

**Submission
No 128**

INQUIRY INTO THE REGULATION OF BROTHELS

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Date Received: 20/08/2015

The Committee Manager
Select Committee on the Regulation of Brothels
Parliament of New South Wales
Macquarie Street Sydney 2000

Via email: ROBInquiry@parliament.nsw.gov.au

19 August 2015

Dear Secretary,

NSW Legislative Assembly Select Committee on the Regulation of Brothels (2015)

1. I am pleased to provide this submission in relation to the Committee's terms of reference to consider a review of regulation of brothels in New South Wales.

Summary

2. Pursuant to the NSW *Constitution Act 1902*, The NSW Parliament shall¹ make laws for the peace, good governance and welfare of its citizens. In any proposed reform and regulation of the sex industry in NSW the Committee must have regard to the welfare of sex workers and People with Disabilities. This will ensure that sex workers and their clients are afforded full protection of their human rights in accordance with Australia's international obligations.
3. The human rights of sex workers and People With Disabilities must be a paramount consideration for the Committee when assessing the appropriateness of any proposed uniform regulation of the Sex Industry. The Committee must consider the connection between the human rights of People With Disabilities and the rights of sex workers carefully. In order to implement a reliable regulatory regime in NSW, the location of sex worker premises and access for the needs of People With Disabilities to secure those services must be a fundamental consideration when developing best practice regulation.
4. I believe that the Parliament of NSW should seek to regulate the sex industry in accordance with international human rights law. This will ensure that sex workers and their clients are afforded full protection of their human rights in accordance with Australia's international obligations. I would also like to draw the Committee's particular attention specifically to the issue of People with Disabilities who access sex worker services. Article 9 of the Convention on the Rights of Disabled People (CRPD) requires that People with Disabilities be guaranteed the right to participate and make personal decisions free from arbitrary interference from government and this means that access to services should be a primary consideration of the legislature in regulating the sex industry. People With Disabilities who access sex workers to fulfil their human right to sexual expression must have those rights recognised and protected from arbitrary government interference. I believe therefore that the Committee must ensure any regulation of the sex industry complies with the rights and protections stipulated by the CRPD.

Pursuant to paragraph 3(g) of the Terms of Reference, the Committee should consider both the personal health, safety, wellbeing and human rights of sex workers and the human rights of their clients.

5. The Committee's specific attention is drawn to its responsibility to protect the human rights of sex workers. In ensuring the human rights of sex workers are protected Public Health

¹ *Constitution Act 1902 (NSW)* The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales

outcomes are also improved. If policy makers and sex workers work together in protecting vulnerable populations there is a resulting benefit.²

6. Sex workers, sex surrogates and sex therapists can support clients with a disability through their commitment to meeting public health standards, occupational health and safety legislation; and by facilitating access to sexual services, the right to sexuality which promotes psychological health and wellbeing.³

Touching Base

7. I am a member of the organisation Touching Base: a charitable organisation formed in 2000, focusing on the rights of people with a disability to access the services of sex workers. Touching Base's work looks specifically at the intersection between the human rights of sex workers and People With Disabilities. I understand Touching Base is making it's own submission to the Inquiry. In Australia men and women with disability access sex workers in order to experience consensual sexual relations and learn more about their sexual capacities.⁴ For some people with significant mobility and dexterity impairments, sex workers may be their only way to express their sexuality.⁵
8. It is important for the Committee to acknowledge the practical work of organisations such as Touching Base in providing training to sex workers and providing access to information and support for caregivers and others who work with People with Disabilities. Touching Base is achieving best practice Public Health Outcomes in accordance with paragraph 3(h) of the Committee's terms of reference.
9. In order to achieve best practice regulation of the sex industry, laws must not unreasonably or arbitrarily interfere with fundamental human rights and freedoms.

Compliance with Human Rights

10. International Human Rights law is grounded on the principles of equality before the law and non-discrimination. The right to equality before the law is affirmed in Article 5 of the CRPD and I draw the Committee's attention to the aims of the Universal Declaration of Human Rights (UDHR), International Covenant Civil Political Rights (ICCPR) and the International Covenant on Economic Cultural and Social Rights (ICESCR) which is that: *all people are born free and equal in dignity and rights.*⁶
11. The CRPD provides for the right to make choices about one's own life. The Preamble to the CPRD and various articles including Article 12 prescribe that in the context of sexual rights for people with disability, the right of people with disability to a personal sphere of sexuality free from arbitrary or unlawful interference by third parties.⁷ must be a fundamental consideration of the Legislature.

² C. Overs and B. Loff, "Toward a legal framework that promotes and protects sex workers' health and human rights," Harvard Journal of Health and Human Rights 15/1 (2013), pp. 186-196;

³ Professor Matthew Yau Head of Occupational Therapy Division James Cook University
<http://theconversation.com/why-the-ndis-should-cover-the-services-of-sex-workers-12718>

⁴ www.touchingbase.org Touching Base

⁵ Teela Sanders, (2007) 'The politics of sexual citizenship: commercial sex and disability', Disability & Society, Volume 22, No 5, pp 439-455 as cited in:

'The right to say yes: upholding the dignity of sex workers and their clients with disability'

Isbister, S and Dearing C Human Rights Law Working Group Newsletter. September 2014, Part II p25.

