Criminal Code (Decriminalising Sex Work) and Other Legislation Amendment Bill 2024

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Submission to Queensland Parliament, Housing, Big Build and Manufacturing Committee, Inquiry on the Criminal Code (Decriminalising Sex Work) and Other Legislation Amendment Bill 2024

Introduction

I thank the Housing, Big Build and Manufacturing Committee for the opportunity to make this submission to its inquiry on the Criminal Code (Decriminalising Sex Work) and Other Legislation Amendment Bill 2024.

The main recommendation of this submission is that the Queensland parliament consider seriously and systematically the adoption of the 'Nordic model' in order to address the prostitution system from within a human rights framework, with a view to working towards the abolition of the prostitution system as a form of gender inequality, of violence against women in particular, and of sexual exploitation.

I am of course aware that this recommendation is not the favoured approach of the Committee. However, the narrow examination of the protection of 'sex work' as contemplated by the Committee fails to consider the context of the prostitution system as a whole and will thereby fail to provide a full and proper response to the very problems identified for the Committee's consideration. The present confused and confusing legislative position on prostitution calls for a more comprehensive and systematic rethinking of the legislation in terms of human rights principles, particularly that of equality in dignity.

There are specific proposals in the present bill that are worthy of implementation, and it is commendable that the bill addresses discrimination offences against prostituted persons and against exited survivors of prostitution. However, the proposed decriminalisation of the prostitution system as a whole fails to make any distinction in terms of unlawfulness between prostituted persons (mainly but not entirely women and girls) and those who prostitute them. This submission contends that such a distinction must be made in any reform of the prostitution system that claims to uphold the human rights of women and to form a step towards sexual equality in Australia.

Such a distinction is pivotal to the 'Nordic model' of addressing prostitution that is recommended by this submission. The 'Nordic model' has been endorsed in resolutions by the Parliamentary Assembly of the Council of Europe (PACE) and by the European Parliament (EP) in early 2014, and most recently by the European Parliament in September 2023.[1]

I make this submission on the basis of research and teaching expertise in the area of prostitution from a human rights perspective. In 2014, I coordinated with Dr Madeleine Coy, then at London Met University, a submission in support of the EP resolution. Our submission was co-signed by a global network of nearly 100 academic researchers into the prostitution and sex industries, with expertise covering empirical and practice-based evidence as well as conceptual and historical perspectives on prostitution. I understand that the approach recommended here might seem unrealistic to those unfamiliar with it, but our wide-ranging research indicates that the Nordic model *works*. To say that it works, means that it works in upholding the human rights of women, whether they are currently in the prostitution system, survivors of the system, or women affected by it. *All* of us are affected by prostitution in various ways, but it is those most affected and most damaged by it who are owed our urgent efforts in working towards its abolition. This is why the current submission urges you to undertake a more comprehensive review and reform of the law on prostitution, and this forms the rationale of this submission in its details as well as its scope. I also write as a Queenslander born and bred (from Ipswich), who remembers clearly the context of political corruption associated with prostitution in the Bjelke-Petersen/Russ Hinze years, and recognize that it is time to move beyond any remnants of that framework.

Current framework of regulation in Queensland

[1] PACE Resolution 1983 of 8 April 2014, Prostitution, Trafficking and Modern Slavery in Europe, ¶6, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20716; European Parliament Resolution of 26 February 2014, Sexual Exploitation and Prostitution and its Impact on Gender Equality, s. B, https://www.europarl.europa.eu/doceo/document/TA-7-2014-0162_EN.html?redirect; European Parliament Resolution of 14 September 2023, Regulation of Prostitution in the EU: Its Cross-border Implications and Impact on Gender Equality and Women's Rights, https://www.europarl.europa.eu/doceo/document/TA-9-2023-0328_EN.html.

The current regulatory framework of the prostitution industry in Queensland is a patchwork of legislation a including that on sexual assault. The provisions of the Commonwealth Criminal Code on sexual slavery, servitude and trafficking (Divisions 270 and 271) also have a bearing on the regulation of the prostitution system throughout Australia, including of course Queensland. There has been little attempt to address the prostitution industry in Queensland (or in other states and territories) within a framework of human rights and human dignity.

Previous attempts at reform in Queensland have not drawn on a human rights principles in the content or language of proposals. The (bipartisan) failure to adopt a human rights framework in addressing prostitution means that while some reforms in the present bill no doubt provide some gains and improvements for those in the prostitution system, the basic causes of systemic problems go unaddressed. Hence, in responding to the terms of the Inquiry this submission takes a broader approach to reform. Within this wider context, I outline the rationale of the 'Nordic model' and its endorsement by the 2014 EP and PACE resolutions, and conclude with a set of practical reform options requiring legislative changes, some of which could be immediately put in place, such as that on the meaning of 'consent' in relation to prostitution and sexual assault.

I welcome an opportunity to provide more details on the research that underlies this submission in evidence to the Committee. I also urge the Committee to hear evidence from survivors of the prostitution system, and recommend that the Committee invite such evidence as a matter of signal importance to its deliberations.

Rationale for the 'Nordic model' approach to the prostitution system

Defenders and beneficiaries of the prostitution industry commonly portray prostitution as a relationship between individuals, in which one person provides sexual services (or performs 'sex work') to another person in exchange for money. Portraying prostitution as a series of such individual, and un-gendered, transactions is a fundamental misunderstanding of the historical and current organization of prostitution. Prostitution is a *system* that includes not only sellers ('sex workers') but crucially, buyers, as well as pimps and other beneficiaries of the industry (particularly through its close links with the pornography industry). The prostitution system is also deeply and fundamentally gendered, with the majority of buyers being men, and the majority of those from whom sex is bought being women and girls. Any attempt to consider the regulation of brothels outside a full understanding of prostitution as **a *system*** fails to comprehend the inequality and subordination, violence and exploitation lying at its foundation.

