



BETTER REGULATION OFFICE

ISSUES PAPER

REGULATION OF BROTHELS IN NSW

September 2012

Written submissions due by Friday 12 October 2012

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Contents

EXECUTIVE SUMMARY	4
LIST OF QUESTIONS FOR CONSIDERATION	6
1. INTRODUCTION	8
1.1 Need for the review	8
1.2 Scope of the review	8
2. BACKGROUND	10
2.1 The size and structure of sex industry in NSW	10
2.2 Who is involved in the sex industry in NSW	12
2.3 Current regulatory framework in NSW	14
3. ALTERNATIVE REGULATORY APPROACHES TO SEX WORK	19
3.1 Regulatory approaches to sex work.....	19
3.2 Case studies	20
4. OBJECTIVES OF PROPOSED REGULATORY SYSTEM – WORKING DEFINITIONS.....	26
4.1 Protection of residential amenity	26
4.2 Protection of sex workers	27
4.3 Safeguarding public health	28
5. THE CURRENT NSW EXPERIENCE	29
5.1 Protection of residential amenity	29
5.2 Protection of sex workers	36
5.3 Safeguarding public health	40
6. POSSIBLE REFORM OPTIONS FOR DISCUSSION	41
6.1 Option 1: Improve the current regulatory system.....	41
6.2 Option 2: Introduce a registration system.....	42
6.3 Option 3: Introduce a licensing system.....	43
APPENDIX A. CURRENT REGULATORY ENVIRONMENT IN NSW	45
APPENDIX B. TIMELINE OF SIGNIFICANT EVENTS IN THE REGULATION OF THE SEX INDUSTRY IN NSW	51
APPENDIX C. SUMMARY OF AUSTRALIAN SEX INDUSTRY LAWS	54

EXECUTIVE SUMMARY

The NSW Government has committed to improving the regulation of brothels and agreed that the objectives of the proposed regulatory system are the protection of residential amenity, protection of sex workers and safeguarding public health. The Department of Premier and Cabinet (via the Better Regulation Office) has been asked by the Government to develop reform options to achieve these objectives.

This Issues Paper serves as the basis for consultation with stakeholders on the evidence base for understanding the sex industry in NSW and on possible options for reform. The review uses the term 'sex services premises', rather than brothels, in order to capture all venues that habitually provide sex services – ranging from private dwellings where sex work is carried out by individual sex workers to large premises operating as commercial businesses.

The Issues Paper consists of six chapters.

- Chapter 1 introduces the need for, and scope of, the review and the consultation process.
- Chapter 2 describes the sex industry in NSW, covering size and structure, participants, and the current regulatory framework for sex services premises.
 - There are around 10,000 sex workers in NSW, with 60 per cent working in commercial sex services premises and the remainder (including most male sex workers) working privately or on the streets.
 - A number of government departments and local authorities regulate and provide services to the sex industry, including local councils, the NSW Ministry of Health, WorkCover NSW and Police. Peer support and outreach programs provide active assistance to sex workers.
 - Sex services premises are regulated in much the same way as any other business, including with regards to setting up, operating, and closing down a premises.
- Chapter 3 discusses the main approaches that have been adopted in Australia and overseas to regulate the sex industry and presents case studies on four different regulatory regimes.
 - Sweden – criminalisation of the client.
 - The Australian Capital Territory – legalisation through registration.
 - Victoria – legalisation through licensing.
 - New Zealand – decriminalisation with controls.
- Chapter 4 proposes working definitions for the objectives of the proposed regulatory system. In summary:
 - Protection of residential amenity: The location and operation of sex services premises should not have undue negative environmental, social or economic impacts upon residents in the local area. Relevant considerations regarding impact may include the compatibility of the land for use as a sex services premises, and public health and safety issues.
 - Protection of sex workers: Sex workers should not be unduly exposed to physical or mental harm while undertaking their work, and should feel empowered to undertake actions that assist with or enhance their protection.

- Safeguarding public health: Sex workers, clients and other members of the community should have low rates of sexually transmitted infections (STIs), including HIV and AIDS.
- Chapter 5 considers the current regulatory system in NSW compared to each of the objectives, drawing on available evidence and specific examples. Key highlights from this chapter include:
 - Councils have adopted a range of approaches to regulate sex service premises in their local area. Many councils rely on location-based restrictions to limit such premises to commercial and/or industrial areas.
 - Despite being illegal, adult services advertisements regularly appear in newspapers.
 - Indoor environments are generally safer for sex workers because they are subject to a range of controls that reduce the likelihood of violence.
 - International reports suggest that Australia is primarily a destination country for victims of trafficking, most of whom are women from South-East Asia.
 - STI rates among female sex workers in NSW are comparable to other sexually active women in the general population and condoms are used in almost all vaginal sex encounters.
 - Two studies undertaken in the past decade suggest that sex services premises have minimal impacts on residential amenity.
- Chapter 6 presents, at a high level, three options for reform.
 - Option 1: Improve the current regulatory system, including improving decision-making in planning for sex services premises and improving the sharing of information between NSW regulators. This option might equally be relevant for adoption as part of registration and licensing options.
 - Option 2: Introduce a registration system for owners and operators of commercial sex services premises. The register could be maintained by a community-based peer outreach body or by a Government agency.
 - Option 3: Introduce a licensing system for owners and operators of commercial sex services premises. The licensing authority, in determining suitability for a licence, would consider: whether the applicant is a fit and proper person; whether it is in the public interest for the licence to be granted; and whether appropriate arrangements have been made to ensure the health, safety, and welfare of sex workers and clients.

The Issues Paper does not analyse the potential impacts of the proposed options as the purpose of the consultation process is to gather evidence, information and perspectives from stakeholders to help inform the development of possible reforms for the Government's consideration. Stakeholders are also welcome to propose an alternative regulatory model for consideration.

LIST OF QUESTIONS FOR CONSIDERATION

A series of questions are raised throughout this Issues Paper where the Review Team is, in particular, seeking input from stakeholders. Wherever possible, stakeholders are asked to explain their reasons and provide specific examples or evidence. Stakeholders are welcome to propose an alternative regulatory model for consideration.

Objectives of proposed regulatory system (Chapter 4)

- How would you alter the working definitions that we have proposed for the Government's objectives for the regulation of sex services premises, relating to protection of residential amenity, protection of sex workers, and safeguarding public health?

The current NSW experience (Chapter 5)

5.1 Protection of residential amenity

- Do you have any evidence about sex services premises' impact on residential amenity?
- Do you have any information about whether councils treat sex services premises differently to other businesses with similar amenity impacts?
- Are there any justifications for councils to treat sex services premises differently to other businesses with similar amenity impacts?
- When considering applications for sex services premises, should councils use only evidence-based approaches that rely on verifiable criteria about possible amenity impacts? Why or why not?
- Should the principles outlined in the Sex Services Premises Planning Guidelines be incorporated into Government policy?
- What would be the advantages or disadvantages of requiring councils to permit sex services premises in their local area?
- What would be the advantages or disadvantages of the State placing restrictions on the location of sex services premises?
- What would be the advantages or disadvantages of repealing the current advertising restrictions on the sex industry?

5.2 Protection of sex workers

- Do you have any information about trafficking or organised crime more broadly and its association with the sex industry?
- Do you have any information that can contribute to the Review Team's understanding about the issues that impact on sex worker protection?
- Do you have any information that may help compare issues affecting sex worker protection across States and Territories?

- Do you have any information about whether crime is relatively more prevalent in the sex industry compared to other businesses, taking account of the circumstances of sex businesses (such as whether they are operating at night)?

5.3 Safeguarding public health

- Do you have any information that may help to explain the level of health outcomes associated with the sex industry in NSW?
- Do you have any information that may help compare public health outcomes across States and Territories?

Possible reform options (Chapter 6)

- Do the different regulatory regimes in NSW, Victoria, Queensland and the ACT have any impacts on sex services premises and communities in NSW towns on either side of relevant borders?

6.1 Option 1: Improve the current regulatory system

- What opportunities are there to ensure an improved and more consistent planning approach for sex services premises across local government?
- Do you have any information about whether the current level of enforcement of the sex services industry is proportionate to the risk involved?
- Do you have any information about how regulators could improve their compliance and enforcement activities in relation to sex services premises?
- Do you have any information about how regulators associated with the sex industry could improve their ways of working together?

6.2 Option 2: Introduce a registration system

- If there were a registration system for sex services premises, do you have any information about whether the relevant businesses would choose to register?
- Do you have any information about who should have access to a register of sex services premises?

6.3 Option 3: Introduce a licensing system

- Do you have any information about the likely effectiveness of a sex services premises licensing system, particularly with regards to sex worker protection?
- Which of the options for regulating sex services premises would best meet the Government's objectives for the proposed regulatory system (protection of residential amenity, protection of sex workers and safeguarding public health)? Please advise your reasons and highlight any impacts on specific types of sex services business such as home-based sex work and street-based work.

1. INTRODUCTION

1.1 Need for the review

The NSW Government has committed to improving the regulation of brothels. This is due to concerns about a large number of unapproved ('illegal') brothels in NSW and to reduce and/or prevent crime and corruption. The Government has agreed that the objectives of a new regulatory system are the protection of residential amenity, protection of sex workers and safeguarding public health, and that the intention is not to target sex workers or their customers.

The Department of Premier and Cabinet (DPC, via the Better Regulation Office) has been asked to develop options to improve the regulation of brothels in NSW. DPC is being assisted in its work by an inter-agency working party overseen by the Special Minister of State, the Hon Chris Hartcher MP. In developing options, DPC has been asked to:

- examine the current sex worker industry in NSW and consider which elements should be included in the regulatory system, noting that single sex workers operating from home will not be captured;
- consider, and make recommendations to maintain, the high level of public health outcomes currently being achieved in NSW across the sex industry;
- consider the elements of the regulatory and licensing scheme for tattoo parlours when established to identify if there are any features of that scheme which could be considered in the context of regulating the brothel industry;
- consult with key stakeholders including representatives of the sex worker industry and health professionals, and other interested parties as part of the process for developing regulatory options; and
- examine the interrelationship between any proposed NSW legislation and other jurisdictions to ensure that there are no unintended negative consequences on towns either side of relevant borders.

This Issues Paper provides information concerning the regulation of sex services premises (in NSW and other key Australian and international jurisdictions), explores the objectives of the proposed regulatory system and considers the current system in NSW compared to the Government's three objectives, and outlines a number of possible options for reform. The paper does not analyse the potential impacts of the possible options as the purpose of the consultation process is to gather this evidence.

The Issues Paper serves as the basis for consultation with stakeholders. Stakeholders are invited to make written submissions on specific questions raised in the Issues Paper as well as any other matters they may wish to canvass, and also have an opportunity to discuss their views in person with the Review Team. This input will help inform the options put to the Government for consideration.

1.2 Scope of the review

Sex work occurs across cultures and political systems around the world and is often referred to as 'the world's oldest profession'. In NSW the sex industry is decriminalised, which means that sex work, running a sex industry business, being a sex worker and purchasing sex services are legal. It

does not, however, mean that the sex industry is unregulated. Rather, the sex industry in NSW is subject to the same kinds of controls and regulations which govern the operation of other businesses, with similar aims of ensuring that outcomes from the industry are not detrimental to society as a whole.

Like for any other industry operating in NSW, the Government has a responsibility to ensure the regulations and controls for the sex industry provide for a safe environment for clients and workers, meet community expectations, and allow businesses to conduct their affairs without the burden of unnecessary and onerous regulation. This review will consider the regulatory framework that could apply to the sex industry in NSW, within the context of sex work remaining legal. In particular, the review will focus on the regulation of sex services premises, which are defined as premises where 'sex work' occurs habitually or has been used for that purpose and is likely again to be used for that purpose.

As recommended by the *Sex Services Premises Planning Guidelines* prepared by the Sex Services Premises Planning Advisory Panel in 2004, the term 'sex services premises' is used in this review as it enables a distinction between the type and scale of premises involving sex work, ranging from dwellings where sex work is carried out by individual sex workers to large premises operating as commercial businesses. Sex services premises may include:

- commercial sex services premises: small (2-4 working rooms), medium (5-10 working rooms) or large-scale (10-20 working rooms) premises;
- home businesses: a resident private sex worker who works in a flat or house or rented residence;
- massage parlours: premises where sex services are offered in addition to massage services; or
- safe houses for street sex workers: premises where rooms are rented on a short-term basis to sex workers or their clients for the purpose of providing sex services.

In addition, any other venues that habitually provide sex services on the premises are considered a 'sex services premises'.¹

The sex industry in NSW consists of a variety of premises and services established to meet the different needs of clients. Sex workers make choices about which parts of the industry they will work in and their decisions are affected by the incentives provided by the regulatory environment. Thus, although focused on the regulation of sex services premises, the review will consider the possible impacts that such regulation may have on other parts of the sex industry (for example, street-based work), including how it may shift the supply of sex services and the subsequent implications for public policy outcomes.

Where appropriate, the review will consider approaches adopted in other key Australian and international jurisdictions for opportunities to improve NSW's regulatory framework. In proposing reform options, this review will make it clear how the laws would be enforced under each option.

¹ Sex Services Premises Planning Advisory Panel (2004), *Sex Services Premises Planning Guidelines*, October 2004, available at http://www.scarletalliance.org.au/library/ssppg_04.

2. BACKGROUND

2.1 The size and structure of sex industry in NSW

NSW has an open and diverse sex industry, with female, male and transgender sex workers providing sexual services in a variety of settings. The Sex Workers Outreach Project (SWOP) estimates that there are approximately 10,000 sex workers in the whole of NSW, although some researchers have suggested the number is likely lower than this.² Of these, around 60 per cent work in commercial sex services premises and the remaining 40 per cent (including most male sex workers) work privately or are street-based.³ The Review Team understands that some workers tend to work in multiple parts of the sector.

