

Not in my neighbourhood: Home businesses (sexual services) and council responses

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Abstract

This paper details the current regime regulating home businesses (sexual services). It is argued that the imposition of notification requirements and locational restrictions upon home businesses (sexual services) is tantamount to ensuring that these businesses will not be able to operate legally, sustaining the possibility of corruption and undermining occupational health and safety. This conflicts with the Legislature's intention in passing the *Disorderly Houses Amendment Act 1995* (NSW). The paper outlines the various avenues available to challenge local council policies, and concludes by arguing that only state policy and legislative reforms will be sufficiently broad to ensure home businesses (sexual services) are responded to as legitimate commercial premises.

Not in my neighbourhood: Home businesses (sexual services) and council responses*

In 1995, the *Disorderly Houses Amendment Act* (NSW) abolished the common law offence of keeping a brothel, making brothels a legitimate land use regulated under the *Environmental Planning and Assessment Act 1979* (NSW). Councils were given the power to approve brothels and to take action in the Land and Environment Court to close a disorderly brothel in response to complaints by nearby residents. This paper explores whether or not the Legislature's intention of treating brothels as legitimate premises has been achieved with regard to private workers operating out of residential dwellings ('home businesses (sexual services)'). The regulation of home businesses (sexual services) is particularly important, as private workers are estimated to comprise 40% of the sex industry.¹

This paper argues that the current legislative regime has been largely unsuccessful with regard to regulating home business (sexual services) as legitimate premises. A significant proportion of local councils have imposed notification conditions and/or locational restrictions upon home businesses (sexual services) which these businesses cannot meet. Rather than closing down, these home businesses (sexual services) continue to operate illegally, thus sustaining the potential for corruption and health and safety problems that the Legislature sought to address with the *Disorderly Houses Amendment Act 1995* (NSW). This paper contends that further legislative reform is required to ensure that home businesses (sexual services) are responded to as legitimate commercial premises.

Section one of the paper details the reasons for the *Disorderly Houses Amendment Act 1995* (NSW) and the current regime regulating sex service premises. Section two details the major regulatory responses of local councils in NSW to home businesses (sexual services). Section three argues that notification procedures and the restriction of brothels to industrial or commercial zones have the effect of precluding home businesses from operating legally. Section four details why reforms relating to the

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regulation of home businesses (sexual services) are essential. Possible avenues for reform in this area are then considered, particularly in light of community activism in the Marrickville local government area against home businesses (sexual services). It is argued that state legislative and policy reforms are the only effective means for ensuring that home businesses (sexual services) are treated as legitimate developments in accordance with the *Disorderly Houses Amendment Act 1995*.

Section One: The legislative context

In 1995 the *Disorderly Houses Amendment Act* legalised brothels and living off the earnings of a prostitute. The Act also abolished the common law offence of keeping a brothel and related common law offences. According to the Second Reading Speech by Paul Whelan, Minister for Police, legislative reforms were introduced in 1995 to overcome the effect of the decision in *Sibuse v Shaw* (1988) 13 NSWLR 98.² In that case, the NSW Court of Appeal held, by a 2-1 decision, that a brothel on Canterbury Road, Belmore, was a disorderly house notwithstanding that it was 'clean, neat and tidy'.

The decision in *Sibuse v Shaw* had negatively impacted upon policing practices and the occupational health and safety of brothels.³ In relation to the policing of brothels, Clover Moore (Member for Bligh) noted that police officers were in a no-win situation.⁴ If police enforced the law this led to the closure of brothels and resulted in more street prostitution and associated health problems. Alternatively, if police chose not to enforce the law the opportunity for corrupt practices arose. The threat of closure of brothels led to the potential to demand and receive payment of bribes.⁵ The catalyst for amendments to the *Disorderly Houses Act* in 1995 was the recognition in the Wood Royal Commission of police corruption associated with prostitution.

¹ Brothels Taskforce, *Report of the Brothels Taskforce* (NSW: Department of Urban Affairs and Planning, NSW, 2001) p 13.

² Whelan, Minister for Police, Second Reading of Disorderly Houses Amendment Bill, *Hansard, Legislative Assembly*, 20/9/95 at 1187.

³ Whelan, n 2 at 1187.

⁴ Moore, Second Reading of Disorderly Houses Amendment Bill, *Hansard, Legislative Assembly*, 18/10/95 at 1952.

