Australian Sex Workers Association

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Women's Safety and Justice Team
Department of Justice and Attorney-General
50 Ann Street
Brisbane QLD 4000

By email: WSJ-Taskforce-Legislation@justice.qld.gov.au

To the Women's Safety and Justice Team,

Re: Consultation - Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023

Thank you for the opportunity to provide feedback on the draft Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023.

Scarlet Alliance, Australian Sex Workers Association is the national peak body for sex workers and sex worker organisations in Australia. Through our objectives, policies and programs, we aim to achieve equality, social, legal, political, cultural and economic justice for past and present workers in the sex industry. Our membership includes state and territory-based and national sex worker organisations and individual sex workers across unceded Australia. Through our work and that of our member organisations and projects, we have the highest level of contact with sex workers and access to sex industry workplaces throughout Australia of any agency. Scarlet Alliance represents sex workers on a number of government and non-government committees and advisory mechanisms.

Sex workers have been key stakeholders during the creation of the *Hear Her Voice* reports, and have outlined some of the kinds of offending we experience and the barriers we face when attempting to access the criminal justice system. We hope that this participation will lead to reforms in legislation, policy and police and judicial procedures reflecting a deeper understanding of sexual and gender-based offending, and the creation of a criminal justice system that can adequately respond to the needs of victims/survivors from all marginalised communities.

In addition to our submission, Scarlet Alliance endorses the submission of Respect Inc, Queensland's peer-based sex worker organisation.

Yours sincerely,

Mish Pony
Chief Executive Officer
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Executive summary

Scarlet Alliance welcomes the proposed Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld) as a step towards ending violence towards sex workers in Queensland, and improving our access to criminal justice remedies. We recognise the hard work, consultation, long discussions, meetings and drafting that has taken place to get to this point. On behalf of the sex worker community, Scarlet Alliance would like to extend many thanks to the Women's Safety and Justice (WSJ) Taskforce and the WJS Team for including the voices of sex workers in this process. We see the needs of sex workers represented in the draft Bill and hope the dedicated involvement of sex workers and sex worker organisations has added value.

Our submission outlines concerns in the framing and wording of the draft Bill which may have unforeseen impacts on sex workers and other marginalised communities. The generosity of stakeholders who participated in the *Hear Her Voice* consultations must be reciprocated by legislation that when scrutinised in detail and put to the test will meet the needs of survivors and affected communities and facilitates equitable access to justice for those most marginalised. We hope that this feedback will assist in ensuring that these legislative reforms are fit-for-purpose.

Circumstances in which there is no consent - fraudulent inducement

While Scarlet Alliance is highly supportive of the insertion of s 348AA outlining circumstances where there is no consent, we are concerned that without further guidance, the proposed wording of s 348AA(1)(l), that there is no consent when 'the person participates in the act because of a fraudulent inducement', may not adequately capture scenarios experienced by sex workers in the course of their work, and may over-capture conduct that should not be subject to the criminal law.

As noted in ongoing stakeholder consultation on the proposed bill, Scarlet Alliance, Respect Inc and DecrimQLD have made clear that any fraud provision in sexual consent laws must **expressly state that non-payment of a sex worker is a circumstance where there is no consent,** in order to ensure that sex workers can access the criminal justice system in these scenarios.

The Women's Safety and Justice Taskforce (WSJ Team, the Taskforce) clearly heard the barriers faced by sex workers when reporting sexual violence and other crimes against them.[1] The Taskforce also noted that '[t]he majority of sex workers and advocates consulted by the Taskforce were firmly of the view that nonpayment constitutes rape or sexual assault,'[2] however stated that it was not possible to make a recommendation that non-payment of sex workers be treated as a circumstance where these is no consent, as this matter was being dealt with by the Queensland Law Reform Commission (QLRC) Inquiry into the decriminalisation of sex work in Queensland.

We rejected this claim at the time, noting that there was nothing about the decriminalisation or QLRC process hindering the Taskforce from making this kind of recommendation. Further, the QLRC Report *A decriminalised sex-work industry for Queensland* did not deal with this issue appropriately, inaccurately stating that this type of offending is adequately addressed by existing legislation, suggesting that non-payment of a sex worker as a circumstance where there is no consent 'may be at odds with community understanding'[3] of sexual offences, and that 'in less serious cases, [a sex worker should pursue this offending] as a civil debt recovery matter.'[4] These comments demonstrate an offensive, intentional and ongoing attempt to minimise sexual violence against sex workers, and minimise the centrality of consent to our work.

