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Australian Sex Workers Association

09 February 2018

To: Director, Legal Policy
Department of the Attorney-General and Justice
GPO Box 1722
Darwin NT 0801

Dear Legal Policy Director,

Thank you for the opportunity to comment on the Modernisation of the Northern Territory (NT) *Anti-Discrimination Act 1993 (the Act)*.

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 [REDACTED]

We look forward to the opportunity to comment on the draft Bill of *the Act* arising from this review process.

Regards,

Jules Kim
Chief Executive Officer
Scarlet Alliance, Australian Sex Workers Association

Executive Summary

Stigma and discrimination against sex workers is perpetuated in a vast number of interrelated ways. Although some forms of discrimination will require the full decriminalisation of sex work in the NT, 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 it. While the full decriminalisation of sex work is optimal for the rights, health and safety of all sex workers, the presence of anti discrimination protections remain crucial regardless of legal frameworks. A number of states and territories have introduced anti-discrimination protections with the intention of providing protection for sex workers. However, unforeseen gaps in legislation have left many sex workers unable to utilise existing protections to redress discriminatory conduct.

Scarlet Alliance supports the inclusion of anti discrimination protections for sex workers as a vital step forward in protecting the basic human rights of a community subject to extreme stigma and discrimination in many facets of our daily lives. The proposed introduction of meaningful anti discrimination coverage for sex workers in NT is a significant opportunity to provide protections for sex workers from discrimination, harassment and vilification. Additionally the proposed representative complaints model will support a complaints process that is accessible to a broader range of people and able to address systemic forms of discrimination. However for the anti discrimination protections to be truly accessible to sex workers, "sex work" and "sex worker" must be included as main attributes.

Sex workers experience a range of direct and indirect, personal and systemic discrimination. These include, but are not limited to:

- when advertising sex industry services;
- when purchasing goods and services;
- when securing housing and accommodation;
- criminal record discrimination;
- in custody disputes;
- in legal processes;
- in policies and practices;
- discrimination against friends, family and partners of sex workers
- in employment; and
- counterproductive police practices.

In many states sex workers do not have access to anti discrimination protections and there are no consistent federal protections for sex workers under Australian anti-discrimination laws. A few states and territories have implemented anti-discrimination legislation with the intention of covering sex workers. However, unforeseen gaps in anti discrimination legislation have left many sex workers unable to access existing legal mechanisms to redress discrimination. Additionally due to regulatory frameworks around sex work and viewpoints on the legitimacy of sex work as work, the wording of existing anti-discrimination legislations have in practice failed to protect sex workers from discrimination and vilification. For this reason, Scarlet Alliance does not support the inclusion of 'lawful sexual activity' in the *Anti-Discrimination Act 1993 NT (the Act)*. While anti discrimination protections for sex workers are crucial, the inclusion of 'lawful sexual activity' category in *the Act* will not fulfil the intended aim of providing much needed coverage for sex workers and will be inaccessible for a large majority of sex workers.

Learning from the practical gaps of other state and territory anti discrimination legislation and to ensure sex workers have access to effective and practical legal avenues to redress discrimination, Scarlet Alliance supports:

- the introduction of 'profession, trade, occupation or calling', 'sex worker' and 'sex work' as main attributes;
- protection coverage to capture past and current sex workers, discrimination on the basis of been presumed or suspected of being a sex worker and associates of sex workers;
- anti vilification laws must explicitly prohibit offensive conduct against sex workers as a protected attribute and extend to those who currently have or have previously held the protected attribute, associate with another person with the protected attribute, or are incorrectly assumed to possess the protected attribute; and
- the introduction of a representative complaints model that enables a collective complaints process, for organisations to submit a complaint on behalf of individuals and for sex workers to be able to make anonymous complaints.

We welcome the intention of the NT Attorney Generals Department to provide anti discrimination coverage to protect the human rights of all members of the community from discrimination, harassment and vilification. This modernisation of *the Act* provides an unparalleled opportunity to capitalise on prior experience in other states and research to inform a world leading example of effective, practical and accessible protections for sex workers that will make a difference for communities experiencing discrimination, harassment, vilification and stigma. If the amendments are carefully considered and appropriately applied, the Northern Territory Government could lead the way in ensuring sex workers' anti-discrimination rights are protected.

Stigma and discrimination faced by sex workers

Many studies have documented the stigma, discrimination and human rights violations that sex workers face in healthcare, legal, social and employment settings.¹ The Scarlet Alliance and AFAO report, *Unjust and Counterproductive: The Failure of the Governments to Protect Sex Workers from Discrimination report (the Unjust and Counterproductive report)*, is an Australia wide study documenting sex workers' experience of stigma and discrimination, that highlights that stigma and discrimination on basis of sex work employment is perpetuated in a vast number of interconnected ways.² Many of the findings from 1999 *the Unjust and Counterproductive report* continue to be relevant today and still remain uncovered by existing anti discrimination legislations.