Closely linked to a defence of prostitution as a series of individual transactions is the emphasis placed by its defenders on women's 'choices' in the industry. Women's choices (ie the 'choices' of 'sex workers') are unquestionably important, but they do not form the driver of the prostitution industry. Prostitution as a social institution is driven by (male) *demand*, that is, the choices men make in choosing to buy sex and the bodies of women. We now know a great deal about the character of those choices through what are often called 'punter sites', where buyers review brothels and the women with whom they have had a paid relation. Even in the course of 'ordinary' transactions, those choices are brutal. The Invisible Men Project, at the-invisible-men.tumblr.com/, for example, collates reports from these sites, providing a chilling picture of the reality for most prostituted women: a reality of violence, desperation, subordination and despair.

The argument of this submission that prostitution is a system of violence and exploitation is supported by a wide variety of women's organizations around the world, who draw attention to the wrong of prostitution as a human rights violation. The distinctiveness of this approach, on which this submission is also based, is the framework of human rights in which it is centered, as marked by close adherence to the principles and text of particular human rights instruments, and by upholding the central principle or value of the *dignity* of the person that is the chief animator of human rights talk and action.

As noted above, this submission recommends the adoption of the 'Nordic model' endorsed by resolutions of the

peak European parliamentary bodies in 2014. In support of the EP resolution, Dr Madeleine Coy and I presented a submission from a global network of researchers united by deep and systematic expertise in researching the dynamics of prostitution and the sex industry, trafficking and violence against women. That collective research drew on contemporary evidence, on historical and philosophical inquiry, and importantly on the testimony of survivors of the prostitution system. Many signatories had worked directly with prostituted women, as well as having individual and collective links with a wide variety of organizations working for the abolition of prostitution as an institution of gender inequality and exploitation. Not all of the signatories agreed on every detail of course, but it is crucial to note that our common position on prostitution was not grounded in a moralistic approach, or in any kind of hostility to women in the prostitution system. Nor was our position based on considerations about maintaining 'public order'. The common concern of signatories was, and continues to be, with the human rights of women, in protecting the dignity of all women equally, and bringing an end to all forms of the subordination and degradation of women.

I am pointing to this submission to the EP in order to indicate that the position I present here is not in any way original to me, and that its main lines are supported by a body of unrivalled expertise in research into prostitution.

On that basis, I note that a meaningful project of reform in regard to prostitution needs to recognize and include the following key issues:

- the gender asymmetry of the sex industry: as noted, men are the majority of those who buy sexual acts, and women and girls are the majority of those whose bodies are bought
- countries in which buying sexual acts has been criminalised have seen sex markets shrink, and trafficking reduced: the adoption of the 'Nordic model' in South Australia offers the potential to replicate this progress
- law is a powerful teacher, and attitudes shift dramatically where the purchase of sexual acts is criminalised, with surveys in Sweden for example consistently showing that a large majority of citizens now think the purchase of sexual acts is unacceptable.

The approach of decriminalisation and/or legalization in the current Queensland bill is that advocated by the prostitution industry itself. That approach has failed prostituted persons, as is clear from the experience of countries like Germany and the Netherlands. Legalization does not tackle the violence inherent to prostitution. Decriminalisation does not attenuate trauma – because the infliction of trauma on persons in prostitution is chiefly by buyers and pimps. The main danger to women in prostitution comes from those who prostitute them, or who financially and in other ways benefit from their prostitution. **Prostitution can only be made safe through abolishing it.**

Abolition is not a utopian model. It is the aim of the 'Nordic model', which was implemented first in Sweden with the Sex Purchase Law of 1998, and has since been adopted in Norway and Iceland, and in 2015, in Northern Ireland and Canada, and since then in France and Israel. It is the approach recommended by the European Parliament and the Parliamentary Assembly of the Council of Europe as forming the basis of a pan-European approach to prostitution and trafficking, reflected in the Resolutions of 2014, and of the EP in 2023.

A model for legislative reform

Consequent to a comprehensive report from its Committee on Women's Rights and Gender Equality, the European Parliament on 26 February 2014 passed a landmark resolution on sexual exploitation and prostitution and its impact on gender equality (2013/2103(INI)). The resolution was carried by an overwhelming majority of 343 votes to 139, with 105 abstentions. The resolution is advisory, that is, not binding on member states. The resolution was drafted and moved by Mary Honeyball (Member in the Socialists & Democrats Group, UK, ie of the centre left), after presentation of a report of the EP Committee on Women's Rights and Gender Equality.

The EP press release (20140221IPR36644_en) summed up succinctly the meaning and significance of the 2014 resolution: 'It stresses that prostitution violates human dignity and human rights, whether it is forced or voluntary,

and calls on member states to find exit strategies and alternative sources of income for women who want to leave prostitution.'

Mary Honeyball herself noted that by the passage of the resolution, 'We send a strong signal that the European Parliament is ambitious enough to tackle prostitution head on rather than accepting it as a fact of life.' Most states up to now have adopted an approach assuming that the prostitution of women is in some way 'a fact of life', that it is 'inevitable', that it is (as in the cliché) 'the oldest profession' that will always be with us. The EP resolution however adopts the approach of the Declaration on the Elimination of Violence against Women (www.un.org/documents/ga/res/48/a48r104.htm) that forms of violence like prostitution and sexual exploitation are 'a manifestation of historically unequal power relations between men and women', and in no sense natural or biological phenomena.

