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A DECADE OF ILLICIT SEX IN THE CITY

ABSTRACT

It's been a decade since the *Disorderly Houses Amendment Act 1995* (NSW) was passed, abolishing the common law offence of keeping a brothel. Under this legislation, councils were to regulate brothels using their planning powers. The NSW Government has proffered very little guidance to councils as to how to best use their powers. The limited advice proffered has been plagued by ambiguities. On the one hand, the legislation was passed with the intention of treating brothels as legitimate commercial premises. On the other hand, the perception of brothels as inherently immoral and offensive has been present in Governmental guidance.

This paper analyses the impact of the NSW Government's equivocal position on the sex industry through an examination of Land and Environment Court cases. It is argued that the LEC is torn between two conflicting approaches, responding to brothels as commercial premises or perceiving brothels as inherently offensive. Whilst initially the LEC responded to brothels as commercial premises, the characterization of brothels as offensive has become increasingly apparent. I argue that the NSW Government needs to release clear guidelines regarding the regulation of the sex industry.

A DECADE OF LICIT SEX IN THE CITY

Ten years ago, the NSW Government abolished the common law offence of keeping a brothel, making brothels a legitimate commercial land use. With the *Disorderly Houses Amendment Act 1995* (NSW),¹ brothels were to be regulated by councils under the *Environmental Planning and Assessment Act 1979* (NSW). This paper evaluates the impact of these legislative reforms a decade on through Land and Environment Court (LEC) decisions. Although the legislation was passed with the stated intention of treating brothels as legitimate commercial businesses, this is contradicted within the terms of the legislation itself and the (limited) guidance proffered by the State to local councils. I explore the ways in which the NSW Government's equivocal position regarding the sex industry is beginning to impact upon LEC decisions.

In Section One I outline the limited guidance proffered by the NSW Government to councils regarding the regulation of brothels and briefly highlight the equivocacy of the government's position. In Section Two, I detail the LEC's practical response to governmental guidance that brothels are to be treated as ordinary commercial businesses and the directive that councils are not permitted to prohibit brothels. In the remainder of the paper I focus on the problematic impacts of the NSW government's sustained perspective that brothels are inherently immoral. Section Three provides evidence of the difficulties created by governmental permission to councils to restrict brothels to industrial zones. The problems inherent in siting commercial premises in industrial zones are manifest in issues arising before the LEC. In Section Four I articulate a disturbing development in LEC decisions, where the notion of a taint of immorality has begun to undermine the otherwise practical approach of the LEC. The LEC has become torn between conflicting approaches to brothels, influenced by practical planning concerns and/or the sustained conception of brothels as inherently disorderly and offensive. In Section Five, I conclude by considering the way forward. This involves a consideration of the Draft Standard Local Environmental Plan released by the NSW Department of Planning in September 2005. I argue that although the Draft LEP is a rather minor step forwards, it leaves largely unaddressed

¹ Now the *Restricted Premises Act 1943* (NSW).

the policy vacuum regarding the regulation of the sex industry. LEC cases are increasingly demonstrating the need for a whole of government approach to the planning issues raised by brothels.

This is a time of transition regarding the language used to refer to the sex industry. Until September 2005, all legislation, government circulars and (most) council control plans referred to premises providing sexual services as 'brothels'. In the September 2005 Draft Standard LEP, the dictionary does not refer to 'brothels', using instead the terms 'sex services premises' and 'sex services (home occupation)'. The definitional shift may well reflect a desire by stakeholders in the industry to separate the contemporary provision of sex services from the historical stigma of disorderliness attached to brothels. However, all the cases and legislation in this area refer to 'brothels' and the definitional shift at the governmental level has not yet come about. Additionally, I shall argue, that the perceived stigma attached to 'brothels' has not yet faded with either legislative reforms or changes in name. There is also the argument that the word brothel could be reclaimed and given a positive spin, an approach adopted by some stakeholders in the industry. Accordingly, this paper shifts between utilisation of the terms 'brothels' and 'sex services premises' where appropriate.

1. NSW GOVERNMENT GUIDANCE

Prior to the legislative reforms, brothels were illegal and subject to closure under the *Disorderly Houses Act 1943* (NSW). The police did not need to differentiate between brothels that were well-run or disorderly. According to the NSW Court of Appeal in *Sibuse Pty Ltd v Shaw* (1988),² all brothels were inherently disorderly and thus subject to closure, notwithstanding that a particular brothel was 'clean, neat and tidy'.

The *Disorderly Houses Amendment Act 1995* (NSW) was introduced for two major reasons. Firstly, it was recognised that illegality of the sex industry was associated with police corruption. The threat of closure of brothels led to potential to demand and receive payment of bribes.³ Secondly, it was asserted that a harm minimisation approach should be adopted in relation to health and safety, by addressing public

² (1988) 13 NSWLR 98.

