*Nina Cheles-McLean**

SEX, MONEY AND THE LAW: FINANCIAL DISCRIMINATION AGAINST SEX WORKERS

Abstract

Financial discrimination is a fundamental challenge for many sex industry workers seeking to earn a living from their chosen profession. It occurs when lawful businesses are denied the banking services required to operate, such as business bank accounts and merchant facilities. Despite the prevalence of media reports and sex worker advocacy, there is a paucity of legal research on this type of discrimination. This article contributes to addressing this gap, drawing on doctrinal research and a qualitative study to explore sex industry workers' experiences of financial discrimination and investigate remedies. It finds that sex industry workers are sometimes discriminated against by financial institutions on the basis of their occupation. This discrimination can force sex industry workers into the cash economy, and compromises their financial security, reputation, mental health, and physical safety. There is no certain legal remedy for sex industry workers who are unjustifiably denied financial services — analysis of banking and anti-discrimination law shows banks can likely discriminate with impunity. While there is no single solution to this problem, anti-discrimination laws should be strengthened to promote financial inclusion. This would involve introducing a carefully drafted protected attribute, which offers substantive protection to the full spectrum of workers within the sex industry.

I Introduction

Australia is currently a leading jurisdiction in sex workers' rights,[1] with multiple states and territories decriminalising sex work and recognising it as a legitimate form of labour. Despite this significant law reform, sex workers

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1 In this article, 'sex work' refers to the provision of sexual services, including sexual intercourse with, or masturbation of, another person, for financial gain: see Linda Selvey et al, *Western Australian Law and Sex Worker Health (LASH) Study: A Summary Report to the Western Australian Department of Health* (Report, 2017) 2–3.

continue to experience high levels of stigma and discrimination, with individuals and institutions treating sex work as a social problem, rather than an occupation. This article focuses on financial discrimination against sex workers, whereby banks and payment service providers deny basic banking services to lawful sex industry businesses based on discriminatory policies and practices. Part III explains the societal problem of stigma and discrimination against sex workers, including financial discrimination. Part IV investigates whether financial service providers can legally refuse to serve sex workers. This part focuses on key issues emerging in anti-discrimination law and identifies the limited scope of the 'protected attributes' as the most significant barrier to accessing legal protection from discrimination. It will be argued that the law does not adequately protect sex workers, and that in many instances, financial institutions can discriminate without legal consequences. Part V summarises the findings of a qualitative study on sex industry workers' experiences with financial service providers. It will be shown that 'de-banking' can force sex workers into the cash economy, and compromise their financial security, reputation, mental health, and physical safety. Part VI draws on the problems uncovered in Parts III to V and explores options for targeted law reform to mitigate the financial exclusion of sex workers. The issues that emerge from financial discrimination are complex and do not lend themselves to easy solutions. However, if anti-discrimination protections for sex workers are strengthened, Australia could present a global best practice model for holistically advancing sex workers' rights, beyond decriminalisation.

II Method

The framing of this article acknowledges sex work is work and that sex workers are entitled to the same rights as other workers and business owners. The research question for this article therefore asked: 'what are the challenges for sex industry workers and businesses in accessing financial services, and what remedies, or law reform, is required to improve access?' Answering this question involved a qualitative study by way of interviews, document analysis, investigating remedies and identifying areas for law reform.

The catalyst for this research was the author's volunteer work with Sex Work Law Reform Victoria ('SWLRV'), a sex worker led organisation advocating for equality for sex workers. SWLRV has received numerous complaints of financial discrimination from sex industry workers and assisted some workers to pursue formal complaints. SWLRV has also undertaken extensive advocacy work to raise awareness of financial discrimination against sex workers. Assisting SWLRV with this work led the author to identify a lack of academic research on this topic, thereby informing the research question for this article.

The qualitative study involved interviewing sex industry workers about their experiences with financial service providers, to gather information on the circumstances in which discrimination was occurring and its consequences. Ethics approval was obtained through the Monash University Human Research Ethics Committee, Project ID 31402. Five in-depth semi-structured interviews were conducted, between February and May 2022. The participants were people currently working

in the sex industry, including three private sex workers, one brothel owner and one escort agency owner. One of the private sex workers had also operated a brothel and escort agency, and drew on those experiences. Two participants were female and three were male. Four were based in Victoria, and one in New South Wales.

Participants were recruited through the SWLRV network and initially approached by a sex worker member of SWLRV. This allowed participants to be assured that participation would be non-judgmental, and their perspectives and experiences would be valued. Those who indicated an interest in the study were then emailed by the author and agreed to participate on an anonymous and voluntary basis. The interviews comprised a series of open-ended questions that were designed to gather information about what financial services the participant required and their experiences with financial service providers. The questions were designed in consultation with a sex worker member of SWLRV and vetted for sensitivity. The use of semi-structured interviews allowed the author to build upon unexpected themes that emerged in the initial interviews, and modify questions for interviews that followed. Interviews were transcribed using software, then manually coded using a coding scheme that was developed according to common issues that emerged in the data. The author used inductive reasoning to analyse the data, drawing on the specific experiences reported by participants to uncover themes and patterns, and form general conclusions about how some members of the sex industry experience financial discrimination.

The chief limitation of the research was the small sample size (five participants based only in Victoria and New South Wales). The findings of the study are therefore not a reliable indication of the statistical prevalence of financial discrimination against sex industry workers. However, the in-depth qualitative interviews yielded useful information and insights into sensitive issues surrounding financial discrimination that could not have been uncovered by an industry-wide survey or other broad method of statistical analysis.[2]

III Discrimination against the Sex Industry

Sex work is a 'major source of income' for many people of all genders in Australia and around the world.[3] It is estimated that 20,000 sex workers operate in Australia in any given year,[4] the majority of whom are female.[5] Some academics and advocacy

2 André Queirós, Daniel Faria and Fernando Almeida, 'Strengths and Limitations of Qualitative and Quantitative Research Methods' (2017) 3(9) *European Journal of Education Studies* 369, 370.

3 Cecilia Benoit et al, 'Prostitution Stigma and its Effect on the Working Conditions, Personal Lives, and Health of Sex Workers' (2018) 55 (4–5) *Journal of Sex Research* 457, 457.

4 Lauren Renshaw et al, 'Migrant Sex Workers in Australia' (Research Report No 131, Australian Institute of Criminology, 2015) 3, 9.

5 Ibid 8.

organisations (primarily radical feminists and faith groups on the Christian right), view sex work as inherently exploitative and see sex workers as victims of sexual violence rather than workers.[6] More commonly, sex work is recognised as a legitimate form of labour.[7] While sex work and its associated business activities (such as operating a brothel) have historically been suppressed or prohibited,[8] there is a clear trend towards the decriminalisation of sex work across Australian jurisdictions. Victoria, New South Wales, Queensland and the Northern Territory have now adopted the decriminalised model, while the Australian Capital Territory and Tasmania have partially decriminalised sex work.[9] Western Australia and South Australia are now the only states where sex work remains largely criminalised.[10]

Although thousands of sex workers now operate lawfully, the stigma associated with sexual services remains deeply ingrained in institutions and the general public.[11] This stigma perpetuates the idea that sex work is a social problem and that sex workers are morally deviant, untrustworthy, victims in need of rescue, or 'vectors of disease'.[12]

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6 See: Barbara Sullivan, 'Working in the Sex Industry in Australia: The Reorganisation of Sex Work in Queensland in the Wake of Law Reform' (2008) 18(3) *Labour and Industry* 73, 79; Graham Ellison, 'Criminalizing the Payment for Sex in Northern Ireland: Sketching the Contours of a Moral Panic' (2017) 57(1) *British Journal of Criminology* 194, 195.

7 Alice Orchiston, 'Precarious or Protected? Evaluating Work Quality in the Legal Sex Industry' (2016) 21(4) *Sociological Research Online* 1, 2; Sheila Jeffreys, 'Prostitution, Trafficking and Feminism: An Update on the Debate' (2009) 32(4) *Women's Studies International Forum* 316, 316.

8 Barbara Sullivan, 'When (Some) Prostitution is Legal: The Impact of Law Reform on Sex Work in Australia' (2010) 37(1) *Journal of Law and Society* 85, 86.

9 *Sex Work Decriminalisation Act 2022* (Vic); *Disorderly Houses Amendment Act 1995* (NSW); *Sex Industry Act 2019* (NT); *Sex Work Act 1992* (ACT); *Criminal Code (Decriminalising Sex Work) and Other Legislation Amendment Act 2024* (Qld) ('*Decriminalising Sex Work Act* (Qld)'); *Sex Industry Offences Act 2005* (Tas).

10 *Prostitution Act 2000* (WA) ss 5–7, 9; *Summary Offences Act 1953* (SA) ss 25–6, pt 6; *Criminal Law Consolidation Act 1935* (SA) s 270.

11 University of New South Wales Centre for Social Research in Health, *Stigma Indicators Monitoring Project: Project Summary Phase 2* (Report, 2020) 3; Kahlia McCausland et al, '"It is Stigma that Makes My Work Dangerous": Experiences and Consequences of Disclosure, Stigma and Discrimination Among Sex Workers in Western Australia' (2022) 24(2) *Culture, Health and Sexuality* 180, 181; Zahra Stardust et al, '"I Wouldn't Call the Cops if I was Being Bashed to Death": Sex Work, Whore Stigma and the Criminal Legal System' (2021) 10(3) *International Journal for Crime, Justice and Social Democracy* 142, 143 ('Sex Work, Whore Stigma and the Criminal Legal System').

12 Scarlet Alliance and Australian Sex Workers Association, *Anti-Discrimination and Vilification Protections for Sex Workers in Australia* (Briefing Paper, February 2022) 1, 2 ('*Anti-Discrimination and Vilification Protections*'); Cecilia Benoit et al, '"I Dodged the Stigma Bullet": Canadian Sex Workers' Situated Responses to Occupational

These negative stereotypes lead to discrimination in areas including goods and services, healthcare, housing, employment, and policing.[13] In a recent survey monitoring stigma experienced by various groups (with a focus on healthcare), 96% of sex worker participants reported experiencing sex work related stigma or discrimination within the last 12 months, and '91% of participants reported any negative treatment by health workers'.[14] This incredibly high level of discrimination excludes sex workers from various spheres of public life and has a significant impact on mental health. A recent study on the relationship between stigma and mental health found sex workers 'anticipated stigma and negative judgements from most people if they disclosed their work'.[15] This led to 'a growing sense of "worthlessness" that their true experiences and stories could not be shared publicly'.[16]

A *Financial Discrimination*

Financial discrimination is an element of the wider discrimination against sex workers which has gained increased visibility in recent years. There has been considerable leadership and advocacy by sex worker groups, who are documenting and resisting financial discrimination.[17] This advocacy has caught the attention of the media, which is increasingly reporting on sex industry 'de-banking'.[18] De-banking refers to the refusal to provide an individual or business with basic banking services.[19] For sex workers and their businesses, this can mean being denied a basic business

Stigma' (2020) 22(1) *Culture, Health and Sexuality* 81, 82 ('Sex Workers' Responses to Stigma'); Stardust et al, 'Sex Work, Whore Stigma and the Criminal Legal System' (n 11) 143–4.

13 Linda Banach, 'Unjust and Counter-Productive: The Failure of Governments to Protect Sex Workers from Discrimination' (Research Report, November 1999) 6–7.

14 Centre for Social Research in Health, *Stigma Indicators Monitoring Project: Sex Workers* (Report, 2020) 1–2.

15 Carla Treloar et al, 'Rethinking the Relationship Between Sex Work, Mental Health and Stigma: A Qualitative Study of Sex Workers in Australia' (2021) 268 *Social Science and Medicine* 1, 4.

