather than STI per se.

Alternatively, it may be feasible to cross reference the STI definition provided in the *Prostitution Act 1992* with the *Public Health Act 1997* and related instruments.

Sections 24 and 25 also create a different level of responsibility for brothel owners, sex workers and clients with an STI, than for those engaging in non-commercial sexual transactions. Section 21 of the *Public Health Regulation 2000* provides, in general terms, a requirement for 'reasonable precautions' to be taken in order to avert transmission of a **notifiable** condition. As discussed above, notifiable sexually transmissible infections do not include genital herpes simplex infections or genital human papilloma virus infections (genital warts).

Section 26 - Medical tests and examinations

We understand the essence of Section 26 to be that the result of a medical test or examination should not be used to convey a belief that a sex worker is not infected with a sexually transmissible infection. We support this provision as being a sound one.

Section 27 - Use of prophylactics

Barrier protection, required in section 27, is still the cornerstone of safe sex practice and of public health strategies to reduce STIs. We support the retention of this provision and support the current definition of 'prophylactics' provided in the Act.

Whilst section 27 of the *Prostitution Act 1992* makes the use of prophylactics mandatory, we note that an associated document, the *Occupational Health and Safety (Sexual Services Industry) Code of Practice 2005 No* 1 (discussed below) is unclear on some aspects of implementation.

Consistent with other views that have been expressed to the Standing Committee we believe that prophylactics represent 'safety equipment', and therefore the employer should make these items freely available to workers.

The *Public Health Act 1997*

Section 113

Section 113 of the *Public Health Act 1997* 'Public health directions—issue' states that *where the Chief Health Officer has reasonable grounds for believing that it is necessary to prevent or alleviate a significant public health hazard, he or she may issue any or all of the following directions to a person for that purpose.*

Public health directions include:

- A direction requiring a person to refrain from behaviour, or an activity, that significantly contributes, or that could so contribute, to the hazard;
- A direction requiring a person to cease performing work of a particular kind, or to cease working at a particular place, while such work significantly contributes, or could so contribute, to the hazard;
- A direction requiring a person who has a transmissible notifiable condition to undergo a medical examination; and
- A direction requiring a person who has a transmissible notifiable condition, or a contact of such a person, to undergo specified counselling.

Section 113 is not specific to STI or to sex workers and their clients, but rather provides legal authority to the Chief Health Officer in a general public health context.

However, the range of directions available to the Chief Health Officer in section 113 includes provision for directions to a person who has a transmissible notifiable condition, or a contact of such a person. Thus the Chief Health Officer has the capacity under Section 113 to issue, for example, a direction stipulating that an individual known to have a notifiable STI *and* presenting a significant health hazard must not engage in sexual activity without a condom. Such a direction could be made irrespective of whether the individual is engaged in providing or receiving commercial sex services.

Public Health Notifiable Conditions determination 2005 (Disallowable Instrument DI 2005 – 220).

This is a disallowable instrument made under the Public Health Act 1997, section 100 'Notifiable Conditions - Ministerial Determination.' The implications of its relationship to the Prostitution Act is dealt with above in discussion about section 25.

Potential overlap between section 113 of the *Public Health Act 1997* and sections 24 and 25 of the *Prostitution Act 1992*

Discussion is warranted of the potential 'overlap' between section 113 of the *Public Health Act 1997* and sections 24 and 25 of the *Prostitution Act 1992*, notwithstanding the above discussion on the lack of differentiation of notifiable and non-notifiable STI in Sections 24 and 25 of the *Prostitution Act 1992.* It would be difficult however to argue that there was 'redundancy' between these provisions in the two Acts: the existence of the *Prostitution Act 1992* in no way reduces the need for the 'general' provisions of section 113 to remain, and the existence and general nature of section 113 does not seem act as a panacea for the issues that sections 24 and 25 of the *Prostitution Act 1992* seek to address.

The *Public Health Regulation 2000*

The *Public Health Regulation 2000* is made under section 138 of the ACT *Public Health Act 1997*. Of particular relevance is Regulation 21 which states that:

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.

This regulation is not specific to STI but rather provides guidance in a general public health context. It has obvious relevance in relation to any sexual activity where either party has a **notifiable** STI.

