



# issues background

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## Brothel regulation in NSW

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## 1. INTRODUCTION

The question of how to effectively regulate brothels has led to considerable divergence in regulatory models used in both Australian and overseas jurisdictions. The most decriminalised of all Australian jurisdictions, NSW relies primarily on planning laws to regulate brothels.

In December 2010, the NSW Coalition's Shadow Minister for Intergovernmental Relations [released](#) an election plan for a brothel licensing regime. This regime was to involve "stringent vetting of brothel licence applicants to clamp down on the use of brothels by organised crime groups and unsuitable persons". A licensing scheme was not introduced during the Coalition Government's first term in office.

On 25 June 2015, Minister for Innovation and Better Regulation Victor Dominello [announced](#) a parliamentary inquiry into brothel regulation in NSW. The Legislative Assembly's [Select Committee on the Regulation of Brothels](#), which will report by 12 November 2015, is to examine and report on:

- a) appropriate local and State Government regulatory and compliance functions for brothels;
- b) the demarcation in local and State Government roles and responsibilities; and
- c) possible reform options that address the social, health and planning challenges associated with legal and illegal brothels.

This backgrounder updates the 2011 NSW Parliamentary Research Service e-brief [Regulation of brothels: an update](#) with recent sources as well as outlining some international regulatory models.

The backgrounder provides a collection of sources on brothel regulation, including research reports, journal articles, and other commentary. The sources listed represent a small selection from a substantial amount of available literature. Links are provided to the full text of sources throughout the paper.

## 2. NSW SEX WORK DEMOGRAPHICS

The exact number of sex workers in NSW is difficult to verify. According to the 2012 Kirby Institute report, [The Sex Industry in New South Wales: a report to the NSW Ministry of Health](#), this is due to 'the covert and transient nature of employment in the industry' (p 16).

The Kirby Institute report referred to estimates showing between 1,500-10,000 female sex workers working across NSW. The vast majority of sex workers (66.7%) were from Asian or other non-English speaking countries, while the median time sex workers spend in the industry was between 1.6 and 2 years.

The proportion of sex workers involved in street work, escort work and work from private homes are as follows (pp 16, 20):

... up to 40% of all sex workers (including most male sex workers) in NSW work privately, approximately 5% are street-based and an unknown number (<10%) work

exclusively as escorts. ... There may be up to 120 street-based sex workers on any one night around NSW, and over 300 in the course of the year

With regard to brothels, at the time of the report there were (p 16):

- At least 101 brothels operating within 20km of the Sydney CBD; and
- Approximately 1,000 female sex workers employed in these brothels in any one week, and 3,174 over any 12 month period.

### 3. OVERVIEW OF BROTHEL REGULATION IN AUSTRALIA

The 2012 NSW Better Regulation Office's [Regulation of Brothels in NSW: Issues Paper](#) summarised sex industry laws in Australian States and Territories (Appendix C). This summary is reproduced in Table 1. State and Territory laws have remained largely unchanged since the 2012 Issues Paper, despite attempts to decriminalise sex work in States such as [South Australia](#).

Table 1: Legal models adopted in Australian jurisdictions	
State/Territory	Legal Model
<i>New South Wales</i>	Sex services premises are legal and only require council planning approval. Escorts are unregulated. Street soliciting is allowed provided it is away from dwellings, schools, churches and hospitals. Living off the earnings of a sex worker is illegal (owners and operators of sex services premises are exempted). Advertising is prohibited.
<i>Victoria</i>	Brothels and escort agencies with more than two workers must have a licence from the Business Licensing Authority (BLA) plus council planning approval. Restrictions on location and size of brothels (up to six rooms; more if established prior to 1996). Small (1 or 2 sex workers) brothels are exempt from holding a licence but must register with the BLA and hold a local council planning permit. Advertising is legal with the licence number given by the BLA. Operating an unlicensed brothel and soliciting in a public place are illegal.
<i>Queensland</i>	Brothels must have a licence from the Prostitution Licensing Authority (PLA) and local council planning approval. Licences and planning approvals need to be renewed annually. Restrictions on location and size of brothels (a maximum of five rooms and no more than five sex workers on the premises at one time). Private sex workers are unregulated but must work alone and must use condoms. Escorts are illegal as is operating an unlicensed brothel. Soliciting in a public place and advertising are illegal.
<i>ACT</i>	Brothels are permitted in prescribed (industrial) locations with council planning approval. Escort agencies are legal. Brothels and escorts must register but no probity checks are conducted as part of registration. Private sex workers must also register. Soliciting in public is illegal.
<i>Western Australia</i>	Brothel keeping with more than one sex worker is illegal. Escort agencies are not illegal. Soliciting in a public place is illegal. The Government introduced a Bill to prohibit all forms of sex work from residential areas and limit the number of permitted brothels to a small number of areas. A strict licensing scheme was proposed for brothel operators and managers and self-employed sex workers. The Bill did not pass into law.
<i>South Australia</i>	Brothel keeping is illegal and some escort work is illegal. Soliciting in a public place is illegal.
<i>Tasmania</i>	Brothel keeping is illegal. Escort work is probably legal. Soliciting in public is illegal.
<i>Northern Territory</i>	Brothel keeping and soliciting in a public place are illegal. Outcall and escort agencies are legal with a licence from the Escort Agency Licensing Board. There are no specific planning requirements.

