Australian Sex Workers Association

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To: The Review Secretariat
Department of Mines, Industry Regulation and Safety
Level 4, Gordon Stephenson House, 140 William Street,
Perth WA 6000

To the Review Secretariat,

Thank you for the opportunity to comment on the Ministerial Review of the State Industrial Relations System.

Scarlet Alliance is the Australian Sex Workers Association. Through our objectives, policies and programs, Scarlet Alliance aims to achieve equality, social, legal, political, cultural and economic justice for past and present workers in the sex industry. Formed in 1989, Scarlet Alliance is the national peak body representing a membership of individual sex workers, and sex worker networks, groups, projects and organisations from around Australia.

Scarlet Alliance is a leader when it comes to advocating for the health, safety and welfare of workers in Australia's sex industry. 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 projects and the work of our membership we have a high level of access to sex industry workplaces throughout Australia. Scarlet Alliance represents sex workers on a number of Commonwealth committees and Ministerial advisory mechanisms.

Please find our submission attached. If you have any questions relating to our submission please do not hesitate to contact, CEO Jules Kim at ceo@scarletalliance.org.au or on 02 9517 2577.

Regards,

Jules Kim.

Executive Summary

Despite the move to criminalise large sectors of the sex industry with the introduction of the *Prostitution Act 2000* (WA), evidence suggests that a variant of the 'containment policy' continue to prevail[12]and sex workers are largely forced to operate outside of the regulated sex industry. Criminalisation has created a situation where the workplace conditions in the sex industry remain largely at the discretion of sex industry operators and as a result reduces sex workers access to industrial rights. Although the *Phillipa v Carmel* (1996) case highlighted that the 'legality' of the sex industry did not prevent the sex worker from accessing their industrial rights in that particular case, sex workers in Western Australia (WA) largely remain uncertain whether they can access their industrial rights.

Also highlighted by the *Phillipa v Carmel* case, was that sex workers are expected to pay taxes irrespective of 'legality' of the sex industry.[3] This has created a situation where sex workers are taxed and audited but have less access to industrial rights in the workplace.

Decriminalisation, alongside the implementation of comprehensive anti-discrimination protections and workplace health and safety standards, is central to protecting the labour rights of sex workers. Decriminalisation recognises sex work to be work and so ensures sex workers can access the same industrial protections as other workers. Importantly, within decriminalisation, sex industry businesses must follow the same regulatory laws and structures as other businesses, resulting in a more transparent sex industry.

There are a variety of working relationships within the sex industry. In regard to whether sex workers should be considered as employees, sex workers do not want to be forced into employee-employer relationships in order to access their industrial rights. Sex workers need to be supported to individually negotiate the type of employment relationship they will have with their employer.

We welcome the intention of the WA government to provide industrial rights coverage to protect the human rights of all members of the community. This Ministerial Review of the State Industrial Relations System provides an important opportunity to ensure people in the sex industry will also be protected from exploitation in their workplace.

[1] Government of Western Australia. (2018). Ministerial Review of the State Industrial Relations System: Interim Report. https://www.commerce.wa.gov.au/labour-relations/interim-report-ministerial-review-state-industrial-relations-system. pg 319.

[2] Donovan, B., Harcourt, C., Egger, S., Schneider, K., O'Connor, J., Marshall, L., . . . Fairley, C. K. (2010). The Sex Industry in Western Australia: A Report to the Western Australian Government. Sydney: National Centre in HIV Epidemiology and Clinical Research, University of New South Walse. Pg 34.

[3] Phillipa v Carmel [1996] IRCA 451.

Review statutory compliance and enforcement mechanisms with the objectives of:
(b) providing effective deterrents to non-compliance with all state industrial laws and instruments.

Criminalisation of the sex industry enables non-compliance with WA industrial laws and instruments.

In Western Australia (WA) large sections of the sex industry are criminalised, such as brothels and street-based sex work.[4] Although escort work is not explicitly criminalised, *section 190 (3)* of the *Criminal Code Act Compilation Act 1913* (WA), which makes it an offence for anyone to live 'wholly or partly off the earnings of prostitution', may extend to those involved in running an escort agency.[5] Private workers who work from the same premise can be prosecuted with brothel keeping offences listed under *section 190* of *Criminal Code Act Compilation Act 1931* (WA). Despite the move to criminalise large sectors of the sex industry with the introduction of the *Prostitution Act 2000* (WA), evidence suggests that a variant of the 'containment policy' continue to prevail[6] and sex workers are largely forced to operate outside of the regulated sex industry.