⁶ Art 1, UDHR. 3: Art 1.1 of the ICCPR. 4: Arts 6, 12, 13 and 15, ICESCR
Art 12 CRPD

2. States Parties shall recognize that persons with disabilities enjoy *legal capacity on an equal basis with others in all aspects of life*

3. States Parties shall take appropriate measures to provide access by persons with disabilities *to the support they may require in exercising their legal capacity*

⁷ See earlier-note 5-Isbister and Dearing -p26

12. Pursuant to **paragraph 3 (g)** of the Terms of Reference, in considering the location and availability of sex worker services, it is important to recognise the right to access services of People With Disabilities. This requires the question of the location of services to be focussed upon health and safety considerations and easy accessibility. In this submission I also draw the Select Committee's attention to the *Disability Discrimination Act 1992* (Cth) ('DDA'), which requires access to premises under section 23 of the DDA, and the provision goods, services and facilities (see section 24 of the DDA). In New South Wales, the *Anti-Discrimination Act 1977* (NSW) ('ADA') prohibits discrimination against a person on the ground of disability with respect to the provision of goods and services (see section 49M of the ADA).
13. The Committee must ensure that the current regulatory regime applied by New South Wales Councils is consistent. At present many parts of NSW have relegated the location of sex worker services to designated industrial zones, which are often isolated, difficult to access and poorly lit. This makes it either impossible or potentially dangerous to access these services for People With Disabilities and it also exposes home based sex workers to unnecessary risk.⁸

Freedom from Discrimination

14. Any present or inconsistent application of local government planning laws in New South Wales would breach human rights protections, including those in the International Covenant On Civil And Political Rights (ICCPR). For example, *Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*" Permitting local government to treat home based sex workers differently to other home-based occupations are in violation of the international human right to freedom from discrimination and Australian anti-discrimination laws.⁹
16. Sexual expression is a fundamental part of being human. The human right to express personal choice and freedom must always be protected. Whilst not all People with Disabilities require access to sex workers, the human right to personal freedom and expression for People with Disabilities who do, must be protected.

Commonwealth Public Policy Developments

17. The Committee's particular attention is drawn to both International developments and changes at the Commonwealth level in Public Policy –particularly concerning the issue of the important and therapeutic Public Health role of sex workers in modern societies.¹⁰ International Human Rights conventions articulate the responsibilities of member States who are parties to the Conventions. In Australia the main Human Rights instruments discussed in this submission have been ratified at law. Both the Human Rights of People with Disabilities and the Human Rights of Sex Workers must be paramount in establishing a regulatory regime for the Sex Industry. Sex workers who work with People with Disabilities are protecting the human rights of People with Disabilities to sexual expression. The human rights of sex workers must also be protected.
18. In 2013 submissions to the Commonwealth parliamentary inquiry into draft legislation for the National Disability Insurance Scheme (NDIS) called for sexual assistance to be included in the list of services offered to Australians with a disability. In order to achieve human rights for people with disability, including the right to access sex therapy and sex services for People with Disabilities. The NDIS is an important milestone in the recognition of individuals right to self-determination in order to fulfil their own intimacy needs and desires. Given that these

⁹ In accordance with the Committee's Terms of Reference: The City of Sydney has successfully regulated private sex workers in residential areas as an exempt development for over a decade, consequently the (2004) Sex Services Premises Planning Guidelines are worthy of review. Through further consultation with stakeholders so as to update and provide currency to the Guidelines and then swift implementation, unnecessary, unreasonable, unwarranted and discriminatory regulation can be removed with one would expect a resulting cost benefit through the removal of unnecessary duplication or over regulation.

¹⁰ C. Overs and B. Loff, "Toward a legal framework that promotes and protects sex workers' health and human rights," Harvard Journal of Health and Human Rights 15/1 (2013)

discussions are being raised at The Commonwealth level, then the NSW State legislature should pay attention to acknowledging and reflect a similar position at law and in terms of Public Policy including in its consultations with the Commonwealth and other State and Territory Governments (COAG).

19. In a recent article in *The Conversation* Professor Mathew Yau, the Head of the Occupational Therapy at James Cook University said:

*“Decades of research have uncovered the many benefits of sex which include physical health, quality of life, psychological wellbeing and sexual self-esteem. People who have a physical or intellectual disability, whether from birth or through accident or disease later in life, might find it difficult to express their sexuality in satisfying ways. Their sexual function or feeling might be limited. And they may be uncertain about how to negotiate relationships and express their sexuality due to lack of knowledge or physical or cognitive limitations. Some people with disabilities have limited opportunities for sexual relationships because they lack privacy and are dependent on others for daily living tasks. They may be well cared for, but a lack of access to sexual release means their quality of life is diminished”*¹¹

20. Dr Lau says therefore that the NDIS could potentially cover two types of sexual services: Professional sex therapy, to provide sex education and guidance to couples and individuals with a disability. Such therapy would focus on how to enjoy or resume sexual and intimate activities after an injury or as the client’s disease progresses.¹²
21. Whilst outside of the scope of the Committee’s terms of reference I hope that the State of NSW will take the lead in negotiations with the Commonwealth and consider the role of the National Disability Insurance Scheme (NDIS) and the funding of sex therapies in its implementation phase at a State and Territory level.
22. Sexual services, for those who don’t have potential partners or physical and/or the intellectual ability for sexual expression should be seen as having a legitimate human right to access these services pursuant to Article 9 of the CRPD.

