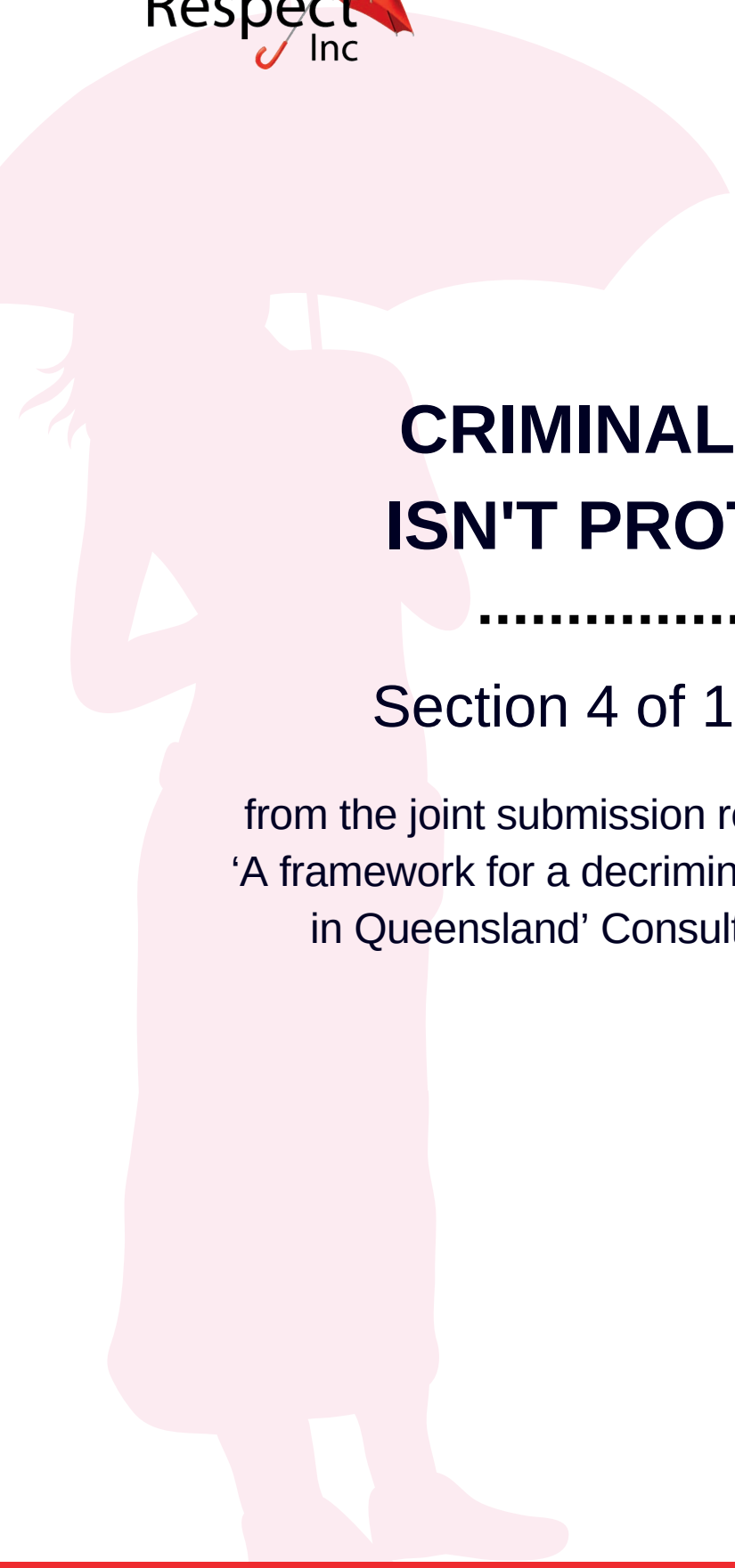

CRIMINALISATION ISN'T PROTECTION

Section 4 of 17 (pp46-62)

from the joint submission responding to the QLRC
'A framework for a decriminalised sex work industry
in Queensland' Consultation Paper WP 80'

CHAPTER 8: 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? For example:

(a) Should the offences in section 77 of the Prostitution Act and sections 229G, 229FA and 229L of the Criminal Code be reformulated in another part of the Criminal Code or in another law?

(b) Should any other offences be included in the Criminal Code or another law (like the exploitation offences in other decriminalised places)?

(c) Should the *Child Employment Act 2006* be amended to prohibit a person from requiring or allowing a child to work as a sex worker or in a sex work business?

No, offences in section 77 of the Prostitution Act and sections 229G, 229FA and 229L of the Criminal Code should not be reformulated in another part of the Criminal Code or in another law. It is an unnecessary duplication of laws to include these or new laws in relation to exploitation. The focus should instead be that sex work is completely decriminalised to enable sex workers to report crime and access WHS protections. The Child Employment Act should not be amended and should not include offences specific to sex work. We explain our reasons for this position in the following sections.

Sex workers would not agree that it is reasonable to maintain criminal laws or create new criminal laws to 'protect against commercial sexual exploitation'. On the contrary, because Queensland already has such robust criminal laws to protect people from unwanted sexual activity, there are already existing protections for sex workers to access after decriminalisation. Using the expression 'commercial sexual exploitation' as something that is distinct from 'sex work' is problematic. Enacting yet another set of distinct criminal laws as a safeguard from exploitation, but only to be applied to sex work, is extremely unhelpful and will only serve to maintain sex work stigma under another name.

