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Regulation Review – Local Government
Compliance and Enforcement
Independent Pricing and Regulatory Tribunal
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6 November 2012

Dear IPaRT,

Thank you for the opportunity to comment on your Regulation Review of local government compliance and enforcement in NSW.

Scarlet Alliance, the Australian Sex Workers Association, is the peak national sex worker organisation in Australia. Formed in 1989, the organisation represents a membership of individual sex workers and sex worker organisations. Through our project work and the work of our membership we have very high access to sex industry workplaces in the major cities and many regional areas of Australia.

Local councils are the regulators of sex services premises in New South Wales. Scarlet Alliance has played a critical role in informing governments at every level on issues affecting workers in the Australian sex industry.

Scarlet Alliance would like to be consulted throughout this review process as a key stakeholder and would like to appear at the public roundtable discussion on 4 December.

For any further information on this submission or its content please contact our Chief Executive Officer, Janelle Fawkes, at our organisations head office in New South Wales.

Regards,

Ari Reid
Acting President

Regulation Review

Local Government Compliance and Enforcement

Scarlet Alliance Submission

Executive Summary

Local councils have been the regulators of sex industry businesses in New South Wales since sex work was decriminalised in 1995. Evidence shows that decriminalisation is the world-renowned, best practice model for sex work regulation, and that it has brought high rates of compliance, minimal opportunities for corruption, increased transparency and improved safety for sex workers.

Unfortunately, the majority of local councils have not implemented decriminalisation effectively. Evidence shows that the majority of local councils have not made consistent and fair decisions regarding sex industry businesses. This has resulted in unnecessary costs in the Land and Environment court, unnecessary regulatory burdens upon sex industry businesses, dangers for sex worker health and safety, and significant barriers to compliance.

However, it is important to recognise that other councils have effectively regulated the sex industry, demonstrating that it is possible. Key to effective regulation is an approach that does not attempt to prohibit the sex industry but to regulate sex industry businesses in the same way other businesses are regulated.

Rather than regulating sex industry businesses effectively many local councils have created barriers to compliance, including:

- excessive requirements when a Development Application (DA) is for a sex industry business (extra parking, opening times, notification requirements and zoning restrictions);
- councillors refusing sex industry business applications based on moral objections or fear of losing local government votes even when planning staff advise the application is in line with council requirements; and
- a lack of recognition of the different scales and sizes (and therefore necessary regulation) of different sex work settings.

Further regulatory problems have occurred when councils have misunderstood or overstepped their roles in relation to regulation of the sex industry.

Unnecessary regulatory burdens imposed by councils involve financial and administrative costs – but also human costs for sex worker safety and rights. Discriminatory decision-making is not justified – there are little to no amenity impacts of sex industry businesses on surrounding communities, and no evidence of an association between sex work and organised crime.

Councils can do better. Successful instances of local council planning exist in NSW. The City of Sydney provides evidence that significant numbers of sex industry businesses can be regulated and integrated effectively when planning and zoning considerations permit various types and scales of sex service premises in their natural locations.

There are a number of opportunities for reform identified in this submission, along with recommendations to improve the current regulatory system. These include implementing the Sex Services Premises Planning Guidelines, appointing a sex industry liaison officer within NSW Planning Department, and funding an education program for councillors.

Regulation of sex work in NSW – key regulatory functions of local government

Sex work has been decriminalised in New South Wales since 1995. NSW is world renowned for its best-practice model, decriminalisation recognised by the United Nations Secretary General, United Nations Population Fund, United Nations Development Fund, and UNAIDS as best for sex worker occupational health and safety, industrial rights and human rights.¹ NSW has one of the healthiest sex industries ever recorded, including among migrant sex workers. Evidence from the Kirby Institute, Australia's National STI and HIV Strategies and case studies demonstrates that decriminalisation has brought improved work safety, high rates of safer sex practice, low rates of sexually transmissible infections, low incidence of trafficking, little to no amenity impacts and no evidence of organised crime. Evidence shows that these health outcomes are *because* of decriminalisation, community-driven health promotion and peer education.

In NSW regulation of the sex industry occurs within a whole-of-Government approach, whereby a number of government authorities and agencies play a role in contributing to the effective regulation of different components of businesses, making for a highly transparent sex industry. The regulation of sex industry businesses occurs in the same manner as regulation of other businesses. Local councils are responsible for zoning, planning and location controls and environmental health.

Local councils are the appropriate regulators of sex industry businesses. Local councils have regulated the sex industry in NSW since 1995, when the Wood Royal Commission showed that there was systemic corruption when police were regulators of brothels.² Where sex industry businesses are regulated like other businesses, sex work is treated as legitimate work, and this brings transparency, accountability and access to services. When fairly regulated in accordance with decriminalisation, council regulation means: a high rate of voluntary compliance, low amenity impacts, low levels of complaints, reduced appeals to the Land and Environment Court, improved public health outcomes, minimal opportunities for corruption, and improved safety for sex workers.

Successful instances of local council planning exist in New South Wales, where the work of the Sydney of City Council illustrates that local councils can effectively manage sex industry businesses through innovative and effective strategies such as the establishment of safe houses and brothel regulation.

However, as discussed below, evidence shows that majority of local councils have not made consistent and fair decisions regarding sex industry businesses. This has resulted in unnecessary costs in the Land and Environment court, unnecessary regulatory burdens upon sex industry businesses, dangers for sex worker health and safety, and significant barriers to compliance. Councils need assistance in implementing decriminalisation.

