

Sex in the Dark: The Brothels Legislation Amendment Act 2007 (NSW)

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Abstract

The *Brothels Legislation Amendment Act 2007* (NSW) was passed by the New South Wales Parliament to expedite the closure of 'disorderly and unlawful brothels'. This article details the enforcement regime introduced by the Act and then considers the reasons for these reforms. The author argues that the reforms are not aimed at tangible, negative impacts, but instead at 'unlawfulness and disorderliness'. The article concludes by suggesting that rather than the current approach of harsh expulsion and exclusion, the government could better achieve law and order through legalisation and regulation.

The *Brothels Legislation Amendment Act 2007* (NSW) was recently passed by the New South Wales Parliament, aimed primarily at expediting the closure of 'disorderly and unlawful brothels'. The legislation expands the powers of councils and the Land and Environment Court, in particular permitting the cutting-off of utilities such as power, gas or water supplies for illegal brothels, reducing notice periods and opportunities for adjournments. I argue that these reforms have been stimulated by a perception of the inherent unlawfulness and disorderliness of brothels, rather than a belief in brothels as potentially lawful and orderly. The legislation attempts to impose law and order upon the sex industry through a harsh enforcement regime of expulsion and exclusion.

The first part of this article details the enforcement regime introduced by the *Brothels Legislation Amendment Act 2007* (NSW). In the next part, I consider the reasons for these reforms and argue that the primary motivation is not tangible, negative amenity impacts but a concern with unlawfulness and disorderliness. I conclude by analysing the likely efficacy of these reforms in imposing law and order, comparing the approach of harsh expulsion and exclusion with an alternative approach of legalisation and regulation.

The *Brothels Legislation Amendment Act 2007* (NSW)

Prior to legislative reforms in 1996, brothels were illegal and subject to closure. The *Disorderly Houses Amendment Act 1995* (NSW) provided that brothels could operate as

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legal businesses and were to be regulated by councils through their planning powers.¹ Since that time, many local councils have agitated for increased powers to identify and shut down ‘illegal’ brothels, with both Liberal and Labor parties promising to deliver councils increased powers against brothels if elected.² The *Brothels Legislation Amendment Act 2007* (NSW) was introduced in parliament to facilitate the closure of ‘disorderly and unlawful’ brothels (Explanatory note 1). The legislation does this in three ways: it expands the definition of brothels and diminishes proof requirements; increases the enforcement and penalty regime; and accelerates the court process.

Definition and Proof of Brothels

The Act expands the definition of brothel in the *Restricted Premises Act 1943* (NSW) s2 from ‘habitually used for prostitution’ to include premises

- (b) that have been used for the purposes of prostitution and 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.

As a consequence of amendments tabled by the Reverend Fred Nile, the *Brothels Legislation Amendment Act 2007* (NSW) introduces a slightly different definition of brothel to the *Environmental Planning and Assessment Act 1979* (NSW), explicitly excluding premises used by only one worker from the definition.³

The legislative reforms broaden the definition of brothels in several ways. First, the new definition does not require councils to prove that the premises are habitually being used for sex work, only that they are *likely* to be. Secondly, the definition allows councils to rely on advertisements and representations to establish that a premises operates as a brothel.

The legislation also allows the court to rely solely on circumstantial evidence in proceedings taken against unlawful or disorderly brothels (*Environmental and Assessment Act 1979* (NSW) s124AB). This can include the number, gender and frequency of persons entering and leaving the premises, appointments, accounts, and the arrangement of furniture, equipment or articles in the premises.⁴ These reforms were introduced in response to council difficulties in establishing a building was being utilised for sexual services. Of particular concern was the use by councils of private investigators to ‘nail down the

1 For more detail, please refer to Crofts 2006.

2 Virginia Judge, Member for Strathfield, NSW, *Parliamentary Debates*, Legislative Assembly, 22 June 2007, 1644.

3 “‘Brothel’ means a brothel within the meaning of the *Restricted Premises Act 1943* (NSW), other than premises used or likely to be used for the purposes of prostitution by no more than one prostitute’: *Environmental Planning and Assessment Act 1979* (NSW) s4(1).

4 In parliamentary debates, Rob Stokes commented: ‘There is considerable evidence to suggest the Legislative Council not only fits that definition, but some might say, is also an illegal use of land.’ Member for Pittwater, NSW, *Parliamentary Debates*, Legislative Assembly, 22 June 2007, 1647.

evidence' by having sex with sex workers. These reforms greatly reduce the evidentiary requirements imposed on councils.

