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13 January 2023

Dear Evan,

Re: Consultation on Draft Guidance: Providing financial services to customers that financial institutions assess to be higher-risk

Thank you for the opportunity to provide feedback on AUSTRAC's Draft Guidance: Providing financial services to customers that financial institutions assess to be higher-risk (the Draft Guidance).

Scarlet Alliance is the Australian Sex Workers Association. Through our objectives, policies and programs, Scarlet Alliance aims to achieve equality, social, legal, political, cultural and economic justice for past and present workers in the sex industry.

Formed in 1989, Scarlet Alliance, Australian Sex Workers Association, is the national peak sex worker organisation. Our membership includes state and territory-based and national sex worker organisations and individual sex workers throughout Australia. Through our work and that of our member organisations, we have the highest level of contact with individuals providing sexual services in a wide range of contexts of any agency or organisation in Australia.

Scarlet Alliance uses a multifaceted 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.

Scarlet Alliance is a leader when it comes to advocating for the health, safety and welfare of workers in Australia's sex industry. We have provided expertise on sex work in a variety of Federal, jurisdictional, research, service provision and civil society arenas over the last three decades. Scarlet Alliance represents sex workers and provides expert advice on a number of government and non-government committees and advisory mechanisms including sitting on the National Roundtable on Human Trafficking and Slavery.

Financial discrimination and 'debanking' impacts sex workers across Australia working in a variety of different contexts. These practices perpetuate stigma towards sex workers, create access barriers to financial services, housing, education and healthcare, and threaten the privacy and physical safety of our community. We commend AUSTRAC for educating financial institutions on effective and appropriate risk management strategies, and hope our feedback on the Draft Guidance will support reduction of the harms routinely experienced by sex workers when dealing with financial institutions.

Yours sincerely,

Mish Pony
Chief Executive Officer

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Introduction: Sex Work, Debanking and Access to Financial Services

Sex workers in Australia work across a range of workplaces and conditions, including in brothels, through agencies, independently, in massage parlours, on webcam, in pornography, producing direct-to-consumer content, on the street, for trade, or in other kinds of opportunistic sex work. Sex workers across all sectors of the sex industry routinely experience surveillance, discrimination, and debanking from financial services providers (FSPs),¹ even in circumstances where we are working within the prescribed space of 'legal' sex work.²

The practices and effects of financial discrimination manifest differently for different sex workers. Many major banks routinely decline to provide, or discontinue providing personal or business financial services to sex workers. Sex workers have reported:

- being charged additional account fees,
- refusal of access to merchant services, billing services and payment processing facilities,
- having applications for credit, financing and insurance services declined without explanation,
- experiencing privacy and information breaches,
- losing income through lack of access to financial services,
- having personal and business accounts closed without being given the opportunity to work with banks to mitigate risk or resolve any concerns,
- having personal and business accounts closed without being provided adequate notice, reasons for the discontinuation of service, or access to appeal processes, and
- having funds frozen or confiscated.

¹ R Whitson, "Sex workers, adult shops and gun businesses say they are being denied banking services", *ABC News*, 12 October 2021, <<https://www.abc.net.au/news/2021-10-12/debanking-sex-industry-gun-shops/100523118>> [accessed 23 December 2022].

² L Baj, "How Australian Banks Are Legally Discriminating Against Sex Workers", *Junkee*, 10 November 2021, <<https://junkee.com/banking-sex-work-australia/313285>> [accessed 23 December 2022].

In 2017, research conducted by the Eros Association, an industry body representing Australian adult entertainment business owners and operators, found that the overall practice of financial FSPs is to treat sex workers 'unfavourably on the basis of broad internal policies against the 'adult industry' rather than tailored assessments of financial risk.³ This is supported by research on sex workers' experiences of discrimination conducted by Scarlet Alliance in 2020, in which 33.3% of survey respondents reported experiencing financial discrimination from a bank, 56.9% from a payment processor (e.g. PayPal), 9.8% from a merchant service provider (e.g. eftpos facilities providers), and 15.7% from a credit card company (e.g. Visa).

Evidence demonstrates that financial discrimination and 'debanking' practices conducted by FSPs towards sex workers are not effective measures to detect money laundering (ML) offences, nor to ensure compliance with Australia's anti-money laundering and counter-terrorism financing (AML/CTF) framework. The Independent Review of the Banking Code of Practice 2021 found that in an apparent attempt to avoid triggering the 'tipping off' provisions in the AML/CTF legislation, FSPs were declining to provide 'legally operating customers with banking services, without adequately investigating if there are any reasonable grounds' to decline or discontinue service.⁴ As noted in AUSTRAC's 'Statement on Debanking' and in this Draft Guidance, these indiscriminate and widespread debanking practices in fact *reduce* the effectiveness of the AML/CTF framework.