The most recent and comprehensive research available to the Review Team on the sex industry in NSW comes from a study undertaken by the Law and Sexworker (LASH) team. Between 2007 and 2008, the LASH team conducted a comparative study of the health and welfare of female sex workers in three Australian capital cities (Sydney, Melbourne and Perth) to determine if the various legislative approaches across Australia were associated with different outcomes for sex workers. The study focused on urban brothel-based female sex workers (for comparability reasons and because such women provide the bulk of commercial sex services in Australia); hence it only provides data for a portion of the sex industry covered by this review.

The information in this section is largely drawn from a report compiled by the LASH team for the NSW Ministry of Health (the LASH results for Melbourne and Perth are forthcoming).⁴

Brothel numbers and locations

Commercial sex services premises are located throughout Sydney, Wollongong, Newcastle, regional cities and in many rural towns. Within Sydney there is a heavy concentration of sex premises in the metropolitan area, with other clusters occurring around major commercial centres such as Parramatta and Liverpool.

The LASH team confirmed that there were at least 101 'brothels' (possibly as many as 200) operating within 20 kilometres of Sydney CBD. Of the 74 brothels visited by LASH data collectors, two-thirds were located in commercial or mixed-use zones, 13 per cent were in industrial zones and 19 per cent were in residential areas. The study did not try to establish the planning status of these brothels.

Most of the brothels visited by the LASH team were relatively small establishments. There was an average of seven sex workers per brothel, with about four workers employed on day shifts and up to six during evening shifts. Brothel sex workers each work on average about 24 hours per week and see approximately 15 clients in that time.

² Donovan, B., Harcourt, C., Egger, S., Watchirs Smith, L., Schneider, K., Kaldor, J.M., Chen, M.Y., Fairley, C.K., Tabrizi, S. (2012), *The Sex Industry in New South Wales: A Report to the NSW Ministry of Health*, Kirby Institute, University of New South Wales, Sydney.

³ Sex Services Premises Planning Advisory Panel (2004) page 12.

⁴ Donovan et al.

Demographics and numbers of sex workers

It is difficult to determine the exact number of sex workers in NSW at any given time. Research shows that, even where sex work is decriminalised, the pervasive social stigma associated with such work means sex workers are unlikely to be open about working in the sex industry, even with family and friends, as it can have implications for family relationships, custody of children, job applications outside of the sex industry, and credit or loan applications.⁵

Overall, the LASH research suggests that there are approximately 1,000 female sex workers working in brothels within 20 kilometres of Sydney CBD. Private sex workers, street-based sex workers and escorts (including male and transgender sex workers) are estimated to add between 2,000 and 3,500 to this total.

In the LASH sample of 201 women, sex workers were aged between 18 and 60 years, with a median age of 31 years. Two-thirds were from Asian or other non-English speaking countries and three were indigenous Australians (Table 1).

Table 1: Country of birth of sex workers, LASH sample (n=201)

Characteristics	No.	%
Country of birth		
Australia	55	27.4
New Zealand	10	5.0
Other English speaking	2	1.0
China	42	20.9
Thailand	35	17.4
Other Asian	30	14.9
Western Europe	18	9.0
Other non-English speaking	9	4.5
Aboriginal/Torres Strait Islander		
Yes	3	1.5
No	187	93.0
Unknown/No response	11	5.5

Information from SWOP indicates a diversity of backgrounds and life stages of sex workers. The average (mean) age of sex workers in NSW is 26, around 16 per cent are currently students, around 23 per cent are married, and a significant number have children who they are supporting. Workers in private situations tend to be older than street or parlour workers, and are usually experienced sex workers who have chosen to work independently after years of working in commercial sex services premises.⁶ According to ACON (formerly the AIDS Council of NSW), the average period spent in the sex industry is about 2.5 years.⁷

⁵ Quadara, A. (2008), *Sex workers and sexual assault in Australia: Prevalence, risk and safety*, Australian Centre for the Study of Sexual Assault, Issues Paper No.8, page 2.

⁶ Sex Services Premises Planning Advisory Panel (2004) page 12.

⁷ Cited in Quadara (2008) page 2.

Health of sex workers

Most LASH respondents (83 per cent) reported that they underwent regular sexual health checks; of these, almost two-thirds reported having sexual health checks at least every six months. Fifty-three percent of sex workers in Sydney reported that they usually attended a public sexual health clinic for checkups.

Condom use is over 99 per cent and sexually transmitted infection (STI) rates are low. Among the 140 LASH participants tested for four common STIs, the prevalence of these conditions was at least as low as would be found in women in the general population.

Clients of sex workers

Clients of sex workers come from a diversity of ethnic and cultural backgrounds. Clients are primarily male, and married or in stable relationships. Research indicates that 50 per cent are between 26 and 40 years of age and a large proportion are middle aged or elderly. Around 40 per cent have children. Of all married clients, over half have been married for over 10 years.

NSW men are infrequent consumers of commercial sex services. In a representative sample of Australian men aged 15 to 59 years in 2001 to 2002, only 2.3 per cent of NSW men reported paying for sex in the past year. This was similar to Australia overall and lower than most countries.

2.2 Who is involved in the sex industry in NSW

The participants in the sex industry in NSW include owners and managers of sex services premises, workers, clients, regulators, health and outreach service providers and the community.

The main government departments and local authorities that regulate and provide services to the sex industry, and the areas they are responsible for, are summarised below.⁸

Local councils

Responsible for:

- developing, administering and compliance checking of planning policies for local sex services premises (for example, by preparing planning controls for brothels and other sex services premises via Local Environment Plans, Development Control Plans, or other specific council policies);
- accepting, advertising and deciding on development applications from sex services premises (noting that applicants can appeal council decisions to the Land and Environment Court); and
- administering food safety and environmental health policies.

NSW Ministry of Health

Responsible for:

- promoting awareness of HIV and AIDS and other STIs;
- providing a range of sexual health services;

⁸ The list is largely drawn from SWOP (2010), *Sex Industry Legal Toolkit*, pages 59-61.

- investigating complaints related to public health issues in sex services premises (for example, a client not being informed of the risk of contracting an STI from an infected sex worker before intercourse takes place); and
- taking action, if needed, under the *Public Health Act 2010*.

WorkCover Authority

Responsible for:

- ensuring compliance in respect of work, health and safety legislation;
- the administration of workers compensation/injury management legislation;
- the provision of advice, education and guidance material to assist businesses to meet their workplace safety and injury management obligations;
- the inspection of workplaces and investigation of workplace incidents; and
- where necessary, issuing penalties and undertaking prosecutions in respect of breaches in the legislation.

NSW Police Force

Responsible for:

- the areas where street-based sex workers may solicit and work;
- prosecuting employers of underage sex workers;
- prosecuting crimes that may occur in a sex work setting (for example, harassment, sexual servitude or sexual assault); and
- assisting other regulators in conducting compliance visits.

Australian Federal Police

Responsible for:

- enforcing anti-trafficking laws; and
- helping other Commonwealth regulators with investigations.

Department of Immigration and Citizenship

Responsible for:

- visas and giving permission to non-Australians to work.

General requirements

As with any other business, owners and operators of sex services premises and workers must also comply with laws concerning tax, social security, anti-discrimination and liquor licensing.

Other groups involved in the sex industry in NSW include Scarlet Alliance and SWOP, described below.

Scarlet Alliance

Scarlet Alliance is the national peak sex worker organisation in Australia. Scarlet Alliance works towards sex worker rights (legal, health, industrial and civil) and uses health promotion approaches (such as encouraging the implementation of safe sex practices) to achieve these rights.

The tools Scarlet Alliance recognises as best practices include peer education, community development, community engagement and advocacy. Scarlet Alliance membership includes State-based sex worker organisations across Australia.

Sex Workers Outreach Project

SWOP was established by the former NSW Health in 1990 as a project of the former AIDS Council of NSW (now ACON), and is funded predominantly by the NSW Ministry of Health. The project aims to minimise the transmission of STIs and HIV and AIDS in the NSW sex industry, as well as providing a range of health, safety, support and information services for sex workers, management, clients and partners of sex industry workers.

SWOP runs various health promotion programs and provides outreach to sex industry workplaces. It also works with sex industry owners and operators to encourage the acceptance and maintenance of safe sex practices and other forms of workplace health and safety. Services provided by SWOP are confidential and free of charge, and extend to women, men and transgender sex workers in NSW. SWOP seeks to reach sex workers in commercial sex services premises, home businesses, those on the street, in bondage and discipline premises, strip clubs and other areas where commercial sex may be available in NSW.

2.3 Current regulatory framework in NSW⁹

In light of the 1995 Wood Royal Commission evidence showing a clear nexus between police corruption and the operation of brothels, NSW sex industry laws were amended in late 1995 to remove the basis for closing a brothel which was not otherwise disorderly. In permitting well-run brothels to operate, the amendments closed off a potential opportunity for corrupt conduct on the part of police and reduced incentives for sex workers to solicit in the streets.

Prior to the 1995 changes all brothels were considered to be 'disorderly houses' and could be closed down.¹⁰ Such laws, it was considered, enabled police corruption and even orderly, well-run brothels could be closed and the sex workers could be forced onto the streets. In introducing the changes into the Parliament, the then Minister for Police stated that street work was undesirable as it could increase the safety risks to sex workers, impede access by health workers and social service providers due to the difficulties of maintaining regular contact with transient workers, and create amenity concerns in local areas.¹¹

⁹ This section is largely drawn from NSW Government (2001), *Final Report of the Brothels Taskforce*, October 2001; Smith, S. (1999), *Regulation of Prostitution: A Review of Recent Developments*, Briefing Paper No 21/99, NSW Parliamentary Library Research Service; and SWOP (2010).

¹⁰ In 1988, the Criminal Court of Appeal held in the *Sibuse v Shaw* case that a brothel was a disorderly house regardless of whether those premises were 'disorderly' in the ordinary sense of the term. This meant that police could seek an order from the Supreme Court that any premises operating as a brothel be closed down merely because the premises were being used for that purpose.

¹¹ Whelan, P., *Disorderly Houses Amendment Bill: Second Reading*, 20 September 1995, Hansard.

The *Disorderly Houses Amendment Act 1995* legalised brothels and living off the earnings of a prostitute. The Act also amended the *Summary Offences Act 1988* and *Crimes Act 1900* to abolish the common law offence of keeping a common bawdy house or brothel and related common law offences. With the passage of the legislation, operating a brothel became a legitimate commercial land use subject to approval under planning laws in much the same way as any other business. Local councils became the determining authority of where such premises could be located and well-run brothels were no longer the concern of police.

The key pieces of State legislation now governing the operation of the sex industry in NSW are the: *Environmental Planning and Assessment Act 1979*; *Restricted Premises Act 1943*; *Summary Offences Act 1988*; *Crimes Act 1900*; *Public Health Act 2010*; and *Work Health and Safety Act 2011*. The remainder of this section briefly summarises what these laws mean for setting up, operating and closing down a sex services premises. More detail on these laws is included at Appendix A. A timeline of significant events in the regulation of the sex industry in NSW is included at Appendix B.

Setting up a sex services premises

Local councils are responsible for deciding the number and location of sex services premises in their area, utilising their powers under the *Environmental Planning and Assessment Act 1979*. Planning regulations for the sex industry may be contained within Local Environment Plans (LEP) or specific Development Control Plans (DCP). Some councils have specific planning policies for sex services premises and others use the same policies for all commercial businesses.

Former NSW Governments have required that councils permit sex services premises as a land use somewhere in their local government area (for example, councils were advised in July 1996 that the former Minister for Planning did not support the blanket prohibition of brothels throughout a local government area as this was contrary to the intention of the 1995 legislative changes¹²). Councils often limit where such premises can be located, for example by restricting them to commercial and/or industrial areas or prohibiting them from operating in residential zones or close to other sensitive land uses such as schools and places of worship. Detailed guidelines for councils about planning for sex services premises (the *Sex Services Premises Planning Guidelines*) were released by the Sex Services Premises Planning Advisory Panel in 2004 but were not formally endorsed by the former Government (see section 5.1 for further details).

Sex services premises must comply with the relevant local council's planning policies and may need to make a development application (DA) to council for permission to operate the business. Sex services premises with more than two sex workers usually require a DA but planning controls for smaller premises vary between councils.

Councils are required to consult with affected residents and businesses on a DA, and must assess the DA according to the following broad criteria outlined in the *Environmental Planning and Assessment Act*:

- the controls of any LEP or DCP;
- the likely impacts of the development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality;

¹² Sex Services Premises Planning Advisory Panel (2004) page 19.

- the suitability of the site for the development;
- any submissions made by the public; and
- the public interest.

Under current legislation, while the Environmental Planning and Assessment Act allows the social impact of a proposal to be taken into account when the DA is being assessed, if a brothel applicant satisfies the planning criteria there is no opportunity for councils to include moral considerations in their determination of a DA (this issue is considered further in section 4.1). If the council refuses a DA, the applicant is able to appeal to the Land and Environment Court. In this case, the Court will rehear the case in its entirety, and make a determination which will replace the council's decision. The Court requires clear evidence of a detrimental impact on amenity.

Development approval is given to the building or land, not to the operator of the sex services premises.

In July 2012, the NSW Government set out its vision for a new planning system for NSW, with the focus on up-front strategic land use planning to add certainty to the development assessment process. The Green Paper, *A New Planning System for NSW*, outlined the Government's agenda to depoliticise the planning system and restore independent, transparent and merit-based decision making:

The NSW Government strongly supports a fundamental shift in the planning system that will see decision making on development applications streamed to appropriate, independent, and expert decision makers.¹³

Such an approach would tend to favour an evidence-based approach to planning decisions.

Operating a sex services premises

Proprietors (that is, owners and operators) of sex services premises have a responsibility to ensure the safety and health of sex workers, other employees, clients and visitors to the premises. The *Health and Safety Guidelines for Brothels* issued by WorkCover NSW and NSW Health outline the required acceptable standards for a safe and healthy work environment, including that proprietors must:

- have a current workers compensation insurance policy;
- provide for the safe use, handling, storage and cleaning of equipment beds, bondage equipment and apparatus;
- provide adequate information, instruction, training and supervision for all employees;
- provide and maintain safe systems of work such as security systems (for example panic buttons) and personal protective equipment (including condoms, dams, gloves, water-based lubricants and other equipment such as linens and towels); and
- maintain places of work under their control in a safe condition and provide and maintain safe entrances and exits to the workplace.