³ Whelan P., Minister for Police, Second Reading of Disorderly Houses Amendment Bill, Hansard, Legislative Assembly, 20 September 1995, p. 1187.

health risks and the more undesirable aspects of prostitution.⁴ The decision in *Sibuse v Shaw* (1988) gave no encouragement to owners to run orderly brothels. Poorly run brothels impacted upon workers, clients and nearby neighbours.⁵ Moreover, it was recognised that brothel closures resulted in increased street prostitution, with increased negative impacts upon workers and nearby residents.

The Legislature intended the *Disorderly Houses (Amendment) Act 1995* (NSW) to override *Sibuse v Shaw* (1988) and to treat sex services premises as legitimate commercial premises. As a consequence of these reforms, sex services premises are now primarily regulated by local councils under the *Environmental Planning and Assessment Act 1979* (NSW). This means that councils can regulate sex services premises through amending Local Environmental Plans (**LEPs**) and Development Control Plans (**DCPs**). In summary, local councils do not have unfettered discretion in the form or content of the LEPs. Local councils need to take into account the comments of the community and the Planning Minister has a right of veto over the implementation of LEPs.⁶

Councils have responded to their responsibility for regulating the sex industry in a variety of ways.⁷ Approximately half the councils in NSW have developed planning principles that are specific to brothels. The majority of these councils do not differentiate between brothel types. These councils tend to rely upon locational restrictions, limiting brothels premises to commercial and/or industrial areas. A small number of councils have developed planning principles regarding the sex industry that differentiate between sex services premises type. For example, Sydney City Council distinguishes between sex services premises types based on differences in amenity

⁴ Gaudry, Second Reading of Disorderly Houses Amendment Bill, Hansard, Legislative Assembly, 18 October 1995, p 1937.

⁵ Moore C, Second Reading of Disorderly Houses Amendment Bill, Hansard, Legislative Assembly, 18 October 1995, p 1952.

⁶ For further information about this process, please refer to Ratcliff I, 'No Sex Please: We're Local Councils' (1999) 4 LGLJ 150 at 152-153.

⁷ For more detail, refer to Crofts P, 'Ambiguities in approaches to brothels: disorderly houses or commercial premises?' (2003) *EPLJ* 445.

and environmental impacts,⁸ ranging from commercial sex services premises⁹ to home businesses.¹⁰

The remaining councils have not developed any policies with regard to sex services premises, resulting in the treatment of sex services premises as ordinary commercial premises. This may reflect a perception of the absence of any sex services premises in the local government area. However, other councils still do not have any specific planning policy with regard to sex services premises, despite development applications for sex services premises in the past ten years.¹¹ These councils rely upon general planning principles to respond to sex services premises development applications.

In the ten years since sex services premises were legalised, the NSW Government has proffered very little guidance to councils as to how to best use their planning powers regarding sex services premises. Although a sex industry policy document recommending best practice models was promised, this document is yet to appear. The Sex Services Planning Advisory Board produced a large report with best practices in 2004, but this has not been released. Guidance can be gleaned from the terms of the *Restricted Premises Act*, council circulars and, most recently, the draft Standard LEP released in September 2005.

Under the *Disorderly Houses (Amendment) Act 1995*, the Legislature indicated that brothels were to be regulated as legitimate commercial premises. However, as I have argued previously, the legislation itself contained details which contradicted the Legislature's intention.¹² Briefly, section 17 of the Act provides the grounds upon which councils may make an application to the LEC to close a brothel. The majority of the grounds (s17(5)(b-g)) are consistent with relevant considerations specified in s79C of the *Environmental Planning and Assessment Act 1979*. These considerations focus upon amenity impacts, including noise, disturbance to the neighbourhood and

⁸ *Sex Industry Policy*, City of Sydney, 23 June 2003.

⁹ Sex workers employed 'in house' but do not reside on the premises, or are not based 'in house'.

¹⁰ Small brothel operated in a dwelling by one resident sex worker, in no more than 10% of any storey within the dwelling.

¹¹ Eg Waverly Council.

¹² Crofts P, 'Ambiguities in approaches to brothels: disorderly houses or commercial premises?' (2003) 20 EPLJ 445.

off-street parking. In contrast, section 17(5)(a) imports an additional consideration which is solely applicable to brothels and beyond the usual relevant considerations for developments. Under section 17(5)(a) a brothel can be closed if it is operating ‘near or within view from a church, hospital, school or other place regularly frequented by children from residential or cultural activities.’ This additional consideration is imported from the *Summary Offences Act 1988* regulating street sex work. It appears to equate the impacts of sex services premises with street sex work, even though through good planning a well-run brothel can operate discreetly with minimum amenity impacts. The additional factor indicates a concern beyond amenity impacts, evoking the historical characterisation of brothels as inherently disorderly and immoral.

