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REGULATION OF SEXUAL SERVICES IN WESTERN AUSTRALIA

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NOTE: The newly-elected Government of Western Australian (Liberal-National Coalition) went to the 2008 state election with a promise to repeal the *Prostitution Amendment Act 2008* (WA) which was prepared under the previous Labor Government. The Government is currently considering new legislation which, based on the very limited information currently available, would allow regulated prostitution in only a few, designated areas and which would remove the role of local government envisaged by the *Prostitution Amendment Act 2008* (WA). Until alternative legislation is proposed, however, the Act stands capable of commencement.

The *Prostitution Amendment Act 2008* (WA) decriminalises prostitution in Western Australia and regulates the provision of prostitution in brothels. To this end, it amends the *Prostitution Act 2000* (WA) – renaming it the *Sexual Services Act 2000* (WA) – as well as several other acts as a consequence.¹ It is expected that the *Prostitution Amendment Act 2008* (WA) will enter into force in mid-2009. This paper explores the factors that caused the formation of the original legislation, how the *Prostitution Act 2000* (WA) dealt with prostitution and the issues that arose as a result, and the extent to which the *Prostitution Amendment Act 2008* (WA) alters this situation.

1. Prostitution in Western Australia: An overview

1.1 Historical background

The purpose of the *Prostitution Act 2000* (WA) was to better regulate prostitution in Western Australia following the end of the so-called ‘police containment policy’ that had previously been employed in the state.² Under that policy, police effectively ‘turned a blind eye’³ to prostitution despite its technical illegality. Arguably, this was due to the realisation that prostitution was inevitable and was better regulated – albeit in a rather rudimentary form – than not at all. Sex workers were required to undergo regular health checks and to register with police, who maintained a database of sex workers⁴ and monitored brothels to ensure that premises were kept drug, alcohol and (of course) children free, and employed only females. This approach was subject to significant criticism for its ‘lack of clarity, the absence of legislative foundation and potential to afford opportunities for corruption’.⁵ The Royal Commission into Whether There Has Been Corrupt or Criminal Conduct by any Western Australian Police Officer, headed by Geoffrey A Kennedy and released March 3, 2004, found that corruption was difficult to guard against under such a system.⁶

¹ These acts comprise: the *Community Protection (Offender Reporting) Act 2004* (WA), *The Criminal Code* (WA), the *Evidence Act 1906* (WA), the *Liquor Control Act 1988* (WA), the *Nurses and Midwives Act 2006* (WA), the *Western Australian College of Teaching Act 2004* (WA), the *Working with Children (Criminal Record Checking) Act 2004* (WA), and the *Young Offenders Act 1994* (WA).

² Prostitution Law Reform Working Group, 2007 *Prostitution Law Reform for Western Australia*, Office of the Attorney General, Perth, 14.

³ This was the characterisation of the former policy by Attorney General and Health Minister Jim McGinty: ABC Radio National, ‘Prostitution in WA’, *The Law Report*, 25 September 2007, <<http://www.abc.net.au/rn/lawreport/stories/2007/2042342.htm>> at 1 March 2009.

⁴ This database has subsequently been destroyed on the recommendation of the Prostitution Law Reform Working Group (discussed below) in the interest of sex workers’ privacy following decriminalisation of sex work in Western Australia: Prostitution Law Reform Working Group, 2007 *Prostitution Law Reform for Western Australia*, Office of the Attorney General, Perth, 35-36.

⁵ Prostitution Law Reform Working Group, 2007 *Prostitution Law Reform for Western Australia*, Office of the Attorney General, Perth, 14.

⁶ Western Australia, Royal Commission Into Whether There Has Been Corrupt of Criminal Conduct By Any Western Australian Police Officer, *Final Report* (2004) vol 2, part 2, 318.

As a result of such misgivings the policy was abandoned by Western Australian Police in August 2000, removing most of what little regulation had previously existed. This, along with the ongoing debate surrounding the regulation of prostitution in Western Australia, appeared to place pressure on the state government to commit to reform, and in 2000 the *Prostitution Act 2000* (WA) entered force. However, while this legislation dealt with street soliciting, the involvement of children, advertising and sponsorship, and police powers to investigate and enforce, it neither decriminalised nor adequately regulated prostitution. Thus the WA Government, in 2003, sought to establish a system of prostitution licensing through the *Prostitution Control Bill 2003* (WA), which would decriminalise the provision of sex work and relegate brothels to industrial land outside the vicinity of schools, churches and residential areas. While this Bill lapsed upon the calling of the 2005 state election, comments made in the states' upper house suggested that it would not have received sufficient support to pass into legislation.⁷

1.2 Push for Reform

In 2006, the Western Australian Attorney General and Health Minister, Jim McGinty, described the state's attempts to control prostitution to this point as a 'head in the sand approach' to a profession 'not capable of being prohibited' and argued that the introduction of comprehensive regulation was necessary to properly regulate the industry.⁸ He argued that any such regulation ought to be defined by choice, allowing individuals to freely leave or enter the sex industry, and protection, both of workers and clients.