At its 12th sitting of 8 April 2014, the Parliamentary Assembly of the Council of Europe passed a resolution on Prostitution, Trafficking and Modern Slavery in Europe (Resolution 1983 [2014]), on the basis of a Report prepared by the PACE Committee on Equality and Non-Discrimination. The PACE resolution noted, 'Forced prostitution and sexual exploitation should be considered as violations of human dignity and, as women are disproportionately represented among victims, as an obstacle to gender equality.' (¶6)

Both the EP and the PACE resolutions draw attention to the violence of exploitation in prostitution and trafficking. It is for this reason that the PACE resolution in particular notes that sex worker organizations are not the sole stakeholders in considering measures to address prostitution. The resolution notes, 'In designing and enforcing prostitution legislation and policies, public authorities should strengthen co- operation with civil society, particularly non-governmental organisations (NGOs), assisting victims of forced prostitution and trafficking, as these are not represented by sex workers' organisations' (¶10). Consultation with survivors of the prostitution system is, from the perspective of my submission, crucial to any project for reform and to any specific reform options advanced, as well as to the implementation and monitoring of such measures.

Five specific recommendations for reform

This submission recommends the following five options for reform as parts of an action plan. These options are adapted from the 2014 PACE resolution (¶12) as a guide to best practice in addressing the prostitution system, legislatively and beyond.

1. The criminalization of the purchase of sexual services, based on the Nordic model, as the most effective way of preventing and combating prostitution and trafficking. These measures should include making unlawful the related activities of pimping and keeping a brothel or similar premises, and making unlawful the advertising of sexual services, including disguised advertising for prostitution.

2. The establishment of counselling centres to provide women and men in prostitution with legal and health assistance, whatever their legal, refugee or migrant status. Such centres should be in addition to putting in place 'exit programs' for those who wish to leave prostitution. Exit programs must be based on a broad holistic approach comprising mental health and health-care services, housing support, education and training, and employment services. It should be mandatory for information on the human rights of those in prostitution, as well as contact details of exit programs and anti-trafficking services, to be clearly displayed in any establishments concerned with prostitution. The government should put in place specialist police units concerned with prostitution and trafficking, along the Swedish model, with adequate resources and training for law enforcement officials, the judiciary, social workers and public health professionals.

3. Raising public awareness of the need to change attitudes to the purchase of sexual services and to prostitution. Crucially, such efforts should increase awareness through the media and school education, particularly among children and young people, with regard to the importance of mutually respectful, gender-equal and violence-free sexuality and sexual practices.

4. The promotion of systematic quantitative and qualitative research on prostitution and trafficking within a human rights framework, with a mandate for independent and regular assessments of the impact of the regulation of prostitution on those persons who remain in the system.

5. As an immediate practical measure, and as part of research into prostitution and trafficking, this submission recommends that sustained consideration be given to the meaning and significance of consent in the law of sexual assault, such as to further protect women in prostitution from sexual assault, particularly by sex buyers and pimps. This proposal responds to the reliance on 'consent' in prostitution as a defence to assault charges against men for their actions against prostituted women. The rationale and form of this specific proposal were presented in a submission to the recent Commonwealth inquiry on consent, and the submission by Ms Simone Watson and me to the inquiry is attached as an appendix so as to provide a detailed explanation of this proposal.

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PLEASE NOTE: This submission does not represent the view of the University of New South Wales.

Appendix on Consent in Prostitution

Simone Watson & Helen Pringle: *Me Too? Leaving No Woman Behind in Addressing Sexual Assault*, Submission to the Senate Inquiry into current and proposed sexual consent laws in Australia, Senate Legal and Constitutional Affairs Committee

Simone Watson & Helen Pringle

ME TOO?
LEAVING NO WOMAN BEHIND IN ADDRESSING SEXUAL ASSAULT

Submission to the Senate Inquiry into current and proposed sexual consent laws in Australia

Senate Legal and Constitutional Affairs Committee

SIMONE WATSON

Ms Simone Watson is an Indigenous sex trade survivor, former human rights delegate for Amnesty International, and the convenor of the Nordic Model Australia Coalition (NorMAC). Ms Watson is based in Western Australia.

HELEN PRINGLE

Dr Helen Pringle is an Associate Professor in the School of Social Sciences at the University of New South Wales, Sydney, with long experience and deep expertise in research and teaching in the areas of human rights and discrimination against women. She is co-founder and co-convenor of the Nordic Model Information Network, a global alliance of researchers on prostitution and the sex industry, trafficking, and other forms of violence against women.

ACKNOWLEDGEMENT

We acknowledge that we live and work on unceded land, and here in particular we acknowledge the wrongs and sorrows of a long history of sexual violence and exploitation of Indigenous women which scars this land but is yet to be fully and truthfully understood as part of the Australian genocide.

22 March 2023

Introduction

We thank the Senate Legal and Constitutional Affairs Committee for the opportunity to make this submission to the Inquiry into current and proposed sexual consent laws in Australia.

With reference to the Inquiry Discussion Paper, our submission chiefly takes up the broad question of the uniformity of sexual assault laws throughout Australia, by noting the principles that should underlie provisions in different states and territories. The central recommendation of our submission is that the Committee take seriously the necessity of explicitly including prostitution in any consideration of the framework of sexual assault laws in Australia. This would involve understanding the prostitution system within a human rights framework, as a form of gender inequality, of violence and coercion against women in particular, and of sexual exploitation.

We are of course aware that this recommendation risks going a little beyond the terms of reference of the Committee for *this* inquiry. However, this submission takes that risk in a considered manner, on the basis that a more narrowly confined examination of consent as contemplated by the Committee leaves behind those women who are most at risk of systemic sexual assault, and who are most in danger of their wrong and injuries being ignored (and in many cases, even mocked). We argue that a comprehensive and systematic rethinking of sexual assault legislation in terms of human rights principles, particularly those of dignity and anti-discrimination, must address the question of consent and of coercion in prostitution.

