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7 June 2024

To the Australian Law Reform Commission

Re: Issues Paper 49 - Justice Responses to Sexual Violence

Thank you for the opportunity to provide a submission in response to *Issues Paper 49 - Justice Responses to Sexual Violence*.

Scarlet Alliance, Australian Sex Workers Association, is the national peak sex worker organisation. Formed in 1989, our membership includes state and territory-based and national sex worker organisations and individual sex workers across unceded Australia.

Scarlet Alliance uses a multifaceted approach to strive for equality, justice and the highest level of health for past and present workers in the sex industry. We achieve our goals and objectives by using best practices including peer education, community development, community engagement and advocacy.

Scarlet Alliance is a leader when it comes to advocating for the health, safety and welfare of workers in Australia's sex industry. Through our work and that of our member organisations and projects, we have the highest level of contact with sex workers and access to sex industry workplaces throughout Australia. Scarlet Alliance represents sex workers on a number of government and non-government committees and advisory mechanisms.

Sex workers are consent experts. Explicitly discussing consent, identifying and negotiating implied consent, using non-verbal communication, and setting and communicating is a cornerstone and key skillset of our work. We recognise that consent can be influenced by various factors, such as financial agreements or the use of protective measures like condoms, and understand that granting consent for one specific sexual activity does not automatically imply consent for any other activities.

However, our expertise and knowledge is frequently dismissed during consent law reforms and in public discourse on addressing widespread sexual violence within uncaded Australia and internationally. Despite our history of advocacy and allyship in sexual violence law reform, sex workers are frequently left behind and unable to access the criminal justice system if we experience sexual violence, regardless of whether the offending occurs in the context of our work or in our personal lives.

In this Inquiry, during state/territory law consent law reform, and in wider debates on law and policy responses to sexual and gendered violence, sex worker voices must be heard as expert stakeholders. Justice systems responses to sexual violence must be viable and accessible to sex workers, from consideration of making a complaint, interactions with police and services, and throughout any judicial process.

Yours faithfully,

Mish-Pony
Chief Executive Officer

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Recognition of sex workers as stakeholders in sexual violence law and policy

Consent discussion and negotiation are fundamental in sex work. Sex workers explicitly discuss consent, identify and negotiate implied consent, use non-verbal communication, and set and communicate boundaries every day, every shift and in every interaction.

In recent media coverage and political and public discourse renewing calls for stronger law and policy responses to sexual and gendered violence, sex workers in Australia have been scapegoated as being responsible for the behaviour of (mostly) male perpetrators. In October 2023, Liberal Party Deputy Leader Sussan Ley called for a halt to further development of strip clubs, asserting a link between erotic entertainment and family violence.¹ In the recent federal budget, the Australian Government dedicated funding to a pilot scheme for mandatory age verification technology for online pornography as being necessary to ‘tackle extremely online misogyny,’² despite rejecting a mandatory age verification framework as being too technologically flawed nine months prior.³

These claims were made without evidence, and have been largely repeated uncritically by media, advocates and policy-makers. This rhetoric positions sex workers as part of the *cause* of sexual and gendered violence in Australia, rather than recognising our unique experience of marginalisation as victim/survivors, and our unique perspectives as consent experts.

Sex workers recognise that consent can be influenced by various factors, such as financial agreements or the use of protective measures like condoms. Importantly, sex workers understand that granting consent for one specific sexual activity does not automatically imply consent for any

¹ Darcy Deviant, [‘The Government Is Making Porn a Scapegoat for Rising Violence Against Women’](#), *Vice* (online, 2 May 2024).

² Georgia Roberts, [‘Nearly \\$1bn funding announced to support victim-survivors leaving violence, combat online misogyny and AI porn’](#) ABC News (online, 1 May 2024).

³ Department of Infrastructure, Transport, Regional Development, Communications and the Arts, [Government Response to the Roadmap for Age Verification](#) (Report, August 2023)

other activities. This intricate understanding highlights the expertise that sex workers have in navigating the complexities of consent in our work.

In this Inquiry, during state/territory law consent law reform, and in wider debates on law and policy responses to sexual and gendered violence, sex worker voices must be heard as expert stakeholders. Justice systems responses to sexual violence must be viable and accessible to sex workers, from consideration of making a complaint, interactions with police and services, and throughout any judicial process.

