Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au

Office of the President

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Our ref: [BT/KB-MC]

The Hon Justice Peter Applegarth AM
Queensland Law Reform Commission
Level 30, 400 George Street
Brisbane QLD 4000

By email: [redacted]

Dear Justice Applegarth

A framework for regulating the sex work industry in Queensland

Thank you for the opportunity to provide feedback on the Consultation Paper, *A framework for regulating the sex work industry in Queensland* (**Consultation Paper**). The Queensland Law Society (**QLS**) appreciates being consulted on this important issue of law reform.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Criminal Law Committee, Industrial Law Committee and Planning & Environment Law Committee.

We acknowledge and commend the Queensland Law Reform Commission (**QLRC**) on its valuable work to date. The issues raised in the Consultation Paper traverse a myriad of overlapping areas. Given the breadth of issues raised and the volume of questions included in the Consultation Paper, we have not responded to every question. We also acknowledge there may be diverse views among our broader membership on the issue of a decriminalised sex work industry.

Introductory remarks

QLS advocates for the development of good law. In doing so, we support the creation of laws which have sufficient regard to individual rights and liberties, seek to eliminate discrimination and disadvantage, and provide access to justice for all members of society. This includes Queensland's sex workers.

QLS supports decriminalisation of the sex work industry to recognise sex work as legitimate work and ensure sex workers have the same rights, protections and obligations as other workers. We emphasise any legislative framework for decriminalisation of sex work in

Queensland must be informed by sex workers themselves to ensure reforms are fit for purpose and free of any unintended consequences.

We also recognise decriminalisation does not mean no regulation, but use the term 'legislative framework' to encompass any legislation or regulation resulting from the decriminalisation of sex work in Queensland.

What might a decriminalised sex work industry look like?

Q1 What should be the main purposes of the recommended framework for a decriminalised sex work industry in Queensland, and why?

When thinking about a decriminalised sex work industry in Queensland, there may be a temptation to simply adopt another state or territory's model, on the basis it has passed through an Australian Parliament and so it may be regarded as 'politically feasible'.[1] Alternatively, a particular model may be seen as the starting point for reform with a 'plus/minus' approach taken of removing or adding components of the model.[2] We echo the QLRC's comments in the Consultation Paper:

> Local differences mean we cannot assume what happens in one jurisdiction will also happen here. However, research from other places about what works well and what does not can help us design our framework. Much will depend on the features of the framework and how it is implemented.[3]

We consider the appropriate starting point for reform to be a legislative framework based on appropriate values and objectives that underpin laws of this kind. As others have commented, 'political compromise, while often necessary for law reform, can lead to legislation failing to reflect its overall policy objectives in important respects.'[4] Any resulting regulations or restrictions must be justifiable by reference to these values and objectives.

We agree with the three focus areas identified in the Consultation Paper, being fairness, safety and health, and consider the main purposes of any legislative framework must be to:

- decriminalise sex work in Queensland and legalise contracts in relation to sex work;
- recognise sex work as work;
- protect sex workers' human rights under the *Human Rights Act 2019* (Qld);
- enhance sex worker, client and public health and safety;
- prohibit exploitation of sex workers and enshrine the right of sex workers to refuse to perform sex work;
- enable the sex work industry to operate in accordance with the laws of the State and the Commonwealth as they apply to all individuals and businesses generally, including laws governing employment, workplace health and safety, workers' compensation and rehabilitation, planning and taxation; and

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[1] Ben White and Lindy Willmott identified this process of reform in relation to voluntary assisted dying legislation in Queensland: Ben White and Lindy Willmott, 'A Model Voluntary Assisted Dying Bill' (2019) 7(2) *Griffith Journal of Law & Human Dignity* 1, 3.
[2] Ibid 4.
[3] Queensland Law Reform Commission, *A framework for a decriminalised sex work industry in Queensland* (Consultation Paper WP 80, April 2022) 35 [5.25].
[4] White and Willmott (n 1) 4.

- reduce stigma of, discrimination against, and harm to, sex workers.

The development of any legislative framework for sex work in Queensland must reflect evidence-based policy that recognises and challenges the long-standing stigma associated with sex work: 'Stigma, deliberately and surreptitiously, shapes laws, regulations, practices, institutions and policies, it undermines the effectiveness and fairness of the regulation of [sex work], and, in general, it results in the social marginalisation of sex workers.'[5] Scholars recognise that 'stigma invites control' in policy responses to sex work and sex workers:

> In many countries this results in the outright prohibition of [sex work], but one of the pernicious consequences of the persistence of stigma is that even the regulation or decriminalisation of [sex work] does not guarantee a lessening of the urge to control. ... [T]he tenacity of stigma is the mechanism by which regulatory approaches to [sex work] generate negative, unintended consequences and progressive policies that get reversed.[6]

With this in mind, we urge the QLRC to consider how the sex work industry can operate in accordance with the general laws of the State and the Commonwealth as they apply to all individuals and businesses generally, where regulatory responses should be limited to addressing specific issues identified by subject matter experts.

Q2 Overall, what might the new framework look like?

