



# A framework for a decriminalised sex work industry in Queensland

**Submission by  
Queensland Advocacy for Inclusion**

**To the Queensland Law Reform Commission**

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## About Queensland Advocacy for Inclusion

Queensland Advocacy for Inclusion (**QAI**) (formerly Queensland Advocacy Incorporated) is an independent, community-based advocacy organisation and community legal service that provides individual and systems advocacy for people with disability. Our mission is to advocate for the protection and advancement of the fundamental needs, rights and lives of people with disability in Queensland. QAI's Management Committee is comprised of a majority of persons with disability, whose wisdom and lived experience is our foundation and guide.

QAI has been engaged in systems advocacy for over thirty years, advocating for change through campaigns directed at attitudinal, law and policy reform. QAI has also supported the development of a range of advocacy initiatives in this state. For over a decade, QAI has provided highly in-demand individual advocacy services. These services are currently provided through our four advocacy practices: the Human Rights Advocacy Practice (which provides legal advocacy in the areas of guardianship and administration, disability discrimination and human rights law and non-legal advocacy support with the Disability Royal Commission and the justice interface); the Mental Health Advocacy Practice (which supports people receiving involuntary treatment for mental illness); the NDIS Advocacy Practice (which provides support for people challenging decisions of the National Disability Insurance Agency and decision support to access the NDIS); and the Disability Advocacy Practice (which operates the Pathways information and referral line, and provides non-legal advocacy support with Education and other systems that impact young people with disability).

From 1 January 2022, we have been funded by the Queensland Government to establish and co-ordinate the Queensland Independent Disability Advocacy Network (QIDAN), which includes operating the Disability Advocacy Pathways Hotline, a centralized phone support for all people with disability in Queensland providing information and referral. We have also been funded to provide advocacy for young people with disability as part of the QIDAN network, which we provide in addition to our non-legal education advocacy for Queensland students with disability. Our individual advocacy experience informs our understanding and prioritisation of systemic advocacy issues.

The objects of QAI's constitution are:

- To advocate for the protection and advancement of the needs, rights, and lives of people with disability in Queensland;
- To protect and advance human rights including the Convention on the Rights of Persons with Disabilities (CRPD);
- To be accountable to the most disadvantaged people with disability in Queensland; and
- To advance the health, social and public wellbeing of disadvantaged people with disability.

## QAI's recommendations

1. QAI has consistently raised concern about provisions within Queensland's Criminal Code that infringe the human rights of people with disability and which arbitrarily limit their right to sexual expression. QAI supports the full decriminalisation of the sex work industry in Queensland. This includes repealing sex-work specific legislation and removing any role for the police in regulating consensual sexual activity of Queenslanders, including Queenslanders with a disability.
2. QAI submits that specific provisions in the Criminal Code that arbitrarily regulate the sexual activity of people with an 'impairment of the mind' are inappropriate. Despite the likely benevolent intentions behind these provisions, sexual assault laws already ensure that non-consensual based sexual activity is a criminal offence.

Consideration should be given to alternatives that ensure the rights of people with disability to express their sexuality are upheld, whilst protecting against the risk of sexual exploitation of people with

impaired decision-making capacity. For example, consideration could be given to including a circumstance of aggravation in the *Penalties and Sentences Act 1992* (Qld), whereby additional criminal penalties occur if an offence is committed and the lack of consent is a result of the victim's impaired decision-making capacity to provide consent to sexual activity.

## Introduction

QAI welcomes the move to decriminalise sex work in Queensland. QAI has consistently raised concern about provisions within Queensland's Criminal Code that infringe the human rights of people with disability and which arbitrarily limit their right to sexual expression. For example, QAI has long called for the 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.

In recognition of the right of all people, including people with a disability, to express their sexual identity and to engage in fulfilling sexual experiences, and in cognisance of the fact that some sex workers may themselves identify as having a disability, QAI supports the full decriminalisation of the sex work industry in Queensland. This includes repealing sex-work specific legislation and removing any role for the police in regulating consensual sexual activity of Queenslanders, including Queenslanders with a disability.

