

**REPORT OF THE
BROTHERS TASK
FORCE**



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**REPORT OF THE
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EXECUTIVE SUMMARY

The Brothels Task Force was established by the NSW Attorney General and the Minister for Urban Affairs and Planning in January 2000. 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 *Disorderly Houses Amendment Act, 1995* abolished the common law offence of keeping a brothel, making brothels a legitimate commercial land use regulated through environmental planning instruments under the *Environmental Planning and Assessment Act, 1979*. Councils were also given the power to take action in the Land and Environment Court to close a disorderly brothel in response to complaints from nearby residents or occupiers.

The Task Force was asked to review the success of the legislative changes after five years of operation and assess the need for further reforms. 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.

Key Findings of the Task Force

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 1943* would clarify the evidence which is needed to reasonably conclude that a premise is a brothel.

The 1995 reforms have had a positive impact on access for workers to health services and occupational health and safety programs.

Recommendations

1. Establish an advisory service to assist local councils in the planning regulation of brothels. Proposed membership and terms of reference for the Brothels Planning Advisory Panel are set out in *Appendix 1*.
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.

Structure of the Report

Part 1 provides background to the legislative changes that decriminalised prostitution and the objectives of those changes.

Part 2 examines the effectiveness of planning regulation in achieving the objectives of the legislative changes.

Part 3 examines the effectiveness of the enforcement of brothel regulation.

Part 4 examines occupational health and safety issues associated with the legislative changes and implications of different planning practices.

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Appendix 3 contains a Minority Statement from the Local Government and Shires Associations.

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1. OVERVIEW OF THE CHANGES TO THE REGULATION OF BROTHELS

The Wood Royal Commission found evidence “showing a clear nexus between police corruption and the operation of brothels.”¹ As a result, the Government conducted a reform of prostitution laws in NSW to remove the basis for an application under the *Disorderly Houses Act 1943* (DH Act) to close a brothel which was not otherwise disorderly. In permitting well-run brothels to operate, a potential opportunity for corrupt conduct on the part of police was closed off.

Prior to the *Disorderly Houses Amendment Act 1995* (DHA Act), all brothels were considered to be “disorderly houses” and could be closed down. Such laws, it was considered, enabled police corruption and even orderly, well-run brothels could be closed and the sex workers would be forced onto the streets. This is unsuitable for a number of reasons:

- ♦ Street prostitution is generally considered to be undesirable.
- ♦ Health and social workers have more difficulty reaching street sex workers with their health and safe-sex practices educational programs.
- ♦ Street sex workers are at greater risk of HIV infection and other STIs than those who work in brothels, where some medical supervision exists and where the use of condoms may be enforced.

The DHA Act decriminalised brothels, making brothels a legitimate commercial land use regulated through planning instruments prepared under the *Environmental Planning and Assessment Act 1979* (EP&A Act). Amendments to the *Summary Offences Act 1988* and the *Crimes Act 1900* abolished the common law misdemeanour of keeping a common bawdy house or brothel; provided that people in legitimate commercial relationships with a sex worker are not guilty of the offence of living off the earnings of prostitution; and ensured that women are not exploited as a result of the recognition of brothels as a legitimate commercial enterprise.

The reforms allow brothels to be regulated in much the same way as any other business. This enables proper control over their impact on communities, through

¹ Wood Royal Commission: Final Report 1997

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locational and management requirements; as well as enhancing proper health and safety practices. It can also reduce the incidence of street prostitution.

Local councils can close illegal brothels² by taking action under the EP&A Act. Councils can also close a brothel under the DH Act if it can demonstrate to the Land and Environment Court that the brothel is having a significant detrimental effect on the local community and that sufficient complaints have been received from nearby residents or occupiers to warrant closing the brothel.

While the police no longer have primary responsibility for regulation of brothels, the reforms do not prevent police from pursuing legitimate enquiries in relation to child prostitution, drug possession or supply, immigration issues, or any other serious criminal offence reasonably suspected of being committed within a brothel. Police may also use the DH Act to close a brothel if it is disorderly.

NSW Health is responsible for addressing public health issues in brothels, promoting AIDS awareness through the Sex Workers' Outreach Project, and providing a range of sexual health services. WorkCover is responsible for the promotion of health and safety, and the prevention of workplace injury and illness in the sex industry.

² Brothels are illegal under the *Environmental Planning and Assessment Act 1979* if they operate where brothels are prohibited under the relevant planning instrument, or if they operate without development consent where brothels require development consent under the relevant planning instrument.

2. PLANNING REGULATION OF BROTHELS

2.1 PLANNING OBJECTIVES FOR BROTHELS

The 1995 reforms aim to achieve the following objectives through the planning regulation of brothels:

- ♦ all brothels should be appropriately regulated under the *Environmental Planning and Assessment Act 1979* (EP&A Act);
- ♦ planning regulation should ensure that brothels are located where they are compatible with other land uses;
- ♦ planning regulation should minimise amenity impacts of brothels on nearby land uses, particularly residential areas and other sensitive uses; and
- ♦ planning regulation should minimise public health risks to both sex workers and their clients.

2.2 ARRANGEMENTS ADOPTED BY COUNCILS TO REGULATE BROTHELS

There are a number of different forms of planning controls adopted by local councils to regulate brothels.

Local planning instruments

Local Environmental Plans (LEPs) prepared under the EP&A Act identify locations for land uses and stipulate whether these uses may be carried out with or without development consent from the local council.

The DH Act and circulars from the Department of Urban Affairs and Planning provide guidance on appropriate locations for brothels³.

