

# Prostitution and Other Acts Amendment Bill 2009

## Explanatory Notes

### General Outline

#### Short Title

The short title of the Bill is the Prostitution and Other Acts Amendment Bill 2009.

#### Objective of the Legislation

The objective of the legislation is to amend the *Prostitution Act 1999* (the Act) to create a framework to regulate the manner in which social escort services can advertise for business and the Criminal Code to create new offences for carrying on the business of enabling illegal prostitution.

#### Reasons for the Bill

In October 2006, the Crime and Misconduct Commission (CMC) released its report on the viability of legalising outcall prostitution services in Queensland, *Regulating Outcall Prostitution: should legal outcall prostitution services be extended to licensed brothels and independent escort agencies?* (the outcall prostitution report). This report was prepared in response to recommendation 23 of the 2004 CMC report *Regulating prostitution: an evaluation of the Prostitution Act 1999 (Qld)* (the regulating prostitution report). The regulating prostitution report concluded that Queensland has a safe and effective legal brothel industry with no evidence of corruption or organised crime, but considered that it had insufficient information to determine whether outcall or escort prostitution services should be legalised. Recommendation 23 called for an extended review by the CMC to examine this issue, in the context of considerable demand for legalisation from the legal sex industry.

Whilst the CMC ultimately recommended against the legalisation of outcall prostitution services, 23 recommendations were made aimed at

ensuring the legal sex industry's continued viability and reducing incentives for an illegal industry. The recommendations can be divided into four general categories:

- prohibiting outcall prostitution other than for sole operators;
- advertising restrictions for social escort services;
- prosecuting illegal operators and seeking asset confiscation; and
- enhancing the safety of sole operators.

Of the 23 recommendations, the Bill implements 16 through amendments to the *Prostitution Act 1999* (the Act), Queensland Criminal Code and the *Child Employment Act 2006*. The amendments to the Act will create a framework to regulate the manner in which social escort services advertise for business and amendments to the Criminal Code will create offences for social escort providers found to be carrying on a business of enabling illegal prostitution and create exceptions to offences to enhance the safety of sole operators.

### **Achievement of the Objective**

The legislation will amend the Act to:

- create a regulation making power to regulate the advertising of social escorts and social escort services;
- prohibit any advertisements for social escorts that do not contain the words 'non-sexual' or 'sexual services are not provided', unequivocally displayed in the advertisement;
- ensure restrictions apply to social escort advertising for any publication that circulates in Queensland, whether or not it is published in Queensland, and whether or not the business is based in Queensland;
- provide that an advertisement published in relation to a social escort service is evidence that the person who was carrying on the business published the advertisement;
- provide a maximum penalty of 10 times the advertising cost of the advertisement for breaching social escort advertising provisions;
- increase the maximum penalty for breaching section 93 (Advertising prostitution) to 10 times the advertising cost of the advertisement;

- impose an obligation on social escort providers to inform prospective clients that prostitution services are not provided; and
- clarify that the advertising restrictions apply to a prostitution advertisement 'however described'.

The legislation will amend the *Child Employment Act* to:

create a new offence which provides that an employer must not require or permit a child under 18 years of age to work as a social escort.

The legislation will amend the Criminal Code to:

- create a new offence of 'Carry on a business of providing unlawful prostitution' with respect to a person who knowingly carries on a business that provides prostitution by two or more prostitutes. The new offence carries a maximum penalty of seven years imprisonment and therefore satisfies the definition of 'serious crime' under the *Criminal Proceeds Confiscation Act 2002*, thus enabling the assets of illegal prostitution providers to be confiscated;
- include provisions to:
  - create an offence for a person who, without reasonable excuse, obtains prostitution through a business suspected on reasonable grounds of providing unlawful prostitution as well as an offence for any sex worker in such an enterprise; and
  - allow such clients and sex workers to obtain a certificate of discharge in return for evidence that can be used against a person carrying on an illegal prostitution enterprise;
- create a new evidentiary provision to provide that whilst the carrying on of the business of prostitution may be inferred from particular evidence obtained through an investigation; condoms and other material for safe sex practices are excluded;
- amend section 228H (Knowingly participate in the provision of prostitution) of the Criminal Code to:
  - clarify that a person who receives an advisory message or communication about a sex worker's location and activity does not commit an offence; and
  - allow the holder of a crowd controller's licence issued under the *Security Providers Act 1993* to be employed as a driver for a sole operator

## **Alternative Means of Achieving Policy Objectives**

There are no alternative means of achieving the policy objectives other than by legislative reform.

