

A framework for a decriminalised sex work industry in Queensland

Consultation Paper WP 80

April 2022

Chapter 16

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Discrimination against sex workers

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Introduction

- 16.1 Some sex worker organisations say criminalisation creates ‘unwarranted stigma, discrimination, prejudice and general misunderstanding about sex work’. This creates barriers for sex workers to access essential services, including goods and services, housing and accommodation, and access to justice.⁶⁶⁰
- 16.2 Queensland’s anti-discrimination laws protect all individuals from unlawful discrimination, including sex workers, working lawfully.
- 16.3 One of the purposes of a decriminalisation framework is to safeguard sex workers’ human rights. This includes the right to equal and effective protection against discrimination.⁶⁶¹

Anti-Discrimination Act 1991

- 16.4 The *Anti-Discrimination Act 1991* makes unfair discrimination, sexual harassment, vilification, and victimisation unlawful in Queensland.
- 16.5 For conduct to be unlawful discrimination under the Act, it must:⁶⁶²
- be based on an attribute listed in the Act;
 - take place in an area of activity listed in the Act; and
 - result in the person being treated less favourably than someone without that attribute.
- 16.6 There are exemptions that allow conduct that would otherwise be discriminatory.
- 16.7 The Queensland Human Rights Commission (QHRC) is currently reviewing the Act.

Discrimination on the basis of lawful sexual activity

- 16.8 A person engaging in lawful forms of sex work in Queensland is protected under the *Anti-Discrimination Act 1991* against unlawful discrimination.
- 16.9 One of the protected attributes in the Act is ‘lawful sexual activity’. This is defined to mean ‘a person’s status as a lawfully employed sex worker, whether or not self-employed’.⁶⁶³
- 16.10 The protection applies to a lawfully employed sex worker. Under the current law, this means a sex worker working in a licensed brothel and a private sex worker working on their own. However, it does not apply to a person engaging in unlawful forms of sex work. This includes street-based sex work, sex work in an unlicensed brothel or massage parlour, escort agencies and two or more private sex workers providing sex work under a co-operative arrangement.

⁶⁶⁰ E Jeffrey, E O’Brien & J Fawkes, *The Case for Decriminalisation: Sex Work and the Law in Queensland*, Crime and Justice Briefing Paper (QUT, 2019).

⁶⁶¹ See terms of reference para 1(g); and ch 6.

⁶⁶² Queensland Human Rights Commission, ‘Discrimination’ (28 June 2019) <<https://www.qhrc.qld.gov.au/your-rights/discrimination-law>>.

⁶⁶³ *Anti-Discrimination Act 1991* (Qld) s 7(1), sch 1 (definition of ‘lawful sexual activity’).

16.11 The Act also includes a protected attribute for 'sexuality', which is defined as 'heterosexuality, homosexuality or bisexuality': see box 1.⁶⁶⁴

16.12 Discrimination based on a protected attribute is prohibited in certain areas of activity. This includes:⁶⁶⁵

- work and work related areas;
- education;
- provision of goods and services;
- superannuation or insurance;
- disposition of land;
- accommodation;
- club membership and affairs;
- administration of State laws and programs; and
- local government.

16.13 Examples of discrimination on the basis of lawful sexual activity include:⁶⁶⁶

- a shop or restaurant refusing service to a person because they are a sex worker;
- a bank manager refusing a loan to a person who is a sex worker even though they meet the financial and other criteria for the loan; or
- a school refusing to enrol a child because the child's parent works as a sex worker.

16.14 A person may make a complaint about unlawful discrimination to the QHRC.⁶⁶⁷

16.15 The QHRC has observed that 'the current definition of lawful sexual activity is narrow and means a person's *status* as a lawfully employed sex worker, whether or not self-employed'.⁶⁶⁸ It also noted that the:⁶⁶⁹

[i]nclusion of the term 'lawful' means that only sex workers operating within the law are currently protected.