⁵ Whelan, Minister for Police, Second Reading of Disorderly Houses Amendment Bill, *Hansard, Legislative Assembly*, 19/9/95 at 1062.

Additionally, the decision in *Sibuse v Shaw* impacted upon the operation of brothels by proffering no encouragement to owners to run orderly brothels:

If police took this action with every brothel that came to their attention, it would mean that even orderly, well-run brothels would be closed and the prostitutes would be forced back on to the streets. Thus, many more city and suburban streets would be used by prostitutes to ply their trade. That is unsuitable and undesirable for a number of reasons. Street prostitution is generally offensive and undesirable, and health and social workers have difficulty reaching street prostitutes with their health and safe-sex practices education programs. Also, street prostitutes are at greater risk of HIV infection than those who work in brothels, where some medical supervision exists and where the use of condoms may be enforced.⁶

Under *Sibuse v Shaw*, a brothel was a disorderly house whether it was well-run or not. Whilst many Parliamentarians stated their abhorrence of prostitution, they asserted that legislative reforms were to be enacted with the intention of harm minimisation,⁷ by addressing public health risks and the more undesirable aspects of prostitution.⁸ Clover Moore (the Member for Bligh whose constituency included Kings Cross) asserted that people living near poorly run brothels complained of used condoms and syringes being dumped in their front yards, harassment and fear of violence.⁹ If brothels were closed down this led to increased street prostitution with even more problems for nearby residents and workers.

The *Disorderly Houses Amendment Act 1995* (NSW) legalised brothels and living off the earnings of a prostitute. Local councils are now the chief regulatory authority to control the number and location of brothels in their respective areas. With the passage of the legislation, brothels are now regulated under the *Environmental Planning and Assessment Act 1979* (NSW). Section 79C of the *Environmental Planning and*

⁶ Whelan, n 2 at 1187.

⁷ Gaudry, Second Reading of Disorderly Houses Amendment Bill, *Hansard, Legislative Assembly*, 18/10/95 at 1937.

⁸ Whelan, n 2 at 1189.

⁹ Moore, n 4 at 1952.

Assessment Act 1979 provides the criteria to which a local council must refer to determine development application.¹⁰

Section Two: Council regulation of home businesses (sexual services)

Broadly speaking, there are three major approaches to home businesses (sexual services) by local councils. The first approach involves the application by some local councils of existing planning controls and an absence of any sex service premises specific policies. This approach has been utilised by a significant number of councils. The second approach, which has tended to be adopted by the majority of local councils, is to develop sex service premises specific policies that do not differentiate between brothel types. The final approach is the development of nuanced sex service premises specific policies that differentiate between brothel types in terms of amenity impacts.¹¹ This section considers the three different approaches by local councils to sex services premises in terms of their impact upon the operation of home businesses (sexual services).

No sex service premises specific policy

Many local councils do not adopt any sex service premises specific policy, with the result that sex service premises developments are governed by existing planning controls. Woollahra and Hurstville Councils provide examples of this approach. Woollahra Council has utilised existing administrative processes to allow appropriate

¹⁰ These are:

(1) Matters for consideration - general

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development subject of the development application:

(a) the provisions of:

(i) any environmental planning instrument, and

(ii) any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority, and

(iii) any development control plan, and

(iv) the regulations ...

that apply to the land to which the development application relates,

(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.

¹¹ Information regarding council policies relating to the sex industry is based on responses to letters sent to all councils in NSW between October 2002 and December 2002. Of the 172 general councils in NSW, 69 councils responded to this request for information.

developments, whilst Hurstville Council has tended to refuse development applications from home businesses (sexual services).

In the absence of any sex service specific policies, brothels are permitted to operate in the same way as other commercial premises.¹² Home businesses (sexual services) are regulated in the same way as other home businesses, by State Environment Planning Policy Number 4 (SEPP 4) - Development Without Consent and Miscellaneous Complying Development. SEPP 4 permits the development of home businesses without requiring development consent across the state. Where councils have no sex service specific policies, SEPP 4 allows home businesses (sexual services) to operate without development consent.

Alternatively, some councils have introduced specific definitions of home occupations that apply generally. For example, Penrith Council allows a home activity without consent, however a home activity cannot involve customers or clients accessing the site. This definition would not permit home businesses (sexual services) as these necessarily involve customers at the premises. Home businesses (sexual services) are not discriminated against under this policy, as all home businesses which rely on customers attending the premises are affected. Councils with these general policies regarding home businesses involving onsite clients permit development with consent. These councils may impose notification procedures as part of the process of consent.