## **Estimated Cost for Government Implementation**

Any increase will be addressed through existing budgets or, if necessary, future budget processes.

## **Consistency with Fundamental Legislative Principles**

### *Reversal of onus of proof.*

The proposed new section 96B(3) of the Act, reverses the onus of proof by providing that a social escort provider commits an offence if a prospective client is not told by an employee of a social escort service or social escort that the service does not include prostitution.

The obligation to clearly inform is complementary to the proposed advertising restrictions and will have no impact on the activities of legitimate social escort providers who currently inform prospective clients that sexual services are not provided. Introducing an offence provision for not clearly informing creates a disincentive for illegal prostitution providers and reduces the attractiveness of advertising illegal prostitution as social escorts. Additionally, police investigating illegal prostitution will be better able to distinguish those who are presenting themselves as legitimate social escort providers and those who are not.

To balance the new offence provisions, a defence is available for social escort providers where it can be proven the offence was committed without the knowledge of the social escort provider and that despite all reasonable precautions the commission of the offence could not have reasonably been prevented.

### *Restrictions on Freedom of Speech*

The submission restricts free speech by imposing advertising regulations on a legal industry. Social escorts and social escort services will be restricted in the manner in which they advertise, closing a loophole that allows illegal prostitution providers to advertise as social escorts. Research undertaken by the CMC in the outcall prostitution report revealed that the small number of legitimate social escort providers already comply with the proposals contained in the Submission. Further, illegal prostitution

providers who publish provocative advertisements to give the appearance of advertisements for prostitution impact upon the continued viability of the legal prostitution industry.

*Penalties of appropriate levels*

New section 229HC creates offences which will apply to the sex workers and clients of an unlawful prostitution enterprise. The offences are based on 'reasonable suspicion'. The penalties and inclusion of the element of 'reasonable suspicion' are justified to ensure consistency with existing section 229I which provides an offence for a person found in a place reasonably suspected of being used for prostitution.

*Immunity from proceeding or prosecution*

The Bill confers immunity from prosecution. Clause 18 of the Bill extends the current certificate of discharge provisions contained in section 229J of the Criminal Code. Sex workers and clients who engage in or obtain prostitution through an unlawful prostitution business may obtain a certificate of discharge in return for evidence that can be used against the person carrying on the business. Such an extension of section 229J is justified to facilitate the identification and prosecution of those ultimately controlling unlawful prostitution enterprises.

## **Consultation conducted in Development of the Bill**

The following government departments were consulted during the preparation of the Bill:

- Department of Child Safety;
- Department of Communities and Disability Services;
- Department of Community Safety;
- Department of Emergency Services;
- Department of Employment and Industrial Services;
- Department of Infrastructure and Planning;
- Department of the Premier and Cabinet;
- Queensland Health;
- Queensland Treasury.

Consultation was also undertaken with the Prostitution Licensing Authority.

A consultation draft of the Criminal Code provisions was given to the:

- President of the Court of Appeal;
- Chief Justice
- Chief Judge;
- Chief Magistrate;
- Legal Aid Queensland;
- Office of the Director of Public Prosecutions
- Queensland Council for Civil Liberties;
- Queensland Law Society;
- Bar Association of Queensland; and
- Crime and Misconduct Commission

## **Notes On Provisions**

### **Part 1                      Preliminary**

#### **Short Title**

Clause 1 specifies the short title of the Bill.

#### **Commencement**

Clause 2 provides that Part 2 of the Bill commences on a day to be fixed by proclamation. Part 3 will commence upon assent of the Bill.

