

PROSTITUTION AMENDMENT BILL 2007

Clause Notes

Part 1 – Preliminary

Part 1 comprises clauses 1 and 2. It contains the title of the Act and the commencement provisions.

Clause 2 provides for the Act to come into operation on a day fixed by proclamation and for different days to be fixed for different provisions.

Part 2 – *Prostitution Act 2000* amended

Part 2 comprises clauses 3 to 29 and amends the *Prostitution Act 2000* (the Act).

Clause 4 amends the title of the Act to the *Prostitution Reform Act 2000*

Clause 5 amends section 3 of the Act. The definitions of various terms relating to prostitution are deleted and definitions of the replacement terms "**act as a sex worker**", "**commercial sexual act**", "**sexual service business**" and "**sex worker**" are inserted. Definitions of additional terms are inserted including those relevant to the certification and regulatory requirements introduced by **cl.20** into Part 3A of the Act. Significant additional terms are "**certificate**", "**individual sex worker**", "**manage**", "**manager**", "**officer**", "**operate**", "**operator**" and "**small owner-operated business**".

"**certificate**" is a certificate issued or renewed under s.21G ie a manager's certificate or an operator's certificate.

"**individual sex worker**" is defined so as to cover sex workers who operate entirely on their own behalf. Individual sex workers are excluded from the operation of certain provisions including the certification provisions of the Act.

"**manage**" is defined, in relation to a sexual service business, as meaning to undertake immediate management, direction or control of the conduct of the sexual service business. Persons who manage a sexual service business will generally be required under s.21 of the Act to obtain a certificate.

They will be subject to various obligations under the Act whether or not they are required to or do obtain a certificate.

"manager" is a person who holds a manager's certificate. Managers have certain additional obligations under the Act to those imposed on persons who manage sexual service businesses.

"officer" in relation to a proprietary company is broadly defined. It includes persons who exercise or exert control or influence over the company or are in a position to do so and persons who are shareholders of the company. Certain checks are performed prior to a person being granted an operator's or a manager's certificate. Where the operator is a proprietary company checks are conducted under s.21G(2) in relation to officers of the company.

"operate" in relation to a sexual service business is broadly defined. It includes persons own, operate or carry on a sexual service business. It also includes a person who employs, supervises or directs a manager of the business and persons who exercise or exert or are in a position to exercise or exert, control or substantial influence over the manner in which the business is conducted. The broad definition of operate is intended to ensure that persons involved in the ownership, control and operation of the commercial sex industry and those that may be in a position to control or substantially influence businesses are subject to the certification and regulatory requirements of the Act. Persons who operate a business will be subject to various obligations under the Act whether or not they are required to or do obtain a certificate.

"operator" is defined to mean a person who holds an operator's certificate. Operators have specific obligations under the Act in addition to those imposed on persons who operate sexual service businesses.

"small owner-operated business" is defined to cover sex workers who on their own or with one other sex worker independently operate their own business. These businesses are excluded from the operation of certain provisions of the Act including the certification requirements. Under s.4 of the *Prostitution Reform Act 2003 (NZ)* (the NZ Act) a similar exception applies but in relation to up to four workers.

- Clause 6** amends s.4 of the Act by substituting terms relating to prostitution with less stigmatising terms.
- Clause 7** inserts s.4A into the Act. This section enables the CEO of the Department of Racing, Gaming and Liquor, who has various functions under the Act including in relation to certification of operators and managers of sexual service businesses, to delegate his or her powers or duties.
- Clause 8** makes a consequential amendment to a heading in Part 2 by replacing the reference to prostitution with a reference to commercial sexual acts.
- Clause 9** expands s.7(1) of the Act, which creates an offence in relation to inducing a person to act, or continue to act, as a prostitute. The existing offence is expanded to include additional circumstances of inducement and coercion covered by s.16 of the NZ Act. These include certain misuses of power or authority and making certain accusations or disclosures, including that a person is unlawfully in Australia.
- Clause 10** deletes s.8 of the Act which makes it an offence for a person to engage in an act of prostitution without using a prophylactic and inserts a new s.8 and s.8A.

Section 8 is based on s.9 of the NZ Act. Obligations are imposed on a person participating in a commercial sexual act to minimise the risk of acquiring or transmitting certain prescribed infections or viruses. The obligations include taking all reasonable steps to ensure a prophylactic is used if penetrative sex or sexual activities with similar risks are engaged in. A person is also prohibited from making statements or implying that a medical examination of the person may feel he or she is not infected or likely to be infected with the prescribed infection or virus. Such statements may be misleading particularly given the window period for viruses such as HIV, within which a person may be infected but the virus might not be detected upon a medical examination.