In the words of the Public Advocate, "*Where people retain capacity to consent to participating in a sexual relationship with another person, they should have their right to be recognised as an autonomous and sexual being respected and protected by the law*".<sup>1</sup> QAI's submission therefore contributes to the Queensland Law Reform Commission's inquiry by highlighting the inequitable way in which some of the current laws that regulate sex work inappropriately infringe the fundamental human rights of people with a disability.

## Why laws that regulate sex work are harmful to people with disability

Under Queensland's Criminal Code, a person who is classified as having an 'impairment of the mind' is not permitted to be at a place used for the purposes of prostitution.<sup>2</sup> A person with an 'impairment of the mind' is defined in the Criminal Code as meaning "*a person with a disability that, a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and, b) results in i) a substantial reduction of the person's capacity for communication, social interaction or learning; and ii) the person needing support.*"<sup>3</sup>

QAI has numerous concerns regarding this definition and its use within the Criminal Code, including its application to laws regulating the sexual activity of people with a disability and their engagement with the sex work industry. QAI submits the following:

1. The scope of the definition is so broad that it includes people with a disability whose impairment may *not* impact their decision-making capacity. For example, a person may have a neurological impairment that impacts how they communicate and which may result in the person requiring support for various activities of daily living, however they may retain the capacity to make their own decisions, particularly in the presence of support.
2. The definition does not reflect the widely accepted position that decision-making capacity, including in relation to sexual activity, is contextual. In other words, capacity is decision, time, and situation (or 'domain') specific, whereby a person's ability to make decisions and communicate them can fluctuate

<sup>1</sup> 2022 Public Advocate Discussion Paper - section 216 Queensland Criminal Code 1899, p3

<sup>2</sup> *Criminal Code 1899* (Qld), Section 229L

<sup>3</sup> *Ibid*, Section 1 - Definitions

and change depending upon the nature of the decision required and the circumstances in which it is made. Assumptions about a person's capacity cannot and should not be drawn simply from the presence of an impairment. All adults at law are presumed to have decision-making capacity until proven otherwise and capacity should be assessed on a decision-by-decision basis. This position is adopted in other Queensland legal contexts, such as the Queensland Capacity Assessment Guidelines 2020 and their role alongside the *Guardianship and Administration Act 2000* (Qld). Moreover, the courts have ruled that a person with intellectual impairment *can* have the capacity to consent, thereby reinforcing the position that capacity should be assessed on an individual basis.<sup>4</sup>

3. The definition is not congruent with contemporary understandings of, and approaches to, supported decision-making as per Australia's obligations under the Convention on the Rights of Persons with Disabilities (CRPD). Through ratification of the CRPD, Australia has committed to ensuring a model of supported decision-making whereby people with disability are assisted to maintain and develop their legal capacity through the assistance of informal supporters to understand, consider and communicate their decisions rather than have this right taken away from them. Only in limited and extremely rare circumstances is the denial of this right necessary, and this must always be a measure of last resort. Indeed, the Australian Law Reform Commission (ALRC) suggests that rather than considering whether a person has capacity for a matter, focus should be placed upon the type of support that is required. The focus has therefore shifted away from making arbitrary conclusions about a person's capacity due to the presence or not of an impairment, and our laws must reflect this change accordingly. People with an 'impairment of the mind' should be supported to make decisions about their own lives, including decisions about their sexuality and engaging the services of a sex worker.
4. Similarly, the definition is at odds with the social model of disability which considers 'impairment' to be a personal characteristic and which conceptualises 'disability' as a social construct caused by inaccessible environments.<sup>5</sup> Consequently, the social model of disability requires an 'ecological view of self-determination'.<sup>6</sup> That is, a focus on the environmental factors that facilitate the exercise of legal capacity and decision-making, where the onus is placed upon 'supporters, rather than those being supported'.<sup>7</sup> Whether a person can consent to engaging the services of a sex worker is therefore dependent upon the way in which the person is supported to understand the nature of the services being offered and to communicate their preferences. For example, is the information available in a range of accessible formats and languages and designed to meet a diverse range of communication needs?
5. Singling out people with an 'impairment of the mind' and denying their right to sexual expression is discriminatory to people with disability in the sense that they are treated less favourably than others by the law. It also reflects antiquated attitudes towards people with disability, perpetuating harmful stereotypes that conceptualise people with disability as 'victims' or asexual, unable to enjoy autonomy over their bodies and unable to exercise self-determination and personal control over their own lives. Such attitudes are extremely destructive and have no place within today's society. The disability rights movement has worked tirelessly over recent decades to dispel such attitudes. Governments must therefore take the opportunity to reconsider the assumptions, values and beliefs underlying our laws