The Government’s stated intention of responding to brothels as legitimate commercial premises is further undermined by section 20, which states:

The enactment of the *Disorderly Houses Amendment Act 1995* should not be taken to indicate that Parliament endorses or encourages the practice of prostitution, which often involves the exploitation and sexual abuse of vulnerable women in our society.

This homily, presumably introduced to placate moral concerns, contradicts the characterization of brothels as legitimate commercial businesses, introducing the spectre of exploitation and abuse.

Apart from the guidance to be gleaned from the *Restricted Premises Act*, the Department of Planning¹³ has sent only two circulars in the past ten years to councils as to the implementation of their planning powers regarding sex services premises. On 29 December 1995, the Department for Urban Affairs and Planning (DUAP) wrote to all local councils stating that a blanket prohibition of brothels through LEPs would not be supported by the Minister. Attempts to ban all brothels would contradict the intention of the legislative reforms.¹⁴ This indicated that the Minister would exercise his or her power of veto over the implementation of LEPs which attempted to ban all brothels. The council circular concluded by stating that brothels are most suitable in

¹³ Formally the Department for Urban Affairs and Planning.

¹⁴ DUAP, *Council Circular – Planning Controls of Brothels* (29 December 1995).

commercial and industrial premises that are not adjacent to schools or facilities frequented by children. The only other circular from the Department of Planning was in July 1996, when DUAP again wrote to all councils advising that the Minister would not object if councils limited permissible sites for brothels to industrial zones.¹⁵

Most recently, the Department of Planning released a Draft Standard LEP in September 2005. Only the definitions provided in the standard dictionary are directly applicable to the sex industry. 'Sex services premises' are defined as 'premises habitually used for the purposes of sex services but does not include a home occupation or sex services (home occupation). The definition of 'home occupation' explicitly excludes sex services. 'Sex services (home occupation)' is defined as including no more than two permanent residents of the dwelling providing sexual services. I examine these proposed reforms at the conclusion of this paper.

In the remainder of the paper I consider the impact that the limited guidance proffered by the NSW Government has had upon LEC judgments with regard to the regulation of the sex industry. Where available, the LEC has followed the guidance from the government. Unfortunately, as shall become apparent, the equivocal nature of the government's position has begun to yield conflicting approaches in the LEC.

2. PRACTICAL APPROACH TO SEX SERVICES PREMISES

In this section, I demonstrate the practical approach adopted by the LEC in responding to sex services premises development application. This practical approach is consistent with the legislative intent that sex services premises are to be treated as legitimate commercial businesses and the DUAP circular stating that councils may not prohibit brothels.¹⁶

As stated above, under the *Disorderly Houses (Amendment) Act* 1995, sex services premises are now predominantly governed by the *Environmental Planning and Assessment Act* 1979. Apart from relevant planning controls, section 79(c) provides the criteria a consent authority must use when determining a development application, these are:

¹⁵ DUAP, *Council Circular – Planning Controls of Brothels* (16 July 1996).

¹⁶ DUAP, *Council Circular – Planning Controls of Brothels* (29 December 1995).

- (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
- (c) the suitability of the site for the development,
- (d) any submissions made in accordance with this Act or the regulations,
- (e) the public interest.

The LEC has stated that morality is not a relevant planning issue with regard to the regulation of brothels.¹⁷ This is in accordance with the NSW Government's stated intention of treating brothels as legitimate commercial businesses. In *Zhang v Canterbury CC* (2001),¹⁸ Commissioner Brown stated that it is not enough to 'simply rely on a brothel's existence to justify its unacceptability'. Instead, councils must provide hard evidence of the detrimental impacts of sex services premises. This was reiterated in *Mark Mahoul v Sydney CC* (2005),¹⁹ where Watts C outlined the authorities regarding 'amenity', particularly in light of the widespread community antipathy towards the proposal for an erotic massage facility on Bayswater Road in Rushcutters Bay. Watts C stated that morals should not influence the decision of the court. Although the concept of amenity was wide and flexible, residents' perceptions had to have a real basis in fact. Their concerns that the development would lead to drug dealing or crime, 'lower the tone' or bring in 'sleaze' lacked any real basis in fact.

The NSW Government has been clear that councils are not permitted to ban brothels. In light of this directive, the LEC has carefully vetted restrictive council policies as to whether they effectively amount to prohibition. Council policies are analysed in terms of their likely outcomes and their relationship with stated council objectives. This issue was considered in *Cresville Pty Ltd v Sutherland Shire Council*.²⁰ The Council had previously resolved to ban brothels in the Shire, but this had not been approved by DUAP. However, Hussey C noted that DUAP had indicated that it would favour severe restrictions as long as they did not combine to effectively prohibit permissible

¹⁷ *Zhang v Canterbury Council* [2004] NSWLEC 500.

¹⁸ (2001) 51 NSWLR 589; 115 LGERA 373.

¹⁹ [2005] NSWLEC 331.

