
The Hon CF Jenkins
Chairperson
Law Reform Commission of Western Australia
GPO Box F317
Perth WA 6841
By email: equalopportunityreview@justice.wa.gov.au

29 October, 2021

Dear Chairperson,

Review of the Equal Opportunity Act 1984 (WA) - a sex workers' rights perspective

Sex Work Law Reform Victoria Inc. (SWLRV) is an independent non-partisan volunteer group led by sex workers, lobbying for the legal rights of sex workers in Victoria.

SWLRV advocates for, amongst other things:

- legislation to better protect sex workers from discrimination

We appreciate this opportunity to contribute to the Review of the *Equal Opportunity Act 1984* (WA) and attach our submission accordingly.

Lisa Dallimore
President of Sex Work Law Reform Victoria Inc.

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Executive Summary

Sex workers in Western Australia experience widespread and pervasive discrimination in all areas of their lives, including accommodation, education and in the provision of goods and services. We recommend inserting ‘social origin, profession, trade, occupation or calling’ and ‘lawful sexual activity’ as new Grounds. In order for these Grounds to have any meaningful application to most sex workers in Western Australia, such reforms must be accompanied by additional reforms to fully decriminalise sex work in Western Australia.

Summary of Recommendations

Recommendation 1

Insert ‘social origin, profession, trade, occupation or calling’ as a Ground. Define this Ground so that it captures:

- part-time, casual or occasional workers;
- both the business activity (eg sex work) and the job descriptor (eg sex worker); and
- the wider industry (eg adult services) and not be limited to a specific job descriptors (eg sex worker).

This Ground should not be subject to any unnecessarily wide exemptions similar to s 57N in the *Discrimination Act 1991* (ACT).

Recommendation 2

Insert ‘lawful sexual activity’ as a Ground. Define this Ground so that it includes a person's status of engaging in lawful sexual activity, and the lawful sexual activity itself.

Recommendation 3

Insert ‘irrelevant criminal record’ as a Ground.

Recommendation 4

Insert ‘association (whether as a relative or otherwise) with a person who is identified by reference to any of the other Grounds’ as a Ground.

Sex Work Law Reform Victoria - fighting for the legal rights of Victorian sex workers

Sex Work Law Reform Victoria, founded in 2018, is a registered not-for-profit organisation led by sex workers advocating for the full decriminalisation of consensual adult sex work in Victoria. We also work to increase anti-discrimination protections for sex workers.

Sex Work Laws in Western Australia

Current laws in Western Australia severely restrict lawful forms of sex work. Street-based sex work and brothels are criminalised. Only sole operators and private escorts may work lawfully in some circumstances.¹ This means that any anti-discrimination laws available to sex workers will only be enjoyed by the minority who are able to operate lawfully.

Discrimination Against Sex Workers

Sex workers experience unacceptable levels of discrimination in Western Australia. Discrimination is pervasive and occurs in areas including the provision of goods and services, housing, employment, healthcare and in the justice system. This discrimination creates feelings of internalised stigma among sex workers, and results in feelings of distress, anxiety, fear, social detachment and isolation.² Nationally, there are increasing reports of financial discrimination, where lawfully operating sex workers are denied the basic banking/merchant facilities necessary for any sole trader to function.³

Although discrimination against sex workers is pervasive and commonplace, it is rarely dealt with by the law in Australia. Discrimination against sex workers is not well documented or understood, as academics and practitioners tend to focus attention on other more prominent Grounds of discrimination, such as gender, race, age etc.

Sex worker loses \$1 million after bank closes accounts

Christine McQueen is a private escort who also runs an escort agency. This is her story.

“Around 10 years ago, Bendigo Bank closed my account following a charge-back claim from a client. Without consulting me, the bank sided with the client, refunding him all the money. They then closed our accounts, which had been operating without drama for around four years. I then searched high and low for a new bank. ANZ, NAB and the Commonwealth Bank all knocked me back. My accountant and I have estimated that annually my small business lost around \$200,000 per year as a direct result of lack of access to payment processing facilities. Over time, I lost more than \$1 million.”

