PROSTITUTION IN NEW ZEALAND: THE RE-IMPORTATION OF MORAL MAJORITARIANISM IN REGULATING A DECRIMINALISED INDUSTRY

Abstract
In 2003 New Zealand became the only country in the world to decriminalise all aspects of unforced prostitution. The law reform heralded a radical shift; rather than attempting to suppress the industry by criminalising the participants, the purpose of the *Prostitution Reform Act* was to ensure that the human rights of prostitutes were safeguarded. But this contentious social experiment has only served to highlight an acute clash between the ideals of public participation in decision-making and the imperative of protecting the rights of an unpopular minority. This article considers this dichotomy. By those most fusty stalwarts of local democracy, bylaws and planning controls, moral disapprobation has been allowed to continue to dominate, suppressing the rights of prostitutes. Further, owing to the discretionary elements inherent in judicial review, administrative law has failed to provide the necessary safeguards. This article responds to Emily Van der Meulen and Elya M.Durisin and serves to caution rights-focused reformists; to be truly effective, any rights-based legislation should be careful in ensuring that the possible continuing moral indignation of local communities is not, through legal processes, permitted to threaten the welfare and safety of prostitutes and risk the creation of a second-tier, clandestine industry.

1. Introduction

In 2003 New Zealand became the only country in the world to decriminalise all aspects of unforced prostitution with the *Prostitution Reform Act* ('PRA'). Underpinning the law reform was an approach that would promote the well-being of prostitutes and ensure their labour and human rights.[1] Indeed, the stated purpose of the PRA is,

> … to decriminalise prostitution (whilst not endorsing or morally sanctioning prostitution or its use) and to create a framework that – (a) safeguards the human rights of sex workers and protects them from exploitation: (b) promotes the welfare and occupational health and safety of sex workers.[2]

Because of the controversy surrounding the legislation, a governmental review process was established to assess its impact and in 2008 the Prostitution Law Review Committee ('PLRC') released its first report.[3] Key findings included that the legislation has had little impact on the numbers working in the industry[4] and a marked effect on supporting prostitutes in refusing particular clients and practices.[5] The PRA has undoubtedly improved conditions

[1] New Zealand Parliamentary Debates (hereinafter Debates), vol. 606, (19 February 2003) 3607-3609 Tim Barnett (NZ Labour) and 3609–3610 Katherine Rich (National). Note we use the word 'prostitute' in this article rather than 'sex-worker' because New Zealand legislation refers to 'prostitute.'
[2] *Prostitution Reform Act 2003* no 28 (Public Act) (NZ) (hereinafter PRA) s. 3; s. 4(1) prostitution is 'the provision of commercial sexual services'; commercial sexual services include 'physical participation in sexual acts for the gratification of another person which are provided for payment or other reward.'
[3] Ministry of Justice *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (New Zealand Government, Wellington 2008) (hereinafter PLRC).
[4] *Ibid.* at 41.
[5] *Ibid.* at 47.

for many prostitutes and has been widely lauded as a success.[6] In their article "Why Decriminalize? How Canada's Municipal and Federal Regulations Increase Sex Workers' Vulnerability,"[7] Emily van der Meulen and Elya M. Durisin argue persuasively for the reform of laws regulating prostitution in Canada and, in suggesting an alternate approach, they point to New Zealand as providing an exemplary model. Certainly there are natural legal, political and social synergies between New Zealand and Canada that justify Canadian reformists considering the law reform in New Zealand, but it is important for international observers to closely consider the scenario in New Zealand to learn from some of the difficulties that have emerged. In particular, van der Meulen and Durisin are impressed that New Zealand places "sex workers' rights at the centre" of regulatory frameworks[8] but in practice questions remain as to whether the New Zealand reforms *are* working adequately to promote the human rights, safety and well-being of prostitutes.

This article considers the law governing prostitution in New Zealand and it highlights an interesting dichotomy. Since the early 1980s, New Zealand has attempted to refine and perfect the democratic process; in particular, government at all levels is structured to promote the participation of the public in decision-making.[9] This approach, however, creates a tension between the Government in wishing to protect the rights of an unpopular minority and the general public, and importantly, as the case of prostitution demonstrates, it is a conflict that can seldom be won by a marginalised group that is truly disadvantaged.

Critically, the participation of the public during parliamentary scrutiny of the PRA had an important influence upon the final form taken by the legislation, securing the right of local government to regulate the location of brothels via the making of bylaws and town planning controls. Existing laws ensure that local authority regulation is informed by submissions from the public. In many districts, this participation has enabled a backlash against decriminalisation and the reassertion of legal moralism in the control of prostitution. In practical terms brothels have been heavily regulated and pushed into marginal areas primarily because public submitters are opposed to prostitution *per se*. The ramifications of this are serious as such an approach has the potential to undermine the welfare and safety of prostitutes, and it risks the continuation of a clandestine, second-tier industry. Prostitution has been decriminalised in New Zealand but the continuing participation of the public at large in decision-making is operating to counteract the purpose of the PRA.

In order to analyse the legal structures that have permitted moral disapprobation to dominate, this article is divided into three subsequent parts. In the first part we will explain the background to and some of the main components of the PRA, including the explicit and additional powers granted to local government. The judicial review of bylaws is addressed in part two; specifically, the difficulty faced by the courts in achieving the correct degree of intervention in cases that concern a clash between the rights of prostitutes and decisions

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[6] Gillian Abel (et al.) (eds.), *Taking the Crime out of Sex Work – New Zealand Sex Workers' Fight for Decriminalisation* (The Policy Press, Bristol 2010) at 260; Vanessa E. Munro and Marina Della Giusta (eds.) *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Ashgate, Hampshire, U.K. 2008) at 57; Deborah R. Brock, *Making Work, Making Trouble The Social Regulation of Sexual Labour* (2nd edn, University of Toronoto Press, Toronto Buffalo London, 2009) at 165. Note however that Brock warns against "local legalization strategies that will undermine the overall gaols of decriminalzation" at 166.

[7] Emily van der Meulen and Elya M. Durisin, "Why Decriminalize? How Canada's Municipal and Federal Regulations Increase Sex Workers Vulnerability" (2008) 20 Canadian Journal of Women and the Law 289-311 at 307-310.

[8] *Ibid.* at 290.

[9] For example by providing for public access to information held by government, citizen's initiated referenda, proportional representation in Parliament, and public participation in resource management and town planning.

based on community preferences. In part three, the role in restricting prostitution played by the *Resource Management Act 1991*, New Zealand's main environmental and planning law statute, is considered.

