

PROSTITUTION LEGISLATION REFORMS

Statement by Attorney General

MR C.C. PORTER (Bateman — Attorney General) [11.31 am] — by leave: This statement will set out the approach that has now been endorsed by cabinet, and the principal mechanics of the legislation that is presently being drafted with respect to prostitution. It is intended to commence a period of public debate and consultation leading up to the release of a draft bill before the return of Parliament in 2011.

Background: Prostitution is a problem with which successive governments in Western Australia have been faced and which represents a range of moral, social and policing challenges for any government. It has been estimated that there are presently 1 700 prostitutes and 38 known brothels in Western Australia, 30 of which are in the Perth metropolitan area.

Previously in Western Australia there existed a system under which prostitution was illegal, but a certain number of brothels were tacitly permitted to operate within predefined areas, and police sporadically inspected premises to ensure no other form of unlawful or undesirable conduct was occurring. This policy was formally revoked by the police in 2000, citing concerns with the potential for corruption due to the unclear nature of the laws.

Currently, the Prostitution Act 2000 deals with street-based prostitution, offences relating to children in prostitution, advertising, and protecting the community in relation to certain health matters. Operating, managing or profiting from such a business—that is, a brothel—is ostensibly criminalised presently by the operation of section 190 of the Criminal Code, but this law is not fully enforced due to evidentiary difficulties and a lack of clarity regarding the laws.

There are two strong ideologically based views on prostitution, which advocate for two opposite and purist policy approaches that reflect those views. And there is a third approach that seeks to find some practical middle ground, which is what this government proposed going into the last election.

For some groups, most often those associated with the sex industry, the provision of sexual stimulation by one person to another is seen in economic terms as a purely private transaction, which, it is argued, has no effect on third parties and so, having no negative externalities, is a purely private transaction that the state should not seek to make unlawful in any substantive way. This purely individualist, free-market view of sexual relations leads to a purist public policy position that argues that because prostitution is an entirely private activity, not impinging negatively on third parties, it should be treated no differently from any other form of commercial activity. Accordingly, many in the sex industry argue that prostitution should not just be permitted in most circumstances, but that it should be treated essentially like any other business, largely regulated by the market and overlaid only by existing mechanisms such as town planning laws.

The result of any law that decriminalises prostitution entirely is to effectively remove police or government law enforcement authorities from the equation and leaves prostitution principally subject only to planning laws. The principal difficulty with this view is that quite unlike sexual relations conducted between consenting adults, which are not engaged in for an exchange of money, prostitution is known to be a transaction or business type that is accompanied by significant negative externalities for law-abiding citizens. The experience is that prostitution businesses, even very small ones, can have the very unfortunate effect of seriously diminishing neighbours' quiet enjoyment of their own property because of the comings and goings of multiple, albeit consenting, clients.

Further, if prostitution is challenging for law enforcement agencies to deal with, it is effectively impossible for local government to appropriately regulate. Local government is completely ill-equipped to effect the shutting down of even a small suburban brothel that may be presenting a serious nuisance and diminishing the quality of life in a local WA community.

Some groups hold a completely opposite view to the free market decriminalisation approach. For some, the premise that sex can be bought and sold like any other commodity is considered so morally repugnant, and the likely effects of permitting this to occur considered so morally and emotionally detrimental to the participants, that they consider prostitution should always be unlawful in all circumstances. A central difficulty with this approach is that it ignores the grim historical reality that prostitution is both prevalent and perhaps the most difficult of any potentially unlawful transaction to police. In the government's view, if a manageable pool of prostitution is not allowed to form lawfully somewhere, the inevitable flow of it everywhere will swamp police resources. Blanket illegality will result in the present situation again in Western Australia; being a system under which there is little relationship between the laws of the state and the situation that occurs on the ground.

In theory, it is presently unlawful to operate a brothel anywhere in Western Australia, but the very reason reform is now needed is that there is wide acceptance that prostitution continues to exist in WA and that the present

system has neither eradicated nor dealt with the existence of prostitution in a way that WA citizens, wanting for the quiet enjoyment of their suburbs, would consider satisfactory.

Between these two extremes, there are licensing regimes under which some amount of prostitution is lawful, usually limited to certain limited geographical areas. Regulatory models such as these are essentially intended to encourage prostitution to operate within a scheme whereby it can be licensed and monitored. These schemes are designed to provide clarity for police and law enforcement about their role. Such models do not entirely obviate the risks associated with prostitution, and they are subject to the reality that, faced with an option between engaging in lawful, licensed prostitution in a permitted area and unlawful prostitution outside a permitted area, if there are not sufficient enforcement powers and activity outside the licensing scheme, there will be insufficient incentive for people to elect to operate within the licensing scheme.

