IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, v. ALMA F. LIARTA,. et al., Defendants.	Criminal Case Nos. 93-133, 93-125, 93-126, 93-127, 93-128. 93-129, 93-131, 93-132, 93-155 **DECISION AND ORDER ON ON DEFENDANT'S MOTION TO DISMISS INFORMATION**

This matter came before the Court for hearing on December 20, 1993. Defendant Alma F. Liarta moves to dismiss the information on the grounds that the statute under which she was charged, Public Law 8-14, is unconstitutionally overbroad, vague, and violates her right to equal protection, both on its face and as applied to Ms. Liarta's alleged conduct. The Government opposes the motion.

In addition to Defendant Liarta, Defendants in the following cases have formally joined in Defendant Liarta's motion: *CNMI v. Ponio*, Crim. Case No. 93-125; *CNMI v. Bigay*, Crim. Case No. 93-126; *CNMI v. Patricio*, Crim. Case No. 93-127; *CNMI v. Oblinguar*,

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Crim. Case No. 93-128; *CNMI v. Cesar*, Crim. Case No. 93-129; *CNMI v. Rubidizo*, Crim. Case No. 93-132; *CNMI v. Villamor*, Crim. Case No. 93-131; and *CNMI v. Baylon*, Crim. Case No. 93-155.[1/]

I. FACTS

1. Public Law 8-14.

Public Law 8-14 was signed into law on February 16, 1993. By its terms, it prohibits "Prostitution, [...] Promoting Prostitution, Permitting Prostitution, and [...] Employment for the Purpose of Providing Sexual Services for Pay." *Public Law 8-14*, § 3.

"Prostitution" is defined as "sexual conduct," which in turn is defined as "sexual intercourse," sexual contact," or "sexual services." *Id.*, § 2(a). According to § 2 of the statute:

> (b) "Sexual Contact" means any touching of the sexual or intimate parts of a person done for the purpose of gratifying the sexual desire of either party.
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> (c) "Sexual Exploitation" means causing by misrepresentation, coercion, threat of force, money, personal gain or otherwise, a person to offer sexual services for pay.
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> (d) "Sexual Intercourse" means sexual intercourse in its ordinary meaning, or:
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> > (1) Any intrusion or penetration, however slight, of any part of another person's body into the genital opening of another person, but emission is not required; or

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[1/] In this opinion, all references to "Defendant" shall include these joined Defendants unless a specific defendant is mentioned.

In addition, Defendants in *CNMI v. Dong*, Crim. Case No. 93-121, and *CNMI v. Yuan*, Crim. Case No. 93-122 have filed a separate motion attacking the constitutionality of Public Law 8-14. This motion will be addressed separately.

> (2) Any penetration of the vagina or anus, however slight, by an object, when committed by one person or another, whether such persons are of the same or opposite sex, except when such penetration is accomplished with the consent of a patient for medically recognized treatment of, or diagnostic purposes for, that patient;
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> (3) Any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.
>
> (e) "Sexual Services" means any form of sexual contact including intercourse, penetration, or any touching of any person, by oneself or another, for the purpose of sexual arousal or gratification, aggression, degradation or other similar purpose.

Id. A completed act is not necessary to trigger the prohibitions of the statute; agreements "or offers to engage in sexual conduct with another person for a fee" are sufficient.

The statute also criminalizes "Promoting Prostitution," defined as "advancing prostitution" or "profiting from prostitution." *Id.*, § 5(c), (d). These terms are themselves defined as follows:

> (a) A person "advances prostitution" if, acting other than as a prostitute or as a customer thereof, he causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution purposes, operates or assists in the operation of a house of prostitution or prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.
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> (b) A person "profits from prostitution" if, acting other than as a prostitute receiving compensation for personally rendered prostitution services, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity.

Id., § 5. Finally, the statute criminalizes "permitting prostitution," defined as follows: "A person is guilty of

permitting prostitution if, having possession or control of a premises which he knows are being used for prostitution purposes, he fails without lawful excuse to make reasonable effort to report, halt, or abate such use." *Id.*, § 6.

For a person to be convicted of promoting or permitting prostitution, the statute requires corroborating testimony beyond the accusation of a person claiming to be the prostitute whose activity was promoted or permitted. *Id.*, § 8. No such corroboration is required for conviction of prostitution itself.

The statute imposes misdemeanor penalties for prostitution and permitting prostitution. *Id.*, § 7. It imposes felony penalties for promoting prostitution, engaging in "sexual exploitation" and employment of another for the purposes of offering sexual services for pay. In addition to these penalties, the statute permits the Court to order either: "(1) a temporary suspension or permanent revocation of the business license of the violator;" or "(2) a temporary or permanent bar on the issuance of all Nonresident Worker Certificates to the violator."

