

## BROTHELS AND DISORDERLY ACTS

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### Abstract

*Although brothels have been able to operate as legal businesses for more than a decade, they continue to be treated more restrictively than businesses with similar amenity impacts. This paper explores the idea that this restrictive treatment can be explained by the continued perception of brothels as disorderly, as 'matter out of place'. This is due in part to the historical association of brothels with disorder in terms of cleanliness, morality and the law. These historical associations have been maintained and reflected in the current regulation of the sex industry, generating fears of pollution and contamination on the strength of its disorderliness.*

### Introduction

Even though brothels have been able to operate in New South Wales as legitimate businesses for more than a decade, they continue to be treated more restrictively than other legitimate businesses with similar amenity impacts. In this paper, I argue that the treatment of sex services premises can be explained by the association of brothels with disorder. This perception of disorderliness, of 'matter out of place', explains the desire to remove brothels from the community, prompted by a fear of moral contamination, corruption or pollution. By articulating an underlying reason for the

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sustained discrimination against brothels, we can then consider strategies for reform in light of ideas about disorder.

In section one of this paper, I briefly outline the current regulatory framework of the sex industry in NSW. In section two I detail the discriminatory treatment of brothels at the State Government and local council levels and also in decisions by the Land and Environment Court. Sex services premises are responded to more restrictively than other businesses with similar amenity impacts. In section three, I consider the ways in which this restrictive treatment has been instigated by a perception that brothels are disorderly, or out of place, in visions of the good community. I apply the ideas articulated by Mary Douglas in *Purity and Danger*,<sup>2</sup> where she links modern responses to disorder or dirt with ‘primitive’ ideas about taboo. I go on to analyse the impact of responses to disorder with the regulation of brothels, particularly the notion that ‘dirt is dangerous’, that the disorderly is polluted and polluting. The final section concludes with a consideration of possible law reform in light of Douglas’ ideas about our responses to the disorderly.

## **SECTION ONE: THE REGULATORY FRAMEWORK**

Prior to legislative reforms in 1996, brothels were illegal and subject to closure, regardless of whether or not they were well-run. Police relied upon the *Disorderly Houses Act 1943* (NSW), which created offences of being an owner or occupier of a declared premise. Under s 3, a variety of grounds could go towards a premise becoming a ‘declared premise’ including ‘drunkenness or disorderly or indecent conduct or any entertainment of a demoralising character takes place on the premises’

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<sup>2</sup> Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (2002).

or it was frequented by ‘reputed criminals or associates of reputed criminals’ or ‘persons of notoriously bad character’. The *Disorderly Houses Act 1943* (NSW) was increasingly relied upon by police in the 1990s to close brothels and prosecute any persons found on the premises. Police were aided in particular by the decision in *Sibuse Pty Ltd v Shaw*,<sup>3</sup> where the Supreme Court declared that a brothel was a disorderly house whether it was well-run or not.

In 1995, the *Disorderly Houses Amendment Act 1995* (NSW) repealed s 3(1)(e) of the *Disorderly Houses Act 1943*, and provided in s 16 that a ‘declaration under s 3 may not be made in respect of premises solely because ... the premises are a brothel’.<sup>4</sup> There were two major reasons provided by the NSW Legislature for these reforms. Firstly, the Wood Royal Commission had identified a link between an illegal sex industry and police corruption. The threat of closure of brothels led to potential to demand and receive payment of bribes.<sup>5</sup> Secondly, it was asserted that a harm minimisation approach should be adopted in relation to health and safety, by addressing public health risks and the more undesirable aspects of prostitution.<sup>6</sup> The decision in *Sibuse v Shaw* gave no encouragement to owners to run orderly brothels. Poorly run brothels impacted upon workers, clients and nearby neighbours.<sup>7</sup> Moreover, it was recognised that brothel closures resulted in increased street prostitution, amplifying negative impacts upon workers and nearby residents.

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<sup>3</sup> (1988) 13 NSWLR 98.

<sup>4</sup> A new Part 3 relating to brothels was introduced, authorising the NSW Land and Environment Court, on an application by the local council, to make an order that the premises are not to be used for the purpose of a brothel (s 17). A local council cannot make an application to the NSWLEC ‘unless it is satisfied that it has received sufficient complaints about the brothel ... to warrant the making of the application’.

<sup>5</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 September 1995, 1187 (Paul Whelan, Minister for Police).

<sup>6</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 October 1995, 1937 (Bryce Gaudry).

<sup>7</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 October 1995, 1952 (Clover Moore).

As a consequence of amendments to the *Restricted Premises Act 1943* (NSW),<sup>8</sup> local councils now have the power to regulate brothels through their plan-making powers, governed by the *Environmental Planning and Assessment Act 1979* (NSW). Accordingly, since 1996, local councils have had the power to regulate brothels through amending Local Environmental Plans (LEPs) and Development Control Plans (DCPs).<sup>9</sup> Briefly, councils do not have an unfettered discretion in the form or content of their LEPs. Local councils are required to take into account the comments of members of the community and any other public authorities which may be affected. Moreover, the Planning Minister has a right of veto over the implementation of LEPs. Recently, the Department of Planning has gazetted a Standard LEP which all local governments are required to adopt within the next five years.

Councils have responded to their responsibility for regulating the sex industry in a variety of ways.<sup>10</sup> Approximately half the councils in NSW have developed planning principles that are specific to brothels. These councils tend to rely upon locational restrictions, limiting brothels to commercial and/or industrial areas. A small number of councils have developed planning principles regarding the sex industry that differentiate between sex services premises type. For example, the draft Sydney City Council LEP distinguishes between sex services premises types based on differences in amenity and environmental impacts, ranging from commercial sex services premises to home occupations.

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<sup>8</sup> The *Disorderly Houses Act 1943* was renamed the *Restricted Premises Act 1943* by the *Disorderly Houses Amendment (Commercial Supply of Prohibited Drugs) Act 2002* (NSW).

<sup>9</sup> I Ratcliff, 'No Sex Please: We're Local Councils' (1999) 4 *Local Government Law Journal* 150, 152-153.

<sup>10</sup> Penny Crofts, 'Ambiguities in Approaches to Brothels: Disorderly houses of commercial premises?' (2003) 20 *Environmental Planning and Law Journal* 445.

The remaining councils have not developed any policies with regard to sex services premises. This may reflect a perception of the absence of any sex services premises in the local government area. However, other councils still do not have any specific planning policy with regard to sex services premises, despite development applications for sex services premises in the past ten years.<sup>11</sup> These councils have relied successfully upon general planning principles to respond to sex services premises development applications.

Council refusals of development applications can be appealed to the Land and Environment Court. In *Martyn v Hornsby Shire Council*,<sup>12</sup> (Martyn) Roseth SC outlined the planning principles for locating ‘brothels’ in the absence of local council guidelines.<sup>13</sup> Although the principles are not law, they are highly influential and have since been applied in a large number of cases<sup>14</sup> and also by councils at first instance.<sup>15</sup>

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<sup>11</sup> For example, Waverly Council has developed only very few provisions which are sex industry specific. Instead, the Council has successfully relied upon existing provisions to regulate businesses.

<sup>12</sup> [2004] NSWLEC 614.

<sup>13</sup> *Ibid.* These are the planning principles in full:

- Brothels are a legal land use that benefits some sections of the community but offends others. Most people believe that the exposure of impressionable groups like children and adolescents to the existence of brothels is undesirable. The aim should therefore be to locate brothels where they are least likely to offend. However, criteria for locating brothels should not be so onerous as to exclude them from all areas of a municipality.
- Brothels should be located to minimise adverse physical impact, such as noise disturbance and overlooking. In this aspect they are no different from other land uses.
- There is no evidence that brothels in general are associated with crime or drug use. Where crime or drugs are in contention in relation to a particular brothel application, this should be supported by evidence.
- Brothels should not adjoin areas that are zoned residential, or be clearly visible from them. Visibility is sometimes a function of distance, but not always.
- Brothels should not adjoin, or be clearly visible from schools, educational institutions for young people or places where children and adolescents regularly gather. This does not mean, however, that brothels should be excluded from every street on which children may walk.
- The relationship of brothels to places of worship (which are likely to attract people who are offended by brothels) is a sensitive one. The existence of a brothel should not be clearly visible from places where worshippers regularly gather.
- There is no need to exclude brothels from every stop on a public transport route. However, it would not be appropriate to locate a brothel next to a bus stop regularly used by school buses.

