

# POSITIVE POTENTIAL: HOW SEX POSITIVITY CAN BENEFIT LEGAL THINKING AND SEX WORK REGULATION IN AUSTRALIA

THEODORE BENNETT\* AND ZAHRA STARDUST\*\*

*This article highlights the value of sex positivity as a framework for thinking about law and demonstrates this value by applying a sex positive legal approach to the regulation of sex work in Australia. This article begins by explaining sex positivity, identifying its central principles and responding to some of the criticisms of it. It then charts the emergence of a distinct line of sex positive thinking within legal commentary, catalogues sex positivity's various uses for legal analysis and explores what the sex positive commitment to sexual autonomy means in terms of law. This article ends by generating a series of reform proposals for sex work regulation in Australia that model the operationalisation of sex positive legal thinking in practice. Ultimately, this article argues that the adoption of sex positive legal thinking allows law to contribute towards the development of a society in which access, information, resources, decision-making and accountability around sex are better facilitated and more equitably facilitated across social groups. In terms of the regulation of sex work in Australia, this would involve not just decriminalisation but also sweeping legal reforms around education, access, work and oppressive social structures.*

## I INTRODUCTION

In October 2019, participants at the 24<sup>th</sup> World Congress of the World Association for Sexual Health, Mexico City released the Declaration on Sexual Pleasure.<sup>1</sup> The Declaration on Sexual Pleasure, amongst other things, urges governments and

\* BA, LLB (Hons), PhD. Senior Lecturer at the University of Western Australia Law School.

\*\* BA, LLB (Hons), MA, PhD, GradDipLegPrac, Postdoctoral Research Fellow, Australian Research Council Centre of Excellence for Automated Decision-Making and Society, Queensland University of Technology, Associate at the Berkman Klein Centre for Internet and Society at Harvard University.

1 World Association for Sexual Health, 'Mexico City World Congress of Sexual Health: Declaration on Sexual Pleasure' (Declaration, World Congress of the World Association for Sexual Health, 15 October 2019) <<https://worldsexualhealth.net/declaration-on-sexual-pleasure/>>.

social institutions to '[p]romote sexual pleasure in law and policy as a fundamental part of sexual health and well-being',<sup>2</sup> and in doing so, progresses the World Association for Sexual Health's 'larger objective' of 'provid[ing] a framework for addressing sexual pleasure in law, policy, advocacy, public health, and clinical practice'.<sup>3</sup> This challenge to make space for sexual pleasure within legal and policy thinking prompts reflection about the Australian legal system. How does the Australian legal system currently deal with sexual pleasure? And, if the issue of sexual pleasure cannot be abstracted from the broader issue of sex more generally, how does the Australian legal system currently deal with sex?

These are not easy questions to answer: they raise issues that are complex, far-reaching and difficult to work through. In this article we argue that the framework of sex positivity provides a valuable means by which legal analysis can engage with the dense connections between law, sex and sexual pleasure. The term 'sex positivity' originated in America in the 1970s but has since developed into a body of thought and practice that is evident internationally within academia, activism, social practice, education and therapy. In brief, a sex positive approach is one that regards 'sexuality as a potentially positive force in one's life' and that 'allows for and ... celebrates sexual diversity, differing desires and relationships structures, and individual choices based on consent'.<sup>4</sup> Traces of sex positivity have been apparent within legal commentary for decades but it is only in recent years that it has emerged as its own distinct body of legal thought.

The purpose of this article is to broadly highlight the value that sex positivity has as an approach to thinking about Australian law and to demonstrate its potential through a close engagement with the specific example of sex work regulations in Australia. This article builds on the current literature by systematising and modernising sex positive thinking, cataloguing sex positivity's uses for legal analysis, further exploring the legal implications of sex positivity's commitment to sexual autonomy and introducing sex positive legal thinking into conversation with Australian law. It shows how the adoption of a sex positive approach to the regulation of sex work in Australia can generate a program of legal reforms that would introduce wide-ranging decriminalisation, better value the contributions of sex workers to society, recognise sex work as work, empower sexual decision-making and increase access to rights.

This article develops across three parts. Part II sets out the meaning of the term 'sex positivity' and works through the key criticisms levelled at sex positivity. It explains how contemporary accounts of sex positivity must adapt in order to remain a useful framework for thinking about sex. Part III connects sex positivity to law by charting the development of sex positive thinking within legal commentary and by outlining what sex positivity can contribute to law today. It shows how a sex positive approach offers legal thinking analytical insight, a

2 Ibid [A].

3 Jessie V Ford et al, 'Why Pleasure Matters: Its Global Relevance for Sexual Health, Sexual Rights and Wellbeing' (2019) 31(3) *International Journal of Sexual Health* 217, 217.

4 Carol Queen and Lynn Comella, 'The Necessary Revolution: Sex-Positive Feminism in the Post-Barnard Era' (2008) 11(3) *Communication Review* 274, 278 ('The Necessary Revolution').

unifying framework and an agenda for reform, and explores what sex positivity's commitment to sexual autonomy can mean for law. Part IV applies a sex positive approach to sex work regulation in Australia, demonstrating the kinds of changes in law, legal thinking, attitudes and processes that sex positivity would promote around this particular issue.

## II WHAT IS SEX POSITIVITY?

In a 1976 monograph, historian and sexologist Vern Bullough described various world cultures and religions as being either 'sex-positive' or 'sex-negative'.<sup>5</sup> He identified Western society as traditionally being sex negative, by which he meant that it was generally hostile towards sex (regarding it as 'sinful' and/or 'immoral') and was tolerant of it only when used for procreative purposes within the bounds of heterosexual marriage.<sup>6</sup> Bullough attributed this negativity to the historical influence of Christianity but also identified such attitudes as being reinforced through 'medical and scientific assumptions' and as being 'part of the law'.<sup>7</sup> He was hopeful, however, that the 1970s could be a turning point for Western society, in that the sexual revolution would instigate 'radical change' and sex would 'no longer [be] regarded as an evil'.<sup>8</sup>

More sophisticated accounts of sex positivity and sex negativity then emerged from American feminist work in the 1970s and 1980s. These contributions 'grew out of the feminist sex wars',<sup>9</sup> a period of internal disagreement within feminism characterised by vociferous arguments around sexuality. Dominance feminists — inspired by the work of writers such as Catharine MacKinnon and Andrea Dworkin — strongly condemned pornography, sex work, BDSM and other sexual practices, but were in turn contested by other feminists who later came to be identified as sex positive, such as Carole Vance, Gayle Rubin, Pat Califia, Lisa Duggan, Nan Hunter, etc.<sup>10</sup> In particular, Gayle Rubin's iconic 1984 essay, 'Thinking Sex: Notes

5 Vern L Bullough, *Sexual Variance in Society and History* (John Wiley & Sons, 1976) 635. This book has been identified as one of the earliest uses of these terms in the modern line of thought leading to sex positivity today: DJ Williams et al, 'Introducing a Multidisciplinary Framework of Positive Sexuality' (2015) 1(1) *Journal of Positive Sexuality* 6, 6. The first printed use of the term 'sex-positive' is, however, claimed by Dr Roger Libby in 1976: Charlie Glickman, 'The Principles of Sex Positivity?' in Allena Gabosch and Jeremy Shub (eds), *Sex Positive Now* (Sexy Activist Publishing, 2019) 21, 21 ('Principles of Sex Positivity'). The term 'sex-negative' appears in print earlier: see, eg, Richard W Smith, 'Why Are Many Societies Sex Negative: A Social-Functionalist Theory' (1975) 5(1) *Counseling Psychologist* 84.

6 Bullough (n 5) 635.

7 Ibid.

8 Ibid 668.

9 Chantelle Ivanski and Taylor Kohut, 'Exploring Definitions of Sex Positivity through Thematic Analysis' (2017) 26(3) *Canadian Journal of Human Sexuality* 216, 216.

10 As Elisa Glick notes, '[i]t is well-known that the pro-sexuality movement emerged as a response to radical and anti-porn feminists, such as Dworkin and MacKinnon, who advocate the use of censorship and other forms of state repression in order to contain sexual violence against

for a Radical Theory of the Politics of Sexuality', provided a cornerstone for sex positivity by highlighting the key role that 'sex negativity' has played within Western society.<sup>11</sup> For Rubin sex negativity manifested in multiple different ways: society's general treatment of sex 'with suspicion', the evaluation of 'almost any sexual practice in terms of its worst possible expression', and the deeming of sexual activities to be 'bad' unless exempted by an 'acceptable excus[e]' such as marriage, reproduction, love or the like.<sup>12</sup> Whilst she did not use the term 'sex positivity' she did aim to develop a 'radical theory of sex' that sought to understand how sexuality is 'organized into systems of power, which reward and encourage some individuals and activities, while punishing and suppressing others'.<sup>13</sup> She argued that feminist analyses of sex as gender oppression overlooked the multiple ways that society was also stratified on the basis of 'erotic taste',<sup>14</sup> and concluded that whilst 'feminism's critique of gender hierarchy must be incorporated into a radical theory of sex' it was imperative that 'an autonomous theory and politics specific to sexuality ... be developed'.<sup>15</sup>

After the feminist sex wars subsided,<sup>16</sup> sex positivity was taken up by a wide variety of people within an ever-increasing range of areas. Sex positive feminism remains an important 'subset' of sex positive thinking<sup>17</sup> — playing a role in activism on US college campuses and in events such as SlutWalk<sup>18</sup> — but sex positivity has not been confined to feminism. It found a natural bedfellow in the rise of queer theory in the 1990s,<sup>19</sup> it has been picked up as part of broader academic and activist efforts around issues such as pornography and sex work,<sup>20</sup> and it provides the founding rationale of various social organisations and community groups, such as The Center for Sex Positive Culture in Seattle and the

women': Elisa Glick, 'Sex Positive: Feminism, Queer Theory, and the Politics of Transgression' (2000) 64(1) *Feminist Review* 19, 22.

11 Gayle S Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' in Richard Parker and Peter Aggleton (eds), *Culture, Society and Sexuality: A Reader* (UCL Press, 1999) 143.

12 Ibid 150.

13 Ibid 170–1.

14 Ibid.

15 Ibid 170.

16 Though it has been argued that recent feminist debates around the #MeToo movement constitute a resumption of hostilities in that they reiterate the core debates around sexuality in terms of consent, danger, pleasure, etc: Brenda Cossman, '#MeToo, Sex Wars 2.0 and the Power of Law' in Javaid Rehman, Ayesha Shahid and Steve Foster (eds), *The Asian Yearbook of Human Rights and Humanitarian Law* (Brill Nijhoff, 2019) vol 3, 18.

17 Queen and Comella, 'The Necessary Revolution' (n 4) 280.

18 See, eg, Deborah Tuerkheimer, 'Slutwalking in the Shadow of the Law' (2014) 98(4) *Minnesota Law Review* 1453 ('Slutwalking').

19 See Glick (n 10).

20 See, eg, Jacqueline Comte, 'Decriminalization of Sex Work: Feminist Discourses in Light of Research' (2014) 18(1) *Sexuality and Culture* 196, 200–1; Jeremy N Thomas, 'Responding to Academic Critiques of Sex Work: Practical Suggestions from a Sex-Positive Perspective' (2015) 1(1) *Journal of Positive Sexuality* 18, 18–20.

Center for Positive Sexuality in Los Angeles.<sup>21</sup> Sex positivity has also been taken up in fields such as counselling, psychology and social services.<sup>22</sup> Community health organisations now use sex positive messaging to provide culturally relevant peer education and pleasure-positive health promotion.<sup>23</sup> The term ‘sex positivity’ has also permeated throughout Western society, with a plethora of articles and explainers about sex positivity being distributed via online, mainstream outlets,<sup>24</sup> and print publishers.<sup>25</sup> Sex positive thinking continues apace within academia, with the *Journal of Positive Sexuality* being founded in 2015.<sup>26</sup>

## A Key Principles

Due to the diverse forums in which sex positivity is discussed and deployed it is difficult to pin down exactly what ‘sex positivity’ means. In order to clarify this, Ivanski and Kohut recently sent a questionnaire to over 50 experts who work in the areas of relationships and sexuality — researchers, therapists, sexologists, sexuality educators, etc — asking them, inter alia, how they would define ‘sex positivity’.<sup>27</sup> Whilst the responses revealed some differences, they also revealed a shared common core, namely that:

[S]ex positivity appears to be an ideology that promotes, with respect to gender and sexuality, being open-minded, non-judgemental and respectful of personal autonomy, given that there is consent. Further, sex positivity advocates for continuous, age appropriate learning and access to comprehensive sexual health information and treatments.<sup>28</sup>

- 21 ‘The Center for Sex Positive Culture: Sexual Freedom for Everyone’, *The CSPC* (Web Page) <<https://thecspc.org>>; ‘Center for Positive Sexuality: Sex Positive Education and Research’, *Center for Positive Sexuality* (Web Page, 2022) <<https://positivesexuality.org>>.
- 22 See Carmen Cruz, Ellen Greenwald and Riddhi Sandil, ‘Let’s Talk about Sex: Integrating Sex Positivity in Counseling Psychology Practice’ (2017) 45(4) *Counseling Psychologist* 547; Apryl A Alexander, ‘Sex for All: Sex Positivity and Intersectionality in Clinical and Counseling Psychology’ (2019) 6(1) *Journal of Black Sexuality and Relationships* 49.
- 23 See Zahra Stardust et al, ‘A Community-Led, Harm-Reduction Approach to Chemsex: Case Study from Australia’s Largest Gay City’ (2018) 15(2) *Sexual Health* 179; Kath Albury, ‘Iloveclaude.com: Pornographic Vernacular in Sexual Health Promotion for Women’ (2015) 2(2–3) *Porn Studies* 222.
- 24 See, eg, Carina Hsieh, ‘What Does “Sex Positive” Mean?’ (25 December 2019) *Cosmopolitan* <<https://www.cosmopolitan.com/sex-love/a30317658/sex-positive-meaning/>>; Lacey Johnson, ‘Here’s What It Really Means to Be Sex Positive’ (28 November 2019) *Oprah Daily* <<https://www.oprahmag.com/life/relationships-love/a30028506/sex-positive-meaning/>>; Sarah Burke, ‘What Does Sex Positivity Look Like Today? We Asked Five Sexperts’ (25 January 2018) *Vice* <[https://www.vice.com/en\\_us/article/yw59ej/what-does-sex-positivity-look-like-today-we-asked-five-sexperts](https://www.vice.com/en_us/article/yw59ej/what-does-sex-positivity-look-like-today-we-asked-five-sexperts)>.
- 25 See, eg, Karen Pickering (ed), *Doing It: Women Tell the Truth about Great Sex* (University of Queensland Press, 2016); Allena Gabosch and Jeremy Shub (eds), *Sex Positive Now* (Sexy Activist Publishing, 2019).
- 26 ‘Journal of Positive Sexuality’, *Center for Positive Sexuality* (Web Page, 2022) <<https://journalofpositivesexuality.org>>.
- 27 Ivanski and Kohut (n 9).
- 28 Ibid 223.

As this common core suggests, although it may be the case that sex positivity is ‘understood differently among scholars and professionals’ it is also true ‘that some of the key ingredients of positive sexuality ... are consistent across definitions’.<sup>29</sup> Accordingly, whilst there is ‘no one accepted definition for sex positivity’ it is nevertheless possible to set out a series of ‘guiding principles’ that characterise a distinct sex positive approach.<sup>30</sup> In systematising and distilling this diverse body of thought, this article offers an original contribution to the literature, identifying four key points that constitute the guiding principles of sex positivity.

