

**Submission
No 79**

INQUIRY INTO THE REGULATION OF BROTHELS

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Submission to Brothels Senate Enquiry

1.0 Background

Ashfield Council has two approved brothels within its local government area - both approved by the Land and Environment Court on appeal after being refused consent by the Council. There are a number of other businesses that include various massage services. From time to time the Council does receive enquiries and complaints from members of its community alleging that a particular premises is being used as a brothel and these matters are investigated and appropriate action taken. Investigations can be both costly and difficult to prosecute because of awareness in the industry of the proof of evidence required for an investigation to ultimately be successful through the court process. There are many recent examples involving other councils which highlight the difficulties in both obtaining evidence and then using that evidence to mount a successful prosecution in an attempt to close down an unauthorized brothel or 'sex services premises' as the use is defined under planning legislation.

The Council does not have any specific information on single operators offering sexual services from residential premises in its area. It is therefore likely that if any do exist, they manage their business in a discrete manner that is not readily apparent to their neighbours or there is potentially a level of tolerance that exists where such activities are carried out in a manner which does not cause nuisance and disturbance to others. Historically, the majority of complaints that Council has received in relation to unauthorized brothels have been in response to nuisance and disturbance issues arising from their activities.

2.0 Ashfield Council Planning Controls

In the current local environmental plan (LEP), Ashfield LEP 2013, 'sex services premises' and 'home occupations (sex services)' are defined as follows:

sex services means sexual acts or sexual services in exchange for payment.

sex services premises means a brothel, but does not include home occupation (sex services).

home occupation (sex services) means the provision of sex services in a dwelling that is a brothel, or in a building that is a brothel and is ancillary to such a dwelling, by no more than 2 permanent residents of the dwelling and that does not involve:

- (a) the employment of persons other than those residents, or
- (b) interference with the amenity of the neighbourhood by reason of the emission of noise, traffic generation or otherwise, or
- (c) the exhibition of any signage, or
- (d) the sale of items (whether goods or materials), or the exposure or offer for sale of items, by retail,

but does not include a home business or sex services premises.

These definitions were introduced in the 'standard instrument LEP' some years ago and should therefore be consistent across all councils. Previously, brothels were part of the generic 'commercial premises' definition and therefore potentially more widespread in their distribution across various zones that make up land use provisions within a LEP.

The Council also has a clause in its current LEP which sets locational criteria for restricted premises and sex services premises:

6.6 Location of restricted premises and sex services premises

- (1) The objective of this clause is to minimise land use conflicts and adverse amenity impacts by providing a reasonable level of separation between restricted premises, sex services premises, specified land uses and places regularly frequented by children.*
- (2) Development consent must not be granted to development for the purposes of restricted premises or sex services premises unless the premises are located:*
 - (a) at least 200 metres (measured from the closest boundary of the lot on which the premises are proposed) from any residence or any land in a residential zone, and*
 - (b) at least 200 metres (measured from the closest boundary of the lot on which the premises are proposed) from any place of public worship, hospital, school, child care centre, community facility or recreation area, and*
 - (c) at least 50 metres (measured from the closest boundary of the lot on which the premises are proposed) from any railway station entrance, bus stop, taxi rank, ferry terminal or the like, and*
 - (d) at least 200 metres (measured from the closest boundary of the lot on which the premises are proposed) from any existing or proposed restricted premises or sex services premises, and*
 - (e) on any floor other than the ground floor of a building.*
- (3) In deciding whether to grant development consent to development for the purposes of restricted premises or sex services premises, the consent authority must consider the following:*
 - (a) the impact that the development and its hours of operation would have on any place likely to be regularly frequented by children:*
 - (i) that adjoins the development, or*
 - (ii) that can be viewed from the development, or*
 - (iii) from which a person can view the development,*
 - (b) whether the operation of the premises is likely to cause a disturbance in the neighbourhood:*
 - (i) because of its size, location, hours of operation or number of employees, or*
 - (ii) taking into account the cumulative impact of the premises along with other sex services premises operating in the neighbourhood during similar hours,*
 - (b) whether the operation of the premises will be likely to interfere with the amenity of the neighbourhood.*

Sex service premises are only permissible in **Zone B4 Mixed Use** in Ashfield LEP 2013. This zone is essentially the area that makes up the 'Ashfield Town Centre' which is the central business district along Liverpool Road and non-residential development at its fringe. Home occupation (sex services) uses are not permissible in any zone in the LEP. Since the gazettal of Ashfield LEP 2013 in December 2013, the Council has not received any

development applications for sex services premises or restricted premises so it has not had to make a decision or test the above criteria in a contested sense through a court process.

