Central Government Aims and Local Government Responses: The Prostitution Reform Act 2003

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Summary

The Ministry of Justice commissioned the Crime and Justice Research Centre (CJRC) to undertake a literature review of models of best practice in relation to resolving tensions between state legislative aims and the local government response. The literature review will inform the statutory review of the Prostitution Reform Act 2003 (PRA) being carried out by the Prostitution Law Review Committee (PLRC). The PRA allows territorial authorities to make by-laws regulating the locations of brothels and the signage advertising commercial sexual services. Some territorial authorities created by-laws that were subsequently challenged in Court (and two quashed) on the basis that they were overly restrictive and contrary to the intention of the legislation. The PLRC wanted to know whether similar tensions had occurred elsewhere as a result of legislation on prostitution, and how they had been resolved.

An extensive literature search provided few answers. Some of the literature related to jurisdictions where central and local government arrangements were too dissimilar to those in New Zealand for any lessons to be learned. There was also some literature which gave examples of issues that had resulted in tensions in the USA (over same-sex marriage, firearms control, and national parks) and England (housing allocation policies, and the management of the water supply). But it offered little by way of models for resolving the tensions.

Nonetheless, we were able to do three things:

i. First, an examination of New Zealand literature describing the roles of central and local government highlighted why tensions arise, and the legal means that currently exist to resolve them.

ii. Second, we spoke to experts from Victoria University's School of Government, Local Government New Zealand, and the Environment Court of New Zealand. While they could not offer much about models of tension resolution, and warned about the transferability of these anyway, those spoken to offered their own suggestions on ways to avoid tension in the future, and to resolve existing tension.

iii. Third, we have documented the experiences of four other jurisdictions as regards the operation and location of brothels following prostitution reforms – though the problems arising were better documented than were the solutions.

The New Zealand situation

New Zealand has a centralised, unitary system of government in which constitutional authority remains with central government. The powers and functions of local government are derived from parliament, currently through the Local Government Act 2002 (LGA). Local government gains some regulatory and legislative authority through the Act, but remains essentially subordinate to central government. The 73 territorial authorities form the backbone of local government, comprising 16 city councils for urban areas, and 57 district councils for rural areas.

The purpose of local government in New Zealand is to promote local autonomy and enhance local democracy through public participation. To achieve this, local government is given some discretionary power through the LGA. One way in which this is exercised is through the creation of by-laws, and these require extensive community consultation beforehand. The Resource Management Act 1991 is another key piece of legislation for local government. It requires them to prepare District Plans specifying the policies the council will use to manage the use of land and whether resource consent for applications for development of land are required. Other legislative Acts also give powers to local government, including Sections 12–15 of the PRA. These sections allow territorial authorities the right to make by-laws controlling the location of brothels, and the signage that advertises commercial sexual services. They also provide extra criteria for local councils to consider in relation to resource consents for applications for brothels.

How tension arises

Tension arises when central government objectives to serve the best interest of New Zealand as a whole conflict with the interests of local communities as perceived by local government. Examples are locating new prisons and low cost housing, and environmental issues.

The objectives of central government legislation in decriminalising prostitution stood to run counter to local community concerns. The government made it clear that the PRA was not morally grounded, but meant to deal with issues of health and safety for sex workers, and their human rights. Where there has been local community opposition, it appears to stem more from a moral stance and to be centred on the location of brothels, particularly in residential areas. In making by-laws, therefore, local government was adhering to their role to engage the public in local decision making, and acting in accordance. The Manukau City Council's Street Prostitution Control Bill was another example of a local government's response to community concerns, in this case over the presence of street prostitution.

Existing mechanisms in New Zealand for resolving tension

Tensions in relation to the PRA have stemmed mainly from territorial authorities enactment of by-laws to control the location of brothels. The ability of territorial authorities to make by-laws cannot be curbed by means of other regulatory mechanisms – for instance, those that can be exercised by the Minister of Local Government in the event of a local authority failing to perform its functions. The main way in which local government creation of by-laws can be challenged is through judicial review in the High Court.

There are four main grounds on which a by-law can be challenged in court. These are that a by-law is:

i. **Contrary to the New Zealand Bill of Rights Act 1990** – which gives a right to freedom of expression and public assembly, freedom of movement, residence and association, and rights to minorities.

ii. '**Repugnant' to the laws of the land**.

iii. **Unreasonable** – as judged by reference to the scope of the by-law and the impact it will have on the community affected by it.

iv. ***Ultra Vires*** ('beyond the power') – when decisions or actions are deemed beyond the authority delegated for the purpose.

Judicial review was used to resolve tension over the PRA when Christchurch, Auckland and Hamilton created by-laws. Cases were put forward by brothel owners in the three areas. The High Court deemed the by-laws in Christchurch and Auckland to be invalid on the grounds of unreasonableness, repugnancy and *ultra vires.* Hamilton City Council's by-law was upheld.

Judicial review appears to have become important in refining and informing local government decision making. When local councils are unclear about the degree to which they can 'modify' legislation through by-laws, some might try to do so and wait for a court ruling. Others wait to see what happens.

Expert suggestions

Experts from Local Government New Zealand, the Environment Court and the School of Government (Victoria University) pointed to some possible solutions. While discussion centred on the PRA, the experts often saw their suggestions as applicable to other situations of tension between central and local government.