Firstly, a sex positive approach explicitly rejects sex negativity and works to counteract its effects. As can be seen from the historical development of these terms, sex negativity and sex positivity emerged as poles within a binary opposition and thus, ‘[a]t its core, sex positivity is a response to sex negativity’.<sup>31</sup> Sex negativity is the general cultural paradigm that ‘sees sex as problematic, disruptive, dangerous’,<sup>32</sup> and that tends to ‘frame sexuality and sexual practices primarily as risky, difficult to manage, and perhaps adversarial’.<sup>33</sup> Whilst Bullough’s early work may have characterised sex negativity in terms of ‘hostility’ to sex, subsequent sex positive thinking has developed well past this point. Sex negativity may indeed manifest via prohibitions on sex but it is not exhausted by this. Queen acknowledges that ‘[i]t may sound odd’ to claim that modern Western society is sex negative, given that we ‘live ... in a society that splices sex into practically everything: music, movies, commercials, the Internet, cable TV... Sex is everywhere!’.<sup>34</sup> Indeed, given that Western ‘pop culture [is] saturated with sexual hedonism, internet pornography, and dating apps’, are we not already living in ‘radically sex-positive times’?<sup>35</sup> But the quantitative fact that sexual images and themes are omnipresent tells us little about the qualitative treatment of sex itself. As Carol Queen writes from the United States of America:

We use sex and desire to sell everything from odorless armpits to cars, yet treating sex as a service commodity is forbidden, the service-providers branded as criminals. In fact, we barely treat sex as something to learn about, a set of skills, a knowledge base. Attempts made to educate people, especially young ones, about birth control and safe sex are attacked.<sup>36</sup>

29 Williams et al (n 5) 6.

30 Margo Kaplan, ‘Sex-Positive Law’ (2014) 89(1) *New York University Law Review* 89, 95.

31 Dawn Serra, ‘Looking Ahead: Justice and the Future of Sex Positivity’ in Allena Gabosch and Jeremy Shub (eds), *Sex Positive Now* (Sexy Activist Publishing, 2019) 214, 214.

32 Queen and Comella, ‘The Necessary Revolution’ (n 4) 278.

33 Williams et al (n 5) 6.

34 Carol Queen, *Real Live Nude Girl: Chronicles of Sex-Positive Culture* (Cleis Press, 2<sup>nd</sup> ed, 2002) x (‘*Real Live Nude Girl*’).

35 Lama Abu Odeh, ‘Janet Halley and the Art of Status Quo Maintenance’ (2019) 2(1) *Social Justice and Equity Law Journal* 5, 44–5.

36 Queen, *Real Live Nude Girl* (n 34) 200.

Furthermore, sex negativity does not just operate via prohibitions but also via productive processes. Sex negativity manifests in ‘sex normativity’, that is, the sophisticated ways in which ‘the state channels sex into preferred forms while excluding or penalizing other forms of sex’.<sup>37</sup> This channelling occurs when the ‘broader social construction of sex ... promotes a narrow vision of acceptable sexual expression and conduct and stigmatizes other visions’.<sup>38</sup> Through techniques such as recognition, normalisation, authorisation and reward, social legitimisation is differentially extended to certain sexual activities, identities and expressions. In these ways the contours of legal regulation ‘shape our erotic possibilities’ and ‘impart a particular normative vision’ of what sex should be.<sup>39</sup> These productive processes do not just work through the ‘rule of law’ but also ‘through media, nongovernmental organizations (NGOs), educators, and others engaged in the “helping professions”’, who all ensure that our sexuality is ‘governed, directed, and made more uniform’.<sup>40</sup> The limited realm of socially legitimised sex (sex that is ‘Good, Normal, Natural, Blessed’) was labelled the ‘charmed circle’ by Rubin.<sup>41</sup> Sex within this charmed circle is characterised by features such as heterosexuality, marriage, monogamy, procreation, non-commerciality, paired coupling, an emotional relationship, similar age groups, privacy, the use of bodies only, vanilla activities, and the absence of pornography.<sup>42</sup> Sex negativity is thus apparent in both restrictions on sex as well as in a much broader range of other oppressive social dynamics around sex, contributing to issues such as compulsory heterosexuality,<sup>43</sup> bisexual erasure,<sup>44</sup> mononormativity,<sup>45</sup> and aspirational ideals of ‘harmonic sex’.<sup>46</sup>

Secondly, sex positivity recognises and validates a wide range of sexual desires, activities and identities as being equally legitimate. In keeping with Rubin’s

37 Jennifer E Rothman, ‘Sex Exceptionalism in Intellectual Property’ (2012) 23(1) *Stanford Law and Policy Review* 119, 120. In this way, sex negativity operates in line with Foucault’s analysis of sex as culturally contingent and constituted by prevailing discursive processes, such as medicine, religion, sexology, etc, and also has a biopolitical function: Michel Foucault, *The History of Sexuality: Volume 1*, tr Robert Hurley (Pantheon Books, 1978) vol 1.

38 Laura A Rosenbury and Jennifer E Rothman, ‘Sex in and out of Intimacy’ (2010) 59(4) *Emory Law Journal* 809, 812.

39 Elizabeth Bernstein and Laurie Schaffner, ‘Regulating Sex: An Introduction’ in Elizabeth Bernstein and Laurie Schaffner (eds), *Regulating Sex: The Politics of Intimacy and Identity* (Routledge, 2005) xi, xiii.

40 Ibid xv.

41 Rubin (n 11) 153.

42 Ibid.

43 See Adrienne Rich, ‘Compulsory Heterosexuality and Lesbian Existence’ (1980) 5(4) *Signs* 631.

44 See Kenji Yoshino, ‘The Epistemic Contract of Bisexual Erasure’ (2000) 52(2) *Stanford Law Review* 353.

45 See Meg Barker and Darren Langdridge, ‘Whatever Happened to Non-Monogamies: Critical Reflections on Recent Research and Theory’ (2010) 13(6) *Sexualities* 748.

46 See Robin Bauer, *Queer BDSM Intimacies: Critical Consent and Pushing Boundaries* (Palgrave Macmillan, 1<sup>st</sup> ed, 2014) 3.

exhortation to develop a concept of ‘benign sexual variation’,<sup>47</sup> a sex positive approach ‘respects diverse ways of expressing and experiencing sexuality and sexual pleasure, and rejects a culture that privileges male or heterosexual desire and pleasure above female or queer desire and pleasure’.<sup>48</sup> Sex positive activists have thus ‘fought fiercely for the freedom to have diverse, multiple, expansive, and agentic sexual expression’ and for the ability for people to ‘freely embrace new modes of experiencing and expressing their sexuality’.<sup>49</sup> Because sex positivity treats ‘sex [as] a subjective experience ... [that] we each have a different relationship with’,<sup>50</sup> it accordingly recognises and legitimises people who are asexual,<sup>51</sup> who choose to be celibate, who do not enjoy sex or who do not enjoy certain sexual activities. It regards a person’s choice not to have sex as being equally legitimate as their choice to have queer, kinky, non-monogamous, commercial and/or solo sex.

Thirdly, a sex positive approach values sex, sexual pleasure and sexual education. Sex positivity treats sex as a potential ‘source of happiness and personal fulfillment’ in people’s lives, and regards the experience of sexual pleasure as ‘a good thing’.<sup>52</sup> It considers this pleasure to be important in and of itself, separate from any connection to ‘emotional bonding or procreation’,<sup>53</sup> and free from any evaluation of whether the pleasure is ‘utilitarian’ or whether it progresses a valuable political goal such as ‘resistance to patriarchy’.<sup>54</sup> In order to maximise the positive potential of sex and sexual pleasure, sex positive approaches advocate for the comprehensive provision of accurate and appropriate sexual information and education to all people. Sex positivity is not, however, a hedonic exhortation that all people everywhere should be having sex, let alone more frequent and varied sex.<sup>55</sup> In the same way that the social dynamics of ‘compulsory heterosexuality’

47 Rubin (n 11) 153.

48 Kaplan (n 30) 95.

49 Breanne Fahs, “‘Freedom to’ and ‘Freedom from’: A New Vision for Sex-Positive Politics” (2014) 17(3) *Sexualities* 267, 272 (emphasis omitted).

50 Charlie Glickman, ‘The Language of Sex Positivity’ (2000) 3 *Electronic Journal of Human Sexuality* 1–3, 2 (‘Language of Sex Positivity’).

51 Indeed, as Emens notes: ‘avowedly sex-positive people tend to be the strongest allies for asexuals’: Elizabeth F Emens, ‘Compulsory Sexuality’ (2014) 66(2) *Stanford Law Review* 303, 340 n 219.

52 Kaplan (n 30) 90.

53 Ibid 95–6.

54 Ummni Khan, ‘Let’s Get It on: Some Reflections on Sex-Positive Feminism’ (2017) 38(3–4) *Women’s Rights Law Reporter* 346, 352.

55 As Annie Sprinkle has put it: ‘[p]eople think that “sex positive” means having sex with lots of people and having lots of orgasms, and if you’re not, then you’re not a sex positive person. That’s not what it is at all’: Jaz Papadopoulos, ‘Eco Sex: Interview by Jaz Papadopoulos with Pioneers Annie Sprinkle and Beth Stephens’ in Allena Gabosch and Jeremy Shub (eds), *Sex Positive Now* (Sexy Activist Publishing, 2019) 194, 195. Contrary to what Baker and Oberman might think, the ‘sex positivists’ ideal is not that all people should be having ‘more passionate, edgy, erotic sex’, and neither do sex positive thinkers hope that an ‘erotic nirvana’ will ‘emerge once we dispens[e] with all the baggage that intimacy and relationship are supposed to bring’: Katharine

are sex negative, so too the social dynamics of ‘compulsory sexuality’ are sex negative.<sup>56</sup>

Fourthly, sex positivity is committed to sexual autonomy and foregrounds this primarily by emphasising the importance of sexual consent. Whilst sex positivity embraces sexual diversity and rejects sexual shaming there are nevertheless limits; a sex positive approach does not ‘denigrate, medicalize, or demonize any form of sexual expression except that which is not consensual’.<sup>57</sup> Sex positivity promotes the fundamental capacity of individuals to give or refuse sexual consent and to have that decision respected by their sexual partner/s, by law and by other social institutions. Sex positive thinking has long emphasised the importance of effective communication between sexual partners when it comes to sexual consent, drawing particular inspiration from the sophisticated consent practices developed with sexual subcultures such as BDSM.<sup>58</sup>

## **B Criticisms of Sex Positivity**

Sex positivity is not without controversy. Given the diverse forums in which it is discussed, its lack of a single clear definition, and the fact that it has developed as a body of thought over a number of decades, sex positivity also provides a moving target for both its critics and proponents. Here, we outline and work through three key points of contention in order to demonstrate how contemporary accounts of sex positivity must develop and adapt.

Firstly, given the genesis of early sex positive writing in the feminist ‘sex wars’ it is unsurprising that some strands of feminist thought are opposed to sex positivity. Longstanding disputes between dominance feminism and sex positive feminism are a well noted feature of legal feminist work around sexuality.<sup>59</sup> Dominance feminist and sex positive thinking about sex diverges around a number of fundamental issues including: the extent to which women have effective agency in sexual decision-making given the social context, the appropriateness of mixing sex with commerciality, whether sexual pleasure and certain sexual activities have empowering potential for women, and the relative weight to be given to the risk of danger and the potential for pleasure in sex. In practical terms these theoretical differences have meant that dominance feminists and sex positive feminists have

K Baker and Michelle Oberman, ‘Women’s Sexual Agency and the Law of Rape in the 21<sup>st</sup> Century’ (2016) 69 *Studies in Law, Politics, and Society* 63, 96–7.

56 Emens (n 51).

57 Carol Queen, ‘Sex Radical Politics, Sex-Positive Feminist Thought, and Whore Stigma’ in Barbara Ryan (ed), *Identity Politics in the Women’s Movement* (New York University Press, 2001) 92, 94 (‘Sex Radical Politics’).

58 Larissa A Brian, ‘A Genealogy of Sexual Consent from the Social Contract to Sex-Positive Feminism’ in Jimmie Manning and Carey Marie Noland (eds), *Contemporary Studies of Sexuality and Communication: Theoretical and Applied Perspectives* (Kendall Hunt Publishing, 1<sup>st</sup> ed, 2015) 35, 41, citing Queen, *Real Live Nude Girl* (n 34).

59 Rosalind Dixon, ‘Feminist Disagreement (Comparatively) Recast’ (2008) 31(2) *Harvard Journal of Law and Gender* 277; Martha Chamallas, ‘Past as Prologue: Old and New Feminisms’ (2010) 17(1) *Michigan Journal of Gender and Law* 157.

strongly split around issues such as the (de)criminalisation of sex work, pornography and BDSM activities.<sup>60</sup> Many of these differences involve long-running, principled disagreement about complex issues and it is not within the scope of this article to resolve them here. Nonetheless, a few clarifications about the sex positive position should be made. Sex positive thinking is not so naive as to maintain that sex in and of itself can topple entrenched power structures<sup>61</sup> (though it may nevertheless be true that, in some cases, '[c]ultivating sexual pleasure for women and gender queer people *is* resistance to patriarchy').<sup>62</sup> Furthermore, more sophisticated accounts of sex positivity do not treat sexuality as if it were a phenomenon outside and apart from society, and that sexual decision-making is thus somehow immunised from social dynamics, pressures and inequalities. Rather, to take patriarchal social conditions as an example, sex positivity does not regard these kinds of limits as constituting a 'totalizing obstacle for women's sexual freedom' and instead 'encourage[s] women to cultivate languages of consent that are empowering, explicit, and true to their desires'.<sup>63</sup> Sex positive feminism can thus maintain both that sex is 'a site of oppression' and that 'sexual pleasure can be positive and empowering',<sup>64</sup> and accordingly work to reduce the former whilst boosting the latter.

Secondly, sex positivity has been criticised for collapsing thinking about sex into the two categories of 'positivity' and 'negativity'. Downing, for example, sees such binary thinking about sex as unhelpful, despairing of the 'reductiv[ity]' and 'oversimplification' of both the sex positive and sex negative positions.<sup>65</sup> She advocates instead for a '*sex critical*' approach that maintains that 'all forms of sexuality should be equally susceptible to critical thinking about the normative or otherwise ideologies they uphold. Assertions that given sexual practices, fantasies, orgasms, etc, are either "good" or "bad" are gross simplifications'.<sup>66</sup> Downing's analysis takes aim at an unsophisticated account of sex positivity, one which seems

60 Fahs identifies the core disagreement here as being about how best to pursue women's sexual autonomy; dominance feminists focus on securing women's 'negative liberty' to be free 'from oppressive structures' around sex, whilst sex positive feminists have typically placed more focus on pursuing women's 'positive liberty' to engage with sex even under conditions of patriarchy: Fahs (n 49) 269, 273.

61 As Califia noted: 'I do not believe that sex has an inherent power to transform the world. I do not believe that pleasure is always an anarchic force for good. I do not believe that we can fuck our way to freedom': Pat Califia, *Macho Sluts: Erotic Fiction*, ed Sasha Alyson (Alyson Publications, 1988) 15.

62 Khan (n 54) 353 (emphasis in original).

63 Brian (n 58) 40. Indeed, as Cossman has identified, even very early sex positive writers 'did not ... only article sexuality as a site of pleasure. Carol Vance, from the inception of the sex wars, was careful to insist that sexuality was both a site of danger and pleasure for women': Cossman (n 16) 22 n 10.

64 Khan (n 54) 353.

65 Lisa Downing, 'Safewording: Kinkphobia and Gender Normativity in *Fifty Shades of Grey*' (2013) 4(1) *Psychology and Sexuality* 92, 94. Taking their cue from Downing, a similar argument for shifting to 'sex critical' can be found in Meg-John Barker and Justin Hancock, 'Sex Positive, Sex Negative, or Sex Critical' in Allena Gabosch and Jeremy Schub (eds), *Sex Positive Now* (Sexy Activist Publishing, 2019) 24, 25.