This article contains lessons for other nations presently debating decriminalisation and in particular, demonstrates the difficulties that may flow if local authorities are permitted to implement specialised rules expressly directed at regulating prostitution. Within Canada, the Pivot Legal Society has identified that zoning is "one of the more controversial issues in the national discussion" concerning decriminalisation, and that it is difficult to assess whether prostitution should be subject to specialised zoning rules.[10] We conclude that within the New Zealand context local authorities should not be able to isolate prostitution and regulate it in a wholly different manner to any other business activity. In particular, we argue that while genuine nuisance effects from any business should be managed, the mere moral disapprobation of the public should have no place in regulating a legal industry at local authority level and this should be carefully guarded against. Ultimately, we contend that the New Zealand law reform of prostitution has been disingenuous. When the stated aim of the Government is to protect the rights of a disadvantaged group, to then allow moral majoritarianism at local community level to affect that minority and to undermine those rights, is perverse law making.

2. Compromising to Obtain Agreement: The Enactment of the PRA 2003

The approach taken to prostitution in New Zealand prior to the law reform of 2003 was "typical of that taken in most comparable jurisdictions … in that it sought to regulate the industry, but did so by penalising the worker."[11] Although the actual provision of sexual services for payment was not itself an offence, brothel keeping, living on the earnings of prostitution and soliciting were.[12]

In 1999, the New Zealand Prostitutes' Collective and other advocates for reform drafted the Prostitution Reform Bill that ultimately was adopted as a private members bill. Parliamentary debates on the Bill provided the setting for a stark clash between rights advocates and those concerned with preserving the traditional values of communities. Supporters argued that the Bill made "no moral judgment about prostitution"[13] but rather aimed to give prostitutes the "same rights as any other New Zealander,"[14] "justice, safety, and dignity" by decriminalising prostitution.[15] Post-decriminalisation, prostitutes were to be subject to the same regulatory regimes as all other workers. Reformists argued that if the Bill were enacted it would reduce exploitation in the industry, prostitutes' "work environments will improve [and] they will be less constrained in forming collectives, or similar worker-run businesses."[16] The Bill's opponents, on the other hand, emphasised moral concerns, with one

[10] Pivot Legal Society, *Beyond Decriminalization: Sex Work, Human Rights and a New Framework for Law Reform* (Vancouver, B.C., June 2006) at 65-77.
[11] PLRC above note 3 at 21.
[12] *Crimes Act* 1961 no 43 (Public Act)(NZ) ss. 147–149; *Summary Offences Act* 1981 no 113 (Public Act) (NZ) s. 26.
[13] Debates vol. 609, 6162 (11 June 2003) Tim Barnett (sponsor).
[14] Debates above note 1 at 3609.
[15] Debates above note 13 at 6159 Lynne Pillay.
[16] *Ibid.* at 6162.

Member of Parliament describing it as "an abomination against society [that] is against the sound social fabric of families."[17]

The legislation draws a distinction between forced or underage prostitution and unforced prostitution,[18] subjecting the former to the full weight of the criminal law whilst decriminalising all aspects of the latter.[19] In attempting to promote the welfare of prostitutes, the PRA extends health and safety legislation to brothels; imposes obligations in relation to safer sex practices on all participants;[20] and ensures the eligibility of prostitutes to obtain state benefits if they leave the industry.[21] In order to ensure that brothels[22] are being managed appropriately, businesses employing five or more prostitutes must be certified and certification can be cancelled for operators who have specified criminal convictions.[23] Small owner operated brothels ('SOOBs'), where four or fewer prostitutes work, are exempt from the certification scheme.[24] There are no requirements for individual prostitutes to register with authorities or to undergo medical tests. Finally, the PLRC was established and required to conduct a major review within five years of enactment, assessing the impact of the reforms.[25]

When the Bill was first introduced to Parliament, it made no mention of the role of local government in regulating prostitution. However, important changes were made following the Select Committee process. A distinctive feature of New Zealand's parliamentary system is that all bills are scrutinised by a Select Committee that invites and considers submissions from the public and then recommends changes to Parliament.[26] Unsurprisingly, opposition to the Bill was both organised and vocal and whilst the primary concern of opponents was for the Bill to fail, a fall-back position would see the introduction of explicit powers that would enable local authorities to control the location of brothels via bylaws and planning mechanisms.

Clearly, such powers would import an element of caution into the reforms; local communities would be able to prevent prostitution from taking place in certain areas. However, the majority of the Select Committee did not endorse this suggestion, considering rather that existing criminal and planning laws were sufficient to address any tangible adverse effects flowing from prostitution.[27] To grant additional powers to local authorities, the Select Committee opined, would run the risk of creating serious local conflict and drive the industry "underground."[28] Despite this view, the Hon Phil Goff introduced the amendments[29] that, accepted in their entirety, became sections 14 and 15 of the PRA:

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[17] *Ibid.* at 6160 Bill Gudgeon.
[18] PRA ss. 16, 17, 20–22.
[19] PRA s. 7.
[20] PRA ss. 8–10.
[21] PRA ss. 17-18.
[22] PRA s. 2: brothels are 'any premises kept or habitually used for the purposes of prostitution.'
[23] PRA s. 36: this discounts previous convictions for living off the earnings of prostitutes; 'pimps' can now become legal 'managers.'
[24] PRA s. 34(3); s. 2 SOOBs are brothels 'at which not more than 4 sex workers work' *and* 'where each of those sex workers retains control over his or her individual earnings.'
[25] PRA ss. 42–46; committee includes a cross-section of society.
[26] Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th edn OUP Melbourne 2004) at 170.
[27] Justice and Electoral Select Committee, Prostitution Reform Bill (29 November 2002) at 15.
[28] *Ibid.* at 32. Note, this was the reason why decriminalisation was favoured over legalisation, see Munro, above note 6 at 3.

S. 14 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.

S. 15 Resource consents in relation to business 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 uses of the area in which the land is situated.

In granting additional powers to local authorities to regulate the location of brothels, the legislature would secure the continuing involvement of the public in the control of prostitution. The statutory purpose of local government is "to enable democratic local decision making…and to promote the social, economic, environmental, and cultural well-being of communities"[30] and in order to ascertain how best to promote the well-being of communities, public participation is essential. When making regulatory bylaws, local authorities must follow the special consultative process[31] set down in the general empowering legislation of the *Local Government Act 2002* and in parallel, the *Resource Management Act 1991* establishes comprehensive procedures to promote public participation in planning decisions.[32]

There can be little doubt that these changes made the Bill more attractive to parliamentarians;[33] it was passed into law following a conscience vote, albeit by the narrowest of margins (there were sixty votes supporting the bill and fifty-nine against, with one Member abstaining). Following the enactment of the PRA, and in consultation with their communities, many local authorities moved to regulate the location of brothels by introducing bylaws or planning controls. In most instances, local authorities adopted a restrictive approach by excluding brothels, including SOOBs, from residential zones altogether and only opening to them limited parts of commercial or industrial areas in which to conduct business.[34] The ramifications of this particular approach are significant because in

