

The Licensing of Sex Work in Australia and New Zealand

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I. INTRODUCTION

The issue of how to best regulate the sex industry is a constant throughout history and across jurisdictions.¹ The legal frameworks for dealing with sex work include criminalisation, complete and partial decriminalisation and legalisation of the industry.² In the 1990s, a number of Australian States and Territories introduced a licensing system in respect to various aspects of the sex industry, namely Queensland, Victoria, Northern Territory and Australian Capital Territory.³ More recently, the New Zealand Parliament passed the *Prostitution Reform Act 2003*, establishing a licensing regime while in Western Australia (WA) and Tasmania there have been unsuccessful attempts to introduce such reform. The WA Parliament debated the *Prostitution Control Bill* in 2003 which, in addition to criminalising street based work, would have created a system for licensing sex workers. The licensing aspects of the legislation were not passed, amid objections from many sectors of the community that the legislation posed a threat to human rights and was unlikely to lead to a better regulated industry. There have recently been public calls for the WA government to revisit the issue. The Tasmanian Government's 2005 proposal to create a licensing system for brothels reverted to a complete ban following public opposition. It was the government's belief that in the absence of the ability to appropriately regulate the industry to protect workers and the community, complete prohibition was necessary.⁴

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¹ For the historical dimensions see Nils Ringdal, *Love for Sale: A Global History of Prostitution* (London, 2004).

² The categories of regulation are variously described. Pinto, Scandia and Wilson refer to criminalisation, legalisation, decriminalisation and decriminalisation with controls. Jordan refers to criminalisation, criminalisation of the clients, legalisation and decriminalisation. See Susan Pinto, Anita Scandia and Paul Wilson, *Prostitution Laws in Australia*, Trends and Issues in Crime and Criminal Justice No 22 (Australian Institute of Criminology, Canberra, 1990); Jan Jordan, *The Sex Industry in New Zealand: A Literature Review* (Ministry of Justice, Wellington, 2005).

³ The sex industry is prohibited in South Australia (*Summary Offences Act 1953*) whereas in NSW it is decriminalised, though with specific limits, for example on the advertising of services, on living on the earnings of prostitution (aside from brothels) (Part 3 *Summary Offences Act 1988*) and on the use of certain premises as a brothel (*Restricted Premises Act 1943*).

⁴ See the Second Reading Speech of Mrs Jackson, Minister for Justice and Industrial Relations, on the Sex Industry Offences Bill (2005), *Tasmanian Hansard (HA)*, Thursday 27 October 2005 pp 26-31. See also the Minister's statements in Alison Andrews 'Working Girls to Have No Minders' *Tasmania Examiner*, 11 October 2005. <www.scarletalliance.org.au/media/News_Item_2005-10-1717.0256> accessed on 2 December 2005. Also Michelle Paine 'Cheers and Jeers Over Brothel Ban' *Tasmania*

Licensing is often seen as providing a better system of regulation than criminalisation or partial criminalisation. The latter options are criticised for avoiding the regulation of an ever present industry and of driving the industry underground, leading to greater risk to workers, an inability to control other criminal conduct that might attach itself to the industry and an inability to ensure positive health measures for workers and clients. They also foster an environment that is conducive to public corruption. Licensing is perceived as a method of drawing the industry into a regulatory framework, which in turn mainstreams it. This renders sex work liable to general legal regulation, crossing issues such as industrial rights, planning provisions and occupational health and safety. However, the effectiveness of a licensing model is not guaranteed. It depends on the underlying principles and processes, and the extent to which a criminalising aspect is maintained.

In light of the ongoing reform efforts in WA, we aim to compare the various licensing models in place in Australia and New Zealand as well as those proposed in Western Australia and Tasmania, as a contribution to the debate in WA and elsewhere. We will first introduce the WA and Queensland models as they epitomise what we call a 'social control model'. This will be followed by a discussion of those jurisdictions that are more closely aligned with a 'pure licensing model', with New Zealand as the pinnacle of this approach. As will become apparent, in principle, licensing per se is not necessarily an effective approach if the model maintains the moral judgment inherent in the rationale for criminalisation and if this underpins its processes.

II. THE REGULATORY SCOPE OF LICENSING

Licensing of the sex industry can encompass a wide range of approaches. There is a distinction between those in which public policy and licensing remain separate and those where the two are conflated. At the one end of the regulatory spectrum, are those jurisdictions that have adopted a 'pure licensing model'. These take a neutral stance on prostitution and license the sex industry in a similar way to other areas of business. New Zealand epitomises this approach, where a generic body is responsible for the licensing of a number of industries, including sex work. The Australian Capital Territory, Victoria and Northern Territory have a similar approach, though with some variations in each. Other licensing approaches, particularly in Queensland and the model proposed for WA, distinguish markedly between the licensing of sex work and other businesses. As will be shown, the latter 'social control' approaches reflect a negative moral stance on sex work and are part of a wide agenda to reduce prostitution.

These differences in approach can dramatically impact on the scope for effective regulation of the industry. If the aim is to reduce prostitution, and this goal is reflected in the licensing processes many workers will not be able or willing to work within the legal framework. In jurisdictions in which licensing

Mercury, 7 October 2005. <www.scarletalliance.org.au/media/News_Item.2005-10-106.1912> accessed on 2 December 2005.

reflects a social control model, the evidence is that regulation has been less than effective. During debate on the 2003 WA Bill, it was argued that 2 years after the Prostitution Licensing Authority in Queensland was established, only 10 legal brothels existed and in Victoria 80% of the brothels operated illegally.⁵ These claims were bolstered by findings of the Queensland Crime and Misconduct Commission in its evaluation of the Queensland Act in December 2004. The major concerns that emerged were the extent of and issues surrounding illegal prostitution.⁶ In particular, the Commission noted that 'illegal prostitution activities in Queensland have continued unabated since the [Act's] implementation'.⁷ Licenses had been issued to only 14 brothels (operated by 24 licensees) throughout Queensland,⁸ with around 75 per cent of sexual services in the state being provided as escort or outcall services, generally operating illegally. A further, significant component of the illegal industry arose from the situation where two workers work together for safety reasons and who, for commercial reasons, did not wish to establish a two-person brothel.⁹ Hence, even those parts of the industry that have the capacity for licensing have not, in fact, come under the licensing regime. Industry representatives argue that this is because of the onerous requirements. Some of the Australian licensing bodies have wide discretionary powers and little guidance on how these are to be used. This means that there is either no entitlement to a license even if conditions are fulfilled or that conditions are so vague that a person may find them difficult to satisfy. Hence, those licensing systems which are administratively complex, intrusive and open to morality based decision-making, as indicated by their lack of adherence to established protocols for fair decision-making, as discussed below, are as inefficient in regulating the industry as models of criminalisation. Both enable a continuation of black markets and act as a barrier to regulation.