We generally agree with the QLRC's observations at 7.17-19 of the Consultation Paper that a decriminalised framework should:

- remove criminal laws and police powers specific to sex work;
- replace sex work licensing laws;
- cover sex work under general laws and regulatory mechanisms that apply to other businesses and workers;
- change laws to address unfair discrimination against sex workers;
- recognise the general criminal law applies to everyone, including sex workers; and
- include sex workers as key partners in law and policy reforms that affect them.[7]

Sex workers and sex work businesses who operate in accordance with general laws and regulations should not fear arrest or prosecution, and sex workers should not have to choose between working safely or legally. Any particular regulations or laws directed at sex workers and sex work businesses (e.g. those relating to public health and safety measures, public amenity etc.) should be based on the most up to date evidence and should not be so administratively or financially burdensome as to deter workers and businesses from operating legally. Any legislative framework should remove police as the primary regulators of the sex work industry.

Q3 What changes would need to be made to the current framework, and why?

We generally agree with the QLRC's observations at 7.19 of the Consultation Paper.

Q4 Who should the new framework apply to, and why?

We highlight the importance of a contemporary and appropriate definition of 'sex work' that moves away from the current definition of 'prostitution' which references 'the use of 1 person by

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[5] Hendrik Wagenaar, Helga Amesberger and Sietske Altink, *Designing Prostitution Policy: Intention and Reality in Regulating the Sex Trade* (Policy Press, 2017) 29.
[6] Ibid 32.
[7] Queensland Law Reform Commission (n 3) 47.

another for his or her sexual satisfaction involving physical contact'.[8] This definition ignores issues of consent and does not reflect modern ideas of sex work as a service. Consideration could be given to the definition in place in the Northern Territory, which defines 'sex work' as 'the provision by a person of services that involve the person participating in sexual activity with another person in return for payment or reward'.[9]

In developing a new definition of 'sex work', regard will need to be had to the existing regulation of certain entertainment venues (e.g. strip clubs) and whether it is necessary or desirable to include or exclude other non-physical sex work (e.g. sex work done via web cam or other technologies) from the definition.

Offences to protect against commercial sexual exploitation

Q5 What offences or other provisions should be included to protect people from being exploited in commercial sexual activity?

QLS considers that a legislative framework for sex work in Queensland should, as far as possible, aim to regulate sex work and sex work businesses under general laws applicable to all individuals and businesses, and should remove police as the primary regulators of the sex work industry. Where a policy decision is made that a particular activity should be a criminal offence, consideration should be given to whether the activity is already an offence under general (i.e. non-sex work specific) laws so as not to unnecessarily duplicate existing offences.

For example, s 229FA of the *Criminal Code Act 1899* (Qld) (**Criminal Code**) makes it an offence to obtain prostitution from a person who is not an adult.[10] Similar conduct may already be an offence under other provisions of the Criminal Code, including: s 210 (Indecent treatment of children under 16); s 215 (Carnal knowledge with or of children under 16); and s 229B (Maintaining a sexual relationship with a child).

Further, if one of the purposes of a legislative framework for sex work in Queensland is to recognise sex work as work, consideration should be given to repealing s 229G of the Criminal Code which makes it an offence to procure engagement in prostitution, to ensure sex work businesses can advertise their services for sex workers in a way that promotes transparency. It may be necessary, however, to reformulate s 229G(2) in another part of the Criminal Code to retain the offence of procuring a person who is not an adult to engage in sex work (unless such conduct could be said to be captured in an existing offence).

QLS also echoes calls from the Queensland Public Advocate for a review of s 216 of the Criminal Code as it relates to persons with 'an impairment of the mind':

> The creation of an offence that is presumed to have occurred on the basis that a person with "an impairment of the mind" is incapable of engaging consensually in any sexual activity is inconsistent with the rights of persons with disability as outlined in international humanitarian conventions and other Queensland laws. ... Section 216 also appears to be the most restrictive of this type of offence provision among Australian states and territories.[11]

The Consultation Paper makes brief reference to s 216 of the Criminal Code; however, the issue of the discriminatory nature of the section towards people with impaired decision-making capacity is not explored as a component of decriminalisation of the sex work industry.

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[8] *Criminal Code 1899* (Qld) s 229E(1)(d).
[9] *Sex Industry Act 2019* (NT).
[10] *Criminal Code 1899* (Qld) s 229FA.
[11] Public Advocate, *A discussion of section 216 of the Queensland Criminal Code: A call to review the criminalisation of sexual relationships involving people with 'an impairment of the mind'* (Discussion Paper, January 2022) 7.

Accordingly, we encourage the QLRC to consider what legal frameworks and principles exist in various jurisdictions, as well as issues such as the level of protection people with impaired decision-making capacity may require, in consultation with people who have knowledge and understanding of such situations.

Licensing of sex work business operators

Q6 Should sex work business operators be required to have some form of licence to operate a sex work business in Queensland? Why or why not?