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<sup>4</sup> *R v Mrzljak* at [16] 'The absence of consent is not an element of an offence under s 216 Criminal Code and it is rightly uncontentious that an intellectually impaired person as defined can have the cognitive capacity to consent and can give consent within the meaning of "consent" in s 348.'

<sup>5</sup> Kayess, R. & Sands, T. (2020) *Convention on the Rights of Persons with Disabilities: Shining a light on Social Transformation*. Sydney: UNSW Social Policy Research Centre

<sup>6</sup> Watson, J. (2016) *Assumptions of Decision-Making Capacity: The Role Supporter Attitudes Play in the Realization of Article 12 for People with Severe or Profound Intellectual Disability*, *Laws*, 2016, 5, 6; p 3

<sup>7</sup> *Ibid*

and policies and consider the extent to which they reflect a human rights framework. QAI submits that these provisions of the Criminal Code are grounded in ableist attitudes, reflect archaic assumptions about the capabilities of people with disability and have no place within contemporary Queensland legislation. Further, our laws should embody the concept of ‘dignity of risk’, whereby everyone, including people with disability, have the right to take chances, make mistakes and learn from their experiences in the same way that other members of the community do.

6. The definition of ‘impairment of the mind’ and its application to laws regulating sex work could be considered in contravention of the *Human Rights Act (2019)* Qld, in particular Article 25 which states that a person has the right not to have their privacy, family, home, or correspondence unlawfully or arbitrarily interfered with.<sup>8</sup> This argument is particularly compelling when the person can be supported to exercise their legal capacity and can consent to engaging the services of a sex worker, meaning that these provisions are neither reasonable, proportionate nor justifiable.
7. Separating out people with so-called ‘impairments of the mind’ and denying their right to engage the services of sex workers has the unintended consequence of denying people with disability access to disability-related support services. Some people with disability access sex work services for therapeutic purposes and have successfully accessed these services with funding from their National Disability Insurance Scheme (NDIS) funding. For example, the case of WRMF and National Disability Insurance Agency<sup>9</sup> where the Administrative Appeals Tribunal (AAT) found that the participant’s engagement of a sex therapist was a reasonable and necessary support. As the Disabled Peoples Organisations Australia (DPOA) has stated, “...some people with disability are in need of specific support to learn about their sexuality and sexual capacity after a significant injury, illness or sexual assault, increase their experience, knowledge and acceptance about changes in their own bodies and abilities, and to gain confidence and social skills to enjoy a positive sexuality”<sup>10</sup>. People with disability therefore need to be able to safely engage with these services without fear of criminalisation.
8. Current provisions within the Criminal Code also make it illegal for a carer or support worker to assist a person who may be classified as having an ‘impairment of the mind’ to engage the services of a sex worker. For example, section 229H makes it a crime for a person who knowingly participates, directly or indirectly, in the provision of prostitution by another person and when a person with an impairment of the mind is engaged in the provision of the prostitution.<sup>11</sup> In light of the fact that up to 90% of the sex work industry remains criminalised by current laws and licensing arrangements<sup>12</sup>, this leaves many disability support workers, family members, friends and potentially even the National Disability Insurance Agency open to criminal liability for involvement in the arrangement and funding of sex worker services.
9. Some sex workers themselves may identify as having a disability and may choose to work as a sex worker for a variety of reasons, including choosing to engage in work that suits their disability related lifestyle needs. For example, a person with a psychosocial disability (or ‘psychiatric impairment’ as per the current definition of ‘impairment of the mind’ in the Criminal Code) may find the flexible working conditions and ability to choose one’s own clients and hours of work to be accommodating of their support needs which might fluctuate and change on a day-to-day basis. All people with disability have

