

LEGAL ADVICE RE: SOLE OPERATOR SEX WORKERS PROVIDING PROSTITUTION FROM MOTEL ROOMS

Disclaimer: Please note that this advice is the opinion of McInnes Wilson Lawyers only. Another lawyer might provide a different opinion. Potentially, the courts might take a different view of the law to that provided by McInnes Wilson. Neither McInnes Wilson Lawyers, nor the PLA accepts any liability for reliance on this advice.

The Prostitution Licensing Authority occasionally receives queries from both sex workers and motel operators on the legality of sole operator sex workers providing prostitution from motel rooms. That is, a room booked by a sex worker for the purpose of providing prostitution (it does not encompass outcall prostitution whereby a sex worker attends the motel room of a client). This situation generally occurs where an out of town sex worker goes to a town for a short period of time with the intention of providing prostitution from a motel room.

The PLA recently sought the advice of its legal counsel, McInnes Wilson Lawyers, on the legality of this practice. For the benefit of the PLA's stakeholders, McInnes Wilson's advice is reproduced in full below:

29 July 2009

Dear Mr Boyce [Chairman, PLA]

We refer to your letter of 6 July 2009 seeking advice in respect of the above. We herewith are pleased to advise in response as follows.

Criminal Code Provisions

The first consideration in respect of this advice, is the extent by which any of the activities conducted by sole operator sex workers, operating from a motel room, may be impacted by the provisions of the *Criminal Code* [Chapter 22A Prostitution]¹.

Relevantly, the meaning of "prostitution" is defined in s. 229E as follows:

Meaning of *prostitution*

- (1) A person engages in ***prostitution*** if the person engages, or offers to engage, in the provision to another person, under an arrangement of a commercial character, of any of the following activities –
- (a) sexual intercourse;
 - (b) masturbation;

¹ Sections 229C – 229O

(c) oral sex;
(d) any activity, other than sexual intercourse, masturbation or oral sex, that involves the use of 1 person by another for his or her sexual satisfaction involving physical contact.

(2) However, a person does not engage in prostitution if –
(a) the activity is an activity mentioned in subsection (1)(d); and
(b) the person is providing adult entertainment under an adult entertainment permit and is an adult and is not a person with an impairment of the mind; and
(c) the activity is authorised under the permit.

(3) Subsection (1) applies equally to males and females.

(4) It does not matter, in relation to an arrangement for the provision of an activity mentioned in subsection (1)(a), (b), (c) or (d), whether –
(a) the arrangement is initiated with the person engaging in the provision of the activity or a third person; or
(b) the pecuniary or other reward under the arrangement is to be received by the person engaging in the provision of the activity or a third person.

(5) ...

The *Criminal Code* also relevantly deals with offences for procuring prostitution², the knowing participation in the provision of prostitution³, and the having of an interest in premises used for prostitution⁴. The application of the various provisions of Chapter 22A of the *Criminal Code* are crafted in such a way, that sole operator sex workers do not transgress the penalty provisions merely by engaging in prostitution on their own volition, provided there is no other party either procuring the prostitution or knowingly participating in the provision of the prostitution.

It is furthermore contemplated in the provisions of the *Criminal Code*, that a person who is a client of a sole operator sex worker, is not per se deemed to fall within the provisions of s. 229I, unless the place concerned was “suspected on reasonable grounds of being used for the purposes of prostitution by two or more prostitutes”.

For the purposes of this advice unless otherwise stipulated, it is assumed that the sole operator sex worker who seeks motel accommodation, has absolutely no arrangement with any other person or entity in connection with the provision of prostitution services from the proposed motel room accommodation which would breach the *Criminal Code*.

² Section 229G

³ Section 229H

⁴ Section 229K

The position of a motel operator

The law relating to accommodation between motel operators and guests is governed by both common law and contract law. There is a Queensland Act titled *Traveller Accommodation Providers (Liability Act) 2001* which governs the innkeeper's liability for things such as loss and damage to guest's property, liens and provision of safe custody of property among other related issues. Apart from certain definitions as outlined, this Act does not otherwise impact upon the issues raised in this advice.⁵

A motel operator in offering accommodation to and accepting a sole operator sex worker as a guest, in our opinion would not offend against the law merely if the motel operator knew that the guest was going to, or likely to engage in prostitution in the accommodation. This is on the proviso that the accommodation contract arose in the usual course of business and without any special solicitation by the motel operator for sex workers to take up accommodation at the premises. If the motel operator acted in a discriminatory way to deny accommodation to a sex worker by reason of that person being a sex worker, then the provisions of the *Anti-Discrimination Act 1991* (ADA) would apply. Section 6 of the ADA provides as follows:

Act's anti-discrimination purpose and how it is to be achieved

(1) One of the purposes of the Act is to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, including work, education and accommodation.
[underlining added]

(2) This purpose is to be achieved by –
(a) prohibiting discrimination that is –
(i) on a ground set out in part 2; and
(ii) of a type set out in part 3; and
(iii) in an area of activity set out in part 4;
unless an exemption set out in part 4 or 5 applies; and
(b) allowing a complaint to be made under Chapter 7 against the person who has unlawfully discriminated; and
(c) using the agencies and procedures established under chapter 7 to deal with the complaint.

Under s. 7 of Part 2 discrimination is prohibited among other things, on the basis of the attribute of "lawful sexual activity". Furthermore, in s. 82 of the ADA, it is provided:

Discrimination in pre-accommodation area

A person must not discriminate against another person –
(a) by failing to accept an application for accommodation; or

⁵ A guest is defined in s. 9 as a person to whom, or for whom, traveller accommodation is provided by an accommodation provider but does not include a person who usually lives at the traveller accommodation

- (b) by failing to renew or extend the supply of accommodation; or
- (c) in the way in which an application is processed; or
- (d) in the terms on which accommodation is offered, renewed or extended.