Enforcement and Penalty Regime

Under the *Brothels Legislation Amendment Act 2007*, councils will be able to make brothel closure orders that can be made effective within five working days rather than the previous 28 days. Orders can be served on any person involved in the management of the brothel, and not just upon owners or occupiers. Non-compliance with these orders is an offence and penalties apply. The order can also be made against a premises being used for 'related sex uses' to ensure that brothels that are closed do not immediately reopen with a related unauthorised use, for example as an erotic massage parlour.⁵ This means that councils can take action against an unauthorised brothel and need not start the process again at the same premises.

Previously, under the *Restricted Premises Act 1943* (NSW) a local council had to have sufficient complaints to warrant the making of a brothel closure order. With the recent amendments, the council needs only one complaint (s17(2)). As a consequence of amendments tabled by the Reverend Fred Nile, one complaint may be sufficient to warrant a brothel closure order only if there are 'two or more prostitutes' (s17(2A)). This amendment was introduced to 'prevent the making of malicious or vindictive complaints by one person against a single woman or a sole female parent who is living in a unit and has been accused of being a prostitute'.⁶

The legislation also expands the class of persons who can complain about brothels to include persons who work in the vicinity or who use, or whose children use, facilities in the vicinity of the brothel (*Restricted Premises Act 1943* (NSW) s17(3)(c)). This was to include parents whose children attended schools that had an unauthorised brothel sited nearby.

Under the new legislation, the Land and Environment Court and local courts can now direct water, electricity or gas to be cut off to premises that have failed to comply with a brothel closure order (*Environmental Planning and Assessment Act 1979* (NSW) s121ZS). Only seven days notice are necessary to the person who received the brothel closure order, the utilities company and the owner or occupier of the premises. In introducing the Bill, Steve Whan (on behalf of Frank Sartor) stated that cutting off utilities supplies was a 'last resort when a brothel operator persistently flouts the law'.⁷

There is very little in the legislation to indicate that a utilities order is only available as a last resort. Section 121ZS(6) of the *Environmental and Assessment Act 1979* (NSW) only specifies that the Land and Environment Court take into account the failure to comply with the brothel closure order, the uses of the premises, the impact of the uses of the premises, and whether the health and safety of any person or the public, will be detrimentally affected by the order. Arguably, the only safeguard rests in s121ZS(6)(e) which allows the court to take into account 'any other matter the court thinks appropriate'. Nor is there any suggestion

5 A 'related sex use' is defined as payment for sexual services or acts, provision of massage services other than genuine remedial or therapeutic services, the use of premises for adult entertainment involving nudity, indecent acts or sexual activity if provided in exchange for payment (*Restricted Premises Act 1943* (NSW) s.).

6 Reverend the Honourable Fred Nile, NSW, *Parliamentary Debates*, Legislative Council, 28 June 2007, 2998.

7 Member for Monaro, NSW, *Parliamentary Debates*, Legislative Assembly, 20 June 2007, 1449; on behalf of Frank Sartor, Member for Rockdale, Minister for Planning, Minister for Redfern/Waterloo, Minister for the Arts.

of persistent flouting of the law – failure to obey a five-day closure order is sufficient to commence these proceedings.

There is protection in the legislation for home occupations (sex services). The legislation specifies that utilities orders may not be made for premises used for residential purposes. This is underlined by the change in definition introduced by Fred Nile to exclude home occupations (sex services) from the *Environmental Planning and Assessment Act 1979* (NSW) definition of a brothel.

Streamlining Court Procedures

The legislation also greatly expedites court proceedings against unauthorised brothels by limiting adjournments and removing natural justice requirements. Under the reforms, the Land and Environment Court may only adjourn proceedings under *Environmental Planning and Assessment Act 1979* (NSW) s124(3) if it is of the opinion an adjournment is justified because of the ‘exceptional circumstances’ of the case. Lodging a development application for a brothel is not by itself an exceptional circumstance (s124AB(2)). The court may make only one adjournment (s124AB(4)). This reform was aimed at stopping brothels from operating indefinitely when a council order has been made against them.

The legislation also provides that a person who gives a brothel closure order does not need to comply with natural justice requirements specified in ss121G-121K (*Environmental Planning and Assessment Act 1979* (NSW)). This excludes consideration of whether an order will make a resident homeless, notice requirements and opportunities for representation.

