

Brothels Bylaw review

History of sex work in New Zealand and the Law

Various forms of legislation regarding commercial sex work have been enacted over the years ending with the *Prostitution Reform Act 2003* (PRA) which decriminalised it throughout New Zealand.

The primary purpose of the PRA is the promotion of the safety and welfare of sex workers and more specifically to:

- safeguard the human rights of sex workers and protect them from exploitation;
- promote the welfare, occupational health and safety of sex workers;
- create an environment that is conducive to public health; and
- protect children from exploitation in relation to prostitution.

Since 2003 sex work has been a legal occupation, subject to the same laws that regulate other businesses and workers, but with some additional requirements aimed at protecting sex workers and their clients (see sections 7 to 23 of the PRA).

The PRA—provisions and limitations

The PRA authorises a Council to adopt a bylaw containing the following two clauses, where it is deemed necessary, and this is the most appropriate way of addressing the perceived problem—see section 155 of the *Local Government Act 2002* (LGA):

- Section 12—Signage
- Section 14—Location of brothels

Any bylaw must also comply with the general requirements of the LGA. Currently Upper Hutt and 12 other Councils have such bylaws, whilst the majority of Councils (54) rely on district plans and/or the resource consent clause in the PRA: (*Section 15—Resource consents in relation to businesses of prostitution*).

Bylaws—purposes and limitations

Under section 145 of the LGA, Council has the ability to address issues for its district through the use of a bylaw where this is necessary, for the following three purposes:

- (a) protecting the public from nuisance;
- (b) protecting, promoting, and maintaining public health and safety;
- (c) minimising the potential for offensive behaviour in public places.

In November 2003, Upper Hutt City Council introduced the *Brothels Bylaw 2003* to address concerns from some members of the community who felt that the “associated signage would be offensive to some members, and that brothels should not be located near the places that children are likely to frequent.”

Is the bylaw consistent with the Bill of Rights?

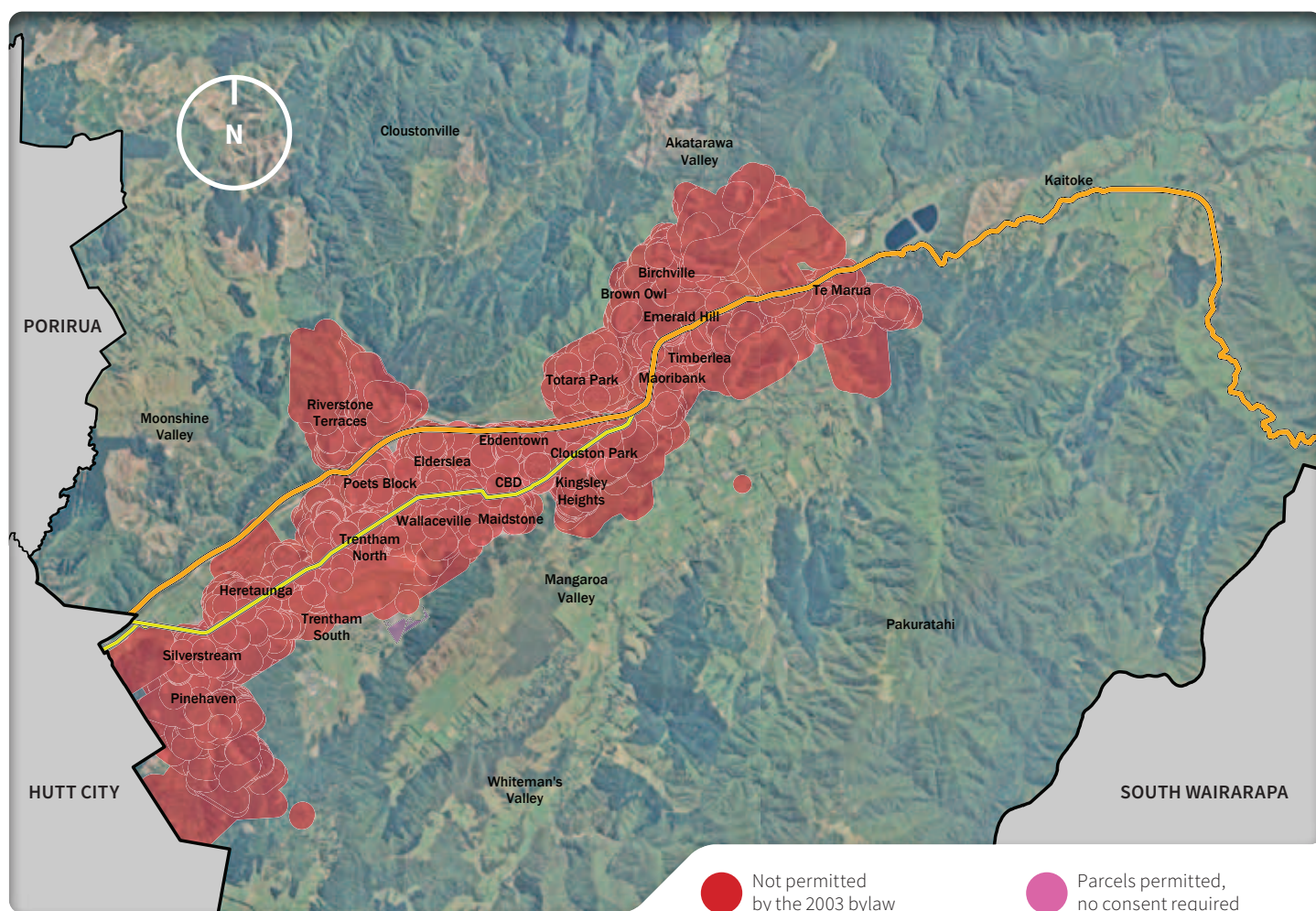
Under section 155 of the LGA, no bylaw may be made which is inconsistent with, or gives rise to any implications under the *New Zealand Bill of Rights Act 1990* (NZBORA).