As shown above, there is no uniform legal approach to sex work in Australia. The various legal models used reflect a spectrum of underlying perspectives, ranging from the view that sex work inherently exploits and harms sex workers, to the view that sex work should be viewed as a legitimate form of employment. Criminalisation models, such as those in South Australia and Tasmania, reflect the former perspective, while decriminalisation models in NSW and Victoria reflect the latter.

However, caution is required when describing the approach of a particular jurisdiction. This is because the sex work industry is comprised of discrete components that are treated differently within each jurisdiction (see Table 2).

<b>Table 2: Legal status of the various aspects of sex work across Australia</b>			
<b>State/Territory</b>	<b>Brothels</b>	<b>Escorts</b>	<b>Streets/public places</b>
<i>New South Wales</i>	Legal: subject to council planning approval	Unregulated	Legal if away from dwellings, schools, churches and hospitals
<i>Victoria</i>	Legal: subject to licence and council planning approval <sup>(i)</sup>	Legal: subject to licence <sup>(i)</sup>	Illegal
<i>Queensland</i>	Legal: subject to licence and planning approval <sup>(ii)</sup>	Illegal	Illegal
<i>ACT</i>	Legal: subject to registration and council planning approval <sup>(iii)</sup>	Legal: subject to registration	Illegal
<i>Western Australia</i>	Illegal <sup>(iv)</sup>	Legal	Illegal
<i>South Australia</i>	Illegal	Illegal (with some exceptions)	Illegal
<i>Tasmania</i>	Illegal	Illegal (“probably”)	Illegal
<i>Northern Territory</i>	Illegal	Legal: subject to licence	Illegal

- (i) Small (1 or 2 sex worker) brothels and escort agencies are exempt from holding a licence but must register with the Business Licensing Authority of Victoria and, in the case of brothels, have a local council planning permit. See: Scarlet Alliance, [Sex Industry Laws — Victoria](#).
- (ii) Private sole operators are unregulated although general conditions apply.
- (iii) Private sex workers must also register.
- (iv) Refers to a brothel with more than 1 sex worker.

## 4. BROTHEL REGULATION IN NSW

A detailed overview of the regulation of the NSW sex industry is available in the 2012 NSW Better Regulation Office issues paper, [Regulation of Brothels in NSW](#).

### HISTORICAL OVERVIEW

The following sources provide an overview of the history of NSW brothel regulation:

B Donovan, C Harcourt, S Egger, L Watchirs Smith, K Schneider, JM Kaldor, MY Chen, CK Fairley, SN Tabrizi, [The Sex Industry in New South Wales: a report to the NSW Ministry of Health](#), Kirby Institute, University of NSW, 2012.

NSW Better Regulation Office, [Regulation of Brothels in NSW: Issues Paper](#), NSW Government, September 2012.

L Roth, [Regulation of brothels: an update](#), NSW Parliamentary Research Service, e-brief 15/2011.

S Smith, [\*The Control of Prostitution: An Update\*](#), NSW Parliamentary Research Service, Briefing Paper 14/03.

S Smith, [\*The Regulation of Prostitution: A Review of Recent Developments\*](#), NSW Parliamentary Research Service, Briefing Paper 21/99.

## THE NSW REGULATORY SYSTEM

NSW is the most decriminalised of all Australian jurisdictions and imposes the least controls on the sex industry. Although a range of criminal laws remain relevant to brothel operations, regulation primarily occurs through:

- Development applications under the [\*Environmental Planning and Assessment Act 1979\*](#); or
- Brothel closure orders, issued by the Land and Environment Court under the [\*Environmental Planning and Assessment Act 1979\*](#) or the [\*Restricted Premises Act 1943\*](#).

### Development applications for brothels

The [\*NSW Better Regulation Office\*](#) (p 15) explained that a local council or authority can approve or reject a development application for a brothel under the [\*Environmental Planning and Assessment Act 1979\*](#) (EP&A Act). That is, under the EP&A Act, local councils are the relevant “consent authority” for brothels. As such, councils can use their powers under the Act to accept or reject development applications for brothels, and so determine the number and location of brothels in their local government area.

[\*Section 79C\*](#) sets out matters to be considered when determining a development application, including Local Environment Control Plans (LEP)<sup>1</sup> and Development Control Plans (DECP). Brothels can only operate legally with a Development Consent and then only if they operate within the terms of that Development Consent. If a Local Council rejects a Development Application the applicant may appeal to the Land and Environment Court under [\*s 97\*](#) of the EP&A Act.