About half of the local councils in NSW have prepared LEPs to identify locations where brothels may operate⁴. Councils have generally adopted the locational principles for brothels contained in the *Disorderly Houses Act 1943* (DH Act), but there is some variation in their application. Most councils prohibit brothels in

³ The DH Act lists the following criteria for determining amenity impacts of brothels: proximity to churches, hospitals, schools or any place regularly frequented by children for recreational or cultural activities; proximity to other brothels; provision of sufficient off-street parking; provision of suitable access; amenity impacts resulting from the size of the brothel and the number of people working in it. The DUAP Circulars state that brothels are commercial uses and are appropriately located in areas where commercial uses are permitted. They also state that in some circumstances, it may be appropriate to restrict brothels to industrial areas.

⁴ As of 21/9/01.

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residential areas. However, some councils, such as South Sydney, allow “home business brothels⁵” in residential, business and mixed use zones without development consent.

Where LEPs 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.

Some local councils would like to prohibit brothels throughout their local government area. This would make all brothels illegal within an area, which is contrary to the objectives of the 1995 reforms.

Development guidelines and policies

Development Control Plans (DCPs) may be prepared under the EP&A Act to provide more detailed planning controls for land uses. A DCP may include development guidelines, such as location, building standards or security guidelines. It may also include health standards, for example, standards for ventilation, lighting, noise, sanitary facilities or contaminated wastes.

The Newcastle DCP for the Regulation of Brothels and Other Sex Industry Establishments, for example, requires *inter alia*:

- ♦ a brothel is not to be located within a remote area or an area in which public transport or support services are not conveniently to hand
- ♦ a brothel is not to provide more than seven rooms in which acts of prostitution are to take place
- ♦ a brothel must provide one on-site parking place per 60m² of gross floor area (in the CBD), and
- ♦ premises are to be provided with adequate lighting in accordance with Australian Standard AS 1680.

South Sydney Council’s Sex Industry Policy contains a base level of planning controls and health standards for all types of sex industry premises. It also introduces a further level of regulation specific to particular sex industries, for example, safe house brothels. A fundamental planning principle in this policy is anti-clustering control. This aims to control the cumulative impacts of premises used for sex industries so as to prevent the formation of perceived ‘red light districts’.

⁵ “home business brothel” is a brothel that operates out of a residence. Home businesses generally involve one or two workers, who are permanent residents of the residence.

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DCPs and policies do not require Ministerial approval or gazettal. No information is available on the number that have been adopted by local councils for brothels.

Local councils working with police

In some areas, police and local councils have developed Memoranda of Understanding (MOU), which are reported to be working well. Under the MOUs, information is exchanged between police and councils in respect of the operation and management of brothels in the local community.

State and regional planning instruments

In addition to planning controls imposed by local councils, the State Government can regulate brothels through Regional Environmental Plans (REPs) and State Environmental Planning Policies (SEPPs) under the EP&A Act. Amendments have been made to SEPP 4 - Development Without Consent and SEPP 22 - Shops and Commercial Premises to facilitate implementation of the reforms.

- An amendment was made to SEPP 4 – Development Without Consent to exclude brothels from the list of development that may be carried out without development consent. However, this does not prevent subsequent LEPs from allowing brothels without development consent in specific areas.
- SEPP 22 – Shops and Commercial Premises allows commercial premises to undergo a change of use from one commercial use to another commercial use, even if the proposed change of use is prohibited in that zone under another planning instrument. SEPP 22 was amended to prevent this type of change of use where the proposed use is a brothel.

2.3 EFFECTIVENESS OF PLANNING REGULATION IN ACHIEVING THE OBJECTIVES OF THE 1995 REFORMS

Regulation of brothels

The 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. This would be contrary to the objectives of the reforms.

Local councils have generally adopted the locational principles contained in the DH Act. Most LEPs which specifically regulate brothels restrict them to

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industrial and/or commercial areas⁶. 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.

⁶ As mentioned in 2.1, where LEPs do not specifically define and regulate brothels they are permitted where commercial premises are permitted.

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A number of issues have arisen from this practice:

- 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.

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.

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.

Local councils should be encouraged to develop appropriate planning controls based on the likely impacts of different types of brothels in particular areas. Proposed brothels would then be considered on their merits when a development application is lodged, at which time the local council would consider the amenity impacts, based on the characteristics of the area and the nature of the proposed operation.

For example, South Sydney Council recognises the following types of brothels which have different amenity and environmental impacts:

- commercial brothel – sex workers employed ‘in house’, but do not reside on the premises
- safe house brothel – for street sex workers, who do not reside on the premises, or are not based ‘in house’
- local business brothel – small brothel operated in a dwelling with a maximum of two non-resident sex workers
- home business brothel – small brothel operated in a dwelling by one resident sex worker, in no more than 10 per cent of any storey within the dwelling.

Commercial brothels may not be appropriate in some local government areas, due to the characteristics of the area. However, it is likely that all local government areas would have some locations where small brothels could

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operate without significant amenity impacts. Home business brothels would have similar impacts as home occupations and potentially could be located in similar areas.

Local councils need further assistance in developing appropriate planning controls based on these principles. It is proposed that an advisory service be established for this purpose. The Brothels Planning Advisory Panel should prepare guiding principles, model planning controls and model development consent conditions. It should also provide a forum for the discussion of issues relating to the planning regulation of brothels.

Locational restrictions expressed as development standards

State Environmental Planning Policy No. 1- Development Standards (SEPP 1) allows the approval of development that does not comply with a set development standard, where this 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.