Reasons for the Reforms

The *Brothels Legislation Amendment Act 2007* (NSW) introduces a raft of new powers, including the shutting off of utilities, reduction of notice periods, reducing evidentiary requirements and limiting opportunities for adjournment. These reforms raise two major questions. First, why has the government perceived this ‘robust’ enforcement regime to be necessary? And secondly, are these reforms the best means to achieve these aims? In this section I consider the justifications for the legislation and argue that the reforms are not aimed at specific amenity impacts of unauthorised brothels. Rather, the primary focus is upon the negative connotations of il/legal brothels. The legislation is informed by a philosophy of brothels as inherently unlawful and disorderly.

Since 1996, brothels have been regulated by councils through their planning powers. A major concern of planning is the control and regulation of amenity impacts (*Environmental Planning and Assessment Act 1979* (NSW) s79C). ‘Amenity’ is a rather ambiguous concept that has been recognised as ‘wide and flexible’ (*Perry Properties v Ashfield Council* at [1]). It includes practical and tangible effects such as traffic, noise, nuisance and lighting, and also less tangible aspects such as the ‘standard or class of the neighbourhood’ (*Broad v Brisbane City Council* at 299). The Land and Environment Court has been clear that morality is not a relevant planning consideration (*Zhang v Canterbury Council*; *Marinos v Ashfield Council*).

The *Brothels Legislation Amendment Act 2007* (NSW) does not appear to be aimed at disorderliness in the sense of negative tangible amenity impacts generated by unauthorised brothels. This is because councils already have general powers to regulate businesses and persons that have negative amenity impacts (see e.g. the *Protection of the Environment Operations Act 1997* (NSW) Pt 8.6). In addition, councils also have specific powers to close

down brothels with negative amenity impacts under s17 of the *Restricted Premises Act* 1943 (NSW). Sydney City Council successfully relied upon this power to shut down Mistys, an erotic massage parlour that was operating with development consent (*Sydney City Council v DeCue*). Mistys offered a massage and masturbation service to groups and/or individuals. This meant that many clients would arrive and leave in groups, leading to anti-social behaviour and disturbances in a residential street. Due to the negative amenity impacts, the Land and Environment Court ordered the brothel closed under the *Restricted Premises Act* 1943 (NSW). Accordingly, a regulatory framework was already available for brothels that were bad neighbours.

Parliamentary debates also indicate that the legislation is not aimed at tangible negative amenity impacts. The focus of the debates was on the unlawfulness, rather than negative amenity impacts. Only Virginia Judge outlined in any detail specific negative (but rather euphemistic) amenity impacts of an illegal brothel in Strathfield Council:⁸

The suspicion arose from clients visiting the premises at all hours of the day and night, screeching car tyres, people shouting in the street, certain objects left in the streets, abusive language, and instances of people knocking on the doors of nearby residences requesting certain services. All of that really upset the local neighbourhood.

This kind of disorderly impact, particularly in a residential area, would be highly undesirable and frustrating. However, it should be noted that these issues are not generated solely (or always) by unauthorised brothels, but may also occur due to backpacker residences, pubs in the vicinity or just inconsiderate neighbours. A more general approach to encouraging and regulating good neighbours may be more appropriate, especially in light of governmental encouragement of higher density living.

Furthermore, the implication that this legislation is not focused on brothels with negative amenity impacts is highlighted by the change in the complaint requirements. Previously, under the *Restricted Premises Act* 1943 (NSW) s17, a council needed to receive 'sufficient' complaints to warrant a brothel closure order. Under the new reforms, the council need receive only one complaint before proceedings to obtain a brothel closure order may commence (except in the case of home occupations (sex services) where councils still need 'sufficient' complaints). This suggests that councils may not be responding to a large number of complaints about a brothel causing negative amenity impacts. There appear to be several different grounds for councils investigating whether a brothel is operating without authorisation. First, council workers may respond to a complaint or complaints made by a member of the public of negative amenity impacts or simply suspicions. Secondly, owners of authorised brothels complain about unauthorised brothels that are operating in the area. In part this is due to a desire to remove the competition, but also due to a sense that they have paid a great deal of money to receive authorisation to operate and it is unfair that others are operating without these expenses. Thirdly, council workers may simply ring advertisements in the newspapers to ascertain whether a business is proffering sexual services without authorisation (ICAC 2007). In many of these cases, councils are not motivated to investigate unauthorised brothels due to complaints about tangible negative amenity impacts.