In answering this question, consideration should be given to a number of factors relevant to this industry and Queensland's regulatory framework for other industries more generally. These include that sex work should be treated as any other type of work, but also that some workers and workplaces are subject to a greater risk of injury, harm and exploitation due to the nature of the work and the demographic of the workers. In this respect, we note the Consultation Paper's commentary on the New Zealand experience:

> The review of New Zealand's decriminalisation laws noted that, 'as the rationale behind the law reform was to decriminalise the sex industry, continuing to vet people in the industry for criminal convictions is incongruous'. However, it found that the history of criminal involvement with the sex work industry in New Zealand and the potential for sex workers to be exploited by operators justified excluding unsuitable persons from having control of sex work businesses.[12]

In keeping with our overarching recommendation for the sex work industry to be treated the same way as other industries, we highlight some industries do require additional safeguards due to the nature of the work and risk of injury and harm. On balance, we consider the sex work industry as one that may be vulnerable to exploitation of those who work in it. Accordingly, we are supportive of a limited licensing scheme for sex work operators who employ or supply sex workers, similar to schemes imposed on other industries that require certain people to hold a licence and demonstrate they have capacity to facilitate work entitlements and the provision of a safe work environment and safe system of work.

As a general premise, a licence should be required for any individual or business who supplies persons to conduct sex work. This requirement would apply whether the person or business employs sex workers directly, or engages them to work in some other way, such as on a contractual basis.

For the purpose of any licensing regime, we consider it necessary to distinguish between sex work businesses who employ or supply sex workers, including on an independent contractor basis (e.g. brothels, massage parlours, escort services etc.) and sex workers who operate as sole operators (e.g. a sex worker who undertakes sex work but also hires a receptionist and driver who do not undertake sex work). Sole operators should not be required to obtain a licence.

We also consider it appropriate for sex workers who operate in collectives with other sex workers for the purpose of reducing certain overheads or enhancing their personal safety to be excluded from the requirement to obtain a licence (providing it is not the case that one person dictates the work or conditions of another person, where that work is sex work). As stated above, the test for whether a person or business requires a licence should relate to whether someone controls the conditions of another person's work as a sex worker.

We do not consider that such a scheme will be able to ensure all persons are protected from exploitation at all times, as this is not the experience in other schemes, however, we consider

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[12] Queensland Law Reform Commission (n 3) 77 [9.44], citing the Prostitution Law Review Committee, *Report on the Operation of the Prostitution Reform Act 2003* (May 2008) 86.

that the starting point should be that if a sex worker is employed (or similarly engaged) to perform sex work, then the person or entity employing or engaging the sex worker should demonstrate that they are able to do this is a safe way.

The Consultation Paper suggests the current brothel licensing scheme is too restrictive, onerous and does not adequately promote sex worker safety. A different model is preferred and consideration should be given to some key requirements that a person or business who supplies/employs sex workers must meet, where failure to meet the requirements would result in cancellation or suspension of the person's or business's licence.

Q7 If a licence were to be required what should the system look like?

Any new licensing scheme for businesses or persons who employ/supply sex workers should align with the purpose of the legislative framework for decriminalisation. Accordingly, we suggest a scheme similar to that in place in New Zealand or the Northern Territory.

We do not consider it appropriate for a number of conditions under the current licensing scheme to be carried over to the new scheme; some of which are listed on page 73 of the Consultation Paper.

Subject to our other comments, we do, however, recommend some reporting obligations for licensees in the event a relevant law or other obligation is breached (whether that relates to a criminal law, work health and safety law, financial viability etc.).

Q8 Should the requirement to hold a licence apply to:

(a) all sex work businesses; or

(b) only those who employ a certain number of sex workers?

As discussed above in response to question 6, QLS considers there are sufficient reasons to require businesses or persons who employ/supply sex workers to hold a licence (irrespective of how many sex workers they engage). We note the definition of 'operator' in the New Zealand legislation. This definition provides a good starting point, however we note the observation in the Consultation Paper that such a definition could also include a receptionist who might interview or "hire" sex workers, or set and supervise their working conditions, which may not be reflective of the scheme's intent. Any legislative framework must be carefully drafted to ensure only the appropriate people are captured. It should also be cognisant of corporate and other business structures. We suggest the model under Queensland's labour hire licensing scheme should be drawn on as a basis for this scheme. Section 7 of the *Labour Hire Licensing Act 2017* (QLD) (**Labour Hire Licensing Act**) provides:

> **7 Meaning of provider and labour hire services**
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> (1) A person (a ***provider***) provides labour hire services if, in the course of carrying on a business, the person supplies, to another person, a worker to do work.

It is possible that some sex work arrangements would be captured under the labour hire licensing scheme and in these cases, consideration should be given as to which licence would be more appropriate and whether dual recognition is viable. Education about compliance with both schemes will be necessary.

