The Sex Workers Union

Australian Sex Workers Industrial Rights Network
A Member of Scarlet Alliance, the Australian Sex Workers Association
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Submission to the Senate Standing Committee on Education, Employment and Workplace Relations: Fair Work Bill 2008.

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Please Note: The General Secretary of the Sex Workers Union, Elena Jeffreys, is available give an oral submission and answer questions, if the Senate Committee so asks. Contact details are above. Elena Jeffreys is also the President of Scarlet Alliance, the Australian Sex Workers Association.

Executive Summary

- **Sex work is tolerated, legalised and decriminalised in Australia.**
- **Even where illegal, sex workers are covered by Industrial Relations Law.**
- **Sex workers' sub-contractor status, as deemed by an employer, is often incorrect or not correctly implemented.**
- **Sex workers are a community affected by HIV. This is a labour rights issue.**
- **Industrial conditions are evidence of trafficking.**
- **Award Coverage must be extended to include sex workers in a variety of workplaces.**
- **Piece Workers and Sham Contracts must be easier for sex workers to challenge.**
- **Sex workers should not be forced to fall within the "High Income Earners" Category**

Background

Sex work is tolerated, legalised and decriminalised in Australia.

Sex workers in Australia work in a variety of decriminalised, legalised and criminalised environments, regulated through State and Territory legislation. The nature of employment for sex workers includes self employed (both home-based and street-based), co-operative situations and casual employment with in-house establishments or brothels, and agencies or escort/out-call establishments.[1]

[1] "In-House" or "Brothel" establishments are where services are provided at location and are not the worker's home premises. "Agency", "Escort" or "Out-Call" establishments generally refer to a business who arranges for the services to be provided elsewhere, such as the clients home or hotel room. Street

Federal industrial legislation is predominately applicable where there is an employment relationship in circumstances such as in-house and agency establishments. However it also has application when street based and/or private sex workers employ another sex worker to augment a specific individual booking or ongoing service.

Even where illegal, sex workers are covered by Industrial Relations Law.

Industrial law is applicable regardless of legal status. This precedent was determined in Phillipa V Carmel, an unfair dismissal case of the Industrial Court of Australia, WI 2523, 1995.[2]

"Ritter had to determine whether the fact that the industry was "illegal" or "immoral" had the effect of denying Phillipa the right to compensation under the law. Ritter determined that previous judgments, and the fact that the Taxation Office was prepared to tax so called "illegal" earnings, meant that Phillipa should not be denied compensation."[3]

Sex workers' sub-contractor status, as deemed by an employer, is often incorrect or not correctly implemented.

"It is vital that [sex workers] are seen as being engaged in work and therefore have the same rights as other workers to organise and to expect that their right to health and safety at work are respected."[4]

The vast majority of sex workers in Australia are described by their employers as sub-contractors in in-house establishments or agency establishments (providing out-call services). The use of sub-contractors in this employment relationship may or may not be the most appropriate format, and the Western Australian case determined that for the purposes of unfair dismissal that an employer/employee relationship did in fact exist.

Brothel owner industry groups are also attempting to lower workplace standards through implementing sub-contractor status in situations that more closely resemble an employer/employee relationship. The historic criminalisation of sex workers, along with the impact of social stigma and discrimination against sex workers, has impacted on the ability for participation in the organised labour movement, or to gain recognised and legal regulation of employment conditions that other workers have achieved, particularly in relation to Awards

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based sex workers may go to the clients house ("Escort") or to a safe house or their own home ("In-House"). Private sex workers may work from their own home or a hotel ("In-House") or go to the clients home or hotel room ("Escort" or "Out-Call").

[2] Phillipa V Carmel [1996] ICRA 451 (10 September 1996) URL: http://www.austlii.edu.au/au/cases/cth/irc/1996/451.html Site accessed 3 December 2008.

[3] Sue Ellery, Article for Phoenix, LHMWU, 24 September 1998. URL: http://www.scarletalliance.org.au/library/carmel-case96/ . Site accessed 3 December 2008.

[4] Sharan Burorws, Address To Sixth International Congress on Aids in Asia And The Pacific Melbourne 2001, Pg 1, URL: http://www.scarletalliance.org.au/library/burrows01/ Site accessed 3 December 2008.

and Enterprise Agreements. Thus individual sex workers, particularly in brothel workplaces, are greatly disadvantaged by the inappropriate push towards unproven sub-contractor status.

Without the benefits of a long history of organised labour, sub-contractor status remains unchallenged in almost all workplaces. The Sex Worker Union plans to develop a recognised and organised labour movement for sex workers. However this is still only now in its infancy compared to other categories of workers. The most important issue to the Sex Workers Union in 2009 is to determine more accurately the rights and responsibilities of sex workers who are sub-contractors, sex workers who are employees, and sex workers whose workplace may be a mixture of both.

Employment conditions are of ongoing importance to sex workers. Of particular concern is retaining the ability to individually negotiate flexibility around conditions and wages as well as collectively negotiate for improvement both at the local enterprise level as well as national employment standards. Flexibility of employment conditions *within the workplace* as well as flexibility *between workplaces* is important for sex workers, along with the range of employment options being available.

Sex workers are a community affected by HIV.

The most recent wave of sex worker organising in Australia began in the early 1980's. This focussed around occupational health and safety rights to condom use in the workplace. These organising struggles were incredibly successful, and continue to be so, as documented internationally. HIV continues to be a unifying issue, in Australia and the region.

