



Can Disability Support Service Providers Organise Access to Sex Workers for Their Clients?

An Analysis of Australian Disability and Sex Worker Legislation and Policy.

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Introduction

Sex work is a divisive issue, nationally and internationally. Some argue that keeping sex work criminalised ‘denies sex workers equality, dignity and workplace safety’,¹ others say that sex work is inherently abusive, and that decriminalisation leads to an increase in exploitation and violence.² Decriminalisation is the preferred legal framework for the majority of sex workers and sex work lobbyists.³ It is also supported by leading human rights organisations – including Amnesty International,⁴ the United Nations,⁵ the World Bank,⁶ and the World Health Organisation⁷ – as the best method to protect the rights of sex workers, reduce violence, increase their ability to access the justice system, and ensure they have appropriate access to health services.

In South Australia, sex work is not specifically illegal, however sex work-related practices are criminalised. Since the 1980s, there have been 14 attempts to decriminalise sex work and reform legislation in South Australia;⁸ most recently: the Statutes Amendment (Repeal of Sex Work Offences) Bill 2020 (SA) (‘Bill’).

The purpose of this essay is to determine whether, under South Australia’s current laws, disability support service providers can organise access to sex workers for their clients, and whether this will change if the proposed amendment Bill passes. To develop an understanding of why this question is being asked, this essay provides a brief overview of disability in Australia, Australia’s international human rights obligations, and the main

¹ Cheryl Overs, ‘Sex work and the law – it’s complicated’, *The Conversation* (online, 3 August 2017) <<https://theconversation.com/sex-work-and-the-law-its-complicated-81316>>. See also Erin Sanders-McDonagh, ‘Ideological war against the decriminalisation of sex work risks sidelining much of the evidence’, *The Conversation* (online, 25 June 2018) <<https://theconversation.com/ideological-war-against-the-decriminalisation-of-sex-work-risks-sidelining-much-of-the-evidence-92883>>.

² See, eg, Julie Bindel, *The Pimping of Prostitution: abolishing the sex work myth* (Palgrave MacMillan, 2019).

³ Janelle Fawkes, ‘Sex work legislation stands in the way of Australia’s commitments: decriminalisation for sex workers health, safety and rights’ (2014) 12(2) *HIV Australia* 22, 22.

⁴ Amnesty International, ‘Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Worker’ (Policy POL 30/4062/2016, 26 May 2016) 2 <<https://www.amnesty.org/en/documents/pol30/4062/2016/en/>>.

⁵ John Godwin, *Sex Work and the Law in Asia and the Pacific* (Report, October 2012) 197-98.

⁶ Deanna Kerrigan et al, *The Global HIV Epidemics among Sex Workers* (World Bank, 2013) 63, 278-9.

⁷ *Prevention and Treatment of HIV and Other Sexually Transmitted Infections for Sex Workers in Low- and Middle-Income Countries* (Report, December 2012), 17.

⁸ Sex Industry Decriminalisation Action Committee, ‘Sex work in SA History’, *Sex Work Law Reform SA* (Information Sheet) 1 <<http://sexworklawreformsa.com/wp-content/uploads/2019/10/3-SA-history-info-sheet.pdf>>. See also South Australia, *Parliamentary Debates*, Legislative Council, 18 June 2020, 1138 (Tammy Franks).

arguments for and against the rights of people with disability to access sexual services. Then this essay discusses the concept of consent and how it relates to people with disability accessing sex workers. Next this essay analyses the legislation governing sex work in South Australia, and how it affects the ability of people with disabilities to access sexual services. Subsequently, this essay considers the legal position of sex work in other Australian jurisdictions. Then this essay discusses the case of *NDIA v WRMF*⁹ and what this may mean for people with disability who wish to access sexual services through the National Disability Insurance Scheme ('NDIS'). Finally, this essay examines the proposed amendment Bill seeking to decriminalise sex work in South Australia and its potential impacts for people with disability who wish to access sexual services.