Reporting sexual violence safely

When I've experienced sexual assault in the past, the cops have done nothing. When I've been robbed, when I've been bashed, the cops have done nothing. They have proven time after time after time that they don't care about queers, they don't care about whores, they don't care about homeless people, they don't care about junkies.⁴

Sex work decriminalisation

The criminalisation of sex work creates significant barriers that impede sex workers from accessing the criminal justice system. The barriers of sex work criminalisation impact sex workers particularly when we seek recourse for sexual violence offending, regardless of whether the violence we are reporting occurs during the course of our work, or is completely unrelated.

Despite endorsement of the full decriminalisation of sex work as the best practice model for sex work regulation by organisations such as UNAIDS, the World Health Organization (WHO), Amnesty International, and *The Lancet* medical journal,⁵ criminal penalties relating to sex work remain in New South Wales, Victoria, Tasmania, the Australian Capital Territory, South Australia and Western Australia.⁶

⁴ A sex worker interviewed in Zahra Stardust et al, ["I Wouldn't Call the Cops if I was Being Bashed to Death": Sex Work, Whore Stigma and the Criminal Legal System"](#) (2021) 10(3) *International Journal for Crime, Justice and Social Democracy* 142, 147.

⁵ Joint United Nations Programme on HIV/AIDS (UNAIDS), [Guidance Note on HIV and Sex Work](#), UNAIDS/09.09E, JC1696E (March 2009);
World Health Organisation (WHO), [Consolidated guidelines on HIV prevention, diagnosis, treatment and care for key populations](#) (Consolidated Guidelines Update, 2016);
Amnesty International, [Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers](#) (Policy No 30/4062/2016, 26 May 2016);
The Lancet, [HIV and Sex Workers](#) (Report Series, 23 July 2014).

⁶ [Summary Offences Act 1988](#) (NSW) ss 15-20;
[Summary Offences Act 1966](#) (Vic) s 38B;
[Sex Industry Offences Act 2005](#) (Tas) ss 4, 5, 8, 12;
[Sex Work Act 1992](#) (ACT) ss 18, 19, 26, 27;
[Summary Offences Act 1953](#) (SA) ss 21, 25-26, 28-29,
Criminal Law Consolidation Act 1935 (SA) s 270;
[Prostitution Act 2000](#) (WA) ss 4-13, [Criminal Code](#) (WA) ss 190-191.

The existence of criminal penalties in relation to sex work generates barriers for sex workers reporting sexual violence. Sex workers who do report risk ‘identification and investigation’ and ‘entrapment, harassment, assault, arrest or attempts at bribery’.⁷

Stigma and safety

Even in contexts where sex work is decriminalised, sex workers continue to face barriers when reporting sexual violence, including being disbelieved or being made to feel responsible for the offending.⁸

Reporting criminal offending to police is just one of many areas of public life and interaction with community services where sex workers experience stigma and discrimination, even in circumstances where our work is completely lawful.⁹ The implementation of comprehensive and specific anti-discrimination protections covering the attributes of ‘sex work’ and ‘sex worker’ are necessary to ensure that sex workers receive equal treatment when reporting violence.

As part of sex work decriminalisation, the Northern Territory, Queensland and Victoria have all implemented anti-discrimination protections for sex workers,¹⁰ in order to ensure sex workers’ full participation in the community, including in access to the criminal justice system. It is essential that in addition to the removal of criminal penalties relating to sex work, that comprehensive and accessible anti-discrimination protections are implemented in each state and territory.

Research also indicates that sex workers have better experiences reporting sexual violence in jurisdictions where police have received training from sex worker organisations.¹¹ Peer-led sex worker organisations must be resourced to deliver this training to police to ensure that sex workers receive equal treatment when making police complaints.

Recommendation 1: That sex work is decriminalised in all Australian states/territories, with the implementation of comprehensive and accessible anti-discrimination protections for sex workers in relevant legislation.

Recommendation 2: That peer-led sex worker organisations in each state/territory are resourced to deliver sex worker sensitivity training to police to ensure that sex workers receive equal treatment when making police complaints.

Recommendation 3: That sex worker peer organisations are resourced to provide targeted support to sex workers engaging with criminal justice processes, including funding for sex worker legal projects.

⁷ Zahra Stardust et al, (n 4) 147.

⁸ Ibid 149-152.

⁹ Scarlet Alliance, [Anti-discrimination & vilification protections for sex workers in Australia](#) (Briefing Paper, February 2022).

¹⁰ *Anti-Discrimination Act 1992* (NT) s 19(1)(ec); [Criminal Code \(Decriminalising Sex Work\) and Other Legislation Amendment Act 2024](#) (Qld) ss 3-6; ‘[Profession, trade or occupation](#)’, *Victorian Equal Opportunity and Human Rights Commission* (Web Page, June 2023).

