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4 Overseas experience

(15)

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

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).

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 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.

Footnotes

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

* 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.

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

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