

Criminal Code (Decriminalising Sex Work) and Other Legislation Amendment Bill 2024

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (HR Act), I, Yvette D'Ath MP, Attorney General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence make this statement of compatibility with respect to the Criminal Code (Decriminalising Sex Work) and Other Legislation Amendment Bill 2024 (the Bill).

In my opinion, the Bill is compatible with the rights protected by the HR Act for the reasons outlined in this statement.

Overview of the Bill

The main purpose of the Bill is to decriminalise sex work and transition the sex work industry into existing regulatory environments by implementing the legislative amendments recommended by the Queensland Law Reform Commission in its report: *A decriminalised sex-work industry for Queensland* (QLRC Report).

The Bill amends the *Anti-Discrimination Act 1991* (AD Act), the *City of Brisbane Act 2010*, the Criminal Code, the *District Court of Queensland Act 1967*, the *Liquor Act 1992*, the *Local Government Act 2009*, the *Penalties and Sentences Act 1992* (PS Act), the *Work Health and Safety Act 2011* and repeals the *Prostitution Act 1999*. The Bill will make consequential amendments as set out in Schedule 1 to the Bill.

The amendments in the Bill will, for the most part, implement those recommended by the QLRC report to (1) decriminalise the sex work industry in Queensland and repeal existing criminal offences relating to sex work; (2) create new offences for the protection of sex workers and children; (3) strengthen the protection of all sex workers from unfair discrimination; and (4) prevent local governments from making local laws specifically about the regulation of sex work.

The Bill will establish a legal framework that will enact a safe, decriminalised sex work industry in Queensland, while improving the health, safety, rights and legal protections for sex workers. The decriminalisation of the sex work industry also protects the rights of all individuals, while balancing the needs and expectations of the community.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion, the following human rights under the HR Act are relevant to the Bill:

- *Recognition and equality before the law* (section 15)

- *Freedom of movement (section 19)*
- *Freedom of thought, conscience, religion and belief (section 20)*
- *Property rights (section 24)*
- *Privacy and reputation (section 25)*
- *Protection of families and children (section 26)*
- *Right to liberty and security of person (section 29)*
- *Fair hearing (section 31)*
- *Rights in criminal proceedings (section 32)*
- *Right not to be tried or punished more than once (section 34)*
- *Right to health services (section 37)*

Amendments that promote human rights

In my opinion the human rights that are promoted by decriminalising sex work:

- *Recognition and equality before the law (section 15)*
- *Freedom of movement (section 19)*
- *Right to privacy and reputation (section 25)*
- *Protection of families and children (section 26)*
- *Right to health services (section 37)*

The QLRC Report found that the current prostitution legal framework limits these human rights for sex workers. For example, the Report noted that current sex work laws are highly restrictive and difficult to comply with, undermining sex workers' autonomy and privacy.

The QLRC Report also noted that the current framework creates incentives to avoid the attention of authorities and isolates sex workers, increasing their vulnerability to exploitation and violence. It creates a two-tiered industry where most sex work is criminalised or occurs outside the licensing system. The framework contributes to stigma and discrimination, and creates barriers to accessing health, safety and legal protections.

Most of the amendments support and promote human rights, in particular, decriminalising sex work which assists sex workers with reducing stigma and discrimination, safeguarding sex workers' human rights, removing barriers to sex workers' safety, health and access to justice, treating sex work like other work, and not singling out sex work for special laws without justification.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Amendments to the Anti-Discrimination Act 1991

The QLRC Report found that sex workers experience barriers to exercising their rights along with significant stigma and discrimination from other people. In quoting a submission received from a sex worker, the QLRC Report noted that sex workers are discriminated against in many ways including in housing, banking and employment.

Decriminalising sex work will remove some of these barriers and is a necessary first step to addressing stigma and discrimination.

The QLRC Report considered that protections under the AD Act need strengthening as part of the decriminalisation framework. This is consistent with the aim of reducing stigma and safeguarding sex workers' human rights, including the right to recognition and equality before the law, the freedom of movement and privacy and reputation.

Section 106C of the AD Act currently provides that it is not unlawful for an accommodation provider to discriminate against a person in relation to accommodation if the accommodation provider reasonably believes that the accommodation is being used or intends to be used to provide sex work.

Recommendation 13 of the QLRC Report is that section 106C of the AD Act should be repealed.

In my opinion, property rights as provided at section 24 of the HR Act is arguably limited by the repeal of section 106C of the AD Act.