¹ Basil Donovan et al, ‘The Sex Industry in Western Australia A Report to the Western Australian Government’ (2010) Sydney: National Centre in HIV Epidemiology and Clinical Research, University of New South Wales.

² Kahlia McCausland et al, ‘It is Stigma that Makes my Work Dangerous’: Experiences and Consequences of Disclosure, Stigma and Discrimination Among Sex Workers in Western Australia’ (2020) *Culture Health and Sexuality* <<https://www.tandfonline.com/doi/pdf/10.1080/13691058.2020.1825813>>.

³ Rhiana Whitson, ‘Sex Workers, Adult Shops and Gun Businesses Say They Are Being Denied Banking Services’, *ABC News* (online, 12 October 2021) <<https://www.abc.net.au/news/2021-10-12/debanking-sex-industry-gun-shops/100523118#:~:text=The%20adult%20shop%20owners'%20experience,is%20not%20an%20isolated%20case.&text=A%20spokesman%20confirmed%20the%20bank,case%2Dby%2Dcase%20basis>>.

Discussion Paper Question: Should social origin or profession, trade, occupation or calling be included as a Ground?

If carefully drafted, a Ground of this nature can protect sex workers from discrimination. ‘Profession, trade, occupation or calling’ was introduced to the *Discrimination Act 1991* (ACT) with the specific intention of protecting sex workers from discrimination.⁴ Victoria intends to amend the *Equal Opportunity Act 2010* (Vic) to insert ‘profession, trade or occupation’ as a protected attribute with the express intention of protecting sex workers from discrimination.⁵

Issues with this Ground

This attribute has been interpreted narrowly in the ACT in relation to sex workers.⁶ This interpretation has weakened protections under anti-discrimination law for people of all occupations. Broadly, there are three significant issues with this attribute in the ACT:

1. It covers the occupation, but not the business activities associated with that occupation.
2. It covers specific occupations, but not the wider industry of which they form part.
3. It may not cover occupations that are undertaken on a part-time or casual basis, or that are a person’s secondary source of income.

These issues are discussed below.

First issue

Profession, trade, occupation or calling has been interpreted so that it will cover sex workers, but not necessarily the business activities associated with that occupation. For example, in *J v Federal Capital Press of Australia Limited (Federal Capital Press)*⁷, a Newspaper treated a sex worker unfavourably because she wished to place an advertisement for her services. The Tribunal found the attribute covered the occupation of ‘sex worker’ but did not cover the activity of placing an advertisement for sex work.⁸ The unfavourable treatment she experienced was found to be indirect discrimination, and therefore subject to the exception that it is lawful if ‘reasonable’.

Broadly, this artificially separates the job descriptor (the ‘occupation’) from work undertaken in that occupation (the work, tasks or activities performed by a person with that occupation) and substantially weakens the operation of this attribute in relation to all occupations. Where there is prejudice against an occupation, it is likely that work activities inherent to the occupation will form part of the circumstances of the discrimination. It is important that this be recognised as direct discrimination.

Consider the following two scenarios:

⁴ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 2 March 1994, 12-20.

⁵ *Sex Work Decriminalisation Bill 2021* (Vic) cl 43.

⁶ *J v Federal Capital Press of Australia Limited* ACAT, 8 February 1999, DT97/153; *Edgley v Federal Capital Press of Australia Pty Ltd* [2001] FCA 379.

⁷ ACAT, 8 February 1999, DT97/153.

⁸ *Ibid* 22.

Scenario 1: A sex worker might apply for a personal bank account for their private finances

Scenario 2: A sex worker might apply for a business bank account for their business income

A bank refusing to provide a sex worker a personal bank account in Scenario 1 could clearly be direct discrimination based on occupation. However, in Scenario 2, if a sex worker is refused a business bank account because a bank has a policy of not allowing business accounts to be used for sex work business activities, a tribunal may determine this denial of service only amounts to indirect discrimination. This would mean the denial of a business bank account to a sex worker could be classified by a tribunal as ‘reasonable’ and therefore amounts to lawful discrimination, even in the absence of any individual assessment of financial risk. This will enable prejudice against certain occupations to continue.