Local council practices create unnecessary regulatory costs and burdens

Local governments do not sufficiently consider or understand best practice regulatory principles and approaches regarding sex industry regulation. There is a difference in approach across local government areas and an ongoing culture of council discrimination, which means that sex industry regulation is arbitrary and inconsistent.

The intention of decriminalisation in NSW is undermined by the actions of local councils. Councils usually apply discriminatory, restrictive and stringent planning requirements upon sex industry

¹ UNAIDS, UNFPA, UNDP, *Sex Work and the Law in Asia and the Pacific*, 2012, UNDP Thailand, accessed at <http://www.snap-undp.org/elibary/Publications/HIV-2012-SexWorkAndLaw.pdf> on 23 October 2012, page 6.

² New South Wales Government (1997), Royal Commission into the NSW Police Service: Final Report – Corruption, 13.

businesses that they do not apply to other commercial businesses. The majority of local councils are themselves creating significant barriers to sex industry business compliance. These barriers are the reason for non-compliance.

Local council barriers include: excessive requirements when a Development Application (DA) is for a sex industry business (extra parking, opening times, notification requirements and zoning restrictions); councillors refusing sex industry business applications based on moral objections or fear of losing local government votes even when planning staff advise the application is in line with council requirements; and a lack of recognition of the different scales and sizes (and therefore necessary regulation) of different sex work settings.

Inappropriate council policy may:

- restrict sex industry businesses to industrial zones, which isolates workers and clients by segregating the sex industry into poorly lit, under-resourced and unsafe areas.
- prohibit private sex workers from working from residential areas or require a DA that publically 'outs' sex workers to neighbours. This can lead to the harassment of individual sex workers, driving sex workers underground. (In the recent local government elections, prohibiting home-based sex work was a policy platform for a Marrickville Mayoral candidate).
- require sex industry businesses to be less visible by only approving premises above ground level. This makes sex services less accessible to people with a disability.
- excessively restrict sex industry business signage resulting in customers being unclear on location and knocking on the wrong door.
- Include anti-clustering laws, which forbid sex industry businesses from being located close to one another, act to limit networking and support among sex worker businesses.

In 2007 in NSW, the *Brothels Legislation Amendment Act* expanded the powers of the Land and Environment Court (LEC) and local councils to close 'disorderly and unlawful brothels'.³ Brothel closure laws are effective within five working days rather than the previous twenty-eight days, and no longer require 'sufficient complaints' but only one complaint. The LEC and local courts can then direct water, electricity and/or gas to be switched off from premises failing to comply with the closure order.⁴

Council decisions are based on moral considerations and electoral politics – contrary to decriminalisation

Even though the Land and Environment Court has confirmed that offensiveness and morality are not relevant planning considerations,⁵ Penny Crofts writes that despite the 1995 reforms decriminalising sex work in NSW and bestowing legal status upon brothels, brothels continue to be 'perceived as outlaws' and 'regarded as inherently awful, disorderly, and hence warranting and requiring exclusion from the community.'⁶

Speaking on Penny Croft's academic work on the regulation of disgust at the Australian Institute of Urban Studies 2012 Seminar Series on Planning and Brothels, Janelle Fawkes cited a repetitive cycle of council discrimination in which:

³ *Brothels Legislation Amendment Act* 2007, No 29, NSW accessed at <http://www.legislation.nsw.gov.au/sessionalview/sessional/act/2007-29.pdf> on 28 September 2011.

⁴ Penny Crofts, 'Brothels: Outlaws or Citizens?' (2010) *International Journal of Law in context*, 6:2, 151-166 at 156.

⁵ *Liu, Lanza and Beauty Holdings Pty Limited v Fairfield City Council* (1996).

⁶ Penny Crofts, 'Brothels: Outlaws or Citizens?' (2010) *International Journal of Law in context*, 6:2, 151-166 at 151.

Councillors see opposing sex industry business applications as a vote winner; development applications are refused on moral grounds; non-compliant sex industry businesses are created; council staff must act on non-compliance (unethical behaviour = private investigation/corruption); local media play up the concept of non-compliant brothels being less safe and providing unsafe services.⁷

These amendments, along with persistent discrimination against sex industry businesses by local councils, treat sex work as a public nuisance in need of strict control, and undermine the intended outcomes of decriminalisation, such as health promotion and reducing the stigma and discrimination towards sex workers.

In 1996 councils were advised that the then Minister for Planning 'did not support the blanket prohibition on brothels throughout a local government area as this was contrary to the intention of the 1995 legislative changes'.⁸

These discriminatory decisions have resulted in excessive costs in the Land and Environment Court

These approaches by local council have resulted in excessive costs to rate payers and business owners when DAs are not approved by council and must be appealed to the Land and Environment Court (LEC). Poor quality decision making provided by councils causes great delays in obtaining approvals.

If their application is rejected by council, to avoid closure a sex industry business must embark on expensive and lengthy appeal procedures in the LEC with no guarantee of success. The Sex Workers Outreach Project (SWOP) NSW has advised the Private Workers Alliance that most of the larger, 'authorised' brothels in NSW have won their DA through the LEC, with costs ranging from \$15,000 - \$100,000.⁹ Appeals to the LEC because of discriminatory local council decisions are wasteful of resources and place high expense on the rate payer and sex industry business owners.