Unsurprisingly, the Western Australian Police were supportive of the proposed regulation⁹, however church groups¹⁰ and even some brothel owners criticised the government for failing to adequately consult the community,¹¹ as did proponents of a model supervised by the Western Australian Health Department as opposed to the Department of Racing, Gaming and Liquor.¹² Despite the Coalition's opposition to reform, some in the Liberal Party spoke out in favour of at least some form of legalised prostitution, particularly in large mining centres such as Kalgoorlie.¹³ Conversely, some opposition also came from within the Labor Party itself.¹⁴

Ronald Weitzer, summarises the political debate over the reforms as follows:

the arguments against the Bill were intended to shame the Government and to arouse a host of fears in the public arena. Prostitution was defined as sinful and evil, inherently exploitative and abusive of women, and detrimental to society — problems that cannot be ameliorated by legalization. These charges clashed with the more pragmatic perspective of the governing party, which centred on harm reduction.¹⁵

⁷ Prostitution Law Reform Working Group, 2007 *Prostitution Law Reform for Western Australia*, Office of the Attorney General, Perth, 15.

⁸ ABC Radio National, 'Prostitution in WA', *The Law Report*, 25 September 2007, <<http://www.abc.net.au/rn/lawreport/stories/2007/2042342.htm>> at 1 March 2009.

⁹ Andrea Hayward, 'Police back brothels', *Australian Associated Press*, 13 August 2007.

¹⁰ 'Criminal clients not sex workers: Perth Catholic Paper', *Catholic News*, 12 June 2007.

¹¹ 'Madam urges politicians to defeat prostitution bill' *ABC Online*, 13 March 2008.

¹² Colin Binns, 'Prostitution is a public health issue', *The West Australian* (Perth), 17 February 2007.

¹³ 'Senior Liberal MP rejects call to close down brothels', *ABC Online*, 21 September 2007.

¹⁴ Robert Taylor, 'Brothels push angers Labor MP', *The West Australian* (Perth) 21 September 2007.

¹⁵ Ronald Weitzer, 2008, 'Legalizing Prostitution: Morality Politics in Western Australia', *British Journal of Criminology* 49: 89.

1.3 Prostitution Law Reform Working Group

In September 2006, the Attorney General/Health Minister announced the formation of a working group to look at reforms of the state's prostitution laws. Consisting of three Western Australian politicians, and senior members of the Department of Health, Western Australia Police, and Office of the Attorney General, the Prostitution Law Reform Working Group (PLRWG) was charged with creating a framework that protected sex workers from exploitation and children from involvement, as well as improving public health.¹⁶ The group did so with a focus on minimal decriminalisation, but also looked at legalised, criminalised and more extensively decriminalised models.¹⁷ The group's focus appears to have been on the prostitution reform¹⁸ passed into legislation in New Zealand in 2003.

The PLRWG met with various stakeholders, including government and sex-industry representatives, and members of the group travelled to New Zealand to meet with participants in that country's framework for the regulation of prostitution. Key stakeholders were invited to make submissions,¹⁹ as were members of the public generally, resulting in 44 written submissions of which 26 supported decriminalisation, 17 did not support decriminalisation, and one which remained neutral.²⁰ Those submissions supporting the proposed reforms came from across the board including government agencies, public health bodies, sex worker support services, members of the public and even a church group; those which argued against any such reform stemmed largely from religious groups and members of the public.

Following this consultation, the PLRWG resolved that the government's proposed minimalist decriminalised model was the best avenue for reform.²¹ Citing the New Zealand model of reform, the group recommended reform including certification of brothels, planning approval requirements, significant health, safety and working conditions, and police powers of entry to enforce these regulations.²² These recommendations were, by and large, adopted by the legislature and are thus discussed below in relation to the specific provisions of the *Sexual Services Act 2000* (WA).

2. Development and Maintenance Requirements

The *Prostitution Amendment Act 2008* (WA) puts into effect planning and development controls, restricting the locations in which sexual service businesses may operate. Under the New Zealand legislation, territorial authorities – the equivalent of Australian local councils – were permitted to enact by-laws restricting where sexual service businesses could operate, causing significant difficulties for certain businesses in obtaining appropriate approvals to commence/continue operation. As a result of this, the PLRWG stressed that any such powers given to local government in Western Australia would need to be framed so as to

¹⁶ Prostitution Law Reform Working Group, 2007 *Prostitution Law Reform for Western Australia*, Office of the Attorney General, Perth, 5.

¹⁷ Prostitution Law Reform Working Group, 2007 *Prostitution Law Reform for Western Australia*, Office of the Attorney General, Perth, 13.

¹⁸ *Prostitution Reform Act 2003* (NZ).

¹⁹ Though of the 60 specific requests made, only 26 were met with a response: Prostitution Law Reform Working Group, 2007 *Prostitution Law Reform for Western Australia*, Office of the Attorney General, Perth, 42-43.

²⁰ Prostitution Law Reform Working Group, 2007 *Prostitution Law Reform for Western Australia*, Office of the Attorney General, Perth, 11.