We have significant concerns with any proposal requiring individual sex workers to register or hold a licence. In Victoria where it has been recognised there are 'significant risk factors, or

even long term ramifications of registering as a sex worker on the government register',[13] the Government has repealed their register that contains details of independent sex workers. Similarly, it was decided that sex workers should no longer be required to register with Access Canberra in the Australian Capital Territory, for a number of reasons, including:

- there was no valid reason for individual sex workers being required to register (for example, a person who runs a hairdressing business from home does not need to register to go about their business, but still needs to meet certain work health and safety requirements);
- the previous register (which required individual sex worker registration) had failed, with only 14 sex workers recorded;
- not enforcing a requirement to register increases health and safety for sex workers who are victims of a crime, because they can come forward knowing they will not be penalised for working without registration; and
- the sex industry attracts stigma and is an industry about which people make assumptions, where it is not something sex workers want on the public record for life.[14]

Accordingly, we consider a sufficient evidence-based reason would need to be established to require individual sex workers (whether they work independently, co-operatively or in a commercial premise like a brothel, massage parlour, or escort service) to register their details or obtain some sort of individual licence. Further, any licensing requirement would need to meet the objectives of the licensing scheme, which we have identified as facilitating worker safety and payment of worker entitlements.

Q9 What should a suitability check involve?

Our preliminary view is that the Northern Territory criteria about when a certificate or licence should be issued appears appropriate. We generally favour an assessment based on objective criteria, while acknowledging there needs to be some flexibility as to how certain information may be provided.

We consider the 'wider test' approach outlined in the Consultation Paper to be problematic. However, there are also issues with the arbitrary nature of any decision made about someone who has breached a work health and safety provision or who was bankrupt or insolvent. In addition, questions about a person's associates may be more difficult to simply answer by reference to a checklist. Accordingly, a combined approach, similar to that outlined in the Consultation Paper, may be needed.

The current ineligibility criteria listed in s 8 of the *Prostitution Act 1999* (Qld) (**Prostitution Act**) seem generally appropriate. We suggest any disqualifying offences should be similar to those under the Labour Hire Licensing scheme. Section 13 of the Labour Hire Licensing Act outlines what is needed for a licence application.

We submit that s 17 of the Prostitution Act will need to be re-drafted if it is to apply to a new licensing scheme. Section 17(1)(a) is not an appropriate factor for the type of limited scheme QLS proposes. A person's reputation, including their character, honesty, and integrity should

[13] Sumeyya Ilanbey, 'Laws on sex work "enshrine" prejudice', *The Age* (online, 7 February 2021) <https://todayspaper.smedia.com.au/theage/shared/ShowArticle.aspx?doc=AGE%2F2021%2F07%2F02&entity=Ar00101&sk=EE461513&mode=text>.

[14] Katie Burgess, 'Major changes for Canberra sex industry get green light', *The Canberra Times* (online, 1 August 2018) <https://www.canberratimes.com.au/story/6013634/major-changes-for-canberra-sex-industry-get-green-light/>.

not be relevant considerations for a licence of this type. While subsections (b) and (d) are appropriate, there is some overlap between the two, which should be addressed. Subsection (c) should refer to certain disqualifying offences, rather than the more general category of indictable offences. We consider subsections (h) and (i) will need to be further considered to determine if they are too broad in the context of a licensee's associates. Our view is that subsection (k) is not relevant.

While we acknowledge the types of activities the current brothel licensing scheme in Queensland is designed to disrupt, we consider there must be flexibility applied to certain factors relevant to a licence application. We also generally object to criminal charges and the circumstances of such charges being considered, rather than convictions. Such an assessment is contrary to the presumption of innocence and places the decision-maker in a position similar to that of a court exercising judicial discretion.

In relation to financial viability, we consider the material and evidence required should not be onerous, but allow a person or business to supply whatever is reasonable and necessary to demonstrate solvency. The person assessing this information should be flexible in the consideration of information and documents, including information and documents that are "commercial in confidence".

Further, there should be scope for the decision-maker to enquire about the provision of further information from the applicant if this is necessary to issue the licence.

Finally, the consideration in s 16(2) of the Prostitution Act should not be carried over to the new scheme. In this respect, we refer to our comments below in relation to planning issues.

Q10 Should the fee for a licence be set at a nominal amount (like the Northern Territory and New Zealand) or a higher amount (like the Prostitution Act)?

If the policy intent behind the licensing scheme is to oversee the industry to promote safe work practices, the fee for a licence should not be prohibitive such that businesses are forced to operate outside of the scheme. Therefore we consider a fee similar to that under the New Zealand and Northern Territory schemes to be appropriate.

Q11 For how long should a licence be valid?

We are supportive of renewal requirements in the event the reporting, monitoring and compliance obligations have not been met while the licence was active. We agree a one year period (as is the case under the New Zealand scheme) is too short, placing an unnecessary administrative burden on both the industry and regulatory bodies. We consider the three year period proposed in the Consultation Paper would strike an appropriate balance.

Q12 What should happen if an operator:

(a) does not hold a valid licence? For example, should there be a criminal penalty, civil penalty, or both?

(b) does not follow any requirements or conditions imposed by the licence? For example, should there be a civil penalty, suspension or cancellation of the licence, or both?

In appropriate circumstances, a civil penalty for a breach of the legislation should be imposed and we refer to those under the Labour Hire Licensing Act and *Fair Work Act 2009* (Cth). We do not consider a penalty of a term of imprisonment to be appropriate. If there are breaches of other general criminal laws, these can be dealt with according to those general laws and processes.