The number of LEC cases that have found the application should have been approved by council demonstrates the widespread barriers created by councils (for example, *Sunny SK Liu v Fairfield City Council* No 10384 of 1996; *Linda v Cameron Willoughby City Council* 10603 of 1996; *Cherie Finlay v Newcastle City Council* No 10385 of 1997).¹⁰ In the case of *Cresville Pty Ltd v Sutherland Shire Council* the LEC refused to apply the council's regulations separating brothels from 'facilities that serve alcohol' by a distance of 50 metres because there was no link to adverse amenity impacts.¹¹

In NSW, the City of Sydney and Marrickville councils have accounted for two-thirds of sex services premises approvals between 1996 and 2007. Eleven councils had not approved *any* brothels. Apart from Sydney or Marrickville, in the 19 other councils where approved brothels were operating, 50 per cent were approved by the Land and Environment Court.¹²

Local council regulations create significant barriers to compliance

⁷ Janelle Fawkes, Planning in NSW – 'Sex Workers Deserve Safe Workplaces', Australian Institute of Urban Studies 2012 Seminar Series – Planning and Brothels, April 2012.

⁸ NSW Government, Better Regulation Office, *Issues Paper: Regulation of Brothels in NSW*, September 2012, 15.

⁹ Erica Red and Saul Isbister, 'Why Sex Workers Believe Smaller is Better: The Faulty Implementation of Decriminalisation in NSW' *HIV Australia*, Volume 3 No. 3, March-May 2004.

¹⁰ SWOP and ACON, *Unfinished Business: Achieving Effective Regulation of the NSW Sex Industry*, 2000, accessed at <http://www.scarletalliance.org.au/library/swop-acon02> on 2 February 2012.

¹¹ *Cresville Pty Ltd v Sutherland Shire Council* [2005] NSWLEC 498 cited in Penny Crofts, 'Brothels: Outlaws or Citizens?' (2010) *International Journal of Law in context*, 6:2, 151-166 at 154.

¹² Kirby Institute, 2012, p41-42, cited in NSW Government, Better Regulation Office, *Issues Paper: Regulation of Brothels in NSW*, September 2012, 32.

Discriminatory council practices and the expense of appealing to the LEC make it difficult for brothel owners to operate legally. Sex industry businesses may be unwilling to make applications for approval fearing that, as evidence demonstrates, it is likely they will be rejected by the local council. The NSW Ministerial Taskforce on Brothels in 2001 noted that restrictive planning and zoning regulations mean instead that 'it can be difficult for brothel operators to operate legally.'¹³

As Penny Crofts writes, 'these highly restrictive regulations do not encourage brothel owners to seek authorisation, particularly if they have been operating without authorisation and without complaint. A development application would draw attention to their existence. This compels many brothels to operate outside the law.'¹⁴ Discriminatory council practices provide no incentives for sex work businesses to comply with the law; rather, they necessitate businesses breaking the law so they can protect their livelihoods, leaving them vulnerable to corruption by council officers and other standover tactics.

Some local councils prohibit brothels from existing in commercial zones and require them to relocate to industrial areas, which can be an expensive, inconvenient and dangerous burden upon sex workers and sex industry businesses. Some may have operated in mixed-use and commercial zones without amenity impacts for many years and find they are unable to submit a DA as this land use is no longer permissible in the zone they are located in. As Scarlet Alliance and NAUWU say, 'These businesses, due to limited suitable zoned and available land, coupled with the perceived dangers of locating their businesses in industrial zones and the prohibitive cost of fit-out of former warehouse spaces; remain outside of the regulatory system.'¹⁵

These unnecessary regulatory burdens have human costs for sex worker safety and rights

Discriminatory council practices are dangerous for sex workers. Julie Bates and Saul Isbister note that when local councils fail to consult with the sex industry when developing planning controls, there are harmful implications:

What happens when it is set up so most sex industry premises... find themselves in an industrial wasteland devoid of activity and a magnet for theft? What happens then when you operate without appropriate consent and know that condoms will be used as part of the evidence to prove you are a [sex industry business]?¹⁶

The Sex Services Premises Planning Guidelines identify a number of disadvantages of anti-clustering controls. They note that clustering creates a level of tolerance and understanding in the community, allowing sex workers to access other local businesses such as pharmacies, doctors and shops. Anti-clustering laws mean that 'like' businesses cannot congregate. This minimises opportunities for sex industry businesses to have similar opening hours that support safety objectives by providing casual surveillance.¹⁷

Discriminatory decision-making among local councils creates a multi-tiered system which undermines the intention of decriminalisation. By failing to recognise sex industry businesses as legitimate businesses, local council practices hinder occupational health and safety (OHS) supports and sex workers' access to services. In their final report to the Minister of Planning, the Sex Services

¹³ Brothels Taskforce, *Report of the Brothels Taskforce*, NSW Department of Planning, 2001, 9.

¹⁴ Penny Crofts, 'Brothels: Outlaws or Citizens?' (2010) *International Journal of Law in context*, 6:2, 151-166 at 154.

¹⁵ Scarlet Alliance and Nothing About Us Without Us, *Submission to Shadow Attorney General Chris Haatcher on Sex Industry Regulation in NSW*, September 2010, at 7-8.

¹⁶ Julie Bates and Saul Isbister, 'Implementation of NSW Sex Industry Legislation/Regulation at local Government Level', Presented at Sex Worker Outreach Project Policy NSW Meeting, Australasian Society for HIV Medicine, 9 September 2011.