²⁰ [2005] NSWLEC 298 (7 June 2005).

development.²¹ The relevant LEP restricted sex shop development opportunities to the larger commercial centres in the Sutherland Shire. Hussey C considered whether or not the draft DCP policies were so restrictive as to effectively prohibit brothels in the only area where brothels were ostensibly permitted to exist. For example, the draft DCP prohibited the location of sex shops within 50 metres of ‘sensitive land uses’, and defined facilities which served alcohol as ‘sensitive land uses’. Hussey C stated that no link:

[W]as established concerning adverse amenity impacts between premises that serve alcohol and sex shops. Nor does there appear to be any attempt to ascertain the restrictive effect of the application of these provisions, considering there are a number of licensed restaurants spread through the commercial centre. When this requirement is applied, it is likely to severely restrict or prohibit sex shops, which could otherwise be allowed and this would be contrary to the role of the DCP.²²

Hussey C concluded that there appeared to be no objective rationale for the separation distances, other than to provide an additional level of restrictions to these types of uses. Accordingly, the DCP was to be given only a limited and not determinative weight.²³ The sex shop was given conditional consent to operate for a 12 month trial period.

The LEC has closely considered council controls to determine whether or not policies are overly restrictive. Council controls regarding parking, opening hours and disability access have been interpreted in a practical and flexible manner. For example, the majority of councils impose strict parking requirements on sex services premises, ranging from general zone parking to special sex services premises parking. The LEC has accepted in a number of cases that clients tend not to park near sex services premises²⁴ and has also noted (where relevant) that sex services premises have different operating hours from existing businesses in the area.²⁵ Accordingly, the

²¹ Ibid. Para. 38.

²² Ibid. Para. 41.

²³ Ibid. Para. 42.

²⁴ Accepted in *Hang v Strathfield MC* [2005] NSWLEC 99; *Sun v Campbelltown City Council* [2005] NSWLEC 518; and *Wheeler v Waverley Council* [2004] NSWLEC 479.

²⁵ For example, in *Joseph Vassallo v Blacktown City Council* [2004] NSWLEC 85, Brown C accepted that the brothel would operate at different times when the spaces in the industrial complex would not be required for their normal use. Additionally, clients could park on the road.

LEC has not accepted inadequacy of parking as sufficient grounds for refusal of development consent. Rather, where necessary, the LEC has imposed additional conditions or required s 94 contributions from sex services premises to make up the parking shortfall.

Strict disability access requirements have been deliberated upon by the LEC. This is because sex services premises restricted to commercial zones are usually prohibited from operating on the ground floor. This means that disability access to pre-existing first floor buildings is often poor. The LEC considered strict disability access requirements in *Pont v Hurstville CC* [2005],²⁶ where a low-key brothel development application had been refused. The LEC noted that the brothel was small-scale and that very few people with disabilities would be affected by lack of access to the facility. Additionally, construction of disability access would lead to an expense involving unjustified hardship. Under clause 23(2), section 11 of the *Disability Discrimination Act*, an exemption to disability access would be justified. Accordingly, the LEC held that lack of disability access in this case would not provide grounds for refusal of the application.

The case of *Davis* provides an excellent example of the practical approach adopted by the LEC to the regulation of the sex industry.²⁷ This case involved the appeal against the refusal of consent for a brothel on Station Street, Harris Park. The brothel was on the upper floor of an early 1900s two-storey building, and had been operating for three years without any complaint to police or council. The DCP required one parking space per three employees, which the brothel was unable to provide. Hoffman C noted that other nearby commercial premises, particularly restaurants, had not provided parking, but were likely to generate more traffic than most shops and offices. It was also noted that the site is ideally located for public transport and therefore car parking could be zero. Additionally, Hoffman C accepted that brothel clients and staff tended to be discrete and not use on-site parking. Accordingly, these factors overrode the DCP requirement of at least 3 parking spaces. The LEC also took into account existing commercial businesses when considering the impact of opening hours upon neighbourhood amenity. It was stated that the brothel had the same opening hours as

²⁶ [2005] NSWLEC 33.

²⁷ *Davis v Parramatta CC* [2005] NSWLEC 474.

nearby restaurants, and it was accepted that restaurant patrons were more likely to cause more nuisance than the brothel, particularly as the brothel entry was separated by a laneway from nearby houses. It was also noted that the regional plan restricted brothels to only two zones. The business zone was only a narrow strip with residential abutting, and the location of the brothel was as far from residential as it was possible to be. Thus Hoffman C gave development consent for the brothel.

In the majority of cases, the LEC has accepted sex industry premises as legitimate commercial entities, and focused on the specific amenity impacts of the particular development. Brothels have been compared to other premises such as restaurants and pubs in terms of amenity impacts. The LEC has been clear that morality is not a relevant planning consideration. Council planning regulations have been analysed in terms of the stated objectives and the practical impact of these controls. Hard and fast evidence of detrimental impact upon amenity has been required. When the LEC has perceived that these policies have been tantamount to banning sex industry premises, these controls have been disregarded.