66 Downing (n 65) 95.

premised on the idea that being sex positive means being uncritically laudatory of sex.<sup>67</sup> But sex positivity ought to be conceived of as already being a critical discourse. It is not some kind of ‘dippy love-child celebration of orgone’,<sup>68</sup> and sex positive thinkers do not need to be reminded that ‘like all human experiences, sex can produce the highest ecstasy, the lowest forms of self- and other- hatred, mild pleasure, mild pain, contentment, resentment, or nothing at all’.<sup>69</sup> Sophisticated accounts of sex positivity do not regard sex as an unqualified good but rather as ‘a potentially positive element of one’s life’.<sup>70</sup> They acknowledge that sex has the capacity to ‘benefit or harm’ depending on ‘what you do and how it affects you’.<sup>71</sup> Sex positivity highlights and attempts to bolster the positive potential of sex whilst also working to minimise its negative potential, such as by ‘tackl[ing] shame, shaming, the lack of good education, and supportive health and other services, our control of our bodies and decisions’.<sup>72</sup>

Downing’s criticism of sex positivity does, however, usefully draw important attention to the ways in which the binary language of sex positivity/negativity can be misleading. The ‘positivity’ of sex positivity should not be mistaken for ‘toxic positivity’ or for a prejudgement that sex is always and inevitably ‘a positive thing’, but should instead be interpreted as a commitment to ‘working towards a more positive relationship with sex’.<sup>73</sup> Accordingly, taking a sex positive approach does not mean automatically taking a ‘*pro-sex* stance on various socio-sexual issues’,<sup>74</sup> but instead involves undertaking an honest and accurate appraisal of such issues that does not fall into the sex negative trap of overemphasising the risks and harms of sex and that ensures that the potential goods of sex, such as sexual pleasure, are properly weighted.<sup>75</sup> The ‘negativity’ of sex negativity should not be interpreted as only encompassing open hostility and revulsion towards sex, but also the more sophisticated social systems that variously channel, contain, co-opt, diffuse and hierarchise sexuality. This binary language can also be problematic in another way:

67 Ibid 94.

68 Queen, *Real Live Nude Girl* (n 34) xxiv.

69 Aya Gruber, ‘Rape, Feminism, and the War on Crime’ (2009) 84(4) *Washington Law Review* 581, 613. This reminder comes after Gruber’s assessment that ‘sex-positivists must be sure not to order their normative conclusions by the overestimation of women’s (and men’s) desire for sex’.

70 Jessamy Gleeson, ‘Sexual Pleasure and Empowerment: A Brief (Her)Story’ in Karen Pickering (ed), *Doing It: Women Tell the Truth about Great Sex* (University of Queensland Press, 2016) 233, 241 (emphasis omitted), citing Sarah Jill Bashein, ‘Sex-Positive Feminism and Safety’ (2016) 41(1) *Women’s Health Activist* 8 and Queen and Comella, ‘The Necessary Revolution’ (n 4). As Gleeson notes, the ‘positivity’ of sex positivity means seeing sex as being ‘a *potentially* positive element of one’s life, and it does not mean we should not question the forces that may result in negative experiences with sex and sexuality. If a person has had wholly negative experiences with sex, sex positivity might question whether they have been supplied with enough information, support, and opportunities for choice’: Gleeson (n 70) 241.

71 Glickman, ‘Language of Sex Positivity’ (n 50) 2.

72 Burke (n 24).

73 Glickman, ‘Language of Sex Positivity’ (n 50) 1.

74 Williams et al (n 5) 6 (emphasis in original).

75 Kaplan (n 30) 163–4.

it risks limiting the potential of sex positivity by locking it within in a perpetually oppositional politics of mere reactivity to the entrenched Western history of sex negativity. To resist this limitation, in Part III(B) below we will show how sex positive legal approaches can be more than merely ameliorative of sex negativity and can also be used to develop affirmative programs of reform.

Thirdly, sex positivity has been criticised for failing to provide sufficient attention and consideration to intersectionality<sup>76</sup> and for being ‘often overwhelmingly white and middle-class’.<sup>77</sup> As Nash points out, sexual pleasure is not apolitical but rather is ‘mediated by patriarchy and its intersection with other structures of domination’.<sup>78</sup> Sex positivity must therefore avoid ‘simply celebrating [pleasure] as necessarily positive’ or adopting an ‘unproblematized celebration of the language of choice’.<sup>79</sup> A long line of black feminist scholarship has examined the devaluing of black women in sex positive spaces.<sup>80</sup> Brooks has pointed out that spaces that purport to be sex positive and feminist are still stratified by race. Her work documents how in the Lusty Lady — a unionised, women-owned peepshow in San Francisco — black dancers were devalued, received lesser pay, experienced racial stereotyping and faced unequal opportunities and racist hiring practices.<sup>81</sup> Mireille Miller-Young has written that black sexual history ‘involves black people’s sustained battle for sexual subjectivity, agency and autonomy’ and ‘aspirations for erotic sovereignty’.<sup>82</sup> She has shown that because black women experience unique forms of exploitation with regard to sexual labour there is a need for a politics that is simultaneously ‘progressive, antiracist, and antisexist’.<sup>83</sup> In the Australian context, Indigenous scholars have long criticised the focus of white feminism upon liberation through orgasm and sex. In her 1993 article ‘Aboriginal Women and the White Lies of the Feminist Movement’, Larissa Behrendt begins with a quote from Bobbi Sykes, who states: ‘Women’s Liberationists ... chatter on about sexual oppression and the competitive orgasm, and ... spare not a thought for the true object of sexual oppression in this country today’.<sup>84</sup> Behrendt argues

76 See Aimee Wodda and Vanessa R Panfil, ‘Insert Sexy Title Here: Moving toward a Sex-Positive Criminology’ (2018) 13(5) *Feminist Criminology* 583, 591–3. For a critique of SlutWalk see: Tuerkheimer, ‘Slutwalking’ (n 18) 1482–8.

77 Barker and Hancock (n 65) 26.

78 Jennifer C Nash, *The Black Body in Ecstasy: Reading Race, Reading Pornography* (Duke University Press, 2014) 13.

79 Ibid 13, 16.

80 See, eg, Siobhan Brooks, *Unequal Desires: Race and Erotic Capital in the Stripping Industry* (State University of New York Press, 2010); Nash (n 78); Mireille Miller-Young, *A Taste for Brown Sugar: Black Women in Pornography* (Duke University Press, 2014).

81 Brooks (n 80) 2–3.

82 Miller-Young (n 80) 29.

83 Ibid 261.

84 Roberta B Sykes, ‘Black Women in Australia: A History’ in Jan Mercer (ed), *The Other Half: Women in Australian Society* (Penguin Books, 1975) 313, 318 quoted in Larissa Behrendt, ‘Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse’ (1993) 1(1) *Australian Feminist Law Journal* 27, 27 (‘Implications for Aboriginal Women’).

that the experience of ‘invasion, dispossession, destruction of culture, abduction, rape, exploitation of labour and murder’ faced by Aboriginal women, including their use as slave labourers for white women and their sexual assault by police,<sup>85</sup> means that sexual politics for Aboriginal women cannot be separated from the fight to end settler colonialism and sexualised racism: ‘[s]exual liberation for white women has meant seeking the right to say ‘yes’ to different sexual partners and different sexual relationships without condemnation. Aboriginal women are still seeking the right to say ‘no’ and destroy the myth of the promiscuous, oversexed black women’.<sup>86</sup>

To overcome the limitations of sex positivity’s earlier formulations within white ‘second-wave feminism’,<sup>87</sup> contemporary sex positivity must be led by a broader range of perspectives, investments and considerations like these. More sophisticated accounts of sex positivity need to prioritise and centre concerns for racial and social justice in recognition of the fact that sex ‘exists within a world build on frameworks like racism, sexism, patriarchy, cisnormativity/transphobia, ableism, fatphobia, whorephobia, classism, ageism, [and] colonialism’.<sup>88</sup> The task of ‘work[ing] toward sexual liberation’ cannot be understood separately from the task of working toward ‘liberation from all oppression’, and thus sex positivity ‘must also be fundamentally committed’ to this broader goal.<sup>89</sup> In order to work towards this goal, in Part III(B) below we show how sex positivity’s commitment to sexual autonomy needs to mean more than respecting sexual autonomy by foregrounding individual sexual consent. It also needs to mean a commitment to building a more democratic sexual culture and improving sexual autonomy in structural ways, including engaging with issues to do with equitable access, education, information, resources, decision-making and accountability around sex.

### III SEX POSITIVITY AND LAW

#### A *The Development of Sex Positivity within Law*

Since the 1970s, sex positive thinking, advocacy and activism has made significant progress in a number of different nonlegal areas, but only qualified inroads into law. Many legal reforms, advocacy and commentary over preceding decades could be described as being broadly sex positive in character, in the sense that the approaches taken and the goals worked towards are roughly in keeping with sex positivity’s guiding principles. Thus, for example, efforts to decriminalise, legally recognise and legally protect members of LGBTIQ+ communities display the hallmarks of sex positivity’s embrace of diversity. Typically, however, legal work

85 Behrendt, ‘Implications for Aboriginal Women’ (n 84) 29–30.

86 Ibid 30.

87 Alexandra Fanghanel, *Disrupting Rape Culture: Public Space, Sexuality and Revolt* (Bristol University Press, 2019) 158.

88 Serra (n 31) 215.

89 Ibid.

like this has been scaffolded by liberalism, human rights, queer theory, or various feminisms, and has neither explicitly used the language of sex positivity nor specifically drawn on sex positivity as a framework of thought.

Although queer legal theory operates within a different discursive framework to sex positivity, it does at times track similarly to sex positive legal thinking. As a theory that works to interrogate and destabilise categories such as sexuality, gender and identity, queer critiques of law continue to present a fundamental challenge to the laws' structures, institutions and assumptions: work that 'make visible the [hetero]sexual ordering ... of ... law'.<sup>90</sup> Queer legal theorists have taken up issues of concern to sex positive thinkers, such as abortion, the criminalisation of homosexuality and sex work regulation. Some have explored the ways in which sex acts become labelled as illicit and how '[s]exual minorities have become a favorite target for majoritarian surveillance and discipline sanctioned by law'.<sup>91</sup> Hallmarks of sex positive thinking, sex normativity and mono-normativity also feature in queer legal theory, where scholars have critiqued the law's rewarding of relationships that resemble heterosexuality (by offering property rights and relationship recognition where couples exhibit monogamy, shared assets and cohabitation). Many writers have critiqued the mainstreaming of marriage equality in gay and lesbian law reform agendas,<sup>92</sup> the problematic construction of sexual orientation,<sup>93</sup> and the emergence of a homonormative legal subject<sup>94</sup> that is constituted via its distance from the 'bad queer' and 'undesirable' sexual intimacies such as public sex, kink, polyamory and pornography.<sup>95</sup> In this sense, queer legal theory — and the emerging field of queer criminology<sup>96</sup> — has been proactive in progressing goals similar to that of the sex positive legal agenda. However, although sex positivity and queer theory can and do converge they are not equivalent. They are quite different in scope: the applications of queer theory extend to a range of issues (such as identity analyses, anti-normativity and textual reading practices) that go far beyond sexuality as such, and where queer theory is applied directly to sexuality it is typically concerned with addressing queer sexualities. Although there is longstanding contestation about the exact limits of what constitutes 'queer' and the focus of queer theory, some queer theory writers

90 Dianne Otto, "'Taking a Break" from "Normal": Thinking Queer in the Context of International Law' (2007) 101 *American Society of International Law Proceedings* 119, 120.

91 Ratna Kapur and Tayyab Mahmud, 'Foreword: Re-Orienting Law and Sexuality' (2000) 48(1) *Cleveland State Law Review* 1, 2.

92 See, eg, Libby Adler, *Gay Priori: A Queer Critical Legal Studies Approach to Law Reform* (Duke University Press, 2018); Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Duke University Press, 2015).

93 See, eg, Aeyal Gross, 'Queer Theory and International Human Rights Law: Does Each Person Have a Sexual Orientation?' (2007) 101 *American Society of International Law Proceedings* 129; Aeyal M Gross, 'Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law' (2008) 21(1) *Leiden Journal of International Law* 235.

94 See, eg, Chris Ashford, '(Homo)Normative Legal Discourses and the Queer Challenge' (2011) 1 *Durham Law Review* 77.

95 Carl F Stychin, *Law's Desire: Sexuality and the Limits of Justice* (Routledge, 1995).

96 Angela Dwyer, Matthew Ball and Thomas Crofts (eds), *Queering Criminology* (Palgrave Macmillan, 2016).

restrict their attention to ‘lesbians, gays, bisexuals, transgender folks, intersex folks, and any others who fall outside of the heteronormative gender binary’.<sup>97</sup> Furthermore, whilst sex positivity, as discussed in Part II(A), can be identified as a framework of thought defined by a distinctive set of common, core principles, queer theory is self-consciously open-ended and deliberately resists attempts at both its own definition and categorisation,<sup>98</sup> as well as the definition and categorisation of sexuality.

Sex positivity has been most directly engaged by legal feminist commentators. Sex positive feminism is one of the major strands of contemporary legal feminist thought.<sup>99</sup> However, accounts of what constitutes sex positive feminism differ significantly across typologies,<sup>100</sup> and there is a tendency for it to be reductively framed by its opposition to dominance feminism.<sup>101</sup> This overlap between sex positivity and legal feminism is in the process of renegotiation. Sex positive legal commentators now couch their work in a variety of ways, such as in terms of being feminist, being sensitive to but not exhausted by feminist considerations, being critical of the shortcomings of some forms of feminism, or as even constituting a deliberate ‘break’ from feminism.<sup>102</sup> Sex positivity is beginning to emerge more fully as its own distinct framework for thinking about law, and this emergence is in many ways a return to the origins of sex positivity in Rubin’s call for ‘an autonomous theory and politics specific to sexuality’.<sup>103</sup> There have been a number of key milestones in the development of this distinct sex positive account of law.<sup>104</sup>

97 Carrie L Buist and Emily Lenning, *Queer Criminology: New Directions in Critical Criminology* (Routledge, 2016) 3.

98 Robert Leckey and Kim Brooks, ‘Introduction’ in Robert Leckey and Kim Brooks (eds), *Queer Theory: Law, Culture, Empire* (Routledge, 2010) 1, 1–2.

99 Dixon (n 59); Chamallas (n 59).

100 Dixon, for example, centres repronormativity at the heart of sex positive feminism: Dixon (n 59) 282–3. By contrast Janus characterises sex positive thinking within feminism as being organised around the principle that ‘sexuality is unique to each individual and should not be judged’: Kathleen Kelly Janus, ‘Finding Common Feminist Ground: The Role of the Next Generation in Shaping Feminist Legal Theory’ (2013) 20(2) *Duke Journal of Gender Law and Policy* 255, 270. Green defines sex positive feminism as ‘emphasiz[ing] the idea of sexual freedom as being an essential component of women’s freedom’: Stuart P Green, *Criminalizing Sex: A Unified Liberal Theory* (Oxford University Press, 2020) 50–1 n 38.

101 See, eg, Aziza Ahmed, ‘Feminism, Power, and Sex Work in the Context of HIV/AIDS: Consequences for Women’s Health’ (2011) 34(1) *Harvard Journal of Law and Gender* 225; Aziza Ahmed, ‘“Rugged Vaginas” and “Vulnerable Rectums”: The Sexual Identity, Epidemiology, and Law of the Global HIV Epidemic’ (2013) 26(1) *Columbia Journal of Gender and Law* 1; Ine Vanwesenbeeck, ‘Sex Work Criminalization Is Barking up the Wrong Tree’ (2017) 46(6) *Archives of Sexual Behaviour* 1631, 1638.

102 As Halley has argued, ‘[f]eminism is not our only word on women’s or human sexual welfare; on power, subordination, and gender; on power in erotic experience’: Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press, 2006) 20 (‘*Split Decisions*’).

103 Rubin (n 11) 179.

104 No such list can be complete and other contributions include: Mae C Quinn, ‘From Turkey Trot to Twitter: Policing Puberty, Purity, and Sex-Positivity’ (2014) 38(1) *New York University Review of Law and Social Change* 51; Rothman (n 37).