The Tasmanian Government holds the view that regulation through licensing is the best approach to ensure the protection of the health and safety of workers and the community and that in the absence of regulation, criminalisation is the next best option.¹⁰ Sex industry representatives are concerned that further criminalisation will increase the dangers to workers.¹¹ However, the same may be true of complex, intrusive and administratively opaque licensing systems and the question is whether such systems are in fact effective in regulating the industry.

Aside from the issue of the effectiveness of regulation, the following comparison between jurisdictions will also raise questions about the

⁵ Edwards C *Parliamentary Reports* [Legislative Assembly] 6 May 2003, 7065.

⁶ Queensland, Crime and Misconduct Commission, *Regulating Prostitution: An Evaluation of the Prostitution Act 1999 (Qld)* December 2004, 80.

⁷ *Ibid.*

⁸ *Ibid* at xii.

⁹ *Ibid* at 80.

¹⁰ See the Second Reading Speech of Mrs Jackson, Minister for Justice and Industrial Relations, on the Sex Industry Offences Bill (2005), *Tasmanian Hansard (HA)*, Thursday 27 October 2005 pp 26-31.

¹¹ Hobart Community Legal Service and Scarlet Alliance reported in Michelle Paine 'Cheers and Jeers Over Brothel Ban' *Tasmania Mercury* 7 October 2005.

<www.scarletalliance.org.au/media/News_Item.2005-10-106.1912> accessed on 2 December 2005.

protection of human rights, as well as the scope for corruption where licensing bodies have widely defined functions. For example, the right to privacy is severely jeopardised by the power of some bodies to require any information they see fit and the right to personal liberty compromised by the wide powers to set conditions on licenses. As important as these issues are, they have not been the focus of this paper.

The next section outlines the regulatory system in each jurisdiction, focusing firstly on those reflecting a social control model, followed by the pure licensing systems. The comparative analysis is reserved for Part IV of the article.

III. LICENSING SYSTEMS

1. SOCIAL CONTROL MODELS

The West Australian *Prostitution Control Bill 2003*

The *Prostitution Control Bill 2003* was preceded by a 2002 version. Following public submissions the State Government amended the Bill to address some community concerns. The Bill was aimed at regulating the sex industry as a whole, including street-based sex work, through incorporation of the provisions of the *Prostitution Control Act 2000* which was due to expire. Because the Government did not hold the majority in the upper house, and without the support of the Opposition or the minor parties, only those provisions relating to the criminalisation of street based work were passed. The licensing provisions did not become law. Nevertheless, we include the details of the proposed system, as we do for Tasmania, as an indicator of a possible model of licensing.

The Bill's objectives were:¹²

- to safeguard public health and wellbeing;
- to protect children and incapable persons from involvement in and exploitation from sex work;
- to control the location of sex work businesses so as to protect the 'social and physical environment of the community';
- to deter connected organized crime;
- to regulate and 'control' managers and workers in the industry, as well as ownership and the operation of businesses;
- to promote the occupational health, welfare and safety of workers, to protect them from exploitation and ensure they have rights and protections normally afforded to employees; and,
- to regulate and 'control' industry advertising.

The *Prostitution Control Bill 2003* provided that a license would be required to carry on a sex-work business¹³ or to manage a business;¹⁴ that is, those

¹² S 6 *Prostitution Control Bill 2003* (WA).

¹³ S 30 *Prostitution Control Bill 2003* (WA).

¹⁴ S 31 *Prostitution Control Bill 2003* (WA).

involved in the management of businesses. Exempt from the requirement were sole operators,¹⁵ defined as those who own and operate businesses on their own.

The WA Government proposed the establishment of a 'Prostitution Control Board'¹⁶ comprised of 4 ministerial nominees and two government appointees.¹⁷ Of the ministerial nominees, only one was required to have specific experience or knowledge of the sex work industry,¹⁸ and this, it seemed, could be at arms length, insofar as it need not be an industry representative. Although the Board had a range of functions including that of encouraging and assisting workers to leave the industry¹⁹ its licensing, monitoring and supervisory functions were most central.²⁰

An application for a license was to be in writing, in a form approved by the Board.²¹ The Bill did not limit the information that could be required, providing the Board with the discretion to determine the application criteria. Material required as part of the application included a photograph, evidence of the applicant's age and identity and two recent character references.²² The Board could also require an applicant to provide palm and fingerprints²³ or any other information or evidence the Board thought necessary.²⁴

There was to be no entitlement to a license, even if the application was satisfactory. The Bill merely established the circumstance under which the Board *could* grant a license; namely if there was no question of the applicant's age and identity, the applicant was not a prescribed criminal offender, there were no Restraining Orders in place and the applicant was of good character and a fit person to have a license.²⁵

The Board's powers were unfettered, with a general power to 'do all things ... necessary or expedient ... for or in connection with the performance of its functions'.²⁶ Regarding the issuing of licenses the power included the ability to grant, revoke, suspend or renew a license²⁷ and to place conditions and restrictions on any license issued.²⁸ The Bill did not provide guidance or limits on the range and types of attached conditions and restrictions. Nor did it specify a timeframe within which applications would be considered. Further there were no limits to the exercise of discretion in revoking a license.

¹⁵ S 30 *Prostitution Control Bill 2003* (WA).

¹⁶ S 8 *Prostitution Control Bill 2003* (WA).

¹⁷ S 9 *Prostitution Control Bill 2003* (WA).

¹⁸ S 10 *Prostitution Control Bill 2003* (WA).

¹⁹ S 15(d) *Prostitution Control Bill 2003* (WA).

²⁰ S 15(a) *Prostitution Control Bill 2003* (WA).

²¹ S 34 *Prostitution Control Bill 2003* (WA).

²² S 35 *Prostitution Control Bill 2003* (WA).

²³ S 36 *Prostitution Control Bill 2003* (WA).

²⁴ S 42 *Prostitution Control Bill 2003* (WA).