<u>How things could have been done differently</u>

Suggestions for how things could have been done differently to avoid tensions in the first place were:

- **Proper due process** – There was a strong sense that it was unacceptable for central government to drop responsibilities 'in the lap' of local government without due process. It was felt there should have been more consultation with local government over what was expected.
- **Explanations and clarifications** – When the PRA was passed, advisors could usefully have gone to local areas to offer training and a full explanation of the intentions of the Act. These visits could also have clarified what action a local area could and could not take (e.g. not creating a by-law to prohibit small owner-operated brothels from operating in residential areas).
- **Morality decisions are the responsibility of the Crown** – It was suggested that it was inappropriate for local communities to 'interfere' with central government legislative decisions on issues of morality.

<u>Solutions that could be applied now</u>

There were suggestions as to how tension between central and local government in relation to the PRA and indeed other matters, could best be handled 'down the line'. They were:

- **More time and money invested** – Local government should be offered better guidelines, by-law templates, and more access to expert advice. Even 'down the line', presentational seminars to councils could be valuable.

- **Understanding differences in reaction** – Better understanding of why councils react differently might help in finding solutions. Factors could be the weight of community pressure, the composition of the council, or the quirk of media attention.
- **Local advisory panels** – These might help, taking into account the scale of the issue and costs involved.
- **Mediation** – This is currently being used successfully in the Environment Court. Aggrieved parties are invited to mediation, with costs paid. It was suggested that this model could be usefully extended to resolve disagreements around other areas of local government decision making (e.g. by-laws).
- **'Let it rest'** – It may be best sometimes to let matters rest, even though tension is evident. In the case of the PRA, for instance, the judicial review rulings have now clarified its interpretation.
- **Review of legislation** – Amendments to law can sometimes help make it clearer. Suggested amendments to the PRA may result from the legislative review due for completion in 2008. The definition of brothels and how this applies to small owner-operated brothels is one 'grey area' for example that could be clarified in a legal amendment.

Four jurisdictions

We identified four jurisdictions for which there was literature on both tension between central and local government in the context of prostitution legislation, and some coverage of responses made to resolve the tension.

New South Wales, Australia

NSW decriminalised prostitution by the Disorderly Houses Act 1995. A Brothels Task Force carried out a review after five years, concluding that local councils were being overly restrictive about the location of brothels. They tended to use planning controls to restrict brothels to industrial and / or commercial areas, and in the main failed to properly distinguish between larger brothels and home businesses. Concerns were raised that requiring brothels to be located in industrial areas might jeopardise the safety of sex workers. The refusal of brothel applications by councils in NSW often seemed to stem from local opposition. If appeals were made and upheld, councils were happy enough to blame the Courts.

Response

In response to these concerns, the Brothels Task Force suggested that local councils needed:

- Further support to optimise the potential of the existing planning system.
- To develop appropriate planning controls based on the likely impacts of different types of brothels.
- To be helped by a Brothels Planning Advisory Panel who could advise councils on appropriate planning instruments, and help develop consent conditions and policies. The

Sex Services Premises Planning Advisory Panel was established by the NSW Cabinet Office in 2004 as a result.

The Task Force also recommended that state environment planning policy be changed to allow home-based brothels to operate without having to obtain development consent.

Victoria, Australia

Brothels in Victoria were legalised by the Prostitution Control Act 1994, although they had to adhere to strict regulations and be licensed. Obtaining a licence was fairly arduous. One or two sex workers running a business are exempt from holding a licence, but are still required to have a council planning permit and to be registered.

A review by the Crime and Misconduct Commission (CMC) showed that local councils in Victoria were initially reluctant to grant planning permits, with applicants having to undertake costly appeals. The CMC reported that illegal prostitution had flourished, with a two-tier system of legal and illegal brothels operating.

Response

The Victorian Parliament introduced legislative changes in 1995 that included more controls over the planning approval process. As a result, councils could reject brothel applications only on planning grounds, and not on moral ones.

Queensland, Australia

Queensland legalised brothels by the Prostitution Act 1999. This was reviewed after four years by the CMC. The review was generally positive, but identified illegal prostitution as continuing. This was because of difficulties in obtaining a licence from the state licensing authority, and obtaining planning approval at local council level – though the latter was mainly due to tenets of the Act itself.

Response

The Prostitution Amendment Act was passed in 2001 to improve processes both for applying for brothel licences, and development approvals from a local council. The Act clarified existing provisions and dealt with the definition of an 'industrial area', and how exclusionary distances from residential areas and other places were to be measured. The Act also established the Office of Independent Assessor – providing an alternative legislative approach for dealing with planning appeals.

The CMC has reported that amendments to the Act had been positively received. The state licensing authority, however, felt that some changes made it more difficult to find an acceptable brothel site, and it wanted the jurisdiction of the Independent Assessor to be extended.

Netherlands

Brothels were legalised in the Netherlands in 2000, and responsibility for rules relating to legal prostitution was handed to municipalities. Municipalities are free to choose how they wish to regulate brothel activities, but virtually all have adopted a model from the Dutch Local Government Association, which includes a system of licensing. Despite government intent to legalise brothels, one in ten municipalities have banned brothels outright. In some regions, brothel owners encounter so many onerous regulations that it is difficult to operate legally. In other regions, it is much easier.

Response

There has been no clear government response to municipalities opting to ban brothels. However, one evaluation says that local municipalities appeared to respond more in line with intentions of central government legislation when: (i) prostitution had existed in the area prior to the new legislation; and (ii) municipalities sought consultation from a full range of stakeholders, including sex workers themselves.

The courts in the Netherlands have also been called upon in areas of conflict. The question of what constitutes a brothel became a matter for the courts to settle for instance. It appears the courts have helped in interpreting the legislation. There are parallels here with New Zealand.