Sex services premises policies: 'brothels'

Many councils have adopted some kind of sex services premises policy by amending Local Environmental Plans (LEPs) and Development Control Plans (DCPs). Ratcliff details the process required of councils when introducing or amending LEPs.¹³ For the purposes of this paper it is sufficient to note that local councils do not have unfettered discretion in the form or content of their LEPs. Local councils are required to take into account the comments of members of the community and any other public authorities and councils which might be affected. More importantly, the Minister for Urban Affairs and Planning also has a right of veto over the implementation of LEPs.

¹² Brothels Taskforce, n 1.

¹³ Ratcliff I, "No sex please: We're Local Councils" (1999) 4 *LGLJ* 150, at 152-153.

This power of veto is particularly significant to local council policies regarding brothels as the Minister for Urban Affairs and Planning has stated that the outright prohibition of brothels in a local council area will not be permitted.¹⁴

The majority of councils that have developed sex services premises policies do not distinguish between brothel types. These councils rely on a broad definition of ‘brothel’, frequently adopted from the *Disorderly Houses Act 1943*, of ‘premises habitually used for the purposes of prostitution, or that have been used for that purpose and are likely again to be used for that purpose.’ Within the council policies, there is no further differentiation between brothel types. This approach has been adopted by councils with a relative absence of sex service premises policies, but also by councils with detailed sex service premises policies.

Many councils have amended the definition of a home business to explicitly exclude any occupation involving the act of prostitution, defining any occupation involving prostitution as a brothel. These councils need not have nuanced sex service premises development policies, but simply insert clauses imposing locational controls and notification requirements upon brothel developments. For example, Randwick Council specifies that development for the purpose of a home activity is permissible without consent, where the proposed use:

- is within a residential or business zone, and
- involves only the use as an office, and
- does not involve clients visiting or deliveries of goods to the premises.¹⁵

Even in the absence of sex service premises specific policies, it is clear that home businesses (sexual services) would not comply with this provision, as they involve clients visiting. Additionally, Randwick Council specifies that there must be an application for consent to carry out development within any zone for the purpose of brothels.¹⁶ In this policy a brothel is defined as ‘a building or place used, whether in whole or in part, for prostitution.’ Brothel development procedures require notification of persons who own land adjoining the subject land, or may be

¹⁴ Brothels Taskforce, n 1 at 8.

¹⁵ Randwick Council, *Randwick Local Environmental Plan 1998*, Schedule One.

¹⁶ Randwick Council, *Randwick Local Environmental Plan 1998*, provision 24.

detrimentally affected by the proposed development. This involves advertisement of the development in a local newspaper and a notice on the site of the subject of the application, specifying a description of the proposed development and the name of the applicant. Councils that adopt this type of approach may also impose locational restrictions upon home businesses (sexual services), by excluding all brothels from specific zones, usually residential and/or commercial.

Some councils have detailed sex service premises specific policies including locational controls, notification requirements, occupational health and safety standards and crime prevention controls. As stated above, these councils do not differentiate between brothel types, thus applying general sex service premises policies to home businesses (sexual services). These councils tend to impose strict notification requirements on all brothel developments, including the erection of a notice on the subject land, publicising the development in a local newspaper or at the council offices. Additionally, these councils impose locational restrictions upon all brothel developments. Sex service premises tend to be restricted to commercial and/or industrial zones.

Sex service premises: nuanced approach

An alternative approach to the regulation of sex service premises has been adopted by a very small number of local councils in NSW.¹⁷ This approach adopts a more nuanced approach to sex service premises, by distinguishing between the range of brothel types and their impacts when determining appropriate locations and planning controls. For example, South Sydney Council distinguishes between the following types of brothels, recognising that there are differences in 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'.

¹⁷ South Sydney Council, Wollongong Council and to a limited extent, Marrickville Council.

- local business brothel: small brothel operated in a dwelling with a maximum of 2 non-resident sex workers.
- home business brothel: small brothel operated in a dwelling by one resident sex worker, in no more than 10% of any storey within any dwelling.

