

Sex Workers Outreach Project

Court and tribunal information: access, disclosure and publication

Preliminary Submission to Open Justice Review



Sex Workers Outreach Project is Australia's largest and longest established community based peer education sex worker organisation focused on HIV, STI and Hepatitis C prevention, education and health promotion for sex workers in NSW.

Last year SWOP interacted with over 5,000 NSW sex workers, visited over 440 sex services premises throughout NSW including 44 visits to regional and rural areas and distributed more than 270,000 pieces of safe sex equipment. We distributed over 20,000 printed pieces of information and developed 19 new resources; trained 52 non-sex work organisations and held 15 small group workshops for sex workers.

SWOP was established in 1990 after its predecessor the Australia Prostitutes Collective which had been established in 1983 ceased operation. Since 1990 SWOP has been funded by the NSW Ministry of Health (NSW Health) to provide sexual health information and support to sex workers in NSW, specifically in relation to HIV and other sexually transmissible infections

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Dear NSW Justice Law Reform Commission,

The Sex Workers Outreach Project (SWOP) is a non-government organisation that exists to provide NSW sex workers with the same access to health, safety, human rights and workplace protections as other Australian workers. SWOP has the highest level of direct contact with sex workers of any agency, government or non-government, in Australia.

While we are primarily funded by NSW Health to sustain the low rates of sexually transmitted infections amongst sex workers; sustain the virtual elimination of HIV transmission within the sex industry; and reduce hepatitis infections in sex workers, we take a holistic view of health. We chose to address this particular inquiry because access to justice is a social determinant of good health.

SWOP believes strongly in the principles of open justice. However we know as sex workers ourselves and from the legal referral work that we do on behalf of NSW sex workers that the vulnerability of sex workers to stigma, discrimination and sometimes physical violence that sex workers know will most likely be collateral result of attempting to access justice prevents us accessing justice.

We also note and recognise that the media, while having an important role in democracy, do not necessarily represent the public interest, particularly in the contemporary climate where commercial exigencies often outweigh everything else. Sex workers are particularly vulnerable to media exposure and that media exposure is often both lurid and factually incorrect.

For sex workers, fair access to justice depends upon both privacy and confidence in justice.

Media reportage on legal cases with sex worker complainants or witnesses can leave sex workers with the impression that it is a waste of time to seek legal redress for any sort of offences committed against them. The media is a very powerful lobby group, with far more power to influence and sway public opinion than marginalised groups like sex workers. The media, through harmful stereotyping of sex workers, can incline us to believe that we will be treated in a prejudicial manner (not be believed) by any justice system we engage with, including when appearing as witnesses. Working in a stigmatised occupation means sex workers have to weigh up access to justice with the potential impact that bringing, or participating in a case, may have upon their privacy and safety, particularly if it is reported upon in the media.

A Federal Magistrates Court case, *CC v Djerrkura*, [2003] FMCA held that “mere embarrassment” is not enough to outweigh the public interest in open justice, but if “the harm flowing to the applicant was such that it may deter them from bringing or prosecuting their claims”ⁱ then it would.

Whilst we do not keep hard statistics on the number of sex workers who decline to prosecute their claims across all legal areas, anecdotally, SWOP can report hearing this rhetoric from NSW sex workers often, most frequently in relation to seeking justice after sexual assault. We would refer the Commission to Community Legal Services who would have more direct experience in this area; SWOP providing referrals to legal services and not legal advice. This is reflected in government findings: “Sex workers’ experiences of violence show that for some workers, sexual assault is more likely to happen than for the general population - yet they are least likely to report sexual assault to police.”ⁱⁱ The sheer number of sex workers who decline to report sexual assault or bring cases prompted SWOP to provide the following advice to co-workers who are supporting sex workers experiencing sexual assault: “If your co-worker does not want to go to the police, respect that decision.”ⁱⁱⁱ

When asked to appear as a witness, a sex worker’s biggest fear is usually that their identity as a sex worker will be publically revealed; and that this will mean they thereafter face discrimination across other forms of employment, housing and in other, seemingly unrelated areas of their life. Discrimination by employers is so entrenched that sex workers term amongst themselves the period of time that they have been engaged in sex work as a “resume gap” in respect to any application they may make for non sex work employment.

Once someone is known to be or to have been a sex worker they are often asked to vacate rented accommodation or their lease is simply not renewed. One of SWOP’s staff members who also sex works lives in a strata building where the by-laws prohibit sex workers from living or working in any lot or common property and describes sex work as an “immoral purpose”. The media regularly report on sex workers who have been asked to leave pre-booked short term and holiday accommodation such as AirBnB’s due to their being sex workers (in many cases where no sex work was taking place). SWOP has documented cases where vigilante action has been taken by residents and managers of apartment buildings to force sex workers resident in the building to leave. The majority of these cases involve intimidation and invoking fear and at times actual physical assault of the known sex worker.

Known sex workers are also have restrictions placed on their travel by some governments. The most notable instance being the United States of America which refuses visas to known sex workers and also to anyone who has sex worked in the past ten years. SWOP receives regular reports of Australian sex workers being refused entry to the USA.

