SWLRV

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(Equality. Safety. Justice)

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1 March, 2022

Dear Commissioner,

Review of the Anti-Discrimination Act - a sex workers' rights perspective

Sex Work Law Reform Victoria Inc. (SWLRV) is an independent non-partisan volunteer group led by sex workers, lobbying for the legal rights of sex workers in Victoria.

SWLRV advocates for, amongst other things:

- legislation to better protect sex workers from discrimination

We appreciate this opportunity to contribute to the Review of the *Anti-Discrimination Act 1991* (QLD) (the **Act**) and attach our submission accordingly.

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Executive Summary

Sex workers experience unacceptable levels of discrimination in all Australian jurisdictions, including in Queensland. We recommend a number of amendments to the Act to provide meaningful protection from discrimination to sex workers and other workers in the adult/sex industries . Most importantly, the Act should not merely protect the bare 'status' of being a sex worker, but also protect sex workers' right to carry out their business activities and earn a living free from discrimination. We also note that in order for any amendments to the Act to have any widespread application to sex workers in Queensland, such reforms must be accompanied by additional reforms to fully decriminalise sex work.

Summary of Recommendations

Recommendation 1

Amend the attribute 'lawful sexual activity' so that it is defined to capture both the status of being a sex worker, and a person's activities as a sex worker.

Recommendation 2

Insert 'profession, trade or occupation' as a new attribute. Define this attribute so that it captures:

- part-time, casual or occasional workers;
- a person's job descriptor (eg brothel manager) and business activities (eg advertising sexual services);
- industry types (eg adult services) and is not limited to a specific job descriptors (eg sex worker).

Recommendation 3

Remove the comparator test and introduce the 'unfavourable treatment' approach.

Recommendation 4

Insert 'irrelevant criminal record' as an attribute.

Recommendation 5

Repeal the sex worker accommodation exemption.

Sex Work Law Reform Victoria - fighting for the legal rights of Victorian sex workers

Sex Work Law Reform Victoria, founded in 2018, is a registered not-for-profit organisation led by sex workers advocating for the full decriminalisation of consensual adult sex work in Victoria. We also work to increase anti-discrimination protections for sex workers. We support our colleagues in other states, as a gesture of solidarity with all sex workers.

Sex Work in Queensland

Queensland has very restrictive sex work laws. While some forms of sex work have been legalised, large parts of the sex industry remain illegal. Brothels are permitted to operate under a licensing system,[1] and no laws prevent sole operator sex workers from providing sexual services at their own premises or from providing escort services. While sole operators remain largely unregulated, their ability to work is significantly restricted by various criminal offences.[2] Criminal laws continue to completely prohibit street-based sex work and escort agencies.[3]

It is likely that the vast majority of legal sex work in Queensland is carried out by sole operators who work alone from their own premises or as escorts.[4] However, the restrictions placed on sole operators by the *Criminal Code,* including provisions requiring them to work in isolation,[5] mean that many also choose to operate illegally because it is safer to do so.[6] The legal brothel sector is small and continues to decline. [7] In 2021, there were only 20 licensed brothels in Queensland.[8]

For these reasons, it is estimated that the majority of sex workers in Queensland work unlawfully, although the exact size of the illegal industry cannot be quantified.[9] The illegal sector includes unlicensed brothels, escort agencies, some sole operators and a small number of street-based sex workers operating in Brisbane.[10] The Queensland Government has recognised the need for law reform and the Queensland

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[1] *Prostitution Act 1999* (Qld).
[2] *Criminal Code 1899* (Qld) ('*Criminal Code*') ch 22A.
[3] *Criminal Code* s 229H.
[4] Barbara Sullivan, 'Working in the Sex Industry in Australia: The Reorganisation of Sex Work in Queensland in the Wake of Law Reform' 2008 18(3) *Labour and Industry* 73, 78.
[5] *Criminal Code* ss 229H, 229HA.
[6] Sullivan (n 4) 84–5.
[7] Prostitution Licensing Authority *Annual Report 2018-2019* (Report, 19 September 2019) 18 ('PLA Report 2018-2019').
[8] Prostitution Licensing Authority *Annual Report 2020-2021* (Report, 10 August 2021) 4.
[9] Crime and Misconduct Commission Queensland *Regulating Prostitution: An Evaluation of the Prostitution Act 1999* (Report, December 2004) xv, xvii, xiii ('CMC Report 2004'); PLA Report 2018-2019 (n 7) 6.
[10] CMC Report 2004 (n 9) xii-xii..

