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18/02/2022

Department of Justice  
Office of the Secretary  
GPO Box 825 Hobart TAS 7001

**RE: *Criminal Code Amendment Bill 2022***

To the Department of Justice,

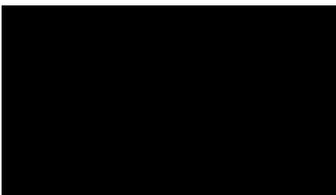
Thank you for the opportunity to respond to the draft *Criminal Code Amendment Bill 2022*.

Scarlet Alliance, Australian Sex Workers Association is the national peak body representing a membership of individual sex workers and sex worker networks, groups, projects, collectives and organisations from around Australia since 1989. 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, in order for sex workers to be self-determining agents, build their own alliances and choose where and how they work. Scarlet Alliance represents sex workers on a number of government and non government committees and advisory mechanisms.

Our Tasmanian Sex Worker Project is funded by the Department of Health and provides an authoritative voice on the experiences of Tasmanian sex workers, including in relation to experiences of sexual assault at work. The project has the highest level of contact with sex workers in Tasmania and is best positioned to consult with Tasmanian government as to best practice and policy around sex worker rights, health and safety.

Please do not hesitate to contact CEO, Jules Kim on [REDACTED] if you have any further questions or require any clarifications.

Sincerely,



Jules Kim  
Chief Executive Officer

## **Executive Summary**

The *Criminal Code Amendment Bill 2022* proposes to implement a provision that clarifies ‘stealthing’ as a negation of consent under the *Criminal Code Act*. Scarlet Alliance supports this development in Tasmanian consent law reform, as instances of stealthing can affect our health, safety and wellbeing at work. We are, however, concerned with the current wording of the amendment, and we urge the Department to ensure that the onus of communicating about and representing condom use is placed on the perpetrator of stealthing, rather than the victim/survivor.

The efficacy of the proposed amendment and its accessibility to sex workers will also be compromised by the current Tasmanian legislation that criminalises some aspects of sex work. Criminalisation and the associated sex work stigma levied against sex workers form major barriers to reporting sexual violence and greatly affect our relationships with police, social services and the criminal justice system.

## **General comments on the proposed amendment**

Scarlet Alliance welcomes the introduction of a stealthing provision into the *Criminal Code Act 1924*. We support the clarification provided by s2A subsections (a)-(c), however we are concerned about the wording of ‘if the person says or does anything to communicate to the other person that condom must be used’. This appears to place the onus of communication on the person being stealthed, rather than on the person committing stealthing.

A comparable provision is s 67(1)(h) within the ACT’s *Crimes Act 1900*, which states that consent is negated if that consent is caused ‘by an intentional misrepresentation by the other person about the use of a condom’. Here, the onus is placed on the person committing stealthing to adhere to how they represented the use of the condom. For example, if person A represents that they intend to use a condom and person B relies on that representation without ‘communicating’ their reliance, and person A subsequently and intentionally fails to use, tampers with or removes the condom without the knowledge of person B, person A has intentionally misrepresented its use, but may not be held liable under the language of the law as drafted here unless person B can be shown to have communicated their reliance.

Sex workers may state at any point, through our advertising, verbal or written negotiations to provide services to a client, or during the service itself, our requirements regarding condom use. It is unclear whether all or some of these instances would suffice as ‘saying or doing anything to communicate...that a condom must be used’. In the case that a client does not read this information in an advertisement, for example, or claims not to be aware of a sex worker’s requirements on this, it is difficult to tell whether stealthing conducted in such an instance would be able to be prosecuted. Clarity in the language that places the onus upon the stealthier, such as in the ACT stealthing provision would address this uncertainty. The issue is about the ‘misrepresentation’ or ‘non consensual removal’ of the condom and must not inadvertently capture consensual non condom usage or accidental condom breakage.

## **The criminalisation of some forms of sex work in Tasmania undermines the efficacy of stealthing protections.**

Sexual violence protections will always be undermined by laws which criminalise aspects of our work, because fear of self-incrimination is a barrier to reporting crimes committed against us at work. As the *Sex Industry Offences Act 2005* currently criminalises many forms of our work, such as brothel and massage parlour work and street based sex work, sex workers face unique risks and barriers in reporting and prosecuting sexual violence. Due to fear of prosecution, sex workers working outside of the legal framework who experience stealthing are unlikely to report it, thus limiting the efficacy of the proposed stealthing protections to apply to all Tasmanians equally. When our work is criminalised and sexual violence occurs in a work setting, sex workers face the impossible decision between accessing redress and facing potential criminalisation, or leaving the crime left unreported. Not only does the criminalisation of Tasmanian sex workers restrict our access to justice, it also encourages perpetrators to see sex workers as 'easy targets' because they think that sex workers are unable to unwilling to go to the police for fear of prosecution or that their complaint will not be taken seriously<sup>1</sup>. Laws that criminalise our work place us at further risk of sexual violence, rather than reducing this risk.