¹³ NSW Government (2012), *A New Planning System for NSW – Green Paper*, July 2012, page 48.

Currently in NSW it is an offence under the *Summary Offences Act 1988* for anyone to advertise sex services, as or for a sex worker or a sex industry business. The law prohibits the publication of advertisements or putting up of signs advertising sex services.

Closing down a sex services premises

The operation of a sex services premises is 'illegal' under the *Environmental Planning and Assessment Act 1979* if it is operating:

- without development consent in an area where consent is required under the relevant planning instrument;
- in an area where sex services premises are prohibited under the relevant planning instrument¹⁴; or
- in contravention of the conditions of a development consent.

If a sex services premises already has council approval but is operating outside the terms of the development consent—for example by operating for longer than the approved hours—council can ask the owner to fix the problem or face further action. Council action can include penalty notices, orders to comply with the development consent, orders to cease using the premises as a sex services premises (a 'brothel closure order'), and withdrawal of the development consent.

If an operator fails to comply with a brothel closure order, council can apply to the Local Court or the Land and Environment Court for a utilities order (under section 121ZS of the *Environmental Planning and Assessment Act*). This means that water, gas or electricity to the premises may be cut. A utilities order can only last three months and cannot be made on residential premises.

Local councils can seek to close down sex services premises if they negatively affect the local area, even if operating lawfully under the *Environmental Planning and Assessment Act*. This extra layer of enforcement available to councils to regulate sex services premises is over and above that available for all other land uses. A council can apply to the Land and Environment Court for an order, under the *Restricted Premises Act 1943*, that a premises cease to be used as a sex services premises if it has received sufficient complaints about the business from:

- residents who live in the area;
- people who work in the area; or
- people who themselves or whose children regularly use facilities in the area.

The council's application must state the reasons why the premises should be closed, and must be based on one or more of the following criteria under section 17 of the *Restricted Premises Act*:

- the sex services premises is operating near or within view from a church, hospital, school or any place regularly attended by children for recreational or cultural purposes;
- the operation of the sex services premises causes a disturbance in the neighbourhood relative to what other businesses are doing and the hours they operate;
- there is insufficient off-street parking (if appropriate);
- there is not suitable access to the sex services premises;

¹⁴ Unless the premises can be demonstrated to have 'established use rights' which pre-date the *Environmental Planning and Assessment Act 1979*.

- the operation of the sex services premises causes a disturbance in the neighbourhood because of its size and the number of people working in it;
- the operation of the sex services premises interferes with the amenity of the neighbourhood.

The possible orders made by the Land and Environment Court under the Restricted Premises Act are that:

- an owner or occupier is not to use or allow the use of premises as a brothel;
- the owner or occupier not use or allow the use of the premises for 'related sex uses'; or
- for a maximum of six months after the order is made, any DA concerning the use of the premises as a brothel or for 'related sex uses' may be suspended or altered (regardless of the whether the proprietor has changed).

Before ordering a sex services premises be closed, the Land and Environment Court must consider the matters under section 17 (listed above) and any other matters it considers relevant. The Land and Environment Court can grant an order on any premises used as a sex industry business.

A sex services premises may also be closed down by the Supreme Court, upon application by police, if any of the 'disorderly' conditions in Part 2 of the Restricted Premises Act have been satisfied, for example if liquor or drugs are unlawfully sold on the premises and are likely to be sold or supplied again. Following the *Disorderly Houses Amendment Act 1995*, a disorderly house declaration cannot be made solely on grounds that the premises is a brothel.

3. ALTERNATIVE REGULATORY APPROACHES TO SEX WORK

There are three main approaches that have been adopted in Australia and internationally to regulate the sex industry. Broadly, these may be classified as: (i) criminalisation of the sale and/or purchase of sex services; (ii) legalisation through licensing or registration of sex workers and sex services premises; and (iii) decriminalisation of sex work. This chapter discusses these approaches and presents case studies on the regulatory regimes in Sweden, the Australian Capital Territory (ACT), Victoria and New Zealand. A summary of Australian sex industry laws is included at Appendix C.

3.1 Regulatory approaches to sex work¹⁵

Criminalisation of the sale and/or purchase of sex services

The most common and traditional regulatory approach in which most forms of sex work and associated activities (such as soliciting, living off the earnings of sex work, brothel keeping and procurement) are illegal. This approach seeks to reduce or eliminate the sex industry altogether and is supported by those who are opposed to sex work on moral, religious, feminist or other grounds.

Within Australia, this is the approach currently operating in Western Australia¹⁶, South Australia and Tasmania.

Legalisation through licensing or registration of sex workers and brothels

Legalisation is where the sex industry is controlled by government, generally to keep it limited to certain areas where it will not offend the wider population. Under this approach, sex work is legal only under certain state-specified conditions, typically involving the licensing or registration of sex workers and sex services premises within zoned areas.

Licensing is seen as a way of excluding criminal and other unsuitable persons from owning, managing or working in the sex industry, and of enhancing government control over the number and location of sex industry premises. In addition, licences are often contingent upon health checks and appropriate workplace conditions. Businesses or workers without the necessary permits are subject to criminal penalties.

Within Australia, the sex industry has been legalised in Victoria, Queensland, the ACT and the Northern Territory.

Decriminalisation of sex work

Decriminalisation is where there has been a repeal of laws governing sex work and criminal offences and penalties relating to soliciting. Under this approach, there are no sex worker-specific regulations imposed by the state. Instead, the operation of the sex industry is subject to the same controls and regulations as those under which other businesses operate.

¹⁵ This section is drawn from Mossman, E. (2007), *International Approaches to Decriminalising or Legalising Prostitution*, Ministry of Justice, October 2007; Abel, G., Fitzgerald, L. and Brunton, C. (2007), *The Impact of the Prostitution Reform Act on the Health and Safety Practice of Sex Workers*, Report to the Prostitution Law Review Committee, University of Otago, November 2007; Harcourt, C., Egger, S. and Donovan, B. (2005), *Sex work and the law*, in *Sexual Health*, 2, 121-128; and Jordan, J. (2005), *The Sex Industry in New Zealand: A Literature Review*, Ministry of Justice, March 2005.

¹⁶ The Western Australian Government introduced the Prostitution Bill 2011 into the Parliament in March 2011 to prohibit all forms of sex work from residential areas and limit the number of permitted brothels to a small number of areas. A strict licensing scheme will apply for brothel operators and managers and self-employed sex workers. The current prohibition on street-based sex work is maintained. At the time of writing, the Bill has not yet passed into law.

Currently, NSW is the only Australian jurisdiction to have adopted a legal framework based on decriminalisation.

3.2 Case studies

Sweden—criminalisation of the client¹⁷

Sweden in 1999 became the first country in the world to prohibit the purchase, but not the sale, of sex services, thereby criminalising the client. The official Swedish view on the prohibition is that:

- sex work is an institutionalised form of male violence against women;
- it is physically and psychologically damaging to sell sex;
- there are no women who sell sex voluntarily; and
- gender equality cannot be achieved as long as men buy, sell and exploit women and children through prostitution.

Supporters of the Swedish model hope that by targeting the demand side of the market, they may reduce or eliminate the sex industry altogether.

To date, there is conflicting evidence about the impact of the Swedish laws. The official evaluation in 2010 found that: street-based sex work in Sweden's three main cities had been halved since the ban was introduced (from roughly 730 sex workers in 1998 to just under 300 in 2008); the prohibition had not led to street-based sex worker shifting methods of solicitation to the internet; and there was both increased support for a ban and a declining number of men who admitted to having purchased sex. However the official evaluation has been subject to severe criticism, with critics arguing it has an ideological basis and lacks scientific rigour.

Most observers suggest there has been a reorganisation of the sex industry in Sweden so that both sex workers and their clients are choosing less visible ways of making contact. This is seen as part of a general international trend of decreasing street-based sex work, with buyers and sellers of sex services now usually making contact with each other through other means (including using mobile phones and the internet, and in bars, restaurants and hotels). There have been few prosecutions in Sweden since the law has been in force, with it being difficult to prove the purchase of a 'temporary sexual relation' if denied by both parties. Most reports also conclude that the prohibition does not deter clients or affect their behaviour, with research finding that the decision about whether to purchase sex is generally linked to issues other than it being illegal.

There are also a number of reported, negative effects of the prohibition, in relation to both sex workers and their clients.

- Sex workers feel less trust in social authorities, police and the legal system. The prohibition prevents sex workers from seeking help and because they are less visible, sex workers are also more difficult for health and support services to reach.

¹⁷ This section is drawn from Dodillet, S. and Ostergren, P. (2011), *The Swedish Sex Purchase Act: Claimed Success and Documented Effects*, Conference Paper presented at the International Workshop: Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges, The Hague, 3-4 March 2011; Stridbeck, U. (2004), *Purchasing Sexual Services in Sweden and the Netherlands: Legal Regulation and Experiences*, abbreviated English version, October 2004; Bucken-Knapp, G. (2010), *Evaluating the Swedish Ban on the Purchase of Sexual Services: The Anna Skarhed Report*, Nordic Prostitution Policy Reform, 7 February 2010; and Skarhed, A. (2010), *Prohibition of the purchase of sexual services: An evaluation 1999-2008*, SOU 2010:49, English translation provided by the Swedish Institute.

- Street-based sex workers experience higher levels of vulnerability and are at greater risk of violence and pressure by clients to engage in unsafe sex practices.
- As they fear being arrested themselves, clients are less willing to assist in cases involving coercion, trafficking or underage persons involved in the sex industry.

The ACT—legalisation through registration¹⁸

The ACT in 1992 legalised sex work in private spaces and set up a series of regulations designed to protect sex workers and the public. The goals of the *Prostitution Act 1992* are to maintain public health, protect the health and safety of sex workers, limit the operation of sex services premises to prescribed locations in industrial areas, and eliminate the sexual exploitation of children.

Under the ACT registration model, members of the sex industry must be registered with the Office of Regulatory Services. Individuals who wish to register themselves or their business must provide contact information and pay a small fee each year. Persons who have been convicted of certain types of offences are prohibited from owning or operating a brothel. Disqualifying offences include assault, murder, sexual assault and involvement in child pornography and exploitation. As of February 2011, the register consisted of 11 commercial operators and 14 brothels and escort sole traders.

Sex workers employed in brothels and escort agencies are required to undergo mandatory testing for STIs. Infected sex workers are prohibited from providing or seeking sex services, while owners and managers must not allow an employee to work if infected. Some commentators have criticised the requirement for mandatory testing while others suggest this stance makes it easier for sex workers to resist pressure not to use a condom.

The *Work Safety (ACT Code of Practice for the Sexual Services Industry) Code of Practice* was introduced in 1999.¹⁹ The Code of Practice was developed by a collective of sex workers, police and health officials, and includes regulations on workplace cleanliness and safety and for the purchase and disposal of personal protective equipment such as condoms. The Code of Practice is enforced by WorkSafe ACT. During 2010 WorkSafe ACT conducted nine unannounced inspections and found a high level of compliance in the majority of sex services premises.

In 2010, the ACT Legislative Assembly Standing Committee on Justice and Community Safety launched an inquiry into the operation of the Prostitution Act. This was precipitated by the death of an underage sex worker from a drug overdose in a licensed brothel. In their submission to the inquiry, ACT Police suggested they did not view the sex industry “as a provenance of significant criminality in this jurisdiction”. Their submission suggested two factors for the low association between the sex industry and criminality in the ACT compared to other jurisdictions:

[F]irstly, the ACT’s decriminalisation of specific activities and the concomitant establishment of a regulated industry lessens the involvement of criminal entities in

¹⁸ This section is drawn from Canadian Library of Parliament (2011), *Prostitution: A Review of Legislation in Selected Countries*, November 2011; NSW Parliamentary Library Research Service (2011), *Regulation of brothels: An update*, November 2011; ACT Parliament (2012), *Inquiry into the Prostitution Act 1992*, report of the ACT Legislative Assembly Standing Committee on Justice and Crime Safety; and Submissions to the ACT Legislative Assembly Standing Committee on Justice and Community Safety: ACT Government, 22 March 2011; and ACT Police, 4 March 2011.

¹⁹ The *Work Safety (ACT Code of Practice for the Sexual Services Industry) Code of Practice* was replaced with the *Work Health and Safety (Sexual Services Industry) Code of Practice* in December 2011.

the industry. Secondly, the comparatively small size of the ACT sex industry enables more effective regulatory compliance and enforcement.

In other words, levels of crime are low because of decriminalisation and an industry that is small enough to enable effective enforcement activity.

Victoria—legalisation through licensing²⁰

Victoria is often referred to in the literature as a classic example of a legalised model. Brothel-based sex work and escort services are able to operate legally when they have obtained the correct permits. All other forms of sex work, including street-based work, are strictly illegal and subject to criminal offences and penalties.

In Victoria, a person must obtain a planning permit from the local council and a licence from the Business Licensing Authority (BLA) to legally carry out business as a 'Prostitution Service Provider'. Small (one or two sex workers) owner-operated brothels are exempt from the licensing regime but must apply for an exemption and are still required to obtain planning permits.

To be eligible for a Prostitution Service Provider licence, applicants must be over 18 years of age and not have been convicted of an indictable offence in the preceding five years or had a previous licence cancelled. Other circumstances in which the BLA must refuse a licence application include the person having an associate with a disqualifying offence within the preceding five years, and being insolvent or under administration.

The BLA provides notice of receiving a licence application to the relevant council, Victoria Police and Consumer Affairs Victoria, and by placing a newspaper advertisement inviting public submissions. In determining the suitability of an application, the BLA must consider whether the applicant is of 'good repute', has adequate financial resources and sufficient business ability to establish and maintain a successful business, and has made appropriate arrangements to ensure the health and safety of workers; and whether the proposed business structure is sufficiently transparent to enable all associates of the applicant to be readily identified. The BLA must not refuse an application only because the individual has been a sex worker.

