

21st March, 2011

TO:
Ms Penny Holloway, General Manager

North Sydney Council
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Submission in response to the
Draft North Sydney Local Environmental
Plan (NSLEP) 2009

and

Draft North Sydney Development Control
Plan (NSDCP) 2010 Part B Section 6: Sex
Services and Restricted Premises

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Dear Ms Holloway

We respond to the draft NSLEP and NSDCP 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. In so doing we take into account the views and experiences of the various sectors of the sex industry and its representative bodies, research findings and National HIV and STI Strategies. We also draw upon the proven successful regulatory and compliance experiences of the City of Sydney, Newcastle and Armidale Dumaresq Councils, which take a pragmatic approach to the regulation of sex industry premises in their Local Government Area (LGA) as for other land uses. We make this submission in the interests of finding simple, effective and workable planning provisions for sex industry premises, as was the intention of the decriminalisation reforms in 1995.

Decriminalisation also was intended to remove the potential for corruption and to address concerns regarding the health and safety of sex workers and their clients and the general public. Above all, it was to treat the sex industry as any other business with the same rights and responsibilities while optimising the health and safety of sex workers, contributing to the improvement of management practices and ensuring good public health outcomes.

Sex services premises and home occupation (sex services) are now lawful land uses under NSW legislation, and must be adequately accommodated within the final version of the NSLEP and NSDCP. Our concerns relate to the way the current draft NSLEP and NSDCP pose unclear and excessive restrictions and prohibit the entire sector of home-based sex work. These provisions will lead to associated negative impacts on public health and the orderly and economic development of land in North Sydney LGA if left unchanged.

Health and Safety Considerations

In accordance with the recognised role of local government in public health regulation one cannot consider the regulation of the sex industry without addressing Australia's response to the HIV pandemic and sex worker health and wellbeing. For more detailed information see [The Role of Local Government in Public Health Regulation](#), as endorsed by the Australia Health Ministers Advisory Council March 2002.

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 in NSW continue to demonstrate very, very low rates of HIV and STIs, however the high rates of safe sex practices and the framework of prevention in Australia means that these low participation rates poses no problems and can actually be a positive contribution to HIV prevention strategies. These outcomes have occurred on a voluntary basis and despite the restrictive legislative conditions that impact on their daily lives; sex workers have shown great resilience in maintaining such extraordinary levels of safe sex practices. This is in direct contrast with the high rates of HIV in the surrounding Asia Pacific Region where the sex industry is largely criminalised.

“Australia has the lowest rate of HIV/AIDS among sex workers in the world, due to the work of community-based sex worker organisations and projects conducted in partnership with State and Territory and Australian Governments, and with other agencies. Peer education has been a significant focus of the work of

community-based sex worker organisations and has included the provision of information on safe sex practices, up-skilling new workers to implement these practices, and outreach services.”
(5th National HIV/AIDS Strategy 2005-2008 p4)

Despite this, 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.

There is a growing body of informed opinion to support the relaxing of zoning and other controls that restrict orderly and economic development and impact on the health and wellbeing of sex workers. (Harcourt, Egger & Donovan: 'Sex Work and the Law', *Review Sexual Health*, 2005, 2, 121-128; & Chin: 'Sex in the Suburbs', Bachelor of Planning Thesis, University of New South Wales, Sydney 2007.)

Evidence-based approach that reflects best practice

There have been a number of reviews and consultations since the 1995 reforms in respect to the regulation of sex services premises and the sex industry generally. These have included the Intergovernmental Brothels Taskforce and the Report of the Brothels Taskforce (2001) and the Sex Services Premises Planning Advisory Panel (2002-2004) that produced the Sex Services Premises Planning Guidelines (2004) (SSPPG). Even though some parts of the SSPPG need updating to reflect changes since 2004, they still remain the most comprehensive resource available when considering planning provisions for sex services in NSW. The SSPPG provides evidence based advice on a range of planning and related issues and was framed on a set of guiding principles that were intended to inform all Local Council decisions regarding planning for sex industry premises.