Advertising

The *Unjust and Counterproductive report* indicates that 'one of the most significant areas of discrimination affecting sex workers throughout Australia is in the advertising of sex industry

¹ Amnesty International. (2016). *Amnesty International policy on State obligations to respect, protect and fulfil the human rights of sex workers*. Retrieved from

<https://www.amnesty.org/en/documents/pol30/4062/2016/en/> on 07/2/18.

Network for Sex Worker Projects (NSWP). (2015). *Stigma and Discrimination Experienced by Sex Workers Living with HIV*. Retrieved from

<http://www.nswp.org/sites/nswp.org/files/Stigma%20and%20Discrimination%20Experienced%20by%20Sex%20Workers%20Living%20with%20HIV%2C%20NSWP%20-%20December%202015.pdf> on 07/02/18

² Scarlet Alliance, & AFAO. (1999). *Unjust and Counter-Productive: The failure of government to protect sex workers from discrimination*. Retrieved from <http://www.scarletalliance.org.au/library/unjust-counterproductive>.

services'.³ The lack of or limited availability of legal avenues to redress discriminatory advertising practices perpetuates discrimination against sex workers in advertising. Some of the discriminatory conduct reported by sex workers across all states and territories include:

1. Newspapers refusing to accept advertising for sexual services;
2. special conditions applying to sex industry advertising such as advance payment, charging higher fees, limits on how long advertisements could run and having to place advertising in person rather than over the telephone;
3. publishers failing to place advertising which had been accepted and paid;
4. denied placement of advertising in the relevant sections of the newspaper;
5. advertisers ignoring complaints or threatening to cancel future advertising;
6. advertisers determining the content and design of advertisements;
7. regularly changing policy and guidelines with respect to sex industry advertising without advisement;
8. unapproved changes to pre-paid advertising; and
9. rudeness of staff when placing advertising.⁴

Generally, participants of the survey believed that they were treated differently from other businesses and singled out for special attention solely by the virtue of their occupation. Discriminatory advertising costs has been consistently raised as an issue at Scarlet Alliance successive annual National Forums, a 3 day conference, workshops, skills and information sharing forum by and for sex workers and sex worker peer educators. Enforcing arbitrary conditions and disproportionately charging sex workers creates significant barriers for sex workers to control when and how they work. For example, charging sex workers higher fees for ads that have a limited running time may force sex workers to work more often to ensure they cover their costs.

In 1999, Edgley, a sex worker in Canberra, filed a complaint with the Discrimination Tribunal against the Canberra Times. The discrimination was allegedly based on sex workers being singled out to prepay for advertising, refusing to place Edgley's advertisement anywhere else except the 'Adult' section and refusing to publish her ad in the Chronicle (the free paper owned by the Times). Edgley's case made it to the Supreme Court where they found there was discrimination, but it was reasonable. Although Edgley was not successful in her discrimination case, the availability of anti-discrimination protections that clearly applied to Edgley as a sex worker was still significant.

Goods and services

The Unjust and Counterproductive report highlighted that sex workers experience a 'wide range of discrimination with respect to the purchase of goods or services', such as by financial institutions, insurance companies, phone companies, service providers and health services.⁵ Sex workers reported that businesses regularly refused supply of goods and services or make inappropriate comments upon discovering sex work employment. For example, when attempting to access credit or loans, 'banks do not apply the same business standards as they would to other service industries.'⁶ Applications for credit cards often sought information about the applicant's occupation rather than their income, and sex workers reported having their applications refused despite no evidence of bad credit rating or unstable or low income. In loan applications, banks often required business records covering a longer period for sex workers than other occupations. Additionally, the Eros Association, an adult industry association, recently published a report documenting sex industry businesses' negative experiences with financial service providers. The report indicated that 'most participants

³ Ibid. pp 17.

⁴ Ibid.

⁵ Ibid. pp 19.

⁶ Ibid.

[sex industry business operators] had been rejected services or treated unfavourably by financial service providers in the past,⁷ highlighting that discrimination also extends to sex industry operators and owners despite operating lawfully. The discrimination by financial institutions continues to be an ongoing issue for sex workers with major banks and financial providers refusing services to sex workers on “moral grounds”.⁸

Similarly, sex workers documented discrimination in securing home, contents and mortgage insurance against loss of income, despite proven good credit ratings. They reported being refused private health insurance or facing higher superannuation premiums due to an assumption they were at greater STI/HIV risk. This is despite evidence that sex workers in Australia have lower rates of STI/HIV than the general population.⁹ Mobile phone companies had denied sex workers applications for phones because of the assumption that their income and address was not considered stable.¹⁰ These restrictions to banking and business facilities continue to prevent sex workers from access to small business opportunities and hinder the development of workplace safety mechanisms.

