

Decriminalising the Sex Industry in Western Australia

1.1 Background:

Magenta is Western Australia's sex worker support project, providing health, advocacy and education services to people working in the WA sex industry. The project's background includes sexual health, human and civil rights, and regular face to face contact with WA sex workers. This submission is informed by the lived experience of Magenta's stakeholders who live and work within many iterations of the WA adult industry, and by the experiences of Magenta's staff.

This submission responds to point (3) from the select committee's terms of reference: *"any other measures introduced to restrict personal choice for individuals as a means of preventing harm to themselves."* Magenta writes to you as the health organisation that comes into contact with the largest cohort of WA sex workers, to provide evidence that existing restrictions on sex workers personal choices are not working to prevent harm. This submission will provide examples of where restrictions of sex workers on a sex worker's personal choice within WA law are outdated, poorly designed and ultimately flawed.

Magenta promotes full decriminalization of the sex industry as best practice for promoting safety in the sex industry, and for reducing harm to sex workers. In turn, we ask that the committee joins us in endorsing the decriminalisation of sex work in Western Australia.

The primary author of this document is Lena Van Hale, Manager of Magenta. If the committee or any of its representatives wishes to discuss this submission or any of the points laid out within it, I can be contacted by email at Lena.VanHale@magenta.org.au, or by phone on 0431 835 756. If the committee would permit my attendance, I would be grateful for an opportunity to present Magenta's case to the committee in person.

1.2 Overview:

While the provision of sexual services itself is legal in Western Australia, the sex industry falls under a criminalised model which prohibits many common practises associated with sex work such as employing security, or working in a group. In addition to removal of sex workers' reasonable health and safety precautions, the regulation of the WA sex industry under criminal laws also excludes sex workers from our society's broader industrial and civil laws designed to prevent exploitation of workers in any workplace.

This submission will provide evidence that these laws criminalising the sex industry go too far, and that criminalising the sex industry is not working to protect sex workers or the public. Existing laws

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fail to promote sex workers' personal safety, fail to provide sex workers with legal recourse in cases of abuse or exploitation, and provide little accountability for abusive clients or exploitation by third parties. This submission will provide examples of where under a criminalised legal framework, sex workers' personal choices are restricted to either working safely, or working within the law, in direct response to point (3) within the inquiry's terms of reference. This submission will also provide comparisons to a decriminalised legal framework, and provides examples where decriminalisation could reverse these grave impacts on sex workers' personal choices.

Magenta promotes the removal of criminal laws governing the WA sex industry, in favour of the full decriminalisation of sex work. This is distinct from legalisation, under which the sex industry remains governed under criminal law. Decriminalisation refers to a legislative model using appropriate labour and industrial rights frameworks to create equitable and safe workplaces, and enables the enactment of industry regulations enjoyed by all other legal industries.

Magenta also notes that among other defects, criminalisation of the sex industry has not reduced the number of sex workers working in the adult industry, is expensive to enforce, and enforces a system where the sex industry is pushed underground, creating an environment deleterious to public health and sex workers' health and safety. It is beyond the scope of this submission to fully explore these aspects of criminalisation.

“Work safely, or work legally?”

Existing Laws and their restrictions on Sex Workers' personal choices

This section explores some of the existing laws that present barriers to sex workers in choosing to exercise their optimum health and safety protocols. This list is not exhaustive but represents some of the existing criminal models restrictions on a sex workers personal choice, to the detriment of a sex worker's personal safety. The key issues for Magenta, are the existing offenses which effect sex workers' choices by outlawing reasonable options for keeping themselves safe. Notably this includes aspects of legislation that inhibit WA sex workers' ability in choosing to report crimes committed against them.

2.1 Sex workers are restricted to choose either working legally, or working safely

This section refers to WA's "Criminal Code Compilation Act 1913", s190 "Being Involved with Prostitution"¹

s.190 of the WA Criminal Code details offenses for persons involved in the provision of sexual services, including a sex worker, a tenant or dependant of a sex worker, and employees or colleagues of a sex worker. Within s190(1), any person who allows a premise they reside in, own or

¹[https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_37141.pdf/\\$FILE/Criminal%20Code%20Act%20Compilation%20Act%201913%20-%20%5B19-a0-00%5D.pdf?OpenElement](https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_37141.pdf/$FILE/Criminal%20Code%20Act%20Compilation%20Act%201913%20-%20%5B19-a0-00%5D.pdf?OpenElement)

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lease, “to be used for the purposes of prostitution” commits an offence under the act, as does anyone who “manages, or acts, or assists in the management of any premises for the purposes of prostitution”, and s190(2) broadly defines brothel keepers as any person who appears, acts or behaves as the person “having control of, care of, or management of any premises as the keeper of the premises” whether or not the person is the real keeper. This section criminalises sex workers who work together from the same residence and sex workers who allow their friends or colleagues to work from their residence for safety. Where two or more sex workers are working together from one location, the sex worker who is the tenant or who is seen to be managing the arrangement could be charged with an offence under the act. This presents a clear conflict with the law for sex workers, who may choose to work together for greater personal safety. **For Western Australian sex workers, safety in numbers remains a criminal offence.**

Magenta notes that sex workers frequently express a fear of violating this law, and that non-compliance with this section of the Act is frequently cited by Magenta’s sex worker clients as a primary reason for them feeling unable to report crimes committed against them. This significantly restricts a sex worker’s ability to freely choose to report crime against them, and effectively outlaws a reasonable safety strategy.

