

# Unfinished business

## *Achieving effective regulation of the NSW sex industry*

### **What does effective regulation of the sex industry offer?**

In 1995 NSW brothels were decriminalised, which meant it was no longer illegal to operate a brothel, as long as the business obtained development approval. The reforms gave brothel operators the opportunity to operate legally and local councils the ability to regulate brothels in much the same way as any other business.

Local council could consider:

- ✗ the impact of the business on the local environment;
- ✗ whether the premises are located in appropriate zoning areas (usually in commercial zones);
- ✗ whether the premises meet health and safety standards; and
- ✗ communities views through the development application process.

These reforms came about because it is well recognised that prohibition drives brothels underground, making it impossible to regulate their location, ensure health and safety standards and provide a rational response to any community concerns. When brothels operate illegally it makes implementing effective HIV and other STD prevention strategies and ensuring health and safety standards very difficult.<sup>1</sup>

The AIDS Council of NSW (ACON) auspices the Sex Workers Outreach Project (SWOP).<sup>2</sup> SWOP is in regular contact with approximately 750 brothels throughout NSW. Despite the myths about the impact of decriminalisation, the number of brothels has not changed substantially since decriminalisation. SWOP has worked closely with many local councils and

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<sup>1</sup> Alexander, P. *Sex work and Health: A question of Safety in the Workplace*, JAMWA Vol. 53, No. 2, Cohen, J. *Transmission of HIV in Prostitutes*, January 1994.

<sup>2</sup> The project works to minimise transmission of sexually transmitted diseases and HIV/AIDS in the NSW sex industry by providing a range of health, safety, support and information services for sex workers, management, clients and partners of sex workers.

brothel operators to ensure that the intention of the reforms are achieved and to monitor the effectiveness of reforms in practice. Despite the cogent rationale for decriminalisation, sex industry reforms have not achieved effective regulation of the sex industry.

### **What role has the NSW Government played in implementing reforms?**

When the reforms came in to effect in 1995, the Department of Urban Affairs and Planning (DUAP) advised local councils that:

- ✗ brothels were now a legitimate land use subject to local council development approval;
- ✗ blanket prohibitions of brothels would contradict the intention of reforms; and
- ✗ brothels were most suitable in commercial and industrial zones.<sup>3</sup>

While DUAP advised local councils that an interdepartmental working party would prepare *Regulation of Sexual Services Industry Interim Guidelines*,<sup>4</sup> current information indicates that these guidelines were never developed.<sup>5</sup>

In July 1996, the (then) Minister for Urban Affairs announced that local councils could limit brothels to industrial zones.<sup>6</sup> By mid 1997, thirteen local councils had amended their Local Environment Plan (LEP) to restrict brothels to industrial areas. This policy shift gave weight to the view that it was acceptable to treat brothels differently from other businesses.

### ***How does restricting brothels to industrial zones undermine achieving a regulated industry?***

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<sup>3</sup> Department of Urban Affairs and Planning communication to General Managers of Local Councils, 29th December 1995.

<sup>4</sup> Correspondence form DUAP to all local councils dated 16<sup>th</sup> July 1996.

<sup>5</sup> Telephone communication with DUAP by the author July 1999.

<sup>6</sup> Department of Urban Affairs and Planning communication to General Managers of Local Councils, 16 July 1996.

The purpose of reform was to bring brothels within the purview of regulation, yet this policy shift to enable brothels to be confined to industrial zones signalled that brothels remained undesirable businesses. This shift does not reflect the fact that many small cottage industry brothels have existed for many years in commercial or mixed residential zones, often with no awareness by communities that they even exist. Allowing local councils to restrict brothels to industrial zones has resulted in many brothels never making the transition to legal businesses. This is the case even where no LEP exists specifically limiting brothels to industrial zones.

Many operators fear being forced into industrial zones, which:

- ✘ are not seen as commercially viable location for brothels;
- ✘ are often considered unsuitable because they are quiet at night and increase the vulnerability of clients, sex workers and health outreach workers to violence;
- ✘ do not offer appropriate accommodation for services which operate on a domestic scale; and
- ✘ are often fully utilised, with no premises available for lease.

The capacity to restrict brothels to industrial areas has also been used by local councils in a disingenuous fashion. For example, the Fairfield Council received a development application (DA) from a brothel that had been operating in a business area for seven years. The Council failed to consider the application for fifteen months, while waiting for their LEP, restricting brothels to industrial zones, to be approved. Once the LEP was approved, the Council refused the DA and made an application to the Court to close the premises down.

The Land and Environment Court (LEC) found that, there was no evidence of any environmental or other harm or disturbance caused by the brothel and the location in the business district was not near any schools or churches. But the zoning changes amounted to a technical breach of *Environmental Planning and Assessment Act*. The Judge made it clear that he considered this a harsh result, but that the Court could not sanction a breach of planning laws. He postponed the closure of the brothel for

eighteen months to enable the brothel operator sufficient time to relocate.<sup>7</sup>

## How have local councils responded to decriminalisation?

Some local councils have worked with their local sex industry and communities to develop brothels policy which aimed to encourage brothels which exist in their area to become legal businesses. This ensured that the Council could effectively regulate the industry and successfully implement the intention of reforms.