In the Foreword to the Sex Services Premises Planning Guidelines, the Chairperson Vic Smith notes”

“These 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”.

Guiding principles for sex industry planning

Before reading the following guiding principles, it is important to note that in the SSPPG, the definition of 'sex services premises' at that time covered all scales and types of premises where sex work occurs – from the largest commercial enterprises to the smallest home-based activities. In 2007 the Standard Instrument – *Principal Local Environment Plan* was enacted, which redefined 'sex services premises' to exclude sex worker home occupations.

The SSPPG guiding principles state:

- *“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”.

Supporting an ‘enabling’ environment for sex workers OH&S

The 1995 law reforms have enabled a range of progressive responses denied the previously illegal and underground status of the sex industry. They include the ability of government instrumentalities, for example WorkCover NSW, and NSW Health to work in consultation with the sex industry and representative organisations (SWOP, Scarlet Alliance, and Australian Federation of AIDS Organisations) to develop occupational *Health & Safety Guidelines for Brothels* (2001). These reforms have better enabled access by representative organisations to the industry and have improved peer education and support opportunities. It has enabled sex workers to demand better working conditions, industry operators to realise their responsibilities and has resulted in invaluable benefits in improved sexual health outcomes.

Above all, the reforms have provided opportunities for sex workers and operators to perceive of themselves as legitimate workers in a legitimate business with the same rights and responsibilities as others. However, if the regulatory system is too restrictive and the goal posts keep moving, the benefits of the reforms will be negated - people will choose to remain outside of the regulatory system and we may see a return to the mistrust, fear, health and safety risks and corruption that existed pre-1995.

Recent outbreaks of corrupt council officer activities in Parramatta and Willoughby are indicative of inadequate zoning options for the various scales and types of sex industry premises; combined with overly restrictive provisions where they are permitted.

Our specific concerns with the provisions for sex industry premises under the draft NSLEP 2010 and the draft NSDCP Section 6: Sex Services and Restricted Premises are as follows:

1. Draft North Sydney Local Environmental Plan (NSLEP) 2009

Home occupation (sex services) must be permitted as exempt development

While the draft NSLEP dictionary defines both sex services premises and home occupation (sex services) as legitimate land use options, it makes provision only for sex services premises being permissible development in the B3 Commercial Core and B4 Mixed Use zones. No provision has been made for home occupation (sex services) in any zones. It is not made clear whether Council has determined to specifically prohibit home-based sex workers across the LGA or if the failure to accommodate this land use in the same way as for other home occupations is an oversight.

It is important here to note that under no circumstances would it be safe or reasonable to require independent sex workers working from residential areas to submit to the development application process. The SSPPG note that there are no known advantages in requiring a DA from private sex workers, only disadvantages with particular regard to safety. It is also inequitable as there is no evidence that home based sex workers have any more impact on their neighbours than other home occupations such as accountants, massage therapists or town planners.

In fact recently the City of Sydney has conducted research that has led it to permit home occupations (sex services) as exempt developments right across the LGA in the draft *City of Sydney LEP 2011*, as follows:

Research undertaken by Council's Safe City Unit shows that home sex workers operate regardless of controls that prohibit them and usually with minimal impacts. Data indicates that a large number of home sex workers currently operate in the LGA and council records show a small number of complaints, mostly about a business in a residential setting rather than the nature of the business. By including home occupations (sex services) as exempt development they will be given the same status as other home occupations. This will continue the existing approach in the former South Sydney and Leichhardt areas and extend it to Central Sydney and Ultimo-Pyrmont.

[City of Sydney Planning Policy Sub-Committee 6/09/2010- File No: S048243]

One of the primary intentions of the 1995 sex industry reform was to eliminate the systemic corruption of the industry by the NSW Police. Trying to enforce a prohibition on home-based sex work within North Sydney LGA is unreasonable and unjustifiable and would unnecessarily increase the potential for corruption to re-emerge.