²⁵ S 37 *Prostitution Control Bill 2003* (WA).

²⁶ S 17 *Prostitution Control Bill 2003* (WA).

²⁷ S 32, s49, s39 *Prostitution Control Bill 2003* (WA).

²⁸ S 43 *Prostitution Control Bill 2003* (WA).

Although the Bill only provided for licensing of industry managers and drivers, the Board had specific, differentiated supervisory functions in respect to any person found by a court to be a sex worker,²⁹ and any person it reasonably suspected of being 'involved in prostitution or related activities'.³⁰ Under these powers the Board could, if there was reasonable suspicion that a worker had a sexually transmitted disease, order that a worker undergo a medical examination within a specified timeframe or periodically.³¹ A contravention of this or any other order of the Board attracted a sentence of imprisonment for up to one year for a second or subsequent offence.³² Further, the Bill provided the Board with the power to ban a person from working as a sex worker, either indefinitely or for a short term, 'for any ... reason that the Board sees fit'.³³ A failure to comply with the order attracted a penalty of up to 2 years imprisonment. The Board would also have the power to monitor the activities of *any* person it reasonably suspected to be involved in prostitution or related activities.³⁴

Where the Board suspected a person was 'engaging in illegal conduct', it could apply for an injunction to stop this. Engaging in illegal conduct was defined broadly to include assisting, inducing or being in any way, directly or indirectly, knowingly concerned with a contravention.³⁵ This could, presumably, include providing condoms to a sex worker operating outside the Act.

Despite the broad range of powers provided to the Prostitution Control Board, the Bill provided the Board with little guidance on the exercise of its powers. The 2002 Bill explicitly excluded the rules of natural justice, in respect to the Board's processes, including any duty to provide procedural fairness.³⁶ Further, the decisions of the Board were not to be subject to judicial supervision.³⁷ In introducing the 2002 Bill the Minister for Police stated her concern 'that persons having interests in prostitution may seek to hamper the effectiveness of statutory controls by invoking principles of administrative law' and that 'it [is] inappropriate for the control of persons involved in prostitution to be subject to the normal principles of administrative law'.³⁸

This extreme position was amended in the 2003 Bill. Instead, the Board was required to provide to the relevant person a notice of its decision and its reasons, within 14 days of the decision,³⁹ although information could be withheld if the Commissioner of Police believed that disclosure might,

²⁹ S 128 *Prostitution Control Bill 2003* (WA) provided the power to keep records on these.

³⁰ For example, s129 *Prostitution Control Bill 2003* (WA) enabled the Board to monitor compliance of these, s130 to undergo medical examinations.

³¹ S 130 *Prostitution Control Bill 2003* (WA).

³² S 90 *Prostitution Control Bill 2003* (WA).

³³ S 96(2) *Prostitution Control Bill 2003* (WA).

³⁴ S 129 *Prostitution Control Bill 2003* (WA).

³⁵ S 134 *Prostitution Control Bill 2003* (WA).

³⁶ S 205 and s 208 *Prostitution Control Bill 2003* (WA).

³⁷ S 208 *Prostitution Control Bill 2003* (WA).

³⁸ Hon Michelle Roberts, Minister for Police and Emergency Services *Summary Notes: A Green Bill for A New Prostitution Control Act* December 2002, p1.

³⁹ S 182 *Prostitution Control Bill 2003* (WA).

amongst other things, be contrary to public interest or prejudice a person's safety, an investigation or the administration of the Act.⁴⁰ An appeal from any decision was to be available to the District Court,⁴¹ until the State Administrative Tribunal was established.⁴² Given the wide discretionary powers of the Board the basis for an appeal would appear to be quite limited.

The Board would also have wide-ranging investigative and information-collecting powers and the Minister would be entitled to any information in the possession of the Board, bar that which might disclose a person's identity.⁴³ Of particular note was the Board's ability to appoint 'authorised persons' with powers to demand documents from any person or to apply for a warrant to enter and inspect premises.⁴⁴ This was in addition to the powers of police, extended under the Bill, and of investigators established under the Bill.

The Queensland *Prostitution Act 1999*

The *Prostitution Act 1999* provides as its sole objective, the regulation of prostitution in Queensland.⁴⁵ In Queensland, soliciting for sex work is only permitted from a licensed brothel, away from public view;⁴⁶ that is, although sex work, itself, is not illegal, services cannot be provided outside a licensed brothel. A brothel is defined as 'premises made available for prostitution by two or more prostitutes at the premises'.⁴⁷

The Act establishes the 'Prostitution Licensing Authority' (PLA),⁴⁸ with the primary function of administering the licensing system.⁴⁹ The Authority also has a role in advising the Minister on programs to promote sexual health care (not ostensibly limited to within the sex industry) in increasing awareness of the issues surrounding the sex industry, and in reducing the number of sex workers.⁵⁰ The PLA has eight members comprised of the Premier-nominated chairperson; representatives from local government, police and the Crime and Misconduct Commission; a doctor; a lawyer and two other Ministerial nominees.⁵¹ Section 102(4) expressly states that the Ministerial nominees should not be industry representatives. Originally, the policy related functions were performed by a separately constituted Prostitution Advisory Council.

⁴⁰ S 183 *Prostitution Control Bill 2003* (WA).

⁴¹ S 183 *Prostitution Control Bill 2003* (WA).

⁴² Roberts, M 'Second Reading Speech to the Prostitution Control Bill 2003 *Parliamentary Reports* [Legislative Assembly] 2 April 2003, 6005.

⁴³ S 20 *Prostitution Control Bill 2003* (WA).

⁴⁴ Ss 138 – 142 *Prostitution Control Bill 2003* (WA).

⁴⁵ S 3 *Prostitution Act 1999* (Qld).

⁴⁶ Ss 73-74 *Prostitution Act 1999* (Qld).

⁴⁷ Schedule 4 *Prostitution Act 1999* (Qld). In addition to the licensing of brothels, the Act provides for the licensing of 'approved managers': Division 2 of Part 3. This will not be covered here.

⁴⁸ S 100 *Prostitution Act 1999* (Qld).

⁴⁹ S 101 *Prostitution Act 1999* (Qld).

⁵⁰ S 101 *Prostitution Act 1999* (Qld).

⁵¹ S 102 *Prostitution Act 1999* (Qld).