Background

People with disability comprise approximately 18% of Australia's population;¹⁰ the prevalence of disability increases with age.¹¹ For 77% of people with disability, their main form of disability is physical; the main form of disability for the remaining 23% is mental or behavioural.¹² People with disability sometimes need support to participate in daily life. Common areas people require assistance with include: health care, property maintenance, household chores, mobility, transport, cognitive or emotional tasks, self-care, reading or writing tasks, and meal preparation.¹³ This need for support is recognised by the *CRPD*.¹⁴

The purpose of the *CRPD* 'is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.'¹⁵ Australia has ratified the *CRPD*, and it is given federal and state legislative recognition in the *NDIS Act*¹⁶ and the *Disability Inclusion Act*,¹⁷ respectively. The *CRPD* requires State Parties to take effective and appropriate measures to

⁹ *National Disability Insurance Agency v WRMF* (2020) 276 FCR 415.

¹⁰ Australian Institute of Health and Welfare | Australian Government, *People with disability in Australia* (Report, 2020) 18 <<https://www.aihw.gov.au/getmedia/ee5ee3c2-152d-4b5f-9901-71d483b47f03/aihw-dis-72.pdf.aspx?inline=true>>.

¹¹ *Ibid* 20.

¹² *Ibid* 22.

¹³ *Ibid* 26.

¹⁴ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('*CRPD*').

¹⁵ *Ibid* art 1.

¹⁶ *National Disability Insurance Scheme Act 2013* (Cth) ch 1 pt 2 s 3(1)(a) ('*NDIS Act*').

¹⁷ *Disability Inclusion Act 2018* (SA) pt 2 s 7.

provide people with disability with the support they require so they can effectively participate in society and interact with their environment.¹⁸ Additionally, article 25 of the *CRPD* establishes that people with disability have the right to enjoy the highest attainable standard of health, including in the area of sexual health.¹⁹ There is a growing belief that sexual health cannot be fulfilled without respect for and protection of human rights, and that the application of human rights (such as the right to equality and non-discrimination,²⁰ the right to privacy,²¹ and the right to freedom of opinion and expression)²² to sexuality and sexual health constitute sexual rights.²³

Advocates for the sexual rights of people with disability note that their sexual needs are often overlooked.²⁴ They argue that throughout history, society has viewed people with disability as either non-sexual or hyper-sexual,²⁵ with them frequently being seen as ‘innocent victims or eternal children’.²⁶ As a result, people with disability have been faced with ‘innumerable barriers to sexual expression and fulfilment ... as well as substantial barriers as clients trying to access sexual services and supports’.²⁷ Proponents for²⁸ and against²⁹ recognition of sexual rights acknowledge that people with disability have sexual desires, in the same way that non-disabled people have sexual desires. What they disagree on, is how the sexual needs of people with disability should be accommodated.

¹⁸ See *CRPD* (n 14) arts 9, 19, 20, 29, 30.

¹⁹ *Ibid* art 25.

²⁰ *Ibid* art 5.

²¹ *Ibid* art 22.

²² *Ibid* art 21.

²³ ‘Defining sexual health’, *World Health Organization* (Web Page, 2010) <<https://www.who.int/teams/sexual-and-reproductive-health-and-research/key-areas-of-work/sexual-health/defining-sexual-health>>.

²⁴ Casey Briggs, ‘Sex work restrictions are punishing people with disabilities, advocates say’, *ABC News* (online, 26 September 2019) <<https://www.abc.net.au/news/2019-09-26/sex-workers-say-laws-are-punishing-people-with-disabilities/11500210>>.

²⁵ ‘Joint Position Statement: A call for a rights-based framework for sexuality in the NDIS’, *Disabled People’s Organisations Australia* (Web Page, 28 August 2019) <https://dpoa.org.au/joint-position-statement-a-call-for-a-rights-based-framework-for-sexuality-in-the-ndis/#_edn5>. See also Jacob Appel, ‘Sex rights for the disabled?’ (2010) 36(3) *Journal of Medical Ethics* 152, 154.

