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**BROTHEL KEEPING s147 CRIMES ACT:
AN ANALYSIS OF THE PROBLEMS OF
CRIMINALISATION AND AN EXAMINATION OF
REFORM OPTIONS**

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I INTRODUCTION

Prostitution is described as “the oldest profession”.¹ Historically the main response of society has not been to eliminate the profession but to regulate it. This has meant the act of prostitution itself is not an offence yet everything relating to prostitution is. There are four sections covering acts relating to prostitution. Under s26 of the Summary Offences Act 1981 it is an offence to solicit sex. Under s147 of the Crimes Act 1961, brothel keeping is prohibited. Under s148(a) of the Crimes Act it is illegal for anyone to live wholly or part on the earnings of a prostitute, and under s148(b) it is an offence to solicit or receive payment for any prostitute. S149 prohibits anyone from engaging for reward in the procuring of any woman or girl to have sex with a man who is not her husband.

This area of law created to regulate prostitution has numerous flaws, for example, prostitutes are punished for the act but clients receive no penalty. Society therefore allows the act to keep males satisfied yet the providers of sex are punished. Prostitutes effectively have no protection and no recourse for exploitation as the law prohibits all related acts. The outcome does not enable police to help harassed prostitutes; instead police time is wasted prosecuting them. The law is effectively pushing the prostitution industry under ground limiting the effectiveness of safe sex education, as the ability to provide programmes to teach prostitutes is hindered. It is due to problems like these that the law relating to prostitution needs to be examined and reformed.

In order to illustrate the failings of the law relating to prostitution I want to focus on s147 which prohibits brothel keeping. S147 attempts to achieve this eradication by preventing the occurrence of prostitution through prosecution of brothels. S147 illustrates the issues with prostitution laws particularly well, demonstrated by the case law where issues of unfairness arise due to loopholes in the legislation allowing “pimps” to avoid the law. Another issue is illustrated in the arbitrary application by the police of s147 in only directing their attention towards the more successful brothels. The case law additionally

shows that attitudes towards prostitution are changing, demonstrated by examples where safe and effective brothels have not been as severely punished. I will argue that safe brothels are preferable to pushing the industry underground and having prostitutes exploited and endangered.

Part II of the essay analyses the basis for criminalising s147. Part III examines the practical problems of s147 as depicted in the cases. Part IV provides additional support towards reform as an option. Part V examines the reform options in particular advocating decriminalisation. Then finally Part V provides an overall conclusion.

While the focus of the essay is narrow it must be remembered that all the law relating to prostitution is flawed and the suggested reforms of s147 should hopefully be broadly beneficial across all of the legislative provisions.

¹ Jordan, Jan., *Prostitution: The Case for Law Reform*, (pp 205-210). In 1993 New Zealand Suffrage Centennial: Women's Law Conference Papers, Elizabeth McDonald (Ed), Produced by Conference Publishing, a division of Charisma Group Limited, (1993), p.205

II BASIS FOR CRIMINALISATION OF s147

The important issue is whether brothel keeping should even be criminalised? The answer will lie in an analysis of the basis for criminalising brothel keeping. This examination will determine whether brothel keeping actually fits within the criminalisation process.

A S147 Crimes Act 1961

S147. Brothel-keeping²- (1) Every one is liable to imprisonment for a term not exceeding 5 years who –

- (a) Keeps or manages, or acts or assists in the management of, any brothel; or
- (b) Being the tenant, lessee, or occupier of any premises, knowingly permits the premises or any part thereof to be used as a brothel; or
- (c) Being the lessor or landlord of any premises, or the agent of the lessor or landlord, lets the premises or any part thereof with the knowledge that the premises are to be used as a brothel, or that some part thereof is to be so used, or is willfully a party to the continued use of the premises or any part thereof as a brothel.

(2) In this section, the term “brothel” means any house, room, set of rooms, or place of any kind whatever used for the purposes of prostitution, whether by one [person] or more.