The Occupational Health and Safety (Sexual Services Industry) Code of Practice 2005 (No 1)

This code is a Disallowable Instrument (DI2005–68) made under the *Occupational Health and Safety Act 1989 – section 206 – Codes of Practice*. The scope of this document is occupationally broad but that it does have some specific guidance around the use of prophylactics as follows:

Employers and/or operators are required by the ACT Prostitution Act 1992, to take all reasonably practicable steps to ensure that sex workers and clients practise safe sex. The ACT Prostitution Act 1992, states that it is an offence to provide or receive commercial sexual services involving vaginal, oral or anal penetration by any means unless a prophylactic is used. It is also an offence under the ACT Prostitution Act 1992, for an operator to discourage the use of prophylactics at a brothel. Clients are to be advised of their obligations under the ACT Prostitution Act 1992, to use PPE [personal protection equipment] for any penetrative sex before commencement of any sexual services. Signs are to be placed in public areas of the brothel to explain that it is a criminal offence to have sex in a brothel without a condom.

We note that whilst section 27 of the *Prostitution Act 1992* makes the use of prophylactics mandatory, the Code of Practice is imprecise on some aspects of implementation. For example, it states that items such as condoms, dams, latex gloves shall be provided free of charge, but it is not clear who should bear the cost. As mentioned above we believe these items should be classed as safety equipment and provided free of charge by the employer.

The Code of Practice also provides specific instructions for workers to examine clients for signs of STIs, stating that *prior to the commencement of sexual services, each client should be examined by the sex worker to detect any visible signs of sexually transmissible disease. Absence of the symptoms listed above does not mean that there is no sexually transmissible disease present. It is necessary to use condoms, dams, etc. regardless of the results from the client's sexual health check. If there are visible signs that may indicate a sexually transmissible infection, the client may not receive a commercial sexual service.*

We note that the highly successful partnership approach in responding to sexually transmissible infections, including HIV, as enshrined in nationally endorsed strategies such as the *Second National STI Strategy 2010-13* and the *Sixth National HIV Strategy 2010-13* places particular emphasis on sex workers as a priority population. Sex workers are considered important public health partners and the

ACT Health Directorate has explicitly acknowledged their importance in helping to contain STIs. As described in the Code of Practice, sex workers can play a useful public health role by referring clients with suspected STI symptoms for a medical check-up.

Overlaps and potential redundancies between Section 24 and 25 of the *Prostitution Act 1992* and Regulation 21 of the *ACT Public Health Regulation 2000*

We are pleased to note that the inquiry is providing an opportunity to examine the reasoning that lies behind sections 24 and 25 and how these may relate to the operation of regulation 21 *of the Public Health Regulation 2000*.

As has been noted above, there seems to be an inconsistency between section 25 of the Prostitution Act 1992, and regulation 21 of the *Public Health Regulation 2000.* The discussion below hopefully provides some insight into the relevant issues.

Section 25 of the Act vs. Regulation 21: A different standard applied to a commercial sexual transaction?

It is reasonable to argue that a person who uses barrier protection such as condoms or dental dams has effectively taken reasonable precautions appropriate to the condition (that is, the presence of a notifiable sexually transmissible infection), as required in regulation 21. It is not immediately clear why a different standard is applied to commercial sexual transactions as per section 25.

It is difficult to be fully cognisant of the all contextual factors which shaped the drafting of the *Prostitution Act 1992*. We understand that the Act was initiated by a private member's Bill, and there is no explanatory statement to provide insight into the thinking behind the Bill.

We note that the early 1990s was an era of extreme concern about HIV and AIDS and a time when the consequences of HIV infection were front and centre in the public mind. Many people in a number of Australian communities were dying of AIDS-related causes. Available HIV treatments at that time were quite limited and relatively ineffective compared to what is available today. These factors may have influenced the "blanket" approach taken in sections 24 and 25 of the Act.

It may be that the approach in sections 24 and 25 arose from a perspective or belief that sex workers have more sexual contacts than most other members of the community. The issue of the number of contacts a sex worker may have and the contribution this may make to overall 'risk' is one worthy of examination.

It may also be that the inclusion of sections 24 and 25 was an example of using 'the precautionary principle', that is, using discretion where there is the possibility of harm and when extensive scientific knowledge on the matter is lacking. This principle assumes a responsibility to protect the public from exposure to harm, when scientific

investigation has found a plausible risk. It suggests that protections can be relaxed only if findings emerge that provide sound evidence that no harm will result.

Whatever the factors shaping the original drafting of the *Prostitution Act 1992* may have been, it is useful to now have the opportunity to consider these issues from the point of view of contemporary knowledge about STI rates in sex workers, and the role of prophylactics in STI prevention. Some of this knowledge is discussed below.

'Safe sex': how effective are condoms?

