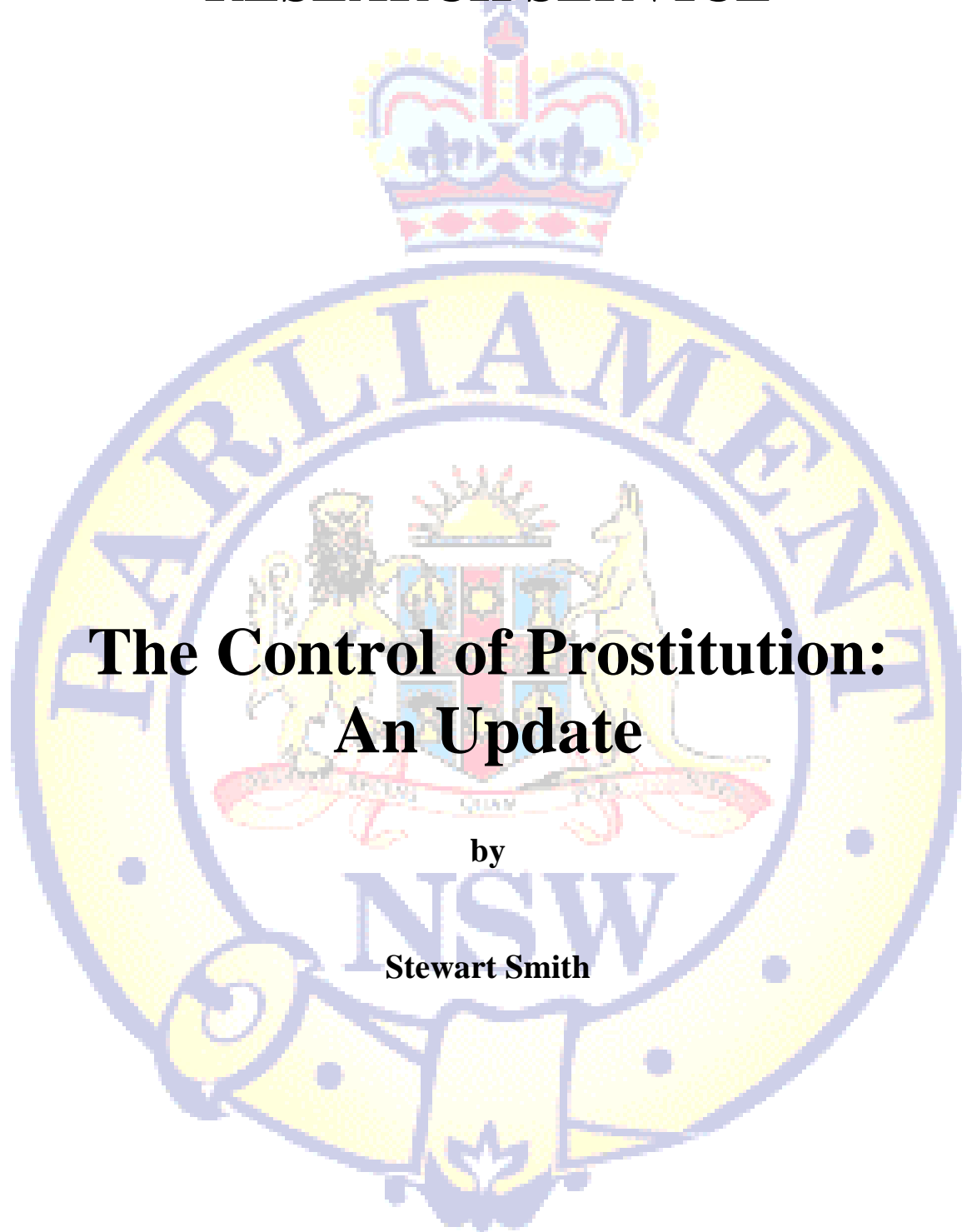


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**The Control of Prostitution:
An Update**

by

Stewart Smith

Briefing Paper No 14/03

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EXECUTIVE SUMMARY

The commercial sex industry in NSW continues to attract media attention as communities throughout the State grapple with the vexed issue of where to locate legal brothels. The difficulty of closing illegal brothels is a major issue that has been addressed since 1999. Issues still of concern include the vetting of brothel applicants as to their fame and character and the licensing of prostitutes and brothels. The incidence of street prostitution and the involvement of illegal immigrants in the sex industry continue to be of concern.

The *Disorderly Houses Amendment Act 1995* legalised brothels and living off the earnings of a prostitute. With the passage of the legislation, a brothel then became a commercial business requiring local council approval under the *Environmental Planning and Assessment Act 1979*.

Current debate centers not so much on the morality of legalised prostitution and brothels, although this is still an issue, but more on how to close down brothels that are illegal. There are two mechanisms for local councils to close down an illegal brothel: the council, or any other person, may apply to the Land and Environment Court to remedy or restrain the breach of the relevant planning legislation; the second mechanism for a local council to close a brothel is through the *Disorderly Houses Act*. Under s.17 of the Act, a council may make an application to the Land and Environment Court for an order to close a brothel if the council has received sufficient complaints about the brothel to warrant making the application.

A Brothel Task Force was established by the Government, and reported in November 2001. The Task Force concluded that the regulation of brothels through the planning system can be an effective means of control, but that local government needed further support to optimise the potential of the planning system. In response, the Government established the Brothels Planning Advisory Panel. The Task Force also recommended amending the *Disorderly Houses Act* to clarify what evidence is needed in the Land and Environment Court to determine that a premise is operating as an (illegal) brothel. Amendments, allowing circumstantial evidence to prove that premises were operating as a brothel, were subsequently passed by the Parliament.

The brothel regulatory environment in other states is reviewed. In South Australia and Tasmania prostitution is illegal, while in the Northern Territory brothels are illegal but prostitution is not. In those States that have legalised prostitution and brothels, one of the main areas of debate is how restrictive the regulatory environment should be. Victoria, Queensland and the proposed reforms in Western Australia provide for a strict regulatory environment, requiring brothels to have both town planning permission and be licensed by a separate licensing authority. In NSW, brothels need town planning permission only. Somewhat ironically, critics of the 'lax' regulatory environment in NSW make reference to the enforcement regime in other jurisdictions. In other states, critics of the claimed restrictive regulatory environment hold NSW as the model for legislation

1.0 INTRODUCTION

Legislation has been introduced and extensively amended over the years as governments of all persuasions have sought to control gambling, drink and prostitution. In mid 1995 the Government, in light of the findings of the Royal Commission into the NSW Police Service, announced that reform of prostitution laws in NSW would be undertaken.¹ Subsequently, legislation was passed to legalise brothels. Local councils became the determining authority for where a brothel was to be located, according to normal planning legislation, and brothels were no longer the concern of the police force.