In the dictionary of the ADA, accommodation is defined as including “a hotel or motel” and “lawful sexual activity” as “a person’s status as a lawfully employed sex worker, whether or not self-employed”. It is clearly the case that the ADA would prohibit any motel operator from applying any discriminatory impositions or forbearances upon a sole operator sex worker in respect of any accommodation arrangement merely on account of the intending guest being a sex worker or having the attribute of “lawful sexual activity”.

There is a possibility that a motel operator might seek to impose by contractual terms, prohibitions upon guests carrying out business or earning income from the accommodation. If a motel operator attempted to impose such a condition, in our opinion it would have to apply equally to all guests, and to all forms of business, so as not to be in breach of the ADA as a facet of potential indirect discrimination.

The above observations, in our opinion, apply equally to the position of multiple sole operator sex workers providing prostitution services from separate rooms at the same motel, provided there is no consensus or meeting of the minds between any of the sole operator sex workers in the provision of prostitution services, for example referring clients to each other. If there were a meeting of the minds in connection with the activities of prostitution from the premises, including by the motel operator, then in our opinion that would give rise to a breach of the provisions of the *Criminal Code* as mentioned above.

In our opinion, even if the motel operator is aware that the guest is a sex worker engaging in prostitution from the motel room, provided the motel operator did not engage in any conduct which would amount to a knowing participation either directly or indirectly in support of that conduct, then the motel operator would not be in breach of the Criminal Code or the provisions of the *Prostitution Act 1999*. This opinion is also subject to the motel operator not wilfully allowing the prostitution as occurring in the accommodation to cause a nuisance to another person in breach of s. 76 of the *Prostitution Act*.

In our opinion, it would not be lawful for a motel operator to charge a sole operator sex worker a higher tariff for the same services than other guests, as it would be contrary to the provisions of the ADA. Similarly, it would, in our opinion, not be lawful for a motel operator to demand a “kick back” from the sex worker, as that would also in our opinion, be contrary to the above provisions of the ADA. Further we are of the opinion that the request for a monetary “kick back” would potentially be in breach of s. 229H of the *Criminal Code*. This is predicated on the basis there would be a meeting of minds between the motel operator and the sex worker on the understanding that

prostitution may be carried out on the premises as a basis for a financial uplift in the accommodation tariff.⁶

Local government implications

The relevant provisions in respect of this area are covered under the *Integrated Planning Act 1997* (IPA). As you are well familiar, the *Prostitution Act 1999* and associated regulations, regulate the specific operation of brothels in Queensland.⁷

The IPA forms the foundation of Queensland planning and development legislation and establishes the process for lodging, assessing and deciding development applications. Fundamentally the IPA regulates the use of land in Queensland.

The Department of Infrastructure and Planning is responsible for administering the IPA with delegated authority provided to local governments to administer and enforce development approvals and more broadly deal with planning and development issues.

Implications for local government in respect of sex workers operating from motel rooms will only arise in circumstances where a development offence under the IPA exists. The development offences would include:

- (a) Development not being carried out in accordance with an approval⁸;
or
- (b) Development, including the material change of use, being carried out without a development approval.⁹

Enforcement measures available to local government under the IPA include:

- (a) prosecution for the development offence¹⁰; or
- (b) issuing of show cause and enforcement notices requiring conditions to be complied with and/or the unlawful use to cease¹¹; or
- (c) declaratory proceedings in the Planning and Environment Court or Magistrates Court requiring the unlawful use to cease.¹²

⁶ The Court of Appeal per Macrossan CJ, Pincus JA and Davies JA in *The Queen v Armstrong* 1996 1QdR 316 deal with an extreme example of arrangements where prostitution was carried out in motel rooms clearly between 2 or more persons for a financial reward to the organisers

⁷ Part 4 governs development approvals

⁸ S4.3.3 IPA

⁹ S4.3.1 IPA

¹⁰ Chapter 4 Part 3 Division 4 IPA

¹¹ Ss4.3.9 & 4.3.10 IPA

¹² S4.1.21 IPA

Given a “brothel” is defined¹³ as being premises made available for prostitution by two or more prostitutes at the premises, the question arises as to whether a motel room made available for one prostitute at any one time would constitute a brothel. Unless multiple rooms of a motel were being used by sex workers as part of an arrangement or understanding or meeting of minds between the sex workers, it would be difficult to argue that the use of a motel room by a single sex worker constituted the use of the premises as a brothel.

Development requiring development approval, in the form of a material change of use, will only arise in circumstances where a brothel is being carried out from premises.

The use of a motel room by a sex worker is in our opinion more likely to be carried out by a “sole operator” and would not constitute a material change of use in its own right.

Unless a specific condition is attached to the development approval for the motel that stipulates the premises are not to be used for prostitution, and we believe this is unlikely, there is nothing a local government could do to regulate the use of a motel room by a sole operating sex worker.

In short, local government implications will only arise where it is established that a “brothel” is constituted at a motel without the necessary development approval, or there is a breach of a condition of a development approval.

In light of the above observations concerning local government implications, we are of the opinion that the activities of a sole operator sex worker would not give rise to any unlawful activity under the IPA.

Conclusion

We trust the above advice adequately addresses your request. We look forward to further discussing with you any aspects of this advice upon which any clarification is sought as well as any proposed use of this advice.

Yours faithfully

McInnes Wilson Lawyers

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¹³ Via schedule 8 of the IPA and schedule 4 of the *Prostitution Act 1999*