However, its functions were incorporated into the PLA following amendment to the Act in 2003.⁵²

A brothel license is granted for one year only, and a full application must be made for renewal.⁵³ An application must include the applicant's name, business address, and proposed management arrangements.⁵⁴ The applicant must also consent to the provision of identifying particulars, defined as including palm prints, fingerprints, voiceprints, and photographs of a person's identifying features.⁵⁵ An application is first referred to the Commissioner of Police for a report on the applicant's criminal history.⁵⁶ The PLA need not consider an application until development approval on the place of business has been granted.⁵⁷ It is then obliged to consider every eligible application,⁵⁸ and to either grant or refuse the application,⁵⁹ although, other than for renewals, there is no timeframe for making a decision.⁶⁰

The Queensland Act does not provide the conditions under which a license will be issued; only a set of criteria for determining the suitability of an applicant⁶¹ and the conditions under which an application must be refused.⁶² One of the grounds of refusal is that the applicant 'is not a suitable person to operate a licensed brothel', although suitability is not defined. To be considered for a license the PLA must consider the applicant's reputation and criminal record, and the financial viability of the brothel⁶³ and may conduct any inquiries it considers necessary. It may at any time set conditions or restrictions on a license, and revoke or vary these.⁶⁴ It also has disciplinary powers, ranging from a reprimand to the permanent cancellation of a license,⁶⁵ which may be triggered on the PLA's own initiative.⁶⁶

The applicant is not afforded a hearing as part of the application process⁶⁷ though where an application is refused, the PLA must provide a written notice of the decision and its reasons.⁶⁸ However, the Act establishes grounds permitting the Supreme Court to order non-disclosure of reasons, with the application to be heard in private and without notice to the person seeking the

⁵² *Police Powers and Responsibilities and Other Legislation Amendment Act 2003* (Qld).

⁵³ S 19 *Prostitution Act 1999* (Qld).

⁵⁴ S 10 *Prostitution Act 1999* (Qld).

⁵⁵ S 13 and Schedule 4 *Prostitution Act 1999* (Qld).

⁵⁶ S 14 *Prostitution Act 1999* (Qld).

⁵⁷ S 15 *Prostitution Act 1999* (Qld).

⁵⁸ S 15 *Prostitution Act 1999* (Qld). S 8 outlines those ineligible for a brothel license, including corporations, minors, a liquor licensee, a person who has had a license revoked in the preceding 3 years and, notably, any other person declared ineligible by the PLA.

⁵⁹ S 18 *Prostitution Act 1999* (Qld).

⁶⁰ S 23 *Prostitution Act 1999* (Qld) provides that the PLA must make a decision regarding a renewal within 1 month of the application being made.

⁶¹ S 17 *Prostitution Act 1999* (Qld).

⁶² S 16 *Prostitution Act 1999* (Qld).

⁶³ S 17 *Prostitution Act 1999* (Qld).

⁶⁴ S 21 *Prostitution Act 1999* (Qld).

⁶⁵ S 29 *Prostitution Act 1999* (Qld).

⁶⁶ S 26 *Prostitution Act 1999* (Qld).

⁶⁷ S 40(4) *Prostitution Act 1999* (Qld).

⁶⁸ S 43(6) *Prostitution Act 1999* (Qld).

reasons.⁶⁹ There are no specific appeals provisions except on development applications.⁷⁰

2. PURE LICENSING MODELS

In our view, the New Zealand (NZ) *Prostitution Reform Act 2003* is the leading pure licensing model. The remaining Australian models are best categorised here, though they include some special provisions relating to the industry. The key issue is whether these provisions impact on the effectiveness of the licensing process.

The New Zealand *Prostitution Reform Act 2003*

In NZ, the *Prostitution Reform Act 2003* was introduced to decriminalise prostitution, while expressly 'not endorsing or morally sanctioning prostitution or its use'.⁷¹ Its objectives are to create a framework which is conducive to public health, which protects workers' human rights, welfare, health and safety, and which protects children from prostitution.⁷²

In NZ every operator of a business of prostitution must hold a certificate.⁷³ A business of prostitution is defined as a business of providing, or arranging the provision of, commercial sexual services.⁷⁴ An operator is a person who owns, operates, controls or manages the business.⁷⁵ A small owner operated brothel is a brothel at which not more than four sex workers work and where each of the workers retains control over his or her individual earnings.⁷⁶ A sex worker who works at a small owner operated business is not considered an operator of that business and such a business is considered for the purposes of this Act not to have an operator.⁷⁷ A person operating as a sex worker on their own or with a small number of others would therefore not need a certificate of operation.

A person must apply to the Registrar of the District Court at Auckland, or the Registrar of any other District Court identified in the Regulations made under the Act as a registrar who may accept applications; that is, an industry specific body has not been set up in NZ to receive applications for certificates or to create conditions for approval of applications. The process of application is highly transparent. There is a prescribed form for application and the information which may be required is clearly identified and limited to what can be reasonably expected when applying for any certificate. Only non-invasive

⁶⁹ S 138 *Prostitution Act 1999* (Qld).

⁷⁰ Part 4 *Prostitution Act 1999* (Qld).

⁷¹ S 3 *Prostitution Reform Act 2003* (NZ).

⁷² S 3 *Prostitution Reform Act 2003* (NZ).

⁷³ S 34 *Prostitution Reform Act 2003* (NZ).

⁷⁴ S 4 *Prostitution Reform Act 2003* (NZ).

⁷⁵ S 5 *Prostitution Reform Act 2003* (NZ).

⁷⁶ S 4 *Prostitution Reform Act 2003* (NZ).

⁷⁷ S 5(2) *Prostitution Reform Act 2003* (NZ).

identifying information can be required, such as the applicant's name, address and photo identification.⁷⁸

The conditions upon which a certificate is to be issued are equally clear. Importantly, the Registrar has no discretion. If the application form is correctly completed, and the applicant is 18 years or older and not disqualified from holding a certificate, then the certificate is to be granted.⁷⁹ A person is disqualified only if he or she has been convicted of a serious offence, of attempting or conspiring to commit any such offence or of being an accessory after the fact to any such offence.⁸⁰ A person who is disqualified may apply for a waiver of the disqualification by writing to the Registrar, who must then pass this on to a District Court judge for determination. A District Court judge has the discretion to make an order to waive the disqualification based on an assessment of the application, a police report and any further material provided by the applicant. In order to waive the disqualification, the District Court judge must be satisfied that the applicant's offending behaviour ought not to be a bar to obtaining a certificate because of its nature or the fact that it occurred so long ago. Further, the police report indicates that there is no association with persons who would themselves be disqualified and who might reasonably be expected to exert influence on the applicant.⁸¹

The Act also clearly separates registration from review of the sex industry. A separate Prostitution Law Review Committee has been established to review matters relating to the sex industry and the operation of the Act.⁸² This Committee is to have eleven members representing all interests in this area. There are two persons nominated by the Minister of Justice and two by the Minister for Commerce to represent operators of businesses of prostitution, one each nominated by the Minister of Women's Affairs, the Minister of Health, Minister for Local Government and Minister of Police, and three nominated by the New Zealand Prostitutes Collective (or any other body representing the interests of sex workers).