1 Introduction

The Ministry of Justice commissioned the Crime and Justice Research Centre (CJRC) to undertake a literature review of models of best practice in relation to resolving tensions between state legislative aims and the local government response. The literature review will inform the statutory review of the Prostitution Reform Act 2003 (PRA) being carried out by the Prostitution Law Review Committee (PLRC). The PRA allows territorial authorities to make by-laws regulating the locations of brothels and the signage advertising commercial sexual services. Some territorial authorities created by-laws that were subsequently challenged in court (and two quashed) on the basis that they were overly restrictive and contrary to the intention of the national legislation. The PLRC wanted to know whether similar tensions had occurred elsewhere as a result of legislation on prostitution, and how they had been resolved.

1.1 The Prostitution Reform Act 2003

The PRA encompassed provisions that enabled territorial authorities to enact by-laws regulating the location and signage of brothels (sections 13–14). Brothels can also be controlled and regulated in the same way as other commercial activities, using the resource consent process provided for in the Resource Management Act 1991 and the relevant local District Plan. However, when considering a resource consent application for a brothel, territorial authorities must now consider additional matters as laid out in section 15 of the PRA. It is also possible for a territorial authority to alter their District Plans to place special requirements on the location of brothels.

Territorial authorities across the country varied widely in their response to the PRA. Some did nothing (e.g. Napier City Council, Masterton District Council, Gisborne City Council, Porirua City Council, Wanganui District Council), being happy with controls provided for in their District Plans. Others decided to enact new by-laws. A small minority elected to amend their District Plans to alter the resource consent process for businesses of prostitution. A full review of the actions taken by territorial authorities in response to the PRA is currently being carried out by the Ministry of Justice, and will provide a more detailed view of the varying actions taken.

Actions taken (or not) by territorial authorities appear to have resulted in tensions in only a few regions – centring around the enactment of new by-laws. By-laws passed by three councils were challenged in court for being overly restrictive and going further than what was intended by the PRA. These three councils were Christchurch City Council, Auckland City Council, and Hamilton City Council. Brothel owners in each of the three areas made applications to have the by-laws reviewed.[1] Concerns centred around the restrictions placed on the location of brothels. These applied to both large brothels and small owner-operated brothels, impacting

1 The validity of by-laws is governed by the By-laws Act 1910.

on individual sex workers. The operation of brothels was limited to small, inner city zones, in areas where the cost of purchasing or renting premises was prohibitive for the majority of sex workers. Auckland City Council also required brothels to be licensed in accordance with the by-law they introduced. The by-laws of Christchurch and then Auckland City Council were quashed, but the Hamilton by-law was upheld.[2]

Where by-laws were overly restrictive, conditions imposed made it difficult for sex workers to operate within the confines of the law, effectively recriminalising prostitution for those who continued to operate. Those who challenged these by-laws argued they were undermining the purpose and effect of the PRA, with the result that the objectives of the Act as intended by parliament could not be achieved.

The response by one council was beyond that provided for in the PRA. Manukau City Council attempted to bring in a local bill to criminalise street prostitution. If passed, this would have meant that the local council had created a criminal law on street prostitution different to the rest of New Zealand. This was clearly in direct opposition to the intention of the PRA. The bill was voted down in parliament.

The tensions created, and the means used to resolve them, have been unsatisfactory for all those involved, and costly in time, money and personal stress. It is clear, then, why there is an interest in how such conflicts can either be avoided, or satisfactorily resolved when they do arise.

This introductory section describes the relevant literature that was reviewed, and outlines some of the problems encountered. **Section 2** describes the relationship and roles of central and local government, revealing how and why these tensions can arise. **Section 3** details existing mechanisms available for resolving tensions and provides some further suggestions for doing so. **Section 4** looks at responses in four overseas jurisdictions when similar conflicts have arisen.

1.2 The literature reviewed

As a first step, we consulted the Legal Research Information Service of the Victoria University of Wellington Law Library, to identify search strategies and the most appropriate databases to search (LegalTrac, LexisNexis Academic Universe, Lexis Nexis New Zealand).

The main search strategies included:

- (central / state / national) government; with
- local (government / authority); with
- (tensions / conflict / resolution / relationship).

2 In the case of Hamilton the judge ruled that although it would be difficult for small owner-operated brothels to operate in the permitted area, it would not be impossible.

Searches using these terms revealed key subject terms to allow for more comprehensive searching. We used similar strategies to search the library catalogue and the world wide web. However, despite extensive searching, the literature found was of limited usefulness. The main problems were:

- Some articles described how different systems or models of jurisdictional governance can impact on the role and functions of local authorities (Hills, 2005; Laurie, 2005; Vincent-Jones, 2002). But there is obviously little value in reviewing whether an alternative system of government in New Zealand might solve tensions between central and local government.

- A group of articles provided overseas examples of issues that had resulted in tensions. For the USA, these included the legality of same sex marriage (Barron, 2006; Schagger, 2005), firearms control (Kirby, 1990) and national parks (Amos, 2006). For England, these were housing allocation policies (Laurie, 2005) and the management of the water supply (Belaidi and Renaud-Hellier, 2006). Unfortunately these articles offered little by way of models for resolving tension.

A more useful source of literature was reviews of other overseas prostitution reforms, which revealed similar problems to those that have arisen here. In a few cases, these reviews described the means taken to resolve the problems. The other useful literature was that which described the roles of central and local government in New Zealand.

