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The (continuing) regulation of prostitution by local authorities

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Introduction

This chapter examines the local government response to the 2003 Prostitution Reform Act (PRA). First, it identifies the local regulatory options – bylaws, district plan rules, decisions on resource consents – that continue to be available following the decriminalisation of prostitution by the PRA. Second, it discusses the degree to which local authorities have adopted these regulatory initiatives, along with the legal challenges to them. To date, there have been three notable challenges (two successful and one unsuccessful) to bylaws enacted by local authorities. The chapter concludes by assessing the state of affairs around local regulation and briefly touching on the tension arising from the local ambivalence towards the national countenance of prostitution.

The continuing role for local regulation of brothels and the business of prostitution

The PRA fundamentally shifts the nature and locus of the regulation of the business of prostitution. The central feature of the PRA was the repeal of the various offences prohibiting solicitation and prostitution. But room remains for the regulation of sex work. Consistent with the purpose of the PRA (section 3), the welfare and occupational health and safety of sex workers are managed nationally through a centrally driven regulatory framework of licensing and inspection of brothels.

Regulation of the perceived neighbourhood or environmental effects of prostitution was left to local communities through their territorial authorities (city and district councils). Territorial authorities are one of the forms of local or municipal government in New Zealand. The responsibility for sub-national governance and regulation generally is shared between 73 territorial authorities (city and district councils) and 12 regional councils (see Mitchell and Knight, 2008, paras 7-11). The allocation of the duty to manage the effects of prostitution to territorial authorities is consistent with the standing brief of territorial authorities. In particular, territorial authorities have a general mandate to promote the well-

being of their communities under the 2002 Local Government Act, including legislative power to pass bylaws to achieve this purpose. They also possess an important role to sustainably manage the use, development or protection of land and natural and physical resources within their district under the 1991 Resource Management Act. This is principally implemented through the legislative power to promulgate objectives, policies and rules in district plans (their central regulatory instrument for planning or land-use management) and the responsibility, as consent authorities, to grant resource consents (effectively permits or dispensations) for activities that do not meet those rules (see generally, Nolan, 2005, chs 3 and 4). Consistent with the usual raison d'être of local government, territorial authorities are charged with enabling democratic local decision making on behalf of their communities when undertaking their functions; among other things, they are required to consult and take account of the views of their communities when making significant decisions.

Following the passing of the PRA, the particular regulatory methods by which local authorities can continue to address aspects of the business of prostitution or activities associated with prostitution are as follows:

- regulation of the location of brothels under section 14 of the PRA;
- regulation of the signage of commercial sexual services under section 12 of the PRA;
- regulation of the business of prostitution under the 1991 Resource Management Act, augmented by section 15 of the PRA; and
- regulation of activities, to the extent possible, under generic law-making and approval processes available to local authorities.

Regulation of the location of brothels

The most controversial regulatory method is the regulation of the location of brothels. Section 14 of the PRA specifically allows territorial authorities to pass such bylaws:

> **s14 Bylaws regulating location of brothels**
> Without limiting section 145 of the Local Government Act 2002, a territorial authority may make bylaws for its district under section 146 of that Act for the purpose of regulating the location of brothels.

While the reforms of local authorities and their law-making powers in 2002 sought to simplify and generalise the scope for bylaws (2002 Local Government Act, section 145; Knight, 2005a), local authorities continue to have specific bylaw-making powers in a narrow range of specific areas (2002 Local Government Act, section 146). The conferral of such a power by the PRA therefore is not unique, and needs to be seen in this broader context (see, for example, Mitchell and Knight, 2008, paras 132-9).

The conferral of a bylaw-making power such as this delineates, in jurisdictional terms, the scope for local regulation of the activity. Local authorities are entitled to develop their own local responses – whether permissive or restrictive – as long as they do not exceed the jurisdictional limits of the empowering provision. In this case, the limits are constructed by first, the governance injunction 'regulat[e]', and, second, the defined subject-matter 'location of brothels'. The governance injunction adopted was relatively soft. There is long-standing authority for the proposition that the power to 'regulate' does not include the power to prohibit or effectively prohibit (*Municipal Corporation of the City of Toronto v Virgo*, 1896). Therefore, while the local community is entitled to pass laws controlling location, an outright ban on brothels throughout the entire district is beyond its power. This basic proposition was central to the litigation about bylaws promulgated by some local authorities and a point to which we return later. Second, the subject-matter was defined in terms of 'brothels', defined in terms of premises (PRA, section 4(1)):

> brothel means any premises kept or habitually used for the purposes of prostitution; but does not include premises at which accommodation is normally provided on a commercial basis if the prostitution occurs under an arrangement initiated elsewhere.