¹¹ Zahra Stardust et al, (n 4) 152-3.

Privacy and safety

A significant barrier for all victim/survivors, but especially for sex workers reporting sexual violence, is the disclosure of personal information to the offender and others during the investigation and prosecution process. The connection of sex work status to personal information can generate significant safety risks and access-barriers for sex workers.

While Scarlet Alliance understands the importance of the principle of open justice requiring the identity of the accuser being an integral part of a defendant being able to respond to an allegation, and there are measures to protect identifying the complainant through court closure, media orders and pseudonymous court reporting, this is often insufficient to ensure safety for complainants, particularly if the matter does not proceed to trial.

Recommendation 4: That the ALRC consider options to protect complainants' personal information and minimise disclosure during complaints and investigation processes.

Asian migrant sex workers

Asian migrant sex workers face additional barriers to reporting sexual violence, as these workers and their workplaces are likely to face increased scrutiny due to Australian 'anti-trafficking' law and policy.¹² Australia's criminal justice and border security approaches to trafficking, slavery and slavery-like offences generate risks of surveillance, detention and deportation for Asian migrant sex workers, disincentivising reporting of *both* exploitative work practices and sexual violence offending.

Scarlet Alliance has consistently argued that agencies such as Fair Work and work health and safety regulators must employ 'firewall' practices to ensure that sex workers are able to report workplace exploitation without this information being used by federal criminal or border authorities to detain or deport themselves or their colleagues.¹³ The Migrant Justice Institute has also called for the development of robust and clear protocols and visa pathways to allow migrant workers to report and seek redress for workplace exploitation while remaining in Australia, without ramifications towards their current visa status or future applications.¹⁴ Similarly, state and territory police must employ 'firewall' practices to enable Asian migrant sex workers to report and seek justice for sexual violence offences without risk of information disclosed during the complaint impacting current or future visa status, or being used to inform workplace raids or targeting.

In each Australian state/territory, Scarlet Alliance's member organisations conduct outreach to sex work workplaces, and employ peer sex workers from diverse cultural and language backgrounds to provide outreach services within their communities. State and territory police must liaise and build relationships with local sex worker peer organisations in order to facilitate safe reporting pathways for Asian migrant sex workers who have experienced sexual violence. Meaningful consultation with

¹² Zahra Stardust et al, (n 4) 148-9.

¹³ See e.g. Scarlet Alliance, Submission to the Attorney General's Department, [Criminal Code Targeted Review](#) (24 March 2023).

¹⁴ This call has been endorsed by over 35 organisations who work with migrant workers, including Anti-Slavery Australia, the NSW Anti-slavery Commissioner, the Australian Workers' Union and the Ethnic Communities' Council of Victoria: Migrant Justice Institute, [Breaking the Silence: A proposal for whistleblower protections to enable migrant workers to address exploitation](#) (Report, November 2022).

sex worker peer organisations will build understanding of barriers to reporting, including cultural and language differences, lack of access to appropriate translators, stigma and criminalisation.

Recommendation 5: That state and territory police employ ‘firewall’ practices to enable Asian migrant sex workers to report sexual violence without risk of information disclosed during the complaints being used for visa compliance, future visa applications, and/or to inform workplace raids or targeting.

Legislative responses to sexual violence

State/territory consent law reforms

Recent reforms introducing models of ‘affirmative’ and/or ‘communicative’ consent alongside changes to rules of evidence and questioning, jury directions and sentencing guidelines have been positive developments for sex workers reporting sexual violence.

This reform must occur across all states and territories, and be accompanied by education for judges, prosecutors and other criminal justice system stakeholders in order to ensure that these reforms deliver safety and equality for sex workers who experience sexual violence. During recent reform processes, sex workers, LGBTQIA+ organisations and allies have also raised that consent law reforms require careful drafting to ensure that provisions relating to misrepresentation and/or identity do not criminalise people for non-disclosure of STIs and BBVs (including HIV) or require disclosure of transgender status.¹⁵

Non-payment of sex workers

Certainly, no one should doubt that fraudulently achieving sexual intercourse by [non payment of a sex worker] constitutes rape, rather than a dishonesty offence, although of course dishonesty is a major element of this fact situation.¹⁶

Payment for services serves as a cornerstone of consent in sex work. Sex workers agree to engage in sexual acts based on the negotiated terms and compensation. When payment is manipulated, stolen, or services are otherwise fraudulently obtained, our consent is violated.

