Australian Sex Workers Association

Phone – 02 9517 2577
Fax – 02 9517 2488
Post – PO Box 854,
Newtown NSW 2042
Street – Suite 203, 1 Erskineville Road,
Newtown NSW 2042
Email – info@scarletalliance.org.au
Web – www.scarletalliance.org.au

Victorian Law Reform Commission
GPO Box 4637
Melbourne
VIC 3001
By email: law.reform@lawreform.vic.gov.au

23 December 2020

Dear Victorian Law Reform Commission,

Re: Improving the Response of the Justice System to Sexual Offences

Thank you for the opportunity to contribute to your inquiry on improving the response of the justice system to sexual offences.

Sex workers face unique risks in relation to sexual offences and face serious and systemic barriers to reporting and prosecuting sexual violence.

The most significant barriers to reporting and prosecuting sexual offences include the existence of criminal laws, licensing laws and registration systems that regulate sex work in Victoria.

Access to redress for sexual violence will always be prohibitive for sex workers while police remain the regulators of the sex industry. In order to be effective, a response to sexual violence must include the removal of these laws and complete decriminalisation of sex work.

Victoria has already undertaken a review into how to implement the decriminalisation of all forms of sex work and we expect a government response to this review to be tabled in 2021. It is imperative that the Victorian Law Reform Commission include recommendations to decriminalise sex work as part of their report on *Improving the Response of the Justice System to Sexual Offences.* The Victorian licensing regime, which includes criminalisation, remains a key barrier to reporting sexual offences for sex workers.

In addition to legislative reform, sex work stigma and myths continue to permeate attitudes in the criminal justice system, including among prosecutors, defence lawyers, police and the judiciary, providing for a traumatising experience during the trial process, and one which deters sex workers from legal mechanisms.

Sex worker organisations have been involved in important and critical initiatives to reduce this stigma, including education and training of criminal justice system staff, however much of this work has been unfunded, particularly in Victoria where the sex worker organisation does not receive any funding. We note with disappointment that Vixen Collective was not approached directly to participate despite their essential role in this area.

In this submission we address relevant questions from your Issues Papers and make recommendations for improving the experiences of sex workers in the criminal justice system.

About us

Scarlet Alliance, Australian Sex Workers Association, is the national peak sex worker organisation in Australia formed in 1989. Our membership includes state and territory based sex worker organisations and individual sex workers. This ensures that we represent issues affecting sex workers nationwide.

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Some projects have multicultural or CALD (Culturally and Linguistically Diverse) project workers, Aboriginal and Torres Strait Islander working parties and trans and gender diverse spokespeople. Scarlet Alliance uses a multifaceted health promotion 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. Along with our membership we have extensive experience documenting the public health and human rights impacts of different models of sex industry regulation, informing sex industry regulation development, and promoting optimal health targets for sex workers.

Vixen Collective is Victoria's peer only sex worker organisation. Vixen Collective promotes the cultural, legal, human, occupational and civil rights of all sex workers, and is the recognised representative body for sex workers in Victoria.

Vixen Collective is an unfunded organisation run entirely by sex workers volunteering their time and energy. Melbourne was the first place in the world to commit funding to a sex worker organisation - the Prostitutes Collective of Victoria (PCV). The PCV were pioneers in sex worker organising. However, in 2001 the PCV was taken over by a community health service and it ceased being a peer-only organisation. Peer-only sex worker organisations do not allow the owners and operators of sex industry businesses, or ancillary staff in the sex industry (people such as managers, receptionists, drivers and cleaners) to participate.

In the absence of a funded peer organisation, Vixen Collective was founded by local sex workers in 2005 and became a member of Scarlet Alliance in 2007. Vixen Collective has continued to engage in sex worker rights, building participation of local sex workers, as well as developing links to state and national sex worker organisations.

Vixen Collective's work includes: peer education, peer support and service provision to sex workers; education initiatives with broader non-sex worker community; advocacy and lobbying; fighting stigma and discrimination; and HIV advisory.