16 Ibid.

17 Zahra Stardust et al, 'High Risk Hustling: Payment Processors Sexual Proxies and Discrimination by Design' (2023) 26(1) *City University of New York Law Review* 57, 67 ('High Risk Hustling').

18 See, eg: Ayesha de Kretser, 'Sex Workers Slam Banks, Regulator Over Flawed Rules', *Australian Financial Review* (online, 16 January 2023) <https://www.afr.com/companies/financial-services/sex-industry-accuses-banks-austrac-of-discrimination-20230115-p5ccm1>; Sarah Simpkins, 'Ombudsman Slams Banks for Adult Industry Discrimination', *Investor Daily* (online, 13 September 2019) <https://www.investordaily.com.au/markets/45677-ombudsman-slams-banks-for-adult-industry-discrimination>; Sex Work Law Reform Victoria, Submission to Mike Callaghan, *Banking Code Review* (6 August 2021) 5 ('Banking Code Review Submission SWLRV').

19 *Flynn v Westpac Banking Corporation* [2022] ACAT 21, 1 [1] ('*Flynn*'); Zeynab Malakoutikhah, 'Financial Exclusion as a Consequence of Counter-Terrorism Financing' (2020) 27(2) *Journal of Financial Crime* 663, 669.

bank account and merchant facilities to take payment from clients. Some banks and specialist merchant services, such as National Australia Bank and SquarePay, have publicly stated they will not serve sex industry businesses.[20] However, Zahra Stardust et al have documented that financial service providers' policies more commonly contain vague prohibitions on sex or adult related activities and products, affording a wide discretion to refuse certain customers.[21] For example, PayPal prohibits transactions involving 'certain sexually oriented materials or services'.[22] Other similar service providers have no accessible policies prohibiting sex industry customers, although they are excluded in practice.[23] This has led individual sex workers and advocacy groups to publish online banking discrimination guides, indicating where their colleagues will be refused services.[24]

Although discrimination against sex workers is well-documented in other areas, the particular issue of financial discrimination has received scarce attention by academia, especially in the Australian context.[25] This can be partly explained by the tendency for sex work research to focus on 'issues of sexual health and violence',[26] with the practicalities of running a sex work business from a financial perspective

20 Amber Schultz, 'It's Sex Discrimination: Banks Strip Brothels and Escort Agencies of Their Rights', *Crikey* (online, 20 May 2020) <https://www.crikey.com.au/2020/05/20/discrimination-against-brothels-banks-report/>.

21 Stardust et al, 'High Risk Hustling' (n 17) 90.

22 'PayPal Acceptable Use Policy', *PayPal* (Web Page, October 2022) cl 2(i) <www.paypal.com/au/legalhub/acceptableuse-full>.

23 Three of the five sex industry workers interviewed by the author were refused services by financial service providers who did not have publicly available policies prohibiting sex industry customers: Interview with Brothel Owner (Nina Cheles-McLean, 19 April 2022) ('Interview with Brothel Owner'); Interview with Private Sex Worker (Nina Cheles-McLean, 18 February 2022) ('Interview with Private Sex Worker A'); Interview with Private Sex Worker (Nina Cheles-McLean, 29 March 2022) ('Interview with Private Sex Worker B').

24 See, eg: MissFreudianSlit, 'Sex Work Approved Payment Options' *SEXWORKER HELPFULS* (Blog Post, November 2018) <https://sexworkerhelpfuls.com/payment-options>; 'Financial Institutions: Which Ones Discriminate?', *Sex Work Law Reform Victoria* (Web Page, 31 January 2023) <https://sexworklawreformvictoria.org.au/financial-institutions-which-ones-discriminate/>.

25 Stardust et al, 'High Risk Hustling' (n 17) 63. For an examination of financial exclusion of the sex and adult industries in the American context, with a focus on payment platforms: see: Natasha Tusikov, 'Censoring Sex: Payment Platform's Regulation of Sexual Expression' in Mathieu Deflem and Derek Silva (eds), *Media and Law: Between Free Speech and Censorship* (Emerald Publishing, 2021) 63; Bianca Beebe, '"Shut up and Take My Money!": Revenue Chokepoints, Platform Governance, and Sex Workers' Financial Exclusion' (2022) 2 *International Journal of Gender, Sexuality and Law* 140; Lana Swartz, *New Money: How Payment Became Social Media* (Yale University Press, 2020) ch 4.

26 Renshaw et al (n 4) 1.

largely ignored.[27] The author is only aware of one journal article, written by Stardust et al in 2023,[28] which specifically addresses this issue in the Australian context. That article addresses the notable gap in Australian scholarship, bringing together sex worker accounts of financial discrimination, and a detailed analysis of what drives financial institutions to discriminate. Aside from the work of Stardust et al, the Eros Association has published a report documenting the high rates of financial discrimination against the adult industry in Australia, however this report focuses on adult store retailers rather than the sex industry.[29]

The issue of de-banking is a complex global problem, which is not limited to the sex industry. Financial exclusion of other populations and industries (including women,[30] African Americans,[31] refugees,[32] Muslim charities,[33] remittance service providers,[34] and low-income earners[35]) has been the subject of extensive commentary. De-banking is often attributed to low risk appetite of financial institutions (including risk of money laundering and terrorist financing), low client

27 Jo Weldon, 'Show Me the Money: A Sex Worker Reflects on Research into the Sex Industry' (2006) 9 *Research for Sex Work: Sex Work and Money* 12, 12–14; Alys Willman-Navarro 'Money and Sex: What Economics Should Be Doing for Sex Work Research' (2006) 9 *Research for Sex Work: Sex Work and Money* 18, 18–20.

28 Stardust et al, 'High Risk Hustling' (n 17). There are a small number of studies and articles which peripherally deal with financial discrimination against sex workers. See, eg, Sharon Pickering, JaneMaree Maher and Alison Gerard, *Working in Victorian Brothels: An Independent Report Commissioned by Consumer Affairs Victoria into the Victorian Brothel Sector* (Report, June 2009) 21–2, 56, which notes Victorian sex workers had difficulty securing housing loans and insurance despite earning high incomes, and recommended targeted assistance in financial planning for sex workers.

29 Stardust et al, 'High Risk Hustling' (n 17). Jarryd Bartle, *Financial Discrimination Against Adults-Only Businesses* (Report, October 2017).

30 See, eg, Stephen Tully, 'The Exclusion of Women from Financial Services and the Prospects of a Human Rights Solution Under Australian Law' (2006) 12(2) *Australian Journal of Human Rights* 53.

31 See, eg, Kristen Broady, Mac McComas and Amine Ouazad, 'An Analysis of Financial Institutions in Black-Majority Communities: Black Borrowers and Depositors Face Considerable Challenges in Accessing Banking Services' (Research Report, 2 November 2021).

32 See, eg, Lene M P Hansen, *Serving Refugee Populations: The Next Financial Inclusion Frontier* (Guidelines for Financial Service Providers, November 2016).

33 See, eg, Stuart Gordon and Sherine El Taraboulsi-McCarthy, *Counter-Terrorism, Bank De-Risking and Humanitarian Response: A Path Forward* (Policy Brief No 72, August 2018) 2–3.

34 See, eg, Louis De Koker, Supriya Singh and Jonathan Capal, 'Closure of Bank Accounts of Remittance Service Providers: Global Challenges and Community Perspectives in Australia' (2017) 36(1) *University of Queensland Law Journal* 119.

35 See, eg, Therese Wilson, 'Consumer Credit Regulation and Rights-Based Social Justice: Addressing Financial Exclusion and Meeting the Credit Needs of Low-Income Australians' (2012) 35(2) *University of New South Wales Law Journal* 501.

profitability and the cost of compliance,[36] reputational risk,[37] and discriminatory policies and practices.[38] Broadly speaking, the outcome of de-banking can lead to exclusion from the mainstream economy, as it forces 'people and entities into less regulated or unregulated channels',[39] ultimately contributing to the growth of the cash economy.[40] In 'highly banked' economies (where most people hold a bank account), financial exclusion has also been linked to social exclusion.[41] De-banked individuals can find themselves 'shut out of modern life', because basic banking services are 'a gateway to other products and services, like insurance, credit and mortgages'.[42] De-banking can also increase the risk of crime, as forcing a business to deal in cash encourages lower rates of tax compliance and heightens the risk of money laundering.[43] Even where a business has no links to criminal activity, the optics of dealing entirely in cash fosters misperceptions that the business is not complying with the law and entrenches stigma.[44] A cycle therefore emerges of stigma resulting in financial exclusion, which only further entrenches stigma.

IV Can Banks Legally Discriminate against Sex Workers?

The growing reports of financial discrimination against sex workers raises the question of whether banks are acting illegally when they refuse to serve sex industry businesses. There is no simple answer to this question, as it requires analysis of multiple intersecting laws which vary across the states and territories. The task

36 Tracey Durner and Liat Shetret, 'Understanding Bank De-Risking and its Effect on Financial Inclusion: An Exploratory Study' (Research Report, November 2015) 9–11.

37 De Koker, Singh and Capal (n 34) 127–8; Malakoutikhah (n 19) 669, 671.

38 Cătălin-Gabriel Stănescu and Asress Adimi Gikay, 'Introduction' in Cătălin-Gabriel Stănescu and Asress Adimi Gikay (eds), *Discrimination, Vulnerable Consumers and Financial Inclusion: Fair Access to Financial Services and the Law* (Routledge, 2021) 1, 3–6.

39 De Koker, Singh and Capal (n 34) 128, citing Financial Action Task Force, 'FATF Clarifies Risk-Based Approach: Case-By-Case, Not Wholesale De-Risking' (Statement, 23 October 2014); Malakoutikhah (n 19) 670.

40 Sharon Collard et al, 'Access to Financial Services in the UK' (Occasional Paper No 17, May 2016) 9.

41 Beatriz Fernández-Olit, Juan Diego Paredes-Gázquez and Marta de la Cuesta-González, 'Are Social and Financial Exclusion Two Sides of the Same Coin? An Analysis of the Financial Integration of Vulnerable People' (2018) 135(1) *Social Indicators Research* 245, 265.

42 Collard et al (n 40) 9.

43 Australian Transaction Reports and Analysis Centre, 'AUSTRAC Statement 2021: De-Banking' (Media Release, 29 October 2021) ('AUSTRAC Statement 2021'); see generally, Gamze Oz-Yalaman, 'Financial Inclusion and Tax Revenue' (2019) 19(3) *Central Bank Review* 107.

44 Interview with Private Sex Worker A (n 23); Penny Crofts and Jason Prior, 'The Proposed Re-Introduction of Policing and Crime into the Regulation of Brothels in New South Wales' (2016) 28(2) *Current Issues in Criminal Justice* 209, 215.

is further complicated by the fact that there is no case law on financial discrimination against sex workers, and little case law on financial discrimination against other groups which could assist in shedding light on the issue.[45] This part will therefore begin by discussing sex work laws and the relevant banking law. Key issues in the application of the various state and territory anti-discrimination laws will then be discussed. The application of anti-discrimination law is complicated by issues emerging across the legal landscape. Next, this part will examine anti-money laundering laws and counter-terrorism financing laws, including those contained in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (*'AML/CTF Act'*). Finally, these strands of law will be drawn together to consider the implications for sex workers who experience financial discrimination.