In making this submission, we find much that is worthy of wider implementation in the recent (2022) changes to the NSW Crimes Act 1900,[1] in particular the provisions concerning 'affirmative consent'. However, we argue for a shift in the legislative *framing* of these provisions, so as to bring their interpretation into line with an overarching definition of sexual assault as

> **a violation of a sexual nature under circumstances of threat or use of force, fraud, coercion, abduction, or of the abuse of power, trust, or a position of dependency or vulnerability**

This definition is adapted from a proposal of Catharine MacKinnon, who draws on the language and reasoning of international law on sexual assault developed in the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court, as well as on the language of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol).[2]

We are in broad agreement with principles of mutual affirmative consent in addressing sexual assault, but we would argue that understanding and recognition of *free consent* should be not only a matter of actions and words (speech acts) between individuals. We must also acknowledge the 'background conditions' within which sexual power and preferences are formed, and in particular the way in which women as a class are marked as vulnerable and at risk, and in which some women are culturally and socially designated with the status of *legitimately* accessible to male sexual entitlement, that is, women in prostitution.

As noted in the Discussion Paper, the problem of sexual assault has been rapidly gaining national and international prominence. Along with women in movements including MeToo and LetHerSpeak, sex trade survivors have campaigned with women's rights campaigners for our voices to be given a central place in legislative contexts and considerations of consent and of sexual assault. Survivors of prostitution draw attention to the fictive character of the 'consent' that is often invoked as underlying prostitution.[3] Agreement on payment for sex can not be considered as *free consent*: it does not displace the coercive context of the prostitution system in which individual transactions take place. In the case of prostitution, money (or other forms of payment) form the initial and framing

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[1] Crimes Act 1900 (NSW), https://legislation.nsw.gov.au/view/html/inforce/current/act-1900-040.

[2] UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, https://treaties.un.org/Pages/ViewDetails.aspx?src=ind&mtdsg_no=XVIII-12-a&chapter=18&clang=_en.

[3] See for example Mia Döring, *Any Girl: A Memoir of Sexual Exploitation and Recovery* (2022); Rachel Moran, *Paid For: My Journey through Prostitution* (2015); Caroline Norma and Melinda Tankard Reist ed., *Prostitution Narratives: Stories of Survival in the Sex Trade* (2016); Rachel Lloyd, *Girls Like Us: Fighting for a World Where Girls are Not for Sale: A Memoir* (2012); Rebecca Bender, *In Pursuit of Love: One Woman's Journey from Trafficked to Triumphant* (2020).

coercive element. What is purchased in prostitution transactions is not sex or consent itself, but the temporary suspension of a woman's desire not to consent – and that is coercion.[4]

We view the problem of sexual consent achieved by payment, and in particular, payment within the (global) prostitution system, as a 'blind spot' in popular and academic discussions of sexual consent. We argue that a system of payment for sex constructs a framework of coercion and constraint, which vitiates not only particular individual expressions of 'consent', but the very conditions of free consent. This form of systemic coercion is exacerbated by the highly gendered structure of the prostitution system, as a network of asymmetrical relationships between prostituted women, and buyers and pimps: on the one hand, the extreme vulnerability of women, with on the other hand a heightened form of male entitlement to access women's bodies. A discussion of sexual consent that does not comprehensively include the prostitution system in its deliberations remains seriously incomplete.

We acknowledge that there is a widespread cultural illusion of the distinctness of sex in prostitution from 'normal' sex, which both reflects and reinforces the illusion of the distinctness of women in prostitution from 'other' women. We refuse to embed such a distinction into consideration of the legal or cultural status of sexual assault. This distinction would mean leaving behind those women most vulnerable to sexual assault, that is, those vulnerable to continual and approved systemic rape in prostitution.

We understand that a change in law cannot singlehandedly or immediately transform entrenched social, cultural and economic practices and institutions. However, we understand law as not only punitive, but also as permissive (particularly in terms of permitting and approving certain categories of entitlement). Law is also a form of (sex) education: the words of legislation, the conduct of trials and the words of judges convey ideas about love and justice which powerfully shape our perspectives and values of what is acceptable and reasonable in our intimate lives.[5] Throughout this submission, we rely on human rights perspectives and treaties, with a central focus on the dignity of the person and her claims to equal enjoyment of the world and its benefits, as guiding our proposal.

On this basis, our **recommendations** to the Committee are twofold:

1. An explicit clarification in all legal statements on sexual assault that a person accused of sexual assault or rape[6] cannot rely on a consent achieved by payment of a monetary sum, or in the course of a commercial transaction, as a defence

2. An explicit legal formulation of a civil action for sexual assault committed in the context of the prostitution system and associated forms of exploitation, whether involving direct commission or complicity in the act. This proposal takes as its model the Illinois Predator Accountability Act.[7]

We welcome an opportunity to provide more details on the experiences and research that underlie this submission in evidence to the Committee We also urge the Committee to hear evidence from survivors of the prostitution system, and indeed recommend that the Committee invite such evidence as a matter of signal importance to its deliberations on consent and sexual assault.

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[4] Simone Watson, Open Letter to Amnesty International (2014). Also see "'Prostitution: We Don't Buy It" Campaign Launch by Jill Meagher's Husband Tom', https://www.independent.ie/videos/irish-news/video-archive-prostitution-we-dont-buy-it-campaign-launch-by-jill-meaghers-husband-tom-31163021.html.

[5] See Helen Pringle, 'Acting Like a Man: Seduction and Rape in the Law', *Griffith Law Review* 2.1 (1993) 64-74.

