

Draft Submission to the Legislative Assembly Select Committee on the Regulation of Brothels

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1. Introduction

Local Government NSW (LGNSW) is the peak body for NSW Local Government, representing all the 152 NSW general-purpose councils, the special-purpose county councils and the NSW Aboriginal Land Council. In essence LGNSW is the 'sword and shield' of the NSW Local Government sector.

The mission of LGNSW is to be a credible, professional organisation representing Local Government and facilitating the development of an effective community-based system of Local Government in NSW.

LGNSW welcomes the Legislative Assembly's Select Committee Inquiry into the Regulation of Brothels as a vehicle for appropriately addressing the failures of the current system to close down premises unlawfully being used for the purposes of prostitution.

2. General Comments

LGNSW acknowledges that the greater majority of councils' knowledge, skills and experience with sex premises is the land use planning context and not in areas such as the extent and nature of the brothel industry across all of NSW, protection of sex workers, organised crime and sex trafficking, or maintaining a high level of public health outcomes.

LGNSW contends that councils do not have adequate regulatory powers and resources to close the operation of unauthorised sex premises, and we therefore call for a new approach that regulates or licenses sex premises on a state-wide basis.

While Local Government supports changes to current laws that may strengthen the powers to close unauthorised sex premises, councils are also aware that these legal disputes are challenging, expensive and can be an ineffective method of managing illegal activities.

LGNSW considers that it may be timely for the NSW Government to set up a regulatory or licencing system that removes the enforcement of unauthorised sex premises from the responsibilities of Local Government and transfers the enforcement role to the NSW Government.

Local Government nevertheless would retain planning powers relating to the location of sex premises and responsibilities to approve sex premises under the current planning laws.

LGNSW's position is outlined below in more detail and generally follows the Committee's Terms of Reference where they have relevance to Local Government. Historically, LGNSW has seen the role of Local Government in the regulation of sex services premises as being confined to building and land use planning matters. Hence this submission will not comment on the health and other considerations raised in the Terms of Reference.

3. Response to relevant Terms of Reference

The following is LGNSW's response to the matters for consideration that the Committee is required to report on that fall within the control and capabilities of Local Government.

3.1 Current regulation of brothels in NSW – Local Government's experience – Issue (b)

The requirements of the *Restricted Premises Act 1943* to show that premises are being used unlawfully for the purposes prostitution or as a brothel are onerous and costly.

The evidentiary burdens can be difficult to obtain and require significant council resources in time and money.

In addition, residents living near or people working within the vicinity of an illegal brothel can feel intimidated and fearful for their safety and may not be prepared to provide the evidence required by the Court to prove that the premises is being used as an illegal brothel.

Although circumstantial evidence can be adduced to show that premises are being used to provide sex it is not always easy for a council to gather this evidence and can take a long period of time and tie up large amounts of council resources to gather such evidence.

However, councils have found that a more efficient way to provide evidence to a Court that premises are being used as a brothel is for a council to employ a member of the public to have sex on the premises so as to provide the required evidence that the premises are being used as a brothel.

This in itself can be problematic where the definition of a brothel in the *Restricted Premises Act* means premises habitually used for the purposes of prostitution. This therefore requires council to undertake its evidence gathering procedure more than one time or with multiple prostitutes at the same premises to satisfy the definition of brothel in the Act.

A council should not need to undertake this type of evidence gathering as it is not a good use of council resources nor is it socially acceptable.

Other provisions that need to be address in approving or not approving the location of sex premises include:

- 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,
- 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,
- whether sufficient off-street parking has been provided if appropriate in the circumstances,
- whether suitable access has been provided to the brothel,
- whether the operation of the brothel causes a disturbance in the neighbourhood because of its size and the number of people working in it,
- whether the operation of the brothel interferes with the amenity of the neighbourhood,
- any other matter that the Land and Environment Court considers relevant.

3.2 Penalties and Enforcement - Issue (c)

Local Government NSW believes that the penalty provision relating to the unlawful use of premises as a brothel as found in the *Environmental Planning and Assessment Act 1979* and *Protection of the Environment Operations Act 1997* are costly and difficult to prosecute. Firstly their needs to be a Court order that has not been complied and no appeal lodged against the issuing of the order and only then might a council consider instituting criminal proceedings.

Although the maximum penalty under this regime is \$1.1 million it would be extremely difficult, costly and onerous for a council to undertake such a prosecution.

It is noted that councils have utilised the closure orders found in the *Environmental Planning and Assessment Act 1979* and the cessation of utilities orders also found in that Act although the cessation of utilities order may be difficult to obtain where the premises are multi use and other residents/owners may be affected by such orders.