Some LEP provisions which identify locations where brothels are prohibited are expressed as development standards. 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.

For example, Blacktown LEP 1988 provided that "development for the purpose of a brothel must not be carried out if the relevant premises are:... (d) within 100 metres from a road zoned Special Uses - Arterial Road and Arterial Road Widening or Special Uses - Local Road and Local Road Widening." In *Vasallo v. Blacktown City Council* [1999] NSWLEC 267 (see *Appendix 4*), the Land and Environment Court determined that this was a development standard which could be varied using SEPP 1 and overturned the council's refusal of the application.

However, in another case, *Weynton v Rockdale City Council* (1999) 106 LGERA 213 (see *Appendix 4*), while the same principle was applied, the Court rejected the application on the basis that the variation was not consistent with the objectives of the standard.

The use of SEPP 1, therefore, is justified where varying the development standard still allows the objective of the standard to be met. If a local council considers that SEPP 1 is being used to weaken its planning controls for brothels, it can:

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- strengthen and clarify the objectives of the development standards in its LEPs, so that any variation to the standards still achieves the desired planning outcome, or
- remove the locational provisions which are expressed as development standards and replace them with prohibitions.

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 an LEP which stated that brothels shall not be carried out 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. *Appendix 4* provides guidance on the drafting of prohibitions and the proposed Advisory Panel could also assist local councils by preparing model planning controls.

Home based brothels

It was clearly the intent of the 1995 reforms that all brothels would be regulated under the EP&A Act, including private workers operating out of residential dwellings ("home based brothels"). Private workers reportedly comprise 40 per cent of the industry⁷.

Local councils have adopted a range of planning controls for home based brothels. Many councils prohibit all brothels in residential zones. Others allow home based brothels without development consent if they are operated by one resident sex worker (as a "home occupation"); and allow them with development consent if they are operated by a maximum of two non-resident sex workers (as a "local business").

A number of issues have arisen from the regulation of home based brothels.

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.

Requiring development consent for home based brothels may also result in the continuation of illegal brothels in residential areas. 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 identification of individual sex workers through the development application process is also contrary to the recommendations of the Legal Working Party of the Intergovernmental Committee on AIDS, and the policies of

⁷ Information supplied by the Sex Workers Outreach Project.

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the Australian Federation of AIDS Organisations (AFAO) and the AIDS Council of NSW. Such requirements are also counter to the UN Declaration of Commitment on HIV/AIDS, 2001⁸.

Workers in illegal home based brothels are less likely to access occupational health and safety programs. The prevalence of HIV infection and sexually transmitted diseases among Australian sex workers remains one of the lowest in the world⁹. The low STI and HIV/AIDS prevalence in NSW sex workers is largely due to the voluntary cooperation of sex workers with outreach and advocacy services. These services are undertaken by specialist sex worker projects in addition to the statewide network of sexual health services. These measures protect public health by minimising the transmission of disease and infection. Prohibiting home based brothels, or requiring development consent for these brothels, may have the effect of creating barriers to these services and programs.

An amendment to State Environmental Planning Policy No 4 - Development Without Consent and Miscellaneous Complying Development could be made to allow home based brothels without development consent across the state. This would make the regulation of home based brothels similar to the regulation of other home occupations. 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 (see section 3).

Conditions attached to development consents for brothels

The evaluation of development applications under the EP&A Act provides a further mechanism for local councils to regulate the operation of brothels. When granting development consent, a council may impose conditions to ensure that a brothel operates in a discreet, unobtrusive and inoffensive manner.

Development consent conditions may be drafted as prescriptions or performance standards, or both.

Prescriptive conditions prescribe the particular acts, matters or things that must be done in carrying out the development. This requires the consent authority to have knowledge and experience of regulating brothels so as to be able to specify the prescriptions needed to achieve the desired planning objectives. However, this approach can lack flexibility. There is no capacity, without changing the development consent, for different means of achieving the objective to be adopted.

⁸ Information supplied by the Sex Workers Outreach Project.

⁹ This low prevalence rate is unique in the Asia Pacific region, which has been identified as having the fastest growing HIV/AIDS epidemic globally, and which has identified sex workers as a highly vulnerable group.

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Alternatively, conditions which specify performance standards allow flexibility, without compromising the objectives sought to be achieved. Performance standards can be general, such as the development shall be carried out in such a manner as not to cause interference with the amenity of the neighbourhood, or particular, such as the development shall not generate noise levels greater than a prescribed level above a background noise measured at the boundary of the nearest residential dwelling.

The proposed Advisory Panel could assist local councils in conditioning development by preparing guidelines or model conditions.

2.4 SUMMARY AND CONCLUSIONS

Local councils should be encouraged to consider the range of brothel types and their impacts when determining appropriate locations and planning controls. If local planning controls are too restrictive, the effectiveness of the planning system in achieving the objectives of the reforms will be undermined. Overly restrictive planning instruments force existing brothels to continue to operate illegally (especially home based brothels operated by one private sex worker) and effectively prohibit any attempts to gain development consent for brothels to operate legally.

An amendment to SEPP 1 is not recommended, as some local councils may want to use it to allow some flexibility in locating brothels. However, LEPs could be amended to change provisions from development standards to prohibitions if councils do not want flexible locational provisions for brothels.

An advisory service should be established to assist councils in preparing appropriate planning provisions. The Brothels Planning Advisory Panel should prepare guiding principles, model LEPs, DCPs, policies and conditions.

3. ENFORCING THE REGULATION OF BROTHELS

The following section of the report is a summary of legal advice obtained by the Task Force, which is attached to the report as *Appendix 4*.