The Report of the Brothels Taskforce (2001) stated: "The identification of individual sex workers through the development application process is also contrary to the recommendations of the Legal Working Party of the Intergovernmental Committee on AIDS. Such requirements are also counter to the UN Declaration of Commitment on HIV/AIDS, 2001", (p.12).

RECOMMENDATION 1:

In order to accommodate the planning principle of equity, and avoid discriminating against sex workers to the greatest extent possible within the discriminatory confines of the Standard Instrument – Principal Local Environment Plan, NSLEP 2009 must be amended to permit home occupation (sex services) as exempt development across the LGA, in all zones where other home occupations are permitted.

2. Draft North Sydney Development Control Plan (NSDCP) 2010

Re: 6.1 Introduction – 12 month DA trial period is unreasonable and overly onerous

The imposition of a 12 month trial is unnecessary and inequitable. Applicant's require development certainty and usually spend many thousands of dollars in fit-out following development consent and many more thousands of dollars if they have had to take the matter to the Land & Environment Court. In the case of unlikely unacceptable amenity impacts, Council has at its disposal the Brothels Legislation Amendment Bill 2007 which provides sufficient safeguard against any genuine ongoing amenity impacts. In *Piao v Willoughby Council*, the Senior Commissioner refused to impose a time limited consent. In this matter the applicant opposed as unreasonable limiting consent to a period of 12 months. The Commissioner agreed that it is highly unreasonable and noted:

“The application involves building works including several new bathrooms...consent for 1 year would not justify the applicant committing itself to these costs. Moreover, a 1 year time limit would require the Council to assess the application again in 1 year. The Environmental Planning & Assessment Act 1979 requires the Council (and the Court) to assess the application thoroughly. A time limited consent seems to me an admission that the application has not been properly assessed”.

Furthermore, unscrupulous competitors or those opposed to sex industry development may use a trial process in an attempt to destroy the business and reputation through making scurrilous complaints.

RECOMMENDATION 2:

In order to accommodate the planning principle of equity, and avoid unreasonably discriminating against sex workers and industry operators, Council must delete all reference to trial periods and instead rely upon conditions of consent and plans of management as a means of monitoring the ongoing operations of approved sex services premises

Re: 6.1.4 Relationship to other documents – additional material

The most up to date resource “*Getting on Top of Health & Safety in the NSW Sex Industry*” produced by SWOP with a grant from WorkCover NSW is now widely used in the sex industry as a guide to occupational health and safety.

RECOMMENDATION 3:

We recommend that the resource “Getting on Top of Health and Safety in the NSW Sex Industry” be identified and recommended in the NSDCP as a best practice guide to health and safety in the NSW sex industry. This resource including a video component is available by contacting SWOP on 02 93194866

Re: 6.2. Locational Requirements

6.2.2 Provisions – P1

The draft DCP location criteria of 500m from any existing restricted premises and the requirement that SSP not be within 100m or within a direct line of sight of a place of worship, hospital, school (including a preschool), child care centre or other place frequented by children for recreational, cultural or similar activities, or community facilities coupled with permissibility of sex services premises in limited zones within the LEP could lead to a perceived prohibition of sex services premises in the North Sydney LGA. This would be contrary to the Restricted Premises Act (formerly the Disorderly houses (Amendment) Act 1995, and the Minister of Planning's subsequent directions.

In considering the cumulative impact of sex services premises, the former South Sydney Council solicitors advised that there was little case law on the cumulative impacts of restricted premises. In 1998 Council was involved in an appeal against their refusal with one of the issues being cumulative impacts on the character and identity of the neighborhood. The draft sex industry policy was raised in evidence. The Court held that in the absence of objective evidence to the contrary, the proposal would "not so adversely affect the amenity of the area as to warrant refusal and it would not cause the area to be perceived as a red light district so as to attract to the area anti or social persons".

A location survey to identify proximity and experience of existing sex services premises to another like use and the reality of genuine amenity impact complaints, may better inform the debate around cumulative impacts. Additionally, unlike the Kings Cross experience, (where brothels and other sex services premises are more readily identified by use of neon lights etc) from the exterior a typical suburban brothel, could not be distinguished from any other use for business purposes.