Notably, the definition of brothel, and therefore section 14, does not draw any distinction between small owner-operator brothels and other larger brothels, unlike some other licensing provisions in the PRA. The specific bylaw-making power does not confer, or speak directly to, any power in relation to the regulation of sex workers individually. Whether there remains the ability to regulate these matters under the general empowering provision and whether the specific power to regulate the location of brothels affects that question is considered below. Further, the reference to 'location' only contemplates spatially based regulation.

Although bylaws represent the local community's articulation of the rules applying to their district, local authorities usually retain the ability to formally condone non-compliance in individual cases. Typically expressed as a dispensing power, bylaws usually provide the generic power to grant permits or otherwise dispense with the application of any rule in a bylaw. For example, the *Model General Bylaws* contains the following template provisions (Standards New Zealand, 2007, clause 7):

> **Dispensing power**
> Where in the opinion of the Council full compliance with any of the provisions of this Bylaw would needlessly or injuriously affect any person, or the course or operation of the business of, or bring loss or inconvenience to any person without any corresponding benefit to the community, the Council may, on special application of that person, dispense with the full compliance with the provisions of this Bylaw;

> provided that any other terms or conditions (if any) that the Council may deem fit to impose shall be complied with by that person.

Potentially, this allows any brothel operator finding themselves operating in a location in contravention of a bylaw, or wishing to establish in a prohibited location, to apply for formal permission to operate regardless. Vociferous local opposition to brothels may mean the prospects of successfully obtaining a dispensation are not high. Any refusal is capable of being challenged in the courts, however, on the basis that it is unlawful (for example, if the dispensation test was not faithfully applied or a blanket rule against dispensations was adopted) or is otherwise manifestly unreasonable.

Unlike resource management rules, there is no explicit requirement that bylaws recognise or preserve 'existing use rights' (Caldwell, 2004; Knight, 2005b). That is, existing businesses operating lawfully before a bylaw is enacted are not automatically exempted from the requirements of any new bylaw. That said, the impact on existing businesses is a factor the courts will take into account when considering whether a bylaw is reasonable or not. A failure to accommodate existing businesses within the new bylaw (either through specific exemptions or a transitional regime) may force a court to conclude that the severity of the bylaw outweighs any positive outcomes such that the bylaw is unreasonable and invalid.

The scope of mandate for local authorities to regulate the location of brothels was initially uncertain. There was some speculation that restrictive bylaws promulgated by some local authorities, provoked by vocal anti-prostitution groups, might have exceeded the express and implied limits set by the bylaw empowering provisions. To some extent, a series of challenges to different brothel bylaws – two successful, one unsuccessful – clarified how far local authorities could go in regulating the location of brothels. However, this is complicated by the fact that the outcomes in the three cases are difficult to reconcile.

Bylaws can be challenged in various ways: a direct challenge to the bylaw under special provisions in the 1908 Bylaws Act, an application to judicially review the local authority's process and decision to adopt a bylaw, or by raising the invalidity of the bylaw collaterally as a defence to enforcement action based on the bylaw (Knight, 2005a). In general terms, the courts' role is two-fold. First, the courts review whether the bylaw is 'lawful', including whether it falls within the scope of the empowering provision, whether it is not repugnant (that is, 'fundamentally inconsistent') to other laws and whether it is consistent with the 1990 New Zealand Bill of Rights Act (under section 155(3) of the 2002 Local Government Act, bylaws must not breach the Bill of Rights Act). Second, the courts assess whether the bylaw is 'reasonable'. The lawfulness of the bylaw is typically scrutinised closely by the courts to determine whether the parameters set by parliament have been correctly observed. In contrast, the assessment of whether, viewed in the round, the bylaw is reasonable is calibrated more deferentially and is designed to provide some latitude for the choices and judgements made by the primarily mandated decision maker, that is, the local authority. Historically,

this has been framed in terms of a particularly convoluted legal test or calculus found in a case from the beginning of last century, *McCarthy v Madden* (1915). In basic terms, it allows the courts to judge whether the productive benefits of the bylaw outweigh the negative effects. But it also reminds the court that locally elected members are mandated, and better placed, to make the judgement about whether a bylaw is suitable; the courts are directed to take a deferential approach, except in a narrow range of circumstances where greater scrutiny may be justified (Knight, 2005a).

The first case, *Willowford v Christchurch City Council* (2005), involved a challenge to a Christchurch City bylaw that: (a) permitted brothels in a small designated area of the district only (in general terms, part of the central business district amounting to about 1% of the city); (b) treated small-owner operator brothels in the same way as larger brothels; and (c) made no provision for existing use rights for existing brothels or for new brothels to apply for dispensations (except for three particular long-standing massage parlours/brothels that were specifically exempted from the location requirements). The bylaw was challenged by a prospective brothel operator who owned land both within and outside the designated area.