Housing and Accommodation

The Unjust and Counterproductive report found that sex workers experience a range of discrimination in securing temporary and permanent housing upon being discovered to be working in the sex industry, irrespective of whether the sex worker is operating lawfully or intend to be working from the premise. Discrimination in accommodation includes ‘refusal to rent properties and hotel rooms. rude treatment by employees of hotels, eviction from private rental accommodation, landlords from business premises contacting landlords from private rental premises about their resident’s occupation, and city councils informing landlords of sex workers’ occupation.’¹¹ The majority of the participants of *the Unjust and Counterproductive report* indicated that they would ‘never put my occupation because I feel sure my application would be rejected.’¹²

In Queensland, the high profile discrimination case involving GK, a sex worker from Queensland, who sued her accommodation provider highlights a positive example in which a sex worker has used legal mechanisms to exercise her anti-discrimination rights. GK sued her accommodation provider for breaching the *Anti-Discrimination Act 1991* (Qld) and the courts ultimately found the conduct by the motel to have constituted direct discrimination on the basis of ‘lawful sexual activity’. However, shortly afterwards, amendments were made to the *Anti-Discrimination Act 1991* (Qld) to allow accommodation providers to lawfully discriminate against sex workers on the basis of using the accommodation premises for commercial use. Although GK’s victory sent a clear message that it was unacceptable and unlawful for business owners to discriminate against sex workers, the amendments made to the *Anti-Discrimination Act 1991* (Qld) exposed the state’s lack of commitment to protecting the rights of sex workers.

⁷ The Eros Foundation. (2017). *Financial discrimination against adults-only businesses*. Retrieved from <http://eros.org.au/wp-content/uploads/Financial-Discrimination-Report-October-2017.pdf> on 07/02/18. pp 4.

⁸ Thomas, Elise (2017) *Sex workers face financial discrimination* <http://thequo.com.au/Stories?postId=b6f7871d-d979-4f97-9002-ffcaf7f1b751>

⁹ AFAO. (2017). *HIV in Australia: 2017*. Retrieved from <https://www.afao.org.au/wp-content/uploads/2017/04/HIV-in-Australia-2017.pdf>.

¹⁰ Scarlet Alliance, & AFAO. (1999). *Unjust and Counter-Productive: The failure of government to protect sex workers from discrimination*. Retrieved from <http://www.scarletalliance.org.au/library/unjust-counterproductive>. pp 19-20.

¹¹ Ibid. pp20.

¹² Ibid.

Discrimination from accommodation providers places sex workers at significant risk. As Michelle, Townsville spokesperson for United Sex Workers in North Queensland, states 'they throw sex workers out and make them homeless. Women fly in from all over Australia and from New Zealand thinking they have a room and when they get there they find there isn't one.'¹³ Discrimination from accommodation providers compromises sex workers basic human right to housing. Without the right to housing, other basic human rights may also be compromised, such as 'right to family life and privacy, the right to freedom of movement, the right to assembly and association, the right to health and the right to development.'¹⁴

Criminal record discrimination

'Irrelevant criminal record' is defined in the *Anti-Discrimination Act 1993* (NT) to include:

- spent convictions;
- a record where no further action was taken;
- a record where no charge has been laid, the charge was dismissed or withdrawn;
- a record where the person was discharged, found not guilty or the finding of guilt was squashed;
- a record where the person was pardoned; or
- a record where the circumstances relating to the offence for which the person was found guilty are not directly relevant to the situation in which the discrimination arises.¹⁵

Sex workers, past and current have reported having previous convictions for sex work as a barrier in range of areas of their life, including future employment. Due to the unworkable legislation and/or criminalisation of many areas of sex work in Australia, sex workers are more likely to have a criminal record. Convictions for sex work should be listed in the definitions of 'irrelevant criminal record'.

Although 'irrelevant criminal record' discrimination is unlawful, the inclusion of *Exemption – Irrelevant criminal record* allow discrimination in the area of work if:

- a) the work principally involves the care, instruction or supervision of vulnerable persons; and
- b) reasonably necessary to protect the physical, psychological or emotional well-being of those vulnerable persons, having regard to all of the relevant circumstances of the case including the person's actions.¹⁶

Vulnerable person includes 'children, aged persons and persons with a physical or intellectual disability or mental illness'.¹⁷

In their summary of the Discussion Paper on Criminal Record Discrimination, the then Human Rights and Equal Opportunity Commission wrote that 'Australians who have a criminal record often face significant barriers to full participation in the Australian community. Trying to find a job is one of the

¹³Anderson, J. (2011). Motel Sex Check: Scrutiny Insults Women. *Townsville Bulletin*. as cited in Scarlet Alliance. (2012). *Submission for the Consolidation of Commonwealth Anti-Discrimination Laws*. Retrieved from [www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Consolidation%20-%20Discussion%20Paper%20-%20096%20-%20Scarlet%20Alliance%20-31%20Jan%202012%20\(word\).DOC](http://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Consolidation%20-%20Discussion%20Paper%20-%20096%20-%20Scarlet%20Alliance%20-31%20Jan%202012%20(word).DOC) on 07/02/18. pp 6.

¹⁴ Sidoti, C. (1996). National Conference on Homelessness Council to Homeless Persons Address by Chris Sidoti, Human Rights Commissioner. *Housing as a human right*. Human Rights and Equal Opportunity Commission: Sydney. Retrieved from http://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/housing.pdf on 08/02/18.

¹⁵ *Anti-discrimination Act 1993* (NT) Section 4 Interpretation Subsection 1 Irrelevant criminal record.