The unfortunate reality is that the last substantive changes directed at improving the police position were made by the Court government in 2000. In 10 years there has been no change whatsoever in the legal and administrative regime applying to prostitution in WA. Things in 2010 are precisely as they were in 2000, and despite all the posturing, the situation is little worse and little better now than it was 10 years ago, which is probably a testament to how difficult it is to reach the correct policy balance in this area.

The previous government made two attempts over eight years to legislate with respect to this issue, but nothing came of these. The second failed attempt, which became the Prostitution Amendment Act 2008, passed through Parliament in April 2008, and the Liberal–National government has promised the operative parts will never become law. If the operative parts of the Labor legislation had come into effect, this legislative model would have included repeal of the sections of the Criminal Code criminalising brothels and activities related to prostitution, with the effect of making all brothels *prima facie* decriminalised; a certification scheme for some brothel managers and operators; exemption from certification requirements for brothels of two or fewer brothel managers and operators; exemption from certification requirements for brothels of two or fewer prostitutes, leaving these brothels lawful and completely unregulated; and a requirement that local government authorities give consideration to all planning applications for brothels.

This model awkwardly straddled licensing and outright decriminalisation but veered strongly to the latter. The exemptions that applied to businesses of two or fewer prostitutes would have left local government powerless to prevent such premises from being situated in residential areas; and, given the extreme evidentiary difficulty of showing how many people are operating from a specific premises, it would have had the practical effect of an unpoliced growth in decriminalised, unregulated brothels in the suburbs of Western Australia.

At least as things presently stand, suburban brothels, although underpoliced, are unlawful and can be shut down in extreme circumstances by police. Under the Labor laws, they would have been legal in the suburbs, and the only way to have them closed would have been for local government to have investigated and prosecuted a case for impermissible land use. At best it is ironic, and at worst a stunt to stand in front of a suburban brothel and complain that it is not being adequately policed when the legislation which the previous government wanted, and which the present government opposed and stopped, would have made that brothel *prima facie* decriminalised and practically impossible to shut down.

The halted Labor legislation was widely rejected by local government, and particularly the outright decriminalisation of micro suburban brothels was rejected as completely unacceptable to ordinary Western Australians. Lacking any clear enforcement framework, the previous government's approach would have led to an increase in suburban prostitution and, with that, a corresponding increase in antisocial and nuisance behaviour, in physical and sexual violence against women and in the risks of organised crime and trafficking.

The Liberal Party indicated its opposition to the Prostitution Amendment Act 2008 prior to the 2008 state election. The Liberal election commitment was to prevent this act from coming into operation, to permit a small number of designated areas where strictly regulated prostitution would be tolerated, and to prevent the spread of brothels in the towns and suburbs of Western Australia.

The specific principles that underlie the government approach that is now being drafted are as follows —

Firstly, the public expects the state government to take responsibility for this issue, and it overwhelmingly does not want to be subject to the antisocial and nuisance behaviour that occurs alongside suburban prostitution. The public expects that no form of prostitution should be permitted in residential areas in Western Australia, and it expects that police will be empowered to act on complaints from members of the public to shut down such nuisance premises. Achieving this outcome is the government's first priority with its legislative model.

Secondly, a responsible government should always recognise that prostitution is a generally undesirable activity, which carries with it risks to people involved, and an ever-present danger of organised criminal

activity. The state government will seek to prevent the expansion of the industry, provide options for persons wishing to leave prostitution, and ensure that, where prostitution does occur, it is properly licensed, monitored and regulated.

Thirdly, to do their jobs effectively, police and government agencies need clear-cut laws and robust powers, and need to be appropriately resourced to tackle this issue. No form of regulation can succeed unless persons are deterred from engaging in prostitution outside of the regulatory scheme and permitted areas.

In broad terms, there are two steps to satisfying these legitimate public expectations. The first is to ensure that no form of prostitution is legal in suburban and residential areas, and that the limited number of premises that are tolerated elsewhere are appropriately located and subject to stringent regulation. The second is to ensure that police are given the powers they need to successfully investigate and prosecute individuals engaging in prostitution outside of permitted premises, with a particular emphasis on purchasers of prostitution and those managing or profiting from such businesses, and that the laws of the state deter persons from engaging in such activities.

Legislative model: The central elements of the scheme that is being drafted by the Liberal–National government are as follows. The first element is the introduction of a strict licensing system —

A licensing scheme will be administered by the Department of Racing, Gaming and Liquor for prostitutes and operators and managers of prostitution businesses. Brothel-based prostitution will only be lawful where it occurs in accordance with the licensing scheme.

For such a business to be lawful, it will be necessary for the operator, manager and prostitutes to have current licences issued by the DRGL, and for the business to be conducted on premises that have been approved for that use by local government through the general planning approval process.

Self-employed prostitutes and collectives of two or more prostitutes will be permitted, but they will also need a licence, and they will need to operate from a permitted zone after planning approval.