Exploitation in sex work should be treated as labour exploitation

> If prostitution were decriminalized or legalized, there would still be a risk that violence, intimidation and coercion would continue to occur. However, serious criminal misconduct can and does occur in hotels, restaurants, public sport facilities and at other public meeting places and is dealt with by the normal laws….The concern about exploitation of women might best be met by laws which prohibit coercion, but not by laws which assume that all men who get money from prostitution are at fault. Care is also needed in deciding what constitutes exploitation. Prostitutes may benefit from relationships with men who protect them from violent clients. They should have the same rights to enter into voluntary relationships as do other citizens.[9]

While the quote above from Fitzgerald is in many ways outdated—speaking about sex workers as women who may need men to protect them from violent clients—in its essence it conveys what sex workers have been advocating for; that sex work should be treated as work, not exploitation. Unfortunately, this sentiment did not survive much past Fitzgerald's report.

Currently, exploitation in the Queensland sex industry is not treated as labour exploitation. Historic regulation of sex work has focused heavily on misguided measures to protect women, children and other 'vulnerable' people from exploitation. One of the purposes of the Prostitution Bill 1999 was to 'address social factors which contribute to involvement in the sex industry'[10] and many other sex work laws have focused on trying to prevent the exploitation of women sex workers by making it illegal to 'entice' someone into sex work or by 'living off the earnings' of a sex worker. In the same vein, sex work laws have focused on protecting young people (children) and people with mental impairment from exposure to, or participation in, sex work. The unintended consequences is that many of the laws that were meant to protect sex workers have been used against us, our partners, our family members and friends, especially when police are seeking to target us.

Sex workers have called for the removal of 'living off the earnings' laws because of the offensive way that they frame us as exploited victims and target our families. In Queensland these laws were not framed as 'living off the earnings' but similar consequences were produced by police use of the 'knowingly participating in the provision of prostitution' offence (s229h), which had unintended consequences for many sex workers and their families. One small example is set out in the news story below:

---

[9] Fitzgerald, A. 1989. *Report of a Commission of Inquiry Pursuant to Orders in Council: Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, p. 191. https://www.ccc.qld.gov.au/about-us/our-history/fitzgerald-inquiry

[10] Prostitution Bill 1999 explanatory notes. https://www.legislation.qld.gov.au/view/html/bill.first.exp/bill-1999-608#

My client is not a pimp
Melanie Petrinec, The Cairns Post, Friday, December 10, 2010

AN Edge Hill sex worker and her husband have fallen foul of Queensland's prostitution laws because the woman was too busy to do her own advertising.
Instead, Marika Matula asked de facto husband Ronald Pacheco to put her ad in the paper, landing the pair in Cairns Magistrates' Court yesterday under legislation aimed to "protect prostitutes from pimps".

The Global Alliance Against Traffic in Women (GAATW) recommends the 'complete' decriminalisation of sex work:

> Complete decriminalisation of sex work is not a panacea, but it is the first step to better protect sex workers' rights. The decriminalisation argument is based on an understanding that sex work is work, and is a precondition for establishing safer, healthier workplaces in an industry in which sex workers' rights are protected by labour laws, and in which sex workers are afforded the same labour protections which other workers enjoy. As in other sectors, this would lead to fewer opportunities for exploitative working conditions, including human trafficking.[11]

Decriminalisation will be undermined if the process gets bogged down by misguided attitudes to sex work as potentially criminal or inherently exploitative, and we know that the criminalisation of vulnerable people does not help them. Exploitation can occur in every industry, yet there are no other special exploitation laws specific to each industry. Creating new sex work-specific exploitation laws will only serve to maintain harmful stereotypes, stigma and discrimination. Specific laws are created out of discriminatory attitudes and, in turn, research shows that these laws drive and maintain stigma.[12] This very recent research on the role that legislation plays in reinforcing stigma and discrimination against sex workers also reveals misguided laws framed as 'protection' for sex workers are a 'major barrier to accessing health care and protective services and impacted negatively on their mental health and wellbeing'.[13] We must break this legal cycle to give sex workers a chance to emerge out of their current stigmatised existance into one that affords them the same rights as other workers in other occupations. Decriminalisation should bring sex workers under the universal protection provided by many existing laws in the Criminal Code (Qld) 1899, Criminal Code Act (Cth) 1995, Fair Work Act (Qld) 2009, Workplace Health and Safety Act (Qld) 1995: all sufficient to protect people from being exploited in any job, including sex work. Additional state

[11] Global Alliance Against Traffic in Women (GAATW). (2018). *Sex workers organising for change: Self-representation, community mobilisation, and working conditions*. p. 40. https://www.gaatw.org/publications/SWorganising/SWorganising-complete-web.pdf

[12] Stardust, Z. et al. 2021. Ibid.

[13] McCausland, K., Lobo, R., Lazarou, M., Hallett, J., Bates, J., Donovan, B. & Selvey, L.A. (2022). '"It is stigma that makes my work dangerous': Experiences and consequences of disclosure, stigma and discrimination among sex workers in Western Australia', *Culture, Health & Sexuality*, vol 24 no 2, pp. 180-195, DOI: 10.1080/13691058.2020.1825813https://www.tandfonline.com/doi/full/10.1080/13691058.2020.1825813?src=recsys

offences would be an unnecessary duplication.[14] We know that creating more, harsher and specific laws about sex work has the opposite-of-intended effect and drives sex work underground so that sex workers are less safe and more likely to be exploited.

Q5a Should the offences in section 77 of the Prostitution Act and sections 229G, 229FA and 229L of the Criminal Code be reformulated in another part of the Criminal Code or in another law?