The *Phillipa v Carmel* case highlighted that the 'legality' and 'morality' of the sex industry was considered when determining whether a sex worker should be granted access to their industrial rights.[7] In this particular case, upon extensive examination, Phillipa was found to be entitled to her industrial rights irrespective of the 'legality' of the sex industry. However, what the *Phillipa v Carmel* case also highlighted was that, despite Phillipa's success, sex workers access to industrial rights is granted on a case by case basis and is largely dependent on the political and legal climate and viewpoints on sex work. As a result, there remains great uncertainty and ambiguity as to whether sex workers can access their industrial rights especially for those who are forced to operate outside of the 'legal' sex industry.

As also highlighted by the *Phillipa v Carmel* case, sex workers are expected to pay taxes irrespective of the 'legality' of sex work.[8] Criminalisation has then led to a situation where sex workers are expected to pay taxes but have little to no access to industrial rights to protect them in the workplace. Sex workers are audited by the ATO, yet are denied basic working conditions that other workers enjoy.

> "I constantly think about the fact that I have to so diligently pay tax and yet my job is not legal."[9]
>
> "One previous employer would take GST monies from the girls' pay when we were told by the Tax Office it's supposed to come from the client."[10]

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[4] *Prostitution Act 2000 (WA)*
Criminal Code Act Compilation Act 1913 (WA), Section 190-191.
[5] Donovan, B., Harcourt, C., Egger, S., Schneider, K., O'Connor, J., Marshall, L., . . . Fairley, C. K. (2010). The Sex Industry in Western Australia: A Report to the Western Australian Government. Sydney: National Centre in HIV Epidemiology and Clinical Research, University of New South Walse. Pg 26.
[6] Ibid. Pg vii.
[7] Phillipa v Carmel [1996] IRCA 451.
[8] Ibid.
[9] Donovan, B., Harcourt, C., Egger, S., Schneider, K., O'Connor, J., Marshall, L., . . . Fairley, C. K. (2010). The Sex Industry in Western Australia: A Report to the Western Australian Government. Sydney: National Centre in HIV Epidemiology and Clinical Research, University of New South Walse. Pg 20.
[10] Ibid.

The criminalisation of large sections of the sex industry in WA means a lack of recourse for sex workers subject to working conditions in breach of the state's industrial laws and structures. Criminalisation has meant that rates of pay, workloads, shifts and other employment conditions remain largely at the discretion of brothel owners. Where sex workers are unable to work together, sex workers are less visible to each other and hinders opportunities to collective bargaining and advocacy. Anecdotal evidence by SWEAR, Magenta and the Street Worker Outreach Project WA (SWOPWA) (the community-based sex worker organisations in WA) highlighted that sex workers have complained that sex industry businesses:

- have withheld wages. WA sex workers indicated that wages can be arbitrarily withheld if a worker becomes unfavourable with the management, refuses a client, does not adhere to the dress code or is late to work.
- have no process to deal with workplace bullying and harassment. In the absence of these formal procedures, disputes are resolved according to worker's favourability with management.
- can cut rates of pay or change other employment conditions without any negotiation or notice.
- are not held accountable if a workplace violation occurs, such as not managing problematic clients. Sex workers have complained that it is not uncommon that sex industry businesses prioritise revenue over sex workers workplace health and safety.

In addition, the criminalisation of sex work, along with the impact of social stigma and discrimination against sex workers, has largely excluded sex workers from participating in the organised labour movement, or to gain recognised and legal regulation of employment conditions that other workers have achieved.

Decriminalisation improves sex workers industrial rights.