A *Sex Work and Banking Law*

The laws governing sex work are found at the state and territory level and differ across jurisdictions. In jurisdictions where sex work remains largely criminalised (South Australia and Western Australia), it is obvious that many sex workers will not receive banking services as a result of compliance concerns on the part of the bank.[46] However, the thousands of sex workers who operate lawfully should arguably be entitled to banking services.[47] Despite the necessity of banking services in contemporary life, there is surprisingly no such entitlement in law. The importance of financial inclusion has led a number of international jurisdictions, including the European Union and Canada, to recognise a right to a bank account.[48] However, no such right has been recognised in Australia,[49] and there is nothing in Australian

45 To the author's knowledge, there are only eight published cases brought against banks by customers claiming discrimination in the area of goods and services: *Evans v Lee* [1996] HREOCA 8 (*'Evans'*); *Keating v ANZ Banking Group Ltd* [1995] VADT 13; *Lomax v National Australia Bank Ltd* [2014] VCAT 348; *Cairns v ANZ Banking Group Ltd* [2016] NSWCATAD 165; *Webb v Commonwealth Bank of Australia* [2011] VCAT 1592; *Csizmadia-Estok v Bendigo Bank* [2006] VCAT 1566; *Gupta v HSBC Bank Australia Ltd* [2020] SACAT 60; *Flynn* (n 19).

46 Banks are not necessarily obligated to refuse services to business customers who engage in any unlawful conduct. For example, it can be assumed Crown Melbourne Ltd still receives banking services despite breaching Victorian gambling laws: Victorian Gambling and Casino Control Commission, *Decision and Reasons for Decision* (TRIM ID: CD/22/21465, 7 November 2022). The refusal of banking services to sex workers operating illegally perpetuates a 'two-tiered industry' and cements disadvantage: Stardust et al 'High Risk Hustling' (n 17) 134. However, anti-discrimination legislation in all jurisdictions permits discriminatory conduct that is necessary to comply with a statutory obligation. See, eg, s 75 of the *Equal Opportunity Act 2010* (Vic). Banks could potentially utilise this exception to refuse to serve sex workers operating illegally, in compliance with their obligation to make risk-based decisions under the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) ss 81–2.

47 Stardust et al, 'High Risk Hustling' (n 17) 132.

48 De Koker, Singh and Capal (n 34) 151–2.

49 Ibid.

banking law that compels a bank to provide basic services to individuals or lawful businesses. This means banks are free to pick and choose who can access their services and to terminate a customer's existing services, without giving reasons.[50] Banks must comply with their own terms and conditions, but these generally afford a wide discretion. For example, National Australia Bank's terms and conditions for its business products state that it may close a customer's accounts by notice in writing for any reason 'it deems appropriate'.[51] According to Louis De Koker, Supriya Singh and Jonathan Capal, this means that '[c]ustomers are generally powerless to prevent bank account closures'.[52] The Australian Banking Association's *Banking Code of Practice* contains some provisions dealing with inclusive banking that go beyond the requirements of the law.[53] Namely, cl 32 states that banks are 'committed to providing banking services which are inclusive of all people'.[54] However, cl 32 has very little practical effect and does not prevent banks from denying services to categories of people according to internal policies.[55]

B *Anti-Discrimination Law*

The silence on the rights of customers in banking law means that a bank's freedom to pick and choose who it will serve is only tempered by anti-discrimination law. Anti-discrimination legislation has been introduced in every state and territory, and at the federal level. These laws do not prohibit discrimination against all people in all circumstances. They only prohibit a 'person' (including a corporation) from discriminating against others because they possess certain protected attributes.[56] Further, these laws only prohibit discrimination whilst engaging in certain activities, such as providing accommodation, providing goods and services, or employing workers.[57] Protected attributes include race, religious belief, disability, age, gender identity

50 Mike Callaghan, *Independent Review of the Banking Code of Practice 2021* (Final Report, November 2021) 100–1; De Koker, Singh and Capal (n 34) 120, 135, 140; Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Financial Related Crime* (7 September 2015) 47.

51 National Bank Australia, *NAB Business Products* (Terms and Conditions, 3 March 2023) [1.14], [2.17], [3.22] <https://www.nab.com.au/content/dam/nabrwd/documents/terms-and-conditions/business/nab-business-products-tnc-oct-2021.pdf>.

52 De Koker, Singh and Capal (n 34) 135.

53 Australian Banking Association, *Banking Code of Practice* (1 March 2020); Callaghan (n 50) 92.

54 Callaghan (n 50) 92.

55 Ibid 100–1; *Australian Financial Complaints Authority Determination No 687972* (12 May 2020).

56 See, eg: *Interpretation of Legislation Act 1984* (Vic) s 38 (definition of 'person'): 'person includes a body politic or corporate as well as an individual'; *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, 277–8 ('*Christian Youth Camps*'); *Bell v iiNET Ltd* [2017] QCAT 114, [102] ('*Bell*').

57 See, eg: *Equal Opportunity Act 2010* (Vic) pt 4 ('*Equal Opportunity Act* (Vic)'); Neil Rees, Simon Rice and Dominque Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 41.

and sexuality.[58] Some, but not all, jurisdictions have protected attributes that apply to sex workers: 'lawful sexual activity' (Victoria and Tasmania); 'sex work activity' (Queensland); 'profession, trade or occupation' (Victoria); and 'employment in sex work or engaging in sex work, including past employment in sex work or engagement in sex work' (Northern Territory).[59] Formerly, 'lawful sexual activity' was the protected attribute applicable to sex workers in Queensland. Following recent legislative amendments, it has been replaced with 'sex work activity'.[60] Anti-discrimination legislation in New South Wales, Western Australia and South Australia currently contains no protections for sex workers.

Relevantly, all states and territories prohibit discrimination in the provision of goods and services,[61] and this includes financial services.[62] This means that banks and other financial services providers must comply with anti-discrimination law when they serve (or refuse to serve) customers. Further, the presence of 'attributed liability' provisions means a financial service provider can be liable when an employee refuses to serve a customer for discriminatory reasons.[63] To avoid liability, the financial service provider must show it took reasonable preventative action to avoid the discrimination.[64] Plainly, it would be very difficult for a financial service provider to invoke this defence where it has express policies or a widespread practice of denying services to particular categories of people (for example, sex workers).

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58 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 52; Rees, Rice and Allen (n 57) 46.

59 *Anti-Discrimination Act 1991* (Qld) ('*Anti-Discrimination Act* (Qld)') s 7(1); *Discrimination Act 1991* (ACT) ('*Discrimination Act* (ACT)') s 7(1)(p); *Equal Opportunity Act* (Vic) (n 57) ss 6(g), 6(la); *Anti-Discrimination Act 1998* (Tas) ('*Anti-Discrimination Act* (Tas)') s 16(d); *Anti-Discrimination Act 1992* (NT) s 19(1)(ec) ('*Anti-Discrimination Act* (NT)').

60 *Anti-Discrimination Act* (Qld) (n 59) s 7(I); *Decriminalising Sex Work Act* (Qld) (n 9) ss 4, 6.

61 *Anti-Discrimination Act 1977* (NSW) s 19 ('*Anti-Discrimination Act* (NSW)'); *Discrimination Act* (ACT) (n 59) s 53; *Equal Opportunity Act* (Vic) (n 57) s 44; *Equal Opportunity Act 1985* (WA) s 20 ('*Equal Opportunity Act* (WA)'); *Anti-Discrimination Act* (NT) (n 59) s 41; *Anti-Discrimination Act* (Qld) (n 59) s 46; *Equal Opportunity Act 1984* (SA) s 39 ('*Equal Opportunity Act* (SA)'); *Anti-Discrimination Act* (Tas) (n 59) s 22(1)(c).

62 See, eg, *Evans* (n 45).

63 *Anti-Discrimination Act* (NSW) (n 61) s 53(1); *Discrimination Act* (ACT) (n 59) s 121A(2); *Equal Opportunity Act* (Vic) (n 57) s 109; *Equal Opportunity Act* (WA) (n 61) s 161(1); *Anti-Discrimination Act* (NT) (n 59) s 105(1); *Anti-Discrimination Act* (Qld) (n 59) s 133(1); *Equal Opportunity Act* (SA) (n 61) s 91(1); *Anti-Discrimination Act* (Tas) (n 59) s 104(3). For an explanation of 'attributed liability' and how it differs from the common law principle of vicarious liability: see Rees, Rice and Allen (n 57) 826–7.

64 *Anti-Discrimination Act* (NSW) (n 61) s 53(3); *Discrimination Act* (ACT) (n 59) s 121A(3); *Equal Opportunity Act* (n 57) s 110; *Equal Opportunity Act* (WA) (n 61) s 161(2); *Anti-Discrimination Act* (NT) (n 59) s 105(2); *Anti-Discrimination Act* (Qld) (n 59) s 133(2); *Equal Opportunity Act* (SA) (n 61) s 91(2); *Anti-Discrimination Act* (Tas) (n 59) s 104(2).

C *Judicial Interpretation of Sex Worker Protected Attributes*

Although five of the seven state and territory anti-discrimination acts ostensibly protect sex workers, 'lawful sexual activity' and 'protection, trade, occupation or calling' are the only attributes that have been considered by a court or tribunal.[65] As will be argued in detail below, in these cases, the scope of the protected attributes was interpreted so narrowly that they were rendered almost inutile.[66] This reflects a wider problem regarding the application of anti-discrimination law. The High Court of Australia has acknowledged on several occasions that anti-discrimination law should be given a liberal interpretation in accordance with its beneficial purpose.[67] However, the judiciary has generally adopted a 'narrow and formalistic' approach to statutory interpretation in anti-discrimination matters.[68] As Beth Gaze and Belinda Smith explain, one aspect of this narrow approach is the judicial tendency to separate 'the named attribute from the activities or manifestations that are inherently associated with it', drawing an 'extremely narrow and artificial line around the protected scope'.[69] This reasoning was infamously applied in *General Electric Co v Gilbert*,[70] leading the United States Supreme Court to separate women and pregnancy, thereby allowing discrimination against a woman because they were pregnant. The High Court of Australia followed similar logic in the heavily criticised,[71] yet influential[72] case *Purvis v New South Wales*,[73] when it held that expelling a disabled school child due to misbehaviour inextricably linked with his disability was not discrimination — thus drawing an artificial line between the status of being disabled and its unavoidable manifestation.

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65 See: *Capocchi v West* [2020] TASADT 8 ('*Capocchi*'); *J v Federal Capital Press of Australia Ltd* [1999] ACTDT 2 ('*Federal Capital Press*'); *Dovedeen Pty Ltd v GK* [2013] QCA 116 ('*Dovedeen*').

66 See below nn 76–92 and accompanying text.

67 Gaze and Smith (n 58) 80–1, citing *Waters v Public Transport Corporation* (1991) 173 CLR 349, 362–5 (Mason CJ and Gaudron J), 378–9 (Brennan J), 383–4 (Deane J), 408–10 (McHugh J); *IW v City of Perth* (1996–7) 191 CLR 1, 12 (Brennan CJ and McHugh J), 27 (Toohey J), 35–6 (Gummow J), 52 (Kirby J) ('*IW*').

68 Gaze and Smith (n 58) 80; Margaret Thornton, 'Disabling Discrimination Legislation: The High Court and Judicial Activism' (2009) 15(1) *Australian Journal of Human Rights* 1, 21.

69 Gaze and Smith (n 58) 80.

70 429 US 125 (1976).

71 See, eg: K Lee Adams, 'Defining Away Discrimination' (2006) 19(3) *Australian Journal of Labour Law* 263, 264; Colin Campbell, 'A Hard Case Making Bad Law: *Purvis v New South Wales* and the Role of the Comparator Under the *Disability Act 1992* (Cth)' (2009) 35 *Federal Law Review* 111.

72 For a discussion of the precedential value of *Purvis v New South Wales* (2003) 217 CLR 9 ('*Purvis*'), see Belinda Smith, 'From *Wardley* to *Purvis*: How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* 3.

73 *Purvis* (n 72).