2. Defendants' Alleged Conduct.

a. Defendant Alma F. Liarta (Crim. Case No. 93-133). According to the statement of Special Agent Claudio K. Norita, on July 17, 1993, at 11:30 p.m., he entered the Double Shot Night Club in Gualo Rai. There, he allegedly had a conversation with a waitress who identified herself as "Bernadette," later identified in a Nonresident Workers' Affidavit as Ms. Liarta. According to Agent Norita's statement, he asked if "Bernadette" could "go out" with him, and she replied that he would have to pay $250 to "mamasang" at the bar counter. The statement continues:

> She also said that she can be with me all night long when I pay and that we can sleep together. I then asked her why do I need to pay her for sleeping with me and she replied because when we go to my hotel we will be together and we can do anything we want to do. I then asked here [sic] what exactly does she mean by that and she replied in a soft voice that we would make love.

Self Statement, July 18, 1993 (Defendant's Exhibit J). Defendant allegedly told Agent Norita that she was "a dancer" and had to "do the shows" before she could leave the club. *Id.* On August 12, 1993, Defendant was arrested at the Double Shot. The Information charges that she "unlawfully offered to engage in sexual conduct with another person or persons for a fee, in violation of Public Law 8-14, § 4."

b. Defendant Evelyn Villamor (Crim. Case No. 93-131). On July 14, 1993 Special Agent Paul T. Ogumoro entered the Double Shot Night Club. According to the Affidavit of Probable Cause, he had a conversation with a woman identifying herself as Vina Cruz, later identified in a Nonresident Workers Affidavit as Ms. Villamor. According to Agent Ogumoro's Self-Statement, Ms. Villamor told him she danced at the club and asked him to take her out to "see Saipan at night." However, she allegedly said that before she could leave with him, Agent Ogumoro would have to pay $200.00 to "mamasang" and buy a drink for her. Agent Ogumoro's statement continues:

> I inquired from Vina Cruz what would she do if she was to come with me and she told me that "you are a man, you know what to do" she laughed and told me that "everything can happen." Vina Cruz told me I should not worry about anything because we will practice "safe sex." I inquired what she meant and she told me that "we can sleep together and have fun."

Based on this information, an Affidavit of Probable Cause was issued by the Government on August 12, 1993. Defendant was

arrested that same day and charged with violation of § 4 of Public Law 8-14.

c. Defendant Nancy G. Rubidizo (Crim. Case No. 93-132). On July 14, 1993 Special Agent Arnold K. Seman entered the Double Shot Night Club. According to the Affidavit of Probable Cause, he had a conversation there with a woman calling herself "Odessa," later identified in a Nonresident Workers Affidavit as Ms. Rubidizo. The Affidavit allegedly lists Ms. Rubidizo's place of employment as the Double Shot and her occupation as "dancer." During her conversation with Agent Seman, Ms. Rubidizo allegedly offered to have sex in exchange for $250, payable to "mamasang." Agent Seman returned to the Double Shot on July 20, 1993, and again conversed with "Odessa." According to the Amended Affidavit of Probable Cause, in this second conversation she again offered to have sex with Agent Seman and discounted her previous offer of $250 to $200. Ms. Rubidizo was arrested on August 13, 1993 and was charged with violating Public Law 8-14, §4.

d. Defendants Susan D. Ponio et al. (Crim. Case Nos. 93-125, 93-126, 93-127, 93-128, 93-129 and 93-155). In these cases, special agents of the Department of Public Safety entered the Executive Massage Parlour, both in Susupe or in Garapan, on July 16 and 17, 1993, posing as massage customers. In each case, an agent paid $50 for a massage and was escorted to a small room, where he met defendant. Either before the massage began or during its course, each defendant offered to perform a sex act upon the agent for an additional fee.

Defendants' ways of communicating these offers, as recounted in the Government's Affidavits of Probable Cause, varied.

Defendant Ponio (Case No. 93-125), identified in the Affidavit as "Ms. Malou," allegedly offered for $200 a "special massage," which she defined as "doing what a couple does, like having sex." Defendant Bigay (Case No. 93-126) allegedly described a "special massage" as "plain sex" in any style except "blow job, anal sex, or not to eat her." Defendant Patricio (Case No. 93-127) allegedly offered a "body to body" massage for $100, consisting of rubbing the agent with her breasts and masturbating him and requiring the use of a condom. Defendant Cesar (Case No. 93-129), originally identified in the Affidavit of Probable Cause as Teresita A. Dakila, allegedly offered a "special massage," defined as "love making," for $150. Defendant Baylon (Case No. 93-155) allegedly offered a "body to body massage" for $150, defined as "getting on top and 'do[ing] everything to make you feel good'" and requiring the use of a condom.

All of the "Executive Massage" Defendants except Ms. Baylon were arrested on August 12, 1993 and charged with violating § 4 of Public Law 8-14. A summons for Ms. Baylon was issued on September 20, 1993. She was also charged with violating § 4 of Public Law 8-14.

II. ISSUES

Six issues are presented by Defendants' motion:

1. Is Public Law 8-14 overbroad on its face, violating the First Amendment of the U.S. Constitution and Article I, Section 2 of the Commonwealth Constitution?

2. Is Public Law 8-14 vague on its face, violating Defendant's right to due process of law under the Fifth and

Fourteenth Amendments to the U.S. Constitution and Article I, Section 5 of the Commonwealth Constitution?