²¹ Prostitution Law Reform Working Group, 2007 *Prostitution Law Reform for Western Australia*, Office of the Attorney General, Perth, 13.

²² Prostitution Law Reform Working Group, 2007 *Prostitution Law Reform for Western Australia*, Office of the Attorney General, Perth, 17-38.

ensure the taking of a 'reasonable and consistent approach', rather than one based on moral considerations, in the making of planning decisions.²³

2.1 Location

It was the view of the PLRWG that existing sexual service businesses should be allowed to continue to operate prior to the enactment of the legislation to ensure that such businesses were not pushed underground.²⁴ Land that was used for the provision of prostitution (other than in a small owner-operated business) immediately prior to September 12, 2006²⁵ and up to and including April 14, 2008 is permitted to be used for a sexual service business if an approval application is made to the CEO in the prescribed manner: s 21X(1)-(2) *Sexual Services Act 2000* (WA). On such application, the CEO must liaise with the Commissioner of Police and the relevant local government, and must grant approval unless he/she is satisfied that the business is not being managed properly, after having regard to the following considerations: whether there have been any complaints regarding the use of the land by resident and occupiers in the area, whether the business causes or is likely to cause a disturbance in the neighbourhood because of the number of sex workers, and the business's hours of operation, noise, and vehicular and pedestrian traffic: s 21X(3)-(4) *Sexual Services Act 2000* (WA).

Applications made under s 4(1) *Planning and Development Act 2005* (WA), to develop any land not falling within this description for the purposes of a sexual service business, require the authority to have regard to whether the business is likely to cause a nuisance to ordinary members of the public using the surrounding area and whether it is incompatible with the existing character or use of the area in which the land is situated: s 21Y(1) *Sexual Services Act 2000* (WA).²⁶

2.2 Advertising

The promotion of employment in the provision of sexual services – whether as a sex worker or assisting in provision in some other way – is prohibited in Western Australia: s 9 *Sexual Services Act 2000* (WA).

In the same vein, it is an offence subject to a \$50,000 penalty, both within and outside Western Australia, to promote or publicise, or agree to promote or publicise, any person as a sex worker or any business involving commercial sexual acts, whether by contract or an arrangement (legally binding or not), under which a sponsorship was, or was to be provided by another person: s 10(1)-(3) *Sexual Services Act 2000* (WA). Sponsorship in this context includes any scholarship, prize, gift or similar benefit, as well as any financial arrangement (other than a bona fide contract of employment or for services) for directly promoting or publicising a person or business via any medium.

Section 10A *Sexual Services Act 2000* (WA) similarly restricts the advertisement of commercial sexual acts. Advertising, in this context, means to advertise by any words, or pictorial or other representation, to notify the availability of or to promote a commercial sexual act, whether generally or specifically: s 10A(4) *Sexual Services Act 2000* (WA). Again

²³ Prostitution Law Reform Working Group, 2007 *Prostitution Law Reform for Western Australia*, Office of the Attorney General, Perth, 22.

²⁴ Prostitution Law Reform Working Group, 2007 *Prostitution Law Reform for Western Australia*, Office of the Attorney General, Perth, 24.

²⁵ This is the date the Attorney General publicly announced the Western Australian Government's intention to reform prostitution laws.

²⁶ Importantly, this section operates only to the extent that the *Planning and Development Act 2005* (WA) does not provide otherwise: *Sexual Services Act 2000* (WA) s 21Y(2).

subject to a \$50,000 penalty, this provision makes it an offence to advertise a commercial sexual act or authorise the same, other than in the prescribed manner (if any) through the internet, a newspaper or periodical.²⁷ In either of the latter two publications, an advertisement must also appear only in the classified advertisements section. Additionally, internet advertising consists of any advertisement sent or made accessible,²⁸ and thus would include 'spam' advertising via email along with advertising appearing on websites or through 'pop ups'. Finally, it is important to note that these advertising restrictions apply across the spectrum of sexual service providers, from individual sex workers though to large sexual service businesses. However, advertisements for non-small owner-operated businesses must carry the certificate number of the operator or manager of the business.²⁹

3. Brothel Owners & Managers

It was the view of the PLRWG that a minimalist certification approach similar to that employed in New Zealand was preferable to the more stringent licensing regimes operating in Victoria and Queensland. The latter system was perceived to push prostitution underground while the former was seen as being more likely to encourage legitimate involvement in the industry³⁰

Under the new regime, operators and managers of sexual service businesses must hold an operator's or manager's certificate if they are to operate or manage legally: s 21B *Prostitution Act 2000* (WA). An operator is a person who holds an operator's certificate, which is effectively a person who 'operates'. A person operates if, in relation to a sexual service business, he/she: owns, operates or carries on the sexual service business (whether alone or with others); employs, supervises or directs any person who undertakes the immediate management, direction or control of the conduct of a sexual service business, or; or exercises or exerts, or is in a position to exercise or exert, control over the manner in which the sexual service business is conducted.³¹ Similarly, a manager is a person who holds a manager's certificate, which is effectively a person who 'manages'. A person manages if, in relation to sexual service business, he/she undertakes the immediate management, direction and control of the conduct of the sexual service business.³² Failure to hold the relevant certificate will render a person liable to imprisonment for three years.³³

It is noteworthy that the Western Australian scheme focuses on the people in charge of sexual service businesses, rather than the individuals that work in those businesses. There is no requirement that sex workers themselves register or obtain certification before providing sexual services and indeed, such a requirement would be quite absurd. While sex workers operating alone or as part of a small owner-operated business³⁴ avoid the requirement to have an operator or manager/s, and thus the requirement to obtain the abovementioned certificates, regulation is still provided by local governments' control over the operation of

²⁷ *Sexual Services Act 2000* (WA) s 10A(1).

