

**Submission
No 120**

INQUIRY INTO THE REGULATION OF BROTHELS

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Date Received: 20/08/2015

19 August 2015

The Hon Victor Dominello MP
Minister for Innovation & Better Regulation
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Dear Minister

RE: Inquiry into the Regulation of Brothels

I refer to your announcement on 25 June, 2015 of a parliamentary inquiry into the regulation of brothels in NSW. Willoughby City Council welcomes the announcement and acknowledgement of the need for a more targeted approach so the community can have confidence in the regulation of brothels and authorities have the ability to address illegal activity.

It is Willoughby City Council's hope that the inquiry will address the social, health and planning challenges associated with legal and illegal brothels. Protection for sex workers must be considered; particularly around organised crime and sex trafficking, as well as to maintain high levels of public health and safety.

Council recommends that the government act to improve the system by amending the:

- *Environmental Planning & Assessment Act 1979* (EP&A Act) to allow Councils to more easily recover costs incurred from investigating an unauthorised brothel use, costs of issuing a *Brothel Closure Order* and monitoring compliance with a *Brothel Closure Order* (including Private Investigator Costs);
- *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* to provide more stringent controls regarding 'change of use' and advertising for massage premises; and
- Advertising for "adult services" in media or elsewhere to include a Development Consent number for the provision of *sex related use* of the premises.

Background

There are currently ten (10) brothels within the City of Willoughby local government area that have been granted Development Consent to operate, subject to conditions.

Over the past ten years, there appears to have been a significant increase in the occurrence of the number of illegal brothels operating within the City of Willoughby.

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Council has been committed to investigating and instigating enforcement action to effect the closure of illegal brothels.

The amendments to the *Environmental Planning & Assessment Act, 1979* made under the *Brothels Amendment Act 2007* with the inclusion of Section 121ZR and Section 121ZS, have enabled a consent authority, such as a Council, to serve a *Brothel Closure Order* on a person on the basis of circumstantial evidence of an unauthorised use of a premises for 'related sex uses' (as defined) without the normal process of natural justice being applicable.

A brothel closure order may prohibit the use of the premises for specified related sex uses, if the use of the premises for the specified uses is a prohibited development or a development for which development consent is required but has not been obtained.

In addition to any other person to whom a brothel closure order may be given, a brothel closure order may be given to any person apparently in control of or managing, or assisting in the control or management, of the brothel.

From 14 May 2009 to 4 August 2015 Council has served a total of forty-one (41) *Brothel Closure Orders* involving thirty-four (34) separate premises within the City of Willoughby.

Council has also instigated five (5) separate sets of Class 4 enforcement proceedings in the Land & Environment Court of NSW to secure Orders for the closure of illegal brothels. There are currently two (2) other separate matters with Council's solicitors with instructions to prepare Class 4 enforcement proceedings in the Land & Environment Court of NSW to secure Orders for the closure of illegal brothels.

The evidence gathering process for these matters presents a significant challenge for Council. The number of instances of suspected illegal brothel activity and the process of investigation is a strain on Council's resources and also one in which Council has not wished to expose its staff to direct increased risk in terms of work health and safety or corruption.

Accordingly, Council's current method involves two (2) separate lines of enquiry:

1. Council's staff investigate internet sites and print media advertisements for adult sex services and inspect premises suspected of providing illegal related sex uses and interview operators. If circumstantial evidence of illegal related sex use is gathered, Council will serve a *Brothel Closure Order* and continue to monitor the situation for compliance.
2. If Council suspects that a *Brothel Closure Order* is not being complied with, a licenced and experienced private investigator is engaged and tasked with attending at the premises of interest and gathering direct evidence of an offence. The private investigator will normally attend and gather direct evidence of an offence on at least two (2) separate occasions.

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Upon presentation of the gathered evidence, Council will contact its solicitors and instruct them to contact the operator of the illegal brothel premises and seek an urgent undertaking in writing that they will cease and desist from using the premises for related sex uses.

Council will continue to monitor the premises for evidence of illegal brothel activity. If Council reasonably suspects that the sex related use is continuing, Council will instruct its private investigator to attend and gather direct evidence. If direct evidence of the sex related use is obtained, the evidence is presented to Council's solicitors with instructions to commence Class 4 enforcement proceedings in the Land & Environment Court of NSW.

Council has been successful in its Class 4 proceedings in the Land & Environment Court of NSW. However, the process (as outlined) is resource intensive, time consuming and costly. Each case, on average, takes Council about 6 months to investigate and prepare and costs about \$20,000 in legal expenses. Council may secure the awarding of costs in the proceedings but the cost recovery process is also a similarly expensive and lengthy exercise.

Current Process

Since 2009, the majority of the premises investigated and closed by Council have been massage premises that provide "extra" services. These extra services have been determined as '*related sex uses*' (the use of premises for the provision of sexual acts or sexual services in exchange for payment).

Council's current process to close an illegal brothel may be outlined as follows:

- The illegal brothel services (*related sex use* of a premises) is identified. Circumstantial evidence of illegal brothel services (such as advertising) is normally sufficient for Council to trigger the issue of a *Brothel Closure Order*.
- Council must then monitor the situation and ascertain if the illegal brothel services are continuing in breach of the *Brothel Closure Order*.
- If Council believes the illegal brothel services are continuing in breach of the *Brothel Closure Order*, Council must then obtain direct evidence to prove the offence to a standard required by a Court of law.
- Direct evidence of a breach of a *Brothel Closure Order* is usually obtained by Council's engagement of the undercover services of a Private Investigator. The courts require direct evidence with more than one (1) visit and also evidence of the receiving the sexual services of a different woman, including evidence of payment, to meet the standard of proof.