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<sup>8</sup> *Human Rights Act 2019* (Qld), section 25

<sup>9</sup> WRMF and National Disability Insurance Agency [2019] AATA 1771

<sup>10</sup> DPOA, ‘Joint Position Statement: A call for a rights based framework for sexuality in the NDIS’;  
<https://dpoa.org.au/joint-position-statement-a-call-for-a-rights-based-framework-for-sexuality-in-the-ndis/>

<sup>11</sup> *Criminal Code 1899* (Qld), section 229H

<sup>12</sup> Respect Inc, Info sheet on ‘A framework for a decriminalized sex work industry in Queensland’ Consultation Paper WP 80, page 12; <https://respectqld.org.au/wp-content/uploads/Decrim/Info-Kit-QLRC-May22.pdf>

a right to work on an equal basis with others as per Article 27 of the CRPD and laws which openly deny this right risk compromising Australia's obligations under international law.

10. The retention of sex-work specific laws and maintaining a role for the police in overseeing and regulating the sex work industry risks harming people with a disability who choose to engage the services of sex workers or who choose to work as a sex worker themselves. Many of the safety measures favoured by people in the sex work industry are currently illegal, such as working in pairs. Sex workers report having to essentially choose between working safely and working legally, and many are reportedly afraid to report abuse or assaults to the police out of fear of being prosecuted.<sup>13</sup>

These laws also risk further criminalising people with a disability who are already overrepresented in the criminal justice system. People with disability continue to encounter structural forces that increase their likelihood of becoming involved in the criminal justice system, such as inadequate community support services that elevate the risk of people encountering the police and a poor understanding of disability-related issues among the police officers which impacts their interactions with people with disability and their families. Police officers are not social workers and are often ill-equipped with the skills required to appropriately support and assess a person with potentially impaired decision-making capacity. Furthermore, the institutional violence that people with disability have historically endured from the police, as evidenced by the Disability Royal Commission, further makes the involvement of police in overseeing this very intimate aspect of a person's life, highly inappropriate.

11. Finally, QAI submits that specific provisions in the Criminal Code that arbitrarily regulate the sexual activity of people with an 'impairment of the mind' are inappropriate. Despite the likely benevolent intentions behind these provisions, sexual assault laws already ensure that non-consensual based sexual activity is a criminal offence. Indeed most sexual assault cases rest upon the prosecution proving that the victim did not provide consent. Additional provisions, such as section 216 of the Criminal Code or provisions which prohibit a person with an impairment of the mind from attending a place used for the purposes of prostitution, are unnecessarily paternalistic as non-consensual based sexual activity is already an offence under the law. Consideration should be given to alternatives that ensure the rights of people with disability to express their sexuality are upheld, whilst protecting against the risk of sexual exploitation of people with impaired decision-making capacity. For example, consideration could be given to including a circumstance of aggravation in the *Penalties and Sentences Act 1992* (Qld), whereby additional criminal penalties occur if an offence is committed and the lack of consent is a result of the victim's impaired decision-making capacity to provide consent to sexual activity.

In summary, QAI advocates for a more nuanced approach that neither limits the right to consensual sexual expression nor unreasonably exposes people with intellectual or cognitive impairments to sexual exploitation. QAI supports the call to decriminalise the sex work industry and for sex work to be treated as other types of work, where existing criminal, civil and workplace health and safety laws and regulations protect against unethical and dangerous behaviour.

## Conclusion

QAI thanks the Queensland Law Reform Commission (QLRC) for the opportunity to contribute to this inquiry. We are happy to provide further information or clarification of any of the matters raised in this submission upon request. QAI also provides permission for our submission to be referred to in the QLRC final report. QAI also directs the QLRC to the 2022 Public Advocate Discussion Paper – section 216 Queensland Criminal Code 1899, which comprehensively addresses many of the themes discussed in this submission relevant to the scope of the current inquiry.

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<sup>13</sup> Ibid