Surprisingly, there has been no substantive academic analysis of the few published discrimination cases involving sex workers. However, examination of these cases shows that the judicial tendency to narrowly interpret protected attributes — which was exemplified by *Purvis* — has also affected the interpretation of sex worker protected attributes. In the few sex worker discrimination cases that have been decided, the judge or tribunal member drew an artificial distinction between 'sex worker' and 'sex work'. The effect of this distinction is that discrimination is prohibited on the basis of a person's sex worker job descriptor, but not because a sex worker is performing sex work.[74]

This narrow interpretation is exemplified by the ruling of the Queensland Court of Appeal in *Dovedeen Pty Ltd v GK* ('*Dovedeen*').[75] The complainant in this case, referred to by the pseudonym 'GK', was a regular guest at the Drovers Rest Motel, and engaged in sex work there. On the last occasion she stayed there, she was told by the manager, Mrs Hartley, that she would not be allowed accommodation in future because she would not allow 'prostitution' in her motel. GK claimed direct discrimination on the basis of lawful sexual activity in the area of provision of accommodation.[76] Mrs Hartley claimed that she did not deny GK accommodation because she was a sex worker per se, but because GK intended to carry out sex work in the motel room.[77] Thus, the central issue in dispute was whether sex work itself came within the scope of 'lawful sexual activity'. Justice of Appeal Fraser held that 'lawful sexual activity' encompassed the status of being a sex worker, but did not include the activity of sex work. In doing so, his Honour relied heavily on the statutory definition of lawful sexual activity: 'a person's *status* as a lawfully employed sex worker, whether or not self-employed'.[78] This interpretation meant that '[d]iscrimination on the basis that [GK] was a lawfully employed sex worker was prohibited, but discrimination on the basis that she proposed to perform work as a sex worker at the motel was not prohibited'.[79]

The approach of Fraser JA is essentially mirrored in the only two other discrimination cases brought by sex workers which have proceeded to judgment in a court or tribunal. In *J v Federal Capital Press of Australia Ltd* ('*Federal Capital Press*'), a sex worker made a discrimination complaint which was heard at the Australian Capital Territory Civil and Administrative Tribunal.[80] The complainant had attempted to

74 Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act* (Discussion Paper, November 2021) 98.

75 *Dovedeen* (n 65).

76 *Anti-Discrimination Act* (Qld) (n 59) ss 82–3.

77 *GK v Dovedeen Pty Ltd (No 3)* [2011] QCAT 509, [8].

78 *Anti-Discrimination Act* (Qld) (n 59) sch 1 (definition of 'lawful sexual activity') (emphasis added). This reference concerns the historical version of the *Anti-Discrimination Act* (Qld) at the time of the judgement. The current version of the *Anti-Discrimination Act* (Qld) no longer contains the protected attribute 'lawful sexual activity' nor its definition in sch 1.

79 *Dovedeen* (n 65) [20].

80 *Federal Capital Press* (n 65).

advertise sexual services in two Canberra newspapers. Her advertisements generally contained the words 'Angie, pampering, passionate, and private [phone no]'.[81] The factual basis of the complaint was accepted by the Tribunal — the complainant's payment terms were different to other advertisers; she was confined to the 'adult services' column and therefore not allowed to place 'spot advertisements', and she was denied advertising services entirely by one of the newspapers. Despite these factual findings, the Tribunal decided that there was no discrimination. This was because it was the '*subject matter* of the advertisements, rather than the *occupation* of the advertiser', which led to the unfavourable treatment.[82]

The subject matter of the complainant's advertisements was sexual services, and they were necessary for her to carry out her occupation as a sex worker. The Member's decision, therefore, assumes that activities inherent to an occupation are not protected. These assumptions are revealed in the evidence that the Member used to justify this finding. Namely, that the complainant had been treated the same as any other advertiser when she placed advertisements that were not for adult services.[83] The Member appears to have inferred that because the complainant was not discriminated against when she placed an advertisement unrelated to sex work, her occupation did not cause the unfavourable treatment when she advertised her sexual services. This indicates that while it would be unlawful to discriminate against a sex worker in their personal capacity (for example a sex worker places an advertisement for a used car), it is lawful to treat them unfavourably when they carry out activities in connection with their occupation. The complainant unsuccessfully appealed the Tribunal's decision, which was ultimately upheld by the Federal Court.[84]

The most recent case dealing with this issue was brought by Zoe Capocchi and heard in the Tasmanian Civil and Administrative Tribunal: *Capocchi v West* ('*Capocchi*').[85] Ms Capocchi was evicted from rented premises for performing 'full service' (a sexual service involving sexual intercourse). Relevantly, the rental contract stipulated that '[u]se of the rooms is solely for sensual adult massage. Sex of any kind is not permitted.'[86] Ms Capocchi claimed, inter alia, that the respondents' conduct in evicting her amounted to direct and indirect discrimination on the basis of 'lawful sexual activity'.

The nature of Ms Capocchi's claim meant the Member had to decide whether the activity of providing 'full service' fell within the scope of 'lawful sexual activity'. Ultimately, the Member found that it did not. The Member decided that the reason Ms Capocchi was evicted

81 Ibid 4.

82 Ibid 23 (emphasis added).

83 Ibid.

84 *Edgley v Federal Capital Press of Australia Pty Ltd* (2001) 108 FCR 1.

85 *Capocchi* (n 65).

86 Ibid [23].

> was not because she was a lawfully employed sex worker who offered full service (the protected attribute) but because she had performed and proposed to perform in the future full service at the respondents' premises in breach of the rental agreement.[87]

The Member's reliance on a breach of the rental agreement somewhat sidesteps the fact that discriminatory clauses in rental agreements may be unenforceable.[88] This point aside, the first aspect of the Member's reasoning relied on a distinction between the status of being a sex worker and actually engaging in sexual activity at particular premises. While the former is encompassed by the protected attribute, the latter is not. This is especially apparent in the Member's comment that '[t]he evidence is that the respondents had no problem with sex workers who wanted to provide full service. They just did not want sex workers providing full service at their premises.'[89] In this regard, the reasoning in *Capocchi* mirrors *Dovedeen* and *Federal Capital Press* — anti-discrimination law does not protect sex workers who perform sex work.

D *Discrimination against Corporations*

An additional barrier to sex workers accessing anti-discrimination protections presents itself in the issue of whether corporations can be protected from discrimination. This is nested in the larger, highly contentious and under-litigated issue of whether a corporation can have human rights.[90] Brothels and escort agencies are often incorporated, and private sex workers also sometimes choose to incorporate rather than operate as sole traders.[91] In these cases, it can arguably be the corporation that has been discriminated against when services are refused. This issue is very likely to arise in financial discrimination cases because an incorporated business will inevitably apply for business banking services in its company name.

Anti-discrimination legislation generally prohibits discrimination by a person against another person. As a matter of law, 'person' generally includes artificial and natural persons.[92] While it is uncontroversial that the 'person' who discriminates can be a corporation,[93] it is less clear if a corporation can be a complainant. This is because a corporation probably cannot possess the protected attributes which form

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87 Ibid [55].

88 See, eg, Tammy Solonec, 'Racial Discrimination in the Private Rental Market: Overcoming Stereotypes and Breaking the Cycle of Housing Despair in Western Australia' (2000) 5(2) *Indigenous Law Bulletin* 4.

89 *Capocchi* (n 65) [65].

90 Shawn Rajanayagam and Carolyn Evans, 'Corporations and Freedom of Religion: Australia and the United States Compared' (2015) 37(3) *Sydney Law Review* 329, 331.

91 Interview with Brothel Owner (n 23); Interview with Private Sex Worker A (n 23); Interview with Escort Agency Owner (Nina Cheles-McLean, 26 March 2022) ('Interview with Escort Agency Owner').

92 Rajanayagam and Evans (n 90) 341; *Acts Interpretation Act 1901* (Cth) s 2C.

93 *Christian Youth Camps* (n 56) 277–8, 333; *Bell* (n 56) [102].

the prohibited grounds of discrimination. For example, a corporation cannot have a race, or a disability, or be pregnant.[94] Of course, corporations are simply a form of organisation used by humans, and the members of a corporation can possess protected attributes.[95] However, the well-established principle of the corporate veil separates a corporation from its members.[96] Considering these difficulties, the following sub-sections discuss ways in which complaints could proceed where banking services have been refused to a sex industry corporation.

1 *Piercing the Corporate Veil*

A corporation could bring a claim if a court imputed the protected attribute of a natural person (whether that be race, disability, or occupation as a sex worker) to the corporation. This process is known as 'reverse veil piercing'.[97] However, according to Shawn Rajanayagam and Carolyn Evans, reverse veil piercing has received little judicial support in Australia.[98] This is exemplified by *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* ('*Christian Youth Camps*').[99] In this case, a religious corporation (Christian Youth Camps Ltd ('CYC')) attempted to rely on a statutory exemption which excused discriminatory conduct if it was necessary for a 'person' to comply with 'genuine religious beliefs'.[100] The Victorian Court of Appeal therefore had to decide whether a corporation was a person who could hold such a belief. The majority held that the exemption could not apply to corporations without an express statutory provision that attributed religious beliefs to corporations by way of legal fiction.[101] As Neave JA explained: '[b]ecause a corporation is not a natural person and has "neither soul nor body", it cannot have a conscious state of mind amounting to a religious belief or principle.'[102] This ruling means it is unlikely that other attributes, including occupation as a sex worker, could be imputed to a corporation for the purposes of making a discrimination complaint.

2 *Interpretation of 'Profession, Trade or Occupation'*

Unlike most protected attributes, 'profession, trade or occupation' could arguably characterise a corporation without piercing the corporate veil. This very issue was

94 Australian Human Rights Commission, Submission to the Attorney-General's Department, *Religious Freedom Bills Second Exposure Draft* (31 January 2020) 15 [46].

95 *Burwell v Hobby Lobby Stores Inc*, 573 US 682, 706–7 (2014).

96 See generally *Salomon v A Salomon & Co Ltd* [1897] AC 22.

97 This is different to 'forward piercing' where the company's liability is imposed on its members: see Rajanayagam and Evans (n 90) 342–3.

98 Ibid 343.

99 *Christian Youth Camps* (n 56).

100 *Equal Opportunity Act 1995* (Vic) s 77.

101 *Christian Youth Camps* (n 56) 334.

102 Ibid 261, quoting *Motel Marine Pty Ltd v IAC (Finance) Pty Ltd* (1963) 110 CLR 9, 14 (Kitto, Taylor and Owen JJ).

raised when the Sex Work Decriminalisation Bill 2021 (Vic), which introduced this attribute, was being debated in Parliament. Gordon Rich-Phillips, Member of the Victorian Legislative Council, referred to businesses that had been de-banked and asked the Minister whether 'profession, trade or occupation' would apply to corporations as well as natural persons, thereby allowing them to make discrimination claims.[103] This question gave rise to the following exchange:

> **Mr LEANE**: Thanks for your patience. I am unsure whether this acquits Mr Rich-Phillips's concern, but the bill does not displace any parts of the Equal Opportunity Act, including the definition of 'person'. Under the Equal Opportunity Act section 4 states:
>
> > ***person*** includes an unincorporated association and, in relation to a natural person, means a person of any age …
>
> **Mr RICH-PHILLIPS**: Thank you, Minister. I take from that the scope is as broad as we discussed, including other incorporated entities and bodies corporate, and therefore this protection would extend to those in respect of a trade, profession or occupation.
>
> **Mr LEANE**: Yes.[104]

This suggests Parliament intended that corporations be protected under Victorian anti-discrimination law based on profession, trade or occupation. However, while the Hansard can guide statutory interpretation,[105] there has been no authoritative judicial ruling on this point.

3 *Association with a Natural Person*

Although a corporation cannot be a sex worker, it can arguably be associated with one. Association with someone who has a protected attribute is itself a protected attribute in most jurisdictions, although wording and definitions vary.[106] The difficulty here is whether a corporation can be said to have an 'association' or 'personal association' with a natural person. In *Cassidy v Leader Associated Newspapers Pty Ltd*,[107] it was held that 'personal association' requires 'an association between natural persons and not between a person and a company'.[108] This

103 Victoria, *Parliamentary Debates*, Legislative Council, 10 February 2022, 260 (Gordon Rich-Phillips).

104 Ibid 265 (Gordon Rich-Phillips and Shaun Leane).

105 Jacinta Dharmananda, 'Outside the Text: Inside the Use of Extrinsic Materials in Statutory Interpretation' (2014) 42(2) *Federal Law Review* 333, 335.