These include: Franke's landmark calling out 'of legal feminism's failure to take on the simultaneous projects of negative and positive sexual liberty';<sup>105</sup> Appleton's explicitly sex positive attempt to develop a 'culturally cliterate' family law that recognises and fosters female sexual pleasure;<sup>106</sup> Halley's 'sex-positive postmodernist'<sup>107</sup> work that has pushed back against regulatory overreach in areas such as sexual harassment law,<sup>108</sup> and consent standards for criminal law and college policies;<sup>109</sup> and, Rosenbury and Rothman's diagnosis of 'sex negativity' in the various ways that the state 'attempt[s] to regulate sexual activity by channeling sex into various forms of state-supported intimacy'.<sup>110</sup>

Two recent articles have further accelerated the emergence of sex positivity as a distinct framework for understanding law. Kaplan's 2014 article 'Sex-Positive Law' wholly rethinks American criminal law's relationship to sexual pleasure.<sup>111</sup> She identifies that there is an 'unspoken assumption' within the criminal law 'that sexual pleasure has negligible or negative value' and turns to sex positivity for a 'framework for understanding what law that acknowledges the value of sexual pleasure might look like'.<sup>112</sup> Her resulting vision of a sex positive law is one where '[l]awmakers, judges, and scholars ... acknowledg[e] the value of sexual pleasure to the individual and society',<sup>113</sup> a shift that would involve recalibrating criminal law regulations around issues such as BDSM activities and obscene speech/material. Wodda and Panfil's 2018 article 'Insert Sexy Title Here: Moving Toward a Sex-Positive Criminology' attempts to counter the 'Profoundly Sex-Negative Endeavour' of American criminology and criminal justice by developing a 'sex-positive feminist criminology and crimino-legal system'.<sup>114</sup> The account of sex positivity that they provide is very broad: 'focus[ing] on consent, safety, harm reduction, and education, and ... encourag[ing] sensitivity to issues of age, race, ability, sexual orientation, and culture, in addition to pleasure'.<sup>115</sup> They identify sex negativity both within law, such as the ways in which sexual variations have historically been demonised through the criminological lens of deviance,<sup>116</sup> and

105 Katherine M Franke, 'Theorizing Yes: An Essay on Feminism, Law, and Desire' (2001) 101(1) *Columbia Law Review* 181, 208.

106 Susan Frelich Appleton, 'Toward a "Culturally Cliterate" Family Law?' (2008) 23(2) *Berkeley Journal of Gender, Law and Justice* 267.

107 Halley, *Split Decisions* (n 102) 22.

108 Janet Halley, 'Sexuality Harassment' in Wendy Brown and Janet Halley (eds), *Left Legalism / Left Critique* (Duke University Press, 2002) 80.

109 Janet Halley, 'The Move to Affirmative Consent' (2016) 42(1) *Signs* 257 ('Affirmative Consent').

110 Rosenbury and Rothman (n 38) 809.

111 Kaplan (n 30).

112 Ibid 91–2.

113 Ibid 150.

114 Wodda and Panfil (n 76) 585.

115 Ibid 589.

116 Ibid 587–9.

also within broader society, such as the social failings around sex education and information provision.<sup>117</sup> Through the example of teen sexting, they demonstrate how these different manifestations of sex negativity combine to impact on the creation of offences and policing practices.<sup>118</sup>

## **B What Sex Positivity Offers to Legal Thinking**

As this emerging line of commentary makes clear, sex positivity provides a valuable framework for legal analysis. All laws are complex amalgams of various factors such as historical contingencies, political motivations, practical expediency, competing policy considerations, sociocultural attitudes, etc. Laws that intersect with sex are like all other laws in this respect. However, laws that intersect with sex are different from other laws in the way that sex negativity potentially provides an additional key factor in understanding both why these laws exist in the forms that they do and how these laws affect society and individuals.

Adopting a sex positive approach to thinking about law provides a crucial analytical lens for identifying and analysing the various impacts that sex negativity can have on law. Sex negativity can manifest within law in clear and straightforward ways, such as law's historical criminalisation of sodomy. Sex negativity can also manifest within law in more subtle and insidious ways, such as the normative effects of the state's selective system of rewards and punishments for certain kinds of intimate relationships. The effects of sex negativity can be identified not only in the substance of law but also in the policies and processes that inform law. As Kaplan has argued, a series of 'sex-negative assumptions ... distort legal discourse' in a variety of ways, including the discounting of sexual pleasure as a valuable good,<sup>119</sup> the failure to recognise and validate female sexual desires and pleasures, and an over-emphasis on harm and risk in relation to sex (particularly when dealing with non-normative sexual activities). These distortions can warp and twist the evaluation of otherwise legitimate policy considerations when it comes to calibrating how law regulates sex.

Sex positivity also provides an inclusive way to think cohesively about the multiple intersections across legal issues around sex. Whilst laws around sex work, pornography, BDSM activities, sexual assault, obscenity and indecency, etc, could all be conceptualised as individual and discrete topics, sex positivity draws attention to how each of these topics might relate back to a broader collective pattern of legal attitudes, understandings and histories built up around sexuality. Different legal areas have their own idiosyncratic doctrinal and policy considerations, but sex positivity has the potential to productively link discussions of these areas.

Ultimately, sex positivity also provides a reformatory goal for the future development of law. This goal is a more sex positive law, meaning broadly the

117 Ibid 589–90.

118 Ibid 593–600.

119 Kaplan (n 30) 92.

development of a more positive relationship between law and sex in line with the four guiding principles set out in Part II above. There is no proscriptive model of what this goal might look like in practice as sex positivity is not a narrow ideology but is rather a broad framework of thinking that can encompass a variety of perspectives and conclusions. Different sex positive thinkers have already put forward different visions of sex positive law.<sup>120</sup> What is clear, though, is that this goal can be worked towards in various ways involving changes to both criminal and civil law, to black-letter law and legal processes, to legal institutions and to legal attitudes.

The potential value of sex positivity for law is, however, tempered by the need for any sex positive account of law to meet the criticisms set out in Part II(B). Contemporary accounts of sex positivity need both to be able to offer an affirmative (not simply reactionary) program of reform as well as to be guided by movements to end intersecting oppressions. In understanding how sex positivity can achieve these objectives, we find it instructive to follow Wodda and Panfil's proposal to focus more on 'structural' issues rather than just an individual's 'right to engage in (or not engage in) sexual behaviors'.<sup>121</sup> Sex positive law must not only be concerned with securing sexual rights but also with working towards sexual equity. If 'access to pleasure (perhaps through fulfillment of desire) is a basic human right that is raced, gendered, classed, abled,'<sup>122</sup> then remedying inequalities of access requires engaging with, and dismantling, the multiple, intersecting, oppressive social practices and institutions that contribute to the maldistribution of sexual opportunities across individuals. Similarly, given that sexual harms are disproportionately distributed across populations, sex positive law ought to address the matrix of factors that make some communities more vulnerable to sexual violence and exploitation, as well as the conditions (including male entitlement, white supremacy and ableism) that enable certain individuals, groups and institutions to abuse their sexual power.

We argue that a sex positive legal approach capable of working towards these broad goals can be developed by unpacking the implications of the fourth key principle of sex positivity identified in Part II(A), namely sex positivity's commitment to sexual autonomy. If this commitment is understood to entail not only showing respect for the sexual consent of individuals but also working towards improving the structural conditions within which individuals navigate sex, then sex positivity can inform sweeping legal changes aimed at developing a society that, across social groupings, better facilitates access, information, resources, decision-making and accountability around sex.

120 As Glickman has identified, 'sex positivity is difficult to operationalize' as it is a set of 'principles more than rules': Glickman, 'Principles of Sex Positivity?' (n 5) 24. One particular issue that has already split sex positive legal commentators is whether a shift towards affirmative models of consent is sex positive or not: see Brian (n 58) 41, citing Queen, *Real Live Nude Girl* (n 34). Cf Halley, 'Affirmative Consent' (n 109).

121 Wodda and Panfil (n 76) 600.

122 Ibid 592.

In recent decades, the notion of sexual autonomy has become increasingly significant within legal discussions of sex.<sup>123</sup> Sexual autonomy broadly refers to the ability of an agent to make meaningful choices about sex, and can be thought of as having two interrelated aspects: negative sexual autonomy (that is the freedom from interference, such as restrictions on choice) and positive sexual autonomy (that is the freedom to do things, such as having the resources and capability to make choices).<sup>124</sup> Sexual autonomy typically finds purchase within law in the form of ‘a bundle of rights, liberties, privileges, powers, and immunities ... organized around the idea of securing for its possessor various forms of sexual self-determination and self-realization’.<sup>125</sup> A lot of sex positive material, especially the earlier work, frames sex positivity’s commitment to sexual autonomy almost entirely in terms of respecting the ability of individuals to give or refuse sexual consent. If consent is taken as a token of autonomy, the intention behind privileging individual consent is to respect people’s ability to author their own sexual lives. Focusing on individual consent enables people to pursue their own sexual identities and activities even if they fall outside the ‘charmed circle’ of socially authorised sex, and thus pushes back against the limitations that law has placed on people engaging in consensual, non-normative sexual activities. Focusing on individual consent also draws attention to people’s ability to refuse unwanted sexual activities and thus demands that law protect people in situations where their consent is absent or vitiated.

However, strong critiques of both consent and of autonomy have emerged within legal discussions about sex, especially in the context of laws around rape. It has been argued that focusing on whether or not an individual consents overlooks consideration of ‘the conditions under which choices can be meaningful’,<sup>126</sup> and therefore whether autonomy is properly realised. This can be particularly problematic in conditions of social inequality where the ‘scope for self-determination afforded to the disempowered is radically reduced, not just by formal prohibitions that deny the availability of certain choices, but also by informal mechanisms that render certain choices too costly — financially, socially, or personally — to be realistic’.<sup>127</sup> It has also been argued that focusing on individual consent fails to account for the ways in which people’s autonomy is impacted by the self-regulating internalisation of social standards that inflects their choices, as well as for the inevitable and inextricable imbrication of individuals and their choices within broader contexts marked by interpersonal relationships.<sup>128</sup>

123 See, eg, Nicola Lacey, ‘Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law’ (1998) 11(1) *Canadian Journal of Law and Jurisprudence* 47, 52; Stephen J Schulhofer, ‘Taking Sexual Autonomy Seriously: Rape Law and Beyond’ (1992) 11(1–2) *Law and Philosophy* 35; Jed Rubenfeld, ‘The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy’ (2013) 122(6) *Yale Law Journal* 1372.

124 Green (n 100) 20–2.

125 Ibid 20.

126 Lacey (n 123) 62.

127 Vanessa E Munro, ‘Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy’ (2008) 41(4) *Akron Law Review* 923, 930.

128 Ibid 933–4.

Furthermore, the use of consent as a legal standard does not necessarily protect or promote sexual autonomy and can indeed undercut it, such as when historical common law principles of legal consent failed to criminalise marital rape.

As Schulhofer has argued, although sexual autonomy may be subject to critique, ‘susceptible to debate and capable of extension’, it nevertheless ‘has a solid core grounded in legal and moral principles already settled in our culture’.<sup>129</sup> Similarly, despite ‘efforts in some jurisdictions to de-center consent from rape laws’, Munro notes that it has become apparent that ‘it is almost impossible to construct a regime for the regulation of sexuality that does not invoke or rely upon ... the language and ideology of consent’.<sup>130</sup> Thus whilst the critiques of consent and sexual autonomy set out above constitute points of tension that sex positivity must work through as it continues to emerge more fully within legal thinking, these critiques do not bar sex positivity from emerging at all. It is not possible to address each and every one of these critiques within the confines of this article, nor all of the alternative organising principles that commentators have suggested should instead underlie certain laws around sex (such as ‘sexual integrity’,<sup>131</sup> ‘dependence’ and ‘vulnerability’,<sup>132</sup> ‘self-possession’,<sup>133</sup> and ‘sexual agency’<sup>134</sup>). It is possible, however, to further explore what sex positivity’s commitment to sexual autonomy could look like in terms of legal thinking.

Sex positivity aims to promote both positive and negative sexual autonomy simultaneously. As discussed above, sex positivity’s foregrounding of consent provides a key means by which it promotes sexual autonomy. However, if the role of law is to ‘protec[t] the autonomy of all persons involved in a sexual encounter’,<sup>135</sup> then it is clear that ‘sexual autonomy has built-in limits’ where sexual activities involve two or more people and thus some legal restrictions on a person’s positive sexual autonomy are warranted in order to protect the negative sexual autonomy of others.<sup>136</sup> But whilst sex positivity might otherwise support minimising legal restrictions on individual sexual consent, sex positivity’s commitment to sexual autonomy need not devolve into some kind of ‘naive, laissez-faire liberalism blind to inequalities of wealth and power’.<sup>137</sup> Whilst law can take a hands-off approach to overriding consent in order to ‘permit individuals to act freely on their own unconstrained conception of what their bodies and their

129 Schulhofer (n 123) 94.

130 Vanessa Munro, ‘Sexual Autonomy’ in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press, 2014) 764.

131 Lacey (n 123).

132 Martha Albertson Fineman, ‘The Vulnerable Subject and the Responsive State’ (2010) 60(2) *Emory Law Journal* 251.

133 Rubinfeld (n 123).

134 Deborah Tuerkheimer, ‘Sex Without Consent’ (2013) 123 *Yale Law Journal Online* 335.

135 Corey Rayburn Yung, ‘Rape Law Fundamentals’ (2015) 27(1) *Yale Journal of Law and Feminism* 1, 32.

136 Ibid 28.

137 Schulhofer (n 123) 70.

sexual capacities are for',<sup>138</sup> it can take a hands-on approach to positively regulating in order to equalise and improve people's ability to exercise their sexual autonomy in self-directed ways. That is, although sexual agency should always be respected, people's capacity for sexual autonomy should nevertheless still 'be cultivated by ... society'.<sup>139</sup>

In terms of equalising people's capacity for sexual autonomy, the goal that law should focus on achieving is akin to what Fischel has called a 'democratically hedonic culture', that is 'a world where access to pleasure and intimacy is not so systematically and unfairly apportioned to the privileged few'.<sup>140</sup> In addition to substantive equalisation and equity, law should also regulate in order to generally improve all people's capacity to exercise sexual autonomy. This could involve changes such as mandating 'sex education curricula' at schools that is 'pluralist' rather than narrow in content;<sup>141</sup> securing more government funding for sexuality research;<sup>142</sup> providing fully government-funded safer sex and contraceptive equipment, sexually transmitted infection ('STI') and blood-borne virus treatment, and abortion services; and introducing broad-based human rights protections that adhere not to certain sexual identities but that cover sexuality *tout court*.<sup>143</sup> Furthermore, sex positive thinking should be informed by the wealth of literature from disability justice movements that re-imagines philosophical conceptions of autonomy. Because 'autonomy is created by and in relationships',<sup>144</sup> autonomy can only be realised by thinking relationally through our embeddedness in societies, communities and care structures. As 'a feature of persons that is manifested only through relations of support, advocacy, and enablement',<sup>145</sup> autonomy requires thinking about collectivity and interdependence, and building and sustaining relationships, networks and infrastructures of support, access and care.

Whilst we have argued here that law reform may be needed to cultivate sexual autonomy, it is important to acknowledge the limitations of using legal projects for social change. As legal scholars we know that law can be a blunt and largely ineffective instrument; legal reforms cannot single-handedly bring about the 'extreme social change' that Califia saw as necessary to the development of a 'culture of radical sex'.<sup>146</sup> It is not just legal changes that are needed here but also

138 Ibid.

139 Fineman (n 132) 260.

140 Joseph J Fischel, *Screw Consent: A Better Politics of Sexual Justice* (University of California Press, 2019) vii.

141 Rosenbury and Rothman (n 38) 864.

142 Ibid 865.

143 See, eg, Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14(5) *European Journal of International Law* 1023.

144 Myriam Winance, 'Rethinking Disability: Lessons from the Past, Questions for the Future' (2016) 10(2) *Alter* 99, 107.