We consider there should be an ability to suspend or cancel a licence where appropriate, and suggest the reasons for this action relate back to the purpose of the licensing scheme. For example, penalties should apply only to the licence holder themselves and not individual sex workers.

Q13 Who should be responsible for carrying out suitability checks and issuing licences?

The Consultation Paper makes several useful suggestions as to the appropriate body to administer a licensing scheme. We have no firm view on the specific body but we would favour an existing structure where staff are given the additional, appropriate training and are well-resourced.

If a decision is made to introduce specialised requirements into the scheme, for example public health requirements, then consideration will need to be given to what other resources might be appropriate.

Q14 Should decisions to refuse an application for a licence or to suspend or cancel a licence be reviewable by QCAT?

QLS recommends decisions to refuse an application for a licence or to suspend or cancel a licence should be reviewable by QCAT. This right should be in addition to the right to bring an application for judicial review of a decision.

Q15 What is the best way for a licensing system (if any) to balance:

(a) the need to protect against illegal activity; and

(b) the need to limit the administrative and resource burden on government and the sex work industry?

As stated, we consider the appropriate purpose of a licensing scheme to be facilitating worker safety and payment of worker entitlements. We do not consider a core objective should be the prevention of illegal activity.

There is a need to balance measures aimed at preventing exploitation and promoting safe work within the industry against the need to limit the administrative and resource burden on government and the sex work industry. As we have stated, there are two fundamental to achieve this balance:

(a) limiting the licence requirements to persons or businesses who employ or supply sex workers; and

(b) limiting the information required for a licence application, the cost of the application and the reporting obligations.

Q16 Apart from a licensing system, what is the best way to deter illegal activity and to protect sex workers from being exploited under the new regulatory framework?

There are existing criminal laws (other than those which 'criminalise' sex work), work health and safety laws, industrial laws and other laws (such as those relating to liquor licensing) that apply to this industry which should be promoted and enforced. Additionally, more funding to educate workers in the industry about their rights and obligations, along with provision of legal assistance and other support services, will ensure sex workers are appropriately equipped to respond to illegal activity and exploitative behaviour.

Q17 What other factors should we consider (if any) in recommending a licensing system

We reiterate our recommendation that a licensing regime or registration requirement should not be imposed on individual sex workers. It may also be necessary to examine different business and operating structures, along with different types of services (including online platform and other ancillary entertainment services such as strip clubs). There may be jurisdictional issues to consider in relation to online and related services.

It will also be important to consider any information to be displayed on a public register of licence holders, with the need to balance workers' and clients' ability to obtain information about the business or service provider and the need to ensure safety and privacy.

Workplace laws

Q18 What is the best way to make sure people in the sex work industry meet their work health and safety standards?

QLS considers the best way ensure people in the sex work industry meet their work health and safety obligations is through enforcement of existing laws that apply generally across workplaces. There should be a focus on education, compliance and enforcement of these existing laws. This should include industry-specfic training on how to comply with duties under the *Work Health and Safety Act 2011* (Qld) and include practical advice on how to conduct risk assessements, safety audits and the like. It may be that WorkSafe Queensland should undertake a targeted campaign in this regard, in consultation with industry stakeholders and support services.

Q19 Should there be a guide for the sex work industry on how to meet work health and safety obligations (for example, a code of practice made under the *Work Health and Safety Act 2011* or guidelines)?

We refer to our answer to question 18 above. There should be guidelines developed for the sex work industry, in consultation with industry workers, on how to meet work health and safety obligations. These resources can be made available on the WorkSafe website, provided with licence information and disseminated through stakeholder groups, social media and other targeted platforms.

There may also be sufficient reasons to create specific work health and safety conditions for the sex work industry, similar to some of those already listed in the Prostitution Act and associated regulation, brothel licence conditions and operational standards manual; for example, the requirments in s 23 of the *Prostitution Regulation 2014* (Qld). Consideration should be given to whether these conditions should be mandatory for licence holders, as they are now for brothels, and placed into specific legislation, or whether this should sit as additional subordinate legislation in the work helath and safety space. Industry experts should be engaged in this process and inform the development of any conditions.

Q20 Are there any other work health and safety matters we should consider in developing a framework for a decriminalised sex work industry?

Specific requirements for ancillary services, such as escort services, should be considered in the framework.

It is likely that where an appropriate (i.e. not overly burdensome or restrictive) licensing scheme is developed for the sex work industry, and individual sex workers are not forced to register their details, decriminalisation will have a positive impact on work health and safety compliance

because operators and workers will be encouraged and supported to know and comply with obligations and report breaches.

Q21 Under a decriminalised framework for the sex work industry, should legislation state that a contract for or to arrange sex work is not illegal or void on public policy or similar grounds?

Under a decriminalised framework, criminal offences that are no longer needed or appropriate will be removed and sex work will be recognised as legitimate and legal work. This should remove barriers to contracts for services being enforced by a court on public policy grounds or for illegality. We acknowledge, however, the Northern Territory and New Zealand have included legislative provisions to make clear that a contract for sex work is not illegal or unenforceable on public policy grounds.