Ultimately, the High Court ruled that the degree of restriction, in particular the effective prohibition on small owner-operated brothels, was too severe and amounted to impermissible prohibition such that it was unreasonable and/or unlawful. On the one hand, Pankhurst J was reluctant – 'by quite a margin' – to conclude that the local authority's definition of the designated area within which brothels could operate was unreasonable or impermissibly small (*Willowford*, 2005, para 71). He placed some weight on the scope of the designated area reflecting the 'considered view' of the Council subcommittee reached after full public consultation. The view of the community weighed strongly in favour of confining brothels to the central business district and their concern was 'understandable' (*Willowford*, 2005, para 71). On the other hand, he took issue with the effect of the small designated area on small owner-operated brothels. He took the view that the bylaw prohibited sex workers from, in the words of the famous *Virgo* statement on non-prohibition, 'plying their trade at all in a substantial and important part of the city no question of any apprehended nuisance being raised' (*Willowford*, 2005, para 94). Particular weight was placed on the uncontested evidence from the New Zealand Prostitutes' Collective that a private home, discreetly situated in suburban areas, was the natural habitat of small owner-operated brothels and that as many as 50 or 60 sex workers would find themselves unable to work lawfully under the bylaw.

The judge was agnostic about whether the finding of invalidity was properly characterised as being based on 'unreasonableness, [impermissible *Virgo*-style] prohibition, or unreasonable restraint of trade' (*Willowford*, 2005, para 94), although there are a number of hints in the judgement that suggest his driving concern was that the local authority had exceeded the critical legislative mandate. In particular, the judge pointed to the findings of the local authority's own subcommittee (ultimately rejected by the council itself) that small owner-operated brothels had

previously existed essentially in residential areas and done so without causing 'significant problems'; he described the subcommittee's original proposal to allow small owner-operator brothels in residential areas as representing 'a realistic squaring up to the clear intent of the Act' (*Willowford*, 2005, para 93) – especially because the PRA recognised that brothels would exist in residential dwellings and exempted them from the need to obtain an operator's certificate.

In the course of his decision, Pankhurst J rejected arguments that the bylaw breached a constitutional or common law right of sex workers to work. His Honour recognised the right of sex workers to engage in the business of prostitution, but accepted that the right was qualified, both generally (regulational restrictions on the right to work being 'commonplace') and specifically (the legislation provided for the regulation of the location of brothels) (*Willowford*, 2005, para 83). Pankhurst J concluded that the bylaw did not intrude 'to any significant degree' on sex workers' right to work (*Willowford*, 2005, para 83), except to the extent he had earlier found that the bylaw improperly restricted the ability of small owner-operated brothels to operate.

The second case, *JB International v Auckland City Council* (2006) involved a challenge to a bylaw that restricted the operation of brothels, including small-owner operated brothels, to a few prescribed zones within Auckland City. The bylaw further restricted the operation of brothels in close proximity to designated schools, churches, transport or community facilities, or existing brothels; within the central business district, it also prohibited operation of brothels at street level. As well as challenging the bylaw, the operator of a brothel outside the designated areas challenged the local authority's refusal to grant a dispensation from the requirements of the bylaws.

Heath J ruled that the bylaw was invalid, essentially because the spatial restrictions were too severe. His Honour also ruled that the refusal of the dispensation was unlawful because there was insufficient evidence to suggest that good reasons existed to prevent the operation of the brothel. The close proximity rules meant that an operator faced 'considerable obstacles' in establishing discrete premises in the central business district and, outside that, there were 'only three (relatively) small pockets of land on which brothels could be established' (*JB International*, 2006, paras 85 and 87). 'The Act envisaged', the judge said, 'that both smaller owner-operated brothels and larger enterprises will operate within the jurisdiction of territorial authorities' (*JB International*, 2006, para 92). The power to regulate the location of brothels must 'be exercised on legal (not moral) grounds', with the purpose of meeting the general objectives of territorial authorities set out in the 2002 Local Government Act (namely, addressing nuisance, public health and safety, and offensive behaviour) and traditional resource management objectives (*JB International*, 2006, para 92). Adopting the analysis of Pankhurst J in *Willowford*, Heath J expressed particular concern that the bylaw effectively forbade small owner-operator brothels from operating in their natural habitat – suburban homes – contrary to the outcome contemplated by the PRA. Concerns were also expressed that the restrictions might force brothels to operate in less discreet

and safe areas, thereby undermining the safety purposes of the PRA. The judge noted that the grounds on which the bylaw was found invalid overlapped; the *Virgo* non-prohibition principle was breached, the purpose of the PRA was undermined and the nature of regulation could be characterised as unreasonable (*JB International*, 2006, paras 76 and 99).