3.1 ENFORCEMENT AVENUES

The regulation of brothels may be enforced under the *Environmental Planning and Assessment Act 1979* (EP&A Act) or the *Disorderly Houses Act 1943* (DH Act). The two Acts provide complementary regimes which can be used in conjunction to regulate and control the inappropriate use of premises as a brothel.

Enforcement under the EP&A Act

The operation of a brothel is illegal under the EP&A Act if it is operating:

- without development consent in an area where consent is required under the relevant planning instrument;
- in an area where brothels are prohibited under the relevant planning instrument; or
- in contravention of the conditions of a development consent.

A local council may issue an order under section 121B(1) of the EP&A Act to close an illegal brothel, or to require the operator to comply with the conditions of the development consent for the premise. The operator may appeal the order to the Land and Environment Court. The Court may then revoke the order, confirm the order, or modify the order. If the operator does not appeal and refuses to comply with the order, the council may prosecute in a local court or the Land and Environment Court.

A third party may apply to the Land and Environment Court under section 123 of the EP&A Act to remedy or restrain the breach of the Act. The Court could then issue an order to the operator of the illegal brothel. There is nothing unusual in this course of action. Councils and citizens regularly take such action to remedy or restrain a breach of the Act. The fact that the particular illegal use is a type of development that is considered to be a brothel, rather than any other type of development, is not relevant.

Enforcement under the DH Act

A local council may also take action under the DH Act to close a brothel (even if the brothel is operating lawfully under the EP&A Act). To take such action, the council must have received sufficient complaints to warrant making the application. These complaints must have been made by residents or occupiers of

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premises situated in the vicinity of the brothel, or by residents of the area who use, or whose children use, facilities in the vicinity of the brothel.

An application to close a disorderly brothel under the DH Act must be based on one or more of the following criteria:

- 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 purposes
- whether the operation of the brothel causes a disturbance in the neighbourhood when taking into account other brothels operating in 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.

However, the Court is not restricted to these criteria and may also take into account any other matter which it considers relevant.

3.2 EVIDENTIARY REQUIREMENTS

Proof that the premise is used for the purpose of a brothel

Proof that a premise is operating as a brothel will depend upon the particular definition of “brothel” in the relevant environmental planning instrument. However, most planning instruments adopt the definition from the DH Act (some with minor amendments):

“Brothel” means 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 purposes. Premises may constitute a brothel even though used by only one prostitute for the purposes of prostitution.

Such a definition requires proof that the premise has not only been used for the purposes of “prostitution”, but that such use is habitual.

The legal advice in *Appendix 4* provides a discussion of the conduct or events which are considered to constitute prostitution. In relation to “habitual”, it is clear that there needs to be some regularity or continuity in the use of the premises for prostitution.

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Evidence to establish the premise has been habitually used for prostitution can be by way of direct evidence or circumstantial evidence.

Direct evidence could be from persons who have used the services of prostitutes on the premise, or from prostitutes who work or have worked at the brothel. Persons may be subpoenaed to give evidence. Direct evidence could also be obtained by way of admissions found in letters to the council or to other persons, or in record of interviews.

However, local councils may have to rely more on circumstantial evidence. The legal advice in *Appendix 4* provides a discussion of the types of circumstantial evidence that may be used. In summary, this includes:

- ♦ number of employees, descriptions of employees, and hours of operation from observations of persons who reside or work in the neighbourhood;
- ♦ oral, documentary and photographic evidence of notices, signs, red lights or other advertisements on the premises; or advertisements in the printed media;
- ♦ registered business name and address which matches the address of the premises; or information on business cards;
- ♦ evidence from persons who ring advertised telephone numbers as to what was said in relation to the provision of services at the premises;
- ♦ documents such as appointment books, the customer database, and accounting information such as invoices, cheques, cheque books, accounts, bank statements, ledgers and tax returns; and
- ♦ evidence from witnesses of the physical layout and arrangement of the premises, the furniture, equipment, tools of trade and other articles in the premises.

Considered together, the circumstantial evidence may establish facts from which the local council or the Court may conclude, as the only rational inference, that the premise is used habitually for the purposes of prostitution. It is proposed that an amendment should be made to the DH Act to clarify the existing law on this issue.

Proof may not be needed that the premise is operating as a brothel

If the local council has not specifically defined and regulated brothels in the LEP, then brothels are generally regulated as commercial premises. In these areas, if a council wished to close an illegal brothel it would only have to prove that the premise is operating as a commercial premise.

Restraining the operation of a brothel

The applicant in proceedings to restrain an illegal brothel under the EP&A Act will need to show:

- the respondent is the person carrying out the development or the owner or occupier of the land who has sufficient control over the person carrying out the development;
- brothels are either prohibited or require development consent on the land under the relevant environmental planning instrument; and
- the premises do not have a development consent authorising the development, or the premises is in contravention of a development consent.

A certified copy of the planning instrument and map, or a certificate under section 149 of the EP&A Act would be sufficient proof of zoning requirements. Proof of ownership of the land would be able to be established by one of the methods of proof in section 151 of the EP&A Act.

To close a brothel under section 17 of the DH Act, the local council will need to show that it has received sufficient complaints about the brothel to warrant applying to have it closed.

Ordinarily, an isolated single complaint would not be sufficient. Having regard to the nature of the use, even a discreet, unobtrusive and inoffensive brothel may attract the occasional complaint. This would not be sufficient for the purposes of an application to close a brothel under the DH Act. Some repetition or continuity of complaint would ordinarily be expected. However, there could be exceptions, if the one complaint establishes, on good evidence problems encountered in section 17(5) of the DH Act (see below).