1.3 Experts consulted

In attempting to locate relevant literature we also contacted experts from the Victoria University's School of Government (Professor Claudia Scott), Local Government New Zealand (Mike Reid) and the Environment Court of New Zealand (Commissioner Jenny Rowan). Those spoken to were unaware of the existence of models of tension resolution between central and local government that could be applied to the New Zealand situation. They also indicated models that do exist tend to be specific to a particular issue and not necessarily applicable to another. It was also felt that models used in other countries, even those with a similar system of government (such as England), would not transfer well to New Zealand. This was particularly because of fundamental differences in governance of local government (which in the UK for instance are largely self-funded). Those spoken to, however, did offer their own suggestions on ways to avoid tension in the future, and to resolve existing tensions. These suggestions are referred to in Section 3.

2 Local and central government roles

In trying to understand how tensions arise between local and central government, a logical first step is to examine their respective roles. These are different, and problems can arise when they are at odds. In New Zealand, the relationship between central and local government is laid out in constitutional arrangements which also provide the legal means for resolving tensions.

2.1 Relationship between central and local government

New Zealand has a centralised, unitary system of government, whereby all constitutional authority remains with central government. Within this system, powers and functions of local government do not exist in any constitutional document. Rather, they are derived from parliament, currently specified in the Local Government Act 2002 (LGA). While local government has been given significant regulatory and legislative authority, it is itself controlled by central government legislation. As such, local government is subordinate to central government (Palmer and Palmer, 2004; Tomblin, 2004).

The New Zealand system contrasts with federal systems of government that exist in countries such as Australia, the USA and Canada. Here, the federal government may share, but does not have power over the constituent units of the country (the states or provinces), other than when responsibility is reserved for the federal government alone (e.g. in relation to defence, or international relations). States or provinces, however, retain power over further divisions such as local authorities, cities or counties.

2.2 Nature of local government in New Zealand

Central government is elected to deal with issues relevant to New Zealand and its people. It is responsible for drafting the laws and regulations that govern the whole of New Zealand. However, local communities within New Zealand have different needs and priorities. Central government has therefore provided for a system of elected local government, and has delegated some law-making functions to them. What is delegated, however, is usually technical or operational regulation with central government retaining the power to implement substantive policy or amend primary law (Cabinet Office, 2001, para 5.46).

The purpose of local government as laid out in the LGA is to:

- enable democratic local decision making and action, by and on behalf of, communities; and
- promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future.

The structure of local government in New Zealand is made up of two main categories of authority: (i) regional; and (ii) territorial.[3] Each has different functions. There are twelve regional councils that have jurisdiction over almost every area of New Zealand. Their role is the management of natural resources, environmental planning and oversight of all regulations administered at regional level. Within these large regions there are 73 territorial authorities of which 16 are city councils and 57 district councils. Their function is to provide local services such as water, rubbish collection and disposal, sewage treatment, parks, reserves, street lighting, roads and libraries. They also process building and environmental consents and administer other regulatory tasks. It is the territorial authorities to which the PRA has given regulatory powers in relation to the location and signage of brothels.

The LGA gives significant discretionary powers to local government in order to make decisions about local issues and services. One way in which territorial authorities manage their communities is through the creation of by-laws, although they must follow processes specified in the LGA (for example, undertaking extensive community consultation before making any new by-laws). There is much variation in by-laws across the territorial authorities, reflecting different community priorities, and sometimes different problems. Lack of standardisation, however, can cause confusion.

The Resource Management Act 1991 is another key piece of legislation for local government. It requires territorial authorities to have a District Plan which specifies policies and rules council will then use to manage the use of the land in its area – how land can be used or developed is outlined in the Plan and whether a resource consent is required.

Local government is also given powers under more than a hundred other Acts (Wright, 2005). This includes the Local Electoral Act 2001; the Building Act 1991, 2004; the Dog Control Act 1996; and now the PRA.

Sections 12–14 of the PRA give territorial authorities the right to make by-laws controlling the location of brothels, and the signage that advertises commercial sexual services. Section 13 also outlines the procedures for making by-laws. Section 15 adds to the matters that a territorial authority must consider when a resource consent application has been made for land use consent in relation to a business of prostitution. These considerations are whether a proposed business / activity 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
- incompatible with the existing character or use of the area in which the land is situated.

However, section 15 also states that these considerations may be overridden with respect to provisions of a District Plan for specified areas. Territorial authorities can amend their District Plans to create rules that are specific to brothels.

3 There are four territorial authorities that also have regional authority responsibilities, these are known as 'unitary authorities'.

2.3 How tensions arise

In New Zealand, local government is democratically elected to run local affairs in a way that best serves the interests of the local community. As said, the LGA requires local government to carry out extensive community consultation before taking actions such as creating new by-laws. Central government, on the other hand, is elected to act in the best interest of New Zealand as a whole. Tension arises when these two sets of interest conflict. Examples are the government's assessed need to build new prisons to deal with an increase in the prison population, in contrast to local opposition to a prison being built in 'their back yard'. Similarly, central government needs to ensure that there is sufficient housing for New Zealanders, including provision for those on low incomes; but low cost housing is unpopular at community level due to adverse effects on neighbouring real estate values. Environmental issues can also give rise to conflict. The economy of the West Coast of the South Island is very dependent on coal, but in response to concerns over climate change, central government discourages the use of coal by industry and individuals. Similarly on the West Coast, the government's conservation responsibilities (e.g. conserving native forests) can be at odds with local industries and other planning needs. Health has also been an arena for tension. For example, fluoridation of the water supply may result in cost savings for the government's national health budget, but opposition from local communities often leads to decisions not to fluoridate the local water supply.