²⁶ Kelly Vincent, ‘Sex work and disability; it’s time to talk’, *ABC News* (online, 10 April 2012) <<https://www.abc.net.au/rampup/articles/2012/04/10/3474014.htm>>.

²⁷ Kelly Fritsch et al, ‘Disability and sex work: developing affinities through decriminalisation’ (2016) 31(1) *Disability & Society* 84, 85.

²⁸ Kelly Vincent (n 26).

²⁹ See Ezio Di Nucci, ‘Sexual rights and disability’ (2011) 37(3) *Journal of Medical Ethics* 158, 158.

Sexual rights advocates argue that providing people with disability the opportunity to access sexual services would be beneficial for their mental and physical wellbeing.³⁰ Additionally, they argue that it supports people with disability to ‘explore and express their sexuality and achieve intimacy’,³¹ and to ‘develop life skills necessary to engage in healthy and consenting sexual and romantic relationships.’³² These claims are supported by the lived experience of people with disability, who have described sexual services as ‘a lifeline to intimacy’,³³ and stated that access to such services has allowed them to ‘develop in ways [they] otherwise may not have.’³⁴ Thus, supporters of sexual rights for people with disability argue for the decriminalisation of sex work.³⁵

On the other hand, opponents to the recognition of sexual rights state that ‘linking prostitution with disability rights creates a risk of association and potentially [stigmatises] people with a disability.’³⁶ They argue that linking the two leads to an unfair assumption that people with disability are only capable of having sex with sex workers.³⁷ Additionally, they argue that advocating for access to sex workers for people with disability, and for the decriminalisation of sex work, contributes to discrimination against, and the further exploitation of, sex workers.³⁸

In rebuttal to these arguments, sexual rights advocates note that people with disability are already stigmatised for their sexual desires; the purpose of advocating for the right to access sexual services is to provide people with disability the choice to explore those sexual desires with a sex worker.³⁹ Furthermore, they note that decriminalisation is not just beneficial for people with disabilities who wish to access sexual services, it also benefits sex workers by creating a ‘supportive [environment] to improve the rights, health, and safety of sex

³⁰ Kelly Vincent (n 26).

³¹ ‘About Us’, *Touching Base* (Web Page) <<https://www.touchingbase.org/>>.

³² ‘Joint Position Statement: A call for a rights-based framework for sexuality in the NDIS’ (n 25).

³³ Casey Briggs (n 24).

³⁴ Tom Nightingale, ‘Call to legalise sex workers for people with disability’, *ABC News* (online, 27 March 2012) <<https://www.abc.net.au/news/2012-03-27/call-to-legalise-sex-workers-for-people-with-disability/3915538>>.

³⁵ Kelly Fritsch et al (n 27) 93.

³⁶ Matthew Holloway, ‘Disability, sex rights and the prostitute’ (2012) 22(18) *Eureka Street*.

³⁷ Naomi Jacobs, ‘Disabled people do have sex lives. Get over it’, *The Guardian* (online, 24 August 2010) <<https://www.theguardian.com/commentisfree/2010/aug/23/disabled-people-sex-lives-equality>>.

³⁸ Matthew Holloway (n 36).

³⁹ Kelly Vincent (n 26).

workers'.⁴⁰ For these reasons, this essay supports the right of people with disabilities to access sexual services.