Financial discrimination towards sex workers is also not an effective strategy for FSPs to detect labour exploitation offences or comply with their obligations pursuant to the *Modern Slavery Act 2018* (Cth). Despite historical framing in both legislation and law enforcement that conflates human trafficking and slavery-like practices with the sex industry, evidence consistently indicates that the majority of these cases occur in non-sex industry contexts. For the period 2015-2016, the majority of referrals to the Australian Federal Police and the Support for Trafficked People Program were unrelated to the sex industry (76.9% and 81% respectively).⁵ For the period 2017-2020, 85% of referrals did not involve the sex industry.⁶ Further, a lack of access to financial services negatively impacts sex workers being able to operate independently and transparently, *increasing* vulnerability to exploitation.⁷

³ J Bartle, *Financial Discrimination Against Adults-Only Businesses*, Eros Association, October 2017, <https://www.eros.org.au/wp-content/uploads/2018/10/Financial_Discrimination_Report_2017.pdf> [accessed 23 December 2022].

⁴ Mike Callaghan AM PSM, *Independent Review of the Banking Code of Practice 2021 - Final Report*, 26 November 2021, <<https://bankingcodereview.com.au/wp-content/uploads/2021/12/Final-Report-Banking-Code-of-Practice-Review-2021.pdf>> [accessed 23 December 2022], p. 101.

⁵ Australian Government, Interdepartmental Committee on Human Trafficking and Slavery, "Trafficking in Persons – The Australian Government Response 1 July 2015 – 30 June 2016" (Canberra: Commonwealth of Australia, 2016), p. 1.

⁶ Australian Government, Interdepartmental Committee on Human Trafficking and Slavery, "Trafficking in Persons – The Australian Government Response 1 July 2017 – 30 June 2020" (Canberra: Commonwealth of Australia, 2021), p. 17.

⁷ See Scarlet Alliance correspondence to Nicole Rose, AUSTRAC, dated 17 February 2022.

Recommendations for the Draft Guidance: Providing financial services to customers that financial institutions assess to be higher-risk

Discontinuation of use of the term 'lawful sex work industry'

The term 'lawful sex work industry' is used throughout the Draft Guidance, and is not an accurate or appropriate term to differentiate between sex work/other adult sector work and businesses, and scenarios which may involve forced labour, servitude, ML and other serious offences.

Unlike many sectors where 'debanking' is prevalent (for example, gun retail or digital currencies), the Australian sex industry is regulated by the states and territories using a complex matrix of laws and regulations, including public health, workplace health and safety, criminal or licensing legislation, as well as local planning/zoning legislation. These differing regulatory approaches and enforcement practices mean that there is no common understanding across the Commonwealth as to what comprises the 'lawful sex work industry.' However, the provision by a person over the age of 18 years 'of services that involve the person participating in sexual activity with another person in return for payment or reward'⁸ is **not** itself prohibited, either by the Commonwealth or by any state or territory.

The inconsistent regulatory approach to sex work across jurisdictions means that determining whether a particular type of sex work, or a particular person's sex work is 'lawful' is highly-specialised knowledge and unlikely to be known or understood by frontline FSP staff. Navigating sex work laws requires knowledge of both the legislative framework in place at state and local levels, as well as the practices of the individual business or sex worker.

These determinations are further complicated by contemporary norms in the sex industry reflecting trends present in the broader 'gig economy': most sex industry businesses engage workers as 'independent contractors' regardless of the expectations and practices of the working relationship. Many sex workers will engage in more than one form of sex work (e.g. a stripper who works in a club may also perform for online audiences), and many sex workers will work across multiple jurisdictions (e.g. a sex worker who works in a Canberra brothel may travel to visit a client in Darwin).

Scarlet Alliance advocates that all sex work is work, and that all sex workers are workers entitled to the same human and industrial rights as other workers, including access to financial services, regardless of whether any particular sex worker currently working within the (often narrow) legal parameters afforded by any particular jurisdiction. Determinations as to whether a particular mode of sex work is 'lawful' are the purview of existing jurisdictional sex work regulatory bodies, are not appropriate for consideration by frontline FSP staff, and are beyond the scope of any guidance produced by AUSTRAC.