We echo the words of the Honourable Justice Hilary Penfold PSM QC in the Supreme Court of the Australian Capital Territory:[5]

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

We also reject claims made in both the QLRC Report[6] and in ongoing consultations that creating explicit provisions targeting non-payment for sexual services and removal of/interference with condoms (discussed in the Stealthing section below) necessarily involves re-criminalising people living with STIs and BBVs, or creates an obligation for trans and gender diverse people to disclose their sex assigned at birth, so long as these provisions are properly drafted.

The current proposed wording of consent being voided if a 'person participates in the act because of a fraudulent inducement' is vague and risks over-capture of already marginalised communities described above. To remedy this, we suggest the insertion of interpretive guidance, similar to the

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[1] Women's Safety and Justice Taskforce, *Hear Her Voice* (Report No 2, July 2022) vol 1, 72, 95 and 153.
[2] Ibid 220.
[3] Queensland Law Reform Commission (QLRC), *A decriminalised sex-work industry for Queensland* (Report No 80, March 2023) 189.
[4] Ibid.
[5] *R v Livas* [2015] ACTSC 50, [34].
[6] Queensland Law Reform Commission (QLRC), *A decriminalised sex-work industry for Queensland* (Report No 80, March 2023) 189.

'examples of harm' below s 348AA(1)(f) to assist in clarifying this section. We propose inserting *'examples of fraudulent inducement'* below s348AA(1)(l), with one example being 'if a sex worker participates in the act because of a promise of payment or reward, and that payment or reward is not made or withdrawn.'

The wording of s 36AA(1)(m) of the *Crimes Act 1958* (Vic) states that there is no consent when 'the act occurs in the provision of commercial sexual services and the person engages in the act because of a false or misleading representation that the person will be paid.' This wording may also be of assistance when drafting interpretive guidance for s 348AA(1)(l).

We also recommend that the proposed carve outs to fraudulent misrepresentation in s 348AA(5) be expanded to state that fraudulent inducement does not include a 'income, *HIV and STIs, age, gender, ethnicity*, wealth or feelings.' We would also recommend that these carve outs also be reinforced in jury directions in these cases.

Recommendation 1: That interpretive guidance be added to the proposed s 348AA(1)(l) to state that examples of fraudulent inducement include 'if a sex worker participates in the act because of a promise of payment or reward, and that payment or reward is not made or withdrawn.'

Recommendation 2: That the carve outs to fraudulent inducement in the proposed s 348AA(5) be expanded to include 'income, *HIV and STIs, age, gender, ethnicity*, wealth or feelings.'

Recommendation 3: That the expanded carve outs for fraudulent inducement of 'income, *HIV and STIs, age, gender, ethnicity*, wealth or feelings' be reinforced in jury directions in these cases.

Stealthing - non-consensual condom removal

While successful prosecutions for non-consensual condom removal during sexual activity (commonly referred to as 'stealthing') in western criminal justice systems have been documented since 2017,[7] this kind of offending has impacted sex workers for much longer. The Queensland sex worker community welcomed the recommendation of the Women's Safety and Justice Taskforce in *Hear Her Voice* that the Criminal Code should be amended to include:[8]

> *a legislative example for the provision…that a person who consents to sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.*

We commend the inclusion of a stealthing provision in the draft Bill, and recognise the intention apparent in s 348AA(2) which states that a person:

> *does not consent to an act with another person if the person says or does anything to communicate to the other person that a condom must be used for that act and the other person intentionally does any of the following things before or during the act—*
>
> *(a) does not use a condom;*
>
> *(b) tampers with the condom;*

[7] 'Swiss court upholds sentence in "stealthing" condom case', *Reuters* (online, 10 May 2017).
[8] *Hear Her Voice* (n 1) 17.

(c) removes the condom.

This wording is taken from amendments to NSW legislation in 2021. In the opinion of Scarlet Alliance, the wording of the more recent Victorian amendments is an improvement on the NSW approach and would be more workable for sex workers seeking justice for this crime in Queensland:

> ***36AA Circumstances in which a person does not consent:***[9]
> *(1) Circumstances in which a person does not consent to an act include, but are not limited to, the following —...*
> *(o) the person engages in the act on the basis that a condom is used and either—*
> *(i) before or during the act, any other person involved in the act intentionally removes the condom or tampers with the condom; or*
> *(ii) the person who was to use the condom intentionally does not use it;*

Recommendation 4: Scarlet Alliance supports the intention and efforts to include 'stealthing' (non-consensual condom removal) within the reforms of this draft Bill, and proposes that the WSJ Team consider incorporating the wording from the Victorian legislation in the Bill.