Accordingly, the primary motivation of the legislation is not in response to disorderliness in the sense of specific negative amenity impacts of unauthorised brothels. Rather the focus of the rhetoric appears to be upon fears of generalised dangers posed by brothels *per se*, ranging from drugs, disease and violence, to the reduction of property

⁸ NSW, Parliamentary Debates, Legislative Assembly, 22 June 2007, 1645.

prices.⁹ Just through their existence, brothels are thought to pose a danger to our community, even without any specific tangible impacts. Parliamentary debates referred to unauthorised brothels operating near schools, which should ‘never be permitted’,¹⁰ even if only the sex worker(s) and clients are aware of the existence of the brothel. This concern with the existence of a brothel was also exemplified in a *Sydney Morning Herald* article (Wainwright 2003) when parents of children at a child-care centre were ‘unaware of the existence of the brothel and its customers until contacted by the *Herald*’.

This concern with removing a brothel simply because of its existence is well-expressed by the Mayor of Ku-ring-gai:

If I want to go down and close my local restaurant because they’ve got cockroaches in their food, we can close them down on the spot. But if I want to close down a brothel, I can’t ... I’ve got to go through a lengthy procedure (Welch 2007).

The simple existence of an unauthorised brothel is perceived as dangerous, regardless of whether or not the brothel generates tangible negative impacts, or even if outsiders are aware of its existence. The parliamentary debates, political promises and media reports often use the language of pestilence of disease. Illegal brothels have ‘plagued local neighbourhoods’,¹¹ ‘pose a very real danger’,¹² and are proliferating. They express a generalised fear of brothels as unlawful and dangerous.

The tough enforcement regime introduced by the *Brothels Legislation Amendment Act* 2007 (NSW) can be characterised as part of a State Government law and order campaign (Weatherburn 2004), with both parties vying for who can be tougher on (illegal) brothels. The legislative reforms were promised by the Labor party just prior to the March elections. Parliamentary debates recorded in principle agreement, with the Liberals asserting they would have gone further.¹³ A Bill tabled in 2001 by the former Opposition leader John Brogden proposed powers for councils to shut down illegal brothels within 48 hours, and then put the onus on the alleged operator to establish that the premises were not operating as a brothel.

Brothels make a fairly easy target for tough law and order rhetoric, due to their history, reinforced by a vocal sex industry lobby group. Historically, brothels were legally and colloquially perceived as disorderly. The expression, ‘my house is like a brothel’ was used to express disorder. In *Sibuse Pty Ltd v Shaw*, the Supreme Court declared that a brothel was a disorderly house whether it was well-run or not. The name of the legislation itself, the *Disorderly Houses Act* 1943 (NSW),¹⁴ reflected and reinforced this association of brothels with disorder and unlawfulness. Until 1995, brothels offended against the legal order, and could not operate legitimately (*Disorderly Houses Amendment Act* 1995 (NSW)). I have analysed elsewhere the historical association of brothels with disorder, including perceptions of immorality, criminality, corruption and disease (Crofts 2007). The *Brothels Legislation Amendment Act* 2007 (NSW) sustains this historical linkage of brothels with disorder, stating the legislation is aimed at ‘unlawful and *disorderly*’ brothels. This is

9 NSW, *Parliamentary Debates*, Legislative Assembly, 22 June 2007, 1646 (Rob Stokes, Member for Pittwater).

10 NSW, *Parliamentary Debates*, Legislative Assembly, 20 June 2007, 1447 (Steve Whan, Member for Monaro).

11 NSW, *Parliamentary Debates*, Legislative Assembly, 22 June 2007, 1648 (Rob Stokes, Member for Pittwater).

12 NSW, *Parliamentary Debates*, Legislative Council, 28 June 2007, 2085 (Don Harwin).

13 NSW, *Parliamentary Debates*, Legislative Council, 28 June 2007, 2085 (Don Harwin).

14 The legislation has since changed names and is not *The Restricted Premises Act* 1943.

despite an absence of any focus upon brothels as generating tangible disorderly amenity impacts. Rather, it is as though there is something inherently disorderly about brothels. The concerns expressed in parliamentary debates about unlawful brothels are the same concerns that are asserted in council objections to brothel development applications. Whether approved or not, brothels are perceived as inherently disorderly and unlawful. Disorder is threatening, it crosses and challenges cherished boundaries and borders (Douglas 2002). Brothels can be perceived as particularly transgressive, crossing legal, moral and religious boundaries (Crofts 2007). They are both polluted and polluting, with the potential to contaminate school students walking past, church goers who can see the brothel, or residents who can simply see the building from their homes (*Martyn v Hornsby Shire Council*).