Councils which distinguish between the different types of brothels can then develop amenity specific policies, differentiating between development conditions for home businesses and large commercial brothels. This can include different zone prohibitions and restrictions, and different notification requirements. For example, the South Sydney Council policy permits the development of home businesses (sexual services) without development consent, provided these operations are limited to only one resident worker and the working area does not occupy more than 10% of the floor area of any storey within the dwelling. Home businesses are permitted without development consent in residential, mixed and commercial zones. In contrast, commercial brothels are restricted to business and mix use zones, and should not be located near predominantly residential uses. Commercial brothels are required to submit development applications, specifying environmental effects and management plans, and notification of neighbouring property owners.

Section Three: Analysis of local councils policies regarding home businesses (sexual services)

This section considers the ways in which council policies impact upon the likelihood of home businesses (sexual services) operating legally. This analysis is important, because home businesses providing sexual services are estimated to make up a large proportion of the sex industry.¹⁸ If council regulation is too restrictive, then rather than closing down home businesses (sexual services) will continue to operate illegally, generating the problems the *Disorderly Houses Amendment Act 1995* was intended to overcome: corruption and health and safety problems. The majority of councils impose strict notification requirements and/or locational restrictions on brothels generally, with a direct impact upon home businesses (sexual services). It is argued that these regulations increase the likelihood that home businesses (sexual

¹⁸ Brothels Task Force, n 1 at 13.

services) will not operate legally. Additionally, the few councils that differentiate between brothel types, may impose size restrictions on home businesses (sexual services).

The majority of councils require some form of notification regarding home business (sexual services) developments. Even local councils without developed sex service premises specific policies tend to impose some notification requirements on home business (sexual services), ranging from advising the council and near neighbours, to notices in local newspapers and a notice erected outside the subject land. The imposition of broad notification conditions upon home businesses is potentially dangerous, as it reveals the identity and location of individual sole operators.¹⁹ Home businesses (sexual services) rely upon discretion and anonymity, and the imposition of strict notification requirements undermines this. Additionally, individual sex workers are unlikely to comply with these conditions and thus these requirements will not achieve sensible planning outcomes as home businesses (sexual services) are most likely to continue operating illegally.²⁰ Workers in illegal home businesses (sexual services) are unlikely to access occupational health and safety programmes. Consequently, the Brothels Task Force noted in 2001, that the identification of individual sex workers through the development application process is contrary to the recommendations of the Legal Working Party of the Intergovernmental Committee on AIDS, and the policies of the Australian Federation of AIDS Organizations (AFAO) and the AIDS Council of NSW.²¹

In addition to notification requirements, the majority of councils impose locational restrictions on brothel developments. The restriction of brothels to commercial zones and industrial zones generates problems for home businesses (sexual services). Home businesses are best placed in residential areas, as by definition, they require home occupation by a sex worker. Of especial concern is the restriction of all brothels to industrial zones which is highly problematic for brothels generally, and home businesses (sexual services) in particular. Industrial zones are inappropriate for

¹⁹ Brothels Task Force, n 1 at 13.

²⁰ Banach L and Metzenrath S, *Principles for Model Sex Industry Legislation* (Sydney: Scarlet Alliance, 2000).

brothels, as they tend to be poorly serviced at night, with poor lighting, no public surveillance and little or no public transport.²² This results in major safety hazards for workers and their clients and can result in ‘no go’ areas. The absence of any other legal activity at night has the potential to provide a focus for illegal activities. Additionally, buildings in industrial areas are unlikely to be suitable for use as a brothel. In order to meet occupational health and safety standards and access requirements, the building will require significant financial outlay. All these problems are exacerbated for home businesses (sexual services). Home businesses (sexual services) are extremely unlikely to relocate to industrial areas.

The imposition of notification requirements and locational restrictions upon all brothels directly restricts the likelihood that home businesses (sexual services) will operate legally. The source of the problem is that the majority of councils do not differentiate between different brothel types. Notification requirements and locational restrictions to commercial or industrial zones tend to favour large commercial operations. Commercial operations can meet notification requirements without compromising safety and are appropriately located in commercial zones. In contrast, home businesses (sexual services) cannot comply with notification requirements as public notices advising of the development location and activity places sole sex workers in danger. Restricting all brothels to industrial or commercial zones is inappropriate for home businesses (sexual services) as by definition, home businesses operate in residential areas. Consequently, it can be argued that notification requirements and locational restrictions are tantamount to ensuring that home businesses (sexual services) cannot operate legally.