Police are never appropriate regulators of industry, and this is of particular concern in the context of sex worker access to justice, where they play dual and conflicting roles as both prosecutor and protector. Access to redress for sexual violence will always be prohibitive to sex workers while police remain the regulators of the sex industry.

The criminalisation of some forms of sex work within Tasmania also exacerbates sex work stigma as we are framed as criminals from whom the community must be protected. This understanding sets a cultural tone where sex workers experience significant challenges having our experiences of violence acknowledged and believed by friends, family and community, health and social service providers, law enforcement, and the criminal justice system. Understandably, this tone resonates throughout all aspects of sex workers' experiences seeking justice, including the decision not to do so. Sex work stigma is compounded by intersectional experiences of discrimination, where sex workers are also members of other populations who are stigmatised, marginalised and over-policed. The anticipation of sex work stigma, bolstered by criminalisation, is a deterrent to reporting sexual violence for all Tasmanian sex workers, whether they are working within or outside the legal framework.

A response to sexual violence, including the criminalisation of stealthing, can only be equitably accessed by sex workers where our work is fully decriminalised<sup>2</sup>. The full decriminalisation of sex work is central to removing police as the regulators of the sex industry thus ensuring that sex workers can access justice in a safe and equal way.

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<sup>1</sup> Zahra Stardust et al., 'I wouldn't call the cops if I was being bashed to death': Sex work, whore stigma and the criminal legal system' (2021) 10(2) *International Journal for Crime, Justice and Social Democracy* (advance) 2 ('Stardust').

<sup>2</sup> Scarlet Alliance 2020, *The Full Decriminalisation of Sex Work in Australia*, Briefing Paper, accessed <[https://scarletalliance.org.au/library/briefing\\_paper\\_full\\_decrim](https://scarletalliance.org.au/library/briefing_paper_full_decrim)>.

## Providing alternative routes of redress for sex workers

Sex workers expect to experience stigma when interacting with the legal system<sup>3</sup>. The anticipation of this stigma and the low likelihood of a fair outcome not impacted by stigma are deterrents for our community in engaging with the legal and criminal justice processes. Due to criminalisation, marginalisation and discrimination, sex workers also have unique privacy and anonymity concerns with seeking redress through the criminal justice system, as we often do not want to connect our legal names to our sex work. Privacy concerns can also prevent sex workers from accessing government support, such as through the Tasmanian Victims of Crime Assistance program, which further impacts on our ability to recover after an assault.

Substantive change would need to occur to ensure sex worker victim/survivors of stealthing and other forms of sexual violence are able to receive fair, non-discriminatory, trauma-informed legal and social services and court proceedings that do not jeopardise our safety by creating publicly-accessible records that connect our legal identities with sex work. One aspect of this is ensuring that law enforcement, social services and legal services are appropriately trained in how to support sex workers who are survivors of sexual violence, including by protecting sensitive identity information. This training must be led by the peer sex worker run Scarlet Alliance Tasmanian Sex Worker Project. The Tasmanian government should also consider recommending alternative routes to redress for sexual violence, such as transformative justice initiatives.

## Recommendations

### Amend the language of s 2A

Change the language of s2A to read:

Without limiting the application of subsection (2) to an act of sexual intercourse, a person does not freely agree to an act of sexual intercourse 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.

### Provide training to support sex workers reporting and prosecuting sexual violence

Ensure that law enforcement, social services and legal services receive training about how to best support sex workers who are reporting sexual violence. Provide options for sex workers pursuing criminal proceedings to protect our anonymity through the use of pseudonyms and / or name suppression on public records.

### Reform Tasmania's sex work legislation to achieve the full decriminalisation of sex work



The Department of Justice must move to recommend the full decriminalisation of sex work in Tasmania. Decriminalisation is the best practice approach to improving the safety, health and wellbeing of sex workers, including our access to justice for sexual violence. For further information on the decriminalisation of sex work please refer to our briefing paper at [https://scarletalliance.org.au/library/briefing\\_paper\\_full\\_decrim](https://scarletalliance.org.au/library/briefing_paper_full_decrim)