The Victorian *Prostitution Control Act 1994*

The Victorian *Prostitution Control Act 1994* lists as its main purpose, 'to seek to control prostitution in Victoria'.⁸³ To this end, the Act establishes a system of licensing and sets out criteria to be used by the relevant planning authority in considering applications for land use by brothels or small owner-operated businesses.⁸⁴ In addition to its 'main purpose' the Act has wide-ranging objectives.⁸⁵

⁷⁸ S 35(4) *Prostitution Reform Act 2003* (NZ).

⁷⁹ S 35(5) *Prostitution Reform Act 2003* (NZ).

⁸⁰ S 36(2), e.g., offences under the Prostitution Reform Act (e.g. offences relating to prostitution of under 18 year olds, compelling a person to provide sexual services), offences punishable under the Crimes Act 1961 with 2 or more years and more serious offences under the Misuse of Drugs Act 1975.

⁸¹ Once the Registrar receives the application he or she must also forward a copy to the Commissioner of police for a report on these matters.

⁸² Part 4 *Prostitution Reform Act 2003* (NZ).

⁸³ S 1 *Prostitution Control Act 1994* (Vic).

⁸⁴ Part 4 *Prostitution Control Act 1994* (Vic).

⁸⁵ S 4 *Prostitution Control Act 1994* (Vic).

- to protection children from sexual exploitation and coercion;
- to minimize the impact of the industry on the community;
- to limit criminal activity in the industry;
- to regulate the location of brothels;
- to regulate the licensing of brothels;
- to minimize the health risks for workers and clients; and,
- to promote worker's welfare and safety.

In Victoria, sex work is only legal if undertaken by a person holding a license.⁸⁶ An exception applies to businesses operated by one or two workers, where there is no other person involved in the business.⁸⁷ The exempted persons must, however, register the business with the externally constituted 'Business Licensing Authority'.⁸⁸ In short, small operators may work without a license provided they are registered. Street-based work remains unlawful.⁸⁹

Licensing applications are made to the Business Licensing Authority (BLA). The BLA administers the licensing and registration requirements of a number of industries, such as consumer credit, motor car trade and travel agents.⁹⁰ Its powers are broadly defined, to 'do anything that is necessary or convenient to be done ... [in] carrying out its functions', though clearly only in respect to licensing.⁹¹ It also has specific functions in respect to the sex industry: to liaise with police and other public authorities (such as the tax office) and to inform a specially established Advisory Committee on issues and trends.⁹² The BLA may also refer ancillary matters, such as occupational health and safety issues, to the relevant authorities.⁹³

The Act provides that an applicant should provide their name, address, occupation, date of birth and other prescribed matters, and must consent to having their fingerprints taken.⁹⁴ Every license application, after being publicly advertised, will be considered by the Authority. The Authority must consider the applicant's reputation and criminal record, and the financial viability of the business⁹⁵ and may conduct any inquiries it considers necessary.⁹⁶ If it considers the applicant eligible, it must grant a license, subject to any conditions or restrictions.⁹⁷ An applicant is not entitled to a hearing,⁹⁸ although the Authority may establish its own procedures for considering matters, as is the case regarding any other industry.⁹⁹

⁸⁶ S 22 *Prostitution Control Act 1994* (Vic).

⁸⁷ S 23 *Prostitution Control Act 1994* (Vic).

⁸⁸ S 24 *Prostitution Control Act 1994* (Vic).

⁸⁹ Ss 12 and 13 *Prostitution Control Act 1994* (Vic).

⁹⁰ S 6 *Business Licensing Authority Act 1998* (Vic).

⁹¹ S 7 *Business Licensing Authority Act 1998* (Vic).

⁹² s25 *Prostitution Control Act 1994* (Vic).

⁹³ S 25 *Prostitution Control Act 1994* (Vic).

⁹⁴ S 33 *Prostitution Control Act 1994* (Vic).

⁹⁵ S 38 *Prostitution Control Act 1994* (Vic).

⁹⁶ S 36A *Prostitution Control Act 1994* (Vic).

⁹⁷ S 39 *Prostitution Control Act 1994* (Vic).

⁹⁸ S36A(6) *Prostitution Control Act 1994* (Vic).

⁹⁹ S 10 *Business Licensing Authority Act 1998* (Vic).

The *Business Licensing Authority Act 1998* (Vic) provides grounds under which the Authority can suspend a license; namely, continuing improper conduct.¹⁰⁰ Any decision may be appealed to the Victorian Civil and Administrative Tribunal.¹⁰¹ A license is automatically cancelled if the licensee is convicted of a relevant offence.¹⁰²

The *Prostitution Control Act 1994* also establishes an Advisory Committee, to advise the Minister on the sex industry in Victoria.¹⁰³ Membership is to include persons with a knowledge of the industry as well as representatives of religious or community interests.¹⁰⁴

The Northern Territory *Prostitution Regulation Act 1992*

The Northern Territory's *Prostitution Regulation Act 1992* provides that it makes provision 'with respect to prostitution, to establish a licensing system for escort agency businesses, and for related purposes'.¹⁰⁵ In the Northern Territory (NT), sex work, including maintaining a brothel is illegal,¹⁰⁶ except for sole operators providing escort services and licensed escort agency businesses. A licensing regime exists for escort agency businesses only.¹⁰⁷ These must apply to a generic NT Licensing Commission for a license to operate.¹⁰⁸ The Commission has the power to determine applications, to set conditions and to cancel or suspend licenses.¹⁰⁹ Its function also includes liaising with police, regarding the investigation of complaints against escort agencies, and to assist the police and the Commission to perform their functions.¹¹⁰ The Commission is comprised of three or more persons, nominated by the Minister, appropriate for the proper conduct of the business of the Commission. There is no requirement that there be an industry-specific nominee, and one of the members must be a lawyer.¹¹¹

In addition to the applicant's name, address, occupation and date of birth, an application must include prescribed information; that is, there is no statutory limit on the information that can be required, although it is not at the Commission's discretion.¹¹² The criteria for assessment of applications include personal character and criminal history but if these are satisfied the license should be granted.¹¹³ Appeals against Commission decisions lie to a magistrate appointed expressly to constitute the 'Escort Agency Licensing

¹⁰⁰ S 21 *Business Licensing Authority Act 1998* (Vic).