(a) The nature of the human right

Section 106C of the AD Act permits accommodation providers to discriminate against another where the provider reasonably believes that the person is to use the accommodation for sex work. An accommodation provider may refuse to supply accommodation or evict the person from the accommodation. The provision also enables the accommodation provider to treat a person unfavourably in connection with the accommodation where the accommodation provider holds that belief.

By repealing the lawful right of accommodation providers under the provision, this may hinder an accommodation provider's right over their property by arbitrarily depriving them full control over who can reside at their property (section 24(2) of the HR Act). Property rights in section 24 of the HR Act protect the right of all persons to own property and provides that people have a right not be arbitrarily deprived of their property.

The term 'deprived' is not defined by the HR Act. The term is considered to include the substantial restriction on a person's use or enjoyment of their property, to the extent that it substantially deprives a property owner of the ability to use his or her property or part of that property.

The concept of arbitrariness in the context of the right carries a meaning of capriciousness, unpredictability, injustice and unreasonableness in the sense of not being proportionate to the legitimate aim sought.

The right to freedom of thought, conscience, religion and belief (section 20) encompasses freedom of thought on all matters, personal conviction and commitment to religion and belief.

(b) The nature of the purpose of the limitation

The purpose of the limitation is to protect the right of sex workers to be recognised and protected equally before the law without discrimination and to be protected from discrimination (section 15 of the HR Act). The limitation protects sex workers' freedom of movement across Queensland including being able to choose where they live (section 19 of the HR Act). Furthermore, the purpose of the limitation is to protect sex workers' right to privacy (section 25 of the HR Act).

In providing for lawful discrimination under the AD Act, sex workers are singled out as the AD Act does not permit accommodation providers to discriminate against other people more broadly.

The QLRC Report identified that the definition of accommodation is broad and may include business premises, a house or flat, a hotel or motel, a boarding house or hostel, a caravan or caravan site, a manufactured home, a camping site, and a building or construction site. Given the broad definition of accommodation, the discriminatory nature of section 106C can limit sex workers freedom to choose where they live, which subsequently restricts their freedom of movement.

The Queensland Human Rights Commission identified in its Report *Building Belonging – Review of Queensland’s Anti-Discrimination Act 1991* (Building Belonging Report) that the threshold for section 106C of the AD Act was too low and it may not be compatible with human rights, as it potentially limits sex workers’ right to equality and privacy.

The removal of this discriminatory provision against sex workers, is both recommended in the QLRC Report and consistent with the Building Belonging Report.

(c) The relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose.

The limitation on the rights of sex workers to be equal before the law, freedom of movement and choice of where to live, and the limitation of sex workers’ right to privacy will be removed with the repeal of section 106C of AD Act. The repeal is consistent with the aims of the decriminalisation of sex work by helping to reduce stigma and discrimination.

It is noted that the Bill’s repeal of accommodation providers’ legislated right under section 106C may affect accommodation providers’ right to exercise their individual or religious belief against sex work, and impact on their ability to exercise control over their property. However, the QLRC Report noted that if section 106C is repealed, accommodation providers will still have control over their premises. Accommodation providers can still make policies regarding the use of their premises in relation to the general conduct of commercial activities on the premises.

(d) Whether there are any less restrictive and reasonably available ways to achieve the purpose.

There is no less restrictive and reasonably available way of achieving the purpose of the amendment.

(e) The balance between the importance of the purpose of the Bill, which if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation.

The repeal of section 106C of the AD Act would have a much greater impact on the rights of sex workers compared to the impact upon the rights of accommodation providers. While accommodation providers will no longer be able to single out sex workers regarding the provision of accommodation, the impact on their right to exercise their belief against sex workers, and their right over their property is minimal as accommodation providers still have the ability to make policies over the general conduct of commercial activities on their premises. The removal of section 106C is necessary, given it is contrary to promoting equality before the law by singling out sex workers, and perpetuates stigma and discrimination. For the reasons

outlined above, any potential human rights impact to accommodation providers is considered reasonable and justified.

Amendment of Criminal Code

The proposed amendments to the Criminal Code create three new offences relating to children in commercial sexual services. These offences, at proposed sections 217A, 217B and 217C of the Criminal Code, will be located within Chapter 22 of the Criminal Code. Chapter 22A of the Criminal Code contains a number of other serious offences that relate to sexual offending against children.