Under a fully decriminalised legal framework, sex workers working from the same property could work together to keep each other safe, and freely report crimes committed against them without fear of retribution.

2.2 Sex workers are restricted in who they choose to live with, and how they spend their money.

s.190(3) of the WA Criminal Code criminalises “any person who lives wholly or partly on earnings that the person knows are the earnings of prostitution”. This applies to any person who lives with a sex worker and is wholly or partly dependant on them, such as a sex worker’s intimate partner or dependants. This subsection makes living as a dependant of a sex worker an offence, and therefore restricts a sex worker’s ability to freely associate and reside with their own intimate partners and families, unless their spouse or adult children are solely independent. **No family should have to choose between living together, or compliance with the law.** Up to 35% of sex workers in Western Australia have reported that they have shared their income with someone else².

Subsection (3) of this Act also criminalises any employee or colleague hired by a sex worker, such as a receptionist, driver, security guard, or cleaner. The decision to hire support staff such as a cleaner or security guard violates s190(3) of the Criminal Code, restricting sex workers ability to freely choose these reasonable options for conducting their business, enjoyed by workers in all other legal professions. This is a heavy restriction on sex workers personal choice, forbidding sex workers from hiring support staff has no discernible benefit to a sex worker or the public, and contributes to sex worker isolation.

² Selvey, L, Hallet, J, Lobo, R, McCausland, K, Bates, J, and Donovan, B. The Law and Sex Worker Health (LASH) Study: A Summary Report to the Western Australian Department of Health

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2.3 Existing laws do not protect sex workers from harm

Besides the inappropriate laws that do exist, sex workers' safety, and freedom of choice, are also restricted by a lack of appropriate regulation. As this submission will discuss below, there are presently insufficient legal frameworks to provide sex workers with access to the basic labour rights.

Without access to fair work, occupational health and safety regulations, or industrial agreements, Owners/Operators of sex industry premises remain charged with dictating their employee's occupational health and safety standards. In terms of a sex worker's labour rights, unless an Owner/Operator chooses to do so, there is nothing that requires them to intervene in or take note of workplace bullying. In terms of a sex worker's personal safety for example, unless an Owner/Operator of a brothel or massage parlour chooses to do so, there is no sufficient legal framework that compels them to refuse service to a known difficult or violent client, giving them the power to knowingly risk their employees' safety.

A flow on effect of this, is that sex workers' choices are restricted severely where they are compelled to comply with their management's abusive policies. For example, each premises might have different policies around whether or not sex workers are allowed to warn each other about violent or dangerous clients. **A sex worker who simply warns their colleagues about a dangerous client, may lose their job for doing so, with no recourse. Magenta notes this practise is disturbingly widespread.**

“If the Police won't help us, where can we go?”

Exploring practises of policing and how they restrict sex workers choices

This section explores the impact of policing practises in Western Australia on the sex industry, and how this restricts sex workers' choices. This section aims to provide examples of where regulating the sex industry through a criminal justice framework has restricted the ability of both sex workers and the police to promote sex worker health and safety

Criminalisation of the sex industry positions the police and sex workers as adversaries, heavily restricting sex workers' ability to report crimes and exploitation. This positioning removes sex workers' ability to freely choose the safest options for their work for fear of criminalisation. To best mitigate these impacts on sex workers choice and safety, Magenta supports the decriminalisation of the WA sex industry, including the application of appropriate industrial, business and zoning regulation to address these concerns.

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3.1 Sex workers are restricted in choosing to report crimes

Evidence shows that 49% of WA sex workers are either uncomfortable or very uncomfortable with reporting to Police sexual assault, threats and other crimes against them. In the largest study ever conducted in the WA sex industry, 27% of all WA sex workers reported experiencing discrimination due to their work from Police officers at least once.² This did not vary by gender, or country of birth.