145 Laura Davy, 'Philosophical Inclusive Design: Intellectual Disability and the Limits of Individual Autonomy in Moral and Political Theory' (2015) 30(1) *Hypatia* 132, 132.

146 Pat Califia, *Public Sex: The Culture of Radical Sex* (Cleis Press, 2<sup>nd</sup> ed, 2000) xii.

broader systemic changes in terms of politics, policies, funding, attitudes, etc. Furthermore, inappropriately calibrated law reform agendas can prove problematic for social change goals, such as where they risk eclipsing vital social change projects necessary for large-scale benefit to marginalised populations,<sup>147</sup> contributing to the carceral state,<sup>148</sup> reifying western liberal legal structures in a settler colonial state,<sup>149</sup> or building up the power of the law rather than the power of the people.<sup>150</sup> Nevertheless, whilst legal change may not be sufficient in and of itself for the development of a sex positive society, some legal reforms may nevertheless be necessary for this or can otherwise provide a useful intermediary step towards improving and alleviating immediate material conditions.<sup>151</sup> To the extent that law can be used to bring about a more sex positive society, sex positivity's reformatory agenda should work towards the more equitable facilitation of access, information, resources, decision-making and accountability around sex.

#### IV SEX WORK REGULATION

Across Parts II and III this article has developed an account of sex positivity, charted its emergence within legal thinking and catalogued its uses for legal analysis. The goal so far has been to provide a broad outline of sex positivity and what it can contribute to legal thinking. The goal of this Part is to take these abstractions and demonstrate what they might entail in terms of specifics and practicalities around one particular area of Australian law. There are, of course, many different areas of Australian law that intersect with sex. Some deal with sex directly and explicitly, such as criminal offences around pornography, whereas others deal with sex indirectly or implicitly, such as family law's selective legitimisation of certain types of personal relationships. Each of these areas has its own unique history and its own internal policy/doctrinal complexities that need to be accounted for. Because of the significant differences across different legal areas, this Part's analysis can only demonstrate the benefits of sex positive legal thinking for the specific area of Australian law considered here. With this caveat in place, this Part will focus on the regulation of sex work across the various Australian states and territories.

147 See Spade (n 92).

148 See Ryan Conrad (ed), *Against Equality: Queer Revolution Not Mere Inclusion* (AK Press, 2014).

149 See Andrea Smith, 'The Moral Limits of the Law: Settler Colonialism and the Anti-Violence Movement' (2012) 2(2) *Settler Colonial Studies* 69.

150 See Yaniv Roznai, 'Revolutionary Lawyering: On Lawyers' Social Responsibilities and Roles during a Democratic Revolution' (2013) 22(2) *Southern California Interdisciplinary Law Journal* 353.

151 As Rothman notes in relation to her sex positive work around intellectual property ('IP') law: '[a] recalibration of IP law will not fundamentally alter our society's relationship to sex, but it is one step in a larger project to provide more space for individuals to develop their own views and experiences of sex': Rothman (n 37) 169–70.

There are three key reasons why we have chosen to focus on sex work regulation in Australia. First, as set out in Part III(A), there is a burgeoning body of distinct sex positive legal literature that addresses a growing number of areas of law. Many issues have already been the subject of detailed sex positive legal analysis, including family law, IP, sexual harassment, BDSM activities, obscenity, teen sexting, etc. There is, however, scope for much more work to be done. Because the existing material heavily focuses on American law and only gestures towards sex work,<sup>152</sup> our choice of focus on Australian sex work further extends the sex positive literature. Second, there are strong pre-existing connections between sex work and sex positivity in a variety of areas other than legal academia, such as activism and advocacy efforts,<sup>153</sup> and sex positive feminism.<sup>154</sup> Our choice of focus on sex work thus builds from a solid foundation of adjacent work. Third, sex work regulation in Australia is very clearly marked by sex negativity. As will be set out below, this area of law is characterised by the historical and ongoing criminalisation, containment and control of consensual sexual activities on the basis of problematic justifications of disease, deviance and danger. The strong influence of sex negativity on this area of law means correlatively that there are strong potential benefits to be gained by adopting a sex positive legal approach here.

In order to ground our sex positive analysis of sex work regulation in Australia, this Part begins by outlining the different systems of laws that govern sex work across the various states and territories. This Part then turns towards the task of envisioning what a sex positive system of sex work regulation would look like. The development of this more sex positive law around sex work is shown to require a wide-ranging process of decriminalisation and an agenda for legal reform aimed at valuing the contributions of sex workers to society, recognising sex work as work, empowering sexual decision-making and increasing access to rights.

## **A The Current Laws**

Sex work regulation is enmeshed in Australia's colonial history.<sup>155</sup> In order to control venereal disease as well as to police colonised people,<sup>156</sup> sex work regulation was established to 'contain and confine working-class and ethnic sexualities and prevent depravity from spilling onto the streets'.<sup>157</sup> During the 19<sup>th</sup> century, sex workers became 'a major target' of campaigns to 'clean-up [the]

152 See, eg, Kaplan (n 30) 161.

153 See, eg, Queen, 'Sex Radical Politics' (n 57) 92; Queen, *Real Live Nude Girl* (n 34); Fahs (n 49) 268.

154 Comte (n 20) 200–1.

155 See generally Anne Summers, *Damned Whores and God's Police* (Penguin Books, 1994); Barbara Sullivan, *The Politics of Sex: Prostitution and Pornography in Australia since 1945* (Cambridge University Press, 1997) 18; Larissa Behrendt, 'Consent in a (Neo)Colonial Society: Aboriginal Women as Sexual and Legal "Other"' (2000) 15(33) *Australian Feminist Studies* 353.

156 Philippa Levine, *Prostitution, Race, and Politics: Policing Venereal Disease in the British Empire* (Routledge, 2003).

157 Yorick Smaal, 'Prostitution: 1880s–1900s', *Queensland Historical Atlas* (Web Page, 22 October 2010) <<https://www.qhatlas.com.au/content/prostitution-1880s-1900s>>.

streets', and were positioned as public annoyance, public menace and vectors of disease that justified increasing police powers.<sup>158</sup> A 'spate of legislation' related to sex work emerged during the same time as 'a centralized, bureaucratized police force' with new powers to control public space and a 'more organized and intrusive' prison system.<sup>159</sup> Legislative instruments regulating 'contagious diseases' created a professional status of sex worker by requiring compulsory registration of sex workers as 'common prostitutes' and periodic medical examinations, with those thought to be infected detained in lock hospitals.<sup>160</sup> A swathe of sex work laws introduced throughout the 20<sup>th</sup> century outlawed soliciting, procurement, brothel-keeping and living off the earnings of prostitution.<sup>161</sup>

Despite numerous inquiries, royal commissions and law reform campaigns, many of these laws persist in 2022.<sup>162</sup> Whilst each state and territory administers their own individual set of laws, sex work today is broadly governed under three regulatory models: criminalisation, licensing and decriminalisation. South Australia, Western Australia and Tasmania remain largely criminalised regimes, while Queensland and the Australian Capital Territory ('ACT') have licensing models, and New South Wales ('NSW'), Victoria and the Northern Territory have developed forms of decriminalisation.

Under criminal regimes, part or all of the sex industry may be illegal and sex workers face barriers to accessing services due to the threat of prosecution. In South Australia, sex work laws date back to the 1930s and common offences include soliciting, procurement, keeping a brothel and living off the earnings of prostitution.<sup>163</sup> In Western Australia, laws prohibit recruitment, street-based sex work and brothels (but not escort agencies), require mandatory prophylactics, and provide extensive police powers to regulate sex work.<sup>164</sup> In 2011, draft legislation

158 Raelene Frances, 'The History of Female Prostitution in Australia' in Roberta Perkins et al (eds), *Sex Work and Sex Workers in Australia* (University of New South Wales Press, 1994) 27, 38.

159 Margaret Amot, 'Prostitution and the State in Victoria: 1890–1914' (MA Thesis, The University of Melbourne, 1986) vi.

160 Sullivan (n 155) 19.

161 Ibid 18–27.

162 The Neave Inquiry in Victoria, Fitzgerald Inquiry in Queensland and the Wood Royal Commission in NSW all recommended the decriminalisation of various aspects of sex work: MA Neave, *Inquiry into Prostitution* (Final Report, October 1985); GE Fitzgerald, *Report of a Commission of Inquiry Pursuant to Orders in Council* (Final Report, 29 June 1989); Justice JRT Wood, *Royal Commission into the New South Wales Police Service* (Final Report, May 1997) ('*Wood Royal Commission*').

163 *Criminal Law Consolidation Act 1935* (SA) ss 65A–7; *Summary Offences Act 1953* (SA) ss 25–6, 28.

164 *Prostitution Act 2000* (WA) ss 5–6, 8–9, 22–36; *Criminal Code Act Compilation Act 1913* (WA) ss 190–1, 331D; Linda Selvey et al, *Western Australian Law and Sex Worker Health (LASH) Study: An Executive Summary Report to the Department of the Attorney General* (Report, August 2017); Basil Donovan et al, *The Sex Industry in Western Australia: A Report to the Western Australian Government* (Report, 2010) ('*The Sex Industry in Western Australia*').

in Western Australia even proposed the fingerprinting of sex workers.<sup>165</sup> In Tasmania, brothels and street-based sex work are criminalised and self-employed sex workers are only permitted to operate with one other person,<sup>166</sup> which limits their ability to share safety information with peers. Sex workers report police using the fact that they are carrying condoms as evidence of a crime, which limits their ability to care for their health and safety.<sup>167</sup> Supposed attempts to ‘protect’ sex workers (for example, in proposals that Australia ought to follow the ‘Swedish Model’ by criminalising clients) themselves resemble a form of ‘patriarchal control’<sup>168</sup> and pose further risks for sex workers who then may move to isolated areas or rush screenings of clients in order to avoid police. Despite their attempts, criminal sanctions do not reduce the incidence of sex work.<sup>169</sup>

Licensing models use onerous conditions to control who can sex work, how they do so and where they do so. Up until 2023, in Victoria,<sup>170</sup> self-employed sex workers are required to register on the Business Licensing Authority’s public register of licensed sex work providers, from which they report being unable to remove their names.<sup>171</sup> In 2018, the ACT repealed their requirements for individual sex workers to register, now only requiring registration of brothels and escort agencies, who can only operate in prescribed locations.<sup>172</sup> Independent sex workers are required to work alone and street-based sex work remains criminalised.<sup>173</sup> In Queensland (and until 2022, Victoria), sex workers are required to undergo mandatory STI testing despite health research demonstrating its obsolescence,<sup>174</sup> and in Queensland it remains an offence for sex workers to work

165 Prostitution Bill 2011 (WA) cl 52.

166 *Sex Industry Offences Act 2005* (Tas) s 3 (definition of ‘self-employed sex-worker’), 4–5, 8, 12.

167 Scarlet Alliance, *The Principles for Model Sex Work Legislation* (Report, 2014) 31 (‘*Model Sex Work Legislation*’).

168 Jay Levy and Pye Jakobsson, ‘Abolitionist Feminism as Patriarchal Control: Swedish Understandings of Prostitution and Trafficking’ (2013) 37(2) *Dialectical Anthropology* 333.

169 Donovan et al, *The Sex Industry in Western Australia* (n 164) vii.

170 ‘Decriminalising Sex Work in Victoria’, [vic.gov.au](http://vic.gov.au) (Web Page, 13 July 2022) <<https://www.vic.gov.au/review-make-recommendations-decriminalisation-sex-work>>.

171 *Model Sex Work Legislation* (n 167) 35–6; ‘Information in the Public Register’, *Public Register of Licensed Sex Work Service Providers* (Web Page, 25 January 2021) <<https://www.consumer.vic.gov.au/licensing-and-registration/sex-work-service-providers/public-register>>. Until the passing of the *Sex Work Decriminalisation Act 2022* (Vic) (‘*Sex Work Decriminalisation Act* (Vic)’), sex work in Victoria was governed via the *Sex Work Act 1994* (Vic) (‘*Sex Work Act* (Vic)’); *Sex Work Regulations 2016* (Vic); *Sex Work (Fees) Regulations 2014* (Vic); *Public Health and Wellbeing Act 2008* (Vic) pt 8 div 10; *Public Health and Wellbeing Regulations 2019* (Vic) pt 7 div 7.

172 *Sex Work Act 1992* (ACT) ss 12, 18 (‘*Sex Work Act* (ACT)’), as amended by *Prostitution Amendment Act 2018* (ACT) ss 16, 18.

173 Broad ranging changes were made to the *Sex Work Act* (ACT) (n 172) in response to the Standing Committee on Justice and Community Safety, Parliament of the Australian Capital Territory, *Inquiry into the Prostitution Act 1992* (Report No 9, February 2012).

174 David P Wilson et al, ‘Sex Workers Can Be Screened Too Often: A Cost-Effective Analysis in Victoria, Australia’ (2010) 86(2) *Sexually Transmitted Infections* 117, 122; Elena Jeffreys,

with an STI or bloodborne virus, regardless of whether they are working safely.<sup>175</sup> Research demonstrates that licensing creates a two-tiered industry, whereby the majority of the industry work outside the law and remain subject to criminal sanctions.<sup>176</sup> In Queensland, for example, street-based sex work, cooperatives of sex workers, massage parlours and unlicensed brothels all remain unlawful. Street-based sex workers continue to experience escalating policing, and police enjoy immunity to pose as clients to entrap sex workers.<sup>177</sup> Queensland Police Service statistics from 2016–17 indicate a 450% increase in charges for sex work offences since the 1989 Fitzgerald Inquiry, which uncovered high levels of police corruption and recommended removing police from a regulatory role.<sup>178</sup>

In NSW, sex work was partially decriminalised in response to the 1995 Wood Royal Commission which found endemic and structural corruption and extortion practices within the NSW Police force.<sup>179</sup> As a result, brothels became a legitimate commercial land use under environmental planning law and NSW Health, WorkCover and local councils became the regulators of sex industry businesses. Partial decriminalisation in NSW has resulted in high rates of condom use and low rates of STIs.<sup>180</sup> However, NSW retains offences for living off the earnings of sex work, specific offences for massage parlours, and public acts of soliciting sex for work within view of a dwelling, school, church or hospital.<sup>181</sup> In NSW, local councils still discriminate against sex industry businesses in planning controls and development consent can be difficult to attain. This is despite research indicating minimal (and sometimes positive) amenity impacts of sex work in neighbourhoods.<sup>182</sup> Although sex workers have insisted that sex work is work, Crofts et al note that sex work is still met with ‘ambivalence in [its] regulation’ and that ‘[c]oncerns about deviance, social harm and immorality underpin and shape

Janelle Fawkes and Zahra Stardust, ‘Mandatory Testing for HIV and Sexually Transmissible Infections among Sex Workers in Australia: A Barrier to HIV and STI Prevention’ (2012) 2(3) *World Journal of AIDS* 203, 203–4; A Samaranayake et al, ‘Legislation Requiring Monthly Testing of Sex Workers with Low Rates of Sexually Transmitted Infections Restricts Access to Services for Higher-Risk Individuals’ (2009) 85(7) *Sexually Transmitted Infections* 540, 540.

175 See *Prostitution Act 1999* (Qld) ss 77A, 89–90. Previously in Victoria, the now repealed *Sex Work Act* (Vic) (n 171) ss 19–20.

176 Christine Harcourt, Sandra Egger and Basil Donovan, ‘Sex Work and the Law’ (2005) 2(3) *Sexual Health* 121.

177 In 2011, the *Police Powers and Responsibilities Act 2000* (Qld) ss 224–6 were amended to permit immunity for police who posed as clients to encourage sex workers to agree to illegal activity in order to charge them.

178 Elena Jeffreys, Erin O’Brien and Janelle Fawkes, *The Case for Decriminalisation: Sex Work and the Law in Queensland* (Crime and Justice Briefing Paper, June 2019) 3.