Vixen Collective's work is informed by ongoing consultation with Victorian sex workers, as well as the broader sex worker community across Australia and internationally.

Issues Paper A: Working together to respond to sexual violence

It is essential to involve sex workers in programmatic responses to sexual violence. Sex workers have a long history of peer education, support and training in relation to sex and consent. Too often, sex worker organisations provide this training in a volunteer and unfunded capacity. Yet this is integral to improving the experiences of sex workers reporting sexual violence and proceeding through the court system. Victoria's peer-only sex worker organisation, Vixen Collective, remains entirely unfunded.

Sex workers face multiple barriers to accessing sexual assault response systems and services. Sex workers have diverse genders and sexualities, however sexual violence and family violence services often use heteronormative and cis-centric language and framing in their approach. Primary prevention and crisis support services are stuck in the logic of binary gender and struggle to keep up with terminology and inclusive practice. This isolates and alienates many trans and gender diverse people from accessing these services, including sex workers. Many projects, organisations and staff are concerned with cisgender heterosexual women and are actively hostile towards sex workers and trans

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and gender diverse people. For this reason, Victorian sex workers struggle to have non-discriminatory access to essential services, or to access them at all.

Funding for sexual violence, gendered violence and family violence services for sex workers is dominated by non-peer organisations, such as Project Respect, colloquially known among sex workers as 'Project DisRespect'. Project DisRespect is an anti-sex worker organisation that advocates for the Swedish Model of sex work criminalisation that criminalises the clients of sex workers, those who 'live off the earnings of prostitution' (including landlords, partners and children), and other third parties. In every jurisdiction that has seen the introduction of the Swedish model, sex workers have experienced exponentially higher levels of violence, homelessness and alienation from support services. This position is rooted in the idea that all 'prostitution' is rape, that 'prostituted women' are incapable of giving consent, and that those who claim to choose sex work are willfully participating in patriarchal violence, or are victims of 'false consciousness'.

The funding of anti-sex work organisations and the lack of funding for peer-only sex worker services creates systemic barriers to sex workers accessing appropriate, non-discriminatory and useful responses to sexual violence. Peer-only sex worker organisations have been recognised by Australia's National HIV Strategy, UNAIDS and UN Population Fund as the best practice model for ensuring the rights and safety of sex workers.

The Victorian government should invest in Vixen Collective as Victoria's representative sex worker peer organisation, who have specialised knowledge, engage in regular, ongoing consultation with the sex worker community. Vixen Collective holds the trust of the community, to provide support and referrals for sex workers who have experienced sexual violence as well as sex work training among criminal justice system staff (including lawyers, police, corrections and judiciary). Resourcing Vixen Collective as a peer sex worker organisation would also provide increased opportunities to develop tailored and translated resources and supports led by migrant sex workers as key peer navigators.

Vixen Collective is currently involved in coordinated work in partnership with the Bayside Sexual Offences and Child Abuse Investigation Team (SOCIT) within Victoria Police as part of the Bayside SOCIT Sex Worker Project. The aim of this pilot project is to form a close working relationship between Bayside SOCIT and the VIC peer sex worker organisation, with a common aim at increasing access for sex workers wishing to report sexual violence they have experienced. This pilot project is currently directed at sex workers within the local government areas of Port Phillip, Stonnington, Kingston, Glen Eira and Bayside.

If successful, it is hoped that this project be expanded Victoria wide. This ongoing work includes: regular consultation and communication between Bayside SOCIT and Vixen Collective; clear referral pathways to facilitate referral to police by Vixen Collective for sex workers wishing to access police; the joint creation of a tailored and targeted resource for sex workers; a direct phone service for sex workers to seek information about their options if they have experienced sexual violence; sensitivity training mechanisms; and a protocol for police to refer sex workers back to Vixen Collective. Initiatives like this have potential to dramatically improve sex workers access to and experience with the criminal justice system if they receive adequate investment and resourcing.