As Andrea Werhun, author of *Modern Whore* explains: “Getting outed is your worst fear realized,” she said. “It’s having to deal with the possibility you will no longer have access to opportunities that were once on your doorstep, because people know that you’re now a whore.”^{iv} Dr Mireille Miller-Young concurs: “Sex work is one of the only professions where workers must choose whether to admit their status, and if they do, are potentially subject to merciless harassment and stalking, the release of their personal data online, the loss of custody of their children, and the foreclosure of opportunity for other kinds of work.”^v

Outing sex workers in the media can have a multitude of indirect consequences that impact the prerequisites for health as set out in the Ottawa Charter^{vi}. For example, being outed as a sex worker may expose a sex worker to homelessness if they rent a property where the property owner or real estate agent discriminates against sex workers; or if they own an apartment when the body corporate discriminates against sex workers. Parents who do sex work have the additional concern that that stigma and discrimination centred upon their occupation will be levelled at their children.^{vii} Family ostracism is common, as evidenced by this case of an 'outed' New Zealand-based sex worker "who has not spoken to her daughter in two-and-a-half years since being exposed"^{viii}.

The use of pseudonyms is a common safety method utilised by sex workers both here in NSW and globally. Pseudonyms help sex workers protect their privacy and safety by creating a clear demarcation between work life and private life. Media reporting that uses a sex worker's real name, photograph and a headline about their occupation, can open the door to stalking and online harassment, as well as the aforementioned discrimination. Fear of either consequence can diminish a sex worker's willingness or ability to prosecute their claim.

As sex workers already have pseudonyms, and feel protected by them, one way to support the principle of open justice and sex worker safety, would be to offer sex workers identity suppression orders rather than closed court proceedings. While it might impact newsworthiness, an identity suppression order would not effectively limit the ability of the press to report.

As our peak body, Scarlet Alliance, points out: "Discrimination comes from private, public and government spheres. Anti-discrimination laws for sex workers in Australia remain inconsistent and ineffective."^{ix} With NSW being one of the Australian states that does not currently have occupational discrimination legislation, the fear of being outed as a sex worker is magnified for local sex workers, and represents a significant barrier to their full participation in the NSW justice system. For example, SWOP is routinely told of hotels and motels that discriminate against sex workers, but to date there has only been one Australian case - *Dovedeen Pty Ltd & Anor v GK* [2013] QCA 116^x - where a sex worker has been brave enough to bring a case against this discriminatory practice, and even then, the worker asked for (and was granted) a name suppression order.

Though it perhaps is beyond the scope of this particularly inquiry, SWOP would like to point out that a decade ago, in 2009, the Australian Human Rights Commission (AHRC) recommended a full overhaul of Australia's anti-discrimination laws to cover some important areas of discrimination that have been left out, including discrimination by occupation^{xi}. We continue to support the AHRC in this endeavour, as overhauling anti-discrimination laws is vital for sex workers to achieve the same access to justice and other human rights as other Australians.

Whether the current arrangements strike the right balance between the proper administration of justice, the rights of victims and witnesses, privacy, confidentiality, public safety, the right to a fair trial, national security, commercial/business interests, and the public interest in open justice.

“The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where the public interest resides.”^{xii} There is no doubt in SWOP’s mind that the public is interested in sex workers, but as Colleen Davis pointed out in 2001, what’s interesting to the public is not necessarily in the public interest. We would argue that most media reporting about sex workers “better fit the description ‘for the interest of the public’ or ‘interesting to the public’ as opposed to ‘in the public interest’.”^{xiii}

Media outlets stoke the public’s interest in sex workers using salacious headlines and imagery whenever possible, however rarely do these clickbait style stories assist the public in really understanding the legal case at hand; demystify sex work; or work to reduce the stigma and discrimination that sex workers experience. It is SWOP’s view that the public interest is not served when the public’s prurient interest in sex workers has a negative effect upon sex workers’ safety and access to justice. This would include when sex workers are unable to testify, unable to testify truthfully, or unable to access justice due to fears about their safety or their future prospects being limited by discrimination. Unfortunately this view does not always seem to be shared by those presiding in NSW courts.

SWOP is aware of cases where suppression/non-publication orders were requested but denied by the bench. There was a major trial at Downing Centre nine years ago where eight current and former sex workers were called as witnesses and, despite protracted requests, the judge refused suppression^{xiv}. In trials like this one, which were already getting major media coverage, the workers’ names being broadcast everywhere caused them fear and psychological distress. Apart from short and long-term effects on these individual witnesses, there is evidence that stress also reduces their capacity to reliably give their evidence on the stand. The Easterbook Hypothesis suggests “people remember slightly different details when they are more stressed.”^{xv}

SWOP would also point out that even when granted, suppression orders and non-publication orders are not always followed. SWOP outreach staff have had contact with a sex worker who was sexually assaulted, with the perpetrator convicted. Unfortunately when the final court papers were processed the prosecutors forgot to suppress her full legal name and home address in the official court documents. The perpetrator received a copy of the court documents with her personal information. The fact that he has this information has left the worker fearful that he has/can/will share this information with others, or retaliate upon release. While the prosecutor wrote an apology letter for the oversight, the outcome has left the worker fearful for her safety and in significant distress. While the worker has applied for funding from victim’s services to get security cameras installed around her home, she has experienced significant delays in getting the funds.