179 *Wood Royal Commission* (n 162) vol 1, 13 [1.39]–[1.40].

180 Basil Donovan et al, ‘Improving the Health of Sex Workers in NSW: Maintaining Success’ (2010) 21(4) *New South Wales Public Health Bulletin* 74, 75.

181 *Summary Offences Act 1988* (NSW) pt 3.

182 Penny Crofts and Jason Prior, ‘Intersections of Planning and Morality in the Regulation and Regard of Brothels in New South Wales’ (2012) 14(2) *Flinders Law Journal* 329, 331–3.

legislative responses to sex work'.<sup>183</sup> The Northern Territory was the first jurisdiction to fully decriminalise sex work in 2019,<sup>184</sup> and Victoria passed its Sex Work Decriminalisation Bill 2021 (Vic) in 2022.<sup>185</sup> In 2022, the Queensland Law Reform Commission is conducting a review to consider a framework for a decriminalisation.<sup>186</sup>

## **B Undoing Sex Negativity**

Sex negativity is self-evidently manifest in both the historical and ongoing imposition of criminalising prohibitions on sex work as well as the more contemporary imposition of onerous licensing conditions. Sex work involves intimacies and pleasures that operate outside the normatively legitimised social structures around sex, such as those involving monogamy, marriage and reproduction.<sup>187</sup> Australia's legal regulations around sex work constitute an attempt to control, contain and channel sex back towards these normative ends, and, in doing so, the law fails to respect the sexual autonomy of sex workers and clients, reflects a hierarchisation of sex that privileges personal relationships over commerciality, and draws on justificatory discourses that conceptualise sex work primarily in terms of nuisance, danger, risk, corruption, deviance, disease, pathology and harm.<sup>188</sup> By approaching sex work through the lenses of protection and containment, both criminalisation and licensing frameworks in effect create more risk for sex workers rather than increasing their agency, supporting their autonomy or facilitating their access to rights.<sup>189</sup> This may partly explain why sex workers have been key protagonists in the movements for sex positive feminism over the last five decades.<sup>190</sup>

Decriminalisation is the obvious first step in dismantling the impact that sex negativity has had on this area of law, but this must be a full rather than partial process of decriminalisation. We understand full decriminalisation here to involve broad and wide-ranging legal reform. It should involve the repeal of the extensive web of criminal offences around sex work, the repeal of those licensing regulations

183 Penny Crofts et al, 'Ambivalent Regulation: The Sexual Services Industries in NSW and Victoria' (2012) 23(3) *Current Issues in Criminal Justice* 393, 393.

184 *Sex Industry Act 2019* (NT) ('*Sex Industry Act* (NT)').

185 *Sex Work Decriminalisation Act* (Vic) (n 171); 'Review to Make Recommendations for the Decriminalisation of Sex Work', *Victorian Government* (Web Page, 17 February 2020) <<https://www.vic.gov.au/sexworkreview>>, archived at <<https://web.archive.org/web/20200320142107/https://www.vic.gov.au/sexworkreview>>.

186 Queensland Law Reform Commission, *A Framework for a Decriminalised Sex Industry in Queensland* (Consultation Paper WP 80, April 2022).

187 Corina McKay, 'Is Sex Work Queer?' (1999) 18(3) *Social Alternatives* 48. See also Mary Laing, Katy Pilcher and Nicola Smith (eds), *Queer Sex Work* (Routledge, 2015).

188 Penny Crofts, 'Brothels: Outlaws or Citizens?' (2010) 6(2) *International Journal of Law in Context* 151, 161.

189 Victoria Nagy and Anastasia Powell, 'Legalising Sex Work: The Regulation of "Risk" in Australian Prostitution Law Reform' (2016) 28(1) *Current Issues in Criminal Justice* 1.

190 Jill Nagle, 'Introduction' in Jill Nagle (ed), *Whores and Other Feminists* (Routledge, 1997) 1.

that single out sex work (such as onerous licensing conditions) and the removal of police as regulators of the industry.<sup>191</sup> Full decriminalisation does not mean the absence of regulation, but rather would mean that sex work is ultimately regulated via standard zoning, planning, and workplace regulations, appropriate and tailored to meet the work, health and safety needs of sex workers. This includes facilitating independent sex workers being able to work together in cooperatives and hire drivers and security. It also means catering for those sex workers who are often left off law reform agendas, such as street-based sex workers, migrant sex workers and sex workers living with HIV, as well as unwinding the legacy effects on sex workers of the historically sex negative system of regulation.

The New Zealand model of sex work regulation is sometimes referred to as ‘decriminalisation’, and yet it continues to prohibit sex work for any sex worker on a temporary visa (such as a student or working holiday visa).<sup>192</sup> This ongoing prohibition for migrant sex workers means they often experience disproportionate police raids, targeting and harassment in workplaces.<sup>193</sup> The conflation of migrant sex work with human trafficking means that sex work regulation at times resembles a ‘militarised humanitarianism’ and ‘carceral feminism’<sup>194</sup> that is imbricated with anti-sex work ideology,<sup>195</sup> and anti-migration agendas,<sup>196</sup> and characterised by a ‘rescue industry’.<sup>197</sup> Generalised concerns about trafficking manifest in immigration officials profiling and stereotyping women travellers at the Australian border.<sup>198</sup> Rather than taking a rescue or carceral approach to migrant sex work, governments should provide safe, legal pathways for sex workers to migrate to Australia and facilitate better access for migrant sex workers to access industrial rights mechanisms without fear of arrest or deportation.<sup>199</sup> Similarly, decriminalisation of sex work must include decriminalisation of sex workers with

191 *Model Sex Work Legislation* (n 167) 6.

192 The *Prostitution Reform Act 2003* (NZ) introduced greater rights and protections for New Zealand national sex workers only: at s 19.

193 Elaine Pearson, ‘Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World’ (Research Report, Global Alliance against Traffic in Women, 2007) 52.

194 Elizabeth Bernstein, ‘Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns’ (2010) 36(1) *Signs* 45.

195 Ronald Weitzer, ‘Sex Trafficking and the Sex Industry: The Need for Evidence-Based Theory and Legislation’ (2011) 101(4) *Journal of Criminal Law and Criminology* 1337.

196 Rutvica Andrijasevic, *Migration, Agency and Citizenship in Sex Trafficking* (Palgrave Macmillan, 2010).

197 Laura María Agustín, *Sex at the Margins: Migration, Labour Markets and the Rescue Industry* (Zed Books, 2007).

198 Sharon Pickering and Julie Ham, ‘Hot Pants at the Border: Sorting Sex Work from Trafficking’ (2014) 54(1) *British Journal of Criminology* 2.

199 Lauren Renshaw et al, *Migrant Sex Workers in Australia* (Report No 131, Australian Institute of Criminology, 2015).

HIV.<sup>200</sup> HIV is now a chronic manageable condition,<sup>201</sup> and with a wide suite of prevention tools and new biotechnologies now available, it is possible for sex workers with HIV to work safely. Those on medication with an undetectable viral load cannot transmit HIV through sexual contact.<sup>202</sup> There is clear evidence that the use of criminal law does not work to reduce HIV infections,<sup>203</sup> and significant international evidence that governments should repeal punitive laws that ‘criminalise HIV transmission, exposure or non-disclosure’ and instead encourage people to access prevention, treatment, care and support services.<sup>204</sup> Intentional or reckless transmission of HIV (as well as the act of placing others at risk) is already subject to criminal and public health laws that prioritise counselling, education and support, escalate to behavioural orders, and position detention as a last resort.<sup>205</sup>

The process of full decriminalisation should also involve unwinding the ongoing effects of law’s history of sex negative regulation by protecting sex workers from discrimination and vilification experienced on the basis of their work. To this end, one of the key proposals in the recent bid to decriminalise sex work in South Australia involved a spent convictions clause to expunge historical sex work convictions from a person’s criminal record.<sup>206</sup> The Northern Territory reforms not only repealed police registration but also mandated the destruction of certain records.<sup>207</sup> The inclusion of spent convictions clauses and the removal of registration systems are critical aspects of sex positive law reform, because records gained through selling sexual services and compliance with registration have been

- 200 Elena Jeffreys, Kane Matthews and Alina Thomas, ‘HIV Criminalisation and Sex Work in Australia’ (2010) 18(35) *Reproductive Health Matters* 129.
- 201 Steven G Deeks, Sharon R Lewin and Diane V Havlir, ‘The End of AIDS: HIV Infection as a Chronic Disease’ (2013) 382(9903) *Lancet* 1525.
- 202 Alison J Rodger et al, ‘Sexual Activity without Condoms and Risk of HIV Transmission in Serodifferent Couples When the HIV-Positive Partner Is Using Suppressive Antiretroviral Therapy’ (2016) 316(2) *Journal of the American Medical Association* 171, 177.
- 203 Scott Burris et al, ‘Do Criminal Laws Influence HIV Risk Behavior: An Empirical Trial’ (2007) 39(2) *Arizona State Law Journal* 467, 507.
- 204 Judith Levine, Global Commission on HIV and the Law, *Risks, Rights and Health* (Report, July 2012) 9; John Godwin, International HIV/AIDS Alliance and Commonwealth HIV and AIDS Action Group, *Enabling Legal Environments for Effective HIV Responses: A Leadership Challenge for the Commonwealth* (Report, November 2010) 5, 10–11; *Political Declaration on HIV and AIDS: On the Fast-Track to Accelerating the Fight against HIV and to Ending the AIDS Epidemic by 2030*, GA Res 70/266, UN Doc A/RES/70/266 (22 June 2016) annex, para 44; Joint United Nations Programme on HIV/AIDS, *UNAIDS Guidance Note on HIV and Sex Work* (Guidance Note, March 2009) 8, 10. See generally Mark Boyd et al, ‘Sexual Transmission of HIV and the Law: An Australian Medical Consensus Statement’ (2016) 205(9) *Medical Journal of Australia* 409.
- 205 *National Guidelines for Managing HIV Transmission Risk Behaviours* (2018) (Report, 21 November 2018) 30.
- 206 The Statutes Amendment (Decriminalisation of Sex Work) Bill 2018 (SA) (‘Decriminalisation of Sex Work Bill (SA)’ aimed to amend the *Spent Convictions Act 2009* (SA) by deleting a person’s criminal record relating to sex work offences, removing barriers for people wanting to leave the industry: Decriminalisation of Sex Work Bill (SA) (n 206) cl 20.
- 207 Section 28 of the *Sex Industry Act* (NT) (n 184) provides that all personal information obtained under pt 2, div 2 or held in the registers referred to in pt 3, div 7 of the *Prostitution Regulation Act 1992* (NT) must be destroyed as soon as practicable.

used as evidence to discriminate against sex workers who are seeking employment in other industries or applying to work with children.<sup>208</sup> Indeed, research demonstrates that sex workers are often refused services or receive poor treatment in finance, health, education, social services and justice.<sup>209</sup> The presence of criminal laws encourages widespread institutional discrimination (including disproportionate fees, overnight suspensions, forfeiting of funds) from banks and payment processors that limits sex worker access to financial infrastructure and digital economies — effectively restricting who can make money online.<sup>210</sup>

Limited protections against discrimination are currently only available for sex workers in some states. For example, Tasmania, Victoria and Queensland provide discrimination protection on the grounds of ‘lawful sexual activity’,<sup>211</sup> and Tasmania further prohibits vilification on this ground,<sup>212</sup> but these provisions are of little use in the majority of circumstances where sex work is unlawful due to licensing and criminal laws. Until 2022, Victoria provided an exception to this protection in provision of accommodation for commercial sexual services and for anything done by religious bodies, religious schools or as part of religious beliefs or principles.<sup>213</sup> In Queensland, sex workers can be discriminated against when working with children.<sup>214</sup> In 2012, Queensland introduced exemptions for accommodation providers, enabling them to discriminate against another person (by refusing to supply accommodation, evicting them, or treating them unfavourably) if they reasonably believe the person is using or intending to use the accommodation in connection with the person’s sex work.<sup>215</sup> The catalyst for these broad provisions (in which a sex worker could be evicted from their rental property by their landlord without even doing sex work, simply by intending to tend to emails or taking phone calls) was a decision by the Queensland Civil and Administrative Tribunal, which found that a motel that had refused accommodation to a sex worker had contravened the *Anti-Discrimination Act 1991*

208 *Model Sex Work Legislation* (n 167) 78.

209 See, eg, Carla Treloar et al, ‘Rethinking the Relationship between Sex Work, Mental Health and Stigma: A Qualitative Study of Sex Workers in Australia’ (2021) 268 (January) *Social Science and Medicine* 113468:1–8; Linda Banach, ‘Unjust and Counter Productive: The Failure of Governments to Protect Sex Workers from Discrimination’ (Research Paper, Scarlet Alliance and Australian Federation of AIDS Organisations, November 1999).

210 Zahra Zsuzsanna Stardust, ‘Alternative Pornographies, Regulatory Fantasies and Resistance Politics’ (PhD Thesis, University of New South Wales, March 2019) 142–5.

211 *Equal Opportunity Act 2010* (Vic) s 6(g) (*‘Equal Opportunity Act (Vic)’*); *Anti-Discrimination Act 1991* (Qld) s 7(1) (*‘Anti-Discrimination Act (Qld)’*); *Anti-Discrimination Act 1998* (Tas) s 16(d) (*‘Anti-Discrimination Act (Tas)’*).

212 *Anti-Discrimination Act (Tas)* (n 211) s 19(c).

213 *Equal Opportunity Act (Vic)* (n 211) ss 62, 82–4. Section 62 of the *Equal Opportunity Act (Vic)* (n 211) was repealed by cl 36 of the Sex Work Decriminalisation Bill 2021 (Vic), which gained royal assent on 1 March 2022.

214 *Anti-Discrimination Act (Qld)* (n 211) s 28.

215 Clause 50 of the Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012 inserted a new s 106C into the *Anti-Discrimination Act (Qld)* (n 211).

(Qld).<sup>216</sup> No states go as far as the ACT, which protects more broadly on the grounds of ‘profession, trade, occupation or calling’.<sup>217</sup> In 2022, Victoria introduced protections on the basis of ‘profession, trade or occupation’, with an exception for discrimination where the experience is relevant to the employment and a ‘genuine occupational requirement for the position’.<sup>218</sup>

And yet there remains a risk that these protections are too generalised to be effective here. In 2021, the Queensland Human Rights Commission commenced a review of the *Anti-Discrimination Act 1991* (Qld), which invites public comment about best practice protections for sex workers.<sup>219</sup> In the decriminalisation campaigns in both South Australia and the Northern Territory, sex workers advocated for sex work-specific civil anti-discrimination protections.<sup>220</sup> In August 2020, a Private Member’s Bill was introduced to the NSW Legislative Council proposing to make it unlawful to discriminate against a person or persons on the ground that they are, or have been, sex workers.<sup>221</sup> The Bill not only protects current and former sex workers but also provides a general protection from whorephobia whereby it is unlawful to discriminate on the grounds of characteristics that appertain generally to or are generally imputed to sex workers.<sup>222</sup> It would not only prohibit discrimination in work but also in education, goods and services, accommodation and registered clubs.<sup>223</sup> At the time of writing, Scarlet Alliance was pursuing an amendment to include discrimination by association. In addition, the Bill includes a vilification provision that makes it unlawful, by public act, to incite hatred towards, serious contempt for, or severe ridicule of sex workers.<sup>224</sup> As civil mechanisms, anti-discrimination laws provide a broad range of remedies, from reinstatement, compensation and apology to anti-discrimination training and policy and procedural change. In 2010, the Family Protection Society apologised to sex workers when Scarlet Alliance commenced an action under the Tasmanian *Anti-Discrimination Act 1988* after they printed a series of newspaper advertisements accusing sex workers of ‘breaking up marriages’.<sup>225</sup>

216 *GK v Dovedeen Pty Ltd* [2012] QCATA 128, [53].

217 *Discrimination Act 1991* (ACT) s 7(1)(p).

