

A framework for a decriminalised sex work industry in Queensland

Consultation Paper WP 80

April 2022

Chapter 9

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Licensing of sex work business operators

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Introduction

- 9.1 Our terms of reference ask us to consider appropriate safeguards to deter the involvement of illegal activity and the exploitation of vulnerable people in the sex work industry. They also ask us to look at the administration of the framework and how to limit the administrative and resource burden on government and industry.¹⁶³
- 9.2 The existing framework for the sex work industry includes a licensing system for brothels. This system involves rigorous checking of the suitability of brothel operators. It is intended to safeguard against the involvement of criminal and corrupt elements and limit the potential harms associated with sex work. It adds to the standard rules and requirements that apply to any business operating in Queensland.
- 9.3 In this chapter, we ask whether sex work business operators should be required to have some form of licence and, if so, what the licensing system should look like. Our focus is on sex work business operators (that is, people who manage or have control over sex workers), not individual sex workers.

Licensing

- 9.4 Licensing is a contentious issue for the sex work industry. It raises issues about the language used, as well as more significant issues about whether a licensing system—whatever it might be called—is desirable.
- 9.5 The Macquarie Dictionary defines ‘licence’ to mean ‘formal permission from a constituted authority to do something, as to carry on some business or profession’ and ‘a certificate of such permission; an official permit’.¹⁶⁴
- 9.6 Licences, permits and registrations are a common feature of business regulation.¹⁶⁵ Licensing requirements vary in how strict and detailed they are. Some laws might require a business to register their details with an authority to operate within the law.¹⁶⁶ Some might require a criminal history check to make sure the person operating the business is suitable.¹⁶⁷ Others, like the licensing system under the Prostitution Act, might have more extensive requirements.¹⁶⁸ Licensing requirements may give the community a degree of comfort that business operators have met minimum standards for involvement in an industry, such as completing special qualifications or training.
- 9.7 For many people in the sex work industry, ‘licensing’ refers to the sort of system that operates now under the Prostitution Act. It requires business operators to pass a criminal history check and fitness of character test, to pay large licensing fees, and to submit to inspections and other ongoing checks. Sex worker organisations and others say that the present licensing system is too complex and costly, creates significant barriers to compliance, and has resulted in a

¹⁶³ Terms of reference para 1(e), (i), (l).

¹⁶⁴ *Macquarie Dictionary* (online at 17 February 2022) ‘licence’ paras 2–3.

¹⁶⁵ See generally Business Queensland, ‘Business licences and permits’ (28 May 2021) <<https://www.business.qld.gov.au/starting-business/licensing-obligations/licences-registrations/licenses-permits>>.

¹⁶⁶ See, eg, *Business Names Registration Act 2011* (Cth).

¹⁶⁷ See, eg, *Working with Children (Risk Management and Screening) Act 2000* (Qld); *Second-hand Dealers and Pawnbrokers Act 2003* (Qld).

¹⁶⁸ See, eg, *Tattoo Industry Act 2013* (Qld); *Liquor Act 1992* (Qld); *Security Providers Act 1993* (Qld).

two-tiered industry of licensed (lawful) and unlicensed (unlawful) operators.¹⁶⁹ This is just one type of licensing system.

- 9.8 Some decriminalised jurisdictions also have licensing systems. But these are quite different to the present system in Queensland. They could be described as a ‘lighter touch’ model of licensing, in contrast to Queensland’s more onerous system. In this model, business operators are required to have a suitability certificate. This means the operator must pass a basic criminal history check to make sure they do not have convictions for certain serious, disqualifying offences. Depending on the jurisdiction, some other requirements may need to be met. These licensing systems do not impose high fees. They are commonly referred to as ‘suitability certificate’ schemes. They are another type of licensing system.
- 9.9 In this chapter, we use the word ‘licensing’ in its widest sense to cover a range of possible options. A licensing system under the new framework, if any, could take a variety of forms— from lighter touch to more onerous. We are interested in your views about whether to include a licensing system and what this might be.

Queensland’s brothel licensing system

Brothel licence requirements

- 9.10 Under the Criminal Code and the Prostitution Act, a person must hold:¹⁷⁰
- a brothel licence to lawfully operate a brothel; and
 - an approved manager’s certificate to lawfully manage a brothel.
- 9.11 Brothel licences and approved manager’s certificates are granted by the PLA under the Prostitution Act.

Ineligibility for a licence

- 9.12 An individual over 18 years can apply for a brothel licence. A person is not eligible to apply for a brothel licence if they:¹⁷¹
- have been convicted of a disqualifying offence;
 - are an insolvent under administration;
 - have had a licence or other authority or certificate under the Prostitution Act (or under the same laws in another Australian state or territory) cancelled in the previous three years;
 - hold a licence or permit under the *Liquor Act 1992* (such as an adult entertainment permit); or
 - are subject to a disciplinary order by the PLA declaring that they are not eligible.

¹⁶⁹ See, eg, E Jeffreys, E O’Brien & J Fawkes, *The Case for Decriminalisation: Sex Work and the Law in Queensland*, Crime and Justice Briefing Paper (QUT, 2019); Scarlet Alliance, *Full Decriminalisation of Sex Work in Australia*, Briefing Paper <https://scarletalliance.org.au/library/briefing_paper_full_decrim>.

¹⁷⁰ See Criminal Code (Qld) ss 229C (definition of ‘unlawful prostitution’), 229F, 229H, 229HA(2), 229HB; *Prostitution Act 1999* (Qld) ss 9, 44, 66, 77.

¹⁷¹ *Prostitution Act 1999* (Qld) s 8.

9.13 Disqualifying offences include:¹⁷²

- certain serious crimes under the Criminal Code, such as official corruption, unlawful homicide, rape, and any offence against chapter 22A of the Criminal Code if it relates to a child or a person with an impairment of the mind; and
- certain serious offences under other laws, such as drug trafficking, money laundering, and some migration offences: see table 2 at [9.102] below.

9.14 In Queensland, certain older convictions need not be disclosed. However, when considering the suitability of a person for involvement in the sex work industry, disclosure is required.¹⁷³ (In contrast, under the *Tattoo Industry Act 2013*, a person is not suitable to hold an operator licence if they have been convicted of a disqualifying offence in the ten years before applying for the licence.¹⁷⁴)

9.15 The same eligibility rules apply for an approved manager's certificate.¹⁷⁵

Assessment of suitability

9.16 To be granted a licence, the PLA must be satisfied the person is 'a suitable person to operate a licensed brothel'. In assessing a person's suitability, the PLA must consider all relevant matters, including:¹⁷⁶

- the person's reputation, including their character, honesty, and integrity;
- criminal convictions;
- criminal charges for sexual offences (involving violence, intimidation, threats, or children);
- the person's associates;
- financial viability of the proposed brothel;
- transparency of the business structure; and
- arrangements for the safety of sex workers.

9.17 The PLA must not decide that the applicant is not suitable to operate a licensed brothel because the person has worked as a prostitute.

9.18 Similar rules apply for granting an approved manager's certificate.¹⁷⁷

Other factors in granting or refusing a licence

9.19 The PLA does not have to consider a person's application for a licence until development approval for the brothel premises has been given by local government.¹⁷⁸

¹⁷² See *Prostitution Act 1999* (Qld) schs 1, 2, 4 (definition of 'disqualifying offence').

¹⁷³ See *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) ss 6, 9A.

¹⁷⁴ See *Tattoo Industry Act 2013* (Qld) s 12(3)(a).

¹⁷⁵ See *Prostitution Act 1999* (Qld) s 34.

¹⁷⁶ See *Prostitution Act 1999* (Qld) ss 16(1)(a), 17.

¹⁷⁷ See *Prostitution Act 1999* (Qld) ss 41(a), 42.

¹⁷⁸ *Prostitution Act 1999* (Qld) s 15(2).