¹⁶ *Ibid*. Section 37 Subsection 1.

¹⁷ *Ibid*. Section 37 Subsection 2.

areas of greatest difficulty for former offenders.¹⁸ Sex workers are more likely to have a criminal record because vast sections of the industry are criminalised. Discrimination in seeking employment and during the course of employment remains a pertinent issue that disproportionately affects sex workers and especially for sex workers with prior criminal record for sex work. Sex workers are often paradoxically stereotyped as victims and agents of crime, particularly sex workers with criminal records. Allowing employers to subjectively disregard the anti-discrimination rights of sex workers with a criminal record allows people who are untrained to make such an assessment to use misconceptions and stereotypes to direct their decision.

Custody

A number of studies highlight that a major concern among sex workers with primary care of children is discrimination in custody disputes and/or harassment of their children if their occupation is known.¹⁹ This has serious implications for sex workers' access to justice as sex workers may be forced to avoid reporting crime, discrimination or harassment to the police in fear that detection by the authorities of their sex work will lead to public identification and their children being removed or harassed. As sex worker from South Australia, writes 'I get petrified of what a history in sex work would mean in front of a judge. I know that sex work isn't supposed to be taken into account, but what about illegal activity? Anyway, the fact that they're not supposed to let sex work affect their decisions doesn't mean that they won't. And how would that affect my ability to do sex work and support us without being detected or risking my family, after having my secrets aired in court? So, when my child's father [ex-partner] says jump, I say how high!'.²⁰

Discrimination against associates of sex workers

The Unjust and Counterproductive report highlights that sex workers felt that police knowledge of their employment also resulted in discrimination against their family, friends and partner, such as being charged with sex industry related charges, judicial discrimination when facing non-sex industry related criminal charges and being denied employment upon discovering the person is an associate of a sex worker.²¹ Allowing lawful discrimination against associates of sex workers isolates sex workers and impede their fundamental human right to freedom of association and self-determination.

Employment

Sex workers often do not disclose their participation in the sex industry for fear of discrimination from employers. This poses significant challenges for sex workers in explaining gaps in employment history, particularly in smaller communities where the worker's occupation is known or assumed. For sex workers with criminal convictions, fear that employers will discriminate against their prior convictions upon discovery creates additional barriers to finding work outside or in a different sector of the sex industry. As indicated above, 'irrelevant criminal record' discrimination is lawful in the NT if the employer finds the discrimination to be 'reasonably necessary' to protect 'vulnerable persons'.²²

¹⁸ Australian Human Rights Commission. (N/A). Discrimination in Employment on the Basis of Criminal Record. Retrieved from <http://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/discrimination-employment-basis-criminal-record> on 07/02/18.

¹⁹ Scarlet Alliance, & AFAO. (1999). *Unjust and Counter-Productive: The failure of government to protect sex workers from discrimination*. Retrieved from <http://www.scarletalliance.org.au/library/unjust-counterproductive> on 07/02/18. pp 16.

²⁰ Reid, A. (2012). *Known Prostitute. Provision: Law Reform*. (7).

²¹ Scarlet Alliance, & AFAO. (1999). *Unjust and Counter-Productive: The failure of government to protect sex workers from discrimination*. Retrieved from <http://www.scarletalliance.org.au/library/unjust-counterproductive> on 07/02/18. pp 16.

²² *Anti-discrimination Act 1993* (NT) Section 37 Subsection 1b.

A number of high profile cases illustrate that discrimination against sex workers, particularly in occupations such as teaching or policing, is ongoing. In 2011, a New Zealand teacher was de-registered after she appeared in Australian Penthouse magazine.²³ In November 2005, a high school teacher in Brisbane was publicly identified and punished for having worked as a sex worker in a licensed Gold Coast brothel.²⁴ The teacher had been seen by a colleague of hers, a male teacher, who was attending the brothel as a client. As Candi writes, 'in an astounding act of moral hypocrisy the prospective client informed the school principal what he had discovered about the woman's second job. Still more astounding, while both of the teachers were 'counselled' about the appropriateness of their behaviour, only the female sex worker was penalised'.²⁵

Counterproductive Police Practices

There are a number of counterproductive police practices that undermine sex workers' health and human rights. The use of condoms as evidence to prosecute sex industry offences is widely recognised to undermine harm reduction strategies in the sex industry as it discourages sex workers and sex industry operators from keeping sufficient quantities of condoms.²⁶ Sex workers also reported that carrying condoms is used by police to justify a range of harassment including: full body searches, to demand identification, to remove them from public amenities such as transport and streets, to pressure sex workers into pleading guilty to sex industry related offences and to make disparaging comments. In addition, the *Unjust and Counterproductive report* highlighted that sex workers do not feel that complaints and reports of crime are taken seriously by the police and judicial system, impeding on sex workers civil rights.²⁷ Sex workers in the NT are disproportionately impacted by police practices as vast areas of the sex industry remain criminalised.