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[29] Debates above note 1 at 3619 Hon. Phil Goff (Minister of Justice); Supplementary Order Paper 2003 (70) Prostitution Reform Bill 2000 (2002 66-2). PRA s. 12 also introduced powers for local authorities to prohibit signage advertising brothels.
[30] *Local Government Act 2002* no 84 (Public Act) (NZ) (hereinafter LGA) s. 10.
[31] LGA ss. 83, 86, and 155–157 requiring the publication of the proposed bylaw and explanatory report, public submissions and a hearing.
[32] *Resource Management Act 1991* no 69 (Public Act) (NZ) (hereinafter RMA). In the case of plan-making and individual applications for resource consents granting dispensation from plan rules, the RMA requires: environmental impact assessments (ss. 32, 88); public notification and consultation (usually) (ss. 95A–95C, Schedule 1); submissions and hearings (ss. 96–100, Schedule 1).
[33] Debates above note 1.
[34] PLRC above note 3 at 137-138. The PLRC reports that out of 73 authorities, 43 expressly considered prostitution in their district post PRA; 15 decided their district plan was sufficient; 6 changed the plan; 15 promulgated a new bylaw or amended an existing bylaw; 13 of those bylaws controlled the location of brothels; 12 defined specific areas within which brothels are permitted to operate, all being commercial and industrial

contrast to many other occupations, the work environment in which prostitutes operate directly influences their well-being and safety.

Research shows that street-based prostitutes are at the greatest risk of violence and abuse.[35] Rights-focused reformers argue that the restrictive approach taken by many local authorities in banning SOOBs from residential zones appears to have forced more prostitutes onto the streets;[36] hardly what the legislature intended in passing the PRA. Prostitutes that do work indoors may meet a client at an arranged venue or work "in-call" (i.e. in a SOOB or managed commercial brothel). Prostitutes who work in SOOBs have much greater freedom to refuse particular clients or practices[37] but forcing SOOBs into less populated industrial or commercial zones places prostitutes "at greater risk of violence and/or robbery, as they may not have the security arrangements that a larger brothel has."[38] In practice, major economic barriers, such as high rentals, prevent individual prostitutes or those working with one or two colleagues from establishing their businesses in commercial zones. Such barriers favour larger brothels run by businesses, whereby others control the prostitutes' labour and income. The New Zealand Prostitutes Collective assert that many prostitutes choose to operate from SOOBs precisely because this avoids the risk of exploitation and abuse, particularly financial abuse, from such 'managers.'[39] One such form of abuse occurs with 'bonding', whereby managers withhold a sum of money from the prostitutes in order to secure their attendance at work. The bond will be forfeited for lateness or non-attendance. Bonding is a persistent problem in New Zealand despite decriminalisation.[40]

SOOBs have other advantages over large, commercial operations.[41] Research highlights the importance of the worker being able to communicate directly with the client before the transaction.[42] When a third party intervenes, misunderstandings are more likely; workers may be placed under pressure to provide services that they are not comfortable with and this can cause tension if they refuse to comply. Further, large businesses tend to be less discreet in advertising their services than SOOBs and concerns have been expressed that this fact alone diminishes workers' prospects for privacy and potentially their ability to exit the

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zones. Updated figures obtained by the authors show that 19 bylaws are in place with a further one in development and 5 district plans specifically address zoning for prostitution; a clear preponderance of public submitters cite moral and religious reasons for opposing prostitution in their neighbourhoods, see Ceri Warnock, "Prostitution in New Zealand: Have the reforms failed?" forthcoming 2012 (on file with authors).

[35] Abel above note 6 at 10; PLRC above note 3 at 55-56; Tamara O'Doherty, "Criminalization and Off-Street Sex Work in Canada" (2011) 53 Canadian Journal of Criminology and Criminal Justice 217-245 at 218 (referring to the plethora of research undertaken on this issue).

[36] Debates vol. 628, 651 (8 September 2010), Hon George Hawkins describing the 'plague' of street prostitution in Manukau City, alleged by Sue Bradford MP to be caused by the restrictive approach taken by the Council to SOOBs at 666.

[37] Gillian Abel and Lisa Fitzgerald "Risk and Risk Management in Sex Work Post-Prostitution Reform Act" in Abel above note 6 at 224; PLRC above note 3 at 46-47; van der Meulen above note 7 at 308.

[38] PLRC above note 3 at 139; Pivot Legal Society above note 10 at 75.

[39] Evidence of Catherine Healy in *Conley v. Hamilton City Council* unreported, H.C. Hamilton, CIV-2005-419-001689, 19 July 2006 [66]–[68] (hereinafter *Conley* (H.C.)); Tim Barnett (et al.) "Lobbying for Decriminalisation" in Abel above note 6 at 70; evidence of A. M. Reed in *Willowford Family Trust v. Christchurch City Council* [2011] N.Z.A.R. 209 [26] (hereinafter *Willowford*).

[40] Elaine Mossman "Brothel operators' and support agencies' experiences of decriminalisation" in Abel above note 6 at 129-130.

[41] Leslie Ann Jeffrey and Gayle MacDonald ""Its's the Money, Honey": The Economy of Sex Work in the Maritimes" (2006) 43 Canadian Review of Sociology / Revue Canadienne de Sociologie 313-327 at 323-325.

[42] O'Doherty above note 35 at 224-5.

industry with ease.[43] There are obviously advantages and disadvantages inherent with each sector of the business, but there is clear evidence that giving workers the choice to operate from SOOBs, a form of brothel that is usually found in residential areas, facilitates the safety and well-being of its workers.

In the Canadian context, in a recent decision of the Ontario Superior Court of Justice,[44] Himel J. found, on the voluminous evidence before her, that:

> [t]he risk of violence towards prostitutes can be reduced, although not necessarily eliminated. The two factors that appear to affect the level of violence against prostitutes are location or venue of work and individual working conditions. With respect to venue, working indoors is generally safer than working on the streets, working independently from a fixed location (in-call) appears to be the safest way for a prostitute to work in Canada.[45]

Himel J. also found that:

> the impact on a neighbourhood of a prostitute working independently and discreetly from a home, or with another person in order to enhance safety may be different than the impact of a large 'brothel-style' establishment … The evidence from both parties demonstrates that there are few community complaints about indoor prostitution establishments.[46]

Councils in New Zealand that have banned brothels from residential areas say that they have done so to respond to community concerns.[47] These preferences were expressed even though there was little evidence in public submissions that brothels operating in residential areas before such controls had in fact caused any nuisance problems, or had any actual deleterious effect on the properties and communities around them.[48] Rather submitters appeared to be basing their opposition on moral or religious grounds.[49] As the PLRC observed,

> SOOBs have caused particular consternation…residents have expressed concerns that the suburbs will be inundated with SOOBs, leading to decreased land values/property valuations, late night noise, littering and a general lowering of the tone of their neighbourhood … [In fact] SOOBs are not a new phenomenon, and have not caused widespread problems in the past. Most are so discreet that they go unnoticed. … There is little evidence that such activity causes disturbance, other than moral indignation, to the community.[50]

