

**SUBMISSION TO
DEPARTMENT OF PLANNING
ON
DRAFT GUIDELINES FOR
SEX SERVICES PREMISES
COMPLIANCE ACTIVITIES
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Contents

INTRODUCTION 3

GUIDING PLANNING PRINCIPLES FOR SSP: 5

UNDERLYING PROBLEMS 7

RESOURCING COUNCILS AND COMMUNITIES TO ACHIEVE
BETTER VOLUNTARY COMPLIANCE OUTCOMES 9

HEALTH AND SAFETY CONSIDERATIONS 10

POINTS TO ADDRESS WHEN CONSIDERING COMPLIANCE
REGIMES 11

RECOMMENDATIONS 13

INTRODUCTION

We thank you for the opportunity to respond to the Draft Guidelines on Compliance. We respond on the basis of our considerable collective knowledge and experience of the many aspects of the sex industry and the regulatory framework under which the NSW sex industry currently exists. We make this submission in the interests of finding simple, effective and workable solutions to planning compliance issues within the sex industry. We do so taking into account the views and experiences of the various sectors of the sex industry and its representative bodies, research findings and the proven successful regulatory and compliance experiences of Newcastle, Marrickville, Wollongong and the City of Sydney Councils.

Our initial response to the Draft Guidelines Flow Chart issued to the Task Force in November is that while it is detailed and specific it is also lengthy and complex. We believe that a simpler protocol along the lines of those followed by the Councils named above would be more useful and more effective in dealing with brothel non-compliance issues.

Specifically the Procedures listed in the Draft Flow Chart require considerable staff resources to be dedicated to an issue that is usually of minor relevance to Council business. Many Councils would find this commitment daunting and it serves only to highlight perceived 'differences' between brothel developments and other commercial uses with possible amenity impacts, contrary to the original intention of the law reform.

A similar perception is encouraged by the designation of a complaint regarding an unauthorised brothel as a "Major issue" (Table A) rapidly leading to police involvement. This is clearly usually not necessary and is not the way other unauthorised uses are treated. At the very least unauthorised brothels should have the opportunity to attempt to comply with planning regulations and to lodge a DA. This is also an opportunity for planning education and information work by Council officers.

In summary we believe that a simpler and more direct flow chart would be easier for busy Council staff to use and therefore more likely to be followed accurately and appropriately. Newcastle's Flow Chart is contained on one page and can be seen at a glance. This should be the bench mark for such an 'on the job' documents.

Additionally there are other planning and regulatory issues that discourage brothel operators from seeking compliance and potentially are a cause of corruption. The failure to address overly restrictive zoning provisions for the various scales and types of sex service premises will continue to provide opportunities for corruption. Overly zealous enforcement activities specific to sex services premises ("SSP") must not be Combined submission to the NSW Department of Planning/Brothels Taskforce 4 permitted to supplant and override the normal planning and compliance processes used for land uses of similar amenity impacts.

Furthermore, a compliance process that takes on an adversarial approach has the potential to return significant sectors of the sex industry to its former underground status where access to premises by health outreach workers is limited and corruption potential is unintentionally increased rather than decreased.

Local government is responsible for implementing appropriate planning controls for SSP as a legitimate land use in NSW. This should be the basis upon which Councils address the sex industry. Local councils and communities need to be appropriately resourced to enable them to understand this process and respect the intent of the bi-partisan reform to decriminalise 'prostitution' in 1995. These changes were intended to regulate SSP within the planning framework as legitimate commercial enterprises.

One cannot introduce new compliance expectations without reflecting on some of the mechanisms by which the current NSW planning framework inhibits competition. Barriers to entry for SSP operators create the unequal planning playing field that is evident across many LGAs. The situation continues to jeopardise the achievement of the intent of the 1995 legislative reforms, which sought to allow SSP to operate within the planning framework in order to reduce opportunities for corruption and to enhance health and safety outcomes for sex workers and their clients.

