ECONOMIC POLICY SCRUTINY COMMITTEE

RESPONSES BY THE DEPARTMENT OF THE ATTORNEY-GENERAL AND JUSTICE

TO WRITTEN QUESTIONS FROM THE COMMITTEE

SEX INDUSTRY BILL 2019

Clause 4 – Definitions

1. **The Northern Territory Women's Legal Services recommended that the term "suitable person" be defined and that the definition of "sex work" be amended to remove the word 'reward' stating that the inclusion of this word leaves sex workers vulnerable to exploitation as well as an expectation to work for inadequate return.**

   (a) What criteria are used to define a "suitable person" and what would be the effect on the operation of the Bill of defining this term in clause 4?

   (b) What would be the effect of removing the word "reward" from the definition of sex worker in clause 4?

AGD Response:

1.(a)

It is intended that the Regulations will set out the criteria for the Commissioner of Consumer Affairs to have regard to in considering whether to issue a suitability certificate. The criteria will provide:

(a) whether the applicant:

   (i) has been previously found guilty of a relevant indictable offence;

   (ii) has been declared bankrupt, or is presently an undischarged bankrupt;

   (iii) has been, or has been associated with an entity that has been, previously subject to proceedings for failure to comply with occupational health and safety laws;

   (iv) was previously certified (or equivalent), and if the certification was revoked; and

(b) any historical and contextual nature of the matters in (a).

A relevant indictable offence is an indictable offence involving:

(a) assault;

(b) sexual assault;

(c) fraud or other dishonesty;

(d) theft;

(e) prohibited substances as defined under the *Misuse of Drugs Act 1990* or equivalent, however would not include an offence relating to the possession or use of a less than traffickable quantity for personal use; or

(f) the provision of sex work by the applicant or another person, however would not include an offence relating to the provision of sex work merely because the applicant was a worker or an operator of a sex services business.

Given the detail, it is not feasible from a legislative drafting perspective to include "suitable person" as a definition in clause 4. Operationally, the criteria contained in the Regulations will be considered in administering the provisions of the Act relating to suitability certificates.

1.(b)

The term "reward" was included in the definition of "sex work" to ensure that the Act applied to all workers regardless of the form of compensation they receive for providing their services. While the term "payment" has connotations that extend beyond money, it is generally understood to relate to a monetary transaction.

The inclusion of the term "reward" in the setting of "in return for payment or reward" is intended to make it clear that, for the purposes of the law in the Northern Territory, a worker will be considered to be a worker regardless of how they are compensated. This supports the legitimisation of the worker and affords the worker access to protection from exploitation.

Clause 7 – Contract for sex work not void

2. **Andrea Tokaji recommended that further strengthening against exploitation could be achieved by amending clause 7 to ensure that 'contracts cannot be enforceable if they are in direct conflict with international and national workers rights, human rights and women's rights principles, for the protection of the women working in Brothels'.**

   (a) What would be the effect on the operation of the Bill of amending clause 7 in this way?

AGD Response:

2.(a)

Australia is a signatory to a number of United Nations charters providing for human rights, including women's rights and worker rights. The implementation of these charters is led by the Commonwealth and supported by states and territories. Particularly relevant to sex work are human rights issues relating to human trafficking and slavery. Collaborative arrangements exist between police services and justice agencies under the National Action Plan to Combat Human Trafficking and Slavery, which includes the detection, investigation and enforcement of Commonwealth and state/territory offences.

Reflecting this, the Northern Territory Criminal Code includes an offence prohibiting conduct that amounts to forced or compulsory labour where elements of assault and/or deprivation of liberty are present (noting the offence may be committed by merely attempting or conspiring to commission the offence, and may be constituted by non-physical elements, including threats).

For workplace contracts (if the Bill is passed), the same laws that govern contracts of service or for service as they apply to other industries will apply to contracts within the sex industry. Inclusion of a clause as suggested would unnecessarily complicate the application of general laws and likely lead to confusion in their application.

Clause 9 – Refusal to perform sex work

3. **Caroline Norma expressed concerns that many sex workers will not exercise their right to withdraw consent due to fear that legal action will be taken against them for breaking the contract.**

   (a) What, if any, measures will be put in place to assist sex workers to understand their legal rights and to combat fears regarding action that may be taken against them for exercising their rights?

AGD Response:

3.(a)

As with any other contract, a contract for sex work requires the express agreement between the parties about the services being provided. The intention of clause 9 relating to refusal is to reinforce the worker's right to determine the terms on which services may be provided, and to enable the withdrawal of consent where the terms are not being met, particularly where a worker's safety and security is at risk.

