

WAGE THEFT BILL 2020 – CONSULTATION RESPONSE

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Project Respect

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About Project Respect

Project Respect is an intersectional feminist organisation, which provides support for women in the sex industry and women trafficked for sexual exploitation. We outreach to licensed brothels across the Greater Melbourne Region to meet with women and provide information about their rights and where they can access support.

Our vision is a world where women are free from trafficking, sexual exploitation, violence, and harm. Our primary mission is to support women in the sex industry and women trafficked and advocate for the structural change needed to end all forms of sexual exploitation. We provide a platform to elevate and amplify the voices of, while also being informed and guided by, women with past and present lived experience.

Executive Summary

Project Respect Welcomes the Wage Theft Bill and congratulates the government on progressive legislation to address exploitation which exists within our community.

Project Respect considers the sex industry as a high risk for the potential exploitation of Australian citizens, Australian permanent residents or temporary immigrants. This is based on our experience working with women directly and through brothel outreach since 1998.

Our work indicates that women from the sex industry continue to experience exploitation or are at risk of being exploited. This is underpinned by the fact that workplace laws that exist in other legalised work industries to protect employees do not apply for women in the sex industry due to their independent contractor status, combined with a lack of investment in addressing exploitation.

Project Respect believes, based on precedent set in *Phillipa v Carmel* [1996], that ongoing wage theft is occurring for people in the sex industry, and that this needs to be rectified prior to the introduction of the Wage Theft Bill 2020 in order to set the standard for sex industry business owners to comply with.

Moreover, exploitation often goes unaddressed due to the high levels of stigma and discrimination about the industry and perpetuated towards people involved in the industry that prohibits people from reporting exploitative practices that occur.

Comments

Project Respect supports the Victorian Government's introduction of the Wage Theft Bill 2020 (the Bill) to ensure the protection of workers' rights to fair payment and that employers, who deliberately and dishonestly withhold wages, or other employee entitlements, face consequences. To ensure that the Bill is enforced as intended, Project Respect recommends:

1. A review of conditions of employment of people involved in the sex industry is undertaken, based on precedent set in *Phillipa v Carmel* [1996] to determine the correct employment status of people involved in the sex industry, particularly women in brothels.
2. That the scope of *Employment* is expanded to include employment relationships disguised as independent contracting arrangements in addition to internships and vocational training.
3. That the scope of the *Enforcement Model* requires mandatory training for the Commissioner and staff of the Wage Inspectorate Victoria to adequately respond to the exploitation of women engaged in the sex industry.
4. That a gendered lens is applied to the Wage Theft Bill, particularly with reference to the *Enforcement Model*.

1. A profile of the sex industry in Victoria

There are currently 89 licensed brothels in the Greater Melbourne Region and approximately 600 owner-operated sex businesses. There is an estimate of 500 massage parlours which are providing unregistered sexual services. Data on the sex industry is difficult to obtain due to the stigma, discrimination and criminality of the industry however, there has been estimates of more than 20,000 people working in the Australian sex industry at any one time.¹ From the limited data available, and based on our own data from our 20 year history of working directly with women and outreaching to licensed brothels in Victoria, we observe that the sex industry has a large and diverse migrant workforce population, and Australian born women comprise of approximately 40%.

2. The sex industry as a setting for labour exploitation

Labour exploitation in the sex industry can manifest in multiple and intersecting ways and can be on a continuum, from breaches of workplace rights, workplace conditions and safety through to criminal forms of labour exploitation and modern slavery. The exploitation often goes unaddressed due to the high levels of stigma and discrimination about the industry and

¹ Renshaw L, Kim J, Fawkes J & Jeffreys E 2015. *Migrant sex workers in Australia*. Research and public policy series no. 131. Canberra: Australian Institute of Criminology. <https://aic.gov.au/publications/rpp/rpp131>

perpetuated towards people involved in the industry. This not only prevents people from reporting, but also inhibits state and commonwealth governments from actively addressing the exploitation which exists in the industry.

This is highlighted by the fact that workplace laws that exist in other legalised work industries to protect employees do not or rarely apply for women in the sex industry, from basic rules around occupational safety through to mandated reporting of serious sexual assault. Further, WorkSafe does not have a specific compliance and enforcement program for the sex industry, despite recognition that the sex industry is an industry of high risk, including for sexual and physical violence.²

3. Exploitation of employment status

In licensed brothels in Victoria, women in the sex Industry have limited protection under civil frameworks such as the Fair Work Act 2009 as they are generally employed as “independent contractors” rather than an “employee”, despite their working conditions, as per the Indica Test, aligning with an employee. This “sham contracting” essentially strips women of laws enacted to protect them and precludes them from basic employment rights such as minimum wage, industry awards, superannuation, paid leave and access to cover under WorkSafe. Despite this independent contractor status, we have not met a woman in the sex industry with a contract.