3. RESTRICTION OF SEX SERVICES PREMISES TO INDUSTRIAL ZONES

This practical approach adopted by the LEC has been undermined by the equivocal position of the NSW government with regard to sex services premises. In this section, I focus upon the implications of the approval by the Department of Planning to the restriction of brothels to industrial zones. As a consequence of this approval, in recent years the LEC has been grappling with the unfortunate effects of the inappropriate restriction of brothels to industrial zones. As stated above, in July 1996, DUAP wrote to all councils stating that the Minister would not object to councils limiting permissible sites for brothels to those zoned for industrial purposes.²⁸

Initially, the LEC stated that the siting of brothels in industrial zones was undesirable. For example, in *Liu v Fairfield CC*, Assessor Roseth asserted that the exclusion of brothels from commercial zones would be tantamount to banning them altogether, which was directly contrary to governmental policy.²⁹ However, in light of

²⁸ DUAP, *Council Circular – Planning Controls of Brothels* (16 July 1995).

²⁹ Unreported, NSWLEC, 10 January 1997.

Ministerial approval, the LEC has increasingly had to grapple with the practical implications of the restriction of sex services premises to industrial areas.

Over the past decade, the problems associated with limiting sex services premises to industrial areas have become increasingly apparent in LEC decisions. As forecast in previous research, the siting of sex services premises in industrial zones has created planning problems.³⁰ Industrial zones are inappropriate for sex services premises, as they tend to be poorly serviced at night, with no public surveillance, poor lighting, and little or no public transport. As indicated in LEC decisions, the siting of sex services premises in industrial zones raises safety issues for clients and workers, and also for surrounding businesses.³¹

The concerns expressed by Assessor Roseth that the siting of sex services premises in industrial zones may be tantamount to banning them have, to a certain extent, been reflected in LEC decisions. For example, in *Sun v Campbelltown City Council*,³² Moore C rejected an application for a brothel in an industrial area, partly due to security concerns. In attempting to argue against parking requirements imposed by council, the applicant argued that clients tended to park some distance from the brothel to preserve anonymity. Moore C noted that the parking off-premises was a ‘two-edged sword’ for the applicant.³³ Although parking-off premises addressed the deficiency of one parking space for clients, it raised security issues. The brothel was located in an area where there would be no other likely surveillance out of hours of patrons who park some distance from the premises and walk towards them. Accordingly, there was an ‘appreciable (perhaps not determinative in itself) additional security risk posed to those persons because of the isolation of the premises; lack of other human activity at those hours of the day; and the fact... that the nearest police station is some 15 minutes or so away by vehicle...’³⁴

³⁰ See Crofts P, ‘Ambiguities in approaches to brothels: disorderly houses or commercial premises?’ (2003) 20 EPLJ 445; Harcourt C, ‘Whose Morality?’ (1999) 18(3) *Social Alternatives* 32.

³¹ See for example, *Sun* [2005] NSWLEC 518; *Joseph Vassallo* [2004] NSWLEC 85; *Hang* [2005] NSWLEC 99; *First Choice* [2005] NSWLEC 259.

³² [2005] NSWLEC 518.

³³ *Ibid.* Para 45.

³⁴ *Ibid.* Para. 68.

Moore C was also concerned about security on the site, noting an absence of natural surveillance, with the requirement that security comes virtually entirely from within the premises. The applicant had proposed an infra-red detective security system for the site, but this could not be used while the brothel was in operation, meaning that the other businesses on the premises would not be protected. The expense involved in providing adequate security on industrial sites after hours is indicated in *Sun* [2005]. The applicant proposed the use of CCTV, the employment of a security guard, and the use of movement sensing lights in the public areas. Moore C found that these measures were inadequate. The security cameras would not have been linked to a recording device, and thus relied upon the diligence of the duty manager, who had a range of other duties. Moore C held that this was ‘a fundamental weakness of the applicants’ understanding of the nature of security that is required for such premises’.³⁵

An unexpected issue that has arisen due to the siting of sex services premises in industrial zones has been the increased insurance costs for other businesses in the area. The LEC appears to have adopted the approach that increased insurance costs do provide demonstrable detrimental economic impact to surrounding businesses, and as such, are a relevant planning factor. For example, in *Yang v Blacktown City Council*,³⁶ a sex services premises was sited in an industrial unit in an existing development in Blacktown. The insurance company had advised that if the sex services premises were approved, the Strata Plan insurance would be cancelled. Hoffman C held that ‘increased insurance costs for neighbours’ was a relevant reason (amongst others) for rejecting the application.³⁷ In *Sun v Campbelltown City Council*,³⁸ Moore C held that even though a renewal of an insurance policy would not be offered if the sex services premises were to be approved, this would not warrant refusal, in and of itself, for the application.