Once a person has a licence from the BLA to be a Prostitution Services Provider, they must then apply for a planning permit from the relevant local council. Persons are restricted to the operation of one brothel venue, so the same person cannot establish a chain of brothels.

Brothels must be personally supervised either by the licensee or an approved manager at all times when trading. Each brothel manager must also have a licence, with application criteria similar to the Prostitution Service Provider licence.

There are concerns that Victoria's licensing system has resulted in a two-tiered sex industry, with a tightly controlled legal (licensed) sector operating alongside a large illegal (unlicensed) sector. There

²⁰ This section is drawn from Jordan (2005; Abel et al (2007); Pickering, S., Maher, J. and Gerard, A. (2009), *Working in Victorian Brothels: An independent report commissioned by Consumer Affairs Victoria into the Victorian brothels sector*, Monash University, June 2009; Parliament of Victoria (2010), *Inquiry into People Trafficking for Sex Work—Final Report*, Drugs and Crime Prevention Committee, June 2010; and Crofts, P., Maher, J., Pickering, S. and Prior, J. (2010), *Ambivalent Regulation: The Sexual Services Industries in NSW and Victoria – Sex Work as Work, or as Special Category?*, in *Current Issues in Criminal Justice*, Volume 23 Number 3, 393-412, March 2012.

were 95 licensed brothels in Victoria in 2010, and while the exact number of unlicensed brothels is unknown estimates range from under 70 to over 300.

The Victorian model is also criticised for discriminating against sex workers. Scarlet Alliance believes the Victorian model of sex industry regulation has 'deeply failed sex workers' and the sex industry in that state.

Sex workers in the licensed sector in Victoria came off with worse occupational health and safety and STI outcomes than sex workers in the fully criminalised industry in WA and in the decriminalised industry in NSW. Increased regulation hurts sex workers, increased surveillance, increased intervention in work places, increased work place visits, increased laws regulations and policies that are special to the sex industry, that people in other industries do not experience and that are not implemented in other industries – that is what discrimination looks like²¹

Critics also argue that Victoria's system discourages sex workers from setting up their own small brothels. The licensing requirements are one deterrent, as is the high cost of running a legal brothel or escort agency. For example, in 2010 the application fee for a brothel licence was \$3,999.50 and the annual licence fee was \$2,285.40 per year. Scarlet Alliance argues that "the regulations do not allow for the natural progression from sex worker, to small business operator, to brothel or escort agency operator, as it favours only people who are well resourced, who may not have the expertise nor be the best persons to run these businesses".²²

Street-based sex workers are also exposed to greater risk than brothel workers, in large part due to their criminal status. The absence of legal protection and their lack of peer and community support contribute to the difficulties they experience in negotiating safe sex. Researchers have also been disturbed by the number of women who are reluctant to report violent crimes, such as rape and assault, to the police due to perceptions of disconnection from the justice system through their illegal status.

New Zealand—decriminalisation with controls²³

New Zealand in 2003 became the first country in the world to decriminalise all forms of sex work. The objective, in letting sex workers and brothels come out into the open, was to create a regulatory framework that:

- safeguards the human rights of sex workers and protects them from exploitation;
- promotes the welfare and occupational safety and health of sex workers;
- creates an environment conducive to public health; and
- protects children from exploitation in relation to prostitution.

Although decriminalised, sex work was made subject to special provisions in addition to the laws and controls that regulate other businesses. In particular, the *Prostitution Reform Act 2003* (PRA) provides that:

²¹ Ms Elena Jeffreys, President, Scarlet Alliance, Meeting with the Victorian Drugs and Crime Prevention Committee, cited in Parliament of Victoria (2010) page 137.

²² Cited in Ministry of Justice (2008), *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003*, May 2008, page 91.

²³ This section is drawn from Ministry of Justice (2008); Jordan (2005); Canadian Library of Parliament (2011) and Bellamy, P. (2012), *Prostitution law reform in New Zealand*, Parliamentary Library Research Paper 2012/05, July 2012.

- *Health and safety requirements:* Operators of sex work businesses must adopt and promote safe sex practices. Sex workers and clients must also adopt safe sex practices.
- *Brothel operator certification system:* Every operator of a sex work business must hold a valid operator's certificate. Small owner-operated brothels (SOOBs) are deemed not to have operators and are therefore not required to hold a certificate (SOOBs are brothels of up to four sex workers where each individual sex worker retains control over their earnings).

The PRA attempts to address the issue of trafficking by denying immigration permits to anyone who intends to work in, invest in, or operate a sex industry business in New Zealand or who does so while living in New Zealand on a temporary permit or limited purpose permit.

Inspectors have the power to enter a premises believed to be a brothel at any reasonable time to ensure compliance with health laws and that the operation, sex workers and clients have adopted safe sex practices. Such practices include individuals involved taking all reasonable steps to ensure that condoms are used and employers making free condoms available. Operators must also provide health information to sex workers and their clients. Between 2004 and 2011, there were two prosecutions and two convictions under the PRA for a sex worker or client failing to adopt safe sex practices.

The Prostitution Law Review Committee's 2008 report on the impact of the PRA concluded that the sex industry had not increased in size during the five years the legislation had been in force and that, on the whole, "the vast majority of people involved in the sex industry are better off under the PRA than they were previously." The Committee found that 60 per cent of sex workers felt they had more power to refuse clients, and that sex workers were more willing to report incidents of violence to police (noting that the regulatory regime prior to the change was criminalisation). However, progress in some areas had been slow, with many sex workers still vulnerable to exploitative employment conditions and reports of some sex workers being forced to take clients against their will.

To be eligible for a brothel operator certificate, applicants must be over 18 years of age, be a citizen or permanent resident of New Zealand or Australia, and not have any disqualifying offences. Brothel operator certificates are granted and held by the Registrar of the Auckland District Court. Between 2004 and 2011, there were 914 applications granted and 21 refused, and 636 renewals granted and three refused.

Unlike in Victoria, a two-tier system of certified and uncertified (illegal) brothels does not appear to have developed in New Zealand. While compliance with the certification system is generally good, complaints have been made by brothel operators that it is too easy to get a certificate, that the reapplication process is inconvenient and time consuming, and that there is no ongoing monitoring to check that current certification is maintained. The Prostitution Law Review Committee examined these complaints in its 2008 report, with the majority of the Committee concluding the certification system has merit but that the current provisions require greater enforcement.

Under the PRA, territorial authorities are able to regulate the location of brothels (including SOOBs) and the signage and advertising associated commercial sex services. The Prostitution Law Review Committee expressed concern in 2008 that some local governments have attempted to force SOOBs to work in the same commercial or industrial areas as larger brothels. The Committee noted such

arrangements were impractical and may place sex workers working from SOOBs at greater risk of violence and/robbery as the areas are not well lit or as populated as the suburbs. The Committee recommended that SOOBs should be regulated in the same manner as any other home business.

4. OBJECTIVES OF PROPOSED REGULATORY SYSTEM – WORKING DEFINITIONS

The NSW Government has agreed that the objectives of the proposed regulatory system for sex services premises will be the protection of residential amenity, the protection of sex workers, and safeguarding public health. This chapter proposes working definitions for each objective.

4.1 Protection of residential amenity

The location and operation of sex services premises should not have undue negative environmental, social or economic impacts upon residents in the local area. Relevant considerations regarding impact may include, but not be limited to:

- the compatibility of the land for use as sex services premises given existing development (for example, the character of the neighbourhood);
- public health and safety issues, including unsafe or offensive behaviour in the locality (for example, violence);
- noise;
- traffic generation;
- access to parking; and
- aesthetics (for example, signage and advertising).

In other words, residential amenity is related to the same issues that would be considered for any proposed development in a locality. The impacts that are relevant are those that may be considered verifiable or objective (that is, evidence-based).

Moral issues

As a regulatory body, councils have a duty of care to ensure that sex services premises are appropriately located and designed, and that sex workers are treated in the same manner as any other group in the community. Operators of commercial sex services premises have a right to submit a DA to council for approval of their premises, to seek council advice on whether they may locate in the area, and to participate in planning processes. As with any applicant, operators of commercial sex services premises whose DA is refused by council can also appeal to the Land and Environment Court.²⁴

The Land and Environment Court has generally confirmed that offensiveness and morality are not relevant planning considerations, and that clear and objectively assessable evidence is required of the potential impact of a sex services premises on amenity. In *Liu, Lonza & Beauty Holdings Pty Limited v Fairfield City Council* (1996), the Land and Environment Court rejected the council's submission that community standards and views on the morality of sex services premises were a relevant social matter for the council to consider in determining a DA. The Court noted that matters of morality could not, of their own be assumed as 'public interest' matters:

The appropriate legal vehicle for any regulation of morality is the criminal law. In New South Wales both prostitution and brothel operations have recently been

²⁴ Sex Services Premises Planning Advisory Panel (2004) Appendix E.

“decriminalised”. It could not be in the public interest that local councils or this court now assume the mantle of moral arbiter.

However, the Court found that while morality was irrelevant, the demonstrable social effect of a particular brothel use was a relevant consideration under the Environmental Planning and Assessment Act.²⁵ Thus, while moral objections are in principle outside the scope of planning regulations, in practice “planning controls can be used to reduce impacts where moral objections are likely to carry most weight, such as locations near schools.”²⁶

4.2 Protection of sex workers

Sex workers should be protected while undertaking their work. This means that sex work should not unduly expose workers to physical or mental harm from, among other things:

- workplace injury;
- harassment, violence and sexual assault;
- trafficking²⁷ and sexual exploitation;
- drugs; and
- organised crime.

A corollary of having sufficient protections for sex workers is that they should feel empowered to undertake actions that assist with or enhance their protection, for example:

- seek support from health and outreach service providers;
- report crimes to Police;
- notify WorkCover of instances where their working environment places them at risk of work-related injury or illness, and/or the working environment does not conform to required acceptable standards; and
- access workers compensation for workplace injuries.

The definition about protection of sex workers does not cover protection from sexually transmitted diseases, which is covered below.

²⁵ Sex Services Premises Planning Advisory Panel (2004) page 20.

²⁶ Searle, G., Boydell, S., Crofts, P., Hubbard, P. and Prior, J. (2011), *The Local Impacts of Sex Industry Premises: Imagination, Reality and Implications for Planning*, Paper presented in Track 1 (Governance) at the 3rd World Planning Schools Congress, 4-8 July 2011, Perth, page 1.

²⁷ As defined in Article 3 of the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, trafficking in persons has three elements:

- (i) there must be an action by a trafficker in the form of recruitment, transportation, transfer, harbouring or receipt of persons;
- (ii) the action must be undertaken by one of the following means: force or threat of force or other forms of coercion, abduction, fraud, deception, abuse of power, abuse of a position of vulnerability, or giving or receiving payments to achieve the consent of a person having control over another person; and
- (iii) The action must be undertaken for the purpose of ‘exploitation’, a concept which includes “at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

Where the trafficking involves children (persons under 18 years), only two elements are required to fit the description: the action and the purpose of exploitation.

4.3 Safeguarding public health

Public health relates to sex workers, clients, and other members of the community having low rates of sexually transmitted infections, including HIV and AIDS. A key contributor to this outcome is safe sex practices.

Questions for consideration:

How would you alter the working definitions that we have proposed for the Government's objectives for the regulation of sex services premises, relating to protection of residential amenity, protection of sex workers, and safeguarding public health?

5. THE CURRENT NSW EXPERIENCE

This chapter considers how NSW's current regulatory system for sex services premises—described broadly in Chapter 2—fares in terms of achieving the three objectives outlined in Chapter 3. Each objective is considered in turn

5.1 Protection of residential amenity

To consider how well the NSW regulatory system protects residential amenity, this section first considers the data that are available about impacts (both verifiable and perceived). It then looks at how councils in NSW have approached planning for sex services premises. The section concludes by looking at State requirements that are specific to the sex industry and aim to protect amenity.

Do sex services premises affect residential amenity?

There is a paucity of evidence available about the impacts of sex services premises on residential amenity. However, two studies undertaken in the past decade provide some useful information.

Prior and Crofts undertook a random survey in 2010 of over 400 residents living in close proximity to commercial sex services premises in the City of Sydney and Parramatta council areas to provide data on the impacts, both positive and negative, of such premises on residents. In total, 43.1 per cent of respondents (including the majority of those surveyed in Parramatta) were unaware they lived within 400 metres of a sex services premises. Of the remaining 56.9 per cent of respondents who were aware of such premises, nearly half (48.2 per cent) believed the business had no overall impact on the local area, 24.1 per cent rated the impact positively and 27.7 per cent rated it negatively.²⁸

Table 2 shows the most common types of impacts identified by the respondents who were aware of sex services premises in the surrounding neighbourhood. Respondents were asked to rate each impact on a scale of -3 (very negative) to +3 (very positive). All types of effects, except noise, were assigned positive, negative and neutral values, revealing the diverse ways in which residents believe sex services premises affect surrounding neighbourhoods.²⁹ Negative impacts were felt most commonly late at night, on weekends, and for less than one hour.³⁰

The survey also showed that where impacts from sex services premises are perceived by residents, some types of other local businesses can have similar amenity impacts. In particular, 69 per cent of respondents who noted impacts from local sex services premises considered that local pubs/clubs or bars produced similar impacts. The main types of impacts identified were employment and crime, followed by lighting, anti-social behaviour, fear of crime, and safety and security.³¹

²⁸ Prior, J. and Crofts, P. (2012), *Effects of sex services premises on neighbourhoods: Residents, local planning and the geographies of a controversial land use*, *New Zealand Geographer*, 68, page 134.

²⁹ Prior and Crofts (2012) pages 135-137.

³⁰ Searle et al.

³¹ Searle et al.