The commercial sex industry in NSW continues to attract media attention as communities throughout the State grapple with the vexed issue of where to locate legal brothels. The difficulty of closing illegal brothels is a major issue that has been addressed since 1999. Issues still of concern include the vetting of brothel applicants as to their fame and character and the licensing of prostitutes and brothels. The incidence of street prostitution and the involvement of illegal immigrants in the sex industry continue to be of concern.²

2.0 THE DISORDERLY HOUSES AMENDMENT ACT 1995

On 20 September 1995, the Minister for Police, Hon Paul Whelan MP, introduced into the Legislative Assembly the *Disorderly Houses Amendment Bill 1995*. After considerable debate in the Parliament on the moral and religious issues surrounding prostitution, the legislation was passed with Opposition support and was assented to on 22 November 1995.

The *Disorderly Houses Amendment Act 1995* legalised brothels and living off the earnings of a prostitute. The Act also amended the *Crimes Act 1900* to abolish the common law offence of keeping a brothel and related common law offences. With the passage of the legislation, a brothel then became a commercial business requiring local council approval under the *Environmental Planning and Assessment Act 1979*. In addition, the *Disorderly Houses Amendment Act 1995* also provided a mechanism for local councils to apply to the Land and Environment Court to close a brothel, as explained further below.

The Act defines a brothel as: premises habitually used for the purposes of prostitution, or that have been used for that purpose and are likely to be used again for that purpose. Premises may constitute a brothel even though used by only one prostitute for the purposes of prostitution.

Current debate centers not so much on the morality of legalised prostitution and brothels, although this is still an issue, but more on how to close down brothels that are illegal. There are two mechanisms for local councils to close down an illegal brothel: ie, brothels located in a zone where they are prohibited, or in a zone where they are permissible with consent

¹ Lamont, L, 'NSW to review its laws on prostitutes', *The Sydney Morning Herald*, 13/6/95.

² This Briefing Paper is an update of the Briefing Paper *The Regulation of Prostitution: A Review of Recent Developments*, 1999.

but consent has not been obtained. These circumstances give rise to a breach of section 76A or 76B³ of the *Environmental Planning and Assessment Act*. The council, or any other person, may apply to the Land and Environment Court to remedy or restrain the breach.

The second mechanism for a local council to close a brothel is through the *Disorderly Houses Act*. Under s.17 of the Act, a council may make an application to the Land and Environment Court for an order to close a brothel. However, the Council cannot make this application unless it has received sufficient complaints about the brothel to warrant making the application. The complaints must have been made by:

- (a) residents of the area in which the brothel is situated who live in the vicinity of the brothel; or
- (b) residents of the area in which the brothel is situated who use, or whose children use, facilities in the vicinity of the brothel; or
- (c) occupiers of premises that are situated in the area in which the brothel is situated and in the vicinity of the brothel.

The Council's application must state the reasons why the brothel should be closed by the Court, yet can only make reference to the reasons as outlined in the Act. These reasons are:

- (a) whether the brothel is operating near or within view from a church, hospital, school or any place regularly frequented by children for recreational or cultural activities;
- (b) whether the operation of the brothel causes a disturbance in the neighbourhood when taking into account other brothels operating in the neighbourhood or other land use within the neighbourhood involving similar hours of operation and creating similar amounts of noise and vehicular and pedestrian traffic;
- (c) whether sufficient off-street parking has been provided if appropriate in the circumstances;
- (d) whether suitable access has been provided to the brothel;
- (e) whether the operation of the brothel causes a disturbance in the neighbourhood because of its size and the number of people working in it;
- (f) whether the operation of the brothel interferes with the amenity of the neighbourhood;

The test for the Council is therefore two-fold. There must be sufficient complaints by the relevant people as defined in the Act, and the complaints must be based on the reasons as

³ These sections refer to developments that need consent or are prohibited developments.

outlined above. In making its determination, the Court must also consider the above reasons, and is also permitted to consider any other matter that the Court considers relevant.

On 29 December 1995, not long after the commencement of the *Disorderly Houses Amendment Act*, the Department of Urban Affairs and Environment wrote to all local councils. The Department reiterated that where a brothel is not prohibited by a Local Environment Plan, council may consider the development application for a brothel in the same way as any other permissible development. It was noted that a blanket prohibition of brothels through Local Environment Plans, making the establishment of brothels illegal under planning law, would not be supported by the Minister for Urban Affairs and Planning (who must sign off each LEP). The Department noted that such an action by a council would contradict the intention of the legislative reforms, may result in increased street prostitution and could encourage attempts to corrupt council staff. The Department concluded that brothels are most suitable in commercial and industrial premises that are not adjacent to schools or facilities frequently used by children.⁴

The Department again wrote to all councils some seven months later advising that the Minister would not object if councils limited permissible sites for brothels to those zoned for industrial purposes. This was in response to community concerns about the possibility of brothels being located in shopping centres. Councils could therefore restrict brothels to industrial areas that are not adjacent to schools or facilities frequently used by children. The Department reiterated that a blanket ban on brothels through Local Environment Plans would not be supported.⁵

Currently, about half of the local councils in NSW have prepared Local Environment Plans to identify locations where brothels may operate. Councils have generally adopted the locational principles for brothels contained in the *Disorderly Houses Act*, but there is some variation in their application. Most councils prohibit brothels in residential areas. However, some councils, such as South Sydney, allow "home business brothels" in residential, business and mixed use zones without development consent. Where Local Environment Plans do not specifically define brothels and state where they are permitted or prohibited, then brothels are generally permitted where other commercial premises are permitted to operate. In some areas, this includes residential zones.⁶

⁴ Department of Urban Affairs and Planning, *Council Circular - Planning Control of Brothels*, 29 December 1995.

⁵ Department of Urban Affairs and Planning, *Council Circular - Planning Control of Brothels*, 16 July 1996.

⁶ NSW Government, *Report of the Brothels Task Force*, November 2001, at 8.