Law Reform Commission is currently investigating a decriminalisation framework for sex work.[11]

Not all workers in the sex and adult industries will be considered sex workers in law. Sex work, referred to as 'prostitution' is currently defined in the *Criminal Code*. It includes engaging in sexual intercourse, masturbation, oral sex or any activity involving physical contact for sexual satisfaction of a commercial character.[12] However, this definition will not usually capture 'adult entertainers' with a permit (such as strippers and lap dancers), so long as certain boundaries are not transgressed in the provision of sexually explicit entertainment.[13] These workers are regulated by a separate regime attached to liquor licensing.[14] In addition, some people who would be considered sex workers in law will not identify as such. For example, people providing erotic massage may not identify as sex workers.

There are therefore three important points to be drawn from the current status of the sex and adult industries in Queensland:

- The majority of sex workers are currently unable to work lawfully. In order for any amendments to the Act to have any widespread application to sex workers, such reforms must be accompanied by additional reforms to fully decriminalise sex work.
- Many workers in the broader adult industry are not regarded as sex workers in law.
- Some people who would be regarded as sex workers in law do not identify as sex workers.

Discrimination Against Sex Workers

Sex workers experience unacceptable levels of discrimination. Discrimination is pervasive and occurs in areas including the provision of goods and services, housing, employment, healthcare and in the justice system.[15] This discrimination creates feelings of internalised stigma among sex workers, and results in feelings of distress, anxiety, fear, social detachment and isolation.[16]

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[11] The Queensland Cabinet and Ministerial Directory 'Considering a safe and regulated sex work industry' *Queensland Government* (Web Page, 28 August 2021) <https://statements.qld.gov.au/statements/93061>.
[12] *Criminal Code* s 229E.
[13] *Criminal Code 1899* (Qld) s 229E(2); *Liquor (Approval of Adult Entertainment Code) Regulation 2002* (Qld) ss 1, 2 , 14.
[14] *Liquor Act 1992* (Qld).
[15] Linda Banach 'Unjust and Counter-Productive: The Failure of Governments to Protect Sex Workers from Discrimination (Report, Scarlet Alliance, November 1999).
[16] Kahlia McCausland et al, 'It is Stigma that Makes my Work Dangerous': Experiences and Consequences of Disclosure, Stigma and Discrimination Among Sex Workers in Western Australia' (2020) *Culture Health and Sexuality* <https://www.tandfonline.com/doi/pdf/10.1080/13691058.2020.1825813>.

Nationally, there are increasing reports of financial discrimination, or 'de-banking' against the sex industry. Lawfully operating sex industry businesses such as sole operator sex workers, adult stores and brothels are being routinely denied the basic banking/merchant facilities necessary for any business to function.[17] Some adult industry workers are even denied personal financial services due to their occupation. For example, in 2018 the ABC reported that the Bank of Queensland had an internal policy that it would not offer finance to those working in the adult industry – even if the loan is unrelated to an adult business.[18]

This form of discrimination results in loss of income and excludes the sex industry from the formal economy. It also creates safety issues, by putting sex workers in the undesirable situation of carrying large quantities of cash, and contributes to stigma by reinforcing the notion that sex work is not real labour. The prevalence of this discrimination has been recognised by the Australian Small Business and Family Enterprise Ombudsman,[19] the Australian Banking Association,[20] the Queensland Adult Business Association[21] and the Queensland Prostitution Licensing Authority.[22]

Discussion question 28: Should there be a new definition of lawful sexual activity, and if so, what definition should be included in the Act? Should the name of the attribute be changed, and if so, what should it be?

We recommend that the attribute 'lawful sexual activity' be strengthened, so that it protects a person's status *and* activities as a sex worker. Although lawful sexual activity, as currently defined, expressly applies to sex workers, it does not offer substantive protection from discrimination. This is because the attribute was narrowly interpreted by Fraser JA in *Dovedeen Pty Ltd v GK* (***Dovedeen***)[23] to capture the 'status' of being a sex worker, but not a person's activities as a sex worker, including sex work itself.[24]

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[17] Jarryd Bartle, Financial Discrimination Against Adults-Only Businesses (Report, Eros Association, October 2017); Rhiana Whitson, 'Sex Workers, Adult Shops and Gun Businesses Say They Are Being Denied Banking Services', *ABC News* (online, 12 October 2021) <https://www.abc.net.au/news/2021-10-12/debanking-sex-industry-gunshops/100523118#:~:text=The%20adult%20shop%20owners'%20experience,is%20not%20an%20isolated%20case.&text=A%20spokesman%20confirmed%20the%20bank,case%2Dby%2Dcase%20basis>.

