



ATTORNEY GENERAL

MINISTER FOR HEALTH, ELECTORAL AFFAIRS

FOR WESTERN AUSTRALIA

Our Ref: 9-24409

Hon Adele Farina MLC
Member for South West Region
PO Box 809
BUSSELTON WA 6280

Dear Ms Farina,

PROPOSED AMENDMENTS TO THE CRIMINAL CODE AMENDMENT BILL 2003

Thankyou for your email of 26 November 2003 seeking my comments on amendments you have proposed to the sexual servitude provisions of the *Criminal Code Amendment Bill 2003*.

After careful consideration, I have come to the view that the proposed amendments are, generally speaking, unnecessary. In this regard I make the following specific comments:

- While I agree that the term "commercial sexual service" used throughout sections 331A - 331D should be replaced with the term "sexual service", the proposed amendments to the definition corresponding to that term are, in my view, unnecessary. The ordinary meaning of the term "commercial" is "interested in financial return rather than artistry; likely to make a profit" (see: *The New Shorter Oxford English Dictionary*). Accordingly, deleting the word "commercial" and inserting the phrase "for reward or valuable consideration" in section 331A(1) will not give the definition of "sexual service" any new or greater meaning. Moreover, while the sexual servitude provisions of the Bill are not part of a national scheme for uniform legislation as such, they are the result of an informal agreement between the Commonwealth and the States and Territories to take a cooperative approach to the issue of sexual servitude. It is therefore appropriate for the definition of "sexual service" in section 331A to correspond with the definition of that term in section 270.4(2) of the *Criminal Code Act 1995* (Cth), section 80B(2) of the *Crimes Act 1900* (NSW) and section 202A(1) of the *Criminal Code Act* (NT). Each of these refers to "the commercial use or display of the body".
- Proposed paragraph (b) of the definition of "commercial sexual service" is unnecessary as acts of prostitution within the meaning of section 3 of the *Prostitution Act 2000* are already covered by the reference in section 331A to "the commercial use...of the body...for the sexual arousal or sexual gratification of others".

30th Floor Allendale Square

77 St George's Terrace Perth WA 6000

Tel: +61 8 9220 5000 Fax: +61 8 9221 2068

ABN: 61313082730

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- Inserting the words "to others *then present*" does not affect the definition of the term "commercial sexual service" other than to require that the person providing a sexual service be in the physical presence of those for whom he or she is providing that service. If this is the intention, then the words "to others then present" are rendered completely meaningless by proposed 331A(2). If this is not the intention, the words do not add any meaning to the definition of "commercial sexual service". As with the words "for the purpose of, or so as to cause", they merely add to the verbosity of section 331A.
- The current definition of "commercial sexual service" is neither explicitly or implicitly limited to situations where the person providing the sexual service is physically present with, and visible to, those for whom the service is provided. The current definition was deliberately drafted to be broad in its terms so as to cover all circumstances in which a person's body is commercially used or displayed for the sexual arousal or gratification of other, including through photographs, videos and the like. Accordingly, in my opinion, proposed new section 331A(2) is unnecessary.
- Proposed new section 331A(2) is furthermore grammatically incorrect. In paragraph (a), the words "it is not an essential element" should read "it is not essential", while in paragraph (b) the word "it" should read "the sexual service" or "the service".
- With respect to section 331B, inserting the words "by force or threats" may be unduly restrictive. While in most instances a defendant would be likely to compel another to provide a sexual service through force or threats, it is possible to envisage situations involving less overt forms of coercion. I recognise, however, that the term "threat" is defined in section 331A without being used in sections 331A - 331D and that this definition will need to be removed.
- With respect to section 331D(a), the words "for reward" are unnecessary as "consideration" in a technical sense is an essential feature of employment contracts and other contractual forms of engagement to provide personal services. See: *Teen Ranch Pty Ltd v Brown* (1995) 87 IR 308; Creighton & Stewart, *Labour Law: An Introduction* (Sydney: The Federation Press, 3rd ed, 2000).
- It is unnecessary to specifically provide that it is *not* a defence that - (i) one or both parents or the legal guardian of a child; or (ii) the legal guardian of, or a person with power of attorney with respect to, an incapable person - purported to consent to, or accept, an offer so as to bind the child or incapable person to its terms. Firstly, this is because the offence created by section 331D is not framed so as to make the absence of consent by the victim an element. A defendant commits an offence simply by offering employment without disclosing the information specified in paragraph (b) - it is irrelevant whether the victim accepts the offer or not and thus any purported consent on the victim's behalf by a third party is also irrelevant. Secondly, even if the absence of consent were an element, it is simply not the law that a parent, legal guardian or person with power of attorney could ever consent to an offer referred to by section 331D on behalf of a child or incapable person.
- Proposed new section 331D(2) is essentially the same as current section 331D(c) except that it renders it insufficient for the defendant to disclose the information specified in paragraph (b) to the victim - the victim must also understand the information disclosed (the amendment also reverses the onus of proof). While I



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appreciate that this change has been made in an attempt to overcome the problem with section 331D(c) identified by the Uniform Legislation and General Purposes Committee in its letter of the 29 October 2003, the proposed amendment is unnecessarily broad. The problem identified with section 331D(c) was that it afforded a defence to recruiters who disclose the information specified in paragraph (b) to children (who may not be able to truly understand that information). As indicated in my letter of the 17 November 2003, this problem can be appropriately overcome by amending section 331D so that paragraph (c) does not apply in respect of children or incapable persons. It is fair to assume that "mere" disclosure will be sufficient in respect of adults who are not "incapable persons" (ie, there is no need for the defendant to additionally prove that the adult victim understood the information disclosed). In this regard I note that proving that a person understood certain information (*contra* that they appeared to understand certain information) would be an extremely difficult burden for a defendant to discharge.

I have instructed Parliamentary Counsel to amend the sexual servitude provisions of the *Criminal Code Amendment Bill 2003* to:

- replace the term "commercial sexual service" used throughout sections 331A - 331D with the term "sexual service";
- remove the definition of "threat" in section 331A; and
- amend section 331D so that paragraph (c) does not apply if the victim is a child or an incapable person.

Yours sincerely


 JIM MCGINTY MLA
ATTORNEY GENERAL