The US Government Centre for Disease Control and Prevention (CDC) states in April 2011 that:

Overall, the preponderance of available epidemiologic studies have found that when used consistently and correctly, condoms are highly effective in preventing the sexual transmission of HIV infection and reduce the risk of other STDs (http://www.cdc.gov/condomeffectiveness/latex.htm, accessed August 2011)

The CDC view is corroborated by many other sources and it has been generally agreed for some decades that correct use of condoms and other barrier protection such as dental dams is an effective precaution in the prevention of notifiable STIs, including HIV. Much effort and money has been expended promoting this concept as a cornerstone of public STI prevention campaigns.

Are sections 24 and 25 of the Act redundant if sex workers present a negligible risk of STI?

The development and implementation of contemporary health related policies, programs and legislation in Australia places a strong emphasis on an evidence base. If sections 24 and 25 are to remain in their current form it is our opinion that there should be some evidential basis provided to support the proposition that there is a greater risk of STI transmission in a sex work setting.

There is no evidence of which we are aware to suggest that, when using prophylactics correctly, sex workers place members of the public at greater risk than would exist in non-commercial sexual contact. If anything the indications are otherwise. Similarly there is no evidence that we are aware of that clients of sex workers place workers at greater risk than would exist in other forms of non-commercial sexual contact.

We would note that one of the difficulties in measuring the level of STI amongst sex workers lies in the fact that many sex workers seek STI testing in the context of general practice or at public sexual health clinics, where there is no requirement for a patient to declare their employment category as part of the testing process.

The Health Directorate, through the Canberra Sexual Health Centre at the Canberra Hospital has since 2003 been conducting an outreach-based sexual health testing program which visits the majority of the ACT's brothels on a monthly basis to provide

sexual health testing and care. This activity is conducted under the banner of 'SWOP Shop' and is co-facilitated by the Sex Worker Outreach Project (SWOP) which is a project of the AIDS Action Council of the ACT. The AIDS Action Council of the ACT, and hence SWOP, is a community organisation funded by the Health Directorate under the terms and conditions of a three-year service funding agreement. The agreement provides for SWOP ACT to deliver a range of sexual health education, prevention and advocacy activities and to report on those activities to the Health Directorate.

The indications from 'SWOP Shop' are that ACT sex workers have lower rates of sexually transmissible infections than may be expected in the general population.

The Canberra Sexual Health Centre reports that in the period 2006-2010, 255 occasions of service were provided to sex workers. There were no diagnoses of syphilis, gonorrhoea or HIV. Only 3/140 (2.1%) of chlamydia tests were positive. This is less than the percentage of positive tests in the general ACT population, which over the same period was closer to the order of 5%.

This is essentially an unsurprising finding, given that Australian sex workers obtain sexual health checkups more regularly than members of the general community and given that sex workers have a significant occupational and economic incentive to maintain good sexual health in order to be able to remain working in the industry.

It is also the case that sex workers usually have greater levels of education and effectiveness in relation to the use of barrier protection, as well is a high degree of self efficacy in relation to the protection of their own sexual health. Much of this self efficacy has been assisted by a range of positive systemic and regulatory factors.

Nationally, in relation to HIV, we note that the *Sixth National HIV Strategy 2010-13* states that: *'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)*

We acknowledge that there is somewhat of a paucity of 'research' into the rates of STI in sex workers in Australia. For reasons related to ethics approval processes, the work that is conducted through the 'SWOP Shop' project is not conducted as formal 'research' in the sense of papers published through a peer reviewed journal. Data from 'SWOP Shop' does however have the advantage of being local, recent, and ongoing.

There is however a small body of published Australian research on the issue of the rates of STI in sex workers in Australia. Typical findings include those from *The incidence of sexually transmitted infections among frequently screened sex workers in a decriminalised and regulated system in Melbourne* (D M Lee, A Binger, J Hocking, C K Fairley. 2005;81:434–436. doi: 10.1136/sti.2004.014431) published in the Journal of Sexually Transmissible Infections. This study concludes that:

The incidence of STIs was low among decriminalised and regulated sex work and most infections were related to partners outside of work. Frequent screening of sex workers will reduce the chance of workers passing on an STI but is expensive.

However, it may also discourage women from joining the sex work system and push them into an illegal system with a worse outcome.

Improving the health of sex workers in NSW: maintaining success (Donovan B, Harcourt C, Egger S, Fairley CK. *NSW Public Health Bulletin*. 2010 Mar-Apr;21(3-4):74-7) finds that:

There is no evidence that decriminalisation in 1995 increased the frequency of commercial sex in NSW. Though the largest sector, female brothels, is now mainly staffed by Asian women, condom use for vaginal and anal sex exceeds 99% and sexually transmissible infection rates are at historic lows.