3.3 Options for reform including a scheme or registration or licensing system for authorised brothels - Issue (d)

An alternative new system of registration or licensing of brothels by the NSW Government is believed to be more effective process of controlling and closing down premises unlawfully used as brothels.

It would be envisaged that this system would be run in a similar fashion to the registration of boarding houses and be undertaken by the State Government.

This system would provide a better system for control of brothels as either they would be registered/licensed or they would not. If a brothel is not registered or licensed a penalty regime could be implemented to overcome the onerous penalty provisions outlined above although this in itself would not make the evidentiary burden on councils any easier.

3.4 Residential amenity and the location of sex services premises - Issue (g)

Local Government Planning controls

Councils have been able to introduce more effective planning controls to manage the development assessment process for sex premises in recent years. These powers in general apply to new premises and are considerably more effective than the enforcement laws around existing unauthorised activities. Subsequently, the current system creates an inequity where new sex premises are approved and often under strict guidelines, while existing premises may be operating under limited regulation or no approvals, and as indicated above, can be very challenging to close down. This can result in the operators of authorised sex premises (and local communities members) reporting to council on the activities of unauthorised sex premises to seek a legal remedy, despite the challenges for council in taking legal action.

Local Government's planning responsibilities in relation to these activities are similar to those of other activities and hence council has certain powers to determine the location of where sex premises are permissible under their Local Environmental Plan. Nevertheless, the NSW Government has mandated under the LEP Standard Template Program that all councils are required to permit sex premises within their LEP, giving councils some level of control over where such activities are located.

There are two types of sex premises under the LEP – sex premises¹ (brothels²) and home occupation (sex services)³. Brothels are permissible in certain specified zones and home occupation (sex services) are usually permissible in most residential zones.

In a limited number of cases councils have developed specific planning controls that may be included in a Development Control Plan (DCP) that provide further planning provisions for the approval of sex premises. For example City of Sydney has a developed specific planning provisions for sex premises that are outlined at:

<http://www.cityofsydney.nsw.gov.au/business/regulations/sex-industry-premises>

A range of approaches

Councils' planning controls vary considerably across the sector reflecting the history and social attitudes around sex premises. It is difficult to apply consistent planning rules given the diversity and clustering that occurs within this industry.

On the whole most councils seek to permit sex premises in discreet locations, to protect the more vulnerable sectors of the local community and provide privacy for the user. In recent years councils have allowed sex premises to be permissible in industrial zones, which has not necessarily been supported by the sex industry that prefer a more populated place to protect their workers.

While it is still highly debatable within communities where sex premises should be located, on the whole councils have adopted a practical view of the issue and are attempting to manage the issues through a development assessment process.

The more contentious issue however, as stated above, is that many of these activities have not been approved, and if submitted as a development application may be very challenging to approve given their location. Some of these activities rely on the benefits of 'existing use rights', the validity of which may be debateable in these situations.

Irrespective of the complexities of site specific applications it is the unauthorized activities that are the main problem and councils lack of ability to manage them.

¹ **sex services premises** means a brothel¹, but does not include home occupation (sex services).

² **brothel** means premises: (a) habitually used for the purposes of prostitution, or (b) that have been used for the purposes of prostitution and are likely to be used again for that purpose, or (c) that have been expressly or implicitly: (i) advertised (whether by advertisements in or on the premises, newspapers, directories or the internet or by other means), or (ii) represented, as being used for the purposes of prostitution, and that are likely to be used for the purposes of prostitution. Premises may constitute a brothel even though used by only one prostitute for the purposes of prostitution.

³ **home occupation (sex services)** means the provision of sex services in a dwelling that is a brothel, or in a building that is a brothel and is ancillary to such a dwelling, by no more than 2 permanent residents of the dwelling and that does not involve: (a) the employment of persons other than those residents, or (b) interference with the amenity of the neighbourhood by reason of the emission of noise, traffic generation or otherwise, or (c) the exhibition of any signage, or (d) the sale of items (whether goods or materials), or the exposure or offer for sale of items, by retail but does not include a home business or sex services premises.

4. Conclusions

Local Government has been unnecessarily and unreasonably burdened with compliance responsibilities pertaining to unauthorised sex premises.

We suggest it is timely for the NSW Government to implement a registration or licensing regime that shifts the responsibilities of enforcement to the NSW Government.

Nevertheless, Local Government supports the retention of planning responsibilities for the location of authorised sex premises.