In addition, the complaints must be made by persons in the following classes:

- residents of the area in which the brothel is situated who live in the vicinity of the brothel;
- residents of the area in which the brothel is situated who use, or whose children use, facilities in the vicinity of the brothel; or
- occupiers of premises situated in the area in which the brothel is situated and in the vicinity of the brothel.

The DH Act also requires that the local council demonstrate that the operation of a brothel should cease because it is having a significant detrimental impact on amenity. This may be demonstrated by reference to one or more of the matters listed in section 17(5) (see 3.1 of this report).

- the proximity of the brothel to, or its visibility from a church, hospital, school or place frequented by children for recreation or cultural activities;

- disturbance caused by the brothel, taking into account other brothels in the neighbourhood and other land use within the neighbourhood involving similar hours, noise and vehicular and pedestrian traffic;
- disturbance caused by the brothel because of its size and the number of people working in it;
- the sufficiency of off street parking;
- the suitability of access to the brothel; and
- the interference with the amenity of the neighbourhood.

3.3 APPEALS AGAINST DECISIONS OF LOCAL COUNCILS

A person who makes an application to a local council to use a premise as a brothel may appeal to the Land and Environment Court if the council refuses to grant development consent, or they may appeal against the conditions that the council imposes on a development consent.

Local councils are often unsuccessful with these appeals. With a small number of exceptions, the Land and Environment Court has tended to overturn council decisions to refuse development applications for the use of a premise as a brothel.

There are a number of reasons why a council's decision may be overturned by the Court:

- a council may not have gathered sufficient admissible evidence for the Court to reasonably conclude that the premise is operating as a brothel;
- the environmental planning instrument or development consent conditions may not be appropriately worded to achieve the planning outcomes that a council intended; or
- a council's decision may have been based on "moral issues"¹⁰, rather than planning issues.

Section 3.2 of this report addresses the evidentiary requirements of the Court, while section 2.3 addresses the wording of planning instruments and development consent conditions.

Planning issues, not "moral issues"

Some council losses in the Land and Environment Court can be attributed to councils failing to restrict their consideration of the application to planning issues. In *Croucher v. Fairfield CC* (NSWLEC 88, 2 July 1997) Talbot J affirmed the decision in *Dennis v Parramatta CC* (1981) 43 LGRA 71 that questions of morality do not arise directly out of the planning and environmental matters required to

¹⁰ The reforms to the prostitution laws establish that brothels are a legitimate commercial use and can only be regulated on the basis of their impact on amenity and the environment.

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be considered under section 90 (now section 79C) of the EP&A Act. Similarly, in *Liu, Lonza & Beauty Holdings v Fairfield City Council* (LEC unreported, 23 December 1996), Murrell AJ rejected a submission on behalf of the council that community standards and views on the morality of brothels was a relevant matter for the council to consider in determining a development application. Her Honour noted that:

“The appropriate legal vehicle for any regulation of morality is criminal law. In New South Wales both prostitution and brothel operation have recently been “decriminalised”. It could not be in the public interest that local councils or this court now assume the mantle of moral arbiter.”

However, while morality per se is irrelevant, “the demonstrable social effect of a particular brothel use” is a relevant consideration under section 79C.

3.4 SUMMARY AND CONCLUSIONS

There has been concern expressed by local councils and others about the cost and time involved in enforcing the regulation of brothels. Enforcement could be improved by:

- amending the *Disorderly House Act 1943* to clarify the existing law concerning the evidence required to reasonably conclude that a premise is operating as a brothel
- releasing the Task Force report and legal advice obtained by the Task Force to assist local councils’ understanding of the evidentiary requirements of the Land and Environment Court

The proposed Advisory Panel will also assist local councils in preparing clearer planning controls and development consent conditions which could be easier to enforce.

4. OCCUPATIONAL HEALTH AND SAFETY ISSUES

4.1 BACKGROUND

HIV and other sexually transmissible diseases among sex workers

The last independent review of the implementation of the National HIV/AIDS strategy (“the Feachem Report”) in Australia found that a HIV epidemic among sex workers had been avoided in this country¹¹. The finding was based on analysis of nationally available data regarding HIV-related knowledge, attitudes and behaviour among sex workers in addition to epidemiological data. Overall condom use among brothel-based workers was found to approach 100% and condom use with non-client sexual partners was assessed as probably as good as, if not better than, that reported by non-sex workers and their sexual partners. The scientific literature on sexually transmitted infections (STIs) supports that finding and documents the changes in behaviour which occurred in the female sex industry between 1984 and 1991. O’Connor *et al* reported zero prevalence rates for chlamydial and gonococcal infections at first presentation of female sex workers to Sydney Sexual Health Centre in 1996; and comparable STI rates among female sex workers to that of the general heterosexual population¹². Harcourt *et al*¹³ and Harcourt and Donovan¹⁴ report statistically significant reductions in rates of acute and chronic STIs and very low rates of HIV infection – none attributable to sex work – among Australian sex workers. Donovan *et al*, in an analysis of clinic-based data from Sydney Sexual Health Centre on gonorrhoea rates among sex workers found a 90 percent decline for the period 1981 to 1989¹⁵.

The Feachem Report did, however, identify two groups of sex workers for which the adoption of safe sex practices was reportedly lower – international sex workers and street-based workers. These findings are also supported by the scientific literature, although there are recent unpublished reports (based on data from Sydney Sexual Health Centre) of improvements in condom use and reduced STI rates among international sex workers as a result of targeted interventions.

