

EXPLANATORY STATEMENT

Sex Industry Bill 2019

SERIAL NO. 105

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

GENERAL OUTLINE

This Bill repeals the *Prostitution Act 1992* and establishes a regulatory framework for the provision of sex work in the Northern Territory.

The purpose of this Bill is to:

- (a) decriminalise sex work and legalise contracts relating to sex work;
- (b) enhance worker, client and public health and safety through:
 - i. applying the *Public and Environmental Health Act 2011* to operators of sex services businesses;
 - ii. allowing sex workers to work together and/or employ support staff; and
 - iii. providing a mechanism to ensure the suitability of operators of commercial scale sex services businesses;
- (c) prohibit exploitation of sex workers and enshrine the right of those workers to refuse to engage in sex work;
- (d) prohibit the use of children for, and in, sex work; and
- (e) enable the sex industry to operate in accordance with the laws of the Territory and the Commonwealth as they apply to all individuals and businesses generally, including, but not limited to, laws governing employment, occupational health and safety, workers compensation and rehabilitation, planning, taxation and discrimination.

NOTES ON CLAUSES

Part 1 Preliminary matters

Clause 1. Short title

This is a formal clause which provides for the citation of the Bill.

The Bill, when passed, may be cited as the *Sex Industry Act 2019*.

Clause 2. Commencement

This is a formal clause which provides when the Act will commence.

The Act will commence on a day fixed by the Administrator by Gazette notice.

Clause 3. Objects of Act

This is a formal clause which sets out the objects of the Act.

The primary object is that the Act provides for the decriminalisation of sex work and legalises contracts for sex work.

With decriminalisation, the Act seeks to enhance worker, client and public health and safety through application of the *Public and Environmental Health Act 2011*, allowing workers to work together and/or employ support staff; and through provision of a mechanism to ensure the suitability of operators of commercial scale sex work businesses.

Offences in the Act aim to prohibit exploitation of workers, along with provisions enshrining the right of workers to refuse to undertake sex work to ensure that consent is required for the provision of sex work at all times, and prohibit the use of children for or in sex work.

Finally, as a decriminalised industry, the Act provides that the sex work industry is to operate in accordance with the laws of the Territory and the Commonwealth in the same way the law applies generally to individuals and business. This includes laws such as that which govern employment, occupational health and safety, workers compensation and rehabilitation, planning, taxation and discrimination.

Clause 4. Definitions

This clause defines terms used through the Act, including the terms 'sex work', 'sex services business' and 'sex worker' to provide modern terminology in place of the terminology used in the repealed *Prostitution Regulation Act 1992*.

Clause 5. Application of Criminal Code

This clause applies Part IIAA of the Criminal Code, which states the general principles of criminal responsibility including defences and burden of proof, to offences against the Act.

Clause 6. Relationship with *Public and Environmental Health Act 2011*

This clause establishes that the *Public Health and Environmental Health Act 2011* applies to the provision of sex work with it to be treated as a declared activity under that Act, with sex service businesses to be exempt from registration otherwise required under that Act. Application of the *Public Health and Environmental Health Act 2011* will allow the development of guidelines and standards on health and hygiene for sex services businesses by the Chief Health Officer and the Minister for Health.

This clause also provides that a police officer, who may exercise powers and functions as an authorised officer under the *Public Health and Environmental Health Act 2011*, may not exercise those powers and functions in relation to sex work.

Part 2 Sex work generally

Clause 7. Contract for sex work not void

This clause explicitly provides that contracts for sex work are legal, thereby overriding the common law position that a contract for sex work is illegal or void on public policy or similar grounds, purely because the subject matter of the contract relates to sex work.

Clause 8. Adoption and promotion of sex safe practices

This clause provides that all reasonable steps must be taken to adopt and promote safe sex practices. This clause does not override other laws providing for occupational health and safety, however directs industry to specifically consider safe sex practices in conjunction with those other laws.

Clause 9. Refusal to perform sex work

This clause enshrines the right of sex workers to refuse to undertake sex work, and ensures that consent is required for the provision of sex work at all times. The clause provides that despite there being a contract for sex work, a person may refuse to provide, or continue to participate in that sex work, and that the contract for sex work does not constitute consent for the purposes of the criminal law.

The clause also provides that the general contractual rights to rescind or cancel, or to recover damages for non-performance of a contract are not affected by the ability of a person to refuse to provide or continue to undertake sex work.