The third case, *Conley v Hamilton City Council* (2006 ad 2008), involved an unsuccessful challenge to a bylaw that (a) restricted the location of brothels to three zones within Hamilton City (the city centre, a commercial zone and an industrial zone); and (b) prohibited the operation of brothels within 100 metres of 'sensitive sites' (churches, schools, marae (sacred Maori meeting places) and so on). The challenge was brought by the operator of a large brothel employing 12 sex workers that had operated for 19 years; the brothel was located just outside the permitted zones of operation and the operator had failed to secure other premises within which she could lawfully operate the brothel.

The challenge was rejected in the High Court (*Conley*, 2006) and subsequently rejected on appeal to the Court of Appeal (*Conley*, 2008), largely on the basis that the degree of restriction was not so grave as to be unlawful. Significantly, both the High Court and Court of Appeal accepted the evidence that there were over 2,500 'potential occupation units', both commercial and residential, within the zones from which brothels could lawfully operate (*Conley*, 2008, para 68). The Court of Appeal noted that it would still be a 'challenge' to find suitable premises for small owner-operated brothels. But it said it was not prepared to rule that in the circumstances the degree of restriction amounted to an objectionable prohibition (*Conley*, 2008, para 68). Further, the court recorded the contextual differences between the *Conley* case and the situation in other cities. First, the Hamilton bylaw fell short of the 'virtual prohibition' found in the *JB International* case. Second, the evidence presented about the natural habitat of small owner-operated brothels differed: in *Willowford*, uncontested evidence was presented that around 50–60 workers in such brothels would be forced to operate illegally under the bylaw; in the *Conley* case, however, the evidence on the impact on such sex workers was more equivocal, with some acceptance that the natural habitat in Hamilton for small owner-operated brothels included discreet apartments in the central city or mixed-use areas where brothels were permitted.

Finally, the Court of Appeal emphasised the need for deference towards the judgements of elected local members when grappling with the appropriate limits of such bylaws. Hammond J said (*Conley*, 2008, para 75):

> [E]ven if this were a close run case, in our view where as here the choices being made are distinctly ones of social policy..., a court should be very slow to intervene, or adopt a high intensity of review. A large margin of appreciation should apply. Parliament entrusted the location of brothels to local authorities, which are elected bodies, and Parliament has itself decided to maintain a measure of ongoing review of prostitution.

A number of points can be drawn from these cases, but first they need to be put in their wider context. These cases represent one of the first contemporary opportunities for the courts to deliberate on their appropriate methodology when reviewing local government legislative action, particularly in the light of the 2002 local government reforms. Fundamental to this question is the degree of intensity or scrutiny the courts will apply to local government questions. Historically, courts were relatively vigilant when reviewing bylaws and were not timid about intervening to overturn decisions of elected bodies if they were concerned about the deleterious effects of the bylaw. This was in part because the bodies and their decision-making deliberations being reviewed were not necessarily viewed with the greatest esteem and it was necessary for the courts to play an active role to protect the rights and interests of citizens. However, modern jurisprudence – spurred by the reforms of local democratic processes – reflects the belief that greater deference should be accorded to decisions made through participatory processes by elected members who are ultimately accountable to the electorate. The line of brothel cases arises in a time of uncertainty and form part of the vanguard of the establishment of the modern approach for reviewing bylaws (see Knight, 2005b). The most authoritative statement comes from the Court of Appeal, where Hammond J stressed the need for judicial restraint so that local communities, through their elected officials, are properly empowered to set the limits on this matter of social policy.

Second, the limits of local authority regulation in this area remain opaque. At first blush, it appears difficult to reconcile the different results in the cases. A number of factors feed into this uncertainty. Local democracy contemplates different outcomes in different districts. As Hammond J noted in *Conley*: 'The whole point of the parliamentary delegation is that the appropriate requirements for the particular locales may very well vary ...' (*Conley*, 2008, para 76). Overlaying that fundamental point is the fact that the nature of judicial supervision of these local decisions is quite open textured and ultimately a matter of judgement. The question of whether the extent of a bylaw is so restrictive that it amounts to impermissible prohibition is a finely balanced judgement call. Whether a bylaw fundamentally undermines the purpose of, or is 'repugnant' to, the PRA is not a simple or definitive question. Assessing the 'reasonableness' of a regulatory measure requires a judgement based on variable and contested cost-benefit factors and weightings. Each of these questions involves the evaluation, in the round, of a bylaw and its effects; whether the bylaw passes muster is a matter of fact and degree.