### Brothel closure orders

The [\*NSW Better Regulation Office\*](#) (p 15) and the [\*Kirby Institute\*](#) have both commented that if a brothel is not operating lawfully, a number of measures are available to local councils under the EP&A Act. These measures include applying to the Land and Environment Court for:

- Orders to comply with any Development Consent;
- Brothel closure orders; and
- Utilities orders (which allow water, gas and electricity supply to the premises to be cut for up to three months).

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<sup>1</sup> In 2009 the NSW Department of Planning issued new directives under the model provisions for the Standard Instrument Principal Local Environmental Plan that requires Local Councils to permit brothels “somewhere in their local government area”. Most Local Councils appear to have prohibited brothels from operating in residential areas: See [\*The Kirby Institute\*](#), 2012, p 36.

Under sections [125](#) and [126](#) of the EP&A Act, failure to comply with these orders or to pay any related penalty notices constitutes an offence that can result in a fine of up to 1,000 penalty units (currently \$1.1 million).

Even where brothels comply with the provisions of the EP&A Act, local councils can utilise the [Restricted Premises Act 1943](#) to close down a brothel. The 2011 e-brief [Regulation of brothels: an update](#) states:

Section 17 of the *Restricted Premises Act 1943* allows the Land and Environment Court, on application by a local council, to make an order that an owner or occupier of premises that are a brothel is not to use or allow the use of the premises as a brothel. The Court can also make an order suspending or varying, for up to 6 months, the operation of any development consent relating to the use of the premises as a brothel.

The local council must not apply for such an order unless it is satisfied that it has received sufficient complaints about the brothel to warrant the making of the application. However, one complaint may be sufficient to warrant the making of an application in the case of a brothel used or likely to be used by two or more prostitutes. In making an order, the Court is to take into account a number of matters specified in the Act: e.g. whether the operation of the brothel interferes with the amenity of the neighbourhood.

For the purposes of the Act, brothel is defined to mean premises:

- (a) habitually used for the purposes of prostitution, or
- (b) that have been used for the purposes of prostitution and are likely to be used again for that purpose, or
- (c) that have been expressly or implicitly [advertised or represented] as being used for the purposes of prostitution, and that are likely to be used for the purposes of prostitution.

Premises may constitute a brothel even though used by only one prostitute for the purposes of prostitution.

### **Criminal offences**

While brothels are predominately regulated using State planning laws, a number of criminal offences are also applicable to the wider sex work industry:

Under the [Summary Offences Act 1988](#), it is an offence to:

- Live wholly or in part on the earnings of prostitution of another person (s 15(1), unless the earnings are derived from working, managing or owning a brothel (s 15(3));
- Use a massage parlour to solicit prostitution (s 16), or to allow the premises to be used for prostitution (s 17);
- Advertise that any premises or person is available for the purposes of prostitution (s 18).

Under the [Crimes Act 1900](#), it is an offence to:

- Promote or engage in acts of child prostitution (s 91D); and
- Cause sexual servitude (s 80D) or conduct a business involving sexual servitude (s 80E).

Additionally, Commonwealth laws that prohibit sexual servitude cases and trafficking of persons apply to NSW sex work, including sections 268.15-16 and 271.2 of the [Criminal Code Act 1995](#).

### ISSUES WITH DECRIMINALISATION

The [NSW Better Regulation Office](#) noted that the NSW model of decriminalisation has generally been seen to be effective from the perspectives of public health, sex worker welfare, and crime reduction (pp 36-40). Writing in 2012, Penny Crofts [argued](#) that (p 39):

... since the decriminalisation of the industry in 1995 there is no evidentiary support that brothels are criminogenic. Historically, when brothels were regarded as inherently disorderly and not able to operate lawfully, there was reason to associate these types of businesses with organised crime. However, with decriminalisation, these historic conditions no longer exist. There is nothing inherently criminogenic about premises used for sex services.

Sex worker advocacy group Scarlet Alliance is also supportive of the decriminalisation model, listing the following benefits of the regime on its [website](#):

- Decriminalisation is supported by the United Nations, and NSW is world renowned for its best-practice model. A move away from decriminalisation is to step back 17 years in sex worker health and safety.
- Decriminalisation is what sex workers want. The current regulatory system is the best and we do not need a reform to the current system in NSW.
- Decriminalisation has brought improved work safety, high rates of safer sex practice and low rates of sexually transmitted infections and no evidence of organised crime.
- Decriminalisation means sex workers can access support in the event of a crime.
- Decriminalisation means that sex industry businesses are already regulated like other businesses, subject to existing regulatory mechanisms such as local council planning and zoning regulations, WorkCover and the Australian Taxation Office. Suggested improvements would be if these mechanisms were applied fairly and sex industry businesses were actually treated like any other business.
- A decriminalised system amplifies opportunities for outreach, magnifies capacities for peer education, supports sex worker self-determination, maximises compliance, increases transparency and minimises discrimination.