As independent contractors, women are only paid per booking however, they are unable to set their rates, and brothel owners and managers take anywhere between 40-60% of the set booking fee. They are expected to present for work for set days and times which is the equivalent of a shift. Women are charged fees for rooms, often fined for not wearing the right clothes or being late to a “shift” – all of which is illegal to impose on independent contractors under the Fair Work Act 2009. Further, women often report that brothel owners and managers will give the money back to a client when the client complains, including when a woman has been sexually assaulted or when a woman stops the booking due to feeling unsafe.

As per the Australian Tax Office, if an independent contractor is primarily contracted for physical labour, then it is the responsibility of the employer to pay the independent contractors Superannuation.³ We have not met a woman in a brothel who has this arrangement with an owner or manager of a brothel.

² Consumer Affairs Victoria 2016, *Operating a licensed sex work business: Guide for licensees and approved managers*, <https://www.consumer.vic.gov.au/businesses/licensed-businesses/sex-work-service-providers/running-your-business/licensee-in-effective-control>, accessed 13th February 2017.

³ ATO, <https://www.ato.gov.au/Business/Super-for-employers/Working-out-if-you-have-to-pay-super/Contractors/>

As independent contractors, women in the sex industry are not covered under WorkSafe and WorkSafe does not list Sex Work as a specific industry. As independent contractors, women are required to purchase their own insurance. We have not met a woman with insurance, and our research in to whether this would be possible has indicated that, due to the nature of the work, they are uninsurable. While these examples are extreme, they are all regular occurrences of exploitation including wage theft that go unchecked in the licensed sex industry.

These factors, combined with the failure of state and territory, as well as commonwealth enforcement and regulation departments to adequately regulate a high-risk industry have been utilised to develop a sex industry business model which actively exploit women engaged in the sex industry.

4. Case law relating to employment status in the sex industry

According to Project Respect's direct correspondence with the Fair Work Ombudsman, the FWO does not have a set position that sex workers are automatically considered to be independent contractors or employees. The indicia test needs to be applied to the particular circumstances of a worker on a case by case basis. Only a court or tribunal can make a determination whether a worker is an employee or an independent contractor. The court/tribunal applies the indicia test to the particular circumstances.

However, *Phillipa v Carmel* [1996] IRCA 451⁴ set precedent in Australia. A woman successfully claimed unfair dismissal and unpaid wages when her employment was terminated in a brothel in Western Australia. Judge Ritter found the conditions of employment of the claimant was more closely aligned with an employee, rather than an independent contractor. Further, Judge Ritter found that the legality of the working environment was irrelevant, as the ATO was prepared to tax the "illegal" earnings. Despite this precedent, there has been no attempt to address this ongoing exploitation of wage theft of women working in the industry. In fact, it is Project Respect's experience that when these factors have been brought to the attention of relevant agencies, the level of wage theft and exploitation has been minimised.

5. Lack of oversight by regulatory bodies to enforce and investigate

Conversations Project Respect had with the Fair Work Ombudsman in February 2017 revealed that the FWO has not undertaken any investigations into the conditions of "employment" women in brothels experience. Moreover, recent findings from a Project Respect enquiry have found that in 2016/17 only 1 (brothel) compliance inspection had been undertaken by Worksafe Victoria⁵ (as of September 2017) and none in 2015/16; in comparison, the construction industry

⁴ *Phillipa v Carmel* [1996] IRCA 451 (10 September 1996)

⁵ Personal communication, Monitoring and Evaluation, Advisory Service Worksafe Victoria, September 13 2017

received 10,926 visits in 2016/17.⁶ In Project Respect's view, these failures to enforce the rights of women who engage in sex work are underpinned by not only the "sham contracting" that categorises women as independent contractors, but also a lack of understanding and awareness of the rights of women engaged in the sex industry.

6. Stigma and discrimination as an inhibitor to reporting and investigating exploitation

Many women speak to us about how they find their working conditions exploitative. This includes unsafe working conditions such as rusty springs in mattresses through to severe sexual assault; labour exploitation and wage theft such as applying incorrect employment status and imposing illegal fines which results in women leaving a "shift" with negative income due to not securing a booking.

Despite their dissatisfaction, women do not report these conditions due to the stigma and discrimination relating to the sex industry. Women do not want to "out" themselves for working in the industry, and they also perceive that "no one cares" about the exploitation they experience. Through Project Respect's long history of working with women in the sex industry, particularly those experiencing exploitation and harm, we have never encountered a woman who has had her issue dealt with under the Fair Work Act 2009 or who has been able to claim workers compensation for injuries, including mental health injuries, as an outcome of their work.