Section 229 (Knowledge of age immaterial) of the Criminal Code provides that except as otherwise stated, it is immaterial for any offences under Chapter 22 that the accused did not know the person was under a particular age, or otherwise believed the person was not under that age. This operates to displace section 24 (Mistake of fact) of the Criminal Code.

Where the child is younger than 12 years old, the offences operate as absolute liability offences.

Each new offence contains a subsection which provides that if the offence is alleged to have been committed in respect of a child of or above the age of 12 years, it is a defence that the accused person believed, on reasonable grounds, that the child was an adult. The defence places an evidential onus on the accused.

In addition to the above, the Bill amends section 678 of the Criminal Code to expand the list of prescribed offences to include the offence at section 217A(1) in circumstances where the child is under the age of 12 years.

The effect of adding the offence at section 217A(1) in circumstances where the child is under the age of 12 years to the list of prescribed offences in section 678 of the Criminal Code, is to allow an acquitted person to be retried for the offence if the Court of Appeal is satisfied there is fresh and compelling evidence against the acquitted person in relation to the offence and it is in the interests of justice (double jeopardy exception).

(a) The nature of the human right

Absolute liability offences

The defences relating to each of the new offences will not apply to the proposed offences where the child is below the age of 12 years. This raises the question of whether absolute liability offences amount to a limit on the right to be presumed innocent under section 32(1) of the HR Act.

Rights in criminal proceedings (section 32) enumerates a number of rights for people charged with criminal offences. Amongst other protections, the provision upholds the presumption of innocence and the privilege against self-incrimination.

On one view, it is open to the State to establish an offence which does not contain a *mens rea* element without limiting this right, so long as the offence is within reasonable limits and the prosecution must still otherwise prove the elements of the offence.

However, it has also been accepted in both Victorian Statements of Compatibility and by the Commonwealth Joint Committee on Human Rights that the creation of absolute liability offences will impose a limit on the presumption of innocence as they increase the possibility that a person is convicted of an offence without fault.

Noting these divergent views, and the purpose of the HR Act, I have accepted that imposing absolute liability offences will limit the right to the presumption of innocence.

Limitations relating to the prohibition of certain conduct

The proposed offences prohibit the following conduct:

- obtaining commercial sexual services from a person who is not an adult (section 217A);
- allowing a person who is not an adult to take part in commercial sexual services (section 217B);
- conduct relating to provision of commercial sexual services by person who is not an adult (section 217C).

The scope of the offences intends to prevent the involvement of people under the age of 18 years in the provision of commercial sexual services. As 16 and 17 year olds are otherwise capable of consenting to sexual intercourse, this limits the right to equality and non-discrimination in section 15(3) and (4) and the right to privacy in section 25.

Recognition and equality before the law (section 15) protects a variety of rights. Amongst the rights protected is the right to recognition as a person before the law. This provision of the HR Act also provides that a person has the right to enjoy their human rights free from discrimination along with a right to equal protection of the law without discrimination.

The right to privacy and reputation (section 25) protects an individual from interference and attacks upon their privacy. The right extends to the protection of an individual's family, home, communications, and reputation.

Double jeopardy exception

As outlined above, the effect of including the offence at 217A(1) in the identified circumstances in the list of prescribed offences at section 678 of the Criminal Code is to allow an acquitted person to be retried for the offence.

Adding section 217A(1) to the list of prescribed offences will limit the right not to be tried or punished more than once at section 34 of the HR Act.

(b) The nature of the purpose of the limitation

Absolute liability offences and limitations relating to the prohibition of certain conduct

Australia has an international obligation to protect children from prostitution, sexual exploitation, sexual abuse, and human trafficking as a signatory and having ratified a number of international conventions and protocols including the United Nations (UN) *Convention on the Worst Forms of Child Labour*, *Convention on the Rights of the Child*, *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, *Convention on the Elimination of All Forms of Discrimination against Women*, and the *Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children*.

The three proposed offences align with Australia's international obligations, while also meeting the Human Rights obligation under section 26 of the HR Act, where every child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interest because of being a child (section 26(2)).

While the purpose of the offences more broadly relates to the protection of children from sexual exploitation, when it comes to children who are under 12 years old, the purpose of imposing absolute liability is to express Parliament's judgement that it would never be reasonable to assume that a child under 12 is an adult.

With the new offences applying where a person is under 18 years of age, the nature of the purpose of the limitation is to also protect against the exploitation of children aged 16 and 17. The QLRC had identified that people aged 16 or 17 are still emotionally vulnerable and should be protected from potential harm as a matter of policy.