Sex industry offences are not applied uniformly and definitions remain unclear for sex workers trying to work within the limited legal framework that presently exists in WA. Sex workers often perceive they will not be believed when reporting assaults, or that officers may not understand that they are in fact working within the law. As this section discusses below, police are an inappropriate regulator for workplaces in the first place. Under a criminalised system, the police are charged with enforcing sex work regulations beyond those found in criminal law, such as occupational health and safety protocols. As the body usually specialised in the investigation of crimes, the police are not appropriate and generally unskilled in the investigation of industrial cases such as wage disputes, workplace bullying, and unfair dismissals. These are not functions that police are neither trained nor willing to provide to sex workers, and would be inappropriate for any other regulated industry.

As shown above the legal frameworks governing the sex industry do not uniformly mandate safe practises, and presently outlaw the application of many common health and safety precautions. Under WA's model sex workers who choose to work safely are put at odds with criminal justice frameworks, exacerbating discrimination against them when reporting crimes. **Eliminating the ability of any person to report crimes, especially when they are the victim of a serious crime, is an egregious failure of criminal law.**

3.2 Criminalisation makes adversaries of the police, regardless of compliance or intent

Positioning police as the body charged with investigating and regulating sex workers labour rights, presents a difficult conundrum for parlour-based sex workers who may wish to lobby for better conditions, but don't wish to be fired from their jobs. Police officers are the unofficial Human Resources department for the sex industry in this regard, creating an inappropriate relationship between Police and the WA sex industry. The police are who sex workers must report crimes to, but they're presently invested in prosecuting sex workers for non-compliance. **This creates an adversarial relationship regardless of whether sex workers are working legally or not.** It is important to note that this point has gathered significant evidence specific to the Western Australian sex industry. In fact the current legislation governing the sex industry in Western Australia has been shown repeatedly to be an impediment to sex worker health and safety.^{2 3 4 5 6}

³ Benoit, C., Smith, M., Jansson, M., Magnus, S., Ouellet, N., Atchison, C., . . . Shaver, F. (2016). Lack of confidence in Police creates a "Blue Ceiling" for sex workers' safety. *Canadian Public Policy*, 42(5), 456-468.

⁴ Donovan, B., Harcourt, C., Egger, S., Schneider, K., O'Connor, J., Marshall, L., . . . Fairley, C. (2010). *The sex industry in Western Australia: a report to the Western Australian Government*.

⁵ El-Hayek, C., van Gemert, C., Bowring, A., Feigin, A., & Stoové, M. (2011). *Review of clinical and health promotion services for sex workers in Western Australia: Prepared for the Western Australian Department of Health*.

⁶ Sloss, C. M., & Harper, G. W. (2010). Legal service needs and utilization of women who trade sex. *Sexuality Research & Social Policy*, 7, 229-241.

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3.3 Outdated laws restrict sex workers' choices and promotes abuse.

Western Australian legislation around the sex industry is brief and unclear. Offenses within the various acts governing the provision of sexual services in Australia are not widely understood by the bulk of sex workers and sex worker clients. Sex workers have reported abusive clients justifying their abuse because of a perception that sex work is illegal and reduced likelihood that sex workers would report assaults². As seen above, even though sex work is legal in Western Australia, these assumptions by violent clients around sex workers reticence to report assaults is actually true. Most WA sex workers do not feel safe enough to contact the police after being assaulted or robbed². In a regulated industry under a decriminalised framework, sex workers could report labour abuses in their workplaces from Owners/Operators of sex industry premises to an appropriate regulatory body, and the costs or penalties associated with non-compliance incentivise management of sex premises to provide a safe and compliant working environment. Presently those costs have the opposite effect; while sex workers are not able to freely report crimes against them, not able to safely comply with existing laws, and unable to freely report abuse and exploitation committed against them in their workplaces, **the existing legal framework incentivises abuse.**

To an unconcerned manager of a sex industry workplace, abuse and exploitation of sex industry workers is economically attractive. Compliance with occupational health and safety frameworks is expensive, and turning away known violent clients represents less cash flow for their business. Sex workers already struggle to report abuse to the police, and while insufficient legal frameworks exist within which sex workers could work legally, the police are often unable to intervene. For sex workers this represents a cascading failure of the existing laws that heavily restrict their personal choices, leaving with them with a set of impossible decisions to make around how to protect their safety. Their personal safety or the ability to report crimes, the choice to report exploitation and abuse, or remain gainfully employed.

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Examining the best practise model of sex industry legislation

The previous sections explored examples of how criminalisation of the WA sex industry has negatively impacted on WA sex workers and their choices. In this section, the submission will explore how appropriately regulating the sex industry could reverse these impacts and provide sex workers in WA with safer, and legal choices. We refer to regulating the sex industry like any other as “decriminalising” the sex industry, which is quite different to the criminalised model or “partial legalisation” that Western Australia currently falls under. Under decriminalisation, the points raised in the above submission are reversed. Sex workers are incentivised to choose the safest options for their work, their workplaces are incentivised to provide a safe environment and held accountable to doing so, and sex workers are able to report crimes to the police without fear.