Until a level playing field exists within the NSW planning system for all sectors of the sex industry, equal to other legitimate land uses, a significant percentage of operators will remain unauthorised or 'illegal'; with all of the associated compliance problems that the reforms of 1995 were supposed to avoid. To achieve a level playing field across all Councils the Department should introduce or amend a State Policy to make commercial SSP permissible in all Commercial zones. A similar approach should be taken for home based sex services businesses allowing a minimum of up to two sex workers to be permissible as exempt development in residential zones in line with other home based businesses.

It is our considered view that the issues surrounding the corrupt behaviour of the Parramatta Council compliance officer stems firstly, from lack of understanding of the intent of the 1995 reforms and failed supervision by appropriately trained managers. This situation can be ameliorated in the future with appropriate training and education that puts at the centre, the recommendations of the 2001 Brothels Taskforce and the Guiding Principles of the Sex Services Premises Planning Guidelines 2004 ("SSPPG").

The Sex Services Premises Planning Advisory Panel was established as a result of the 2001 Brothels Taskforce. The SSPPG state that: "*The most effective way for councils to reduce the number of illegal operators ...within local council areas is to*

draft planning provisions that enable operators to conduct well-run premises within a reasonable choice of localities.”¹

A notable example of a LEP supporting this principle was made by Armidale/Dumaresq Council in 2007 (after the Department of Planning put pressure on planners to amend overly restrictive zoning provisions within the draft Armidale/Dumaresq LEP 2007).

GUIDING PLANNING PRINCIPLES FOR SSP:

The SSPPG state that:

“...the following guiding principles should inform all decisions regarding planning for sex services premises:

- *appropriate planning for sex services premises can provide councils with greater control over their location, design and operation*
- *planning regulations and enforcement actions have direct implications for the health and safety of workers and their clients*
- *sex services premises should be treated in a similar manner to other commercial enterprises, and should be able to rely on consistency and continuity in local planning decisions*
- *planning provisions should acknowledge all types of sex services premises and ensure that controls relate to the scale and potential impact of each premises*
- *reasonable, rather than unnecessarily restrictive, planning controls are likely to result in a higher proportion of sex services premises complying with council requirements, with corresponding benefits to council, the local community and health service providers*
- *provision and consideration of sound information enables appropriate policy and decision-making processes, and*
- *engaging the community, including the sex industry, and developing professional strategies can assist the community and professionals to understand the nature of sex services premises and recognise that they are a legitimate land use to be regulated through the NSW planning system.*

Maintaining a focus on these guiding principles can assist all parties, including councils, the sex industry and the local community, by providing clarity and consistency of regulation, minimising amenity impacts and ensuring the health and safety of workers and clients.”²

The Sex Services Premises Planning Guidelines provide further advice on enforcement matters:

¹ Sex Services Premises Planning Guidelines(2004) p. 76

² Sex Services Premises Planning Guidelines(2004) p 3

Enforcement actions against premises may also change the structure of the industry. The inability to become a legal land use and the fear of detection can increase the chances of sex workers turning to private escort work, operating out of hotels or clients' houses, or street work, both of which pose significantly more risks to the personal safety of the worker.

Similarly, premises forced to close and relocate may down-scale to enable the business to be more mobile or more viable. In this instance, operators of commercial sex services premises may seek to reduce costs by employing only sex workers without vital support staff such as receptionists, who screen clients and supervise the premises. In addition, private workers in this situation can lose contact with their peers and with health agencies, whose support on safe sex issues has contributed to the very low rates of HIV/AIDS in the sex industry to date. Sex worker access to health services is encouraged by the NSW HIV-AIDS Strategy.

Prohibitive and restrictive planning controls and adversarial enforcement actions also perpetuate perceptions that the industry is illegal, which gives the client the upper hand in demanding unsafe sex or making other demands of workers. The opposite is a culture of acceptance that the activity is a legitimate land use, regulated by councils and other government agencies, bound by sets of rules and operating under normal commercial circumstances.³

³ Sex Services Premises Planning Guidelines(2004) pp. 73-74

UNDERLYING PROBLEMS

Over the past 30 years, we have seen many changes and experienced the industry as an illegal and much reviled entity where corruption was rife, sexual health of sex workers was constantly in jeopardy; legal, human and labour rights non-existent and corruption was endemic. Over the past 14 years, we have had an unparalleled opportunity through the planning system to remedy this situation.