The increased insurance premiums for surrounding businesses in industrial zones raise important issues. The basis for the increased insurance premiums needs to be explored. The LEC has clearly stated in many cases that sex services premises do not

³⁵ Ibid. Para. 65.

³⁶ [2005] NSWLEC 282 (19 May 2005).

³⁷ Ibid. Para 72.

³⁸ [2005] NSWLEC 518.

lead to an increase in crime and has consistently pointed to the absence of evidence associating licit sex services premises with increased crime.³⁹ Accordingly, this begs the question as to the grounds upon which insurance companies are raising insurance premiums.⁴⁰ As stated above, the location of sex services premises in industrial zones means that sex services premises operating after business hours are in otherwise deserted areas. From an insurance perspective, this does raise security issues, regardless of the business type, as it attracts persons to isolated areas lacking in surveillance. There appears to be an assumption that clients of sex-workers are immoral and therefore potentially criminal, a link the LEC has rejected. One response to this issue would be to locate other sex services premises in the area, which creates new and different problems, in particular the creation of a red-light district and impact upon surrounding businesses. An alternative argument is that the clients and workers attracted to brothels at night-time provide surveillance for an area that would otherwise be deserted.

The location of sex services premises in industrial zones appears to solve some of the issues confronting councils, in particular the seclusion of sex services premises away from 'sensitive uses' and the protection of amenity of commercial and residential areas. However, as glumly stated by Senior Constable Wood in *Joseph Vassallo* 'the location of the sex services premise in an industrial area may solve the issue of placing it out of sight, however it will not take away the impact of crime.'⁴¹ Additionally, the increased security costs associated with the restriction of sex services premises to industrial zones means that only the larger sex services premises are able to meet these extra costs. This impacts upon the occupational conditions and power of sex-workers, particularly when compared with home businesses.

³⁹ See for example, *Jim Marinos* [2005] NSWLEC 2; *Joseph Vassallo* [2004] NSWLEC 85; *Wheeler* [2004] NSWLEC 479; *Zhang v Ashfield* [2004] NSWLEC 259.

⁴⁰ I requested advice from insurance brokers and was advised that it was extremely difficult for brothels to obtain insurance unless they were top of the market. This was because insurance companies are essentially conservative and brothels are regarded as high risk, due to the association of organized crime with brothels during the 1970s. This provides some indication of the sustained historical linking of brothels with disorderliness and immorality, despite governmental reforms.

⁴¹ [2004] NSWLEC 85 at para 28.

The Department of Planning's permission to councils to limit brothels to industrial areas has generated problems associated with inappropriately locating commercial businesses in industrial zones. The LEC has been compelled to deal with the mess. From a planning perspective, sex services premises should be responded to as legitimate commercial premises which are most appropriately located in commercial zones. Commercial zones proffer well-lit areas, natural public surveillance due to street activity and occupation. However, as a consequence of governmental guidance, the LEC has been compelled to grapple with the practical implications of the inappropriate siting of sex services premises in industrial zones. This guidance is not in accordance with practical planning concerns, but with the desire to hide sex services premises due to their perceived immorality or offensiveness.

4. 'BROTHEL' AS A CATEGORY

Apart from grappling with the repercussions of dealing with the inappropriate restriction of sex services premises to industrial zones, the LEC's practical approach is beginning to be undermined by the failure of the NSW government to distinguish between sex services premises types.

Until the release of the Draft Standard LEP in September 2005 the NSW government has consistently failed to distinguish between sex services premises. The *Disorderly Houses (Amendment) Act* 1995 and all governmental guidance to councils has consistently referred to brothels as a class. This is despite the recommendation by the Brothels Taskforce councils distinguish between brothel types and their impacts when determining appropriate locations and planning controls.⁴²

If planning concerns were the central motivation, then it would be sensible and practical to distinguish between different sex services premises on the basis of amenity impacts. Clearly, a large commercial business would have very different amenity impacts in comparison with a home business with one worker. Specific definitions of sex service premises foster a more refined response to the different types of sex service premises and their different impacts upon neighbourhood amenity. As I argued previously, the governmental failure to distinguish between

⁴² Brothels Taskforce, *Report of the Brothels Taskforce* (NSW Govt Printer, NSW, 2001) p 16.

brothel types is motivated by the sustained historical characterization of brothels as inherently disorderly and immoral.⁴³ Accordingly, the guidance proffered by the NSW government is incoherent and inconsistent. The Government has advised councils to treat brothels as legitimate commercial businesses, but the (limited) guidance proffered to councils conflicts with this advice. The failure to differentiate between brothel types has been adopted by the majority of councils that have developed brothel controls.

Recently, the Janus-faced approach by the NSW government to brothels has begun to be reflected in LEC decisions. The LEC has been torn between two conflicting approaches. The first responds to sex services premises as legitimate commercial businesses, responding to specific sex services premises in terms of the particular planning issues that arise, and requiring hard and fast evidence of detrimental impact. This approach dovetails neatly with a general LEC approach of responding to developments in a practical way, and excluding concerns that are irrelevant to planning. This approach has been detailed in Section Two.