Under the *Discrimination Act 1991* (ACT), this artificial distinction is compounded by an exception found in s 57N. The exception provides:

Part 3 does not make it unlawful to discriminate against a person on the ground of the profession, trade, occupation or calling of the person in relation to any transaction if profession, trade, occupation or calling is relevant to that transaction and the discrimination is reasonable in those circumstances.

The courts have struggled to interpret the meaning of this provision, including the meaning of ‘transaction’. In effect, it seems to have reduced direct discrimination to indirect discrimination where a person’s business activities are relevant to the circumstances of the discrimination.⁹ We do not recommend this Ground be accompanied by a similar exception in the *Equal Opportunity Act 1984* (WA).

Second Issue

In the ACT, ‘profession, trade, occupation or calling’ has been interpreted so that it will capture ‘sex worker’, but it will not capture ‘adult services’.¹⁰ It seems the attribute will protect specific occupations, but not capture the wider industry of which those occupations form part. Where unfavourable treatment is directed at a broader industry (eg adult industry), the discrimination will be indirect, and therefore lawful if deemed ‘reasonable’.

This creates practical problems and weakens anti-discrimination law. For example, it might be possible for a bank to avoid liability by phrasing discriminatory policies at a higher level of generality. A policy that disadvantages ‘adult services businesses’ (as opposed to ‘sex workers’) might only be indirect discrimination, and therefore lawful, if deemed reasonable.

Federal Capital Press illustrates this unsatisfactory operation of the law. In that case, a sex worker who sought to advertise in a newspaper was denied credit by that newspaper on the basis of a policy directed at ‘adult services advertisers’. This was found to be indirect discrimination. The Tribunal found this denial of service to be reasonable, based on the newspaper’s claim that adult services

⁹ *Edgely v Federal Capital Press of Australia Pty Ltd* [1999] ACTSC 95 at [71]-[72].

¹⁰ *Federal Capital Press* at 20–23.

advertisers were a credit risk. This claim was accepted by the Tribunal although it was not substantiated by any evidence.¹¹ Discriminatory policies that target a specific industry should be recognised as direct discrimination.

Third issue

In *Federal Capital Press*, the Tribunal assessed whether ‘sex worker’ could properly be described as the complainant’s occupation with reference to evidence of the extent of her involvement in that work. It was argued that ‘occupation’ should be distinguished from ‘occasional engagement in an activity’. In the end, the Tribunal found the sex worker complainant was covered by the protected attribute, but only because there was extensive evidence of her financial dependence on sex work over a long period of time.¹² Therefore, the decision left open that part time/casual sex workers, or people for whom sex work is a secondary source of income might not be covered by ‘profession, trade, occupation or calling’.

Recommendation 1

Insert ‘social origin, profession, trade, occupation or calling’ as a Ground. Define this Ground so that it captures:

- part-time, casual or occasional workers;
- both the business activity (eg sex work) and the job descriptor (eg sex worker); and
- the wider industry (eg adult services) and not be limited to a specific job descriptors (eg sex worker).

This Ground should not be subject to any unnecessarily wide exemptions similar to s 57N in the *Discrimination Act 1991* (ACT).

Discussion Paper Question: Should lawful sexual activity be included as a Ground? If so, what exceptions might apply?

Lawful sexual activity also has potential to protect sex workers. In Queensland, the attribute lawful sexual activity was originally introduced to cover the gay and lesbian community. It was later amended, reducing its application specifically to sex workers.¹³

¹¹ Ibid 22–24.

¹² Ibid 20–21.

¹³ *Discrimination Law Amendment Act 2002 (No 74 of 2002)* (QLD).

Lawful sexual activity also probably covers sex workers in Victoria, however there is very little case law on point.¹⁴ According to the Victorian Equal Opportunity and Human Rights Commission, this attribute covers sex workers.¹⁵

Issues with this Ground

There are two issues with lawful sexual activity:

1. It may capture the job descriptor of 'sex worker' but not the sexual activity itself.
2. Conversely, it may require actual proof of sexual activity occurring.

These issues are discussed below.

