

**Submission  
No 137**

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

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# **NSW Government Submission to the Legislative Assembly Select Committee on the Regulation of Brothels' Inquiry into the Regulation of Brothels**

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## Introduction

The NSW Government welcomes the Inquiry into the Regulation of Brothels. It is an opportunity to comprehensively review the current regulatory system for brothels in NSW to ensure it meets stakeholder and community expectations.

The NSW Government considers that the objectives of any regulatory system for brothels should be the protection of residential amenity, protection of sex workers and safeguarding public health.

In addition to considering the recommendations of the Inquiry, the NSW Government is taking other actions in relation to the sex industry to:

- Develop a practice manual to assist councils dealing with unapproved brothels, inspecting approved brothels, and adopting risk-based compliance techniques.
- Establish a monitoring and compliance protocol between NSW regulators involved in the sex services industry, including in relation to the sharing of information.

This submission provides an overview of the current regulatory system for brothels in NSW.

## Current regulatory framework for brothels in NSW

The sex industry is decriminalised in NSW. The key pieces of state legislation now governing the operation of the sex industry in NSW are:

- *Environmental Planning and Assessment Act 1979* (EP&A Act): regulates brothels as a land use through the planning and development assessment process.
- *Local Government Act 1993*: enables the enforcement of conditions of consent and inspections of premises.
- *Restricted Premises Act 1943*: provides a definition of a brothel and outlines powers to seek an order to close a brothel.
- *Summary Offences Act 1988*: provides a definition of prostitution and provides offences relating to sex work including advertising sex work and coercion.
- *Crimes Act 1900*: provides offences relating to sexual servitude.
- *Public Health Act 2010*: provides public health and disease control measures and offences relating to sexually transmissible infections.
- *Work Health and Safety Act 2011* (WH&S Act): provides work health and safety requirements.

Councils are responsible for regulating brothels as a land use. As well as councils, a number of NSW Government agencies have roles in relation to the sex industry:

- Department of Planning and Environment is responsible for the planning system as whole including zoning for different land uses.
- WorkCover NSW is responsible for administering the legislation relating to health, safety and welfare at work including brothels.
- NSW Ministry of Health is responsible for supporting the delivery of HIV and STI services.
- The NSW Police Force is responsible for investigating criminal activities associated with brothels and sex work.

## Land use planning, compliance and enforcement

### Planning for brothels

Under the EP&A Act, councils may regulate brothels through local environmental plans (LEPs) or development control plans (DCPs). LEPs may permit or prohibit sex work (including 'sex services premises' or 'home occupation (sex services)') in specific locations (i.e. through zones) in LEPs, or specify standards or controls that must be met for the location, design or operation of such premises.

The planning principle on the location of brothels set down in the NSW Land and Environment Court has been widely used by councils to inform their policy on regulating brothels (see Appendix A)<sup>1</sup>. The planning principle notes that brothels are a legal land use that benefits some parts of the community and offends others. The principle advises that brothels should not be located near schools, educational institutions for young people or places where children and adolescents regularly gather, or near places of religious worship. The principle also states that criteria for locating brothels should not be so onerous as to exclude them from all areas of a municipality.

Some councils, in particular the City of Sydney, have undertaken substantive policy and strategic planning work to establish planning frameworks for the control of brothels and related adult entertainment premises<sup>2</sup>. Other councils have broadly limited the development of brothels in their area through extensive planning control.

### Development assessment

Development consent, obtained through lodgement of a development application (DA), is generally required to operate a premises as a brothel, whether as a sex services premises or a home occupation (sex services). Requirements for the location, design, and operation of brothels are generally set by councils in their DCPs, which also usually require the notification and/or advertising of these DAs to the community, or for them to be determined by a full meeting of council rather than by a council officer under delegation. There is no requirement for councils to consult with other public agencies, such as health or police services, as part of the assessment of a DA for a brothel.

If a brothel is granted development consent, it will be required to act in accordance with conditions of consent. The conditions of consent are set by the relevant council, and may relate to the management and operation of the premises (including maintaining a Plan of Management), hours of operations, limits on the number of workers, cleaning requirements, or allowing access by health professionals to assist and educate workers.

### Enforcement and compliance

As the consent authority, councils are primarily responsible for regulating the operation of brothels with or without development consent.

There is a range of legislative avenues for councils to undertake compliance and enforcement for brothels:

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<sup>1</sup> The planning principle is explicitly referred to in the following DCPs: Randwick DCP 2013, Lake Macquarie DCP 2014, Hornsby DCP 2013, Byron DCP 2014.

<sup>2</sup> City of Sydney. (2013). *Development Guidelines: Sex Industry and Adult Entertainment Premises*. Sydney, Australia. City of Sydney.