Nevertheless, there remain concerns about and criticism of the NSW model.

Local councils have criticised the ability of planning laws to effectively regulate brothels, as explained in the 2012 Kirby Institute report, [The Sex Industry in New South Wales: a report to the NSW Ministry of Health](#):

Several local councils have criticised the planning scheme for brothels, claiming that they do not have adequate resources to investigate and litigate in the Land and Environment Court, where necessary (*Sydney Morning Herald*, 30/8/1999). Some councils have been reluctant to include brothels in their Local Environment Plans and some have criticised the decisions of the court as favouring brothels over councils.

One especially contentious issue involves the standard of proof required to close brothels down, with local councils having to pay private investigators to gather evidence that a premises is operating as a brothel before seeking orders to close the premises down. Such actions are further complicated by the existence of two different definitions of brothel:

- The definition under [section 4](#) of the EP&A Act, which excludes “premises used or likely to be used for the purposes of prostitution by no more than one prostitute”; and
- The definition under [section 2](#) of the *Restricted Premises Act*, which provides that “premises may constitute a brothel even though used by only one prostitute for the purposes of prostitution”.

This issue was discussed in E Duff, [Show me more sex, judge tells council in landmark legal case](#), Sydney Morning Herald, 9 March 2015:

Hornsby Council paid a private investigator to go undercover inside the parlour and have sex with a prostitute as part of a bitter, year-long legal battle to have the operation closed. The business operates directly next door to a tutorial centre for primary school children - and 50 metres away from Hornsby Girls' High School.

But in a benchmark decision, a judge has dismissed the case, ruling that council's evidence of sex being sold on the premises fell short of the NSW's specific definition of the term "brothel" - which requires more than one prostitute to be providing services onsite. The outcome means both Hornsby - and other councils - would have to fund multiple trips inside suspect premises to have any chance of a result.

In response, Premier Mike Baird announced he would ask the NSW Parliament to establish a "full parliamentary inquiry" into the regulation of brothels across the state, saying it was a complex issue and he wanted to get it right.

In their 2012 article in *Current Issues in Criminal Justice*, Penny Crofts and her colleagues [contend](#) that, despite decriminalisation's benefits, the existing legislation reinforces a perception of brothels as inherently unlawful and disorderly, reducing the desirability of many operators to make themselves known to the local community (p 402):

This is communicated particularly in the *Environmental Planning and Assessment Act*, which, under s 124AB(2), limits the capacity of the LEC to grant adjournments:

The Court may not adjourn proceedings under section 124(3) unless it is of the opinion that the adjournment is justified because of the exceptional circumstances of the case. The fact that it is intended to lodge a development application, or that a development application has been made, is not of itself an exceptional circumstance.

This subsection expresses the doubt that brothels would ever wish, or be able, to operate legally. A development application is regarded as a stalling tactic to prevent closure, with an owner going through the motions of seeking registration, rather than expressing a desire to operate legally.

The reforms provide no incentive for the operators of brothels that have been operating without authorisation and without the knowledge of the surrounding community to make a development application. Under this schema, if brothel owners apply for development approval, not only would they draw (unwanted) attention to themselves and face the high likelihood of council refusal, but the local council would



be able to impose closure orders and potentially shut off the utilities to the brothel while the LEC considers an appeal against council refusal.

The [NSW Better Regulation Office](#) presented three options for reforming the NSW model:

1. Improve the existing regulatory system;
2. Introduce a registration system for owners and operators of commercial sex services premises; or
3. Introduce a licensing system for owners and operators of commercial sex services premises.

The Office stated that the first option—improving NSW’s existing regulatory system—involves two elements:

**Improved decision-making in planning for sex services premises** ... This option would involve the introduction of mechanisms to ensure that planning decisions about the number and location of sex services premises are made according to standard (evidence-based) principles. The option could be implemented in a variety of ways, including through State-endorsed guidance being provided to councils or decisions involving sex services premises being made by independent bodies.

...

**[Improving the sharing of information between NSW regulators]** would involve the development of a monitoring and compliance protocol between NSW regulators involved in the sex industry, including in relation to the sharing of information. The protocol would cover respective roles and responsibilities, the frequency of inspections, what is to be inspected on the premises and for what reasons. This will provide more certainty for commercial sex services premises and ensure equitable treatment with other commercial premises.

## KEY SOURCES

### Academic Publications

P Crofts, '[The Proposed licensing of brothels in NSW](#)' (2012) 17 *Local Government Law Journal* 3.

P Crofts, J Maher, S Pickering, J Prior, '[Ambivalent Regulation: The Sexual Services Industries in NSW and Victoria - Sex Work as Work, or as Special Category?](#)' (2012) 23 *Current Issues in Criminal Justice* 393.