106 *Discrimination Act* (ACT) (n 59) s 7(c); *Anti-Discrimination Act* (NSW) (n 61) s 7; *Equal Opportunity Act* (Vic) (n 57) s 6(q); *Anti-Discrimination Act* (NT) (n 59) s 19(r); *Anti-Discrimination Act* (Qld) (n 59) s 7(p); *Equal Opportunity Act* (SA) (n 61) s 29(2)(d); *Anti-Discrimination Act* (Tas) (n 59) s 16(s).

107 [2002] VCAT 1656 ('*Cassidy*').

108 Ibid [75].

strongly suggests that a sex industry corporation could not rely on its association with sex workers in Victorian proceedings. However, the outcome could differ in jurisdictions whose definition of association is broad enough to encompass association with a corporation.[109]

4 *A Natural Person Makes the Discrimination Claim*

The most straightforward way for a sex worker who operates an incorporated business to make a discrimination complaint will likely be to make the complaint in their own name. There is conflicting case law on whether a natural person can make a complaint about discrimination that was technically directed at a corporation. The High Court considered this issue in the context of disability discrimination in *IW v City of Perth* ('*IW*').[110] In that case, an individual referred to as 'IW' complained that he was refused services by reason of his impairment when Perth City Council denied planning approval for a drop-in centre for human immunodeficiency virus ('HIV') positive persons. IW was HIV positive and therefore possessed a relevant impairment under the *Equal Opportunity Act 1984* (WA). However, it was not IW, but an incorporated association named 'Persons Living with Aids (WA) Inc' ('PLWA'), of which IW was a member, who had applied for and was refused planning approval.[111] The majority held that IW did not have standing to complain. This was because IW had not made the application, so technically he had not been refused services.[112] As Gummow J succinctly explained: '[IW] suffered impairment but did not seek the provision of services by the Council. Services were sought by PLWA, but it did not suffer impairment.'[113]

This same issue arose in the Victorian Civil and Administrative Tribunal case that preceded *Christian Youth Camps*: *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd* ('*Cobaw Community Health Services Ltd* (VCAT)').[114] The claim was brought by Cobaw Community Health Services Ltd ('Cobaw'), an incorporated community health service that focused on suicide prevention among same-sex attracted rural youth. An employee of Cobaw had attempted to book accommodation owned by CYC to conduct a weekend camp for same-sex attracted youth. CYC refused to provide the accommodation on the grounds it was opposed to homosexual activity because it was contrary to the bible.

Cobaw brought the discrimination claim against CYC as a 'representative body' for the attendees of the camp, who possessed the protected attribute 'sexual orientation'.[115] In order to have standing to bring the complaint, Cobaw was required to

109 See, eg, Australian Human Rights Commission (n 94) 13.

110 *IW* (n 67).

111 Ibid 7 (Brennan CJ and McHugh J), 18–19 (Dawson and Gaudron JJ).

112 Ibid 25 (Dawson and Gaudron JJ), 45 (Gummow J).

113 Ibid 45.

114 [2010] VCAT 1613 ('*Cobaw Community Health Services Ltd* (VCAT)').

115 Ibid [61]–[68].

show that each of the attendees would have had standing to bring the claim in their own right.[116] CYC attempted to rely on *IW*, and argued it was Cobaw who had applied for and was refused accommodation and not the camp attendees.[117] Judge Hampel distinguished *IW* and found Cobaw had applied for the accommodation 'on behalf' of the attendees.[118] The discriminatory conduct was therefore directed at the camp attendees and not at the corporate entity.[119] Judge Hampel emphasised that this finding was dependent on the facts of the case. In particular, the Cobaw employee had made it clear the accommodation was to be provided for the camp attendees (same sex-attracted youth) and did not refer to Cobaw (the corporation) when attempting to book the accommodation.[120] Judge Hampel's decision indicates there may be some scope for sex workers to bring discrimination claims where they can argue a corporation applied for banking services on their behalf. However, the success of this argument will be dependent on the particular facts of the case.

E *Anti-Money Laundering and Counter Terrorism Financing Laws*

Another barrier to sex workers seeking redress for financial discrimination presents itself in s 235 of the *AML/CTF Act*, which potentially provides protection from liability to banks who discriminate against their customers. The *AML/CTF Act* imposes obligations on financial institutions to prevent serious financial crimes, including money laundering and the financing of terrorism. While these obligations are clearly appropriate, evidence has emerged that instead of assessing customer risk on a case-by-case basis, financial institutions are de-banking entire categories of persons and businesses who they deem to be high risk,[121] 'without adequate consideration and without clear reasons'.[122] Compounding this issue, the *AML/CTF Act* provides an exemption from liability to financial institutions in relation to this potentially discriminatory conduct. Section 235(1) provides:

116 *Equal Opportunity Act 1995* (Vic) ss 104(1)(a), 104(1B)(a)(i); *Cobaw Community Health Services Ltd* (VCAT) (n 114) [60].

117 *Cobaw Community Health Services Ltd* (VCAT) (n 114) [167].

118 Ibid [172], [175].

119 Ibid [171]–[172].

120 Ibid [172].

121 Australian Transaction Reports and Analysis Centre, 'AUSTRAC Statement 2021' (n 43); Attorney-General's Department, *Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations* (Report, April 2016) 99; Australian Transaction Reports and Analysis Centre, *Strategic Analysis Brief: Bank De-Risking of Remittance Businesses* (Brief, 2015) 4 ('Bank De-Risking').

122 Select Committee on Australia as a Technology and Financial Centre, Parliament of Australia, *Select Committee on Australia as a Technology and Financial Centre* (Final Report, October 2021) xi.

> (1) An action, suit or proceeding (whether criminal or civil) does not lie against:
>
> (a) a person (the ***first person***); or
>
> (b) an officer, employee or agent of the first person acting in the course of his or her office, employment or agency;
>
> in relation to anything done, or omitted to be done, *in good faith* by the first person, officer, employee or agent:
>
> …
>
> (e) in compliance, or *in purported compliance*, with any other requirement under:
>
> (i) this Act …[123]

This exemption is incredibly broad and can likely be utilised to avoid liability for discrimination.[124] Notably, s 235(1)(e) applies to conduct 'in *purported* compliance' with the *AML/CTF Act*. This could possibly capture discriminatory conduct that is not required or authorised by the *AML/CTF Act*. Although the conduct must be carried out in 'good faith', this is unlikely to prevent s 235(1)(e) from being used in discrimination proceedings, because discriminators do not necessarily have an intention to discriminate that amounts to bad faith.[125]

The first instance of a bank claiming a defence under s 235 in discrimination proceedings occurred in a claim brought by a bitcoin trader: *Flynn v Westpac Banking Corporation* ('*Flynn*').[126] In this case, Westpac refused to provide any personal or business banking services to a digital currency exchange operator named Allan Flynn, in perpetuity.[127] Westpac's decision was not based on an individualised assessment of risk, but on a blanket policy not to provide services to digital currency exchange providers.[128] Mr Flynn claimed he was discriminated against because of his occupation. In its defence, Westpac raised s 235(1)(e).[129]

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123 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 235(1) (emphasis added).

124 Human Rights and Equal Opportunity Commission, Submission No 32 to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Provisions of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006, and the Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Bill 2006* (November 2006) 4.

125 Ibid, citing *Australian Medical Council v Wilson* (1996) 68 FCR 46 (Sackville J).

126 *Flynn* (n 19).

127 Ibid [12]–[14], [22].

128 Ibid [40], [61].

129 Ibid [47].

Unfortunately, the Tribunal could not determine whether s 235(1)(e) excused Westpac's conduct, because it accepted Westpac's argument that it did not have jurisdiction to consider the *AML/CTF Act*, which is Commonwealth legislation.[130] The Tribunal held that Westpac was therefore obliged to obtain relief under s 235(1)(e) in 'a court of competent jurisdiction'.[131] Westpac subsequently applied for judicial review of the Tribunal's decision, requesting orders that Mr Flynn's discrimination claim be dismissed. Westpac's grounds included that it had raised a 'non colourable defence under a Commonwealth statute' (ie s 235(1)(e)) and that Westpac was not required to commence proceedings in a separate jurisdiction in order to rely on s 235(1)(e).[132] Essentially, Westpac argued that raising s 235(1)(e) should simply put an end to discrimination proceedings. The dispute between Westpac and Mr Flynn settled in May 2022.[133] The full implications of s 235(1)(e) are therefore still unclear, however it could present a significant barrier to sex workers pursuing financial discrimination complaints.

F *Implications for Financial Discrimination*

The total effect of the laws discussed above presents a series of hurdles for sex workers seeking redress for financial discrimination. The likely outcome is that sex workers will only be protected from financial discrimination in very limited circumstances, in certain jurisdictions. In many instances, a financial institution can likely refuse to serve a sex worker without legal consequences, even if the decision is based on prejudice. As explained above, nothing in banking law prevents services being denied to sex workers, no matter how capricious the reason. Sex workers will therefore need to rely on anti-discrimination law. This will only be possible in jurisdictions with a protected attribute applicable to sex workers (Victoria, Queensland, Tasmania, the Northern Territory and the Australian Capital Territory). In South Australia, Western Australia and New South Wales, sex workers will have no remedy.

A sex worker's legal status will impact their ability to make a complaint. If a sex worker is not working lawfully, they may not be able to rely on *lawful* sexual activity. Furthermore, sex workers who work illegally will be reluctant to draw attention to themselves by making a legal claim.[134] If a sex worker has incorporated their business, the principle of the corporate veil will further complicate matters. This could prevent discrimination claims from succeeding based on the technicality that services were applied for under a company name. As discussed above, there are

130 Ibid [64].

131 Ibid [73].

132 Westpac Banking Corporation, 'Originating Application: Judicial Review', filed in *Westpac Banking Corporation v Allan Flynn*, 19 April 2022.

133 @Allan_W_Flynn (Twitter, 26 May 2022, 10:29 am) <https://twitter.com/Allan_W_Flynn/status/1529620583151017984>.

134 See generally Stardust et al, 'Sex Work, Whore Stigma and the Criminal Legal System' (n 11).

various ways this could be circumvented, but a sex worker will likely have to frame their claim so that the company was acting on their behalf.

The most significant barrier is the limited scope of the various protected attributes. Courts and tribunals have consistently found that protected attributes applicable to sex workers do not encompass sex work activities. This narrow interpretation would pose significant difficulties for discrimination claims where business banking services, such as a business bank account, and merchant services, have been refused. This is because a bank could claim they have no objection to sex worker customers per se, but do not offer financial services for the purpose of conducting the activity of sex work. Indeed, Westpac appeared to raise a similar argument in *Flynn*:

> Westpac's case is that it de-banked Mr Flynn because *his use* of accounts with Westpac and St George to operate a digital currency exchange business fell outside Westpac's risk appetite. It was this, rather than *his occupation* as a DCE operator or provider, that was the reason for its decision.[135]

According to the logic followed in *Dovedeen*, *Federal Capital Press* and *Capocchi*, this argument could equally apply to sex workers, and succeed.

The final hurdle for sex workers presents itself in s 235(1)(e) of the *AML/CTF Act*. There is a common misperception that the sex industry is at an increased risk of money laundering.[136] It is therefore highly likely that a bank would raise s 235(1)(e) in a discrimination claim brought by a sex worker. Raising s 235(1)(e) could provide a free pass for banks to discriminate against their customers if their conduct can be linked to 'purported compliance' with the *AML/CTF Act*. At the least, it will remove a dispute from a Tribunal's jurisdiction, necessitating costly litigation in a court with federal jurisdiction. For many, this could make addressing financial discrimination through anti-discrimination law almost impossible.