Together, subclauses (1) through (3) balance the competing interests between worker safety and the general application of contract law.

The right to refuse to undertake sex work under subclause (1) is to allow a sex worker to stop the booking and withdraw their services at any time where they fear for their safety or wellbeing (whether it be physical, psychological or health), or otherwise. Subclause (1) enshrines that consent is required at all times throughout; reinforcing that “no means no”, and “stop means stop”.

Reflecting that consent is a fundamental (and ongoing) requirement for sex work, subclause (2) prevents an offender using the consent initially provided through a contract for sex work as a defence to an assault or other crime committed against the sex worker. While a worker may have consented to engage in sex work, that consent does not necessarily translate to consent in the participation of activities that would ordinarily constitute a criminal offence (such as assault or sexual assault). Subclause (2) makes it clear that, in relation to whether or not a crime had been committed against a sex worker, the mere fact that the worker entered into a contract for sex work does not constitute consent for anything that might occur subsequently.

Subclause (3) reinforces the common law position that generally applies to all contracts, that where a person breaches a contract (in this case by applying the rights provided under subclause (1)), and does not provide what was contracted for, the other party may be entitled to reimbursement (if it is not precluded under the contract), or other remedies other than specific performance (specific performance in this situation would constitute a criminal offence in the absence of consent).

This does not mean that sex workers will be required to pay compensation to clients on every occasion a contract is terminated. As the common law acknowledges, the entitlement

to damages for a breach of contract will depend on the particular circumstances around that breach. For example, if a worker is assaulted, then an offence has occurred, and it is that action which has brought the booking to an end at the instigation of the perpetrator. There would not be recourse under the law of contract (or the criminal law) for the perpetrator to seek compensation as the perpetrator brought the contract to an end, not the worker.

Likewise, if the worker is an employee, that worker would not be liable to reimburse an employer (operator) if that employer were obliged to pay compensation because the worker refused to provide the services agreed to between the employer and the client. Under general employment law, the employer is vicariously liable for actions of its employees, and is obliged to indemnify them for any actions they have done in good faith. In addition, public policy precludes an employer seeking compensation from an employee where that employee is exercising a statutory right in favour of the employee's health and safety (such as that provided under subclause (1)).

Part 3 Offences

Clause 10. Inducing person to perform sex work

This clause provides that it is an offence to intentionally do specified conduct if the conduct results in a person providing or continuing to provide sex work and the defendant is reckless as to this result.

The specified conduct includes intimidation, assault, supplying a dangerous drug, false representations and damaging property of a person.

The maximum penalty for the offence is 5 years imprisonment.

Clause 11. Inducing person to provide payment from sex work

This clause provides that it is an offence to intentionally do specified conduct if the conduct results in a person providing payment, that is derived directly or indirectly from sex work, and the defendant is reckless as to the result and circumstance.

The specified conduct includes intimidation, assault, supplying a dangerous drug, false representations and damaging property of a person.

The maximum penalty for the offence is 5 years imprisonment.

Clause 12. Causing or allowing child to perform sex work or work in sex services business

This clause provides that it is an offence to intentionally engage in conduct that results in a child performing or continuing to perform sex work, or to work for or in a sex services business and the person is reckless as to the result.

Subclause 1 relates to conduct involving a child under the age of 14 years and provides a maximum penalty of imprisonment for 14 years.

Subclause 2 relates to conduct involving a child over the age of 14 years and provides a maximum penalty of imprisonment for 7 years.

Strict liability applies to the age of the child. A defence of mistake of fact is available under the Criminal Code in relation to strict liability.

This offence recognises the public policy position that no child should be participating in sex work whatsoever, with the level of culpability for allowing that to occur being determined by

the capacity of the child to appreciate the situation and the circumstances surrounding the child's involvement.

Clause 13. Receiving payment from sex work by child

This clause provides that it is an offence to receive a payment which is derived from sex work provided by a child and the person is reckless as to this circumstance.

Subclause 1 relates to conduct involving a child under the age of 14 years and provides a maximum penalty of imprisonment for 14 years.

Subclause 2 relates to conduct involving a child over the age of 14 years and provides a maximum penalty of imprisonment for 7 years.

Strict liability applies to the age of the child. A defence of mistake of fact is available under the Criminal Code in relation to strict liability.