SWOP has also regularly had contact with sex workers who, after witnessing crime(s), have given the police statement in their own name, been cooperative with NSW Police and The Office of the Director of Public Prosecutions (ODPP) and been viewed as reliable witnesses, only to find down the track during court proceedings, their promised name suppression won't happen, with no option to withdraw their statement. If the proceedings do not take place in a closed court, or proceed without the promised identity suppression orders, these witnesses have the added fear of media presence. Sex workers often contact SWOP aghast at not having this likelihood clearly explained to them by NSW Police before they make a statement in their real name.

While in NSW the victim of crime is meant to have court protections (including suppression orders, giving evidence remotely etc.) all of those provisions may be denied to others giving evidence, even if they have a fear of the accused or associated criminals. In the Nair case mentioned above, one sex worker witness specifically mentioned being frightened of giving evidence in front of Dr. Nair, explaining, "I just don't know what he is capable of", while another was "worried about her safety, reprisals from the accused."^{xvi}

It is SWOP's view that a nuanced understanding of the effects of 'outing' could assist the bench with making decisions concerning suppression and non-publication orders about sex workers, and indeed in other categories where people experience high levels of stigma and discrimination centred upon an attribute, occupation, illness, sexuality or gender identity. In a recent submission to the review of the laws surrounding consent in relation to sexual assault in NSW, the Australian Queer Students' Network (AQSN) argued that consent law should cover coercion into sex under "the threat of 'outing' someone as an LGBTQIA+ person, as someone of HIV+ status or as a sex worker"^{xvii}. If we can recognise that this is an inappropriate way to get sexual consent, we must also recognise that the NSW judicial system ignoring the impact of being outed as a sex worker, HIV positive person or LGBTQIA+ person, is not justifiable under the principle of open justice.

It is not in the public interest that people accessing justice experience severe negative outcomes from being 'outed', particularly if fear of these outcomes means justice is not served. The added reach of social media compounds these harms, and is perhaps the biggest reason that than NSW laws pertaining to suppression orders need to be changed. Being "outed" was once easily containable as a local issue when publishing was localised – if a worker was outed in their home town, they could move to the nearest capital city. Today it takes just seconds for a story to go viral and leave the person with nowhere to escape the discrimination.

In *Nair v R [2013] NSWCCA 79* Prosecutor Kate Thompson argued in favour of suppressing all eight sex workers names as "identifying them would cost them personally and professionally, and would also discourage other people working in the sex industry from coming forward in the future."^{xviii} Thompson explained that protecting their real names was only a "small limitation on open justice." Unfortunately the only witness deemed worthy of identity suppression, 'Emily' was only granted it because she refused to testify without it, and with her being out of jurisdiction, it was impossible for the police to compel her to do so. 'Emily's' refusal to testify without suppression evidences the harm of outing. It is unfortunate that her colleagues were not afforded the same consideration, simply because they happened to reside within Australia.

It is broadly SWOP's view that the impacts of 'outing' could be covered in the existing law, namely section 8 (e) of the *Court Suppression and Non-publication Orders Act 2010 No 106*, which states as grounds for making an order, that "it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice." We would advocate for "outing" to be unpacked as a grounds for making an identity suppression order in the *NSW Bench Book* and the *Criminal Trial Courts Bench Book*.

SWOP RECOMMENDATIONS:

- Update the NSW Bench Book and Criminal Trial Courts Bench Book to cover “outing” as a reasonable ground for making an identity suppression order under section 8(e) of the Court Suppression and Non-publication Orders Act 2010 No 106.
- Properly resource relevant NGOs to provide regular judicial training on “outing” and the impact it has upon marginalised groups, like sex workers, HIV positive people and LGBTQIA+ people.
- Update the NSW Bench Book and Criminal Trial Courts Bench Book to advise granting identity suppression orders to sex workers, HIV positive and LGBTQIA witnesses who fear ‘outing’, allowing them the same options to provide testimony away from the accused as required.
- Ensure NSW Police and The Office of the Director of Public Prosecutions take every step to ensure sex worker victims and witnesses have their names suppressed, and they are able to testify without fear of retaliation and discrimination.
- Ensure NSW Police provide complete disclosure about the possibility of suppression orders being refused before sex workers give statements.
- Recommend an overhaul of Australia’s federal anti-discrimination laws to ensure consistent coverage of other important areas of discrimination, including discrimination by occupation.

SWOP would also like to thank the NSW Justice Law Reform Commission for the opportunity to submit to this Inquiry.

SWOP would also like to acknowledge the support of Dr. Maggie Hall, criminologist, criminal lawyer, social worker and lecturer in social work at Western Sydney University in the drafting of this preliminary submission.

We would be happy to attest further to any of the issues outlined in this submission in person, by phone [REDACTED] or by email [REDACTED]

Yours Sincerely,

[REDACTED]

Cameron Cox
Chief Executive Officer
Sex Workers Outreach Project Inc. (SWOP)

Endnotes;

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