With regard to prostitution, the objectives of central government legislation in decriminalising prostitution stood to run counter to local community concerns. The government made it clear they were not taking a moral stance but were legislating to deal with issues to do with the health and safety of sex workers, and their human rights. However, where opposition from local communities arose, it appeared often to be influenced more by moral viewpoints. Community consultation by local government uncovered strong opposition from some community members and activist groups. They were opposed to prostitution in their neighbourhoods, whether it involved a large commercial brothel or a sex worker running a business from home.

While it was made clear that local councils could not use by-laws to completely ban prostitution, in response to community concerns some councils tried to limit it to very small, industrial zones. In making restrictive by-laws, therefore, local government was adhering to their role to engage the public in the local-decision making process, and then acting in accordance.

The Manukau City Council's Street Prostitution Control Bill was also in response to community concerns, but in this case it was over the presence of street prostitution. Community concerns centred on feeling unsafe in areas where there was street prostitution, and the general public nuisance associated with it (e.g. offensive rubbish).

In all cases, the local government's response to community concern was at odds with aims intended by the central government when they decriminalised prostitution.

3 Existing mechanisms in New Zealand for resolving tension

Section 2 described the situation in New Zealand as regards central and local government as being one in which local government is essentially the subordinate partner. At the same time, some law-making functions have been delegated to local government so that it can operate effectively, and in accordance with local interests. Constitutional arrangements provide for some checks and balances to ensure local government does not abuse the power and discretion it has – though it is worth saying that opposition from local communities can itself be seen as check and balance in the other direction, that is, on central government decision making. After all, it is local communities who will be electing the next central government in the future.

A key issue central to this paper is the power given to local government to make by-laws.[4] This power falls outside the ways in which local government action can be challenged on other fronts. For example, the Minister of Local Government can intervene if a local government fails to perform its functions, but only if there has been a significant failure not as a result of exceeding its by-law making powers. The Local Government Commission can make recommendations to the Minister on matters relating to local government, but this would not tend to extend to the local government's use of by-laws. The Regulations Review Committee can scrutinise all statutory regulations, but again does not have the jurisdiction to examine local government by-laws (Palmer and Palmer, 2004).

3.1 Judicial review

The main way in which local government decision making and the creation and enforcement of by-laws can be challenged is through an application to the High Court for a judicial review. The High Court has the power to determine whether councils have:

- neglected to consider relevant matters;
- considered irrelevant matters;
- failed to consult or follow statutory procedures; or
- reached a decision that it is unreasonable.

Palmer and Palmer (2004) review the four main ways in which a by-law can be challenged in court. These are that a by-law is:

4 The use of the resource management process and / or any alteration of District Plans by local government in response to the PRA has been less common and does not appear to have caused tensions. If individuals are unhappy with the content of District Plans or decisions on resource consent applications, appeals are dealt with through the Environment Court.

i. **Contrary to the New Zealand Bill of Rights Act 1990** – the LGA prevents councils making by-laws that are inconsistent with this Act, which gives right to freedom of expression and public assembly, freedom of movement and residence, the rights of minorities, and freedom of association.

ii. **Repugnant to the laws of the land** – Section 14 of the By-laws Act 1910 provides that a by-law will be invalid if it is 'repugnant' to the laws of New Zealand.

iii. **Unreasonable** – A by-law can be challenged in court as invalid, on the grounds that the decision made about it was unreasonable, as judged by reference to the scope of the by-law and the impact it will have on the community affected by it (Section 17 of the By-laws Act 1910).

iv. ***Ultra Vires*** ('beyond the power') – when again it is invalid (Section 17 of the By-laws Act 1910). The *ultra vires* rule can be applied if decisions or actions are deemed beyond the authority delegated for the purpose. Section 12(3) of the LGA also states that local government is not empowered to override any enactment or general law.

Judicial review was the mechanism used to resolve the tension between central and local government when Christchurch, Auckland and Hamilton created by-laws under the powers given to them in the PRA. Three cases were put forward to the High Court for judicial review by brothel owners in the three areas.[5] Judges of the High Court deemed the by-laws in Christchurch and Auckland to be invalid on the grounds of unreasonableness, repugnancy and *ultra vires*. They were considered invalid mainly in relation to their impact on small owner-operator brothels who would have been prohibited from residential areas. However, Hamilton City Council's by-law was not found to be unreasonable and was upheld.

Judicial reviews can also be used to resolve complaints against how local government has conducted a resource management process. However, appeals against the content of District Plans or decisions on resource consent applications must first be made to the Environment Court, where they are usually resolved.

Palmer and Palmer (2004) suggest that the judicial review process has become an important element in refining and informing local government decision making. When new legislation is passed, local councils can be unclear about their role in relation to the legislation, or the extent of regulatory powers. Some councils go ahead and act based on their best understanding. They then rely on the court system for clarification over whether their actions were appropriate. Other councils wait to see the outcomes of court cases before deciding on what action they themselves will take. The Community Development Contribution Policy[6] was an example of this. Council's were unclear over how much consultation was required, and were able to gain clarification through subsequent court rulings. This also appears to be the case

5 Respectively, these were Willowford Family Trust v Christchurch City Council (High Court, Christchurch, CIV-2004-409-002299, 29/7/2005); J B International Ltd v Auckland City Council (High Court, Auckland, CIV 2005-404-2214, 14/3/2006); and Conley v Hamilton City Council (High Court, Hamilton, CIV 2005-419-001689, 19/7/2006).