No. All of the laws listed in Q5a are dated and many are duplications of other laws adequate for the purposes. Section 77 of the Prostitution Act, when enacted, was a duplication of s218 of the Criminal Code, which had been considered adequate to cover coercion in sex work under the Prostitution Laws Amendment Act 1992.

> 218.(1) A person who—
> (a) by threats or intimidation of any kind, procures a person to engage in a sexual act, either in Queensland or elsewhere; or
> (b) by a false pretence, procures a person to engage in a sexual act, either in Queensland or elsewhere; or
> (c) administers to a person, or causes a person to take, a drug or other thing with intent to stupefy or overpower the person to enable a sexual act to be engaged in with the person;
> commits a crime.
> Maximum penalty—imprisonment for 7 years.
> (2) If the victim of an offence against this section is a child under the age of 16 or an intellectually impaired person, the maximum penalty to which the offender is liable is imprisonment for 14 years.
> (3) A person may be convicted of an offence against this section on the uncorroborated testimony of 1 witness, but the Judge must warn the jury of the danger of acting on the testimony unless they find that it is corroborated in some material particular by other evidence implicating the person.

Section 77 was brought in to add additional 'safeguards' for brothels under the licensing framework but it was also a duplication of section 229G of the Criminal Code, which was introduced as part of Chapter 22A in 1992. Sections 229G and 229L remain virtually unchanged since they were enacted under the 1992 law reform. They should be repealed and not reformulated elsewhere, for the reasons discussed below:

Section 77 Prostitution Act — forcing a person to do sex work
Section 77 is an unnecessary duplication of additional Queensland and Commonwealth legislation, which already operates to provide adequate protections against exploitation and coercion in a workplace situation without specifically targeting sex workers.

It is already covered by:

- Sections 343, 345 Fair Work Act 2009 (Cth) (Fair Work Act). Section 343 (Coercion) Section 345 (Misrepresentations)

[14] Division 270 of the Commonwealth Criminal Code 'Slavery-like offences'. https://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/cca1995115/sch1.html

- Section 218, Criminal Code 1899 (Qld): Section 218 (Procuring sexual acts by coercion). It is also worth noting that section 218(3) expressly provides that the definition of 'engaging in a sexual act' is not limited to 'sexual intercourse or acts involving physical contact', which gives additional breadth to the scope of the provision.
- Section 271.2(2)-(2C), Criminal Code Act 1995 (Cth) (Commonwealth Criminal Code) Chapter 8, Section 271.2(2) - (2C) Contains offences for trafficking persons, including children, for the purpose of sexual exploitation.

Sex workers also have existing civil protections under the Fair Work Act that are comparable to workers in other industries or occupations that operate in Queensland. The creation of criminal penalties specific to sex workers under section 77 operates on a discriminatory basis to criminalise sex work. This is inconsistent with the overall goal of decriminalising sex work.

The laws that are currently in place for sex workers are unnecessary as they overlap with existing Commonwealth and Queensland legislation, including the Criminal Code (Qld), Commonwealth Criminal Code and the Fair Work Act. For the reasons that follow, sections within these additional statutes provide sufficient protection to people from being exploited in any industry, which includes sex work:

(a) Workplace protections exist under section 343 and 345 of the Fair Work Act to protect individuals from coercion against exercising their workplace rights and being subject to misrepresentation about their work.

(b) Coercion in the context of sexual acts is captured by section 218 of the Criminal Code (Qld), which creates it as an offence to procure sexual acts by coercion (with sexual acts not being limited to sexual intercourse or physical contact). Note: This carries a maximum penalty of 14 years imprisonment, and captures a broader array of conduct than section 77. It creates a significant and more than adequate criminal penalty for such conduct.

(c) Section 270.1A of the Commonwealth Criminal Code captures duress involving trafficking and exploitation situations, noting it has defined words such as 'coercion' and 'duress'. It is a specific and adequate deterrent applying existing criminal law.

The duplication of Commonwealth laws is neither necessary nor an effective means to prevent exploitation and trafficking in sex work. The Federal laws are supported by the federal police and other agencies that have extensive powers to investigate and prosecute criminal exploitation in sex workers' workplaces. These federal agencies and departments are equipped to effectively assist in preventing exploitation. The removal of section 77 will assist in legitimising sex work in which employee rights and protections are regulated in the same way as other industries.

Section 229G Criminal Code — advertising for, or asking someone to do, sex work:
Section 229G of the Criminal Code (Qld) should be removed.This law is not about workplace exploitation, it is about asking someone to do sex work at all. Section 229G uses the term 'procure' in such a way (inclusively instead of definitively) that it covers both procurement for exploitation and procurement for legal work. It is so broad that it could criminalise the acts of clients who book sex workers for bookings that involve the sex worker leaving their place of

residence. This is not surprising because it was drafted at a time when the parliament did not recognise sex work as work and did not want there to be any mechanism by which sex work business operators could be part of someone engaging in sex work. If sex work is to be treated like a legitimate business there must be a way that sex workers and business operators can advertise for workers. If we are to treat sex work as work it should be legitimate for someone to ask another person to engage in sex work. How else can a private sex worker 'procure' another sex worker for a double booking or enter into a collective with other sex workers? In terms of advertising for employment, sex workers will be able to be thoroughly informed about employment opportunities at other businesses, understand the requirements and the particulars of a job and have more options to move into areas where the working conditions are better. It should be noted that this charge has historically been used by police to entrap sex workers and if retained, police are likely to revert to its use.[15]

Section 229FA Criminal Code — employing or transacting with someone who is not an adult (under 18) to do sex work:

The offence in section 229FA is well covered by other, non-sex work provisions, offences under both the Queensland and Commonwealth Criminal Codes. The Child Protection Act 1999 (Qld) is also of widespread application to protect children from harm. In particular, for children under 16, the provisions relating to rape and indecent treatment/carnal knowledge of children exist in the Queensland Criminal Code. The Criminal Code contains a range of offences that cover sexual exploitation of a person under 16, including sections that would cover any sex work situation. They make it an offence to:

- engage in child sexual exploitation (s210, s215, s229b)
- conspire in making a child available for sexual exploitation (s221)
- provide premises for child exploitation (s213)
- take a child for child exploitation s219
- procure a child for child exploitation (s216, s217)
- procure using the internet (s218a)
- groom a child for sexual exploitation (s218b).