To some extent, the reluctance of the courts to clearly articulate the ground for striking down bylaws has exacerbated this uncertainty, a point noted by the Court of Appeal (*Conley*, 2008, para 44, adopting Knight, 2005b). Clarity about the basis for intervention is critical for developing a body of jurisprudence about the limits in this area. For example, if a bylaw is quashed due to the local authority exceeding the legislative mandate in section 14 because it effectively prohibits small owner-operated brothels, that judicial ruling should be of universal application; no local authority can, as a matter of law, effectively prohibit small owner-operator

brothels, regardless of local conditions. However, if a bylaw is quashed because the negative effects of the bylaw are not generally proportionate to the positive outcomes (or vice versa), the central issue is the reasonableness of the regulatory initiative; this will be an assessment dominated by local conditions, along with desired community outcomes and views.

Third, as it stands, it is difficult to predict whether a bylaw will be treated as being valid or not. The general theme that can be discerned from the various cases is that local authorities can legitimately respond to community concerns about the location of brothels but cannot set their regulation too aggressively such that it makes it practically impossible for brothels, particularly small owner-operated (typically suburban) brothels, to operate. It is difficult to state the scope and limits of the local authority bylaw-making power with any greater certainty that this. Finally, it is worth noting that, following this line of case, the general uncertainty about the limits of permissible regulation was considered by the Prostitution Law Reform Committee (PLRC, 2008, pp 145-6). The committee took the view that the decisions in *Willowford* and *JB International* better reflected the philosophy of the PRA, although it accepted that the *Conley* case turned on its own facts. It noted that the jurisprudence is 'still developing' and suggested it would be 'premature' to amend the Act to attempt to provide any greater certainty (PLRC, 2008, p 146). In particular, it said it would be 'fictional' to amend the terminology to exclude small owner-operated brothels from the definition of a brothel in order to exclude them from location controls and it was concerned that such a change might produce 'unintended consequences' (PLRC, 2008, p 146). Further, variable geographical situations and population spreads made it difficult to provide hard-and-fast rules for controlling the location of brothels.

Regulation of signage

Section 12 of the PRA specifically empowers territorial authorities to regulate signage advertising commercial sexual services:

> **12 Bylaws controlling signage advertising commercial sexual services**
>
> (1) A territorial authority may make bylaws for its district that prohibit or regulate signage that is in, or is visible from, a public place, and that advertises commercial sexual services.
>
> (2) Bylaws may be made under this section only if the territorial authority is satisfied that the bylaw is necessary to prevent the public display of signage that–
>
> (a) is likely to cause a nuisance or serious offence to ordinary members of the public using the area; or
>
> (b) is incompatible with the existing character or use of that area.

(3) Bylaws made under this section may prohibit or regulate signage in any terms, including (without limitation) by imposing restrictions on the content, form, or amount of signage on display.

(4) Parts 8 and 9 of the Local Government Act 2002 (which are about, among other things, the enforcement of bylaws and penalties for their breach) apply to a bylaw made under this section as if the bylaw had been made under section 145 of that Act.

In this provision, 'commercial sexual services' carries the statutory definition as set out in section 4(1), that is, sexual services that:

(a) involve physical participation by a person in sexual acts with, and for the gratification of, another person; and

(b) are provided for payment or other reward (irrespective of whether the reward is given to the person providing the services or another person).

Prior to the PRA, local authorities already had some scope to regulate signage under the general power to make bylaws for the purpose of 'protecting the public from nuisance' or 'minimising the potential for offensive behaviour in public places' (2002 Local Government Act, section 145) or, arguably, the power to regulate 'trading in public places' (2002 Local Government Act, section 146(a)(v)). However, the specific provision in the PRA is slightly different. First, the scope of the provision is potentially broader. It covers signage that is not only in public places but also 'visible from' public places. This enlarges the signage capable of being regulated to include signs on private property; therefore, the threshold before regulation is permitted is lowered. Although the provision replicates the general power by permitting regulation where signs are likely to cause a 'nuisance' (cf 2002 Local Government Act, section 145(a)) or likely to cause 'serious offence' (cf 2002 Local Government Act, section 145(c)), the additional jurisdictional ground of 'incompatibility' with the existing use or character of the area is added. A signage bylaw could potentially be challenged if it regulated signs in circumstances that fell short of those mentioned in section 12(2). However, the jurisdictional terms ('serious offensive', 'nuisance', 'incompatibility' and 'character') have a degree of vagueness or ambiguity that mean it would be difficult to overturn a local authority's judgement that a particular case has been made out for a signage bylaw to be adopted.

Second, the specific bylaw-making power clarifies that this type of regulation can include an absolute prohibition or restrictions of various kinds. This avoids any bylaws being attacked on the basis that they overreach under the *Virgo* principle (although the broader 'purpose' injunction in section 145 might have ameliorated that possibility anyway).