¹⁷ *Ibid.*

Premises Planning Advisory Panel noted that local council decisions act to increase underground activity while reducing sex workers' access to health services:

A strong incidence of councils preparing controls which are overly restrictive on sex services premises, again not particularly based on significant planning grounds, nor equitable in nature... Restricting types of premises available for such activity reduces options for workers and also for their clients and increases underground activity with implications for adequate access to health services.¹⁸

Julie Bates and Saul Isbister note that there has been insufficient monitoring of local government policy by the health sector. They state, 'A failure by the health sector to adequately monitor local council policies has led to a failure to address deficits in the implementation of better practice public health principles and policy at the local government level.'¹⁹

Private sex workers

A considerable percentage of NSW sex workers operate privately. This includes sex workers who are home-based (owning or renting a property), those sex workers that rent a property or own a property for the purposes of doing sex work. Some private sex workers work in pairs or small co-ops or collectives to cover costs and for peer support.

For private, independent sex workers, local planning laws can have significant effects on their anonymity and security. Individual sex workers offering sex services may still be classed as a 'brothel' by law and may find our business prohibited in residential zones. In council areas which permit working from home, sex workers may be required to apply for a DA which can include placing signage outside of the home, effectively 'outing' sex workers to other residents and passers by, and/or the publication of the sex workers name in local papers, which leads to further harassment and stigma. In September 2011, all other types of home occupations were permitted as exempt developments across all councils in NSW. This means that they did not require development approval from council.²⁰ As Crofts notes, this process of requiring a DA from home-based sex workers can put sex workers in danger:

[M]any councils require applicants to place a sign outside the front of their property, explaining the nature of the proposed development... [this can] excite a great deal of community opposition and may well place the sex worker in danger. These kinds of planning requirements make it virtually impossible for [private sex workers] to apply for, let alone receive, development consent. This is problematic because it is estimated that [private sex workers] make up at least 40% of the sex industry (Brothels Taskforce, 2001). Accordingly, these planning regulations and principles ensure that a large proportion of the industry remains outside the law; that is, outlaws.²¹

Touching Base Inc and Urban Realists, Planning and Health Consultants, note that 'there are no known advantages in requiring a DA from private sex workers, only disadvantages.'²² They cite the Sex Services Premises Planning Guidelines that 'there is no evidence that a home-based sex worker has any more impact than other home occupations, e.g. an architect working from home, and

¹⁸ Confidential Report to the NSW Minister for Planning on the Sex Services Premises Planning Guidelines, 6, cited in Scarlet Alliance and Nothing About Us Without Us, *Submission to Shadow Attorney General Chris Haatchler on Sex Industry Regulation in NSW*, September 2010, at 12.

¹⁹ Julie Bates and Saul Isbister, 'Implementation of NSW Sex Industry Legislation/Regulation at local Government Level', Presented at Sex Worker Outreach Project Policy NSW Meeting, Australasian Society for HIV Medicine, 9 September 2011..

²⁰ State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 under the *Environmental Planning and Assessment Act 1979*, Part 2, sub division 22.

²¹ Penny Crofts, 'Brothels: Outlaws or Citizens?' (2010) *International Journal of Law in context*, 6:2, 151-166 at 155.

²² Touching Base Inc and Urban Realists, Planning and Health Consultants, *Submission in Response to the Draft Sydney Local Environmental Plan 2011*, April 2011, 5.

accountant, tax agent, photographer, etc.²³ Touching Base and Urban Realists note that ‘many clients with disability prefer to access the services of home-based sex workers.’²⁴

Yet where private sex work is prohibited, evidence from the Private Workers Alliance and the Sex Workers Outreach Project reports men posing as council officers demanding free sexual services in return for not disclosing their home business.²⁵ Saul Isbister and Erica Red state that ‘the decriminalisation process in NSW has been both consciously and inadvertently undermined, resulting in a policy that favours large sex establishments and drives small-scale and home-based businesses underground.’²⁶

In 2007 the Standard Local Environment Plan redefined the term ‘sex services premises’ to mean a ‘brothel’ and changed its meaning to explicitly exclude ‘home occupations (sex services)’. This meant that instead of referring to ‘sex services premises’ as a range of scales and types of premises, home-based sex work became a new category whereby sex work permitted could not include more than two permanent residents. This is contrary to the way in which all other home occupations are permitted to have an unlimited number of permanent residents unless they impact on residential amenity. Sex work is the only work in which the number of workers is regulated because of the work, rather than the amenity.

Private sex workers should be permitted to work together, without the requirement for a DA and in pairs and small collectives. It should be noted that New Zealand allows five sex workers to work together and this has not resulted in amenity impacts. Home based sex workers should be permitted as exempt developments across all councils in NSW, and there should not be a limit to the number of sex workers who are permitted to work together.

Excessive enforcement and compliance – councils are overstepping their role

Regulatory problems have occurred when councils have overstepped their roles in relation to regulation of the sex industry. In her presentation at the Australian Institute of Urban Studies 2012 Seminar Series on Planning and Brothels, Janelle Fawkes notes that local councils in NSW regularly misunderstand their role in the regulation of the sex industry. Fawkes referred to statements by the Hornsby Council Mayor that indicated they were aiming to investigate organised crime, illegal immigrants and corruption in the sex industry rather than referring those matters to the appropriate body. Fawkes notes that addressing organised crime is the role of police, addressing migration compliance is the role of DIAC, and addressing corruption is the role of ICAC.²⁷

In NSW in the areas of visa compliance and council compliance the level of compliance checking has been disproportionate to the risk but also out of step with the significant barriers put in place by local government. While councils make it difficult to comply with onerous or discriminatory regulations, media hysteria surrounds council non-compliant brothels. Media attention to these brothels, incorrectly referred to as ‘illegal brothels’, then provokes further government surveillance, compliance and enforcement activities that ultimately do not serve to assist sex workers at all.