This offence recognises the public policy position that no child should be participating in sex work whatsoever, and that no person should benefit from that child's participation. The level of culpability of an offender is to be determined by the capacity of the child to appreciate the situation.

Clause 14. Agreeing to sex work by child

This clause provides that it is an offence to intentionally offer or accept an offer to enter an agreement where a child is to perform sex work or work in a sex services business, and the person is reckless as to those circumstance.

Subclause 1 relates to conduct involving a child under the age of 14 years and provides a maximum penalty of imprisonment for 14 years.

Subclause 2 relates to conduct involving a child over the age of 14 years and provides a maximum penalty of imprisonment for 7 years.

Strict liability applies to the age of the child. A defence of mistake of fact is available under the Criminal Code in relation to strict liability.

This offence recognises the public policy position that no child should be participating in sex work whatsoever, with the level of culpability for allowing that to occur being determined by the capacity of the child to appreciate the situation and the circumstances surrounding the child's involvement.

Clause 15. Non-compliant advertising

This clause provides offences for advertising relating to sex work services.

Subclause (1) provides it is an offence place an advertisement for sex work services in a newspaper or on television or radio if not in accordance with the regulations. The regulations proscribe the size, content and what photos may be used for advertisements.

Subclause (2) provides that it is an offence to publish an advertisement likely to induce a person to seek employment as a sex worker.

A maximum penalty of 20 penalty units applies to both offences and both offences are strict liability offences.

Clause 16. Medical examinations

This clause provides that in the setting of a contract for sex work, it is an offence to use a medical examination to state or imply that a person has undergone a medical examination and is not infected with a sexually transmitted infection or a blood borne virus.

A medical examination cannot be held out as a 'clean bill of health' as it only indicates the health of the person at the time that the examination occurred. As such, the offence applies equally to sex workers, operators of sex services businesses, and clients.

This clause does not, however, prevent the use of medical examinations as part of a person's own health, safety and wellbeing regime, or conveying the result of such an examination outside of a contract for sex work, including where a sex worker conveys the results to an operator who is their employer as part of that health, safety and wellbeing regime.

The maximum penalty for the offence is 20 penalty units.

Part 4 Suitability certificates

Clause 17. Body corporate may appoint nominee

This clause provides that a nominee may be appointed by a sex services business that is a body corporate, with one or more individuals able to be nominated, with the nominee being responsible for day-to-day control of the business.

Clause 18. Requirement to hold suitability certificate

This clause provides that an operator of a sex services business that engages more than two sex workers, and each executive officer and nominee of that business, must hold a suitability certificate. The process for obtaining a suitability certificate is provided in clause 19.

Clause 19. Application for suitability certificate

This clause provides that an application may be made, with the prescribed fee, to the Commissioner of Consumer Affairs, as the prescribed responsible body, for a suitability certificate.

To issue a suitability certificate, the Commissioner must be satisfied that the applicant and each person required to hold a suitability certificate in relation to the sex services business are suitable persons to operate the business and meet any requirements as may be prescribed in the regulations.

Clause 20. Duration of suitability certificate

This clause provides that a suitability certificate remains in force while the holder of the certificate remains associated with the business, or the Commissioner revokes the certificate pursuant to clause 21.

Clause 21. Revocation of suitability certificate

This clause provides that the Commissioner may, on information provided, undertake an investigation and consider whether a person who holds a suitability certificate is suitable to operate a sex services business. The Commissioner may either revoke the certificate if it is the opinion of the Commissioner that the person is no longer suitable, or confirm the person is suitable (and the suitability certificate stands).

Clause 22. Use of information collected under Part

This clause provides that any record generated as a result of an application for a suitability certificate may not be used other than for considering the application and must be destroyed when the person no longer holds the suitability certificate.

Part 5 Miscellaneous

Clause 23. Review by NTCAT

This clause provides that the NTCAT has jurisdiction to review a decision on application by an affected person.

The decisions that may be reviewed are reviewable decisions specified in the Schedule.

The persons who may apply to NTCAT for review are an affected person as specified in the Schedule.

Clause 24. Regulations

This clause is a standard clause providing that the Administrator may make regulations under the Act.

A regulation made under this Act may prescribe fees payable, set out requirements for advertising, and provide for the requirements of suitability certificates and matters relevant to revocation of suitability certificates.

Part 6 Repeal and transitional matters

Clause 25. Acts repealed

This is a standard clause which provides that the specified Acts are repealed.