There will be restrictions on who can hold any type of licence, which will include that the person must have reached the age of 18 years, and must be a permanent resident of Australia or an Australian citizen. Holders of student or other visas will not be able to lawfully act as prostitutes. This will enhance the state's ability to police human trafficking.

Operators and managers must ordinarily be resident in Western Australia; and should not have been guilty of, or have charges pending in connection with, a range of specified offences.

Applicants for all licences will require a probity check by WA Police, which will include taking fingerprints and palm prints for criminal record checks, and checks for criminal associations.

The second element is the prohibition of prostitution in residential areas —

No form of prostitution will be lawful in areas zoned for residential or mixed residential use; or where residential dwellings are a permitted use under local government planning schemes.

The role that local government authorities will play in the scheme will be in respect of zoning matters and the standard approvals process that apply to them.

An application to a local government for planning approval to operate a brothel in a permitted discretionary use area will allow the local community a say through their council in what they will and will not tolerate and where they may tolerate it. The state government will take the outcome of the local government applications process into strong account, but, in accordance with our election promise, the state government, via the Minister for Planning, will hold the final decision to approve a specific planning application.

In all cases, the establishment of a prostitution business in areas categorised as discretionary use for zoning purposes will be contingent upon the issue of a valid licence by DRGL.

The state government will not require local government to assume responsibility for investigating or closing inappropriately located unlawful premises. This will be a matter exclusively for police.

Prostitution businesses will not be permitted within 100 metres of a residential dwelling other than a caretaker's house; or within 200 metres of a protected place, which will be defined in the regulations to include places of worship, hospitals, and schools and other educational establishments.

With the increased trend towards mixed residential areas in a number of local government areas, there may be some local government authorities that will lack areas where a prostitution business could be prima facie permitted.

It is proposed that in the City of Perth, an exception will apply so that mixed-use areas might be permitted places for prostitution businesses if, at the time the business commences, the land is not within 50 metres of a residential dwelling or within 100 metres of a protected place. This is similar to the Victorian legislation.

To allow for transmission to the new scheme, existing businesses established prior to 6 September 2008 and still operating from the same address will be able to continue to operate with the approval of the chief executive officer of DRGL for an appropriate grace period. This will provide long-established, well-run businesses with an opportunity to relocate if they are situated outside a designated permissible area.

Operators, managers and prostitutes working in these existing businesses will be required to lodge applications for relevant licences within three months of the day on which the legislation comes into operation.

The third element is the targeting of unlawful prostitution. There will be three general approaches penalising unlawful prostitution. These are as follows —

For operators and managers, anyone who runs a prostitution business without a current licence will be liable for a penalty of three years' imprisonment. For prostitutes, a person who engages in prostitution without a current licence will be liable for a maximum fine of \$6 000. First offences for prostitutes will ordinarily be punishable by the issuing of an infringement notice, and consideration will be given to referring such persons to appropriate diversionary services. For the clients of unlawful prostitution businesses, police will be provided with the power to issue on-the-spot infringement notices for a person found in, or entering, or leaving, premises that are being used in the conduct of prostitution, except where that business has possessed and displayed what appears to be a valid licence, or where that person can show a lawful excuse for being on the premises. A client who commits repeat offences of using an unlawful prostitution service will not be eligible for an infringement notice but will be subject to a court penalty of a fine of up to \$6 000, or imprisonment for one year. This aims to deter operations that do not seek appropriate licences, and deter the clients who used them from seeking the services of such operators.

Under the proposed scheme, WA Police will be responsible for dealing with public complaints about unlawful prostitution and, where their involvement becomes necessary, enforcing the law with respect to offences under the Act.

In accordance with the high priority accorded to ensuring that police are able to respond to individual public complaints and close down unlawful brothels in residential areas, WA Police will develop performance indicators relating to successful prosecutions and closures of such businesses in response to public complaints.

To enhance the police capacity to perform their role, it is proposed to amend the Prostitution Act 2000 to provide for some additional powers specific to prostitution. These are as follows —

An officer, with the authorisation of a police officer of assistant commissioner level or above, will be able to issue premises with a closure notice. Such a notice may be issued where there are reasonable grounds for believing that the premises were used for activities related to specified offences under the Prostitution Act 2000, there are reasonable grounds for believing that the making of an order is necessary for preventing this from occurring, and reasonable steps have been taken to establish the identity of the person who resides in the premises.

Upon the issuing of such a closure notice, persons other than those who reside in, or own, the premises will be prevented from entering the premises. As soon as a closure notice is issued, a police officer must make an application to court for a closure order, which order can be made if the court is satisfied the premises were used for activities related to offences under the Prostitution Act 2000, and that it is necessary to prevent the premises continuing to be used for such activities. A closure order granted by a court will allow access to premises to be restricted for up to three months. In practical terms, these notices will provide police with a means of responding to public complaints about inappropriately located, unlawful businesses. They are based upon successful powers operating in the United Kingdom.