A final regulatory approach that impacts upon home businesses (sexual services) is the restriction on size that may be imposed by the few councils with sex service premises policies that differentiate between types of brothels. For example, South Sydney Council permits home businesses (sexual services) without consent, only where there is one resident worker. This restriction is based on the view that one home based sex worker will result in similar amenity impacts to any other type of

²¹ Brothels Task Force, n 1 at 13 - 14.

²² Harcourt C, “Whose Morality?” (1999) 18(3) *Social Alternatives* 32.

home based business. However, information from the Sex Workers Outreach Project suggests that many operators of home businesses (sexual services) prefer to employ at least one other worker for safety and financial reasons.²³ Employees can work alternatively and share supportive roles. The imposition of size restrictions upon home businesses (sexual services) that compromise their safety will mean that home businesses (sexual services) will continue to operate illegally. SEPP 4 does not impose limits to the number of residents who may carry out an occupation in a dwelling. The general limitation relates to an occupation which does 'not involve interference with the amenity of the neighbourhood'.

In summary, there are three major ways in council policies reduce the likelihood that home businesses (sexual services) will operate legally. Firstly, councils can impose strict notification requirements that compromise the safety of home businesses (sexual services) as they lead to the identification of the location and the worker. Secondly, many councils restrict all brothels to commercial or industrial zones that are completely inappropriate for home businesses (sexual services) that by definition are located in residential areas. Finally, the few councils with policies that differentiate between brothel types may impose size restrictions upon home businesses (sexual services), limiting the business to one resident sex worker. Notification requirements, locational and size restrictions reflect the tendency to over regulate the sex industry, and reduce the likelihood that home businesses (sexual services) will operate legally.

Council policies imposing unnecessary restrictions that home businesses (sexual services) cannot meet will not lead to home businesses (sexual services) shutting down. Rather, these businesses will continue to operate illegally, undermining the very reasons for the introduction of the *Disorderly Houses Amendment Act 1995*. Illegal operation of home businesses (sexual services) sustains the possibility of council and/or police corruption. Additionally, requiring development applications from individual sex workers has implications for occupational health and safety. Occupational health and safety programmes are dependent on voluntary cooperation of sex workers with outreach and advocacy services. Prohibiting home business

²³ Womerah Services, *Planning Guidelines for Sex Service Premises*, Report submitted to the Brothels Advisory Panel, NSW, 26 March 2003.

brothels or requiring development consent may undermine the efficacy of these services and programmes as workers in illegal home brothels are less likely to access occupational health and safety programmes than workers in legal brothels.²⁴

Section Four: Challenges to council policies

Notification requirements, locational and size restrictions limit the possibility of home businesses (sexual services) operating legally. This section considers the various avenues available to challenge these restrictive policies. These restrictions should be challenged on several grounds. Firstly, the intention of the Legislature in enacting the *Disorderly Houses Amendment Act 1995* was to encourage the regulation of sex services premises as legitimate commercial businesses. This was motivated by a desire to minimise corruption opportunities associated with illegality and to encourage well-run brothels with health and safety standards. Notification requirements and locational restrictions are tantamount to banning home businesses (sexual services), ensuring that a significant proportion of the sex industry continues to operate illegally throughout the majority of New South Wales.

Secondly, notification requirements and locational restrictions should be challenged because they are not motivated by relevant planning considerations. Section 79C *Environmental Planning and Assessment Act* specifies the relevant matters for consideration, specifically ‘the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.’²⁵ This means that councils should be generating policies regarding sex services premises that are informed by concerns regarding amenity. The failure to differentiate between brothel types means that councils are associating potential amenity impacts of home businesses (sexual services) with large commercial brothels. Whilst home businesses (sexual services) may have some amenity impacts, these amenity impacts are minimal compared to the potential impacts of large commercial brothels. Home businesses (sexual services) are unlikely to have an amenity impact that differs from most other residential premises. The only

²⁴ Brothels Task Force, n 1 at 13.

²⁵ *Environmental Planning and Assessment Act 1979* (NSW), s 79C(1)(b).

different amenity impact is that home businesses (sexual services) may have clients visiting outside standard business hours.