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135 *Flynn* (n 19) [38] (emphasis in original). This point was not resolved because the Tribunal ordered a stay: at [74].

136 Sex Work Law Reform Victoria, 'Banking Code Review Submission SWLRV' (n 18) 11, citing: Julie Walters et al, 'Anti-Money Laundering and Counter-Terrorism Financing Across the Globe: A Comparative Study of Regulatory Action' (Research Report No 113, Australian Institute of Criminology, 10 February 2012); Clare Sullivan and Evan Smith, 'Trade-Based Money Laundering: Risks and Regulatory Responses' (Research Report No 115, Australian Institute of Criminology, 2 February 2012); Julie Walters et al, 'The Anti-Money Laundering and Counter-Terrorism Financing Regime in Australia: Perceptions of Regulated Businesses in Australia' (Research Report No 117, Australian Institute of Criminology, 1 August 2012); Julie Walters et al, 'Money Laundering and Financing of Terrorism Risks in Non-Financial Sector Businesses and Professions' (Research Report No 122, Australian Institute of Criminology, 1 May 2013).

V Qualitative Analysis of Sex Industry Workers' Experiences of Financial Discrimination

Building upon the apparent inadequacies in our current legal frameworks, the experiences shared by participants during the qualitative study provide a deeper understanding of the 'de-banking' problem facing the sex industry and the law reform that is therefore required to achieve financial inclusion. The data yielded indicates that accessing financial services is a significant challenge for the sex industry, because some financial service providers are refusing to serve, or otherwise disadvantaging sex industry workers because of their occupation. The interviews also revealed various strategies sex industry workers have developed to mitigate the negative consequences of discrimination and carry out their business.

A *Types of Discrimination*

Participants reported various forms of prejudicial treatment, including: (1) refusal of service; (2) termination of existing services; (3) denial of credit; (4) chargebacks being unfairly processed against their business; and (5) being charged inflated merchant fees. Participants reported being refused various services at the point of application, including business bank accounts, personal bank accounts, business loans and merchant services. Some participants reported multiple instances of being refused services throughout their careers. This conduct was not limited to certain providers but appeared to be widespread across the financial sector — participants were refused services by the big four banks, medium sized banks, specialist merchant services and payment processing apps.

Participants described being refused services immediately after disclosing their occupation. For example, a brothel owner explained:

> Every time I went to a bank, I was upfront, I said, 'listen, I'm in the adult industry, I run a brothel, do you accept this business in your bank?' And the person would run away, speak to the manager, or the manager would come out and say, 'sorry, sir, we don't do brothels or the sex industry'.[137]

The only participant who did not report being refused services had never disclosed his profession to a financial service provider.

Some participants also reported having existing services terminated, in some instances immediately after they disclosed their occupation. In other instances, services were suddenly terminated after openly dealing with the bank as a sex industry business for decades. One brothel owner reported that a Big Four bank not only terminated his existing business and personal accounts, but also closed the personal accounts of his wife and sister, although they were not involved in the operations of his brothel.

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137 Interview with Brothel Owner (n 23).

One private sex worker reported discrimination in relation to chargebacks. She said that banks had unfairly sided with her clients when chargebacks were claimed against her business. She described one such occasion when a client requested a chargeback, claiming he had not received a sexual service. The bank processed the chargeback and then terminated the sex worker's merchant services:

> We did triple verification, we had him on security cameras, we took a photo of his ID. And then his claim to [medium sized bank] merchant services when he did the chargeback was that someone impersonated him. And that just fucking blew our socks off. [The bank] didn't even believe him. They just went with him, because like my evidence was irrefutable and they're not blind. Basically, they've just gone 'fuck ya' to me … You can accurately say that that sex act would not have gone down had it not been transactionary. And now you've gone and violated that … You've got to look at who's facilitating some of these chargebacks which facilitates the sexual assault, or the rape, which is banks and merchant services. And they're not accountable.[138]

According to Stardust et al, chargebacks are often requested by clients 'because they do not wish the service to appear on their bank records, because they feel entitled to access free or discounted services/content, or simply because they know that, as a stigmatized group, sex workers have little recourse'.[139]

The private sex worker involved in the transaction described above quite understandably viewed the bank's conduct as facilitating sexual assault, because it vitiated her condition for consent. The issue of banks wrongfully processing chargebacks in this context warrants particular concern, and should be the subject of separate research, considering its complexities.

An escort agency owner reported being charged higher merchant fees because of the nature of her business, despite having a reliable customer record with the same bank for decades:

> When you told a bank you were an escort service, they would charge you 10%, 8%, 6%. Then people who think they know better would say, 'mate, do what we do and tell them you're a bookshop, because you'll only pay 2.4% on your merchant terminal'. But for about 20 years, we paid 10%. They've always charged us more than some unknown quantity that's just opened up for a year, who says they're a café.[140]

This account reflects Stardust et al's observation that '[w]here sex workers are successful in opening accounts, they may be charged higher premiums or fees than other users, effectively taxed for their sex work status.'[141]

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138 Interview with Private Sex Worker A (n 23).

139 Stardust et al, 'High Risk Hustling' (n 17) 103.

140 Interview with Escort Agency Owner (n 91).

141 Ibid 68, citing LaLa B Holston-Zannell, 'How Mastercard's New Policy Violates Sex Workers' Rights', *ACLU* (Web Page, 15 October 2021) <https://perma.cc/58E3-LWDW>.

B *Reasons for Discrimination*

The most common reasons given for refusal of service were that the provider did not serve the participant's business type, or that their business type was 'high risk'. Although 'risk' is often relied on by banks in this context, there is a lack of reliable data showing that sex industry workers are indeed 'high risk' customers, making it unclear whether banks are drawing on accurate or individualised evidence in these 'risk assessments'.[142] Some participants were not given any reason for refusal of service. A brothel owner received multiple letters stating the decision to close his accounts was based on 'commercial reasons'.[143] After pursuing internal and external complaint processes, the bank refused to provide further reasons. After a private sex worker's merchant services were terminated by a payment service provider, he wrote a letter of complaint to their CEO. Their response indicated he was refused services purely on the grounds of his occupation:

> They didn't explain why they terminated me, they just said it was because 'we don't take that industry.' There was no reference to my actual conduct, good or bad. There was no talk of my individual risk. It was 'we don't take your industry' and this was put in writing on a number of occasions. Not just from a junior sales rep, but from the CEO himself.[144]

Most participants could not think of a reason why they were refused services other than their occupation. For example, an escort agency owner whose business bank account and merchant services were terminated commented:

> We haven't had credit cards go bad that have been unresolved. Got a massive record and we can show you the records. So, it's not because you know, something's gone wrong … Someone in [big four bank] made an error. I haven't done anything wrong. This is a fundamental error. You can't throw out a customer after 28 and a half years.[145]

However, one private sex worker believed that on one occasion her merchant services were terminated due to a chargeback being processed against her business. In addition, a brothel owner believed his bank accounts may have been closed because he was contesting criminal charges. The author does not know the details of these charges, so it is unclear if they could have provided a legitimate reason for the bank's decision. However, the brothel owner believed the pending charges could not explain why he was subsequently refused services on point of application by 13 different banks that had no knowledge of the charges: 'As soon as you say that

142 Stardust et al 'High Risk Hustling' (n 17) 102, 104. See also Crofts and Prior, 'Regulation of Brothels' (n 44), which argues that perceived links between sex work and crime in New South Wales are largely unfounded or based on outdated stereotypes.

143 Interview with Brothel Owner (n 23).

144 Interview with Private Sex Worker B (n 23).

145 Interview with Escort Agency Owner (n 91).

you own a business and it's in the brothel industry, the answer is "no" straight away, you can't even apply.'[146]

The explanations given by financial service providers for refusal of service indicate that on most occasions, the primary reason was the participant's occupation. This is especially apparent where services were immediately refused on point of application, because this could not be based on an individualised risk assessment or customer conduct. This apparent disregard of an individual sex workers' positive customer record echoes the case *Sibuse Pty Ltd v Shaw*,[147] where the New South Wales Court of Appeal found that all brothels were inherently disorderly and therefore subject to closure, regardless of whether a particular brothel was 'clean, neat and tidy'.[148]

C *Consequences of Discrimination*

Participants reported numerous negative consequences of being excluded from financial services, including operating without the necessary service, physical safety concerns, inconvenience, reputational damage, vulnerability to theft, loss of income and insecurity. Participants also described experiencing negative emotional impacts and stigma.

On some of the occasions when services were terminated, participants were able to obtain services from another provider. On other occasions, they struggled to find a provider and were forced to operate without the service. A private sex worker was forced to operate without merchant services for a number of years. As a result, she primarily dealt in cash, which was not her preference. A brothel owner has still been unable to secure a business bank account or merchant services and has been forced to operate entirely in cash. He has resorted to storing the cash in on-site safe deposit boxes. However, he is concerned this may cause legal complications for his business, because storing vast quantities of cash on site could appear suspicious to the police, or the Australian Tax Office:

> What my accountant's done, he's written to the Tax Office … You need to write a formal letter, that the banks have blocked you out because of your industry, and it's a legal industry in Victoria, and you show them all the licenses … and you explain that now you can't bank, what do I do with the cash? You need an answer from them. Where do I put it? Under the bed? Because you need to put it on record. Because if they come here and see all this cash …[149]

The brothel owner's concerns reflect Penny Crofts and Jason Prior's observation that brothels are often incorrectly associated with money laundering due to their

146 Interview with Brothel Owner (n 23).

147 (1988) 13 NSWLR 98.

148 Penny Crofts, 'A Decade of Licit Sex in the City' (2006) 12(1) *Local Government Law Journal* 5, 6, quoting *Sibuse Pty Ltd v Shaw* (1988) 13 NSWLR 98.

149 Interview with Brothel Owner (n 23).

reputation as cash rich premises.[150] Some participants indicated that accepting cash payments compromised their safety, and they preferred clients to pay electronically. However, this was not possible when they could not obtain merchant services. A private sex worker explained:

> It's a digital signature, it basically offers me so much more security, especially for new people. [When clients cannot pay in cash] they go and find, unfortunately, an easier target … the bad proportion of the males in our society will go and find lower hanging fruit, so to speak. So, the more you are ingratiated in the system, the less risk you experience.[151]

The sex workers who are forced to rely on cash are the 'lower hanging fruit' who are made vulnerable in the scenario described by the private sex worker. According to the private sex worker, they are more likely to attract dangerous clients, because there is no electronic transaction through which the client can be traced. An escort agency owner made a similar comment: '[card payment] filters the calibre of the client out. Definitely, it's a different calibre of person. And yes, the traceability, and the reliability … If something's gonna go wrong, it's gonna be a "pay cash" person.'[152] A private sex worker also expressed safety concerns about making late night trips to the bank to deposit cash after seeing clients:

> I'm exhausted … and I had to run to the bank. I'd get there at 3 am when they started to do that thing where you could bank in the ATM. I remember being paranoid looking up and down the street, thinking 'if I'm robbed, we default on the next mortgage payment'.[153]

Some participants expressed that dealing in cash was also a source of inconvenience. For example, a private sex worker commented:

> Because I prefer to operate above board, in the sense that I do declare all my income, I do pay income tax, if I get paid in cash, I still have to deposit that anyway, which is just more work, because it's a trip to the ATM machine, usually late at night, which is inconvenient.[154]

Participants believed that being forced to deal in cash had damaged their reputation. For example, a former brothel owner believed she was diminished in the eyes of her staff when she could not provide merchant services:

