



2 March 2022

Dear Victorian Department of Justice and Community Safety,

**Re: Responding to recommendation 50 and 51 of the Victorian Law Reform Commission's Report into Improving the Justice System Response to Sexual Offences**

Thank you for the opportunity to provide feedback on recommendations 50 and 51 of the Victorian Law Reform Commission's Report into Improving the Justice System Response to Sexual Offences (the Report).

Sex workers face unique risks in relation to sexual offences and face serious and systemic barriers to reporting and prosecuting sexual violence. These barriers include social and institutional attitudes towards sex workers, a lack of clarity in relation to the implementation of the legislative framework decriminalising sex work, and the ongoing criminalisation of some forms of sex work in Victoria.

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

Despite the context of 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, creating a traumatising environment during engagement with the system, which deters sex workers from accessing legal remedies.

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 Vixen has only recently begun to receive funding. We note with frustration and concern that Vixen was not approached directly by the VLRC to participate despite their essential role in this area as Victoria's representative body for sex workers, and that our joint submission was not considered by the Victorian Law Reform Commission's Report into Improving the Response of the Justice System to Sexual Offences. While the Report does discuss sex work in some areas, the exclusion of the Vixen and Scarlet Alliance submission means the report did not consider or incorporate the voices and needs of Victorian sex workers.

In this document we address the questions outlined in your consultation document in relation to recommendations 50 and 51 of the Report, and provide broader comment on improving the experiences of sex workers in the criminal justice system.

**About us**

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

Until the beginning of 2022, Vixen was 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

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 this absence of a funded peer organisation, Vixen was founded by local sex workers in 2005 and became a member of Scarlet Alliance in 2007. In this context, Vixen has provided advocacy in areas relating sex worker rights, building participation and networks of local sex workers, developing links to state and national sex worker organisations, as well as building relationships with government, culminating in the successful passage of the Sex Work Decriminalisation Act 2022 (Vic). As of 2022, Vixen is receiving funding via auspicing by Scarlet Alliance to support the implementation of decriminalisation and provide vital outreach and support to our community.

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

**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.

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.

## **Responses to VLRC Recommendations 50 and 51**

### **Recommendation 50 - Strengthening the definition of consent**

#### **Reforming the definition of consent**

##### **1. *How could affirmative consent principles be reflected in section 36 of the Crimes Act?***

We believe that affirmative consent principles should be articulated by defining consent in section 36(1) of the Crimes Act as "free and voluntary agreement," and with interpretation assisted by a set of 'guiding principles of consent' additional to the guiding principles contained in section 37B of the Crimes Act - see our response to question 3 below.

We believe that this most clearly captures the spirit of affirmative consent as an ongoing, real-time, iterative process that requires communication between the parties involved, while providing clear guidance for interpretation.

##### **2. *Would the addition of 'voluntary' capture any circumstances or conduct that 'free' would not?***

We believe that use of the word 'voluntary' most clearly and accurately captures that consent arises from an active choice in the circumstances and cannot be inferred, for instance, by a body's physiological response. For most people, it is a more tangible and understandable word than 'free.'

##### **3. *Do you think the definition should include a list of universal statements or should there***

***be a separate list of ‘guiding principles of consent’ that does not form part of the definition? Or both (as in the NSW Act)? What concepts should or could be captured in either?***

We support the development of a separate list of ‘guiding principles of consent’ to be read alongside the guiding principles outlined in section 37B. This approach minimises the potential for confusion and contradiction within the definition. We recommend the addition of the following guiding principles of consent:

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

***4. How are the guiding principles in section 37B of the Crimes Act used in practice in terms of: making decisions about charging; proceeding with a prosecution; applying and interpreting sexual offences; sentencing?***

Section 37B requires Parliament and courts to have regard to a range of factors regarding the prevalence and characteristics of sexual offences. We recommend that section 37B(c) be amended to expressly recognise that “sex workers face unique barriers to reporting sexual violence.”

We also note that the current section 37A 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. Additionally, the language of the current section 37A should be updated to avoid binary gender terminology and include ‘their’ to include non-binary people.

We also believe that the guiding principles should explicitly recognise that being a sex worker or that receiving payment (in money or kind) for a sexual service does not, in and of itself, constitute consent to sexual activity. 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.