6 The Local Government Act 2002 authorises local authorities to impose development contributions on parties such as property developers to cover costs to the local authority caused by their development (e.g. sub-division development requiring water management systems to be put in place). However, the provisions of the Act are reasonably complex, requiring local authorities to make a number of assumptions and significant judgements in applying them. Aspects of policies developed by some authorities have been found to be 'unlawful' by the High Court, requiring authorities with similar aspects to reconsider their own policies.

with the PRA. High Court decisions have assisted in the interpretation of the aims of the PRA and ruled on the legality of the actions taken by some territorial authorities. These rulings are then taken into consideration by other territorial authorities in decision making relating to the PRA.

3.2 Solutions suggested

Personal communication with experts from Local Government New Zealand, the Environment Court and the School of Government (Victoria University) pointed to some possible solutions. Suggestions related to how things might have been done differently when the PRA first came into effect. Others related to what could have been done after the legislation had come into effect and when it was evident that problems were arising. While discussion centred on the PRA, the experts often saw their suggestions as applicable to other situations of tension between central and local government. There was in general a strong degree of sympathy for local government and the way in which it had to respond to central government legislation.

How things could have been done differently

In terms of how things could have been done differently to avoid tensions arising in the first place, the suggestions were:

- **Proper due process** – There was a strong sense among all those spoken to that it was unacceptable for central government to drop responsibilities 'in the lap' of local government without due process. It was felt there should have been more consultation over what was expected of local government, what it felt it was capable of, and what resources it would need to carry out its responsibilities effectively.

- **Explanations and clarifications** – When the PRA was first passed, it would have been useful if teams of advisors had gone to local areas to offer training, and provide full explanation of the intentions of the Act (e.g. to improve welfare, health and safety of sex workers). These visits could also have clarified what actions or decisions the local area could take, and what they could not. For example, it could have been explained that creating by-laws to prohibit small owner-operated brothels from operating in residential areas was not allowable. If the intended limitations to local 'authority' had been made clearer, then councils could have 'saved face' by explaining to their local communities where they could act, and what was beyond their jurisdiction.

- **Morality decisions are the responsibility of the Crown** – It was suggested that the ability of local communities to 'interfere' with legislative decisions by central government which were likely to attract moral opposition should be limited or curbed. The example of same-sex civil unions was given. This was seen as an issue affecting a minority group that would not have been fairly decided if community sensibilities had been allowed to dominate.

Solutions that could be applied now

Those spoken to had a range of suggestions as to how tension between central and local government in relation the PRA and – indeed other matters – could best be handled 'down the line'. The suggestions were:

- **More time and money invested** – The suggestion here was local government should be offered better guidelines, by-law templates, and more access to expert advice. Developing 'best practice' models to draw on would also help. Even 'down the line', presentational seminars to councils could be valuable, offering clearer guidelines on what they can and cannot do.

- **Understanding differences in reaction** – It was felt that a better understanding of why councils react differently might help in finding solutions. In relation to the PRA, for instance, the majority of councils have either taken no action or enacted by-laws with minimal implications; others chose a more significant response. It would be useful to understand whether this was because of community pressure, the composition of the council, or a quirk of media attention.

- **Local advisory panels** – It was felt these might help, taking into account the scale of the issue and costs involved. The Maori Standing Committee, for example, is a formal body which around one in five territorial authorities have chosen to establish. The committees are given powers to advise or make recommendations to local government on matters of concern to Maori.

- **Mediation** – This is the model currently being used successfully in the Environment Court. When an appeal is made to the Court, all parties are invited to mediation as an alternative to proceeding with time consuming and costly court procedures. Mediation is a free service, paid for by government. An independent and impartial mediator hears all sides of the story. If agreement among parties is reached, this is reviewed by an Environment Court Judge, and the decision becomes final and binding. Resolution is more often reached through presenting the facts in a way that make them more acceptable to all parties, rather than points of law. Where agreement is not reached, an appeal proceeds to the Court. This mediation model is currently available to business owners who have resource consent applications to develop a brothel declined. It was suggested that this model could be usefully extended to resolve disagreements around other areas of local government decision making.

- **'Let it rest'** – Another suggestion was that it may be best sometimes to let matters rest, even though tension has been evident. In the case of the PRA, for instance, the judicial review rulings have now assisted in clarifying its interpretation.

- **Review of legislation** – Amendments to law can sometimes help make it clearer. Suggested amendments to the PRA may result from the legislative review due for completion in 2008. The definition of brothels and how this applies to small owner-operated brothels is one 'grey area', for example, that could be clarified to assist with local government decision making.

4 Overseas experience

Local government reluctance to allow brothels to operate in their area is not unique to New Zealand. Rather, it seems common in many jurisdictions that have either decriminalised or legalised prostitution. But examples of problems arising were much better documented than were the solutions.

Where prostitution has either been legalised or decriminalised, the degree of governance given over to local government has varied. In Germany, for example, prostitution is legal at the federal level, but individual states have the right to ban outright some types of prostitution in certain areas (de Pommereau, 2005). Those to whom regulatory authority has been given at local level has also varied. In some jurisdictions (as in New Zealand), local regulation is under the control of local government. The control exerted by local government may be limited to the use of standard planning controls or they may administer a specific licensing scheme for brothels. In other jurisdictions, it is the police and sometimes health officials that are responsible for regulation (e.g. in Turkey and Greece).

Issues have arisen both over the location of brothels, or the designation of 'tolerance zones' in countries where only individual sex work is allowed. In Hungary, for example, central government legislation permits individual sex work in zones designated by local authorities – but the problem has been that few local government areas designated tolerance zones (Central & Eastern European Harm Reduction Network, 2005). Resistance from local communities was typically an impediment, due to concern about real estate prices. Local human rights organisations and the Hungarian Prostitutes Association have insisted that the local authorities involved are acting illegally in not designating a tolerance zone.