Issues Paper B: Key issues in the criminal justice system

Rape myths permeate the criminal justice system and in particular, myths relating to sex work and consent. Sex workers are often presumed to be in a perpetual state of consent or being incapable of

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consent, by virtue of our work. There is a history of judicial commentary from Victoria that has viewed a person's sex work as lessening the psychological impact of sexual assault and rape, presuming that rape of sex workers would be less heinous than rape of non-sex workers. Until 2016, judges could take 'prostitution' into account in determining the impact of rape during sentencing.

A poignant example of sexual violence against sex workers not being taken seriously is in the death of Tracy Connelly, which was treated substantially differently in the media to the death of non-sex worker Jill Meagher. Meagher's murderer Adrian Bailey had assaulted a number of sex workers and was out on bail at the time of this offence.

Important changes were made to the Victorian Sentencing Manual in 2016 driven by Vixen's advocacy with support by the St Kilda Legal Service. Despite this, a legacy about the 'rapeability' of sex workers persists in the criminal justice system. While we welcomed these overdue reforms to the Sentencing Manual, further work is required to address lingering attitudes about sex work and consent in the criminal justice system, particularly among the legal profession and judiciary. The law should send a clear signal that sex workers can place limits on consent, and can experience sexual assault, including at work.

We support the funding and resourcing of specialist courts for sexual violence, although recognise the need to upskill, train and equip general courts across the state with better understandings and knowledge of sexual violence, especially in relation to sex work and consent, as well as improved linkages and referral pathways for peer support.

Issues Paper C: Defining sexual offences

Defining and framing consent

Consent is defined in s36(1) of the Act to mean "free agreement." Section 36(2) sets out a list of circumstances of non-consent.

While we do not think sex work should be specifically mentioned in the *Crimes Act*, we believe that the VLRC Report should explicitly recognise that being a sex worker or taking a booking for sexual services does not, in and of itself, constitute consent to sexual activity. The VLRC should state expressly that payment (in money or kind) for sex does not, in and of itself, equate to consent. This is an important and necessary way to recognise that sex workers are not in a perpetual state of consent by virtue of our work.

Objectives and Guiding Principles

We appreciate that s37A upholds the fundamental right of every person to make decisions about their sexual behaviour and choose not to engage in sexual activity. We believe this should say "choose whether or not to engage in sexual activity" instead of being framed only in the negative.

The language of s37A should avoid binary gender terminology and include 'their' to include non-binary people.

Section 37B (Guiding Principles) requires Parliament and courts to have regard to a range of factors regarding the prevalence and characteristics of sexual offences. In relation to s37B(c) we recommend that the VLRC expressly recognise in the report that "sex workers face unique barriers to reporting sexual violence".

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We also recommend the addition of the following guiding principles in s37B, which reiterate the principles of communicative consent:

- A person's consent should not be presumed;
- Consent is an ongoing, real-time, iterative process that requires communication and checking in between the parties;
- Consent to one particular activity does not mean that there is consent to other sexual activity;
- Consent to sexual activity with one person does not mean consent to sexual activity with another person; and
- Consent at one time does not mean consent at another time.

Fraud and mistake

Section 45 sets out an offence for procuring a sexual act by fraud, while section 36(2) outlines circumstances of non-consent. These include (h) the person is mistaken about the sexual nature of the act; and (i) the person is mistaken about the identity of any other person involved in the act.

Issues of fraud and mistake arise in various ways for sex workers.

Firstly, the VLRC Report should explicitly recognise that fraudulent conduct of clients can vitiate consent, particularly in cases where they have pretended to pay or agreed to and failed to pay after the booking. In some states, sex workers have successfully been able to prosecute clients for sexual assault where they have pretended to pay sex workers, and the worker's consent to the booking was based on this misrepresentation.

The VLRC report should also clarify that the fraud provision captures instances of stealthing. Stealthing is not always taken seriously, and sex workers regularly report clients intentionally stealthily removing condoms, but having insufficient means of redress. Stealthing should be captured by the fraud provision where people have mutually negotiated a risk reduction strategy and one has, unbeknownst to the other, unilaterally removed the barrier.