²⁸ *Sexual Services Act 2000* (WA) s 10A(3).

²⁹ *Sexual Services Act 2000* (WA) s 10A(2).

³⁰ Prostitution Law Reform Working Group, 2007 *Prostitution Law Reform for Western Australia*, Office of the Attorney General, Perth, 17-18.

³¹ *Sexual Services Act 2000* (WA) s 3.

³² *Sexual Services Act 2000* (WA) s 3.

³³ *Sexual Services Act 2000* (WA) s 21B(1)-(2).

³⁴ A small owner operated business is defined in *Sexual Services Act 2000* (WA) s 3: 'a sexual service business in which not more than 2 sex workers work and where each of those sex workers has full control over his or her individual earnings from taking part in commercial sexual acts'.

businesses from homes under various by laws. The PLRWG was of the view that such provisions would provide adequate regulation of small sexual service businesses.³⁵

3.1 Eligibility

Only individuals may obtain or renew a manager's or operator's certificate, though a proprietary company may also hold an operator's certificate. However, such a company must only count individuals among its shareholders: s 21C *Sexual Services Act 2000* (WA).

The prime decision maker in relation to certification of managers and operators is the CEO – the chief executive officer of the Public Service department principally assisting the Minister in the administration of certification.³⁶ The CEO may issue or renew a certificate where he/she is satisfied that the applicant is an individual of at least 18 years old age and who is suitable to hold such a certificate and the responsibilities that come with managing a sexual services business. The criteria for suitability require that the applicant has no charge pending for an alleged offence under the law of the Commonwealth or any Australian State or Territory, where the charge involves an act of violence against the person or involves a victim who was a child or incapable person: s 21G(1)(a)-(b) *Sexual Services Act 2000* (WA).

The CEO must also be satisfied that the applicant has not been declared a drug trafficker,³⁷ and has not been found guilty of an offence described in sch 2,³⁸ or under any Australian law that the CEO considers to be substantially similar to such an offence: s 21G(1)(c)-(e) *Sexual Services Act 2000* (WA). The sch 2 offences include all of the *Criminal Code* (WA) offences prescribed under s 14 *Sexual Services Act 2000* (WA), excluding offences relating to grievous bodily harm,³⁹ deprivation of liberty,⁴⁰ and the making of threats,⁴¹ and additional offences relating to the sexual assault of children outside Western Australia,⁴² persistent sexual conduct with children,⁴³ and sexual servitude.⁴⁴ It also includes the offences of employment of children for indecent purposes⁴⁵ and involvement in child pornography.⁴⁶

Furthermore, the CEO must be satisfied that the applicant has not been convicted of any other, indictable offence that is triable by jury and which the CEO considers would make it inappropriate for a certificate to be granted: s 21G(1)(f) *Sexual Services Act 2000* (WA). Finally, the CEO must be satisfied that the applicant has not had a certificate under the *Sexual Services Act 2000* (WA) revoked in the previous 5 years, is not the subject of a violence restraining order,⁴⁷ is otherwise of good character, a fit and proper person to hold a certificate, ordinarily resident in Western Australia and a citizen or permanent resident of Australia, and complies with any other prescribed matter: s 21G(1)(g)-(k) *Sexual Services Act 2000* (WA).

³⁵ Prostitution Law Reform Working Group, 2007 *Prostitution Law Reform for Western Australia*, Office of the Attorney General, Perth, 19.

³⁶ *Sexual Services Act 2000* (WA) s 3.

³⁷ Under *Misuse of Drugs Act 1981* (WA) s 32A.

³⁸ *Prostitution Amendment Act 2008* (WA) s 26, amending *Prostitution Act 2000* (WA).

³⁹ *Criminal Code* (WA) s 297.

⁴⁰ *Criminal Code* (WA) s 333C.

⁴¹ *Criminal Code* (WA) ss 338A-338C.

⁴² *Criminal Code* (WA) s 187.

⁴³ *Criminal Code* (WA) s 321A.

⁴⁴ *Criminal Code* (WA) ss 331B-331D.

⁴⁵ *Child Welfare Act 1947* (WA) s 108(1).

⁴⁶ *Censorship Act 1996* (WA) s 60.

⁴⁷ See *Restraining Orders Act 1997* (WA) s 3.

The suitability criteria outlined above also apply where an application for an operator's certificate is made by a proprietary company, however these are applied to each officer⁴⁸ of the company rather than the company itself, due to the obvious difficulties that would result if that were to be done: s 21G(2) *Sexual Services Act 2000* (WA).