There is also a law that covers distribution of images of child exploitation (s223).

The Commonwealth Criminal Code offers protection where, for example, a carrier service is used. There are also sections of the Criminal Code that deal with rape and sexual assault (s349-352) with section 349 noting that children under 12 years of age are unable to give consent.

Both Commonwealth and Queensland laws deem the legal age of consent for sexual intercourse to be sixteen. People aged 16 years or older are considered to have the requisite autonomy to legally be able to engage in sexual activity. There should not be a law contained in the Criminal Code (Qld) that interferes with this freedom of choice. We are of the belief that the age of consent issue must be considered in these laws. Where a young person between 16 and 18 years of age is employed to be a sex worker, this would currently be covered by the Child Employment Act 2006 (Qld) and Child Employment Regulation 2016 (Qld), which protects young people under 18 years from being required to perform work that may be harmful to their health, safety or that compromises their mental, moral or social development.

[15] *Sirens are coming*. (2022). ABC Podcast bonus. https://www.abc.net.au/radio/programs/dig/siren-are-coming-bonus/13917046

This provision would well be able to be applied to prevent children being employed to engage in sex work and therefore a sex work-specific offence is not required. Any criminal aspect could also be prosecuted under the Criminal Code (for example where there was procurement for sexual exploitation).

Criminalising sex workers under 18 is harmful because it forces them to be isolated and without the benefit of peer education. It may actively discourage underage sex workers from safely receiving help and assistance when they require it. It puts underage sex workers at higher risk of harm as they may have a fear of being charged themselves for the crimes associated with their work if they report anything to the police. The current wording of section 229FA could result in underage sex workers being prosecuted and convicted. It does not adequately protect underage people, it merely marginalises them and results in them having frequent encounters with law enforcement.

In conclusion, the offence in section 229FA is well covered by other, non-sex-work, offences under both the Queensland and Commonwealth Criminal Codes, both of which are well equipped to provide protection to a person who is not an adult.

Section 229L Criminal Code — allowing someone who is not an adult or has 'impairment of the mind' to be on premises of a sex work business:

It is our position firstly, that section 229L of the Queensland Criminal Code is a duplication of already existing Queensland and Commonwealth legislation, well equipped to provide protection to a person who is not an adult as discussed for s229FA. Secondly, section 229L is ambiguous and too broad to protect an individual's right to sexual autonomy and sexual choice. The section has harmful impacts for sex workers who are parents or carers, sex workers who have children or other family members who live with impairment, young people who do sex work and sex workers and clients who live with impairment. We discuss these issues in turn.

Child or young person on premises used for sex work

If there is any fear of child exploitation because of a child being on the premises, offenders can be prosecuted under the identified provisions in Chapter 22, especially section 213 of the Queensland Criminal Code. Prosecuting offences under Chapter 22 of the Queensland Criminal Code places the focus on actual identified harms or exploitation of the child not simply because of them being on premises used for sex work. This prevents unnecessary targeting of sex workers who themselves are parents or caregivers to children and hence live with them.

Furthermore, if the child is at risk of harm because of being on premises used for sex work (but not sufficient to be criminally prosecuted for the abovementioned offences), the Child Protection Act applies to allow investigation by the Department of Children, Youth Justice and Multicultural Affairs. 'Harm' in this Act is defined broadly and includes 'any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing'.
Harm can be caused by:

(a) physical, psychological or emotional abuse or neglect; or
(b) sexual abuse or exploitation.

These laws operate to protect children who are identified to be at actual risk of harm or exploitation as a result of exposure to sex work and would avoid the unnecessary consequence of criminalising a parent's lawful choice to engage in sex work.

A blanket offence for children being on premises used by more than one sex worker would cause considerable hardship for sex workers who have children and work from home and/or share workspace in a collective with other sex workers. In circumstances where there are two or more sex workers on the premises with their children, it is often the case that they are working together for safety and to share costs. It decreases their reliance on third parties, and they may share childcare duties. However, section 229L creates criminal liability on any sex workers if a child is on site at any time. The sex worker is then subject to a significant risk of arrest, police harassment and/or abuse. In a decriminalised system there will always be an option for marginalised sex workers to work together; this would support positive relationships with police and other service organisations, making it easier for sex workers to seek help if they need to.

It is stigmatising to suggest that parents engaging in sex work will harm their children if their children remain on premises while sex work is occurring. Many people working from home keep their children on premises while they are working, including those in businesses where they receive clients and deliver services to those clients in a separate room. People performing therapeutic or psychological services, which may include activities or conversations that are not suitable for children still conduct these services from home and maintain a separation of their children from the work at hand. Other larger businesses such as alcohol and gambling venues that restrict children will sometimes provide a separate child-care/play room for employees and clients. For example, there are casino guidelines for providing separate 'play' areas: 'Where child play areas are provided, best efforts should be made to minimise exposure to areas where gambling activities are conducted'.[16]

There are online WorkSafe Queensland guidelines for advising about safety of children at workplaces.[17] Sex work WHS guidelines would include similar instructions about children on premises of sex work businesses.