Importantly, the fraud provision should also capture instances where police officers, council officers and private investigators misrepresent themselves and pose as clients for the purposes of undercover investigations and entrapment. This is discussed below as a barrier to sex workers reporting and should be explicitly mentioned in the VLRC Report.

The second issue to note is that fraud should be distinguished from puffery. Section 45 should not be interpreted so broadly as to criminalise people who, for example, do not resemble their advertising photos or misrepresent their age.

Importantly, neither s45 (fraud) nor s36(2) (mistake) should be interpreted in a way that requires people to disclose that they are intersex or trans or gender diverse before sex. Intersex people and trans and gender diverse people experience high levels of sexual coercion and violence, and yet the criminal law has been slow to recognise this. Historically, non-disclosure of trans identity has been incorrectly and inappropriately framed as 'deception' as part of the 'homosexual advance defence' and 'trans panic defence'. The frame of deception and misrepresentation is a harmful cultural

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narrative about trans and gender diverse people that has excused transphobic violence. It remains a risk that these provisions can be misused by police or transphobic former sexual partners. This should be expressly recognised in the Report.

Similarly, these provisions should not be used to require a person to disclose their HIV status. There is consensus in the public health space that HIV ought to be treated as a health issue, not a criminal issue. People are no longer required to disclose HIV status before sex at law, because of the serious consequences of stigma, discrimination and violence upon disclosure. New developments in biomedical prevention mean that people with HIV can engage in safer sex using a range of risk reduction strategies. When a person has undetectable viral load, HIV is not transmissible. Furthermore, continued STI and HIV criminalisation for sex workers in Victoria creates barriers for sex workers with HIV to report to police and access mainstream support services if they experience sexual violence. It is imperative that the mistake and fraud provisions are not used to criminalise trans and gender diverse people and people with HIV. This should be explicit in the VLRC Report.

Other laws

We further note that, while Victoria has recently introduced changes to prohibit the non-consensual dissemination of intimate images, there is no specific offence for recording an intimate image without consent in Victoria. We understand there is an offence in the *Summary Offences Act 1966* (s41B) of visually capturing a person's genital or anal region in circumstances where it would be reasonable to expect it would not be captured. However, this may not be sufficient to address non-consensual client practices of covert filming that may occur during sex work bookings.

Issues Paper D: Report to charge

Sex workers need more options for reporting sexual violence. Our consultations often indicate that sex workers want to be able to report sexual violence anonymously, without necessarily agreeing to be witness to a police prosecution. Sex workers want to be able to report without identifying themselves to police and putting ourselves at risk of surveillance, future discrimination, and/or prosecution for sex work offences. Sex workers want access to free, confidential legal advice to be able to better understand our options.

The most significant challenge to sex workers reporting sexual violence is Victoria's failed licensing system, and the role of Victoria Police as key enforcers. Licensing forces many sex workers to work outside of the legal framework, therefore effectively, or in the case of street-based sex work, explicitly, criminalising their work. This leaves those workers open to police targeting, fines and charges, and police and criminal records. For those few sex workers who are able to meet the dangerous and complex requirements to work compliantly, the licensing system subjects them to discriminatory surveillance and monitoring by police and the state. Licensing forces workers into oppositional contact with police, produces profound barriers to accessing police services, courts, and support services, and reinforces stigmatising attitudes held by the public, including individual police officers. Licensing presents a major barrier to sex workers coming forward and disclosing.

Policing presents significant barriers to sex workers reporting rape or sexual assault. Because of their role under licensing as prosecutors, police are unable to fulfil their role as protectors. One of the key barriers facing sex workers in Victoria is the use of surveillance, and covert policing and other 'entrapment' type behaviour by police, as well as the longstanding use of private investigators posing as clients by some city councils. Victoria Police use this tactic to target sex workers and/or charge sex

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workers with sex work related offences, and local councils contract private investigators to pose as clients in order to prove that certain premises are being used as unlicensed brothels and are therefore non-compliant. Brimbank council have publicly acknowledged their use of private investigators to investigate suspected unlicensed venues as recently as 2019.