3. Is Public Law 8-14 unconstitutionally vague as applied to Defendant Liarta's alleged conduct?

4. Do the provisions of Public Law 8-14 discriminate on the basis of race, violating the equal protection guarantee of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 6 of the Commonwealth Constitution?

5. Does the manner in which the Government has enforced Public Law 8-14 discriminate on the basis of race or sex, violating Defendant's right to equal protection?

6. Can the Court sever from the statute any provisions of Public Law 8-14 that are unconstitutional?

III. ANALYSIS

A. OVERBREADTH

1. Applicable Constitutional Provisions.

Section 501(a) of The Commonwealth Covenant establishes that the First, Fifth and Fourteenth Amendments to the U.S. Constitution are fully applicable within the Northern Mariana Islands. Thus, the decisions of the United States Supreme Court regarding freedom of speech, due process of law and equal protection under law are binding precedents upon this Court. Moreover, Article I, Sections 2, 5 and 6 of the Commonwealth Constitution set forth guarantees intended to confer the same rights granted by the First, Fifth and Fourteenth Amendments,

respectively. *See Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands* (1976) at 3-4, 20-22.

2. Facial Overbreadth.

In analyzing whether a criminal statute is unconstitutionally overbroad or vague on its face,[2/] "a court's first task is to determine whether the enactment reaches a substantial amount of constitutional conduct." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 102 S.Ct. 1187, 1191 (1982). If the terms of a statute prohibit a substantial range of conduct protected by the First Amendment, that statute can be challenged as overbroad, even by someone whose own conduct is not protected by the First Amendment. *Kolender v. Lawson*, 103 S.Ct 1855, 1859 n.8 (1980); *Doran v. Salem Inn, Inc.*, 95 S.Ct. 2561, 2568-2569 (1975) *citing Grayned v. City of Rockford*, 92 S.Ct. 2294, 2302 (1972).

a. "Sexual Exploitation" and "Sexual Services." Here, Defendant cites § 2(c), which defines "sexual exploitation" and § 2(e), which defines "sexual services," as violating the First Amendment. According to Defendant, these provisions prohibit "the hiring of performers, actors, dancers (like Defendant) who 'touch' other performers [...] in movies, performances and dance, in violation of the First Amendment." *Plaintiff's Memorandum in Support of Motion to Dismiss* at 16.

The U.S. Supreme Court has explicitly found non-obscene "erotic dancing" of the type found in bars and nightclubs to be protected by the First Amendment. *Barnes v. Glen Theatre, Inc.*,

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[2/] A "facial" challenge asserts that a given law is unconstitutional no matter to whom it is applied. An "as applied" challenge asserts that a law is unconstitutional when applied to the facts of a particular case.

111 S.Ct 2456, 2460 (1991) (non-obscene nude dancing is expressive conduct "within the outer perimeters of the First Amendment"). As one court stated:

> While the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics) it may not differ in substance from the dance viewed by the person who [...] wants some 'entertainment' with his beer or shot of rye.

Salem Inn, Inc. v. Frank, 501 F.2d 18, 21 n.3 (2d Cir. 1974), *aff'd in part, Doran v. Salem Inn, supra*, 95 S.Ct. at 2561. Even Public Law 8-14 itself recognizes the existence of "legitimate entertainment" alongside the activities it seeks to criminalize. *See* § 1.

Guinther v. Wilkinson, 679 F. Supp. 1066 (D. Utah 1988) considered an anti-prostitution statute which prohibited the touching of any person's "clothed or unclothed genitals, pubic area, buttocks, anus or [...] breast, whether alone or between members of the same or opposite sex." In that case, the court found the law to be unconstitutionally overbroad, as it could apply to various protected forms of dance. Here, Section 2(e)'s prohibition on "any touching of any person, by oneself or another" sweeps even more broadly than the statute in *Guinther* and clearly encompasses many forms of performing art.

The Government relies on the clause "for the purpose of sexual arousal or gratification, aggression, degradation or other similar purpose" to save the statute from facial invalidity. Courts have found otherwise overbroad statutes to be valid by virtue of clauses criminalizing only conduct done for a non-protected purpose. *See, e.g., Osborne v. Ohio*, 110 S.Ct. 1691, 1698 (1990) (statute prohibiting nude photos of minors not

overbroad where it contained numerous exceptions for "proper purposes"); *People v. Freeman*, 250 Cal. Rptr. 598, 600 (Cal. 1988), *cert. den.*, 109 S.Ct. 1133 (prostitution statute not overbroad where defined as conduct "for the purpose of sexual arousal or gratification of the customer or of the prostitute"); *State v. Carter*, 570 P.2d 1218, 1220 (Wash. 1977).

However, where such a "purpose" clause is not carefully drawn to keep the statute from infringing the First Amendment, courts have found the statute overbroad. *See Johnson v. Carson*, 569 F. Supp. 974, 976 n.2 (M.D. Fla. 1983) (statute prohibiting loitering "manifesting purpose of prostitution" overbroad, citing various state authorities); *Wyche v. State*, 53 Crim. L. Rep. (BNA) 1058 (Fla. 1993) (same); *Coleman v. Richmond*, 42 Crim. L. Rep. (BNA) 2335 (Va. App. Ct. 1988).