Councils appear to develop general policies regarding brothels based upon unsubstantiated fears of impacts by brothels generally. In cases regarding amenity, or social or environmental impact, the Land and Environment Court has required hard and fast evidence of detriment.²⁶ Consequently, councils should not be relying upon unsubstantiated fears as the basis for policies regarding brothels generally. This is especially salient as policies regarding brothels generally ignore that home businesses (sexual services) are likely to have minimal amenity impacts as they rely upon discretion and anonymity for their client base. Alternatively, general policies developed by councils may be motivated by general moral concerns, regarding the inherent immorality of brothels. The Land and Environment Court has been clear that morality is not a factor relevant for consideration in the development application process.²⁷ The reforms to the *Disorderly Houses Act 1943* established brothels as a legitimate commercial use, and as such, they can only be regulated on the basis of their impact on the amenity and the environment. Council policies that do not differentiate between brothel types and their different amenity impacts are motivated by moral concerns or unsubstantiated fears which have been held by the Land and Environment Court to be irrelevant planning considerations.

A third and related reason to challenge the imposition of notification requirements and/or locational restrictions is that these policies are inequitable. The *Disorderly Houses Amendment Act* was enacted with the intention of responding to brothels as legitimate commercial businesses. Home businesses (sexual services) should be responded to in the same way as other home businesses. The imposition of special restrictions upon home businesses (sexual services) is based upon historical characterisations of brothels as inherently disorderly. This approach contradicts the *Disorderly Houses Amendment Act* and should be challenged.

²⁶ *Weynton v Rockdale City Council* (1999) 106 LGERA 213.

²⁷ *Liu, Lonza and Beauty Holdings v Fairfield* (LEC Unreported, 23 December 1996).

There are limited avenues available to challenge locational and size restrictions and notification requirements. It is of course, open to residents to lobby their relevant councils to change sex service premises policies. However, political rallying at the local council level will not be sufficiently broad to challenge the virtually state-wide approach to home businesses (sexual services). Additionally, given the recent experiences of Marrickville Council this avenue is unlikely to provide much success. Marrickville Council had initially passed a policy that permitted a single sex worker to operate from home without development consent. However, community activism and widespread media attention lead to this policy being revoked within two weeks.²⁸

Appeals to the Land and Environment Court

One possible avenue that can be utilised to challenge council policies regarding home businesses (sexual services) is through appeals to the Land and Environment Court. However, as argued below, this avenue will have limited efficacy in changing council policies in this area.

Council conditions imposed on all developments can be challenged in the Land and Environment Court. If the Court interprets these conditions as development standards, rather than prohibitions, then the conditions can be subject to an appeal under State Environmental Policy No 1 - Development Standards (SEPP 1). SEPP 1 permits the approval of a development that does not comply with a set development standard, where this can be shown to unreasonable or unnecessary. SEPP 1 is justified where varying the development standard still allows the objective of the standard to be met. Section 4 of the *Environmental Planning and Assessment Act 1979* (NSW) defines a 'development standard' as the 'provisions of an environmental planning instrument ... in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development...' In discussing these provisions, Justice Clark has stated that 'there is, in my view, a great difference between a claim which prohibits the

²⁸ Eg, O'Rourke C, 'Scepticism on brothel backdown' *Sydney Morning Herald*, 20/2/03, 8; Nicholls S, 'Council weighs up DIY brothels' *Sydney Morning Herald*, 23/1/03, 5.

carrying out of a particular development on identified land and one fixing requirements to be complied with in carrying out that development.’²⁹

Available case law is clear that zone restrictions are interpreted by the Land and Environment Court as prohibitions, rather than development standards. This is because zone restrictions prohibit the carrying out of a particular development on identified land. Consequently, one of the major limits on home businesses (sexual services) operating legally, council policies restricting all brothels to industrial or commercial zones, will not be liable to a SEPP 1 appeal.³⁰

From available case law, all conditions imposed by councils on brothel developments that are additional to zone prohibitions would be interpreted by the Land and Environment Court as development standards, rather than prohibitions, and thus liable to SEPP 1 appeals. The restrictions on size to one resident worker in home businesses (sexual services) imposed by South Sydney Council could be liable to a SEPP 1 appeal. The Land and Environment Court would have to determine whether or not size restrictions are ‘unnecessary or unreasonable’ on a case by case basis, and based on amenity impacts of individual home businesses (sexual services). Whilst appeals on size limitations may provide some level of success in the Land and Environment Court, the difficulty is that only two councils in New South Wales impose any size restrictions on home businesses (sexual services). Consequently, success in these cases will not have any widespread impact on the legality or otherwise of home businesses (sexual services) beyond two local government areas.