## **Part 2                      Amendment of Prostitution Act 1999**

### **Act Amended**

Clause 3 specifies that part 2 amends the *Prostitution Act 1999*.

### **Insertion of new subdivision 1 heading for part 6, division 4**

Clause 4 inserts a new subdivision and heading for definitions used for Division 4 advertising offences.

### **Amendment of s 92 (Definitions for division 4)**

Clause 5 amends the definition of publish under section 92 to include the publishing of advertisements on the internet, whether or not the source of the internet publication is located in Queensland.

### **Insertion of new subdivision 2 heading for part 6, division 4**

Clause 6 inserts a new subdivision and heading for advertising offences relating to prostitution.

### **Amendment of s 93 (Advertising prostitution)**

Clause 7 of the Bill amends section 93 of the Act which provides an offence for a person who publishes an advertisement for prostitution where the advertisement:

- describes the services offered;
- is not in the approved form; or
- is published through radio, television, film or video recording.

Clause 7(1) omits the current penalties associated with advertising breaches under section 93 and creates a new penalty provision for subsections (1) - (3) which includes:

- publishing an advertisement through an internet website established for an advertisement; and
- publishing an advertisement through any other means.

A person will be deemed to have published an advertisement through an internet website established for an advertisement, where that person has established a website that is an advertisement for a prostitution service or a social escort service. This provision is not meant to capture a person who attaches an advertisement for prostitution or social escort services to external website. This will be captured under the second tier of the penalty 'publishing an advertisement through any other means'.

The penalty provisions have been amended to take into account the actual costs associated with establishing a website or publishing an advertisement in another manner. Where the cost of publishing the advertisement is \$1000 or less the maximum penalty will remain at the current 70 penalty units (\$7000). However, where the cost of publishing is greater than \$1000 the maximum penalty has been increased to 10 times the commercial cost of establishing the internet website that is the advertisement or 10 times the cost of publishing the advertisement in another manner.

Clause 7(2) relocates the definition for 'approved form' to section 92 (definitions).

Clause 7(3) removes section 93(4) which is made redundant by relocation of 'approved form' to section 92.

### **Insertion of new subdivision 3 (Advertising offences relating to social escort services) and new sections 96A-96C**

Clause 8 creates a new subdivision to provide for advertising offences relating to social escort services through new sections 96A – 96C.

#### **96A (Advertising social escort services)**

The new section 96A(1) provides that a person must not publish an advertisement for social escort services unless the advertisement contains the words 'non sexual' or 'sexual services are not provided'.

96A(2) provides that a person must not publish an advertisement for a social escort service unless it is in the approved form.

New penalty provisions associated with a breach of section 96A have been tiered to take into account the actual costs associated with establishing an internet website for an advertisement or publishing an advertisement through any other means. Where the cost of publishing is \$1000 or less the maximum penalty remains at the current 70 penalty units. Where the cost of publishing is greater than \$1000 the maximum penalty has been

increased to 10 times the commercial cost of establishing the internet website for an advertisement or 10 times the cost of publishing the advertisement where the advertisement is published through any other means.

### **96B (Clients of social escort services to be informed that prostitution is not provided)**

The new section 96B creates new offences for social escorts, employees of social escort providers and social escort providers who do not clearly inform clients or prospective clients that the social escort service does not provide prostitution

Section 96B(1) provides that an employee of a social escort provider must not arrange a social escort service unless the employee has clearly informed the client that prostitution is not provided. The maximum penalty for failing to inform under this provision is 70 penalty units.

Section 96B(2) provides that a social escort must not provide a social escort service unless the social escort has clearly informed the client that prostitution is not provided. The maximum penalty for failing to inform under this provision is 70 penalty units.