**Reforming the circumstances where consent is not given in section 36(2)**

***5) Is there a need for legislation to provide any other circumstances where consent is considered not to be given under section 36(2)? Either the circumstances suggested above or any others?***

We believe that substantial reform is required to support a legislative framework and criminal justice system which upholds the rights of sex workers to place limits on consent, and recognises that sex workers can experience sexual assault, including at work.

As mentioned in our response to question 4 above, we recommend the inclusion of an explicit statement that a sex worker accepting money for a booking does not imply consent to any sexual activity as part of the guiding principles in section 37B. We note that it was not until 2016 that the Victorian Sentencing Manual, driven by Vixen’s advocacy with support from the St Kilda Legal Service, was amended to reflect that a victim-survivor’s status as a sex worker was not considered to be a mitigating factor during sentencing. Despite this, a legacy about the ‘rapeability’ of sex workers persists in the criminal justice system and wider society including media. While we welcomed these overdue reforms to the Sentencing Manual, significant 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.

However, it is our position that further expanding the non-exhaustive list of circumstances where consent is deemed not to be given in section 36(2) is an ineffective and unwieldy approach which ultimately undermines the intent of reform to define consent as active and affirmative, with no evidence base that this will improve the access of sex workers or any other victim-survivor to remedies within the criminal justice system.

The most effective way to uphold the right of sex workers to not consent to sexual activity would be achieved by expanding the guiding principles in section 37B and dealing with non-payment, entrapment and 'stealth' offenses by clarifying and/or expanding the provisions in section 45 (procuring sexual act by fraud). The rationale for this position are discussed in our response to question 7 and under the heading Recommendation 51 - Making clear 'stealth' is non-consensual sexual activity below.

We draw attention to the harmful attitudes perpetuated by non-peer funded organisations providing 'services' to sex workers, such as Project Respect, colloquially known among sex workers as 'Project DisRespect'. Project DisRespect is an anti-sex worker organisation that has long advocated 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. 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.'

Just as we advocate that sex workers can choose not to consent to sexual activity, we advocate that sex workers *can* voluntarily consent to sexual activity, and believe that expanding section 36(2) risks the creation of confusing scenarios where sex workers' right to consent may be undermined.

**6) *Are the existing consent vitiating circumstances in section 36(2) of the Crimes Act being interpreted/applied in the manner that is intended? If not, how could these be amended to more clearly reflect their intent?***

We raise concerns in relation to the current provisions that consent does not occur when a person is mistaken about the sexual nature of the act (section 36(2)(h)) or a person is mistaken about the identity of any other person involved in the act (section 36(2)(i)).

These must be clarified to ensure that they cannot 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, representations or 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 narrative about trans and gender diverse people that has enabled transphobic violence. It remains a risk that these provisions can be misused by police or transphobic former sexual partners.

Similarly, these provisions must not be used to require a person to disclose or represent their HIV status or any other information in relation to their sexual health. 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. It is imperative that these provisions are not used to criminalise trans and gender diverse people and people living with HIV.

**7) *Fraud: In what circumstances is section 45 of the Crimes Act currently used?***

Barriers to reporting offenses under the failed licensing model have led to a paucity of definitive evidence showing whether this section is fit for purpose in dealing with fraud against sex workers in the course of our work, however community consultation and experience strongly indicates that S45 is not currently broadly accessible to sex workers.

Sex workers may experience conduct by clients where they have pretended to pay or agreed to and

failed to pay after the booking, or instances where police officers, council officers and private investigators misrepresent themselves and pose as clients for the purposes of undercover investigations and entrapment. Until the commencement of the Sex Work Decriminalisation Act 2021, and as an ongoing reality for sex workers excluded by that Act, sex workers are unlikely to report these types of offenses, with an even smaller likelihood that these complaints will be handled sensitively or led to a resolution within the criminal justice system.

Among peer networks, sex workers also report they have insufficient means of redress through legal remedies in instances of stealthing, non payment by clients, or covert policing/private investigation tactics involving procuring sex via fraud. If a sex worker and client have mutually negotiated condom use, and the client unilaterally removes the condom unbeknownst to the sex worker and continues the sexual activity, this behaviour clearly constitutes an offence within the scope of section 45, and the sex worker should be entitled to make a complaint pursuant to this section if they choose. This should also be the case where a sex worker has consented to sex on the basis of payment and that payment is reversed, falsified or withheld.

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.