Non-verbal implementation of safer sex protection

Condom use as a prerequisite to consent to sexual activity is not always communicated verbally. Sexual partners use body language and gestures as an agreement to safer sex practice. For deaf, non-verbal, or language disparate sexual partners, the act of putting a condom on forms the agreement and expectation that it must be worn. The act of putting a condom on a sexual partner, or viewing a sexual partner putting the condom on themselves, demonstrates expectation that the condom will not be removed or tampered with. This expectation and agreement exists regardless of whether a person verbalises that a condom must be used.

It is important that the legislation penalises the act of removing or tampering with a condom if the condom was put on or viewed to be put on. Our reading of the current wording of the draft Bill is that this could be covered in the phrase 'does anything to communicate.' If this wording is to continue into the next phase of the draft Bill we would ask that expert opinion be sought to confirm that putting a condom on a person, or witnessing a person putting on a condom, would satisfy doing 'anything to communicate' that a condom must be used.

Recommendation 5: If the proposed legislation is to include the words 'anything to communicate' in relation to condom use, Scarlet Alliance recommend the WSJ Team seek expert advice to confirm such wording in s 348AA(2) would include putting a condom on a person, or witnessing a person putting on a condom.

Failure to report reasonable excuse

Scarlet Alliance understands that this amendment intends to address how the reasonable excuse for failing to report child sexual abuse should be applied, and who it applies to. The clause would mean

[9] *Crimes Act 1958* (Vic), s 36AA.

it is only *medical practitioners, psychologists, nurses, social workers and counsellors* who are not compelled to report *if* the person is no longer in harm, and/or when the survivor is aged 16 or older. Concerns with the drafting include:

- That a young person accessing community-based services outside of the proposed list of exempted professions is at risk of being dragged into a criminal justice system complaint, even if that is not what the young person wants at that time. Many young survivors involved with 'youth justice' systems do not trust the police to protect them, and/or otherwise do not want to engage with the criminal justice process.
- Aboriginal health workers, disability advocates, youth workers, AOD workers, sex worker peer educators and other service providers are not exempt and therefore would be committing an offence if they did not report, even if that is not the wishes of the young person. These frontline workers are often a young-person's first point of contact with support services, and are likely to receive disclosures from young people.
- Reducing the scope of the failure to report excuse does not reduce the barriers of mistrust generated by the provision, and is likely to stop young people from accessing services that are there to assist them. This seems counterproductive to the social inclusion of young people.
- The focus should be on enforcing reporting from the institutions most prone to excusing themselves from reporting: churches, scouts, boys homes and non-secular services. Community-run services should not be caught up in the amendment.
- There are relevant Royal Commission recommendations that could be taken into account to improve the drafting.

Scarlet Alliance does not have a recommendation in relation to this clause, we urge the Women's Safety and Justice Team to listen to the experts across the community sector when redrafting.

Coercive control offences - age of perpetrator

Scarlet Alliance encourages the Women's Safety and Justice Team to consider the negative impacts of extending coercive control offences (division 2 of the draft Bill) to under 18 year olds, particularly given the length of sentencing (14 years), the fact that this is a new offence, and the long-standing issues of bias against your people within the criminal justice system.

Scarlet Alliance does not support children and young people under 18 being able to be charged with coercive control offences. Systemic responses to children and young people who use coercive control, abuse or violence should be different to systemic responses designed for adults. Funding for community-controlled programs is a more appropriate response.

Aboriginal and Torres Strait Islander young people already experience over-incarceration and disproportionate discrimination within the (often complex) policing of domestic and family violence. Adding young people aged 16-18 as a potential target for coercive control policing may only add to the racialised and gendered policing issues in Queensland.

Scarlet Alliance does not have a recommendation in relation to this clause in the bill, we defer to the knowledge and advocacy of relevant youth and Aboriginal and Torres Strait Islander organisations.

Cognitive impairment

Scarlet Alliance supports the advocacy being conducted by Queensland disability organisations for a (much overdue) review of the impairment of mind definition and criminal code application[10] and their demand that s 216 should be fully repealed. Given this will not occur prior to the passing of the draft Bill, Scarlet Alliance urges the Women's Safety and Justice Team to consult with disability organisations on an ongoing basis prior to finalisation of the proposed new laws.