Due to widespread stigma and misinformed community and judicial attitudes towards sex workers and consent, generic ‘fraudulent inducement’ type offences are insufficient to deliver justice for sex

¹⁵ Scarlet Alliance and Vixen, [Joint Submission to the Victorian Department of Justice and Community Safety, Consultation: Recommendation 50 and 51 of the Victorian Law Reform Commission’s Report into Improving the Justice System Response to Sexual Offences](#) (2 March 2022) 4.

Northern Territory Aids and Hepatitis Council (NTAHC) et al, [Submission to the Northern Territory Law Reform Committee, Inquiry into Consent for Sexual Offences](#) (31 July 2023) 3-4;

Scarlet Alliance, [Submission to the Queensland Women’s Safety and Justice Team, Criminal Law \(Coercive Control and Affirmative Consent\) and Other Legislation Amendment Bill 2023](#) (4 August 2023) 3-4.

¹⁶ *R v Livas* [2015] ACTSC 50, [34].

workers who experience consent violations through non-payment.¹⁷ Similarly, proposals that sex workers should pursue this offending as a ‘civil debt recovery matter’¹⁸ demonstrate an offensive attempt to minimise sexual violence against sex workers, and minimise the centrality of consent to our work.

Both Victoria and Queensland have introduced clear statutory provisions that non-payment of a sex worker is a circumstance where there is no consent. In Victoria, circumstances in which a person does not consent includes when:

*the act occurs in the provision of commercial sexual services and the person engages in the act because of a false or misleading representation that the person will be paid.*¹⁹

In Queensland, circumstances in which a person does not consent includes when:

*the person is a sex worker and participates in the act because of a false or fraudulent representation that the person will be paid or receive some reward for the act.*²⁰

As part of the move towards affirmative and/or communicative models of consent, it is vital that all states and territories specify within legislation that non-payment of a sex worker amounts to a circumstance where there is no consent.

Recommendation 6: That all states and territories specify within criminal legislation that non-payment of a sex worker amounts to a circumstance where there is no consent.

‘Stealthing’ - non-consensual condom tampering or removal

The term ‘stealthing’ is widely used among English-speaking sex workers to describe non-consensual condom non-use, tampering or removal during sexual activity. We acknowledge that the term ‘stealthing’ carries different connotations within some LGBTI+ communities, where it has been used derogatorily to describe trans people who ‘pass,’ and recognise that some sex workers and allies may find the term uncomfortable or problematic.

The use of a condom as a contingency factor in consent is becoming increasingly recognised in Australian law, and is an important legislative development for sex workers. The practice of ‘stealthing’ (non-consensual condom non-use, tampering or removal) changes the conditions of sex

¹⁷ For example, while the Law Reform Commission of Western Australia acknowledges that non-payment amounts to a breach of ‘sex workers’ sexual autonomy’, introducing a specific provision listing non-payment of a sex worker as a circumstance where there is no consent would be ‘incongruous... given that in Western Australia, most sex work related activities are currently illegal’: Law Reform Commission of Western Australia, [Project 113: Sexual Offences](#) (Final Report, October 2023) 92-3.

¹⁸ See e.g., Queensland Law Reform Commission (QLRC), *A decriminalised sex-work industry for Queensland* (Report No 80, March 2023) 189.

¹⁹ *Crimes Act 1958* (Vic) 36AA(1)(m).

²⁰ [Criminal Law \(Coercive Control and Affirmative Consent\) and Other Legislation Amendment Act 2024](#) (Qld) s 13.

without one party's knowledge, which means there is no consent. Stealthing presents many adverse consequences for survivors, including the risk of STI/BBV, psychological trauma, and feelings of guilt and shame associated with the violation of our dignity and bodily autonomy.

Australian research indicates that while stealthing impacts both women and men who have sex with men and occurs in a variety of casual sexual/dating contexts, women who are sex workers were three times more likely to have experienced stealthing.²¹ When sex workers experience stealthing, we often confront victim-blaming attitudes that question our credibility, integrity, and right to bodily autonomy.

As part of recent consent law reforms, several jurisdictions have now explicitly criminalised stealthing as part of provisions outlining circumstances where there is no consent.