Anti-discrimination protections for sex workers

Although there are a few high-profile cases where sex workers have attempted to access formal justice mechanisms to redress discrimination, the perceived or limited availability of legal avenues, particularly for those excluded from operating in the "legal" industry, remains a significant barrier for sex workers to access justice. Anecdotally, this suggests that many instances of discrimination against sex workers go unreported. Sex workers' daily and ongoing experiences of discrimination, harassment and stigma signal the crucial need for legislative reform.

²³ Tamara McLean. (2011). NZ teacher deregistered over Penthouse pic. *The Sydney Morning Herald*. Retrieved from <http://www.smh.com.au/breaking-news-world/nz-teacher-deregistered-over-penthouse-pic-20110503-1e5k4.html> on 07/02/18

²⁴ Odgers, R. (2005). Teachers may face second job ban. *Courier Mail*. Retrieved from http://www.scarletalliance.org.au/nm/australia/qld/Odgers_2005/

²⁵ Forrest, C. (2007). (Anti) Discrimination in the Sunshine State *Provision: The Whore Stigma*. (1). pp 13.

²⁶ Asia Catalyst. (2016). *The Condom Quandry: A Study of the Impact of Law Enforcement Practices on Effective HIV Prevention among Male, Female, and Transgender Sex Workers in China*. Retrieved from <http://www.nswp.org/resource/the-condom-quandry> on 07/02/18.

Amnesty International. (2016). *Amnesty International policy on State obligations to respect, protect and fulfil the human rights of sex workers*. Retrieved from <https://www.amnesty.org/en/documents/pol30/4062/2016/en/> on 07/2/18. pp 10.

²⁷ Scarlet Alliance, & AFAO. (1999). *Unjust and Counter-Productive: The failure of government to protect sex workers from discrimination*. Retrieved from <http://www.scarletalliance.org.au/library/unjust-counterproductive>. pp 7.

The former United Nations Secretary 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.*”²⁸

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.*”²⁹

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 ensures their access to justice.³⁰

In an effort to meet international human rights obligations, a number of states have implemented anti-discrimination protections for sex workers with the intention of providing ‘fair, large and liberal’ protection.³¹ However, unforeseen gaps in legislation have resulted in anti-discrimination protection across jurisdictions being inconsistent, ‘narrow’ and ‘pernickety’.³²

For example, although the category ‘lawful sexual activity’ is used in Queensland, Victoria and Tasmania, the criminalisation of large sections of the sex industry in those states have left many sex workers unable to access anti-discrimination protections. Similarly, within the current legislation in the Northern Territory (NT) a large variety of workers would be considered as “unlawful” such as brothel based workers, private workers working from a fixed premises or together with another worker and street based sex workers. Escort workers who are unable to meet the requirements to obtain a police certificate are also considered to be “unlawful”. Currently in NT police certificates for escorts are refused to anyone with a prior drug conviction. For those sex workers who do obtain a certificate, their names will be recorded on a police register and currently there is no way to remove your name from the police register. Some sex workers have reported experiencing the negative impacts of police registration when their sex work experience has been used in custody cases or when applying for a police clearance for work outside of the sex industry. While anti discrimination protections for sex workers are crucial, in practice, the inclusion of ‘lawful sexual activity’ category in the *Anti-Discrimination Act 1993* (NT) will make anti discrimination protections inaccessible for a large majority of sex workers. Sex workers that are excluded from the “legal” sex industry already face significant barriers to accessing justice, such as fear that reporting discrimination, harassment or crime will result in prosecution for their work, further surveillance, harassment, incarceration or deportation.³³

In the ACT, the *Discrimination Act 1991 s7(1)(m)* provides anti-discrimination protection on the basis of “profession, trade, occupation or calling”. However the ACT *Discrimination Act 1991* does not define what ‘profession, trade, occupation or calling’ covers. It was the intention when the clause was drafted to provide protection for sex workers, but like the protections based on “lawful sexual activity”, “profession, trade, occupation or calling” depends heavily on the current regulatory and

²⁸ UNAIDS. (2009). *UNAIDS Guidance Note on HIV and Sex Work*. Geneva. pp 2.

²⁹ 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*. pp 14.

³⁰ *Ibid.* pp 13.

³¹ See *IW v City of Perth* (1997) 191 CLR 1. See Kirby J at 58, Brennan CJ and McHugh J at 12, and Kirby J at 58

³² *Ibid.*

³³ Amnesty International. (2016). *Amnesty International policy on State obligations to respect, protect and fulfil the human rights of sex workers*. Retrieved from <https://www.amnesty.org/en/documents/pol30/4062/2016/en/> on 07/2/18. pp 11.

legal environment surrounding sex work in that particular jurisdiction. Lawful sexual activity is redundant in a criminalised jurisdiction, because sex work is not considered to be lawful. In a political or judicial climate that does not consider sex work to be work, “profession, trade occupation or calling” would not be considered to cover sex workers and the ACT *Discrimination Act 1991* does not provide a definition to contest otherwise. Both options have significant gaps, and are subject to their regulatory frameworks and environments. While ‘profession, trade, occupation or calling’ is an important attribute for the anti discrimination provisions, for sex workers to be able to access protections, it is crucial that ‘sex worker’ and ‘sex work’ are included as main attributes in the *Anti-Discrimination Act 1993 NT (the Act)*. This will ensure the removal of any ambiguities and uncertainties in the coverage of sex workers under *the Act* regardless of legal or political environments and viewpoints on sex work.