[6] We prefer to use the term 'sexual assault' because it catches a wider range of sexual violation than penile penetration, an over-narrow definition that figures in many conventional and some legal understandings of the term 'rape'

[7] Illinois General Assembly, 740 ILCS 128/ Predator Accountability Act, http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2812&ChapterID=57. Please see other references to the Act noted below.

Sexual Assault: A Crime of Sex Inequality and Discrimination

We believe that the recent (2022) changes to the NSW Crimes Act sections on sexual assault[8] provide a solid working model on which to build. These changes are clarified in the Act by a statement of their objective, in the following terms:

> An objective of this Subdivision is to recognise the following—
>
> (a) every person has a right to choose whether or not to participate in a sexual activity,
>
> (b) consent to a sexual activity is not to be presumed,
>
> (c) consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.[9]

Making explicit in this way the objective of the law on sexual assault is important in setting out its values and boundaries. We note briefly in passing that 'ongoing and mutual communication' cannot *by definition* be accomplished (or even be a possibility) where a partner to the act is unconscious, even if made so by a preceding act of mutual agreement. But we caution that sustaining the conditions of 'ongoing and mutual communication' does not require 'enthusiasm': we do not believe that it is the role of law to investigate and monitor levels of enthusiasm in sexual acts, and believe it is a fundamental mistake to require this of sexual partners, or to use it as another way of speaking about affirmative consent.[10]

However, we believe that the stated objective in the NSW Crimes Act significantly displaces recognition that sexual assault is most appropriately defined in terms of acts or a context of *coercion*, which might include not only brute force but other factors that make impossible equality and mutuality in sexual or intimate relationships. We believe that the basic objective must include an outline of sexual assault as, in the terms noted above:

> **a violation of a sexual nature under circumstances of threat or use of force, fraud, coercion, abduction, or of the abuse of power, trust, or a position of dependency or vulnerability[11]**

This formulation of what constitutes sexual assault draws on the reasoning of international legal forums in deliberations on prosecutions in this area. For example, the pivotal Rwanda case of *Akayesu* (1998) defined rape in international law as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive', where coercion was explained in this way: 'Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances.'[12]

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[8] See Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021 (NSW), 3.10.1A, https://legislation.nsw.gov.au/view/html/inforce/current/act-1900-040#pt.3-div.10-sdiv.1A, now in *Crimes Act,* Subdivision 1A Consent and knowledge of consent, 61HF.

[9] Crimes Act 1900 (NSW), https://legislation.nsw.gov.au/view/html/inforce/current/act-1900-040#pt.3-div.10-sdiv.1A.

[10] See the short discussions at ABC, 'Enthusiastic Consent': What Is It, How Do You Prove It, and Will it Work in Court?' (8 May 2018), https://www.abc.net.au/triplej/programs/hack/how-do-you-prove-enthusiastic-consent-in-court/9740214, and University of Sydney, 'What Enthusiastic Consent Actually Looks Like: If It's Not an Enthusiastic Yes, It's a No' (21 September 2022), https://www.sydney.edu.au/study/why-choose-sydney/student-life/student-news/2022/09/21/what-enthusiastic-consent-actually-looks-like-.html.

[11] See Catharine A. MacKinnon, 'Rape Redefined', *Harvard Law & Policy Review* 10 (2016) 431-477, 432, where the formulation reads: 'a physical invasion of a sexual nature under circumstances of threat or use of force, fraud, coercion, abduction, or of the abuse of power, trust, or a position of dependency or vulnerability'. In our view, sexual assault need not involve 'invasion': see the incidents taken up in *The Prosecutor v Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para. 429, https://www.refworld.org/cases,ICTR,40278fbb4.html, and *The Prosecutor v Mikaeli Muhimana*, ICTR-95-1B-T, International Criminal Tribunal for Rwanda (ICTR), 28 April 2005, paras. 32, 65, https://www.refworld.org/cases,ICTR,429c29694.html. Although the reasoning in the *Akayesu* decision does not confine the term 'invasion' to penetration, we see the use of 'invasion' as potentially misleading in popular discussions of sexual assault, perhaps entailing non-cognisance of various acts of sexual violation.

[12] *The Prosecutor v Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, paras. 598 and 688, https://www.refworld.org/cases,ICTR,40278fbb4.html, and discussed in MacKinnon,

Please note that we are not, of course, referring to cases in international law as binding precedents in Australian domestic law. Rather, as the leading thinking on questions of sexual assault, these cases provide valuable and insightful guidance as to how to understand the respective salience of coercion and of consent in sexual relationships.

The point we draw from the guidance provided by sexual assault cases in international law is not a denial of the importance of consent. Rather, we wish to draw attention to the way in which a *context* of inequality of standing in sexual encounters is mobilised such as to make those encounters themselves into occasions for the further unfolding of inequality in the absence of mutuality. That is, a form of *sex discrimination* is constructed, in the sense given to that term by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW):

> For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil *or any other field* [emphasis added].[13]

The understanding of 'discrimination' set out in CEDAW is perhaps not how discrimination is usually understood in popular and media forums, but it does fit an appropriate understanding of sexual assault as an action 'which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women,… on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'. General Recommendation No. 19 of the Committee on the Elimination of Discrimination against Women further succinctly explains: 'The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately.'[14]

The Declaration on the Elimination of Violence against Women sets out what counts as violence in such contexts of discrimination against women as members of the class of women:

> For the purposes of this Declaration, the term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.[15]

That is, the Declaration understand 'violence' in terms of what it *does* to women and to women's lives, rather than being a word to name specific (physical) actions against individuals such as punching, choking etc.