Table 2: Type and value of impacts of sex premises impacts, (n=224)

Type of impact	Positive impact	Negative impact	Neutral impact
	n (% of 224)		
Sexual health	17 (7.6)	14 (6.3)	190 (84.8)
Anti-social behaviour	4 (1.8)	30 (13.4)	191 (85.3)
State of the neighbourhood	6 (2.7)	23 (10.3)	192 (85.7)
Safety and security	6 (2.7)	20 (8.9)	193 (86.2)
Parking and traffic	5 (2.2)	27 (12.1)	196 (87.5)
Crime	6 (2.7)	17 (7.3)	198 (88.4)
Fear of crime	3 (1.3)	18 (8.0)	201 (89.7)
Employment	13 (5.8)	9 (4.0)	201 (89.7)
Property values	5 (2.2)	18 (8.0)	202 (90.2)
Morality	1 (0.4)	18 (8.5)	203 (90.6)
Noise	0	28 (12.5)	204 (91.1)
Lighting	7 (3.1)	6 (2.7)	211 (94.2)

The Sex Services Premises Planning Advisory Panel noted in the *Sex Services Premises Planning Guidelines* that “councils currently allowing commercial sex services premises in commercial areas do not report any notable amenity impacts arising from them”. The minimal impacts could be due to a number of factors, including:

- Many commercial sex services premises operate during the early evening or late at night when other businesses are less likely to be operating. This may reduce the overall level of activity in the area and decrease the potential for parking problems.
- Many patrons of commercial sex services premises seek to maintain their anonymity and are unlikely to draw attention to themselves by creating noise and disturbance or by parking near the premises.
- Most premises are discreet and visual impact is likely to be minimal.³²

Research conducted in 2003 by the University of Technology Sydney showed that home-based sex work also has minimal impacts on amenity. Respondents were selected from residents in various apartment blocks in two specific council areas which had blocks with sex workers working from home. The key findings of the research were as follows:

- There was limited awareness of home business generally, with some respondents citing the benefits of home businesses for neighbourhood safety and most respondents stating that they did not think home businesses always needed to receive council approval.
- There was no awareness of home-based sex workers in either council area.
- The presence of home-based sex workers appeared to have no impact on the resident’s perception of crime.³³

³² Sex Services Premises Planning Advisory Panel (2004) pages 40 and 57.

Crofts and Prior have also found that home occupation (sex services) premises have little to no amenity impact and neighbours are unlikely to be aware of a nearby premises unless the operator advises them. In interviews, home-based sex workers indicated that, for personal and commercial reasons, they sought to minimise the potential for disruptions to their neighbours using a variety of strategies including “vetting drunk/disorderly clients; closing windows/blinds; limiting the hours of operation where possible to 9 a.m. – 5 p.m. Monday – Friday; training clients how to enter and leave the premises quietly; “don’t book clients so they are back to back”; and keeping client numbers down”.³⁴

Questions for consideration:

Do you have any evidence about sex services premises’ impact on residential amenity?

Analysis about perceived impact

There is a difference between perception of the likely amenity impacts of a sex services premises and actual experience. In the Prior and Crofts survey, residents who had known about local sex services premises for more than three years perceived their impact in neutral terms on average, whereas in general respondents with three years or less knowledge had a negative perception of impact. “This suggests that residents become more accepting of a nearby sex premises the longer they are familiar with its presence. This is in accordance with disgust and disorder theories which suggest increased levels of acceptance of objects of disgust through increased familiarity and prolonged contact.”³⁵

As part of their research, Prior and Crofts also analysed 284 resident submissions to 47 planning processes for sex services premises in the City of Sydney and Parramatta council areas and found that “formal planning processes tend to attract participation by those who are negative towards a proposed land use”.³⁶ The vast majority (98.2 per cent) of submissions believed that the proposed sex services premises would have an overall negative impact on the surrounding neighbourhood. In contrast, their survey of residents produced a broader range of perspectives on the overall experience of the effect of the sex services premises, highlighting “a disjunction between the imagined fears of sex premises as inherently disorderly ... compared with the lived experience of brothels as orderly businesses”.³⁷

Council approaches to sex services premises in the planning system

Commercial sex services premises

Under previous Government policies, councils have been required to permit sex services premises somewhere in their local government area. However, the LASH survey shows mixed results in DA approvals among 23 inner-city councils where approved ‘brothels’ were known to be operating:

³³ Sex Services Premises Planning Advisory Panel (2004) page 29.

³⁴ Crofts, P. and Prior, J. (2012), *Home Occupation or Brothel? Selling Sex from Home in New South Wales*, Urban Policy and Research, Vol. 30, No. 2, 127-143, June 2012, page 137.

³⁵ Prior and Crofts (2012) page 134.

³⁶ Prior and Crofts (2012) page 132.

³⁷ Prior and Crofts (2012) page 135.

- Two councils (City of Sydney and Marrickville) accounted for two-thirds of approvals between 1996 and 2007 (61 and 15 approvals, respectively). Sixteen (21 per cent) of these were Court approved. Eight other councils had also approved brothels during this period.
- Eleven councils had not approved any brothels (Ashfield council stated it was opposed to any brothel DA). Of these, six had Court-approved brothels within their areas.
- Two councils (one with five and one with two brothels) did not distinguish between court and council approvals.

Apart from Sydney City and Marrickville councils, in the other 18 councils where approved brothels were operating, 50 per cent were approved by the Land and Environment Court.³⁸

Crofts has noted that councils in NSW have adopted a broad range of approaches to regulating sex services premises in their area. Around 50 per cent of councils have developed planning controls that are specific to 'brothels' as a land use and generally rely on location-based restrictions, limiting such premises to commercial and/or industrial areas. A small number of councils (including the City of Sydney) have developed planning controls that distinguish between various types and scales of sex services premises based on differences in amenity and environmental impacts. The remaining councils have not developed any policies with regard to sex services premises. "This may reflect a perception that no sex services premises exist in the respective local government areas."³⁹

While local planning instruments do not have a blanket prohibition on sex services premises, councils are permitted to restrict brothels to industrial areas "if that is appropriate to the local circumstances".⁴⁰ As a consequence, many councils in NSW have restricted sex services premises to industrial zones "on the assumption that, in such locations, they would be least likely to cause amenity impact to nearby communities or potential offence to the general public". However, locating sex services premises in industrial zones raises safety issues (see below).⁴¹

Some councils allow commercial sex services premises in commercial zones but impose restrictions on the location in the form of detailed development standards. For instance, some LEPs state that sex services premises must not be located at ground or street level, or that they must be a certain distance from another sex industry premises (often referred to as anti-clustering controls) or sensitive land uses such as child care centres, schools and any other places regularly frequented by children.⁴² The *Sex Services Premises Planning Guidelines* note that "[p]recluding premises from ground level can affect disability access unless a lift or other device is installed...[a]part from equity considerations, this can place the council and owner/operator of the premises at risk of a complaint being made and sustained under the provisions of the *Disability Discrimination Act 1992*".⁴³

³⁸ Kirby Institute (2012) pages 41-42.

³⁹ Crofts et al (2012) page 403.

⁴⁰ Sex Services Premises Planning Advisory Panel (2004) pages 18-19.

⁴¹ Sex Services Premises Planning Advisory Panel (2004) page 29.

⁴² Sex Services Premises Planning Advisory Panel (2004) page 29.

⁴³ Sex Services Premises Planning Advisory Panel (2004) pages 34 and 37.

Questions for consideration:

Do you have any information about whether councils treat sex services premises differently to other businesses with similar amenity impacts?

Are there any justifications for councils to treat sex services premises differently to other businesses with similar amenity impacts?

When considering applications for sex services premises, should councils use only evidence-based approaches that rely on verifiable criteria about possible amenity impacts? Why or why not?

Home-based sex work

Councils have commonly adopted three main approaches for dealing with home-based sex work in their local area. These include:

- Specific prohibition: councils specifically exclude home-based sex work as a home occupation in their LEPs and commonly define such land uses as a brothel only permissible in certain zones, usually industrial zones.
- Generic prohibition: in some cases, definitions prepared by councils do not specifically exclude home-based sex work but do not allow home occupations or home businesses of any kind in residential zones where the activity involves customers or clients visiting the site.
- Exempt development: some councils allow home-based sex work as exempt development if they comply with certain pre-set criteria (for example, no more than one resident sex worker).⁴⁴

The Brothels Task Force concluded that prohibiting home-based sex work may not result in sex workers relocating to areas where sex services premises are permissible, but instead they may continue to operate illegally in residential areas. The Task Force noted that:

Requiring development consent for home based brothels may also result in the continuation of illegal brothels in residential areas. Sex workers in home based brothels are less likely to seek development consent because it reveals their identity and location, with the result that they can be subject to various forms of abuse and violence.

The Task Force was also concerned that workers in illegal home-based sex premises are less likely to access occupational health and safety programs, and that prohibiting such premises or requiring development consent may have the effect of creating barriers to these services and programs.⁴⁵

Guidance for councils in planning for sex services premises

The Sex Services Premises Planning Advisory Panel, established by the NSW Cabinet Office in 2002 on the recommendation of the Brothels Task Force, released guidance for councils in 2004. The *Sex Services Premises Planning Guidelines* outline better practice options for councils in planning for different types and scales of sex services premises. These include options for addressing sex services premises in LEPs (including allowing home-based sex work as exempt and complying development),

⁴⁴ Sex Services Premises Planning Advisory Panel (2004) pages 30-31.

⁴⁵ NSW Government (2001) pages 13-14.

options for establishing development standards for these premises either in an LEP or a DCP, and options for improving the monitoring and enforcement roles of council. The Guidelines outline a set of principles that 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.⁴⁶

The Guidelines suggest that “[a]ppropriately regulated sex services premises can minimise amenity impacts to surrounding properties and uphold high standards of occupational health and safety which are of benefit to workers, clients and the wider community ... However councils need to ensure that planning controls allow for the fair and equitable treatment of all sex services premises”.⁴⁷ Although released, the Guidelines were not formally endorsed by the previous Government and have been ignored by most councils.⁴⁸

Questions for consideration:

Should the principles outlined in the Sex Services Premises Planning Guidelines be incorporated into Government policy?

Monitoring and enforcement

Councils have monitoring and enforcement roles for all land uses and activities occurring in local areas. The *Sex Services Premises Planning Guidelines* note that “[e]nforcement actions undertaken by councils in respect to sex services premises cause dissatisfaction both for councils, which lament the cost and time consuming processes involved, and for operators of sex services premises, who feel they are being unfairly targeted by council enforcement actions”. For example:

⁴⁶ Sex Services Premises Planning Advisory Panel (2004) page 3.

⁴⁷ Sex Services Premises Planning Advisory Panel (2004) Foreword.

⁴⁸ Donovan et al (2012) page 40.

- An issue for councils is that even when they have gone through the lengthy and costly process to obtain an order from the Land and Environment Court for the closure of a sex services premises, the illegal operator often moves premises thereby forcing the council to start the process again.
- Operators of sex services premises claim that some councils enforce regular and detailed inspections of approved premises but take no action to close down known, unauthorised premises within the area. "The operation of unauthorised premises creates competition for authorised ones, who charge higher fees to recover the costs spent on fire upgrades and other matters to comply with council controls ... this imbalance ... creates animosity between operators."
- Many councils seek to rely on circumstantial evidence (such as phone appointments with private sex workers) to establish that premises are used as a brothel. The use of such appointments as evidence "inhibits the ability for sex workers to screen and negotiate with clients. It may also limit access by health service providers to sex workers for health education, as they may not admit to offering sexual services out of fear of compliance action".⁴⁹

State approaches to the location of sex services premises

State planning tools have some provisions that are specific to the sex industry. Some of these approaches are facilitative; for example, it has been the policy of previous NSW Governments that councils must permit sex services premises somewhere in their local government area.⁵⁰ Conversely, some State requirements place restrictions on sex services premises. For example:

- Councils have been advised that the Department of Planning would not object if 'brothels' were restricted to industrial areas, if that is appropriate to the local circumstances.
- The Standard Instrument LEP excludes 'home occupation (sex services)' and 'sex services premises' from the 'home business' and 'home occupation' land uses.
- The *Restricted Premises Act 1943* introduces proximity to a place of worship, hospital, school or other place regularly frequented by children for recreational or cultural activities as a planning concern, which is not required of other business types.

Questions for consideration:

What would be the advantages or disadvantages of requiring councils to permit sex services premises in their local area?

What would be the advantages or disadvantages of the State placing restrictions on the location of sex services premises?

Other State legislation: advertising

In addition to those mentioned above, the State places other requirements on sex services premises. The most prominent of these is the prohibition on the advertising of sex services contained in the *Summary Offences Act 1988*. Under this Act, it is currently illegal to:

- advertise or erect a sign indicating that a premises is used for the purposes of sex work;
- advertise that a person available for the purposes of sex services; or
- advertise for employment for sex workers.

⁴⁹ Sex Services Premises Planning Advisory Panel (2004) pages 43-46.

⁵⁰ Sex Services Premises Planning Advisory Panel (2004) pages 18-19.

Despite these provisions, adult services advertisements regularly appear in newspapers including the *Daily Telegraph*, and the cost and types of services offered by sex services premises can be found listed on many websites. It appears the broader community does not object to this advertising given the lack of complaints.

Many councils use the advertisements in newspapers to monitor sex services premises in their area. In a survey of councils conducted in 2009 by the Department of Planning, over 50 per cent of councils that responded considered advertisements a useful source of information or would if there were such advertisements. In areas with sex services premises, some councils reported that the advertisements provide information that allowed them to be proactive in pursuing unauthorised activity rather than simply reacting to complaints.

It has also been suggested that advertisements are used by peer support and outreach programs to locate sex workers and provide information about safe sex practices, sexual health, safety and other issues.

Questions for consideration:

What would be the advantages or disadvantages of repealing the current advertising restrictions on the sex industry?

5.2 Protection of sex workers

This section considers whether sex workers are overly exposed to risks associated with violence, trafficking and sexual exploitation, and workplace injury. The section concludes by considering the general perception of the sex industry and its association with crime.