¹⁰¹ Ss 17B and 25 *Business Licensing Authority Act 1998* (Vic).

¹⁰² S 22 *Prostitution Control Act 1994* (Vic).

¹⁰³ S 67 *Prostitution Control Act 1994* (Vic).

¹⁰⁴ S 67(3) *Prostitution Control Act 1994* (Vic).

¹⁰⁵ Long Title, *Prostitution Regulation Act 1992* (NT).

¹⁰⁶ Ss 4, 5 and 10 *Prostitution Regulation Act 1992* (NT).

¹⁰⁷ S 6 *Prostitution Regulation Act 1992* (NT).

¹⁰⁸ S 22 *Prostitution Regulation Act 1992* (NT).

¹⁰⁹ S 22 *Prostitution Regulation Act 1992* (NT).

¹¹⁰ S 22 *Prostitution Regulation Act 1992* (NT).

¹¹¹ S 6 *Northern Territory Licensing Commission Act 1999* (NT).

¹¹² S 25 *Prostitution Regulation Act 1992* (NT).

¹¹³ S 28 pursuant to s 24 *Prostitution Regulation Act 1992* (NT).

Appeals Tribunal'.¹¹⁴ An appellant may request the Commission's reason in writing.¹¹⁵

The Australian Capital Territory *Prostitution Act 1992*

The long title of the Australian Capital Territory's *Prostitution Act 1992* is '[a]n Act to regulate certain aspects of prostitution.' The Act establishes a public service position known as the 'Registrar of Brothels and Escort Agencies',¹¹⁶ and creates a system of registration for brothels and escort agencies,¹¹⁷ defined broadly to include private sole operators.¹¹⁸ An operator must submit a registration notice containing the business name and contact details of the people controlling the business,¹¹⁹ and pay a minimal fee¹²⁰ to operate a business within designated light-industrial areas.¹²¹ There are, however, prescribed offences disqualifying certain people from having an involvement in a brothel.¹²²

The Registrar's function is to keep a register of the information provided by operators.¹²³ The Act specifies that, in relation to sole operators, that is, someone who solely owns and operates a brothel or escort agency,¹²⁴ names or addresses should not be available for public inspection.¹²⁵ The Registrar does not have investigative or inspection powers. The only special requirement associated with registration, aside from that of location, is the need for brothels to ensure the use of prophylactics¹²⁶ and that workers are not infected with a sexually transmitted infection.¹²⁷

The Tasmanian *Sex Industry Regulation Bill 2005*

In 2005 the *Sex Industry Regulation Bill 2005* was introduced into the Tasmanian Parliament which would have created a licensing system. Its aims were to 'promote the welfare and occupational health and safety of sex workers, to protect children from exploitation in the sex industry, to safeguard health'.

Under the Tasmanian proposals the Director of Consumer Affairs and Trading was to maintain a register of sexual services businesses.¹²⁸ Two categories of

¹¹⁴ Ss 33 and 34 *Prostitution Regulation Act 1992* (NT).

¹¹⁵ S 35 *Prostitution Regulation Act 1992* (NT).

¹¹⁶ S 9 *Prostitution Act 1992* (ACT).

¹¹⁷ S 12 *Prostitution Act 1992* (ACT).

¹¹⁸ S 2 *Prostitution Act 1992* (ACT). Street-based work is illegal: S 19.

¹¹⁹ Ss 12 and 7 *Prostitution Act 1992* (ACT).

¹²⁰ S 29 *Prostitution Act 1992* (ACT).

¹²¹ S 18 *Prostitution Act 1992* (ACT).

¹²² S 15 *Prostitution Act 1992* (ACT).

¹²³ S 10 *Prostitution Act 1992* (ACT).

¹²⁴ S 5 *Prostitution Act 1992* (ACT).

¹²⁵ S 11 *Prostitution Act 1992* (ACT).

¹²⁶ S 27 *Prostitution Act 1992* (ACT).

¹²⁷ S 26 *Prostitution Act 1992* (ACT).

¹²⁸ S 4 *Sex Industry Regulation Bill 2005* (Tas).

sexual service providers were required to register: A self-employed worker (which included a person who with only one other sex worker owns and operates a sexual service business) and a commercial operator (which is a person who owns employs, manages or controls other sex workers). It was to be an offence for either category of provider to operate without a licence.¹²⁹

To register, the applicant was to provide, in an approved form, information required by the Director relating to the name of the business, the names, dates of birth, residential addresses and the prescribed proof of identity of the operator and the sex workers.¹³⁰ It is unclear whether the required information could extend to invasive proof of identity such as palm prints. The application was also to include an authorisation from each person named as a commercial operator allowing the Director to obtain a copy of the criminal record of the person (if it existed) and an opinion of the Commissioner of Police as to whether the proposed commercial operator was a fit and proper person for the purposes of the Bill.¹³¹ The Director was then to seek an opinion from the Commissioner of Police as to whether a proposed commercial operator is a fit and proper person.¹³² In making this determination the Commissioner of Police could take into account “any criminal intelligence report or other information about any person applying for registration as a commercial operator relating to alleged criminal activity in the nature of a disqualifying offence, whether in Tasmania or elsewhere, from which it may be reasonably inferred that the person constitutes a risk to the safety or health of sex workers or their clients.”¹³³ If the Commissioner was of the opinion that the applicant was not a fit and proper person to be a commercial operator the Director could refuse to register the sexual services business, in which case the applicant was to be notified in writing of the decision.¹³⁴ Where the applicant had been convicted of a disqualifying offence the Director was not to register the applicant and was to give written notice of the decision.¹³⁵

The aim of the Government in introducing the *Sex Industry Regulation Bill 2005* was to “provide greater protection for sex workers and children and to establish a regulatory framework to keep undesirable elements out of the sex industry.”¹³⁶ The Bill did not, however, receive the support of the Tasmanian Legislative Council. The Government felt that without this licensing system it could not achieve its aims of securing a safer working environment and therefore in a dramatic turn introduced the *Sex Industry Offences Bill 2005*. This Bill provides for a total ban on brothels.¹³⁷

¹²⁹ S 6 *Sex Industry Regulation Bill 2005* (Tas).