The purpose of this section is to prohibit brothel keeping, which involves the managing of rooms or any kind of place for the purposes of prostitution, whether by one woman or more than one. This section is all encompassing, as under the wording of the section only one woman involved in prostitution in a house constitutes a brothel.

² S 147. Brothel-keeping, Crimes Act 1961.

The question is whether brothel keeping is truly criminal or is it only criminal because it was placed into the criminal code along with everything relating to prostitution? The reason this question needs to be asked is because the criminal law "notion is circular: criminal law claims to respond to deviance, yet deviance (for the purposes of criminal law) can only be defined by looking to the criminal law itself."³ Conduct can be criminal due to the fact it is in the criminal code. We therefore need to focus on whether brothel keeping is conduct that should be criminalised. In order to decide why society has criminalised brothel keeping we need to look at what conditions society requires in order to criminalise conduct. The standard of behaviour society currently uses is immoral or harmful behaviour.

B Immorality as a basis for criminalisation

Is brothel keeping immoral? Packer⁴ has suggested that one of the criteria that needs to be met in order to criminalise conduct is that it "must not be condoned by any significant segment of society."⁵ This criteria refines the morality issue to the question of whether society condones brothel keeping. Brothels are houses where sex work occurs and historically they have been considered immoral by wider society for this very reason. There is current evidence, however, that suggests that perceptions towards the prostitution industry are changing. This is substantiated in the cases to be examined in Part III. The defence in *Hastie v Police*⁶ produced evidence of a "changing community attitude towards sexual activity in general and prostitution in particular."⁷ Subsequently the public's reaction to the *Corporate Affairs* case "has now sparked calls for (prostitution) to be legalised."⁸ Even the judge was not particularly harsh as "Judge

³ Cameron, Neil & Young Warren. *Laws 214 Criminal Law (Streams A and B) Volume 1*. (1999) Quote itself comes from Lacey, Wells & Meure (1990) p.20

⁴ H. Packer has provided six criteria he believes need to be fulfilled in order to criminalise conduct. Criteria number one directly relates to issues of morality.

⁵ H. Packer, *The Limits of the Criminal Sanction* (1969), In Lacey, Nicola & Wells, Celia., *Reconstructing Criminal Law: Text and Materials*. Second Edition. Published by Butterworths, London, Edinburgh, Dublin, (1998), Chapter 4, p.360

⁶ *Hastie v Police* 2/9/93 HC AK, Tompkins J (AP 120-93)

⁷ *Hastie v Police*, above n6, p.3

⁸ Plunket, Pat., *The fall of the house that sex built*. In *The Dominion*, June 29, (1996)

Unwin sentenced Karen Glasgow and Edward Truby to periodic detention rather than jail, saying he was awake to the substantial shift in public tolerance of prostitution.”⁹

Further evidence of the public’s changing attitudes towards prostitution and prostitutes can be seen through the disappearance of Lisa Blakie. Detective Inspector Rob Pope, who was in charge of Miss Blakie’s investigation, said he was originally worried that as Lisa Blakie was a prostitute, “the public would sneer, (but) they did not. People were eager to help the police with their inquiries ... the undertone was that she was a person.”¹⁰ The cooperation of the public in the Lisa Blakie inquiry demonstrates that perhaps the “old profession, (and) old attitudes ... are both changing.”¹¹ These examples illustrate that perhaps Packer’s first criteria is not fulfilled. Basing criminalisation of brothel keeping on the immorality of the conduct is a weak argument in light of society’s changing attitudes.

Conversely the question of whether brothel keeping is immoral may not need to be answered. Although immorality is used as a starting point for criminalising conduct, immorality may not even be a necessary condition. Few people would deny the existence of morals in the criminal code, but morals are not complete in themselves. However, some commentators not only believe that immorality is a necessary condition but that it is a sufficient condition for criminalising conduct. It is believed “the fact the conduct is morally wrong is enough.”¹² Lord Devlin is a supporter of this reasoning, “criminal sanctions, according to Lord Devlin, should ... depend upon the law-maker’s interpretation of the likelihood of the right-minded man being deeply disgusted.”¹³

There is a strong counterargument that immorality is too limited a criteria and “one cannot, as Lord Devlin has done, throw rationality completely to the wind in order to replace it with the reasonable man’s disgust – which ... may be based on ignorance,

⁹ Hayden, Frank., *Money talks in case of double standards*. In *The Sunday Star-Times*, June 30, (1996).