The "purpose" clause of §2(e) is not drawn narrowly enough to save the statute. Like the California statute in *Freeman* it mentions the purpose of "sexual arousal of gratification," but unlike the statute in *Freeman* it does not say <u>whose</u> gratification or arousal must be intended. Thus, a non-obscene performance intended to arouse as well as edify its <u>audience</u> would come within the ambit of the statute. The holdings of *Doran* and *Barnes* clearly forbid this. Furthermore, the statute includes conduct for the purpose of "aggression, degradation or other similar purpose." Such a provision might cause a theater company to refrain from performing a play containing a thought-provoking depiction of sexual abuse. This "chilling effect" on free speech is exactly what the First Amendment forbids, and precisely what the overbreadth doctrine is designed to prevent. Furthermore, as

applied to dance, § 2(e) sweeps so broadly as possibly to prohibit the traditional and customary dances performed in the Commonwealth by such groups as the Palauan Association, infringing upon local culture. The Court therefore finds that § 2(e) of Public Law 8-14 is unconstitutionally overbroad. Likewise, insofar as § 2(e)'s definition of "sexual services" is incorporated in § 2(c), that section is overbroad as well.

b. "Advancing Prostitution." Defendant also challenges § 5(a)'s definition of "advancing prostitution" on First Amendment grounds, arguing that this provision could criminalize the hiring of actors or dancers for non-obscene performances. *See Freeman, supra*, 250 Cal. Rptr. at 600. Insofar as the statute's definition of "prostitution" depends on the constitutionally-infirm "sexual services," the Court agrees.

The Court however rejects Defendant's second contention, that the act of "procuring or soliciting" prostitution in its "core" sense of sexual intercourse for hire constitutes protected speech. *Wood v. U.S.*, 498 A.2d 1140, 1142 (D.C. App. 1985) specifically addressed Defendant's argument here, that the constitutional protection afforded "commercial speech" extends to solicitations of prostitution. The *Wood* court found no First Amendment violation, noting that for commercial speech to receive constitutional protection it must concern lawful activity. *Id.* at 1143, *citing Central Hudson Gas & Elec. Corp. v. Public Service Commission*, 100 S.Ct. 2343 (1980). Prostitution, by the terms of Public Law 8-14, is an illegal activity. Therefore, a ban on soliciting prostitution presents no constitutional difficulty, so long as the ban on prostitution itself survives scrutiny.

B. VAGUENESS

1. Facial Vagueness.

A statute is unconstitutionally vague, violating a defendant's right to due process of law, if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, [...] or is so indefinite that it encourages arbitrary and erratic arrests and convictions." *Colautti v. Franklin*, 99 S.Ct. 675, 683 (1979), *citing United States v. Harriss*, 74 S.Ct. 808, 812 (1954) and *Papachristou v. Jacksonville*, 92 S.Ct. 839, 843 (1972).

Vagueness and overbreadth are logically related doctrines. *Kolender, supra*, 103 S.Ct. at 1859, n.8. However, they differ in a key respect. While anyone accused of violating a criminal statute may complain of its overbreadth, vagueness can only be asserted by one who can claim that the law did not clearly prohibit his or her actual behavior. As the U.S. Supreme Court stated in *Flipside, supra*, 102 S.Ct. at 1191, "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."

Before analyzing the specifics of the statute, the Court notes that the Governor and the Attorney General perceived several ambiguities in the statute prior to its passage, and that a bill was passed by House of Representatives on August 17, 1993 for the explicit purpose of correcting these perceived ambiguities. *See Defendant's Exhibits D-F*. However, none of these documents suggests that ambiguities in Public Law 8-14 rise to the level of unconstitutional denial of due process. Indeed, the Attorney General's opinion letter specifies that it found "no

constitutional or statutory basis to recommend against it being signed into law." *Exh. D* at 4. *Accord Flipside, supra*, 102 S.Ct. at 1195 ("ambiguities" in statute do not render it unconstitutional where it is sufficiently clear to apply unambiguously to Defendant's conduct).

Here, Defendant's vagueness challenges to Public Law 8-14 can be grouped into three categories: 1) those attacking the definitions of prostitution itself, i.e., "sexual contact," "sexual intercourse" and "sexual services"; 2) those attacking the definitions of crimes related to prostitution, i.e., "sexual exploitation," "advancing prostitution" and "profiting from prostitution"; and 3) those attacking the penalties applicable to these crimes.

a. <u>"Sexual Contact", "Sexual Intercourse," and "Sexual Services</u>." As to "sexual contact," it is true that "any touching of the sexual or intimate parts of a person done for the purpose of gratifying the sexual desire of either party" could apply to touching the toes, ears, or any other body part that a particular customer happened to find erotic. It is also true, as Defendant asserts, that the definition of "sexual Intercourse" in § 2(d)(1) lacks the "medical diagnosis" exception of § 2(d)(2). Finally, it is true that the term "for pay" in § 3 and elsewhere could include in-kind services, drugs, or any other form of consideration.