Further, as the Draft Guidance notes, in order for FSPs to effectively manage risk, 'both financial institutions and their customers must communicate openly and in good faith to ensure that the

⁸ See *Sex Industry Act 2019* (NT) s 4.

financial institution can be confident it understands the risks presented by the customer.' The use of the term 'lawful sex work', and the implied responsibility for FSPs to distinguish when it is present, may exacerbate the likelihood of FSPs indiscriminately debanking sex workers, in turn forcing sex workers to be less candid about their occupation. As such, the phrase 'lawful sex work' should not be a feature of any AUSTRAC publications, including this Draft Guidance.

Recommendation 1: Replace the term 'lawful sex work' with 'sex work' throughout the Draft Guidance, and adopt this practice in all future AUSTRAC publications that address sex work.

'Use a risk-based approach' and 'Assess the risks posed by each customer' understanding sex worker 'risk' and anti-discrimination protections

Australian FSPs are required to develop systems to detect and manage the risks associated with providing services to businesses who may be involved in ML, terrorism financing (TF), and/or other serious crime. Beyond the prevalence of cash-intensive transactions in some parts of the sector, the categorisation by FSPs of sex work and sex industry businesses as being 'higher risk' of association with ML/TF or other serious crime is based on moralistic stigma rather than evidence.

This stigma has resulted in both historic and ongoing financial discrimination and debanking, which creates systemic disadvantage for individual sex workers and sex industry businesses, and impacts our ability to implement important safety strategies like requiring traceable deposits as a method of screening our clients. Without access to financial services, many of our businesses have developed cash-intensive models as a way to avoid surveillance or debanking, and as a way to protect our privacy in places where sex work laws and other forms of stigma and discrimination make it risky to transact transparently. At the same time, FSPs continue to apply broad policies deeming sex industry customers to present too great a risk to provide with services.

Sex workers face discrimination and stigma in many areas of society and it should be noted that even in ideal circumstances in which financial discrimination, debanking and transaction surveillance were not common experiences for sex workers, many would still elect to trade and bank in cash for a wide range of reasons, including considerations of privacy, guarantee of immediate payment/access to funds, and as a result of previous experiences with banks. This, in and of itself, is not justification for increased 'due diligence' measures, nor does it indicate that a customer is 'high-risk'.

Recommendation 2: The Guidance should make clear that a diversity of modes of transaction are part of normal trade by sex workers. AUSTRAC should consider collaboration with Scarlet Alliance to produce an additional set of guidelines for FSPs to support the provision of non-discriminatory and appropriate services to support sex worker safety and privacy.

It is positive that the Draft Guidance explicitly states that a risk-based approach does not require declining to provide services to an entire industry sector, but rather involves a good-faith assessment and understanding of the risks posed by individual customers as well as consideration of other statutory obligations such as anti-discrimination legislation. In particular, we would ask that this section

of the Draft Guidance be amended to include reference to anti-discrimination legislation protecting sex workers in the following jurisdictions:

- The Australian Capital Territory, where it is unlawful to discriminate against a person based on their 'profession, occupation, trade or calling'.⁹
- The Northern Territory, where recent amendments to the *Anti-Discrimination Act 1992* specifically include 'sex work' and 'sex worker' as protected attributes from discrimination.¹⁰
- Queensland, where it is unlawful to discriminate against a person on the basis of their 'lawful sexual activity'.¹¹
- Tasmania, where it is unlawful to discriminate against a person on the basis of their 'lawful sexual activity'.¹²
- Victoria, where it is unlawful to discriminate against a person on the basis of their 'lawful sexual activity' or on the basis of their 'profession, trade or occupation'.¹³

Recommendation 3: Amend the section 'Use a risk-based approach [H3]' in the Draft Guidance to include reference to the obligations of FSPs to abide by relevant anti-discrimination legislation protecting sex worker customers.

'Conduct customer due diligence' and 'Conduct ongoing and enhanced customer due diligence' - surveillance, privacy and stigma

In order to assist FSPs to accurately assess the risk profile of sex industry customers and to avoid perpetuating stigma and discrimination towards sex workers, it is important that the Guidance recognises the legitimate safety and privacy concerns of sex workers when accessing financial services, especially in relation to 'customer due diligence' conducted by FSPs.

As outlined above, sex workers across Australia are subject to a wide variety of jurisdictional regulations. Further, while there is no evidence to support an inherent link between sex work and serious crime in Australia, ongoing research by Scarlet Alliance and the University of New South Wales Centre for Social Research in Health indicates that the vast majority of sex workers in Australia

⁹ *Discrimination Act 1991* (ACT) s 7(1)(p). The ACT Human Rights Commission also notes that a bank declining to provide a customer with a credit card on the basis of their status as a sex worker would be an example of unlawful discrimination - see <<https://hrc.act.gov.au/discrimination/profession-trade-occupation-calling/>> [accessed 23 December 2022].