Violence

Researchers have concluded that there are significantly different profiles of risk between indoor and outdoor forms of sex work, finding that street-based sex workers are the most vulnerable to all forms of workplace violence. These workers are more likely to experience repeat victimisation, aggravated or particularly brutal sexual assaults, kidnapping and unlawful imprisonment, and multiple forms of interpersonal violence while at work including verbal abuse, physical assault, robbery and non-payment.⁵¹

A report released by SWOP in 2007 showed that violence against sex workers in NSW is most likely to be perpetrated against street-based sex workers, take the form of physical or sexual assault, and be committed by men aged between 25 and 45. The findings of the *Safety Issues in Sex Industry Settings* report were drawn from data supplied by female, male and transgender sex workers across NSW who experienced violent attacks, rapes or other work-related problems between 2000 and 2006.⁵² The findings are consistent other research showing that 75 per cent of street-based sex workers in NSW experience violence at work.⁵³ This compares to only 5 to 10 per cent of parlour and private sex workers having reported some form of violence in their work (for example, robbery with violence, rape, bashing, stabbing).⁵⁴

⁵¹ Quadara (2008), pages 8 and 10.

⁵² ACON (2007), *New Report Aims to Reduce Violence Against NSW Sex Workers*, Media release.

⁵³ Sex Services Premises Planning Advisory Panel (2004) page 10.

⁵⁴ Kirby Institute (2012) page 13.

Indoor environments are generally safer for sex workers because they are subject to a range of controls that reduce the likelihood of violence. For example, the design of commercial sex services premises (lighting, security doors, intercom and surveillance systems) can increase workers' ability to control the interaction with clients and increase awareness of encounters that are not going well. Telephone bookings allow clients to be screened. The presence of other staff also increases safety, such as a receptionist who can assess the potential danger a client may present (for example, if intoxicated), respond to violent encounters and monitor situations.⁵⁵

However, some decisions made by councils could inadvertently expose indoor-based sex workers to a higher risk of violence. For example, if sex services premises are pushed into industrial zones which are generally not safe for women as they are isolated, have poor lighting and often no access to public transport. Another example is if councils do not allow home-based sex in residential areas, which might mean such workers would be less likely to come forward if they were the victim of violence or other criminal behaviour.

Where violence does occur, sex workers in NSW are able to access health and support services and report incidents to Police without fear of being prosecuted. This contrasts with other jurisdictions in Australia where sex work is illegal and sex workers are reluctant to report experiences of violence to authorities for fear of incriminating themselves and receiving penalties for sex work.

Trafficking and sexual exploitation

Trafficking in persons is recognised internationally as a human rights violation. Australia is a signatory to the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons* and has incorporated the Protocol into domestic law through the passage of a number of laws, including the *Criminal Code (Trafficking in Persons Offences) Act 2005*. These laws establish a number of trafficking crimes such as slavery, sexual servitude and debt bondage.⁵⁶

While the number of persons trafficked to Australia is unknown, international reports suggest that Australia is primarily a destination country for victims of trafficking, most of whom are women from South-East Asia (in particular, from Thailand, the Philippines, Malaysia and South Korea.⁵⁷ The US State Department's *Trafficking in Persons Report* comments that "it seems the overwhelming number of trafficking cases in Australia are women brought to the major cities to work in the sex industry. Most enter Australia initially voluntarily and with the knowledge that they will work in that industry. It is only later that they are subjected to debt bondage and sexual servitude".⁵⁸

At the Australian level, 191 victims of trafficking were identified between 2004 and March 2012. To date, victims have been predominantly identified in Sydney and Melbourne (NSW accounted for 41 of 65 of all suspected trafficking victims in 2009-10 and 62 of 80 in 2010-11⁵⁹). The majority of cases are first detected by the Department of Immigration and Citizenship, usually during compliance visits (immigration raids of workplaces and homes), and then referred to the Australian Federal Police for

⁵⁵ Quadara page 12.

⁵⁶ Parliament of Victoria (2010) page 7.

⁵⁷ UN Human Rights Council (2012), *Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngopzi Ezi, Addendum: Mission to Australia, A/HRC/20/18/Add.1*, 18 May 2012, page 3.

⁵⁸ Parliament of Victoria (2010) page 27.

⁵⁹ Joudo Larsen, J., Renshaw, L., Gray-Barry, S., Andreovski, H. and Corsbie, T. (2012), *Trafficking in persons monitoring report: January 2009 – June 2011*, Monitoring Report No. 19, Australian Institute of Criminology, June 2012, page 17.

further assessment.⁶⁰ In a number of cases, victims “have actively sought help and assistance; for example, by calling 000, going to the local police station, contacting their embassy in Australia and asking the men they meet in brothels to help them”⁶¹. As at 30 June 2011, 33 individuals had been charged with trafficking-related offences across Australia and since January 2004 there have been three convictions for sexual servitude.⁶²

Licensed brothels in Victoria and DA-approved brothels in NSW have been linked to trafficking for sexual exploitation. In October 2011, the *Sydney Morning Herald*, *The Age* and Four Corners reported two Australian Federal Police investigations, Operations Elixation and Raspberry, that identified two Sydney brothels and three in Melbourne linked to “an international human trafficking and sex slavery ring”. The syndicate allegedly convinced Asian women to come to Australia to study and then forced them to work as sex slaves.⁶³ In February 2012, the *Sydney Morning Herald* reported the case of three Thai women “lured to Australia from Thailand on the promise of student visas ... [and] ... allegedly held against their will to work as sex slaves” at an approved brothel in Sydney’s west.⁶⁴ The LASH team found no evidence of recent trafficking of female sex workers in the Sydney brothel survey.⁶⁵

With the licensing system in Victoria, the expectation might be that the fit and proper person test for owners and operators would preclude trafficking offences taking place in licensed brothels. However, an inquiry by the Victorian Parliament’s Drugs and Crime Prevention Committee in 2010 found that “[t]here is a clear and close connection between sex trafficking and the legal and the unregulated sex industry”.⁶⁶ The report noted that nearly all cases of trafficking or sexual servitude that have reached the courts in Australia were originally discovered in legal sex services premises (including the three cases of sexual servitude to date before Victorian courts, which all concerned legal brothels). The report cited research suggesting that Australian Federal Police investigators have detected trafficking cases in both legal and illegal sex services premises, and that “this distinction has little relevance from the perspective of investigating trafficking”.⁶⁷

The NSW Community Relations Commission is currently conducting an *Inquiry into the Exploitation of Women through Trafficking*. This includes an undertaking to investigate issues surrounding the trafficking and exploitation of people in the sex industry and other forms of employment, and identify practical measures to address the trafficking of people in NSW.⁶⁸ The Commission will conclude its report later in 2012.

⁶⁰ UN Human Rights Council (2012) page 11.

⁶¹ David, F. (2008), *Trafficking of women for sexual purposes*, Research and Public Policy Series No. 95, Australian Institute of Criminology, page ix.

⁶² Larsen et al (2012) page 16.

⁶³ <http://www.theage.com.au/national/legal-brothels-linked-to-international-sex-trafficking-rings-20111009-1lfxs.html> and <http://www.abc.net.au/4corners/stories/2011/10/06/3333668.htm>.

⁶⁴ <http://www.smh.com.au/nsw/brothel-owner-charged-over-human-trafficking-20120202-1qvoo.html>.

⁶⁵ Kirby Institute (2012) page 11.

⁶⁶ Parliament of Victoria (2010) page v.

⁶⁷ Parliament of Victoria (2010) page 133.

⁶⁸ Community Relations Commission (2012), *Inquiry into the Exploitation of Women through Trafficking*, Terms of Reference.

Questions for consideration:

Do you have any information about trafficking or organised crime more broadly and its association with the sex industry?

Workplace injury

WorkCover undertakes a range of compliance and enforcement activities that are primarily determined by the level of risk within a particular industry. WorkCover uses data and evidence to prioritise compliance and enforcement activities. Workplace inspections and/or interventions can also result following a complaint or a workplace incident.

WorkCover's "Focus on Industry Program" aims to maximise prevention activities in those industries with the highest rates of injuries or illness. The sex services industry does not feature as a priority industry for WorkCover under this program; nor does it feature nationally under the draft *Australian Work Health and Safety Strategy 2012 – 2022*. Worker's compensation claims in NSW between June 2009 and May 2012 reveal only a few claims. However, the degree of under-reporting of injuries and/or illness in the sex services industry is unknown.

Individual sex workers have a strong interest in maintaining their own health, which obviously affects their ability to earn future income. Currently, from a sex worker's perspective, it is easy (low cost) to move between different parts of the industry (e.g. from a brothel to home-based work). This means that worker choice can have a positive impact on health outcomes: if (say) a brothel's operations were unhygienic, a sex worker would have an incentive to move to either another brothel or another industry segment, and hence maintain their own health, and that of their clients.

Questions for consideration:

Do you have any information that can contribute to the Review Team's understanding about the issues that impact on sex worker protection?

Do you have any information that may help compare issues affecting sex worker protection across States and Territories?

Perception of crime and the sex industry

Individuals often cite 'common sense' as justification for suggesting a link between sex services premises and organised crime, drugs and trafficking. Crofts characterises this as treating brothels as 'criminogenic' – the view that "they cause crime, whether as victims or perpetrators". She argues that, despite these claims being made:

since the decriminalisation of the industry in 1995 there is no evidentiary support that brothels are criminogenic. Historically, when brothels were regarded as inherently disorderly and not able to operate lawfully, there was reason to associate these types of businesses with organised crime. However, with decriminalisation, these historic conditions no longer exist. There is nothing inherently criminogenic about premises used for sex services.⁶⁹

⁶⁹ Crofts, P. (2012), *The proposed licensing of brothels in New South Wales*, 17 LGLJ 3, page 5.

The Land and Environment Court has similarly stated that “[t]here is no evidence that brothels in general are associated with crime or drug use”.⁷⁰

Questions for consideration:

Do you have any information about whether crime is relatively more prevalent in the sex industry compared to other businesses, taking account of the circumstances of sex businesses (such as whether they are operating at night)?

5.3 Safeguarding public health

As defined in Chapter 4, good public health outcomes in relation to the sex industry mean that there are low rates of sexually transmitted diseases. Key drivers for these public health outcomes are the use of safe sex practices and voluntary regular STI screening. NSW has the most extensive network of sexual health services in Australia and all treat sex workers as a priority population.⁷¹

Research has shown that rates of STIs among female sex workers in NSW are comparable to other sexually active women in the general population, and HIV in female sex workers remains rare in Australia. Most respondents (83 per cent) in the LASH study reported that they underwent regular sex health checks; of these, almost two-thirds reported having checks at least every six months. Condoms are used in over 99 per cent of vaginal sex encounters in Sydney, with similar rates of use by sex workers of non-Asian and Asian background.⁷²

Questions for consideration:

Do you have any that information that may help to explain the level of health outcomes associated with the sex industry in NSW?

Do you have any information that may help compare public health outcomes across States and Territories?

⁷⁰ Roseth SC in *Martyn v Hornsby Shire Council*, cited in Crofts, P. (2006), *Visual Contamination: Disgust and the regulation of brothels*, Paper delivered at PASSAGES: law, aesthetics, politics, 13-14 July 2006, Melbourne, page 3.

⁷¹ Kirby Institute (2012) pages 12 and 23.

⁷² Kirby Institute (2012) page 24.

6. POSSIBLE REFORM OPTIONS FOR DISCUSSION

Three broad options have been identified for reforming the regulation of sex services premises in NSW: (1) improve the current regulatory system; (2) introduce a registration system; and (3) introduce a licensing system. This chapter defines each option. Data and evidence are sought from stakeholders to help inform the development of these options for the Government's consideration later in 2012.

Of particular interest to the NSW Government is whether different systems across adjacent States and Territories lead to cross-border issues. Such issues may involve the substitution of sex services premises, sex workers or clients from one jurisdiction to another, due to (say) the relative ease and cost of transacting. Such issues may also have regulatory implications, such as the transfer of costs from a regulator in one jurisdiction to another.

Questions for consideration:

Do the different regulatory regimes in NSW, Victoria, Queensland and the ACT have any impacts on sex services premises and communities in NSW towns on either side of relevant borders?

While this review is mostly concerned with regulatory arrangements for the sex industry, non-regulatory approaches are also important. A highly visible and potentially significant non-regulatory mechanism is provided by specialist sexual health services and through support and outreach programs. For example, SWOP works with sex services premises throughout NSW to promote the acceptance and maintenance of safe sex and drug behaviour, and also provides training to service providers (including criminal justice services) to enhance awareness of sex worker issues. Such groups play an important role in providing support, research and advice to those involved in the sex industry in NSW, which potentially contributes to the protection of sex workers and the safeguarding of public health.

6.1 Option 1: Improve the current regulatory system

This option would involve two elements: (i) improved decision-making in planning for sex services premises; and (ii) improving the sharing of information between NSW regulators. These elements might equally be relevant for adoption as part of the registration and licensing options.

Improved decision-making in planning for sex services premises

The 2001 Brothels Task Force report found that the regulation of sex services premises through the planning system can be an effective means of control but that local councils need further support to deal with planning and implementation issues.⁷³

This option would involve the introduction of mechanisms to ensure that planning decisions about the number and location of sex services premises are made according to standard (evidence-based) principles. The option could be implemented in a variety of ways, including through State-endorsed guidance being provided to councils or decisions involving sex services premises being made by independent bodies.

⁷³ NSW Government (2001) page 3.

For example, the Government could provide comprehensive guidance to councils on planning for sex services premises, perhaps based on the *Sex Services Premises Planning Guidelines* released in 2004. This would include, as recommended by the Brothels Task Force, guidance on developing local planning instruments that identify areas where sex services premises are compatible with other land uses and appropriate planning controls based on the likely impacts of different types of sex services premises in particular areas.⁷⁴

Other mechanisms for achieving an explicit evidence-based approach towards dealing with sex services premises may be identified in the context of the Government's current planning system reforms (as foreshadowed in the Green Paper '*A New Planning System for NSW*').

Question for consideration:

What opportunities are there to ensure an improved and consistent planning approach for sex services premises across local government?

Improving the sharing of information between NSW regulators

The regulation of sex services premises is the responsibility of a number of regulators in NSW. It is unclear whether the current level of enforcement is proportionate to the risks involved in the sex industry, and whether regulators are sharing information to enable better targeting of compliance efforts and reduce unnecessary inspections.