¹⁰ Ansley, Bruce., “Sex & The City,” *Listener*, April 1 – 7 2000 p.23

¹¹ Ansley, above n10, p.23

¹² Clarkson, C.M.V. & Keating, H.M., *Criminal Law: Text and Materials*. Published by Sweet & Maxwell, London, (1990) p.80

¹³ Clarkson & Keating, above n12, p.81

superstition or misunderstanding.”¹⁴ According to Clarkson and Keating whilst immorality may be a necessary condition for the imposition of the criminal law, it ought not to be a sufficient one. They believe more conditions are needed to make conduct criminal. The arguments of Clarkson and Keating are persuasive and it appears even if brothel keeping is considered immoral this is not a strong enough reason to justify the criminalisation of the conduct.

C Harm as a basis for criminalisation

Is brothel keeping harmful? Harm can be “any violation of an interest of a person.”¹⁵ This definition is too wide, as anything can be construed as harm. The concept of harm needs to be refined. “Of initial attractiveness, at least, is the commonly drawn distinction between primary and secondary harms.”¹⁶ This distinction refers to direct and indirect harms.

Direct harm is not going to be enough of a justification for the criminalisation of brothel keeping as “the mere fact that an activity causes some ‘harm’ ... cannot be in itself a sufficient warrant for the intervention of the criminal law.”¹⁷ This leads to indirect harms, which may be a basis for the clarification of brothel keeping as criminal. The indirect harms relating to brothel keeping examine harms towards individual prostitutes and towards society.

1 Modelling justification

If the law allows the activity then young people who may be vulnerable or susceptible may be drawn in and “model” themselves on prostitutes.¹⁸

¹⁴ Clarkson & Keating, above n12, p.83

¹⁵ Clarkson & Keating, above n12, p.85

¹⁶ Clarkson & Keating, above n12, p.86

¹⁷ Clarkson & Keating, above n12, p.85

¹⁸ Young, Warren., Criminal Law 214, introduction classes on the criminal law, (1999).

The modelling justification deals with individual harms. There is a strong argument for criminalising prostitution and brothel keeping based on the modelling justification. Young girls might see the life of prostitution as glamorous and hence model themselves on prostitutes. This was the position of Michelle, who is currently a prostitute. She stated that at school, "we thought it was a really glamorous industry and stuff. The women always looked beautiful."¹⁹ Even if the life itself is not perceived as alluring, young girls may see prostitutes making large quantities of money and want to earn this type of cash for themselves. Prostitutes themselves admit, "they were entranced by the big money they saw as fact, unquestioned."²⁰

The question is, however, whether modelling is a realistic fear? Most young girls have their focus on school, homework, future education goals, friends and inevitably boys. The fact is, however, that there are impressionable girls like Michelle who will become prostitutes to "escape poverty, at least, and to live the good life, at best."²¹ The question then becomes whether the harm from these few young girls entering the prostitution industry is enough to justify imposing the criminal law on prostitution and in particular brothel keeping? If brothels are sanctioned then susceptible young girls will have an easy way in which to enter the industry, as they can live in brothels avoiding the unsafe street environment. It is arguable from this perspective that brothel keeping should be criminalised, however, there are more viable alternative options.

One option is to provide education in schools outlining the reality of the life of prostitutes. This would help to dispel the idea of glamour. Prostitutes could talk to young girls to show them that in actuality "the money wasn't so good."²² A second option is the viable and preferred alternative of decriminalisation. This reform option will be discussed in-depth in part IV of the paper. The argument briefly is that the open industry created by decriminalisation would allow police observation, as well as regulation confining the industry to the service sector away from impressionable youth.