Any potential legal action arising from the withdrawal of consent will depend on the circumstances of the individual case. Additionally, it would be limited to the reimbursement of any payment made by the client in respect of the services not provided as agreed in the contract for service. A breach of contract which results in an application for damages would also require determination of damages by a court.

Industry groups, such as Scarlet Alliance and Sex worker Outreach Program, have committed to undertaking education and information programs for workers and businesses on the operation of the Act. This would likely include informing workers of rights in relation to consent.

Clauses 12-14 – Children and sex work

4. **The Committee has been advised by its legal counsel that a child involved in sex work could be criminally liable under clauses 12 to 14. For example, clause 13 creates an offence where a person receives payment for sex work involving a child and it is possible the children themselves would receive payment for that work. Equivalent legislation in New Zealand provides that 'no person under 18 years of age may be charged as a party to an offence committed on or with that person' (s 23(3) *Prostitution Reform Act 2003*).**

   (a) Please clarify the intention of these provisions with regard to the prosecution and conviction of children providing sex services or receiving payment for sex services.

   b) What would be the effect of amending the Bill to include a provision similar to that in s 23(3) of the New Zealand Prostitution Reform Act 2003?

AGD Response:

4.(a)

Clauses 12 to 14 are intended to prohibit a child being engaged or used to perform sex services. The Bill removes the existing offence which provides that it is an offence for a child to perform sex work, which acknowledges that a child is more likely than not doing so under duress. The offences are drafted to attribute fault to the actions of the person who is engaging or using a child for sex work rather than to the child who is present.

While it is conceivable that a child may be charged as a result of conduct contrary to the offence provisions in the Bill, such as by procuring another child to perform sex work, there are considerations that apply when determining whether to charge a child. If the offender is a child, the ordinary prosecutorial discretion and culpability/capacity about children applies, including the principle of doli incapax for children under 14.

Ultimately the offences are intended to protect children from being used or exploited for sex work.

4.(b)

The inclusion of a provision similar to section 23(3) of the *Prostitution Reform Act 2003* (NZ) would have the effect of preventing the prosecution of a 17 year old who might be engaged in, for example, the act of forcing, through the use of intimidation or violence, another child to perform sex work or procuring a child to provide sex work services for another person. In such circumstances, it may be appropriate for the child to be charged.

Clause 15 – Non-compliant advertising

5. **A number of submitters have recommended the Bill be amended to remove clause 15(2) and (4) stating that sex work businesses should be able to advertise sex work positions in the same way that other businesses advertise for staff. They note that making such advertising illegal encourages non-compliance and 'oblique advertising' which can potentially lead to 'circumstantial entrance to the industry' and lead to misunderstandings about what the position entails.**

   (a) Given that clause 3(e) states that an object of the Act is to treat sex work in the same way as any other industry, what is the rationale for making it an offence to advertise sex work positions?

   (b) What would be the effect on the operation of the Bill or removing clauses 15(2) and (4)?

AGD Response:

5.(a)

Clause 15 reflects government's policy decision to retain the current restrictions on advertising as found in section 19 of the *Prostitution Regulation Act 1992* and regulation 4 of the *Prostitution Regulations 1992*.

5.(b)

There would not be an effect on the overall operation of the Bill if clauses 15(2) and (4) were removed.

6. **A number of submitters objected to clause 15(1) noting that, as specified in clause 3(e), sex services should be subject to the same advertising restrictions as other businesses. Concern was expressed that restrictions would be carried over from the *Prostitution Regulation Act 1992,* with this resulting in onerous conditions and contributing to low levels of compliance and enforcement. Several submitters also highlighted the importance of transparency when advertising services, noting that clear advertising and subsequent negotiations with a client contributed to a sex worker's safety by reducing risk.**

   (a). What is the rationale for allowing the prescription of additional restrictions on advertising in the sex industry that would not be applied to other industries?

AGD Response:

6.(a)

Clause 15 reflects government's policy decision to retain the current restrictions on advertising as found in section 19 of the *Prostitution Regulation Act 1992* and regulation 4 of the *Prostitution Regulations 1992*.

Clauses 18-21 – Suitability certificates

7. **A number of submitters commented that the requirement for a suitability certificate for businesses that employ more than two sex workers is onerous, with comparable legislation in other jurisdictions only requiring certificates for businesses with more than four employees (New Zealand) or five employees (South Australia).**

   (a) What is the rationale for requiring suitability certificates where a sex services business engages more than 2 sex workers?