3.0 PROSTITUTION OFFENCES UNDER THE SUMMARY OFFENCES ACT 1988

Prostitution offences are included in Part 3 of the *Summary Offences Act 1988*. The Act includes various prostitution offences as follows:

- It is an offence for a person to live on the earnings of prostitution of another person, except if the person is employed in a brothel;
- It is an offence by coercive conduct or undue influence, to cause or induce another person to commit an act of prostitution;
- It is an offence to use, for the purpose of prostitution or soliciting for prostitution, any premises held out as being available for massage, steam baths, sauna or similar, or for taking of photographs or services of a like nature; Similarly, the owner, occupier or manager of these premises shall not knowingly permit the above premises to be used for prostitution;
- Section 18 of the Act prohibits any advertising, including signs, indicating that any premises are used or are available for use, or that a person is available, for the purposes of prostitution;
- It is an offence to advertise for a prostitute;
- Section 19 details offences for soliciting clients by prostitutes. These include:
A person in a road or road related area shall not, near or within view from a dwelling, school, church or hospital, solicit another person for the purpose of prostitution; A person shall not, in a school, church or hospital, solicit another person for the purpose of prostitution; A person shall not, in or near, or within view from, a dwelling, school, church, hospital or public place, solicit another person, for the purpose of prostitution, in a manner that harasses or distresses the other person. A reference to soliciting in this section include a reference to soliciting from a motor vehicle, whether moving or stationary.
- Section 19A provides for similar offences, except in this case for clients soliciting prostitutes. This section was inserted in 1999 with the introduction of the *Crimes and Courts Amendment Act 1999*. The Hon Paul Whelan MP, then Minister for Police, stated about the Bill at the Second Reading Stage: “By clearly criminalising the behaviour of persons seeking the services of prostitutes in the proscribed public places, the creation of the new offences should have a deterrent effect on such persons and thus reduce the incidence of street prostitution. The creation of a separate offence for clients will guide police discretion by providing police with an explicit policy statement and clear direction about the desirability of charging clients of sex workers with prostitution offences. By expressly mentioning "motor vehicles" the new offence will operate to target kerb crawlers. Kerb crawlers are persons who seek the services of street prostitutes by driving slowly along the street. Their behaviour causes significant community concern in certain areas. The mere act of driving slowly in a non-dangerous manner is not criminalised by this proposal. However, soliciting a sex worker or soliciting a client from a vehicle

is specifically targeted.”⁷

- Section 20 of the Act covers public acts of prostitution. It is an offence for each person taking part in an act of prostitution to do so in, or within view from, a school, church, hospital or public place, or within view from a dwelling, including in a vehicle, whether or not the act of prostitution can be seen from outside the vehicle.

4.0 RECENT DEVELOPMENTS

4.1 Private Member Prostitution Bills

Reflecting the wide community opinion about the best management of brothels in the community, there have been several Private Member Bills presented to the Parliament on prostitution related issues since the 1995 reforms. For instance, John Brogden MP introduced into the Legislative Assembly on 6th September 2001 the *Community Protection (Illegal Brothels) Bill*. The Bill amended the *Environmental Planning and Assessment Act 1979* to:

- remove the application of State Environmental Planning Policy No 1 in relation to development for the purposes of a brothel;
- provide for councils to issue orders to cease using premises for the purpose of an illegal brothel;
- if the brothel failed to comply within 48 hours of being issued a closure order, authorise the council to prevent access to the illegal brothel, such as erecting hoardings over doors and windows or changing the locks.

Speaking to the Bill, Mr Brogden stated: “The existing legislation has failed to allow councils to control the location of brothels and it has failed to empower councils to close down brothels that are operating illegally...These reforms will allow councils to restrict brothels to appropriate areas. Councils will be empowered to act immediately against illegal brothels. Sex workers will not be forced out of legal brothels and onto the streets. Instead, the operators of illegal brothels will be forced to obtain lawful consent for the activities conducted on their premises. For some brothels this may involve moving to a more appropriate location. For those operators who employ illegal immigrants as sex slaves, or who refuse to upgrade their premises to ensure a safe and clean environment, this Bill will give councils the power needed to put those operators out of business.”⁸

The Government, in not supporting the Bill, noted that its reforms to the Disorderly Houses Act (reforms introduced in November 2001, as discussed below) and the introduction of a Brothel Planning Advisory Panel had made the Bill redundant. Whilst this claim was strongly rejected by the Opposition, the Bill was negatived at the Second Reading Speech stage on 20th June 2002.

⁷ NSWPD, 16 November 1999, *Crimes and Courts Amendment Bill 1999*, Second Reading Speech by the Hon Paul Whelan MP, Minister for Police, at 2916.

⁸ NSWPD, 20th September 2001, *Community Protection (Illegal Brothels) Bill*, at 16,958.

On the 15th November 2001 Mr Richard Torbay MP also introduced a Private Members Bill – the *Local Communities (Brothels – Flexible Zoning) Bill 2001*. The object of the Bill was to allow councils to establish brothel-free zones in local government areas (which may comprise all or part of a local government area). Under the Bill, an occupier of premises in a brothel-free zone who uses the premises as a brothel would be guilty of an offence. The Bill was supported by the Opposition, but opposed by the Government, and was negatived on 14th November 2002.

5.0 THE REPORT OF THE BROTHELS TASK FORCE

The Brothels Task Force was established by the NSW Attorney General and the Minister for Urban Affairs and Planning in January 2000, and reported in November 2001.⁹ The Task Force was commissioned to monitor the regulation of brothels by local councils and to assess the success of occupational health and safety programs for sex workers, their clients and the public. The specific Terms of Reference of the Task Force were:

- 1) Application of planning controls to brothels.
 - a) identify the way in which councils have undertaken the role assigned to them by the *Disorderly Houses Amendment Act 1995*;
 - b) assess whether the objectives of the Act are being achieved through the arrangements adopted by councils;
 - c) make recommendations for action by Government and/or councils to address deficiencies.
- 2) Evidentiary requirements.
 - a) assess the evidentiary requirements of the Land and Environment Court on councils regarding the prosecution and closure of brothels;
 - b) recommend action by Government to address deficiencies.
- 3) Occupational Health and Safety issues.

Assess the success of programs provided by the NSW Health and WorkCover for sex workers, their clients and the public.

The Task Force comprised representatives from The Cabinet Office, Attorney General's Department, Department of Local Government, Department of Urban Affairs and Planning, Ministry for Police, WorkCover NSW, NSW Health, Police Service, and the Local Government and Shires Associations.

⁹ NSW Government, *Report of the Brothels Task Force*, November 2001.

The key findings of the Report were:

- The objectives of the 1995 reforms are still relevant and appropriate, and the regulation of brothels through the planning system can be an effective means of control. However, local councils need further support to optimise the potential of the planning system.
- An advisory service is needed to assist local councils in the planning regulation of brothels. The Brothels Planning Advisory Panel would advise and guide councils in the preparation of appropriate planning instruments, development consent conditions and policies. It would also provide a forum for the discussion of issues relating to the planning regulation of brothels.
- Some local councils are experiencing difficulties in enforcing the planning regulation of brothels. Amendments to the *Disorderly Houses Act* would clarify the evidence which is needed to reasonably conclude that premises are a brothel.
- The 1995 reforms have had a positive impact on access for workers to health services and occupational health and safety programs.

There were three main recommendations of the Brothel Task Force. These were:

1. Establish an advisory service to assist local councils in the planning regulation of brothels – a Brothels Planning Advisory Panel;
2. Amend the *Disorderly Houses Act 1943* to clarify the existing law concerning the evidence which is needed to determine that a premise is operating as a brothel;
3. Continue occupational health and safety programs for sex workers.