For example, in 1996 the South Sydney Council adopted a brothel policy and established a process of publicising the policy and educating communities and the industry. Under this policy, 56 DA's were lodged with Council, 20 were refused, 35 were approved, including a mere 5 determined through the Court. Applications were overwhelming from existing businesses.<sup>8</sup>

In 1998 the Council undertook:

- ✘ extensive consultation process with the sex industry, local residents and businesses to revise the policy ;
- ✘ widely disseminated the revised policy; and
- ✘ provided the opportunity for written submissions.

Positive outcomes of working closely with key players throughout the process have been:

- ✘ achieving a policy with far greater coverage, embracing more businesses within the regulatory system including massage premises, private workers and "sex on premise" venues;
- ✘ enabling local council to consider the diversity and concentration of all sex related businesses.
- ✘ enabling many existing brothels to be regulated;
- ✘ enabling participation from local communities in the process of DA applications; and
- ✘ reducing levels of complaints relating to brothels.

However, many councils are discouraging the sex industry from applying for DA's by openly opposing reforms.<sup>9</sup> Some have developed policies which severely

<sup>7</sup> *Fairfield City Council v Taouk & Ors* [1988] NSW LEC 132 (24 June 1998)

<sup>8</sup> Existing brothels versus new businesses seeking approval was at a proportion of 8:1. South Sydney Council Town Planner and the *City Hub* 5/11/99

<sup>9</sup> Examples of local council resistance to reforms is well documented in many articles in local media including: *No*

limit the potential locations within approved zones. Other councils reject DA's from brothels as a matter of course or fail to respond to applications within the statutory period for assessment. This forces brothel owners to pursue their case in Court. Some local councils initiate costly court cases, closing down brothels which have been operating without complaints for several years. In some cases Councils use DA's as evidence of the use of premises as a brothel<sup>10</sup>

For example, a brothel had been operating in a business district for 18 years. There was no evidence of undesirable social impact. The brothel owner made an application and the Council did not respond within the statutory period. The brothel operator was forced to bring an application to the Court against the deemed refusal. The brothel operator's appeal was upheld and development consent granted.<sup>11</sup>

The likelihood of refusal or deemed refusal deters brothel operators from applying to become legal businesses, even where they have a strong case for doing so.

In a string of early cases in the LEC, local councils sought to justify their refusal of development applications for brothel on moral grounds.<sup>12</sup> The Court made clear that the reforms did not allow for this and that councils should concern themselves with planning considerations. Despite this, many local councils continue to oppose brothels on moral grounds, thus discouraging existing brothels operators from making a DA, forcing them to remain illegal.<sup>13</sup> Recently Hurstville Local Council stated that they would continue to treat all brothels as illegal, despite the State Government's

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*Exemption Council's Red Light on Brothels*, Glebe and Inner Western Weekly 17th February 1999; *Brothels face big crackdown*, The Champion, Liverpool 10th March 1999; *Council sees red over brothel zone*, Inner Western Weekly 10th February 1999, *Council deflates brothel boom*, St George Leader, 24th June 1999.

<sup>10</sup> For example, *Parramatta City Council v Stonewale Pty Ltd & Ors* [1991] NSWLEC 23, 22nd February 1991 and *Bankstown City Council v Joseph Attallah* [1998] NSWLEC 228, 25th September 1998.

<sup>11</sup> *Croucher v Fairfield City Council* No 10630 of 1996.

<sup>12</sup> *Sunny SK Liu v Fairfield City Council* No 10384 of 1996, *Linda v Cameron Willoughby City Council* No 10603 of 1996. *Cherie Finlay v Newcastle CC* No 10385 of 1997 and *Damilform Pty Ltd v Willoughby CC* No 10456 of 1998 confirmed these earlier cases.

<sup>13</sup> SWOP case studies 1997 - brothels owners in Southern Sydney, Southern Beaches and Blacktown areas.

continued refusal to allow amendments to their LEP banning brothels.<sup>14</sup>

Since decriminalisation, the LEC has heard a total of 93 cases regarding DA's for brothels.<sup>15</sup> Local council bought 53 cases to court, winning 40 of these, a 75% success rate. This rate must be understood in the context of councils closing down existing brothels by restricting brothels to industrial zones or severely limiting locations. On the other hand brothel operators took 40 cases to court, winning 37 of these, a 92% success rate.

## How have brothel operators responded to decriminalisation?

Brothel operators commonly cite local council hostility to reforms as a major disincentive to even applying for development consent. They fear that applying will bring their business to the attention of local councils and that they will be closed down, regardless of the quality of the business and appropriateness of the location. Alternatively, where applications have been made, they are often refused or used as evidence for closure.