The obvious answer to this problem is to decriminalise sex work in Victoria, which would dismantle the licensing system in its entirety, by removing criminal laws in addition to discriminatory planning policies, thereby removing the need for and ability of police or councils to engage in these activities. In the meantime, the practice of engaging in sex with sex workers under false pretences should be understood as fraudulent activity under the law, and recognised as a form of rape and/or sexual assault. In these instances, police and private investigators are fraudulently inducing consent to sex. The Commission should make clear in its report that this type of misrepresentation vitiates consent.

Issues Paper E: The trial process

Appropriate directions to juries are essential in sexual assault trials. We note that Victoria already has a provision in the *Jury Direction Act 2015* (Part 5) that permits Judges to give jury directions in sexual assault trials. In particular, section 46 permits Judges to give directions on consent, including (when requested by prosecution or defence) directions that debunk specific myths relating to sexual violence.

It is important to have explicit directions that address sex work specific stereotypes. We recommend that more specific directions be available to Judges to direct juries to examine their assumptions about sex work, sexuality, gender, and STIs/HIV in order to address the unique social stigmas that act as barriers to justice. These directions should be developed collaboratively in consultation with peer sex worker organisations, LGBTIQA+ organisations and HIV organisations.

Issues Paper G: Restorative and alternative justice models

We support a shift towards restorative and transformative justice models, noting that the aim ought to be not simply to restore circumstances to the status quo but to transform individual and social understandings and dynamics. We note the success of Aboriginal and Torres Strait Islander-led justice reinvestment initiatives that reinvest funds from prisons and policing back into community-controlled programming, as well as the success of circle sentencing approaches led by elders, and recommend further investment, resourcing and expansion of these initiatives.

In particular, we recommend funding for transformative justice models developed collaboratively by sex workers with peer sex worker organisations. This is an area where sex workers have much to contribute.

We also note the challenges of transformative justice approaches in relation to sexual offences, including the risks of sex workers being outed and risk that they can provide a framework for sexual offenders to learn to deploy feminist language in order to evade responsibility for their actions.

What's important is that survivors have options. The criminal trial should not be the only option. Reporting to police should not be the only option. State responses to sexual violence should not be the only option.

Importantly, for restorative and transformative justice to be effective and meaningful for sex workers, there needs to be broader structural change. Sex work must be decriminalised. Police cannot be the regulators of the sex industry. Sexual violence survivors must be able to speak out about their

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experiences. This means removing gag provisions that prohibit survivors from identifying themselves, perpetrators, and speaking publicly about their experience. Anti-discrimination protections must be introduced, not simply on the basis of lawful sexual activity but on the basis of past or present sex work. Sex worker peer organisations must be funded to devise and create our own community-controlled strategies to prevent and respond to sexual violence.

Issues Paper H: Civil law and other non-criminal responses

It is essential that sexual violence survivors are able to access civil and non-criminal mechanisms. The role of victim's compensation is an essential part of supporting victims of crime to recover costs and expenses and financial assistance to move on with their lives.

In addition, specialised sex worker legal services are crucial in equipping sex workers with knowledge and options. In some states, sex workers have successfully been able to use civil remedies to address different forms of sexual violence and fraudulent client behavior. For example, the Inner City Legal Centre in NSW support sex workers to recover debts from clients where they have deliberately reversed payments following their session or provided falsified proof of payment in advance of the session.

The Victorian Government should fund a sex work specific legal service that is staffed by peer lawyers and which can provide free and accessible legal advice, representation and information to sex workers. Vixen Collective and Scarlet Alliance should be jointly resourced to conduct a community needs analysis and to lead the establishment of the service. Such an initiative would build on Vixen Collective's existing work with community and other legal services, in particular ongoing stakeholder collaboration between Vixen Collective and St Kilda Legal Service, which includes joint resource development, sex worker senstitivity training, and the facilitation of improved referral pathways.