Child sexual exploitation

As discussed above for s229FA there are more than adequate laws under the Queensland Criminal Code and the Child Protection Act 1999 (Qld) to safeguard against and cover sexual exploitation of children under 16 years old in sex work, or under any other circumstances. Section 213 of the Criminal Code in particular provides safeguards against organised exploitation including providing premises. Additional laws are not necessary and they will continue to legalise stigmatisation of sex workers and create barriers for sex workers who are parents/caregivers. Decriminalisation will mean existing child exploitation protections will apply to sex work workplaces, just like any other workplace in Queensland.

[16] Department of Justice & Attorney General Queensland. (2020). Responsible gambling resource manual: Casinos 2020 4.5 p. 27. https://www.publications.qld.gov.au/dataset/responsible-gambling-code-of-practice-and-resource-manuals/resource/adc08e35-2e49-4053-af06-de5d439dab68?inner_span=True

[17] WorkSafe Queensland Children in workplaces online guidelines. https://www.worksafe.qld.gov.au/safety-and-prevention/hazards/hazards-index/children-in-workplaces

Young people involved in sex work

The age of sexual consent is 16 and we know that people aged between 16 and18 years old do sex work. Criminalisation of young sex workers or their clients increases their isolation and decreases their safety if they cannot access peer education by working with other sex workers or hire support staff.

Under the UN Convention on the Rights of the Child children are defined to be under 18 unless under their local laws the 'age of majority' is earlier.[18] For the purposes of discussing child sexual exploitation the age of majority in Queensland could be considered to be 16 years, which is the age of consent for sexual activity under the Criminal Code. McClure et al (2014:9), when discussing young sex workers' need for access to information and health services argue that 'The evolving capacities of adolescents should be taken into account to determine the most appropriate interventions to support them. The needs of 10-13 year olds, for example, might be quite different from those of 14-17 year olds, many of whom could have been surviving outside a family setting for years, managing their day-to-day lives as de facto adults.[19]

No reference to sex work in the Child Employment Act

It will undermine decriminalisation to include specific reference to sex work or social escorts in the Child Employment Act 2006. There should be no amendment to the Child Employment Act 2006 to prohibit a person from requiring or allowing a child to work as a sex worker or in a sex work business. We argue for the repeal of this section: '8B Prohibition on work as social escort (1) An employer must not require or permit a child to work as a social escort. Maximum penalty—100 penalty units. (2) In this section—social escort see the Prostitution Act 1999, schedule 4.' This refers to the Prostitution Act for a definition of 'social escort' and is an example of another exceptional law, as the only two occupations specifically mentioned in the Child Employment Act 2006 and Regulation 2016 are entertainment and social escort.

The amendment to include social escort (s8B) was made after 2009 when a number of changes were made to the sex work laws under the Prostitution and Other Amendments Act 2010 following the Crime and Misconduct Commission 2006 review of the laws to determine if licensed brothels should be allowed to do outcalls. Changes to the laws to include the concept of the 'social escort' came about because brothel licensees argued that illegal escorts were undermining the financial viability of their businesses. At the public hearing the idea was presented that escort agencies might try to get around the law by posing as social escort services that do not provide sexual services. Recommendations were made by the CMC to restrict advertising further as a way to '...close off the loophole that allows illegal prostitution providers to advertise as ''social'' escorts', even though the CMC acknowledged at the time that:

> The recommendations in this section are not made because we believe there are a large number of true social escorts who need to be regulated. On the contrary, our research suggests that the small number of legitimate social escorts are already

[18] United Nations Article 1, Convention on the Rights of the Child. Adopted 1989 In force 1990. https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child

[19] McClure, C., Chandler, C. & Bissell, S. (2014). 'Responses to HIV in sexually exploited children or adolescents who sell sex', *The Lancet* HIV and sex workers, July 2014, pp. 8-10.

> complying with the requirements recommended. The reason for the recommendations is to target illegal prostitution providers. If there is a set of regulations defining the advertising and other activities of ‘‘social escorts’’, illegal prostitution providers will no longer be able to masquerade as ‘‘social’’ escorts and thereby obtain a competitive advantage over the legal prostitution industry.[20]

There has never been any suggestion that there were children working as social escorts but as a part of this process the addition of s8B in the Child Employment Act was automatically made to include a ban on a child being employed as a 'social escort'. We note that the term ‘social escort’ is not used in any of the child employment codes or guides; it only exists in the Child Employment Act and should be removed from the Act as part of establishing the new decriminalised framework in Queensland so that the extensive and existing safeguards for all child employment apply.

As discussed above, the Child Employment Act itself contains adequate safeguards, which would protect persons under 18 being employed in any type of work requiring nudity, exposure of genitalia or erotic dress (8A) and an employer must not require or permit a child to work in a role or situation that is inappropriate for the child, having regard to the child’s age, emotional and psychological development, maturity and sensitivity (8C).[21] Including sex work or social escort is overkill and stigmatising.

‘Impairment of mind’

Under the current law a person with ‘impairment of the mind’ cannot work at a licensed brothel or be on any other sex work premises, with very harsh prison penalties imposed on anyone who works with them in any way. This impacts on both sex workers and clients because under section 229L if someone with ‘impairment of mind’ was to attend a brothel as a client they put the sex worker and possibly a carer at risk of criminal conviction. Removal of Section 229L would improve the rights of persons with an ‘impairment of the mind’, including the right to gain access in a safe and dignified manner befitting the individual's level of ability to the range and types of sex work services available without discrimination or systemic barriers. Currently section 229L does not allow for persons with an ‘impairment of mind’ who have the capacity to make decisions relating to consent to participate in sex work or engage with sex workers to do so. This section prevents the sex industry from organising sex workers who are trained and skilled to work with people with intellectual disabilities.