Reasonableness and Proportionality

23. With respect to the Select Committee Terms of Reference at 3(h): good legislation is proportionate to the problem to be addressed. Consequently, legislative provisions should be *“reasonable, necessary and proportionate”*.¹³ In seeking to implement reasonable, proportionate and necessary laws that regulate the sex industry, the Committee must remove all unnecessary and arbitrary interference by local government. The Committee is encouraged to implement the findings and Guidelines of the Sex Services Premises Planning Advisory Panel (SSPPAP - The Panel) (2004) and the Sex Services Premises Planning Guidelines (The Guidelines), which were designed to assist councils to make informed decisions when regulating the sex industry in NSW. In seeking to implement a fair and just regulatory model, the Committee is urged to review and discuss the implementation of the guidelines in consultation with relevant stakeholders.¹⁴ In considering the rights of disabled persons to access and have the freedom to

¹¹ Professor Matthew Yau Head of Occupational Therapy Division James Cook University
<http://theconversation.com/why-the-ndis-should-cover-the-services-of-sex-workers-12718>

¹² Ibid.

¹³ The UK case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1 is frequently taken as the departure point for determining the standard of ‘unreasonableness’ for courts and tribunals. In *Wednesbury*, Lord Greene MR famously stated that the courts can intervene where a decision by a Minister or government body ‘is so unreasonable that no reasonable authority could ever have come to it’.

Sara Dehm and Cait Storr, ‘Unreasonable Refusal to Adjourn’
<http://blogs.unimelb.edu.au/opinionsonhigh/2013/07/17/dehm-storr-li/>

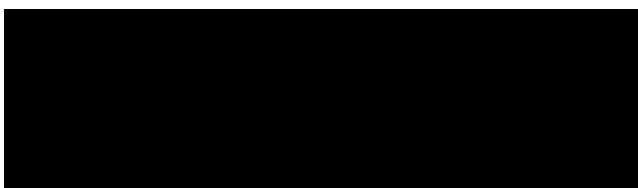
¹⁴ In 2004 The Panel made recommendations to the Minister for Planning towards the development of policy to treat all home occupations equitably on the basis of amenity impact. This is consistent with the international human right to be free from discrimination. The Panel also recommended that any issues of amenity and impact on locality be addressed through Council’s normal planning processes. In addressing councils’ tendency to over regulate, establishing a small Panel to help/ advise councils in the process of applying the Guidelines and the resourcing of training workshops for councils would be a helpful consideration in implanting a state wide and consistent regulatory regime that is reasonable and proportionate.

engage sexual surrogacy and other services, unwarranted and unnecessary regulation of sex workers must end.

Conclusion

16. The Select Committee is required at paragraph 2(c) of the Terms of Reference to review “possible reform options that address the social, health and planning challenges associated with legal and illegal brothels”. This will require removal of unnecessary and unreasonable laws and regulations. Adopting The Panel’s Guidelines will achieve consistency in the regulation of sex work throughout New South Wales. I draw the Committee’s particular attention to the successful policy implemented by the City of Sydney, which has regulated private sex workers in residential areas as an exempt development for over a decade.¹⁵
17. Pursuant to paragraph 3(f) of the Terms of Reference, I believe that a human rights framework properly supports the fulfilment of privacy and public health legal obligations that underpin the regulation of the sex industry in NSW and throughout Australia.
18. The Committee must specifically acknowledge the work that organisations such as Touching Base and private sex workers perform because in so doing they are honouring the State party obligations under the CRPD in terms of ensuring that People with disabilities have the right to make personal choices about their own lives¹⁶ including the right to engage sex workers to fulfil their need for sexual expression.
19. In establishing best practice regulation in NSW, it is important that the Committee ensures that both the human rights of sex workers and the human rights of People with Disabilities is fundamental consideration in any proposed uniform regulation or legislation in this area and that laws be *for the peace, welfare and good governance* of all its citizens.
20. In order to establish appropriate local and state government rules: achieve best practice public health outcomes: and enforce and protect Australia’s international human rights obligations, the fundamental human rights of sex workers and People with Disabilities must be protected within one consistent regulatory framework.

Yours faithfully,



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¹⁵ See information, contact details and referrals for Duty Planner at City of Sydney
<http://www.cityofsydney.nsw.gov.au/business/regulations/sex-industry-premises>

¹⁶ Ageing, Disability and Home Care, Department of Family and Community Services NSW, ‘Client Risk Policy and Procedures’ (2012), p 4, www.adhc.nsw.gov.au/_data/assets/file/0009/228078/Client_Risk_Policy_and_Procedures_Apr_2012.pdf, accessed 8 August 2015