- Councils have powers to enforce development under the EP&A Act. If a brothel is not operating in accordance with its development consent, without development consent, or in an area where brothels are prohibited, a council may restrain such a breach of the EP&A Act. Enforcement tools include:
  - issuing a penalty notice;
  - issuing an order to comply with a development consent (s. 121B of the EP&A Act);
  - issuing an order for a premises to cease being used as a brothel (a brothel closure order under s. 121ZR of the EP&A Act); or
  - if a brothel closure order is not complied with, enforcing the order by cutting off utilities to the premises via an order to the Local Court or the Land and Environment Court (s. 121ZS of the EP&A Act);
  - undertaking action in the Land and Environment Court.
- Under s. 17 of the Restricted Premises Act the Land and Environment Court may, on application by a council, make an order that an owner or occupier of premises that are a sex services premises is not to use or allow the use of the premises as a sex services premises, even if the sex services premises has development consent. There is a range of criteria the Court must take into account in s. 17(1) of the Act when considering whether ordering a sex services premises to be closed.

The *Brothel Legislation Amendment Act 2007* expanded the powers of councils and the Land and Environment Court via amendments to the EP&A Act and the Restricted Premises Act, in particular permitting the cutting-off of utilities such as power, gas or water supplies for brothels without development consent, reducing notice periods and opportunities for adjournments. Brothel orders can be made effective within five working days, and can be served on any person involved in the management of the brothel, and not just upon owners or occupiers. Noncompliance with these orders is an offence and penalties apply.

The order can also be made against a premises being used for 'related sex uses' to ensure that brothels that are closed do not immediately reopen with a related unauthorised use, for example as an erotic massage parlour.

Despite the legislative avenues available to councils, recent media coverage has highlighted the practical difficulties and costs for councils associated with the enforcement of planning law in relation to brothels they consider to be operating without development consent or not in accordance with conditions of consent<sup>3</sup>.

## Advertising

The Summary Offences Act currently prohibits the advertising of sex services. Under this Act, it is illegal to:

- advertise or erect a sign indicating that a premises is used for the purposes of sex work (s. 18 of the Summary Offences Act);
- advertise that a person is available for the purposes of sex services (s. 18 of the Summary Offences Act); or

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<sup>3</sup> Chung, F. (2015, February 27). High-rise happy endings: Illegal prostitution thriving at swanky Central Park complex. *News.com.au*.  
Duff, E. (2014, September 21). Councils hire sex spies to catch parlours in the act. *Sydney Morning Herald*.

- advertise for employment for sex workers (s. 18A of the Summary Offences Act).

Despite the prohibition, advertising of brothels does occur and councils use the advertisements in newspapers to monitor sex industry premises in their area.

## Work health and safety and public health

### Work health and safety

The WH&S Act regulates health and safety at work. The WH&S Act covers all workplaces in NSW including brothels. Owners and operators of brothels, as with any other enterprise, have a responsibility to ensure the health and safety of sex workers, other employees, clients and visitors to the premises.

Under the *Workers Compensation Act 1987*, employers must obtain and maintain in force a policy of workers compensation insurance for their employees.

WorkCover NSW is responsible for administering the legislation relating to health, safety and welfare at work and undertakes a range of compliance and enforcement activities that are primarily determined by the level of risk with in a particular industry. WorkCover uses data and evidence to prioritise activities to those industries with the highest rates of injuries or illness. Based on such data, the sex industry is not a priority industry for WorkCover. However, the degree of under-reporting of injuries and/or illness in the sex industry is unknown.

WorkCover conducts workplace inspections and/or interventions following a complaint or a workplace incident and, where necessary, issues penalties and undertakes prosecutions in respect of breaches of the legislation. Where an investigation has taken place, the most common issues have related to the need for personal protective equipment, maintenance of a clean work environment and lack of appropriate workers compensation insurance.

In 2001 WorkCover NSW in collaboration with NSW Health issued a guide *Health and Safety Guidelines for Brothels* which sets out comprehensive guidelines and minimum standards that proprietors should comply with to maintain a safe and healthy work environment. The guidelines are voluntary although WorkCover NSW surveys sex premises from time to time to monitor compliance.

The Sex Workers Outreach Project (SWOP) was established in 1990 and is funded by the NSW Ministry of Health to provide HIV, hepatitis C and sexually transmissible infections peer-based health education, prevention, outreach and support to sex industry workers across a range of settings in NSW. It also works with brothels owners and operators to encourage the acceptance and maintenance of safe sex practices and general workplace health and safety.

### Public Health

Public health in relation to the sex industry relates primarily to the levels of sexually transmissible infections (STIs), including HIV, amongst sex workers, clients and members of the community. The key contributors to safeguarding public health in this context are safe sex practices and access to appropriate peer education health promotion and outreach services and professional clinical services.

Research by the Law and Sexworker Health team (LASH) finds that condom use at work approaches 100 per cent in Sydney brothels and when the LASH team tested the Sydney sex workers the prevalence of four STIs was at least as low as the general population<sup>4</sup>.

The current low levels of STIs are seen as a result of a successful targeted approach by the NSW Government, specialist health services, support and outreach programs (including SWOP) and sex workers to promote HIV and STI prevention and treatment in the sex industry.

The Public Health Act makes it an offence for an individual or an owner or operator of a sex services premises, including a brothel, to knowingly permit sexual intercourse to take place where there is a risk of contracting a sexually transmissible medical condition, without informing relevant parties.