- 9.20 A licence application must be refused if the PLA considers that, if it were granted, the combined total of licensed brothels and adult entertainment premises in that area ‘would substantially affect the character of the locality’.¹⁷⁹

Register

- 9.21 The PLA must keep a public register of licence and certificate holders.¹⁸⁰

Licence conditions and monitoring

- 9.22 The PLA may add conditions to a licence or certificate. In practice, it attaches a set of standard conditions to each licence or certificate that it issues.¹⁸¹
- 9.23 The PLA also has the function of monitoring ‘the provision of prostitution’ at licensed brothels. It does this by carrying out audits and inspections of brothels to make sure licensees are following the Prostitution Act and meeting their licence conditions. The PLA may also conduct disciplinary inquiries and take disciplinary action against brothel licensees and approved managers.¹⁸² For some offences under the Prostitution Act and the Prostitution Regulation, the PLA may issue penalty infringement notices.¹⁸³

Other licensing requirements

- 9.24 The licensing system imposes specific requirements on the conduct of the business or of the licensee. This includes requirements about:¹⁸⁴
- the display and production of brothel licences;
 - sexual health and safer sex practices;
 - measures to protect sex workers; and
 - limits on the size of brothels and sex worker and staffing numbers.
- 9.25 The Prostitution Act also includes specific rules that:¹⁸⁵
- a licensee may not own multiple brothels;
 - a brothel may not be operated in partnership with an unlicensed person;
 - escort services (outcalls) from brothels are not permitted;
 - brothels must be personally supervised when trading; and
 - liquor is not permitted at brothels.
- 9.26 Many of these matters are offences under the Act.

¹⁷⁹ *Prostitution Act 1999* (Qld) s 16(2).

¹⁸⁰ *Prostitution Act 1999* (Qld) s 111.

¹⁸¹ See *Prostitution Act 1999* (Qld) ss 18(1)(a), 19(5)(d)(iii), 21, 43(1)(a), 44(4)(d)(iii), 47; PLA, ‘Brothel Licence Conditions’ (v 14, 13 May 2019) <https://www.pla.qld.gov.au/_data/assets/pdf_file/0007/674836/pla-brothel-licence-conditions-v14.pdf>.

¹⁸² See generally *Prostitution Act 1999* (Qld) ss 26, 29, 52, 55, 101(c)–(e); PLA, ‘Queensland Brothel Licence compliance’ (2022) <https://www.pla.qld.gov.au/licensing/brothel-licence#comply_licence_conditions>.

¹⁸³ See *State Penalties Enforcement Regulation 2014* (Qld) ss 4–6 sch 1; PLA, *Operational Standards Manual* [9.2].

¹⁸⁴ See *Prostitution Act 1999* (Qld) ss 77, 77A(5)–(6), 78, 87–89; *Prostitution Regulation 2014* (Qld) s 23; ‘Brothel licence conditions’ (v 14, 13 May 2019) <https://www.pla.qld.gov.au/_data/assets/pdf_file/0007/674836/pla-brothel-licence-conditions-v14.pdf>.

¹⁸⁵ *Prostitution Act 1999* (Qld) ss 19(2), 78(1)(a), 79, 80–83.

Consequences of not holding a licence or not following a licence requirement

- 9.27 A person who operates a brothel without holding a licence may be guilty of an offence under Chapter 22A of the Criminal Code, such as:
- knowingly participating in providing prostitution (section 229H); or
 - carrying on the business of providing unlawful prostitution (section 229HB).
- 9.28 The Prostitution Act contains several offences. For example, it is an offence punishable by a maximum penalty of 200 penalty units (\$27 570) or five years imprisonment for a person to:¹⁸⁶
- provide prostitution at a place other than the brothel;
 - have more than 13 staff on premises;
 - not follow a licence condition;
 - operate a brothel while the licence is suspended; or
 - have more sex workers on premises than allowed for the number of rooms at the brothel.
- 9.29 The PLA may conduct a disciplinary inquiry and take disciplinary action if a person does not follow a condition of their licence or certificate.¹⁸⁷ The Prostitution Act gives the PLA several disciplinary powers, including giving a reprimand, issuing a monetary penalty, and suspending or cancelling the licence or certificate.¹⁸⁸

The aim of the brothel licensing system

- 9.30 Historically, Queensland's sex work industry was closely linked with organised crime and official corruption. The 1989 Fitzgerald Inquiry found that brothels were being operated by crime syndicates who were sometimes also involved in the drug trade, and that operators were paying protection money to corrupt police. When the Prostitution Bill 1999 was introduced into Parliament, the Minister for Police and Corrective Services said:¹⁸⁹
- We cannot ever forget the part prostitution has played in corruption and organised crime in this State during some dark years in Queensland's history. We must remain ever vigilant against corruption and organised crime, and the passage of this Bill will assist us in that task.
- 9.31 By legalising brothels and establishing a licensing system, the Prostitution Act was designed to break this connection. One of the five underlying principles of the Act is safeguarding against corruption and organised crime.¹⁹⁰ A strict licensing system was intended to 'ensure undesirable persons are not permitted to operate within the legal industry'.¹⁹¹
- 9.32 The Prostitution Act and the brothel licensing system was also intended to promote sex workers' safety, reduce health risks for sex workers and the community, and make sure that

¹⁸⁶ *Prostitution Act 1999* (Qld) s 78.

¹⁸⁷ *Prostitution Act 1999* (Qld) ss 26–27, 52–53.

¹⁸⁸ *Prostitution Act 1999* (Qld) ss 29(2), 55(2).

¹⁸⁹ Queensland, *Parliamentary Debates*, 10 November 1999, 4826 (TA Barton, Minister for Police and Corrective Services).

¹⁹⁰ Explanatory Notes, *Prostitution Bill 1999* (Qld) 1.

¹⁹¹ Queensland, *Parliamentary Debates*, 10 November 1999, 4826 (TA Barton, Minister for Police and Corrective Services) 4826.

the operation of brothels is not ‘an intrusion into the day-to-day lives of members of the community’.¹⁹²

Review findings about the effectiveness of the Prostitution Act

9.33 In 2004 and 2011, the CMC reviewed the effectiveness of the Prostitution Act. In each review, the CMC found that the Act had been an effective barrier to organised crime and corruption within the licensed sector.¹⁹³

9.34 It had also reported that the illegal sector did not appear to be affected by corruption or organised crime:¹⁹⁴

since the implementation of the Act, there was no evidence of corruption among police or other government agencies in either the legal or illegal prostitution industries in Queensland. ...

...

Although illegal prostitution, which by its very nature may be classified as organised crime, existed in Queensland, there was little evidence of further involvement of the industry in crimes such as the drug market, sex trafficking or child prostitution. (note omitted)

9.35 The CMC also found no evidence that migrant sex workers in Queensland were the subject of sex trafficking or debt bondage.¹⁹⁵

9.36 Nevertheless, the CMC noted that it is important to continue to monitor the industry and take steps to minimise the risks of corruption and organised crime.¹⁹⁶

Licensing in decriminalised jurisdictions

9.37 Other jurisdictions identify that the sex work industry can be vulnerable to the involvement of criminal elements and that sex workers can be vulnerable to being exploited.¹⁹⁷ It is argued that this is especially the case when sex work is criminalised and operates in a hidden way. But even in a decriminalised framework, the sex work industry might be exposed to these risks.

9.38 Some places where sex work is decriminalised include licensing systems as part of their frameworks: see table 1. The aim of these systems is to help protect sex workers’ health and safety by restricting who can operate a commercial sex work business. By filtering out operators who have criminal convictions for particular offences, the licensing systems aim to guard against exploitation and criminal elements, and to make sure operators are suitable for the role. This is the approach in New Zealand and the Northern Territory.

9.39 Other decriminalised places do not have a licensing system. This includes New South Wales and Victoria, although proposals have been made from time to time in New South Wales for some form of licensing.