[18] David Chau and Lin Evlin', 'Sex Industry Faces 'Financial Discrimination' from Banks, Ombudsman Says' *ABC News* (Online, 4 January 2018) <https://www.abc.net.au/news/2018-01-04/sex-industry-businesses-face-financial-discrimination/9303376>.

[19] Ibid.

[20] Mike Callaghan, *Independent Review of the Banking Code of Practice* (Final Report, November 2021) 91, 101–2..

[21] Queensland Adult Business Association, Submission to the Australian Banking Association *Independent Review of the Banking Code of Practice* (August 2021).

[22] Prostitution Licensing Authority *In Touch* (Newsletter, Issue 145, October 2019).

[23] [2013] QCA 116.

[24] Ibid [19]-[22].

In practice, this means that while it could be unlawful to discriminate against a person purely on the basis that they happen to be a sex worker, it will be lawful to discriminate against a person because they are performing sex work. Any attribute that protects sex workers so long as they are not carrying out their profession is of little use to the sex worker community.

Fraser JA's narrow interpretation of the attribute has significant implications for the ability of sex workers to conduct their business in Queensland. For example, while financial institutions could be prohibited from discriminating against sex workers in their personal capacity, they are likely free to deny services to people in their professional capacity. The following examples will illustrate this point.

A sex worker named Y applies for a *personal*, everyday bank account with Bank X. In Y's application, he discloses his occupation. Bank X has a policy of denying banking services to sex workers, and Y's application is refused. Bank X's refusal of service would likely amount to direct discrimination on the basis of lawful sexual activity under the Act. There could be no basis for Bank X's decision other than Y's status as a lawfully employed sex worker. This is because the bank account is for personal use and there is therefore no sexual activity that the bank could point to as the true basis for the refusal of services.

The application of the Act would likely be different if Y was refused services in his professional capacity as a sex worker. For example, Y could seek a business bank account and merchant facilities from Bank X. These services are essential to conducting Y's sex work business; the merchant facilities would be used to charge clients and the account would be used to deposit sex work earnings. Bank X refuses Y's application. Bank X tells Y that they have no objection to customers who are sex workers per se, but cannot offer financial services to business customers for the purposes of conducting the activity of sex work. In this scenario, the discrimination could be considered lawful, because Bank X is not discriminating against Y's status as a sex worker, but against his sex work related activities.

Sex workers should have the right to carry out their profession and earn a living just like any worker or small business owner. However, there is currently nothing in the Act which protects this basic right. Including 'activities' in the definition of lawful sexual activity would remedy this situation. It would bring sex work itself and other related activities such as advertising and banking sex work earnings within the scope of the attribute. This would offer more meaningful protection to sex workers, and in the case of financial discrimination, could be used to prevent their exclusion from the formal economy.

Discussion question 39: Should any additional attributes be included in the Act? If so, what evidence can you provide for why these attributes should be protected? How should they be defined? How would inclusion of the attribute promote the rights to equality and non-discrimination?

Discrimination against the adult and sex industries is not limited to sex workers. Other workers, including brothel operators, escort agency drivers, adult store managers and adult entertainers experience discrimination. Many of these people will not be protected by 'lawful sexual activity' because they are not regarded as sex workers in law.

As noted above, adult entertainers such as strippers are also not considered sex workers in law, and it is therefore unlikely they will be protected by lawful sexual activity. Some people, such as brothel operators and escort agency drivers could be protected by their association with sex workers, under s 7(p) of the Act. However, others who experience discrimination, such as adult store managers and adult entertainers may not be protected by this attribute, as they are not necessarily associated with sex workers. It should also be recognised that some people providing sexual services may not identify as sex workers. For these reasons, we recommend 'profession, trade or occupation' be inserted into the Act as a new attribute.

'Profession, trade, occupation or calling' was introduced to the *Discrimination Act 1991* (ACT) with the specific intention of protecting sex workers from discrimination.[25] Victoria intends to amend the *Equal Opportunity Act 2010* (Vic) to insert 'profession, trade or occupation' as a protected attribute, also with the express intention of protecting sex workers from discrimination.[26] This attribute has the obvious benefit of its breadth, and if accompanied by a carefully drafted definition, could offer protection to all workers in the adult industry. However, it must be noted that this attribute has been interpreted narrowly in the ACT in relation to sex workers.[27] This interpretation has weakened protections under anti-discrimination law for people of all occupations. Broadly, there are three significant issues with this attribute in the ACT:

1. Similar to lawful sexual activity, it has been interpreted narrowly, so that it covers the occupation, but not necessarily the business activities associated with that occupation.[28]
2. It is unclear whether or not it covers occupations that are undertaken on a part-time or casual basis, or that are a person's secondary source of income.[29]
3. It covers specific occupations (eg sex worker), but not the wider industry of which they form a part (eg adult services).[30]

To address these issues, we recommend 'profession, trade or occupation' be defined so that it captures:

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[25] Australian Capital Territory, *Parliamentary* Debates, Legislative Assembly, 2 March 1994, 12-20.