B Donovan, C Harcourt, S Egger, L Watchirs Smith, K Schneider, JM Kaldor, MY Chen, CK Fairley, SN Tabrizi, '[The Sex Industry in New South Wales: a report to the NSW Ministry of Health](#)', Kirby Institute, University of NSW, 2012.

T Crofts, T Summerfield, '[The Licensing of Sex Work: Regulating an Industry or Enforcing Public Morality?](#)' (2007) 33 *University of Western Australia Law Review* 269.

## Legislation

[Crimes Act 1900 \(NSW\)](#).

[Criminal Code Act 1995 \(Cth\)](#).

[Environmental Planning and Assessment Act 1979 \(NSW\)](#).

[Restricted Premises Act 1943 \(NSW\)](#).

[Summary Offences Act 1988 \(NSW\)](#).

## Government/Parliamentary Publications

NSW Better Regulation Office, [Regulation of Brothels in NSW: Issues Paper](#), NSW Government, September 2012.

L Roth, [Regulation of brothels: an update](#), NSW Parliamentary Research Service, e-brief 15/2011.

Independent Commission Against Corruption, [Report on an investigation into corrupt conduct associated with the regulation of brothels in Parramatta](#), NSW Government, August 2007.

Brothels Task Force, [Report of the Brothels Task Force](#), NSW Government, November 2001.

## Media/Other

N Gladstone, [Brothels cost north shore council over \\$100,000 in a year to regulate an “underbelly of shady operators”](#), Daily Telegraph, 4 June 2015.

E Duff, [North Sydney Council launches legal action against brothel that charges one fee for Asian workers and another for the rest](#), Sydney Morning Herald, 24 May 2015.

E Duff, [Show me more sex, judge tells council in landmark legal case](#), Sydney Morning Herald, 9 March 2015.

E Jeffreys, [The flawed thinking behind brothel licensing](#), Sydney Morning Herald, 10 July 2014.

R Smith, [Hornsby Council calls on State Government for help in regulating illegal brothels, sex trade](#), Daily Telegraph, 20 May 2014.

P Crofts, [Not in my backyard: who wants a brothel as a neighbour?](#), The Conversation, 26 December 2013.

Scarlet Alliance, [The benefits of decriminalisation](#), 16 April 2013.

## 5. AUSTRALIAN AND NZ LICENSING SCHEMES

This chapter provides a summary of the Victorian and Queensland licensing schemes for sex work services, the ACT's brothel registration system, and New Zealand's brothel licensing scheme.

A more detailed overview of these schemes, and those of other Australian States, is available in [Regulation of brothels: an update](#), e-brief 15/2011.

### BROTHEL LICENSING IN VICTORIA AND QUEENSLAND

#### Licensing requirements

In both Victoria and Queensland, brothels and escort agencies with more than two workers must have a licence from a licensing authority. The 2011 e-brief [Regulation of brothels: an update](#) gave the following explanation:

In Victoria, the licensing authority for sex work services (which includes brothels and escort agencies) is the [Business Licensing Authority](#) within Consumer Affairs Victoria. In Queensland, the licensing authority for brothels is the [Prostitution Licensing Authority](#). Key elements of the schemes in both States include:

- A brothel can only be operated with a licence issued by the licensing authority. Small owner-operators are exempt but in Victoria they need to be registered with the authority;
- Certain persons are not eligible to apply for a licence or should not be granted a licence: e.g. persons who have been convicted of certain offences. In addition, the licensing authority is to refuse an application if the person is not a suitable person to operate a brothel. The Act lists a number of matters to be considered in determining if an applicant is a suitable person.
- In Queensland, a licence cannot authorise a person to operate a brothel at more than one premises. In Victoria, there is no such statutory restriction, but the licensing authority usually imposes a condition on a licence tying it to specified premises.
- In certain circumstances, cancellation of a licence is automatic: e.g. if the licensee is convicted of certain offences. In other specified circumstances, disciplinary action can be taken against the licensee: e.g. reprimand, requiring the licensee to comply with a requirement, or suspending or cancelling the licence. In Queensland, the licensing authority can take this action whereas in Victoria, these powers are vested in the Civil and Administrative Tribunal;
- Managers of brothels also need to be approved by the licensing authority. Similar provisions apply to managers as those dealing with the determination of licence applications, and those providing for automatic cancellation of licences and disciplinary action.

It is an offence in both States to operate a brothel without a licence. In Victoria, section 22 of the [Sex Work Act 1994](#) stipulates that the offence of carrying on business as a sex work service provider without a licence, or in breach of a licence condition, can result in a maximum penalty of 5 years imprisonment and/or a fine of up to 1200 penalty units (\$182,004 as of [1 July 2015](#)).