Tension between central and local government has arisen most commonly, though, in jurisdictions where legislation has allowed brothels to operate. Examples are given below of four jurisdictions which have experienced problems from the actions taken by local government to regulate brothels. Any actions taken to resolve issues are also described.

4.1 New South Wales, Australia

New South Wales is the only other jurisdiction that, like New Zealand, has decriminalised prostitution, in its case with the Disorderly Houses Act 1995. The Brothels Task Force (2001) carried out a review of the Act five years after it came into operation. It concluded that local councils (who were responsible for enforcing planning restrictions in relation to the location of brothels) were being overly restrictive – making it difficult for brothel operators to keep within the law. This was contrary to the objectives of the reforms introduced by the State legislation.

Local councils controlled the location of brothels through Local Environment Plans, or in some cases Development Control Plans.[7] Local councils have tended to use the planning controls to restrict brothels to industrial and / or commercial areas (Brothels Task Force, 2001). Problems were most evident where councils did not distinguish between larger brothels and home business brothels, with both being restricted to industrial zones. Most small brothels (with one or two sex workers) tended to have operated in residential areas; if they continued to do so, they would be operating illegally according to local regulations. Private Workers Alliance (PWA) and Sex Worker Outreach Project (SWOP), 2003 also noted that the regulations favoured owners (predominantly male) of larger brothels who had the resources to challenge the Development Application in court. (Costs ranged from A$15,000 to A$100,000 according to PWA and SWOP, 2003).

There was also concern that if local councils required brothels to be located in industrial areas, this might jeopardise the safety of sex workers (Brothels Task Force, 2001; Red and 'Saul', 2003). Further problems were evident if there were no industrial or commercial areas in which brothels could locate.

In a recent paper, Smith (2003) argued that councils were refusing brothel applications 'to save face with the ratepayers'. Appeals could be made to the Land and Environment Court, but if the council decision was overruled, the Court could be blamed. Smith's paper suggested that councils would refuse applications – rather than face the political ramifications – even if they knew the decision would be overruled on appeal. Thus, as in New Zealand, disagreements at local level are currently being resolved at the state level via the courts. Smith notes, though, that the Council of Churches and the New South Wales opposition leader have called for a change in state legislation to allow local councils to make the final decision on where brothels could be located.

Response

The Brothels Task Force (2001) suggested local councils needed further support to optimise the potential of the existing planning system. It also noted that local councils needed to develop appropriate planning controls based on the likely impacts of different types of brothels (i.e. to consider the differing impacts of home businesses compared to larger commercial brothels).

The Task Force recommended a Brothels Planning Advisory Panel to advise and guide councils on appropriate planning instruments, and developing consent conditions and policies. The Panel was also to provide a forum for discussing issues relating to planning regulation as regards brothels. In response the Sex Services Premises Planning Advisory Panel was established by the NSW Cabinet Office in 2004.[8] It produced the *Sex Services Premises Planning Guidelines* in 2004 to assist local government in deciding on what sex services premises could operate in their areas, and outlining best practice (Sex Services Premises Planning Advisory Panel, 2004).

7 Both were prepared under the Environment and Planning Act 1979.

8 It comprised an independent chairperson; single representatives from the Department of Planning, NSW Health, State Chamber of Commerce, Local Government Association of NSW, and Shires Association of NSW; one metropolitan and one non-metropolitan council member; the Sex Workers Outreach Project (SWOP); Private Workers Alliance (PWA); and a legal representative with expertise in sex service planning.

The Task Force also recommended that the state should intervene and amend state environment planning policy to allow home-based brothels to operate across NSW without having to obtain development consent – bringing them in line with the regulation of other home-based occupations. A similar proposal was offered by Red and 'Saul' (2003) who suggested that private worker home-based businesses should be excluded from the definition of a 'brothel' in the Disorderly Houses Act 1995.

4.2 Victoria, Australia

Brothels in Victoria were legalised by the Prostitution Control Act 1994, although they had to adhere to strict regulations. According to the Crime and Misconduct Commission (CMC), illegal prostitution has flourished, with a two-tier system of legal and illegal brothels now in operation. CMC noted that local councils in Victoria were initially reluctant to grant planning permits, and applicants had to go through a costly appeals process (CMC, 2004). Sullivan (1999) attributed the increase in the number of illegal brothels to councils enforcing overly restrictive planning rules, the high costs involved in gaining the necessary licences and permits, together with the level of legal scrutiny (Sullivan, 1999). Sullivan also noted that there were very few small owner-operators registered with the Business Licensing Authority (BLA) (just five in Victoria in 1998), indicating a problem with the system.

To operate legally, brothel owners are required to hold a local council planning permit, and operators also needed a 'Prostitution Service Providers Licence' administered by the state's BLA. Obtaining a licence was seen to be fairly arduous. For instance, operators had to consent to having their fingerprints taken and had to meet various criteria related to their suitability to operate a brothel – many of these relating to prior convictions (Smith, 2003). The BLA also had to give notice to local councils and invite public submissions on the application (through an advertisement in the local paper). Responses from these parties was then to be taken into account by the BLA. A copy of the application for a licence also had to be sent by the BLA to the Director of Fair Trading and Chief Commissioner of Police for comment, before finally deciding on whether to approve the application.

One or two sex workers running a private business are exempt from holding a licence, but must still register with the BLA and hold a council planning permit.

Response

The Victorian Parliament introduced legislative changes in 1995 related to the planning approval process. As a result, councils could reject brothel applications only on planning grounds, and not on moral ones (Queensland Govt, 1998, p81, cited in CMC, 2004).