Double jeopardy exception

The purpose of the limitation on the right to not be tried more than once is to ensure individuals acquitted of serious prescribed offences are able to be brought to justice where fresh and compelling evidence of guilt emerges, and to preserve the integrity of the criminal justice system.

The emergence of compelling new evidence of guilt after an acquittal undermines the legitimacy of the acquittal, and an absolute prohibition on retrial for prescribed offences undermines the integrity of the criminal justice system and public confidence in that system.

- (c) The relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose.

Absolute liability offences and limitations relating to the prohibition of certain conduct

The absolute liability which arises under the new offences in respect of a child aged less than 12 achieves the protection of children by facilitating the prosecution of the offences.

By defining commercial sexual services as only including a person over 18, and criminalising conduct related to commercial sexual services involving children, the amendments help prevent their exploitation in those services.

Double jeopardy exception

The limitation on the right to not be tried more than once will achieve the purpose of ensuring that serious offenders can be brought to justice and preserving the integrity of the criminal justice system by providing an appropriate mechanism for a person to be retried for the offence where fresh and compelling evidence subsequently emerges, and it is in the interests of justice for the person to be retried.

- (d) Whether there are any less restrictive and reasonably available ways to achieve the purpose.

Absolute liability offences

Possible alternatives would be to extend the defence of reasonable belief for ages 12 and above to all ages, or to allow for section 24 (Mistake of fact) of the Criminal Code to apply to the offences. Certainly, these alternatives would be less restrictive on the right to be presumed innocent, as they would provide the accused with an opportunity to avoid prosecution where they were able to successfully rely on the defence.

However, these would not be as effective in achieving the purpose of protecting children under 12 from sexual exploitation or expressing the judgement of Parliament about the reasonableness of a mistaken belief in the age of a child. It is recognised in the offences that there may be occasions where a person could reasonably believe that a child between 12 and

under 18 years old was in fact 18 years old, and given this belief would not have acted differently. In those circumstances, the offences do not serve to prevent the behaviour or achieve the purpose of protecting children, and it is reasonable to allow the defence.

The purpose of restricting the operation of the defence where the child is under 12 is to clearly express Parliament's judgement that it is never reasonable for a person to believe a child under the age of 12 years old is 18 years or older. It follows, then, that there would not be an occasion where a person acting reasonably would engage in the conduct regardless of the offence based on their belief about age. Restricting the defences will therefore help achieve the protection of children by ensuring that anyone engaging in that conduct is appropriately prosecuted. Extending the defences would risk an accused successfully relying on their belief in circumstances where Parliament has determined such belief can never be reasonable.

In relation to restricting sex work to a person who is at least 18 years old, a less restrictive alternative would be to allow a person to participate in commercial sexual services where they would otherwise be able to provide consent to sexual intercourse. However, as noted in the QLRC Report, 16 and 17-year-olds remain particularly vulnerable to exploitation in these services, and as such allowing their participation would not be as effective in combatting this recognised issue.

Double jeopardy exception

There is no less restrictive and available way to achieve the purpose.

- (e) The balance between the importance of the purpose of the Bill, which if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation.

Absolute liability offences

On one side of the scales, the right to the presumption of innocence, and as far as this incorporated a requirement for an accused only to be found guilty where there is fault, is of foundational importance to the fairness of the criminal justice system. The proposed offences limit this right for the accused where a child is under 12 years old by precluding any opportunity for the accused to argue that they believed the child was 18 years old. However, as reflected in the discussion above, it is considered wholly improbable that an accused could ever reasonably hold such a belief.

On the other hand, the offences are designed to protect children by way of criminalising, and facilitating the prosecution of, sexual exploitation of children. The significant harm that such conduct can cause to a vulnerable group (that is, children under 12), and the need to effectively combat this harm, outweighs any limitation on the presumption of innocence.

For children between the age of 16 to under 18 years of age - on one hand, the values of bodily and decision-making autonomy are of great importance, and by excluding people based on age (where they would otherwise be able to consent to sexual intercourse) from participating in commercial sexual services undermines these values on a discriminatory basis.

On the other hand, the limitations serve an important purpose in the protection of children, and it achieves this purpose not by way of criminalising the conduct of children, but instead criminalising the conduct of people who are participating in the exploitation of the child. Given the importance of stamping out sexual exploitation of all children, the proposed amendments strike a fair balance.