We are also aware that under Section 134A of the Prostitution Act 1999 (Qld) an exemption is provided to health professionals for essentially breaching patient confidentiality to inform a police officer if they reasonably believe that a sex worker at a licenced brothel is a person with an ‘impairment of mind’. The provision allows the health professional (i.e. a doctor or a registered nurse—see s 134A[6] to provide a police officer with information about the sex worker and the sex worker’s disability. This exemption would presumably apply for the client of a sex worker as well. This has created unintended barriers to health care and support seeking behaviour of sex workers with various cognitive, psychiatric or neurodivergent

[20] Crime and Misconduct Commission. (CMC). (2006). *Regulating outcall prostitution*, p. 47. https://www.ccc.qld.gov.au/sites/default/files/Docs/Public-Hearings/Escort-agency-hearings/Regulating-outcall-prostitution-Report-2006.pdf

[21] Child Employment Act. (2006). https://www.legislation.qld.gov.au/view/pdf/inforce/2010-10-14/act-2006-002

conditions who did not want their doctors to inform the police that they were working as sex workers.

The current definition of 'impairment' is very broad: 'a person with a disability attributable to an intellectual, psychiatric, cognitive or neurological impairment or any combination of these where the disability substantially reduces the person's capacity for communicating, interacting socially or learning, and results in the person needing support'.[22] This definition captures many circumstances and issues that sex workers and clients who are capable of negotiating consent may experience. For many sex workers with disability sex work provides them with a stable income, capacity to pay for and attend therapy and the flexibility to schedule work around their disability. Decriminalisation of the offence created by this section would allow sex workers living with impairment to access all the same benefits; access to occupational health and safety and reduced surveillance. Further marginalisation through over-regulation of normal human activity results in poor access and a denial of the human rights of individuals.

The problem of this broad definition was specifically addressed in R v Mrzljak[23], a case under section 216 where all three judges of the Court of Appeal made it clear that 'the existence of an intellectual impairment did not mean that a person is incapable of giving or withholding consent'. It is imperative that section 229L be removed and the definition of impairment in section 216 be amended to reflect a more appropriate and conclusive definition of what constitutes an inability to consent to sexual activity.

The Public Advocate Qld and disability organisations such as Queensland Advocacy Inclusion (QAI) also oppose the current overly broad definition of 'impairment of mind' and its use in laws about sexual activity under s216 of the Criminal Code, including sex work, 'which has been interpreted to have such a broad application that it includes not only people who have impaired decision-making ability, but those with disabilities that have no impact on decision-making ability'.[24] They call for a new definition that refers to a permanent impairment that affects decision-making capacity to understand and consent to sexual activity. In Queensland there is already a legislated process for supported decision making with people who have capacity issues. Decision-making ability, consent and capacity are dealt with in the Public Guardian Act 2014, Guardianship and Administration Act 2000 and Powers of Attorney Act 1998, which can used along with the Queensland Capacity Assessment Guidelines (QCAG) by people who are concerned about a person's capacity to decide on matters of sexual consent. The Queensland Capacity Assessment Guidelines (QCAG), updated last year, sets out a process for assessing whether a person passes a 'general test for capacity':

> The legal test to apply: Under the general test for capacity under Queensland's guardianship legislation, the adult must be capable of: (a) understanding the nature and effect of decisions about the matter (b) freely and voluntarily making decisions about the matter (c) communicating the decision in some way. There are three parts

[22] Criminal Code Act 1899 Schedule 1, p. 42. https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-1899-009

[23] R v Mrzljak[2004] QCA 420 https://www.queenslandjudgments.com.au/caselaw/qca/2004/420

[24] The Public Advocate Qld. (Jan 2022). 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'. https://www.justice.qld.gov.au/__data/assets/pdf_file/0006/703770/202201-section-216-report-final-22.pdf

that make up this test. The criteria in all three needs to be met for an adult to have capacity to make the decision.[25]

The capacity assessment guidelines support people to assist a person living with impairment to make a decision and there is an emphasis on 'supported decision making' using the 'least restrictive options' and assuming at the outset that the person has capacity. This emphasis is to ensure that the process upholds the human rights of the individuals who are being assessed. It says, 'It is important that at the time you conduct the assessment you identify the decision(s) to be made by the adult. This is because capacity is specific to the decision to be made. The test of capacity may also be different depending on the decision to be made.'[26]

Specific and restrictive legislation would create negative unintended consequences for already marginalised people. The existing Queensland consent laws reflect both the UN Convention on the Rights of Persons Living with Disability and the Queensland HRA (Qld) that people should be assumed to have decision-making capacity unless assessed otherwise and that they should be subject to the 'least restrictive' options to uphold their privacy and equality before the law. We envision that a legal contradiction could arise for employers, carers and sex workers who cannot legally discriminate on the basis of disability if there was a new law framed that would make it impossible for them not to discriminate on the basis of 'impairment of mind' with respect to providing sexual services and being on premises. In recent years the NDIS has provided people who have a range of disabilities, including 'impairment of mind' with access to sexual services.[27] They have a right to reasonable and necessary support but a carer in Queensland who is concerned about a potential prison term is going to be reluctant to provide that support for a client who has impairment that is encapsulated under the definition of 'impairment of mind'. Another unintended consequence of laws like this is that they can be used to limit the rights of a person with disability to engage in activity to which they have the capacity to consent by carers and people with POA who may disagree on moral grounds to sex work, or sexual activity in general, and who will use the law to argue against it.