The maximum penalty in Queensland under section 70 of the [Prostitution Act 1999](#) is less severe than Victoria, but can still result in up to 3 years imprisonment or a fine of up to 200 penalty units (\$22,770 as of [1 July 2014](#)).

### Planning restrictions

In addition to licence requirements, brothels and escort agencies in Victoria and Queensland must have council planning approval in order to operate. Under section 74 of Victoria's [Sex Work Act 1994](#), a council or other responsible authority must refuse a permit for the use of a premises as a brothel if:

- The land is zoned by a planning scheme as being primarily for residential use;
- The land is within 200 metres of a place of worship, hospital, school, kindergarten, children's services centre or other location frequented by children; or
- More than 6 rooms are to be used for sex work.

Schedule 1 of Queensland's [Sustainable Planning Act 2009](#) imposes similar planning restrictions on brothels, including setting a maximum of 5 rooms for sex work, and preventing brothels from operating between 100-200 metres from residential areas and other public places regularly frequented by children.

### BROTHEL REGISTRATION IN THE AUSTRALIAN CAPITAL TERRITORY

The 2011 e-brief [Regulation of brothels: an update](#) summarised the brothel registration system under the [Prostitution Act 1992](#):

In the ACT, brothels (and escort agencies) are legal but they must be registered with the Office of Regulatory Services and they can only exist in a prescribed location. The prescribed locations are Fyshwick in the CBD, and Mitchell in the Gungahlin district.

Persons who have been convicted of certain types of offences are prohibited from owning or operating a brothel: the maximum penalty for this offence is imprisonment for one year and/or a fine of \$11,000. Persons must give the Registrar a copy of a police report about their criminal record at least seven days before they become the owner or operator of a brothel.

### NEW ZEALAND – MINIMALIST LICENSING

Like Victoria and Queensland, New Zealand operates a brothel licensing regime under the [Prostitution Reform Act 2003](#). Unlike its Australian counterparts, the New Zealand scheme takes a minimalist approach to regulation. This is explained in the 2007 Western Australian [Report of the Prostitution Law Reform Working Group](#):

In contrast [to Australian licensing regimes], the approach of New Zealand is to adopt a minimalist certification regime. In the NZ Act, the term 'certification' was preferred rather than 'licensing' to reflect the minimalist approach being taken to regulation, in contrast to full licensing models, and to reduce negative connotations that may be associated with the licensing of prostitution. Under the New Zealand model, all operators of businesses of prostitution must hold a certificate. The certificate:

- is issued by the Registrar of the District Court (as per the regulations);
- is for a period of 12 months and may be renewed or cancelled; and

- must be produced on the request of a member of police (properly identified) by a person reasonably believed to be the operator of a business of prostitution.

An operator who does not hold the requisite certificate commits an offence. A person is disqualified from holding a certificate if he or she has been convicted of an offence, including criminal and drug related offences. The court maintains a record of applicants for certificates and certificate holders.

Under section 35 of the [Prostitution Reform Act 2003 \(NZ\)](#), a brothel operating certificate can be obtained by completing a prescribed application form, with only non-invasive identifying information required, such as an applicant's name, address and photo identification. Under section 34 of the *Prostitution Reform Act*, brothels with four or fewer sex workers, classified as "small owner-operated brothels", are not required to obtain a certificate.

Additionally, the *Prostitution Reform Act* separates brothel registration from the review process, as [explained](#) in a 2007 article by Crofts and Summerfield (p 278):

A separate Prostitution Law Review Committee has been established [under Pt 4 of the Act] to review matters relating to the sex industry and the operation of the Act. This Committee is to have eleven members representing all interests in this area. There are two persons nominated by the Minister of Justice and two by the Minister for Commerce to represent operators of businesses of prostitution, one each nominated by the Minister of Women's Affairs, the Minister for Health, Minister for Local Government and Minister of Police, and three nominated by the New Zealand Prostitutes Collective (or any other body representing the interests of sex workers).

### ISSUES WITH LICENSING REGIMES

Brothel licensing regimes have come under criticism from a number of experts and advocacy groups. The 2012 Kirby Institute report [included](#) the specific recommendation that (p 8):

**Licensing of sex work ('legalisation') should not be regarded as a viable legislative response.** For over a century systems that require licensing of sex workers or brothels have consistently failed – most jurisdictions that once had licensing systems have abandoned them. As most sex workers remain unlicensed criminal codes remain in force, leaving the potential for police corruption. Licensing systems are expensive and difficult to administer, and they always generate an unlicensed underclass. That underclass is wary of and avoids surveillance systems and public health services: the current systems in Queensland and Victoria confirm this fact. Thus, licensing is a threat to public health.

The Kirby Institute report continues (pp 9-10):

Often called 'legalisation', under this system either brothels or individual sex workers can apply to the state for a license to operate. Seen as a means of excluding undesirable persons from the industry and of enhancing government control over the number, location, and operation of brothels, licensing has never lived up to expectations. Unlicensed premises and sex workers remain criminalised, and the unlicensed sector normally comprises a large proportion of the industry.