However, the charge against Defendant Liarta is that she offered to "make love" to Agent Norita in exchange for $250. If that term is interpreted as the Government urges (an issue discussed in detail below in Part B(4)), she is not alleged to have offered to massage his toes. Nor is she alleged to have

offered to diagnose his medical condition. Nor is she alleged to have agreed to accept any payment other than money. The Court finds that, a person of ordinary intelligence, upon reading §§ 2(b) and (d) of the statute, would understand that offering to have sex with a person in exchange for a fee of $250 violates the law. In this regard, the clause "for the purpose of gratifying the sexual desire of either party" (emphasis added) greatly clarifies § 2(b), and § 2(d) is quite explicit in its prohibitions. These provisions, therefore, are not unconstitutionally vague on these facts.

This analysis does not change when any of the other joined defendants are placed in Defendant Liarta's position. Each allegedly offered to perform a "core" sex act for cash. Defendants Villamor and Rubidizo are alleged to have made offers similar to Ms. Liarta's. And by the allegations against the "Executive Massage" defendants, there appeared to be a clear distinction between regular (presumably legitimate) massage, priced at $50, and "special massage," costing considerably more and involving a sex act. Those defendants who allegedly offered "body to body" massage required the use of a condom, clearly indicating the intention to stimulate the customer to orgasm. No one of ordinary intelligence could doubt from the terms of § 2(b) and (d) that, whatever ambiguities exist around their edges, these definitions cover the conduct these defendants are accused of. *See Commonwealth v. Cohen*, 538 A.2d 582 (Pa. Super. Ct. 1988), *alloc. den.*, 549 A.2d 914, *app. dism.*, 488 U.S. 1035 (rejecting

vagueness challenge to prostitution statute brought by "massage parlor" workers).[3/]

Section 2(e), however, is unconstitutionally vague. The language "any touching of any person, by oneself or another, for the purpose of sexual arousal or gratification, aggression, degradation or other similar purpose" sweeps so broadly that it confers unfettered discretion on law enforcement officers and gives citizens almost no guidance as to what is prohibited. *See Guinther*, 679 F. Supp. at 1071 ("[i]f a law does not provide standards against which a person's conduct may be measured it is unconstitutionally vague and incapable of any application").

b. "Sexual Exploitation," "Advancing Prostitution," and "Profiting from Prostitution." As to §§ 2(c) and 5, neither Defendant Liarta, nor any of the joined defendants, have been accused of either "sexual exploitation" (which by the terms of § 7(b) is a separately punishable offense aside from prostitution, promoting prostitution or permitting prostitution) or of "advancing" or "profiting from" prostitution. Since these provisions have not been applied to her, Ms. Liarta has no standing to attack them on vagueness grounds. Accordingly, the Court makes no determination of the constitutionality of these provisions here.[4/]

[3/] In reaching this conclusion, the Court expresses no opinion as to whether another criminal defendant accused of different conduct might successfully challenge these same sections of Public Law 8-14 on vagueness grounds. The Court holds only that the overbreadth doctrine does not permit these defendants to challenge ambiguities that do not pertain to their alleged conduct.

[4/] However, this provision is properly before the Court in the parallel motion pending in *CNMI v. Dong*, Crim. Case. No. 93-121, and will be considered in that context.

c. Penalties. Defendant also challenges the penalties leviable under § 7(d) of the statute, arguing that it provides no guidance as to which "violators" stand to lose their business licenses or their Nonresident Worker Certificates. The vagueness doctrine applies with the same force to the penalty provisions of a law as it does to provisions delineating the offense. *See People v. Superior Court of Alameda County (Gamble)*, 647 P.2d 76, 79 (Cal. 1982).

Here, the provisions are applicable to all "violators." Defendant Liarta is clearly accused of being a "violator"; thus she has standing to assert the vagueness of these provisions. The Attorney General's opinion letter to Governor Guerrero assumed that these penalties are intended to be levied against "persons who operate business establishments involved in prostitution, such as night clubs and restaurants." *See Defendant's Exhibit D*, at 3. However, by their terms they could apply to customers, prostitutes, pimps, business owners, or anyone else found guilty of an offense under the statute. The penalties in § 7(d) are severe, entailing the loss of the ability to live or operate a business within the Commonwealth. The fact that these penalties are applicable to a single act of prostitution otherwise punishable as a misdemeanor, without any guidelines as to how or when they may be levied, renders them vulnerable to erratic and discriminatory application. This is forbidden under the vagueness doctrine. *Papachristou, supra*, 92 S.Ct. at 843. Section 7(d) is therefore unconstitutional.