5.1 The effectiveness of planning legislation in achieving the objectives of the 1995 reforms

The Brothel Review Task Force found that local councils have generally adopted the brothel locational principles contained in the *Disorderly Houses Act*. Most Local Environmental Plans which specifically regulate brothels restrict them to industrial and/or commercial areas. This pattern is a result of Circulars issued by the Department of Urban Affairs and Planning, which state that the Minister will allow councils to restrict the location of brothels in this way. However, the Task Force found a number of issues that have arisen from this practice:

- Brothels operating from industrial areas may pose a safety threat to sex workers;
- Most small brothels (i.e. one or two sex workers) are illegal because they tend to locate in residential areas; and
- Some local government areas do not have industrial or commercial areas available for brothels to locate in.

The Task Force noted that the continuation of illegal brothels and the inability of legal brothels to be established is undesirable because:

- it may encourage street sex work;
- the amenity impacts are not controlled through development consent provisions;
- illegal operators are vulnerable to corrupt conduct by council officers (as they were vulnerable to corrupt conduct by police before the introduction of reforms in 1995);
- illegal operators are less likely to access occupational health and safety programs.

The Task Force concluded that the most effective method of reducing the number of illegal brothels is to develop planning instruments that identify areas where brothels are compatible with other land uses and to attach appropriate conditions of development consent to address the amenity impacts.

5.2 SEPP 1 – Development Standards

The Brothel Review Task Force noted complaints about the use of State Environmental Planning Policy No. 1- Development Standards (SEPP 1) in order to approve a brothel development application. SEPP 1 allows the approval of a development that does not comply with a specified development standard, where this requirement can be shown to be unreasonable or unnecessary. The SEPP is intended to make development standards more flexible, allowing consideration of the circumstances of individual development proposals. Consequently, a council refusal of an application for a brothel may be overturned by the Land and Environment Court on a merits appeal, where the Court concludes that compliance with the standard is unreasonable or unnecessary.

However, local councils and communities have complained that SEPP 1 provides an avenue for brothel applicants to seek Land and Environment Court approval for a rejected brothel development application. For instance, John Brogden MP has told Parliament: “SEPP 1 provides the applicant with an avenue to convince the Land and Environment Court that the council’s development standard is unreasonable or unnecessary in the circumstances. This policy has resulted in the establishment of brothels in locations that blatantly contravene council planning policies such as local environment plans and development control plans....The use of SEPP 1 to sidestep development standards also adds to the legal bill of councils.”¹⁰

However, the Brothel Task Force essentially put the onus of SEPP 1 complaints back on to Councils. It stated that some provisions within Local Environment Plans that identify locations where brothels are prohibited are expressed as development standards. Therefore the use of SEPP 1 is justified where varying the development standard still allows the objective of the standard to be met. The Task Force noted that if a local council considers that SEPP 1 is being used to weaken its planning controls for brothels, it can:

- strengthen and clarify the objectives of the development standards in its Local Environment Plans, so that any variation to the standards still achieves the desired

¹⁰ NSWPD, 20th September 2001, *Community Protection (Illegal Brothels) Bill*, at 16,958.

planning outcome; or

- remove the locational provisions which are expressed as development standards and replace them with prohibitions.

The Task Force noted that a provision which absolutely prohibits a form of development in a specified locality, or on land with a specified characteristic, is not a development standard. A provision in a Local Environment Plan which stated that brothels shall not be established on land in a particular zone, or on land in any zone if a particular form of use (of a sensitive kind such as a church or school) is carried out on adjoining land, would be a prohibition.

5.3 Home based brothels

In February this year the issue of home based brothels attracted wide community interest after Marrickville Council adopted a policy of allowing a single sex worker to operate from home without development consent. However, after much community protest at the decision, and shortly before a State election, the Council wrote to the Minister for Planning asking him to refuse their plan (which required his consent).¹¹ The Minister refused the plan and it subsequently became ‘null and void’.¹²

The Brothel Review Task Force identified a number of issues in regard to home based brothels. Their role in the industry and how they are regulated is important, as private workers reportedly comprise 40 per cent of the industry. The Task Force noted that local councils have adopted a range of planning controls for home based brothels. These include: many councils prohibit all brothels in residential zones; some councils allow home based brothels without development consent if they are operated by one resident sex worker (as a "home occupation"); whilst some councils allow them with development consent if they are operated by a maximum of two non-resident sex workers (as a "local business").

The Task Force concluded that prohibiting home based brothels may not result in sex workers relocating to areas where brothels are permissible. Instead, they may continue to operate illegally in residential areas. In addition, requiring development consent for home based brothels may also result in the continuation of illegal brothels in residential areas. The Task Force noted that sex workers in home based brothels are less likely to seek development consent because it reveals their identity and location, with the result that they can be subject to various forms of abuse and violence. The Task Force was also concerned that workers in illegal home based brothels are less likely to access occupational health and safety programs, and that prohibiting home based brothels, or requiring development consent for these brothels, may have the effect of creating barriers to occupational health and safety services and programs.

The Task Force discussed the option of an amendment to State Environmental Planning

¹¹ “Scepticism on brothel backdown” in *The Sydney Morning Herald*, 20 February 2003.

¹² “Brothel plan ‘null and void’” in *The Daily Telegraph*, 26 February 2003.

Policy No 4 - Development Without Consent and Miscellaneous Complying Development, which could be made to allow home based brothels to be permitted without development consent across the state. This would make the regulation of home based brothels similar to the regulation of other home occupations. The Task Force noted that home based brothels regulated in this manner could still be closed by local councils if they had an adverse impact on the amenity of the neighbourhood. However, with the community protest at the Marrickville Council decision as noted above, this does not seem likely in the near future.

5.4 Government Response to the Report of the Brothel Task Force and other Developments

In response to the recommendations of the Brothel Task Force, on 30th November 2001 the Government introduced the *Disorderly Houses Amendment (Brothels) Bill 2001*. The passage of the Bill ensured that the Land and Environment Court can rely on circumstantial evidence to establish that premises are being used as a brothel. In introducing the Bill, Tony Stewart MP stated: "...the circumstantial evidence may establish facts from which the Court may conclude, as the only rational inference, that the premises are used for the purposes of prostitution. This will assist local councils in proceedings before the Land and Environment Court on an application under the Disorderly Houses Act for premises not to be used as a brothel, or under the Environmental Planning and Assessment Act to restrain the use of premises as a brothel. The Bill is proposed as part of a package of ongoing measures to address the issues identified by the Brothels Task Force."¹³

The Act provides examples of circumstantial evidence including, but not limited to the following:

- (a)evidence relating to persons entering and leaving the premises (including number, gender and frequency) that is consistent with the use of the premises for prostitution,
- (b)evidence of the premises being advertised expressly or implicitly for the purposes of prostitution (including advertisements on or in the premises, newspapers, directories or the Internet),
- (c)evidence of appointments with persons at the premises for the purposes of prostitution that are made through the use of telephone numbers or other contact details that are publicly advertised,
- (d)evidence of information in books and accounts that is consistent with the use of the premises for prostitution,
- (e)evidence of the arrangement of the premises, or of the furniture, equipment or articles in the premises, that is consistent with the use of the premises for prostitution.