...

In Queensland, for example, after 20 years of operation, only 25 brothels (less than 10%) have joined the scheme (Prostitution Licensing Authority, 2009). Licensing systems are self-serving, expensive and exclusive, often pushing sex workers onto the

street (Harcourt et al., 2005), while undermining access by surveillance and health promotion programs (Chen et al., 2010; Harcourt et al., 2010; Rowe, 2011). As well as being questionable from a human rights perspective, mandatory sexual health screening of sex workers in Victoria has been shown to waste millions of dollars (Wilson et al., 2010) and to displace higher risk patients from finite public health services (Samaranake et al., 2010).

Penny Crofts and her colleagues [found](#) that the devolution of regulation under the Victorian licensing system impacts the ability of councils to stop illegal activity:

The devolution of key regulatory activities against brothel premises to councils that have limited resources has constrained options for enforcement: for example, councils could not address illegal acts carried out within brothels (Kotnik, Czymoniewicz-Klippel and Hoban 2007), which significantly limited enforcement action on unlicensed or problematic premises where worker safety might be compromised. In addition, the lack of shared state-wide knowledge (or even shared urban knowledge in Melbourne, where most of the premises are clustered) has reduced the likelihood of prosecutions and of a consistent approach being adopted (Pickering, Maher and Gerard 2009).

Other experts are less critical of the licensing model. Thomas Crofts and Summerfield [argued](#) in a 2007 journal article that New Zealand's "pure licensing model", which licenses the sex industry in a similar way to other businesses, can benefit both sex workers and the community (p 287):

... the dominant view within Australian [sic] and New Zealand seems to be that a licensing scheme can best ensure the health and safety of the community and those working in the sex industry. To be effective, however, the system should follow a pure licensing model, guided by principles of fairness, transparency, rationality and efficiency ... models such as that operating in NZ, enable the protection of the community as well as the individuals involved in the industry, not only from the industry, but also from the power of the state and its representatives.

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## 6. THE NORDIC MODEL

### PROSECUTING CLIENTS, NOT SEX WORKERS

On 1 January 1999 Sweden became the first country to introduce legislation criminalising the purchase—but not the sale—of sexual services, when it enacted the *Prohibiting the Purchase of Sexual Services (Sex Purchase Act)*, which became incorporated into the Swedish *Penal Code* as ss 11 and 12 of Chapter 6. [Chapter 6 s 11](#) of the Swedish *Penal Code* provides:

A person who, otherwise than as previously provided in this Chapter, obtains a casual sexual relation in return for payment, shall be sentenced for purchase of sexual service to a fine or imprisonment for at most one year.

Procuring sex work is also prohibited under [Chapter 6 s 12](#) of the *Penal Code*:

A person who promotes or improperly financially exploits a person's engagement in casual sexual relations in return for payment shall be sentenced for procuring to imprisonment for at most four years.

If a person who, holding the right to the use of premises, has granted the right to use them to another, subsequently learns that the premises are wholly or to a substantial extent used for casual sexual relations in return for payment and omits to do what can reasonably be requested to terminate the granted right, he or she shall, if the activity continues or is resumed at the premises, be considered to have promoted the activity and shall be held criminally responsible in accordance with the first paragraph.

A 2010 report by the Swedish Institute [explained](#) the purpose of criminalising the purchase of sexual services (pp 4-5):

The bill proposed a large number of measures in different social sectors to combat violence against women, prostitution and sexual harassment in working life. According to the bill, one issue that was closely related to that of violence against women and a lack of gender equality was the issue of men who purchase sexual services, usually from women, namely, the issue of prostitution.

The most important insight regarding the issue of prostitution presented in the bill was that attention must be directed to the buyers. It was a matter of a shift in perspective, which can be summarized by stating the obvious: if there was no demand there would be no prostitution.

As stated in a 2013 [journal article](#) by Ka Hon Chu and Glass, the underlying rationale of the Swedish model is that sex work is inherently harmful, both to sex workers and to Swedish society, because all sex work is a form of male violence against women and undermines gender equality. Criminalising male demand for prostitution is therefore the most equitable and effective means of reducing the prevalence of prostitution.

Ka Hon Chu and Glass further state that Norway and Iceland have subsequently enacted similar legislation, and the Nordic model has been considered in many other nations, including France, the United Kingdom, Canada and Scotland.