In summary, we believe that the approach in international law of emphasising a context of coercion rather than an examination for the presence or absence of consent as defining and addressing sexual assault offences is best practice. The presence of consent as ascertained through mutual affirmation may serve as *evidence* of whether a coercive context exists in regard to particular incidents, and hence of whether an act was an expression of inequality and/or exemplar of discrimination. The presence of consent may also serve in some limited circumstances as a defence to a charge of sexual assault. In other words, it is the existence of coercion (which may or may not include brute force) rather than the non-communication of mutual consent that is best understood as definitional of the

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'Rape Redefined', 469-470. The discussion of Alison Cole, '*Prosecutor* v. *Gacumbitsi:* The New Definition for Prosecuting Rape under International Law', *International Criminal Law Review* 8 (2008) 55–86, provides a useful summary of some unresolved problems in regard to question of the salience of consent in sexual assault cases in international law.

[13] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, U.N.T.S., vol. 1249, p. 13, Article 1, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=_en.

[14] UN Committee on the Elimination of Discrimination Against Women, CEDAW General Recommendation No. 19: Violence against Women, ¶6, U.N. Doc. CEDAW/C 1992/L.1/Add.15 (1992), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCEDAW%2FGEC%2F3731&Lang=en.

[15] UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104, https://digitallibrary.un.org/record/179739?ln=en.

offence. Our attention in these matters should focus directly on elements of coercion as the overall framework for understanding sexual assault.

Prostitution and Sexual Assault: Disqualifying Reliance on Consent

The new NSW sexual assault provisions include (section 61HJ) a list of 'circumstances in which there is no consent', circumstances indicating coercion, deception, and inequality in trust, dependence, authority etc. Section 61HJ (2) adds, 'This section does not limit the grounds on which it may be established that a person does not consent to a sexual activity.' If the prostitution system is understood as a framework of coercion, it is conceivable that a reliance on consent achieved by payment could be disqualified under this provision. We believe, however, that *explicit* reference should be made in the law on sexual assault that a further ground on which it may be established that a person does not consent to a sexual activity is where payment is made in consideration of acts within the prostitution system.

The Preamble to the 1949 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* (which Australia has not – yet – signed or ratified)[16] notes that 'Prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person'. Payment for sex is itself a form of constraint, indeed of coercion. In this situation, the payment is not for a specific good or a service, but rather a payment for suspension of the women's desire *not to consent*. This form of systemic coercion is exacerbated by the gendered nature of the prostitution system and the fundamental inequality and asymmetry of prostitution relationships and of the system itself, placing an inequitable burden of vulnerability on women. This portrait of the prostitution system outlined by the 1949 Convention is echoed in global trafficking instruments such as the Palermo Protoocol, which notes:

> For the purposes of this Protocol:
>
> (a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, *by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation* [emphasis added]. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
>
> (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;…[17]

The provision explicitly disallows reliance on the consent of a person achieved by payment as a defence to a charge of trafficking.

We should note there that we recognise that many discussions of trafficking proceed on the basis that there is bright line between trafficking and prostitution, with trafficking defined in terms of physical force (eg women handcuffed to beds) and/or fraud (eg women induced into trafficking by false or misleading promises). Such a distinction between trafficking and prostitution cannot be maintained as a notation of reality. Trafficking across borders of women into brothels, for example, acts as a feeder system into prostitution in national states. Moreover, the element of crossing national borders is not maintained in the Australian legal understanding of trafficking. The Commonwealth Criminal Code includes 'domestic trafficking' in its provisions on Trafficking in Persons, covering

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[16] UN General Assembly, *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, A/RES/317, Article 3, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-11-a&chapter=7&clang=_en.

[17] UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, Artucle 3, https://treaties.un.org/Pages/ViewDetails.aspx?src=ind&mtdsg_no=XVIII-12-a&chapter=18&clang=_en.

movement across state borders within Australia.[18] In this case, consent cannot be relied upon as a defence.[19] Moreover, throughout this section, 'coercion' is to be given the same meaning as in Division 270 (Slavery and slavery-like offences), where the term includes coercion by any of the following: force; duress; detention; psychological oppression; abuse of power; taking advantage of a person's vulnerability.

Our claim is that prostitution as a system of violence and exploitation is not only connected to trafficking empirically on the ground. The global prostitution system also exhibits common features of coercion that should lead us to address it in largely similar terms as trafficking, in particular, that consent should not be permissible as a defence where cocerion includes such features. This position is supported by a wide variety of women's organizations around the world, who draw attention to the wrong of prostitution as a human rights violation like trafficking. The distinctiveness of this approach is the framework of human rights in which it is centred, as marked by close adherence to the principles and text of particular human rights instruments, and by upholding the central principle or value of the *dignity* of the person that is the chief animator of human rights talk and action.

These principles and commitments are the basis of the 'Nordic model' endorsed by resolutions of the peak European parliamentary bodies in 2014, the European Parliament[20] and the Parliamentary Assembly of the Council of Europe.[21] It is crucial to note here that such a position on prostitution was is *not* grounded in a moralistic approach, or in any kind of hostility to women in the prostitution system. Nor is our position based on considerations about maintaining 'public order' in the face of an asserted 'nuisance' of prostitution. Our common concern continues to be with the human rights of women, in protecting the dignity of *all* women equally, and bringing an end to all forms of the subordination and degradation of women.

We recognise that defenders and beneficiaries of the prostitution industry commonly portray prostitution as a relationship between individuals, in which one person provides sexual services (or performs 'sex work') to another person in exchange for money. Portraying prostitution as a series of such individual, and un-gendered, transactions is a fundamental misunderstanding of the historical and current organization of prostitution. Prostitution is a *system* that includes not only sellers ('sex workers') but crucially, buyers, as well as pimps and other beneficiaries of the industry (particularly through its close links with the pornography industry). The prostitution system is also deeply and fundamentally gendered, with the majority of buyers being men, and the majority of those from whom sex is bought being women and girls. An attempt to consider consent to prostitution outside a full understanding of prostitution as a *system* fails to comprehend the inequality and subordination, violence and exploitation lying at its foundation.