¹¹ Commonwealth Department of Human Services and Health *Valuing the past ... investing in the future Evaluation of the National HIV/AIDS Strategy 1993-94 to 1995-96*. 1995.

¹² O’Connor CC, Berry G *et al* Sexual Health and use of condoms among local and international sex workers in Sydney. *Genitourinary Medicine* 1996; 72.

¹³ Harcourt C, Philpot R and Edwards J The effects of condom use by clients on the incidence of STDs in female prostitutes *Venerology* 2, 1 1989

¹⁴ Donovan B and Harcourt C The female sex industry in Australia: A Health Promotion Model *Venerology* 9,1 1996.

¹⁵ Donovan B, Bek M, *et al* Heterosexual Gonorrhoea in central Sydney: Implications for HIV control *The Medical Journal of Australia* vol 154 pp520-1 1991.

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There is a limited literature on the health of street-based sex workers in NSW. A recent study of the health of street-based sex workers in Sydney, Newcastle and Wollongong, commissioned by NSW Health, found that HIV infection rates among that group remained low and comparable with female indoor sex workers (ie brothel/parlour workers)¹⁶. The study confirmed the perception that illicit drug use (including the lifestyle consequences of drug dependency, hepatitis B and C) and violence by clients and other people are the major threats to the health and welfare of street-based sex workers.

The report recommended strategies to improve relations between sex workers, police and the wider community through a cooperative approach to issues affecting the amenity of locations where street-based sex work is located. Such strategies will also have the effect of allowing health service provision to this marginalised group. For example, Newcastle continues to experience the impact of activity in the mid 1990s which closed many brothels. This has led to an increase in the numbers of street sex workers and workers in private situations making it difficult for outreach workers to locate them.

Further marginalisation of women working from their home or on the street makes them more difficult to access for public health prevention efforts and more vulnerable to exploitation, both from clients demanding unsafe sex, through enforcement activity by police and from working in hazardous areas ie. industrial areas, poorly lit streets, isolated areas etc.

There are no published data on rates of STIs for home based sex workers. It has been suggested that, to avoid identification as sex workers and detection by local councils, private workers may be less likely to attend sexual health services and maintain contact with sex worker outreach services. This could create the potential for unsafe sex practices and exposure to STIs.

Health services for sex workers in NSW

NSW has had dedicated services providing sexual health advocacy and advice to the sex industry since 1983. The first dedicated organisation being the Australian Prostitutes Collective (APC) and more recently the Sex Workers Outreach Project (SWOP).

The APC was founded in July 1983 and first received Government funding in 1985. The Sydney office of the APC was closed in 1989 and as a result of dedicated Commonwealth funding for the first National AIDS Strategy which operated from 1989 to 1993 funding was provided to the AIDS Council of NSW to develop a statewide sex worker project.

¹⁶ Harcourt C and Donovan B in a report prepared for NSW Health *The Health*

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The National AIDS Strategy's successful approach has, in addition to a focus on harm minimisation, also included an emphasis on a partnership model which directly involves affected communities in prevention and control efforts. The Sex Workers Outreach Project (SWOP) was established by NSW Health in 1990 to promote AIDS awareness state wide to sex workers, clients and managers. SWOP estimates that at any given time there are approximately 3,000 sex industry workers in NSW; 70% of these workers work in brothels with the remaining 30% working privately or on the street. It is considered probable that a percentage of sex workers would always opt for street work for a variety of reasons, ranging from flexibility of hours to financial benefits, or in some cases, confidentiality.

SWOP and Sydney Sexual Health Centre both provide outreach services, clinical services, interpreting services, immigration referral and develop specific resources for non English speaking background sex workers. To date these services have predominantly catered to Thai and Vietnamese sex workers. Other significant service providers to sex workers include the Gender Centre, the NSW Users and AIDS Association, the Kirketon Road Centre and the statewide network of sexual health services.

The sexual health infrastructure in NSW has played a major role in service provision to the sex industry. Sexual health services provide screening, treatment, sexual health education, preventative advice and contact tracing encompassing the clients of these workers. Sex workers working in brothels (both legal and illegal) are usually required by brothel management to present a health certificate to their employer once a month or every three months depending on the organisation. There is no legal or policy requirement for sex workers to be regularly tested for STIs. Section 3.5 of the WorkCover/NSW Health and safety guidelines for brothels in NSW states that evidence of attendance for sexual health tests should not be used as an alternative to safe sex practices as such certificates do not imply freedom from STIs. To date the adoption by the sex industry of measures which protect the health of the public has been achieved by promotion of a standardised voluntary approach. It has also been facilitated by reforms to criminal law since 1979 and more recently the amendments to the Disorderly Houses Act. Since the emergence of HIV infection, the brothel-based sex industry in NSW has transformed to become almost entirely based on safe sex practices.

The legislative reform which has taken place assists with maintenance and expansion of current models of service delivery to sex workers by generally ensuring that the industry is not driven underground.

Implementation of the *Disorderly Houses Amendment Act 1995* - health and safety issues

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NSW Health, in collaboration with WorkCover NSW, released Health & Safety Guidelines for Brothels in NSW. The booklet was initially published in October 1997. The most recent revision is currently being updated to incorporate legislative changes and will be ready for distribution in late 2001.

The Guidelines contain provisions for the protection of public health in relation to both the brothel environment (food, spa's, waste management, ventilation, lighting, noise etc) and practices (examinations of clients, availability of information regarding STIs, access to the means to prevent STIs etc); and information on investigation of public health related complaints.