Questions 7: Should “lawful sex work” be included as an attribute under the Act?

Scarlet Alliance does not support the inclusion of ‘lawful sexual activity’.

Although the term ‘lawful sexual activity’ is used in Queensland, Tasmania, and Victoria, it has proven to be too narrow and restrictive in providing inclusive anti-discrimination coverage to sex workers. In Queensland, protection for sex workers under ‘lawful sexual activity’ is limited and fails to cover street-based sex workers, private workers operating with other workers and sex workers operating out of unlicensed agencies and brothels. Additionally, as highlighted above accommodation providers in Queensland are explicitly exempt from anti-discrimination legislation if they ‘reasonably believe’ the person ‘is using, or intends to use’ the premise for sex work³⁴, further eroding anti-discrimination protection for sex workers. In Tasmania, the criminalisation of many aspects of sex work, such as brothels, renders the use of a ‘lawful sexual activity’ category inadequate. In Victoria, while ‘lawful sexual activity’ is a main attribute, sex workers are specifically singled out as an *exception*, so it remains lawful to discriminate against people engaging in commercial lawful sexual activity when providing accommodation.³⁵

Similarly, the NT sex industry regulation provides sex workers with a narrow legal framework to lawfully operate within, excluding sex workers operating in the unregulated sex industry from being covered by the proposed ‘lawful sexual activity’ category. For example, brothels and street-based sex work are completely criminalised. Working with or from the same premise as other sex workers is a well-documented safety strategy for sex workers.³⁶ However, under NT sex industry regulations, private sex workers are forced to apply for expensive, complicated and time-consuming escort licenses to practice this simple yet effective safety strategy. Escort workers are also required to register with the police and can be disqualified from registration or have their registration revoked if they attempt to commit or have been committed of a ‘violent or drug related crime’.³⁷ Moreover, there are a number of reasons why sex workers may not want or be able to register with the police such registration with the police goes on the sex worker’s permanent record and can be used to discriminate against them in custody cases and when applying for police clearance. In effect, limiting

³⁴ *Anti-discrimination Act 1991* (Qld) Section 106C Accommodation for use in connection with work as a sex worker.

³⁵ *Equal Opportunity Act 2010* (Vic) Section 62 Exception—accommodation for commercial sexual services.

³⁶ Amnesty International. (2016). *Amnesty International policy on State obligations to respect, protect and fulfil the human rights of sex workers*. Retrieved from <https://www.amnesty.org/en/documents/pol30/4062/2016/en/> on 07/2/18. pp 10.

³⁷ NT Government. (2017). Escort licences. Retrieved from <https://nt.gov.au/industry/hospitality/escort-licences/sex-worker-certification> on 07/02/18.

protection to sex workers who fit into the 'lawful sexual activity' category excludes those operating outside of the regulated sex industry from accessing anti-discrimination protection and using legal remedies to resolve their disputes.

It is also well documented the significant marginalisation and vulnerability faced by sex workers who are excluded from the "legal" sector of the sex industry, such as reduced access to formal justice mechanisms as sex workers fear that reporting crime will result in increased surveillance, being charged, harassed, incarcerated or even deported.³⁸ Restricting discrimination protection to 'lawful sexual activity' sends the message that discrimination against some workers is inevitable and there are no legal remedies for these sex workers when their human rights have been violated.

Scarlet Alliance supports the inclusion of 'profession, trade, occupation or calling' as a main attribute.

The Australian Capital Territory's (ACT) *Discrimination Act 1991* (ACT) includes 'profession, trade, occupation or calling' as a main attribute. Although the term is left undefined, the Hansard shows that the intention of this category is to ensure the *Discrimination Act 1991* (ACT) also covers sex workers.³⁹ However, the exception included under *Division 4.7 Exceptions relating to profession, trade, occupation or calling* makes discrimination lawful if 'profession, trade, occupation, or calling is relevant to that transaction and the discrimination is reasonable in those circumstances',⁴⁰ diluting the impact of the legislation in protecting people, especially sex workers, from discrimination. Scarlet Alliance does not support this exception to be included in the modernisation of *the Act* as it weakens the impact of the proposed legislation.

Although the use of the category 'profession, trade, occupation or calling' as a main attribute covers sex workers more broadly by directing the focus of anti-discrimination protection away from the legality of the worker's employment, the lack of a clear definition of what the category entails may continue to create uncertainty as to whether sex workers operating in the unregulated sex industry is covered. In the NT, where sex work is not decriminalised and many aspects of sex work is criminalised, an undefined 'profession, trade, occupation or calling' category may be interpreted to not cover some sex workers, particularly for those operating in the unregulated sex industry and who trade sex in kind but do not identify as a sex worker, like those engaging in sex for favours. The inclusion of 'profession, trade, occupation or calling' does not adequately and fully cover sex workers and does not replace the need for 'sex work' and 'sex worker' as a main attribute for inclusion.