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[43] PLRC above note 3 at 80; *Willowford* above note 39, [26]; *Conley* (H.C). above note 39, [66]–[68].
[44] *Bedford v. Canada (Attorney General)* [2010] O.J. No 4057 per Himel J. [3], Himel J. found that offences set out in the Canadian Criminal Code of living on the avails of prostitution, keeping a common bawdy-house and communicating in a public place for the purposes of prostitution are not in accord with the principles of fundamental justice and breached the right to security of the person protected under the Canadian Charter of Rights and Freedoms.
[45] *Ibid.* at [300].
[46] *Ibid.* at [400]-[401].
[47] PLRC above note 3 at 138; *Conley v. Hamilton City Council* [2008] 1 N.Z.L.R. 789; [2008] N.Z.R.M.A. 139 (C.A.) (hereinafter *Conley* (C.A.), [34]–[39]; *Willowford* above note 39 at [55].
[48] Warnock above note 34. Also see *Willowford* above note 39 at [75].
[49] Warnock above note 34.
[50] PLRC above note 3 at 142-3.

While van der Meulen and Durisin interpreted the New Zealand reforms as reflecting the receptiveness of the general population to the "social legitimating of sex work",[51] this evaluation is too optimistic. Local authorities' restrictions on prostitutes reflect a continuing stigmatisation. The fact that local communities appear to be expressing moral indignation to prostitution *per se* rather than providing direct evidence of nuisance effects is particularly important as the following part of the article explains.

3. The Misuse of Bylaws and Limited Safeguard of Review

To date, nineteen local authorities have promulgated bylaws to regulate the location of brothels.[52] Many of these bylaws control brothels, including SOOBs, by excluding them from residential areas and allowing them to operate only in commercial or industrial zones. All bylaws promulgated by local authorities must conform with the general empowering legislation, the *Local Government Act 2002*, and in accordance with s 145 of that Act can only be made to protect the public from nuisance; protect, promote, and maintain public health and safety; and / or minimise the potential for offensive behaviour in public places. If bylaws are made for reasons that fall outside s145 they will be susceptible to review by the High Court.[53] Critically, bylaws, including bylaws to regulate brothels, cannot be made simply for moral reasons. In *JB International v. Auckland City Council*, Heath J. confirmed that:

> Parliament's intention was that the power to make bylaws regulating the location of brothels would be exercised on legal (not moral) grounds with the intention of meeting one or more of the policy concerns identified in ss. 145 and 146 of the *Local Government Act 2002*.[54]

Thus far, bylaws seeking to control prostitution in three of New Zealand's most heavily populated metropolitan cities, Auckland, Christchurch and Hamilton, have been challenged in court.[55] In each case, the local authority had followed all necessary procedural requirements, called for and considered public submissions and produced bylaws that preserved certain areas where brothels might operate while excluding them from residential areas. Opponents argued, amongst other things, that the bylaws amounted to a *de facto* prohibition on SOOBs, and challenged them for want of validity[56] on the grounds that they interfered unlawfully with the rights of prostitutes; were unreasonable; *ultra vires* of the local authority; or were otherwise repugnant to the laws of New Zealand.

In the first case, *Willowford Family Trust v. Christchurch City Council*, Panckhurst J. considered the local consultation process that had lead to the making of the bylaw and noted

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[51] Van der Meulen above note 7 at 310.
[52] Warnock above note 34.
[53] The High Court constitutes the second tier of the court system in New Zealand. Appeals from the High Court are to the Court of Appeal; appeals from the Court of Appeal are to the highest court, the Supreme Court.
[54] *JB International Ltd v. Auckland City Council* [2006] N.Z.R.M.A. 401 (hereinafter *JB International*) at [92]. The *Local Government Act 2002* s. 146 lists specific reasons for which bylaws can be made, including '(iv) trading in public places.'
[55] *Willowford* above note 39; *JB International* above note 54; *Conley* (H.C.) above note 39 and *Conley* (C.A.) above note 47.
[56] *Bylaws Act 1910* no 28 (Public Act) (NZ) ss. 12, 17.

that approximately 1,500 people had made submissions on the issue with 61% taking the view that, "brothels should be confined to the central business district."[57] The Council had established a sub-committee to advise on the issue. The sub-committee had recommended that, "SOOBs should be allowed to operate in residential areas"[58] as SOOBs "existed presently, largely in residential areas, with few complaints being received … there was little evidence that these had caused significant problems."[59] Despite these recommendations, the Council promulgated the bylaw that restricted brothels to a limited and defined area in the central business district.

The undesirability of judicial interference with community-based decision-making has been considered in all three of the bylaws cases. In *Willowford*, Panckhurst J. referred to *McCarthy v. Madden,*[60] a New Zealand case that sets out, as his Honour described it, the "well-established approach to unreasonableness" in bylaws cases.[61] *McCarthy* emphasised that Judges "should defer to the assessment of the elected representatives of the community" and should be slow to intervene in those decisions, but also stipulated that, "where [a] bylaw impinges upon a public right and does not produce a corresponding benefit to the community affected by it … generally the bylaw will be unreasonable."[62] Accordingly, an important question in *Willowford* concerned the rights affected by the Christchurch bylaw. The applicants argued that the bylaw infringed prostitutes' right to work and the question arose as to whether this was a justiciable right in the present context. New Zealand does have the *Bill of Rights Act*[63] although this is not supreme law and the identified rights are relatively meagre in comparison to those guaranteed by the Canadian Charter.[64] While the *Bill of Rights Act* affirms, protects, and promotes certain fundamental freedoms and human rights, including the right to freedom of association and the right not to be subjected to degrading or disproportionately severe treatment,[65] it does not affirm the right to work.[66] But Panckhurst J. construed the PRA itself as establishing a right for prostitutes to work and also found that the PRA recognises SOOBs "as a constituent part of the business of prostitution."[67]

In considering the restrictions imposed by the bylaw, the Judge found that while the *de jure* effect of the bylaw was to restrict all brothels to non-residential areas, its *de facto* effect was to deny the existence of SOOBs in Christchurch.[68] The Prostitution Reform Act permitted the regulation of brothels but as *Municipal Corporation of the City of Toronto v. Virgo*[69] established, the power to regulate does not include the power to prohibit. In *Virgo* the then Privy Council quashed a bylaw that prevented hawkers from operating in eight of the busiest streets of Toronto. The Privy Council considered that rather than looking for a literal