¹³⁰ S 10 *Sex Industry Regulation Bill 2005* (Tas).

¹³¹ S 10(2) *Sex Industry Regulation Bill 2005* (Tas).

¹³² S 8 *Sex Industry Regulation Bill 2005* (Tas).

¹³³ S 8(3) *Sex Industry Regulation Bill 2005* (Tas).

¹³⁴ S 8(2) and (4) *Sex Industry Regulation Bill 2005* (Tas).

¹³⁵ S 7 *Sex Industry Regulation Bill 2005* (Tas).

¹³⁶ See the Second Reading Speech of Mrs Jackson, Minister for Justice and Industrial Relations, on the Sex Industry Offences Bill (2005), *Tasmanian Hansard* (HA), Thursday 27 October 2005 p. 26 ff.

¹³⁷ See the Second Reading Speech of Mrs Jackson, Minister for Justice and Industrial Relations, on the Sex Industry Offences Bill (2005), *Tasmanian Hansard* (HA), Thursday 27 October 2005 p. 26 ff.

IV. COMPARISON OF THE LICENSING MODELS

Principles for Effective Licensing

At the core of any fair licensing model is the ideal that its processes be transparent, fair, rational and efficient. Where the system reflects a social control model these principles can become compromised by policy imperatives. In this section we compare the different jurisdictions with a view to evaluate the extent to which they ensure effective regulation. Adherence to these principles is vital to ensure public confidence in administrative processes, such as the determination and monitoring of licenses. The principles have implications for the structure and constitution of the licensing body, its powers and objectives, and the processes for lodging and for granting applications, and are a useful guide for evaluating the various licensing systems. Such values are especially important in industries that are historically vulnerable to crime and corruption.

Bodies responsible for licensing

Impartial decision-making requires a separation between policy and licensing functions to limit political influence. With regards to the sex industry, there are varying degrees of convergence of the licensing and social control functions. The most extreme example of this is that proposed in WA where the functions of the Prostitution Control Board included licensing, supervision of licensees, provision of Ministerial policy advice, dissemination of information on 'prostitution-related issues' and most pointedly, the provision of alternatives to prostitution and advice to those wishing to cease prostitution.¹³⁸ Similarly, Queensland's Prostitution Licensing Authority has functions with policy overtones, including the function of advising the Minister on programs to help prostitutes leave the industry and to raise awareness about issues relating to prostitution. In neither State is there a separate advisory committee, the licensing body performs the advisory and policy functions. These systems reflect what we would call a social control model of licensing.

Other jurisdictions have established licensing bodies that are distinct from the policy arm, with pure licensing functions (such as ACT) or a deferral of licensing to existing generic licensing bodies (such as NZ, NT and Vic). Such generic bodies may have additional functions relating to the sex industry, such as the Victorian Business Licensing Authority which has the responsibility to liaise with the police, and to inform the advisory committee of industry issues and trends relevant to its functions.¹³⁹ However, such additional functions do not impact on decision-making.

The difference between the social control model and the pure licensing model is that for the former the social agenda precedes the determination of licensing and may influence the exercise of the decision-making functions. In

¹³⁸ Ss 15 and 16 *Prostitution Control Bill 2003* (WA).

¹³⁹ S 25 *Prostitution Control Act 1994* (Vic).

short, it includes a moral agenda. The latter draws a distinction between the policy concerns of government and the administration of the licensing regime, so that the social agenda need not impact on the decision-making process. Its link to policy is after the fact in its provision of information to relevant policy bodies.

Functions of the Licensing Body

A distinction may also be drawn between licensing bodies on the basis of their regulatory powers. Some bodies are primarily concerned with registration whilst others have powers associated with compliance and with serving a policy agenda.

In the ACT, the registrar's function is limited to the maintenance of a register of information.¹⁴⁰ This is similar to the system in NZ. In Victoria and NT, the relevant bodies can refer matters to the police for investigation, but do not have independent investigatory powers.¹⁴¹ These are essential reporting functions in relation to licensing.

In Queensland and WA (proposed) the relevant bodies' functions extend to investigatory and disciplinary action in regard to existing licensees, and in the case of WA, the sex industry generally. Section 86 of the Queensland Act provides the Authority with power to demand that a licensee provide a copy of their license¹⁴² or provide personal particulars.¹⁴³ Under the proposed WA model, the Board would have had the wide-reaching power of being able to order a person who was reasonably suspected of being involved in prostitution to undergo a medical examination. The Board could also authorise a member of staff (an 'authorised person')¹⁴⁴ who would have extensive powers to interrogate and obtain information from 'a person', including the power to enter and search premises with warrant.¹⁴⁵ This is a worrying extension of policing powers to a body which has a clear policy agenda (to reduce prostitution), creating an obvious conflict with the decision-making principles noted above.

Membership of licensing bodies

It is reasonable that those bodies that are generic in nature, and which have narrow, licensing functions, do not have specific industry representation, except insofar as representation from any other industry group is relevant in the determination of matters. In NZ, the Registrar of the District Court¹⁴⁶ accepts registration applications. This is purely procedural and highly transparent so does not necessitate industry participation. On the other hand,

¹⁴⁰ S 10 *Prostitution Act* (ACT).

¹⁴¹ S 22 *prostitution Regulation Act 1992* (NT), ss25 & 26 *Prostitution Control Act 1994* (Vic).

¹⁴² S 88 *Prostitution Act 1999* (Qld).

¹⁴³ S 86 *Prostitution Act 1999* (Qld).

¹⁴⁴ S 138 *Prostitution Control Bill 2003* (WA).

¹⁴⁵ Ss 138-144 *Prostitution Control Bill 2003* (WA).

¹⁴⁶ Or the Registrar of any other District Court identified in the Regulations made under the Act as a registrar who may accept applications.

the NZ Prostitution Law Review Committee, which reviews matters related to the sex industry, has wide-reaching industry representation, nominated by both Government and industry.

