

**Submission  
No 62**

## **INQUIRY INTO THE REGULATION OF BROTHELS**

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18 August 2015

The Committee Manager  
Select Committee on the Regulation of Brothels  
Parliament House  
Macquarie St  
Sydney NSW 2000

Dear Sir/Madam

Submission - Inquiry into the Regulation of Brothels

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Thank you for the opportunity to provide a submission in relation to the Parliamentary Inquiry into the regulation of brothels in New South Wales.

As background, Hornsby Council was recently unsuccessful in taking action in the Local Court regarding the alleged unapproved use of a property in Hornsby as a brothel. Although Council had demonstrated that one worker was providing sex services to members of the public, the Court found that the legal definition of a brothel involves more than one prostitute providing sex services at a premise at any one time. In this regard, the case highlighted anomalies in respect to the definition of a brothel under the Environmental Planning and Assessment Act 1979 and the Restricted Premises Act 1943. The case also provided a clear direction regarding the high burden of proof required by councils in taking action in the Court. This has significant resource and financial implications for local government.

In response to the Parliamentary Inquiry, please find below information that may be of assistance to the Committee.

### **NSW Legislation**

The difficulty with current NSW legislation is that if sex services are only provided by one prostitute, the use of a premise is not defined as a brothel. As such, the use of the premise would be permissible even if sex services were being provided by one prostitute. It is useful to reproduce the definitions applicable within the NSW legislation to further explain and understand the burden of proof to which Council is required to prove.

"Sex service premises" is defined in the Hornsby Local Environmental Plan 2013 to mean "brothel". "Brothel" is defined in the Environmental Planning & Assessment Act 1979 to mean:

*"a brothel within the meaning of the Restricted Premises Act 1943, other than premises used or likely to be used for the purposes of prostitution by no more than one prostitute"*

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The Restricted Premises Act 1943 defines a brothel as a premise:

- “(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:*
- (i) advertised (whether by advertisements in or on the premises, newspapers, directories or the internet or by other means), or*
- (ii) 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”*

The Committee will note that whilst the Restricted Premises Act 1943 provides that one prostitute only can result in a premise being used as a brothel, the Environmental Planning and Assessment Act 1979 definition provides that it must be used by more than one prostitute.

Prior to 2007, the definition of a brothel within the Restricted Premises Act 1943 only encompassed the provision of subclause (a) above, i.e. that the premises be habitually used for the purposes of prostitution. The difficulties for councils in obtaining proof associated with this definition however, led to legislative changes being made, which included redefining the meaning of “brothel” within the Act, as well as introducing mechanisms such as brothel closure orders as an alternative to criminal prosecution.

Whilst the intention of the NSW Government to redefine the meaning of “brothel” may have been to make it simpler for councils to succeed in prosecuting owners and operators of unlawful brothels, it is Councils view that the level of evidence required and the sophistication of the proprietors in concealing their activities means that these cases remain far from simple.

### **Enforcement powers required to close illegal brothels**

The NSW Government has provided a number of enforcement powers to shut down unlawful brothels, as follows:-

- a. Environmental Planning and Assessment Act 1979
  - i. Section 121B Orders (Order No. 1 - Brothel Closure Orders)
  - ii. Penalty Infringement Notices for breaches to the Act, more recently for prohibited uses
- b. Civil proceedings
  - i. Civil proceedings have a burden of proof on the balance of probabilities

- i.i. Court Orders can be made to have the use of the premise cease if the burden of proof is met
- c. Criminal proceedings
  - i. Criminal proceedings have a burden of proof of beyond reasonable doubt
    - i.i. The Courts can only issue penalties in criminal proceedings of this nature

The difficulty with criminal proceedings is that councils bear the onus of proving each element of the offence beyond a reasonable doubt. Accordingly, before commencing criminal proceedings council officers must obtain the following evidence: -