Decriminalisation, combined with comprehensive anti-discrimination protections for sex workers, would improve sex worker autonomy, control, workplace health and safety (WHS) and industrial rights. The decriminalisation of the sex work is central to supporting the labour rights of sex workers and their ability to access industrial rights mechanisms. Decriminalisation means that sex workers and sex industry businesses are treated like other workers and businesses with the same access to their industrial rights. Decriminalisation will mean sex workers can report crime to the police without fear of prosecution. In New South Wales (NSW), decriminalisation has brought:

a. Exceptionally good public health outcomes and low rates of STIs and HIV;[11]
b. No evidence of organised crime;[12]

[11] Department of Health. (2014). *Seventh National HIV Strategy 2014-2017*. Commonwealth of Australia Retrieved from http://www.health.gov.au/internet/main/publishing.nsf/content/ohp-bbvs-hiv.
Basil D et al. (2012). *The sex industry in New South Wales: A report to the NSW Ministry of Health*. Sydney: Kirby Institute, University of New South Wales.

[12] Minister for Innovation and Better Regulation. (2016). NSW Government Response to the Legislative Assembly Inquiry into the Regulation of Brothels. Retrieved from https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=185#tab-governmentresponses.

c. Better access to OHS. In NSW, 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;[13]
d. Little to no amenity impacts;[14]
e. No increase in the size of the sex industry[15];and
f. More transparent operation of sex industry businesses and increased access to support for all sex workers and reducing the opportunity for exploitation.

WHS

The Best Practice Guide to Occupational Health and Safety in the Sex Industry (The Best Practice Guide) states that 'all workers, no matter what industry they work in, have a right not to have their health put at risk through carrying out the normal requirements of their work.'[16] The Best Practice Guide is comprehensive in its recommendations to protect the occupational health and safety of sex workers. The Guide recommends that sex industry businesses:

- provide information on safer sex in a variety of common community languages;
- provide free supplies of personal protective equipment (such as condoms, lubricant, alarms and mobile phone for escort workers);
- provide training for staff in cleaning toys, aids and surfaces, prevent occupational overuse (such as repetitive strain injury) by ensuring proper work tool design (adjustable massage tables, correct massage techniques, alternating between repetitive and non-repetitive activities);
- install safety devices (alarm buttons, policies of ejecting inappropriate clients); maintain temperature regulation (heating and cooling);
- ensure adequate lighting; and
- provide written policy documents for staff covering trauma, condom breakage and safety procedures.

These national guidelines need be adapted, in consultation with sex workers, for the WA sex industry to increase sex workers access to OHS protections.

[13] NSW Department of Health, & WorkCover NSW. (2001). *Health and safety guidelines for brothels in NSW*. WorkCover NSW.
[14] Hubbard, P., Boydell, S., Crofts, P., Prior, J., & Searle, G. (2013). Noxious neighbours? Interrogating the impacts of sex premises in residential areas. *Environment and Planning A, 45*(1).
Basil D et al. (2012). *The sex industry in New South Wales: A report to the NSW Ministry of Health*. Sydney: Kirby Institute, University of New South Wales. Pg 43.
[15] Donovan, B., Harcourt, C., Egger, S., Watchirs Smith, L., Schneider, K., Kaldor, J., . . . Tabrizi, S. (2012). The sex industry in New South Wales: a report to the NSW Ministry of Health. *Sydney: Kirby Institute, University of New South Wales*. pg 7.
[16] Edler, D. (n.a). A guide to best practice: occupational health and safety in the Australian sex industry. http://www.scarletalliance.org.au/library/bestpractise. pg 1.

Review the definition of 'employee' in the *Industrial Relations Act 1979* (WA) and *the Minimum Conditions of Employment Act 1993* (WA) with the objective of ensuring comprehensive coverage for all employees.

The Sex Workers' Union was formed in 2008 with the 'intention of becoming Australia's national union for sex workers'.[17] Although the Sex Workers Union disbanded in 2011, a key campaign of the Union was 'to determine more accurately the rights and responsibilities of sex workers who are subcontractors, sex workers who are employees, and sex workers whose workplace may be a mixture of both.'[18] A major concern among sex workers is being incorrectly referred to as an 'independent contractor' but being treated as an 'employee' in the workplace. Incorrectly referring to sex workers as an 'independent contractor' allows brothel operators to effectively lower workplace standards and avoid industrial responsibilities, such as superannuation, sick leave, workers compensation, maternity leave or paid holidays. Being (incorrectly) referred to as an independent contractor means that it can be difficult for sex workers to prove they have a right to compensation for unfair dismissal and other workplace violations. Remedies and protections are often only available to those with employee status. The Best Practice Guide notes that the employment relationship forms the basis for: 'participation in the conciliation and arbitration process; entitlement to join a union; rights and obligations under statute law, such as workers compensation; annual leave, sick leave and long service leave; industry-based superannuation schemes; and occupational health and safety legislation'.[19] Sex workers who genuinely choose the option of independent contracting need to enjoy the full benefits, flexibility and independence this brings rather than being subject to sham contracts with employment style conditions.