## SECTION TWO: RESTRICTIVE TREATMENT OF SEX SERVICES PREMISES

Despite the intention of the *Disorderly Houses Amendment Act 1995* to characterize and regulate brothels as legitimate businesses, they continue to be treated differently from other legitimate businesses with similar amenity impacts. In this section I detail briefly the restrictive treatment of sex services premises at the institutional level, focusing on the state government, local councils and the Land and Environment Court.

As a consequence of the legislative reforms in 1995, sex services premises are now predominantly regulated through planning powers under the *Environmental Planning and Assessment Act 1979* (NSW).<sup>16</sup> In addition to planning regulations, a planning authority must take into consideration:

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- Where a brothel is proposed in proximity to several others, it should be considered in the context that a concentration is likely to change the character of the street or area. In some cases this may be consistent with the desired future character, in others not.
  - The access to brothels should be discreet and discourage clients gathering or waiting on the street. Apart from areas where brothels, sex shop and strip clubs predominate, signage should be restricted to the address and telephone number.

At [18] (Roseth SC).

<sup>14</sup> For example, *AJA Trading* [2005] NSWLEC 253; *Boutros v Strathfield Municipal Council* [2005] NSWLEC 605; *Davis v Parramatta City Council* [2005] NSWLEC 474; *First Choice Stress Relief v Inverell Shire Council* [2005] NSWLEC 259; *Makhoul v Sydney City Council* [2005] NSWLEC 331; *Monteleone v Ryde City Council* [2005] NSWLEC 549.

<sup>15</sup> I have been informed that Hurstville Council is now relying on the planning principles in addition to their own highly restrictive sex services premises policies.

<sup>16</sup> Section 79C of the *Environmental Planning and Assessment Act 1979* (NSW) details the criteria a consent authority must use when determining a development application:

79C (1) In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development subject of the development application:

(a) the provisions of:

- (i) any environmental planning instrument, and
- (ii) any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority, and
- (iii) any development control plan, and
- (iv) the regulations ...

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

... the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.<sup>17</sup>

This subsection focuses upon what has been termed ‘amenity’. Amenity is a broad, rather ambiguous concept, and has been recognised as ‘wide and flexible’, transcending mere physical content.<sup>18</sup> Thomas J in *Broad v Brisbane City Council* attempted to articulate the notion:

The wide-ranging concept of amenity contains many aspects that may be difficult to articulate. Some aspects are practical and tangible such as traffic generation, noise, nuisance, appearance and even the way of life of the neighbourhood. Other concepts are more elusive such as the standard or class of the neighbourhood, and the reasonable expectations of the neighbourhood.<sup>19</sup>

The Land and Environment Court has been clear that morality is not a relevant planning consideration.<sup>20</sup>

The regulation of sex services premises can be broadly divided into two main approaches. The first approach is in accordance with legitimate planning concerns, comparing the amenity impacts of a specific sex services premises with other legitimate businesses with similar amenity impacts. The second approach goes beyond the purview of relevant planning concerns, with highly restrictive results. The first approach reflects and reinforces the stated intention of the NSW Legislature to

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- (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
  - (c) the suitability of the site for the development,
  - (d) any submissions made in accordance with this Act or the regulations,
  - (e) the public interest.

<sup>17</sup> *Environmental Planning and Assessment Act 1979* (NSW) s 79C(1)(b).

<sup>18</sup> *Perry Properties Pty Ltd v Ashfield Council (No 2)* [2001] NSWLEC 62; *Broad v Brisbane City Council* (1986) LGRA 296; *New Century Developments Pty Ltd v Baulkham Hills Shire Council* [2003] NSWLEC 154.

<sup>19</sup> (1986) 59 LGRA 296, 299.

<sup>20</sup> *Zhang v Canterbury Council* [2004] NSWLEC 500; *Marinos v Ashfield Municipal Council* [2005] NSWLEC 2, [32]; *Sun v Campbelltown City Council* [2005] NSWLEC 518, [5]; *Pont v Hurstville City Council* [2005] NSWLEC 33.

treat sex services premises like any other legitimate businesses. It can be seen in some council policies and also in many Land and Environment Court decisions.<sup>21</sup>

When adhering to the first approach, the Land and Environment Court has evaluated the impact of brothels as it would any other development – in terms of hard and fast evidence of impact upon amenity. The Court has closely considered council controls to determine whether or not brothels policies are overly restrictive. Many councils impose very strict requirements upon ‘brothel’ developments as a means to limit the number of sex services premises operating in the area (if at all). For example, councils tend to impose strict parking demands upon brothels. When considering these parking regulations, the Court has accepted that clients tend not to park near sex services premises,<sup>22</sup> sex services premises have different operating hours from existing businesses in the area,<sup>23</sup> and compared the parking requirements imposed on brothels with other businesses with similar or greater parking impacts.<sup>24</sup> For these reasons, the Land and Environment Court has approved development applications for sex services premises even though they may not meet the council parking requirements. In *Cresville Pty Ltd v Sutherland Shire Council*,<sup>25</sup> 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 shops. Hussey C stated that ‘there is no apparent objective rationale for the

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<sup>21</sup> Crofts, above n 10.

<sup>22</sup> *Hang v Strathfield Municipal Council* [2005] NSWLEC 99 and *Sun v Campbelltown City Council* [2005] NSWLEC 518.

<sup>23</sup> For example, in *Vassallo v Blacktown City Council* [2004] NSWLEC 85, Brown C accepted that the brothel would operate at different times when the spaces in the industrial complex would not be required for their normal use.

<sup>24</sup> *Davis v Parramatta City Council* [2005] NSWLEC 474.

<sup>25</sup> [2005] NSWLEC 498.



separation distances, other than to provide an additional level of restrictions on these types of uses.<sup>26</sup> In these cases, the Court has accepted sex services premises as legitimate commercial entities, and focused upon the specific amenity impacts of the development, stating clearly that morality is not a relevant consideration. As with any other development, the Court has required hard and fast evidence of detrimental impact upon amenity.

The second approach to the regulation of brothels goes beyond orthodox planning concerns. This supplement can be perceived in the failure to differentiate between types of sex services premises at all institutional levels. The *Restricted Premises Act 1943* (NSW) defines brothel as:

... premises habitually used for the purposes of prostitution, or that have been used for that purpose and are likely to be used again for that purpose. Premises may constitute a brothel even though used by only one prostitute for the purposes of prostitution.<sup>27</sup>

The majority of councils that have created sex industry specific planning principles also do not distinguish between brothel types, relying instead on (an approximation of) the definition of 'brothel' from the *Restricted Premises Act 1943*. The planning principles recently articulated by the NSW Land and Environment Court in *Martyn* also do not differentiate between brothel types.<sup>28</sup>

This failure to differentiate between brothel types is contrary to orthodox planning practices because it does not take into account the specific amenity impacts of different sex services premises which vary according to type and scale. Thus, large

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<sup>26</sup> Ibid [42].

<sup>27</sup> *Restricted Premises Act 1943* (NSW) s 2.