²³ Sex Services Premises Planning Advisory Panel, *Sex Services Premises Planning Guidelines*, NSW Department of Planning, 2004, 54, cited in Touching Base Inc and Urban Realists, ‘Submission in Response to the Draft Sydney Local Environmental Plan 2011’, April 2011, 5.

²⁴ Ibid at 6.

²⁵ Sex Services Premises Planning Advisory Panel, *Sex Services Premises Planning Guidelines*, NSW Department of Planning, 2004, 54, cited in Touching Base Inc and Urban Realists, ‘Submission in Response to the Draft Sydney Local Environmental Plan 2011’, April 2011, 5.

²⁶ Erica Red and Saul Isbister, ‘Why Sex Workers Believe Smaller is Better: The Faulty Implementation of Decriminalisation in NSW’ *HIV Australia*, Volume 3 No. 3, March-May 2004.

²⁷ Janelle Fawkes, Planning in NSW – ‘Sex Workers Deserve Safe Workplaces’, Australian Institute of Urban Studies 2012 Seminar Series – Planning and Brothels, April 2012.

A shift in approach by local council to the effective implementation of decriminalisation would significantly reduce non-compliance and therefore the level of compliance checking necessary. Should the shift incorporate a move toward removing unnecessary barriers to compliance for sex industry businesses (excessive requirements and unsafe zoning and moral instead of planning decisions) and private sex workers (DA requirement etc) toward an approach that promotes compliance it would result in both a significant saving of local government resources currently wasted in LEC disputes and a manageable level of enforcement activity.

There is still an identified need for effective training of agencies conducting compliance operations in sex industry workplaces. Numerous incidents have been reported to Scarlet Alliance and our member organisations of agencies displaying a lack of knowledge of issues that affect sex workers and an absence of knowledge on how to relate to migrant sex workers especially. Agencies must be trained by migrant sex workers on sex worker and cultural sensitivities to facilitate appropriate and effective interactions with migrant sex workers.

Regulatory burdens are unjustified – there are minimal to nil amenity impacts of sex industry businesses

There are little to no amenity impacts of sex industry businesses on surrounding communities. Where local councils refuse Development Applications on the basis of perceived amenity impacts such as noise or nuisance, these impacts rarely manifest or justify council bias. A central aspect of sex work is discretion to ensure the confidentiality of ourselves and our clients.

Research from 2008 demonstrates that after 13 years of decriminalisation in NSW, only one brothel owner had been ordered to cease operation due to amenity impacts, and there had been no complaints relating to amenity impacts for private sex work.²⁸ Penny Crofts states, 'Most people are unaware that they have been living next to a home occupation (sex services). [Private sex workers] need to be discreet – to keep clients and also for personal safety'.²⁹ Her research with Prior suggests that brothels have a neutral or positive effect on neighbourhoods.³⁰ Many brothels are also small-scale those visited by the Law and Sex Worker Health team for their 2012 Report to the NSW Ministry of Health had an 'average of seven workers per brothel, with about four workers employed on day shifts and up to six during evening shifts'.³¹

Saul Isbister notes that in Marrickville Local Council, town planners checked with neighbouring Councils and Police Local Area Commands in 2002, covering a population of half a million people, and found that 'No complaints had been recorded in any police area command and corresponding council.'³² Feminist sociologist Eva Cox supervised students at the University of Technology, Sydney, surveying residents in blocks in Marrickville and Woolhara which 'showed quite clearly that local residents were unaware of home based sex workers in their immediate neighbourhood'.³³

²⁸ Scarlet Alliance and Nothing About Us Without Us, *Submission to Shadow Attorney General Chris Haatcher on Sex Industry Regulation in NSW*, September 2010, at 10.

²⁹ City of Sydney (2005) Home Occupation Sex Services Premises Research Project Final Report, cited in Penny Crofts, 'Brothels: Outlaws or Citizens?' (2010), *International Journal of Law in context*, 6:2, 151-166 at 164.

³⁰ Prior and Crofts, 'Effects of sex premises on neighbourhoods: Residents, local planning and the geographies of a controversial land use' (2012) 68 *New Zealand Geographer* 130.

³¹ NSW Government, Better Regulation Office, *Issues Paper: Regulation of Brothels in NSW*, September 2012, 10.

³² Saul Isbister, 'Corruption and Associated Risks in NSW Development Approval Processes of Local Government', in *Provision: Defining Sex Worker Space*, Issue 1, 2006, 27 at 28.

³³ Lauren Jamieson, 'UTS Students' Research on Home Occupations' November 2003, Findings presented by Eva Cox to commissioners at the Sydney of City Council, 15 March 2004, cited in Erica Red and Saul Isbister, 'Why Sex Workers Believe Smaller is Better: The Faulty Implementation of Decriminalisation in NSW' *HIV Australia*, Volume 3 No. 3, March-May 2004.

Prior and Crofts' 2010 study illustrates that of 400 residents living in close proximity to commercial sex services in City of Sydney and Parramatta, 43.1% were unaware they lived within 400m, and of those who did know, 48.2% believed the business had no overall impact in the local area, and 24.1% rated it positively.³⁴ Prior and Crofts' research suggests that communities come to accept sex services premises as they become more familiar with them and the longer they are in the neighbourhood: 'residents become more accepting of a nearby sex premises the longer they are familiar with its presence.'³⁵ Importantly, the findings suggest that where individuals or community groups put in submissions about a council's proposed land use, the planning process tends to attract participation by those who have negative views.³⁶

There is no evidence of association between sex work and organised crime

There is no evidence that organised crime is associated with the sex industry, or that crime is relatively more prevalent in the sex industry compared to other businesses. NAUWU note that in *Martyn v Hornsby Council*, the Senior Commissioner of the LEC noted that 'there is no evidence that brothels in general are associated with crime or drug use.'³⁷ Penny Crofts states that 'there is nothing inherently criminogenic about premises used for sex services.'³⁸ There is also no evidence of any link between trafficking and organised crime. Fiona David writes in her report on Organised Crime and Trafficking in Persons that 'It is frequently assumed that organised criminal groups are heavily implicated in trafficking in persons. However, this assumption remains relatively untested.'³⁹

Council practices of imposing onerous requirements on sex industry businesses do not protect communities from criminality or violence, but ironically put sex workers in more dangerous working environments, with negative effects on our safety and rights. Evidence clearly illustrates that it is sex workers who are in need of protection (from bad planning decisions), not communities in need of protection (from sex work or sex workers).