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[57] *Willowford* above note 39 at [15].
[58] *Ibid.* at [20].
[59] *Ibid.* at [75].
[60] (1914) 33 NZLR 1251.
[61] *Willowford* above note 39 at [70].
[62] *Ibid.* at [67].
[63] *New Zealand Bill of Rights Act* 1990 no 109 (Public Act) (NZ) (hereinafter NZBRA). Note also LGA s. 155(3): a bylaw that breaches a right or freedom that has been affirmed in an Act of Parliament will not stand.
[64] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act* 1982.
[65] NZBRA ss. 17 and 9 respectively.
[66] All parties accepted that the right to work was an ancient common law right and, if found to be pertinent, should be protected by the Court; *Willowford* above note 39 at [78]-[79]; see for example *Ipswich Tailors' Case No 2* (1614) 11 Co.Rep.53a; *Nagle v. Feilden* [1966] 2 Q.B. 633.
[67] *Willowford* above note 39 at [93].
[68] *Ibid.* at [93]-[94].
[69] [1896] A.C. 88 (P.C.).

prohibition, the substantive effect of a bylaw was the important issue.[70] Applying *Virgo*, Panckhurst J. framed the ultimate question as to one of substance and degree of interference with the right to work and found that the Christchurch bylaw prohibited prostitutes "from plying their trade at all in a substantial and important portion of the city no question of any apprehended nuisance being raised."[71] In applying *McCarthy*, Panckhurst J. determined that Christchurch City Council could not justify the deleterious effect of the bylaw on prostitutes' rights because there was no corresponding benefit to the community: rather the evidence showed that SOOBs existed in residential areas without occasioning "significant problems."[72] Accordingly, Panckurst J. struck down the bylaw for invalidity.

In the second case, *JB International Ltd v. Auckland City Council,* Heath J. also quashed the challenged bylaw. Auckland City Council had consulted widely before promulgating the bylaw and while the judgement does not refer to the results of this consultation, his Honour emphasised on a number of occasions that, "a Council's bylaw making power must be exercised on legal rather than moral grounds."[73] In terms of the appropriate legal tests to employ, Heath J. also relied upon *McCarthy* and the idea that where a bylaw affects a public right "it will be scrutinised with greater care."[74] In considering the rights established by the PRA, Heath J. disagreed with the Court in *Willowford* and did not accept that the PRA protected the general right of prostitutes to work.[75] However, Heath J. did find that Parliament intended some brothels would operate from suburban homes. His Honour interpreted the PRA as expressly providing for SOOBs and to this extent a prohibition of SOOBs would be *ultra vires*.[76]

The Auckland bylaw prevented brothels from operating in residential areas, certain other specified precincts and from within certain distances of listed sensitive sites. Heath J. found that those wishing to work legally could do so only in "very limited pockets" of Auckland city, in areas that "might not be as discreet and safe as potential clients may wish them to be."[77] By adopting a *Virgo* substantive effects test, the Judge found that there was a *de facto* prohibition of SOOBs. Further, Heath J. opined that a likely consequence of retaining the bylaw "would be a resurgence in illegal activity outside the designated areas and the consequential dilution of the purpose of the Act."[78]

In the third case, *Conley v. Hamilton City Council*, the bylaw was upheld both at first instance in the High Court and on appeal to the Court of Appeal. Both judgments refer to the process of community consultation that had taken place. Over 1,350 submissions from the public had been received and 77.2% specifically opposed any form of brothel operating in residential areas.[79] Once again, a sub-committee established by the Council had recommended that nevertheless prostitutes be permitted to work from SOOBs in residential areas, and once again the Council had promulgated a bylaw that did not accord with this

[70] *Schubert v. Wanganui District Council* unreported, H.C. Wanganui, CIV 2010-483-230, 3 March 2011 [34]–[40] and [170] (application of the substantive test in New Zealand).
[71] *Willowford* above note 39 at [94].
[72] *Ibid.* at [92].
[73] *JB International* above note 54 at [102].
[74] *Ibid.* at [54] and [55].
[75] These are afirmed by the NZBRA 1990 s. 9 of the Bill of Rights, *JB International* above note 54 at [89].
[76] *JB International* above note 54 at [91]–[93].
[77] *Ibid.* at [95].
[78] *Ibid.* at [95].
[79] *Conley* (C.A.) above note 47 at [36].

recommendation in light of public opposition. The Court of Appeal referred to a summary that had been prepared of the submissions received that suggested:

> small owner operated brothels in residential areas have not always been discreet and that there has been a degree of offensive behaviour; residential environments for brothels were considered to be more likely to unnecessarily expose children and young people to the sex industry; and allowing residential brothels in residential areas would add to prostitution becoming "normalised" behaviour within the various communities and influence career choices of young people towards work in the sex industry.[80]

The Court of Appeal did not elucidate upon what was meant by "a degree of offensive behaviour." Pursuant to the bylaw, all brothels were confined to industrial and commercial zones in Hamilton. In considering the constraints imposed, the Courts accepted that it would be "a challenge" to find a house in the permitted area that could be used as a brothel.[81] However, in sharp contrast to the decisions in *Willowford* and *JB International*, neither the High Court nor the Court of Appeal agreed that this amounted to prohibition under the guise of regulation.[82] Specifically, the Court of Appeal noted that the bylaw did not "prohibit all commercial sexual activity in residential areas."[83] Neither Court in *Conley* accepted that the PRA provided for prostitutes to work in a particular manner. Interestingly, members of the New Zealand Prostitutes Collective gave evidence in each bylaws case as to the risks inherent with confining brothels to industrial and commercial areas. In *Willowford* Panckhurst J. acknowledged the advantages occasioned by SOOBs although in *Conley* neither the High Court nor Court of Appeal found this evidence persuasive. The Court of Appeal in particular refused to find that any justiciable rights had been infringed by the Hamilton bylaw.[84]

On the face of the three cases, it is difficult to discern a clear difference in the degrees of restriction imposed by the individual bylaws, but the stricter approach taken to the task of discerning the effect of the bylaw in *Conley* is mirrored by the Courts' approach to judicial review and the question of unreasonableness. In so far as the Court of Appeal was concerned, unreasonableness in this context should be expressed in terms of the "*Wednesbury* formulation"[85] and courts should be very slow to intervene in community-based decision-making "where as here the choices being made are distinctly ones of social policy"[86] in order to avoid offending against,

> the democratic imperative; (that is, the deciders derive authority from an electoral mandate, to which they are accountable); secondly a constitutional imperative, (that government, not Courts decides fundamental policy); and thirdly, an imperative that

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[80] *Ibid.* at [37].
[81] *Conley* (H.C.) above note 39 at [72]; *Conley* (C.A.) above note 47 [66].
[82] *Conley* (H.C.) *ibid.* at [76]; *Conley* (C.A.) *ibid.* at [66]–[68]. The challenge in *Conley* failed. Potentially the more deferential approach adopted in *Conley* led the Courts to focus on literal prohibition (the approach taken to the degree of scrutiny can influence the decision in error of law cases, see *Pearlman v. Keepers and Governors of Harrow School* [1979] Q.B. 56 (C.A.)).
[83] *Conley* (C.A.) above note 47 at [67].
[84] *Ibid.* at [75].
[85] *Ibid.* at [52]. This is of course a reference *to Associated Provincial Picture Houses* v *Wednesbury* Corporation [1948] 1 KB 223 and its test for unreasonableness: a decision that is so unreasonable that no reasonable decision-maker would have come to it.
[86] *Ibid.* at [75].