Research from other jurisdictions does not necessarily translate to the ACT context because other jurisdictions impose different regulatory mechanisms in regard to sex work, and these can lead to different outcomes.

We would welcome any efforts locally or nationally that may assist in improving our knowledge base on this issue.

Section 25: The special circumstances of HIV infection compared to other Notifiable STI

Unlike notifiable bacterial STI (chlamydia, gonorrhoea and syphilis) that are readily treatable and cured by antibiotics, HIV infection is presently a lifelong viral infection. Whilst there is a large amount of research and development currently underway relating to treatments, vaccines and preventative agents such as microbicides, there is currently no HIV 'cure' on the medical horizon.

However, the range of medical treatments that are currently available to suppress HIV viral replication in a HIV positive individual are very effective and the prognosis for a person with HIV receiving effective medical treatment in Australia, in terms of life expectancy, is not that much different to the general community.

The level of infection risk posed by a person with HIV who is not employing safe sex practices is related to a number of factors. These include the type of sexual activity and the individual's 'viral load' (the level of HIV virus, most usually measured in a blood sample). Viral load is higher in untreated individuals and is close to its highest in the weeks immediately following a person becoming infected with HIV. It is therefore the case that an undiagnosed or untreated person with HIV engaging in unprotected sexual activity presents a significantly higher risk of transmitting HIV than a person whose viral load is minimised by medication.

The Standing Committee is no doubt aware of the 2008 case of an ACT sex worker who was HIV-positive and charged under section 25 of the Act.

The high profile of this case generated a great deal of media and community dialogue and discussion. Sex worker advocates voiced a strong concern that the provisions of section 25 were inequitable and precluded an HIV positive person from ever engaging in sex work as an occupation in the ACT.

Given the reciprocal responsibilities that are placed on clients under the provisions of section 25, it is also the case that a person living with HIV (and aware of their HIV diagnosis) is precluded from ever receiving a commercial sexual service in the ACT.

It is our understanding that this is not the case in all other state or territory jurisdictions. A person living with HIV can access or supply sexual commercial services in New South Wales, the Northern Territory, South Australia and Tasmania (with mandatory disclosure). There is no specific law relevant in Western Australia (which we understand along with Victoria is also currently reviewing its sex work regulation and legislation).

Some of the dimensions of this issue lie outside of the health purview but rather in the realm of restrictions on commercial practice and associated issues. It is however a concern that the provisions of section 25 may in some cases deter sex workers and clients from seeking a HIV test. As discussed below this could have very serious consequences if an individual, and particularly a recently infected individual, was engaging in unprotected sexual practices.

Current legislative provisions, and risks and downsides

We are aware of some viewpoints in the sex worker community which suggest that a legal penalty on a sex worker for working whilst *aware of* the presence of STI could in some cases result in workers being less likely to *seek* testing, as they could then claim ignorance of their STI status as a defence against the penalties imposed in sections 24 and 25.

This is a feasible proposition although difficult to verify, except anecdotally. We are aware, through SWOP, that in 2008 when media attention was devoted to the high profile case of an HIV positive sex worker, there was a marked reduction for several months of the number of sex workers seeking testing with SWOP Shop. The reason for this association is not proven although workers from SWOP have cited a theme of 'fear of regulators' expressed by sex workers at that time.

Conclusion

We note that the inquiry into the *Prostitution Act 1992*, and specifically its public health oriented provisions, presents an opportunity to balance some difficult and complex issues. This includes finding a balance between potential public health risks and the rights and responsibilities of sex workers and their clients.

Furthermore, the inquiry provides an opportunity to work towards consistency in terms and provisions in the *Prostitution Act 1992, the Public Health Act 1997* and the associated *Public Health Regulation 2000,* as well as the *Occupational Health and Safety (Sexual Services Industry) Code of Practice 2005 (No 1).*

A key question is whether issues raised by section 24 and 25 of the *Prostitution Act 1992,* which are essentially public health matters, could instead be effectively

managed by the existing provisions of the *Public Health Act 1997* and its associated regulations and legislative instruments. Based on the above discussion it would seem that this is a feasible approach.

Public health approaches are key to the prevention of STI. We hope the inquiry into the Prostitution Act will provide guidance for future public health interventions which may include education for brothel owners, sex workers and clients as to their rights and responsibilities.