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**SUBMISSION TO DEPARTMENT OF
PLANNING AND BETTER REGULATION
OFFICE: PROMOTING ECONOMIC GROWTH
AND COMPETITION THROUGH THE
PLANNING SYSTEM**

12 June, 2009

Scarlet Alliance is the Australian peak body of sex worker organisations, projects and groups in Australia. Scarlet Alliance works to achieve social, legal, political, cultural and economic justice for past and present sex workers

Introduction

The Scarlet Alliance applauds the NSW government's initiative to consider if aspects of the NSW planning system need reform to ensure the right balance in achieving sustainable social and environmental outcomes. We support any initiative that seeks to understand how restrictive planning controls affect competition within the sex industry and identify reforms that would result in a more equitable planning system. In order to promote a fair and competitive business environment and improved health and safety outcomes for sex workers, their clients and the community, a level planning playing field is an essential first step.

However, the NSW planning system has failed to deliver sustainable development opportunities for the various sectors of the NSW sex industry. Currently it is anything but a level playing field. Mechanisms that inhibit opportunities for competitive entry to the market include:

- Failure to differentiate between the various scales and types of sex services premises (SSP) including reduction in opportunities for home based sex workers to locate in residential zones¹.
- Restrictive local planning controls that conflict with the intent of the 1995 reforms and seek to locate SSP in extremely limited localities; usually industrial zones. This eliminates the potential for commercial SSP development in more suitable zones, such as commercial and mixed use zones, and denies independent sex workers the choice of their natural location in residential zones.
- Limitation on suitable zoned land
- Failure to adequately resource councils, councillors and communities to deal with contentious and complex planning issues.
- Onerous information requirements for submission of a Development Application (DA)
- Lengthy timeframes to achieve officer's recommendation
- Further delays while councillors consider the application
- Political decisions by councillors that result in refusals not in accordance with the officer's recommendation and not based on a merit assessment
- Imposition of trial periods that jeopardise investment in fit out and general set up
- The need to seek justice through the Land & Environment Court

NSW sex workers and industry operators, like other businesses, are facing challenges due to the current economic downturn.

¹ Sex Services Premises Planning Guidelines (SSPPG), 2004, p. 72.

Background of NSW sex industry regulation

Since the arrival of the First Fleet, there has always been a sex industry in Australia and no amount of government intervention has managed to eradicate it. However, its form and obvious presence has varied across states and territories due to differing legislative frameworks, policing practices and populations. (Frances 1994).

Significant reforms were introduced in NSW in 1995 culminating in the *Disorderly Houses (Amendment) Act 1995*. These reforms were a direct result of the Woods Royal Commission into the NSW Police Service that identified pervasive police corruption in respect to among other areas, the sex industry. The amendment was intended to remove corruption, address concerns regarding the health and safety of sex workers and their clients and the general public and above all, to treat the sex industry as any other commercial business; with the same rights and responsibilities.

In January 2000 the NSW Attorney General and the then Minister for Urban Affairs and Planning established a Brothels Ministerial Task Force to review the success of the legislative changes, assess the need for further reforms and assess the success of occupational health and safety programs for sex workers.²

As a result, the Sex Services Premises Planning Advisory Panel was established in 2002, with a broad range of key informants from State and Local Government, along with sex industry representation. This Panel produced Guidelines known as the Sex Services Premises Planning Guidelines (SSPPG).³ The Guidelines were designed to provide councils with a comprehensive resource for decision-making and best practice in planning for sex services premises, and involved extensive research and consultation. However, the SSPPG were only made available in 2005, on request from the Planning Department; and were never distributed to local councils as was the need and intention.

The introduction of the Standard LEP entrenched statewide discrimination against independent sex workers by separating them from other home occupations and home businesses for the first time at the state level. Under the 1980 Model Provisions that preceded the Standard LEP, the statewide definition of “home occupation” did not preclude sex workers, thus sex workers were treated equally as other home occupations as exempt development.

The Standard LEP does not differentiate between commercial SSP and other commercial businesses in the same way as it separates and discriminates against home based sex worker businesses compared to other home based businesses. This situation is insupportable in regards to facilitating competition between the various sectors of the sex industry and would not be supported for other industries.

² *Report of the Brothels Taskforce*, 2001 ISBN 0 7347 0270 1

³ *Sex Services Premises Planning Guidelines*, NSW Planning 2004

Provisions in strategies or environmental planning instruments (EPI)

The limitation on suitable zoned land for the various scales and types of SSP has a detrimental impact on the sustainable economic development of SSP in NSW.

These range from small-scale 2-3 room premises with 3 sex workers and a manager/receptionist, to larger premises of between 6 to 10 rooms with a similar ratio of sex workers and ancillary staff. In addition, it fails to accommodate an estimated 40% of the industry, being independent sex workers operating from mainly residential areas (SSPPG, p. 29)⁴.