NSW Ministry of Health is responsible for supporting the delivery of HIV and STI services through the implementation of the NSW HIV and STI Strategies. This includes:

- Providing funding through the 'Partnerships for Health' program to community based NGOs
- Providing a range of sexual health services;
- Investigating complaints related to public health issues in brothels; and
- Taking action, if needed, under the Public Health Act.

The use of contaminated equipment during skin penetration activities, such as ear piercing or tattooing, risks transmitting infections between clients. Swimming pools and spa baths, if poorly maintained, can cause infections in exposed people. The Public Health Act and *Public Health Regulation 2012* regulate these activities and facilities. The regulations are primarily enforced by councils. Public Health Units provide advice and training for councils, with support from NSW Health. Council Environmental Health Officers also undertake routine inspections of brothels to assess general hygiene, the provision of cleaning and personal hygiene facilities, and the availability of safe sex material.

## Prevention, detection and investigation of crime

### Investigating criminal activities associated with brothels and sex work

Since the 1995 decriminalisation of brothels, the primary body responsible for the investigation of brothels has moved from the NSW Police Force to councils. The role of the NSW Police Force in relation to brothels is focused on investigating criminal activities associated with brothels and sex work.

This may include enforcing laws such as:

- Sexual servitude (s. 80D and s. 80E of the Crimes Act);
- Procuring (s. 91A and s. 91B of the Crimes Act);
- The age of sex workers, including in brothels (who must be at least 18 years old) (s. 91C of the Crimes Act);
- Coercion (s. 15A of the Summary Offences Act);

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<sup>4</sup> Donovan, B., Harcourt, C., Egger, S., Watchirs Smith, L., Schneider, K., Kaldor, J.M., Chen, M.Y., Fairley, C.K., Tabrizi, S., (2012). *The Sex Industry in New South Wales: a Report to the NSW Ministry of Health*. Sydney: Kirby Institute, University of New South Wales.



- Where street sex workers solicit or work (must not be near or within view of a dwelling, school, church or hospital) (s. 19 and s. 20 of the Summary Offences Act);
- Crimes such as harassment or sexual assault, as well as any other crimes which may have taken place in a brothels;
- The involvement of other criminal groups or activities in the operation of brothels.

While a handful of charges have been brought, there have been no convictions over the past five years for sexual servitude (s. 80D of the Crimes Act) or coercion (s. 15A of the Summary Offences Act)<sup>5</sup>.

The NSW Police Force may apply to the Supreme Court for a brothel to be closed down if any of the 'disorderly' conditions in Part 2 of the Restricted Premises Act are suspected to be taking place on the premises of the brothel. This may include the sale of liquor or drugs in the brothel, or the involvement of criminals in the control or management of the brothel.

In some local area commands, sex worker liaison officers have been established to help sex workers in their dealings with the police. The liaison officers are aimed to help support sex workers dealing with police, and vice versa.

### **Sex trafficking and organised crime**

The Australian Federal Police is separately responsible for investigating the trafficking of people into all industries and domestic situations, including for sex work. The Australian Federal Police works in close coordination with the Department of Immigration and Border Protection and the NSW Police Force.

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<sup>5</sup> As at March 2015. NSW Bureau of Crime Statistics and Research.

## Appendix A. Planning principle on the location of brothels

Planning principle on the location of brothels set down by Roseth SC in *Martyn v Hornsby Shire Council* [2004] NSWLEC 614, at [18]:

The following are criteria for locating brothels:

- Brothels are a legal land use that benefits some sections of the community but offends others.
- Most people believe that the exposure of impressionable groups like children and adolescents to the existence of brothels is undesirable. The aim should therefore be to locate brothels where they are least likely to offend. However, criteria for locating brothels should not be so onerous as to exclude them from all areas of a municipality.
- Brothels should be located to minimise adverse physical impact, such as noise disturbance and overlooking. In this aspect they are no different from other land uses.
- There is no evidence that brothels in general are associated with crime or drug use. Where crime or drugs are in contention in relation to a particular brothel application, this should be supported by evidence.
- Brothels should not adjoin areas that are zoned residential, or be clearly visible from them. Visibility is sometimes a function of distance, but not always.
- Brothels should not adjoin, or be clearly visible from schools, educational institutions for young people or places where children and adolescents regularly gather. This does not mean, however, that brothels should be excluded from every street on which children may walk.
- The relationship of brothels to places of worship (which are likely to attract people who are offended by brothels) is a sensitive one. The existence of a brothel should not be clearly visible from places where worshippers regularly gather.
- There is no need to exclude brothels from every stop on a public transport route. However, it would not be appropriate to locate a brothel next to a bus stop regularly used by school buses.
- Where a brothel is proposed in proximity to several others, it should be considered in the context that a concentration is likely to change the character of the street or area. In some cases this may be consistent with the desired future character, in others not.
- The access to brothels should be discreet and discourage clients gathering or waiting on the street. Apart from areas where brothels, sex shop and strip clubs predominate, signage should be restricted to the address and telephone number.