The Adult Business Association has contributed to the fears about disorderly brothels. The ABA represents (some) owners of authorised brothels in NSW, and has strongly and loudly supported council claims of the need for greater enforcement powers to remove 'illegal' brothels. The ABA has adopted the risky political strategy of attempting to draw a sharp distinction between lawful and orderly brothels, and unlawful and disorderly brothels. The ABA has reinforced community perceptions of a flourishing and dangerous illegal industry, releasing research in late 2006 that 782 businesses were offering 'illicit' sex services across 70 Sydney council zones, resulting in more than \$500 million revenue a year (LAC Lawyers 2007). The ABA arrived at this figure by ringing up advertisements in local newspapers to determine whether or not they offered sex services. Unfortunately the research made no distinction between home occupations (sex services) and commercial brothels operating without development consent.¹⁵ The ABA also played on the notion that brothels operating without development consent will break other laws and regulations, including tax dodging, health and safety rules, and the employment of under-age sex workers or sex slaves. Whilst council authorisation may ease the work of taxation agents and health workers, it is irrelevant for the Tax Office and organisations like ACON whether or not a brothel has development consent.

The ABA has built upon historical perceptions of brothels as disorderly, by attempting to distinguish between orderly, lawful brothels and disorderly, unlawful brothels. This sustains historical associations of brothels with disorderliness and contributes to the law and order discourse now aimed at brothels. The ABA has contributed to a context which perceives the removal of un/lawful brothels as the most appropriate crime prevention approach available. The *Brothels Legislation Amendment Act 2007* expresses a desire to remove, expunge or exclude (un/lawful) brothels from the community.

Efficacy of the Reforms

An illegal sex industry can generate negative impacts, including disease, crime, violence and corruption. This section evaluates two different approaches to an illegal sex industry. One approach desires to exclude, expunge or erase illegal brothels, the other aims to bring brothels within a regulatory framework. Interestingly, both approaches have the same motivation – a desire to introduce or impose law and order upon the sex industry.

Currently, both approaches to the regulation of the sex industry are expressed in NSW legislation. The first, most recently expressed in the *Brothels Legislation Amendment Act 2007* (NSW), aims to hound unauthorised brothels out of the community through strict

¹⁵ Home occupations (sex services) can have an ambiguous legal position in some local council areas (Crofts 2007).

enforcement practices. The second approach aims to deal with the negative impacts of an illegal sex industry through better management of risks and harms through legalisation and regulation. This approach (partially) informed the *Disorderly Houses Amendment Act 1995* (NSW), with the stated aim of reform that brothels would be able to operate as legitimate businesses. Whilst the first approach aims to exile or exclude the sex industry from the community, the second attempts to include brothels within the community. These approaches are also reflected at the local government level (Crofts 2006). Some local councils respond to brothels as (potentially) legitimate businesses,¹⁶ whilst other local councils have stated that they do not want any brothels in their local government area and devote council resources to identifying and removing any unauthorised brothels (see e.g., Ashfield Council Media Releases in 2000).

The *Brothels Legislation Amendment Act 2007* (NSW) is presented as complementary to the reforms of 1995. The new legislation is portrayed as simply providing an enforcement regime for councils to apply against recalcitrant brothels that have chosen to be unlawful and disorderly despite reforms. However, I would argue that the *Brothels Legislation Amendment Act 2007* (NSW) is actually antagonistic to the earlier reforms aimed at treating brothels as legitimate businesses. This is because the *Brothels Legislation Amendment Act 2007* (NSW) is informed by the notion that an unlawful brothel can never be/come lawful, and that existing brothels are always potentially disorderly.

The legislation expresses a deep-seated doubt about the desirability of brothels operating legally in the community. This is communicated particularly in s124AB(2) of the *Environmental Planning and Assessment Act*, limiting the capacity of the Land and Environment Court to grant adjournments:

The Court may not adjourn proceedings under s124(3) unless it is of the opinion that the adjournment is justified because of the exceptional circumstances of the case. The fact that it is intended to lodge a development application, or that a development application has been made, is not by itself an exceptional circumstance.

This subsection expresses doubt that brothels would ever wish to, or could, operate legally. A development application would simply be a stalling tactic to prevent closure, with an owner 'go(ing) through the motions' of a development application, rather than expressing a desire to operate legally.¹⁷

Under the reforms, existing unauthorised brothels that have been operating without amenity impacts and the knowledge of the surrounding community are not encouraged to make a development application. If they do apply for development approval, not only will they draw (unwanted) attention to themselves with the high likelihood of council refusal of the application, but the local council will now be able to impose closure orders and potentially shut off the utilities of the brothel whilst the Land and Environment Court is considering an appeal against council refusal.