<sup>28</sup> [2004] NSWLEC 614.

commercial brothels may be high-volume premises, with potential amenity impacts including noise, lighting and signs (all of which can be covered by existing commercial planning principles). In contrast, a home occupation (sex services) will have little to no amenity impact, with neighbours unlikely to even be aware of its existence. In the recent case of *City of Sydney Council v DeCue*,<sup>29</sup> Preston CJ noted the different amenity impacts of different sex services premises. The former tenant had been a full-service brothel and appeared not to have had any negative amenity impact on the area. In contrast, *Mistys*, the current business had offered a massage and masturbation service to individuals and/or groups. This meant that many clients would arrive and leave in groups, leading to disturbances and anti-social behaviour outside of the brothel. The different clientele and services provided had implications for the impact of this particular type of business on the surrounding area. One of the fundamental recommendations of the Sex Services Premises Planning Advisory Panel was to recognise the difference in type and scale of sex services premises in planning controls.<sup>30</sup>

The failure to differentiate between business types is particularly problematic, because the type of sex services premises that the regulations imagine are those with potentially the greatest amenity impacts – large scale commercial brothels. This augments the perception that strict regulations are both required and appropriate.

The focus on large commercial brothels in planning regulations can be seen in the enunciation and application of locational restrictions. The Department of Planning indicated in a Council Circular in 1996 that whilst councils may not prohibit brothels,

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<sup>29</sup> [2006] NSWLEC 763.

<sup>30</sup> Different business types include: commercial sex services premises, small commercial sex services premises, home businesses (sex services), home occupations (sex services), escort services, massage parlours and sex-on-premises venues. New South Wales Sex Services Premises Planning Advisory Panel, *Sex Services Premises Planning Guidelines* (2004) iii.

councils could restrict brothels to industrial zones.<sup>31</sup> As a consequence, many councils in NSW have restricted brothels to industrial zones, with the problems associated with these restrictions becoming increasingly apparent.<sup>32</sup> As forecast in previous research, the siting of sex services premises in industrial zones has generated planning problems.<sup>33</sup> Industrial zones tend to be poorly serviced at night, with no public surveillance, poor lighting, and little or no public transport. As indicated in LEC decisions, the siting of sex services premises in industrial zones raises safety issues for clients and workers, and also for surrounding businesses.<sup>34</sup> Only the very large commercial brothels are capable of meeting the expense of added security, notification requirements and remodelling of buildings.<sup>35</sup> Rather than shunting brothels into industrial zones, they could be regulated as legitimate commercial businesses, and as such, able to operate in commercial zones. Commercial zones proffer well-lit areas and natural public surveillance due to street activity and occupation.

Home occupations (sex services) have been particularly disadvantaged by the catch-all category of 'brothel'. The restriction of 'brothels' to commercial and/or industrial zones in council planning controls effectively prevents home occupations from operating legally. This has recently been exacerbated by the planning principles enunciated by the Land and Environment Court in *Martyn*, which state that 'brothels'

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<sup>31</sup> New South Wales Department of Urban Affairs and Planning, *Council Circular – Planning Controls of Brothels* (16 July 1996).

<sup>32</sup> Penny Crofts, 'A Decade of Licit Sex in the City' (2006) 12 *Local Government Law Journal* 5.

<sup>33</sup> Crofts, 'Ambiguities in approaches to brothels' above n 10; C Harcourt, 'Whose Morality?' (1999) 18(3) *Social Alternatives* 32.

<sup>34</sup> See for example, *Sun* [2005] NSWLEC 518; *Vassallo* [2004] NSWLEC 85; *Hang* [2005] NSWLEC 99; *First Choice* [2005] NSWLEC 259.

<sup>35</sup> For example, in *Hang v Strathfield Municipal Council* [2005] NSWLEC 99, the police cautioned that at night the industrial site was isolated and operators must provide safety for staff and clients, including adequate lighting, duress alarms, security doors and an entrance that was not concealed and did not have any entrapment areas.

should ‘not adjoin areas that are zoned residential, or be clearly visible from them’.<sup>36</sup> These regulations effectively preclude home occupations (sex services) from operating with consent in areas with homes. This is extremely problematic given that it is estimated that home occupations (sexual services) make up at least 40% of the sex industry.<sup>37</sup> Accordingly, these principles directly conflict with the intention to legalise and regulate the industry.

The *Standard Instrument (Local Environmental Plans) Order 2005* (NSW) provides a glimmer of hope. This Order prescribes the form and content of a principal LEP for all local councils in NSW. The purpose of the Standard LEP is to simplify and streamline the State’s planning system.<sup>38</sup> The Standard LEP includes zone descriptions, land use matrix (showing the sorts of developments that can happen in each of the zones), planning provisions and definitions. The only references to the sex industry in the Standard LEP occur in the Dictionary. The LEP no longer utilises the term ‘brothel’ but refers instead to ‘sex services premises’, which are ‘premises habitually used for the purpose of sex services, but does not include a home occupation or sex services (home occupation)’. This means that for the first time, the State Government is differentiating between types of sex services premises on the basis of size. Whilst this is a step in the right direction, the *Standard LEP* then takes two steps backwards by distinguishing home occupations (sex services) from home occupations.<sup>39</sup> At the moment, where councils have no specific sex services premises

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<sup>36</sup> *Martyn* [2004] NSWLEC 614, [18].

<sup>37</sup> Brothels Taskforce B, New South Wales Parliament, *Report of the Brothels Taskforce* (2001).

<sup>38</sup> NSW Department of Planning, *What's in the draft Standard LEP package: outline* (2005).

<sup>39</sup> The standard LEP defines ‘sex services (home occupation) as:

‘the provision of sex services in a dwelling, or in a building ancillary to a dwelling, by no more than 2 permanent residents of the dwelling and that does not involve:  
the employment of persons other than those residents, or  
interference with the amenity of the neighbourhood by reason of the emission of noise, traffic generation or otherwise, or

planning controls, home occupations (sex services) are treated like other home occupations.<sup>40</sup> This means that they can operate legally without development consent. The new *Standard LEP* requires councils to discriminate against home occupations (sex services), treating them differently from home occupations, even though there are no relevant planning grounds for this distinction. This drawing attention to home occupations (sex services) is problematic, because, based on past practice, councils that have created sex services premises policies tend to be highly restrictive or excite large numbers of community objections.<sup>41</sup>

### SECTION THREE: EXPLORING DISORDER

In the previous section I established that despite legislative reforms, sex services premises continue to be treated in a more restrictive way than other legitimate businesses at the state and local government levels and also (increasingly) by the Land and Environment Court. In this section, I explore the idea that the

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the exhibition of any notice, advertisement or sign, or  
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 occupation or sex service premises.

Home occupations are defined as:

An occupation carried on in a dwelling, or in a building ancillary to a dwelling, by the permanent residents of the dwelling 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, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, waste water, waste products, grit or oil, traffic generation or otherwise, or
- (c) the display of goods, whether in a window or otherwise, or
- (d) the exhibition of any notice, advertisement or sign ... or
- (e) the sale of items (whether goods or materials), or the exposure or offer for sale of items, by retail,

but does not include a bed and breakfast establishment or sex services (home occupation).

<sup>40</sup> Although with the decision in *Martyn* [2004] NSWLEC 614 it is arguable that this is no longer the case.

<sup>41</sup> This 'double movement' in legislative reforms to the regulation of the sex industry is not isolated to NSW. For example, in her analysis of the regulation of the sex industry in Queensland, Godden comments:

'The laws reveal a double movement to at once remove the moral stigma by legitimising some forms of prostitution, yet to tightly contain the bodily activity away from public view.'  
Godden L, 'The Bounding of Vice: Prostitution and Planning Law' (2001) 10(1) *Griffith Law Review* 77, 87.

discriminatory regulation of sex services premises is animated by perceptions of disorder. As will become apparent, notions of what is perceived to be disorderly and polluting vary on many different levels, so this analysis is geared toward exploring why sex services premises might excite fears of pollution in some, but not all, people. I rely on Mary Douglas' sustained meditation on taboo and dirt in *Purity and Danger* for insight into why brothels may be perceived as 'matter out of place' and our responses to this perceived disorder.<sup>42</sup>

In *Purity and Danger*, Douglas explored the central theme that 'dirt is dangerous'.<sup>43</sup> Through an analysis of 'primitive' cultures, Douglas posits similarities between taboos and our own relationship with dirt. Taboos arose in response to ambiguous or anomalous concepts or things. Douglas asserts that our ideas about dirt are the modern equivalent of taboo; 'we denounce it by calling it dirty and dangerous; they taboo it'.<sup>44</sup> Once we remove our knowledge of bacteria and hygiene, we are left with the old definition of dirt as 'matter out of place'.<sup>45</sup> Neither dirt nor taboo are absolute concepts, they are never unique, isolated experiences or events. Rather, they assume some kind of system, and contravention of that order.