150 Crofts and Prior (n 44) 215.

151 Interview with Private Sex Worker A (n 23).

152 Interview with Escort Agency Owner (n 91).

153 Interview with Private Sex Worker A (n 23).

154 Interview with Private Sex Worker B (n 23).

> I will never forget how humiliated I was in front of my whole team. I had 30 people working for me and all of a sudden, in front of their eyes, I couldn't get merchant services. I know they were laughing at me in the girl's room.[155]

Dealing in cash also affected the attitudes of clients towards sex workers. A private sex worker said some of her clients assumed she was breaking the law when she could only accept cash: 'I came across as not professional. I did, I came across as shifty. The amount of people that would ask me, "do you pay tax on this?" Or, "you obviously don't pay tax on this cash right?" And I'd be like, "oh my god yes."' The same private sex worker described significant loss of income from operating without merchant services:

> I lost easily a million. Easily. Because my rates are not cheap. So, if your cash extraction is $1,000 maximum from an ATM, my fee is $1,000. Without merchant facilities, clients can't be using their credit cards and you've got a lot of income lost there as well. A booking might blow out, you know they might want more time and be paying for more time. But if you don't have merchant facilities it just puts an end to it. You've got to get dressed and go get money and come back? No.[156]

Ongoing insecurity was a common theme among participants who had services terminated. Even after finding another provider, they felt their services could be terminated again at any moment, regardless of their good conduct as a customer. As Lana Swartz writes, 'to survive, you have to get paid … [a] system that suddenly and unexpectedly cuts you off from money can be as perilous as not having access to any system at all.'[157] In this regard, a private sex worker commented:

> I have felt a profound sense of insecurity, as I suspect most sex workers have, in all the 10 years I've been working, including right now with [payment service provider] … because all companies we know from lived experience are susceptible to just de-bank you and ban you with little to no notice. So, there's always that lack of security there.[158]

Participants expressed strong feelings of anger, injustice and stigmatisation after being refused services. A private sex worker commented: 'At the time, it made me feel shocked and extremely angry … And it really hasn't gone away, like the level of anger is still there, at what they've done and the fact that they're getting away with it.'[159] An escort agency owner described how she felt devalued by her bank's conduct:

> I've never hidden what I've done. I fought for legalisation. We're supposed to be free. I'm the boss, I'm a lady and what you see is what you get. There are no hidden agendas behind us. And there's no guys standing over ladies … I feel like everything I've done to raise us up into the daylight, like we should be proud. I felt devalued. And

155 Interview with Private Sex Worker A (n 23).

156 Ibid.

157 Swartz (n 25) 82.

158 Interview with Private Sex Worker B (n 23).

159 Ibid.

> I still feel devalued, and I'm hurt. And I should be able to move past that being hurt. But it's like they're just laughing, like everything we did means nothing and 'girls, you can go and get stuffed' basically. They've pushed us back down.[160]

D *Strategies to Mitigate Discrimination*

Participants adopted different strategies to adapt to this precarious environment, with varying levels of success. For example, some participants had utilised financial technology solutions such as the payment app 'Beem It' after being refused services by the major banks. However, access to smaller payment service providers (at least, the ones that do not discriminate) does not remedy exclusion from mainstream banks, because they require digital literacy and uptake on the part of clients.[161] One private sex worker expressed immense frustration about convincing her clients to adopt electronic payment apps:

> They [the clients] go, 'Well, I've known you for 20 years, so why the fuck should I?' And I go, 'Well, that's all totally fine and well, but if you could just like EFT it, so I'm not an angry sex worker in your face, and that would be even better.' So the migration of like, 'just fucking do it. I'm not asking you out of the kindness of my heart. I'm asking you as in an order.' So, I've had to sort of groom this like enormous group of people to traverse into this new reality — the reality is, that, sex workers want cashless. They just fucking do.[162]

Other participants did not disclose their profession at certain times to avoid anticipated discrimination. This reflects the finding made by numerous studies that sex workers commonly conceal their profession to avoid discrimination.[163] One private sex worker explained why he had never disclosed his occupation to his bank:

> It's just about the stigma around it that they have. I mean, I've heard from other workers how they were ostracised, so to speak, for their profession. They weren't allowed to have a bank account because they were considered less than worthy, I guess.[164]

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160 Interview with Escort Agency Owner (n 91).

161 Stardust et al, 'High Risk Hustling' (n 17) 84. See also Beebe (n 25) 159, who writes that cryptocurrency is often suggested as a solution for sex workers, although clients would likely be unwilling or unable to pay in that manner.

162 Interview with Private Sex Worker A (n 23).

163 See, eg: Julie Ham and Alison Gerard, 'Strategic In/visibility: Does Agency Make Sex Workers Invisible?' (2014) 14(3) *Criminology and Criminal Justice* 298, 307; McCausland et al (n 11) 2–3; Benoit et al, 'Sex Workers' Responses to Stigma' (n 12) 87; Lynzi Armstrong and Cherida Fraser, 'The Disclosure Dilemma: Stigma and Talking About Sex Work in the Decriminalised Context' in Lynzi Armstrong and Gillian Abel (eds), *Decriminalisation and Social Change* (Bristol University Press, 2020) 177, 194.

164 Interview with Private Sex Worker C (Nina Cheles-McLean, 29 March 2022).

Some participants had obtained business banking services for a second business and banked their sex work earnings through the second business. One private sex worker explained that he banked his sex work earnings as if it were income from his live music business:

> It works perfectly that way. So, the cover business is genuine, legitimate. And then if there's any questions on the other cash deposits in there, I just say 'well I did a wedding or I did a birthday for this person or that person'. It's very simple really. So, my tax returns at the end of the year are very simple. There's the cash earnings that are declared and then the actual traceable earnings, usually through booking agents.[165]

However, it was not possible for all participants to obtain services under a 'shadow occupation'. A brothel owner explained:

> How does a place like mine do that? Have a look at the size of me. I'm not this little pebble. It stands out. Everyone in Australia knows it. How can I say, 'oh, it's Mandy's Massage Shop', and there's $150,000 worth of credit cards coming through?[166]

Other participants insisted on disclosing their occupation as a matter of principle, even though they expected this would result in discrimination. An escort agency owner explained:

> If we said we were something else, which would be very easy to say, that we were seamstresses or piecework, we would hold the account. But I'm not prepared to not state the business. We're legal. We fought hard to legalise it in the state of Victoria. We've got nothing to hide.[167]

While sex workers may successfully utilise strategies such as adopting a 'shadow occupation' and reporting sex work income to the tax office under the cover of a second job, this exposes sex workers to a risk of criminal liability. For example, this conduct could arguably be in breach of taxation law which prohibits making 'false or misleading statements' to a tax officer.[168]

E *Discussion*

Overall, the findings of this study indicate that occupational discrimination on the part of financial service providers is disadvantaging sex industry workers on multiple levels. It is causing financial insecurity, reputational damage, contributing to dangerous working conditions and perpetuating stigma and its associated harm to mental health. It is also compromising the immediate physical safety of sex workers who are forced to deal in cash. More broadly, financial service providers

165 Ibid.

166 Interview with Brothel Owner (n 23).

167 Interview with Escort Agency Owner (n 91).

168 *Taxation Administration Act 1953* (Cth) s 8K.

may be stalling social progress by signalling to the general public that sex industry workers are not operating legitimate businesses deserving of financial services.[169]

Further research would be required to ascertain the underlying cause of financial service providers' unwillingness to service the sex industry in Australia. The Eros Association has suggested that financial discrimination against the adult industry can be attributed to moral objections, a misplaced perception that the industry is high risk, or the flow on effects of overseas anti-adult industry regulations.[170] Similarly, Stardust et al argue that complex factors give rise to this discrimination, including risk detection systems that do not distinguish between sex trafficking and consensual sex work, 'moral panic', and the transnational impact of the United States' restrictive sex work laws on Australian financial institutions.[171]

It is noteworthy that the interviews uncovered extensive experiences of discrimination, although participants were limited to Victoria and New South Wales, where many sex workers and sex work premises have been operating lawfully for decades. This signals two things. First, that sex workers seeking financial services in jurisdictions where sex work is largely illegal, such as Western Australia and South Australia are likely in a worse position than the participants in this study and would very likely face severe stigma and discrimination. Second, it reflects the significant 'time lag' between reform to sex work laws and the treatment of sex workers as legitimate participants in the workforce, which has been examined extensively in the work of Crofts and Prior.[172] As Bianca Beebe points out, this means that the policies of financial service providers arguably have 'a more profound effect on sex workers' material reality than state legislation, as these intermediaries control how they are able to secure business and be paid for it without having to answer to a voting demographic'.[173] This demonstrates the continued need for robust anti-discrimination protections for sex workers, despite achieving formal 'equality' with other workers before the law.

VI Options for Reform

Plainly, the law does not adequately protect sex workers from financial discrimination. This 'emboldens individuals, organisations and institutions to discriminate against sex workers with the knowledge that this behaviour is socially and culturally

169 Stardust et al, 'High Risk Hustling' (n 17) 89.

170 Bartle (n 29) 10.

171 Stardust et al, 'High Risk Hustling' (n 17) 73, 104, 136.

172 See, eg: Crofts (n 148); Penny Crofts et al, 'Ambivalent Regulation: The Sexual Services Industries in NSW and Victoria' (2012) 23(3) *Current Issues in Criminal Justice* 393; Crofts and Prior (n 44); Penny Crofts, 'Brothels and Disorderly Acts' (2007) 1 *Public Space: Journal of Law and Social Justice* 1.

173 Beebe (n 25) 140.

accepted and legally sanctioned'.[174] This final part discusses options for targeted law reform to address this, with a focus on the protected attributes under anti-discrimination law.

A *Anti-Money Laundering and Counter Terrorism Financing Laws*

The exemption from liability found in s 235 of the *AML/CTF Act* should be amended so that it does not apply in anti-discrimination proceedings. The Australian Human Rights Commission ('AHRC') raised significant concerns about s 235 as it appeared in the Bill which became the *AML/CTF Act*. The AHRC argued there was a real risk the Bill could lead to financial institutions discriminating against customers based on race, religion and nationality. In this context, it was rightly argued they should not be exempt from liability under discrimination law.[175] As noted above, the AHRC's concerns have essentially materialised, with obligations under the *AML/CTF Act*, and s 235 presently being utilised by banks to justify policies of blanket financial exclusion.[176] This was not the intention of the *AML/CTF Act*, and could actually increase the risk of money laundering,[177] by forcing businesses to deal entirely in cash. Amending s 235 will mean these discriminatory policies will not be immune from judicial scrutiny, encouraging banks to assess customer risk on a case-by-case basis.

B *Protecting Corporations from Discrimination*

This article does not advocate for additional rights for corporations to make discrimination claims. In the context of discrimination against the sex industry (or other small businesses run by people with protected attributes), increased rights for corporations may seem desirable. However, this could have the unintended consequence of giving already powerful corporations a means to advance their commercial interests. For example, campaigns led by environmental and social activists have essentially led to the de-banking of companies in the fossil fuel[178] and

174 Scarlet Alliance and Australian Sex Workers Association, 'Anti-Discrimination and Vilification Protections' (n 12) 2.

175 Human Rights and Equal Opportunity Commission, *Comments on the Anti-Money Laundering and Terrorism Financing Bill 2006 and Draft Consolidated AML/TF Rules 2006* (Comment, 2006). Note that in 2008, the Human Rights and Equal Opportunity Commission was renamed the Australian Human Rights Commission.

176 *Flynn* (n 20) [47]; Australian Transaction Reports and Analysis Centre, 'AUSTRAC Statement 2021' (n 43).