In New South Wales, the definition of consent notes that:

*a person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity - Example--: A person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.*²²

In the Australian Capital Territory:

*a person does not consent to an act...if the person...participates in the act because of an intentional misrepresentation by another person about the use of a condom.*²³

In Victoria, circumstances in which a person does not consent to an act include if:

*the person engages in the act on the basis that a condom is used and either - (i) before or during the act, any other person involved in the act intentionally removes the condom or tampers with the condom; or (ii) the person who was to use the condom intentionally does not use it.*²⁴

In Tasmania:

*a person does not freely agree to an act of sexual intercourse with another person if the person says or does anything to communicate to the other person that a condom must be used for that sexual intercourse and the other person intentionally – (a) does not use a condom; or (b) tampers with the condom; or (c) removes the condom – before or during the sexual intercourse.*²⁵

And in South Australia, 'a person is taken not to freely and voluntarily agree to sexual activity if':

²¹ Rosie Latimer et al, '[Non-consensual condom removal, reported by patients at a sexual health clinic in Melbourne, Australia](#)' (2018) 13(12) *PLoS ONE* 12.

²² *Crimes Act 1900* (NSW) [s 61HI\(5\)](#).

²³ *Crimes Act 1900* (ACT) [s 67\(1\)\(i\)](#).

²⁴ *Crimes Act 1958* (Vic) [s 36AA\(1\)\(o\)](#).

²⁵ *Criminal Code 1924* (Tas) [s 2A\(2A\)](#).

*the person agrees to engage in the activity because of a misrepresentation (whether express or implied) as to the use of a condom during the activity.*²⁶

Scarlet Alliance supports the introduction of provisions in every state and territory outlining that stealthing (non-consensual condom non-use, tampering or removal) is a violation of consent. We note the following:

- It is essential that these provisions are contained within circumstances where there is no consent. **The use of a condom is the contingency factor in the consent** - if this is violated, then the resulting offence is rape or sexual assault. Introducing stealthing as a separate stand-alone offence may result in this type of offending being treated less seriously than other sexual offending, with corresponding lesser penalties.
- These provisions must be specific to non-consensual **condom** non-use, tampering or removal.²⁷
- These provisions must not directly or inadvertently criminalise **consensual condom non-use**, or generate additional criminalisation or obligations for sex workers, people living with BBV/STI or other marginalised groups.
- These provisions must be accessible to sex workers, regardless of whether we are working within permitted legal frameworks.²⁸

Recommendation 7: That ‘stealthing’ (non-consensual condom non-use, tampering or removal) is included as a circumstance where there is no consent to sexual activity within criminal legislation in every Australian state/territory.

²⁶ *Criminal Law Consolidation Act 1935* (SA) [s 46\(3\)\(ga\)](#).

²⁷ Attempts to broaden these provisions to include deceptive conduct around other safer-sex or family planning practices is likely to generate issues of confusion and burden of proof, making the provisions inaccessible to those who need them. See, e.g. [R v Lawrence \[2020\] EWCA Crim 971](#), where the defendant’s deception that he had undergone a vasectomy was considered insufficiently related to the physical act of sex so as to void the complainant’s consent.

²⁸ We note that the Law Reform Commission of Western Australia has recommended reform that intentional non-consensual condom non-use, tampering or removal become a circumstance where there is no consent: *Project 113* (n 13) 113. The Commission also noted that ‘the fact that an individual works in the sex work industry does not mean they have fewer rights to sexual autonomy or bodily integrity’ (at 54). However, the Commission also noted that as ‘most sex work related activities are currently illegal’ consent in sex work could not be specifically addressed (at 93). Given this commentary, it is difficult to see how a sex worker in Western Australia who experienced stealthing would actually be able to access any new stealthing provisions.

Summary of recommendations

Recommendation 1: That sex work is decriminalised in all Australian states/territories, with the implementation of comprehensive and accessible anti-discrimination protections for sex workers in relevant legislation.

Recommendation 2: That peer-led sex worker organisations in each state/territory are resourced to deliver sex worker sensitivity training to police to ensure that sex workers receive equal treatment when making police complaints.

Recommendation 3: That sex worker peer organisations are resourced to provide targeted support to sex workers engaging with criminal justice processes, including funding for sex worker legal projects.

Recommendation 4: That the ALRC consider options to protect complainants' personal information and minimise disclosure during complaints and investigation processes.

Recommendation 5: That state and territory police employ 'firewall' practices to enable Asian migrant sex workers to report sexual violence without risk of information disclosed during the complaints being used for visa compliance, future visa applications, and/or to inform workplace raids or targeting.

Recommendation 6: That all states and territories specify within criminal legislation that non-payment of a sex worker amounts to a circumstance where there is no consent.

Recommendation 7: That 'stealthing' (non-consensual condom non-use, tampering or removal) is included as a circumstance where there is no consent to sexual activity within criminal legislation in every Australian state/territory.