Such representation might be expected on those bodies whose functions go beyond mere registration or licensing. In regard to the Authority in Queensland and the proposed Board in Western Australia there is no provision for a representative of the sex industry to be a member of the board. In fact, in Queensland, industry representation is expressly excluded. It seems particularly inappropriate that a board set up to regulate and make policy recommendations in regard to an industry would not have industry representation. This suggests a view that the Authority or Board is not concerned, or need not be concerned, with the views of people actually working in that industry. Again, this reflects the moral overtones of the legislation. This lack of representation impinges on the bodies' ability to be open, rational and fair, insofar as valuable input is excluded.

Process for obtaining licenses

Each of the jurisdictions differently characterise the parts of the industry requiring licensing. For example, in NZ only an operator of a business of prostitution needs a certificate which means that up to four people can work together at brothel without the need to apply for a certificate. This contrasts drastically with the proposed system in WA where only a sole operator need not apply for a license and where it would be forbidden for persons to work together.¹⁴⁷

This issue aside, the information required of New Zealand applicants is of the type that one would expect of an applicant for any other type of license and the procedure for applying for a license is clear and simple. There is a webpage with plain language and a frequently asked questions section. A complete list is provided in the legislation of the items that must be provided in order to apply for a license and these requirements are non-invasive. The NZ legislation strictly limits the information available to the Registrar, and clear states the basis upon which a license is to be granted.

This approach is very different from the procedure in most of the Australian jurisdictions, where, aside from the ACT, a wide range of information may be required and registration bodies tend to have extensive powers to investigate the application.¹⁴⁸ The Authority in Victoria and Queensland and the planned Board in Western Australia may for instance conduct any inquiries they consider necessary.¹⁴⁹ This gives such bodies wide discretionary powers and could lead to invasive inquiries. In complete contrast to NZ there is no limit in these jurisdictions on the sort of information which the Board may require.¹⁵⁰

¹⁴⁷ S 30 *Prostitution Control Bill 2003* (WA).

¹⁴⁸ These differ from the investigative powers related to the ongoing regulation of existing licenses.

¹⁴⁹ S 36A *Prostitution Control Act 1994* (Vic).

¹⁵⁰ S 42 *Prostitution Control Bill 2003* (WA).

Indeed, even the information which is specifically mentioned in WA, which includes palm and fingerprints,¹⁵¹ is particularly invasive.

Transparency of decision-making

One of the key protections against arbitrary executive power is that processes be open, transparent and accountable. This is afforded through providing stakeholders with a hearing, reasons for decisions and recourse to appeal as well as the creation of clear guidelines and limits on the exercise of the decision-making power. The degrees to which these are afforded vary significantly between jurisdictions.

As outlined above, NZ uses a prescribed form which requires that the application provide minimal information. The Registrar does not have a discretion over the provision of the license so long as the prescribed conditions are satisfied. A person is to be granted a license *unless* they are disqualified from holding a license which occurs if they have committed a relatively serious criminal offence.¹⁵² The disqualified person may apply for a waiver, with the matter determined by a District Court judge. Hence the process for applying and the basis for any determination is clear, with independent review available to the applicant. The degree of transparency and clarity is similar in the ACT and the NT.

This process is dramatically different under the WA proposal, where the rules of natural justice and the right of review were originally expressly excluded. The Government's reasoning was that those in the sex industry should not be subject to principles of administrative law, and this was reflected in the overall tenor of the proposals. There was to be no limit on the information that could be required to accompany an application, there would be no timeframe for determining applications and the Board was not bound to provide a license if all requirements were satisfied, leaving wide scope for arbitrary demands and decisions. In a revised version of the Bill appeals were to be available to the State Administrative Tribunal.

In Qld, the PLA has similarly wide discretionary powers. For example, a ground for refusal is that a person is "not a suitable person", a term which finds no definition. Despite this wide discretion, the applicant is not afforded a hearing and a non-disclosure order may be made in respect to the PLA's reasons. Further, although it is obliged to consider every application there is no prescribed time frame.

In those jurisdictions in which the relevant licensing body has wide discretion, transparency in decision making are all more important if the public is to have faith that decisions are fair, impartial and rationally made. However, in Australia, there has been a tendency for the bodies with the greatest discretionary power and the greatest scope for invasive processes, to restrict the procedures enabling transparency and accountability.

¹⁵¹ S 36 *Prostitution Control Bill 2003* (WA).

¹⁵² S 36(2)(NZ).

Conditions on licenses

There are parallels between a body's ability to impose conditions on licenses and whether the licensing system is a pure registration or a social control model. Again New Zealand clearly fits the former category with no provisions made in the legislation for conditions to be attached to the certificate. In contrast, all Australian jurisdictions, except the ACT, provide for conditions and restrictions to be imposed on licenses.¹⁵³ This gives the licensing bodies wide discretionary powers to attach any conditions and restrictions they deem necessary to the license. This is highly problematic in those jurisdictions that have adopted social control models, that is, where the conditions may be based on a moral rather than rational basis, or where there is limited scope for hearings or reviews. Although breach of such conditions generally does not lead to an automatic cancellation of the license it may be a ground for discretionary cancellation or suspension (for instance the NT¹⁵⁴) or may lead to disciplinary action (for instance Qld¹⁵⁵).

V. CONCLUSION

There is no doubt that, given the divergent community view points on the operation of the sex industry, that its regulation is a vexed issue for government. However, the dominant view within Australian and New Zealand seems to be that a licensing system can best ensure the health and safety of the community and those working in the sex industry. To be effective, however, the system should follow a pure licensing model, guided by principles of fairness, transparency, rationality and efficiency.

A strict and invasive registration system is not beneficial for those in the industry or the community. Difficulty in obtaining a license because of onerous requirements or the discretionary basis for the grant may lead to the continuation of illegal work and the perpetuation of poor working conditions for such workers. Licensing models which conflate social control and regulation, do not necessarily lead to effective regulation of an industry. Rather models such as that operating in NZ, enable the protection of the community as well as the individuals involved in the industry, not only from the industry, but from the power of the state and its representatives. In future deliberations we hope that the WA Government would take as its starting point the New Zealand model rather than the system operating in Queensland.

¹⁵³ S 29 (NT); s 18(1)(a) (Qld); s 39(2) (Vic); s 43 (WA).

¹⁵⁴ S 32(3)(a)(i)(NT).

¹⁵⁵ S 27(c) (Qld).