Our preliminary view is that such a law, which would confirm the statute overrides the common law, is unecessary, and would only serve to complicate the statute book. However, we would support such a provision if there was a risk that existing common law could still render some sex work contracts void after these reforms.

Q22 Should there be a new law stating that a person may, at any time, refuse to perform or continue to perform sex work?

We consider such a law could be a valuable tool for sex workers who feel threatened or unsafe. In these circumstances, it may be that any contract to provide sex services is rendered void and the sex worker must return any money paid to the client if the services have not been provided. This may need to be assessed on a case by case basis.

Public health and the health of sex workers

Q23 Should laws or other measures be taken to promote public health and protect the health of sex workers and their clients about:

(a) the use of prophylactics;

(b) managing the risk of sexually transmitted infections

(c) sexual health testing; or

(d) another matter?

QLS considers any laws or other measures taken to promote public health and protect the health of sex workers and their clients should be informed by public health experts and underpinned by up to date research. The Consultation Paper indicates that most research points to sex work-specific health laws encouraging 'stigma and [creating] barriers to accessing health services' where 'best practice is made up of peer-based educational programs and sex workers voluntarily using safer sex practices and having sexual health testing'.[15] Accordingly, it should be considered whether any specific issues relating to sex work are addressed under general law (i.e. through the *Public Health Act 2005* (Qld)).

If public health experts deem certain measures are necessary for the sex work industry, then some form of registration or licensing scheme for sole operators may need to be considered as a way to regulate compliance with public health measures. The need to enforce public health measures will need to be balanced against the reasons set out above regarding why a licensing scheme for individual sex workers (not supplying other people to perform this work) is not preferred. The enforcement of any such public health measures (e.g. the use of prophylactics

[15] Queensland Law Reform Commission (n 3) 118 [11.3].

or testing requirements) should not be regulated by police and police should not have powers to engage in entrapment.

Q24 If yes to Q23, what should those measures be and why?

We refer to our answer to question 23 above.

Q25-37 Planning laws and sex work

In response to questions 25-37, QLS considers that sex work businesses should, as far as possible, be regulated the same way as other businesses. This would mean home-based sex work businesses are subject to the same planning requirements as other home-based businesses, and that commercial sex work businesses will be able to operate in commercial and residential zones subject to complying with the planning requirements for a commercial use in these zones.

If specific planning regulations are enacted for commercial sex work businesses, it is preferable these be adopted state-wide, and that local governments should not be provided with the discretionary power to prohibit commercial sex work busineses. In this respect, the *Victorian Sex Work Decriminalisation Act 2022* (Vic) provides: 'A local law made under the *Local Government Act 2020* must not be inconsistent with the purposes of this Act or undermine the purposes of this Act to decriminalise sex work and provide for the reduction of discrimination against, and harm to, sex workers.'[16] We recommend the introduction of a similar law in any legislative framework for sex work in Queensland.

In contrast, research on the NSW experience indicates that planning applications by brothels are commonly judged on the underlying assumption that 'brothels are inherently offensive to some members of the community' as opposed to focusing on specific amenity impacts of particular developments.[17] In that jurisdiction, sex work-specific planning laws impose significant administrative and regulatory burdens on sex work businesses that result in most businesses being unable to meet local planning laws; for example, unreasonably high car park requirements, proximity limits, short opening hours, requirements that front doors be off street level, requirements that private workers live at their work address, and the banning of 'co-ops'.

Similarly, most eligible local governments in Queensland (being those with a population of less than 25,000 residents) have taken up the option to prohibit brothels under local planning laws. It is likely that similar consequences will arise where local governments are provided the ability to prohibit sex work businesses in the relevant local government area. Such discretionary powers would likely exclude most sex workers in residential and mixed zones from the benefits of decriminalistion (as well as those living in rural, regional and remote Queensland).

Q38-41 Advertising sex work

In response to questions 38-41, we recommend consideration be given to whether national advertising laws and regulations already appropriately cover the field in relation to sex work advertising. Where additional regulations are required, consideration could be given to the proposed Victorian model, where it will be a summary offence to publish or cause to be published an advertisement for commercial sexual services that contravenes any regulations made by the Governor in Council, and outdoor signage for sex work businesses will be regulated by existing planning controls which apply to all businesses. Additionally, Queensland already has a framework for regulation of adult entertainment advertising, and sex work could

[16] *Sex Work Decriminalisation Act 2022* (Vic) s 3(1).
[17] Penny Crofts, 'Visual Contamination: Disgust and the Regulation of Brothels' (Speech, PASSAGES: Law, Aesthetics, Politics, 13-14 July 2006) 5.

appropriately be captured under the same framework to reduce the level of complexity and administrative burden on both Government and the industry.