## EFFECTIVENESS OF THE NORDIC MODEL

In 2009, ten years after its introduction, the Swedish Government evaluated the Nordic model, [concluding](#) (pp 7-10):

- There has been a 50% real reduction in street prostitution, without corresponding increases in other types of sex work (for instance, indoor sex work);
- The offence of purchasing sex may not have been policed effectively, because police may be focusing their resources on more serious offences;
- Overall, while there was an increase in prostitution in neighbouring Nordic countries during the period 1999–2009, as far as can be determined prostitution did not increase in Sweden;
- While the number of foreign women in street prostitution has increased in Sweden, it is less than dramatic increases seen in comparable countries; and
- Although it is difficult to determine the exact scale of human trafficking for sexual purposes, in Sweden this crime “is considered to be substantially smaller in scale than in other comparable countries”.

However, both the [Canadian HIV/Aids Legal Network](#) and researchers [Ka Hon Chu and Glass](#) (pp 105-8) have questioned the evaluation's conclusions. They argue that the majority of the available evidence suggests that:

- While “visible” prostitution (street sex work) appears to have declined, sex workers have in fact moved indoors, online and to neighbouring countries;
- The move to indoor sex work is effectively prohibited;<sup>2</sup>
- The law is rarely or at best inconsistently enforced;
- Sex workers who continue to work on the streets report increased risks and experience of violence, in part because regular clients have been deterred by the threat of arrest and clients who remain are likely to be intoxicated, violent and ask for unprotected sex;
- Fewer available clients for street sex workers has also reduced the bargaining power of sex workers, leading to lower prices and increased pressure to see more clients and agree to unsafe sex;
- Street sex workers have also reported more aggressive policing and a deterioration of the relationship between sex workers and police. They also report that police search for condoms as evidence of prostitution, which makes sex workers less likely to carry them;
- Following the reforms, clients who would have otherwise reported violence or abuse of sex workers are more reluctant to go to the police for fear of being arrested for purchasing a sexual service; and
- Sex workers are unable to access social security benefits that are available to all workers engaged in legal labour.

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<sup>2</sup> Due to the terms of Chapter 6 s 12 it has even been argued that, by letting clients use their premises for sex, sex workers may be breaching Chapter 6 s 12: See Canadian HIV/AIDS Legal Network, p 2.

An August 2015 [discussion paper](#) by UK think tank the Institute of Economic Affairs argues that efforts to criminalise buyers of sex services in Sweden have resulted in buyers travelling to other countries to access these services (p 23):

Countries that seek to eliminate the sex industry simply push demand abroad to neighbouring countries or far Eastern countries such as Thailand where the industry thrives. In Sweden, for example, 80 per cent of men who have paid for sex did so abroad.

A 2014 article from [The Guardian \(UK\)](#) suggested that sex worker advocacy groups have also generally opposed the Nordic model, which they claim does the following:

- Stigmatises sex workers;
- Exposes sex workers to eviction or rent extortion (under Chapter 6 s 12 of the *Penal Code*, landlords are prohibited from collecting money earned from the sale of sex); and
- Erodes sex workers' parental rights, because they are assumed to be incapable of making sound parenting decisions.

In Time Magazine, E Brown [compared](#) the Swedish reforms with New Zealand's licensing regime, suggesting that:

From a practical standpoint, criminalising clients ... still focuses law enforcement efforts and siphons tax dollars toward fighting the sex trade. It still means arresting, finding and jailing people over consensual sex. ...

In New Zealand, street prostitution, escort services, pimping and brothels were decriminalised in 2003, and so far sex workers and the New Zealand government have raved about the arrangement. A [government review in 2008](#) found the overall number of sex workers had not gone up since prostitution became legal, nor had instances of illegal sex-trafficking. The most significant change was sex workers enjoying safer and better working conditions. Researchers also found high levels of condom use and a very low rate of HIV among New Zealand sex workers. The bottom line on decriminalisation is that it is a means of harm reduction.

## CRITICISM OF THE NORDIC MODEL'S RATIONALE

The rationale underlying the Nordic model has not been universally supported. As Ka Hon Chu and Glass [state](#):

Within this framework, all men who purchase are deemed to be aggressors and all women in sex work are deemed to be victims of male violence and patriarchal oppression, a framing that conflates sex work with trafficking, pathologises male clients, and renders male and trans workers largely invisible.

In a 2010 journal article Weizter [contended](#) that in all prohibitionist models, including the Nordic model, prostitutes are considered to be oppressed victims. Similarly, clients are deemed to be "sexual predators" that "buy women rather than use sexual services" (p 17). Weizter noted that, in contrast to this narrative, a comparative

American study found few differences between prostitutes' customers and a nationally representative sample of American men.<sup>3</sup>

Weitzer also states that sex work is a segmented market. Instead of stereotyping all sex workers into an undifferentiated category, the evidence points to significant differences among those who sell sex, with street sex workers generally experiencing the highest level of victimisation and other areas of sex work experiencing better conditions and higher levels of individual agency (pp 18-9).

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<sup>3</sup> Discussing M Monto, N McRee, 'A comparison of the male customers of female street prostitutes with national samples of men' (2005) 49 *International Journal of Offender Therapy and Comparative Criminology* 505.

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