Parliamentary debates also expressed doubt about the possibility of brothels operating lawfully. Rob Stokes asserted the need to 'empower communities to control illegal land

16 For example, Waverly Council treats sex services premises as ordinary businesses and responds to development applications from brothels according to planning principles applied to other businesses with similar amenity impacts. Sydney City Council has developed specific sex industry planning policies that differentiate between sex services premises according to potential amenity impacts based on factors such as size, services and locations.

17 Steven Whan, Member for Monaro, NSW, *Parliamentary Debates*, Legislative Assembly, 20 June 2007, 1448.

uses' He was particularly concerned about Land and Environment Court approval of brothels after council refusals:

In cases where councils have properly monitored developments and used their power to issue orders to shut down illegal brothels, the operators have simply turned around and sought a development application to legalise the land use, which the council understandably has refused. If the matter goes to court, the community is left to pay huge bills to fight illegal developments, which are often approved by the Court.¹⁸

Stokes appears to be concerned not just about 'unlawful' brothels, but also the prospect that these brothels may become 'lawful'. His statement is based on a belief that brothels cannot and should not become lawful. Whether approved by the Land and Environment Court or not, brothels remain 'illegal' developments.

Parliamentary debates, legislative reforms and media reports refer frequently and expansively to the 'illegality' in and of the sex industry. The lexicon of unlawfulness is used to denote brothels that are not authorised by councils, regardless of whether or not they have tangible negative amenity impacts. In addition, authorised brothels are also labelled 'unlawful' if they have disorderly impacts, or even in cases where the Land and Environment Court has approved the development in the face of council opposition. The *Brothels Legislation Amendment Act 2007 (NSW)* can be utilised to shut down brothels which have never been authorised, but also those which are authorised but are disorderly. It is as though even when authorised, any possibility of lawfulness and order is at best temporary and contingent. There is an erasure of any distinction between failures to meet planning controls and criminality. The rhetoric of unlawfulness excites and plays upon fears of disorder, particularly that illegality will taint our children, our families, our community and our legal system (Crofts 2007).

The *Brothels Legislation Amendment Act 2007 (NSW)* is built upon and expresses an underlying philosophy of brothels as inherently unlawful and disorderly. The reforms are based upon a desire to remove or expel these businesses from the community. But is a tough enforcement regime the most appropriate way to respond to illegal brothels?

The problem with these reforms is that history has demonstrated that attempting to remove the sex industry from the community through harsh penalties and crackdowns is doomed to fail. It is possible to predict that the reforms will fail to address the problems identified by Parliament. For example, the reforms were introduced to reduce costs for local councils attempting to close illegal brothels. Whilst local councils may no longer have to pay private detectives to have sex with workers to prove a business is a brothel, some evidence will still be needed to establish a brothel. Also, presumably, many local councils will continue to allocate resources to preventing brothels from operating lawfully through court battles in the Land and Environment Court. An alternative approach is to regard brothels as potentially legal businesses. Rather than allocating resources to shutting down brothels, local councils may be better placed in finding appropriate premises from which brothels can operate to minimise negative amenity impacts upon the community.

Incentives for introducing the enforcement regime in 2007 are remarkably similar to concerns stimulating decriminalisation in 1995. For example, one of the stated aims of the 2007 reforms is the protection of the health of workers and clients through a punitive regime, but these same concerns were expressed in 1995. Parliament was concerned with health with the *Disorderly Houses Amendment Act 1995 (NSW)* aimed at reducing street-sex work and the associated risks to clients, workers and passers by and also encouraging

18 Member for Pittwater, NSW, *Parliamentary Debates*, Legislative Assembly, 22 June 2007, 1646.

owners to manage brothels that were well-run, safe and clean.¹⁹ The 1995 reforms were introduced due to a belief that legalisation of the sex industry assists organisations such as the Sex Workers Outreach Project (SWOP) in maintaining contact with workers, offers the opportunity to set up best practice models, gives workers a framework of safe practices and regulators to whom they can complain if their employer does not adhere to these practices.