16.16 Some sex worker organisations say decriminalisation will improve access to anti-discrimination protections. By making more forms of sex work lawful, the protected attribute of 'lawful sexual activity' will apply to more sex workers.⁶⁷⁰

16.17 They also say decriminalisation will, over time, help to reduce stigma and discrimination against sex workers, as well as increasing opportunities for outreach, education and

Box 1: History of protected attribute of 'lawful sexual activity'

- 'Lawful sexual activity' was included as a protected attribute when the *Anti-Discrimination Act 1991* was first passed
- However, at that time it was not defined and separate protection for sexuality was not included: this meant lawful sexual activity was initially given a wider meaning than it has now
- When 'sexuality' was added as a separate attribute in 2002, the present definition of lawful sexual activity was also added

⁶⁶⁴ See *Discrimination Law Amendment Act 2002* (Qld) ss 12(1), 14(1); Queensland, *Parliamentary Debates*, 6 November 2002, 4445 (RJ Welford, Attorney-General and Minister for Justice).

⁶⁶⁵ *Anti-Discrimination Act 1991* (Qld) ch 2 pt 4.

⁶⁶⁶ Queensland Human Rights Commission, 'Discrimination on the basis of lawful sexual activity' (Fact Sheet, July 2019) <<https://www.qhrc.qld.gov.au/your-rights/discrimination-law/lawful-sexual-activity>>.

⁶⁶⁷ Ibid.

⁶⁶⁸ Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act* (Discussion Paper, 2021) 98.

⁶⁶⁹ Ibid.

⁶⁷⁰ Scarlet Alliance, *The Principles for Model Sex Work Legislation* (2014) 75.

support.⁶⁷¹ Following decriminalisation in New Zealand, it was observed that cultural change does not happen overnight and stigma takes time to dissipate.⁶⁷² Others have also noted that reducing stigma ‘requires a systematic response that necessitates but goes beyond the decriminalisation of sex work’.⁶⁷³

- 16.18 Some sex worker organisations also consider that decriminalisation ‘must be coupled with comprehensive human rights and anti-discrimination protections for sex workers at state, territory and federal levels to be fully effective’.⁶⁷⁴

Other jurisdictions

- 16.19 Legislation in Victoria and Tasmania also prohibits discrimination on the basis of lawful sexual activity.⁶⁷⁵ In those jurisdictions, the definition of ‘lawful sexual activity’ is not limited to sex work. In Victoria, ‘lawful sexual activity’ is defined to mean ‘engaging in, not engaging in or refusing to engage in a lawful sexual activity’.⁶⁷⁶ In Tasmania, ‘sexual activity’ includes ‘not engaging in, or refusing to engage in, sexual activity’.⁶⁷⁷

- 16.20 In its submission to the Review into the decriminalisation of sex work, the Victorian Equal Opportunity & Human Rights Commission supported the decriminalisation of all forms of sex work.⁶⁷⁸ It noted this ‘is an important step in helping prevent stigma, as well as discrimination and other rights violations’.⁶⁷⁹ It also stated that decriminalisation would expand the coverage of existing anti-discrimination protections.⁶⁸⁰

Decriminalisation of sex work would have the positive effect of broadening the existing protected attribute of ‘lawful sexual activity’ to cover discrimination against any sex worker that is related to their profession, occupation or trade. If, however, certain types of sex work remain criminal, the available anti-discrimination protections would continue to be curtailed.

- 16.21 The Victorian Equal Opportunity & Human Rights Commission noted that some stakeholders preferred for discrimination against sex workers to be addressed by including a new protected attribute related to profession, occupation or trade (rather than relying on the ‘lawful sexual activity’ attribute). Legislation in the Australian Capital Territory protects the attribute of ‘profession, trade, occupation or calling’ as a ground of discrimination, which covers sex workers.⁶⁸¹ The Victorian Equal Opportunity & Human Rights Commission was not opposed to this suggestion but considered that:⁶⁸²

671 Ibid 28, 72.

672 Prostitution Law Review Committee, *Report on the Operation of the Prostitution Reform Act 2003* (May 2008) 58.

673 Z 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(3) *International Journal for Crime, Justice and Social Democracy* 142, 144.

674 Scarlet Alliance, *The Principles for Model Sex Work Legislation* (2014) 28.

675 *Anti-Discrimination Act 1998* (Tas) s 16(d); *Equal Opportunity Act 2010* (Vic) s 6(g).

676 *Equal Opportunity Act 2010* (Vic) s 4(1) (definition of ‘lawful sexual activity’).

