

20 July 2020

The Hon Fiona Patten MP
C/- Review Secretariat
Review to Make Recommendations for the Decriminalisation of Sex Work
Regulation Group, Department of Justice and Community Safety

BY EMAIL: swr@justice.vic.gov.au

Dear Ms Patten

The Victorian Equal Opportunity and Human Rights Commission welcomes the government's review into the decriminalisation of sex work in Victoria. The review is an important opportunity to develop better public health and human rights outcomes, particularly for sex workers.

This submission details the Commission's support for the decriminalisation of sex work and our expert view regarding how the *Equal Opportunity Act 2010 (Vic)* can be strengthened to enhance protections against discrimination for sex workers. While the question of *how* decriminalisation should occur is important, it falls outside the scope of our statutory remit.

Recommendations

Recommendation 1.

The Victorian Government should decriminalise all forms of sex work, including street-based sex work, in line with human rights standards and public health research.

Recommendation 2.

The Victorian Government should provide additional resources to enable:

- (a) the Commission to partner with key peer and other sex worker support services to develop and deliver a tailored education program and accompanying resources on the rights of sex workers under the *Equal Opportunity Act 2010 (Vic)*
- (b) those services to enhance existing activities to raise awareness of sex workers' rights and, where appropriate, support them to make complaints of discrimination.

Recommendation 3.

The Victorian Government should continue and complete its work to introduce a new protected attribute of 'irrelevant criminal record' into the *Equal Opportunity Act 2010 (Vic)*.

Recommendation 4.

The Victorian Government should consider removing the exception in section 62 of the *Equal Opportunity Act 2010 (Vic)* related to accommodation for commercial sexual services.

Recommendation 5.

The Victorian Government should amend the *Equal Opportunity Act 2010* (Vic) to enable the Commission to:

- (a) undertake own-motion public inquiries with consent of the Board (Pt 9, new section)
- (b) investigate serious matters that indicate a possible contravention of the Act (s 127):
 - (i) without the need for a reasonable expectation that the matter cannot be resolved by dispute resolution or the Victorian Civil and Administrative Tribunal
 - (ii) with the introduction of a 'reasonable expectation' that the matter relates to a class or group of people
- (c) compel attendance, information and documents for an investigation or public inquiry without the need for an order from the Victorian Civil and Administrative Tribunal (ss 129-134)
- (d) seek enforceable undertakings and issue compliance notices as potential outcomes of an investigation or a public inquiry (s 139, new sub-section).

Decriminalisation supports better public health and human rights outcomes

In many countries, including Australia, sex work has been, and continues to be, regulated through criminal law and other punitive regulations. Research shows that this approach:

- marginalises sex workers in the community, driving sex work underground as workers seek to avoid criminal and other negative consequences, such as surveillance, harassment, arrest and imprisonment
- fosters stigmatising social attitudes (often linked to harmful norms and stereotypes that seek to link sex to marriage or reproduction) that can have lasting impacts like impairing access to healthcare and other essential services
- creates barriers for sex workers who want to report discrimination, harassment, abuse or other rights violations
- enables discrimination and abuse to occur with impunity.¹

'Criminalization and application of other punitive regulations to sex work foster discriminatory practices and stigmatizing social attitudes and drive sex work underground, making health services hard to reach.'²

A criminal law approach to sex work also has a disproportionate, negative effect on women,³ owing to the gendered nature of sex work, which, in turn, has the effect of exacerbating existing gender inequality in the community. It also disproportionately affects trans and gender diverse sex workers, who are often subjected to intersectional forms of discrimination and stigma.⁴

By contrast, evidence indicates that jurisdictions that have decriminalised sex work – opting instead to regulate it through anti-discrimination, public health, labour or, for example, workplace health and safety laws – have promoted public health and human rights outcomes.⁵

Positive impacts include increased access to healthcare services for sex workers, increased condom use among brothel-based workers and significantly reduced rates of sexually transmitted infections.⁶ In a further example, research shows that decriminalisation 'could avert 33–46% of new HIV infections in sex workers and clients during a decade, through its iterative effects on violence, policing, safer work environment, and HIV transmission'.⁷

Equal opportunity and human rights law support the decriminalisation of sex work.