Ashfield Council has, over many years, consistently rejected all development applications for brothels and, prior to current planning controls coming into effect, strongly opposed the introduction of brothels as 'commercial premises' through land use planning controls.

The Council has long argued that because it is a relatively small LGA and predominantly of residential character there are few, if any, locations within the LGA, which would be suitable for brothels. It has no industrial zoned land of any significance and its commercial areas adjoin residential development. Previous attempts to introduce a Development Control Plan (DCP) to set criteria around the local of brothels did not proceed because of the difficulties in trying to find an area or areas which were suitable and could minimize amenity impacts on local residents.

These issues were put to previous State governments and their agencies, when the Council sought to be exempted from the need to allow brothels in its area, however, the expectation was that all councils needed to define an area or areas within which brothels could be permissible. Hence Ashfield's response, in its current LEP, was to limit this to the mixed use zone which defines the Ashfield Town Centre area.

The Regulation of Brothels in NSW Issues Paper prepared by the NSW Government in 2012 made the following comments in this regard:

"Moral issues

As a regulatory body, councils have a duty of care to ensure that sex services premises are appropriately located and designed, and that sex workers are treated in the same manner as any other group in the community. Operators of commercial sex services premises have a right to submit a DA to council for approval of their premises, to seek council advice on whether they may locate in the area, and to participate in planning processes. As with any applicant, operators of commercial sex services premises whose DA is refused by council can also appeal to the Land and Environment Court.

Sex Services Premises Planning Advisory Panel (2004) Appendix E.

The Land and Environment Court has generally confirmed that offensiveness and morality are not relevant planning considerations, and that clear and objectively assessable evidence is required of the potential impact of a sex services premises on amenity. In Liu, Lonza & Beauty Holdings Pty Limited v Fairfield City Council (1996), the Land and Environment Court rejected the council's submission that community standards and views on the morality of sex services premises were a relevant social matter for the council to consider in determining a DA. The Court noted that matters of morality could not, of their own be assumed as 'public interest' matters:

The appropriate legal vehicle for any regulation of morality is the criminal law. In New South Wales both prostitution and brothel operations have recently been Regulation of Brothels in NSW: Issues Paper 27 "decriminalised". It could not be in the public interest that local councils or this court now assume the mantle of moral arbiter.

However, the Court found that while morality was irrelevant, the demonstrable social effect of a particular brothel use was a relevant consideration under the Environmental Planning and Assessment Act. Thus, while moral objections are in principle outside the scope of planning regulations, in practice "planning controls can be used to reduce

impacts where moral objections are likely to carry most weight, such as locations near schools.”

3.0 Objectives of Regulatory System

The issues paper identified three main objectives of the regulatory system being:

- Protection of residential amenity
- Protection of sex workers
- Safeguarding public health

Protection of residential amenity

The two approved brothels in Ashfield LGA have been operational for well over 10 years and conduct their operations relatively discretely and with limited impacts on the amenity of their respective localities. Both facilities had been operational for some time before development applications were lodged to ‘regularise’ their use and this was a factor the Land & Environment Court took into consideration when considering the appeals against the refusal of the applications by the Council.

To date, whenever unauthorised brothels or applications are received where resident amenity or concerns are evident Council has generally been successful in rejecting or ceasing the activity. The Council was successful in defending the refusal of an application for a brothel on Parramatta Road in the early 2000s largely because of strong and persistent opposition from nearby residents.

Protection sex workers

This is considered to be under the province of state control either to directly regulate and educate as appropriate or to work through councils as it does for other health and safety related matters. Regardless of any specific model that the state government may adopt it is considered vital that this key consideration is overviewed and appropriately resourced to ensure control of sexually transmitted disease to a standard commensurate with community expectations.

Similarly issues of workplace injuries, violence, sexual servitude and crime are beyond the scope of powers and functions of local councils.

Safeguarding public health

The 2012 issues paper released by the state government refers to a 2007-2008 study by the Law and Sexworker team (LASH). The study found that the rates of STI’s amongst sex workers to other sexually active women in the community was no greater. Fortunately, the rate of HIV in female sex workers remains low and the use of condoms was reported at a rate of 99%.

Council is not equipped either by legislation or expertise to impose any appropriate standards and inspection routines in this regard. Should unacceptable increases in public health risks be identified due to sex workers it is considered incumbent on the government of the day to act accordingly. Again if local government has a role to play it should be subject to legislative overview and management by the state government.