Additionally, design requirements can minimize the impact and presence in the locality and consequently will have no cumulative adverse effects on the area in which the uses are located. It is worthy of noting that the term "red light" does not determine a "district" but comes from the traditional use of red lights to identify the location of a brothel. As we know today, design requirements and conditions of development consent can prohibit the use of red lights, neon lights, flashing lights or other identifying features.

We draw your attention to the former South Sydney Council experience where sex services premises had and still do co-exist with residential uses some being directly adjacent to a residence without being the cause of amenity impacts or detrimental change in the character of the locale.

After the above exclusions, obtaining a suitable site within a currently permissible zone or in fact submitting a DA for an existing use that is permissible in the zone in which it inhabits and then pass the various amenity, safety and security, car parking and other performance criteria within the draft NSDCP, it would further eliminate candidate sites or existing uses. And, there would still remain the hurdle of the Development Application process.

Once again, from the exterior a typical suburban brothel could not be distinguished from any other use for business purposes and design requirements can minimize the impact and presence in the locality and consequently will have no adverse effects on the area in which it is located. For example, many brothels that won their case in the Land & Environment Court to operate in Marrickville have existed without complaint for over a decade.

In considering the real impact of sex services premises and with no hard evidence to suggest that they cause unacceptable amenity impacts, a merit assessment process should assess whether a proposed development would so adversely affect the

amenity of the area as to warrant refusal and this merit assessment must take into account the proposed development's design, appearance and plan of management.

In this regard, a well-designed suburban brothel cannot be distinguished from any other use for business purposes from the exterior and design and management can ensure no adverse impact on the neighbourhood in which it is located. Furthermore, there is sufficient safeguard against any genuine ongoing amenity impacts via the use amendments in law made by the *Brothels Legislation Amendment Bill 2007*.

RECOMMENDATION 4:

In the absence of evidence of negative amenity or social impacts and in order to accommodate the planning principle of equity, and avoid discriminating against sex workers and industry operators, Clause 6.2.2 P1 (a) and (b) must be deleted from the draft NSDCP. In the future the DCP should be augmented by a LGA wide review of the compatibility of existing sex services premises and their respective surrounding land uses including an assessment of actual genuine amenity impact complaints in order to provide a realistic location assessment tool that should then be included in the DCP in accordance with best practice

Re: 6.2. Locational Requirements

6.2.2 Provisions – P2

In *Perry Properties vs. Ashfield Council*, the Land and Environment Court found that no issues would arise from the close proximity of the proposed brothel to a bus stop. Furthermore, the core role of the Sex Services Premises Advisory Panel was to assist councils in land use planning for sex services premises and they recommend that DCP provisions can ensure that sex services premises are discreet so that children would, to all intents and purposes, be unaware of it, particularly as the activity occurs indoors. In addition, there is no evidence to suggest that the behaviour of clients attending a sex services premises poses a safety risk to children (part 2 of the SSPPG).

RECOMMENDATION 5 :

In the absence of evidence of negative amenity or social impacts, Clause 6.2.2 P2 must be deleted from the draft NSDCP

Re: 6.2. Locational Requirements

6.2.2 Provisions – P3

North Sydney Council has not provided any rationale to explain, nor evidence to justify why sex services premises are not permitted to have ground floor locations. Many other Councils in surrounding areas do not have this sort of restriction in place. Such a restriction denies the sexual and related rights of people with disabilities, including the right to gain access in a safe and dignified manner befitting their level of ability to the range of various scales and types of sex industry premises that exist within any given LGA, without experiencing discrimination or systemic barriers.

RECOMMENDATION 6:

In order to avoid discrimination and to address the need for premises to provide access for people with a disability, the draft NSDCP must be amended to support the location of sex services premises or parts of premises at ground floor level

Re: 6.2. Locational Requirements

6.2.2 Provisions – P4

There is no evidence or research to substantiate this requirement. Crime and anti-social behaviour occurs across our cities and in our suburbs daily and is an unfortunate fact of modern life, not dependent on the existence of a brothel. However, communities and businesses can implement strategies to optimize crime prevention through environmental design such as that found in a well designed sex services premises. In *Martyn v Hornsby Shire Council*, the Senior Commissioner in developing planning principles notes:

“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”.