Section 96B(3) creates an offence for a social escort provider to arrange for the provision of a social escort or provide a social escort without either an employee of the social escort service, the social escort or social escort provider clearly informing the client that prostitution is not provided as part of the social escort service. The maximum penalty for failing to inform under this provision is 70 penalty units

Section 96B (4) creates a defence for social escort providers who can prove that not only were appropriate instructions regarding the obligation to inform provided to employees of the social escort service and social escorts, that all reasonable precautions were taken to ensure employees were aware of that obligation. Furthermore the social escort provider must show that the offence was committed without the provider's knowledge and that despite reasonable due diligence the provider could not have prevented the commission of the offence.

Subsection (5) defines 'arrange' for the purposes of section 96B as 'to enter into an arrangement of a commercial character'.

### **96C (Evidentiary provision)**

96C creates a new provision which allows for an advertisement or statement that has been published in relation to a social escort service to be considered evidence of carrying on a business of a social escort service. This provision mirrors the current evidentiary provision under section 96 of the Act which applies specifically to the advertising of licensed brothels.

### **Amendment of s 139 (Approval of forms)**

Clause 9 amends section 139(2) of the Act to allow the Prostitution Licensing Authority to approve forms relating to the advertising of social escort services in the same manner as it currently does for the advertising of legal brothels.

### **Amendment to s 139A (Guidelines)**

Clause 10 amends section 139A, subsections (1) and (2) to provide that advertising guidelines issued by the Prostitution Licensing Authority and the manner in which those guidelines are copied, kept or amended will apply equally to social escort services as they do to prostitution.

### **Amendment of s 140 (Regulation-making power)**

Clause 11 amends section 140(2)(e) to allow regulations to be made with respect to the advertising of social escort services. Currently section 140(2)(e) only allows regulations to be made with respect to a licensed brothels.

### **Amendment of Schedule 4 (Dictionary)**

Clause 12(1) amends Schedule 4 by omitting the definition of ‘approved form’.

Clause 12(2) provides a location reference for the definition for ‘advertisement’ ‘approved form’ and ‘publish’.

Clause 12(3) defines the terms ‘health services’, ‘publish’ ‘social escort’ and ‘social escort provider’.

## **Part 3                      Amendment of Criminal Code**

### **Act amended**

Clause 13 specifies that part 3 amends the Criminal Code.

### **Amendment of s 229C (Definitions)**

Clause 14(1) amends the heading for definitions.

Clause 14(2) amends section 229C by the insertion of new definitions for ‘carrying on a business’ and ‘unlawful prostitution’. Also, the term ‘prostitution’ is inserted with reference to the definition in section 229E.

### **Insertion of new s 229F (Meaning of carry on a business)**

Clause 15 creates a new section 229F (Meaning of ‘carry on a business’) which defines the term ‘carry on a business’ as it applies to unlawful prostitution. To carry on a business a person must: provide finance for the business; and take part in the management of the business or control the business. The intention behind the inclusion of the definition is to ensure the new offence as provided in section 229HB is not so broad as to reduce the operating scope of section 229H and elevate less sophisticated operators to the more serious offence.

### **Amendment s 229H (Knowingly participate in provision of prostitution)**

Clause 16(1) amends section 229H (1) by removing example 3.

Clause 16(2) amends section 229H to clarify that the conduct illustrated in example 5 is subject to the exemption provided in section 229HA(4)(b)(ii).

Clause 16(3) amends section 229H to clarify that the conduct illustrated in example 6 is subject to the exemption provided in section 229HA (5).

Clause 16(4) amends section 229H to renumber the examples given the removal of example 3.

Clause 16 (5) amends section 229H to include a note to clarify that some of the examples may also illustrate the new offence of Carrying on a business of providing unlawful prostitution as defined in section 229HB.

Clause 16(6), (7), (9), (10) and (11) have the effect of extending the conduct which does not constitute an offence of participating in the provision of prostitution and relocating such exempt conduct from section 229H and placing the provisions in a new section 229HA.

Clause 16(8) is a consequential amendment, recognising the new definition of ‘unlawful prostitution’.

Clause 16(9) extends the conduct which does not constitute an offence of participating in the provision of prostitution. The amendment will allow the holder of a current crowd controller licence, issued under the *Security Providers Act 1993*, to act as a driver for a sole operator sex worker. The clause also provides that a person who assists a sole operator as a bodyguard or a driver, as allowed under the provisions, may not work for or assist another person who is engaged in prostitution.