Section 8A creates an offence for a person to engage in penetrative sex if he or she has a prescribed infection or virus. It is intended to prescribe in due course various infections or viruses including HIV and Hepatitis B for the purposes of this section. This is a public health measure due to the risk and consequences of transmission from such activities.

Clauses 11 and 12 update terminology relating to prostitution in ss.9 and 10 of the Act.

Clause 13 inserts a new s.10A into the Act. Advertising commercial sexual acts is to be restricted to the classified sections of newspapers or periodicals or through the internet. Advertising through those means may also be the subject to prescribed requirements if they are considered to be necessary in due course. At present advertising is largely self-regulated.

Clause 14 inserts sections 13A and 13B into the Act.

Section 13A provides statutory recognition of the fundamental right of sex workers and clients to refuse to take part in, or continue to take part in, a sexual act. A contract does not amount to consent for the purposes of the criminal law if a person does not consent, or withdraws his or her consent, to taking part in the sexual act. A client's right, if any, to rescind or cancel, or to recover damages for a contract for taking part in a commercial sexual act that is not undertaken is unaffected by this provision.

Section 13B reflects the important principle that a person should never be forced to work as a sex worker and that sex workers who may wish to leave the industry should not be deterred from doing so. An injured worker may have compensation entitlements under the *Workers' Compensation and Injury Management Act 1981* (eg for incapacity to work resulting from the injury: see s.21 and Schedule 1 cl. 7 of that Act). Sex work is not a suitable employment for workers who do not wish to work or continue to work in the sex industry. Section 13B ensures that if an injured worker refuses to be or continue to be a sex worker their workers' compensation entitlements may not be lost or affected in any way by reason of having capacity to work as a sex worker. The definition of "refusal" in s.13B(2) applies only to this section and clarifies that "a refusal" is a refusal to engage in sex work in general. Section 13B is based on s.18(2) of the NZ Act.

Clause 15 updates the heading to Division 2 of the Act by substituting a reference to sex workers.

Clause 16 amends s.14 of the Act which prohibits certain persons from acting as a sex worker. The existing penalty for all such persons, including a child, is 2 years imprisonment. The amendment reduces the penalty in respect of a child who acts as a sex worker to a fine of \$6,000 in recognition that it would be inappropriate for a child to be imprisoned for acting as a sex worker. The emphasis of the Bill is on the protection of children rather than imposition of sanctions on them.

Clauses 17 and 18 update terminology in relation to prostitution in ss.17 and 20 of the Act.

Clause 19 updates the terminology in s.21 of the Act, which creates an offence in relation to allowing a child to enter or be present at certain places of prostitution. The offence is also extended to places where a commercial sexual may be taking place.

Clause 20 inserts s.21A and Part 3A into the Act. Part 3A contains the substantive provisions regulating sexual service businesses.

Section 21A imposes obligations on persons who operate sexual service businesses in order to protect children. Strict liability is imposed to ensure that a child is not employed as a sex worker in a business. A penalty of 5 years imprisonment with a summary conviction penalty of 3 years applies. This offence provision supplements existing offences in ss.16, 17 and 18 of the Act relating to the involvement of children in commercial sexual acts. A person who manages or operates a sexual service business must also ensure that no child is present at a place at or from which the business is carried on. A person who operates a sexual service business must before employing or engaging a sex worker ensure the person provides photographic evidence in a form such as a current passport or driver's licence. Similar obligations are imposed under s.15 of the *Tobacco Products Control Act 2006* in relation to the purchase of tobacco. Relevant records must be retained for 3 years to enable verification that children are not being employed.

Part 3A – Sexual service business

Part 3A is a new Part of the Act dealing with the requirements for certification and regulation of sexual service businesses.

Division 1 – Requirement for certificate

Division 1 comprises s.21B which requires certain persons to hold a certificate.

Section 21B requires persons who operate a sexual service business to hold an operator's certificate and persons who manage such a business to hold an operator's or a manager's certificate. Given the extended definition of operate, on many occasions more than one person will be required to obtain an operator's certificate. (see definitions of "operate" and "manage" in s.3(1) as introduced by **cl. 5(2)**). The certification requirements do not apply to an individual sex worker or a small owner-operated business ie one or two sex workers operating a business on their own (see also definitions in s.3(1)). Under the NZ Act small owner-operated businesses involving up to four workers are exempt.