"Health policy workers and researchers have come to learn that understanding and influencing the social climate is an important step in designing appropriate responses to AIDS. The same principles are true for the world of work. Those of us involve in industrial relations and workplace issues need to apply these same principles in responding to HIV/AIDS. This means that it we need to understand the working environment, the way work is organised, power relationships and particularly factors at work that increase worker's vulnerability to HIV infection."[5]

Industrial conditions are evidence of trafficking.

Trafficking legislation introduced by the Howard Government criminalised activities associated with human trafficking. Australian slavery and sexual servitude cases that have ensued under the new laws illustrate the importance of stronger industrial support for sex workers. The Attorney Generals' Roundtable on Human Trafficking includes specialist policy advice from Scarlet Alliance (Australian Sex Workers Association), and the Workplace Ombudsmen.

This is an emerging issue that places even more emphasis on the importance of clarity and inclusion of sex workers, including migrant sex workers, in the federal industrial relations system.

[5] Sharan Burorws, Address To Sixth International Congress on Aids in Asia And The Pacific Melbourne 2001, Pg 2,

Issues.

Award Coverage must be extended to include sex workers in a variety of workplaces.

Chapter 2, Part 2-3, Division 3, Sub-Division C (Terms that must be included in modern awards), 143 (Coverage terms), Section (7), excludes certain categories of employees from being covered by Industrial Awards, particularly relating to the employment of senior or managerial employees. **Sub-sections (a) and (b)** talks about *"who, because of the nature or seniority of their role, have traditionally not been covered by awards" as* categories of employees who are excluded from being covered by an award. While the SWU understands that this relates primarily to senior managers, we are concerned that this may also inadvertently exclude Sex Workers from being able to be covered by an award.

The Sex Workers Union submits that these sections should explicitly allow for awards to be established for workers who have traditionally not been covered by awards previously. Sex workers have not enjoyed the formal recognition and award benefits of many years of organised labour that other workers have had. We want the option available for sex workers to be able to, in the future, negotiate and establish award conditions like other, more formally organised workers have achieved.

These provisions if they remain could prevent the creation of new awards for sex workers, effectively discriminating against sex workers for not having had a form of work that is legal, recognised and explicitly accepted within the industrial systems of Australia.

The Sex Workers Union believes that the development of national standards through federal industrial relations for all sex workers is an important avenue for sex workers to contribute to the ongoing improvement of workplace conditions. This would also be of benefit to the many migrant sex workers who travel to Australia for work, particular those in the surrounding Asia-Pacific countries, positively impacting on Australia's prevention of human trafficking.

Piece Workers and Sham Contracts must be easier for sex workers to challenge.

The majority of Australian Sex Workers are purportedly employed as contractors, which the SWU believes could be considered Sham Contracts as outlined at **Chapter 3, Part 3-1, Division 6**. In spite of this, the Sex Workers Union still supports the ongoing use of employing sex workers as contractors, as there are many sex workers who prefer the flexibility and independence that comes from these arrangements, however we strongly believe that full benefits of sub-contracting are currently being withheld by most brothel owners with conditions more akin to that of an employee.

Considering the wide-spread use of contractors by brothel and agency operators and the nature of earnings for sex workers in these establishments, the SWU would consider that the category of employment for establishments wishing to directly employ sex workers would fall under the definition of Pieceworkers. These provisions are important, and in their application to sex workers, in enabling establishments to offer genuine employment opportunities beyond the traditional, and often miss-used, contractor opportunities.

Chapter 3, Part 3-1, Division 6 Sham Arrangements, deals with the employment of independent contractors and provides protection for employees not to be employed as independent contractors. The SWU strongly supports the clarification of employee versus independent contractor and the protections this provision provides for. However, parts of these provisions relate only to where a business "*employs, or has at any time employed,"* which may not be applicable to sex workers. The remedies for such action are limited to civil action only and the SWU would seek that the legislation allow for additional remedy through the proposed Fair Work Commission in converting an independent contractor to an employee in the event that the employer did not know, or was not reckless in not knowing the contract was employment rather than independent contracting arrangement.

This is of particular relevant to sex workers and sex workers' employers as both employers and employees (either piece workers or contractors) are still in the process of adjusting the traditional employment relationships to more properly reflect the relevant national industrial legislation.

Sex workers should not be forced to fall within the "High Income Earners" Category

There exists a wide range of income levels for sex workers, some of whom may reach the levels of income associated with High Income Employees as defined in **Section 329** of the draft legislation. However due to the nature of the industry and the categories of engagement being either sub-contractors or piece workers it is unlikely that these Sex Workers would properly fall under this category, through ***Chapter 2, Part 2-9, Division 3, Sub-Sections (1) (a) and (2) (a), guarantee of annual earnings***. The SWU would not like to see any Sex Worker fall under this category, even if their annual earnings are of a similar level as proscribed in regulation. The wording of these sections is important to ensuring that this does not inadvertently occur.

Exclusion of High Income Earners from Unfair Dismissal (**Chapter 3, Part 3-2, Division 2, Sub-Section 382**) should be determined on qualifying as an High Income Employee as defined in Sub-Section 329. (**Chapter 2, Part 2-9, Division 3**) rather than simply the level of earnings as defined in the regulations relating to the High Income threshold. Sex Workers currently have no industry award and, if given employment at this stage, would fall into the category of *"award/agreement free employee"*[6] exempting them from unfair dismissal in the event they happen to earn above the High Income Threshold in the regulations.

[6] As defined in the Definitions of the Fair Work Bill 2008, **Chapter 1, Part 1-2, Division 2 – 12 The Dictionary, Page 11**