677 *Anti-Discrimination Act 1998* (Tas) s 3 (definition of ‘sexual activity’). ‘Lawful sexual activity’ is not defined.

678 Victorian Equal Opportunity and Human Rights Commission, *Submission to the Review into the Decriminalisation of Sex Work*, 20 July 2020, 1, Rec 1.

679 Ibid 3.

680 Ibid 4.

681 *Discrimination Act 1991* (ACT) s 7(1)(p).

682 Victorian Equal Opportunity and Human Rights Commission, *Submission to the Review into the Decriminalisation of Sex Work*, 20 July 2020, 5.

the [*Equal Opportunity Act 2010* (Vic)] already protects sex workers against discrimination related to their profession, occupation or trade — protections that would be extended should all sex work be decriminalised.

- 16.22 It also considered ‘there is a need for greater education and information to support sex workers to understand and realise their rights’, including by increasing resources to key peer and other sex worker support services.⁶⁸³
- 16.23 The *Sex Work Decriminalisation Act 2022* (Vic) inserts a new protected attribute in the *Equal Opportunity Act 2010* (Vic) to protect persons from discrimination on the basis of their ‘profession, trade or occupation’. It also inserts an exception for genuine occupational requirements.⁶⁸⁴ This protected attribute is not limited to sex workers but applies more broadly.
- 16.24 The Minister who introduced the Bill explained:⁶⁸⁵
- This amendment is intended to prevent discrimination by promoting the right of sex workers to recognition and equality before the law but may also have broader benefits in promoting the rights of other cohorts who face discrimination and stigma as a result of their occupation.

Exemptions

- 16.25 There are exemptions in the *Anti-Discrimination Act 1991* that allow conduct that would otherwise be unlawful discrimination.
- 16.26 The Act contains general exemptions that apply to all protected attributes. This includes something done to protect public health or the health and safety of people at work.⁶⁸⁶
- 16.27 The Queensland Civil and Administrative Tribunal (or, for work-related exemptions, the Queensland Industrial Relations Commission) also has a general power to grant an exemption on application. The exemption may be to a person, people or class of people from the operation of a specified provision of the Act.⁶⁸⁷
- 16.28 The Act also includes exemptions that are specific to lawful sexual activity for work with children and accommodation for use in connection with work as a sex worker.

Work with children

- 16.29 Section 28(1) of the Act provides that discrimination on the basis of lawful sexual activity (sex workers) or gender identity (such as transgender or intersex people) is not unlawful in work and work related areas if:
- the work involves the care or instruction of minors; and
 - the discrimination is reasonably necessary to protect the physical, psychological or emotional wellbeing of minors having regard to all the relevant circumstances of the case, including the person’s actions.

683 Ibid 5, Rec 2.

684 *Sex Work Decriminalisation Act 2022* (Vic) ss 34–35. These provisions commence on 10 May 2022 (unless proclaimed earlier): s 2(1)-(2).

685 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 October 2021, 3879 (Home, Minister for Ports and Freight, Minister for Consumer Affairs, Gaming and Liquor Regulation, and Minister for Fishing and Boating).

686 *Anti-Discrimination Act 1991* (Qld) ch 2 pt 5.

687 *Anti-Discrimination Act 1991* (Qld) s 113. See generally Queensland Human Rights Commission, ‘Tribunal exemptions’ (1 February 2021) <<https://www.qhrc.qld.gov.au/resources/legal-information/exemptions>> and ‘Applying for a tribunal exemption’ (15 November 2021) <<https://www.qhrc.qld.gov.au/your-responsibilities/for-employers/discrimination-and-harassment-at-work/applying-for-a-tribunal-exemption>>.