Q42-46 Public solicitation

In response to questions 42-46, QLS considers, given the very low numbers of street-based sex workers and advances in technologies which make soliciting for clients off the street more accessible, public solicitation should also be decriminalised. As the Consultation Paper points out, decriminalisation of public solicitation is unlikely to increase the number of street-based sex workers. In New Zealand, decriminalisation of public solicitation has resulted in 'no meaningful increase in the numbers working in the industry, in either street or indoor sectors.'[18]

Decriminalisation of public solicitation would improve sex worker safety, as well as relationships between sex workers and police. Street-based sex work in criminalised contexts 'is often subject to more active policing because of its perceived "public nuisance"; this can mean relations between police and street workers are particularly fraught, further problematizing the reporting of violence.'[19] While street-based sex workers may continue to be at higher risk of violence and threats of violence compared to sex workers in other locations, decriminalisation of street-based sex work would improve worker safety. This is because workers would be able to work in 'more open locations, and spend more time screening potential clients' as well as report violence to police without risk of prosecution.[20] Essentially, these workers would not need to choose between working safely and working legally.

Continued criminalisation of street-based sex work also risks the further marginalisation of certain sex workers, for example Aboriginal and Torres Strait Islander sex workers.[21] Prior to decriminalisation of public solicitation in New Zealand, it was found that the 'visibility of street work also increases the chance of arrest in contexts where soliciting is illegal, which is likely to contribute to the reasons for Maori and Pasifika women's over-representation among those charged with soliciting', because they were more likely to undertake street-based sex work than other sex workers.[22]

Research on the Viennese model, where street-based sex work has been confined to very limited areas, also shows that discussion of sex work regulation often revolves around street-based sex work and results in unintended consequences:

> The example of Viennese street-based prostitution demonstrates the negative effects that giving in to morality politics has on the policy process. Lacking any evidence, residents and politicians create the impression that the residents are endangered by outdoor sex work. Sex workers and prostitution are defined as a problem, not the policies towards prostitution. The police, who have traditionally been tasked with implementing prostitution law in Vienna, reinforce this perception. Police operating routines designate certain manifestations of prostitution as both 'problematic' and 'feasible for intervention'. The result is that street prostitution, although a small part in Vienna's prostitution market, has become the focal point of policy implementation...

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[18] Johanna Schmidt, 'The Regulation of Sex Work in Aotearoa/New Zealand: An Overview' (2017) 31(2) *Women's Studies Journal* 35, 45.
[19] Ibid 41.
[20] Ibid 46.
[21] Who, in a 2005 study on street-based sex workers in greater Sydney comprised one-quarter of the sex workers interviewed: Roxburgh et al, *Mental health, drug use and risk among female street-based sex workers in greater Sydney* (NDARC Technical Report No. 237, 2005).
[22] Schmidt (n 18) 42.

> Another lesson learned is that expelling street prostitution from residential areas will not pacify residents. It is the visibility of outdoor prostitution, itself largely an effect of excessive media attention, that disturbs and becomes a source of conflict.[23]

Accordingly, we strongly support the decriminalisation of public solicitation in Queensland. We also recommend against sex work-specific loitering laws and 'move on' powers because, as the Consultation Paper points out, such laws have the potential to 'be abused, impact on a person's right to lawfully use a street and create opportunities for corruption in the form of "deals" between sex workers and police.'[24] We reiterate the need for a provision similar to that in Victoria restricting the ability of local governments to enact local laws that are inconsistent with the purposes of decriminalisation.[25] This approach would enhance street-based sex worker safety while ensuring sex workers remain subject to general laws, including the offence of 'public nuisance' which a person commits if they behave in a disorderly, offensive, threatening or violent way and their behaviour interferes, or is likely to interfere, with another person peacefully passing through or enjoying a public place.[26]

In making recommendations about public solicitation, loitering laws and 'move on' powers, consideration should also be given to sex workers' human rights, including their right to freedom of movement[27] and their right to work.[28]

Review of the new regulatory framework

Q47 Should there be a requirement in legislation to review the new regulatory framework for the sex work industry within a set period of time after decriminalisation?

QLS considers an independent review of the new legislative framework should be undertaken within 5 years of its commencement.

Q50-52 Other matters

In response to questions 50-52, QLS recommends appropriate levels of funding be allocated to ensure education and training can be provided on the matters identified in the Consultation Paper, being:

- public education and awareness programs to address stigma and educate the community about sex workers;
- information, education and training for sex workers and sex work business operators on their rights and obligations;
- education and training programs for officials and organisations to deal with sex workers;

as well as steps to build positive relationships between sex workers, police and other authorities, and peer support and outreach services for sex workers on health and other matters. Appropriate bodies will also need to be sufficiently resourced to ensure sex workers are effectively educated about their rights and responsibilities under any new legislative framework.

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[23] Wagenaar, Amesberger and Altink (n 5) 134.
[24] Queensland Law Reform Commission (n 3) 169 [14.15].
[25] *Sex Work Decriminalisation Act 2022* (Vic) s 3(1).
[26] *Summary Offences act 2005* (Qld) s 6.
[27] *Human Rights Act 2019* (Qld) s 19.
[28] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6.

Q53-54 Fraudulent promise to pay a sex worker for a sexual act

In response to questions 53-54, QLS considers the offence of rape (which carries a maximum penalty of life imprisonment) should not be aligned with circumstances relating to the recovery of money. Our members highlight that including this type of circumstance into the non-exhaustive list under s 348(2) of the Criminal Code could have the unintended consequence of creating separate categories of rape and would introduce a new category that traditionally would not be understood by most members of the community as rape.