Consent

In this essay, when reference is made to a disability support service provider organising access for a client to a sex worker for sexual activity, it is assumed that both the client and sex worker are adults who freely and voluntarily consent to the sexual activity.⁴¹ Engaging in sexual intercourse with another person who does not consent, or who withdraws consent, is rape, and carries a maximum penalty of life imprisonment.⁴²

Additionally, it is assumed that it is the client's wish to engage a sex worker, and they are not being compelled by the disability support service provider to do so. Compelling a person to engage in sexual intercourse with someone else or to engage in sexual self-penetration, where the person compelled does not consent, is rape, and carries a maximum penalty of life imprisonment.⁴³

Furthermore, it is assumed that the client, if they have an intellectual disability, is able to understand the nature and consequences of sexual intercourse. Knowingly engaging in sexual intercourse with a person who, by reason of intellectual disability is unable to understand the nature or consequences of sexual intercourse, is unlawful sexual intercourse and has a maximum penalty of 10 years imprisonment.⁴⁴

Current Sex Worker Legislation and Policy in South Australia

In Australia, the legal status of sex work differs between the states and territories. South Australia's sex work laws are the most restrictive in Australia. As previously mentioned, sex work itself is not expressly prohibited, however, sex work-related practices are criminalised by the *Criminal Law Consolidation Act*⁴⁵ and the *Summary Offences Act*.⁴⁶ Besides a few

⁴⁰ Kelly Fritsch et al (n 27) 93.

⁴¹ See *Criminal Law Consolidation Act 1935* (SA) pt 3 div 11 s 46.

⁴² *Ibid* pt 3 div 11 s 48(1).

⁴³ *Ibid* pt 3 div 11 s 48(2).

⁴⁴ *Ibid* pt 3 div 11 s 49(6).

⁴⁵ *Criminal Law Consolidation Act 1935* (SA).

⁴⁶ *Summary Offences Act 1953* (SA).

minor amendments, the majority of sex work provisions in South Australian legislation remain the same as they were when they were originally enacted, some over 50 years ago.⁴⁷

The *Criminal Law Consolidation Act* codifies the common law offence of ‘keeping a common bawdy house’,⁴⁸ providing a maximum penalty of two years imprisonment. ‘Bawdy house’ is an antiquated term meaning ‘brothel’.⁴⁹ The continued use of this term illustrates that South Australia’s sex work legislation is not up-to-date.

Under the *Summary Offences Act*, it is an offence to: solicit a person for the purpose of prostitution in a public place, or within the view or hearing of a person in a public place;⁵⁰ engage in procurement for prostitution;⁵¹ live off the earnings gained by another person through prostitution;⁵² be in premises, or be the occupier of premises, frequented by prostitutes;⁵³ permit premises to be used as a brothel;⁵⁴ keep or manage a brothel;⁵⁵ and receive money earned through prostitution in a brothel.⁵⁶ The term ‘brothel’ is defined as a ‘premises to which persons resort for ... [or which are] occupied or used for the purposes of prostitution’.⁵⁷

The term prostitute ‘includes any male person who prostitutes his body for fee or reward’.⁵⁸ This is an inclusive definition, meaning the statutory definition extends the terms meaning to include both its ordinary meaning and something specific considered outside the ordinary meaning. The Macquarie Dictionary defines ‘prostitute’ as ‘a person, especially a woman, who engages in sexual intercourse for money as a livelihood’.⁵⁹ Historically, South Australian legislation criminalising prostitution did not consider male sex workers, as

⁴⁷ Scarlet Alliance | Australian Sex Workers Association, ‘SA’, *Law* (Web Page, 8 April 2015) <<https://scarletalliance.org.au/laws/sa>>.

⁴⁸ *Criminal Law Consolidation Act 1935*(SA) pt 9 div 1 s 270(1)(b).

⁴⁹ *Macquarie Dictionary* (online at 15 November 2021) ‘bawdy house’.

⁵⁰ *Summary Offences Act 1953* (SA) pt 5 s 25.

⁵¹ *Ibid* pt 5 s 25A(1).

⁵² *Ibid* pt 5 s 26(1).

⁵³ *Ibid* pt 3 s 21(1)

⁵⁴ *Ibid* pt 6 s 29.

⁵⁵ *Ibid* pt 6 s 28(1)(a).

⁵⁶ *Ibid* pt 6 s 28(1)(b).

⁵⁷ *Ibid* pt 6 s 27.