The second approach starts with the notion of sex services premises as a category of development that is inherently offensive. In *Martyn v Hornsby* [2004],⁴⁴ Roseth SC outlined the planning principles for locating sex services premises in the absence of local council guidelines. Roseth SC states:

Brothels are a legal land use that benefits some sections of the community but offends others. Most people believe that the exposure of impressionable groups like children and adolescents to the existence of brothels is undesirable. The aim should therefore be to locate brothels where they are least likely to offend. However, criteria for locating brothels should not be so onerous as to exclude them from all areas of a municipality.⁴⁵

⁴³ Crofts P, 'Ambiguities in Approaches to Brothels: disorderly houses or commercial premises?' (2003) EPLJ 445.

⁴⁴ [2004] NSWLEC 614. Henceforth referred to as *Martyn* [2004].

⁴⁵ *Ibid.* Para 18.

Roseth SC then goes on to detail a series of planning principles that have since been applied in a number of cases.⁴⁶ The principles are:

- Brothels should be located to minimise adverse physical impact, such as noise disturbance and overlooking. In this aspect they are no different from other land uses.
 - There is no evidence that brothels in general are associated with crime or drug use. Where crime or drugs are in contention in relation to a particular brothel application, this should be supported by evidence.
 - Brothels should not adjoin areas that are zoned residential, or be clearly visible from them. Visibility is sometimes a function of distance, but not always.
 - Brothels should not adjoin, or be clearly visible from schools, educational institutions for young people or places where children and adolescents regularly gather. This does not mean, however, that brothels should be excluded from every street on which children may walk.
 - The relationship of brothels to places of worship (which are likely to attract people who are offended by brothels) is a sensitive one. The existence of a brothel should not be clearly visible from places where worshippers regularly gather.
 - There is no need to exclude brothels from every stop on a public transport route. However, it would not be appropriate to locate a brothel next to a bus stop regularly used by school buses.
 - Where a brothel is proposed in proximity to several others, it should be considered in the context that a concentration is likely to change the character of the street or area. In some cases this may be consistent with the desired future character, in others not.
 - The access to brothels should be discreet and discourage clients gathering or waiting on the street. Apart from areas where brothels, sex shop and strip clubs predominate, signage should be restricted to the address and telephone number.
- (para 18)

In applying these principles Roseth SC rejected the development application for a small brothel. Of concern was the visibility of the brothel from a residential allotment.

⁴⁶ For example, *AJA Trading* [2005] NSWLEC 253; *Boutros v Strathfield Municipal Council* [2005] NSWLEC 605; *Davis* [2005] NSWLEC 474; *First Choice Stress Relief v Inverell Shire Council* [2005] NSWLEC 259; *Mark Makhoul v Sydney City Council* [2005] NSWLEC 331; and *Monteleone v Ryde City Council* [2005] NSWLEC 549.

Although the brothel was screened it was sufficient that the ‘brothel’s existence would be known.’ (para 19). Additionally, its closeness to a College of Skin Care also precluded the siting of a brothel:

The entrances are adjacent and it is likely that the students of the college would frequently encounter the brothel’s clients on their way to and from the classes. I do not want to judge whether this in itself would have a corrupting effect on them. However, it is likely that some of the parents would not like the proximity of the brothel and would look for other colleges for their daughters. The economic effect on the College could be serious. Instead of 30 students, they may find only 20 or fewer for their classes.’ (para 20)

Whilst a detailed analysis of this case is beyond the scope of this paper, two issues can be highlighted. Firstly, the underlying philosophy of these principles is that sex services premises are inherently offensive to the majority of people. This conflicts directly with the usual LEC approach of only considering relevant planning issues and requiring hard and fast evidence. As detailed in section two of this paper, the usual LEC approach of evaluating council objectives in creating planning controls from the perspective of whether the objective was legitimate and whether the planning controls were consistent with the objective. The underlying objective of protecting the community because brothels are inherently offensive is not a legitimate ground. The LEC has previously stated that offensiveness and morality were not relevant planning considerations. The issue of the relevance of offensiveness was considered in *New Century Developments* [2003].⁴⁷ This case concerned the proposal for a mosque that attracted widespread community opposition. Lloyd J held that the consent authority must not blindly accept the subjective fears and concerns expressed in public submissions. Rather, there must be evidence that can be objectively assessed.⁴⁸ The stated objective of the planning principles is thus flawed, as it is based upon irrelevant planning issues. This is particularly the case, given that presumably the offensiveness of sex services premises is based upon their perceived immorality. The LEC has been

⁴⁷ NSWLEC 2003.