   (b) What consideration, if any, was given to specifying a higher number such as the requirements currently in force in New Zealand and South Australia?

   (c) Are there any conditions under which sex workers who work together in the same premises but do not manage or employ each other would be required to hold a suitability certificate? If so, what are these conditions?

AGD Response:

7.(a)

The number of workers forms the basis on which to distinguish between small scale operations and commercial scale ventures. The number is somewhat arbitrary: New Zealand opted for four, South Australia opted for five.

The Northern Territory's Bill has settled on two workers being the delineation based on interactions with the Northern Territory Planning Scheme in relation to home occupation use of premises under that scheme. The rationale is that operators who cannot operate out of a residential premises due to the size of their operation (i.e. more than two workers) would ordinarily be considered commercial scale.

7.(b)

Consideration was given to a higher number of workers, however this would not work with the Northern Territory Planning Scheme for home occupation use of premises. Community amenity is a consideration for home occupation use of premises.

7.(c)

The requirement to obtain a suitability certificate applies to business operators who engage more than two workers. A sex services business that is operated by a sole trader (e.g. an independent sex worker) would not need to obtain a suitability certificate unless that operator engaged two other workers to work for them. The fact that an independent worker may share some facilities with another independent worker will not, of its own, change the nature of those independent businesses.

The object is to distinguish between commercial operations who employ a number of workers and have a larger client base and independent sex workers so as to provide some level of guarantee that workers and clients of commercial scale businesses will not be taken advantage of or exploited.

8. **Clause 24 states that the requirements for suitability certificates may be prescribed in the regulations.**

   (a) What criteria will be considered when assessing whether a person is "suitable" to own or manage a sex industry business?

AGD Response:

8.(a)

Please refer to the response provided to question 1 above.

9. **Legal advice provided to the Committee noted that while a sex service business engaging more than two sex workers 'must' hold a suitability certificate, there is no separate provision for general penalties under the Bill for breaching that requirement. Although clause 24(2) enables regulations to provide for the 'requirements of suitability certificates' and 'matters relevant to the revocation of suitability certificates' it does not provide for penalties.**

   (a) Please clarify why no penalties or consequences have been provided in the Bill for breaching clause 18.

   (b) What is the effect of the requirement for suitability certificates in the absence of such penalties?

AGD Response:

9.(a)

The intent of the Bill is to change the regulatory nature for the business of sex work. In supporting the move from prohibition to permitting the operation of sex service businesses, consideration has been provided to how it is best regulated. This includes considering matters of potential non-compliance. Most business regulation does not automatically result in the commission of an offence for non-compliance. In determining whether to provide non-compliance as an offence, the nature of the operational requirement is considered. It is also open to the regulator, in this case the Commissioner of Consumer Affairs, to seek compliance through civil injunctive action in the courts, which has a lower burden of proof threshold than criminal matters.

Additionally, the experience under the current *Prostitution Regulation Act 1992*, and in jurisdictions elsewhere, has also shown that an overly criminal regulatory environment can create difficulties for enforcement measures in establishing the standard of beyond reasonable doubt required for offences.

The focus of the Bill is also to ensure that sex workers have access to the same workplace rights as other workers such as a safe and healthy work environment.

9.(b)

The objective of suitability certification is to provide some level of guarantee that workers and clients of those businesses will not be taken advantage of or exploited. It also provides some guidance to industry on the expected standards following decriminalisation.

10. Clause 20(a) provides that a suitability certificate remains in force 'until there is a change to any of the certificate holders' of a body corporate. By clause 18(2), for a body corporate 'each executive officer and any nominee of the operator must hold a suitability certificate'. Clause 20 appears to mean that where an executive officer is replaced the suitability certificate expires for all certificate holders of that corporation. This would effectively mean that if an officer is replaced the business would have to shut down until new certificates could be issued.

(a) Please clarify whether it is the intent of clause 20 to result in the expiration of suitability certificates for all certificate holders of a corporation when one of these holders is replaced.

(b) What would be the effect on the operation of the Bill of removing clause 20(a)?

(c) If clause 20(a) is required, what would be a convenient means of enabling continuity of business following a change?

AGD Response:

10.(a)

Under clause 18(b), the corporate operator and each executive officer/nominee must hold a suitability certificate. The suitability certificate is issued on an individual basis, not a collective basis. The suitability certificate remains in force while there is no change in the circumstances of the person holding the certificate. For example, if an executive officer leaves a body corporate, the certificate issued to the body corporate operator will remain in force under clause 20(a) if the body corporate remains the operator. Under this scenario, the certification of the executive officer would automatically lapse as the person is no longer an officer of the body corporate.