⁵⁸ *Ibid* pt 1 s 4(1) (definition of ‘prostitute’). See also *Criminal Law Consolidation Act 1935* (SA) pt 1 s 5(1) (definition of ‘common prostitute’).

⁵⁹ *Macquarie Dictionary* (online at 15 November 2021) ‘prostitute’ (def 1).

homosexuality itself was criminalised and the general assumption was that sex workers were women.

Engaging in procurement includes '[procuring] another to become a prostitute; ... [publishing] an advertisement to the effect that the person (or some other person) is willing to employ or engage a prostitute; or [approaching] another person with a view to persuading the other person to accept employment or an engagement as a prostitute.'⁶⁰

What does this mean for people with disabilities who wish to access sexual services?

As there is no explicit prohibition on exchanging sexual services for money, it is technically legal for people with disabilities to access sex workers. However, the restrictions on sex work-related activities (particularly on procurement for the purposes of prostitution, soliciting, and being in premises frequented by prostitutes) make the process of engaging a sex worker illegal. A disability support service provider organising access to a sex worker for a client would fall within the definition of 'engaging in procurement for prostitution' and that action is thus illegal and an offence under the *Summary Offences Act*.⁶¹

Sex Worker Legislation in Other Australian Jurisdictions

Jurisdictions where sex work is decriminalised and regulated

In 1995, with the passing of the *Disorderly Houses Amendment Act 1995* (NSW), **New South Wales** became the first jurisdiction, internationally, to decriminalise sex work.⁶² This amendment abolished the common law offence of keeping a brothel and 'made brothels a legitimate commercial land use regulated through environmental planning instruments'.⁶³ Note, however, that it is an offence to: live off the earnings gained by another through prostitution (except as a manager or employee of a brothel);⁶⁴ publish advertisements for prostitution;⁶⁵ or solicit for the purposes of prostitution in or near a dwelling, school, church

⁶⁰ *Summary Offences Act 1953* (SA) pt 5 s 25A(2).

⁶¹ *Ibid* pt 5 s 25A(1).

⁶² Paul Gregoire, 'Decriminalised: The NSW Laws Governing Sex Work', *Sydney Criminal Lawyers* (Article, 13 August 2019) <<https://www.sydneycriminallawyers.com.au/blog/decriminalised-the-nsw-laws-governing-sex-work/>>.

⁶³ New South Wales, *Parliamentary Debates*, Legislative Council, 13 December 2001, 20247 (John Hatzistergos).

⁶⁴ *Summary Offences Act 1988* (NSW) pt 3 s 15.

⁶⁵ *Ibid* pt 3 ss 18, 18A.

or hospital.⁶⁶ The continued existence of these offences has led some to call the New South Wales' approach 'partial decriminalisation'.⁶⁷

In 2019, the **Northern Territory** was the third jurisdiction internationally, following New South Wales and New Zealand, to decriminalise sex work.⁶⁸ Sex work is regulated by the *Sex Industry Act 2019* (NT), which legalised contracts in relation to sex work.⁶⁹ Note that operators of sexual services businesses, who engage three or more sex workers, are required to hold suitability certificates⁷⁰ issued by the Commissioner of Consumer Affairs.⁷¹

As sex work is decriminalised in New South Wales and the Northern Territory, it is legal to engage a sex worker in both jurisdictions. Therefore, a disability support service provider would be able to coordinate access to a sex worker for a client.

Jurisdictions where sex work is regulated (but not decriminalised)

In the **Australian Capital Territory**, brothels (other than sole operator brothels)⁷² can only be operated in prescribed locations⁷³ and must be registered with the Commissioner for Fair Trading.⁷⁴ Additionally, soliciting or loitering in a public place for the purpose of offering or procuring commercial sexual services is illegal.⁷⁵

In **Queensland** it is permissible to conduct sex work in a licensed brothel, or as a sole, private worker.⁷⁶ However, soliciting for prostitution in or near a public place is an offence.⁷⁷

⁶⁶ Ibid pt 3 ss 19, 19A.