> Courts in many, if not most areas, lack the relevant expertise to make such assessments.

The decision of the Court of Appeal in *Conley* throws into doubt the approach taken by the High Court in *Willowford* and *J.B. International* and the result is that the law in this area is in a state of flux. However, these cases are interesting as a number of important lessons can be learnt from them.

First, in at least two of the bylaws cases there was a paucity of evidence to show that the bylaws were promulgated for 'legal not moral' reasons, and in fact the contrary appears to be the case. If this is correct, it is hard to see how the resulting bylaws could fall properly within the scope of the empowering legislation, and the actions of the local authorities in promulgating those bylaws would be *ultra vires*. Despite this (and while the Judges were willing to sanction against moral-decision making) the courts were unwilling to consider and decide the cases on this basis. Why was this? It may have simply been a feature of the manner in which the cases were argued, but it might also reflect the nervousness of the Judges to consider too closely the decision-making process of communities in such a sensitive area. To this extent, judicial review may not provide an adequate safeguard against 'moral not legal' decision-making by local authorities.

Second, the legislature should be clear that the manner and location of working directly affects the well-being and safety of prostitutes and the law should make clear provision and support the safest practices, not operate to undermine this. In both *Conley* and *Willowford* a reverse parody to *Virgo* existed; despite the bylaws prostitutes could continue to ply their trade in residential areas, they could, for example, street-walk. By implication, the Court of Appeal found this acceptable but Panckhurst J. did not. Rather Panckhurst J. accepted that the manner in which prostitutes chose to operate was an integral component of their right to work and his decision in this regard was juxtaposed with findings as to the benefits of SOOBs derived from the evidence of the New Zealand Prostitutes Collective. Certainly, adopting this approach better upheld the purpose of the PRA by maximising the welfare and safety of prostitutes, and it is an approach supported by *Virgo.* The Privy Council did not reason that the disenfranchised hawkers could continue to sell goods in the main city by becoming shop-keepers.[87] For the Court of Appeal (New Zealand's second highest court) to effectively endorse street-walking but restrict SOOBs is not acceptable in the context of the aims of the PRA. And from the perspective of community values, how can this approach be preferable? Clearly, relying upon the evidence in individual cases to demonstrate that particular ways of working better promote the well-being and safety of prostitutes, and thereafter depending upon judicial discretion to interpret legislation or to approach the review in ways that accord with this perspective, is too uncertain a process.

Third, there has been a real divergence in judicial opinion as to whether the bylaws affected rights and therefore what legal tests and intensity of review should apply.[88] Both Panckhurst J. and Heath J. relied heavily on *McCarthy* and *Virgo,* cases that emphasise the importance of rights in the evaluation of unreasonableness, supporting the view that where an exercise of power intrudes on rights, the courts will more closely scrutinise the resulting decision, rule or regulation. Being clear that rights are involved is also more likely persuade Judges to rely on a substantive and not a literal interpretation of the effect of the bylaws under challenge. The critical issue for the courts in the prostitution cases therefore became

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[87] We are grateful to Stuart Anderson for this observation.

[88] Dean Knight "The (Continuing) Regulation of Prostitution by Local Authorities" in Abel above note 6 at 148.

one of context. Were these cases to be properly categorised as rights-based cases: did the bylaws infringe rights? The Court of Appeal did not believe so and as a result found that *Wednesbury* provided the correct standard for review. Clearly, the application of this test (which holds that "only a very extreme degree [of unreasonableness] can bring an administrative decision within the legitimate scope of judicial invalidation"[89]) to bylaws created in accordance with a legislative regime that provides for extensive public participation creates an intractable difficulty for opponents. If the majority of submitters supported the bylaw, challenges based on unreasonableness, absent more explicit *vires* arguments, will fail. And if a large number of authorities had promulgated similar bylaws, the position of the minority dissenters appears hopeless. By definition, minorities will not be favoured by *Wednesbury.*

Although parliamentarians were clear as to the rights that prostitutes should have, the diverse views of the courts demonstrate that this clarity has not been sufficiently reflected in the text of the PRA. Further, in light of New Zealand's skeletal domestic human rights legislation, the rights anticipated by supporters are not rights that are clearly justiciable.[90] It is possible that the confusion that has arisen in New Zealand over the relevance and content of applicable rights is less likely to arise in Canada. There, the Constitution expressly includes potentially relevant rights, which case law has applied in the actual context of prostitution.[91] But, this aside, legislation that seeks to effect radical change in the way that society perceives and treats hitherto maligned minorities should be explicit in the rights afforded to those minorities, particularly if these are not guaranteed by the Constitution or otherwise well articulated in general law.

In summary, the bylaws cases have lead to inconsistency and confusion. The hope that the reforms would give prostitutes "justice, safety, and dignity" is yet to be realised and the bar to achieving this is propped up not just by the misuse of bylaws and the limited safeguard of review but also by mechanisms available to local authorities in their town and country-planning role.

4. Counterproductive Tinkering: The Regulation of Prostitution by Resource Management Mechanisms

In addition to using bylaws, local authorities can regulate brothels via planning law mechanisms and were able to do so without any additional powers being granted to them by the PRA. Prior to the advent of the PRA, the courts in planning cases had long acknowledged "that, planning must allow a diversity in social behaviour … [it] gives the members of the community the opportunity to adopt the lifestyle they desire, notwithstanding that it may be a lifestyle foreign to or even criticised by others" and that planning may restrict that behaviour "only when necessary for the common good."[92] What exactly constitutes the common good

[89] *R. v. Secretary of State for the Home Dept ex p. Daly* [2001] 2 A.C .532; [2001] 3 All E.R. 433 (H.L.), per Lord Cooke at [32].
[90] Neither NZBRA nor the *Human Rights Act 1993* no 82 (Public Act) (N.Z.) include the right to security of the person that was the Canadian Charter right held to be unjustifiably breached in *Bedford* above note 44, or rights to free choice of work/to just and favourable work conditions.
[91] *Bedford* above note 44.
[92] *Centrepoint Community Growth Trust v. Takapuna City Council* (1978) 6 N.Z.T.P.A. 503 (P.T.) (Turner J.) 507.

was given greater definition following the promulgation of the *Resource Management Act* in 1991 ('RMA').[93]

Described as effects-based legislation,[94] the RMA draws a clear distinction between activities and the effects on the environment of those activities. In contrast to the centralised planning approach popular under the Town and Country Planning Acts, the introduction of the RMA signalled a more liberal approach to land use; people should be permitted to do what they want with their land providing that this does not result in undue adverse effects on the environment.[95] Time and again the courts have emphasised that, "it is effects on the environment that ultimately are of importance, rather than the precise identity of the activity generating them."[96]Accordingly, in making rules to regulate land use[97] or in determining resource consent applications for permission to do something contrary to the provisions of a plan,[98] local authorities are to focus upon environmental effects not the nature of activities *per se*.