Commercial SSP

In relation to the commercial scale of SSP, current regulations have created an uneven multi-tiered system. This is comprised of:

- (a) those few who have been able to get development consent consistent with the historic location of SSP in mixed use and commercial zones - as was the intent of the 1995 reforms; or,
- (b) those who have had no choice but to attempt to locate their businesses in industrial zones, (even then, many have been required to take the matter on appeal to the LEC following refusal at the local government level), or,
- (c) unauthorised/'illegal' commercial SSP, including premises who have operated within mixed-use and commercial zones without amenity for many years, and find they are unable to submit a DA as the use is not currently permissible in the zone they are located in. These businesses, due to limited suitable zoned and available land, coupled with the perceived dangers of locating their business in industrial zones and the prohibitive cost of fit-out of former warehouse spaces, remain outside of the regulatory system

In addition, councillor determination of development proposals for commercial SSP are rarely considered on their merits and emotion and moral argument is allowed to guide the decision making process.

Independent sex workers

Many independent home based sex workers are unable to benefit from the 1995 reforms as depending on their local government area, they may now find their business prohibited in mixed use and/or residential zones.

Under the Standard LEP there is no provision for '*home business (sexual services)*' in residential zones; nor under the majority of current LEPs.

It should be noted that a significant number of independent sex workers operate quite lawfully, discreetly and most importantly – anonymously, as exempt and complying developments in various and diverse local government areas, eg: Sydney City, Canada Bay and Armidale/Dumaresq.

⁴ *Sex Services Premises Planning Guidelines*, NSW Planning 2004

Additionally, in all local government areas of NSW independent sex workers who only offer escort services are currently operating quite lawfully. Independent Escorts do not require consent from local council to do outcalls (SSPPG: 2004: p. 11).

Overall, the factors outlined above create a fractured relationship between those with development consent and those without, and denies opportunities of genuine competitiveness based on a level playing field. Of particular concern is the associated and ongoing potential for corruption. A review of current local government planning instruments and recent case law will clarify the limited and restrictive manner in which local government has provided for SSP development - leading to the circumstances described above.

Evidence-based planning approaches required to achieve equitable planning regime

As the Ministerial Taskforce on Brothels noted, *"The [1995] reforms to the prostitution laws made brothels a legitimate land use. However, if planning regulation is too restrictive, it can be difficult for brothel operators to operate legally."* (Final Report: p. 9)⁵. Yet since that time most local councils have continued to create overly-restrictive and prohibitive zoning controls and/or regularly refuse Development Applications from sex services premises - even if they have met the principle objectives and specific controls of planning instruments. Such decisions are often overturned in the Land and Environment Court (LEC), at significant cost to operators and ratepayers.

Furthermore, the SSPPG state that: *"The most effective way for councils to reduce the number of illegal operators ... within local council areas is to draft planning provisions that enable operators to conduct well-run premises within a reasonable choice of localities."* (SSPPG: p.76). A notable example of one LEP, supporting the above planning principle, was made by Armidale/Dumaresq Council in 2007. Another relevant example is the provision for commercial SSP in recent amendments to Wollongong Council planning controls. The draft Wollongong LEP 2009 includes specific controls for commercial SSP which identifies them as permissible development in the B2 Commercial Core, B3 Mixed Use City Edge, B6 Enterprise Corridor and IN2 Industrial zones where they meet specific controls.

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 DHA Act), and illegal operators are less likely to access occupational health and safety programs." (Final Report: p. 11)⁶.

⁵ *Report of the Brothels Taskforce, 2001 ISBN 0 7347 0270 1*

⁶ *Report of the Brothels Taskforce, 2001 ISBN 0 7347 0270 1*

There is a growing body of informed opinion to support relaxing zoning controls that currently restrict competition and impact on the health and wellbeing of sex workers, for example recent research by Harcourt, Egger & Donovan.⁷

Just like the previous criminal law prior to the 1995 amendments, the current restrictions on location and the general hostility towards SSP development is creating a barrier to SSP development opportunities. This situation inadvertently constrains sustainable economic develop and fair competition within the industry. Additionally, it has a detrimental impact on peer based health promotion activities.

Furthermore, uncertainty in the planning system has created investment risks and has imposed additional unnecessary costs on operators and potential operators. We understand this situation has resulted in otherwise commercially viable proposals failing and in some cases, operators have had to ultimately sell their business or property to recoup the expenses associated with the court appeal process and/or the expensive fitouts of former warehouse spaces.

For independent sex workers, dislocation of their homes and businesses and additional costs associated with breaking a lease agreement and moving premises, causes significant economic harm and personal hardship.

⁷ Harcourt, Egger & Donovan, 2005, 'Sex Work and the Law, *Sex Health*, vol.2, No. 3, pp.121-128.

The Development Approval Process for commercial SPP

In NSW the level of information required to be submitted with a DA is overly-onerous and the approval process for SSP is particularly drawn out and uncertain. We welcome in principle the introduction of the Standard LEP because it has the potential to reduce the complexity of planning instruments. However, there needs to be a uniform non-discriminatory approach in relevant development control plans and a reduction in the documentation requirements for commercial SPP DA's across the State.