This option would involve the development of a monitoring and compliance protocol between NSW regulators involved in the sex industry, including in relation to the sharing of information. The protocol would cover respective roles and responsibilities, the frequency of inspections, what is to be inspected on the premises and for what reasons. This will provide more certainty for commercial sex services premises and ensure equitable treatment with other commercial premises.

Questions for consideration:

Do you have any information about whether the current level of enforcement of the sex services industry is proportionate to the risk involved?

Do you have any information about how regulators could improve their compliance and enforcement activities in relation to sex services premises?

Do you have any information about how regulators associated with the sex industry could improve their ways of working together?

6.2 Option 2: Introduce a registration system

This option would require owners and operators of sex services premises to be registered. A criminal history check would not be required as part of the registration process. Development approval by the relevant local council would not be a prerequisite for registration and the register would not be made available to councils. The registration option would not include home-based sex workers.

⁷⁴ NSW Government (2001) page 11.

Consideration would need to be given as to who would maintain the register. An approach that primarily focuses on health outcomes might see the register maintained by a community-based peer outreach body, such as SWOP. Under this approach there would be limited disclosure of the register to other enforcement bodies such as Police. On the other hand, an approach with a broader focus would require the register to be maintained by a Government agency and involve an active role for Police alongside the NSW Ministry of Health and community-based peer outreach programs.

Questions for consideration:

If there were a registration system for sex services premises, do you have any information about whether the relevant businesses would choose to register?

Do you have any information about who should have access to a register of sex services premises?

6.3 Option 3: Introduce a licensing system

This option would make it an offence to own or operate a (commercial) sex services premises without a licence. Applicants would be vetted for suitability based on their criminal history and any relevant criminal intelligence or criminal information held by Police (that is, a 'fit and proper person' test). Any licence would be contingent on the sex services premises covered by the application having received development approval from the relevant council. The licensing option would not include home-based sex workers.

Applicants would need to be over 18 years of age to be eligible for a licence and not have been convicted of an indictable offence in the preceding five years, had a previous licence cancelled, or have a close associate with a disqualifying offence within the preceding five years. Similar to criteria in the licensing scheme for tattoo parlours in NSW⁷⁵, applicants would also need to be natural persons and citizens or permanent residents of Australia, and could not be controlled members of declared organisations under the *Crimes (Criminal Organisations Control) Act 2012*. In determining whether to grant a licence, the licensing authority would also need to consider:

- whether the applicant is 'a fit and proper person' to be granted the licence;
- whether it would be contrary to the public interest for the licence to be granted; and
- whether the applicant has made appropriate arrangements to ensure the health, safety and welfare of sex workers, clients and other visitors to the premises.

This option would involve licences being issued by an existing State Government regulatory authority (such as NSW Fair Trading or the Office of Liquor, Gaming and Racing) or by a new sex services licensing authority. Local councils would retain responsibility for establishing the planning framework for the location and operation of sex services premises in their area and for determining DAs for individual premises. Relevant conditions in the development consent could be integrated into the licence to reduce costs and avoid inconsistencies between approvals.

Fees would be charged for the licences, possibly on a full cost recovery basis. The adoption of a full cost recovery model would be contingent on gaining a better understanding of the structure and size of sex services premises (for example, an average business size of six sex workers would represent a

⁷⁵ The *Tattoo Parlours Act 2012* received assent on 29 May 2012.

more difficult scenario to achieve full cost recovery than an industry dominated by a few large businesses).

The outcomes of a licensing regime would depend heavily on the incentives or disincentives for owners and operators of sex services premises associated with obtaining a licence compared to operating illegally.

Questions for consideration (licensing):

Do you have any information about the likely effectiveness of a sex services premises licensing system, particular with regards to sex worker protection?

Questions for consideration (general):

Which of the options for regulating sex services premises would best meet the Government's objectives for the proposed regulatory system (protection of residential amenity, protection of sex workers and safeguarding public health)? Please advise your reasons and highlight any impacts on specific types of sex services business such as home-based sex work and street-based work.

You are welcome to propose an alternative regulatory model for consideration.

APPENDIX A. CURRENT REGULATORY ENVIRONMENT IN NSW

There are six key pieces of State legislation governing the operation of the sex industry in NSW:

- *Environmental Planning and Assessment Act 1979* (EP&A Act) – provides the development consent process.
- *Restricted Premises Act 1943* (formerly the Disorderly Houses Act 1943) – provides a definition of a brothel and a mechanism for councils to take action against brothels.
- *Summary Offences Act 1988* – provides offences related to sex work.
- *Crimes Act 1900* – provides offences related to sexual servitude.
- *Public Health Act 2010* – provides public health and disease control measures and offences related to sexually transmitted diseases.
- *Work Health and Safety Act 2011* – provides occupational health and safety requirements.

This appendix outline the main provisions contained in the above Acts with respect to the operation of the sex industry. Commonwealth laws provide migration requirements and prevent people trafficking.

A.1 Provisions under the EP&A Act

Since 1995, sex services premises have been regulated as a land use under the EP&A Act. The Government is currently reviewing the planning system with the aim of replacing the EP&A Act with a new system.⁷⁶

At present, councils have significant powers in regulating such premises, including:

- powers to restrict or to prohibit sex services premises in particular areas;
- planning powers to approve individual premises; and
- the power to seek the closure of a sex services premises if it is operating without a required development consent.

Local Environment Plans

Councils prepare Local Environmental Plans (LEP) to apply to their local government area, which are approved by the Minister for Planning and Infrastructure. Since 2006, councils have been required to prepare LEPs based on a Standard Instrument LEP. The Standard Instrument provides a common structure, model clauses and standard definitions, including the following:

brothel has the same meaning as in the Act. That is, brothel means a brothel within the meaning of the *Restricted Premises Act 1943*, other than premises used or likely to be used for the purposes of prostitution by no more than one prostitute.

home occupation (sex services) means the provision of sex services in a dwelling that is a brothel, or in a building that is a brothel and is ancillary to such a dwelling, by no more than 2 permanent residents of the dwelling and that does not involve:

- (a) the employment of persons other than those residents, or
- (b) interference with the amenity of the neighbourhood by reason of the emission of noise, traffic generation or otherwise, or

⁷⁶ See *A New Planning System for NSW – Green Paper* (2012), available at <http://www.planning.nsw.gov.au/a-new-planning-system-for-nsw>.

- (c) the exhibition of any signage, or
- (d) the sale of items (whether goods or materials), or the exposure or offer for sale of items, by retail,

but does not include a home business or sex services premises.

restricted premises means premises that, due to their nature, restrict access to patrons or customers over 18 years of age, and includes sex shops and similar premises, but does not include a pub, hotel or motel accommodation, home occupation (sex services) or sex services premises.

sex services means sexual acts or sexual services in exchange for payment.

sex services premises means a brothel, but does not include home occupation (sex services).

An LEP may contain provisions which nominate the zone(s) where sex services premises may be located within the local government area. Former NSW Governments required that councils permit sex services premises as a land use somewhere in their local government areas. Councils may restrict such premises to industrial areas if they consider that is the only appropriate location in the local area.

The Model Local Clause in the Standard Instrument LEP (clause 6.6), which councils may opt to include in an LEP, includes provisions to avoid sex services premises being located close to sensitive land uses such as residential zones, schools and places of worship.

(1) Development consent must not be granted for development for the purposes of sex services premises if the premises will be located on land that adjoins, or that is separated only by a road from, land:

- (a) in Zone R1 General Residential, Zone R2 Low Density Residential or Zone R3 Medium Density Residential, or
- (b) used as a place of public worship or for community or school uses, or
- (c) in Zone RE1 Public Recreation.

(2) In deciding whether to grant consent to any such development, the consent authority must take into account the impact that the proposed development would have on children who use the land.

Development applications

Where sex services premises are permissible, a council must consider a development application (DA) for such premises in the same way as for any other permissible development. Councils are required to consult with affected residents and businesses, and then evaluate the DA according to the criteria set out in section 79C of the EP&A Act, including:

- the controls of any LEP or Development Control Plan⁷⁷;
- the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality;
- the suitability of the site for the development;
- any submissions made in accordance with this Act or the regulations; and
- the public interest.

⁷⁷ Development Control Plans (DCPs) may be prepared by councils to provide more detailed planning guidance for particular types of development. A DCP may include development standards in relation to location, building design, and ongoing management for specific classes of development.

A.2 Provisions in the Restricted Premises Act 1943

Provisions under the *Restricted Premises Act 1943* complement the enforcement provisions under the EP&A Act and apply to sex services premises whether they are operating with or without development consent, where there is an adverse impact on the community. This complements the powers available to councils under the EP&A Act, and allows councils to seek an order from the Land and Environment Court to close down sex services premises which have been the subject of community complaint.

The Restricted Premises Act provides the definition of a brothel as:

brothel means premises:

- (a) habitually used for the purposes of prostitution, or
- (b) that have been used for the purposes of prostitution and are likely to be used again for that purpose, or
- (c) that have been expressly or implicitly:
 - (i) advertised (whether by advertisements in or on the premises, newspapers, directories or the internet or by other means), or
 - (ii) represented,
as being used for the purposes of prostitution, and that are likely to be used for the purposes of prostitution.

Premises may constitute a brothel even though used by only one prostitute for the purposes of prostitution.

Unlike the EP&A Act, the above definition captures premises used by a single sex worker (these are explicitly excluded in the EP&A Act). Where the activities of a single sex worker are having an undue effect on neighbours or local amenity, there is scope to take action under this Restricted Premises Act to stop premises being used as a brothel.

Under section 17, the Land and Environment Court may, on application by a local council, make an order that an owner or occupier of a premises used as a brothel is not to use or allow the use of the premises for the purpose of a brothel. In making an order, the Court must take into consideration the criteria set out at subsection 17(5):

- (a) whether the brothel is operating near or within view from a church, hospital, school or any place regularly frequented by children for recreational or cultural activities,
- (b) whether the operation of the brothel causes a disturbance in the neighbourhood when taking into account other brothels operating in the neighbourhood or other land use within the neighbourhood involving similar hours of operation and creating similar amounts of noise and vehicular and pedestrian traffic,
- (c) whether sufficient off-street parking has been provided if appropriate in the circumstances,
- (d) whether suitable access has been provided to the brothel,
- (e) whether the operation of the brothel causes a disturbance in the neighbourhood because of its size and the number of people working in it,
- (f) whether the operation of the brothel interferes with the amenity of the neighbourhood,
- (g) any other matter that the Land and Environment Court considers is relevant.

In order to make an application, the council must be satisfied that it has received sufficient complaints about the sex services premises to warrant the making of the application. The complaint or complaints must have been made by:

- (a) residents of the area in which the brothel is situated who live in the vicinity of the brothel, or
- (b) residents of the area in which the brothel is situated who use, or whose children use, facilities in the vicinity of the brothel, or

- (c) occupiers of premises that are situated in the area in which the brothel is situated and in the vicinity of the brothel, or
- (d) persons who work in the vicinity of the brothel or persons who regularly use, or whose children regularly use, facilities in the vicinity of the brothel.

An order by the Land and Environment Court may also prohibit the owner or occupier of the premises from using it, or allowing the premises to be used, for specified related sex uses.

The Supreme Court and the District Court also have the power under Part 2 of the Restricted Premises Act to make a declaration, on application by Police, that a premises is 'disorderly'. After the 1995 reforms, a sex services premises can no longer be declared a 'disorderly house' solely on the grounds that it is a brothel. Rather, it is necessary for Police to show reasonable grounds for suspecting:

- (a) that drunkenness or disorderly or indecent conduct or any entertainment of a demoralising character takes place on the premises, or has taken place and is likely to take place again on the premises, or
- (b) that liquor or a drug is unlawfully sold or supplied on or from the premises or has been so sold or supplied on or from the premises and is likely to be so sold again on or from the premises, or
- (c) that reputed criminals or associates of reputed criminals are to be found on or resort to the premises or have resorted and are likely to resort again to the premises, or
- (d) that any of the persons having control of or managing or taking part or assisting in the control or management of the premises:
 - (i) is a reputed criminal or an associate of reputed criminals, or
 - (ii) has been concerned in the control or management of other premises which have been the subject of a declaration under this Part, or
 - (iii) is or has been concerned in the control or management of premises which are or have been frequented by persons of notoriously bad character or of premises on or from which liquor or a drug is or has been unlawfully sold or supplied.

After the service of a declaration notice, the owner or occupier of the premises is guilty of an offence if any of the above conditions apply while the declaration is in force.

A.3 Provisions in the Summary Offences Act 1988

'Part 3 Prostitution' of the *Summary Offences Act 1988* includes a number of provisions relevant to the regulation of sex services premises and sex work. These include:

- s15 **Living on earnings of prostitution:** A person shall not knowingly live wholly or in part on the earnings of prostitution of another person unless the person owns, manages or is employed in the brothel. This provision also applies to brothels used by only a single prostitute.
- s15A **Causing or inducing prostitution:** A person must not cause or induce another person to commit an act of prostitution or surrender any proceeds of an act of prostitution.
- s16/17 **Prostitution or soliciting in massage parlours:** A person shall not use, or knowingly permit to be used, any premises used for massage, sauna baths, steam baths or for physical exercise, or for the taking of photographs or as a photographic studio for the purpose of prostitution or of soliciting for prostitution.
- s18 **Advertising premises used for prostitution:** A person shall not, in any manner, publish or cause to be published an advertisement, or erect or cause to be erected any sign, indicating that any premises are used or are available for use, or that a person is available, for the purposes of prostitution.
- s18A **Advertising for prostitutes:** A person shall not, in any manner, publish or cause to be published an advertisement for a prostitute. In this section, advertisement for a prostitute means an advertisement that indicates, or that can be reasonably taken to indicate, that:

- employment for a prostitute is or may be available; or a person is required for employment as a prostitute or to act as a prostitute; or a person is required for employment in a position that involves, or may involve, acting as a prostitute.
- s19/19A **Soliciting clients by prostitutes/prostitutes by clients:** A person shall not solicit another person for the purpose of prostitution: in a school, church or hospital; on or near a road (including in a vehicle) near or within view from a dwelling, school, church or hospital; or near, or within view from, a dwelling, school, church, hospital or public place in a manner that harasses or distresses the other person.
- s20 **Public acts of prostitution:** Any person taking part in an act of prostitution in, or within view from (including in a vehicle) a school, church, hospital or public place or within view from a dwelling is guilty of an offence.
- s21 **Search warrant:** A member of the Police Force may be issued with a search warrant by an authorised officer if the member has reasonable grounds for believing that section 16 or 17 is being contravened, or within 72 hours will be contravened. The Police officer may be authorised to: enter and search the premises; arrest, search and bring before a Magistrate or an authorised officer any person who is, or appears to have been, contravening either section 16 or 17; and seize any article that may be evidence of such a contravention.