However, in the majority of LGAs it has been a costly and complex exercise for proponents, councils and communities; that has failed to reflect the true intentions of the 1995 reforms which were to reduce corruption potential by limiting the regulation of SSP to a complaint based system of genuine amenity impact and not a witch hunt.

To avoid a shift from police corruption to council corruption, councils were only given limited responsibilities in the regulation of brothels⁴:

*Mr MOSS (Canterbury) [11.46]:” I want to emphasise the fact that this legislation is not about legalising brothels but about decriminalising brothels. There is a very big difference between decriminalising and legalising. The purpose of the bill is to ensure that brothels that do not disturb the peace or the local community are no longer subject to police interference. This is being done in order to eliminate corruption, because it is a fact that on occasions in the past the authorities have been extremely selective when determining what is and what is not a brothel. I support the Bill, as I am sure this measure will eliminate corruption”.*⁵

The limitation on suitable zoned land has created a multi-tiered system that has had a detrimental impact on the sustainable economic development of SSP. That is, few have been able to get development consent consistent with the historic location of SSP in mixed use and commercial zones - as was the intent of the 1995 reforms; while others have had no choice but to attempt to locate their businesses in industrial zones.

Even then, many have been required to take the matter on appeal to the LEC following refusal at the local government level. Often this refusal occurs against the considered advice of the Council's own town planners. Councillor determination of development proposals for SSP are rarely considered on their merits and emotion and moral argument is allowed to guide the decision making process.

As a result of limited suitable zoned and available land, coupled with the perceived dangers of locating commercial business in industrial zones and the prohibitive cost of fit-out of former warehouse spaces, many brothels remain outside of the regulatory system.

⁴ What's wrong - Sex Industry Briefing Paper for ICAC Feb 2002 -Prepared by the Private Worker Alliance in conjunction with the Sex Workers Outreach Project

⁵ Disorderly Houses Amendment Bill - Extract from Legislative Assembly Hansard of 18/10/95

Additionally, many existing long-term commercial operators and many independent home based sex workers are unable to benefit from the 1995 reforms as depending on their local government area, they find their business prohibited in mixed use, commercial and/or residential zones. Under the Standard LEP, there is no provision for 'home business (sexual services)' in residential zones; nor under the majority of current Local Environment Plans.

This of course, creates the ongoing potential for corruption and disputes between those with development consent and those without. A review of current local government planning instruments and recent case law, will clarify the limited and restrictive manner in which local government has provided for SSP development, even to the point of totally excluding the home based sex worker sector of the industry.

Furthermore, uncertainty in the planning system has created investment risks and has imposed additional unnecessary costs on operators and potential operators of SSP. This situation has resulted in otherwise commercially viable proposals teetering on the edge of financial collapse. In some cases, operators and proponents have had to sell a business or property to recoup expenditure required to fight on through the courts or cover expenses already outlaid for a property that is now useless in terms of its intended use. Others have had to break leases, (with the ensuing costs) and walk away having already spent many thousands of dollars in preparation of the proposal but find they cannot sustain further costs of a LEC appeal.

In order to support and guide local councils to accommodate all scales and types of SSP, and move away from the notion that SSP are appropriate only in industrial zones, the Government should consider making it clearer to Councils that the 1996 Ministerial directive that "*unilaterally declared that local councils could now restrict brothels to industrial zones only*"⁶, has now been superseded by clause 6.6 of the *Model local clauses for SI LEPs [20090324]*⁷.

The problem is not simply about how well or otherwise a Council approaches compliance. It is about how well or otherwise it makes provisions for SSP development and communicates its rights and responsibilities with the industry and the community. For over 14 years, NSW Councils have had the power to restrict numbers on grounds of proximity to other SSP and 'sensitive land uses', residential uses,, and for some councils, to prohibit SSP in the majority of zones. The latter leaves many potential operators scrambling to find the very few suitable and available sites within small pockets of industrially zoned land. The reality is that local government councillors regularly override the recommendations of planning staff, and refuse development applications from SSP even when they have met the principle objectives of the planning controls. Such decisions are mostly overturned in the LEC, at significant cost to proponents and ratepayers.