NSW Health has a number of existing regulatory provisions that address public health issues in brothels. They include policies, circulars, guidelines and legislation. NSW Health and local government authorities have joint responsibilities regarding investigations of complaints relating to public health issues such as noise, food handling and water quality of spas and swimming pools.

NSW Health and Area Health Service Public Health Units, in collaboration with sexual health services, have primary responsibility for investigating complaints relating to public health issues associated with the transmission of blood borne viruses and STIs. Under the provisions of the *Public Health Act 1991* (as amended), public health action can be initiated against any brothel or sex workers who irresponsibly place the health of the public at risk. This action can include inspection of premises, counselling and case management, the issue of Public Health Orders and the mounting of prosecutions. A designated physician from the Sydney Sexual Health Service chairs the assessment panel which advises NSW Health on such matters.

The notification provisions of the *Public Health Act 1991* permit NSW Health to investigate and monitor outbreaks of sexually transmitted diseases. Through this mechanism the AIDS/Infectious Diseases Unit has been able to initiate pro-active education and prevention measures related to minimising the spread of sexually transmitted diseases.

The Consumer and Business Services (CABS) Team in WorkCover has responsibility for the sex industry. The team approach allows WorkCover to:

- ♦ be more flexible and responsive
- ♦ work more closely and collaboratively with the sex industry
- ♦ have a more detailed understanding of industry issues and priorities
- ♦ more readily adopt whole of industry approaches.

This will further enhance WorkCover's promotion of health and safety, and the prevention of workplace injury and illness in the sex industry.

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The WorkCover NSW Injury Prevention, Education and Research Grants Scheme – Health and Workplace Safety in the Sex Industry, commenced in January 1999. This project aims to increase the capacity of the sex industry to formulate and implement workplace health and safety systems. The project is funded under the WorkCover NSW Injury Prevention, Education and Research Grants Scheme and is conducted by the Sex Workers Outreach Project (SWOP).

The specific outcomes to be achieved during the course of the project are:

- i. an assessment across the industry of OHS attitudes and knowledge; and an assessment and amendment of the Health and Safety Guidelines for Brothels;
- ii. a health and safety guidebook;
- iii. a safety audit checklist incorporated in the guidebook;
- iv. a video, training sessions and resources packages to augment the above Guidelines; and
- v. an evaluation of the effectiveness of these measures.

The products of the project are described in more detail in *Appendix 2*.

Emerging and Ongoing Issues

WorkCover and the NSW Health Department in consultation with SWOP, Kirkeaton Road Centre, Sydney Sexual Health Centre and, through the commissioning of various reports have identified the following issues:

- ♦ sex on premises venues – *Health and safety guidelines for communicable diseases for sex on premises venues* were released by NSW Health in August 2001
- ♦ safe houses – for street-based sex workers
- ♦ the security of sex workers – improving methods/systems especially in isolated industrial areas and for street-based sex workers – dangerous working conditions, poor lighting
- ♦ health and safety issues for home based sex workers – including access to health services, confidentiality and the risks of working in isolation and issues related to obtaining development consent
- ♦ confirming the employment status of sex workers – contractors, workers or deemed workers
- ♦ employment status & responsibility for workers compensation and injury management
- ♦ employment status and OHS responsibilities
- ♦ illegal workers – conditions of employment, literacy, payment of bond
- ♦ rights and responsibilities of workers and managers regarding OHS & Injury Management
- ♦ access to hygiene facilities for street-based sex workers
- ♦ safe and hygienic use of sex aids – including disinfection and storage.

4.2 SUMMARY AND CONCLUSIONS

Decriminalisation of prostitution has had a positive impact on access for workers to health services and occupational health and safety programs. However, care must be taken to ensure that planning controls do not create barriers to the implementation of effective public health policies and services directed at sex workers in all facets of the sex industry. It is proposed that occupational health and safety programs for sex workers should continue.

APPENDIX 1

PROPOSED STRUCTURE AND ROLE OF THE BROTHELS PLANNING ADVISORY PANEL:

Membership:

- Independent chair appointed by Department of Urban Affairs and Planning and the Local Government and Shires Associations
- Department of Urban Affairs and Planning representative
- NSW Health representative
- State Chamber of Commerce representative
- Local Government and Shires Associations representative
- Local council representatives – 1 metropolitan, 1 non-metropolitan
- Sex Workers Outreach Project representative
- Private Worker Alliance representative
- A person with expertise in legal issues associated with planning for brothels.

Role of the Panel:

- (a) The Panel will provide an advisory service to councils on planning instruments and policies relating to brothels, and the imposition of appropriate conditions of development consent for brothels, including:
 - controls and conditions to achieve occupational health and safety objectives, and
 - neighbourhood amenity and environmental impacts of brothels.The Panel will prepare and promote guiding principles, model codes, planning provisions, policies and conditions.
- (b) The Panel will provide an advisory service to councils on the enforcement of planning regulations for brothels and release a plain English version of the evidentiary requirements for the Land and Environment Court.
- (c) If requested, the Panel will advise the Director-General of the Department of Urban Affairs and Planning on draft local environmental plans containing provisions affecting brothels.

APPENDIX 2:

PRODUCTS OF THE PROJECT - HEALTH AND WORKPLACE SAFETY IN THE SEX INDUSTRY:

a) 'Health and Safety Guidelines for Brothels in NSW'-Booklet

These Guidelines describe the legal rights and duties, legislative standards, and practices to ensure a safe and healthy workplace and rehabilitation of workers. Part of the current project was to review the booklet and its impact on the Sex Workers industry in NSW.