218 *Sex Work Decriminalisation Act (Vic)* (n 171) s 34–5.

219 Queensland Human Rights Commission, *Review of Queensland’s Anti-Discrimination Act* (Discussion Paper, November 2021) 97, 118–19, 121.

220 See, eg, *Decriminalisation of Sex Work Bill* (SA) (n 206) pt 3.

221 The Anti-Discrimination Amendment (Sex Workers) Bill 2020 (NSW) was introduced by MP Abigail Boyd.

222 *Ibid* cl 50AB.

223 *Ibid* cls 50AK–50AL, 50AN.

224 *Ibid* cl 50AO.

225 ABC News, ‘Family Group Apologises to Sex Workers’, *ABC News* (online, 29 April 2010) <<https://www.abc.net.au/news/2010-04-29/family-group-apologises-to-sex-workers/414712>>.

## C Promoting a Sex Positive Society

The broad and wide-ranging decriminalisation of sex work that has been set out above is an important first step for sex positive reform but is not the last step. Full decriminalisation clears the ground for the further sex positive reforms that are needed in this area in order to affirmatively cultivate sexual autonomy. Decriminalisation is thus a starting point and not an end goal, as Koken writes ‘decriminalization alone will not be enough. ... A larger transformation of gender relations and cultural values surrounding sexuality, as well as a revolution in labor rights and distribution of resources, is necessary to effect large-scale change in the sex industry’.<sup>226</sup> An affirmative sex positive vision for sex work regulation in Australia involves a wide range of further reforms across a number of different areas.

### 1 Valuing Sex Education

In pursuing his ‘politics of democratic hedonism’, Fischel argues for the increased availability of education, information, services and resourcing in order in order to better equip people with information about sexual health and pleasure. He makes a number of proposals that would cultivate people’s sexual autonomy, including publicly funded access to birth control, reproductive services, a variety of contraceptive options, sexual communication workshops as well as subsidisation of pre-exposure prophylaxis (‘PrEP’) and antiretrovirals (calls that have been echoed in Australia).<sup>227</sup> One key issue that we pick up here is sex education. Australia’s current sex education curriculum requires updating to be more engaging, informative, inclusive and culturally relevant,<sup>228</sup> especially for LGBTIQ+ young people.<sup>229</sup> Our curriculum ought to teach sexual ethics and

226 Juline A Koken, ‘The Meaning of the “Whore”: How Feminist Theories on Prostitution Shape Research on Female Sex Workers’ in Melissa Hope Ditmore, Antonia Levy and Alys Willman (eds), *Sex Work Matters: Exploring Money, Power and Intimacy in the Sex Industry* (Zed Books, 2010) 28, 64. Ronald Weitzer proposes six preconditions for the reduction and elimination of stigma from sex work: neutralisation of language and eradication of derogatory terms, more balanced media portrayal and eradication of the current negativity bias in mass media, decriminalisation of sex work as a ‘necessary, but not sufficient condition for de-stigmatization’, industry mobilisation and advocacy for rights, sex worker activism by individuals and organisations, and political interventions by academics: Ronald Weitzer, ‘Resistance to Sex Work Stigma’ (2018) 21(5–6) *Sexualities* 717, 722 (emphasis in original).

227 Christy Newman et al, ‘Promoting “Equitable Access” to PrEP in Australia: Taking Account of Stakeholder Perspectives’ (2019) 23 *AIDS and Behavior* 1846.

228 See, eg, Janet Helmer et al, ‘Improving Sexual Health for Young People: Making Sexuality Education a Priority’ (2015) 15(2) *Sex Education* 158; Barrie Shannon and Stephen J Smith, ‘“A Lot More to Learn than Where Babies Come From”: Controversy, Language and Agenda Setting in the Framing of School-Based Sexuality Education Curricula in Australia’ (2015) 15(6) *Sex Education* 641; Lynne Hillier and Anne Mitchell, ‘“It Was as Useful as a Chocolate Kettle”: Sex Education in the Lives of Same-Sex-Attracted Young People in Australia’ (2008) 8(2) *Sex Education* 211.

229 Kerry H Robinson et al, ‘Growing Up Queer: Issues Facing Young Australians Who Are Gender Variant and Sexuality Diverse’ (Report, Young and Well Cooperative Research Centre, February 2014).

non-violent relating,<sup>230</sup> in addition to consent, respectful relationship skills, diversity of bodies and pleasures, open communication, media literacy and bystander interventions to address issues such as sexual racism and body fascism. Improved sex education facilitates informed decision-making, better communication and more skilful negotiation of sexual pleasures, risks and boundaries.

Sex workers already actively work to make up for the deficiencies of the Australian sex education curriculum as they play an important role in adult, youth and professional education. Sex workers emerged as leaders in public health, outreach and health promotion at the height of the HIV epidemic, mobilising alongside other affected communities.<sup>231</sup> As a result of peer education, sex workers in Australia have one of the lowest incidents of HIV in the world.<sup>232</sup> Sex worker organisations hold training sessions for police and justice professionals, speak at university ‘sex and consent’ weeks and create sex education resources to assist viewers to develop conceptual tools to decode pornography and become ‘competent in mediated sexuality’,<sup>233</sup> which is recognised as a cornerstone of healthy sexual development. Sex workers have organised community forums for teenagers on porn literacy speaking alongside sexologists, family planning and psychologists.<sup>234</sup> They have participated in theatre media pieces to answer questions from teenagers about labour conditions, pleasure, relationships and sexual health.<sup>235</sup> Currently, these important contributions are largely unfunded. The value that this external educative work brings to cultivating sexual autonomy within society should be recognised and facilitated by appropriate government investment and support.

## **2 Improving Access to Sexual Services**

Governments should also recognise the fact that sex work provides a number of valuable social goods, including the experience of sexual pleasure, and should take positive steps to recognise that it is a legitimate service for which funding, facilitation and assistance to access may be required. Some sex workers already provide discounted services to women, couples, trans people and people with disability who face barriers to accessing sexual services, but here we pick up the

230 Moira Carmody, ‘Ethical Erotics: Reconceptualizing Anti-Rape Education’ (2005) 8(4) *Sexualities* 465, 478.

231 See generally *Rampant: How a City Stopped a Plague* (Chapman Pictures, 2007).

232 Skye McGregor et al, Kirby Institute, *HIV, Viral Hepatitis and Sexually Transmissible Infections in Australia* (Annual Surveillance Report, 2018) 5.

233 Alan McKee et al, ‘Healthy Sexual Development: A Multidisciplinary Framework for Research’ (2010) 22(1) *International Journal of Sexual Health* 14, 14.

234 Sessions included Helen Betty Corday’s ‘Generation Sex’ (Speech, Fitzroy High School, 24 August 2015) and Helen Betty Corday, ‘What’s Missing in Sex Education’ (Speech, Fitzroy High School, 3 June 2014), discussed in Zahra Stardust ‘Won’t Somebody Think of the Children: Gonzo Puts Teens in Conversations with Porn Stars’ [2016] (3) *The New Eros Journal* 30, 30 (‘Think of the Children’).

235 Stardust, ‘Think of the Children’ (n 234) 30.

issues around people with disability.<sup>236</sup> Sex workers have long provided services to people with disability, including through the organisation Touching Base.<sup>237</sup> Australia is obliged to ensure that people with disability enjoy the highest standard of health without discrimination, including sexual health.<sup>238</sup> The National Disability Insurance Scheme ('NDIS') provides funding directly to people with permanent and significant disability for supports and services that are 'reasonable and necessary' in order to 'realise their potential for physical, social, emotional and intellectual development'.<sup>239</sup> Disability organisations have called for a rights-based framework for sexuality in the NDIS that includes 'appropriate disability-inclusive sexuality and relationships education; information and resources to support individual learning needs; support for dating and social sexual engagements; access to adaptive sex toys; access to sex therapy or utilising sexual services from sex workers'.<sup>240</sup>

In 2020, the Federal Court confirmed that sex workers could be considered a 'reasonable and necessary support[t]' to be accessed via the NDIS.<sup>241</sup> In 2017, a woman living with multiple sclerosis was denied her application by the National Disability Insurance Agency ('NDIA') for a sex worker to assist her to achieve sexual release as part of her NDIS plan. After her success at the Administrative Appeals Tribunal,<sup>242</sup> the NDIA appealed to the Federal Court arguing that the scheme "'does not fund" participation in sexual activity' and 'does not pay for sex workers'.<sup>243</sup> They argued that it would not meet the criteria of 'what it is reasonable to expect families, carers and the community to provide'.<sup>244</sup> The woman gave evidence that the sex worker she engaged was experienced, disability-trained and understood her needs and limitations,<sup>245</sup> and her psychologist agreed that seeing a sex worker 'significantly improved her mood and confidence'.<sup>246</sup> In a unanimous

236 For an extended discussion of law, disability and issues around sex: see Joseph J Fischel and Hilary O'Connell, 'Crippling Consent: Autonomy and Access' in *Screw Consent: A Better Politics of Sexual Justice* (University of California Press, 2019) 135.

237 The documentary *Scarlet Road* (Paradigm Pictures, 2011) follows Rachel Wotton's journey working with people with disability: 'Scarlet Road' (Web Page) <<https://www.scarletroad.com.au/about/>>.

238 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 25(a).

239 *National Disability Insurance Scheme Act 2013* (Cth) ss 4(1), 4(5) ('NDIS Act').

240 Disabled People's Organisations Australia and Touching Base, 'A Call for a Rights-Based Framework for Sexuality in the NDIS' (Joint Position Statement, 28 August 2019).

241 *National Disability Insurance Agency v WRMF* (2020) 276 FCR 415, 447 [142]–[143] ('WRMF'), discussing *NDIS Act* (n 239) ss 3–4, 34.

242 *Re WRMF and National Disability Insurance Agency* (2019) 167 ALD 194 ('*Re WRMF*').

243 *WRMF* (n 241) 447 [142], 423 [28] (Flick, Mortimer and Banks-Smith JJ).

244 *Ibid* 424 [38].

245 *Ibid* 432 [78].

246 *Ibid* 423 [26].

ruling, the Federal Court found that the *National Disability Insurance Scheme Act 2013* (Cth) (*NDIS Act*) does not expressly exclude such activities.<sup>247</sup>

It is important to note that this modest moment of progress for people with disability faced both legal hurdles and political backlash. The earlier decision of the Administrative Appeals Tribunal sought to distinguish between sex workers and sex therapists in an attempt to restrict the scope of the NDIS to the latter.<sup>248</sup> Although sex therapists can offer guidance grounded in psychology, sexology or counselling, because they do not offer direct physical touch sex therapists can only be of limited assistance for people who require support to actually have sex, reach orgasm or otherwise satisfy their sexual needs. Legal thinking here should value the benefits of sexual pleasure beyond a medicalised framework of therapy or health: the pursuit of sexual pleasure is an important end in and of itself, and separate from any connection to medical or therapeutic programming.

While the Federal Court confirmed that the *NDIS Act* did not restrict the engagement of sex workers as part of a support plan, a spokesperson for the NDIS Minister subsequently announced that they were considering changes to the legislation in response to the decision.<sup>249</sup> In 2020, an NDIS report announced a new proposed rule to ‘make clear that NDIS funding is not to be used to purchase the services of a sex worker or devices solely for sexual stimulation’.<sup>250</sup> These events suggest the need for law to be explicit in recognising that sex work is work, that access to sex is a valuable social good, and that a scheme for person-centred disability supports should involve facilitating access to sexual intimacy. A sex positive approach would resist creating a hierarchy of value between the kinds of services offered by sex therapists and sex workers.

### **3 Respecting Sexual Decision-Making**

Whilst it is important that governments recognise and facilitate the value of sexual services to broader society, it is equally important to ensure that sex workers’ sexual decision-making in the course of their work is adequately protected. Attempts to design more sex positive approaches to sex work regulation have often been mistaken as equating to ‘men’s right to orgasm’ or a person’s ‘right to sex’.<sup>251</sup>

247 Ibid 447 [142].

248 *Re WRMF* (n 242) 195 [3] (B W Rayment DP).

249 Luke Henriques-Gomes, ‘NDIS Funds May Be Used to Pay for Sex Workers, Court Rules’, *The Guardian* (online, 12 May 2020) <<https://www.theguardian.com/australia-news/2020/may/12/ndis-funds-pay-sex-workers-court-rules>>.

250 Department of Social Services (Commonwealth), ‘Improving the National Disability Insurance Scheme: Better Participant Experience and Improved Access and Planning’ (Information Paper, 24 November 2020) 4 <[https://www.dss.gov.au/sites/default/files/documents/11\\_2020/ndis-reforms-dss-information-paper.pdf](https://www.dss.gov.au/sites/default/files/documents/11_2020/ndis-reforms-dss-information-paper.pdf)>.

251 Jennifer Oriel, ‘Sexual Pleasure as a Human Right: Harmful or Helpful to Women in the Context of HIV/AIDS?’ (2005) 28(5) *Women’s Studies International Forum* 392, 400–1; Caroline Norma, ‘A Human Right to Prostitute Others: Amnesty International and the Privileging of the Male Orgasm’ in Miranda Kiraly and Meagan Tyler (eds), *Freedom Fallacy: The Limits of Liberal Feminism* (Connor Court Publishing, 2015) 125, 130.

Whilst orgasm and sex can be positive things for any person, as we noted above in Part III(B) the scope of a person's sexual autonomy is always limited by the sexual autonomy of others. Law must respect both freedoms from and freedoms to, and sex positivity is a 'politics of *maybe*' rather than a 'politics of *yes*'.<sup>252</sup> Sex positivity is committed to respecting the sexual consent of individuals and yet the same social problem that Rubin identified in America in the 1980s persists today in Australian law: '[i]f sex is taken too seriously, sexual persecution is not taken seriously enough'.<sup>253</sup> This has been especially true for the law's paradoxical treatment of sex workers, which has failed to respect their sexual decision-making. Criminal laws often treat sex workers as if they are inherent victims without agency to consent. However, in sexual assault trials, sex workers have often been presumed to exist in a perpetual state of consent. Judges have remarked that sexual assault is 'not as heinous' when committed against sex workers compared to a 'chaste' or 'happily married woman' because 'the forcible sexual act itself would not cause a reaction of revulsion'<sup>254</sup> or that a sex worker would experience less psychological harm because of her sexual history.<sup>255</sup> The Victorian Sentencing Manual permitted judges to take into account 'prostitution, and the conduct of the victim prior to the offence' in sentencing sexual offenders up until 2016.

Numerous States in Australia are in the process of reviewing their laws involving sexual consent.<sup>256</sup> Whilst a sex positive analysis of all of the issues raised by such laws is beyond the scope of this article, this changing legal space has the potential to better recognise sex workers' ability to articulate and place limits on their sexual consent. In 2020, the NSW Law Reform Commission released their recommendations for law reform.<sup>257</sup> The NSW proposals would move the law here towards a communicative consent model that approaches sex as a mutual interaction. This is relevant for sex workers as the proposals include new interpretive principles stating that every person has a fundamental 'right to choose whether or not to participate', that a person's consent should not be presumed, and that sexual activity should involve 'ongoing and mutual communication, decision-making and free and voluntary agreement'.<sup>258</sup> In particular, these proposals include explicit provisions useful for addressing some of the presumptions and issues sex workers face at work. They clarify that consent to one particular sexual activity

252 Fahs (n 49) 275, citing Carisa R Showden, 'Theorising Maybe: A Feminist/Queer Theory Convergence' (2012) 13(1) *Feminist Theory* 3 (emphasis in original).

253 Rubin (n 11) 171.

254 *A-G (Vic) v Harris* (Victorian Court of Criminal Appeal, Starke, Crockett and Gray JJ, 11 August 1981) 6–7 (Starke J), quoted in Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2<sup>nd</sup> ed, 2002) 347.

255 *R v Hakopian* (County Court of Victoria, Jones J, 8 August 1991) 8 (Jones J), quoted in Graycar and Morgan (n 254) 347.