⁴⁸ *Ibid.* Para 61.

very clear that the morality or otherwise of a sex services premise is not a relevant consideration under the *EP&A Act* (1979).⁴⁹

Secondly, the planning principles enunciated by Roseth SC are based around the concept of sex services premises as a category. As stated above, this general approach reflects the NSW government's failure to distinguish between brothel types. This conflicts with the practical approach of the LEC of considering the specific amenity impacts of a particular development in a particular area. The lumping together of all brothel types means that the different amenity impacts of a small business and a large commercial brothel are not considered. Rather, the planning principles are focused upon the idea that brothels are inherently offensive and best tucked away. A direct impact of the failure to differentiate between sex services premises is that the planning principles effectively prohibit home businesses, as brothels should 'not adjoin areas that are zoned residential, or be clearly visible from them'.⁵⁰ This is extremely problematic given that it is estimated that home businesses (sexual services) make up 40% of the sex industry. Accordingly, these principles directly conflict with the intention to legalise and regulate the industry.

5. THE NEED FOR (GOOD) GOVERNMENTAL GUIDANCE

In the decade since brothels were legalised, it has become increasingly apparent that the NSW government needs to provide clear and unequivocal guidance to councils regarding the regulation of brothels. The highly influential case of *Martyn* [2004] demonstrates this urgent need. In the absence of detailed governmental guidance, the LEC has constructed its own planning principles to fill the policy vacuum. Of particular concern is the absence of any authority or objective evidence underlying the planning principles in *Martyn* [2004]. These 'planning principles' need to be unpicked in terms of relevant planning concerns.

The planning principles enunciated in *Martyn* [2004] conflict with advice received by the NSW government of the need to differentiate between brothel types.⁵¹ Moreover, these planning principles undermine the usual approach adopted by the LEC of

⁴⁹ For example, *Jim Marinos* [2005] NSWLEC 2 para 32; *Sun* [2005] NSWLEC 518 para 5; *Pont* [2005] NSWLEC 33.

⁵⁰ *Martin* [2004] Para 18.

⁵¹ *Report of the Brothels Taskforce*, NSW Government Printer, 2001.

focusing upon the relevant planning issues raised by specific developments in particular areas. This has led to increasing unpredictability in LEC decisions with regard to brothels. It is not clear whether or not the LEC will adopt a practical approach, the *Martyn* [2004] principles, or a combination of the two. This does not assist councils in their responses to development applications for brothels.

The proposed reforms released in September 2005 provide some hope. The Draft Standard LEP has the advantage of differentiating between sex services – creating two categories; sex service premises and sex services (home occupation). This will at least encourage councils to consider the place of home businesses (sex services) when creating planning controls, whereas previously the majority of councils simply referred to brothels as a category. The definition of sex services (home occupation) also has the positive aspect of including two sex workers on premises. This is something that workers have been arguing in favour of for some time. However, the Draft Standard LEP does have some drawbacks. The creation of only two categories of sex services premises does not adequately reflect the make up of the industry. Of more concern though, is the explicit exclusion of home occupation (sex services) from ‘home businesses’ and ‘home industries’. Apart from issues of morality it is difficult to justify this exclusion of sex services (home occupation) from the category of home businesses generally. These proposed reforms are unlikely to generate very much change in the regulation by councils of home occupation (sex services). The reforms will also impact negatively on the home occupation (sex services) that are currently operating as home businesses in councils which lack specific brothels policies.

CONCLUSION

In the past ten years the NSW Government has proffered very little guidance to councils about how to best use their planning powers in relation to the sex industry. The little guidance available has been equivocal at best. On the one hand, the Government passed the *Disorderly Houses Amendment Act* with the stated intention of treating brothels as legitimate commercial premises. On the other hand, the Government has continued to be influenced by the historical characterization of brothels as inherently offensive and disorderly. Unfortunately, the LEC has been left to grapple with the impact of these mixed messages.

On the whole, the LEC has tended to respond to brothels as legitimate commercial businesses and made it clear that morality is not a relevant planning issue. However, the ambivalence of the Government's policy regarding the sex industry has begun to negatively affect the LEC. On one level, the LEC has been forced to deal with the practical issues raised by the inappropriate restriction of brothels to industrial zones. On another level, the sustained perception of brothels as immoral has started to change the general approach of the LEC. The highly influential case of *Martyn v Hornsby* applied principles which stemmed from the assumption that brothels are offensive. This conflicts with the clear principles that morality and offensiveness are not relevant planning issues.

The NSW Government needs to provide clear guidelines that are consistent with the principle that sex services premises are legitimate commercial businesses. The Draft Standard LEP has the advantage of distinguishing between brothel types, recognising that size does matter at least in terms of amenity impacts. However, the refusal to treat sex premises (home occupation) like any other home occupation reflects a continued perception that sex services premises are inherently offensive. The best practice models recommended by the Brothels Taskforce and the Sex Services Planning Advisory Board would be a good place to start.