¹⁹² Ibid. See also Explanatory Notes, Prostitution Bill 1999 (Qld) 1–3.

¹⁹³ CMC Prostitution Report (2004) 47–8, 51; CMC Prostitution Report (2011) 16, 19–20, 33.

¹⁹⁴ CMC Prostitution Report (2011) 16–19.

¹⁹⁵ Ibid xiii, 20.

¹⁹⁶ See ibid 18, 21.

¹⁹⁷ See, eg, Victorian Law Reform Commission, *Use of Regulatory Regimes in Preventing the Infiltration of Organised Crime into Lawful Occupations and Industries*, Report No 33 (2016) 28 (and at 58, 105, 111, 112, 116).

Table 1: Sex work business operator licensing requirements in the Northern Territory and New Zealand¹⁹⁸

	NT	NZ
Requirement to hold a certificate	<p>Each operator of a sex services business that engages three or more sex workers must hold a suitability certificate.</p> <p>If the operator of a sex services business is a body corporate, each executive officer and any nominee must also hold a suitability certificate.</p>	<p>Each operator of a business of prostitution must hold an operator certificate.</p> <p>Small owner-operated brothels are permitted, where there are no more than four sex workers and each keeps control over their own earnings. These brothels do not have an operator.</p>
When a certificate may be issued (suitability requirements)	<p>A certificate may be issued if the applicant and any other person required to hold a certificate are suitable persons to operate a sex services business.</p> <p>Also, in the 10 years before applying for a certificate, the applicant or person must not have:</p> <ul style="list-style-type: none"> • been found guilty of a relevant (disqualifying) offence; • been an executive officer of a body corporate when the body corporate was found guilty of an indictable offence against the <i>Fair Work Act 2009</i> (Cth) or against a work health and safety law; • been bankrupt, applied to take the benefit of a law for the relief of bankrupt or insolvent debtors or compounded with creditors or made an assignment of the applicant's or person's remuneration for their benefit; or • had a previous suitability certificate, or a similar certificate in another jurisdiction, revoked. 	<p>To be eligible for a certificate a person must:</p> <ul style="list-style-type: none"> • not have been convicted of a disqualifying offence; or • have been granted a waiver of disqualification.
Fee to obtain a certificate	\$124	\$250
How long a certificate lasts	Until no longer needed or revoked.	One year and may be renewed.
Cancelling a certificate	May be revoked if the holder ceases to be a suitable person.	Must be cancelled if the holder is convicted of a disqualifying offence or the waiver of disqualification is cancelled.

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See *Sex Industry Act 2019* (NT) pt 4; *Sex Industry Regulations 2020* (NT) regs 4–5; *Prostitution Reform Act 2003* (NZ) ss 4(1) (definition of 'small owner-operator brothel'), 5(2), pt 3; *Prostitution (Operator Certificate) Regulations 2003* (NZ) s 9, sch 2. See also Northern Territory Government, 'Operate a sex services business' (1 July 2021) <<https://nt.gov.au/industry/licences/operate-a-sex-services-business>>.

New Zealand

- 9.40 The *Prostitution Reform Act 2003* (NZ) decriminalised sex work and repealed the *Massage Parlours Act 1978* (NZ). It requires all sex work business operators to have a certificate.
- 9.41 When the Prostitution Reform Bill 2000 (NZ) was first introduced into the New Zealand Parliament, it did not include a licensing system for operators. In considering whether the new decriminalised framework should include a licensing system, the New Zealand Justice and Electoral Committee said:¹⁹⁹
- The key rationale given in support of a licensing regime is to restrict who may operate a business of prostitution. This is to ensure that those in control of workers are suitable for the role, and to help keep organised crime groups, criminal entrepreneurs and other criminals out of the commercial sex industry.
- 9.42 The committee's members did not agree whether the Bill should include a certification requirement, but set out the features of such a requirement for parliament to consider. Because of the negative tone that 'licensing' has for sex work, the committee referred to the requirements as 'certification' rather than 'licensing'.²⁰⁰
- 9.43 The Bill was later amended during parliamentary debate to include the operator certificate requirement now in the Act: see table 1. There is no provision for conditions to be attached to the certificate.
- 9.44 The review of New Zealand's decriminalisation laws noted that, 'as the rationale behind the law reform was to decriminalise the sex industry, continuing to vet people in the industry for criminal convictions is incongruous'. However, it found that the history of criminal involvement with the sex work industry in New Zealand and the potential for sex workers to be exploited by operators justified excluding unsuitable persons from having control of sex work businesses.²⁰¹
- 9.45 The review found that the certificate system in the Act based on disqualifying offences was 'sound'. However, there was no ongoing monitoring or enforcement of whether operators held or continued to hold a certificate or promoted the health and safety of sex workers. The review recommended that, when operators receive a certificate, they should also be given information about their rights and responsibilities as sex work business operators.²⁰²

Northern Territory

- 9.46 Before decriminalising sex work, the Northern Territory had a licensing system for escort agencies. The *Sex Industry Act 2019* (NT) removed that licensing system. It now requires sex work business operators that engage three or more sex workers to have a suitability certificate: see table 1.
- 9.47 The suitability requirements are intended to protect sex workers and clients from being exploited:²⁰³
- by ensuring that people operating commercial businesses are suitable to operate that business, in that they have not been found to have committed serious criminal

199 Justice and Electoral Committee, New Zealand Parliament, *Prostitution Reform Bill 66-2* (Report, November 2002) 28.

200 Ibid.

201 Prostitution Law Review Committee, *Report on the Operation of the Prostitution Reform Act 2003* (May 2008) 86.

202 Ibid 93–5, 97.

203 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 18 September 2019, 7026 (McCarthy, on behalf of the Attorney-General and Minister for Justice).

offences previously, but have also not had serious business failings in the past, such as bankruptcy or non-compliance with occupational health and safety laws.

9.48 The requirements are also intended to be ‘a signpost to guide the industry on the expected standards as it strives toward that social licence that comes with decriminalisation’.²⁰⁴

9.49 In its Inquiry into the Sex Industry Bill 2019 (NT), the Northern Territory Economic Policy Scrutiny Committee referred to sex worker concerns about the proposed certificate system:²⁰⁵

Key concerns related to: potential non-compliance due to onerous requirements; the view that sex work does not require special regulation and should be regulated through the same laws as other businesses; and the number of employees that would trigger a requirement for a certificate.

9.50 However, the committee found that:²⁰⁶

the highly personal nature of sex work and the potential for criminal elements to enter the industry, justifies the provision of additional safeguards to reduce risk within the industry.

New South Wales

9.51 Decriminalisation of the sex work industry in New South Wales has never included a licensing system.

9.52 However, there have been occasional calls for a system of vetting brothel operators.

9.53 A 1999 New South Wales Parliamentary Library Briefing Paper referred to concerns that there were operators with ‘criminal connections’, and ‘less savoury elements’ were not being filtered out because there was no screening of operators’ suitability.²⁰⁷ A 2003 Briefing Paper said that issues of concern ‘include the vetting of brothel applicants as to their fame and character’. It noted that the Local Government and Shires Associations of NSW supported a brothel licensing system for ‘larger commercial operations’.²⁰⁸

9.54 In 2007, the Independent Commission Against Corruption recommended that government consider ‘adopting a system to prevent unsuitable persons operating brothels’ as a barrier to corrupt conduct at brothels. It noted that:²⁰⁹

the NSW approach of treating brothels as a planning matter alone means that only the use of premises as a brothel is subject to scrutiny. There is no ‘fit and proper person’ requirement applicable to intending brothel operators, and there is no check for criminal links.

9.55 In 2011, the government proposed a licensing system ‘with stringent vetting of brothel licence applicants’ to address ‘the use of brothels by organised crime groups and unsuitable

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Ibid.