256 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021); New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020); Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020).

257 New South Wales Law Reform Commission (n 256).

258 *Ibid* xii, 2 [1.4], 47, 49 [4.20].

does not mean consent to another activity (meaning that clients' stealthy removal of condoms would violate consent) and that consent at one time does not mean consent at another time (reflecting that sex workers are not in an ongoing state of consent by virtue of their work).<sup>259</sup> These reflect consent as an ongoing, real-time, iterative process and require communication and checking in between the parties. The NSW proposals also include updated jury directions to require jurists to examine their own assumptions about who can be sexually assaulted and the circumstances in which non-consensual activity can occur.<sup>260</sup> These proposals align with sex positive law reform in that they are not simply based on the popular misunderstanding of sex positivity as 'Whoooooooooo! Sex!'<sup>261</sup> but instead actively operate to support people's bodily sovereignty.

To better support sex workers in exercising boundaries, some jurisdictions have clarified that the acceptance of payment (in money or kind) is not, only by reason of that fact, to be taken as sexual consent. For comparison, the Northern Territory's *Sex Industry Act 2019* contains an express provision providing that '[d]espite anything in a contract for sex work, a person may, at any time, refuse to perform or continue to perform sex work'.<sup>262</sup> In that legislation, '[t]he fact that a person has entered into a contract for sex work does not of itself constitute consent for the purposes of the criminal law if the person does not consent, or withdraws the person's consent, to performing sex work'.<sup>263</sup> Sex worker organisations have also argued that consent should be vitiated where sex workers' clients have 'provided falsified proof of payment' or 'deliberately reversed payments following their session', in addition to occasions where police and council investigators misrepresent themselves by posing as clients.<sup>264</sup> In some jurisdictions, sex workers have already used fraud provisions to convict clients who induced them to participate in a session by pretending to pay them.<sup>265</sup>

Proposals like these show how the law could play a role in supporting and upholding people's sexual agency, autonomy and decision-making whilst simultaneously interrupting cultures of male entitlement and police impunity. However, we ought to remember that carceral solutions to sexual violence often fail survivors, contribute to a prison industrial complex, and do not necessarily lead

259 Ibid 66–73 [5.81]–[5.88].

260 Ibid 158 [8.29], 168–78 [8.91]–[8.132].

261 Burke (n 24).

262 *Sex Industry Act (NT)* (n 184) s 9(1).

263 Ibid s 9(2).

264 Inner City Legal Centre, Submission No 82 to New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (26 November 2019) 3 <<https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/Submissions/CO82.pdf>>. See also Zahra Stardust and Hilary Caldwell, 'Archetypal Sluts: Payment of Sex Workers as a Condition of Consent' in Yvette Russell and Kate Gleeson (eds), *New Directions in Sexual Violence Research* (Routledge, forthcoming).

265 See, eg, *R v Livas* [2015] ACTSC 50.

to sexual justice.<sup>266</sup> People in prison can face both a lack of access to adequate therapeutic programming and an increased risk of sexual assault.<sup>267</sup> It is unlikely that people will learn the skills necessary to become a ‘good sexual citizen’ during their incarceration. Instead, transformative justice approaches have sought to reimagine a system with more options for decision-making by survivors.<sup>268</sup> Broader social and cultural transformation, including investment in sex education, may prove more effective prevention than the expansion of criminal law.

#### 4 Empowering Sex Workers

Removing the criminalising controls on sex work enables other areas of law to operate in ways that could potentially empower sex workers as workers, including instituting workplace health and safety protections and industrial rights. In NSW, sex workers have produced workplace health and safety (‘WHS’) guidelines in partnership with NSW Health and SafeWork NSW that have been translated into Thai, Korean and simplified Chinese.<sup>269</sup> These guidelines clarify that sex workers are deemed workers for the purpose of WHS law, including workers compensation, and reiterate that sex services premises are required to consult with workers to control risks according to Safe Work Australia’s national code of practice.<sup>270</sup> The guidelines require workplaces to provide free and accessible personal protective equipment (such as latex and non-latex condoms, dams, gloves, water-based lubricants) and implement processes to prevent violence, including duress alarms and restricting access to abusive clients.<sup>271</sup> Similar guidelines are currently being developed by the Sex Worker Outreach Program Northern Territory and Scarlet Alliance in partnership with NT WorkSafe and Unions NT.<sup>272</sup>

266 See generally Judith Levine and Erica R Meiners, *The Feminist and the Sex Offender: Confronting Harm, Ending State Violence* (Verso, 2020).

267 Paul L Simpson et al, ‘Factors Associated with Sexual Coercion in a Representative Sample of Men in Australian Prisons’ (2016) 45(5) *Archives of Sexual Behaviour* 1195.

268 For example, Jane Bolitho’s partnership with the Elizabeth Evatt Community Legal Centre on the Cicada Project seeks to develop a restorative justice approach to sexual violence: ‘Free Legal Advice for the Communities of the Blue Mountains and Central Tablelands’, *The Cicada Project* (Web Page, 2020) <<https://www.eeccl.org.au/cicada-project>>, archived at <<https://web.archive.org/web/20200815133951/https://www.eeccl.org.au/cicada-project>>. For more on alternative models: see Ching-In Chen, Jai Dulani and Leah Lakshmi Piepzna-Samarasinha (eds), *The Revolution Starts at Home: Confronting Intimate Violence within Activist Communities* (AK Press, 2016).

269 SafeWork NSW, *Health and Safety Guidelines for Sex Services Premises in NSW* (Guidelines, 16 December 2019) ch 1 <<https://www.safework.nsw.gov.au/resource-library/other-services/health-and-safety-guidelines-for-sex-services-premises-in-nsw>> (‘*Safe Work NSW Guidelines*’).

270 Ibid ch 2. See also Safe Work Australia, *How to Manage Work Health and Safety Risks* (Code of Practice, May 2018) <<https://www.safeworkaustralia.gov.au/doc/model-codes-practice/model-code-practice-how-manage-work-health-and-safety-risks>> (‘*Safe Work Australia Code of Practice*’).

271 *Safe Work Australia Code of Practice* (n 270) 19–20; *SafeWork NSW Guidelines* (n 269) chs 7, 9.

272 See, eg, Sex Worker Outreach Program and Sex Worker Reference Group, Submission to Northern Territory Government (29 May 2019)

Because sex workers traverse a variety of working conditions, state governments should fund specific sex work projects at community legal centres to assist sex workers in accessing their industrial rights. In NSW, sex workers can access free legal advice through the sex worker legal service at the Inner City Legal Centre.<sup>273</sup> Sex workers are referred by calling their local sex worker organisation and speaking with a peer worker and the service is not means-tested. Solicitors can assist sex workers to recover debts from clients and employers, issue takedown notices or letters of demand for copyright infringement where agencies have refused to remove a worker's profile picture, make complaints of unfair dismissal, unpaid wages or unfair treatment from management, challenge unenforceable penalties for policy infractions (such as fines for lateness) and assist where sex workers have entered into sham contracts or been incorrectly classified as independent contractors instead of employees. Having a designated, funded and specialised sex worker legal service driven by peer sex worker organisations would assist to facilitate sex workers' access to industrial rights.

However, it is important to clarify here that the law should empower people who exchange sex to do so in ways that suit them, regardless of whether they identify as sex 'workers' at all. While sex workers have long campaigned for their labour to be recognised labour, a significant aspect of sex worker organising is the resistance of work and the rejection of the idea that safety, security, shelter and dignity ought to be bestowed through the glorification of work. Sex workers are people with a range of gender identities and sexualities,<sup>274</sup> who work across many spaces (including brothels, hotels, clubs, homes, BDSM dungeons, safe houses, cars and online) and in diverse forms (including full-service work, BDSM play, phone sex, striptease, pornography, web-camming, content creation and more) performed for money, services or trade. If sex positivity is concerned with recognising and validating a wide range of desires, activities and identities in line with Rubin's concept of benign sexual variation, then sex positive law reform must work to equally facilitate these, regardless of whether they desire or attract the status of worker. Sex work stigma often produces social and sexual hierarchies (known in-industry as 'whorearchies') that differentiate between various kinds of workers, settings and services, often on the basis of their respectability or exposure to police contact. These include value-based distinctions between outdoor/indoor, migrant/citizen, full-service/non-contact sex work. Just as Rubin's 'charmed circle' exposed the problems with a good/bad sex binary, the law should avoid privileging some forms of sex work (and sex workers) over others and actively work against reproducing these hierarchies.

[https://tfhc.nt.gov.au/\\_data/assets/pdf\\_file/0011/1006976/sex-worker-outreach-project-nt-submission-nt-svprf.pdf](https://tfhc.nt.gov.au/_data/assets/pdf_file/0011/1006976/sex-worker-outreach-project-nt-submission-nt-svprf.pdf).

273 'Sex Worker Legal Service', *Inner City Legal Centre* (Web Page, 2022) <https://www.iclc.org.au/our-services/sex-worker-legal-service/>.

274 See generally Hilary Caldwell and John de Wit, 'Women's Experiences Buying Sex in Australia: Egalitarian Powermoves' (2021) 24(4) *Sexualities* 549; Mary Laing, Katy Pilcher and Nicola Smith (eds), *Queer Sex Work* (Routledge, 2015).

## 5 Addressing Structural Inequalities

In order to proactively build a sex positive society, further legal changes are needed that go beyond the removal of criminal laws and the facilitation of a wider range of individual choices around sex work. It would be a misreading of sex positive thinking to form a legal agenda that focuses only on measures of formal equality such as anti-discrimination protections and workplace rights. To do so would be to fall into a similar trap as some gay and lesbian reformist politics, which have largely privileged equal rights for a few above the kinds of redistributive goals that have capacity to assist the most marginalised.<sup>275</sup> By focusing not just on individuals, identities and rights but also on the structural conditions and power dynamics that shape sex, a sex positive legal analysis can take aim at the broader inequalities and oppressions that intersect with sex work.

A sex positive legal agenda that is attuned to these structural factors could work to counter the social dynamics that contribute to the assault of sex workers with impunity, such as via the eradication of patriarchy, sexism, misogyny, misogynoir and rape culture. It could also work to counter the trans stigma, transphobia and transmisogyny that result in disproportionate acts of violence against, and murder of, trans sex workers. Such an agenda could address how gentrification, eradication and displacement have affected street-based sex workers within neighbourhoods that have historically been their sites of residence, work, sociality and community.<sup>276</sup> It could also address the punitive anti-trafficking and anti-immigration policies that are used to maintain discriminatory border controls without offering any protections for migrant sex workers, as well as the cultures of slut-shaming and drug-shaming that impact sex worker parents in their interactions with child services. For sex workers with chronic illness and disabilities, law reform priorities may not be about reifying or glorifying a work ethic but rather about anti-work struggle and re-evaluating how care work, labour, wealth and welfare are distributed.<sup>277</sup> Central to concerns about sex workers' general autonomy is an agenda for affordable access to health care and housing that offers sex workers safety and stability to support their sexual decision-making.<sup>278</sup>

In this sense, sex positive law reform projects require thinking beyond sexual rights and beyond individuals. Sex work reform cannot be separated from movements for

275 Adler (n 92).

276 Katie Hail-Jares, Corey S Shdaimah and Chrysanthi S Leon (eds), *Challenging Perspectives on Street-Based Sex Work* (Temple University Press, 2017).

277 Helen Hester and Zahra Stardust, 'Sex Work in a Postwork Imaginary: On Abolitionism, Careerism, and Respectability' in Jennifer Cooke (ed), *The New Feminist Literary Studies* (Cambridge University Press, 2020) 69; Kali Kanivale and Natalie P, 'Sex Work is Work and All Work Sucks' (Workshop, Scarlet Alliance National Forum, 13 November 2019); Heather Berg, *Porn Work: Sex, Labor, and Late Capitalism* (University of North Carolina Press, 2021); moose moon, 'Introduction' (2021) 52(3) *Columbia Human Rights Law Review* 1062.

278 See generally L Lazarus et al, 'Risky Health Environments: Women Sex Workers' Struggles to Find Safe, Secure and Non-Exploitative Housing in Canada's Poorest Postal Code' (2011) 73(11) *Social Science and Medicine* 1600; Tara Lyons et al, 'The Impacts of Intersecting Stigmas on Health and Housing Experiences of Queer Women Sex Workers in Vancouver, Canada' (2021) 68(6) *Journal of Homosexuality* 957.

social, economic, racial or disability justice, including those to end poverty and homelessness. Indeed, sex worker movements are already in conversation about how to end the systems of racial capitalism underpinning sex work regulation,<sup>279</sup> build systems of mutual aid to support sex workers in times of need, the demilitarisation and defunding of police who act as sex workers' perpetrators and prosecutors rather than protectors<sup>280</sup> and abolish prisons so as to end the grossly disproportionate policing, targeting and incarceration of Aboriginal and Torres Strait Islander sex workers.<sup>281</sup> A sex positive law reform agenda ought to be concerned with self-determination and sovereignty, meaning it requires decolonisation — not as a metaphor but as the 'repatriation of Indigenous land and life'<sup>282</sup> — which could not only re-envision sexuality, sex work and sexual cultures but could fundamentally alter current systems of law and government as we know them. By holding onto the radical threads underpinning sex positive movements, the sex positive agenda is not confined to liberal human rights law reform but can also address the multiple systems that drive and perpetuate structural systems of sexual oppression.

## V CONCLUSION

Since the 1970s the concept of sex positivity has spread internationally and diffused across multiple academic disciplines and areas of social life. We have argued that the recent emergence of a distinct sex positive line of thinking about law is a welcome and important development. Whether or not sex positive legal thinking continues to emerge and become more fully realised depends, to a large extent, on whether it can be established that it has value as a framework for working with law. We have shown in this article that it does. The broad-ranging body of sex positive work can be adapted and systematised into a coherent set of guiding principles. Sex positive legal thinking overlaps with, but is importantly distinct from, queer legal theory and legal feminism, and a growing body of commentary has begun to leverage the unique potential of sex positivity to work through the connections between law, sex and sexual pleasure across a number of different areas of law. Adopting a sex positive approach provides legal analysts with a diagnostic lens, a unifying framework and a reformatory goal, as well as a toolbox of valuable analytical concepts such as benign sexual variation, the charmed circle and sex normativity. In this article we have demonstrated the potential of sex positive legal thinking through a detailed analysis of sex work

279 Nada DeCat and Zahra Stardust, 'Against Inclusion: Sex Work Research, Racial Capitalism, and the Knowledge Industrial Complex' in Pranee Liamputtong (ed), *Handbook of Social Inclusion: Research and Practices in Health and Social Sciences* (Springer, 2021) 1.

280 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.

281 Scarlet Alliance, *2021–2026 Strategic Plan* (Report, 2021) 19–20 <<https://scarletalliance.org.au/who/stratplan/stratplan21-26>>.

282 Eve Tuck and K Wayne Yang, 'Decolonization Is Not a Metaphor' (2012) 1(1) *Decolonization: Indigeneity, Education and Society* 1, 1.

regulation in Australia. Our analysis has demonstrated that sex positive thinking can generate an affirmative program of legal change in this area, involving not just decriminalisation but also sweeping reforms around education, access, work rights and oppressive social structures.

It is our hope that this article provides both a foundation and an impetus for future sex positive analyses of Australian law. Whilst the contributions that sex positivity can make to other areas of Australian law are yet to be determined, as sex positive legal thinking develops further these future efforts must continue to work through a number of outstanding issues, including fleshing out what sex positivity's commitment to sexual autonomy means in legal terms and determining how best to foreground intersectionality and social justice considerations within law reform. Any such efforts must also be attentive to the limitations of sex positive legal thinking. Law is both an insufficient and an imperfect means for working towards a society in which access, information, resources, decision-making and accountability around sex are both equitably facilitated and better facilitated. Much more than legal change is needed to bring this about. But to the extent that law can contribute towards this goal, it should. Adopting a sex positive approach to legal thinking allows law to rise to this challenge.