4.0 Registration or licensing of authorised brothels

Registration or licensing of brothels and massage parlours is supported on a number of grounds. Reduction in crime links by owners and workers, improved assessment processes, fairer and more consistent outcomes for applicants, reduction in exploitation of underage and vulnerable workers, improved health outcomes for workers and the public, provision of skilled specialist staff are all expected outcomes of an appropriately established body/state government overview responsible for regulating these sex industries.

Any state wide registration scheme should ideally be supported by appropriately resourced interagency enforcement teams such as immigration, crime squads, planning and health specialists.

Recorded histories of prostitution/brothels go back thousands of years and were amongst some of the earliest 'businesses' of the Australian colony. They have proven resilient, difficult to completely control and extremely quick to adapt to changing climates of attempts by police and political control.

A system of licensing and registration has the potential to at least, if appropriately resourced, address the following matters:

- the suitability of the licensee/operator
- supervisory requirements
- mandatory health and safety requirements
- set appropriate standards and protection for sex workers

Backing up a registration and licensing approach should be an appropriate inspection and monitoring regime which has personnel with the necessary authorities to conduct random inspections and enforce compliance with licensing requirements.

5.0 Unauthorised brothels

Current legislative arrangements in place for councils to close down an unauthorised brothel can be costly, time consuming and difficult to prove. Earlier this year Hornsby Council launched a prosecution against a massage parlour in its LGA it claimed was being used as brothel and gathered evidence from a private investigator that sex services were indeed being offered, however, the court hearing the matter ruled that the council had not met the 'standard of proof' that the premises was a brothel because only one worker had been found to provide sex services. This, by definition, did not meet the test that the premises were a brothel. Hornsby Council claimed that this action had cost its ratepayers over \$100,000.00.

The onus of proof in such circumstances appears to put councils at a significant disadvantage and exposes what is at times a clearly inadequate legislative system.

If it is proposed that some form of registration and/or licensing arrangement is a way to improve the management of brothels then the enforcement arm of such a system also need wholesale review and improvement.

In the past there have been issues of corruption linked to both the NSW Police and Local Government in relation to the operation of brothels so it may be appropriate for a new

'authority' to be responsible for regulating licensed and unlicensed operators. Such an arrangement would need to be supported with appropriate legislative powers to move much more swiftly and cost effectively on operators not meeting their license obligations and those operating without an authority or approval.

6.0 Authorising brothels

As noted in section 2.0 of this submission, Ashfield Council has responded to its 'obligation' to allow sex services premises in its LGA by making the use permissible in its B4 Mixed Use Zone in the LEP. Other councils are likely to have approached this requirement differently and may well have different standards and criteria around how they plan for brothels in their LGAs.

If the state government can see fit to introduce State Environmental Planning Policies (SEPPs) for Affordable Rental Housing, Exempt & Complying Development and the Design Quality of Residential Apartment Development, among many others, perhaps one can be introduced for sex services premises.

This would enable consistent criteria to be set for location, design, standards, character, etc and the general approach to land use management would therefore be centralized, not ad hoc, as is currently the case. From an industry perspective, there would be a consistent set of planning controls that apply across the state. Such an approach may see more applications for approval submitted 'up front' rather than the more common scenario where an unauthorized use is first established and then, after complaints and enforcement action is commenced, a development application is submitted for consideration.

A well thought out common set of criteria and standards, to which all relevant stakeholders, including local government, have input, could also see the current 'one size fits all' approach to spread sex services premises throughout all councils rationalized to areas that area more suitable and where amenity impacts are minimized.

7.0 Recommendations

That the Parliamentary Inquiry into Brothels in NSW considers the following:

- a) a statewide registration and/or licensing scheme for sex services premises which is administered by a State agency or authority.**
- b) in the event that an agency or authority is established, that appropriate resources be provided for the licensing, investigation, enforcement and monitoring of the scheme.**
- c) that the proposed scheme include appropriate legislative arrangements including penalties and powers for the relevant authority to investigate and close down unauthorized/licensed sex services premises.**
- d) that the inherent objectives of the newly created authority to license and regulate sex service premises also include the protection of sex workers, public health and the protection of public amenity.**
- e) the introduction of a State Environmental Planning Policy for sex services premises, which is developed with key stakeholder input, including local**

government, that sets appropriate standards for the location, design, and operation of sex services premises across the state.

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