Closely linked to a defence of prostitution as a series of individual transactions is the emphasis placed by its defenders on women's 'choices' in the industry. Women's choices (ie the 'choices' of 'sex workers') are unquestionably important, but they do not form the driver of the prostitution industry, just as they do not form the foundation of trafficking. Prostitution as a social institution is driven by (male) *demand*, that is, the choices that men make in choosing to buy sex and the bodies of women. We now know a great deal about the character of those choices through what are sometimes called 'punter sites', on which sex buyers review brothels and the women with whom they have had a paid relation. Even in the course of 'ordinary' transactions, those choices are brutal. The Invisible Men Project, for example, collates reports from these sites, providing a chilling picture of the reality

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[18] Criminal Code Act 1995 (Cth), Division 271, https://www.legislation.gov.au/Details/C2021C00183/Html/Volume_2. Section 271.11 (Jurisdictional requirements—offences of domestic trafficking in persons or organs) clarifies the reach of the the term 'domestic trafficking'.

[19] See Criminal Code Act 1995 (Cth), 271.11B (Offences against Division 271—no defence of victim consent or acquiescence): 'To avoid doubt, it is not a defence in a proceeding for an offence against this Division that a person against whom the offence is alleged to have been committed consented to, or acquiesced in, conduct constituting any element of the offence.'

[20] European Parliament Resolution of 26 February 2014, Sexual Exploitation and Prostitution and its Impact on Gender Equality, https://www.europarl.europa.eu/doceo/document/TA-7-2014-0162_EN.html?redirect, based on European Parliament Report of 4 February 2014, on Sexual Exploitation and Prostitution and its Impact on Gender Equality, https://www.europarl.europa.eu/doceo/document/A-7-2014-0071_EN.html?redirect.

[21] Parliamentary Assembly of the Council of Europe [PACE] Resolution 1983 of 8 April 2014, Prostitution, Trafficking and Modern Slavery in Europe, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20716, based on PACE Report of 26 April 2012, on Prostitution, Trafficking and Modern Slavery in Europe, https://pace.coe.int/en/files/20559.

for most prostituted women: a reality of violence, desperation, subordination and despair.[22] The main danger to women in prostitution comes from those who prostitute them, and/or who financially and in other ways benefit from their prostitution and the trauma it perpetuates throughout the lives of women.

In 2014, the Parliamentary Assembly of the Council of Europe [PACE] passed a resolution on Prostitution, Trafficking and Modern Slavery in Europe (Resolution 1983) on the basis of a Report prepared by the PACE Committee on Equality and Non-Discrimination, noting: 'Forced prostitution and sexual exploitation should be considered as violations of human dignity and, as women are disproportionately represented among victims, as an obstacle to gender equality'.[23] The 2014 European Parliament Resolution on Sexual Exploitation and Prostitution and its Impact on Gender Equality was made on the agreed basis that 'prostitution and forced prostitution are forms of slavery incompatible with human dignity and fundamental human rights'.[24]

Both the European Parliament and PACE resolutions draw attention to the violence of exploitation in prostitution and trafficking. It is for this reason that the PACE resolution in particular notes that sex worker organizations are not the sole stakeholders in considering measures that address prostitution in one way or another. The PACE resolution notes, 'In designing and enforcing prostitution legislation and policies, public authorities should strengthen co-operation with civil society, particularly non-governmental organisations (NGOs), assisting victims of forced prostitution and trafficking, as these are not represented by sex workers' organisations'.[25] Consultation with *survivors* of the prostitution system is crucial to any project for its reform and to any specific reform options advanced, as well as to the implementation and monitoring of such measures.

The current regulatory framework of the prostitution industry in Australia is a patchwork of legislation that includes criminal law and codes, summary offences legislation, as well as other generally applicable law. There has been little attempt to address prostitution within a framework of human rights and human dignity. We believe that our recommendation to disqualify reliance on consent as a defence in sexual assault in prostitution would go some way to do this through legislative reform. Our proposal also has the potential to remove disincentives to reporting by individual women of sexual assault in the ordinary course of prostitution, which is endemic, as noted in a classic study by pro 'sex work' researchers of street prostitution in the Greater Sydney: 'Given that current PTSD among these women is related to adult sexual assault (which was reported as the most prevalent and most stressful trauma), establishing a safe environment and minimising their ongoing exposure to trauma would entail leaving the sex industry, where occupationally they are at risk of sexual assault on a daily basis.'[26]

Conclusion: Specific Recommendations for Reform of Sexual Assault Law

This submission recommends the following proposals for reform in relation to consent, and for the plan on the law on sexual assault action.[27] We make specific legislative proposals, but they would also serve to raise public awareness of the need to change actions and attitudes to the purchase of sexual services and to prostitution. We

[22] The Invisible Men Project, https://the-invisible-men.tumblr.com/. For the Australian context, see Natalie Jovanoski and Meagan Tyler, '"Bitch, You Got What You Deserved!": Violation and Violence in Sex Buyer Reviews of Legal Brothels', *Violence against Women* 24.16 (2018) 1887-1908; Meagan Tyler and Natalie Jovanovski, 'The Limits of Ethical Consumption in the Sex Industry: An Analysis of Online Brothel Reviews', *Women's Studies International Forum* 66 (2018) 9-16.
[23] PACE Resolution 1983 of 8 April 2014, Prostitution, Trafficking and Modern Slavery in Europe, ¶6, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20716.
[24] European Parliament Resolution of 26 February 2014, Sexual Exploitation and Prostitution and its Impact on Gender Equality, s. B, https://www.europarl.europa.eu/doceo/document/TA-7-2014-0162_EN.html?redirect.
[25] PACE Resolution 1983 of 8 April 2014, Prostitution, Trafficking and Modern Slavery in Europe, ¶10, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20716.
[26] Amanda Roxburgh, Louisa Degenhardt and Jan Copeland, 'Posttraumatic Stress Disorder among Female Street-Based Sex Workers in the Greater Sydney Area, Australia', *BMC Psychiatry* 6 (2006), https://bmcpsychiatry.biomedcentral.com/articles/10.1186/1471-244X-6-24.
[27] Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022-2027, https://www.ag.gov.au/system/files/2022-08/MAG-work-plan-strengthen-criminal-justice-responses-to-sexual-assault-2022-2027.pdf.