Trafficking

Australia has extensive federal trafficking laws that already exist and will continue to apply after decriminalisation in Queensland. There is no need for additional state-based laws.

Evidence from sex worker organisations, evidence-based research and government statistics consistently support that trafficking and exploitation is not the experience for the vast majority of migrant sex workers in Australia.[28] [29] The Joint Standing Committee on Foreign Affairs Defence and Trade Human Rights Sub-Committee inquiry report, *Trading lives: Modern day human trafficking* found that most trafficking and slavery matters in Australia involve small networks based on overseas family or business connections rather than large organised crime

[25] Queensland Capacity Assessment Guidelines, p. 16. https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/23e5bde1-40d7-4115-a15d-c15165422020/qld-capacity-assessment-guidelines-version-2-to-upload-28-04-21.pdf?ETag=8be7451b7432cea4533983685981f72b

[26] Queensland Capacity Assessment Guidelines p. 22.

[27] Touching Base Inc. NDIS and sex work, https://www.touchingbase.org/ndis-and-sex-work/

[28] Australian Government. (2016). *Trafficking in persons: The Australian Government Response*, Canberra: The Parliament of the Commonwealth of Australia: Commonwealth of Australia, p. 4.

[29] Renshaw, L., Kim, J., Fawkes, J., & Jeffreys, E. (2015). *Migrant sex workers in Australia*, Australian Institute of Criminology Reports, Research and Public Policy Series 131.

groups. It goes on to state: 'The research overall suggests that exposure to vulnerabilities is not the norm in the sex industry but that what you can find is that there are a very small number of sex workers who are potentially connected with a niche'.[30]

What we do know is that enforcement practices discourage actual reporting and capture sex workers who are not trafficked. Criminal justice approaches to trafficking have increased the stigma and marginalisation of migrant sex workers, led to the criminalisation of our workplaces and undermined efforts to address labour exploitation. International human rights organisations increasingly report that the greatest threat to the health, safety and human rights of migrant sex workers is government anti-trafficking policy and enforcement.[31] [32]

Organised crime

Large-scale organised crime and 'pimping' is not a characteristic of the sex industry in Australia.[33] The Australian Crime Commission produces biennial reports that present the current picture of serious and organised crime and outline the existing and emerging organised crime threats impacting the Australian community and national interests. The sex industry has consistently not been identified as an area of current or emerging organised crime environment or threat in any of those reports.

While police in Queensland regularly refer to organised crime, in real terms they are describing us, sex workers. Under the current law many day-to-day aspects of sex work are considered a crime—as are the ways we share information and keep each other safe. In reality most police media statements and references in meetings describing organised crime have actually been sex workers working together, hiring a receptionist, sharing receptionists, or working in massage parlours or other currently criminalised sex work workplaces. The current legal context has to be taken into account on this issue.

Historically, organised crime has not been a characteristic of the Queensland sex work industry either, and sex workers reject the assertion that 'Historically, Queensland's sex work industry was closely linked with organised crime', which has been reduced due to the licensing framework (QLRC p.74). The Fitzgerald Inquiry was not an investigation of prostitution, it was an investigation of government and police corruption. Evidence was heard to understand the political and bureaucratic structures of the time that allowed corruption to flourish in the policing of a range of areas but in particular 'vice' industries, such as gaming (sp bookmaking and gaming machines), unlicensed alcohol venues, drug distribution and prostitution. It also looked at rorting of informant payment systems and the widespread acceptance of police and politician corruption and payoffs under the Bjelke-Petersen government. The report comprises 388 pages, including a huge raft of recommendations to overhaul the government and police service. Of this, only about five pages of discussion are about prostitution and that is limited to the persons and establishments from which police in the Licensing Branch were taking

---

[30] Joint Standing Committee on Foreign Affairs, Defence and Trade Human Rights Sub-Committee (2013) *Trading lives: Modern day human trafficking*. Canberra: Parliament of the Commonwealth of Australia, p. 22.

[31] Pearson, E. (2007). 'Australia', collateral damage: The impact of anti-trafficking measures on human rights around the world, *Global Alliance Against Traffic in Women*, October 2007, p. 52.

[32] Busza, J., Castle, S., & Diarra, A. (2004). 'Trafficking and health', *British Medical Journal*, vol 328, pp. 1269-1371 at 3.

[33] Donovan, B., Harcourt, C., Egger, S., Watchirs Smith, L., Schneider, K., Kaldor, J.M., Chen, M.Y., & Fairley, C.K. (2012). *The sex industry in New South Wales: A report to the NSW Ministry of Health*. Sydney: Kirby Institute, University of New South Wales, p. 22.

bribes.[34] It is likely that the smaller, more diverse, less centralised sex workers and sex work businesses in Queensland that did not operate in the Brisbane inner city areas were not required to pay off the Licensing Branch and therefore did not come to the attention of the Inquiry, since the corrupt engagement of the Licensing Branch with sex work businesses was focused primarily in Brisbane.[35] Fitzgerald only refers to one couple, Hector Hapeta and Mary-Ann Tilley, who owned several brothels and one escort agency in the inner city. His description of their circumstances and those in which they came to pay off the police indicates that they were ordinary sex work business operators who had been charged with prostitution offences and then approached by police to become a part of their protection racket. They were not part of what is commonly understood to be 'organised crime':

> Next, in mid-1981, the first steps were taken to organize payments in relation to prostitution. Hector Brandon Hapeta and his defacto wife Ann Marie Tilley owned a number of brothels and at least one escort agency, and Tilley worked both as a prostitute and a receptionist. As such, she was occasionally breached for lesser offences, leading, in April, 1981, to a short sentence of imprisonment" (p.64-65)...first Hapeta and Tilley and then others began paying large sums regularly for the protection of their brothels and other prostitution activities (p. 65).