NOTE: The PRA does allow that the section 12 requirements for signs may be inconsistent with the NZBORA.

The location restrictions in the current bylaw can be argued as being directly inconsistent with NZBORA because it impinges on these rights and freedoms, and is not within the “reasonable limits prescribed by law as can be justified in a free and democratic society.” These restrictions effectively prohibit a brothel from operating in almost any business viable part of the city.

The bylaw is therefore vulnerable to legal challenge. It can also be argued that the current bylaw does not support the intents or purpose of the PRA.

Limitations on the location of brothels posed by the Brothels Bylaw 2003 and the Upper Hutt District Plan



What is the current bylaw?

A full copy of the current brothels bylaw 2003 can be found on our website, but as a brief summary:

SECTION 12

Signs must be fixed to the premises and must not exceed 1.0 m by 0.3 m. They may only contain the name of the brothel and must not contain words or images that are considered to be sexually explicit or offensive. They must not have neon or flashing lighting, nor be visible from a residential zone.

Signs must also comply with the *Control of Advertising Signs Bylaw 2005*. However, this bylaw was revoked in 2019 and all signs must now comply with Upper Hutt City Council's District Plan.

SECTION 14

Brothels may not be established within the CBD, or in a residential zone, or in any gang buildings, and must be at least 200 m from a 'sensitive site' (e.g. schools, kindergartens, places of worship, marae, retirement villages, and rest homes).

In practice, this excludes almost all locations where a commercially viable business could operate.

NOTE: The PRA defines a brothel as “any premises kept or habitually used for the purposes of prostitution.”

What about small owner-operated brothels?

Many sex workers choose to work from home or at a small owner-operated brothel (SOOB)—defined as “having no more than four sex workers operating, and each worker retains control over their individual earnings.”

The current bylaw, unlike other councils', prohibits home-workers and SOOBs from operating legally in almost all areas of the city, other than in remote rural locations.

Does it matter if a bylaw goes beyond the provisions of the PRA?

In 2005, 2006, and 2011, three other councils' brothel bylaws were challenged and quashed by the High Court and ruled as being *unreasonable, too restrictive, a restraint of trade, and beyond the authority delegated to the council for this purpose...and therefore inconsistent with the NZBORA*. These Councils were ordered to re-write the bylaw and pay costs to the plaintiff.

In 2006 and 2018, two other councils substantially revised their brothel bylaws in light of extensive media coverage.

Why do we need to review the bylaw?

Under section 159 of the LGA, bylaws must be reviewed at set intervals.

In 2008 a number of recommended amendments were agreed by Council for public consultation:

- Permit a solo sex worker to operate from home in a residential zone—the buffer zone would not apply.
- Reduce the buffer zone surrounding sensitive sites from 200 m to 100 m.
- Permit brothels in the CBD—but not on Main St, or ground level, or within 100 m of any civic buildings.

Council reaffirmed the bylaw with no amendments in 2009.

In 2019 Council commenced the current review.

How does a review work?