Current proposals for regulatory reform by the NSW Government will increase costs and red tape dramatically

The NSW Government Better Regulation Office is currently conducting a review of regulation of brothels in NSW. Part of their review is a proposal to introduce a licensing system for sex industry businesses. This licensing system would mean an end to 17 years of decriminalisation in NSW.

Under the proposed reforms, a licensing system would increase regulatory costs dramatically. We note that the NSW Government currently has a target of \$750million in reduced 'red tape' costs for businesses and the community by June 2015. This is impossible if licensing is introduced as a model of sex work regulation in NSW. A licensing model is inconsistent with the NSW Government aims of reducing red tape costs, and contrary to epidemiology, best-practice and human rights. We are seriously concerned to ensure this proposal does not become law.

³⁴ Prior J and Crofts P (2012), *Effects of Sex Services Premises on Neighbourhoods: Residents, local planning and the geographies of a controversial land use*, New Zealand Geographer, 68, page 134.

³⁵ Crofts P and Prior J (2012), *Home Occupation or Brothel? Selling Sex from Home in New South Wales*, Urban Policy and Research, Vol 30, No 2, 127-143, June 2012, page 137.

³⁶ NSW Government, Better Regulation Office, *Issues Paper: Regulation of Brothels in NSW*, September 2012, 31.

³⁷ Nothing About Us Without Us, 'North Sydney Council Prohibits Home Occupation (Sex Services) in All Zones under the New Draft LEP', accessed at <http://nothing-about-us-without-us.com/tag/urban-realists/> on 18 July 2011.

³⁸ Crofts, P, *The Proposed Licensing of Brothels in NSW*, 17 LGLI 3, page 5, cited in NSW Government, Better Regulation Office, *Issues Paper: Regulation of Brothels in NSW*, September 2012, 39.

³⁹ Fiona David, 'Organised Crime and Trafficking in Persons', *Trends and Issues in Crime and Criminal Justice*, Number 436, March 2012, Australian Institute of Criminology, accessed at http://www.aic.gov.au/documents/F/3/2/%7BF32BB053-07A7-4698-BED7-47DA99F09BBD%7Dtandi436_001.pdf on 23 October 2012.

All evidence of licensing from Queensland in Victoria, where licensing models are in place, indicate that licensing is expensive, ineffective and unworkable. In Queensland the system has cost nearly \$7 million in Government contributions to operate over a ten year period, and is still does not self-sustain through licensing fees.⁴⁰ In Queensland in 2001-2 the average time to process a brothel license application was 231 days.⁴¹ A study of why potential applicants did not apply for a license showed *because of the information required, privacy invasion and fees too expensive* as the top three reasons to not apply.⁴² In Victoria, the application fee for a brothel licence in 2010 was \$3,999.50 and the annual licence fee was \$2,285.40 per year.

Licensing models involve enormous administrative capacity but have extremely low compliance. In Queensland, 11 years of licensing has resulted in only 24 brothels being registered, while the majority of workplaces operate outside the licensing system.⁴³ In Queensland, councils are granted permission to refuse brothel development applications. Within two years of implementation, 201 towns in Queensland 'black banned' brothels, forcing them to operate outside the licensing system.⁴⁴ Under the Victorian licensing model, there were 95 licensed brothels and up to 70 unlicensed brothels in 2006.⁴⁵ Fifty per cent of Victorian sex workers still operate illegally in 2012, and 90% of the Queensland industry operates illegally.⁴⁶

Licensing models require heavy police involvement, maximising corruption risk. In Queensland licensing has required the development of a Police Prostitution Enforcement Taskforce (PET-F). In 2005, 74% of complaints received by the PLA were referred to PET-F for response. Similarly, police have now replaced Consumer Affairs in Victoria as key regulators of the sex industry.

The LASH (Law and Sexual Health) report to the NSW Health Department in 2012 recommend that the licensing of sex work should not be regarded as a viable legislative response and is a 'threat to public health.'⁴⁷

The fact that councils have not implemented decriminalisation effectively is not a reason to abandon decriminalisation and introduce a licensing regime. To do so would be an administrative, financial and regulatory disaster for government and community, and a serious blow to sex worker rights and safety. Councils need assistance and guidance from State and sex workers to make fair and consistent planning decisions regarding sex industry businesses.

Councils can do better – evidence of successful council regulation

It is clear that decriminalisation as a model can be successful when effectively implemented. There are clear opportunities to ensure an improved and consistent planning approach for sex service premises across local government. The City of Sydney provides evidence that significant numbers of sex industry businesses can be regulated and integrated effectively when planning and zoning considerations permit various types and scales of sex service premises in their natural locations (for example, brothels in commercial and mixed-use zones and home-based services in residential

⁴⁰ Prostitution Licensing Authority, Queensland, *Annual Reports 2001-2011*, Statements of Financial Performance. When calculated, the Government Contributions across each year in the first ten years of licensing have added to \$6,959,000. In 2010-11, the PLA received \$561,565 in licensing fees, but the total expenditure for that year was \$1, 339, 663.