[26] *Sex Work Decriminalisation Bill 2021* (Vic) cl 43.

[27] J v Federal Capital Press of Australia Limited ACAT, 8 February 1999, DT97/153; *Edgley v Federal Capital Press of Australia Pty Ltd* [2001] FCA 379.

[28] J v Federal Capital Press of Australia Limited ACAT, 8 February 1999, DT97/153, 22.

[29] Ibid 21.

[30] Ibid 20-23.

1. A person's job descriptor (eg brothel manager) and business activities (eg advertising sexual services).
2. Part-time, casual or occasional workers.
3. Industry types (eg adult services) and is not limited to specific job descriptors (eg sex worker).

Discussion question 2: Should the test for direct discrimination remain unchanged, or should the 'unfavourable treatment' approach be adopted?

We recommend the comparator test be replaced by the 'unfavourable treatment' approach, because the former creates unnecessary complications and unrealistic evidentiary hurdles for complainants alleging direct discrimination. This is aptly demonstrated by Fraser JA's approach to formulating an appropriate comparator in *Dovedeen*. In that case, a sex worker known as GK was refused future accommodation by a motel manager because she had carried out sex work at the motel.

Fraser JA acknowledged that the appropriate comparator in this situation could not be a person seeking accommodation for the purposes of sex work. This would effectively mean the comparator was a lawfully employed sex worker and would disregard the requirement that the comparator not have the relevant attribute.[31] Fraser JA found that although the comparator could not be a sex worker, the 'same or not materially different circumstances' required by the comparator test in s 10(1) could not 'disregard altogether the activities which GK proposed to conduct in the motel room'. That is, some form of sexual activity needed to be included in the hypothetical situation involving the non-sex worker comparator.

This led Fraser JA to find that that appropriate comparator was 'a person who was not an employed sex worker who sought accommodation with a view to a series of separate sexual encounters with different people coming to and going from the person's motel room'.[32] Fraser JA found that such a person would not have been treated differently to GK:

> There was no basis in the evidence for finding that [the hotel manager] would have provided accommodation to a person in those or similar circumstances or that they would have charged an amount for accommodation which differed from the amount that GK was charged.[33]

On this basis, Fraser JA found direct discrimination had not occurred.[34]

Ultimately, Fraser JA required GK to provide evidence that the motel manager would treat a sexually promiscuous hotel guest in a different manner to how GK was treated – an arguably impossible task. Dispensing with the comparator test would remove the need for these highly artificial enquiries and focus attention on the actual cause of the discrimination.

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[31] *Dovedeen* (n 23) [28].
[32] Ibid [30].
[33] Ibid.
[34] Ibid [32].

Discussion question 47: Should the sex worker accommodation exemption be retained, changed or repealed?

We recognise that the stated purpose of the accommodation exemption was to give businesses 'control over the use that is made of their premises'.[35] However, we note that the exemption is sex worker specific, and does not apply to other occupations or people seeking accommodation for any other purpose. This signifies that the exemption is not truly about balancing the rights of businesses/landlords and accommodation seekers. In practice, it entrenches prejudice against sex workers in law.

There are other means by which landlords and businesses can retain control of their premises without prejudicing and stigmatising a particular group. For example, a landlord could insert a clause in a rental contract that says the premises cannot be used to conduct any business. There are also local laws in every jurisdiction which address amenity and noise complaints. These laws apply to everyone, including sex workers.

The accommodation exemption anticipates problems with sex workers in accommodation which are not borne out in reality. Sex work is a profession which is generally carried out discreetly. As noted above, the majority of sex workers in QLD do not work in brothels. They are currently working in hotels, Airbnbs, private premises and at client's premises, usually without incident. This exemption is unnecessary and renders the majority of sex workers who operate outside of brothels vulnerable to discrimination and eviction.

Discussion question 30: Is there a need to cover discrimination on the grounds of irrelevant criminal record, spent criminal record, or expunged homosexual conviction?

In jurisdictions such as Queensland, where many forms of sex work are criminalised, some sex workers live with sex work related convictions. For this reason, we recommend 'irrelevant criminal record' be inserted as an attribute in the Act.

[35] Queensland, *Parliamentary Debates*, Legislative Assembly, 1 November 2012, 2382 (JP Bleijie, Attorney-General).