177 Australian Transaction Reports and Analysis Centre, 'AUSTRAC Statement 2021' (n 43).

178 Zoe Bush and Fleur Ramsay, 'Is it Time for Lawyers to Dump their Fossil Fuel Clients?' *Saturday Paper* (30 April 2022) 94; Alex Kotch, 'ALEC Launches Attack on Banks that Divest from Fossil Fuels', *Centre for Media and Democracy* (online, 3 December 2021) <https://www.exposedbycmd.org/2021/12/03/alec-launches-attack-on-banks-that-divest-from-fossil-fuels/>.

tobacco industries.[179] It would not align with the purpose of anti-discrimination law if these companies could make discrimination claims under the protected attribute profession, trade or occupation. While this may appear far-fetched, reports have emerged of a 'burgeoning fossil fuel discrimination movement'[180] in the United States.[181]

Judge Hampel's decision in *Cobaw Community Health Services Ltd* (VCAT)[182] struck the correct balance on this issue, and it is respectfully submitted that her decision should be followed. According to Hampel J, the law can address discrimination directed at a corporation where the corporation was acting on behalf of a natural person.[183] This means the protected attributes of natural persons remain central to the alleged discrimination, ensuring that the purpose of anti-discrimination law is not subverted.

C *Protected Attributes for Sex Workers*

Most importantly, sex workers should be protected by carefully drafted protected attributes in every state and territory. There is no best practice model for a protected attribute in any jurisdiction that merits replication. The current attributes have not withstood statutory interpretation by courts and tribunals, and as a result are too narrow in their scope to offer substantial protection. Tellingly, there has not been a single Australian case in which a sex worker has made a successful discrimination claim.[184] This distinct lack of success indicates that any protected attribute designed for sex workers must be watertight, and expressly provide what is included in its scope. As Gaze and Smith explain, 'whatever the statutory formulation, unless a feature is expressly mentioned in the Act, there will always be a question about how broadly or narrowly a court will interpret the attribute'.[185]

Crucially, any attribute designed for sex workers must expressly include sex work itself. Limiting an attribute to the sex worker job descriptor will only prevent discrimination when a sex worker is not working (for example, if a person is refused service in a grocery store because they happen to be a sex worker). Including sex work is necessary to prevent discrimination in the course of carrying out a business,

179 'The Tobacco-Free Finance Pledge', *United Nations Environment Program Finance Initiative* (Web Page) <https://www.unepfi.org/insurance/insurance/projects/the-tobacco-free-finance-pledge/>.

180 Statement of Intent, Texas Senate Bill 13, 16 March 2021 (Brian Birdwell).

181 Nitish Pahwa, 'Oil Companies are Whining About "Discrimination"', *Slate Magazine* (online 24 January 2022) <https://slate.com/technology/2022/01/climate-divestment-harvard-fossil-fuel-opposition.html>.

182 *Cobaw Community Health Services Ltd* (VCAT) (n 114).

183 Ibid [170]–[172].

184 *Dovedeen* (n 65); *Payne v APN News & Media* [2015] QCAT 514; *Millen v The Salvation Army (Queensland) Property Trust* [2004] QADT 33; *Federal Capital Press* (n 65); *Capocchi* (n 65).

185 Gaze and Smith (n 58) 83.

including purchasing advertisements, booking accommodation, and applying for financial services.[186] The existing case law indicates that these are the very situations where discrimination is most likely to occur. With a view to addressing these issues, the following sub-sections consider options for amending existing attributes and propose a new protected attribute for sex workers.

1 *Lawful Sexual Activity*

The rulings in *Dovedeen* and *Capocchi* indicate lawful sexual activity excludes sex work and related activities. This could be remedied by a statutory definition clarifying that the attribute includes sex work.[187] However, the limitation of the attribute to lawful sex workers is arguably unworkable.[188] In jurisdictions with criminalisation models, a significant proportion of the industry will at times work illegally or have an uncertain legal status. These workers cannot rely on lawful sexual activity.[189] Furthermore, some street-based sex work offences remain in decriminalised jurisdictions.[190] Street-based workers are the most visible and arguably the most vulnerable to discrimination.[191] Accordingly, it would be unacceptable to leave street-based workers out of any attribute designed to protect sex workers.

2 *Sex Work and Sex Worker*

Scarlet Alliance, the peak national body for sex workers, considers 'sex work and sex worker' to be best practice for a protected attribute.[192] This attribute is also supported by numerous sex worker advocacy groups and the Queensland Human Rights Commission ('QHRC').[193] In July 2022, the QHRC recommended

186 Scarlet Alliance and Australian Sex Workers Association, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991* (4 March 2022) 8 ('Submission to QHRC').

187 Sex Work Law Reform Victoria, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991* (1 March 2022) 2, 7 ('Submission to QHRC').

188 Stardust et al, 'High Risk Hustling' (n 17) 130.

189 Victorian Equal Opportunity and Human Rights Commission, Submission to Department of Justice and Community Safety, *Review to Make Recommendations for the Decriminalisation of Sex Work* (20 July 2020) 4.

190 *Summary Offences Act 1988* (NSW) s 19(1); *Summary Offences Act 1966* (Vic) s 38B.

191 South Australian Sex Industry Network, Submission No 30 to Select Committee on the Statutes Amendment (Decriminalisation of Sex Work) Bill 2015, *Inquiry into the Statutes Amendment (Decriminalisation of Sex Work) Bill 2015* (16 October 2015) 2.

192 Scarlet Alliance and Australian Sex Workers Association, *Anti-Discrimination and Vilification Protections* (n 12) 6.

193 Sex Worker Outreach Program (SWOP NT) and Sex Worker Reference Group, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991* (undated) 8; Sex Worker Outreach Project (SWOP NSW), Submission to Queensland Human Rights Commission, *Review of Queensland's*

Queensland's anti-discrimination act be amended to include 'sex worker', defined as 'being a sex worker or engaging in sex work'.[194] The Queensland government has given effect to this recommendation, by introducing the new protected attribute 'sex work activity'.[195] The Northern Territory recently amended its anti-discrimination act to include a similar protected attribute: 'employment in sex work or engaging in sex work, including past employment in sex work or engagement in sex work'.[196]

The primary benefit of 'sex work and sex worker' (and the similarly worded protected attributes in Queensland and the Northern Territory) is its specificity, as it ensures the activity of sex work is within scope. Including 'sex work' would also ensure that people who do not identify as a sex worker, or who cannot substantiate a sex worker 'occupation' but have engaged in sex work at certain times are protected. Importantly, this attribute recognises the unique historical and current stigma attached to sex work that is not experienced by people in other professions.[197]

However, this approach has its pitfalls. It could exclude numerous workers in the sex and adult industries, including strippers, adult web-cammers, phone sex operators, brothel managers, escort agency managers, and adult product retailers, because they may not be classified as sex workers, or as engaging in sex work in law.[198] Certain members of the sex industry, such as brothel managers, could be protected from discrimination on the basis of their 'association' with sex workers. However, this would not capture people such as adult store retailers or strippers, who do not necessarily have any association with sex workers. Furthermore, 'association' does not necessarily include contractual or business relationships,[199] and is not a protected attribute in all jurisdictions.[200]

Discrimination against other sex industry workers can also have a detrimental effect on sex workers. For example, some escort agency managers provide payment terminals to escort workers.[201] If a bank refuses merchant services to the escort

Anti-Discrimination Act 1991 (4 March 2022) 3; Magenta, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991* (28 February 2022) 2; South Australian Sex Industry Network, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991* (undated) 2.

194 Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 27, 295.

195 Explanatory Notes, Criminal Code (Decriminalising Sex Work) and Other Legislation Amendment Bill 2024 (Qld) 3; *Decriminalising Sex Work Act* (Qld) (n 9) s 4.

196 *Anti-Discrimination Act* (NT) (n 59) s 19(1)(ec).

197 Scarlet Alliance and Australian Sex Workers Association, 'Submission to QHRC' (n 186) 8.

198 Sex Work Law Reform Victoria, 'Submission to QHRC' (n 187) 7.

199 *Cassidy* (n 107) [82]–[83].

200 The *Equal Opportunity Act 1984* (WA) does not contain a protected attribute of association.

201 Interview with Escort Agency Owner (n 91).

agency manager, the escort workers will be forced to deal in cash. 'Sex work and sex worker' would likely be more effective than 'lawful sexual activity' and 'profession, trade or occupation'.[202] However, its exclusion of the wider sex and adult industries is problematic.

3 *Profession, Trade or Occupation*

The attribute 'profession, trade or occupation' has been advocated for by a number of sex worker advocacy groups at different times.[203] However, it is no longer considered best practice by Scarlet Alliance, who recognises it has not adequately protected sex workers.[204] It may be difficult for some complainants to prove their occupation as a sex worker, because a large proportion of sex workers work part-time or casually and move in and out of the industry.[205] However, the most significant issue with this attribute is that it may not encompass activities necessary to perform an occupation, including sex work itself.[206] The obvious benefit of this attribute is its breadth. It will encompass the numerous occupations within the sex and adult industries that face discrimination.[207] The problems with this attribute could largely be addressed by an accompanying definition clarifying that the attribute includes but is not limited to 'sex work' and 'sex worker', or at the very least includes the business activities associated with an occupation.

An alternative solution could be to introduce 'profession, trade or occupation' and 'being a sex worker or engaging in sex work' as overlapping attributes that operate together to cover the field of professions within the sex and adult industries. This could address the issue that no single attribute appears to be adequate. Although unorthodox, the concept of overlapping attributes presents as the best option

202 The similarly worded attributes in the Northern Territory ('employment in sex work or engaging in sex work, including past employment in sex work or engagement in sex work') and Queensland ('sex work activity') are yet to be judicially tested: see above nn 59–60 and accompanying text.

203 Scarlet Alliance and Australian Sex Workers Association, Submission No 146 to Department of the Attorney-General and Justice, *Modernisation of the Anti-Discrimination Act* (9 February 2018) 11; Sex Worker Outreach Program (SWOP NT) and Sex Worker Reference Group, (SWRG) Collective, Submission No 162 to Department of the Attorney-General and Justice, *Modernisation of the Anti-Discrimination Act* (February 2018) 6; Sex Work Law Reform Victoria, Submission to Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA) (29 October 2021) 1.

204 Scarlet Alliance and Australian Sex Workers Association, *Anti-Discrimination and Vilification Protections* (n 12) 6.

205 JaneMaree Maher, Sharon Pickering and Alison Gerard, 'Privileging Work not Sex: Flexibility and Employment in the Sexual Services Industry' (2012) 60(4) *Sociological Review* 654, 663–4; Basil Donovan et al, *The Sex Industry in New South Wales: A Report to the NSW Ministry of Health* (Report, 2012) 18.

206 *Federal Capital Press* (n 65).

207 Sex Work Law Reform Victoria, 'Submission to QHRC' (n 187) 7.

for addressing the full picture of discrimination against the wider sex and adult industries.

VII Conclusion

Financial discrimination is emerging as a significant issue for the sex industry and marks the next frontier in sex workers' rights. Decriminalisation cannot be fully enjoyed by sex workers who cannot open a bank account and take payment from clients. The multiple areas of intersecting law that bear upon this issue mean there can be no easy solution to the problems described in this article. The barriers sex workers will face when making a discrimination claim are many and complex. This article has identified some of the most significant barriers, and proposed options for reform by amending the *AML/CTF Act* and introducing robust protected attributes. Introducing protected attributes which unambiguously protect sex workers would represent a significant step towards equality. Clearly, it is not enough for such an attribute to protect the status of being a sex worker. This would be akin to an attribute that purports to protect gay and lesbian people but does not protect them if they engage in same-sex sexual activity. Accordingly, any attribute designed to protect sex workers must expressly include sex work itself. This will protect sex workers' right to carry out their profession, including engaging in basic activities such as banking their earnings. Case law shows that this matter cannot be left to interpretation by courts and tribunals. Unless the attribute is drafted to include sex work, it is almost certain to remain excluded from the protective blanket of Australia's anti-discrimination laws.