Double jeopardy exception

The importance of protecting the right of individuals not to be tried more than once for the same offence must be balanced against the public interest in fair hearings and just outcomes, community safety, the integrity of the criminal justice system and public confidence in that system.

On balance, having regard to the extent of the limitation on the right of individuals not to be tried more than once for the same offence, it is considered that the importance of achieving the purposes of the amendments outweighs the harm caused to the right of individuals not to be tried more than once for the same offence.

Amendments to the Penalties and Sentences Act 1992

The amendments proposed in Part 8 of the Bill are relevant to the operation of Part 9D (Serious and organised crime) of the PS Act and, in particular, the serious organised crime circumstance of aggravation.

Under section 161Q (Meaning of serious organised crime circumstance of aggravation) of the PS Act, a circumstance of aggravation applies where a person is convicted of a prescribed offence, when at the time the offence was committed, or at any time during the course of the commission of the offence, the offender:

- (a) was a participant in a criminal organisation; and
- (b) knew, or ought reasonably to have known, the offence was being committed;
 - (i) at the direction of a criminal organisation or a participant in a criminal organisation; or
 - (ii) in association with 1 or more persons who were, at the time the offence was committed, or at any time during the course of the commission of the offence, participants in a criminal organisation; or
 - (iii) for the benefit of a criminal organisation.

Section 161Q of the PS Act refers to this as the serious organised crime circumstance of aggravation.

Schedule 1C to the PS Act sets out those offences which are prescribed offences for the purposes of the serious organised crime circumstance of aggravation. This Bill inserts the new offences at sections 217A, 217B and 217C of the Criminal Code.

The new prescribed offences are in line with Recommendation 31 of the QLRC Report that proposes that the serious organised crime circumstance of aggravation apply to offences which involve coercing a person to participate in the provision of sex work and the involvement of children in sex work.

The amendments may increase the time that people convicted of these offences will be deprived of their liberty and thereby limit section 29(1) of the HR Act.

(a) The nature of the human right

Section 29(1) of the HR Act states that every person has the right to liberty. This right to liberty

means that people must not be arrested and detained, unless provided for by law. Their arrest and detention must also not be arbitrary.

The concept of arbitrariness carries a human rights meaning of capriciousness, unpredictability and unreasonableness in the sense of not being proportionate to the legitimate aim sought.

(b) The nature of the purpose of the limitation

Arguably, the amendments to increase the maximum penalties for a prescribed offence limits a defendant's right to liberty by increasing the period of the time they may be detained in custody. However, a defendant will still be protected by the rights in subsections 29(4) to (7) of the HR Act which provide several procedural rights once a person has been arrested or detained.

The purpose of the limitation is to promote the protection of victims and more appropriately reflect the seriousness of these offences and send a message to offenders and the community that this conduct is viewed seriously and is not acceptable. This also aligns with Australia's international obligations under multiple international conventions and protocols relating to the protection of children from exploitation and child prostitution.

(c) The relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose.

The maximum sentence for an offence is a reflection of, and a proxy for, its seriousness. Increasing penalties for an offence is a suitable way of showing that the offence is considered to be more serious, and provides greater protection for victims.

(d) Whether there are any less restrictive and reasonably available ways to achieve the purpose.

A less restrictive alternative would be to not prescribe the offences for the purposes of the serious organised crime circumstance of aggravation.

However, as noted above, maximum sentences are a reflection of the seriousness of the offence. The penalty levels proposed by including the offences within the serious organised crime circumstance of aggravation reflect the seriousness of the offence. Therefore, there is no less restrictive alternative which would still achieve the purpose of the amendments.

(e) The balance between the importance of the purpose of the Bill, which if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The limitation on the right to liberty is appropriate to ensure that sentences imposed for relevant offences adequately account for the impacts of the offending behaviour and to meet community expectations.

As noted above, the purpose of the limitation is to promote the protection of victims, and to reflect the seriousness of the offending behaviour. By including the offences within the serious organised crime circumstance of aggravation, the Bill sends a strong message that the ramifications of this conduct are severe and that individuals who engage in such activities will face serious consequences.

On balance, having regard to the extent of limitations on the right to liberty, it is considered that the importance of achieving the purposes of the limitations outweighs the harm caused to the right to liberty.

Conclusion

In my opinion, the Bill is compatible with the rights protected by the HR Act for the reasons outlined in this statement.

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Minister for the Prevention of Domestic and Family Violence

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