**8) *If a consent vitiating circumstance surrounding the concept of fraud were included in section 36(2), how should this be worded to be consistent with other provisions (i.e. false and misleading?)***

As discussed in our response to question 5 above, we believe that expanding the list of consent vitiating circumstances in section 36(2) is unwieldy and confusing, undermines the spirit of the proposed reform and in the case of the concept of fraud, may create further barriers to sex workers accessing legal redress for these types of offenses.

As outlined in our responses to questions 5 and 7 above, sex workers are both specifically vulnerable to fraud related offences *and* have historically been treated by the criminal justice system as having a lower threshold of sexual consent. Until there is evidence that the attitudes explicit in the previous Sentencing Guidelines no longer influence the decision-making of police, lawyers, the judiciary and the wider community, we are sceptical that sex workers will be able to successfully rely on a provision where their consent to sexual activity is voided if they experience fraud in the course of their work. This points to the explicit need for sensitivity training for police and judiciary by Vixen to ensure attitudes to sexual violence experienced by sex workers are treated seriously and fairly.

Irrespective of whether obtaining sex by fraud remains a separate offence under section 45 or is rolled into a consent vitiating circumstance under section 36(2) it is essential that it does not mirror the approach taken in NSW. The scope must be clarified in order to ensure that the provision cannot be weaponised against a person who makes any representation about their gender identity or sexuality, fails to disclose or misrepresents their BBV or STI status.

There should also be a clear distinction between consent vitiating circumstances and puffery or white lies (for example, age or body description in sex work advertising).

**9) *Should the legislation include exceptions, such as in NSW?***

The legislation must include clear exceptions to ensure that PWHIV and trans and gender diverse people are not criminalised by the consent legislation reforms. Additionally these reforms must not re-criminalise consensual non condom use, accidental condom breakage and STI & BBV status.

More broadly, an adequate response to violation of sexual consent, including in the context of violence, especially family violence, can only be achieved through a whole of justice system reform, not merely through legislative changes, implementing an evidence-based and nuanced understanding of the impact of coercive control on victim-survivors, combined with access to appropriate services for all victim-survivors, including sex workers, people of colour, migrants and refugees, disabled

people, LGBTQIA+ people, people living with HIV and people who use drugs.

### **A belief will not be reasonable if a person has not ‘taken steps’**

As outlined in our above responses, we believe that an affirmative consent model is best implemented via option 3, by expanding the guiding principles in section 37B to inform interpretation of both the definition of consent and the meaning of “reasonable steps,” in a particular set of circumstances, acknowledging the contextual nature of sexual interactions, protecting the rights of sex workers and other adults to both consent and not consent to sexual activity.

### **Recommendation 51 - Making clear ‘stealthing’ is non-consensual sexual activity**

As noted in our responses to the questions relating to recommendation 50 above, sex workers, like other members of the Victorian public, report experiencing ‘stealthing’ type behaviours and also experience barriers to both reporting and prosecuting these behaviours within the criminal justice system. Legislative reform targeting these types of offences must meet the needs of the populations it purports to protect, and avoid further stigmatisation and re-criminalisation of marginalised and over-policed communities.

The legacy of Victoria’s failed licencing model, combined with the ongoing and pervasive stigma and discrimination experienced by sex workers across Australia, is that sex workers who are victim-survivors of these types of offences are routinely disbelieved, unsupported and traumatised by the criminal justice system. Due to this injustice, there is inadequate evidence that the creation of provisions equating ‘stealthing’ behaviour with rape or sexual assault would lead to improved access to criminal justice remedies for sex worker victim-survivors.

The high levels of stigma, harmful myths about sex workers and consent, and structural discrimination experienced by sex worker victim-survivors in the justice system means the higher burden of proof required when pursuing a rape or sexual assault conviction could constitute a barrier to both reporting and to a just and fair outcome in the court system. For this reason, we strongly support ensuring that stealthing is clearly positioned as an offence pursuant to section 45 of the Crimes Act 1958.

However, if the government chooses to include stealthing as a circumstance vitiating consent under section 36(2) rather than an offence pursuant to section 45, Vixen and Scarlet Alliance strongly recommend a **narrow approach**.