Douglas assumes a predilection in humans to create clear-cut classifications of the objects in their world. According to this theory, anomalous items, such as those that are unique or instantiate properties of different classes, are disturbing and become the objects of pollution or taboo. Things that are acceptable or even attractive when in their proper place, can be polluting and dangerous when out of place. For example,

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<sup>42</sup> Douglas, above n 2.

<sup>43</sup> Ibid x.

<sup>44</sup> Ibid xi.

<sup>45</sup> Ibid 44.

one is not disgusted by saliva in one's mouth, it becomes offensive outside the body so that we will refuse to drink from a glass into which one has spit.<sup>46</sup> We enjoy kissing our lover, and yet many subjects would refuse to use their lover's toothbrush.<sup>47</sup> Douglas accepts that the construction of systems, the gestures of classifying, systematising and cleansing, are necessarily contingent. However, the central point is that both dirt and taboo offend. Dirt and taboo are matter out of place, anomalous or ambiguous, and challenge our systems and categories.

Douglas' detail of the structures of taboo illuminates modern responses to matter out of place. Taboos are part of a societal function to reward conformity and repulse attack. Our ideas of dirt and taboo protect our visions of the good community, particularly at the margins and vulnerable points. The main function of taboo and dirt is to impose a system on inherently untidy experiences, protecting distinctive categories of the universe, shoring up uncertainty and reducing disorder. Dirt offends against order. The elimination of dirt is not a negative movement, but a positive effort to organise the environment. Our efforts to dust, vacuum, polish and tidy are not governed by a desire to escape disease, but to re-order our environment, to make it conform to an idea(l). Our responses to dirt, to matter out of place, are based upon our desire to make unity of experience, to organise our environment. Douglas transposes our responses to dirt to people, things and ideas that are anomalous or ambiguous. Persons, things or ideas that cross lines, boundaries or margins of structures are polluted and polluting – they are disorderly and threaten disorder. Our responses to matter out of place can be negative or positive. In our fear and disgust of disorder we can seek to eliminate, punish, expunge or condemn the offending substance, or we can

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<sup>46</sup> P Rozin and A Fallon, 'A Perspective on Disgust' (1987) 94 *Psychological Review* 23.

<sup>47</sup> P Rozin, L Millman and C Nemeroff, 'Operation of the Laws of Sympathetic Magic in Disgust and Other Domains' (1986) 50(4) *Journal of Personality and Social Psychology* 703.

change our systems of order, at the individual or social level, to incorporate and accept the anomalous or ambiguous. Taboo and dirt are regarded as dangerous in part because of their potential for instigating change.

Douglas' ideas about 'matter out of place' or disorder are particularly apposite for brothels. Colloquially and legally, brothels have long been connected with being outside ordering structures. The colloquial expression 'my house is like a brothel', is used to express mess and disorder. Until 2002, the legislation governing brothels was called the *Disorderly Houses Act 1943* (NSW).<sup>48</sup> Moreover, the NSW Court of Appeal held a brothel was a disorderly house, notwithstanding that it was 'clean, neat and tidy'.<sup>49</sup>

Untidiness, in and of itself, is insufficient to explain the perceived danger of disorder, the sense of impending pollution or disruption. We all tolerate varying levels of untidiness in different aspects of our lives without fear of contamination. Untidiness may be unpleasant or distasteful, but something more is needed to elicit a sense of impending disorder and pollution. This is suggested in the colloquial and legal labelling of brothels as disorderly, regardless of whether or not the establishment is pristine. It is as though there is something inherently offensive or disorderly about brothels. Douglas asserts that the idea of matter out of place implies two conditions: 'a set of ordered relations and a contravention of that order'.<sup>50</sup> This suggests that brothels may elicit disgust because they are challenging to systems of order, confusing or contradicting cherished classifications. Accordingly, this requires some

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<sup>48</sup> The *Disorderly Houses Act 1943* (NSW) was renamed the *Restricted Premises Act 1943* (NSW) by the *Disorderly Houses Amendment (Commercial Supply of Prohibited Drugs) Act 2002* (NSW).

<sup>49</sup> (1988) 13 NSWLR 98, 121 (McHugh JA).

<sup>50</sup> Douglas, above n 2.



sense of the structure against which brothels apparently offend. Rather than embarking upon an impossible quest to describe the overall structures of society, I will instead limit my analysis to the structures assumed and relied upon in the legal materials composing the regulation of brothels – including legislation, regulations, council policies and Land and Environment Court cases. These materials particularly express legal and socio-moral structures.

The original reasons for the reforming legislation in 1995 provide some indication of the association of brothels with disorderliness. Health was cited as one the major reasons for reform, with the NSW Legislature asserting that a harm minimisation approach should be adopted.<sup>51</sup> Reforms were aimed at reducing street sex-work, and the associated health risks to clients, workers and passers-by,<sup>52</sup> and also encouraging owners to manage brothels that were well-run, safe and clean. There was very much a sense of ‘cleaning-up’ – the streets and the brothels. This focus upon hygiene is one of the major themes of contemporary ideas of defilement. Douglas states that dirt avoidance for us is frequently a matter of hygiene.<sup>53</sup> Our ideas about dirt and disorder are frequently expressed on the individual level and are aimed at protection of the body. Fears of disease are one of the most obvious manifestations of the perceived contamination potential of matter out of place. However, the association of the sex industry with disorder goes beyond concerns with hygiene. This is demonstrated by the willingness to use condoms and other safe sex paraphernalia as evidence that the

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<sup>51</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 October 1995, 1937 (Bryce Gaudry).

<sup>52</sup> See eg, ‘Street prostitution is generally considered to be undesirable... Health and social workers have more difficulty reaching street sex workers with health and safety education programs. Street sex workers are at greater risk of sexually transmitted infections than those who work in brothels, where some medical supervision exists and where the use of condoms may be enforced.’ New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 November 2001, 19295 (Tony Stewart).

<sup>53</sup> Douglas, above n 2.

premises are being used as brothels in the absence of council consent,<sup>54</sup> despite recognition that this discourages unauthorised brothels from practising safe-sex. Section 17A allows the Court to rely on circumstantial evidence to find that particular premises are used as a brothel:

However, the presence in any premises of articles or equipment that facilitate or encourage safe sex practices does not of itself constitute evidence of any kind that the premises are being used as a brothel.<sup>55</sup>

Accordingly, safe sex paraphernalia cannot stand alone, but can be coupled with other evidence to prove that the business is operating as a brothel. This willingness to sacrifice health concerns in exchange for evidence of an unauthorised brothel, suggests that the primary motivation for the regulation and restriction of brothels is not hygiene.

The second stated motivation for legislative reforms in 1995 was the association of the illegal sex industry with corruption. It was accepted in Parliament that the Wood Royal Commission had identified a link between an illegal sex industry and police corruption. As with health issues, the concern with crime rests on a perception that the sex industry corrupts and taints – whether our bodies or our laws and law enforcers.<sup>56</sup> This motivation shifts the discourse of disorder from our individual bodies to the protectors of the social and legal body – the police. Prior to legal reforms, brothels by definition offended against the legal order. The potential pollution of disorder is apparent in Parliamentary concerns, asserting that the operation of illegal brothels

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<sup>54</sup> See for example, *R v Rahme* (1993) 70 A Crim R 357 at 358 and the *Disorderly Houses Amendment Act (Brothels) Act 2001*.