The provisions on sex work do not apply to clubs registered under the *Registered Clubs Act 1976* or licensed premises under the *Liquor Act 1982*.

The NSW Police Force is responsible for enforcing the offences related to sex work in the Summary Offences Act.

A.4 Provisions in the Crimes Act 1900

The *Crimes Act 1900* makes it an offence to cause sexual servitude or conduct a business that involves the sexual servitude of other persons. Sexual servitude is defined in the Crimes Act as ‘the condition of a person who provides sexual services and who, because of the use of force or threats: (a) is not free to cease providing sexual services, or (b) is not free to leave the place or area where the person provides sexual services’.

Police enforce the sexual servitude offences.

A.5 Provisions in the Public Health Act 2010

The *Public Health Act 2010* makes it an offence for an individual or an owner or operator of a sex services premises to knowingly permit sexual intercourse to take place where there is a risk of contracting a sexually transmissible medical condition, without informing relevant parties.

Sex workers and proprietors must comply with section 79 of the Public Health Act. There is an explicit obligation on the individual as well as the proprietor of the sex services premises.

- (1) A person who knows that he or she suffers from a sexually transmitted infection is guilty of an offence if he or she has sexual intercourse with another person unless, before the intercourse takes place, the other person:
- (a) has been informed of the risk of contracting a sexually transmitted infection from the person with whom intercourse is proposed, and
 - (b) has voluntarily agreed to accept the risk.
- Maximum penalty: 50 penalty units.
- (2) An owner or occupier of a building or place who knowingly permits another person to:
- (a) have sexual intercourse at the building or place for the purpose of prostitution, and
 - (b) in doing so, commit an offence under subsection (1),
- is guilty of an offence.
- Maximum penalty: 50 penalty units.

(3) It is a defence to any proceedings for an offence under this section if the court is satisfied that the defendant took reasonable precautions to prevent the transmission of the sexually transmitted infection.

(4) For the purposes of this section, a person is not presumed incapable of having sexual intercourse by reason only of the person's age.

(5) A person (other than a member of the NSW Health Service) must notify the Director-General if the person commences proceedings against a person for an offence under this section.

Sexual intercourse means sexual connection by the introduction into a person's vagina, anus or mouth of any part of another person's penis, or cunnilingus (section 77).

The local area Health Service is responsible for investigating complaints or allegations concerning sex services premises relating to risks to public health.

A.6 Provisions in the Work Health and Safety Act 2011

Under NSW occupational health and safety legislation, a person conducting a business or undertaking (PCBU, the new term that includes employers) has a primary duty of care to ensure workers and others are not exposed to a risk to their health and safety. A primary duty of care is owed by a PCBU when it:

- directs or influences work carried out by a worker;
- engages or causes to engage a worker to carry out work (including through sub-contracting); or
- has management or control of a workplace.

The PCBU must meet its obligations, so far as is reasonably practicable, to provide a safe and healthy workplace for workers or other persons by ensuring:

- safe systems of work;
- a safe work environment;
- accommodation for workers, if provided, is appropriate;
- safe use of plant, structures and substances;
- facilities for the welfare of workers are adequate;
- notification and recording of workplace incidents;
- adequate information, training, instruction and supervision is given;
- compliance with the requirements under the work health and safety regulation; and
- effective systems are in place for monitoring the health of workers and workplace conditions.

A PCBU must also have meaningful and open consultation about work health and safety with its workers, health and safety representatives and health and safety committees.

The *Workers Compensation Act 1987* requires employers to obtain and maintain in force a policy of workers compensation insurance for their employees (as defined in the Act). If they fails to do so, WorkCover NSW may recover from the employer double the premium that would have been payable and a court may impose a penalty. The employer may also be liable for compensation paid to any worker injured while employed there.

APPENDIX B. TIMELINE OF SIGNIFICANT EVENTS IN THE REGULATION OF THE SEX INDUSTRY IN NSW

Year	Event
1835	The <i>Prevention of Vagrancy Act 1835</i> introduced partly to enable the arrest of prostitutes.
1943	<p>The <i>Disorderly Houses Act 1943</i> introduced to enable Police to seek an order from the Supreme Court declaring certain premises to be 'disorderly', included those associated with:</p> <ul style="list-style-type: none"> • drunkenness or disorderly or indecent conduct or any entertainment of a demoralising character; • the unlawful sale of liquor or a drug is unlawfully sold; and • reputed criminals or associates of reputed criminals. <p>If a premises was declared 'disorderly', any person thereafter entering the premises was guilty of an offence and the owner/occupier could also be guilty of an offence in certain circumstances. The Police were also given strong enforcement powers.</p> <p>The objective of the laws was to address concerns about the behaviour of American servicemen and impacts upon residents.</p>
1968	The <i>Disorderly Houses Act 1943</i> amended to add premises 'habitually used for prostitution' to the classes of premises that may be declared a disorderly house. The Court of Appeal held in 1988 in <i>Sibuse Pty Ltd v Shaw</i> that a brothel is a 'disorderly' premises regardless of whether it is disorderly within the ordinary meaning.
1979	<p>The statutory offence of prostitution in the <i>Summary Offences Act 1970</i> was repealed by the <i>Summary Offences (Repeal) Act 1979</i>. Other offences were retained i.e.:</p> <ul style="list-style-type: none"> • common law offences of keeping a common bawdy house or brothel and living off the earnings of prostitution; and • the statutory offence of keeping a disorderly house.
1994	Wood Royal Commission established to investigate the existence and extent of corruption in the NSW Police Service.
1995	<p>The <i>Disorderly Houses Amendment Act 1995</i> introduced to allow well-run brothels to operate lawfully, reduce risks of Police corruption (in light of Wood Royal Commission evidence showing serious and systemic Police corruption, particularly in the Kings Cross detective division, and a clear nexus between Police corruption and the operation of brothels), minimise street prostitution, and reduce public health risks. The Act:</p> <ul style="list-style-type: none"> • amended the Summary Offences Act and Crimes Act to abolish the common law offences of keeping a common bawdy house or brothel and living off the earnings of prostitution in the case of brothel owners, managers or employees; • amended the Disorderly Houses Act so that an otherwise orderly brothel could not be declared a 'disorderly' house; • provided a mechanism for communities to make complaints to local councils about the amenity impacts of brothels; and • enabled Councils to apply to the Land and Environment Court to have a brothel closed down based on specified criteria.

Year	Event
	<p>As a result, brothels would now be regulated as a land use under the <i>Environmental Planning and Assessment Act 1979</i>.</p> <p>Councils were advised that the Minister would not approve a Local Environment Plan (LEP) if brothels were not permissible in at least one location within the local government area.</p>
2001	<p>Ministerial Taskforce on Brothels, established to assess whether the objectives of the 1995 reforms were being achieved, found that:</p> <ul style="list-style-type: none"> • decriminalisation had a positive effect on the health and safety of sex workers; • the planning system can be an effective means of regulating all sex service premises in the same manner as any other land use within a local council area through the planning arrangements adopted by local councils; and • there was greater need for assistance to be provided to local councils in planning for various sex services premises, and recommended the establishment of an advisory service for councils.
2004	<p><i>Sex Services Premises Planning Guidelines</i> released by the Sex Services Planning and Advisory Panel to guide councils in planning for various sex services premises. The Guidelines were not endorsed by the Department of Planning.</p>
2007	<p>The <i>Brothels Legislation Amendment Act 2007</i> introduced to:</p> <ul style="list-style-type: none"> • amend the <i>Restricted Premises Act 1943</i> (formerly <i>Disorderly Houses Act 1943</i>) to make it easier for councils to identify and gather evidence that a brothel is operating without development consent, in contravention of their conditions of consent, or where there is an adverse impact on the community; • provide new enforcement powers in the Environmental Planning and Assessment Act to enable councils to close such brothels, including through: <ul style="list-style-type: none"> – utilities orders to cut the supply of essential services to the premises; – amendments to prevent council closure actions from being frustrated by prohibiting such businesses from reopening as a massage parlour etc; and – limiting the ability of the Land and Environment Court to adjourn proceedings while another development approval is sought. <p>ICAC released its <i>Report on an investigation into corrupt conduct associated with the regulation of brothels in Parramatta</i> that found Parramatta Council's Team Leader, Compliance Services, took money and free sexual services in return for frustrating action against unapproved brothels between 2003 and 2007.</p> <p>The ICAC report recommended that the Government:</p> <ol style="list-style-type: none"> 1. Review the corruption risks relating to the regulation of brothels by local council and develop an appropriate strategy to address those risks. 2. Consider adopting a system to prevent unsuitable persons from operating brothels. 3. Legislate to require sex industry advertisements to show the relevant development consent number (or if they do not require consent, an exemption number).
2008	<p>Interagency Taskforce established to respond to ICAC's recommendations. The Taskforce comprised representatives of the Department of Justice and Attorney General, Department of Planning, NSW Police and Ministry of Police, DPC, Department of Local Government and the Parramatta City Council.</p>

Year	Event
2009	<p>The Minister for Planning wrote to the Australian Publishers Bureau requesting its members ensure that sex industry advertisements show the relevant development consent number (or if they do not require consent, an exemption number). This was done notwithstanding that advertising is illegal.</p>
2012	<p>Kirby Institute released <i>The Sex Industry in New South Wales: A Report to the NSW Ministry of Health</i>. The report provided extensive information and data on matters, including: the size and structure of the sex industry, the health of sex workers, perceptions of sex industry conditions, prostitution law, and policing and local government responses.</p> <p>The Kirby Institute found that:</p> <ul style="list-style-type: none"> • Sydney's sex industry is commensurate with the size of its population and similar to estimates from 20 years ago. • Offences in the period 2000 to 2006 were overwhelmingly concentrated on the street-based sex industry. • Brothels are widely dispersed in inner urban and suburban areas and attract few complaints from neighbours. • Many Sydney brothels operate without approval from local councils as a result of difficulties gaining development consent and these are often small with poor work health and safety standards. • Sydney brothels have a higher proportion of sex workers that were born in Asian or other non-English speaking countries than in other Australian cities. • Condom use at work approaches 100 per cent in Sydney brothels and the prevalence of STIs was generally at least as low as in the general population. <p>The Kirby Institute recommended that:</p> <ul style="list-style-type: none"> • Decriminalisation be endorsed as it has improved human rights, removed Police corruption, reduced burdens on the criminal justice system, and enhanced surveillance, health promotion and safety. • That licensing not be adopted due to problems in Victoria and Queensland including the creation of an underclass that undermines the delivery of health support and increases risks of police corruption. • The Department of Planning should endorse planning guidelines for brothels based on the <i>Sex Services Premises Planning Guidelines</i>. • Councils and WorkCover should be provided with additional resources to regulate the industry and WorkCover should oversee compliance activity to ensure that all sex industry businesses, in particular unapproved brothels, comply with work health and safety requirements.

APPENDIX C. SUMMARY OF AUSTRALIAN SEX INDUSTRY LAWS⁷⁸

State or Territory	Legal status
NSW	Sex services premises are legal and only require council planning approval. Escorts are unregulated. Street soliciting is allowed provided it is away from dwellings, schools, churches and hospitals. Living off the earnings of a sex worker is illegal (owners and operators of sex services premises are exempted). Advertising is prohibited.
Victoria	Brothels and escort agencies with more than two workers must have a licence from the Business Licensing Authority (BLA) plus council planning approval. Restrictions on location and size of brothels (up to six rooms; more if established prior to 1996). Small (1 or 2 sex workers) brothels are exempt from holding a licence but must register with the BLA and hold a local council planning permit. Advertising is legal with the licence number given by the BLA. Operating an unlicensed brothel and soliciting in a public place are illegal.
Queensland	Brothels must have a license from the Prostitution Licensing Authority (PLA) and local council planning approval. Licenses and planning approvals need to be renewed annually. Restrictions on location and size of brothels (a maximum of five rooms and no more than five sex workers on the premises at one time). Private sex workers are unregulated but must work alone and must use condoms. Escorts are illegal as is operating an unlicensed brothel. Soliciting in a public place and advertising are illegal.
Western Australia	Brothel keeping with more than one sex worker is illegal. Escort agencies are not illegal. Soliciting in a public place is illegal. The Government has introduced a Bill to prohibit all forms of sex work from residential areas and limit the number of permitted brothels to a small number of areas. A strict licensing scheme is proposed for brothel operators and managers and self-employed sex workers. The current prohibition on street-based sex work would be maintained. At the time of writing, the Bill has not yet passed into law.
South Australia	Brothel keeping is illegal and some escort work is illegal. Soliciting in a public place is illegal.
Tasmania	Brothel keeping is illegal. Escort work is probably legal. Soliciting in a public place is illegal.
ACT	Brothels are permitted in prescribed (industrial) locations with council planning approval. Escort agencies are legal. Brothels and escorts must register but no probity checks are conducted as part of the registration process. Private sex workers must also register. Soliciting in a public place is illegal.
Northern Territory	Brothel keeping and soliciting in a public place are illegal. Outcall and escort agencies are legal with a licence from the Escort Agency Licensing Board. There are no specific planning requirements.

⁷⁸ The table is drawn from Harcourt et al (2005) and Mossman (2007).