Council policies that have a much greater general impact on the legality of home businesses (sexual services) are notification requirements. It is not clear whether or not notification clauses can be classified as development standards or not, and hence, whether they can be subject to SEPP 1 appeals. There are no decisions where a party has challenged notification clauses. Development standards have been defined by the Land and Environment Court as ‘provisions specifying requirements or fixing

²⁹ *The Council of the Municipality of North Sydney v PD Mayoh Pty Ltd (No 2)* (1990) 71 LGRA 222 at 236.

³⁰ *Amorgas v Marrickville Council* [1998] NSWLEC 172.

standards in respect of an aspect of development.’³¹ Mahoney JA observed that the definition of development standards in section 4 of the *Environmental Planning and Assessment Act 1979* (NSW) deals with the details of a development which are to be carried out or the standards to be observed in the carrying out of it and not whether the development may be carried out at all.³²

It is unclear whether or not notification requirements can be classified as development standards. It could be argued that notification requirements may be characterised as neither development prohibitions or standards, but rather as procedural requirements. This means that notification requirements would operate in some twilight zone, where they cannot be subject to appeal to the Land and Environment Court by home businesses (sexual services) as they are procedural, despite having the substantive impact of effectively precluding home businesses (sexual services) from operating. Only affected residents could appeal to the Land and Environment Court where a council has not fulfilled notification requirements, on the basis of natural justice.³³

On the other hand, it could be argued that notification requirements should be interpreted as development standards. Notification requirements cannot be classified as development prohibitions. Although most notification clauses contain mandatory language - applications ‘will’ or ‘shall’ be advertised - this does not mean that they are prohibitions. Prohibition in this context means, ‘prohibits the carrying out of a particular development on identified land’.³⁴ Clearly, these notification clauses do not propose to prohibit development on specified land. Thus it could be argued that given that notification requirements are not prohibitions, they must be development standards. This is supported by the contention that fulfilment of notification requirements is a condition precedent to the granting of consent, and therefore, notification requirements should be characterised as development standards.

³¹ *The Council of the Municipality of North Sydney v PD Mayoh Pty Ltd (No 2)* (1990) 71 LGRA 222 per Clarke JA at 235.

³² *The Council of the Municipality of North Sydney v PD Mayoh Pty Ltd (No 2)* (1990) 71 LGRA 222 per Mahoney JA at 232-233.

³³ Flick GA, *Natural Justice: Principles and Practical Application* (2nd ed, Butterworths, 1984) p 28.

³⁴ *The Council of the Municipality of North Sydney v PD Mayoh Pty Ltd (No 2)* (1990) 71 LGRA 222 per Clarke JA at 236.

Even if notification requirements are interpreted as development standards, home businesses (sexual services) would then have to argue that these requirements are ‘unnecessary and unreasonable’. If these notification requirements are above and beyond those required of other home businesses with similar amenity impacts, then the Land and Environment Court may find in favour of waiving notification requirements. However, reliance upon appeals to the Land and Environment Court is an ineffective means for challenging notification requirements. Home business (sexual services) operators would be identified in the process of the case, replicating and exacerbating the very problem they are seeking to challenge in notification requirements. Additionally, the costs required to appeal to the Land and Environment Court may be prohibitively expensive for home business (sexual services) operators.

The major shortcoming with reliance upon the Land and Environment Court to challenge local council policies regarding home businesses (sexual services) is that the reach of these appeals is too limited. Firstly, the basis for appeals is too restricted to be of assistance to challenge one of the major council policies that limit the possibility of home businesses operating legally, namely, zone restrictions. Zone prohibitions are not subject to SEPP 1 appeals because they have been interpreted as development prohibitions rather than development standards. Additionally, it is unclear whether notification conditions can be interpreted as development standards which would permit appeals to the Land and Environment Court, or as procedural standards that are not liable to SEPP 1 appeals. Consequently, the only council development conditions that could be liable to a SEPP 1 appeal are size restrictions, and these are imposed by only two councils in New South Wales. Secondly, Land and Environment Court appeals are restricted in their impact, as they are decided on a case by case basis. These decisions do not lead to any reforms to council policies, let alone on a state wide basis.