In general, and for financial reasons, proponents prefer to pursue the local government process, even if the 40 days statutory timeframe for a determination on a DA has lapsed. We have been advised that council decisions for SPP invariably take between 4 months to 1 year, well in excess of the statutory timeframe⁸. Even after patiently waiting for due process, proponents are usually forced to seek recourse in the LEC - with associated further expense and further delays.

Most SSP development applications, if approved, (even if consent has been gained through the LEC), are burdened by trial periods. Conditions of consent and operating to an approved plan of management, as in other commercial developments, should suffice. The recent findings of the LEC are relevant in this regard. The commissioner found that the imposition of a trial period was highly unreasonable.

“The application involves building works, including several new bathrooms. A consent for one year would not justify the applicant committing itself to these costs. Moreover, a one-year time limit would require the council to assess the application again in a year. The Environmental Planning and Assessment Act 1979 requires the council (and the Court) to assess the application thoroughly. A time-limited consent seems to me an admission that the application has not been properly assessed”⁹.

In this regard, we specifically seek your consideration of the unreasonable imposition of trial periods. Such provisions are anti-competitive in nature. Trial periods only provide uncertainty for operators, who have to comply with expensive and onerous conditions of consent. They have no business security as final consent may or may not be granted at the end of the trial period.

⁸ Pers. Comm. Julie Bates, Urban Realists, 4th June, 2009.

⁹ Piao v Willoughby City Council 2008 (NSWLEC 1407)

Developing appropriate balance in the planning system

Until a level playing field exists within the NSW planning system for all sectors of the sex industry, equal to other legitimate land uses, a significant percentage of operators will remain unauthorised or 'illegal'. These operators will continue to be denied opportunities to engage in innovation and competition within and across industry sectors.

Local councils and communities need adequately resourcing to enable them to understand and respect the intent of the Labour Government in reforming 'prostitution' laws in 1995. These changes intended to regulate SSP within the planning framework as legitimate commercial enterprises. Education is the key to implementing these reforms at the local council level.

The implementation of the 'Guiding Principles' of the SSPPAG will support and facilitate orderly, economic SSP development with consequent beneficial social and health outcome. These guiding principles are:

- *“Appropriate planning for sex services premises 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 services premises should be treated in a similar manner to other commercial enterprises, and should be able to rely on consistency and continuity in local planning decisions*
- *Planning provisions should acknowledge all types of sex services premises and ensure that controls relate to the scale and potential impact of each premises*
- *Reasonable, rather than unnecessarily restrictive, planning controls are likely to result in a higher proportion of sex service premises 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 services premises and recognise that they are a legitimate land use to be regulated through the NSW planning system*

Maintaining a focus on these guiding principles can assist all parties, including councils, the sex industry and the local community [along with legislators], by providing clarity and consistency of regulation, minimising amenity impacts and ensuring the health and safety of workers and their clients”(SSPPG, p. 3)¹⁰

¹⁰ Sex Services Premises Planning Guidelines, NSW Planning 2004

Specific Recommendations for changes to the planning system

1. In order to support and guide local councils to accommodate all scales and types of SSP, the Minister for Planning must revoke the 1996 Ministerial directive that “*unilaterally declared that local councils could now restrict brothels to industrial zones only*”.¹¹
2. Remove discriminatory provisions against sex workers within the standard LEP. Amend the Dictionary definitions of ‘*home occupation*’ and ‘*home business*’ by deleting their reference to ‘*home occupation (sex services)*’ and then delete the definition of ‘*home occupation (sex services)*’
3. Appoint a sex industry liaison officer within the Department of Planning. 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 SSPPG (p.3), which would be very timely during the current round of LEP reviews.
4. Revise and update the existing SSPPG as an ongoing resource for councils
5. Promote the development and use of ‘Fact sheets’ to address and appropriately respond to community concerns and public perceptions of safety issues. Sample Fact sheets are available in the SSPPG (Appendix E)
6. Support research into actual amenity impacts of SSP since 1995. We believe this will identify adverse impacts to be negligible and consequent permissibility in a broad range of commercial and mixed use zones with home based sex worker businesses permissible in residential zones subject to merit and site based assessment should be acceptable.
7. Support and fund the development of a half day education program at the next NSW Local Government Conference, to:
 - inform councillors of the rationale behind decriminalisation;
 - explain the legislative framework including the Standard LEP;
 - explore the impact of planning on Occupational Health and Safety, competition, economic outcomes and in the sex industry;
 - reveal the reality of amenity issues; and
 - review case law.

¹¹ Red, Erica and Saul, 2004, ‘Why sex workers believe ‘Smaller is Better’’, *HIV Australia*, Vol. 3. No. 3. [Online: http://www.afao.org.au/view_articles.asp?pxa=ve&pxs=103&pxsc=127&pxsgc=139&id=352]