- 16.30 Section 28 was included when the Act was first enacted and before lawful sexual activity was defined. When the Act was debated in parliament, it was suggested that section 28 could operate to allow discriminatory treatment of staff where there is 'promiscuity between unmarried people on the staff of a school' which the school finds 'morally offensive'.⁶⁸⁸
- 16.31 No other Australian state or territory permits discrimination against sex workers (or transgender or intersex people) on this basis.
- 16.32 The QHRC has stated that section 28 appears:⁶⁸⁹
- to perpetuate an offensive stereotype that sex workers, transgender, or intersex people pose inherent risks to children, which is not aligned with contemporary community attitudes.
- 16.33 The QHRC also noted that Queensland has a working with children risk management and screening system, known as the 'blue card system'. This aims to create safe environments for children when participating in activities or receiving services, including childcare, education, sport, cultural activities and foster care. The blue card system screens and monitors people who work with minors. It also requires organisations, business operators and self-employed operators to implement a child and youth risk management strategy.⁶⁹⁰

Accommodation for use in connection with work as a sex worker

- 16.34 Section 106C of the Act provides that discrimination on the basis of lawful sexual activity is not unlawful in:
- refusing to supply accommodation;
 - evicting a person from accommodation; or
 - treating a person unfavourably in connection with accommodation (for example, by charging a higher rate for cleaning).
- 16.35 An accommodation provider can use this exemption if they reasonably believe the other person is using, or intends to use, the accommodation in connection with that person's, or another person's, work as a sex worker.⁶⁹¹
- 16.36 'Accommodation' is defined widely. It includes business premises, a house or flat, a hotel or motel, a boarding house or hostel, a caravan or caravan site, a manufactured home, a camping site and a building or construction site.⁶⁹²
- 16.37 Section 106C was introduced in 2012 in response to the decision of the appeal tribunal in *GK v Dovedeen Pty Ltd*.⁶⁹³ It was held in that case that a motel had contravened the *Anti-Discrimination Act 1991* by refusing to provide accommodation to a private sex worker in the future, because she was performing sex work at the motel.⁶⁹⁴ Section 106C was inserted to 'give accommodation providers certainty and control in the use that is made of their

⁶⁸⁸ See *Anti-Discrimination Act 1991* (Qld) (as passed). See also Queensland, *Parliamentary Debates*, 3 December 1991, 3608 (B Littleproud).

⁶⁸⁹ Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act* (Discussion Paper, 2021) 119.

⁶⁹⁰ Ibid. See generally Queensland Government, 'Blue cards for working with children' <<https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/regulated-industries-and-licensing/blue-card>>.

⁶⁹¹ See generally Queensland Human Rights Commission, 'Discrimination on the basis of lawful sexual activity' (Fact Sheet, July 2019) <<https://www.qhrc.qld.gov.au/your-rights/discrimination-law/lawful-sexual-activity>>.

⁶⁹² *Anti-Discrimination Act 1991* (Qld) sch 1 (definition of 'accommodation').

⁶⁹³ See Explanatory Notes, Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012 (Qld) 4.

⁶⁹⁴ *GK v Dovedeen Pty Ltd* [2012] QCATA 128. This decision was later overturned by the Court of Appeal: *Dovedeen Pty Ltd v GK* [2013] QCA 116.

premises'.⁶⁹⁵ It applies only 'if the property is being used or will be used for sex work, not solely on the basis that the occupant is a sex worker themselves'.⁶⁹⁶

16.38 However, this exemption has been criticised because it is broad and enables accommodation providers to lawfully discriminate against sex workers. It only requires the accommodation provider to 'reasonably believe' the person 'intends to use' the accommodation 'in connection with' sex work. As a result, sex workers may experience difficulties in obtaining housing and accommodation, face eviction, or be subject to additional charges and rude treatment.⁶⁹⁷ It has been noted that the exemption 'forms a viable pretext for blanket refusal' or eviction of persons who are known to be sex workers 'in nearly any circumstances'.⁶⁹⁸

16.39 A similar exemption is currently included in section 62 of the *Equal Opportunity Act 2010* (Vic). The Victorian Equal Opportunity and Human Rights Commission suggested the Victorian Government consider repealing this section.⁶⁹⁹ It noted this exemption seems inconsistent with decriminalisation and the aim of reducing stigma and discrimination. It considered that 'its mere existence could further perpetuate stigmatising social attitudes related to sex work and deter individuals from initiating complaints of discrimination'. It explained:⁷⁰⁰

The exception seeks to balance equal access to accommodation and the ability of accommodation providers to exercise some degree of control over who occupies their premises and for what purpose it is used. However, as it operates only in relation to persons who wish to provide commercial sexual services, it appears to be about permitting prejudice. Furthermore, as a blanket exception, it arguably does not operate in the least restrictive means possible and seems incongruous with steps to decriminalise sex work and bring Victoria in line with leading best practice.