¹⁰ S Spina-Matthews, "The NT's sex worker laws are among the world's most progressive. Meet some of the people that made them happen", *ABC News*, 26 November 2022, <<https://www.abc.net.au/news/2022-11-27/northern-territory-world-first-sex-worker-protections-laws/101697764>> [accessed 23 December 2022].

¹¹ *Anti-Discrimination Act 1991* (QLD) s 7(l). The Queensland Government notes that this includes discrimination on the basis of '[status as a legal sex worker](#)'.

¹² *Anti-Discrimination Act 1998* (TAS) s 16(d).

¹³ *Equal Opportunity Act 2010* (VIC) s 6(g),(la). The Victorian Equal Opportunity and Human Rights Commission notes that as sex work has been decriminalised in Victoria, discrimination on the basis of a person's status as a sex worker is unlawful - see <<https://www.humanrights.vic.gov.au/for-individuals/profession-trade-occupation/>> [accessed 23 December 2022].

experience stigma, surveillance and/or discrimination, resulting in access barriers to healthcare and justice, as well as negative impacts on mental health and emotional resilience.¹⁴

The open and good faith communication required for FSPs to effectively manage risk and comply with statutory AML/CTF obligations must be understood as a mutual obligation, with a recognition that sex worker customers have legitimate concerns in relation to the collection, storage and disclosure of their personal information by FSPs. Any ongoing and enhanced due diligence undertaken by FSPs towards sex worker customers must be:

- Based on consideration of the individual customer's risk profile in the context of best available evidence, rather than with reference to institutional policies that categorise businesses associated with sex as inherently 'high risk.'
- Conducted in a manner that ensures sex worker customers are able to maintain their confidentiality, and ensures the protection of personal information, including when taking over-the-counter deposits into sex worker bank accounts.
- Conducted in a professional and appropriate manner to ensure that sex worker customers do not experience discrimination and stigma from FSP staff.

'Ending the business relationship'

Both in Australia and globally, sex workers have reported experiences of debanking involving both personal and business accounts being closed without notice and without the provision of clearly articulated reasons, sometimes leading to sex workers losing access to funds temporarily or permanently.¹⁵ We commend AUSTRAC for providing clear guidance that where possible, FSPs should 'provide meaningful reasons to customers for deciding not to provide financial services' and that failing to do so (as well as the threat of debanking more generally) both discourages customers from providing FSPs with transparent information *and* increases the likelihood of legitimate AML/CTF and other serious crime remaining undetected.

Despite the lack of evidentiary basis linking sex work in Australia to serious crime, and the existence of anti-discrimination protections in many jurisdictions outlined above, without-notice closure of existing personal and business bank accounts remains a form of debanking routinely experienced by sex workers in Australia and globally, and an ongoing concern for our community. As outlined at Recommendation 2 above, we urge AUSTRAC to provide FSPs with clear guidance on providing services to sex worker customers, including guidance on appropriate responses to sex worker customers in situations where a decision to decline or discontinue services is made.

¹⁴ C Treloar et al., "Rethinking the relationship between sex work, mental health and stigma: a qualitative study of sex workers in Australia", in *Social Science & Medicine*, vol. 268, 2021, 113468, <<https://linkinghub.elsevier.com/retrieve/pii/S0277953620306870>> [accessed 23 December 2022]. See also Z Stardust, "The stigma of sex work comes with a high cost", *The Conversation*, 10 August 2017, <<http://theconversation.com/the-stigma-of-sex-work-comes-with-a-high-cost-79657>> [accessed 23 December 2022].

¹⁵ Baj (n. 2 above). See also R Almeida, "Sex workers report wide discrimination in everyday life tasks: 'It's traumatising'", *NZ Herald*, 16 September 2022, <<https://www.nzherald.co.nz/nz/sex-workers-report-wide-discrimination-in-everyday-life-tasks/>> [accessed 23 December 2022].

Scenarios - 'Lawful sex work customer'

While it may be helpful to provide a scenario highlighting sex worker customers as a demographic who routinely experience debanking and detailing how FSPs can provide services without undermining their AML/CTF obligations, we do not deem the questions asked in this scenario to be appropriate or helpful in determining risk. As noted in Recommendation 1 above, placing frontline FSP staff in a position of determining the 'legality' of an individual's sex work is unrealistic and inappropriate, and the questions proposed, if intended to be an example of a frontline staff member of an FSP determining whether the customer's activities are 'lawful', display a lack of knowledge about ACT sex work laws. Again, this determination **should not be** a part of FSP staff duties.