<sup>55</sup> *Restricted Premises Act 1995* (NSW).

<sup>56</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 September 1995, 1187 (Paul Whelan, Minister for Police).

could encourage bribery by police and brothels.<sup>57</sup> The association of brothels with breaches of the law, with their potential for spreading disorder against the legal order, was an important motivation for reform.

The legal materials also reflect and reinforce the idea that brothels are disorderly because they offend against the moral order.<sup>58</sup> The association of immoral behaviour with brothels was explicit in the *Disorderly Houses Act 1943* (NSW), which was aimed at premises where ‘disorderly or indecent conduct or any entertainment of a demoralising character takes place on the premises’. Even in the legislation which was introduced in 1995 for the purpose of decriminalising sex services premises, the Legislature stated:

The enactment of the *Disorderly Houses Amendment Act 1995* should not be taken to indicate that Parliament endorses or encourages the practice of prostitution, which often involves the exploitation and sexual abuse of vulnerable women in our society.<sup>59</sup>

This ensures that a taint of immorality in the sex services industry remains even at the State level of law reform, with the Legislature seeking to distance itself from this moral pollution. Brothels are perceived (by some) as immoral because they offer sex outside of marriage. The regulation of the sex industry continues to be structured around the assumption that brothels are inherently immoral and offensive. Thus s 17 of the *Disorderly Houses Act* specifies that a brothel can be closed if it is operating

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<sup>57</sup> New South Wales, Royal Commission into the New South Wales Police Service, *Final Report* (1997) 16 (‘Wood Royal Commission’). However, it appears that far from establishing systemic police corruption, the Wood Royal Commission rested its assumption of ‘a clear nexus between police corruption and the operation of brothels’ upon common sense rather than evidence. In the almost 1,000 pages of the Report, there were only nine instances of sex industry associated police corruption.

<sup>58</sup> For example: ‘Some people argue that tough criminal penalties should be maintained against prostitution because it contravenes God’s laws, spreads disease, corrupts men and demeans and oppresses women.’ A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (2003).

<sup>59</sup> *Disorderly Houses Amendment Act 1995*, s 20.

‘near or within view from a church, hospital or school or other place regularly frequented by children from residential or cultural activities.’ Additionally, the planning principles in *Martyn* note that ‘the relationship of brothels to places of worship (which are likely to attract people who are offended by brothels) is a sensitive one.’<sup>60</sup>

Brothels are perceived as disorderly and offensive because they break the rules of morality that are closely entwined with sex and breach the legal order. The imagery of the disorderliness of brothels ranges from our individual bodies to the legal body and our souls.

#### **SECTION FOUR: RESPONSES TO DISORDER**

In the previous section I explored why brothels may be perceived as disorderly. This section explores responses to disorder, based on Douglas key theme that ‘dirt is dangerous’. The disorderly is polluted and polluting. It is the potential for the disorderly to disrupt, challenge and transgress our cherished classifications which causes us to regard the disorderly as dangerous. This then raises the question of how we might respond to the threat of the disorderly. ‘Negatively, we can ignore, just not perceive them, or perceiving we can condemn. Positively, we can deliberately confront the anomaly and try to create a new pattern of reality in which it has a place.’<sup>61</sup> Our patterns of classification can be re-ordered on the individual and social level. Given that the world does not always match up with our notions of order, our categories and assumptions, individuals and cultures must have various provisions for dealing with ambiguous or anomalous events. This section analyses the ways in which

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<sup>60</sup> *Martyn* [2004] NSWLEC 614, [18].

<sup>61</sup> Douglas, above n 2.

sex services premises are regarded as polluted and polluting, and the response to this perceived danger or potential for change.

Douglas asserts that pollution dangers strike when form has been attacked. Pollution powers inhere in society and in the structure of ideas – they punish a (symbolic) breaking of that which should be joined or a joining of that which should be separate.<sup>62</sup> By crossing some line, a polluted object or person unleashes danger.<sup>63</sup> Our reactions to pollution dangers can vary, including fear, disgust, but also humour. Disgust studies have highlighted the uncanniness and power of matter out of place. For example, we might admire someone's beautiful hair, but if it is in our soup it is out of place and disgusting, and contaminates the whole bowl of soup. Pollution structures appear to have almost magical properties in their ability to contaminate and taint. Thus, most people would refuse to eat from a pet bowl, even if the pet bowl has been thoroughly washed. If we discover that we have mistakenly eaten from a pet bowl, we will feel not just distaste, but a sense of contamination or pollution that will not be easily cleaned away.

The notion of sex services premises as polluted and polluting is manifest at many regulatory levels. The association of brothels with illegality is perceived as likely to attract more illegal elements to any area in which sex services premises are operating. Community objections to brothel development applications frequently cite fears that brothels will attract criminal elements,<sup>64</sup> drug-taking, pimps,<sup>65</sup> illegal immigrants,<sup>66</sup>

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<sup>62</sup> Ibid 140.

<sup>63</sup> Ibid.

<sup>64</sup> For example, *Marinos v Ashfield Municipal Council* [2005] NSWLEC 2; *Vassallo v Blacktown City Council* [2004] NSWLEC 85.

<sup>65</sup> *Sex Services Premises Planning Guidelines*, above n 30.

and even illegal parking<sup>67</sup> or driving.<sup>68</sup> These objections revolve around an assumption of contagion, that immoral behaviour will attract and create more immoral behaviour and contaminate the nearby community. This was expressed clearly in *Hang v Strathfield Municipal Council*,<sup>69</sup> where amongst other concerns, a petition signed by residents opposed to a brothel in an industrial area, stated that ‘the brothel would attract persons with a criminal record and increase crime in the area affecting both industrial and residential properties in the area.’ It appears that even authorised brothels have retained the historical taint of illegality and, as such, can pollute any area in which they are situated.

Fears of pollution are also manifest in responses to brothel clients. The planning principles in *Martyn* seek to discourage ‘clients gathering or waiting on the street’. Clients who enter the brothel are corrupted and thus, corrupting. One of the grounds for refusing the development application for a brothel in *Martyn* was its close proximity to a skin care college:

The entrances are adjacent and it is likely that the students of the college would frequently encounter the brothel’s clients on their way to and from classes. I do not want to judge whether this in itself would have a corrupting effect on them. However, it is likely, that some of the parents would not like the proximity of the brothel and would look for other colleges for their daughters.<sup>70</sup>

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<sup>66</sup> This was claimed by an objector in *Hang v Strathfield Municipal Council* [2005] NSWLEC 99 [20]. I have not seen any cases in the Land and Environment Court where there has been a finding that sex services premises seeking development applications employ illegal immigrants or sex slaves. I would argue that legalisation and regulation limits the likelihood of these issues.

<sup>67</sup> The fear of illegal parking particularly captures the sense in which immoral and illegal behaviour is perceived to be contagious. The assumption is that people who go to (or work in) brothels are immoral and thus likely to break other moral and legal codes, such as parking regulations.

<sup>68</sup> An objector in *Hang v Strathfield Municipal Council* [2005] at [18] stated that ‘cars occasionally raced each other due to the lack of intersections and isolation... the brothel might attract more.’

<sup>69</sup> [2005] NSWLEC 99, [22].

<sup>70</sup> *Martyn* [2004] NSWLEC 614, [20].