4. Vagueness as Applied to Defendant Liarta.

Defendant Liarta also claims that Public Law 8-14 is unconstitutionally vague as specifically applied to the allegations in Agent Norita's account of his conversation with "Bernadette" at the Double Shot Night Club on July 17, 1993. To this end, much is made of the multiple meanings of the term "make love," allegedly uttered by "Bernadette." *See Defendant's Exhibit K.* However, according to Agent Norita, Ms. Liarta spoke this phrase along with the statements "we can sleep together," "we will be together and we can do anything we want to do," and "it cannot be tonight because she [sic] has her period." *Id.* In this context, the phrase "we would make love" is fairly interpretable as an offer to have sexual intercourse even by the most restrictive of the various definitions in § 2. The fact that "make love" is on the polite end of the linguistic register does not deprive it of this meaning. Thus, Public Law 8-14 is not unconstitutionally vague as applied to Defendant Liarta.[5/]

C. EQUAL PROTECTION

The remainder of Defendant's challenges to Public Law 8-14 rest on the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Article I, § 6 of the Commonwealth Constitution. Under both provisions, governmental classifications based on race or ancestry must be narrowly tailored and necessary to protect a compelling state interest. *Hoffman v. U.S.*,, 767

[5/] None of the other joined defendants asserted any challenge to Public Law 8-14 as applied to their specific alleged conduct. Therefore, the Court will refrain from discussing those cases here.

F.2d 1431, 1435 (9th Cir. 1985); *Analysis of the Constitution, supra*, at 22. Classifications based on sex are likewise subject to heightened judicial scrutiny. *Id.*; *Craig v. Boren*, 97 S.Ct. 451 (1976).[6/]

1. Corroboration Requirement of § 8.

Section 8 of Public Law 8-14 provides:

> A person shall not be convicted of permitting or promoting prostitution, in any degree, or of attempting to commit any such offense, solely upon the uncorroborated testimony of a person whose prostitution activity he/she is alleged to have advanced or attempted to advance, or from whose prostitution activity he/she is alleged to have profited or attempted to profit.

Defendant points out that she is not afforded any such corroboration requirement. She further points to the legislative history of § 8, in which the Senate Committee on Health, Education and Welfare reported that the corroboration requirement was added to the law in order to "protect an innocent landowner from frivolous or malicious allegations of having permitted prostitution on his property." *Standing Committee Report No. 8-32* (Dec. 1, 1992) at 4. According to Defendant, this intention to protect landowners constitutes race discrimination by virtue of the fact that land ownership is limited to persons of Northern Marianas descent. C.N.M.I. CONST., art. XII.

Statutes need not expressly refer to race in order to be racially discriminatory. *Yick Wo v. Hopkins*, 6 S.Ct. 1064 (1880); *Asian American Business Group v. City of Pomona*, 716 F. Supp.

[6/] While under *Boren*, gender classifications need only survive "intermediate scrutiny" -- i.e., demonstration to the court that the classification is substantially related to an important government interest -- under Art. I of the Commonwealth Constitution, gender classifications are subjected to the same "strict scrutiny" test used for racial classifications. *Analysis, supra*, at 22.

1328, 1332 (C.D. Cal. 1989). Even a law which is neutral on its face and which serves some "legitimate" purpose is invalidated where there is proof that racial discrimination was the primary -- or "but for" -- motivation for the law's enactment. *Hunter v. Underwood*, 105 S.Ct. 1916, 1922 (1985); *Hernandez v. Woodard*, 714 F. Supp. 963, 970 (N.D. Ill. 1989). Moreover, where criminal statutes have treated defendants dissimilarly, such as on the basis of sex, courts have scrutinized the law to ensure that the classification is substantially related to an important state interest. *State v. Gurganus*, 250 S.E. 2d 668 (NC App. 1979) (heightened scrutiny applied to law giving longer sentences for assaults by males against females than for assaults between males).

Here, the legislature has expressly declared an intent to afford a procedural safeguard to landowner defendants in a class of criminal prosecutions, while denying it to other defendants whom it believes to be non-landowners.[7/] Moreover, while the history of enforcement of Public Law 8-14 is still too scanty to draw any conclusions as to the racial impact of § 8, the provision is likely to benefit landowners (among others), while non-landowners are more likely to be prosecuted for prostitution itself, without the protections of § 8.

There are two possible routes to escape the conclusion that § 8 constitutes an invalid, racial classification. The first

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[7/] It is true that, in general, inferring legislative intent is a hazardous business. But this statement comes in a report of the Senate committee which added § 8 to the bill and is as official a statement of legislative purpose as could be found. Thus, the Court finds Defendant's Exhibit C to be conclusive evidence that this concern for landowners was the motivating force behind the enactment of § 8.

would be to argue that in the CNMI, Article XII authorizes racial classifications based on land ownership, regardless of the context. It is true that the provisions of Article XII limiting land ownership to persons of Northern Marianas descent have been held to be outside the protections of the Fourteenth Amendment. *Wabol v. Villacrusis,* 958 F.2d 1450, 1462 (9th Cir. 1990). However, in so holding, the *Wabol* court performed a careful analysis to preserve the applicability of rights deemed "fundamental" in the sense of being "the basis of all free government." *Id.*, 958 F.2d at 1460. The Commonwealth Supreme Court endorsed this analysis in *Ferreira v. Borja*, 2 N.M.I. 514, 533 (1992), *rev'd on other grounds*, 1 F.3d 960 (9th Cir. 1993). There can be no doubt that the Fourteenth Amendment's prohibition of race discrimination is among these "fundamental" rights. *See, e.g.*, C.N.M.I. CONST., art, I, § 6; *Analysis, supra*, at 22; *In re Blankenship*, 3 N.M.I. 209, 219 (1992); *Temengil v. Trust Territory of the Pacific Islands*, 2 C.R. 598, 618 (D.N.M.I. 1986).