Consistent with the notion of decriminalisation and treating sex work as legitimate work, refusal to pay a sex worker for a mutually agreed upon sexual act would more appropriately be categorised as fraud in circumstances where there is serious dishonesty and misrepresentation by the client. In other less serious circumstances, it may be that such situations can be dealt with under general civil laws relating to the recovery of a debt.

Consideration should be given to how the legislative framework for a decriminalised sex work industry could enable a sex worker to have someone assisting with protection and recovery of money. Further, it is likely that recommendations to the Commissioner of Police will be required to ensure the QPS Operational Procedures Manual concerning prosecution of fraud offences includes some specific directions about this type of conduct.

Q48 What other factors should we consider (if any) in recommending changes to the criminal law on this issue?

We raise for the QLRC's consideration the issue of stealthing, noting the Women's Safety and Justice Taskforce is also examining whether stealthing should be explicitly referenced in Queensland law.[29] The act of stealthing may already be covered under the current offence of rape, pursuant to s 349 of the Criminal Code.

In circumstances where a complainant's consent to sexual intercourse is conditional on the defendant's use of a condom, the act of stealthing may deprive the complainant of a free and voluntary choice about whether to continue with sexual intercourse or not. In circumstances where a complainant does not consent to sexual intercourse without a condom, the complainant's consent is withdrawn with the removal of the condom. Rape can be prosecuted on the basis that the defendant nullifies a complainant's consent in modifying the act that a complainant consents to (sex with a condom), without obtaining fresh consent to sexual intercourse without a condom.

There is no explicit reference in the Criminal Code to the act of non-consensual condom removal during sexual intercourse, and limited published decisions considering the issue in Queensland. There have been, however, at least two instances in Queensland where condom related consent issues have been considered by the courts. First, the defendant in the case of *R v RAD*[30] was convicted of one count of rape, which was upheld on appeal. In that case, the complainant told the defendant to put a condom on prior to sexual intercourse, but he refused to do so and went ahead and had sexual intercourse with the complainant. The prosecution argued at trial that sexual intercourse had occurred without the complainant's free and voluntary

[29] Women's Safety and Justice Taskforce, *Discussion Paper 3: Women and girls' experiences across the criminal justice system as victims-survivors of sexual violence and also as accused persons and offenders* (Discussion Paper, 22 February 2022) 53-4.
[30] [2018] QCA 103.

consent. In affirming this view, the trial judged stated 'the complainant was willing to have sexual activity with the accused, there was [no] consent to... sexual activity without a condom.[31]

The second case took place in 2019 before the District Court in Gladstone, where the defendant was tried for rape. It was alleged that without the complainant's consent, the defendant removed a condom during sexual intercourse. In that case, the complainant had agreed to intercourse on the basis the defendant would wear a condom; she watched him put one on but then during sexual intercourse she realised he was no longer wearing one. The defendant was found not guilty.[32] However, the QLRC said in relation to the case: 'It is not possible, however, to discern the basis of the jury's verdict. A jury is not required to give reasons for its decision, and, from the limited information available about the trial, it is unknown whether other issues were also raised.'[33]

The QLRC has recognised there is still a significant gap in the law and confusion around non-consensual condom removal,[34] stating '[o]n one view, the non-consensual removal of a condom... [is] already covered by existing provisions, like the one in Queensland, to the effect that a person's consent to an act is not freely and voluntarily given if it is obtained 'by false and fraudulent representations about the nature or purpose of the act.[35]

While there are conceivably situations where conduct constituting stealthing should appropriately be charged as a rape offence, there are other situations where the conduct is of a lesser nature and an "all or nothing" approach of a rape charge may result in a miscarriage of justice. Multiple offence options may properly reflect the complex circumstances in which stealthing may arise to varying degrees of criminality.

Accordingly, QLS agrees with the QLRC's previous findings:

> The Commission acknowledges ... that the sabotage or removal of a condom without the other party's consent is a concerning practice. It is aware of at least one instance where such an act has been prosecuted as rape in Queensland.
>
> There may well be merit in considering whether this practice should be specifically dealt with as an offence in its own right. The Commission does not recommend an amendment to section 348(2) of the Criminal Code to include specific circumstances where the defendant sabotages or removes a condom without consent.[36]

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[31] Ibid [31].
[32] S Barnham, 'Gladstone man fights rape allegation after removing condom', *The Observer* (online, 25 July 2019); S Barnham, 'NOT GUILTY: Man accused of 'stealthing' rape is acquitted', *The Observer* (online, 25 July 2019).
[33] Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) 135-6 [6.110].
[34] Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Working Paper No 78, 20 December 2019) [134]. See also B Chesser and A Zahra, 'Stealthing: a criminal offence?' (2019) 32(2) *Current Issues in Criminal Justice* 217, 219.
[35] Ibid [136].
[36] QLRC (n 33) 144 [6.142]-[6.143].

Thank you again for the opportunity to make a submission to this inquiry. We look forward to the QLRC's report and Government response. QLS would be pleased to be consulted on any new or amending legislation following this inquiry.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

Kara Thomson
President