The comments by Roseth SC suggest that the brothel clients may well corrupt students of the school, just through sheer physical proximity. This assumption of corruption reproduces the earlier fears of corruption of the police service by an illegal sex industry. This fear of corruption and contagion by clients of brothels is in contradiction with other Land and Environment Court statements:

Insofar as the behaviour of brothel patrons might affect the amenity of the area... patrons should be considered as ordinary members of the community. Hence any concerns about safety and security cannot be justified by assertions that brothel patrons are, in this regard, different to the rest of the community.<sup>71</sup>

Despite law reforms, brothel clients continue to be perceived as different from clients doing business with other commercial venues.<sup>72</sup>

The perception of the potential for brothels to pollute and contaminate the community impact upon locational restrictions. The perception of brothels as polluting is reflected in Land and Environment Court cases regarding the need to protect commercial zones. For example, a council objected to a sex shop development application arguing that the public could find the 'use offensive and not shop in the Centre or at nearby retailers, which could result in the loss of expenditure.'<sup>73</sup> Particular concern was expressed about the proposed sign 'Sin City', as this could create the impression of a 'red light' district.<sup>74</sup> Even though the shop was on the first floor of a commercial business, the council maintained its concern that the shop in and of itself was offensive and would have a negative impact on the area. According to this

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<sup>71</sup> *Zhang v Ashfield Municipal Council* [2001] NSWCA 167 (Bly C).

<sup>72</sup> This was illustrated powerfully at a public lecture I gave last year where I was asked about how I would protect members of the community from rapes committed by clients of sex services premises. Once again, this reflected the idea that a person who was willing to visit sex services premises was immoral, and hence more likely to be willing to breach other principles of morality.

<sup>73</sup> *Cresville Pty Ltd v Sutherland Shire Council* [2005] NSWLEC 298 [27].

<sup>74</sup> *Ibid* [31]. The proposed signage was amended.

perspective, sex services premises are so polluting they can undermine existing commercial operations and attract further ‘immoral’ elements. In *Marinos v Ashfield Municipal Council*, it was claimed that a proposed adult book shop would affect the ‘social fabric’ of the town centre.<sup>75</sup> A town planner stated that ‘this could have an economic impact in changing the nature of the area. It is a fine line, and that could discourage economic investment in the area and narrow the uses in the area if there was a perception of a Kings Cross being formed. That would have an economic impact.’<sup>76</sup>

These fears of contamination by brothels are also expressed with the perceived need to keep brothels away from the vulnerable and the godly. Section 17 of the *Disorderly Houses Amendment Act 1995* provides the grounds upon which councils may make an application to the LEC to close a brothel. The majority of the grounds (s 17(5)(b-g)) are consistent with relevant considerations specified in s 79C of the *Environmental Planning and Assessment Act 1979*. These considerations focus upon amenity impacts, including noise, disturbance to the neighbourhood and off-street parking. In contrast, s 17(5)(a) imports an additional consideration which is solely applicable to brothels and beyond the usual relevant considerations for developments. Under s 17(5)(a) a brothel can be closed if it is operating ‘near or within view from a church, hospital, school or other place regularly frequented by children from residential or cultural activities.’ Brothels are regarded as incompatible with places of holiness and blessing. This is also reflected in the planning principles enunciated in *Martyn*:

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<sup>75</sup> *Marinos v Ashfield Municipal Council* [2005] NSWLEC 2, [32].

<sup>76</sup> *Ibid* [61].



The relationship of brothels to places of worship (which are likely to attract people who are offended by brothels) is a sensitive one. The existence of a brothel should not be clearly visible from places where worshippers regularly gather.<sup>77</sup>

Merely seeing a brothel from a place of worship has the potential to contaminate and taint the place of worship and worshippers.

This concern with *seeing* brothels is reflected in the planning principles in *Martyn*. The principles note that children and adolescents are ‘impressionable’, and accordingly it is ‘undesirable’ that they be exposed to brothels. Thus, ‘brothels should not adjoin, or be clearly *visible* from schools, educational institutions for young people or places where children and adolescents regularly gather.’<sup>78</sup> Children, the sick, and the holy are most at risk from the potential contamination of brothels. In cases appealing development applications for brothels in industrial zones, the Land and Environment Court has also focused upon visibility, despite the isolation of the area. In *Vassallo v Blacktown City Council*,<sup>79</sup> the council’s town planner stated that an underlying objective of council regulations was to ‘reduce the prominence of brothels’. The Court accepted that:

The brothel will not be unacceptably prominent. Its access will also be discreet... the subject site is screened from [the]... road by landscaping and no signage is proposed to alert any passers-by of its existence. It was argued that they would be lighting of the unit at times when it would not normally be expected for an industrial use and this could give some indication of its existence. I am not however convinced that this will

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<sup>77</sup> *Martyn* [2004] NSWLEC 614, [18].

<sup>78</sup> *Ibid.*

<sup>79</sup> [2004] NSWLEC 65, 15.

necessarily be the case. While some persons passing the subject site may notice the lights there are no overt indications that it is being used as a brothel.<sup>80</sup>

Brown C accepts that visibility of a brothel, even in an industrial site, is undesirable. This brothel was approved because of its ability to blend in with other businesses in the area, despite its late night lighting.

This emphasis upon *visibility* in the legislation, council regulations and Land Environment Court planning principles is fascinating. This focus on the visual is imported from the *Summary Offences Act 1988* (NSW) regulating street sex work. It appears to equate the impacts of sex services premises with street sex work, even though through good planning a well-run brothel can operate discreetly with minimum amenity impacts. In other cases, the Land and Environment Court has focused on structural means to ensure that neighbours do not see or hear what goes on inside a brothel.<sup>81</sup> However, s 17(5)(a) of the *Disorderly Houses Amendment Act 1995* and the planning principles in *Martyn* revolve around the idea that simply *knowing* a brothel exists in your community and being able to see the building, even if you cannot see what goes on inside it, is contaminating.<sup>82</sup> This is based on the idea of *contagion*, with the activities inside the brothel infecting the bricks, mortar, roof of the entire building. It is almost as though the building is magically irradiated from within, polluting all who see it. On this reading, brothels are so dangerous that they cannot be ignored. They must be expunged from the community.

This focus on the visual in the regulation of sex services premises can be pursued further, by considering the metaphor of visual containers. Lakoff and Johnson have

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<sup>80</sup> Ibid [17].

<sup>81</sup> For eg *Fang Lin v Sydney City Council* [2005] NSWLEC 95.

<sup>82</sup> This has the potential to raise issues for sex services premises in high rise buildings.

argued that our ordinary conceptual system is fundamentally metaphorical in nature. Our concepts structure how we relate to the world, what we perceive, and how we get around. Usually we are unaware of these conceptual systems, and how they may play a central role in defining our everyday realities.<sup>83</sup> Lakoff and Johnson assert that when we talk about sight, vision, seeing, we usually metaphorically construct a visual container.<sup>84</sup> For example, things come *into* view, or are *in* my field of vision. Things are *out* of the visual field, *within* or *out* of sight. We conceptualise our visual field as a container and what we see as being inside it.

This idea of the visual container can be combined with the notion of powerful polluting or tainting aspects of matter out of place. If something disorderly is within our visual container, then it has the potential to pollute the entire container. Thus two drops of sewerage in a cask of wine will render the wine undrinkable, whereas two drops of wine in the sewerage will have no impact whatsoever.<sup>85</sup> If we perceive brothels as disorderly and they are within our visual field, then they will contaminate everything within our vision. The fact that we cannot see what is going on inside the building of the brothel is immaterial, the building itself is tainted and contaminated by what is going on inside it. Brothels will taint us, our children, our church, our community through their mere presence. Even in industrial zones, brothels might taint children through their presence. An objector to a brothel in an industrial area noted

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<sup>83</sup> Lakoff and Johnson use the example of the metaphorical concept of 'argument is war'. They argue this structures what we do and how we understand what we are doing when we argue. Thus we talk about attacking or defending a position, winning and losing, destroying an opponent or shooting someone down. You can wipe your opponent out. Lakoff and Johnson point out the extent to which this metaphor structures the way we think about arguing, suggesting that we imagine an alternative metaphor, such as 'argument is dancing' G Lakoff and M Johnson, *Metaphors We Live By* (1980), ch 13.

<sup>84</sup> Ibid 30.