The underlying effects-based philosophy of the RMA has a particular relevance when one is concerned with prostitution. Theoretically, the nature of the business of prostitution, that is, the activity itself, conducted in private away from prying eyes, should be irrelevant in resource management decision-making. Only the external nuisance effects flowing from that activity should be considered by decision-makers, as this is the case with all other types of activity that come under legal scrutiny.

As stated above, studies conducted prior to and post the enactment of the PRA found that nuisance effects from brothels, particularly SOOBs, were rare.[99] Despite this, prostitution related activities are heavily regulated in district plans that specifically address the issue[100] and the reason for this lies in the difficulties of drafting effects-based plans. The majority of authorities still use a traditional zoning approach to drafting plans that identifies specific activities that will be permitted, controlled or prohibited within individual zones (an approach that is based on the presumption that particular activities tend to generate standard environmental effects) and call for public submissions on these proposals. Local authorities justify this approach to drafting on the basis that it facilitates lay peoples' understanding of plans and whilst not expressly endorsed by the courts, it is not a practice that has been

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[93] The RMA prescribes an interrelated system of planning documents and procedures to regulate the use of land, air and water.

[94] *Application by Christchurch City Council* [1995] N.Z.R.M.A. 129 (H.C.).

[95] RMA s. 9; *Batchelor v. Tauranga District Council (No. 2)* [1993] 2 N.Z.L.R. 84 (H.C.) 139.

[96]*Batchelor* above note 95 at 142; *KB Furniture v. Tauranga District Council* [1993] 3 N.Z.L.R. 197, 201; *Kamo Veterinary Holdings Ltd v. Whangarei District Council* unreported, Envt. C. Auckland, A161/2003, 18 September 2003 [28]. Such effects are not to be considered in a vacuum but rather help determine how best to promote the purpose of the Act: "that is the sustainable management of natural and physical resources." Sustainable management includes "… managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enable people and communities to provide for their social, economic, and cultural well-being and safety ..." see RMA Part 2 ss. 5-8. So, in considering both the positive and adverse effects flowing from a proposed activity, the local authority in the first instance, or the Environment Court on a de novo appeal, would make a final determination on the application in accordance with what best met the purpose of the Act.

[97] RMA s. 76(3).

[98] RMA s. 104(1), when considering an application for a resource consent decision-makers must, "subject to Part 2, have regard to (a) any actual or potential effects on the environment of allowing the activity; and (b) any relevant provisions of… a plan; and (c) any other matter the consent authority considers is reasonably necessary to determine the application."

[99] Above notes 48 and 50 above and accompanying text.

[100] Warnock above note 34.

criticised.[101] In amending plans to address prostitution, authorities have specifically identified 'brothels', not the neutralised effects of such.[102] This wording tends to invite a moral response from submitters[103] and indeed a survey of the submissions received supports this contention.[104] Communities are not accepting of prostitution despite decriminalisation[105]and the discussion at local authority level has provided a clear demonstration of this; local authority planning regulation is not focused upon ensuring equity for prostitutes, far from it. In particular, as stated above, communities have been most resistant to prostitutes operating from residential areas. While, as noted by van der Meulen and Durisin, the PRA appears to empower small groups of sex workers from working from home,[106]in practice this has not proved to be the case.

Plan rules may therefore present hurdles to prostitutes who wish to establish SOOBs, however there are mechanisms that provide checks and balances against unduly restrictive plans. Prostitutes who want to work from their home in residential areas could challenge the plan[107] or, more appropriately, apply for a resource consent[108] granting dispensation from the plan rules (a cheaper, speedier remedy). Again, a critical component concerns the notification of any such applications and public participation in decision-making.[109] However, applicants face an onerous obstacle to consent. Section 15 of the PRA amended the RMA by requiring decision-makers to take into account community moral concerns, *even in the absence of specific nuisance effects*,[110] and a valid interpretation of the legislation is that such concerns are to be given particular priority.[111]

Decision-makers are not expressly mandated to take into account moral mores in considering any other business-related application for resource consent (for example, 'pornography retailers', 'alternative religious organisations' or 'vivisection laboratories') and while psychological effects may constitute valid planning concerns in certain instances, the practice of the courts has been to give little if any weight to moral considerations, or to the

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[101] *Christchurch* above note 94 and see Warnock above note 34.
[102] For example, Waimate District Plan bans the '*business of prostitution'* from the residential zone and Lower Hutt City Plan regulates the location of '*brothels*' see Warnock above note 34.
[103] Text accompanying notes 47 - 50 above. Public submissions are not wholly determinative of an issue, as the authority has to undertake a comprehensive analysis, RMA s. 32, however in the context of activities that are perceived to have a high social impact, it appears that submissions will carry great weight.
[104] Warnock above note 34. In the Australian context, a similar phenomenon has occurred, see P. Crofts "Brothels and Disorderly Acts" (2007) 1 *Public Space: the Journal of Law and Social Justice*, at 21-28.
[105] Further see "NZ'ers Want Brothels Booted Out of Residential Areas," 30th May 2011 online: Scoop, < http://auckland.scoop.co.nz/2011/05/nzers-want-brothels-booted-out-of-residential-areas-2/> (date accessed 31 May 2011).
[106] Van der Meulen above note 7 at 308.
[107] RMA Schedule 1 Part 2.
[108] RMA s. 9; even in the absence of express controls, businesses will have to comply with generic rules as to opening-hours, traffic controls etc. or apply for resource consent.
[109] Above note 32.
[110] General adverse effects (noise, traffic etc.) are possible with all businesses and can be managed by conditions on the consent or an early review of the consent. Effects on property prices constitute valid planning concerns but strong evidence must be adduced of significant effects and the court has warned that, "… real estate agents' assessments are notoriously variable…market conditions at the time of sale are unpredictable, but much more likely to be the predominant influence" (*Little Sydney Mining Co. v. Tasman District Council* unreported, Envt . C. Wellington, W150/09, 1 September 2010 at [93]).
[111] These effects have been singled out; decision-makers '*must* have regard' to them; they are not muted by being 'subject to' the considerations contained in Part 2 of the RMA as all other effects are.

psychological effects of 'mere knowledge', when they have been raised.[112]Rather, the courts had developed objective tests and standards that reflected the idea that mere discomfort or the thought that 'you don't like what that other person is doing,' is an insufficient basis for preventing a person using their property in an otherwise legal manner.