The changes to the guidelines were necessary to:

- incorporate the new injury management obligations and
- provide more guidance in areas of major concern and about major hazards.

Following this review, the contents of the booklet will be revised and translated into Chinese, Korean and Thai. Once WorkCover and NSW Health approve the final proofs, the booklet will be printed. The publication will then be distributed to sex industry workers, owners, managers and service providers.

b) 'Getting on Top of Health and Safety in the NSW Sex Industry' – Video

This video complements the Guidebook (see below) and contains health and safety information for the Sex Industry in the form of a number of 'scenarios' conveying clear messages. A master copy of the video has been completed and WorkCover has received the final version.

c) 'Getting on Top of Health and Safety in the NSW Sex Industry' – Guidebook

This guidebook, which complements the video (see above), contains chapters on occupational health and safety legislation, the implementation of the Guidelines, workers compensation, risk management, injury management, cleanliness and hygiene and specific health and safety issues for brothels. WorkCover has approved the draft version and will give final approval once the proofs have been reviewed. The Guidebook has also been translated into Chinese, Korean and Thai. It is expected that the Guidebook will be ready for distribution in early 2001.

d) 'Health and Workplace Safety in the Sex Industry' – Training Module

This includes a 'Trainer's Kit' and 'Participants Notes' for use in training sessions with sex industry workers, owner managers and service providers. WorkCover has provided feedback on the original drafts but has not yet received the final draft for approval.

e) Final Report

APPENDIX 3:

MINORITY STATEMENT FROM THE LOCAL GOVERNMENT AND SHIRES ASSOCIATIONS

October 2001

Prepared by Cr Peter Woods OAM, President of the Local Government Association on behalf of the Local Government and Shires Associations of NSW.

Introduction

The Local Government and Shires Associations of NSW are the peak organisations for Local Government representing all 172 councils in NSW.

I have represented the Associations on the Brothels Task Force which was established by the NSW Attorney General and the Minister for Urban Affairs and Planning in January 2000.

The establishment of this Task Force followed ongoing concern in Local Government about the operation of the Disorderly Houses Amendment Act 1995 and the regulation of brothels in council areas. As a result of these concerns a submission was prepared by Local Government which supported the following steps and urged their adoption by the Attorney General:

- Preparation by councils of a local area policy for brothels, with a Ministerial Advisory Committee to be established to consider and make recommendations in respect of each council's policy. The Committee would comprise representatives from Local and State Governments, and the sex industry.
- Subject to the above, each council would prepare a local environmental plan which would prohibit the establishment of brothels within the council area or limit their operation to identified areas.
- The Land and Environment Court to be directed to abide by the provisions of a council LEP.
- A consolidated piece of legislation to be introduced by the Government which clearly sets out the provisions relating to the operation of brothels and which would provide a requirement for licensing of all brothels.
- The licensing of brothels to be undertaken by a state government agency, with Local Government vested only with the town planning responsibility.

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- A clear commitment from the Government to permit community consultation at all stages of the brothel approval process.
- Licensing to be properly regulated and renewable.
- NSW Health to prepare a clear set of health guidelines for the sexual services industry and that Department to have responsibility for their enforcement.
- Evidentiary procedures in relation to the operation of illegal brothels to be relaxed.

This Minority Statement has been prepared in order to enable me to express my reaction to the findings of the report.

Comment on the Report of the Brothels Task Force

I would like to state at the outset that I support in principle the recommendations of the Task Force Report. The Report and the work of the Task Force has moved in a positive manner to address many of the issues associated with this type of land use.

In particular, support is provided for the Advisory Committee which is proposed to assist local councils in the planning regulation of brothels. This is welcomed with the proviso that the Committee will be a voluntary process for councils. Support is also provided for the makeup of the Committee and the proposed Local Government representation. It is felt that a Committee of this sort will go some way to assist councils in dealing with this land use.

I would also like to support the general commitment, through this Committee, to the ongoing review of this issue especially in relation to local councils. I would also like to support the proposal for the Committee to release a plain English version of the evidentiary requirements for the Land and Environment Court. This will go some way to addressing some information issues.

I would also like to provide my strong support to the draft "Disorderly Houses Amendment (Brothels) Bill 2001" which is proposed as a part of this Report. I believe that this legislation will go a long way to assist councils in carrying out the very important and currently difficult and expensive actions associated with the regulation and enforcement of brothels and the associated evidentiary requirements.

The matters relating to health and safety in relation to brothels are also supported.

A matter that was not addressed by the Task Force Report

As indicated above in our original submission, there was strong support for the introduction of a two tiered system of control or a licensing body. I am disappointed that this was not addressed as a part of the Task Forces' work.

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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 councils only deal with planning aspects of applications and that other matters such as health, licensing, illegal operations and law and order issues could be dealt with by this body.

This body would potentially lead to a reduction in criminal involvement in the industry, maximise safety and employment conditions and access to health services for workers. This may reduce community concerns and reduce conflict in the obtaining of planning approval. The Associations would endorse this body only applying to larger commercial operations and not home occupations.

However, I do recognise that the changes that are proposed in the Report may need to be initially tested to see if any real changes arise which assist Local Government's concerns.

Conclusion

In conclusion I would like to thank the Task Force for taking on board many of the initial concerns of Local Government.

In particular I would like to reiterate my support for the Advisory Committee and the proposed legislative amendments. It is imperative that these proposals are reviewed and revisited in the future to enable any arising issues to be addressed.

Although the two tiered body was not addressed by the Task Force, I do acknowledge that the outlined proposals should be given time to assess as to how far they will go to address the issues of concern to Local Government.