Scarlet Alliance supports the additional inclusion of 'sex work' and 'sex worker' as main attributes.

To reduce these foreseeable gaps in coverage for sex workers and enhance the impact of anti-discrimination protection in the NT, 'sex work' and 'sex worker' also need to be included as main attributes alongside the 'profession, trade, occupation or calling' category. Explicitly naming 'sex work' and 'sex worker' as main attributes ensures sex workers, despite the type of sex work they are engaging in or whether the person making the complaint is operating in the regulated or unregulated sex industry, will be covered by anti-discrimination legislation. It will also allow for protections for sex workers against discrimination, harassment and stigma regardless of regulatory, political and judicial

³⁸ Amnesty International. (2016). *Amnesty International policy on State obligations to respect, protect and fulfil the human rights of sex workers*. Retrieved from <https://www.amnesty.org/en/documents/pol30/4062/2016/en/> on 07/2/18. pp 11.

³⁹ ACT Government. (1993). *Debates of the Legislative Assembly for the ACT*. Retrieved from <http://www.hansard.act.gov.au/hansard/1993/pdfs/19931215.pdf> on 07/02/18. pp 4599.

⁴⁰ *Discrimination Act 1991* (ACT) Section 54N/Discrimination in profession, trade, occupation or calling.

environments and viewpoints around sex work. The inclusion of 'sex work' and 'sex worker' as main attributes will significantly reduce uncertainty for the complaint *and* the judicial system.

Scarlet Alliance support the internationally recognised definition of 'sex work' that is used by the Lancet medical journal in their special series 'HIV and sex workers' produced in collaboration with sex workers and sex worker organisations.⁴¹ The Lancet defines 'sex work' as 'the sale/exchange of consensual adult sexual services'.⁴² This definition of 'sex work' is intended to be 'non-judgemental' and enable 'HIV responses to sex work to be addressed through a labour rights framework in addition to a human rights framework'.⁴³ Accordingly, 'sex worker' is defined as a person who engages in the 'sale/exchange of consensual adult sexual services'.

Scarlet Alliance supports protection for past and current sex workers.

Although it is not uncommon for sex workers to transition in and out of the sex industry to study, travel or engage in non-sex industry related employment, the stigma and discrimination associated with previous or current employment in the sex industry remains. As highlighted above, *the Unjust and Counterproductive report* found that sex workers were often forced to not disclose 'previous or current employment in the sex industry for fear of discrimination when seeking alternative employment'.⁴⁴

Lodging a formal complaint against an employer or public official often requires the applicant to provide their legal name. *The Unjust and Counterproductive report* highlighted that sex workers are deterred from utilising legal remedies to pursue their employers for unfair work practices or dismissals as they fear that connecting their legal name to sex work will result in discrimination in the future, including when seeking employment in other industries or during custody disputes.⁴⁵

The South Australian Bill, *Statutes Amendment (Decriminalisation of Sex Work) Bill 2015* (the SA Bill), which passed the Legislative Council and is waiting to be voted on in the House of Assembly, is hailed by many, not just sex workers, to provide the best framework to regulate the sex industry and protect the human rights of sex workers. The SA Bill intends to amend *Section 85T Criteria for establishing discrimination on other grounds* of the *Equal Opportunity Act 1984* (SA) to include discrimination 'on the ground of being, or having been, a sex worker'. Scarlet Alliance supports similar amendments to the *Anti-Discrimination Act 1993* (NT) to enhance the impact of the legislation by providing past and current sex workers protection from discrimination.

Additionally, the SA Bill intends to amend *Section 85T criteria for establishing discrimination on other grounds* to include 'a characteristic that appertains generally to persons who are, or who have in the past been, sex workers, or on the basis of a presumed characteristic that is generally imputed to persons who are, or who have in the past been, sex workers'. The inclusion of this section in the NT *Anti-Discrimination Act 1993* (NT) will expand the scope of coverage for those discriminated against on the basis they are perceived or suspected of being a sex worker. Anecdotally, Scarlet Alliance has received numerous reports of people, irrespective of whether they were engaging in sex work at the time, being pulled over by police or refused accommodation because they were suspected of being a

⁴¹ The Lancet (2014) *HIV and sex workers*. Retrieved from <http://www.thelancet.com/series/HIV-and-sex-workers>

⁴² The Lancet. (2014). *Table: Glossary of terms used in Series on HIV and sex workers*. cited in Das, P., & Horton, R. (2014). Bringing sex workers to the centre of the HIV response. *Lancet*, 385(9962), 3-4.

⁴³ Ibid.

⁴⁴ Scarlet Alliance, & AFAO. (1999). *Unjust and Counter-Productive: The failure of government to protect sex workers from discrimination*. Retrieved from <http://www.scarletalliance.org.au/library/unjust-counterproductive>. pp 7.

⁴⁵ Ibid. pp 42.

sex worker or engaging in sex work. The inclusion of this amendment will widen the scope of the legislation to cover a broader demographic of people, not just sex workers.