On commencement of this Act, the *Prostitution Regulation Act 1992* (Act No 6 of 1992), the *Prostitution Regulation Amendment Act 1993* (No 47 of 1993), and the *Prostitution Regulation Amendment Act 2000* (No 69 of 2000) are repealed.

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

This clause provides that all personal information obtained under Part 2, Division 2 or held in registers under Part 3, Division 7 of the *Prostitution Regulation Act 1992* by any person must be destroyed as soon as practicable after the commencement of this Act. This is despite anything in the *Information Act 2002* which provides for the retention of records.

Part 7 Consequential amendments

This Part amends various other Acts and Regulations to remove references to offences contained in the *Prostitution Regulation Act 1999* following its repeal, and inserts references, where relevant, to offences under the *Sex Industry Act 2019* as they relate to those specific Acts and Regulations.

Division 1 Child Protection (Offender Reporting and Registration) Act 2004

Clause 27. Act amended

This clause provides that Division 1 of Part 7 amends the *Child Protection (Offender Reporting and Registration) Act 2004*.

Clause 28. Schedule 2 amended (Class 2 offences)

This clause amends Schedule 2, items 9 to 12 of the *Child Protection (Offender Reporting and Registration) Act 2004* to remove reference to offences under the *Prostitution Regulation Act 1999* following its repeal, and inserts references to offences under the *Sex Industry Act 2019* deemed to be Class 2 offences.

Division 2 Commercial Passenger (Miscellaneous) Regulations 1992

Clause 29. Regulation amended

This clause provides that Division 2 of Part 7 amends the *Commercial Passenger (Miscellaneous) Regulations 1992*.

Clause 30. Schedule 3 amended (Disqualifying offences)

This clause amends Schedule 3 of the *Commercial Passenger (Miscellaneous) Regulations 1992* to remove reference to offences under the *Prostitution Regulation Act 1999* following its repeal, and inserts references to offences under the *Sex Industry Act 2019* deemed to be disqualifying offences.

Division 3 Criminal Records (Spent Convictions) Act 1992

Clause 31. Act amended

This clause provides that Division 3 of Part 7 amends the *Criminal Records (Spent Convictions) Act 1992*.

Clause 32. Section 15 amended (Exclusions in relation to spent convictions)

This clause omits section 15(g) of the *Criminal Records (Spent Convictions) Act 1992* which provides that where an offence listed under section 24(3) of the *Prostitution Regulation Act 1992* is considered to be spent under the *Criminal Records (Spent Convictions) Act 1992* those offences may still be considered for the purposes of eligibility for the grant or renewal of a license under section 24 of the *Prostitution Regulation Act 1992* following repeal of the *Prostitution Regulation Act 1992*. With repeal of the *Prostitution Regulation Act 1992*, section 15(g) of the *Criminal Records (Spent Convictions) Act 1992* will have no operation and will therefore be repealed.

Division 4 Fines and Penalties (Recovery) Regulations 2001

Clause 33. Regulations amended

This clause provides that Division 4 of Part 7 amends the *Fines and Penalties (Recovery) Regulations 2001*.

Clause 34. Schedule 1 amended

This clause amends Schedule 1 of the *Fines and Penalties (Recovery) Regulations 2001* to remove reference to the *Prostitution Regulation Act 1992* and insert a reference to the *Sex Industry Act 2019* as an Act to which the *Fines and Penalties (Recovery) Act 2001* applies for the purpose of enabling and enforcing penalties generated through the issuing of infringement notices for offences under the *Sex Industry Act 2019*.

Division 5 Serious Sex Offenders Act 2013

Clause 35. Acts amended

This clause provides that Division 5 of Part 7 amends the *Serious Sex Offenders Act 2013*.

Clause 36. Schedule 1 amended (Serious sex offences)

This clause amends Schedule 1 of the *Serious Sex Offenders Act 2013* to remove reference to offences under the *Prostitution Regulation Act 1999* following its repeal, and inserts references to offences under the *Sex Industry Act 2019* that are deemed to be serious sex offences for the purpose of the *Serious Sex Offenders Act 2013*.