⁶ Red, Erica and Saul, 2004 "Why sex workers believe smaller is Better" HIV Australia Vol. 3. No. 3

⁷ 6.6 Restriction on consent for particular sex services premises [local].

Essentially the problem is that we have an inequitable planning system that has failed to differentiate between the various scales and types of SSP. These range from small scale 2-3 room premises with 3 sex workers and a manager/receptionist to larger premises of between 6 to 10 rooms with a similar ratio of sex workers and ancillary staff. In addition, it fails to accommodate an estimated 40% of the industry, which is made up of independent sex workers operating mainly from residential areas⁸

RESOURCING COUNCILS AND COMMUNITIES TO ACHIEVE BETTER VOLUNTARY COMPLIANCE OUTCOMES

In the Foreword to the SSPPG Vic Smith, the Chairperson of the Sex Services Premises Planning and Advisory Panel whose task it was to oversee the development of the Guidelines states:

“These guidelines have been prepared by the Sex Services Premises Planning Advisory Panel over a two year period and are the result of extensive research and consultation concerning local council planning approaches towards the sex industry. The guidelines aim to lead councils to best practice in planning for different types and scales of sex services premises. To this end, the guidelines present factual information on the nature and operation of the sex industry in NSW, an analysis of current planning practice concerning sex services premises, and options and strategies which will deliver improved outcomes for councils, the sex industry and the community. I commend the guidelines to councils as a comprehensive resource document to assist them in making informed decisions”.

⁸ Sex Services Premises Planning Guidelines(2004) pp.9 and 29)

HEALTH AND SAFETY CONSIDERATIONS

One cannot consider compliance activities under the planning system without addressing Australia's response to the HIV pandemic and sex worker health and wellbeing. Sex workers individually and through their representative bodies have a long and esteemed history of educating their clients and supporting each other around issues of isolation, health and wellbeing, improving workplace conditions, challenging laws, stigma and discrimination. In terms of sexual health, sex workers continue to demonstrate high levels of sexual health outcomes and in the now over 26 years of HIV in Australia, there has been no recorded case of transmission of HIV between a sex worker and a client or vice versa. Sex workers who attend sexual health clinics have been shown to have consistently lower rates of sexually transmitted infections (STIs) than do female sexual health clinic attendees from the general community. ⁹

This dramatic improvement in the sexual health of Australian sex workers since the mid 1980s has occurred through voluntary action, despite the restrictive legislative conditions that impact on the lives and livelihoods of sex workers on a daily basis. Across all states and territories of Australia impediments to safe working conditions occur through a variety of punitive laws. Despite this, sex workers have shown great resilience and skill in maintaining such high levels of safe sex practices and should be applauded not condemned as occurs in most media and other representations of sex workers and their industry.

The NSW model of sex industry decriminalisation is still regarded as a world leader in better practice. However, the potential for increase in HIV (and other STIs) in the sex industry remains due to the high turnover of industry workers and the barriers to market entry including over-restrictive planning controls and their inequitable implementation through overly zealous enforcement and compliance activities. There is a growing body of informed opinion to support the relaxing of zoning and other controls that discourage compliance, restrict competition and impact on the health and wellbeing of sex workers. See, Harcourt, Egger & Donovan: 'Sex Work and the Law', *Review Sexual Health*, 2005, 2, 121-128.

Just like the criminal law prior to the 1995 amendments, current restrictions on location and the ad hoc and politically biased implementation of planning instruments is creating a barrier to SSP development opportunities. This situation inadvertently constrains sustainable economic development and fair competition within the sex industry and business generally. Additionally, it has a detrimental impact on peer based health promotion activities.