205

Economic Policy Scrutiny Committee, Legislative Assembly of the Northern Territory, *Inquiry into the Sex Industry Bill 2019* (Report, November 2019) 22.

206

Ibid 25.

207

S Smith, ‘The regulation of prostitution: a review of recent developments’ (Briefing Paper No 21/99, NSW Parliamentary Library Research Service, November 1999) 9.

208

S Smith, ‘The control of prostitution: an update’ (Briefing Paper No 14/03, NSW Parliamentary Library Research Service, July 2003) 1, 12.

209

Independent Commission Against Corruption (NSW), *Report on an Investigation into Corrupt Conduct Associated with the Regulation of Brothels in Parramatta* (August 2007) 25–6, Rec 2.

persons'.²¹⁰ In 2012, the Better Regulation Office identified a licensing system as one of three possible options to reform the regulation of the sex work industry.²¹¹

9.56 In 2015, the New South Wales Select Committee on the Regulation of Brothels found that the sex work industry is attractive to organised crime because the industry operates discreetly, and is largely cash-based, making it easier to launder the proceeds of crime.²¹² The committee heard evidence from the New South Wales Police Force of the involvement of outlaw motorcycle gangs and Asian organised crime in brothels, along with sexual servitude and exploitation of sex workers.²¹³

9.57 However, sex worker organisations disputed the involvement of criminal activity in the sex work industry.²¹⁴ The Sex Workers Outreach Project (SWOP) told the committee:²¹⁵

In relation to organised crime, we are aware of regular and frequent allegations of criminality in the sex industry, but apart from unsubstantiated media reports, there is little hard data to support these claims or any evidence of the rates of criminal involvement in the sex industry at all, let alone above other industries.

9.58 The committee recommended a system of brothel licensing in New South Wales.²¹⁶ Its recommendations included the following:

Recommendation 11: A system of licensing of brothels (as defined) should be introduced because it would assist with proper enforcement of the planning laws, allow for better protection of sex workers from exploitation and danger, assist with fighting organised criminal elements in the industry, and ensure only fit and proper persons control and operate brothels.

...

Recommendation 13: That all owners, managers, employees (other than sex workers), and their associates, be required to be fit and proper persons to be affiliated with a licensed brothel under the proposed NSW brothel licensing scheme.

9.59 The committee also recommended that, if the proposed licensing system is not implemented, 'more resources be allocated to local councils for them to continue to investigate and prosecute owners and operators of unauthorised brothels'.²¹⁷

9.60 The government considered, but did not adopt, the committee's recommendations about licensing, explaining that:²¹⁸

This model would be high cost and risks creating incentives for non-compliance. It also risks creating similar adverse outcomes as recriminalisation, such as reduced sexual health screening and protection for sex workers.

...

210 See L Roth, 'Regulation of brothels: an update' (e-brief 15/2011, NSW Parliamentary Library Research Service, November 2011) 1.

211 Better Regulation Office (NSW), *Regulation of Brothels in NSW* (Issues Paper, 2012) 43.

212 Select Committee on the Regulation of Brothels, Legislative Assembly of New South Wales, *Inquiry into the Regulation of Brothels* (Report, November 2015) 60.

213 Ibid 47–8.

214 Ibid 54–5, 57.

215 Ibid 54, quoting Sex Workers Outreach Project Inc (SWOP).

216 Select Committee on the Regulation of Brothels, Legislative Assembly of New South Wales, *Inquiry into the Regulation of Brothels* (Report, November 2015) Recs 11–20.

217 Ibid Rec 22.

218 New South Wales Government, *Response to the Legislative Assembly Inquiry into the Regulation of Brothels* (May 2016) 5–10.

[However] The NSW Government will continue to work with councils to assist them with effectively monitoring and enforcing their regulatory responsibilities. The NSW Government has also provided additional assistance to councils through legislation that grants them greater powers and access to premises.

Victoria

- 9.61 The *Sex Work Decriminalisation Act 2022* (Vic) will repeal the *Sex Work Act 1994* (Vic) and its licensing system. Licensing in Victoria was criticised for creating a two-tiered industry of a licensed (lawful) sector and an unlicensed (unlawful) sector, ‘where workers have access to different rights and protections under the law purely based on how, where and with whom they work’.²¹⁹ According to the Victorian Government, the licensing system:²²⁰

is complex, costly and onerous. This has led to poor compliance and the growth of a large, unlicensed sex work industry in Victoria, which neither criminalisation nor licensing has been able to eliminate. This system has many negative impacts for sex workers and business operators ...

- 9.62 There are no suitability requirements for sex work business operators under the new framework. A certificate system was rejected by the Victorian Parliament because it would continue the harms of the old framework and be ineffective:²²¹

The introduction of an industry-specific certification system essentially maintains the current licensing and regulation system and is fundamentally at odds with what this bill is doing, which is decriminalisation. There is significant evidence that the current system is not working to protect sex workers. In fact it undermines sex worker rights and erodes working conditions. Establishing a similar licensing system, albeit with slightly different criteria or procedural requirements, would result in a continuation of the current harms. Further evidence demonstrates that the certification of brothel managers is not effective, and for practical reasons a certification process is not able to consider what makes a person a good brothel owner.

- 9.63 A proposal to make it a criminal offence for certain prohibited persons to own or operate a sex work business was also rejected by the parliament. The responsible minister said:²²²

The criteria proposed by the amendment to prohibit a person from working in the sex work industry are broad and perpetuate the stigma associated with the sex work industry, creating further barriers to sex workers and operators. The amendment in essence will introduce a harmful regulatory system at odds with a decriminalisation model.

- 9.64 The Victorian approach is not to single out the sex work industry for added regulation but to bring it under existing regulation that applies to all businesses. The Explanatory Memorandum to the *Sex Work Decriminalisation Bill 2021* (Vic) says:²²³

The rationale for this approach is that sex work businesses should be treated the same as other Victorian businesses and regulated through standard planning,

219 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 October 2021, 3882 (Home, Minister for Ports and Freight, Minister for Consumer Affairs, Gaming and Liquor Regulation, Minister for Fishing and Boating).

220 Department of Justice and Community Safety (Vic), *Decriminalising Sex Work* (Discussion Paper, 2021) 2. See also *ibid*.

221 Victoria, *Parliamentary Debates*, Legislative Council, 10 February 2022, 235 (Leane, Minister for Local Government, Minister for Suburban Development, Minister for Veterans) (and at 236).

222 *Ibid* 264 (and at 262–5).

223 Explanatory Memorandum, *Sex Work Decriminalisation Bill 2021* (Vic) 10.

occupational health and safety and other business regulations that apply to all businesses in Victoria.

Should the new framework include a licensing system?

- 9.65 Decriminalisation is intended to improve sex workers' rights, health and safety and to bring the sex work industry into the mainstream of business regulation.
- 9.66 By allowing sex work businesses to operate lawfully, more transparently and without the fear of criminal sanctions, it is argued there may be less opportunity for criminal elements and corruption.
- 9.67 It remains important for a decriminalised framework to include safeguards to deter illegal activity and the exploitation of sex workers.
- 9.68 A licensing system could be one possible safeguard. Its main purpose would be to prevent unsuitable people from operating sex work businesses.
- 9.69 The personal and private nature of the sex work industry may mean that sex workers can be vulnerable to abuse and exploitation. This risk is heightened when sex workers are working in a business under the ownership or control of another person.
- 9.70 Lawful sex work businesses could be attractive to organised crime, especially for the purpose of money laundering. Sex work businesses might use cash and tend to operate in private. Organised crime groups that infiltrate lawful industries may use 'unfair competitive practices', like failing to follow industry, tax or employment laws to reduce their operating costs, or using 'coercive and intimidatory practices' to collect debts or 'drive competitors from the market'.²²⁴
- 9.71 On the one hand, a licensing system might help address these risks. Licensing systems are not an unusual feature of industry regulation. Queensland's brothel licensing system has been successful in quarantining brothels from organised crime and corruption.
- 9.72 If business operators are screened for suitability, they may be more likely to meet their regulatory obligations, respect the agency and autonomy of sex workers, and operate the business lawfully and safely.
- 9.73 A light touch licensing system is the approach taken in the Northern Territory and New Zealand.
- 9.74 On the other hand, the history of sex work industry licensing in Queensland (and Victoria) is problematic. Licensing is criticised for being costly to administer and creating a two-tiered industry of a licensed (lawful) sector and an unlicensed (unlawful) sector. This has resulted in a large unlicensed sector which is said to undermine sex workers' rights, health and safety.
- 9.75 Operators could be left out of the system or choose to remain outside it. This could blunt the health and safety benefits of decriminalisation and maintain barriers to sex workers' access to protection and redress from relevant authorities.