In addition, a major impetus for legalisation in 1995 was due to a concern with corruption. Parliament noted that the Wood Royal Commission had identified a link with an illegal sex industry and police corruption.²⁰ In the recent parliamentary debates, Sylvia Hale (Greens) stated that the Brothels Legislation Amendment Bill 2007 (NSW) raised corruption concerns.²¹ However, this was labelled as ‘tangential’ by the government.²²

This refusal to address issues of corruption demonstrates one of the major weaknesses of the *Brothels Legislation Amendment Act 2007* (NSW). In May 2007, just prior to the parliamentary debate of the new Brothels Legislation Amendment Bill 2007 (NSW), the Independent Commission Against Corruption (ICAC) was investigating a council worker, Wade Fryar, and his acceptance of bribes in the form of money and sexual services from illegal brothel owners and workers. In exchange, Fryar would not investigate complaints against the brothel, or would warn them of upcoming investigations. Mr King, Counsel assisting the proceedings, neatly articulated the opportunities for corruption generated by an illegal sex industry:

In the past, operating relatively clandestinely and mostly in cash, the continued operation of brothels has always depended on the authorities, whether it be the police or local authorities failing to take action to investigate or prosecute.

That inaction has no doubt frequently been the result of those engaging in the unlawful provision of sexual services being able to provide ongoing bribes to those charged with enforcement of the law and preparedness of the corrupt to accept those bribes or to extort payment where not offered to protect the activity. The corruption of individual public officers in this area has no doubt been a significant factor in their corruption in other areas to the more general harm of the community.

Being paid to turn a blind eye to the operation of a brothel can readily be extended to ignoring sexual servitude or the use or sale of prohibited drugs on those premises. Those prepared to engage in one criminal activity are frequently prepared to engage in other criminal activities. The past acceptances of bribes or engagement in extortion provides a powerful lever (NSW, Independent Commission Against Corruption, *Public Hearing, Transcript of Proceedings, Operation E06/1630*, 14 May 2007, 2).

This quotation demonstrates the contaminating effects of unlawfulness. Whilst Fryar admitted to years of corruption in vague terms, the witnesses who he had bribed denied ever performing sexual services for him or anyone else, and also minimised the extent of the bribes. An illegal industry can contribute toward corruption, and even when this corruption is discovered, it is difficult to shed a light on its extent.

The *Brothels Legislation Amendment Act 2007* (NSW) represents a return to the bad old days of criminalisation of the sex industry. The legislation provides no encouragement or

19 Tony Stewart, NSW, *Parliamentary Debates*, Legislative Assembly, 30 November 2001, 19295-19297.

20 Paul Whelan, Minister for Police, NSW, *Parliamentary Debates*, Legislative Assembly, 20 September 1995, 1188.

21 NSW, *Parliamentary Debates*, Legislative Council, 28 June 2007, 2086-2088.

22 John Della Bosca, Minister for Education and Training, Minister for Industrial Relations, Minister for the Central Coast, Minister Assisting the Minister for Finance, NSW, *Parliamentary Debates*, Legislative Council, 28 June 2007, 2092.

assistance to unauthorised brothels to operate lawfully. The reforms are in opposition to recommendations from groups like SWOP and the government's own Brothels Taskforce (Brothels Taskforce 2001; Sex Services Premises Planning Advisory Panel 2004). Not only will the reforms fail to address issues such as health, negative amenity impacts or crime, but it will exacerbate other problems, particularly council corruption.

Criminalisation of the sex industry manifestly does not work and generates more problems than it solves. Legalisation allows for regulation and encourages best practice models for health and safety. Negative impacts associated with unlawfulness fade away under a well-regulated industry. A legal industry reduces the opportunity for bribery and corruption and minimises the association of the sex industry with crime. Legalisation of the industry removes the opportunities for massive profits obtained on a black market. Owners of larger brothels are encouraged to perceive their business as long-term rather than businesses that can and must be moved frequently. Legal brothels owners invest money in the building and services, and consequently have a concern with being on good terms with their long-term neighbours.

Rather than focusing upon shutting down unlawful brothels, the government would have been better placed in investigating why the sex industry has such difficulties in operating legally. It is estimated that only 125 of the 850 sex services to which the Sex Workers Outreach Project provides services have development consent. Rather than assuming that 85% of the industry wishes to operate unlawfully and should be punished, the government would be better placed researching how to advance legalisation and regulation of the industry.