4.3 Queensland, Australia

Queensland legalised brothels with the Prostitution Act 1999. This was reviewed after four years of operations by the CMC (2004). The review was on the whole positive, but identified illegal prostitution as continuing. This was attributed in part to the difficulties of obtaining a licence from the state's Prostitution Licensing Authority (PLA), and in part to obtaining planning approval at local council level. Unlike other states, it appears the problems of gaining

council approval were mainly due to restrictions imposed by Queensland in the Prostitution Act 1999, rather than local impediments. The councils did, however, have the capacity to override some brothel development applications.[9]

Response

The Prostitution Amendment Act was passed in 2001 to improve processes both for determining applications for brothel licences, and development approvals from a local council. The Act clarified existing provisions and also dealt with some operational matters, e.g. defining an 'industrial area', and specifying how exclusionary distances from residential areas and other places were to be measured.

A new process was also created to review a local council's approval of decisions, with the establishment of the Office of Independent Assessor. This provided an alternative legislative approach for dealing with planning appeals. The new provisions created a right of appeal to the Independent Assessor against decisions made by the local council assessment manager, but was limited to just 'code-assessed' development applications for a licensed brothel. Appeals against 'impact assessed' applications are still made to the Planning and Environment Court.

CMC have reported that amendments to the Act had been positively received. The Local Government Association of Queensland reported to the CMC that following the amendments, concerns about council approval 'were no longer an issue'. The PLA, however, had concerns that while the amendments had made things clearer, some changes made it more difficult to find an acceptable site for a brothel. For example, the requirement that there should be 100 metres 'as the crow flies' from a brothel to certain places (e.g. churches, schools, residential properties) did not, according to the PLA, recognise other factors such as separation by a five lane highway.

The PLA thought the Independent Assessment Process had worked well, but felt the jurisdiction of the Independent Assessor should be extended to include a capacity to hear appeals against initial decisions of council assessment managers about whether premises should be 'impact' or 'code' assessed. This was based on the observation that some councils had overridden processes by deeming premises to be 'impact assessable', when it was clearly a 'code-assessable' premises. At present, appeals to the Independent Assessor can only be heard against 'code-assessed' applications.

4.4 Netherlands

Brothels were legalised in the Netherlands in 2000. Responsibility for the administration of rules relating to prostitution in general was handed to municipalities (local authorities). This decentralisation recognised that municipalities had to deal with prostitution and its associated affects at the local level (Working Group on the Legal Regulation of the Purchase of Sexual

9 Councils could override 'code assessed' but not 'impact assessed' applications. Applications for brothels in predominantly industrial areas are 'code assessed'. Approval is based on whether the location of the brothel meets the conditions outlined in the Prostitution Regulation 2000. In contrast, an 'impact assessment' involves a broader assessment of the effects of the proposal on the surrounding area. Appeals against decisions can be made to the Planning and Environment Court for impact assessment applications only.

Services, 2004).[10] Municipalities are free to choose how they wish to regulate brothel activities, but 94% have adopted a model provided by the Dutch Local Government Association, which includes a system of licensing. Despite the government's intent to legalise brothels, 12% of municipalities have chosen a 'no brothel' policy and banned brothels outright. In some regions, brothel owners encounter so many onerous regulations that it is difficult to operate legally. In other regions, it is much easier (Working Group, 2004).

Response

There has been no clear government response to municipalities opting to ban brothels. However, an evaluation by Wagenaar (2004) points to two things that have helped local municipalities to adhere with central government legislation more successfully. These were:

- Implementation was seen as more effective in areas where prostitution had existed prior to the new legislation, and communication lines between parties already existed.

- More successful municipalities were those who sought participation not only from the Police, city legal officers, local politicians, service providers, and citizens for instance, but also from those in the sex industry – recognising that the latter would not accept hierarchical implementation of a licensing system. This appeared to increase 'buy in' to the legislation – for example through sex workers registering and attending voluntary health checks.

The courts in the Netherlands have also been called upon in areas of conflict. For example, the question of what constitutes a brothel became a court matter (Wagenaar, 2004 cited in the Working Group, 2004). The role of the courts was seen in a positive light by Wagenaar, assisting in implementing the new legislation, and producing a clearer interpretation of it. There are parallels here with New Zealand.

10 Legal authority for the municipalities' regulation of prostitution is set out in the Dutch Law on Municipalities (Gemeentewet, article 151a).

5 Conclusions

Constitutional arrangements in New Zealand explain how tensions can arise between central and local government. Local government decision making must reflect community concerns, which can be at odds with central government objectives. Local government is given some discretionary power through the LGA and one way in which this is exercised is through the creation of by-laws. The main legal mechanism in place for resolving tensions over local government by-laws is through applications to the High Court for a judicial review. This process has been used to date to resolve tensions that have arisen in response to the by-laws created in response to the PRA. The Environment Court is responsible for resolving concerns over the content of a local government's District Plan, or its decisions on resource consent applications. However, while these options are provided for in the PRA, they do not appear to date to have resulted in tensions.

Tension about the location of brothels is not unique to New Zealand. Overseas responses to resolve similar conflict echo many of the suggestions offered by experts in New Zealand. These centre on:

- providing more support to local government to help them make decisions more in line with legislative aims;
- amending legislation to provide clearer definitions of terms which have caused problems (e.g. the definition of brothels and whether this includes small owner-operated businesses); and
- making it clearer what decisions local government can and cannot make.

It could be that tensions in New Zealand may resolve themselves with assistance from the High Court in the legal interpretation of the Act. However, if the courts continue to be called on to resolve disputes, a mediation model similar to that operating in the Environment Court could be usefully considered.

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