Scarlet Alliance supports protection against discrimination for family, friends and partners of sex workers.

As highlighted above, discrimination extends to sex workers' family, friends, colleagues, partners and other associates of sex workers.⁴⁶ Discrimination against associates of sex workers may affect personal relationships because family, friends and partners may fear criminal prosecution, police attention or discrimination in other aspects of their lives, forcing sex workers to isolate themselves or hide their employment from their community in an effort to protect others from discrimination and criminal offences. In practice, discrimination against associates of sex workers impedes sex workers' fundamental human right to freedom of association and self-determination, restricting sex workers capacity to associate and organise with others to improve their wellbeing and safety.

The *SA Bill* explicitly extends anti-discrimination protection to associates of sex workers by providing protection on the basis of 'an attribute of or a circumstance affecting a relative or associate of the other, being an attribute or circumstance described in the preceding paragraphs'.⁴⁷ The *SA Bill* makes clear that it is unlawful to discriminate against a person on the basis that the person is an associate of a sex worker.

Scarlet Alliance supports the introduction of a representative complaints model.

Our members have highlighted that sex workers are often deterred from filing legal complaints as it requires them to make a complaint in their legal name and risk further discrimination as a consequence. Having their legal name connected to an anti discrimination claim forces public disclosure for a sex worker. It connects a sex workers "work name" with their legal name and personal details that could potentially compromise security and safety. This creates massive barriers for sex workers willingness to engage with the anti discrimination complaints process. Moreover, the examples of discrimination cited by sex workers are often systemic and ongoing.

A further barrier cited by sex workers has been the difficulty for an individual in navigating the complex and often confronting complaints process. This can be particularly challenging for sex workers prone to multiple forms of discrimination, such as sex workers living with a disability and sex workers from culturally and linguistically diverse backgrounds, including migrant and Aboriginal and Torres Strait Islander sex workers. For this reason we support the inclusion of representative complaint model. The introduction of a representative complaints model would enable peer sex worker organisations to bring complaints about acts of systemic discrimination on behalf of sex workers who are unable or unwilling to bring an individual complaint.

Conclusion

Sex workers experience stigma and discrimination in a number of interrelated ways. The implementation of comprehensive anti-discrimination protections will ensure past and current sex workers and their family, friends, partners and colleagues have mechanisms to redress discriminatory

⁴⁶ NSWP. (2013). Consensus statement: On Sex Work, Human Rights, and the Law. pp 11.

Scarlet Alliance, & AFAO. (1999). *Unjust and Counter-Productive: The failure of government to protect sex workers from discrimination*. Retrieved from <http://www.scarletalliance.org.au/library/unjust-counterproductive>. pp 16.

⁴⁷ *Statutes Amendment (Decriminalisation of Sex Work) Bill 2015 (SA)* Section 8 Amendment of section 85T—Criteria for establishing discrimination on other grounds.

conduct that is not reliant on the sex worker's legal status nor regulatory environments and viewpoints around the legitimacy of sex work.

The inclusion of 'profession, trade, occupation or calling', 'sex worker' and 'sex work' as main attributes alongside the broadening of the scope of the legislation to explicitly include discrimination against being perceived or suspected of being a sex worker, past and current workers and associates of sex workers provide the most comprehensive approach to ensuring sex workers in the NT are adequately protected. While the full decriminalisation of sex work is a vital element in protecting the human, health and labour rights of sex workers, the inclusion of the amendments as listed in this submission will ensure the gaps in anti-discrimination protection in other states and territories are anticipated and rectified, making the NT a leader in assuring protections against discrimination, stigma, harassment and vilification for all members of the community.

Recommendations

- Scarlet Alliance does not support the inclusion of 'lawful sexual activity' as it has proven to be too narrow and restrictive in providing inclusive anti-discrimination coverage to sex workers.
- Scarlet Alliance supports the inclusion of 'profession, trade, occupation or calling' as a main attribute alongside the additional inclusion of 'sex work' and 'sex worker' as main attributes to eliminate any uncertainty or ambiguity that those who do not identify as a sex worker or are excluded from operating in the "legal" sex industry is covered by anti-discrimination protection. Additionally the crucial inclusion of 'sex work' and 'sex worker' will provide protection regardless of legal environments or viewpoints on the legitimacy of sex work.
- Scarlet Alliance supports protection for past and current sex workers to enhance the impact of the anti-discrimination legislation and to reduce barriers to acquiring alternative employment.
- Scarlet Alliance supports protection against discrimination for associates of sex workers to ensure sex workers fundamental human rights to freedom of association and self-determination is protected.
- Scarlet Alliance supports the introduction of anti vilification laws that explicitly prohibit offensive conduct against sex workers as a protected attribute and extend to those who currently have or have previously held the protected attribute, associate with another person with the protected attribute, or are incorrectly assumed to possess the protected attribute; and
- Scarlet Alliance supports the introduction of a representative complaints model that enables a collective complaints process, for organisations to submit a complaint on behalf of individuals and for sex workers to be able to make anonymous complaints.