Reform of state policies

State wide reform is necessary due to the large number of councils that have developed policies that undermine the possibility of home businesses (sexual services) operating legally. On the 29th of December 1995, the Department for Urban Affairs and Planning wrote to all local councils stating that a blanket prohibition of brothels

through LEPs would not be supported by the Minister. This was because such an action by a council would contradict the intention of the legislative reforms, may result in increased street prostitution and could encourage attempts to corrupt council staff.³⁵ However, as argued throughout this paper, the imposition of notification conditions and/or restrictions of all brothels to commercial and/or industrial zones is tantamount to banning home businesses (sexual services) and thus contradicts the intention of the legislative reforms. Council policies regarding home businesses (sexual services) thus need to be reformed. There are several ways in which this can be done.

The most effective approach to improve council responses to home businesses (sexual services) is through legislative reforms. In 2001 the Brothels Taskforce recommended an amendment to State Environmental Planning Policy Number 4 (SEPP 4) to allow home businesses (sexual services) without development consent across the state.³⁶ This reform is essential and long overdue. The imposition by many individual councils of consent requirements for home businesses (sexual services) undermines the likelihood that home businesses (sexual services) will operate legally, due to the dangers inherent in identifying individual sex workers and their locations. Additionally, the imposition of development consent conditions that are not required of other home businesses with similar amenity impacts is inequitable and based on concerns that are not relevant factors to planning. The special imposition of notification requirements upon home businesses (sexual services) thus contradicts the *Disorderly Houses Amendment Act 1995* (NSW) in two ways. These conditions undermine the possibility of home businesses (sexual services) operating legally and also conflicts with the intention of the Legislature that councils respond to brothels as legitimate commercial premises. Consequently, it is strongly recommended that SEPP 4 is altered to allow home businesses (sexual services) to operate without consent.

³⁵ Department of Urban Affairs and Planning, *Council Circular - Planning Controls of Brothels*, 29/12/1995.

³⁶ Brothels Task Force, n 1 at 14.

An alternative approach is to change the definition of a brothel in the *Disorderly Houses Act* to exclude home businesses (sexual services). This would have the advantage of ensuring that home businesses (sexual services) are responded to by local councils in the same way as other home businesses with similar amenity impacts. Once again, this would be consistent with the intention underlying the original reforms to the *Disorderly Houses Amendment Act 1995* (NSW).

In addition to legislative reform, the approach adopted by the Minister for Urban Affairs and Planning regarding council policies relating to brothels should change. This Minister has a right of veto over the implementation of Land and Environment Plans (LEPs). The Minister has made it clear that outright prohibition of brothels is inconsistent with legislative reforms and thus unacceptable. However, the Minister has accepted and approved council policies that effectively prohibit a large proportion of the sex industry, that is, home businesses (sexual services). The Minister should stop accepting policies that fail to differentiate between brothel types, as this is inconsistent with the intention of legislative reforms. Additionally, the Minister should stop approving the restriction of brothels to industrial zones, as this contradicts the intention of the Legislature of responding to brothels as legitimate commercial premises.

Conclusion

Legislative reforms in 1995 to the *Disorderly Houses Act 1943* (NSW) were motivated by an intention to ensure that brothels were treated as legitimate commercial premises. These reforms were enacted to reduce corruption opportunities and to improve occupational health and safety in brothels. Unfortunately, the majority of councils have utilised their planning powers in a way that is inconsistent with the intention of these reforms. Councils have imposed notification conditions and/or locational restrictions that home businesses (sexual services) cannot safely meet. These conditions are not consistent with responding to brothels as legitimate premises. Rather than being motivated by concerns regarding amenity impacts, these policies have been developed on the basis of irrelevant planning factors such as unsubstantiated fears and moral concerns.

Avenues available to home business (sexual services) operators wishing to work legally are limited. The Land and Environment Court offers only restricted grounds for appeal on a case by case basis. State wide reform is necessary to ensure that a significant proportion of the sex industry is able to operate legally in a way that is consistent with the Legislature's intention. SEPP 4 needs to be changed to require home businesses (sexual services) to operate without consent. Alternatively, the definition of 'brothel' in the *Disorderly Houses Amendment Act 1995* (NSW) can be changed to exclude home businesses (sexual services). Additionally, the NSW state government's response to home businesses (sexual services) needs to be more consistent and in accordance with the *Disorderly Houses Amendment Act*. The Minister's approval of council policies that impose notification requirements and locational restrictions on home businesses (sexual services) needs to halt, as these policies are tantamount to banning home businesses.