- 9.76 Sex worker organisations say that decriminalisation does not involve licensing.²²⁵ Respect Inc and DecrimQLD advocate for the repeal of the Prostitution Act and its licensing system, which they say have failed.²²⁶ They submitted to the Northern Territory Government that:²²⁷
- licensing systems create a two-tiered industry whereby only a very small percentage can meet the requirements to licence and the rest of the industry has no option but to operate illegally. This model takes the opposite approach to maximising compliance—it creates a section of the industry that can never comply and is therefore criminalised.
- 9.77 Sex worker organisations also highlight concerns about a system that requires a certificate of suitability for sex work business operators.²²⁸ In their submission to the Northern Territory Select Committee, Respect Inc and DecrimQLD said:²²⁹
- This is a layer of unnecessary regulation that will create a barrier to compliance and unnecessarily complicate the decriminalisation model. Application of this approach to individual sex workers would reverse many benefits of [decriminalisation].
- 9.78 Licensing might be seen as incompatible with the intent of decriminalisation to bring the sex work industry into the mainstream of business regulation. General business regulation will apply to the sex work industry. There is a view that the industry should not be singled out for an extra overlay of regulation. This is the approach in Victoria.

If there is a licensing system, what should it look like?

- 9.79 If the new framework were to include a licensing system, we need to consider what type of system it should be.
- 9.80 Licensing can encompass a range of approaches from simple or basic, to more complex or onerous. In its simplest form, it might require a suitability check to rule out particular people. A more onerous system might impose rules on how the licensee and business operates and include monitoring and disciplinary action.
- 9.81 Suitability requirements can also range in complexity. Under a basic system, a person might be considered suitable if they have not been convicted of a disqualifying offence in a given period. More complex suitability checks might require a decision-maker to consider other matters, such as: any criminal convictions; the person's reputation, character, honesty and integrity; the person's associates; whether the person has been bankrupt; the financial viability of their business; the transparency of their business structure; whether they have previously had a licence or certificate cancelled; and their corporate history. This might involve the decision-maker in a more subjective assessment, rather than a 'checklist' exercise.

²²⁵ See, eg, Scarlet Alliance, *Full Decriminalisation of Sex Work in Australia*, Briefing Paper <https://scarletalliance.org.au/library/briefing_paper_full_decrim>.

²²⁶ Respect Inc, 'Decriminalise sex work' (2018) <<https://respectqld.org.au/decriminalise-sex-work/>>; #DecrimQLD, 'What would decriminalisation mean for Queensland?' (Laws, Facts, Rights & Safety Infographic No 6, 2018) <<https://respectqld.org.au/wp-content/uploads/2021-No-6-infographics-Final-1-pdf.jpg>>.

²²⁷ Respect Inc & DecrimQLD, Submission to Department of Justice and the Attorney General (NT), *Reforming Regulation of the Sex Industry in the Northern Territory* (13 May 2019) 8.

²²⁸ See generally Economic Policy Scrutiny Committee, Legislative Assembly of the Northern Territory, *Inquiry into the Sex Industry Bill 2019* (Report, November 2019) 22.

²²⁹ Respect Inc & DecrimQLD, Submission No 22 to NT Economic Policy Scrutiny Committee, Legislative Assembly of the Northern Territory, *Sex Industry Bill 2019* (8 October 2019) 2.

- 9.82 In its 2011 report on the Prostitution Act, the CMC commented:²³⁰
- It is generally acknowledged that illegal prostitution will never be eliminated, but the balance between the legal sector and the illegal sector needs to be shifted so that the illegal sector diminishes.
- 9.83 An effective licensing system must strike a difficult balance. It must balance the risks of imposing too much regulation (which may lead people to operate outside the lawful sector) and the risks of failing to give enough oversight (which may undermine sex workers' rights). Researcher Ronald Weitzer explains:²³¹
- A two-tiered structure of legal and illegal sectors is common in legal prostitution systems, but the size of each sector is influenced by the kinds of regulations adopted. The less onerous and costly the regulations, the smaller the size of the illegal sector (the latter is virtually nonexistent in New Zealand). When the regulations are extensive, expensive, stigmatizing, and perceived as arbitrary or discriminatory compared to other businesses, this amplifies the temptation to opt out and operate illegally. The costs of a licence and of complying with the regulations should not be such as to force operators out of the legal market, as in Queensland. The costs should be comparable to those of other service agencies: there should be no special, added 'sin tax.' At the same time, an overly minimalist system can be a problem. ... A laissez-faire system can result in insufficient safeguards and controls, disempowering sex workers. (notes omitted)
- 9.84 The greater the regulatory cost and burden, the more probable that operators may not follow the law and the licensing system will be ineffective.
- 9.85 In Queensland, there are high barriers to entering and remaining in the licensed sector of the sex work industry. The brothel licence application process is lengthy and expensive. Brothel licences are valid for three years.²³² Initial fees are between \$23 005 and \$64 405, depending on the size of the brothel and the number of licensees involved, and annual fees are payable in the remaining years.²³³ There are also frequent audits and inspections of brothels by the PLA to monitor and enforce regulatory compliance. The higher the 'red tape' burden, the greater the incentive to operate outside the licensing system. There is substantial non-compliance with the requirement to hold a licence, shown by the estimated number of massage parlours operating as sex work businesses and the small number of licensed brothels: see chapter 3.
- 9.86 A simpler and less costly licensing system may be more likely to encourage operators to obtain a licence. To give a minimum level of comfort to the community, it could rule out people who have a serious criminal history from operating a sex work business. However, this might not be considered enough to make sure of high standards of practice.
- 9.87 The rest of this chapter asks about particular features of any such system.

Who should the licensing system apply to?

- 9.88 In Queensland, brothel operators (people who carry on the business) and managers must hold a licence or certificate, respectively. Licensing requirements do not apply to individual sex workers.

²³⁰ CMC Prostitution Report (2011) 30.

²³¹ R Weitzer, *Legalizing Prostitution: From Illicit Vice to Lawful Business* (NYU Press, 2012) 210.

²³² *Prostitution Act 1999* (Qld) s 19(4).

²³³ See *Prostitution Regulation 2014* (Qld) s 20 sch 2; PLA, 'Licence fees and forms' (2022) <<https://www.pla.qld.gov.au/licensing/licence-fees-and-forms>>.