⁴¹ Prostitution Licensing Authority, *Annual Report 2001-2*, Queensland, 15, accessed at <http://www.pla.qld.gov.au/Resources/PLA/reportsPublications/annualReport/2002/documents/annualReport2002.pdf> on 21 March 2012.

⁴² Prostitution Licensing Authority, Queensland, *Annual Report 2001-2*, Table 9, page 63.

⁴³ Prostitution Licensing Authority Queensland, *Licensed Brothels*, <http://www.pla.qld.gov.au/brothels/licensedBrothels.htm> accessed on 8 September 2011.

⁴⁴ Prostitution Licensing Authority, Queensland, *Annual Report 2001-2*, 15.

⁴⁵ Chen MY, Donovan B, Harcourt C, Morton A, Moss L, Wallis S, Cook K, Batras D, Groves J, Tabrizi SN, Garland S, Fairley CK, 'Estimating the number of unlicensed brothels operating in Melbourne (2010), *Australia and New Zealand Journal of Public Health* Vol 34(1), 67.

⁴⁶ Donovan B, Harcourt C, Egger S, Watchirs Smith L, Schneider K, Kaldor JM, Chen MY, Fairley CK, Tabrizi S (2012) *The Sex Industry in New South Wales: a Report to the NSW Ministry of Health*, Kirby Institute, UNSW.

⁴⁷ Basil Donovan et al, *The Sex Industry in New South Wales: A Report to the NSW Ministry of Health*, Kirby Institute, 2012.

zones).⁴⁸ Armidale Dumaresq council in 2008 also adopted the planning principle of equity in their LEP.⁴⁹ Penny Crofts notes that the City of Sydney council, which includes Kings Cross, has nuanced planning principles that cater to various kinds of sex industry businesses and permit individual private sex workers to work at home without development consent:

The planning principles differentiate between sex services premises types based on size, nature and potential amenity impacts rather than the 'catch-all category' of brothel. Specific regulations are developed for different business types of brothels, safe house brothels, sex on premises venues, swingers' clubs, bondage and discipline parlours and sex services (home occupations) premises.⁵⁰

In 2010 Janelle Fawkes and Saul Isbister cited the areas City of Sydney, Canada Bay and Armidale Dumaresq and note that 'A significant number of sex workers operate lawfully, discreetly and most importantly – anonymously, as exempt and complying developments in various and diverse local government areas.'⁵¹

Implementing the Sex Services Premises Planning Guidelines

In 2004 the Sex Services Premises Planning Guidelines were developed by the NSW Sex Services Premises Planning Advisory Panel and aimed to assist local government decisions and outline what constitutes better practice – 'achieving occupational health and safety objectives and minimising the potential for corruption and the impact of premises upon neighbourhood amenity and the environment.'⁵² The Principles outlined in the Sex Services Premises Planning Guidelines should be formally endorsed and incorporated into Government Policy.

The NSW State Government must show leadership to local councils in best-practice planning for sex industry businesses. Julie Bates and Saul Isbister write that an 'absence of guidance leads to councils behaving badly'.⁵³ Where states do not provide guidance for local councils on best-practice sex industry planning, councils introduce development control plans that make it impossible for sex industry businesses to survive. Julie Bates and Saul Isbister cite Sutherland Council's admission of how they deliberately create barriers to sex industry businesses gaining approval:

[T]he LEP may permit a form of development that the council opposes (e.g. brothels) so the council will make development control plan provisions that are so restrictive that no proposal could satisfy the requirements. Should an applicant choose to submit an application obstacles would be created to frustrate the applicant. Should the proposal then come before the council it would be refused so that the applicant was forced to appeal to the Land and Environment Court.⁵⁴

The Guiding Principles in the Guidelines include a recognition that planning regulations and enforcement have direct implications on the health and safety of workers, and that reasonable, rather than restrictive, planning controls are likely to result in compliance.⁵⁵ The Guiding Principles are relevant to all states and territories to assist in local government decision-making. They state:

⁴⁸ Scarlet Alliance and Nothing About Us Without Us, *Submission to Shadow Attorney General Chris Haatcher on Sex Industry Regulation in NSW*, September 2010, at 6.

⁴⁹ Armidale Dumaresq LEP 2008, cited in Touching Base Inc and Urban Realists, Planning and Health Consultants, *Submission in Response to the Draft Sydney Local Environmental Plan 2011*, April 2011, 4.

⁵⁰ Penny Crofts, 'Brothels: Outlaws or Citizens?' (2010) *International Journal of Law in context*, 6:2, 151-166 at 157.

⁵¹ *Ibid* at 8.

⁵² Sex Services Premises Planning Advisory Panel, *Sex Services Premises Planning Guidelines*, NSW Department of Planning, 2004, i.

⁵³ Julie Bates and Saul Isbister, *Open Letter to All NSW Parliamentarians and Director-Generals of Relevant Departments*, 2 August, 2011.

⁵⁴ Sutherland Council, *Submission to the Standing Committee on State Development*, 2009, cited in Julie Bates and Saul Isbister, *Open Letter to All NSW Parliamentarians and Director-Generals of Relevant Departments*, 2 August, 2011.

⁵⁵ Sex Services Premises Planning Advisory Panel, *Sex Services Premises Planning Guidelines*, NSW Department of Planning, 2004, cited in Touching Base Inc and Urban Realists, *Submission in Response to the Draft Sydney Local Environmental Plan 2011*, April 2011, 5.