⁹ Harcourt, C, (1994), 'Prostitution and Public health in the Era of AIDS'. In: *Sex Work and Sex Workers in Australia*, Perkins, R, Prestage, G, Sharp, R and Lovejoy, F, (eds.), UNSW Press, Sydney 718-219

POINTS TO ADDRESS WHEN CONSIDERING COMPLIANCE REGIMES

- Review successful models of compliance tested over time, rather than failed approaches or new and overly authoritative and punitive approaches that are likely to increase non-compliance. A best practice approach encourages an ongoing dialogue with the sex industry and fair and equitable planning controls rather than over-restrictive zoning provisions used in tandem with over-zealous compliance/enforcement regimes.
- Treat the sex industry like any other land use and treat a complaint like any other complaint for any other use of land – no different from a say a bakery operating without consent or in contravention of consent.
- Communication is key to providing guidance for complying with planning controls
- Education and information should always precede enforcement
- As a last resort only is there a need to use extra powers (given under the Prostitution Amendment Bill 2007 - utilities orders etc.). This action should only be used if a justified impact is occurring.
- The proposed Council Compliance Flowchart increases the role of Council Compliance officers BEYOND the role that police had previously had. This alone increases chances for corruption and is against the spirit of the 1996 legislation.
- Brothels make up less than 1% of complaints received by Councils such as Marrickville, and are not representative of the bulk of complaints
- The investment required to investigate using a “compliance team” is an overuse of limited Council resources – swarms of people are unnecessary
- The current draft compliance responses to ICAC go too far, would lead to unnecessary delays in processes, strain relationships with operators, and are not the same for other land uses.
- Search warrants are not necessary for most situations
- Combined submission to the NSW Department of Planning/Brothels Taskforce 12
- Video recording of visits to premises could breach privacy rights of clients and workers – better to just take still photos to provide snapshots of compliance related matters, not of individuals.

Combined submission to the NSW Department of Planning/Brothels Taskforce 11

- In regards to reporting final outcomes: requiring “orders” or Pins” removes the discretionary powers from Council Officers.
- If a premises is unauthorised, better practice requires that Council will provide information and education and if sex services are a permissible land use in that zone, will recommend operator submit to DA process
- Resources must be made available to assist with any language barriers.
- Corruption risks arise with other regulatory matters Council covers – like food shops, building inspectors and parking meters – brothels are not a big part of the work of council.
- Taskforce Flow Charts are an over-reaction to Parramatta situation. Since 2003 Parramatta Council has been identified as an example of the worst practice in overly-restrictive regulatory regimes that inevitably lead to corruption¹⁰.
- Councils already have Codes of Conduct which cover: ethical and legal behaviours and reporting corruption; with internal controls to reduce corruption potentials.

¹⁰What's wrong - Sex Industry Briefing Paper for ICAC Feb 2002 -Prepared by the Private Worker Alliance in conjunction with the Sex Workers Outreach Project

RECOMMENDATIONS

1. Appoint a sex industry liaison officer within the Department of Planning. This position would require a demonstrable understanding of the NSW sex industry and the intent and justification of decriminalisation. Their role would be to assist councils to abide by the guiding principles for sex industry planning identified in the SSPPG (p.3), which would be very timely during the current round of LEP reviews.
2. Remove discriminatory provisions against sex workers within the standard LEP by amending the Dictionary definitions of '*home occupation*', '*home business*' and '*home industry*'¹¹ OR, make a State Policy to enable premises where a minimum of up to 2 workers work together to operate as an 'exempt development'
3. Introduce a State Policy to make commercial SSP a permissible use in all commercial areas.
4. Revise and update the existing SSPPG and distribute to councils with a training component as an ongoing resource for councils.
5. Promote the development and use of simple 'Fact sheets' to address and appropriately respond to community concerns and public perceptions of safety issues. Sample Fact sheets are available in the SSPPG at Appendix E)
6. Support and fund the development of a half-day training program¹², to:
 - inform councillors of the rationale behind decriminalisation;
 - explain the legislative framework including the Standard LEP;
 - explore the impact of planning on Occupational Health and Safety, competition, economic and social outcomes and in the sex industry;
 - reveal the reality of amenity issues;
 - review case law; and
 - instruct on better practice compliance activities

In conclusion, we implore the government to ensure local councils and communities are adequately resourced to enable them to understand and respect the intent of the Labour Government in reforming 'prostitution' related laws in 1995, which was to regulate SSP within the planning framework as a legitimate commercial enterprise.

¹¹ To create consistency with recent changes that permit all scales of home-based businesses as exempt development across NSW

¹² Similar to the training program recently developed to educate stakeholders on changes to regulations for licensed premises