- 9.89 In New Zealand and the Northern Territory, an ‘operator’ of a sex work business must hold a certificate. This is because they manage or have control over sex workers in their business.
- 9.90 ‘Operator’ is defined broadly in New Zealand as:²³⁴
- a person who, whether alone or with others, owns, operates, controls, or manages the business; and includes (without limitation) any person who—
- (a) is the director of a company that is an operator; or
- (b) determines—
- (i) when or where an individual sex worker will work; or
- (ii) the conditions in which sex workers in the business work; or
- (iii) the amount of money, or proportion of an amount of money, that a sex worker receives as payment for prostitution; or
- (c) is a person who employs, supervises, or directs any person who does any of the things referred to in paragraph (b).
- 9.91 This definition includes owners and managers. Depending on their roles, it also includes receptionists, who might interview or hire sex workers, or set and supervise their working conditions.²³⁵ The aim is to cover people in the business who have control over sex workers’ working conditions.²³⁶
- 9.92 In the Northern Territory, an ‘operator’ is ‘a person who owns or operates the business’. A body corporate may operate a sex services business, but each executive officer and any nominee (a person with day-to-day control of the business) must also hold a suitability certificate. All executive officers and nominees of the body corporate must be found suitable before a certificate can be issued for the business.²³⁷
- 9.93 In New Zealand, every operator of a sex work business must hold a certificate, no matter how many sex workers they engage. However, ‘small owner-operated brothels’, of up to four sex workers who each keep control over their own earnings, do not have an operator, and none of the sex workers in those brothels needs to hold a certificate: see table 1.
- 9.94 In the Northern Territory, an operator does not need to hold a certificate unless the business engages three or more sex workers: see table 1. This was done to distinguish between ‘small scale operations’, which can be carried out as home-based businesses under planning laws, and ‘commercial scale ventures’.²³⁸

What should a suitability check involve?

- 9.95 Requiring sex work business operators to meet a suitability standard would be a central part of any licensing system. It would serve two complementary purposes:
- filtering out people who are considered to be unsuitable to operate a sex work business (which would help to protect sex workers’ health and safety); and

²³⁴ *Prostitution Reform Act 2003* (NZ) s 5(1).

²³⁵ See Prostitution Law Review Committee, above n 201, 86.

²³⁶ See Justice and Electoral Committee, New Zealand Parliament, *Prostitution Reform Bill 66-2* (Report, November 2002) 28, 29–30.

²³⁷ See *Sex Industry Act 2019* (NT) ss 4 (definition of ‘operator’), 17, 18(2), 19(3).

²³⁸ See Economic Policy Scrutiny Committee, Legislative Assembly of the Northern Territory, *Inquiry into the Sex Industry Bill 2019* (Report, November 2019) 25.

- deterring the involvement of illegal activity in the sex work industry (which would help to protect sex workers' rights and the integrity of the industry).

9.96 What should a suitability check involve to meet these purposes?

9.97 A person's suitability to operate a sex work business could be affected by numerous factors. Suitability requirements could vary in how complex they are and how much discretion is given to the decision-maker. Three main approaches could be taken:

- a simple check against a list of objective criteria;
- a wider 'fitness of character' test, taking into account any relevant matter; or
- an approach that combines elements of the first two approaches.

A check against objective criteria

9.98 One approach might require the decision-maker to consider a list of objective matters, without exercising any discretion. An example of this is where an applicant is considered suitable if they have not been convicted of a disqualifying offence. This is the approach in New Zealand.

9.99 This would limit the suitability check to questions of fact. The criteria would be clear and objective. The decision-maker would not need to make any subjective judgments, and would typically not need to ask for extra information from the applicant.

9.100 A list of objective matters could be limited to whether the person has been convicted (or found guilty) of certain serious offences, as in New Zealand. Or it could include other things, as in the Northern Territory, like:

- whether the person was an executive officer of a body corporate when it was found guilty of indictable offences against the *Fair Work Act 2009* (Cth) or a work health and safety law;
- whether the person has been bankrupt; and
- whether the person has had a certificate or similar licence cancelled under sex work laws here or in another Australian state or territory.

9.101 Depending on what matters are included, this approach might be expected to have fewer time and resource costs. It might also have less effect on the applicant's privacy.

9.102 The disqualifying offences that apply in Queensland, the Northern Territory, and New Zealand are set out in table 2.

Table 2: Disqualifying offences in Queensland, the Northern Territory and New Zealand²³⁹

QLD*	NT	NZ
unlawful homicide (murder or manslaughter) or attempt to murder kidnapping and kidnapping for ransom	an indictable offence involving assault	crimes against the person, including murder, manslaughter, assault and abduction
rape or attempt to commit rape an offence in ch 22 of the Criminal Code, if it relates to a child or person with an impairment of the mind	an indictable offence involving sexual assault	sexual crimes, including rape
trafficking in dangerous drugs or in relevant substances or things	an indictable offence involving a dangerous drug, such as possession of a traffickable quantity, supply, cultivation, or manufacture	dealing with controlled drugs, cultivating prohibited plants, and other related offences
—	—	firearms offences, such as selling, possessing, and carrying
an offence in ch 22A of the Criminal Code, if it relates to a child or a person with an impairment of the mind	an indictable offence arising from the provision of sex work (except if committed merely by being a sex worker or sex services business operator)	an offence under the <i>Prostitution Reform Act 2003</i> (NZ) (except for some offences about certificates)
extortion	an indictable offence involving fraud, dishonesty or theft	robbery, extortion and burglary
money laundering	—	money laundering
official corruption	—	
—	—	participation in an organised criminal group
various offences under the <i>Migration Act 1958</i> (Cth)	—	—
—	an indictable offence against the <i>Fair Work Act 2009</i> (Cth) or a work health and safety law (including if the person was an executive officer of a body corporate when it was found guilty of such an offence)	—
*In Queensland, this includes offences that would be disqualifying offences if committed in that State		

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Prostitution Act 1999 (Qld) schs 1, 2, 4 (definition of 'disqualifying offence'); *Sex Industry Act 2019* (NT) s 19(3)(b); *Sex Industry Regulations 2020* (NT) reg 5; *Prostitution Reform Act 2003* (NZ) s 36.

9.103 In New Zealand, a person can apply for a waiver of disqualification.²⁴⁰ In the Northern Territory, disqualifying offences are relevant only if the person was found guilty in the 10 year period before the licence application is made.²⁴¹

A wider test

9.104 A different approach might require the decision-maker to form an opinion that the person is 'suitable', based on a wider list of matters, including the person's character and reputation. This is the approach under Queensland's existing brothel licensing system.

9.105 This would require the decision-maker to exercise a discretion and form a subjective judgment. Relevant factors could be listed in the legislation. But it would be for the decision-maker to consider them and give them whatever weight they thought appropriate. The decision-maker would need to collect and look at more information from applicants and others.

9.106 This approach might be expected to take more time and resources. It might have a greater effect on the applicant's privacy, and may require more steps for procedural fairness (including giving reasons for the decision).

9.107 Relevant matters to consider in deciding whether a person is suitable could include things like:²⁴²

- the person's reputation, including their character, honesty, and integrity;
- the person's criminal history;
- the criminal history of the person's associates, including executive officers of corporations;
- any history of bankruptcy;
- the transparency of the person's business structure and its financial viability; and
- whether the person will have arrangements in place to protect sex workers' safety and meet regulatory obligations.

9.108 It has been suggested that, in high-risk industries, a person's associates should be looked at to decide if the person is suitable to operate the business. The aim would be to identify if the applicant is a 'front person' (someone without criminal convictions who has applied for a licence for an organised crime group and who will not be the genuine operator). The Victorian Law Reform Commission suggests that a licence application should be refused only if the person has a criminal associate with the 'ability to influence the business of the applicant'. However, investigating a person's associates 'is likely to require significant regulatory resources' and 'creates a burden for legitimate applicants, particularly because it will probably mean that applications take longer to process'.²⁴³

A combined approach

9.109 A third approach is to combine elements of the other two approaches.

²⁴⁰ See *Prostitution Reform Act 2003* (NZ) ss 35(5)(c)(ii), 37.

²⁴¹ See *Sex Industry Regulations 2020* (NT) reg 5(1).

²⁴² See, eg, *Prostitution Act 1999* (Qld) s 17; *Liquor Act 1992* (Qld) ss 107(1)–(2), 107E(1); *Tattoo Industry Act 2013* (Qld) s 12(2).

²⁴³ Victorian Law Reform Commission, above n 197, 72.