Third, bylaws made under section 12 (in contrast to bylaws made under section 14) need not be consistent with the 1990 New Zealand Bill of Rights Act. Ordinarily subordinate legislation such as bylaws must not breach the Bill

of Rights (2002 Local Government Act, section 155(3); *Drew v Attorney-General*, 2002), that is, any bylaws restricting rights like the freedom of expression are only permissible if they are enacted in the pursuit of an important government objective and any restrictions on the rights are proportionate with that objective (Rishworth et al, 2003, ch 5; Butler and Butler, 2005, ch 6; *R v Hansen*, 2007). However, section 13(2) of the PRA contained an express provision exempting compliance with the Bill of Rights for signage bylaws.

> [A] bylaw may be made under section 12 even if, contrary to section 155(3) of the Local Government Act 2002, it is inconsistent with the New Zealand Bill of Rights Act 1990.

In many respects, the provision was adopted out of an abundance of caution. Although any signage bylaws would prima facie restrict people's expressive rights under section 14 of the Bill of Rights, bylaws would have been potentially justifiable and therefore lawful. But perhaps there was not the mood for such challenges – even potentially futile challenges. The exemption provision avoided any doubt.

A number of local authorities have enacted bylaws incorporating restrictions on signage advertising commercial sexual services, either specifically addressing brothels (for example, North Shore City) or more generally as part of a broader package regulating the advertising of sexual services or offensive advertising (for example, Wellington City). While the form of the regulation varies between local authorities, the regulation has been relatively restrictive, although not entirely prohibitive. For example, North Shore City prohibits signs displaying anything other than the name of the brothel proprietor and imposes strict controls on the size and illumination of the sign (2008 North Shore City Bylaw, clause 25.4.1). In contrast, Wellington City requires approval for all signs, based on criteria largely focused on depiction of sexual activity, nudity and offensiveness (2008 Wellington Consolidated Bylaw, Part 5, clause 10).

Land use regulation under the 1991 Resource Management Act

Local authorities have the power to regulate brothels under the 1991 Resource Management Act, either by promulgating rules specifically to regulate brothels or through judgements made on individual applications for resource consents.

Section 15(3) of the PRA expressly left open the power of territorial authorities to develop land use controls regulating the business of prostitution or brothels:

> Subsection (1) does not limit or affect the operation of the Resource Management Act 1991 in any way, and it may be overridden, with respect to particular areas within a district, by the provisions of a district plan or proposed district plan.

Local authorities have the legislative power to promulgate objectives, policies and rules in district plans to manage 'the effects of the use, development, or protection of land and associated natural and physical resources of the district' (1991 Resource Management Act, sections 31 and 72). As with other businesses or home enterprises, the operation of a brothel, regardless of size or nature, constitutes the 'use' of land, thereby allowing local authorities to regulate any adverse effects of the activities on the environment. This potentially allows the regulation of the location of brothels, along with the management (or prohibition) of adverse effects of prostitution businesses, including signage, parking and so on.

With the key terms – 'effects' and 'environment' – being framed broadly (notably to include amenity values and community well-being, not just ecological factors) (1991 Resource Management Act, sections 2 and 3) a wide degree of regulation is, in theory, permissible. However, any proposed rule regulating activities must, on a case-by-case basis, pass muster under section 32 of the Resource Management Act. This evaluation subjects any rule (and associated provisions) to relatively intense scrutiny to ensure that it is consistent with the purpose of the Resource Management Act (viz 'sustainable management') and, having regard to their efficiency and effectiveness, it is the most appropriate method to achieve that purpose – broadly inviting a cost-benefit assessment of any rule (1991 Resource Management Act, section 32; see Nolan, 2005, para 3.91). Critically, the section 32 assessment of a local authority is subject to appeal to the Environment Court on a *de novo* basis, effectively allowing the court to reach a fresh and independent evaluation of the appropriateness of the rule (1991 Resource Management Act, section 290 and schedule 1, clause 14).

Further, regulation through district plan rules comes with an additional complication for local authorities. Any controls on brothels or the business of prostitution only operate prospectively; any brothels or businesses already established before any rule was promulgated are entitled to 'existing use rights', thereby exempting them from the application of any new controls. Existing use rights arise where a land use was 'lawfully established' before any rule was formally notified to public and where the effects of the land use are the 'same or similar in character, intensity, and scale' to those which existed before the rule was notified (1991 Resource Management Act, section 10). There was a question-mark about whether brothels or businesses of prostitution would be able to establish that they were 'lawfully established' when, even though they were not typically addressed in previous resource management controls, prostitution and brothels were effectively unlawful under the criminal law. However, this became moot with the passing of the PRA, as brothels and such businesses became lawful and therefore capable of relying on existing use rights when the Act came into force on 28 June 2003. With the minimal lead-time before the Act came into force, few, if any, local authorities were able to notify district plans provisions in time to prevent existing use rights applying to existing brothels.