The Bill was not opposed by the Opposition, but it expressed the view that the Opposition's proposed changes, as outlined in the *Community Protection (Illegal Brothels) Bill 2001*, would be more effective. In June 2003, Barry O'Farrell MP, noted the problems of illegal brothels closing after council action, simply to reopen elsewhere. Mr O'Farrell told the

¹³ NSWPD, 30 November 2001, *Disorderly Houses Amendment (Brothels) Bill 2001*, Second Reading Speech, Mr Tony Stewart, at 19,295.

House: "...the legislation [*Disorderly Houses Act*] does nothing to prevent the operator simply pulling up stumps and moving premises. The legislation continues to impose a costly and time consuming process upon local councils attempting to close down illegal brothels....It is time that NSW licensed brothels, as other States do. ... Restrictions that allow only licensed brothels to advertise would also help to overcome the existing problems illegal brothels are causing local communities."¹⁴ In regards to the expense for councils commencing court action to close illegal brothels, Brian Preston SC, in legal advice to the Brothels Task Force, noted that the Land and Environment Court has shown a willingness to order costs against a respondent where, although the breach (such as an illegal brothel) is terminated before proceedings for injunctive relief come on for hearing, the unauthorised use was terminated only because the council had commenced the proceedings.¹⁵ The Attorney General Hon Bob Debus MP noted the following in regard to how long it may take a council to obtain Land and Environment orders to close an illegal brothel: "Properly prepared and properly advised, with evidence sensibly collected, a council could go to court and make an initial application for an order which, in some circumstances, will be made on the spot. But, in any event, a council will be able to secure a court hearing in a month or a bit more. Given all of the circumstances that we are dealing with, and given that the regime being set up is a planning regime ... effectively closing brothels that are inappropriately situated—it seems to me that the Government has introduced arrangements that will, by any reasonable measure, be said to be efficacious."¹⁶

In response to the recommendation of the Brothels Task Force, the Government established the Sex Services Premises Planning Advisory Panel. The Panel is to provide advice and assistance to councils in developing their local environment plans, as well as preparing guidelines to assist councils in managing brothel development applications and preparing development control plans. The Local Government and Shires Association of NSW (now known as Lgov NSW) is responsible for administering the Panel. Vic Smith, former Mayor of South Sydney Council, has been appointed the independent chairperson. Other members of the Panel include representatives from: Lgov NSW, Planning NSW; NSW Health; NSW Chamber of Commerce; two councillors, one each from metropolitan and regional NSW; Sex Workers' Outreach Project; Private Workers Alliance; and a person with expertise in legal issues relating to brothels. The Panel held its first meeting in May 2002.¹⁷

¹⁴ NSWPD, *Hansard Proof*, 18 June 2003, at 46.

¹⁵ NSW Government, *Report of the Brothels Task Force*, November 2001. Appendix 4: Legal Advice from Brian Preston SC, *Planning Laws and Brothels: Consolidated Memorandum of Advice*, at 72. Preston used the example of *Rockdale City Council v Kim Maxy Jin* (Unreported LEC, 13 August 1999), where Bignold J was satisfied that the unauthorized use of premises for the purpose of a brothel was terminated only because the council had commenced the class 4 proceedings, and the council was therefore entitled to the costs orders claimed against the respondents.

¹⁶ NSWPD, 5 December 2001, *Disorderly Houses Amendment (Brothels) Bill*, Second Reading Debate, at 19,573.

¹⁷ NSWPD, 14 November 2002, at 6800. Hon Dr Refshauge MP, Minister for Planning, speaking on the *Local Communities (Brothels – Flexible Zoning) Bill*.

5.5 A Separate Licensing Authority

In a minority statement to the Brothels Task Force Report, Cr Peter Woods, on behalf of the Local Government and Shires Associations of NSW, expressed support in principle for the recommendations of the report. However, he expressed disappointment that the Task Force did not address the issue of a two tiered system of brothel control, ie, a separate licensing authority. He stated: “The Associations have previously asserted that a licensing regime should be in place which would separate the planning issues, which are the responsibility of the councils, from the other issues associated with these land uses. It is proposed that this Body would be formed and administered by the State Government and would operate in a similar manner to the Liquor Licensing Court. This body would ensure that other matters such as health, licensing, illegal operations and law and order issues could be dealt with by this body. ...The Associations would endorse this body only applying to larger commercial operations and not home occupations.”¹⁸

However, the Government has rejected arguments for a separate licensing authority, believing it to be a potential area for corruption. For instance, the opening statement of the Brothel Task Force Report was: “The Wood Royal Commission found evidence ‘showing a clear nexus between police corruption and the operation of brothels’ ... In permitting well-run brothels to operate, a potential opportunity for corrupt conduct on the part of police was closed off.”¹⁹ Similarly, in introducing the *Disorderly Houses Amendment (Brothels) Bill 2001*, and making reference to the Local Government Associations desire for a separate licensing authority, Tony Stewart MP told the Parliament: “The Government does not support this proposal. Similar licensing schemes in other States have not worked. Sex workers avoid licensing to protect their privacy. Unlicensed workers are less likely to participate in occupational health and safety programs, and this impacts on public health. Unlicensed workers would also be vulnerable to corrupt conduct on the part of licensing authorities. ... The Government is concerned that some of the proposals to change the regulation of brothels will create new opportunities for corruption and impose a regime that will increase the number of sex workers who are operating illegally.”²⁰

Ironically, press reports indicate that the Police Service is disgruntled with some brothels being approved by the relevant local council. In one case, South Sydney Council approved an existing street workers’ brothel for another 12 months despite police objection. In another case involving Canada Bay Council, the police objected to a brothel application due to the proximity of an outlawed ‘bikie’s clubhouse’. The Council approved the brothel, and a Canada Bay spokesperson stated: “The existence of a biker clubhouse would not be able to be taken into account by council when determining an application as it is not a planning issue.”²¹ The Brothel Task Force report noted that some local councils and relevant police

¹⁸ NSW Government, *Report of the Brothels Task Force*, November 2001, at 30.

¹⁹ NSW Government, *Report of the Brothels Task Force*, November 2001, at 5.

²⁰ NSWPD, *Disorderly Houses Amendment (Brothels) Bill 2001*, Second Reading Speech, Mr Tony Stewart, 30 November 2001, at 19,295.