In particular, the government should analyse where the intention of treating brothels like ordinary, legitimate business has gone astray. Brothels continue to be treated more restrictively than other businesses with similar or worse amenity impacts (Crofts 2007). Many local councils have highly restrictive sex industry planning policies, restricting all brothels to industrial and/or commercial zones, imposing strict parking and notification requirements (Crofts 2006). Where brothel owners have sufficient funds, appeals to the Land and Environment Court are highly likely to meet with success (SWOP 2003). This is because the Land and Environment Court evaluates planning policies in terms of hard and fast evidence of impact upon amenity. The court closely considers whether or not brothels policies are overly restrictive. For example, in *Cresville Pty Ltd v Sutherland Shire Council* (2005), the court refused to apply Council's regulations separating 'brothels' from other 'sensitive land uses' such as 'facilities that serve alcohol' by a distance of 50 metres. The court noted that there was no link established concerning adverse amenity impacts between premises that serve alcohol and sex services premises. Hussey C asserted that 'there is no apparent objective rationale for the separation distances, other than to provide an additional level of restrictions on these types of uses' (42).

A straightforward way to impose law and order upon a large proportion of the industry would be to differentiate between sex services premises types. Presently, the majority of councils, following the state government's lead, make no differentiation between home occupations (sex services) and large commercial brothels, despite their very different amenity impact levels. Large commercial brothels may be high-volume premises, with potential amenity impacts including noise, lighting and signs. In contrast, a home occupation (sex service) will have little to no impact, with neighbours unlikely to even be aware of its existence (Home Occupation Sex Services Premises Project 2005). Home occupations (sex services) are unable to fulfil planning requirements designed for large brothels, particularly the restriction to industrial zones. This is problematic because it is

estimated that at least 40% of the sex industry is made up of home occupations (sex services) (Brothels Taskforce 2001). If local councils treated these businesses like other home occupations, this would automatically massively increase the proportion of authorised businesses from 15% to at least 55% of the sex industry. The recent ICAC hearing demonstrated that home occupation (sex services) workers were highly vulnerable to corruption in council areas which did not have policies specific to home occupations (sex services) (ICAC 2007). Authorisation of home occupations (sex services) would be consistent with planning practices due to their low amenity impact and would bring a large proportion of the sex industry under the umbrella of the law simply and effectively.

The State Government needs to provide guidance to local councils about best practice models. Since 1995 the State Government has issued very little guidance, despite requests from councils, indicating only that whilst councils may not prohibit brothels they could restrict brothels to industrial zones (NSW Dept for Planning 1996). Currently, it is as though councils and the State Government are operating in the dark. The *Brothels Legislation Amendment Act 2007* and the *Standard Instrument (Local Environmental Plans) Order 2005* (NSW) have been released without any reference to research considering actual amenity impacts of brothels or good planning models (see e.g., Brothels Taskforce 2001).

One of the reasons for the lack of any clear guidance of best practice models is that the government is torn between perceptions of the sex industry as inherently unlawful and the possibility of sex industry becoming lawful and orderly. The legislation and regulations in this area reflect the ambiguities and uncertainty of the government's philosophy. Despite claiming that the new legislation takes a 'holistic' approach to the regulation of the industry, the *Brothels Legislation Amendment Act* simply contributes to the disorderly character of the law in this area. For example, with the reforms of the *Brothels Legislation Amendment Act 2007* there are now several different definitions of brothels at the State Government level – with the *Restricted Premises Act 1943*, *Environmental Planning and Assessment Act 1979* and the *Standard Instrument (Local Environmental Plans) Order 2005* (NSW) each containing different definitions. This is because the government is torn between a desire to exclude and expel brothels and a recognition that a practical nuanced approach allowing the opportunity for order in the sex industry is more effective but politically less popular.

Conclusion

The *Brothels Legislation Amendment Act 2007* (NSW) has provided a tough enforcement regime for councils to rid the community of 'disorderly and unlawful' brothels. The legislation gives councils the power to shut off the utilities of brothels, shortens notice periods and limits the opportunities for adjournments. Rather than being aimed at brothels that create negative amenity impacts, the reforms are informed by a belief in the inherent unlawfulness and disorderliness of brothels, limiting the opportunities for future authorisation of sex services premises. These reforms undermine the stated intention of the *Disorderly Houses Amendment Act 1995* (NSW) of permitting the sex industry to operate as legitimate businesses. The *Brothels Legislation Amendment Act 2007* represents a suspension in the attempt by the NSW Government to encourage the sex industry to move towards authorisation and legality. Rather, the legislation is aimed at expelling and erasing brothels from the community. It would have been much better if the government had examined why the process of legalisation has stalled in NSW. This would include detailed research about council policies, and analysis of whether there was a link between councils with highly restrictive planning policies and rates of unauthorised brothels. Many of the

problems in this area can be traced to a lack of clear guidance from the government to local councils about how best to handle their planning powers with regard to the sex industry. Legislation and regulation of the sex industry are being made in the dark.

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