Fitzgerald came to the conclusion that:

> Prostitution, other voluntary sexual behaviour, s.p. bookmaking, illegal gambling and the illicit sale of alcohol and drugs are presently criminal offences, but the laws concerning them are not effectively enforced. From a resources point of view, there are arguments for decriminalization and regulation of some of these types of conduct. However, not enough is known about the involvement of organized crime in these areas, and the likely affect of decriminalization on such involvement. Without this knowledge, and in spite of considerable research, this Commission cannot make recommendations on these matters, in spite of the expectation that it will do so.[36]

Fitzgerald questioned how 'organised' the crime of prostitution was in Queensland, noting that a definition could be derived by examining where the money went: 'If they stay with and are used on "legitimate" expenses by the people directly engaged in misconduct, then the crime is usually local. If a "cut" goes to others, remote from the misconduct, then the crime is clearly "organised"'.[37] On that basis, we would argue that it was organised crime only so far as a 'cut' was being paid to corrupt police, with the only option being to pay up or be charged. If those

---

[34] Fitzgerald, A. (1989). Report of a Commission of Inquiry Pursuant to Orders in Council:Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, pp. 52,53,59,64-65,66,69,69,192-193. https://www.ccc.qld.gov.au/about-us/our-history/fitzgerald-inquiry

[35] Fitzgerald, A. (1989). Report of a Commission of Inquiry Pursuant to Orders in Council:Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, p. 60. https://www.ccc.qld.gov.au/about-us/our-history/fitzgerald-inquiry

[36] Fitzgerald, A. (1989) Report of a Commission of Inquiry Pursuant to Orders in Council:Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, p. 362. https://www.ccc.qld.gov.au/about-us/our-history/fitzgerald-inquiry

[37] Fitzgerald, A. (1989) Report of a Commission of Inquiry Pursuant to Orders in Council:Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, p. 162. https://www.ccc.qld.gov.au/about-us/our-history/fitzgerald-inquiry

sex workers and sex work businesses had become part of the investigation the focus on organised crime may have been reduced.

The Criminal Justice Commission, which was created by the Fitzgerald Inquiry and conducted the first review of the sex work legislation two years later, said that:

> Although the Commission of Inquiry had examined in some detail prostitution-related activities it did not know the extent and nature of the involvement of organised crime….The paucity of information that Commissioner Fitzgerald alluded to has not changed substantially since the time of the Commission of Inquiry.[38]

The first CMC review of the licensing framework reported that 'The measures for preventing corruption that were imposed on the Queensland public sector, including the police service, following the Fitzgerald Inquiry appeared to be effective in ensuring accountability and transparency among those dealing with the industry'[39], but since then it has been assumed that it was the licensing framework itself that had dealt with police corruption and organised crime.

No offences in the Prostitution Act or the Criminal Code that refer to sex work should be maintained or reformulated in other parts of the Criminal Code or another law. The exploitation laws in other decriminalised places are not helpful and are stigmatising. This undermines decriminalisation. Existing state and federal laws that protect all workplaces from exploitation, trafficking and crime will apply. Additional state laws would be an unnecessary duplication.

Recommendation 6 (Q5):
The offences in section 77 or the Prostitution Act and sections 229G, 229FA and 229L of the Criminal Code should not be kept or reformulated in another law because they are dated and duplicate adequate existing laws in the Criminal Code and elsewhere.

Recommendation 7 (Q5)
No offences or other provisions using the term 'commercial sexual exploitation' should be included, and creating new sex work-specific laws to deal with sexual exploitation will undermine decriminalisation and create unintended consequences for vulnerable sex workers and others who will have these laws and concomitant stigma used against them.

Recommendation 8 (Q5):
The full removal of state police as prosecutors of sex workers in Queensland is an essential and non-negotiable plank of decriminalisation.

[38] Criminal Justice Commission (CJC). (1991). *Regulating morality?: An inquiry into prostitution in Queensland*, p. 2 https://www.ccc.qld.gov.au/publications/regulating-morality-inquiry-prostitution-queensland

[39] Crime and Misconduct Commission (CMC). (2004). *Regulating prostitution: An evaluation of the Prostitution Act (Qld) 1999*, p. 46. https://www.ccc.qld.gov.au/sites/default/files/Docs/Publications/CMC/Regulating-prostitution-An-Evaluation-of-the-Prostitution-Act-1999-%28QLD%29-Report-2004.pdf

Recommendation 9 (Q5):
Current existing state and federal laws should be acknowledged as adequate to safeguard sex workers, people with intellectual disability, children and people impacted by trafficking under decriminalisation.

Recommendation 10:
There should be no blanket law to prevent children from being on premises where sex workers work.

Recommendation 11:
The Child Employment Act should not be amended to include offences specific to sex work but should be amended to remove section 8B **'**prohibition on work as social escort'.

Recommendation 12:
The definition of 'impairment of mind' in the Criminal Code must be replaced with a definition that refers to one's capacity to consent to sexual activity.

Recommendation 13:
We support the call for a review of the definition of 'impairment of the mind' and abolition of section 216 of the Criminal Code, which criminalises sexual activity involving a person with an 'impairment of the mind', even when that person has capacity to consent to the sexual activity.