Division 2 – Manager's or operator's certificate

Division 2 comprises ss.21C to 21L and sets out the certification process for operators and managers.

Section 21C provides that only an individual may apply for a manager's certificate and that an individual or a proprietary company, in certain circumstances, may apply for an operator's certificate. The shareholders of the company must all be individuals. This is to avoid the additional time, cost and difficulty of vetting applications if shareholders were not individuals but part of a wider corporate structure.

Section 21D sets out the process to be followed and information required to be provided in applying to the CEO of the Department of Racing, Gaming and Liquor to obtain or renew a certificate.

Section 21E empowers the CEO to obtain from the applicant additional materials that may be relevant to determination of an application to grant or renew a certificate.

Section 21F facilitates the reporting by the Commissioner of Police to the CEO in relation to managers, operators, the operation of sexual service businesses and the suitability of persons to hold certificates. The Commissioner may direct the CEO not to communicate or divulge information communicated by the Commissioner if its disclosure might be contrary to the public interest. This power ensures the Commissioner is able to communicate confidential intelligence holdings without the risk of

its disclosure to the applicant or other third parties contrary to the public interest. If an applicant applies to the State Administrative Tribunal to review a decision of the CEO (see s.21W) the Commissioner or the CEO may apply in private to the Tribunal for an order that the information be treated as protected information and not be disclosed.

Section 21G provides the CEO with a discretion to issue or renew a certificate if the applicant satisfies certain requirements. The requirements are principally directed to ensuring that certificate holders are suitable persons. They must not have pending charges or convictions in relation to serious offences such as offences involving violence, drugs or children and must otherwise be of good character and fit and proper to hold a certificate. A residency requirement applies to facilitate enforcement of regulatory aspects of the legislation. Under s.21G(1)(k) applicants may be required to comply with other prescribed requirements. This will enable matters to be prescribed in due course if experience indicates that additional requirements ought to be imposed on applicants.

Section 21H provides that certificates may be issued or renewed for up to one year. This ensures the suitability of certificate holders to continue in the industry is regularly reviewed.

Section 21I requires the CEO to keep a register of certificate holders.

Section 21J provides that the register is required to be available for inspection by police officers and persons of a class specified in the regulations. This will facilitate inclusion of additional classes of persons, such as officials with obligations under other statutes, should a demonstrated need arise.

Section 21K provides for the content of certificates and issue of certified copies. It will be necessary for a holder of a certificate to obtain a certified copy if the holder operates or manages more than one business due to the requirements to display certificates under s.21L.

Section 21L imposes an obligations on managers and operators to ensure certificates are displayed visibly to a person on entering a place of business. This will ensure that persons entering a place are aware that a sexual service business is being conducted and of the identity of the manager and operator of the business.

Division 3 – Suspension or revocation of certificate

Division 3 comprises ss.21M and 21N which detail the powers of the CEO to suspend or revoke a certificate and obtain information relevant to that decision.

Section 21M empowers the CEO to require a person to produce documents or things to the CEO, inspect, retain and copy any such things and require a person to give information or answer questions relevant to a determination whether or not a certificate should be suspended or revoked. The CEO is required to inform the person of their obligations to comply with the request of the CEO under this section.

Section 21N provides that the CEO may revoke a certificate if no longer satisfied as to any matter about which the CEO would be required to be satisfied before issuing the certificate or comes to know of any other matter that would prevent the CEO from issuing the certificate if an application were only then being made for it. The CEO may also suspend a certificate for a specified period. A certificate holder must first be given a reasonable opportunity to be heard or make written representations.

Division 4 – Conducting a sexual service business

Division 4 comprises ss.21O to 21R and imposes various obligations on persons operating or managing sexual services businesses.

Section 21O requires that a person who operates a sexual service business must ensure that an individual operator or manager is present at all times during which the business is being carried on at or from a place. This ensures that there is personal supervision and management of the business at all times. The obligation does not apply in relation to individual sex workers or small owner-operated businesses of up to two sex workers (see definitions introduced by **cl. 5(2)** in s.3(1)).