<sup>85</sup> W Miller, *The Anatomy of Disgust* (1997); P Rozin and A Fallon, above n 46, 32.

that children walked past the brothel, and had been heard to ‘discuss’ the brothel.<sup>86</sup> For the objector, this was sufficient in and of itself to reject the brothel’s development application. Measures were introduced to remove signage and flashing lights, so that ‘school children who walked or bicycled past would not be aware of its presence.’

Brothels are perceived as crossing social barriers and as such are dangerous polluters. They can be regarded as doubly wicked objects of reprobation, first because they cross the boundaries of legal and socio-moral orders and secondly because they endanger the community.<sup>87</sup> The focus on the (in)visibility of brothels reflects attempts to ignore and erase the anomalous. Regulations excluding home occupations (sex services) from residential areas and shunting brothels into industrial zones are based upon a desire to ensure that brothels are repressed and expelled.

## **SECTION FIVE: DISORDERLY ACTS AND REFORMING STRATEGIES**

The preceding analysis highlights the influence of fears of disorder in the restrictive regulation of brothels. This analysis can be taken further with an interrogation of the structure of the regulation of the sex industry and resulting ideas about strategies for reform.

The regulation of the sex industry reflects and reinforces the notion of brothels as disorderly. Despite more than a decade having passed since sex services premises were legalised, they continue to be perceived as ‘matter out of place’. There does not seem to be any good *place* for brothels to be located. As noted above, the location of brothels in industrial areas causes problems due to the isolation and lack of

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<sup>86</sup> *Hang v Strathfield Municipal Council* [2005] NSWLEC 99, [18].

<sup>87</sup> Douglas above n 2, 172.

infrastructure. There are fears that brothels in commercial zones will fundamentally alter the character of the area, creating ‘red light districts’ and undermining the viability of more orthodox businesses. The potential for sex services premises in residential areas has not even been considered or directly averted to at the state and (most) local government levels and in Land and Environment Court decisions until the recent introduction of the Standard Local Environmental Plan. This is despite acknowledgement that home occupations make up at least 40% of the sex industry.<sup>88</sup> Accordingly, legislative reforms have sustained and contributed to the characterisation of sex services premises as ambiguous and anomalous, as ‘matter out of place’. There is still no clear and appropriate locational category within which to place sex services premises.

Additionally, the catch-all category of ‘brothel’ also contributes to this sense of anomaly. Many who work from home or in erotic massage parlours would assert that they do not work in ‘brothels’. Home occupations (sex services) in particular create a sense of disjunction in attempts to characterise them as brothels. The introduction of the Standard Local Environmental Plan does move slightly in the right direction, by differentiating between home occupations (sex services) and all other sex services premises. However, these categories do not go far enough, and lack sufficient nuance to adequately reflect the different types of sex services and their varying amenity impacts.

The sense of anomaly also persists in the question of the legitimacy of sex services premises. Although the legislative reforms were enacted with the intention of treating

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<sup>88</sup> Project Home Occupation Sex Service Premises, *Home Occupation Sex Service Premises Research Project: Final Report*, (2005).

sex services premises as legitimate businesses, the extra legislative and regulatory requirements and restrictions imposed upon brothels suggests that they are both something more and less than legitimate businesses. There has been an increasing rhetoric dividing sex services premises into legal and illegal categories, by some stakeholders,<sup>89</sup> local councillors<sup>90</sup> and state politicians.<sup>91</sup> The state opposition and some local councils are promising significant resources to shutting illegal brothels down. However, the dichotomy of legal and illegal is not easily applied to the sex industry. For example, as detailed above, the regulatory position of home occupations in many local council areas is far from unclear. The stark legal/illegal dichotomy also fails to capture those brothels that have been operating for years and are in the process of seeking approval from councils. It is possible to talk about authorised and unauthorised sex services premises, but this is not applicable to home occupations (sex services) which can operate without consent in some local government areas. The labelling of brothels as ‘illegal’ is based upon the urge to remove and eliminate brothels. Rather than attempting to impose this distinction, we should instead seek to encourage and assist unauthorised sex services premises to request and receive authorisation. In other words, rather than regarding sex services premises as illegal blights in our community, we should see them as potentially legitimate businesses. We should shift from regarding sex services premises as disorderly and instead think of them as orderly.

Douglas’ idea about dirt as a product of organising system encourages us to examine the legal structures. The laws and regulations applicable to the sex industry are highly

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<sup>89</sup> For example the Adult Business Association.

<sup>90</sup> For example, ‘Illegal brothel madam cops council’s fine’, *North Shore Times* (Sydney), 11 January 2007.

<sup>91</sup> For example, ‘Government ‘turning a blind eye’ to illegal brothels’ at <<http://au.news.yahoo.com.au>> 10 Dec 2006.

complex and intertwined. There has been an internal movement of the law around and between criminal, planning and occupational health and safety law and regulations. There have been innumerable name and definitional changes over the decades (and past months), whilst the residue of earlier laws and regulations continue to haunt newer reforms. The regulation of sex services premises varies from local council to local council, with differences in terminology depending upon the geographical and legal region. The new *Standard LEP* will not resolve even naming issues, as other legislation and the Land and Environment Court continues to refer to ‘brothels’, a category that will no longer exist when the *Standard LEP* comes into effect over the next few years. To put it simply, the laws and regulations governing the sex industry are messy, complex, *disorderly*.

Not only are these regulations informed by responses to disorder, but they are disorderly, generating fears of pollution and contamination on the strength of their disorderliness, their messiness. There is ambiguity within the laws and regulations, including the inconsistency of purpose in the legislation – with the laws and regulations undermining the stated intention of the reforms of treating brothels like any other businesses. The lack of clear boundaries reflects and reinforces disorder – intimating that pollution fears of the sex industry are appropriate. Douglas suggests that we can respond to ambiguities in negative ways or positive ways.<sup>92</sup> The law oscillates between both responses. The reforms of the past decade have been motivated by a desire to deliberately confront the treatment of brothels and to create a new pattern of reality – the characterisation of sex services premises as legitimate businesses. However, this desire has been undermined by the continued tendency to

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<sup>92</sup> Douglas, above n 2, 48.

condemn brothels. The legislative reforms are based upon *restricted premises* – the intentions for reform are inadequately carried through. Accordingly, not only do planning regulations reflect the desire to expel and exclude brothels, the regulations themselves disorderly. The disorderliness of the regulations have begun to pollute Land and Environment Court decisions, with judgments shifting from orthodox planning concerns into more restrictive approaches to sex services premises. At the local council level, the lack of clarity of the legislative reforms has been reflected in confused and confusing council policies. Recognising this disorder, the extent to which regulations reflect and reinforce the idea of sex services premises as ambiguous and anomalous, may lead to meaningful reforms and the cleaning up of disorderly laws and regulations.

Douglas has asserted that whilst shifts in structures can occur at individual levels, it is particularly important that changes occur at the cultural level:

Culture, in the sense of the public, standardised values of a community, mediates the experience of individuals. It provides in advance some basic categories, a positive pattern in which ideas and values are tidily ordered. And above all, it has authority, since each is induced to assent because of the assent of others.<sup>93</sup>

Presently, the state government has not provided basic categories for the place of brothels. Disorder is embedded in the regulation of the sex industry, impacting upon practices. Douglas' ideas identify the need for practical reforms at the state level to assist in rethinking and reorganising our systems of classification. Moreover, her ideas suggest that these reforms will be effective in shifting perceptions of the sex industry from the disorderly to the orderly.

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<sup>93</sup> Ibid.



Studies of disgust provide some indication of the various means by which we may change classifications of the sex industry by taking the characteristics of disorder seriously.<sup>94</sup> In his analysis of disgust, Rozin notes that ‘contamination, by its nature, forces us into paradox and contradiction’.<sup>95</sup> Douglas too, notes that the world rarely matches our systematic ideals. We are compelled to construct various ways to get along in a physically contaminated world. One way is to set some limit on significant levels of contamination. For example, the prohibition against mixing dairy and meat in kosher tradition is potentially crippling, inasmuch dairy ‘particles’ in the air might fall into a meat stew at anytime. This is handled in the Talmud by the explicit rule that a kosher food is *not* rendered non Kosher if less than one part contaminant (eg dairy product) is accidentally mixed with 60 parts of the food in question (eg meat).<sup>96</sup> This idea of setting limits on acceptable levels of contamination is reflected in some local council policies and the *Martyn* planning principles concerned with ‘clustering’ of brothels,<sup>97</sup> aimed at preventing the creation of new red light districts. For example, the draft Sydney City Council policy will not approve a development application for a new brothel within 75 metres of an existing brothel.