To determine the employment relationship, the law takes into account a number of factors including the degree of control exercised by the employer, how hours are worked out, where the work is carried out, who provides the equipment, whether holidays or other forms of leave apply, whether tax is deducted and who deducts it, superannuation and insurance cover.[20] In *Phillipa v Carmel* case, the court decided that for the purposes of unfair dismissal, an employer/employee relationship did in fact exist between the brothel operator and worker in that case.[21] However, as noted by the Sex Workers' Union, the 'sub-contractor status remains unchallenged in almost all workplaces.'[22] What the *Phillipa v Carmel* case highlighted was that employment relationship is also determined on a case by case basis, after the fact. As a result, there remains great uncertainty as to whether sex workers who are incorrectly referred to as 'independent contractors' can access their industrial rights.

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[17] Elena Jeffery, Kane Matthews, & Fawkes, J. (2014). *Formation and history of the Australian Sex Workers' Union: July 2008 - 2011 [Poster]*. Paper presented at the 20th International AIDS Conference 2014, Melbourne.
[18] The Sex Workers' Union. (2009). Submission to the Senate Standing Committee on Education, Employment and Workplace Relations: Fair Work Bill 2008. https://www.aph.gov.au/DocumentStore.ashx?id=c7ee0670-4700-421d-9312-e1b1c7832593. Pg 3.
[19] Edler, D. (n.a). A guide to best practice: occupational health and safety in the Australian sex industry. http://www.scarletalliance.org.au/library/bestpractise. pg 10.
[20] Ellery, S. (24th September 1998). Phillipa v Carmel. *Phoenix*. http://www.scarletalliance.org.au/library/carmel-case96.
[21] Phillipa v Carmel [1996] IRCA 451.
[22] The Sex Workers' Union. (2009). Submission to the Senate Standing Committee on Education, Employment and Workplace Relations: Fair Work Bill 2008. https://www.aph.gov.au/DocumentStore.ashx?id=c7ee0670-4700-421d-9312-e1b1c7832593. pg 3.

In addition, under *section 49D* of the *Industrial relations Act 1979* (WA) the employer has a duty to maintain employment records and under *section 49E* must provide their employee access to their employment record upon 'written request by a relevant person'. A sex worker's employment record is critical to challenging incorrect labelling of their employment status. However, the criminalisation of the brothels means that brothel operators are not incentivised to follow relevant industrial laws and may be reluctant to keep records in fear that their employment records will be used against them to prosecute sex industry-related criminal offences. As a result, the criminalisation of sex work may further exacerbate sex workers' barriers to utilising industrial mechanisms to redress exploitative working conditions as they are less likely to gain access to their employment records.

Sex workers also do not want to be forced into employer-employee relationships in order to access their industrial rights. Sex workers need to be able to individually negotiate the type of employment relationship they will have with their employer as well as 'collectively negotiate for improvement both at local enterprise level as well as national employment standards'.[23] Being an employee requires sex workers to provide their legal name and Tax File Number (TFN) to a sex industry manager. As a result, being an 'employee' can pose dangers in terms of privacy and confidently. For example, criminalisation and a lack of adequate anti-discrimination and WHS protections for sex workers can foster an unequal power relationship with employers as sex workers are acutely aware of their lack of adequate protections safeguarding their rights and reduced capacity to report to the police due to fear of been arrested or fined for sex work offences.