In addition to this, with the complexities of employment law, women in the sex industry may not fully understand their civil and labour rights and not self-identify as being exploited, despite the conditions in which they find themselves fitting the description of exploitation. Intersecting with this, is the additional vulnerabilities of migrant women. The FWO suggests that migrant workers are particularly vulnerable to workplace exploitation, due to difficulties understanding and securing their entitlements because of age, language and cultural barriers, the remoteness of their working location and, in some cases, their concerns about preserving their visa status. A 2015 Australian Institute of Criminology report revealed that migrant women in the sex industry experience multiple compounding issues including language barriers and isolation, gender and race discrimination, and stigma associated with sex work that may exacerbate their risk in experiencing, and barriers to reporting incidents of violence and exploitation.⁷ Both the findings from the AIC report and FWO's understanding of the vulnerabilities of migrant workers aligns with Project Respect's own work with women.

⁶ Personal communication, Monitoring and Evaluation Service, Advisory Service Worksafe Victoria, December 1 2017

⁷ Australian Institute of Criminology (AIC), *Migrant sex workers in Australia*, Research and Public Policy Series 131, 2015

7. Review into the sex industry for ongoing systemic wage theft

In November 2019, the Victorian Government announced a Review into Decriminalisation of Sex Work. Project Respect welcomes this review. We hope it will address the ongoing systemic issues which are prevalent in the Victorian Sex Industry. However, we strongly advocate that a review into the conditions of employment for people in the sex industry, based on precedent set in *Phillipa v Carmel* [1996], is undertaken prior to the introduction of this Bill. This will ensure longstanding employment exploitation, including wage theft is addressed as well as to ensure that sex industry business owners are clear about their obligations.

8. Implications for the Enforcement Model

The Bill stipulates that the Enforcement Model will include the necessary powers to enable the Inspectorate to inquire into and investigate wage theft offences, including the power to bring criminal proceedings. Project Respect submits that this power by itself will be ineffective if there is not substantial investment made in the capacity of inspector staff to better understand the sex industry, the ongoing exploitation which exists and the stigma and discrimination that currently prevents women in the industry from reporting exploitation. Moreover, there is both a lack of coordinated response across a range of regulatory bodies and currently an absence of best practice standards that can be applied by any enforcement body within the sex industry.

9. The absence of a coordinated response

The licensed sex industry in Victoria is regulated and as such, there are a number of regulatory and enforcement authorities that can legally enter into licensed brothels. These authorities include at a state level Consumer Affairs Victoria, local council compliance and safety officers, Victoria Police and WorkSafe Victoria and at a Federal level, Department of Social Services, Border Force, ATO, and AFP (and others). In a report commissioned by Consumer Affairs Victoria in 2009 relating to the sex industry, regulator and enforcement respondents indicated enforcement and compliance are partially and adversely impacted by the lack of clear regulatory principles and the assigning of different roles to different agencies with different resourcing, priorities and systems. There is little harmonisation or coordination between these bodies to ensure instances of exploitation ranging from wage theft through to modern slavery are identified.

Further, the regulation and the authorised officers have limited experience or knowledge in assessing the health and wellbeing as well as conditions of employment of women within the sex industry and are likely to harbour personal prejudices in relation to the industry and women working in the industry.

10. Wage theft in informal (illegal) spaces

Compounding these structural disconnections in enforcement and regulation is the shifting of responsibility of who should be tasked with resource allocation to target informal sex industry businesses. As the 2009 CAV report indicates, “[w]ith the exception of CAV, all other enforcement officers interviewed indicated that their agencies view irregular sexual service activity as low to very low priority In these situations” (original emphasis).⁸ There is a lack of systematic recording and sharing of information, as well as an interagency approach to addressing the issue of informal sex industry businesses, and while this provides the opportunity for crime to flourish, it also provides the conditions for women to experience wage theft and severe exploitation.

As Judge Ritter found in *Phillipa v Carmel* [1996], it was irrelevant whether income was obtained legally or illegally. The proposed full decriminalisation of the sex industry in Victoria is founded on a supposition that decriminalisation will remove stigma and discrimination which prevents women from reporting exploitation and violence. Project Respect hopes this outcome is achieved. However, as it currently stands, in addition to the 89 licensed brothels that are actively engaging in exploitative labour practices, there is an estimate of more than 500 massage businesses also engaging in the same practices. This is currently an unchecked industry, and we would encourage a full investigation to be conducted to ensure both licensed and unlicensed businesses are aware of their obligations before the Bill is introduced.