⁶⁷ See eg, John Godwin (n 5) 196.

⁶⁸ Paul Gregoire, 'NT Sex Workers Finally Have Decriminalisation: An Interview With SWOP NT's Coordinator Leanne Melling', *Sydney Criminal Lawyers* (Article, 5 December 2019) <<https://www.sydneycriminallawyers.com.au/blog/nt-sex-workers-finally-have-decriminalisation-an-interview-with-swop-nts-coordinator-leanne-melling/>>.

⁶⁹ *Sex Industry Act 2019* (NT) pt 2 s 7.

⁷⁰ Ibid pt 4 s 18(1).

⁷¹ See ibid pt 4 s 19.

⁷² *Sex Work Act 1992* (ACT) pt 3 s 18(3).

⁷³ Ibid pt s 18(1).

⁷⁴ Ibid pt 2 div 2.2 s 12.

⁷⁵ Ibid pt 3 s 19(1).

⁷⁶ *Criminal Code Act 1899* (QLD) sch 1 pt 4 ch 22A s 229C (definition of 'unlawful prostitution'). See also *Prostitution Act 1999* (QLD).

⁷⁷ *Prostitution Act 1999* (QLD) pt 6 div 1 s 73(1)-(2).

In **Victoria**, brothels and escort agencies are required to hold licences;⁷⁸ entering an unlicensed brothel is an offence.⁷⁹ Small, owner-operated businesses (of no more than two workers) are not required to hold a licence⁸⁰ but must register their business with the Business Licensing Authority.⁸¹ Additionally, it is an offence to solicit for sex work services in or near a place of worship, a hospital, a school, or a public place regularly frequented by children (when children are present).⁸² Notably, Victoria has begun the process of decriminalising sex work, with the Sex Work Decriminalisation Bill 2021 (VIC) currently before the Legislative Council after passing the Legislative Assembly in late October, 2021.⁸³

In these jurisdictions, a disability support service provider could legally organise access to a sex worker for a client, so long as the sex worker has complied with any applicable licensing or registration requirements.

Jurisdictions where sex work is criminalised

In **Tasmania**, it is illegal to operate a commercial sexual services business (a brothel)⁸⁴ or to solicit or loiter in a public place for the purpose of offering or procuring sexual services.⁸⁵ However, private sexual services businesses, of no more than two sex workers (neither of whom manage or employ the other), are legal.⁸⁶ Therefore, it is possible for people with disabilities to legally engage a sex worker, and for disability support service providers to organise access to a sex worker, from a private sexual services business.

Western Australia's sex work laws are similar to South Australia's; sex work itself is not illegal, but most sex work-related activities are. It is an offence to: offer or procure commercial sexual services in (or in the view or within hearing of) a public place;⁸⁷ permit premises to be used, or keep or manage premises, for the purposes of prostitution;⁸⁸ as a

⁷⁸ *Sex Work Act 1994* (VIC) pt 3 div 1 s 22.

⁷⁹ *Ibid* pt 2 s 15.

⁸⁰ *Ibid* pt 3 div 1 s 23.

⁸¹ *Ibid* pt 3 div 1 s 24.

⁸² *Ibid* pt 2 ss 12(1), 13(1).

⁸³ Office of the Chief Parliamentary Counsel Victoria 'Sex Work Decriminalisation Bill 2021', *Victorian Legislation* (Web Page) <<https://www.legislation.vic.gov.au/bills/sex-work-decriminalisation-bill-2021>>.

⁸⁴ *Sex Industry Offences Act 2005* (TAS) pt 2 s 4.

⁸⁵ *Ibid* pt 2 s 8.

⁸⁶ See *Ibid* pt 1 s 3(1) (definition of 'self-employed sex worker').

⁸⁷ *Prostitution Act 2000* (WA) pt 2 div 1 ss 5(1), 6(1).