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Magenta notes that other models of sex work legislation exist, such as the criminalisation of sex workers' advertising seen in United States, and the criminalisation of sex industry clients commonly referred to as the "end demand" model, the Nordic model, or Swedish Model. Each of these models position sex workers and police as adversaries, and restrict sex workers' access to labour rights and criminal justice frameworks in the same way, by offering no appropriate industrial regulations for the sex industry. It is beyond the scope of this submission to examine each model of sex industry legislation in the modern world individually, but each of these models inappropriately rely on criminal justice frameworks to enforce labour rights in the sex industry, and in doing so they restrict sex workers personal choices and personal safety in the same manners as detailed in the above submission.

4.1 Decriminalisation of the sex industry is best practise for enhancing personal safety

A decriminalised sex industry removes police as regulators of the industry, repeals criminal laws governing the sex industry, and regulates businesses in the adult industry by standard industry codes enforced on any other industry. By repositioning police and sex workers as allies, sex workers have enhanced ability to report crimes⁸, and both groups can work together in obtaining optimum health and safety protocols for sex workers. In Australia, decriminalisation has been demonstrated to lead to the best health outcomes in sex workers, including negligible rates of sexually transmitted infections, and blood borne viruses⁷. Decriminalisation has been shown consistently to remove barriers for HIV prevention, and enhance opportunities for health promotion amongst sex workers⁸.

4.2 Endorsement of Decriminalisation

Magenta calls for an end to criminal laws governing the WA sex industry and the enactment of appropriate industrial and business regulations. Magenta calls on the Committee to join us in our endorsement of decriminalisation, as the safest legal model for sex workers and the public.

Decriminalisation of the sex industry has existed in Australia since 1995, when NSW partially decriminalised their sex industry. New Zealand decriminalised their industry in 2003, and each of these jurisdictions now enjoy the best health outcomes for sex workers, and a higher willingness amongst sex workers to report crimes. In the previous two decades, many international bodies have expressed their support of decriminalisation such as The Lancet⁹, Amnesty International¹⁰, the World Health Organisation¹¹, and the United Nations¹². While a wealth of international evidence and

⁷ Harcourt, C, and Donovan, B, 'The Many Faces of Sex Work', Sexually Transmitted Infections, 81, 2005, 201.

⁸ Platt L, Grenfell P, Meiksin R, Elmes J, Sherman SG, Sanders T, et al. (2018) Associations between sex work laws and sex workers' health: A systematic review and meta-analysis of quantitative and qualitative studies. PLoS Med 15(12): e1002680. <https://doi.org/10.1371/journal.pmed.1002680>

⁹ <https://www.thelancet.com/series/HIV-and-sex-workers?code=lancet-site>

¹⁰ AMNESTY INTERNATIONAL POLICY ON STATE OBLIGATIONS TO RESPECT, PROTECT AND FULFIL THE HUMAN RIGHTS OF SEX WORKERSPOL 30/4062/2016. Obtained Via: <https://www.amnesty.org/download/Documents/POL3040622016ENGLISH.PDF>

¹¹ http://www.who.int/hiv/topics/sex_work/about/en/

¹² UNAIDS, UNFPA and UNDP, *Sex Work and the Law in Asia and the Pacific*, 2012, UNDP Thailand, accessed at <http://www.undp.org/content/dam/undp/library/hiv/aids/English/HIV-2012-SexWorkAndLaw.pdf>

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support for decriminalisation exists, it is important to note that locally, Western Australia itself has conducted significant research on the sex industry within WA's own unique context which echoes this international consensus. Quoted throughout this submission are findings from the Law and Sex Worker Health (LASH) Study conducted here in Western Australia by Curtin University in 2017, which represents one of the most thorough bodies of research into the sex industry ever conducted in Australia.²

Magenta echoes this recommendation laid out in the LASH report:

“Sex work should be decriminalised in Western Australia

Our study demonstrated a number of ways that the criminalisation of sex work in Western Australia has a negative impact on the health, safety and well-being of sex workers. This includes criminalisation being used as an excuse for abuse by clients of sex workers; a reluctance of sex workers to go to the Police as victims of crime; the hidden nature of sex work in the context of private houses and massage parlours impeding access to services and health promotion; and the physical risk of street-based sex work. Decriminalisation also allows a highly visible focus on workplace health and safety in brothels and massage parlours. It is also an important step towards reducing stigma and discrimination experienced by sex workers. There is good evidence that decriminalising sex work does not result in an increase in the number of clients accessing sex work (Rissel et al., 2017), and the normalisation of this work is important in improving the health and well-being of sex workers.”

Magenta endorses decriminalisation of sex work in Western Australia, both as WA's support service for sex workers and as the health organisation in WA in contact with the largest population of sex workers. Magenta asks that the committee in turn also endorses the decriminalisation of sex work in Western Australia.