Where DAs are refused, brothel operators face the expense of court proceedings and preparing their cases. The cost involved in appealing is around \$15,000<sup>16</sup>. This is a particular deterrent for smaller brothels and private workers, with limited financial resources. Ironically, these small-scale businesses have limited environmental impact and are less likely to attract community opposition.

Where brothel operators do have the resources to appeal they are successful in 92% of cases indicating that local councils do regularly refuse reasonable applications. Given the cost of appealing, it is highly likely that there are many council refusals are never challenged and many more applications that are never made.

## The reforms can work

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<sup>14</sup> *St George Leader*, 24th June 1999.

<sup>15</sup> We were able to identify a total of 93 such cases involving applications relating to brothels and heard by the LEC since the reforms came in force in December 1995, until August 1999.

<sup>16</sup> This figure includes legal representation, court filing fees, architectural plans, building reports and town planner support. Personal communication of the author with Paul De Fina, Town Planner, August 1999.

The rationale for decriminalisation of the sex industry remains sound. Laws and systems of regulation which in effect prohibit the operation of brothels will not stop them from existing.

Prohibitive approaches simply:

- ✗ keeps the sex industry underground;
- ✗ makes it impossible to regulate their location;
- ✗ makes it impossible to ensure health and safety standards for clients and workers; and
- ✗ fails to provide a rational response to community concerns.

Where councils have involved the industry and community in developing appropriate policies and processes to enable fair consideration of each application on planning grounds, brothel operators have been willing to make applications. This enables local councils to effectively regulate and locate sex industry businesses.

### **What needs to be done?**

The NSW Government's commitment to decriminalisation of the sex industry and the sound rationale for doing so, needs to be backed by continued commitment to educating the community about the reasons for decriminalisation and the benefits of regulation for communities and for the industry.

The NSW Government is well placed to guide and resource local partnerships to give effect to reforms. In fact it was always envisaged that there would be a coordinated approach to resourcing local councils to implement reforms.<sup>17</sup> This did not occur and needs to happen to give effect to reforms.<sup>18</sup>

The NSW Government is already committed to supporting local communities to address critical issues. The *Strengthening Communities Unit* (the Unit) in the NSW Premier's Department brings together a number of existing social development projects, such as the community builders' initiative and the Drug and Community Action Strategy. The unit manages key issues and projects related to strengthening communities that require a whole of government approach. As a result it is well placed to guide,

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<sup>17</sup> Correspondence form DUAP to all local councils dated 16<sup>th</sup> July 1996.

<sup>18</sup> Telephone communication with DUAP by the author July 1999.

resource and coordinate local responses to improve regulation of the sex industry.

### ***What will work best at local level?***

A shared commitment is needed to achieve effective regulation of the sex industry. Fostering local partnerships can create a shared understanding of:

- ✗ the realities of the sex industry, rather than the myths
- ✗ the rationale for the reforms;
- ✗ the advantages of effective regulation;
- ✗ the viewpoints of all participants; and
- ✗ options for improving regulation, while balancing the impact on communities.

Local partnerships, which foster a collaborative approach, create opportunities to find mutually acceptable solutions. Local councils should be encouraged and supported to create working partnerships, which engage all the necessary stakeholders, such as members of the sex industry, businesses, residents, health care providers and relevant community organisations, in a joint effort to achieve regulation of the industry. Local initiatives need to be supported by strong leadership and clear guidance from the NSW Government. This approach is not new and is proving valuable to address sensitive and complex social issues. Increasingly, governments are encouraging, and communities are seeking, greater involvement in solving local issues, ranging from environmental issues to addressing drug use in our communities.

The NSW Government's response to the outcomes of the Drug Summit provides a useful model for harnessing the role of local communities, while retaining a role at State level to guide, resource and coordinate local responses.<sup>19</sup>

The Government is developing a *Drug and Community Action Strategy* which will:

- ✗ support the establishment of local Community Drug Action Teams (CDAT), with involvement from a wide range of stakeholders in the local community, supported by regionally based project officers;
- ✗ provide information and training programs for local councils and other organisations;

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<sup>19</sup> NSW Drug Summit 1999 - Government Plan of Action, July 1999, Forward.

- ✍ provide guidelines on how communities can work together to deal with local drug issues; and
- ✍ provide clearinghouse on what governments and communities are doing on the issue.

In our view this model, with its emphasis on community involvement, is ideal for working on other sensitive social issues such as sex industry regulation. The model could be readily adapted to achieving effective regulation of the sex industry.

### *How can the State Government support local partnerships?*

In applying the above model the key roles for the NSW Government are:

- ✍ **leadership** about the rationale for reforms and the benefits of effective regulation of the sex industry;
- ✍ **supporting local partnerships** which engage a range of community stakeholders to work with local councils to achieve effective regulation;
- ✍ **information and resources** - to equip local partnerships with best practice models for policies and procedures and for developing local partnerships;
- ✍ **coordination** – to maximise exchanges of local experiences to reduce duplication of effort at local level.