It is possible to have ones' legal name and TFN suppressed and confidential from the employer (to avoid stigma, harassment, or improper use of personal information) and still maintain the benefits of being an employee. However, given the continuing criminalisation of sex work in WA, stigmas around sex work and lack of sufficient anti-discrimination protection in WA, sex workers fear our personal information being shared formally or maliciously. These concerns, in addition to preferences for flexibility and style of work, mean that sex worker prefer to be able to negotiate the type of employment relationship they have with their employer. Sex worker workplaces should be subject to WHS regulations that sets standards for health and safety of every workplace regardless of working arrangements. There are duties under WHS legislation that ensure workplace conditions do not expose workers to risks to their health and safety. Work conditions must be in accordance with industrial relations laws, WHS, and workers compensation laws. Currently in WA the *Prostitution Bill* 2011 explicitly excludes sex workers from the *Workers' Compensation and Injury Management Act 1981*.

Anti-discrimination protections for sex workers

Providing sex workers with comprehensive anti-discrimination protections will send a clear message that discrimination against sex workers is unlawful and there are practical legal avenues to redress unfair labour practices. The presence of anti-discrimination protections remains crucial regardless of legal frameworks. A number of states and territories have introduced anti-discrimination protections with the intention of providing protections for sex workers. The former United Nations Secretary

[23] Ibid.

General Ban Ki-Moon states that "in most countries, discrimination remains legal against women, men who have sex with men, sex workers, drug users, and ethnic minorities. This must change."[24] Former Australian High Court judge the Hon. Michael Kirby AC CMG states that "We will insist on human rights for all, including for sex workers. Nothing else is acceptable as a matter of true public morality."[25] UNAIDS and the United Nations Population Fund state that it is essential for governments to create an enabling legal and policy environment which insists upon universal rights for sex workers and ensure their access to justice.[26]

Support sex worker advocacy

The Sex Workers' Union began the process of developing a recognised labour movement for sex workers and seeking a legally enforceable set of basic working conditions for sex workers across Australia. Historically, stigma, discrimination and criminalisation of sex work has excluded sex workers from the organised labour movement and have reduced sex workers right to unionise. As a result, sex workers largely do not enjoy the formal recognition and award benefits of many years of organised labour that other workers have had. In 2008, the Sex Workers' Union wrote that 'We want the option available for sex workers to be able to, in the future, negotiate and establish award conditions like other, more formally organised workers have achieved'.[27]

Scarlet Alliance, The Sex Workers' Union and other sex worker organisations have shown that sex workers in Australia have the capacity to be involved in high level policy discussions on complex social issues, and to be able to implement radical behavioural and cultural change in workplaces when education and resources are available to support us. Collective bargaining and advocacy are important means for sex workers to contribute to the ongoing improvement of our workplace conditions.

Recommendations

- The decriminalisation of sex work is central to ensuring sex workers' industrial rights. Decriminalisation means that sex workers and sex industry businesses are treated like other workers and businesses with the same access to their industrial rights, such as the right to unionise and collectively bargain.

- The Best Practice Guide should be adapted, in consultation with sex workers, for the WA sex industry to increase sex workers' access to WHS protections.

- Sex worker workplaces should be subject to WHS regulations that sets standards for health and safety of every workplace regardless of working arrangements.

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[24] UNAIDS. (2012). *UNAIDS Guidance Note on HIV and Sex Work*. Retrieved from Geneva http://www.unaids.org/sites/default/files/media_asset/JC2306_UNAIDS-guidance-note-HIV-sex-work_en_0.pdf. pg 2.

[25] UNAIDS, & UNFPA. (2011). Building Partnerships on HIV and Sex Work: Report and Recommendations from the first Asia and the Pacific Regional Consultation on HIV and Sex Work. pg 14.

[26] Ibid. pg 13.

[27] The Sex Workers' Union. (2009). Submission to the Senate Standing Committee on Education, Employment and Workplace Relations: Fair Work Bill 2008. https://www.aph.gov.au/DocumentStore.ashx?id=c7ee0670-4700-421d-9312-e1b1c7832593. pg 4.

- The section of the *Prostitution Bill 2011* which explicitly excludes sex workers from the *Workers' Compensation and Injury Management Act 1981* needs to be removed.

- Sex workers need to be able to individually negotiate the type of employment relationship they will have with their employer.

- Sex workers need comprehensive anti-discrimination protections to ensure they have access to practical legal avenues to redress unfair labour practices.

- Sex worker organising need to be supported by recognising sex work as work with the same rights as other workers.