Furthermore, while protecting land ownership in the Commonwealth is an important, if not compelling, state interest, that interest has little logical connection to a criminal prohibition on promoting or permitting prostitution. The Government has advanced no scenario whereby a defendant accused of permitting prostitution stands to lose his or her land, and the Court can think of none. And there is no legitimate reason for giving landowners special protections from "frivolous or malicious allegations of having permitted prostitution," while denying those accused of prostitution itself this safeguard against "frivolous or malicious allegations." Mere invocation of "land ownership,"

without more, cannot justify granting procedural protections to criminal defendants of Northern Marianas descent when these are not available to other defendants.

The second possible argument in favor of § 8 is that it does not protect landowners only, but protects anyone accused of permitting or promoting prostitution. This group will presumably include lessees of land, business owners and managers who are not of Northern Marianas descent. The fact that § 8 sweeps beyond strict racial categories could be said to save it, regardless of the intent of those who passed it. *See Palmer v. Thompson*, 91 S.Ct. 1940 (1971) (where city was alleged to have closed pools to avoid desegregation, no equal protection violation occurred where closing had racially neutral effect).

However, *Palmer* did not involve clear evidence of legislative intent, such as is present here. Moreover, *Palmer* has been, if not overruled, severely limited by *Hunter, supra*, 105 S.Ct. at 1922, which found that, where the intent of the legislature is clearly discriminatory, the fact more than one race is affected by the law does not save it. *See also Hernandez, supra*, 714 F. Supp. at 970. Finally, as noted above, § 8 of Public Law 8-14 is certainly likely to have a disparate impact based on race. Therefore, the fact that persons not of Northern Marianas descent will also benefit from § 8 does not save it from constitutional attack.

In sum, § 8 of Public Law 8-14 is unconstitutional in that it discriminates on the basis of race without being necessary to protect a compelling state interest.

2. Selective Prosecution.

Defendant also charges that the Government has discriminated on the basis of national origin and gender in bringing prosecutions under Public Law 8-14. Selective prosecution claims are judged on "ordinary equal protection standards." *Wayte v. U.S.*, 105 S.Ct. 1524, 1531 (1985). In order to succeed on a claim of selective prosecution, Defendant must demonstrate two facts. First, she must provide evidence that persons similarly situated have not been prosecuted. Second, she must show that the decision to prosecute was made on the basis of an unjustifiable standard such as race, or that the prosecution was intended to prevent her exercise of a fundamental right. *U.S. v. Aguilar*, 871 F.2d 1436, 1474 (9th Cir. 1989), *cert. den.*, 111 S.Ct. 751 (1991); *U.S. v. Schoolcraft*, 879 F.2d 64, 68 (3d Cir. 1989); *Government of Virgin Islands v. Harrigan*, 791 F.2d 34, 36 (3d Cir. 1986). Defendant bears the burden of proof for both of these factors. *Schoolcraft, supra*.

In support of her claim here, Defendant has submitted a list of all such prosecutions so far, showing the gender and nationality of each defendant. *See Defendant's Exhibit L.* Of these sixteen defendants, all but one are female, and none are persons of Northern Marianas descent or Caucasian.[8/] In rebuttal, the Government presented at the December 20, 1993 hearing the testimony of Special Agent Ed Manalili, the agent in charge of the Department of Public Safety's prostitution investigation, which culminated in the arrests and prosecutions at issue here. Agent

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[8/] Eleven defendants are Filipina, three are Korean, and two are Chinese.

Manalili testified that, while the Department of Public Safety had information that local women work as prostitutes in the CNMI, they cater exclusively to Japanese clients. According to the Agent, the Department has no officers who are Japanese nationals and could pose as customers to investigate these suspects. Furthermore, local women in general know who police officers are, further complicating investigatory efforts against locals. Similarly, Agent Manalili stated that while police information indicated the existence of Caucasian women operating as prostitutes, these women had all left Saipan by the time police attempted to obtain solicitations from them. As for male customers, Agent Manalili testified that an attempt was made to arrest customers when the police made the arrests on August 12, 1993, but no customers were present at that time. Moreover, the Department lacks the female personnel to act as "decoys" to apprehend customers in a more direct manner. Finally, at oral argument the Government claimed to have targeted its enforcement efforts on the profit-making upper tiers of the prostitution "pyramid," i.e., prostitutes and promoters instead of customers, as the most effective way to begin enforcing the new statute.