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- Once direct evidence of the illegal brothel activity has been secured, Council will then instruct its solicitors to initiate legal proceedings through the Land & Environment Court and request a court order for the cessation of the illegal brothel use.
- The Court Orders do not seek to close the legitimate (massage) part of business; only an Order for the cessation of the provision of *sex related uses*.
- If the brothel continues to operate in breach of any court order, Council may seek criminal prosecution. This process can take several months and often a business will relocate to a nearby premises with a new business name. If this occurs, the process must recommence.

121ZS Enforcement of orders by cessation of utilities

Council has not, to date, sought to exercise the provisions of Section 121ZS of the EP&A Act for enforcement of Orders by cessation of utilities because of the perceived difficulty and limited prospects of success.

For instance, Council believes it would be difficult to isolate one particular lot (illegal brothel) in a strata plan development and not disrupt supply to neighbouring lots (who are not associated with the illegal brothel) unless the lot was separately metered.

Council is also concerned about the potential lengthy time and additional costs associated with the evidence gathering and legal process involved in successfully securing a utilities order from the court. Furthermore, the occupier may simply vacate the subject premises and relocate to a new premises before the hearing date of the matter at court.

In *Blacktown City Council v Li and Ors* [2014] NSWLEC 1046 (24 February 2014) the Council was unsuccessful in obtaining a Utilities Order because the Council conceded that the brothel use had ceased at the time of the hearing. His Honour said that...*"s121ZS requires that as a matter of jurisdictional fact I must be satisfied that there has been a failure to comply with a brothel closure order". His Honour also said "it is clear from the provisions of s121ZS(6) that the matters that are required to be taken into consideration include things that are clearly, presently, present related rather than related to past conduct. As a consequence of that, as there is no present failure – I am satisfied that I do not have jurisdiction to make the order sought"*.

Penalty Notices for Prohibited Development

On 6 July, 2015 Council wrote to The Hon Rob Stokes MP, Minister for Planning NSW. In the letter, Council requested the regulations in NSW be amended to enable Penalty Notices (fines) to be issued for instances of 'prohibited development'.

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It is desirable that a prosecuting authority (like Council) have the capacity to issue Penalty Notices (fines) for development that is prohibited because it will be:

1. an efficient way of disposing of the matter and;
2. a cost effective way of disposing of the matter when compared with the current system of prosecution in a local court.

This capacity will strengthen Council's ability to address instances of illegal brothel activity.

A copy of Council's letter to the Minister, dated 6 July, 2015 is attached.

Council was pleased to receive a reply from the NSW Planning & Environment that advises, inter alia, Council's request has been supported. The regulations have been amended and councils in NSW will be able to issue Penalty Notices for offences of 'prohibited development' from 14 August, 2015.

A copy of the Department's letter, dated 3 August, 2015 is also attached.

Recommended changes

Environmental Planning & Assessment Act 1979

- Consider amendments to the *Environmental Planning & Assessment Act 1979* (EP&A Act) that allow Councils to more easily recover costs incurred from investigating an unauthorised brothel use, costs of issuing a *Brothel Closure Order* and monitoring compliance with a *Brothel Closure Order* (including Private Investigator Costs). Section 121CA provides that a Compliance Cost Notice may be issued however to recoup costs the matter would need to be referred to Court. There is currently no provision in the regulations for an authority such as a Council to issue a Penalty Notice for non-compliance with a Compliance Cost Notice.
- Consider amendments to the EP&A Act for a *Brothel Closure Order* to be in force on the subject land irrespective of tenant or property owner changes. Problems may currently arise where the occupier of a premise's changes and enforcement action is required to recommence against a new occupier as a respondent in any court case.
- Consider amendments to the EP&A Act allowing Council to close a massage premises operation (under an Order No. 1) if direct evidence is obtained of an unauthorised brothel use.

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State Environmental Planning Policy (Exempt and Complying Development Codes) 2008.

- Amend the SEPP – Subdivision 10A “Change of Use” as massage premises are often used to disguise illegal brothel activity. Massage premises currently fall under the definition of “business premises”. The change of use of a premise's to ‘massage premises’ should not be exempt or complying development but rather development that requires the prior development consent of a consent authority. This change will enable councils to more easily identify and control massage premises.
- Amend the SEPP to prohibit massage premises from fitting locks on internal doors. Beds, explicit material, including pornographic images, pornographic magazines, pornographic movies and condoms must also be prohibited on the premises.
- Amend the SEPP - Division 2 “Advertising and Signage Exempt Development Codes” to prohibit massage premises from advertising with suggestive content (e.g. “sensual massage” or “special massage”, etc.)

Advertising for Adult Services

- All advertising for “adult services” in media or elsewhere should be required to include a Development Consent number for the provision of *sex related use* of the premises.

If you require any further information or have any queries, please contact Council's Manager Compliance Unit, Mark Taylor on telephone [REDACTED]

Yours sincerely

[REDACTED]
Debra Just
GENERAL MANAGER