⁸⁸ *Criminal Code Act Compilation Act 1913* (WA) pt IV ch XXII s 190(1).

licensee (the holder of a licence or permit under the *Liquor Control Act 1998* (WA)), permit a prostitute to remain on the licensed premises.⁸⁹ Although Western Australia's laws are similar to South Australia's, there are less restrictions on private sexual services. As such, it would be possible for people with disabilities to legally engage, or for disability support service providers to organise access to, a private sex worker.

Accessing Sexual Services Under the National Disability Insurance Scheme

There have been advocates for the inclusion of 'sexual assistance' within the list of services covered by the NDIS since the *NDIS Act* was first drafted.⁹⁰ Following the decision of the Federal Court in *NDIA v WRMF*, it now looks like this might become a reality. This case involved an appeal by the National Disability Insurance Agency ('NDIA') against a decision made by the Administrative Appeal Tribunal that sex therapy is a reasonable and necessary support⁹¹ which could be funded through an NDIS plan.⁹²

The case before the Tribunal related to a woman in her forties with multiple sclerosis and a number of other serious medical conditions. Since her diagnosis of multiple sclerosis, over 17 years ago, the woman has been single – for reasons she attributes to her disability. Due to the nature of her medical conditions, achieving sexual release without assistance is unlikely.⁹³ In 2016, the woman became an NDIS participant. At that time, she sought to include within her NDIS plan funding for sexual services provided by a person described as a sex worker. In 2017, she was notified that the NDIA would not fund such services because they were not a reasonable or necessary support.⁹⁴ Subsequently, she applied to the Tribunal for review of the NDIA's decision.

In this case, the Tribunal made a distinction between a sex therapist and a sex worker, stating that the support requested by the woman in this case was 'the services of a sexual therapist, specially trained in treating disabled persons.'⁹⁵ As such, the Tribunal only concerned itself

⁸⁹ *Liquor Control Act 1988* (WA) pt 4 div 6 s 115(1)(b).

⁹⁰ See, eg, Matthew Yau, 'Why the NDIS should cover the services of sex workers', *The Conversation* (online, 14 March 2013) <<https://theconversation.com/why-the-ndis-should-cover-the-services-of-sex-workers-12718>>.

⁹¹ See *NDIS Act* (n 16) ch 3 pt 2 div 2 s 34.

⁹² See *WRMF v National Disability Insurance Agency* [2019] AATA 1771.

⁹³ *Ibid* 1773 [3].

⁹⁴ *National Disability Insurance Agency v WRMF* (2020) 276 FCR 415, 417 [3]-[5].

⁹⁵ *WRMF v National Disability Insurance Agency* [2019] AATA 1771, 1772 [1].

with whether, on proper construction of the *NDIS Act*, services of a sex therapist could be considered a reasonable and necessary support, and not whether the services of a sex worker could be thus construed.⁹⁶ Ultimately, the Tribunal concluded that sex therapy was a reasonable and necessary support, and remitted the decision to the NDIA for reconsideration with this conclusion in mind.⁹⁷

The NDIA appealed the Tribunal's decision in the Federal Court, providing five grounds for doing so. Most notably:

[T]hat the Tribunal failed to accord the Agency procedural fairness or failed to perform its statutory task because it considered the question of support to the respondent from a sex therapist when the respondent's claim was based upon seeking a different and specific support, being support from a sex worker.⁹⁸

The Court disagreed with this argument, because although different terminology had been used, the nature of the support described by the woman, specifically '... a professional sex worker with significant sexual experience and disability training',⁹⁹ was identical to that described by the Tribunal '... a sex therapist, specially trained in treating disabled persons.'¹⁰⁰ The Court held that it was clear the Tribunal understood the nature of the requested services, and chose to label such services as 'sex therapy', not to refer to a service provider who did not participate in sexual acts and activities,¹⁰¹ but rather to denote a difference from standard prostitution services for able-bodied clientele.¹⁰² Thus, the Court concluded that the Tribunal properly understood the support claimed and addressed this support appropriately.¹⁰³

Ultimately the Court dismissed the NDIA's appeal, concluding that 'sexual activity and sexual relationships are to be regarded as within the scheme of the [NDIS] Act. ... Whether they amount to a "reasonable and necessary support" in a given case however will generally be a question of fact.'¹⁰⁴ This decision represents a significant step forward for the movement

⁹⁶ Ibid 1773 [3].