- 9.110 In effect, the existing brothel licensing system in Queensland does this. Under the Prostitution Act:
- a person is not eligible to apply for a brothel licence if (among other things) the person has been convicted of a disqualifying offence; and
 - the PLA must refuse the person’s application for a licence if satisfied the person is ‘not a suitable person to operate a licensed brothel’, based on ‘all relevant matters’.
- 9.111 The approach under the decriminalisation laws in the Northern Territory also combines elements of both approaches. The commissioner may issue a ‘suitability certificate’ if satisfied the person:²⁴⁴
- is ‘suitable’ to operate a sex services business; and
 - meets the set requirements (which include not being found guilty of a disqualifying offence and not having been bankrupt).

Striking a workable balance

- 9.112 A suitability check aims to give some minimum level of comfort that sex work businesses will operate lawfully and safely. We also need to consider the intention of decriminalisation to bring the sex work industry within the mainstream of business regulation.
- 9.113 The more complex the suitability requirements are, the greater the potential administrative and resource burden for government and industry, and the higher the risk that businesses will operate without a licence.²⁴⁵
- 9.114 When considering the Prostitution Reform Bill 2000 (NZ), the New Zealand Justice and Electoral Committee said that:²⁴⁶
- A certification regime should be simple and straightforward. It should not be onerous or expensive as this may discourage compliance. Extending it to factors other than disqualifying convictions leads to a more complex regime.
- Basing the fitness of character test on previous convictions (except for prostitution-related offences) is a clear, objective measure forming a solid basis for the test. For this reason we have rejected the idea of a wider fitness of character test which might include general requirements as to appropriate character alongside a list of prohibited convictions. The criteria proposed to get certification should be open, transparent and related to the reason for having a certification regime—namely the protection of sex workers. A person should be entitled to a certificate (as of right) if he or she has no disqualifying convictions.
- 9.115 The risk of non-compliance has the potential to continue a two-tier system of licensed and unlicensed sex work business operators. Because sex work occurs in private, it is possible to operate a sex work business with the appearance of a different business. This is how erotic massage parlours operate. Outwardly they appear to offer massage services only while actually offering commercial sexual services.
- 9.116 The review of New Zealand’s decriminalisation laws found that a two-tier system did ‘not seem to have developed’ there, but that this danger should be avoided. The review committee

²⁴⁴ *Sex Industry Act 2019* (NT) s 19(3); *Sex Industry Regulations 2020* (NT) reg 5(1).

²⁴⁵ See generally Victorian Law Reform Commission, above n 197, 58.

²⁴⁶ Justice and Electoral Committee, New Zealand Parliament, *Prostitution Reform Bill 66–2* (Report, November 2002) 29.

considered that 'regulation should initially be kept to a minimum whilst still providing adequate checks on those managing sex workers'. The committee commented that '[g]radual changes are needed to ensure the confidence and support of the industry'.²⁴⁷

9.117 On the other hand, a system of suitability checks that is too simple may also carry risks.

9.118 The review of New Zealand's decriminalisation laws found that some operators thought it was 'too easy to get a certificate', and that the number of operator certificates had 'decreased each year' since the licensing system started. The review committee said that:²⁴⁸

Factors responsible for the decline in the number of certificates may include: brothel operators not requiring that all staff that should hold a certificate do so [in part due to some confusion about who is required to hold a certificate]; a lack of enforcement; and/or brothels operating illegally as SOOBs [small owner-operator brothels]; or a decline in the number of brothels.

9.119 The review found that the suitability test 'appears to be robust' and there was no evidence of people attempting to avoid the system by 'using a "front person" with no disqualifying convictions'. But it also found the system did not include steps to check that brothel operators hold a valid certificate and are promoting sex workers' health and safety. The review committee concluded that the licensing system has merit, but needed more enforcement.²⁴⁹

9.120 Whatever is included in a suitability check, factors such as privacy, procedural fairness, information sharing, and notice requirements will also likely need to be considered.

Licensing fees

9.121 Depending on the cost structure involved, licensing fees might be a barrier to entry. Licence fees are likely to be high if the licensing system is based on full or substantial cost recovery. High fees might increase the likelihood of a person operating a sex work business without holding a licence. There is also a risk that '[v]ery high licence fees may provide a perverse incentive to organised crime groups to enter the occupation/industry on an unlicensed basis and operate below cost'.²⁵⁰

9.122 Unlike Queensland, the licensing systems in New Zealand and the Northern Territory have low fees: see table 1 and [9.85] above. The review of New Zealand's decriminalisation laws found that high fees can be a barrier. The review committee concluded that fees should remain low, and an increase 'should only be considered at a time when the system is operating with the confidence and support of the industry'.²⁵¹ At the time, the application fee was \$205. It is now \$250.

For how long should a licence be valid?

9.123 In New Zealand, operator certificates are valid for one year. The review committee referred to criticism that the certificate renewal process was 'inconvenient and time consuming'. It

²⁴⁷ Prostitution Law Review Committee, above n 201, 91, 94.

²⁴⁸ Ibid 91, 93.

²⁴⁹ Ibid 93–4.

²⁵⁰ Victorian Law Reform Commission, above n 197, 59. See also [9.85] above.

²⁵¹ Prostitution Law Review Committee, above n 201, 95.

recommended that certificates should be valid for three years.²⁵² Queensland brothel licences are valid for three years.²⁵³

- 9.124 In the Northern Territory, suitability certificates are valid until they are no longer needed or are revoked. Although administratively simple, this may mean that certificates will remain in force even if a person is no longer operating a sex work business. This might happen if the holder of the certificate does not tell the responsible agency that they have stopped being an operator.

What should happen if an operator does not hold a licence or does not follow a licence requirement?

- 9.125 If there is no penalty for operating a sex work business without holding a licence it might encourage people not to follow the law and lead to a two-tier system of licensed and unlicensed operators. On the other hand, the possibility of a serious fine or other penalty may discourage non-compliance.
- 9.126 In New Zealand, it is an offence for an operator of a business of prostitution not to hold an operator certificate, punishable by a fine of up to \$10 000. In contrast, in the Northern Territory it is not an offence if the operator of a sex services business does not hold a suitability certificate, but they may be liable to pay a civil penalty.²⁵⁴
- 9.127 Convictions for criminal offences can have significant effects. For example, a convicted person might be required to disclose their conviction when seeking certain types of employment, be disqualified from particular occupations or roles, and experience the social stigma of having a criminal conviction. As such, a criminal offence might be more effective than a civil penalty at discouraging people from operating without a licence. However, to secure a conviction, the prosecution would need to prove the offence ‘beyond a reasonable doubt’, which is a high standard of proof.
- 9.128 Civil penalties are imposed by civil rather than criminal court processes and are usually in the form of monetary penalties. The standard of proof is ‘on the balance of probabilities’, which is a lower standard than in criminal matters. This may make it easier to prove that a person has been operating a sex work business without a licence.
- 9.129 A civil penalty may also be more in keeping with the aim of removing criminal penalties for involvement in the sex work industry. In a different context, the Australian Law Reform Commission said:²⁵⁵

Civil monetary penalties play a key role in regulation as they may be sufficiently serious to act as a deterrent (if imposed at a high enough level) but do not carry the stigma of a criminal conviction. Civil penalties may be more severe than criminal penalties in many cases. (note omitted)

- 9.130 However, in the case of the Sex Industry Bill 2019 (NT), the Northern Territory Economic Policy Scrutiny Committee considered that:²⁵⁶

the absence of a penalty for not complying with certification requirements results in legislation that is of questionable enforceability. ... it is rare for compliance to be

252 Ibid 91, 97.

253 *Prostitution Act 1999* (Qld) s 19(4).

254 See *Prostitution Reform Act 2003* (NZ) s 34; *Sex Industry Act 2019* (NT) s 18.

255 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (May 2008) vol 3, 2398.