Clause 16(10) also extends the conduct which does not constitute an offence of participating in the provision of prostitution. The amendment will allow a person to receive a message directly from a sole operator about the sole operator’s current location or activities, to ensure the safety of that sole operator. The message taker must not be a current sex worker and may not assist another person who is engaged in prostitution.

Clause 16(11) relocates and renumbers sections 229H(3) to (6) as section 229HA(2) to (5).

### **Insertion of new sections 229HA -229HC**

Clause 17 inserts new sections 229HA – 229HC. .

#### **229HA (When section 229H does not apply to a person)**

New section 229HA provides when the offence of Knowingly participate in the provision of prostitution (section 229H) does not apply to a person. The provisions are discussed above.

#### **229HB (Carrying on business of providing unlawful prostitution)**

New section 229HB creates an offence of carrying on the business of providing unlawful prostitution.

Subsection (1) creates an offence for a person who knowingly carries on the business of providing unlawful prostitution. The definition for ‘carry

on a business of providing unlawful prostitution' is provided for under the definitions for Chapter 22A. The offence is a crime and carries a maximum penalty of seven years imprisonment.

Subsection (2) provides a circumstance of aggravation where the business involves the provision of prostitution by a minor or person with an impairment of the mind. In such circumstances the offender is liable to a maximum penalty of 14 years imprisonment.

### **229HC (Persons engaging in or obtaining prostitution through unlawful prostitution business)**

New section 229HC creates an offence for a person to engage in or obtain prostitution through a business providing unlawful prostitution.

Subsection (1) creates an offence where a person engages in prostitution through a business suspected of providing unlawful prostitution. The penalties associated with this provision have been tiered with a maximum penalty of three years imprisonment for a first offence, five years imprisonment for a second offence and seven years imprisonment for a third and subsequent offence.

Subsection (2) creates an offence where a person, without reasonable excuse, obtains prostitution through a business suspected of providing unlawful prostitution. The penalties for this provision have been tiered with a maximum penalty of three years imprisonment for a first offence, five years imprisonment for a second offence and seven years imprisonment for a third and subsequent offence.

The penalties and structure of the offences mirror the offence defined in section 229I.

### **Amendment of s 229J (Certificates of discharge on s 229I offence)**

Clause 18(1) amends the heading of section 229J as a consequence of extending section 229J to the new offences under section 229HC.

Clause 18(2) amends section 229J(1) by inserting a new definition of 'unlawful prostitution offence' which means an offence against new section 229HC(1) or (2). ).

Clause 18(3) amends section 229J(1) by extending the definitions of 'defendant' and 'the court' to include an unlawful prostitution offence.

Clause 18(4) amends sections 229J(2), (5)(a), (6) and (7) to allow the provisions to apply to an unlawful prostitution offence.

Clause 18(5) amends section 229J(5)(b) to encompass both unlawful prostitution offences and unlawful presence offences. Where an applicant is seeking a certificate of discharge in relation to an unlawful prostitution offence, the applicant is required to give evidence in relation to carrying on the business of providing unlawful prostitution.

### **Insertion of a new section 229M Evidence that business of prostitution is being carried on**

Clause 19(1) and (2) enact a mirror provision to section 229N and provide that whilst the carrying on a business of prostitution may be inferred from records of employment, business records, telephone records, advertisements and any other factors or circumstances that are relevant, condoms and other safe sex materials are not admissible against an accused charged under section 229HB.

## **Part 4                      Amendment of *Child Employment Act 2006***

### **Act amended**

**Clause 20** specifies that this part amends the *Child Employment Act 2006*.

### **Insertion of new s 8B (Prohibition on work as social escort)**

**Clause 21** inserts a new section '8B Prohibition on work as social escort

To provide that an employer must not require or permit a child under 18 years of age to work as a social escort as defined in schedule 4 of the *Prostitution Act 1999*. A maximum penalty of 100 penalty units is provided.