⁹⁷ Ibid 1787 [54].

⁹⁸ *National Disability Insurance Agency v WRMF* (2020) 276 FCR 415, 429 [58].

⁹⁹ Ibid 432 [78]

¹⁰⁰ *WRMF v National Disability Insurance Agency* [2019] AATA 1771, 1772 [1].

¹⁰¹ *National Disability Insurance Agency v WRMF* (2020) 276 FCR 415, 435 [98].

¹⁰² Ibid 435-436 [95],[99].

¹⁰³ Ibid 437 [102].

¹⁰⁴ Ibid 416.

to recognise the sexual rights of people with disability. As a result of this decision, NDIS participants are in a far better position to request funding for sexual service supports. However, it is clear the NDIA will not provide such supports without resistance. Following the conclusion of the case, a spokesperson for the then NDIS Minister, the Honourable Stuart Robert, stated that ‘while the government respects the court’s decision, the government does not believe that use of NDIS funds to pay for the services of a sex worker is in line with community expectations’.¹⁰⁵

The Statutes Amendment (Repeal of Sex Work Offences) Bill 2020 (SA)

The Bill was first introduced on 8 April 2020 by the Honourable Tammy Franks MLC,¹⁰⁶ and is currently before a Select Committee of the Legislative Council – the Committee’s report is due on 1 December 2021.¹⁰⁷ Unlike previous bids for decriminalisation in SA, the Bill does not propose methods for regulation of the industry. Instead, it concentrates on abolishing the offences relating to prostitution in the *Criminal Law Consolidation Act* and the *Summary Offences Act*. The reason for this approach is that a major barrier to decriminalisation in the past has been disagreement on how the industry should be regulated.¹⁰⁸ Thus, to avoid this pitfall, this Bill focuses on establishing a time limit for the removal of the criminal penalties, consequently putting the Government on notice to ‘negotiate and work with the industry to transition to a lawful model of operation’.¹⁰⁹

What impacts might this have on people with disabilities who wish to access sexual services?

The passing of this Bill would repeal all sex work-related offences in South Australia, allowing disability support service providers to organise access to sexual services for their clients. However, given this Bill does not include provisions for regulation of the sex work industry, it is currently unclear whether there will be any restrictions on when, how and where service providers can organise access.

¹⁰⁵ Luke Henriques-Gomes, ‘NDIS funds may be used to pay for sex workers, court rules’, *The Guardian* (online, 12 May 2020) <<https://www.theguardian.com/australia-news/2020/may/12/ndis-funds-pay-sex-workers-court-rules>>.

¹⁰⁶ South Australia, *Parliamentary Debates*, Legislative Council, 8 April 2020, 491 (Tammy Franks).

¹⁰⁷ South Australia, *Parliamentary Debates*, Legislative Council, 17 November 2021, 4888 (Robert Simms).

¹⁰⁸ Tammy Franks, ‘Sex Work Offences Subject of New Inquiry’ (Media Release, The Greens South Australia, 4 February 2021).

¹⁰⁹ Tammy Franks, ‘New Bid to Repeal SA’s Archaic Sex Work Offences’ (Media Release, The Greens South Australia, 18 June 2020).

Conclusion

South Australia has the most restrictive sex work laws in Australia. Unlike all other Australian jurisdictions, there is no legal avenue for disability support service providers to organise access to sexual services for their clients. However, this may change soon if the proposed Bill to repeal sex work offences in South Australia, currently before parliament, is successful. Additionally, following the decision of the Federal Court in *NDIA v WRMF*, people with disabilities (who are NDIS participants) may be able to receive funding for sexual services as a support under their NDIS plan.

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