256 Economic Policy Scrutiny Committee, Legislative Assembly of the Northern Territory, *Inquiry into the Sex Industry Bill 2019* (Report, November 2019) 26.

sought through civil injunctive action in the courts and that without an offence there is little incentive for sex work businesses to obtain a suitability certificate. This is likely to result in low levels of compliance and greater potential for 'unsuitable' employers to enter or remain in the industry, as they would be able to operate a sex services business with relative impunity.

- 9.131 Another matter to consider is what should happen if an operator does not follow any requirements or conditions imposed by the licence. For example, a civil penalty might apply or the person's licence might be suspended or cancelled.

Who should be responsible for issuing a licence?

- 9.132 If there were a licensing system for sex work business operators, we need to consider who should be responsible for its administration. This could be a new or an existing regulatory body.
- 9.133 In Queensland, the PLA administers the brothel licensing system and decides applications for brothel licences and approved manager's certificates under the Prostitution Act. It has established experience as a sex work industry regulator. However, its functions are limited to one industry and, in particular, to the licensed brothel sector which makes up only a small part of the sex work industry.
- 9.134 Some agencies in Queensland and other jurisdictions perform licensing and registration functions across multiple industries. This may create economies of scale and contain administration costs. Bringing the sex work industry within this framework might also be seen to fit with the intended aims of decriminalisation.
- 9.135 In Queensland, the Office of Fair Trading 'enforces consumer protection laws and regulates several industries to achieve a fair and safe marketplace'. It is responsible for licensing property agents, motor dealers, security providers, tattoo salon operators and tattooists, auctioneers, second-hand dealers and pawnbrokers, debt collectors and process servers, introduction agents, and inbound tour operators.²⁵⁷
- 9.136 In Victoria, the Business Licensing Authority was responsible for licensing sex work service providers to operate brothels or escort agencies. This will end when the licensing system is repealed by the *Sex Work Decriminalisation Act 2022* (Vic). The Business Licensing Authority is also responsible for licensing and registration of conveyancers, estate agents, motor car traders, owners corporation managers, professional engineers, rooming house operators, and second-hand dealers and pawnbrokers.²⁵⁸
- 9.137 In the Northern Territory, Licensing NT decides applications for suitability certificates for sex services business operators. It is also responsible for licensing and registration for many other professions and industries including auctioneers, associations, gambling, gaming machine, liquor, lotteries, motor vehicle dealers, pawnbrokers and second hand dealers, security, tobacco, and real estate, business and conveyancing agents.²⁵⁹
- 9.138 In New Zealand, applications for an operator certificate are made to and decided by the Registrar of the District Court at Auckland.

257 Department of Justice and Attorney-General (Qld), 'Office of fair trading' (23 December 2021) <<https://www.justice.qld.gov.au/about-us/services/fair-trading>>. See generally Office of Fair Trading (Qld), 'Regulated industries, licensing and legislation' (2022) <<https://www.qld.gov.au/law/fair-trading>>.

258 See generally Consumer Affairs Victoria, 'Licensing and registration' <<https://www.consumer.vic.gov.au/licensing-and-registration>>; Consumer Affairs Victoria, 'Business Licensing Authority' (17 October 2019) <<https://www.consumer.vic.gov.au/about-us/who-we-are-and-what-we-do/public-committees-and-boards/business-licensing-authority>>.

259 See generally Northern Territory Government, 'Licensing NT online' (24 June 2020) <<https://nt.gov.au/industry/licences/licensing-nt-online>>.

- 9.139 As well as deciding applications to be a sex work business operator, the relevant agency would be responsible for cancelling the licence if the holder ceased to be a suitable person. If the system was 'light touch' and based on disqualifying offences, a licence could be cancelled automatically if the holder was convicted of a disqualifying offence. This is the position under the Prostitution Act.²⁶⁰
- 9.140 Whichever agency is responsible for issuing (and cancelling or suspending) licences, other matters might also need to be considered, such as whether the agency should have any particular powers or functions to monitor if operators have a valid licence and are meeting other requirements. In the review of New Zealand's decriminalisation laws, it was observed that '[o]ngoing monitoring is key to a robust system of certification'.²⁶¹

Review of decisions

- 9.141 Another issue to consider is the availability of review of decisions of the agency who issues (or refuses, suspends or cancels) a licence.
- 9.142 Decisions to refuse, suspend or cancel an operator's licence are likely to be reviewable under the *Judicial Review Act 1991*. That Act gives a person whose interests are adversely affected by an administrative decision made under a statute a right to apply to the court for an order for review of the decision.²⁶² This is the position for decisions about licences made by the PLA under the Prostitution Act.
- 9.143 The decriminalisation laws could alternatively allow a person to apply to the Queensland Civil and Administrative Tribunal (QCAT) for review of decisions. This is the approach in many other licensing systems in Queensland.²⁶³ It is also the approach in the Northern Territory, where decisions to refuse or revoke a suitability certificate can be reviewed by the Northern Territory Civil and Administrative Tribunal.²⁶⁴ This might be a more accessible and faster avenue for review than going to court.

²⁶⁰ *Prostitution Act 1999* (Qld) s 25(a).

²⁶¹ Prostitution Law Review Committee, above n 201, 93 (and at 94).

²⁶² *Judicial Review Act 1991* (Qld) ss 4, 7, 20, 30.

²⁶³ See, eg, *Property Occupations Act 2014* (Qld) ss 171, 176, sch 1; *Tattoo Industry Act 2013* (Qld) s 56; *Motor Dealers and Chattel Auctioneers Act 2014* (Qld) s 196, sch 2; *Security Providers Act 1993* (Qld) s 26; *Second-hand Dealers and Pawnbrokers Act 2003* (Qld) s 107; *Liquor Act 1992* (Qld) s 21.

²⁶⁴ See *Sex Industry Act 2019* (NT) s 23, sch.

CONSULTATION QUESTIONS

Whether a licensing system is needed

Q6 Should sex work business operators be required to have some form of licence to operate a sex work business in Queensland? Why or why not?

Features of a licensing system

Q7 If a licence were to be required what should the system look like?

Q8 Should the requirement to hold a licence apply to:

- (a) all sex work businesses; or
- (b) only those who employ a certain number of sex workers?

Q9 What should a suitability check involve? For example, should it:

- (a) be limited to checking whether the person has convictions for serious disqualifying offences (like New Zealand)?
- (b) include checking whether the person has been bankrupt, had another licence for operating a sex work business revoked, or been an executive officer of a body corporate that was found guilty of a serious offence against workplace laws (like the Northern Territory)?
- (c) require the decision-maker to form an opinion that the person is 'suitable', based on any relevant matter (like the Prostitution Act or in the Northern Territory)?

Q10 Should the fee for a licence be set at a nominal amount (like the Northern Territory and New Zealand) or a higher amount (like the Prostitution Act)?

Q11 For how long should a licence be valid?

Q12 What should happen if an operator:

- (a) does not hold a valid licence? For example, should there be a criminal penalty, civil penalty, or both?
- (b) does not follow any requirements or conditions imposed by the licence? For example, should there be a civil penalty, suspension or cancellation of the licence, or both?

Q13 Who should be responsible for carrying out suitability checks and issuing licences? For example, should this be:

- (a) an existing body that deals with other industries, like the Office of Fair Trading; or
- (b) an existing or newly created body with a role specific to the sex work industry, like the PLA?

Q14 Should decisions to refuse an application for a licence or to suspend or cancel a licence be reviewable by QCAT?

Other considerations or options

Q15 What is the best way for a licensing system (if any) to balance:

- (a) the need to protect against illegal activity; and

(b) the need to limit the administrative and resource burden on government and the sex work industry?

Q16 Apart from a licensing system, what is the best way to deter illegal activity and to protect sex workers from being exploited under the new regulatory framework?

Q17 What other factors should we consider (if any) in recommending a licensing system?