Division 6 Repeal of Part

Clause 37. Repeal of Part

This clause is a technical clause that repeals Part 7 the day after it commences. The purpose of this section is administrative in nature, removing otherwise defunct legislation from the statute book. On commencement, the amendments contained in Part 7 are automatically incorporated in the respective Acts and Regulations by operation of law. Having served its purpose of making those amendments, retention of what is effectively a 'dead law' adds unnecessary confusion as to what the current law is, and adds an unnecessary burden to the Office of the Parliamentary Counsel's management of the statute book. That an Act or Regulation has been amended is recorded in its legislative history as an end note; that records of the content of amending Acts are retained in Parliamentary Records (Hansard); and that the Office of the Parliamentary Counsel maintain a database of historical legislation, relieves the need for retention of defunct legislation on the statute book for research or other purposes.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with the Thirteenth Assembly Sessional Orders (Part 12.3) as adopted on 24 August 2017.

Sex Industry Bill 2019

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

OVERVIEW OF THE BILL

The proposed Bill will decriminalise sex work (while not endorsing or morally sanctioning it) and thereby provide sex workers with the same health and safety protections afforded to workers of other industries. Accordingly, the Bill will provide a framework that:

- (a) promotes the welfare and occupational health and safety of sex workers;
- (b) safeguards the human rights of sex workers and protects them from exploitation;
- (c) is conducive to public health; and
- (d) prohibits the use of persons under 18 years of age in the provision of sex work.

Through the provision of practical regulation, the Bill will raise the safety of sex workers and their clients by taking sex work out of the ambit of criminal enterprise. Accordingly, the purpose of this Bill is not to legislate on the morality of sex work; its purpose is to solely address the genuine issues associated with the health and safety of sex workers, and their human rights.

HUMAN RIGHTS IMPLICATIONS

The Bill will afford a significant amount of protection and normalisation to the sex industry and by extension, sex workers, many of whom are vulnerable women. Accordingly, a number of rights provided in the International Convention on Civil and Political Rights (ICCPR), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are all positively engaged and are set out in detail below.

The prohibition against slavery and forced labour – Article 8 ICCPR

The right to be free from forced or compulsory labour prohibits requiring a person to undertake work which the person has not voluntarily consented to, but does so because of threats made, either physical or psychological. Accordingly, it falls on the state not to subject anyone to such treatment and ensure there are adequate laws and measures in place that prevent private individuals or companies from subjecting people to such treatment.

The criminalisation of sex work does not lead to the non-existence of sex work. Instead, it forces sex workers to operate outside of the law, and as a consequence, within the purview of criminal enterprise. There, the likelihood of trafficking and forced labour (sex work) is

high, as perpetrators are encouraged in the knowledge that sex workers, who have no recourse to police services due to their criminal status, are unlikely to report their exploitation for fear of legal repercussions.

Accordingly, self-determination in the context of sex work, that is to say, the ability of a sex worker to safely and confidently deny the provision of services to anyone they wish, is a right this Bill will seek to protect and enforce.

Right to Work – Articles 6, 7 and 8 (ICESCR)

The right to work specifies that people have the right to choose an occupation and engage in work, operating under work conditions that are just and favourable, particularly safe working conditions. Additionally, it emphasises that the state adopt measures that reduce workers operating outside of the formal economy.

The regulatory framework provided by this Bill will ensure that operators of sex services businesses adopt and promote safe sex practices and a healthy work environment for sex workers, and in so doing, entice sex workers to move out of the informal, unregulated and therefore, often unsafe economy into the formal economy.

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of women in sex work - Article 6 of CEDAW

The trafficking of women and the exploitation of female sex workers are more often than not, the conduct of criminal enterprise that takes advantage of the lack of government oversight, and isolated, vulnerable women.

Sex work is a societal inevitability and, as an industry, is near impossible to prevent. History has shown that when demand exists for a good or service, and that service is criminalised, the door is open for criminal elements to come in and operate unscrupulously, regardless of the nature of that good or service. Accordingly, where women are forced to work within a sex industry dominated by criminals, they are much more likely to suffer exploitation and trafficking.

The proposed Bill recognises this fact and will seek to decriminalise sex work, providing a practical regulatory framework for workers and their advocates, so that the women who operate within the sex industry can be made aware of their rights (particularly the right to say 'no' and to seek assistance from police), and where they have their rights infringed upon, their recourse to the law will be fully supported. By treating the sex industry like any other business or industry, criminal elements will find it increasingly challenging to hold sway over the industry and exploit or traffic women.

CONCLUSION

This Bill is compatible with human rights as it does not raise any human rights issues.