Police will also be provided with a broad power of entry onto premises that they reasonably suspect are being used for prostitution, and will ensure that full information sharing occurs between the relevant government agencies.

The fourth element is with respect to how lawful businesses may be conducted. It is proposed to amend the Prostitution Act 2000 to outline certain matters regarding how a lawful prostitution business must be conducted. These amendments aim to ensure that the lawful industry is tightly regulated, prevent the least desirable elements of prostitution from occurring within the regulated system, and assist in policing the industry. The proposed legislation will —

Require that current licences of an operator, manager or prostitute be visibly displayed at the premises at all times.

Strengthen existing provisions in relation to the required use of prophylactics for persons engaged in prostitution.

Prohibit certain commercial sex acts if a person is infected with a sexually transmitted infection.

Protect a prostitute's right to, at any time, refuse to take part in or to continue to take part in a commercial sex act.

Expand the existing protections against the coercion of people into prostitution. Specifically, the existing provisions will be amended to specify that a person is not to induce another person to act as a prostitute by using any power or authority that person may have because of their position or occupation; or because of any relationship they may have or have had in the past; or by making an accusation or a detrimental disclosure, whether true or false, about a person regarding an offence that has been committed; or about misconduct likely to damage a person's reputation; or regarding that person being unlawfully in Australia. It will be a strict liability offence for a person to pay for sex with someone who is coerced by another person for that person's financial gain. It will be a very serious offence for a person to pay for sex with a person who they know is being coerced by another person. Restrict advertising for a prostitution business to the internet and to the classified section of a newspaper or periodical, and require all advertisements to display a valid licensing number in the advertisement.

Additional provisions are proposed to protect children, including provisions compelling a person who operates a prostitution business to ensure that a child is not employed as a prostitute in the business. The penalty for this will be imprisonment for up to 5 years.

When a person is apprehended for an initial offence of acting as a prostitute, the government will make provision for funding of interventions designed to assist persons who wish to leave the business in lieu of the imposition of a conviction.

Outcomes sought: The government is not expecting that all these reforms will necessarily be popular with existing sex industry advocates or other interest groups; however, this is not the outcome that the Liberal-National government is seeking. Our first priority with these laws is to prevent the negative impact of prostitution businesses on ordinary Western Australians in residential areas. Having regard to other law enforcement priorities, human history and international policing experience show that prostitution will likely never be capable of being eradicated in this state, and the public does not realistically expect that to occur.

The fundamental outcome that the Liberal-National government wants to produce is that when it is clear that a brothel is operating unlawfully and is negatively impacting on the quiet enjoyment of residences or other businesses, public complaints will be responded to, and businesses and people who are the subject of such complaints will be investigated and shut down. Rather than continue with a system whereby the laws of this state say one thing and something quite different occurs on the ground, the government's focus has been on developing a detailed, clear-cut and robust system of laws that will create a clear distinction between what is lawful and unlawful, restrict the overall size of the industry, and ensure that premises that are inappropriately situated and negatively impact on ordinary Western Australians will be closed. This will be a tight legislative and regulatory model, similar to that which applies to other activities that are lawful in certain circumstances.

Obviously, this proposed model has some resourcing implications compared with the more laissez-faire free-market model, but we consider that strict regulation is the only responsible approach that a conscientious government can take to this issue. We do not want a system that encourages or permits the involvement of organised crime, makes Western Australia a sex-trafficking destination, or burdens local governments with the task of preventing brothels being established close to schools, playgrounds or residences. If there is one thing that the experience of the previous government's legislative failures clearly indicates, it is that it is critical that legislation reflect the legitimate concerns of local government and ordinary Western Australians, instead of being imposed on them in pursuit of an ideological goal of decriminalisation.

Point of Order

Mr J.R. QUIGLEY: Time has gone on the clock.

The SPEAKER: Member for Mindarie, I will be the determining point of whether the Attorney General is going to finish this statement. I have enabled the Attorney General to finish it. I am sure he does not have much to continue with.

Ministerial Statement Resumed

Mr C.C. PORTER: Indeed, I have one paragraph left, Mr Speaker.

A draft bill reflecting the approach that I have just described will be made publicly available in the coming months.

I have taken the step of delivering this speech to allow the opposition to respond as it sees fit to the detailed mechanics and principles of the government's plan, and to ensure that people who wish to do so are given an opportunity to respond to the proposal as early as possible in the drafting process. We are particularly concerned to ensure that local governments, residents and people who will be directly affected by what is proposed are able to freely express their views in the lead-up to the release of a draft bill. The government will consider all comment provided, and, following the consultation process, our intention is to finalise and introduce in the first half of 2011 legislation reflecting the approach that I have described.