For instance, the UN Committee on the Elimination of Discrimination against Women – the UN treaty body responsible for monitoring the implementation of the *Convention on the Elimination of All Forms of Discrimination against Women*⁸ – has recommended that States Parties decriminalise sex work.⁹ In its expert view, States Parties should: adopt appropriate legal and policy responses to address discrimination and gender-based violence against sex workers; and repeal all legal provisions that discriminate against women and enshrine, encourage, facilitate, justify or tolerate any form of gender-based violence against them.¹⁰

In line with this view, the World Health Organization has recommended that '[a]ll countries should work towards decriminalization of sex work and elimination of the unjust application of non-criminal laws and regulations against sex workers'.¹¹ It has also urged states to

establish antidiscrimination and other rights-respecting laws to protect against discrimination and violence, and other violations of rights faced by sex workers in order to realize their human rights and reduce their vulnerability to HIV infection and the impact of AIDS.¹²

The Commission expresses its strong support for decriminalisation of all forms of sex work, including street-based sex work, consistent with human rights standards and public health research. Decriminalisation is essential for the rights, health and safety of sex workers and will help to remove the obstacles that sex workers and their advocates often face when seeking to uphold rights. It would also enable sex work to be treated in the same way as other types of work, helping to de-stigmatise this occupation.

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The Victorian Government should decriminalise all forms of sex work, including street-based sex work, in line with human rights standards and public health research.

Decriminalisation would expand the coverage of existing anti-discrimination protections

Question 7 of the consultation paper asks: What could be done to address social stigma or discrimination against sex workers? The Commission reiterates that decriminalisation of all sex work is an important step in helping to prevent stigma, as well as discrimination and other rights violations. The Equal Opportunity Act also offers critical protections against discrimination – protections that would be expanded should all forms of sex work be decriminalised in Victoria.

Discrimination on the basis of 'lawful sexual activity'

Under the Equal Opportunity Act, it is unlawful to discriminate against a person based on 'lawful sexual activity', which is defined as 'engaging in, not engaging in or refusing to engage in a lawful sexual activity'.¹³ A person's sexual activity – so long as it is lawful – should have no bearing on whether a person gets a job, a bank loan or, for example, a place on a sports team.

Persons engaging in lawful forms of sex work in Victoria are therefore protected against discrimination under the Act.¹⁴

Examples of discrimination based on 'lawful sexual activity'

- Refusing to provide a bank loan to someone because they are a sex worker, even though they meet the relevant criteria.
- Withdrawing a job offer because the successful applicant disclosed that they previously worked as a manager in a legal brothel.
- Refusing to enroll a child in a sporting activity because their parent is engaged in lawful forms of sex work.
- Deciding not to promote someone because they are in a polyamorous relationship.

Victoria's anti-discrimination protections do not extend to 'unlawful' sexual activity. While this is appropriate in almost all cases,¹⁵ it does mean that people who are involved in street-based sex work or operate outside Victoria's licensing system – activities currently deemed unlawful – are not protected against related discrimination. The effect of this is to leave some sex workers vulnerable to discrimination and other rights violations.

Since 1 July 2013, the Commission has received a small number of complaints and enquiries regarding 'lawful sexual activity' discrimination, with only a few of those related to sex work.¹⁶

35 people made complaints of discrimination based on 'lawful sexual activity'	169 people made enquiries related to discrimination based on 'lawful sexual activity'
3 of those people made complaints related to sex work	10 of those people made enquiries related to sex work

Based on the available evidence, it is reasonable to assume that the low number of complaints and enquiries (compared to those related to other protected attributes) is due, *inter alia*, to:

- limited awareness that the Act provides certain protections against discrimination related to sex work
- ongoing stigma associated with sex work
- the section 62 exception for accommodation providers (see below).

Decriminalisation of sex work would have the positive effect of broadening the existing protected attribute of 'lawful sexual activity' to cover discrimination against any sex worker that is related to their profession, occupation or trade. If, however, certain types of sex work remain criminal, the available anti-discrimination protections would continue to be curtailed.

The Commission has heard from some stakeholders that would prefer to address discrimination against sex workers by including a new protected attribute in the Equal Opportunity Act related to profession, occupation or trade, rather than relying on the 'lawful sexual activity' attribute.