Although regulation through district plan rules remains available to local authorities, the narrower mandate, more intense supervision of any proposed

controls and impact of existing use rights mean this type of regulation is less attractive to local authorities. Few local authorities have adopted this regulatory approach.

The second resource management tool available to local authorities to regulate brothels and prostitution businesses is the express power to take into account additional effects when considering an application for resource consent relating to a 'business of prostitution' (PRA, section 15(1) and (2)):

> **Resource consents in relation to businesses of prostitution**
>
> (1) When considering an application for a resource consent under the Resource Management Act 1991 for a land use relating to a business of prostitution, a territorial authority must have regard to whether the business of prostitution–
>
> (a) is likely to cause a nuisance or serious offence to ordinary members of the public using the area in which the land is situated; or
>
> (b) is incompatible with the existing character or use of the area in which the land is situated.
>
> (2) Having considered the matters in subsection (1)(a) and (b) as well as the matters it is required to consider under the Resource Management Act 1991, the territorial authority may, in accordance with sections 104A to 104D of that Act, grant or refuse to grant a resource consent, or, in accordance with section 108 of that Act, impose conditions on any resource consent granted.

Obviating the need for local authorities to change their district plans to specifically direct the consideration of these matters, this provision gives local authorities the power to address any potential 'nuisance', 'serious offence' and 'character incompatibility' when assessing applications for resource consent for brothels and prostitution businesses. In some cases, depending on the nature of the relevant district plan rules, local authorities could have ordinarily taken these matters into account; however, this provision avoids any doubt about the power to do so and extends the circumstances in which these matters can be taken into account.

These additional factors can be considered in any case where an application is made for a resource consent application 'relating to the business of prostitution' (prostitution having been defined as 'the provision of commercial sexual services' (section 4)). The reach of the section 15 has yet to be definitively settled by the courts, but the language suggests it has broad application. The qualifier 'relating to' suggests a wide interpretation and transcends the customary demarcation between 'development' (the construction or alterations of buildings or facilities) and 'use' (the activity that takes place in those buildings), and applies in both cases. Further, the need to obtain a resource consent need not arise from a failure to comply with a district plan rule specifically regulating brothels or prostitution (such as a

spatial prohibition of the operation of brothels in certain zones); it may arise from a failure to comply with rules regulating general matters not specific to brothels or prostitution (such as bulk and location of buildings, parking requirements, size of business and so on).

Finally, the provision allows for an application to be declined, or conditions imposed, in circumstances where ordinarily that would not be possible. Absent this provision, the 1991 Resource Management Act circumscribes, based on a prescribed hierarchy, when certain matters can be taken into account in the decision about whether to grant a resource consent and what type of action can be taken as a result. At one end, for activities listed as 'controlled activities' or 'restricted discretionary activities' in a district plan, a local authority may only consider certain effects specifically listed in the district plan. In the case of the former, they can only impose conditions to address the effect, not decline the application and, in the case of the latter, they can impose conditions or decline the application. For example, an activity may be treated as being controlled if it only proposes to provide 80% of the required number of car-parks, or restricted discretionary if it only proposes 60% of the required number. In such cases, the conditions or matters required to be taken into account would typically be restricted to car-parking, the size of the business and other expressly recorded related effects. At the other end, for activities listed as 'discretionary' or 'non-complying' activities, any effects can be taken into account and the application could be declined or any conditions imposed. For example, for such activities, an application could be declined for any reason, such as noise, even if the need to obtain a resource consent arose solely because of a failure to provide the (unrelated) required number of car-parks. Section 15, therefore, allows local authorities to take into account 'nuisance', 'serious offence' and 'character incompatibility' relating to brothels even if, in the case of controlled or restricted discretionary activities, they were not specifically listed in district plans. Further, in the case of controlled activities, section 15 allows an application to be declined, even though ordinarily this would not be permissible. The reach of section 15 is, however, not comprehensive. The additional matters to be considered can only be considered when an application for a resource consent is required. If a brothel or prostitution business is a 'permitted activity' under a district plan such that it can be undertaken lawfully without applying for a resource consent, there is no ability for a local authority to control the brothel or business under section 15.