Further, as noted in our discussion of the process outlined in the 'Conduct customer due diligence' and 'Conduct ongoing and enhanced customer due diligence' sections, guidance on assessing and managing customer risk must make clear that the risk assessment matrix and tools must be both proportionate to level of risk presented by the customer (informed by best evidence) and conducted in line FSPs' other statutory obligations, such as anti-discrimination legislation. The suggestion in the scenario to 'apply enhanced due diligence with transaction monitoring tools' may be an appropriate risk management strategy in this particular scenario, or for some sex industry customers, but without specificity as to a level of appropriate scrutiny, sex worker customers will continue to experience stigma and discrimination from FSPs.

As discussed above, increased surveillance by FSPs presents increased risk to the privacy and confidentiality of sex worker customers. For example, in the provided scenario, 'K' is asked by FSP staff to confirm the jurisdictions they provide services in, noting that the 'enhanced due diligence' conducted towards K includes monitoring cash deposits made at branches outside the ACT, and suggesting that if K did choose to work in multiple jurisdictions (a common practice among sex workers in Australia), they would be required to notify the FSP - an onerous requirement that replicates criminal surveillance, despite there being no evidence of crime. Further, if K was a new sex worker, it may be difficult for them to categorically state which jurisdictions they plan to work in. If K had previously experienced family violence, this kind of transaction monitoring may generate genuine concern for physical safety. On this point, in the research conducted by Scarlet Alliance in 2020 on sex workers' experiences of financial discrimination, 31% of respondents reported experiencing a scenario where a bank disclosed their personal details (e.g. real name) to a client or other person.

The actions of the FSP to 'detect large fluctuations in deposits, unusually large deposits and cash deposits made to branches outside the ACT' is very likely to capture incredibly common practices among sex workers. Sex work income can fluctuate significantly for a wide range of reasons, including the sex worker's capacity to work, the number of shifts they are provided by a sex industry business, market trends, and other factors. To suggest that a low-income week, or that a sex worker depositing a larger amount of cash than usual after a good week of trade could be an indicator of a financial crime is simply inaccurate. Questions like this may also encourage a sex worker to create artificial regularity to their banking transactions, which could result in them having to hold a large amount of cash with no security so as not to trigger further surveillance if deposited at once. It may also create additional stress during a lower-earning period. Because sex workers come and go from our work at will, work across multiple jurisdictions, and have insecure incomes by virtue of our status as independent

contractors, this monitoring is likely to provide very little useful information. This is not 'proportionate to risk'.

Without reassurance that FSPs are assessing and monitoring the risks presented by sex worker customers fairly, transparently, and on the basis of actual risk presented, sex workers cannot have confidence in the risk management strategies FSPs employ. The greater number of vulnerabilities a sex worker may experience (e.g. if a sex worker is a migrant, lives with disability, is LGBTQ+, has experienced family violence), the greater the potential impact of disproportionate risk management strategies.

If sex worker customers are subject to a level of scrutiny beyond individuals and businesses with a similar risk profile, (considering best evidence, trading norms, projected and actual income etc.) an FSP will likely not be meeting their obligations under relevant anti-discrimination legislation. In the context of routine debanking and disproportionate actions towards sex worker customers in Australia and internationally, it is not reasonable to expect sex workers to respond with the transparency and candour which FSPs require from all customers to ensure the effective operation of Australia's AML/CTF Framework.

Our recommendation for this section (in addition to removing references to 'lawful sex work' outlined in Recommendation 1) can be found in Recommendation 2: that AUSTRAC work with Scarlet Alliance to produce an appropriate illustrative scenario for this section as part of producing additional guidelines for FSPs to support the provision of non-discriminatory and appropriate services to support sex worker safety and privacy. If these guidelines are unable to be developed, we would ask that this scenario be removed from the Draft Guidance.

Recommendations Summary

As outlined above, our recommendations for the Draft Guidance are:

1. Replace the term 'lawful sex work' with 'sex work' throughout the Draft Guidance, and adopt this practice in all future AUSTRAC publications that address sex work.
2. The Guidance should make clear that a diversity of modes of transaction are part of normal trade by sex workers. AUSTRAC should consider collaboration with Scarlet Alliance to produce an additional set of guidelines for FSPs to support the provision of non-discriminatory and appropriate services to support sex worker safety and privacy.
3. Amend the section 'Use a risk-based approach [H3]' in the Draft Guidance to include reference to the obligations of FSPs to abide by relevant anti-discrimination legislation protecting sex worker customers.