The Commission is not opposed to this suggestion and recognises that such an attribute exists in the Australian Capital Territory¹⁷ and could help to reduce stigma. Still, we consider that the Act already protects sex workers against discrimination related to their profession, occupation or trade – protections that would be extended should all sex work be decriminalised – and note that, like in Victoria, sex work is covered by the definitions of 'lawful sexual activity' and 'sexual activity' in Queensland¹⁸ and Tasmania, respectively.¹⁹

No matter which attribute is ultimately preferred as the vehicle through which to protect sex workers against discrimination, there is a need for greater education and information to support sex workers to understand and realise their rights. This requires additional resourcing for peer and other sex worker support services, including community legal centres, to enable them to enhance their awareness-raising activities and work to support discrimination complaints.

In addition, a nominal amount of funding would enable the Commission to partner with some of these services to develop and deliver a tailored education program and accompanying resources on the rights of sex workers. This would be a cost-effective and resource-efficient way to share the Commission's expertise about the legal protections against discrimination for sex workers.

Recommendation 2.

The Victorian Government should provide additional resources to enable:

- (a) the Commission to partner with key peer and other sex worker support services to develop and deliver a tailored education program and accompanying resources on the rights of sex workers under the *Equal Opportunity Act 2010* (Vic)
- (b) those services to enhance existing activities to raise awareness of sex workers' rights and, where appropriate, support them to make complaints of discrimination.

Discrimination on the basis of 'irrelevant criminal record'

The Commission receives dozens of enquiries each year regarding discrimination related to criminal record. Yet, the Equal Opportunity Act does not currently protect against discrimination related to irrelevant criminal record. This affects sex workers experiencing discrimination due to convictions related to sex work that would otherwise be lawful under a decriminalised approach.

The absence of such protections has wide-ranging impacts, including reducing employment opportunities, entrenching disadvantage and reinforcing a person's marginalised status.

The Commission welcomes the government's in-principle agreement to amend the Equal Opportunity Act to include non-disclosed criminal record information as a protected attribute²⁰ – noting that work is underway to determine the scope of anti-discrimination protections needed to support reintegration and ensure the effectiveness of the scheme.

Amending the Act to protect against this form of discrimination will enhance existing protections, including for sex workers convicted of past crimes related to sex work. It will also provide clarity about the use of criminal records and provide a mechanism for sex workers and other people to seek recourse if they have been unfairly and unlawfully treated because of their criminal record.

The Commission recommends that the Victorian Government follow through on its commitment to include an additional protected attribute in the Equal Opportunity Act to protect against discrimination related to irrelevant criminal record.²¹ The Act should be amended to include 'irrelevant criminal record' as the protected attribute, rather than 'spent conviction', in line with the recommendation made by Julian Gardner in his earlier review of the Act.²²

The Commission also welcomes the government's commitment to establish a legislated spent convictions scheme.²³ This scheme will provide a critical mechanism to support the dignity and equality of Victorians and help to alleviate ongoing disadvantage by reducing barriers to employment and housing, including for sex workers.

Recommendation 3.

The Victorian Government should continue and complete its work to introduce a new protected attribute of ‘irrelevant criminal record’ into the *Equal Opportunity Act 2010 (Vic)*.

Exceptions

The Equal Opportunity Act provides that discrimination may be justified in certain circumstances.

Section 62 of the Act states that a person may refuse to provide accommodation to another person if they intend ‘to use the accommodation for, or in connection with, a lawful sexual activity on a commercial basis’. In such circumstances, a person denied accommodation is unable to obtain a remedy for the refusal under the Act.

Unlike with an exemption,²⁴ the Commission is not ordinarily notified if a person relies or seeks to rely on section 62 of the Act. It is therefore difficult to know the extent to which sex workers are negatively impacted by its operation.²⁵ Nevertheless, we have heard anecdotal accounts from stakeholders regarding the problematic nature of this exception and note that its mere existence could further perpetuate stigmatising social attitudes related to sex work and deter individuals from initiating complaints of discrimination.

The exception seeks to balance equal access to accommodation and the ability of accommodation providers to exercise some degree of control over who occupies their premises and for what purpose it is used. However, as it operates only in relation to persons who wish to provide commercial sexual services, it appears to be about permitting prejudice. Furthermore, as a blanket exception, it arguably does not operate in the least restrictive means possible and seems incongruous with steps to decriminalise sex work and bring Victoria in line with leading best practice.