The effect of this provision has, to date, only been considered in one judicial decision: *Mount Victoria Residents Association Incorporated v The Wellington City Council* (2009). Members of a local residents' group challenged Wellington City Council's decision to grant a resource consent for the expansion of an existing brothel located in a residential zone – The Lovely Lilly – from three sex workers to five. In its decision to grant consent, the council had focused solely on traditional resource management effects, such as provision for car-parking, and did not refer to the compatibility, nuisance or serious offence matters mandated by section 15 of the PRA. This failure was fatal. The council had ambivalently argued that

even though it had not directly referred to these matters, they were still indirectly assessed or partially considered in the standard assessment of the effects. But that was insufficient. The court reiterated the 'tolerably clear' intention of parliament, expressed in section 15, that compatibility matters were to be taken into account over and above the usual resource management considerations (*Mount Victoria Residents*, 2009, para 10). As there was no contest to the fact that the application was one relating to the business of prostitution, the council's failure to directly turn its mind to these matters, both when deciding whether to publicly notify the application and when deciding whether to grant the application, led to the resource consent for the brothel being quashed. Dobson J was, however, careful to note that it should not be assumed that section 15 matters would automatically mean that every application relating to the business of prostitution would need to be publicly notified or that the application must be declined; there was still the need for 'case by case consideration' (*Mount Victoria Residents*, 2009, para 26).

Generic law-making powers and approval processes

Local authorities also possess a number of generic law-making powers or responsibility for approval processes. Some local authorities have sought to utilise these general powers to regulate brothels and prostitution activities.

A number of local authorities have enacted bylaws seeking to prohibit the 'touting' or 'solicitation' of commercial sex services, either solicitation of services per se (Rodney District Council and Rotorua District Council) (Caldwell, 2004, p 136; PLRC, 2008, p 140) or touting of brothel-related services (Grey District Council) (PLRC, 2008, p 140). Others have sought to specifically prohibit street prostitution (Carterton District Council and Queenstown Lakes District Council) (Caldwell, 2004, p 136; PLRC, 2008, p 140).

The lawfulness of these regulatory responses is, in some cases, unclear, and, in other cases, dubious. Local authorities possess the power, at least in a jurisdictional sense, to enact such bylaws under their general bylaw-making powers (that is, 'protecting the public from nuisance', 'protecting, promoting, and maintaining public health and safety' and 'minimising the potential for offensive behaviour in public places'; 2002 Local Government Act, section 145), their specific bylaw-making powers governing the regulation of street trading or hawking in the 2002 Local Government Act (that is, to 'regulate ... trading in public places'; 2002 Local Government Act, section 146(a)(vi)), or their general bylaw-making power under public health legislation (that is, 'improving, promoting, or protecting public health, and preventing or abating nuisances'; 1956 Health Act, section 64(1)(a)). As a matter of jurisdiction, these provisions are broad enough to provide an initial foundation for these measures. However, there remains a question of whether doing so is fundamentally inconsistent or repugnant to the PRA (Caldwell, 2004). This point has yet to be tested in the courts.

Local authority-led law reform

It seems clear that there is not universal satisfaction among local authorities with the extent to which prostitution can be regulated, even with the relatively potent power of local authorities to continue to regulate aspects of the prostitution business. Some local authorities favour greater powers to regulate the perceived concerns about prostitution.

Most dramatically, this was demonstrated by the attempt by Manukau City Council to lobby parliament to enact a local Bill prohibiting street prostitution within its district. The Manukau City Council (Control of Street Prostitution) Bill was introduced by local Member of Parliament, George Hawkins, in November 2005. It proposed to make it illegal for both sex workers and clients to 'solicit for prostitution in a public place' within Manukau City. The proposed Bill was designed to respond to local concerns about the high number of sex workers operating on the street (estimated at over 150) and the associated negative effects of street sex work (Hawkins, 2005). Ultimately, the Bill was voted down by 73 votes to 46 (New Zealand Parliament, 2006, p 5653), after an adverse report from the Local Government and Environment Select Committee (Local Government and Environment Select Committee, 2006). While the Select Committee acknowledged some of the concerns that led to the Bill being promoted, the majority of the Committee suggested there were better ways to address concerns about street safety without undermining the purpose of the PRA or enacting a location-specific law.

Conclusion

Local authorities continue to have the power to regulate the business of prostitution, either through specific measures brought in the package of reforms in the PRA or through their generic law-making or administrative powers. The bundle of powers available to local authorities varies in their potency. Militant regulation of brothel advertising is permitted, while the power to regulate the location of brothels is more circumscribed (and uncertain). Some local authorities have sought to aggressively utilise their available powers, although not all attempts have been sanctioned by the courts, with some bylaws governing the location of brothels being overturned. The propriety of some other bylaws, particularly those effectively prohibiting solicitation, have not yet been definitively tested before the courts.

Local authority regulation has arguably now become the main locus for debate about the merits of regulating (or, rather, restricting) prostitution. That locus is framed by awkward tensions: a national, philosophical direction to ensure a safe and healthy environment for sex workers to legitimately operate within; strongly held views by some elements of local communities against prostitution and its effect on local amenity; and uncertainty and variation from the courts about how

to mediate between national commands and local concerns, particularly where central government has mandated some degree of role for local responses.

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