²¹ “Paying a price for brothels” in *The Daily Telegraph*, 9 August 2002.

have signed a Memorandum of Understanding, in which information is exchanged between the parties in respect of the operation and management of brothels in their local community.

5.6 Street Prostitution

It is apparent that street prostitution is still a problem in certain areas, particularly around Darlinghurst and Cabramatta. South Sydney Council has closed streets surrounding a school in Darlinghurst in an attempt to stop drivers kerb-crawling for prostitutes. With police enforcement of street prostitution proving largely ineffective, the commander of Kings Cross police was reported as saying: “The answer to solving street prostitution has very little to do with police enforcement.”²² Police have installed signs in the area stating that undercover police are targeting kerb crawlers, yet ten offenders were caught in the week after the signs were installed. A police spokesman stated: “This is the crazy bit – we have signs telling them police are in the area and they still come here and get a criminal record. It’s the only undercover operation I know of that is literally signposted.”²³

Reba Meagher MP, Member for Cabramatta, has also raised in the House problems of street prostitution in parts of her electorate. Ms Meagher noted police operations in her area that have attempted to deal with the problem, and spoke about problems with the *Summary Offences Act*. She stated: “The *Summary Offences Act* creates the offence of soliciting for street prostitution. However, those convicted of this offence are generally issued with a fine and end up back on the street and working to pay the fine, if they are so inclined. I believe that a review of the legislation is required if police enforcement efforts are to achieve more than simply feeding the revolving door at the local courthouse.”²⁴ Ms Meagher noted the range of police enforcement and intervention strategies being used to remove street prostitution, including working with the Cabramatta Drug Intervention Service and contact with the Sex Worker Outreach Program. However, Ms Meagher concluded that a co-ordinated multi-agency approach that includes housing, community services and health, along with non-government agencies, is required, and told the House that she has asked the Cabramatta project place manager to coordinate a conference of these stakeholders to develop a range of strategies to ensure that street prostitution does not become entrenched in her electorate.

5.7 The Renaming of the Disorderly Houses Act 1943

In November 2002 the Government introduced the *Disorderly Houses Amendment (Commercial Supply of Prohibited Drugs) Bill*. The bill, supported by the Opposition, was assented to on 17/12/2002. The bill amended and renamed the *Disorderly Houses Act 1943*, with the resulting new Act being called the *Restricted Premises Act*. The

²² “Streets closed near school in bid to curb the crawlers.” In *The Sydney Morning Herald*, 18 April 2002.

²³ “Drivers face arrest. Kerb crawlers ignore police warnings.” In *The Sunday Telegraph*, 16 March 2003.

²⁴ *NSWPD*, 9th May 2002, Cabramatta Street Prostitution, at 1995.

amendments, principally concerned with the supply of prohibited drugs at commercial premises such as cafes, overhauled the disorderly house notice and declaration provisions. It also adopted similar provisions from the *Liquor Act* which allow for the temporary closure of offending premises.²⁵ Disorderly houses are now termed restricted premises.

5.8 Illegal Immigrants and ‘Sex Slavery’

Following revelations that an illegal immigrant, Ms Phoungtong Simaplee, who died in Villawood Detention Centre, was allegedly brought to Australia as a 12 year old girl and enslaved as a prostitute, the NSW Government established a working party to tackle the sex slave trade. Minister Nori told the House:

I have instructed the Department of Women to immediately establish a New South Wales working party of relevant State government agencies, including the Ministry for Police, Attorney General, Health, and Community Services, to work with representatives of the sex industry to ascertain the extent of the problem in New South Wales and any measures that State authorities can undertake to alleviate the plight of women who may be in this position.

The working party will also report to the Federal Government with recommendations through the Ministerial Council for Women to continue to pressure the Federal Government to act on behalf of all these women. Legislation was introduced a couple of years ago but to date there have been no successful prosecutions. The reason for that is very simple: these women are terrified of their former captors. When they are picked up by Immigration they are most reluctant to talk to the Australian Federal Police because they know that they will be put in a detention centre and deported, and that they will not get the health care and support they ought to get.

I want this working party to convene because I want it to make some recommendations. I hope it will draw on the British experience, because when British authorities introduced proper support services for these women they were much more willing to be witnesses for the Crown. They were 50 per cent more willing to take whatever risk it entailed to talk to the authorities, and that resulted in an increase in prosecutions.²⁶

The calls for a judicial inquiry into sex slavery in Australia grew in intensity after an ABC program aired accusations of a sex industry insider, who stated that brothel owners know about Immigration raids in advance. Commonwealth Minister Ruddock considered that the issue did not warrant such an inquiry.²⁷ In mid-June NSW Police in Auburn received a complaint from three Indonesian women complaining that they had been deceptively recruited to come to Australia and had been held in sexual servitude. The Australian Federal Police and Immigration were notified, and subsequently two arrests were made.

²⁵ NSWPD, 20th November 2002, *Disorderly Houses Amendment (Commercial Supply of Prohibited Drugs) Bill*, at 7100.

²⁶ NSWPD, 22nd May 2003, *Illegal Non-Citizens Sexual Exploitation*, at 1053.

²⁷ “Growing complaints of sex slavery in Australia” in ABC AM Thursday, 12 June 2003, 08:18:47, see <http://www.abc.net.au/am/content/2003/s877861.htm>

These were the first charges laid under the Commonwealth's *Criminal Code Act 1995*, relating to sexual servitude.²⁸

6.0 RECENT REFORMS TO PROSTITUTION LAWS IN OTHER STATES

The 1999 Briefing Paper, *The Regulation of Prostitution: A Review of Recent Developments*, outlined the brothel regulatory environment in Victoria. Victorian brothel owners must be licensed by the Business Licensing Authority, and are permitted to operate one brothel venue only. Being in, entering or leaving an unlicensed brothel without a lawful excuse is an offence. In any advertisements that the brothel may publish, the licence number must be clearly displayed. After obtaining a licence, local government planning approval is also required to open a brothel. The police and local council can seek to close an illegal brothel through action in the Magistrates Court.

Since the 1999 Briefing Paper, significant legislative developments have also taken place in Western Australia and Queensland. In South Australia and Tasmania prostitution is illegal, while in the Northern Territory brothels are illegal but prostitution is not. In those States that have legalised prostitution and brothels, one of the main areas of debate is how restrictive the regulatory environment should be. Victoria, Queensland and the proposed reforms in Western Australia provide for a strict regulatory environment, requiring brothels to have both town planning permission and be licensed by a separate licensing authority. In NSW, brothels need town planning permission only. Somewhat ironically, critics of the 'lax' regulatory environment in NSW make reference to the enforcement regime in other jurisdictions. In other states, critics of the claimed restrictive regulatory environment hold NSW as the model for legislation. Regulatory developments in Western Australia and Queensland are discussed below.