11. A gendered lens

Overwhelmingly, people involved in the sex industry identify as women, and purchases of sexual services are men. Women report that they experience various forms of violence when engaged at work. For this reason, Project Respect believes every official entering a brothel should be accompanied by a social worker with knowledge of the sex industry and the harms which it can cause. In addition to this, the inclusion of trauma informed, gender sensitive interpreters would hopefully break down the perceived power imbalance between women in brothels, particularly migrant women and authorities. Given this, and the systemic underpayment of women workers more generally across Australia, Project Respect recommends that a gendered lens is applied to the Bill before it is introduced.

⁸ CAV, 2009, p. 9

APPENDIX A: Roles and Responsibilities of Enforcement and Regulatory Bodies

This myriad of regulation, compliance and enforcement roles with different agencies is outlined below:

- Consumer Affairs Victoria are allowed to enter a licensed premises whenever they want to ensure the brothel is compliant with the Sex Work Act 1994.⁹ The Act provides minimal framework to ensure the health and wellbeing of women in the sex industry is being taken into account.
- The Public Health and Wellbeing Act 2008 (PHWA) includes various provisions relating to Victorian brothels. The Act requires authorised officers from the Victorian Department of Health & Human Services to inspect all licensed brothels at least once every year. As part of these inspections, at the request of an authorised officer, the person in charge of the brothel must allow the authorised officer to interview women in the sex industry on the premises without the proprietor being present. This framework of this act is for the management and control of infectious diseases, including the use of condoms and disposal of biohazardous waste as well as the hygiene practices within the brothel.¹⁰ There is little insight into the welfare of women.
- The Australian Taxation Office (ATO) enforces Commonwealth laws about taxation. Their agents can enter a brothel, provided they have photo identification and written authority from the ATO to access brothel records.¹¹ While ATO visits could uncover exploitative practices, the ATO must give notice of any visit.
- The Department of Immigration and Border Protection (DIBP) inspects brothels to ensure businesses comply with visa requirements. A brothel must comply with the Migration Act 1958 and only employ Australian citizens or non-citizens over the age of 18 years who are legally entitled to work in Australia.¹² Our experiences show the sex industry can be a cash economy, and assessing visa paperwork of migrant women in brothels does not necessary show the actual working times women in the sex industry are undertaking.
- Victoria Police, and more specifically the Victorian Police Sex Industry Coordination Unit (SICU) can enter any licensed brothel in Victoria without a search warrant, if approved by the Chief Commissioner of Police. SICU are responsive to harm and exploitation women in the sex industry experience, however, again, their focus is less on the health and welfare of women, and more focused on the policing of the industry. Project Respect's

⁹ *ibid*

¹⁰ CAV 2009, p. 10

¹¹ *ibid*

¹² *ibid*

relationship with SICU is quite strong, and we believe SICU is well placed to address and report on issues of exploitation, however, they are not involved in the National Roundtable on Human Trafficking and are not a part of this working group. SICU should be trained in being able to identify labour exploitation, and understand the referral process to AFP, particularly in relation to their work with illicit massage businesses. Referral mechanisms between SICU and civil society organisation such as Project Respect need to be developed and strengthened to ensure women experiencing exploitation, particularly from immigrant backgrounds are linked in to the appropriate services.¹³

- The Australian Federal Police can enter a brothel without consent if they have a warrant or if they believe that a crime is being committed. They may also be accompanied by officials from the ATO, DIBP and Centrelink.¹⁴
- WorkSafe Victoria inspectors can enter a brothel during working hours, or at any time when they have formed a reasonable belief of an immediate risk to anyone, to assess and enforce compliance with health and safety laws.¹⁵ However, WorkSafe does not run a compliance and enforcement program specifically in relation to sex work, despite the sex industry being an industry of high risk, including for sexual and physical violence. In no other industry, would a regulatory body’s guide to operating a business indicate that women in the sex industry “are at risk of physical and sexual assault”.¹⁶
- While local councils, together with police, can take court action to shut down illegal brothels and face a fine or 12 months in jail, local governments, for the most part, do not undertake this work, but rather deflect responsibility to other authorities. Project Respect works with a number of local councils, and, apart from one proactive local council, all others fail to take responsibility to address the issue of illegal brothels. Local Councils advise they are responsible under the Planning and Environment Act 1987 for considering permit applications from prospective brothel owners and monitoring compliance with planning requirements. They believe, as illegal brothels do not have a permit or license, they are not tasked with the issues of shutting them down.¹⁷

¹³ ibid

¹⁴ CAV 2009, p. 11

¹⁵ ibid

¹⁶ ibid

¹⁷ ibid