Section 15 of the PRA has changed this approach. The section has only been subject to judicial interpretation on one occasion so far but the decision of the High Court in *Mount Victoria Residents Association Inc v. Wellington City Council*[113] confirms that the ramifications of the amendment are considerable. That case concerned a preliminary decision on a resource consent application (akin to planning permission) for a brothel. Wellington City Council argued that it should not have to consider a brothel any differently to any other business seeking resource consent. In particular, the understanding of the Council was that the PRA did not give local authorities the ability to decline applications for brothels solely on the nature of the activity taking-place on the site.[114] Dobson J. disagreed and stated that:

> [t]he prospect of serious offence being given to ordinary members of the public using the area, or indeed the incompatibility of the business of prostitution with the existing character of an area, as recognised by s 15(1) of the PRA, does mean that a territorial authority might decline an application for a business of prostitution solely on the character of the activity that was to take place on the site.[115]

In the context of resource management law the statement that a territorial authority might decline an application for a business "*solely on the character of the activity*" is entirely novel. If this is correct, s. 15 has two major effects. Firstly, it permits decision-making that is contrary to the philosophy underpinning environmental management in New Zealand and secondly, it radically alters the basis for decision-making where prostitution based activities are concerned compared to any other commercial activity. Planning law imposes all sorts of restrictions on businesses to manage nuisance effects, but it is only prostitution related activities that may legally be restricted on the sole basis that 'others don't like the thought of what is taking place in private.' There is no attempt to explain the meaning of "serious offence" in the PRA but the courts may well draw on formula established in other areas to guide interpretation. Within the criminal sphere in Australasia, case law has established that, 'offensive behaviour' must "wound the feelings, arouse anger or resentment or disgust or outrage" even if that result was unintentional.[116]

Perhaps unsurprisingly, to date there have not been any substantive court decisions on resource consent applications for prostitution-based activities. Throughout the whole of New Zealand, only *three* applications for resource consent have been received since the enactment of the PRA.[117] Two concerned applications for brothels in residential areas and both applications were withdrawn when the applicants were informed (post *Mount Victoria*) that full notification would be required. The Council administrative fee for full public notification would cost at least NZD$12,000 in these cases (c. CAD$9,500).

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[112] See Ceri Warnock, "Understanding the Objective: Psychological Effects in Environmental Decision-Making" (2011) 25 New Zealand Universities Law Review, (forthcoming).
[113] Unreported, H.C. Wellington, CIV-2008-485-1820, 5 March 2009 (Dobson J.).
[114] *Ibid.* at [31].
[115] *Ibid.* at [32].
[116] *Ceramalus v. Police* (1991) 7 C.R.N.Z. 678, 683.
[117] Warnock above note 34.

Members of the New Zealand Prostitutes Collective have expressed concerns that local authority regulation appears to be undermining the purpose of the PRA and their national co-ordinator has stated that:

> [a] number of sex workers are forced to work in breach of these bylaws and district plans which is a significant issue for those sex workers who wish to determine their own sex work. It frustrates NZPC that these Councils are misinterpreting the purpose of the PRA and undermining the rights, health, and wellbeing of these independent sex workers in particular. You would expect policies to support sex workers to be self-determining.[118]

The suggestion is therefore that a clandestine, illegitimate brothel industry is developing, which is of course completely counter-productive to the law reform of decriminalisation.

In summary, s. 15 of the PRA introduces higher hurdles for prostitutes in obtaining resource consent for businesses in comparison to all other applicants. It enables, as Dobson J. stated, resource consent to be declined because of the very nature of the business. The participation of the public, taken in conjunction with the method of plan making, allows the moral disapproval of the community to dominate and s. 15 of the PRA has over ridden the case law that, arguably, would have achieved a better balance in managing the inherent conflict of interests that accompanies prostitution. Thus, within the context of planning law, prostitutes' labour options will continue to be restricted by the moral mores of the community.

5. Conclusion

Over sixty years ago, the Wolfenden Report on Homosexual Offences and Prostitution concluded that "… unless a deliberate attempt is to be made by a society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[119]Undoubtedly a sexual minority, prostitutes have been left behind in the progress towards equality achieved by similarly stigmatised minorities, perhaps a reflection that they are truly a most disadvantaged group. Thus, in disentangling the 'sin' of prostitution from the sphere of crime, New Zealand seemingly made monumental strides forward in human rights terms. But the legislature faltered and failed at the last moment. No longer criminalised, prostitution is nevertheless still controlled and restricted in accordance with moral mores, and the continued legal discrimination of prostitutes is justified by the same moral disapproval that underpinned criminal sanctions. By those most uninteresting of legal mechanisms, bylaws and district plans, many prostitutes in New Zealand will be prevented from achieving the right to 'justice, safety and dignity' envisaged by supporters of the PRA.

These local government mechanisms, legitimised by public participatory structures, have permitted the moral disapprobation of communities to the 'self regarding conduct of others' to take precedence. The result, legally, has been the heavy regulation of prostitution; regulation that particularly affects prostitutes wanting to work safely indoors by themselves or in small collectives. And what has been the practical result of this? In a scenario almost

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[118] Catherine Healy personal communication with authors 11th October 2011(on file).

[119] Committee on Homosexual Offences and Prostitution, *Report of the Committee on Homosexual Offences and Prostitution* (Cm. 247, 1957) at 187–188.

redolent of the imaginings of Huxley, those sex workers wishing to escape the corporatisation of commercial sex, or the squalor of street walking, will have increasingly limited choices.

Within New Zealand, a *legal* fix to this problem is simple: repeal sections 14 and 15 of the PRA. Trust in the checks and safeguards of resource management law to strike the correct balance between reflecting community interests and ensuring against undue discrimination of a disadvantaged and maligned minority. Whilst genuine nuisance effects should be managed, mere moral disapprobation (or the thought that opponents 'do not like what others are doing, consensually, in private') should have no place in regulating prostitution as a decriminalised activity. Although Parliamentary caution was understandable at the beginning, almost a decade has passed since the reforms were enacted and it is time to move forward. The report of the PLRC may assuage many of the initial concerns expressed over decriminalisation and the focus must now move towards ensuring the rights-based purposes of the PRA.

For other similar nations, particularly Canada, the message is clear. Reforming archaic criminal laws on prostitution is unlikely to lead to the Sodom and Gomorrah feared and will improve the position of prostitutes immeasurably, but even in a liberal society such as New Zealand, communities are still resistant to the idea that prostitutes deserve fair treatment. Law-makers should be clear that in the context of prostitution the manner of working is important and any rights-based law should support the safest practices, not act to prevent this. Ultimately, there is little point in recasting the issue as one of human rights if moral majoritarianism is allowed to re-enter through the back door. To pass decision-making to local authorities at an early stage in the reform process may allow the moral mores of the community to dominate in an area rife with emotions and this has the potential to act as anathema to rights-based legislation.