¹⁹ Ansley, above n10, p.22

²⁰ Ansley, above n10, p.20

²¹ Ansley, above n10, p.20

²² Ansley, above n10, p.20

2 *Categorical imperative justification*

The activity is acceptable if confined but the problem is that activities like these spread, causing harm to society. Under the categorical imperative justification the idea is to stop things before they change the social fabric.²³

This basis for criminalisation fits within Packer's criteria as he believes "the conduct must be regarded by most people as socially threatening ..."²⁴ Applying the categorical imperative, if one brothel was allowed then brothels would start appearing everywhere. This image is one that is socially threatening towards society. However, this justification for criminalisation may be questioned, as illustrated by the example of homosexuality. If homosexuality was allowed "the picture which is called to mind is that of a nation where most of the population is homosexual."²⁵ In reality this would not occur and the same could be argued in relation to brothel keeping. Drinking can further demonstrate the lack of merit of the categorical imperative justification which assumes people are weak minded and hence copy others. In reality our society is individualistic and the majority of people choose to drink in moderation. Police intervention works towards controlling the weaker members of society, for example pub raids catch many underage drinkers who then face heavy penalties. While this police intervention is not fail safe it does deter many youths. Police intervention could be used in relation to brothel keeping to ensure only truly consenting adults are involved in the activity. Police could further limit brothels to designated districts in the community avoiding residential areas.

Under the reform option of decriminalisation the entire world would not suddenly become compelled towards prostitution or the running of brothels. A small minority may be able to change the social fabric of society, however brothel keeping will not have this affect if intervention and sector limitations are in place. The arguments for criminalisation of brothels based on the categorical imperative justification are weak.

²³ Young, above n18

²⁴ Packer, above n5, p.360

²⁵ Clarkson & Keating, above n12, p.87

3 *Harm of Commodification*

Of greater concern is the potential for all aspects of prostitution to contribute to the commodification of the female body. According to Bridgeman & Millns, "the objection to viewing prostitution as a form of wage labour is that prostitution commodifies the female body which, in the sexual contract, becomes an object for sale."²⁶ Instead of viewing prostitution as a sale of sexual services it is seen as a sale of body parts. There is, however, a lack of consensus amongst feminists regarding the nature of prostitution and sex work in general. Radical feminists believe that commodification, inherent in the sex work contract, "does nothing to change the sexual subordination of women to men. In fact it may reinforce it."²⁷ Liberal Feminists however "see the sexual contract as offering the possibility of sexual autonomy."²⁸ They do, however, protest to the objectification of women's bodies.

The ideas of commodification of the female body are particularly prevalent in relation to brothel keeping because the brothel is where the sale of sexual services takes place. The female body becomes a sexual object for sale under the roof of the brothel. While brothel keeping may perpetuate the harm of commodification, this harm will inevitably occur. If brothels are not available the objectification of women's bodies will simply be moved onto the streets. This situation is worse as a properly managed brothel can become a place of protection for a prostitute, whereas on the streets prostitutes are more likely to be exploited or harmed. The only true way that commodification of the female body will be removed is by stamping out sex work in its entirety. We must be aware that short term this is not a viable option, as society's attitudes would need to be changed. It is clear, however, that continued criminalisation of brothels is not the preferred option to avoid commodification, as currently the "criminalisation of brothels isolates the prostitute at work, leaving her without the physical protection that the presence of other women could

²⁶ Bridgeman, Jo., & Millns, Susan., *Feminist Perspectives on Law: Law's Engagement with the Female Body*. Sweet & Maxwell, London, (1998), p.756

²⁷ Bridgeman & Millns, above n26, p.756

²⁸ Bridgeman & Millns, above n26, p.756

provide.”²⁹ Brothels provide sex workers safety from commodification as they are not alone, but have the support of other sex workers. The basis for continued criminalisation of brothel keeping is hence not supported by the commodification argument. Decriminalisation of brothel keeping would open up the industry and allow prostitutes to legally band together through brothels to help prevent commodification of their bodies through safety in numbers.