Careful consideration of the continued appropriateness of section 62 is needed, particularly following decriminalisation. A more balanced approach – and one that could help to reduce stigma – might be to instead require accommodation providers to apply to the Victorian Civil and Administrative Tribunal (VCAT) for an exemption under section 89 of the Act.

Under this approach, individual providers would need to persuade VCAT that it is a reasonable limitation of the right to equality to refuse to provide accommodation to another person for a lawful sexual activity on a commercial basis.

Recommendation 4.

The Victorian Government should consider removing the exception in section 62 of the *Equal Opportunity Act 2010 (Vic)* related to accommodation for commercial sexual services.

Greater enforcement powers would strengthen anti-discrimination protections

Section 15(2) of the Equal Opportunity Act introduces a ‘positive duty’ to ‘take reasonable and proportionate measures to eliminate ... discrimination, sexual harassment or victimisation as far as possible’. It requires duty holders to be proactive about prevention, rather than simply reacting to complaints.

This is especially important given what we know about low rates of reporting of discrimination by sex workers (see above), as well as broader evidence regarding the heavy burden on individual victims to bring complaints of discrimination in the absence of effective enforcement powers for regulators.²⁶

Stronger enforcement powers for the Commission to enforce compliance with the Act would:

- reduce the burden on individuals, including sex workers, to bring complaints
- re-introduce effective consequences for non-compliance (for example, requiring organisations to take corrective action enforceable at VCAT, allowing public inquiries on industry-wide breaches in the public interest)
- improve rates of compliance with discrimination (and similar) laws
- enable us to address the systemic drivers of discrimination (and related behaviour).

Effective consequences for non-compliance with the positive duty are key when education and encouragement fail to bring about change.

These changes would bring the Act in line with international best practice. For example, the equality duty in the *Equality Act 2006* (UK) enables the UK Equality and Human Rights Commission to enforce compliance through a broad range of regulatory tools, including assessments, investigations, agreements and compliance notices. It also has the power to conduct a public inquiry into any matter relating to any of its duties and has done so in relation to disability-related harassment for example.

Recommendation 5.

The Victorian Government should amend the *Equal Opportunity Act 2010* (Vic) to enable the Commission to:

- (a) undertake own-motion public inquiries with consent of the Board (Pt 9, new section)
- (b) investigate serious matters that indicate a possible contravention of the Act (s 127):
 - (i) without the need for a reasonable expectation that the matter cannot be resolved by dispute resolution or the Victorian Civil and Administrative Tribunal
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- (c) compel attendance, information and documents for an investigation or public inquiry without the need for an order from the Victorian Civil and Administrative Tribunal (ss 129-134)
- (d) seek enforceable undertakings and issue compliance notices as potential outcomes of an investigation or a public inquiry (s 139, new sub-section).

In closing, please accept my thanks for the opportunity to contribute to this important review. The Commission looks forward to the opportunity to discuss our views in further detail on Thursday, 23 July.

Yours faithfully



Kristen Hilton

Victorian Equal Opportunity and Human Rights Commissioner

¹ World Health Organization, *Sexual health, human rights and the law* (Report, 2015) 27; John Godwin, *Sex work and the law in Asia and the Pacific: Law, HIV and human rights in the context of sex* (UNAIDS, UNFP and UNDP, 2012) 1-3; Simone Cusack, 'Advancing sexual health and human rights in the Western Pacific', Working paper commissioned by the World Health Organization (2010) [325].

² World Health Organization, above n 1, 27 [citations omitted].

³ See, for example, Committee on the Elimination of Discrimination against Women, *General recommendation no. 33 on women's access to justice*, UN Doc. CEDAW/C/GC/33 (2015) [49].

⁴ See, for example, Amnesty International, *Amnesty International policy on state obligations to respect, protect and fulfil the human rights of sex workers*, POL 30/4062/2016 (2016) 9; Joint United Nations Programme on HIV/AIDS, *UNAIDS guidance note on HIV and sex work* (2012) 4, 16.

⁵ Godwin, above n 1, 6.

⁶ World Health Organization, above n 1, 28 [citations omitted].

⁷ Chris Beyrer et al, 'HIV and sex workers' (2015) (385) *The Lancet* 287, 288. See also at 291.