1. Council staff discuss the issues and potential solutions with key stakeholders, then Council agrees on a proposed option.
2. A proposed bylaw is drafted and published for public consultation and feedback.
3. Council considers any feedback submitted and holds a hearing if people want to present their submission.
4. Council decides whether to make any changes as a result of the submissions, and the final bylaw is adopted.

How does the current bylaw affect sex workers?

Legitimate brothel operators must obtain and hold a current operator certificate from the Ministry of Justice, and premises may be inspected by the Police to ensure compliance with the PRA's welfare requirements.

Nevertheless, it is possible that illegal brothel operators might neglect their duties as a legitimate and responsible employer, as required under the provisions of the PRA.

Coercion, harassment, assault and rape of sex workers, exploitation of immigrants by illegal sex traffickers, and abuse of underage children all continue to be practiced by a few people who continue to operate outside the law.

The New Zealand Prostitutes Collective mantra is the same as it was when they started out—“*Making sure every sex worker is safe every time, everywhere.*” Dame Catherine Healy.

However, if a sex worker in Upper Hutt were to report their mistreatment to the Police today, under the current bylaw they could be prosecuted, subject to a fine of up to \$20,000 and given a criminal record, since they would be admitting to a breach of the bylaw.

How does the PRA protect people?

There are a number of provisions in the PRA aimed at protecting the welfare and safety of sex workers and clients/public:

- S7** A contract for the provision of commercial sexual services is legal and binding. Commercial sex work has the same contractual requirements for payment as for the provision of other contracted services.
- S8** Operators of brothels must adopt and promote safer sex practices.
- S9** Sex workers and clients must adopt safer sex practices.
- S10** Workers must comply with the *Health and Safety at Work Act 2015*.
- S16** No one may induce or compel persons to provide commercial sexual services or earnings from prostitution.

- S17** A person may, at any time, refuse to provide, or to continue to provide, a commercial sexual service to any other person—this includes non-consensual practices and rape.
- S18** A person's benefit, or entitlement to a benefit, under the *Social Security Act 2018* may not be cancelled or affected in any other way by their refusal to work, or to continue to work, as a sex worker.
- S19** No visa may be granted under the *Immigration Act 2009* to a person on the basis that the person has provided, or intends to provide, commercial sexual services.
- S20** No person may cause, assist, facilitate, or encourage a person under 18 years of age to provide commercial sexual services to any person.
- S21** No person may receive earnings from commercial sexual services provided by person under 18 years
- S22** No person may contract for commercial sexual services from, or be client of, person under 18 years
- S23** It is an offence to breach prohibitions on the use in prostitution of persons under 18 years (s20 – 22).

Preconceptions about sex work

In 2008 the Prostitution Law Review Committee (PLRC) completed a review of how the PRA was operating.

It concluded that *"On the whole, the PRA has been effective in achieving its purpose, and the Committee is confident that the vast majority of people involved in the sex industry are better*

off under the PRA than they were previously. The PRA has had a marked effect in safeguarding the rights of sex workers. Removing the taint of illegality has empowered sex workers by reducing the opportunity for coercion and exploitation."

Decriminalisation leads to an increase in the number of sex workers

The PLRC report indicated that the numbers of workers remained more or less the same since the PRA came into force.

Drug use—using sex work to support addiction

The PLRC report found *"the perception that drug use is high amongst street workers, was considered to be fallacy."*

Links to organised crime

Decriminalising sex work has helped to separate the now legal activities from their legacy of organised crime and gang-related activities.

Use and exploitation of underage minors

Sections 20 to 23 of the PRA cover prohibitions on the use of persons under 18 years and Police may obtain warrants to search brothels if there are grounds for believing minors may be engaged in sex work.

Sex trafficking and sex tourists

Under s19 of the PRA, migrants who are not permanent residents are not allowed to work in the sex industry. The rule is intended to *"remove any incentives for...vulnerable people to enter New Zealand for the purpose of providing commercial sexual services."*

Your thoughts?

Council wants to get input from stakeholders who are involved in, or impacted by, the sex industry and this bylaw. This includes, but is not limited to, NZ Police, regional public health staff, sex workers, Social Services, Community facilities, Schools, Marae and some other sensitive sites.

Any submissions or proposals regarding the bylaw must:

- focus on the legal issues surrounding the bylaw; and
- satisfy the requirements of s145 of the LGA (purposes and limitations) and s155 for making bylaws (NZBORA).

CONTACT US

For more information visit our website:
upperhuttcity.com/brothels-bylaw



If you have any further questions relating to this you are welcome to contact us as follows:

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