Section 21P requires that a person who manages or operates a sexual service business must ensure that persons acting as sex workers in the business are employed as employees or engaged as independent contractors by a person who operates the business. The requirement does not apply to individual sex workers or small owner-operated businesses of up to two sex workers. The purpose of this section is to ensure that workers are either employees or independent contractors but not engaged

under any other form of arrangement. Sex workers engaged in this way will be workers for the purpose of the workers' compensation legislation and be protected under the *Occupational Safety And Health Act 1984*.

Section 21Q prohibits a person operating a sexual service business at or from licensed premises. This, together with the amendment to s.37(6) *Liquor Control Act 1988* (see **cl. 33**) ensures sexual service businesses are not operated from licensed premises.

Section 21R prohibits a person operating a small owner-operated business at or from premises at or from which another sexual service business is operating. This ensures that small owner-operated businesses, which are exempt from certain requirements including certification, operate independently from other sexual service businesses.

Division 5 – Protection of sex workers and clients

Division 5 comprises ss.21S to 21U and imposes obligations on persons who manage or operate sexual services businesses in relation to the health and safety of sex workers and clients. Similar obligations are imposed on workers and clients under ss.8, 8A and 13A (see **cl. 10 and cl.14**).

Section 21S provides that a person who manages or operates a sexual service business (whether they have a certificate or not) must adopt a range of measures to ensure the health and safety of sex workers and clients. Similar obligations are imposed under s.8 of the NZ Act.

Section 21T provides that a person who manages or operates a sexual service business must not permit or encourage a person to act as a sex worker and engage in penetrative sex if the person knows or ought to know that the person has a prescribed infection or virus. It is intended to prescribe various infections or viruses such as HIV and Hepatitis B for the purposes of this section. A due diligence defence is available.

Section 21U requires a person who manages or operates a sexual service business to give prophylactics free of charge to clients and sex workers. This will promote the use of prophylactics, which is less likely to occur if sex workers or clients are charged for their use.

Division 6 – Powers of entry

Division 6 comprises s.21V which empowers police officers to enter certain places.

Section 21V enables a police officer to enter certain places to ensure certification requirements under the Act are being complied with. This power is in addition to any other legislative or common law rights or powers that a police officer may have to enter the place. A place may be entered under this section if the officer has a reasonable suspicion it is not being used as a legitimate residence and that a sexual service business that is not a small owner-operated business (see definition in s3(1) introduced by **cl.5(2)**) is being carried on at or from the place.

Division 7 – Review by State Administrative Tribunal

Division 7 comprises s.21W and sets out the right of persons to apply to the State Administrative Tribunal and the manner in which information subject to the direction by the Commissioner not to be disclosed be dealt with.

Section 21W allows an aggrieved person to apply to the Tribunal to review a decision of the CEO to refuse to issue or renew or suspend or revoke a certificate. The Commissioner of Police is also a party to review. If the Commissioner has issued a direction to the CEO under s.21F(3) not to disclose information, either may apply in private to the Tribunal for an order that the information not be disclosed to third parties. The Tribunal is required to make such an order if satisfied that the disclosure of the information might fall into certain categories which might be contrary to the public interest. This will ensure the integrity of important police intelligence holdings. If an order is made the information is required to be treated as protected matter for the purposes of the *State Administrative Tribunal Act 2004*.

Division 8 – Planning and development controls

Division 8 comprises ss.21X and 21Y and sets out the process for planning and development controls to be exercised in relation to sexual service businesses.

Section 21X provides a mechanism to enable existing well-managed sexual service businesses to expeditiously obtain planning approval to enable their continued operation. The section applies to land used for the

purpose of a business (other than a small owner-operated business) immediately before 12 September 2006. This is the date on which the Government announced its intention to establish the Prostitution Law Reform Working Group. This requirement is intended to ensure that opportunistic operators who commenced business after that date do not receive the benefit of this provision. The CEO of the Department of Racing, Gaming and Liquor will determine applications after liaising with local government and the Commissioner of Police. Regard is to be had to various factors such as historical complaints about the use of the land from residents or occupiers in the area and whether the business causes, or is likely to cause, a disturbance or interference with the amenity of the neighbourhood. The CEO is required to give approval unless having regard to those three matters the CEO is satisfied that the business is not being managed appropriately.