3.2 Application process

To obtain or renew a certificate, a manager or operator must apply to the CEO, in a form approved by the CEO accompanied by any document or information specified in the form for verifying the background and reputation of the applicant: s 21D(a)-(b) *Sexual Services Act 2000* (WA). Of course, any application must also be accompanied by the prescribed fee, must state the name and address of any other person with whom the applicant will operate a sexual service business, and must also contain the location of the place at or from which the applicant's sexual service business is to be carried on: s 21D(c)-(e) *Sexual Services Act 2000* (WA). Upon request, applicants for certificates, or for renewal thereof, must also provide the CEO with any additional document or information the CEO requires that is or could be relevant to making his/her decision. Failure to do so may result in a \$6,000 fine and, more significantly, allows the CEO to hold off consideration until the required information is provided: s 21E *Sexual Services Act 2000* (WA).

The application must then be sent by the CEO to the Commissioner of Police for a report on the eligibility of the applicant. This report must be provided by the Commissioner within 4 weeks of receipt of the copy of the application or any longer period if agreed to by the CEO: s 21F(1)-(2) *Sexual Services Act 2000* (WA). In doing so, the Commissioner may, in writing, direct the CEO not to communicate to any other person any information specified in the direction and which is provided to the CEO under the Commissioner's report or otherwise. This is, however, on the proviso that the Commissioner considers the information might: prejudice the safety of a person, prejudice the effectiveness of an investigation or prosecution, reveal the identity of an informant, reveal confidential police practices or methodology, or otherwise be contrary to the public interest: s 21F(3)-(4) *Sexual Services Act 2000* (WA). In this event, the CEO must comply with a proper direction of the Commissioner.⁴⁹

3.3 Licensing

3.3.1 Duration

A certificate must state its duration and this must not exceed one year. If renewed after, but within 28 days of the day on which it expired, the renewal will be deemed to take effect on the day immediately after the date of expiry: s 21H *Sexual Services Act 2000* (WA).

3.3.2 Register of certificate holders

Section 21I *Sexual Services Act 2000* (WA) requires the CEO to keep an accurate and up-to-date register of all present and former certificate holders, in such manner and form as he/she determines. In respect of each certificate holder, this register must contain the holder's name, business or other address, details of any suspension or revocation, and any other information required by regulation. In the case of an operator, the register must also note the name and address of any other person with whom the operator operated or operates the

⁴⁸ An 'officer' of a company is defined as: a director or secretary; a person who exercises or exerts control or influence over the company, or is in a position to do so; or a shareholder: *Sexual Services Act 2000* (WA) s 3.

⁴⁹ Though this duty is despite the *Freedom of Information Act 1992* (WA), it is still subject to *State Administrative Tribunal Act 2004* (WA) s 24.

sexual service business and the location of the place at or from which the business is/was being carried on.

This register must be available for inspection by an officer – meaning a police officer or a person of the class specified in the regulations for this definition⁵⁰ – during normal office hours and may be made available electronically: s 21J(1)-(2) *Sexual Services Act 2000* (WA). An officer may, on application to the CEO and payment of any fee prescribed by the regulations,⁵¹ obtain a certified copy of the register or any entry therein, however no fee is payable if an application is made by a police officer for the purpose of performing a proper police function: s 21J(3)-(4) *Sexual Services Act 2000* (WA).

3.3.3 Display of certificates by operators and managers

Section 21K *Sexual Services Act 2000* (WA) requires that a certificate contain all prescribed particulars, is to be replaced with a new certificate if renewed, and may be provided by the CEO to the holder as a certified copy on the payment of any prescribed fee. Further, managers and operators of a sexual service business must ensure that current certificates, or certified copies, are displayed at the place where the business is conducted so that these are visible to a person on entering the place: s 21L(1) *Sexual Services Act 2000* (WA). A penalty of \$12,000 applies where any person fails to display, alters or defaces a certificate.⁵²

3.3.4 Suspension and revocation of a certificate

For the purposes of determining whether or not a certificate should be suspended or revoked, the CEO may: require a person to produce any document or other thing concerning the determination that is in the possession or under the control of the person, inspect and retain it for such reasonable period as the CEO thinks fit and make copies, require a person to give such information as the CEO requires and to answer any question put to that person: s 21M(1) *Sexual Services Act 2000* (WA).

Any requirement to produce a document or thing must be made in writing given to the person required to produce it, must specify the time at or within which it must be produced, may require that it be produced at a specific place and by specific means, and, where a document required is not in a readable format, it is also a requirement that it be produced itself, along with its contents in a readable format: s 21M(2) *Sexual Services Act 2000* (WA). Further, any requirement that information be given or a question answered, may be made orally or by notice in writing, must specify the time at or within which the information is to be given or the question answered, and may require that the information or answer required be given orally or in writing, be given at or sent or delivered to a place specified in the requirement, be sent or delivered by specific means, or be verified by statutory declaration: s 21M(3) *Sexual Services Act 2000* (WA). The CEO must also inform any person required to provide a document or thing, or to give information or answer a question, that they are obliged to do so under the *Sexual Services Act 2000* (WA): s 21M (4)-(5) *Sexual Services Act 2000* (WA).