Defendant's evidence is suggestive of unbalanced enforcement trends that should not be condoned in the long term. However, it fails to satisfy the two-part test described above for a selective prosecution claim. As to race discrimination, Agent Manalili's testimony verifies that women of Northern Marianas descent and Caucasian women are suspected of working as prostitutes in the Commonwealth. But the officer also supplied legitimate, non-discriminatory reasons why these suspects have not been arrested

or prosecuted: these women cater to Japanese customers, and local women tend to know who the police are.

As to gender discrimination, the "persons similarly situated" part of the test is met by sheer inference, since every act of heterosexual prostitution requires a person of each gender. However, legitimate reasons again explain the emphasis on women. First, the Department of Public Safety at this stage lacks personnel capable of posing as female prostitutes. Second, the Government initially focused its enforcement efforts on those who profit from prostitution rather than those who provide its market. *People v. Sup. Ct. of Alameda County*, 562 P.2d 1315, 1320 (Cal. 1977).

None of these reasons for the Government's focus on women could justify the lopsided enforcement record presented here if it were to persist over the long term. *See Alameda County, supra,* 562 P.2d at 1325 (Tobriner, J., dissenting). However, enforcement of the ban on prostitution is yet in its initial stage, and the Government should be given a chance to develop a more comprehensive enforcement program in a step-by-step fashion. Thus, the Court rejects Defendant's selective prosecution claim.

D. SEVERABILITY

Finally, Defendant urges that if any part of Public Law 8-14 be found unconstitutional, the entire law be stricken. The Government points to § 10 as evidence that the Legislature intended any unconstitutional clauses to be severed, leaving the remainder intact. Section 10 provides that "[i]f any Section of this Act should be declared invalid by a court of competent

jurisdiction, the judicial determination shall not affect the validity of the Act or any part thereof, other than the particular part declared invalid or unenforceable."

Severability of an unconstitutional provision from the remainder of a statute is governed by legislative intent. In *Buckley v. Valeo*, 96 S.Ct. 612, 677 (1976), the U.S. Supreme Court stated:

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of what is not, the invalid part may be dropped if what is left is fully operative as law.

Id. (citation omitted); *see also Gubensio-Ortiz v. Kanahele*, 857 F.2d 1245, 1267 (9th Cir. 1988) (denying severance where it appeared that Congress intended to have sentencing reforms either operate as a package or not at all). In *Gubensio-Ortiz*, the court treated the absence of a severability clause as evidence (though not conclusive) of Congressional intent to let the legislation stand or fall as a whole. 857 F.2d at 1267.

Here, the presence of a severability clause suggests the opposite inference, that the Legislature did intend that parts of Public Law 8-14 could be stricken without invalidating the whole. Defendant's Exhibit B sets forth much of the public comment on Public Law 8-14 at hearings prior to its passage, showing that the Legislature was responding to widespread anti-prostitution sentiment among the electorate when it passed the statute. As the House Committee on Health, Education and Welfare stated in its report, "the public demands that the criminal law go on record against prostitution." *Defendant's Exhibit B*, at 8. It is true that the statute as passed attempts to sweep more broadly than just "core" prostitution offenses, but it is also evident that

many in both the Legislature and the Executive considered the law a first step. Passage by the House of H.B. 8-288 on July 17, 1993 supports this view. *See Defendant's Exhibit F.* Based on this evidence, the Court believes that the Legislature intended for the law to remain in force so long as enough of it remained to achieve its basic purpose of "go[ing] on record against prostitution."

In ruling on this motion, the Court has found sections 2(e), 7(d) and 8 to be unconstitutional. In addition, sections 2(a), 2(c), 3 and 7(b), while not themselves unconstitutional, contain reference to sections which <u>are</u> unconstitutional, such as the vague and overbroad "sexual services." Nevertheless, enough of § 2 of the statute remains to define a "core" offense of prostitution. The Court has already determined that the allegations against Defendant here fall within that "core." Moreover, enough of § 7 remains to establish parameters of punishment for offenses within that "core." In sum, the Court believes that by striking any references to invalid sections,[9/] the remaining parts of Public Law 8-14 will function to achieve the Legislature's basic purpose until a more comprehensive reform can be drafted and enacted.

[9/] The only exception to this ruling is Section 2(c), defining "sexual exploitation," which depends so completely on the term "sexual services" that it cannot stand without it; therefore, the provision must be stricken.

IV. CONCLUSION

For the foregoing reasons, the Court ORDERS:

1. Section 2(e) of Public Law 8-14 shall be stricken, and any reference to "sexual services" in other sections shall likewise be stricken.

2. Section 2(c) shall be stricken.

3. Section 7(b), line 20, beginning with the phrase "or who knowingly engages," through line 22, ending with the phrase "performing sexual services for pay," shall be stricken.

4. Section 7(d) shall be stricken.

5. Section 8 shall be stricken.

6. The remaining provisions of Public Law 8-14 shall remain in force.

7. Defendants' motion to dismiss the informations against them is DENIED.

So ORDERED this 20TH day of January, 1994.

Marty WK Taylor

MARTY W.K. TAYLOR, Associate Judge