6.1 Western Australia Prostitution Control Bill 2003

The *Prostitution Act 2000* was introduced as an interim measure to address an immediate problem with street and child prostitution while comprehensive legislation to control and regulate the prostitution industry was developed. The resultant legislation is the *Prostitution Control Bill 2003*, introduced into the Western Australian Legislative Assembly on 2 April 2003. The Bill provides for the overall regulation of the prostitution industry and will repeal the *Prostitution Act 2000*.

The Bill proposes a combination of licensing brothels by a dedicated licensing authority, as well as requiring brothels to seek local government planning approval under certain circumstances. Passage of the Bill will provide for the following:

²⁸ NSWPD, *Hansard Proof*, 19 June 2003, statement by Hon Sandra Nori, Minister for Women, at 41.

The establishment of a Prostitution Control Board

- The Board is comprised of: a chairman appointed by the Governor on the nomination of the Minister; the Commissioner of Health; the Commissioner of Police; and three other persons appointed by the Minister representing the areas of local government, a medical practitioner and a person having knowledge of or involved in the business of prostitution;
- The Board has four main functions: to perform the licensing and supervisory functions provided by the Act; to advise the Minister on policy in relation to prostitution; to disseminate information and provide education to prostitutes on prostitution related issues; and to develop strategies to provide persons with alternatives to becoming prostitutes, and to advise prostitutes wishing to cease prostitution;
- The Minister may give written directions to the Board in relation to the performance of its functions, but cannot direct the Board in relation to licensing or approval processes for particular individuals and businesses;
- The Board may employ a Registrar and staff.

Definitions

- A ‘brothel business’ means a business involving the provision of prostitution at the place from which the business is carried on, but does not include a sole operator brothel business.
- A ‘prostitution agency business’ means a business involving the use of prostitution in the course of which acts of prostitution are performed elsewhere than at a brothel, except that it does not include a sole operator agency business;
- A ‘sole operator agency business’ means a business that is owned and operated by one person only, involving the provision of prostitution in the course of which only that person acts a prostitute and the acts of prostitution are performed elsewhere than at that person’s principal place of residence or a brothel;
- A ‘sole operator brothel business’ means a business that is owned and operated by one person only, involving the provision of prostitution in the course of which only one person acts as a prostitute and the acts of prostitution are performed only at that person’s principal place of residence.

Licensing Provisions

- A licence is required to carry on: a brothel business; a prostitution agency business; or for a person who acts as a prostitution manager. It is an offence not to have an appropriate licence, with a maximum penalty of 14 years imprisonment. No monetary fine is provided for. The penalty for a prostitution manager acting without a licence is imprisonment for up to five years. Applications for licences are made to the Prostitution Control Board. Appeals against a refusal of a licence may be made to the District Court;
- Accompanying an application for a licence, an applicant must also provide evidence of their age and identity, including photographs, and testimonials from two people as to the applicant’s character; in the case of a partnership or body corporate, each partner or managerial officer can be required to provide information to ensure they meet the criteria for a licence;

- Criteria under which the Board must refuse a licence are outlined, including: deemed not to be a fit and proper person; drug trafficking; or sexual offences.
- Licences are valid for three years, which may be renewed upon application to the Board.

Other Obligations and Offences

- A person who knows, or could reasonably be expected to know, that another person is prohibited from acting as prostitute, is not to invite that person to act as prostitute. Penalty – imprisonment for one year.
- Seeking a prostitute (ie, seeking street prostitution) in or in view or within hearing of a public place is an offence, with a penalty of imprisonment for seven years if the person sought is a child or an incapable person, otherwise imprisonment for two years;
- A prostitute seeking a client in or in view or within hearing of a public place is an offence, with a penalty of imprisonment for three years if the person whom the offender seeks to be a client is a child, otherwise imprisonment for one year;
- A person providing a place for prostitution without a licence is liable to imprisonment for five years, except if the provision of premises is the principal place of residence of a self-employed sole prostitute;
- A client who attends a place unlawfully provided for purpose of taking part in an act of prostitution is liable to a penalty of \$6,000;
- A person who causes, permits or seeks to induce a child (less than 18 years) or incapable person to act as a prostitute is liable to imprisonment of 20 years;
- A person who obtains payment for prostitution by a child is liable to imprisonment for 14 years;
- A person is not to take part, whether as a prostitute or as a client, in an act of prostitution at a place where the person knows that a child is present – first offence penalty is \$25,000, second and subsequent offences 2 years imprisonment and \$25,000;
- A person: assaulting or threatening to assault; intimidate; supply or offer to supply a prohibited drug; or do anything else with the intention of inducing another (adult) person to act as a prostitute is liable to imprisonment of 14 years (summary conviction three years);
- Restrictions on advertising, promoting employment in the prostitution industry and prohibition of sponsorships by a prostitution related business are provided for;

Prostitution Control Board Supervisory Functions

- The Board may apply to the Supreme Court or the District Court for an injunction to prevent a person from engaging in anything that would constitute a breach of the Act;
- The Board may authorise Board staff to investigate any particular matter, provisions for warrants to enter a premises is provided for;
- The Board may establish a formal inquiry, not bound by the rules of evidence, and examine witnesses on oath or affirmation.

Planning Controls

The Bill amends planning schemes such that:

- A brothel will not be permitted in a residential zone or precinct;
- A brothel is permitted in an industry zone provided it is not within 300 metres (or such lesser distance as permitted) of a protected use place (defined as: an educational establishment, child care premises or other place regularly frequented by children for recreational or cultural activities, a place of worship, or land in a residential zone or precinct.);
- Except with planning approval from the local council, a brothel is not permitted in land zoned neither residential/industrial as included above. Planning approval is not to be granted unless the consent authority is satisfied that it is not within 300 metres of a protected use place;

Provisions for Police

- A police officer, who reasonably suspects that an offence against the Act is being committed, will be able, without a warrant, to stop, detain and search anyone or any conveyance. This is intended to provide police with search and seizure powers to control street soliciting and kerb crawling;
- A police officer, with the approval of a senior police officer, may, without a warrant, at any time, enter a place that is being or reasonably suspected of being used as a brothel for which there is no licence;
- A police officer, with the approval of a senior police officer, may, without a warrant, enter a legal brothel if it is suspected that an offence involving a child or incapable person is being committed, or where a person is seeking to induce another person to act as a prostitute.

The Western Australian sex industry “has declared war on the State Government over changes to prostitution laws, saying watered-down proposals will still drive most of the industry underground.”²⁹ A sex industry spokesperson stated about the reforms: “It creates a two-tiered industry where you have some people who are able to fit through the hoop and can get a licence but the majority work outside that in an illegal industry”.³⁰ Catholic Archbishop Hickey claimed the proposed prostitution laws were contradictory, and noted: “If the Government, Parliament and the public are to believe this legislation will be successful in preventing organised illegal prostitution, then clearly it can prevent all organised prostitution.”³¹

6.2 Queensland Prostitution Act 1999

The *Queensland Prostitution Act* regulates prostitution by a brothel licensing system and town planning controls. Important components of the Act are as follows:

²⁹ “Sex law changes attacked” in *The West Australian*, 27 March 2003.