⁸ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) [hereinafter 'CEDAW'].

⁹ For an overview of the application of CEDAW to sex work, including the approach taken by the Committee, see International Women's Rights Action Watch Asia Pacific and Global Network of Sex Work Projects, *Framework on rights of sex Workers & CEDAW* (International Women's Rights Action Watch – Asia Pacific, 2017).

¹⁰ See, for example, Committee on the Elimination of Discrimination against Women, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, UN Doc CEDAW/C/GC/35, 26 July 2017 [12], [29(c)(i)].

¹¹ World Health Organization, *Prevention and treatment of HIV and other sexually transmitted infections for sex workers in low- and middle-income countries: Recommendations for a public health approach* (2012) 8.

¹² *Ibid.*

¹³ *Equal Opportunity Act 2010* (Vic) s 4.

¹⁴ Victorian Equal Opportunity and Human Rights Commission, *Victorian Discrimination Law* (2nd ed, September 2019).

¹⁵ Examples of sexual activities outside the scope of the definition of 'lawful sexual activity' include paedophilia, incest, bestiality and sexual assault. See Victorian Equal Opportunity and Human Rights Commission, *ibid.*

¹⁶ Victorian jurisprudence related to 'lawful sexual activity' discrimination is limited, with cases typically involving a person who alleges they have been treated unfavourably because of extramarital affairs or sexual relationships between co-workers. See, for example, *Rowley v Goodyear Tyres Pty Ltd* [2011] VCAT 1536.

¹⁷ *Discrimination Act 1991* (ACT) s 7(1)(q). The Act does not define the term of 'profession, trade, occupation or calling': s 2. It includes an exception in section 57N, which means it is not unlawful to discriminate against a person on the ground of the profession, trade, occupation or calling of the person 'in relation to any transaction if profession, trade, occupation or calling is relevant to that transaction and the discrimination is reasonable in those circumstances'.

¹⁸ In Queensland, section 7(l) of the *Anti-Discrimination Act 1991* (Qld) makes it unlawful to discriminate on the basis of 'lawful sexual activity'. Schedule 1 of that Act expressly includes sex work in its definition of 'lawful sexual activity', defining it as meaning 'a person's status as a lawfully employed sex worker, whether or not self-employed'. See also Queensland Human Rights Commission, 'Factsheet: Discrimination on the basis of lawful sexual activity' (2019).

¹⁹ Section 16(d) of the *Anti-Discrimination Act 1998* (Tas) prohibits discrimination based on 'lawful sexual activity'. Section 3 of that Act defines 'sexual activity' as includes not engaging in, or refusing to engage in, sexual activity. Although the Act itself is silent on sex work, Equal Opportunity Tasmania has explained that the term 'lawful sexual activity' includes 'legal prostitution'. See Equal Opportunity Tasmania, 'Lawful sexual activity discrimination' (website undated), https://equalopportunity.tas.gov.au/html_version/lawful_sexual_activity_discrimination.

²⁰ Attorney-General, 'Victoria to have a legislated spent convictions scheme', Media release, 27 February 2020.

²¹ See generally Victorian Equal Opportunity and Human Rights Commission, *Submission to the Inquiry into a Legislated Spent Convictions Scheme* (July 2019).

²² Julian Gardner, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (Report, State of Victoria, Department of Justice, 2008) 104 (Recommendation 48).

²³ Attorney-General, above n 20. See also Parliament of Victoria, Legislative Council, Legal and Social Issues Committee, *Inquiry into a legislated spent convictions scheme: A Controlled Disclosure of Criminal Record Information framework for Victoria* (2020).

²⁴ *Equal Opportunity Act 2010* (Vic) ss 89-91.

²⁵ In 2009, the Scrutiny of Acts and Regulations Committee noted that ‘there is no reported case of a complaint engaging’ the exception in section 57 of the *Equal Opportunity Act 1995* (Vic), the predecessor to the current Act: Scrutiny of Acts and Regulations Committee, *Exceptions and Exemptions to the Equal Opportunity Act 1995*, Final Report (State of Victoria, 2009) 48.

²⁶ Australian Human Rights Commission, *Respect@Work: National inquiry into sexual harassment in Australian workplaces* (Report, 2020) 14, 442.