It appears that both immorality and harm are not sufficient to criminalise conduct, in particular brothel keeping. Indeed, indirect harms could be said to be simply dressing up the value argument for immorality, which in itself is not a sufficient condition. This can be explained by the arguments based on the modeling justification and categorical imperative justification which are actually morality issues hiding behind extra criteria. Care over young females’ well-being is basically a moral judgement that young females should not become prostitutes. Whereas ideas of society overcome by brothel keeping is actually moral panic based around abhorrence towards sexual misdemeanors. The fact is, as previously discussed, society’s moral judgements towards the prostitution industry are changing towards a more positive approach. Clarkson and Keating state that, “it is not enough in our submission that a practice is widely regarded as immoral. Nor is it enough that it should cause harm. Both of these are minimal conditions for action by means of the criminal law but they are not sufficient.”³⁰

D Extra Criteria as a basis for criminalisation

1 *Whether “it can be dealt with through even-handed and non-discriminatory law enforcement.”*³¹

In order to find a basis for the criminalisation of brothel keeping Packer’s fourth criteria is relevant. The argument is brothel keeping should be criminalised as it is an even-

²⁹ S. Duncan, “Disrupting the Surface of Order and Innocence: Towards a Theory of Sexuality and the Law.” (1994) In Bridgeman, Jo., & Millns, Susan., *Feminist Perspectives on Law: Law’s Engagement with the Female Body*. Sweet & Maxwell, London, (1998), p.740

³⁰ Clarkson & Keating, above n12, p.95

handed and non-discriminatory method of law enforcement. It can, however, be demonstrated that prostitution laws are not dealt with in this way. These laws are not even-handed towards prostitutes as they cannot solicit for sex whereas males can offer to pay prostitutes. The law is discriminatory towards prostitutes as they are stigmatised and receive no police help with difficult clients. Brothel keepers also face discrimination due to the arbitrary enforcement of the laws by the police in only punishing the successful brothels. This will be examined further in Part III. This extra criteria as a basis for criminalisation appears unjustifiable as the brothel keeping laws are not even-handed or non-discriminatory.

2 *Whether "no reasonable alternatives to the criminal sanction exist for dealing with it."*³²

Packer's sixth criteria could be a further basis for the reason behind criminalising brothel keeping. The argument is that brothel keeping should be criminalised as there are no reasonable alternatives to this criminal sanction. This criterion ultimately fails as two possible reforms can be identified to replace the continued criminalisation of brothel keeping. The two reform options are legalisation and decriminalisation. These will be discussed further in Part IV of the paper. The sixth criteria is not satisfied as I will argue that decriminalising the law is definitely a reasonable alternative to criminalisation of brothels.

3 *Whether "controlling it through the criminal process will not expose that process to severe qualitative or quantitative strains."*³³

Packer's fourth criteria could be a further basis for criminalising brothel keeping. The argument is that brothels do not impose severe qualitative or quantitative strains on the criminal process. The counter argument is stated by Clarkson & Keating³⁴ who say:³⁵

³¹ Packer, above n5, p.360

³² Packer, above n5, p.360

³³ Packer, above n5, p.360

To obtain evidence, police are obliged to resort to behavior which tends to degrade and demean both themselves personally and law enforcement as an institution ... the complaint of the critic [is] that the police have more important things to do with their time.

The police are a finite resource and spending police hours trying to apprehend brothel keepers is a waste of their limited and valuable time. In fact the police themselves believe that the prostitution laws waste police time. District Commander Gerry Cunneen of the Wellington Police said, "it's not a priority for us to be running around peeping through the windows to see if someone is engaging in sex for money."³⁶ Under analysis the fourth criteria is not fulfilled, as policing brothels places a severe quantitative strain on the police given that they have more important issues to be concerned with.