Furthermore, sociological research shows that brothel owners/operators, sex workers and clients are generally indistinguishable from the general community and wish to remain so for personal, safety and privacy reasons, (*Perkins R. The Most Misunderstood Popular Business*. Submission to South Sydney Council Draft Brothels Policy 1995).

RECOMMENDATION 7:

In order to accommodate the planning principle of equity, and avoid discriminating against sex workers and industry operators, Clause 6.2.2 P4 must be deleted from the draft NSDCP. Design objectives contained in 6.3 provide sufficient safe guard for safety and security of staff and visitors

6.3. External Design of Premises

6.3.2 Provisions – P6

North Sydney Council has not provided any rationale to explain, nor evidence to justify why sex services premises must be located away from apartments and multi-unit dwellings. This clause is highly ambiguous and does not provide clear guidance to either proponents or the community and therefore cannot meet the aim of the EPA Act 1979 to achieve orderly and economic development of land. The term 'away' may be open to uncertain interpretation in implementation. This clause could be used to refuse applications and result in significant cost to proponents and ratepayers of North Sydney LGA

RECOMMENDATION check:

This clause must be deleted from the draft NSDCP provisions because it does not provide clear guidance to either proponents or the community on Council's expectations and therefore cannot meet the aim of the EPA Act 1979

Conclusion

Finally, we refer you to Chapter 6 of the SSPPG – '*Achieving Better Practice*' (pp.69-77), particularly '*6.5 Prohibitive and overly-restrictive approaches*' (p.72). We trust that after careful examination of this most relevant resource available, Council will take on board our recommendations which we believe represent the best practice options available under the current legislative and regulatory regime in NSW.

REFERENCES:

Armidale Dumaresq LEP 2008

Brothels Legislation Amendment Bill 2007

Chin, Sophia: 'Sex in the Suburbs', Bachelor of Planning Thesis, University of New South Wales, Sydney, 2007

City of Sydney Planning Policy Sub-Committee 6/09/2010, Item 2. *Draft City Plan Local Environmental Plan – Referral to Department of Planning for a Certificate Allowing Exhibition*

Disorderly Houses Amendment Act 1995

Draft City of Sydney LEP 2011

Draft North Sydney Local Environment Plan (NSLEP) 2009

Draft Development Control Plan (NSDCP) 2010, Part B Section 6 Sex Services and Restricted Premises

Explanatory Document to *DRAFT SYDNEY LEP 2011*

Harcourt, Egger & Donovan: 'Sex Work and the Law', *Review Sexual Health*, 2005, 2, *Health & Safety Guidelines for Brothels* (2001)

Martyn v Hornsby Shire Council [2004] NSWLEC 614

National HIV and STI Strategies – past and present

Newcastle LEP 2003

NSW Intergovernmental Brothels Taskforce Report

Parramatta City Council - corrupt conduct associated with regulation of brothels (Operation Pelion), Independent Commission Against Corruption, 2007

Perkins R. *The Most Misunderstood Popular Business*. Submission to South Sydney Council Draft Brothels Policy 1995).

Perry Properties Pty Ltd v Ashfield Council (No 2) [2001] NSWLEC 62

Piao v Willoughby City Council 2008 (NSWLEC 1407)

Report of the Brothels Taskforce (2001)

Restricted Premises Act 1943

Sex Services Premises Planning Advisory Panel (Minutes 2002-2004)

Sex Services Premises Planning Guidelines (2004)

Standard Instrument – Principal Local Environment Plan 2007

The Role of Local Government in Public Health Regulation, National Public Health Partnership 2002 Endorsed AHMAC March 2002

Willoughby City Council – alleged corrupt conduct of Council employee (Operation Churchill), Independent Commission Against Corruption, 2011