An alternative and more common solution is to avoid contemplation of pollution possibilities in an impure world. Thus, we prefer not to think about the fact that the air we inhale was both inhaled and exhaled by others in our environment.<sup>98</sup> We will happily kiss our dogs and cats, and avoid thinking about where their faces have been.

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<sup>94</sup> Dan Kahan, 'The Progressive Appropriation of Disgust' in Susan A Bandes (ed), *The Passions of Law* (1999).

<sup>95</sup> Rozin and Fallon, above n 46, 32.

<sup>96</sup> Ibid 31. My father has brought me up to believe in the 5 second ‘drop rule’. That is, that food is still edible if you pick it up within 5 seconds of dropping it. Dad has recently increased the drop rule to 10 seconds, which horrifies one of my younger sisters.

<sup>97</sup> *Martyn* [2004] NSWLEC 614, [18].

<sup>98</sup> Advocates for water recycling still have to shift the perception that used water is ‘contaminated’ even though it poses no health threat.

We avoid thinking about what goes on in the kitchens of restaurants making the food that we eat. We can capitalise on this desire to avoid contemplation of contamination possibilities with home occupations (sex services). Research shows that most people are unaware that they have been living next to a home occupation (sex service). Home occupations (sex services) need to be discrete – to keep clients and also for safety purposes.<sup>99</sup> This suggests that as long as people are not told that they are living near a home occupation (sex services), they will remain unaware, and disgust will not be excited. Accordingly, the *Standard Instrument (Local Environmental Plans) Order 2005* (NSW) should not draw attention to home occupations (sex services). Home occupations (sex services) should be regulated like other home occupations – allowing them to operate without development consent.

Ideational factors are important to feelings of disorder and fears of pollution. This may be because pollution fears require some cognitive sophistication due to the idea of contamination. Contamination implies some conception of invisible entities that are the vehicles of contamination, the idea that appearance is distinct from reality.<sup>100</sup> Additionally, perceptions of disorder change over time and across societies. *Purity and Danger* is devoted to detailing the various taboo structures in different cultures. The importance of ideational factors to perceptions of disorder means that there is potential to shift contamination fears on a cognitive level. This suggests that by challenging conceptions about brothels on a cognitive level, could assist in diminishing perceptions of disorder that some feel with regard to the sex industry. The Sex Services Premises Planning Advisory Panel found that submissions to councils on sex services planning matters tend to be based upon the following stereotypes:

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<sup>99</sup> Project Home Occupation Sex Service Premises, above n 88.

<sup>100</sup> P Rozin, J Haidt and C McCauley, 'Disgust' in M Lewis and J Haviland (eds), *Handbook of Emotions* (2004).

- it attracts criminal elements and presents a safety risk to the community;
- it is associated with drugs and ‘pimps’;
- it attracts intoxicated people who will cause a disturbance in the area;
- only ‘undesirable’ people frequent sex services premises;
- sex work exploits women and encourages ‘sex slavery’;
- it undermines the family values of an area;
- it is offensive to all community groups and undermines the moral fabric of the community;
- it has negative impacts on children/adolescents;
- it degrades the ‘tone’ and character of the area.<sup>101</sup>

These assumptions could be unpicked. For example, despite many attempts by councils to argue the contrary, there is no evidence of a link between sex services premises and crime.

Our perceptions of anomaly can also change through prolonged contact. We tend to avoid opportunities that would provide the extinction of characterisation of disorder. We may view disorderly objects at a distance, but we rarely allow close contact with these items. However, the longer we are in contact with the disorderly, the more our fears and disgust can weaken by extinction or adaptation. Douglas argues that it is this very potential for change that leads us to fear disorder. Conceptual systems can change on either a personal or social level (hence the danger of polluters). This suggests that long-term treatment of sex services premises as legitimate businesses will also assist in overcoming the response to brothels as disgusting.

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<sup>101</sup> *Sex Services Premises Planning Guidelines*, above n 30.

Studies on disgust responses to disorder also suggest that the label matters. In one experiment subjects were presented with two glass ‘chemical’ bottles, each about one-quarter filled with a white powder which was sucrose. One had a typed label on it that said “Sucrose (Table sugar)” the other a typed label that said “Sodium Cyanide” with a red printed “Poison” sticker below it. The experimenter told the subjects that the bottles were new, and had never been near or had cyanide in them, and that sugar was in both bottles. A spoon from each bottle was then put into separate cups and subjects were asked which cup they would prefer to drink from.<sup>102</sup> Almost all subjects preferred the sugar labelled as ‘sucrose’ to the sugar labelled as ‘sodium cyanide’ . This suggests that a shift away from the name ‘brothel’ may be appropriate.<sup>103</sup> The shift in name from the *Disorderly Houses* to *Restricted Premises Act 1943* is consistent with changing the label. So too is the change in the *Standard LEP*, with the Department of Planning referring to ‘sex services premises’ rather than ‘brothels’. The Sex Services Premises Planning Advisory Panel recommends that instead of lumping sex services premises under the umbrella term of ‘brothel’ we differentiate between; commercial sex services premises, small commercial sex services premises, home businesses involving sex work, home occupations (sex services), escort services and massage parlours.<sup>104</sup> This reasoning also suggests that it would be powerful to stop differentiating ‘home occupations (sex services)’ from ‘home occupations’ generally. This would allow home occupations (sex services) to be regarded as the same as other home occupations. A change in name, creating legal classifications that

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<sup>102</sup> To ensure that subjects were not avoiding the cyanide bottle because of doubts as to the real contents of the bottle, a second experiment got the subjects to label the bottles themselves. There was a smaller but still similar effect, with subjects still preferring the sugar labelled ‘sucrose’.

<sup>103</sup> Although I also think there is much to be argued in favour of reclaiming the name, at least in relation to the large commercial sex services premises.

<sup>104</sup> *Sex Services Premises Planning Guidelines*, above n30.

more adequately reflect the different types of sexual services, would create a new order for sex services premises and reduce disorder.

## CONCLUSION

Despite being able to operate as legitimate businesses for over a decade, sex services premises continue to be treated more restrictively than other businesses with similar (or worse) amenity impacts. This discriminatory treatment occurs at the state and local governmental levels and increasingly in Land and Environment Court decisions. The analysis of disorder by Douglas provides an explanation for this restrictive treatment. Sex services premises may be perceived as disorderly due to their offences against socio-moral and legal codes assumed and reiterated in legal materials. The regulation of the sex industry corresponds with the assertion by Douglas that we see dirt as dangerous. There is an assumption that ‘brothels’ will contaminate or pollute simply through their presence. From this standpoint, merely seeing a brothel can corrupt a child, a church, or a community. The desire to remove brothels from ‘within view’ is consistent with concerns about contamination and pollution.

Recognition of the influence of disorder aids the reform process. This analysis highlights the extent to which the regulatory scheme reflects and reinforces perceptions of disorder. Sex services premises continue to be perceived as ‘matter out of place’ *because* there is still no place for them in the legal code. They remain transitional and marginal. They are anomalous and their legal position is ambiguous. However, theories of disorder indicate that change is possible. The legislation needs to be cleaned up, moving from its restricted premises and foundations, toward treating sex services premises as ordinary businesses with a focus on amenity impacts. This

needs to occur at the state level. The disorderly approach of the NSW Government has tainted the reform process. Systems and structures can change, and this process can and should be accomplished at the state level.

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