- Appropriate planning for [sex industry businesses] can provide councils with greater control over their location, design and operation;
- Planning regulations and enforcement actions have direct implications for the health and safety of workers and their clients;
- [Sex industry businesses] should be treated in a similar manner to other commercial enterprises, and planning provisions should acknowledge a types of [sex work] and ensure that controls relate to the scale and potential impact of each [kind];
- Reasonable, rather than unnecessarily restrictive, planning controls are likely to result in a higher proportion of [sex workers and sex industry businesses] complying with council requirements, with corresponding benefits to council, the local community and health service providers;
- Provision and consideration of sound information enables appropriate policy and decision-making processes; and
- Engaging the community, including the sex industry, and developing professional strategies can assist the community and professionals to understand the nature of [sex work and sex industry businesses] and recognise that they are a legitimate land use to be regulated through [state and territory] planning systems.⁵⁶

Treating sex work as legitimate work and planning appropriately for sex industry businesses has a number of tangible positive effects on the community. As Penny Crofts writes, perceiving sex work as legitimate ‘imports an existing legal framework, with associated accountabilities, rights and responsibilities. This shift in conception results in people viewing sex services premises differently, experiencing them differently and regulating them differently.’⁵⁷ Recognising sex work as legitimate work reduces stigma and improves the health, safety and rights of sex workers.

Appointment of a sex industry liaison officer within NSW Planning Department and funding of education program for councillors

There are ways to enhance assistance to councils, so they have the resources and skills to undertake regulatory activities effectively.

The appointment of a sex industry liaison officer within NSW planning department is necessary to assist local councils in abiding by the Planning Guidelines.⁵⁸ This position would require a demonstrable understanding of the NSW sex industry and the intent and justification of decriminalisation. Their role would be to assist councils to abide by the guiding principles for sex industry planning identified in the Guidelines.

Scarlet Alliance recommends the development and funding of an education program to inform councillors of the rationale behind decriminalisation; explain the legislative framework and Standard LEP; explore the impact on OHS, competition and economic outcomes for the sex industry; explore the reality of amenity issues; review councils’ range of controls, remedies and powers; review case law and costs relating to court cases; provide resources in multiple languages; and educate on best-practice approaches to sex industry planning; and review case law and costs relating to LEC cases.⁵⁹

Touching Base and Urban Realists suggest that governments should be providing factsheets for council websites, advising people why council is involved in planning for sex services premises and

⁵⁶ Sex Services Premises Planning Advisory Panel, *Sex Services Premises Planning Guidelines*, NSW Department of Planning, 2004, 1.3 Planning Guidelines.

⁵⁷ Penny Crofts, ‘Brothels: Outlaws or Citizens?’ (2010) *International Journal of Law in context*, 6:2, 151-166 at 151.

⁵⁸ Scarlet Alliance and Nothing About Us Without Us, *Submission to Shadow Attorney General Chris Haatcher on Sex Industry Regulation in NSW*, September 2010, at 9.

⁵⁹ Ibid.

educating on the benefits of council involvement.⁶⁰ Such resources should be available in multiple languages to reflect the multi-cultural nature of sex work.⁶¹ These measures would assist in sex work being viewed and treated as a legitimate form of work and eliminating discrimination against sex industry businesses by governments, councils and communities alike.

Identifying reform opportunities - Recommendations to improve regulatory system

The financial, administrative, regulatory and human costs of discriminatory council practices are unnecessary and inconsistent with the regulatory rationale of decriminalisation.

To improve planning decisions:

- The Principles outlined in the Sex Services Premises Planning Guidelines should be formally endorsed and incorporated into Government Policy.
- The existing SSPPG should be revised, updated and applied as an ongoing resource for councils.
- Discriminatory provisions against sex workers should be removed from the standard LEP. The standard LEP should be amended to adhere to the Sex Services Premises Planning Guidelines and the basic definition of 'brothel' should be removed so that councils must differentiate between business proposals based on specific amenity impacts;
- A sex industry liaison officer should be appointed within the NSW planning department is necessary to assist local councils in abiding by the Planning Guidelines.
- The NSW Government should fund an education program to inform councillors of the rationale behind decriminalisation.
- Sex work should be treated as legitimate work and sex industry businesses should be treated as legitimate businesses by states and local councils.
- Local councils should be guided by the planning principle of equity.
- Sex workers and sex work businesses should not be subject to special provisions that set them apart from other businesses.
- There must be consistency and continuity in local authority planning decisions.
- Local councils must provide reasons and evidence why a business is not suitable in a certain locality based on pre-determined criteria that apply to all enterprises.
- Sex industry businesses should be permitted in all business zones where other commercial premises are.
- Home-based sex workers should be permitted as exempt development in all zones where other home occupations are permitted to avoid discrimination and protect safety of sex workers, and private sex workers should be able to work individually, in pairs, small groups or co-ops.
- Councils should not have excessive zoning restrictions or anti-clustering references in their plans.
- Councils should support the location of brothels or parts of brothels at ground floor level to ensure they are accessible to people with disability.

Implementing these recommendations would significantly reduce unnecessary regulatory burdens and expenses for NSW businesses and the community.

⁶⁰ Touching Base Inc and Urban Realists, *Submission in Response to the Draft Sydney Local Environmental Plan 2011*, April 2011, 5 8.

⁶¹ Sex Services Premises Planning Advisory Panel, *Sex Services Premises Planning Guidelines*, NSW Department of Planning, 2004, 54, cited in *Ibid*, 9.