³⁰ “Residents press for ban on streetwalkers” in *The West Australian*, 13 February 2003.

³¹ “Church attacks sex Bill” in *The West Australian*, 6 February 2003.

Prostitution Licensing Authority

- Section 100 of the Act established the Prostitution Licensing Authority, which consists of six members: chairperson – an independent, respected member of the community nominated by the Premier; Commissioner (or at least rank of Superintendent) of Police; Chairperson of the Crime and Misconduct Commission; a doctor; a lawyer; and a senior representative of the Local Government Association of Queensland.
- The Authority has the following functions: to decide licence applications; to decide approved manager applications; to monitor the provision of prostitution through licensed brothels; to conduct disciplinary inquiries in relation to licences and approved managers, and discipline same; to receive complaints about prostitution; to liaise with the police service; to inform relevant government departments and agencies about possible offences that are detected while carrying out its functions; to inform the Prostitution Advisory Council about issues and trends relevant to its functions.

Prostitution Advisory Council

- Members include: a representative of prostitutes in Queensland; a person with experience as a sexual health care doctor or social worker with prostitutes; a person who has knowledge of relevant issues for marginalised or disadvantaged young people; and a person who is representative of religious or community interests.
- The Act identifies seven functions for the Council, including: disseminating information about the dangers inherent in prostitution and measures to improve personal security; to coordinate the development of codes of practice for licensed brothels; to promote and coordinate programs that: promote sexual health; help prostitutes leave prostitution and more; and to advise the Ministerial Committee on issues related to the regulation of prostitution (the Ministerial Committee is comprised of Ministers who administer the following Acts: Prostitution Act; Family Services Act 1987; Health Act 1932 and the Liquor Act 1992).

Licensing System

- A licence is required from the Prostitution Licensing Authority to operate a brothel. The Authority must refer the application to the Commissioner of Police, who must make inquiries as to the applicant's criminal history and any other matters as considered appropriate.
- The Authority is not obliged to consider an application until the application has development approval from the relevant assessment manager (under the *Integrated Planning Act 1997*).
- In considering an application, the Authority must consider whether any other licences or adult entertainment permits have been granted in the locality in which the proposed brothel is to be located, and the extent to which the character of the locality may be affected in the application was granted;
- The Authority must refuse a licence application if it is satisfied that the applicant: is not a suitable person to operate a licensed brothel; or holds a licence or a permit under the *Liquor Act 1992*; or the Authority considers that, if the application was granted, the combined total of licensed brothels and premises permitted to provide

adult entertainment would substantially affect the character of the locality – ie, became a ‘red light district’;

- Licences are granted for one year, and may be renewed upon application;
- The manager of a licensed brothel must also apply to the Authority to become an ‘approved manager’.

Police Powers

- A police officer of at least the rank of inspector (or authorised by same) may enter at any time the premises of a licensed brothel when it is open for business. They may inspect the premises and with the written authorisation of the Authority, collect evidence.

Development Approval

- Brothels must also have planning consent from the local consent authority. The ‘assessment manager’ must refuse the application if the proposed brothel is: within 200 metres of the closest point on any boundary of a primarily residential area; or is within 200 metres of any residential building, place of worship, hospital, school, kindergarten, or any other facility or place regularly frequented by children, measured according to the shortest route a person may reasonably and lawfully take by vehicle or foot; the application must be refused if within 100 metres of any of the above as measured by a straight line.
- The development application must also be refused if it is in a town with a population of less than 25,000, where the local government authority has required that all applications within the area be refused, and the Minister has agreed with this.
- Applicants have the right of appeal when a development application is refused.

Closing Prohibited Brothels

- A police officer, the Authority or an officer of the relevant local government area may apply to a Magistrates Court for an order declaring that particular premises are a prohibited brothel.
- The Court may declare premises to be a prohibited brothel if is satisfied, on the balance of probabilities, that a person is operating a brothel without a licence, or that it is a brothel in contravention of planning legislation;
- Upon gaining a declaration, notice must be given to the owner and occupier of the premises, as well as a notice at the entrance to the premises;
- It is an offence to enter or leave a prohibited brothel, or to use premises as a brothel after a declaration has been given.

General Offences

- Publicly soliciting for prostitution, by both client and prostitute, is an offence.
- A range of other offences, such as: permitting a prostitute infected with disease to work in a licensed premises; use of prophylactics; advertising offences and more are provided for.

Critics of the Queensland legislation state that the restrictive regulatory environment has

had no effect on the State's 'flourishing' illegal prostitution, and has put street workers lives at risk. Only 12 brothels are currently licensed in Queensland. The Chairman of the Prostitution licensing Authority, Mr Bill Carter QC, was reported as saying that the *Prostitution Act* was so restrictive that it prevented licensed brothels from responding to calls outside their premises, as well as demanding an unworkable number of girls per room. He stated: "The effect of the legislation means that outcall clients are going to the illegal industry or the NSW industry, because it's much more flexible there than in Queensland....The restrictions are too restrictive and it's an unfair competition, competing against the illegal industry."³² A licensed brothel owner commented about the legislation: "We've been pushed into industrial areas and hidden, we're paying \$20,000 a year for our licence before we can even open the doors, we're fingerprinted and interrogated, we have trouble getting workers because we can't advertise and they're (the Government) in our faces all the time."³³ In response to these criticisms, a Government spokesman was reported to have said that the Government had deliberately made it difficult for anyone to obtain a brothel licence and did not want the pitfalls of more flexible legislation in other states.³⁴

7.0 CONCLUSION

The major conclusion of the NSW Brothels Task Force was that the planning system is an effective mechanism to regulate brothels, but that councils needed some help and advice in how to do this effectively. This highlights the complexity of the planning legislation when the third tier of government finds it difficult to write their own effective local planning codes.

Councils seeking restraining orders from the Land and Environment Court to close illegal brothels should find it easier with the passage of legislative amendments. For instance, councils should no longer have to resort to hiring private investigators to have sex with a prostitute to prove that a premises is being used as an illegal brothel – it is now clear that circumstantial evidence is sufficient. However, the vexed issue of street prostitution, and more recently sex slavery involving illegal migrants, needs further attention. Evidently, police enforcement alone of these issues has not solved the problem, and a broad range of cooperative measures is required.

³² "Brutal cost of selling sex legally" in *The Courier-Mail*, 15 March 2003.

³³ "Brutal cost of selling sex legally" in *The Courier-Mail*, 15 March 2003.

³⁴ "Brutal cost of selling sex legally" in *The Courier-Mail*, 15 March 2003.