Section 21Y enables local government to grant planning approval in relation to sexual service businesses even though their present schemes do not provide for this use. Applications are required to be treated as if the purpose is a use that is not permitted unless it has exercised its discretion by granting planning approval. In exercising its discretion it must, in addition to other relevant considerations, have regard to whether the development is likely to cause a nuisance to ordinary members of the public using the area in which the land is situated and is incompatible with the existing character or use of the area in which the land is situated. This interim provision ensures that development applications can be approved prior to local planning schemes being amended. Once appropriate amendments have been made to local planning schemes, under the guidance of the Western Australian Planning Commission, the provision will cease to have effect.

Division 9 – Offences

Division 9 comprises ss.21Z to 21ZD and creates various offences and obligations.

Section 21Z creates an offence in relation to the provision of false or misleading statements or information in relation to an application for a certificate.

Section 21ZA creates an offence in relation to non-compliance, without reasonable excuse, with a requirement made under s.21M (ie a requirement to provide information, answers to questions or to produce documents or things). It is a defence if the person can show that the CEO did not at the time inform the person that he or she was required under this Act to comply with the CEO's requirement, that the time specified did not afford the person sufficient notice to enable him or her to comply or that the CEO did not have reasonable grounds at the time to believe that compliance would assist the CEO in making the determination.

Section 21ZB clarifies that a person does not have an excuse from complying with a requirement under s.21M on the grounds of self-incrimination. Any answers given by the individual or the fact that a document or thing was produced to comply with the requirement are inadmissible in evidence in any civil or criminal proceedings against the individual, other than for an offence against s.21ZA(1)(b).

Section 21ZC creates an offence in relation to obstructing a police officer exercising powers under s.21V to check compliance with certification requirements.

Section 21ZD imposes an obligation on an operator of a sexual service business to notify the CEO in writing of various notifiable matters within seven days of becoming aware of them. Notifiable matters include certain charges being brought against or convictions being entered against managers, operators and their officers and changes in the location of the business or its operators. These matters are relevant to the certification functions of the CEO and police.

Clause 21 updates terminology in relation to prostitution in s.26(1) of the Act.

Clause 22 repeals s.54 of the Act and substitutes a more extensive averment provision to facilitate prosecution of contraventions of the Act.

Clause 23 amends s.56(1) of the Act, which provides for the protection of police officers from legal action for actions in good faith, by affording the same protection to the CEO.

Clause 24 amends s.57(4) of the Act, which relates to the exchange of information between State authorities, by including the CEO and persons employed in the Department principally assisting the Minister in the administration of

Part 3A of the Act (see definition of “Department” inserted in s.3(1) by **cl.5(2)**).

Clause 25 amends s.58 of the Act, which imposes confidentiality obligations on various persons, by including the CEO and persons in the Department as persons to whom the obligations apply.

Clause 26 inserts ss.59A and 60 into the Act.

Section 59A imposes strict vicarious criminal liability on a person who has an operator's certificate for an offence committed by a manager under the Act as the holder of a manager's certificate. This ensures that an operator is diligent in ensuring that the manager of the business complies with their obligations under the Act.

Section 60 provides for the Health Minister to carry out a review of the operation and effectiveness of the Act as soon as practicable after two years. The two-year period is to ensure that any difficulties with the operation of the Act are promptly identified and remedied.

Clause 27 inserts Schedule 2 into the Act.

Schedule 2 – Offences relating to granting a certificate

Schedule 2 lists a series of serious offences the commission of which will preclude a person from obtaining or holding a certificate under the Act.

Clauses 28 and 29 make consequential amendments to the Act to update terminology in relation to prostitution.

Part 3 – Other Acts amended

Part 3 consequentially amends other Acts.

Clauses 30 to 32 and 34 to 37 amend various Acts by updating terminology in relation to prostitution.

Clause 31 also amends *The Criminal Code* by repealing ss.190 and 191 which are either no longer necessary or adequately reflected in the Act.

Clause 32 also inserts in Schedule 7 Part B of the *Evidence Act 1906* reference to s.21A of the Act. This ensures that other provisions of the *Evidence Act* (see ss.106A to 106T) relating to children giving evidence apply to offences under s.21A.

Clause 33 amends the *Liquor Control Act 1988* by inserting s.37(7) into that Act. Under that section an application for a liquor licence must not be granted where the licensing authority is satisfied that the premises to which the

application relates are premises at or from which a sexual service business operates. This is complementary to the offence provision in s.21Q which prohibits a person operating a sexual service business from licensed premises.

Clause 35 also amends the *Western Australian College of Teaching Act 2004* by adding a reference to offences under s.21A of the Act into Schedule 2. Person who commit offences listed in Schedule 2 may not be registered as teachers.