Section 21N(1) *Sexual Services Act 2000* (WA) allows the CEO, by notice to a certificate holder, to revoke his/her certificate if the CEO is no longer satisfied as to any matter about which the CEO is required to be satisfied before issuing the certificate. Before doing so, however, the CEO must also inform a certificate holder that the CEO is considering revoking the certificate and give the holder a reasonable opportunity to respond.⁵³ The CEO may

⁵⁰ *Sexual Services Act 2000* (WA) s 21J(5).

⁵¹ Such regulations have not been released and will not be until the *Prostitution Amendment Act 2008* (WA) is proclaimed.

⁵² *Sexual Services Act 2000* (WA) s 21L(3).

⁵³ *Sexual Services Act 2000* (WA) s 21N(1).

also, through the same process, suspend a certificate for a period specified by notice.⁵⁴ A person aggrieved by a decision of the CEO may apply to the State Administrative Tribunal for a review of the decision. However, the Commissioner of Police or the CEO may apply to the Tribunal to prevent the disclosure of certain information to the applicant, his/her representative or any other person: s 21W(1)-(3), (6) *Sexual Services Act 2000* (WA).⁵⁵

3.4 Conducting a Sexual Service Business

An operator of a sexual service business, other than an individual sex worker or a small owner-operated business, must ensure that either an operator or manager is present at all times during which the business is being carried on. Failure to do so will result in a \$24,000 penalty for a first offence, and 3 years' imprisonment for any subsequent offence: s 21O *Sexual Services Act 2000* (WA).

Managers or operators of sexual service businesses must not allow people to act as sex workers unless they have entered into a contract of service with the operator and, whenever acting as sex workers, are acting in the course of their employment under such a contract: s 21P(1) *Sexual Services Act 2000* (WA). Failure to do so will result in a \$50,000 fine, though this will not be enforceable against individual sex workers or small-owner operated businesses: s 21P(2)-(3) *Sexual Services Act 2000* (WA).

Additional restrictions on sexual service businesses are that they must not be operated at or from premises licensed to serve liquor,⁵⁶ otherwise the operator will be liable to a \$50,000 fine, and those businesses that are small owner-operated businesses must not share premises for the provision of sexual services with another sexual service business of any size: s 21Q-21R *Sexual Services Act 2000* (WA).

3.5 Protection of Sex Workers and Clients

3.5.1 Obligations of operators and managers

Managers and operators of sexual service businesses must take all reasonable steps to ensure that, unless a prophylactic is used, a sex worker employed or engaged by the business does not take part in a commercial sexual act involving vaginal, anal or oral penetration, or other activities carrying a similar or greater risk of acquiring or transmitting a prescribed infection or virus: s 21S(1)(a) *Sexual Services Act 2000* (WA). Managers and operators must also take all reasonable steps to give health information⁵⁷ to both sex workers and clients, and display this prominently in any place at or from which the business is carried on: s 21S(1)(b)-(c) *Sexual Services Act 2000* (WA).

It is further required that managers and operators: neither state nor imply that a medical examination of a sex worker means that he/she is not infected or likely to be infected with a prescribed infection or virus, take all other reasonable steps to minimise the risk of a sex worker employed or engaged by the business acquiring or transmitting a prescribed infection

⁵⁴ *Sexual Services Act 2000* (WA) s 21N(2).

⁵⁵ Under *Sexual Services Act 2000* (WA) s 21W(4), the Tribunal is to make such an order if it is satisfied that disclosure of the information might: prejudice the safety of a person, prejudice the effectiveness of an investigation or prosecution, reveal the identity of an informant, reveal confidential police practices or methodology, or otherwise be contrary to the public interest.

⁵⁶ See *Liquor Control Act 1988* (WA) s 3(1).

⁵⁷ 'Health information' is defined in the *Sexual Services Act 2000* (WA) s 21S(2): 'information on sex practices and services for the prevention and treatment of a prescribed infection or virus'.

or virus,⁵⁸ and display information prominently in any place at or from which the business is carried on regarding the right of a sex worker to refuse to take part in or continue to take part in a sexual act: s 21S(1)(d)-(f) *Sexual Services Act 2000* (WA). Failure to meet any of the above obligations renders a manager or operator liable to a \$12,000 fine.⁵⁹

A manager or operator must not permit or encourage a sex worker to act as a sex worker and engage in acts involving vaginal, anal or oral penetration where that manager or operator knows, or could reasonably be expected to know, that the person has a prescribed infection or virus. Where a manager or operator permits such work, he/she will be liable to imprisonment for 2 years: s 21T(1) *Sexual Services Act 2000* (WA). However, a manager or operator will have a defence if it can be proved that he/she exercised all due diligence as ought to have been exercised, having regard to the nature of the person's functions and to all the circumstances, to prevent the sex worker from working in his/her sexual service business: s 21T(2) *Sexual Services Act 2000* (WA).