First issue

The difficulty with lawful sexual activity in Queensland, is that like 'profession, trade, occupation or calling' in the ACT, it has been interpreted in a way that artificially separates job descriptor from business activity. In *Dovedeen Pty Ltd v GK*¹⁶ (**Dovedeen**), the Court found that while it was unlawful to refuse accommodation to a sex worker because of her occupation, it was lawful to refuse her accommodation because she undertook sex work in that accommodation.¹⁷

This operation of the law is largely due to the unfortunate wording in the definition of lawful sexual activity, which is defined as '*a person's status as a lawfully employed sex worker, whether or not self-employed*'. The word 'status' has been interpreted to limit the attribute to the mere status, or job descriptor of being a sex worker, and excludes the actual sexual activity, that is, the sex work.¹⁸ Any attribute that protects a sex worker so long as they are not engaging in sex work is of very little use.

Second issue

Conversely, lawful sexual activity can also be interpreted to require evidence of actual sexual activity to be enlivened. This was the case in Queensland, before the attribute was amended to refer specifically to the status of being a sex worker. There was confusion over whether a person had to demonstrate actual sexual activity to gain protection, meaning for example, a celibate homosexual person might not be protected.

This means that, potentially, lawful sexual activity could be interpreted to only protect a sex worker where actual sex work forms part of the circumstances of the discrimination. This would produce the opposite situation to *Dovedeen*. For example, it would only be unlawful to deny a sex worker accommodation on the basis of lawful sexual activity, if there was evidence she/he engaged, or intended to engage in sexual activity there.

¹⁴ *Cassidy v Leader Associated Newspaper Pty Ltd* [2002] VCAT 1656; *Packer v RL & SJ Vagg Pty Ltd* [2001] VCAT 2218.

¹⁵ 'Lawful Sexual Activity' *Victorian Equal Opportunity and Human Rights Commission* (Web Page) <<https://www.humanrights.vic.gov.au/for-individuals/lawful-sexual-activity/>>.

¹⁶ [2013] QCA 116.

¹⁷ *Ibid* [20]-[22].

¹⁸ *Ibid* [22]-[23].

Recommendation 2

Insert 'lawful sexual activity' as a Ground. Define this Ground so that it includes a person's status of engaging in a lawful sexual activity, and the lawful sexual activity itself.

Discussion Paper Question: Should irrelevant criminal record be included as a Ground? If so, what exceptions might apply?

In jurisdictions such as Western Australia where most forms of sex work are criminalised, some sex workers live with sex work related convictions.

Recommendation 3

Insert 'irrelevant criminal record' as a Ground.

Discussion Paper Question: Should the protections for relatives/associates be extended to relatives/associates of people who have or are assumed to have any protected attribute under the Act?

It is common for those who work alongside sex workers to experience direct discrimination. The associates of sex workers who usually face discrimination are colleagues rather than family members or friends. These associations are of a business nature, rather than a personal nature and therefore may not be captured by the ground of 'personal association'. For example, associates may include escort agency drivers, brothel managers or website developers providing services to sex workers.

The Equal Opportunity Act 2010 (Vic) includes the attribute 'personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.' Limiting this attribute to 'personal' association has unnecessarily restricted its application. *Cassidy v Leader Associated Newspapers*¹⁹ illustrates this limitation. In that case, a brothel manager claimed he was discriminated against due his personal association with the sex workers working in his brothel. The Tribunal found personal association did not cover business-type relationships and observed that it was difficult to determine when a workplace relationship became a personal association.²⁰ The brothel manager had to provide extensive evidence, including 'detailed accounts of the personal lives of prostitutes...including their relationships and personal problems' to prove his personal association.²¹

The limited operation of this Ground would be especially unsatisfactory in relation to the Ground 'social origin or profession, trade, occupation or calling'. Almost all occupations, including the 'sex work' occupation, necessarily involve business/professional relationships with other parties, including clients, other contractors, suppliers, creditors, business owners etc.

¹⁹ [2002] VCAT 1656.

²⁰ Ibid [82]-[83].

²¹ Ibid [25], [84].

Given the likelihood that prejudice directed at an occupation, will extend to their clients and business associates, it would be contradictory to protect the occupation, and not associations that arise purely by virtue of that occupation.

Recommendation 4

Insert 'association (whether as a relative or otherwise) with a person who is identified by reference to any of the other Grounds' as a Ground.