16.40 The Victorian Equal Opportunity and Human Rights Commission also noted that accommodation providers could apply to the Victorian Civil and Administrative Tribunal (VCAT) to grant an exemption under its general power.⁷⁰¹ It considered that this could be 'a more balanced approach', noting that:⁷⁰²

Under this approach, individual providers would need to persuade VCAT that it is a reasonable limitation of the right to equality to refuse to provide accommodation to another person for a lawful sexual activity on a commercial basis.

16.41 The *Sex Work Decriminalisation Act 2022* (Vic) repeals section 62 of the *Equal Opportunity Act 2010* (Vic).⁷⁰³ The Victorian Government explained this 'will address stigmatising social attitudes relating to sex work and remove a barrier to sex work taking place in safe locations'.⁷⁰⁴

695 See Explanatory Notes, Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012 (Qld) 5.

696 Queensland Human Rights Commission, 'Lawful sexual activity' (28 June 2019) <<https://www.ghrc.qld.gov.au/your-rights/discrimination-law/lawful-sexual-activity>>.

697 H Hobbs & A Trotter, 'How far have we really come? Civil and political rights in Queensland' (2013) 25(2) *Bond Law Review* 166, 205–6; Scarlet Alliance, *The Principles for Model Sex Work Legislation* (2014) 75–6, 78.

698 Hobbs and Trotter, above n 697, 205–6.

699 Victorian Equal Opportunity and Human Rights Commission, *Submission to the Review into the Decriminalisation of Sex Work*, 20 July 2020, 6, Rec 4.

700 Ibid 6.

701 Ibid, referring to *Equal Opportunity Act 2010* (Vic) s 89. Similar provision is made in *Anti-Discrimination Act 1991* (Qld) s 113: see [16.27] above.

702 Victorian Equal Opportunity and Human Rights Commission, *Submission to the Review into the Decriminalisation of Sex Work*, 20 July 2020, 6, Rec 4.

703 *Sex Work Decriminalisation Act 2022* (Vic) s 36. This provision commences on 10 May 2022: s 2(1)–(2).

704 Department of Justice and Community Safety (Vic), *Decriminalising Sex Work* (Discussion Paper, 2021) 4.

Queensland Human Rights Commission review

- 16.42 The Queensland Human Rights Commission (QHRC) administers the *Anti-Discrimination Act 1991*.
- 16.43 On 4 May 2021, the Attorney-General asked the QHRC to undertake a review of the Act. The terms of reference ask the QHRC to consider whether there is a need for any reform to enhance and update the Act to best protect and promote equality and non-discrimination and the realisation of human rights. The QHRC is to consider whether there is any need for reform, and if so, the scope of the reform. This includes reforms about the protected attributes, areas of activity, and exemptions under the Act.⁷⁰⁵
- 16.44 The QHRC released a discussion paper in November 2021, seeking submissions on many issues. The questions in the discussion paper include:⁷⁰⁶
- Should there be a new definition of lawful sexual activity, and if so, what definition should be included in the Act? Should the name of the attribute be changed, and if so, what should it be? (Discussion question 28);
 - Are there reasons why the work with children exemption should not be repealed? (Discussion question 45);
 - Should the sex worker accommodation exemption be retained, changed or repealed? (Discussion question 47).
- 16.45 Submissions to that review closed on 1 March 2022. The QHRC has also established a Reference Group to provide advice to its review. The QHRC must finalise its report on the review by 30 June 2022.⁷⁰⁷
- 16.46 Given the QHRC is considering those matters as part of its review of the Act, we are not asking specific questions about the same issues. We will have regard to the QHRC's report and recommendations (and any submissions that might be made to us in our review) on these issues.

CONSULTATION QUESTION

- Q49** Is there anything you would like to tell us about how the *Anti-Discrimination Act 1991* could best protect sex workers against unlawful discrimination in light of the decriminalisation of the sex work industry?

⁷⁰⁵ Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act* (Discussion Paper, 2021) 9–10.

⁷⁰⁶ Ibid 98, 119, 121.

⁷⁰⁷ Queensland Human Rights Commission, 'ADA review' (13 July 2021) <<https://www.qhrc.qld.gov.au/law-reform>>.