Sexual reputation evidence

Sex workers have long experienced prejudice and discrimination in the justice system due to the stigma of being sexually active and working in a marginalised job that is also criminalised. As Qld moves into decriminalisation, Scarlet Alliance welcomes the sections of the draft Bill pertaining to prohibition on questions and evidence concerning sexual reputation and history:

> ***103ZG Prohibition on questions and evidence concerning sexual reputation of complainant***
> *The court must not allow any questions as to, or admit any evidence of, the sexual reputation of the complainant.*
> ***103ZH Restriction on questions and evidence concerning complainant's sexual activities***
> *The complainant must not be cross-examined, and the court must not admit any evidence, as to the sexual activities, whether consensual or non-consensual, of the complainant (other than those to which the charge relates), without the leave of the court.*

These clauses are important to prevent survivors being vilified on the stand for their sex work background. For some sex workers the fear of being outed on the stand has been a barrier to reporting sexual violence. The removal of this barrier is essential to the safety of sex worker survivors who come forward to engage in the criminal justice system. Without this clause Scarlet Alliance would be concerned that the other important improvements pursued in the draft bill would remain inaccessible to sex worker survivors. Scarlet Alliance supports these clauses to be retained beyond the draft stage of this bill. We note that if or when a court determines sexual reputation or activities to be of substantive probative value, s 103ZK allows for the admission of this evidence.

Recommendation 6: That the proposed amendments to the *Evidence Act 1977* in relation to sexual reputation evidence (part 6, division 2) be retained in the Bill.

Improper questions

Scarlet Alliance submission Respect Inc submission 31 Jan 2023 said:

> *a question pertaining to a person's sex work or history of sex work should be provided as an example of an improper question. Due to the high levels of stigma, discrimination and*

[10] *Criminal Code 1989 (Qld)*, s 216

stereotyping that sex workers face, a victim of sexual assault may be treated unfairly by the court if these types of questions are allowed.

Respect Inc also argued that 'the court MUST disallow improper questions' and Scarlet Alliance notes that this is currently in the draft Bill. It is a positive outcome to see the result of years of careful consultation, discussion and meetings of the Taskforce now in the form of the draft Bill. Community argued strongly for a clear disallowance of questions and evidence relating to sexual reputation, and we can see that the WSJ Team has followed this line of thinking and made sure it is represented in the draft Bill. Efforts by the WSJ Team to have this change in law should also be supported by investment in training for the judiciary. Scarlet Alliance recommends that community groups be involved in delivering such training, so that those responsible for implementing these changes are able to hear from survivors directly.

Recommendation 7: That the proposed amendments to the *Evidence Act 1977* in relation to improper questions (part 6, division 3) be retained in the Bill.

Directions to jury—consent and mistake of fact

During the *Hear Her Voice* process, as well as during consultations with the sex worker community and ongoing engagement with consent law reforms in Australian jurisdiction, this topic is of high importance. We commend the inclusion of sex work in s 103ZZG and recognise the hard work of both Taskforce and the WSJ Team to meet the needs of sex worker survivors of sexual offences and family violence in the draft Bill.

103ZZG Direction on behaviour and appearance of complainant
The judge may direct the jury that it should not be assumed that a person consented to a sexual activity because the person…
(e) worked as a sex worker.

Scarlet Alliance welcomes this change, and urges that it be retained in the Bill and passed into legislation.

Recommendation 8: That the proposed amendments to the *Evidence Act 1977* in relation to jury directions related to sexual offences (part 6, division 4) be retained in the Bill, particularly the proposed amendment in s 103ZZG(e) that a person's status as a sex worker, or past sex worker should not generate an assumption that a person consented to a sexual activity.

Recommendations

1. That interpretive guidance be added to the proposed s 348AA(1)(l) to state that examples of fraudulent inducement include 'if a sex worker participates in the act because of a promise of payment or reward, and that payment or reward is not made or withdrawn.'
2. That the carve outs to fraudulent inducement in the proposed s 348AA(5) be expanded to include 'income, *HIV and STIs, age, gender, ethnicity*, wealth or feelings.'
3. That the expanded carve outs for fraudulent inducement of 'income, *HIV and STIs, age, gender, ethnicity*, wealth or feelings' be reinforced in jury directions in these cases.
4. Scarlet Alliance supports the intention and efforts to include 'stealthing' (non-consensual condom removal) within the reforms of this draft Bill, and proposes that the WSJ Team consider incorporating the wording from the Victorian legislation in the Bill.
5. That the WSJ Team seek expert advice to confirm that doing 'anything to communicate' that a condom must be worn for the purposes s 348AA(2) would include putting a condom on a person, or witnessing a person putting on a condom.
6. That the proposed amendments to the *Evidence Act 1977* in relation to sexual reputation evidence (part 6, division 2) be retained in the Bill.
7. That the proposed amendments to the *Evidence Act 1977* in relation to improper questions (part 6, division 3) be retained in the Bill.
8. That the proposed amendments to the *Evidence Act 1977* in relation to jury directions related to sexual offences (part 6, division 4) be retained in the Bill, particularly the proposed amendment in s 103ZZG(e) that a person's status as a sex worker, or past sex worker should not generate an assumption that a person consented to a sexual activity.