A manager or operator of a sexual service business must give a prophylactic sheath free of charge to a client and a sex worker for use when taking part in a commercial sexual act at the sexual service business. Failure to do so renders the manager or operator liable to a \$12,000 fine: s 21U *Sexual Services Act 2000* (WA).

3.5.2 Right to refuse to do sex work

The PLRWG recognised the significant vulnerability of sex workers – particularly street and escort workers, and foreign sex workers – to violence and exploitation. To this end, the group recommended that sex workers' employment entitlement not be affected by their decision to refuse to perform commercial sex acts. The rationale behind this is that if entitlements, such as outstanding payments remain available despite a decision to quit, sex workers with a 'genuine desire to leave the industry' will be assisted to do so.⁶⁰

Section 14 *Prostitution Amendment Act 2008* (WA) therefore inserts additional provisions regarding a sex worker's refusal to work. Section 13A *Sexual Services Act 2000* (WA) allows a person to refuse to take part in or continue to take part in a commercial sexual act. This is despite the existence of any contract requiring the person to participate in such activity, which does not constitute consent where actual consent does not exist or has been withdrawn. The provision does not, however, protect a sex worker from another party's right to rescind such a contract or recover damages for a failure to perform contract work. Section 13B *Sexual Services Act 2000* (WA) protects a sex worker's rights under the *Workers' Compensation and Injury Management Act 1981* (WA) where he/she refuses to do or continue sex work generally (as opposed to refusal to perform particular acts or at a particular time).

4. Police powers of enforcement

The *Prostitution Amendment Act 2008* (WA) leaves police powers of enforcement largely untouched other than replacing all references to prostitution with references to sexual service businesses. Police have the power to enter any place he/she has a reasonable suspicion is not a residence and from which a sexual service business that is not a small owner-operated business is being carried on. Upon entry, he/she may check that any required certificates are

⁵⁸ Potentially, this could extend to cancelling the employment of an injecting drug user.

⁵⁹ *Sexual Services Act 2000* (WA) s 21S(1).

⁶⁰ Prostitution Law Reform Working Group, 2007 *Prostitution Law Reform for Western Australia*, Office of the Attorney General, Perth, 31.

displayed and may request proof of identity from any operator or manager.⁶¹ In relation to certain offences under s 7 *Sexual Services Act 2000* (WA) and those relating to children, an officer may also request, either in writing or orally, any document or thing, retain this to make copies, and may request any other information legally required to be given.⁶²

Police officers also have powers to direct people to move on where they are suspected of committing or intending to commit an offence against the *Sexual Services Act 2000* (WA),⁶³ and may, without warrant, detain and search anyone similarly suspected and seize anything likely to provide evidence of this.⁶⁴ Police may also, without warrant, enter a sexual service business place, search, and seize anything affording evidence of an offence against the provision of the *Sexual Services Act 2000* (WA).⁶⁵ This is in line with the recommendations of the PLRWG, which suggested that police retain such powers, despite these being more extensive than those shared by New Zealand police, in order to strike a better balance between minimising regulation and ensuring the appropriateness of sexual service business participants.⁶⁶ Of course, police also have powers to search and seize with warrants, which may be obtained remotely.⁶⁷ In any of the above searches, the typical requirements regarding police searches of individuals apply.⁶⁸ Police have various other powers incidental to the seizure of documents and things in ss 30-32, 34 *Sexual Services Act 2000* (WA).

Importantly, an officer may also act undercover and with immunity from prosecution for any offence against the *Sexual Services Act 2000* (WA), provided that the Police Commissioner has deemed the officer to be a suitable person.⁶⁹

5. Restraining Orders

The *Prostitution Act 2000* (WA) allowed the court to make various restraining orders to prevent individuals from committing further offences where they had already been found to have committed an offence against the Act. These provisions remain intact in the *Sexual Services Act 2000* (WA).⁷⁰ The court may similarly make an order restraining a person who has been given a direction to move on under s 24 *Sexual Services Act 2000* (WA).⁷¹ Before any such order is made, a person must be given an opportunity to be heard: s 39 *Sexual Services Act 2000* (WA). However, if made, an order may contain any terms necessary to prevent a person reoffending⁷² and may remain in effect as long as specified or, where no period is specified, for one year: s 41 *Sexual Services Act 2000* (WA). Breach of a restraining order renders the person against whom it was made liable to a \$5,000 penalty: s 46 *Sexual Services Act 2000* (WA).

⁶¹ *Sexual Services Act 2000* (WA) s 21V.

⁶² *Sexual Services Act 2000* (WA) s 23.

⁶³ *Sexual Services Act 2000* (WA) s 24.

⁶⁴ *Sexual Services Act 2000* (WA) s 25.

⁶⁵ *Sexual Services Act 2000* (WA) s 26.

⁶⁶ Prostitution Law Reform Working Group, 2007 *Prostitution Law Reform for Western Australia*, Office of the Attorney General, Perth, 35

⁶⁷ *Sexual Services Act 2000* (WA) ss 27-28.