do not have to wait for attitudes to change before actions change. Crucially, such public educative efforts via the law have the potential to raise general awareness with regard to the importance of mutually respectful, gender-equal and violence-free sexuality and sexual practices.

It can sometimes be difficult to understand prostitution *as* coercion, even despite the high incidence of acts of violence in the 'normal' course of prostitution transactions being well-known. There is a general cultural consensus in Australia (and elsewhere) that payment for sex presents no general barrier to recognising the presence of consent, or indeed the presence of mutual affirmative consent. This understanding is held across the board. It is not a left-right issue.

This cultural 'blind spot' in understanding the prostitution system as coercive can be deadly for women in prostitution. An illustrative case is that of Henry Jiang.[28] Mr Jiang was a real estate agent who broke into a vacant house and paid an escort agency for a women to come there. At the end of the hour, in which Mr Jiang experienced sexual incapacity, the woman made to leave, but was blocked by Jiang, who put a sponge in her mouth and bound her across the face and by the hands with electrical cable. The woman alleged that Jiang then vaginally, anally and digitally anally raped her, performed unprotected oral sex on her, and indecently assaulted her. She finally escaped without her clothes, with the police having to use bolt cutters to release her bound hands. The Magistrate refused bail to Jiang on the basis of what he characterised as 'sustained torture' and 'brutal rape'. Jiang's defence was that there was consent to the whole encounter. The jury acquitted him on seven charges of false imprisonment and sexual assault. Jiang pleaded guilty to a separate charge of theft, in the course of a dispute over drugs, of a small amount of money and the woman's mobile; the judge suggested that the jury members in the previous case had seemingly made their decision on the apparent basis that Jiang had paid for the woman, and that he was within his rights in seeking the completion of their mutual agreement.

In such cases, and particularly where there is a history of repeated violation of women in prostitution (a notorious recent example being Adrian Bayley, who murdered Jill Meagher),[29] the context of coercion should disqualify prima facie any reliance on consent in answer to the charge, but also severely truncates any possibility of the withdrawal of 'consent'. Our first recommendation is as follows:

> **An explicit clarification in all legal statements on sexual assault that a person accused of sexual assault or rape cannot rely on a consent achieved by payment of a monetary sum, or in the course of a commercial transaction, as a defence**

In order to give 'teeth' to this provision, we recommend that a civil action be enabled for sexual assault and abuse in the context of prostitution:

> **An explicit legal formulation of a civil action for sexual assault committed in the context of the prostitution system and associated forms of exploitation, whether involving direct commission or complicity in the act.**

This provision might seem in some way superfluous if there is an effective and enforced law on sexual assault on the ground of coercion. However, this recommendation represents a response to *aggravated* sexual assault, relating to the systemic and organised character of sexual assault both in the course of prostitution, and incidental to it. The enabling of such a cause of civil action was pioneered by the Illinois Predator Accountability Act of 2006,[30] allowing 'persons who have been or who are subjected to the sex trade to seek civil damages', with the 'sex trade' being defined widely so as to include soliciting a woman in prostitution, pandering, keeping a place of prostitution,

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[28] *DPP v Jiang* [2016] VCC 494 (26 April 2016), https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCC/2016/494.html.

[29] See *The Queen v Bayley* [2013] VSC 313 (19 June 2013), www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSC/2013/313.html.

[30] Illinois General Assembly, 740 ILCS 128/ Predator Accountability Act, http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2812&ChapterID=57. For further discussion of the Act, and the obstacles to its wider use, see Samir Goswami, 'From Street Corner to Statehouse: Survivors' Struggle for Civil Rights' in *Global Perspectives on Prostitution and Sex Trafficking: Europe, Latin America, North America, and Global* ed. Rochelle L. Dalla et al. (2011); Shay-Ann M. Heiser Singh, 'The Predator Accountability Act: Empowering Women in Prostitution to Pursue their own Justice', *DePaul Law Review* 56 (2007) 1035-1063; and the shorter account in Christopher P. Keleher, 'The Illinois Predator Accountability Act: A Sleeping Giant', *Illinois Bar Journal* 98.11 (November 2010), https://amicuscreative.com/global_pictures/1123/Predator_Accountability_Act_Article.pdf.

pimping, obscenity, trafficking over the areas of street prostitution, pornography, escort services, and massage parlours and brothels.

Neither of our recommendation are punitive of women in prostitution. It is our view that prostitution is not a victimless crime, and that it would be unjust and at odds with human rights principles to punish those who are its victims and who suffer its wrong and injuries often throughout the rest of their lives.

Finally, our proposals in tandem would serve as a reminder to popular culture and the media that sexual assault of women in coercive circumstances is not to be mitigated by reference to her ostensible consent. An expression of consent born of vulnerability, powerlessness, of poverty does not indicate the free consent of citizens in a democracy. If we as a society and culture continue to fail to comprehend this, we ensure that some women are left behind. And we thereby ensure that it is no great matter that they are left behind, and that not all women have a human right to the enjoyment of the world on equal terms with other women, and with men.

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