10.(b)

Removal of clause 20(a) would see persons possessing a suitability certificate indefinitely, even where they are no longer connected with the business. Clause 21 only gives the Commissioner of Consumer Affairs the power to revoke a suitability certificate under certain circumstances. By construction of Part 4, the Commissioner cannot revoke the certificate as, in the absence of clause 20(a), it is not a contravention of the proposed Act if a person validly issued a suitability certificate subsequently ceased involvement with the business.

10.(c)

Continuity of business follows the issuing of the certificate on an individual basis. Where the operator remains the same, and an officer or officers change, continuity is preserved through the operator. Where the operator changes, it is entirely appropriate that an assessment be conducted, even if an executive officer or nominee of the previous body corporate operator remains with the business, as a new operator is now involved with the business.

Clause 26 – Destruction of certain records created under Prostitution Regulation Act 1992

11. Clause 26(a) relates to personal information collected under Part 2, Division 2 of the *Prostitution Regulation Act 1992* but the only section of Division 2 that refers to the collection of personal information appears to be section 9.

(a) Please advise why clause 26(a) refers to the destruction of personal information in the whole of Part 2, Division 2 rather than only to section 9 of this division.

AGD Response:

11.(a)

The drafting of clause 26(a) is a matter of drafting style and requirements within the scope of Parliamentary Counsel.

12. Scarlet Alliance commented that clause 26 should also apply to any personal information that was shared from the register to other agencies.

(a) What consideration, if any, has been given to the destruction of this information where it has been shared with other agencies?

AGD Response:

12.(a)

As drafted, clause 26 calls for the destruction of all information obtained under Part 2, Division 2, or held in accordance with Part 3, Division 7 of the *Prostitution Regulation Act 1992*.

By operation, the requirement to destroy that information will apply to any person who holds that information regardless of who or where that person is. In addition, the Northern Territory's Information Privacy Principle 4.2 (made under the *Information Act 2000*) requires a public sector organisation to destroy personal information if it is no longer needed for the purpose it was acquired. That information will no longer be needed on repeal of the *Prostitution Regulation Act 1992*. Similar requirements exist under the *Commonwealth's Privacy Act 1988* (Australian Privacy Principle 11.2) and in other jurisdictions.

Consequently, all personal information will be required to be destroyed no matter how it is held.

13. **The Anti-Discrimination Commissioner and a number of other submitters supported the inclusion of clause 26 but commented that the Bill should also include a provision to expunge criminal records for sex workers for offences related to the criminal model. Scarlet Alliance commented that expungement of criminal records will reduce barriers to sex workers gaining employment in other industries and address a range of other adverse impacts consequent on having a sex work related criminal record.**

    (a) What consideration has been given to expunging the criminal records of sex workers and has a timeline been developed?

AGD Response:

13.(a)

It is understood that since commencement of the *Prostitution Regulation Act 1992*, 11 individuals have had one or more charges that were brought against them under the Act proven. However, only one of those individuals has had a conviction recorded, with fines imposed in relation to the offences of being an unlicensed escort agency, and carrying on escort agency without a manager.

The policy considerations to provide for expungement of criminal records would consider the type of offence or offences for expungement and the need to address convictions that relate to conduct which once was illegal but is now legal. It is noted that carrying on a sex service business will no longer be illegal and consideration could be given to exploring the implications of providing for expungement in due course.

Issues outside of the scope of the Bill but raised by submitters

14. **A large number of submitters, particularly those who opposed the Bill, expressed concern that many sex workers are vulnerable women or girls who will be unaware of, or too fearful to exercise, their rights under the new Act and that this will contribute to ongoing exploitation and abuse. Several submitters from the sex industry have recommended that these issues be addressed through the provision of peer support and the development of work health and safety guidelines similar to those developed in New South Wales, with these being developed collaboratively with organisations such as Scarlet Alliance, SWOP NT, NT Worksafe and Unions NT.**

    (a) What, if any, consideration has been given to developing Work Health and Safety guidelines?

    (b) What, if any consideration has been given to resourcing peer support with a view to providing such support to groups who engage in sex work who are particularly vulnerable, such as Aboriginal women and girls

AGD Response:

14.(a)

Scarlet Alliance and SWOP NT have advised that they are working with Unions NT and, where appropriate, NT WorkSafe, to develop guidelines in consultation with workers and business operators. These guidelines will be specific to individual businesses.

14.(b)

The Northern Territory Government provides funding and support in a number of forms to various non-government organisations through its annual budget process. This is beyond the scope of this Bill.