⁶⁸ These requirements include that officers may only search individuals of the same sex and that body cavity searches may only be conducted by a medical practitioner or registered nurse as defined in the *Medical Practitioners Act 2008* (WA) and *Nurses and Midwives Act 2006* (WA): *Sexual Services Act 2000* (WA) s 29.

⁶⁹ *Sexual Services Act 2000* (WA) s 35.

⁷⁰ *Sexual Services Act 2000* (WA) s 37.

⁷¹ *Sexual Services Act 2000* (WA) s 38.

⁷² *Sexual Services Act 2000* (WA) s 40.

Orders may be varied or cancelled upon application to the Court by the police or by the person against whom the order was made, where there is sufficient reason given to do so,⁷³ and a person aggrieved by a decision of a court relation to a restraining order may appeal against that decision: s 47 *Sexual Services Act 2000* (WA). Additionally, various provisions exist for the making and variation/cancellation of restraining orders against children in s 45 *Sexual Services Act 2000* (WA).

6. Legal Proceedings

A prosecution for an offence under *Sexual Services Act 2000* (WA) can only be commenced by a police officer in front of a magistrate: s 55 *Sexual Services Act 2000* (WA).

6.1 Protection of certain persons

A police officer, person assisting a police officer and the CEO will be relieved of tortious liability for anything done or omitted to be done, in good faith in the performance or purported performance of a function under the *Sexual Services Act 2000* (WA).⁷⁴

6.2 Exchange of information between State authorities

Section 57 of the former *Prostitution Act 2000* (WA) made provision for the exchange of information between State authorities – police, public servants administering the *Young Offenders Act 1994* (WA) and the *Children and Community Services Act 2004* (WA)⁷⁵ – where this was or could reasonably be expected to be relevant to the performance of a function of the State authority to which the information was disclosed, though this was subject to certain limitations, such as where the provision of information would be likely to compromise an investigation: s 57(1)-(3) *Prostitution Act 2000* (WA). Such information could be disclosed even where contrary to any duty of confidentiality and a person making such disclosure would not incur civil or criminal liability as a result of the disclosure: s 57(5)-(6) *Prostitution Act 2000* (WA).

Section 23 *Prostitution Amendment Act 2008* (WA) maintains these provisions and provides for the further inclusion of the CEO and persons employed in the Department amongst the State Authorities referred to in s 57 *Prostitution Act 2000* (WA).

6.3 Liability of managerial officers and operators

Where a corporation commits an offence under the Act, each person who is a managerial officer⁷⁶ is also to be treated as having committed the offence, unless the person proves both that he/she exercised all such due diligence to prevent the commission of the offence as he/she ought to have, having regard to the nature of his/her functions and the surrounding circumstances, and that the offence was committed without his/her consent or connivance: s 59 *Prostitution Act 2000* (WA) and remains so under the *Sexual Services Act 2000* (WA). Further, where a manager commits an offence under the *Sexual Services Act 2000* (WA), the

⁷³ *Sexual Services Act 2000* (WA) s 42.

⁷⁴ *Sexual Services Act 2000* (WA) s 56.

⁷⁵ *Prostitution Act 2000* (WA) s 57(4).

⁷⁶ This may include the director, secretary, persons exercising control or influence over the body or in a position to do so, persons taking responsibility for the management of a business carried on by the body, and shareholders of the relevant proprietary company: *Sexual Services Act 2000* (WA) s 3.

operator of the relevant sexual service business is treated as having committed the same offence and is liable to the penalty prescribed: s 59A *Sexual Services Act 2000* (WA).

7. Administration of the Act

7.1 Review

The Minister administering the *Health Legislation Administration Act 1984* (WA) is to carry out a review of the operation and effectiveness of the Act as soon as is practicable after the expiration of 2 years from the commencement of the *Prostitution Amendment Act 2008* (WA)⁷⁷ and is to prepare a report based on this review and lay it before each House of Parliament: s 60 *Sexual Services Act 2000* (WA).

7.2 Regulations

For the purposes of the *Sexual Services Act 2000* (WA), regulations may be created to exempt a place described in regulations from being a place that is, or is in the view or within hearing of, a public place: s 61 *Sexual Services Act 2000* (WA). Regulations may also be created in regards to the making of applications for the making, variation or cancellation of restraining orders: s 62 *Sexual Services Act 2000* (WA).

7.3 New schedule

As noted above, s 26 *Prostitution Amendment Act 2008* (WA) also inserts an additional schedule into the former *Prostitution Act 2000* (WA). Schedule 2 contains offences relevant to the granting of a certificate. These include:

- *Censorship Act 1996* (WA) s 60.
- *Child Welfare Act 1947* (WA) s 108(1).
- *Children and Community Services Act 2004* (WA) s 192(1) or (2).
- *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA) s 60.
- *The Criminal Code* ss 181; 186; 187; 204A or 204B; 278 or 279; 281A; 320(2) or (3); s 321(2) or (3); 321A(3); 324, 325 or 326; 327; 329; 330(2) or (3); 331B, 331C or 331D; 332; 343; 396, 397 or 398.

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⁷⁷ The date on which this occurs is April 14, 2010.