Recommendations

Sexual offences and jury directions

- In relation to the definition of non-consent in s36(2), the Report should expressly recognise that a person who accepts payment or trade for sexual activity is not, only by reason of that fact, to be taken to consent to that activity.
- In relation to the list of circumstances in which there is no consent (s36), the Report should expressly recognise that for the purposes of s36(2)(h) and (i) a person cannot be mistaken about a person's gender identity, sex characteristics or sexual health status.
- The Objectives in s37A should be updated to use gender neutral language and to say "whether or not to engage in" sexual activity.
- In relation to the Guiding Principles in s37B, the VLRC Report should expressly recognise that sex workers face unique barriers to reporting sexual violence.
- The Guiding Principles in s37B should be updated to include:
    - A person's consent should not be presumed;
    - Consent is an ongoing, real-time, iterative process that requires communication and checking in between the parties;

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- Consent to one particular activity does not mean that there is consent to other sexual activity;
- Consent to sexual activity with one person does not mean consent to sexual activity with another person; and
- Consent at one time does not mean consent at another time.

- The provision on fraud in s45 should go beyond misrepresentation and include both dishonesty and deception as elements.
- The VLRC Report should state that section 45 is intended to capture misrepresentations about payment for sexual services, instances of stealthing and practices of entrapment by police, councils and private investigators.
- The provision on fraud in s45 should include these qualifying statements in the Note:
  - "For the purposes of this section, a person is not required to disclose their STI/HIV status before sex."
  - "For the purposes of this section, a person is not required to disclose their sex or gender identity, history, status or experience before sex."
- The VLRC report should include an express statement that s45 should be interpreted to capture (a) misrepresentations from clients about payment for sexual services (b) instances of stealthing and (c) practices of entrapment by police officers and private investigators.
- The VLRC report should include an express statement that fraud should be distinguished from puffery.
- Section 46 of the Jury Directions Act 2015 should be updated to include the following directions:
  - "People of all gender identities, histories and experiences, people of all variations in sex characteristics and people of all sexualities experience sexual assault, and a person's representations about their gender identity, expression, history and experience are their own, regardless of whether they have been legally or medically affirmed."
  - "Safer sex is a mutual and shared responsibility, and new biomedical prevention technologies have changed the meanings of what constitutes safer sex."
  - "Sex workers can experience sexual assault, both within and outside the workplace, and the fact that a person has accepted payment or trade for sexual activity is not, only by reason of that fact, to be taken as consent to that activity."

<u>Policy and practice</u>

- Victoria must decriminalise sex work in order for sex workers to access justice. This includes the removal of licensing and registration laws, and includes the decriminalisation of street-based sex work, migrant sex work and sex workers with HIV.
- Victoria must introduce specific anti-discrimination protections for sex workers.

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- Funding for a specialised sex worker legal service with peer staff to provide free and accessible legal advice for sex workers.
- Funding of Vixen Collective as the state-based peer sex worker organisation to develop community-based responses to sexual violence, including specialised and culturally relevant transformative justice pilot projects for sex workers.
- Funding of Vixen Collective to deliver sex worker sensitivity training to lawyers, police, corrections, judiciary and other criminal justice system staff.
- Justice reinvestment to divert resources from policing and carceral systems to community-owned, community-controlled, community-developed transformative justice responses and prevention programs.

We recommend that the Victorian Law Reform Commission consult directly with Scarlet Alliance, Vixen Collective and peer-led HIV, intersex and LGBTQA+ organisations in drafting the wording of these sections.

To discuss our submission in further detail, please do not hesitate to contact Scarlet Alliance on (02) 9517 2577 or ceo@scarletalliance.org.au or Vixen Collective on 0412 369 669 or dylan@vixencollective.org

Sincerely,



Jules Kim

Chief Executive Officer

Scarlet Alliance, Australian Sex Workers Association

Dylan O'Hara

Advocacy Coordinator

Vixen Collective

Peaches Smith

Community Engagement Coordinator

Vixen Collective