**A stealthing offence should capture condoms only, place the burden of responsibility on the condom wearer only, and refer to deliberate misrepresentation or falsification of condom use, *non-consensual* removal of the condom, or tampering with the condom, before or during sex.**

It should be made clear that a person does not freely agree to a sexual act with another person if the other person without consent or intentionally misrepresents their use of the condom by

- (a) falsifying use of the condom; or
- (b) tampering with the condom; or
- (c) removing the condom— before or during the sexual intercourse.

Our recommendations are outlined in more detail in response to the questions below.

**13. Device: What type of device should be captured?**

Stealthing should be defined narrowly to capture condoms only.

“Device” should be limited to what is commonly understood to be connected to the behaviour of “stealthing,” and address the harms arising from this behaviour – i.e. that it is an action involving deliberate deception or misrepresentation in relation to the removal/non-consensual non-use of a condom, and/or non-consensual removal of a condom and/or tampering with a condom.

**14. Should the new circumstance extend beyond the removal or non-use of a condom and include other STI-prevention and contraceptive devices as recommended by the VLRC? If so, what types of devices should or should not be captured?**

Extending the definition of ‘stealthing’ beyond the removal of a condom and/or deception relating to its removal/non-use fails to address the context and harm of stealthing behaviour, and risks creating issues of both interpretation and community understanding and acceptance.

As stated, sex workers and other members of the Victorian community have raised stealthing as a specific issue which is narrowly time bound and relates specifically to the non-consensual removal and/or misrepresentation of condom use, during sex. The broadness of scope of both the middle and broad approaches proposed in the consultation paper raises considerable concern, including potential unintended consequences for groups including sex workers.

For some people, non disclosure or misrepresentation of use of contraception may occur in a family violence context, or for other valid reasons in other settings. This should not be criminalised as sexual assault or rape. Broader issues of sexual or reproductive health should not be conflated with issues concerning consent and sexual violence.

**15. What type of behaviour should be captured? E.g. non-use, removal, disruption or misrepresentation as to use?**

Stealthing has clear elements - 1) a condom wearer deliberately removing or tampering with a condom without the consent of the other party, and/or 2) that person engaging in deception or misrepresentation or falsification in relation to the condom being removed or not present.

This may occur either in scenarios where an individual pretends to put on a condom prior to sex commencing, or where an individual intentionally removes the condom during sex without informing or seeking consent of the other person, and then continues the sexual activity either by verbal misrepresentation that the condom is still on, and/or by positioning themselves in such a way that the other person is unable to verify whether a condom is present.

It is imperative that any provision codifying stealthing offences actually addresses the harm created by the offence, and provides remedy to victim-survivors of these offences, without generating unintended consequences of re-criminalising and re-stigmatising marginalised communities. Inherent in the right to consent to sexual activity on the condition of condom use is the right of adults to consensually engage in sexual activities without the use of condoms, regardless of, and without obligation to disclose, their occupation, STI and BBV status, sexuality or gender identity.

For this reason, we recommend the provision clearly outlines that the behaviour involves both an intentional act of removal and/or tampering *and/or* a deliberate misrepresentation or deception on the part of the condom wearer in order for the offence to occur.

***16. Is timing of the behaviour relevant? I.e. should the new circumstance only apply to behaviour 'immediately before' and 'during' the act?***

The timing of the behaviour is relevant to the offence and must be captured by the provision. The provision must be limited to removal and deception occurring within or immediately before the context of an instance of sexual activity, both to satisfy the elements of the offence, and also to uphold and reinforce the broader principle that consent is situation-specific and continuously negotiated.

***17. How should any reform consider the broader context in which this conduct occurs (such as in a sex work context, a form of reproductive coercion or particular issues in the LGBTIQA+ community)?***

We believe that the VLRC's approach to reform outlined in recommendation 51 inadequately addresses the harms of both stealthing *and* reproductive coercion by attempting to equate two very different categories of offences. This is an example of the broader failure of criminal justice reform to address social harms due to discomfort in engaging with issues relating to sexual behaviour. Stealthing offences occur in the context of sexual activity between adults engaging in sex with a partner with whom they do not wish to consent to having sex with in the absence of a condom, for example a sex worker and their client, or a casual sexual encounter. Reproductive coercion generally occurs in the context of intimate relationships, usually in conjunction with other ongoing behaviours of violence, sexual violence and coercive control. The equation of these two harms shows both a lack of sensitivity to both demographics of victim-survivors, and also decreases the likelihood that the resulting legislation will successfully respond to either harm.