- a. that sexual services are being provided for reward. This is usually obtained by engaging private investigators to have sex with prostitutes working at the premise;
- b. that more than one prostitute is working at the premise at any one time;
- c. that the premise is offering sexual services in an ongoing nature, i.e. not a one-off situation by a rogue worker;
- d. statements from complainants who were offered sex at the premise;
- e. details of whom is in charge of the business and confirmation from them that they control and influence the way the business is operating. The fact that they own or lease the property is not sufficient evidence to commence proceedings against them;
- f. statements from the operator of the business and/or staff working at the premises confirming:
  - who pays the employees;
  - who organises the services offered at the premise;
  - who is present on a regular basis;
  - who signs off on the placement of newspaper advertisements.

Further to this, circumstantial evidence is also collated when investigating these matters, including obtaining advertisements for sexual services in the adult section of newspapers and online, as well as references to sexual services provided at a premise on online adult forums.

As you could appreciate, obtaining this evidence to the required legal standard has significant resource and financial implications for local government.

## Hornsby Shire Council's experience

From Hornsby Council's experience, the following information is provided with respect to the current regulatory regime.

### Brothel Closure Orders

Pursuant to Section 121B of the Environmental Planning and Assessment Act 1979 Act, Brothel Closure Orders can be issued under Order No. 1 on the operators or owners of premises in circumstances where Council has sufficient evidence to indicate that a premise is being used for a purpose that is prohibited development, namely a brothel.

The process for issuing a Brothel Closure Order is: -

1. Council must obtain evidence, as detailed above confirming that premise is being used as a brothel and details of the operator of the premise;
2. A Section 121B Order No. 1 is issued by Council requiring the business operator/manager/owner to cease using the premise as a brothel;
3. If the Order is not complied with, Council can take the following action:
  - a. Commence Local Court or Land and Environment Court proceedings to obtain a Utilities Order which requires gas, water or electricity to be switched off at the premise. However, it is worthwhile noting that Councils legal representatives have indicated that the courts look favourably on defendants who use the defence that all reasonable steps were taken to ensure the use did not occur again.
  - b. Commence Class 4 proceedings in the Land and Environment Court seeking that Councils Order be enforced and complied with. In these cases, failure to comply with a Court Order is contempt of the Court.

The difficulty with this enforcement power is that once the Section 121B Brothel Closure Order has been issued, Council and its private investigators are required to revisit the premises to prove that the Order has not been complied with before seeking a Utilities Order. If Court proceedings are able to be commenced it is in Councils experience that the proprietor of the business simply 'closes up shop' and moves to a different premises, resulting in the problem being moved to a new suburb or even to a different Local Government Area.

### Prosecution in the Local Court


Pursuant to Section 76 of the Environmental Planning and Assessment Act 1979 prosecution proceedings can be commenced in the Local Court against the proprietor for carrying out a prohibited development, namely a brothel.




## Future regulation of brothels in New South Wales

As outlined above, the investigation and enforcement of unlawful brothels is an extremely time consuming and highly resource dependent process for councils and requires strong regulation, similar to the State Government-enforced licensing requirements for alcohol and tobacco. It is the position of Hornsby Shire Council that to achieve a state-wide consistent approach to regulating and licensing brothels and protecting workers in this field, one appropriate regulatory authority at the State Government level should be established. This change in responsibility would enable the licensing, regulation and enforcement of brothels to be better managed both in terms of the funding and resources required for investigations.

Further to this, in order for the future, effective regulation of brothels throughout New South Wales, Council urges that the Committee resolve to have the definition of 'brothel' within the Environmental Planning and Assessment Act 1979 to be amended to mirror that contained within the Restricted Premises Act 1943. This amendment would ensure that the burden of proof beyond a reasonable doubt would be able to be met when taking enforcement action against proprietors of unlawful brothels.

Council thanks you for the opportunity to provide feedback on the inquiry into the regulation of brothels in NSW. Should you wish to further discuss this matter, please do not hesitate to contact Simon Evans, Compliance and Certifications Manager on 

Yours faithfully



SIMON EVANS  
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