***18. Who should be captured? E.g. only the person using the device?***

The offence should capture only the person wearing the condom. It is vital the onus be placed only on the perpetrator, not on both parties. The offence should capture only the conduct of non-consensual removal of a condom and/or misrepresentation of use of a condom, and/or deliberate tampering, in the context of a specific instance of sexual activity, and only the wearer should be captured by the offence.

The stated intention of these reforms is to provide greater access to the justice system for victim/survivors who experience violation of consent via stealthing. Broadening the scope beyond the person using the device could risk the criminalisation of consensual non-use of condoms, and dilutes the specific purpose of consent reforms.

In the context of sex work specifically, the Victorian Government has recognised the harmful and discriminatory nature of mandatory condom use for sex workers by repealing Section 18A of the Sex Work Act 1994, as part of the first tranche of implementation of the Sex Work Decriminalisation Bill 2021. Mandatory condom use in legislation is not based in evidence, creates barriers to safer sex and harm reduction strategies, criminalises sex workers, and perpetuates stigma and discrimination. It is essential that any reforms relating to stealthing and consent do not risk inadvertently recreating this requirement for sex workers, or for any other person.

## **Whole of Victorian Government strategy to address sexual violence, abuse and harm**

In our joint submission to the VLRC, we identified a number of key areas to address to support sex workers' access to justice, and to address the unique intersections of stigma, discrimination and criminalisation faced by sex workers who are victim-survivors of sexual and family violence. We summarise these below, and look forward to ongoing discussion and collaboration between our organisations and DJCS as the strategy continues to be developed, including from a primary-prevention perspective.

### **Crucial role of peer sex worker organisations**

As stated in our 2020 submission, it is essential to involve sex workers in all levels of programmatic responses to sexual violence, via our recognised peer organisations. 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/or unfunded capacity. Yet this is integral to improving the experiences of sex workers reporting sexual violence and proceeding through the court system.

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 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 has been 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 sexual/family/gendered violence 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 continue to invest in Vixen as Victoria's representative sex worker peer organisation. Vixen has specialised knowledge, and engages in regular, ongoing consultation with the sex worker community. Vixen 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).

Vixen has continued partnership work 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 has been 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.

It is hoped that this project or a similar one could be further developed and expanded Victoria wide. This ongoing work includes: regular consultation and communication between Bayside SOCIT and Vixen; clear referral pathways to facilitate referral to police by Vixen for sex workers wishing to access police; 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. 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 and are co-designed with Vixen and Scarlet Alliance.

### **Reporting sexual violence**

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, which includes criminalisation, 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. While we welcome the passage of the Sex Work Decriminalisation Bill 2021 (the Bill), many elements of the licensing system will remain in place until late 2023, and its impacts on stigma and discrimination will not evaporate overnight. Additionally, the Bill retains criminalisation of street based sex work in certain places and at certain times. Until this is rectified, those workers will continue to face heightened stigma and discrimination and ongoing barriers to justice.

Policing presents significant barriers to sex workers reporting rape or sexual assault. Because of their role under licensing as prosecutors, police have been 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 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 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, LGBTIQ+ organisations and HIV organisations.

### **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 fully decriminalised. Police cannot be the regulators of the sex industry. Sexual violence survivors must be able to speak out about their 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.

### **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 in formal partnership with Vixen, that is staffed by peer lawyers and which can provide free and accessible legal advice, representation and information to sex workers,. Vixen 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's existing work with community and other legal services, in particular ongoing stakeholder collaboration between Vixen and St Kilda Legal Service, which includes joint resource development, sex work sensitivity training delivered by Vixen, and the facilitation of improved referral pathways.

### **Other legal reforms**

As stated in our 2020 submission, while Victoria has 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 is not sufficient to address non-consensual client practices of covert filming that may occur during sex work bookings. In instances where this occurs, it is important that sex workers have avenues within the justice system to address this

As noted above, it is also essential that Victoria fully decriminalises all forms of sex work, and extends decriminalisation to the whole sex worker community, notably street based sex workers. While any criminalisation and police regulation of sex work remains, those sex workers will continue to face the same barriers to reporting and to accessing the justice system, and key support services.

To discuss our submission in further detail, please do not hesitate to contact Scarlet Alliance [REDACTED]

Sincerely,



Dylan O'Hara  
**Acting Manager**  
Vixen



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