The question to be considered is should brothel keeping continue to be criminalised? Does the public still require it to be criminalised? Brothel keeping in general may be viewed as immoral and this was the initial reason for criminalisation. However, it has been shown that this does not appear sufficient to continue the criminalisation of prostitution. It can be argued that the people involved in prostitution are generally consenting adults; therefore perhaps brothel keeping should not be criminalised. An issue can be raised that although consenting the adults may still be harmed. The situation could be coercive and the females could face the harm of commodification. This is why decriminalisation would be effective as police controls could ensure that prostitution is only occurring between adults who are truly consenting. The question remains why has prostitution been criminalised?

The law itself may be one of the main reasons that prostitutes are considered immoral and undesirable to society as the prostitute is described as a "pariah – a legal leper who

³⁴ Clarkson & Keating are talking with regard to homosexuality, however, the same principles apply to brothel keeping.

³⁵ Clarkson & Keating, above n12, p.93

³⁶ Assignment Programme on TVNZ, Channel One., *Sex Charades*. 25th July 1996.

infects all she meets.”³⁷ This relates to the circular notion of the criminal law, that the only reason prostitutes are deemed criminal is because this is what the law says. The law itself makes prostitutes immoral as the law causes problems for anyone associated with prostitutes. This demonstrates that the current law may not have a true basis for criminalisation.

Problem with the 'One Person' Provision

Detective Inspector, Rob Pope, identifies the true reason for criminalisation. He questions, “what is it that stigmatises and stereotypes a prostitute as opposed to a car salesman or an accountant? The motivation is the same. The others just have more socially acceptable labels.”³⁸ Detective Inspector Pope’s query is significant, as he has identified the true reason why prostitution is criminalised, that is the fact that prostitution has been labelled by society as adverse. Detective Inspector Pope is saying that there is little difference between prostitution and other professions as they are all motivated by money, therefore why should prostitution continue to be criminalised. This is particularly relevant when we consider he demonstrated that the public’s views towards prostitution are changing. It is time therefore that the law changed with them.

The basis for criminalisation of brothel keeping has been shown to be weak. Public perception is changing and hence the criminalisation of brothel keeping for moral reasons has little weight. The identifiable harms all have viable alternative options to be further examined in Part VI. The issues with continued criminalisation of s147 are compounded by the practical problems demonstrated through the cases.

³⁷Duncan, above n29, p.734

III CASE ANALYSIS OF s147

The practical problems and anomalies with s147 are numerous and can be identified through case analysis.

A Problems with the 'One Person' Provision

The reason for the one person provision in ss (2) of s147 is due to the case of *Strath v Foxton*.³⁹ This case caused the changes to the 1961 legislation so that a brothel can constitute just one person in a house. This was done in order to catch landlords in this particular scenario. This to me seems absurd, as the purpose of s147 is to try to stop large scale pimping and prostitutes being exploited. However, this particular part of the legislation ensures prostitutes remain on the streets as they cannot return home because "prostitutes working from home violate this [s147] law."⁴⁰ This provision ensures that prostitutes "will have difficulty in securing and retaining accommodation."⁴¹ As the oldest profession prostitution is not going to stop and instead prostitutes should be protected not forced onto the streets.

B Loopholes allowing pimps to avoid criminalisation

The second problem identified with s147 is the fact it has a loophole allowing pimps to avoid criminalisation. This causes the law to be arbitrary and ineffective. The case of *R v Gray*⁴² demonstrates this loophole. The Court of Appeal decision was an appeal by Kenneth Raymond Gray from a jury conviction of keeping a brothel. Mr Gray advertised in a newspaper for female escorts. Three women replied, two of them under-cover police

³⁸ Ansley, above n10, p.20

³⁹ *Strath v Foxton* [1955] 3 All ER 398. This was the case which forced changes to the 1961 legislation. In this case the lessor let the first and second floors and the third floor respectively to two women who she knew to be prostitutes. She was charged with letting the premises with the knowledge that they were to be used as brothel. The magistrate found however that there were separate letting of the two flats and no common user. Hence the lessor was not found guilty of the charge against her as the premises did not constitute a brothel since premises used by only one woman could not be regarded as a brothel.

⁴⁰ Ministry of Women's Affairs., *Prostitution: A Background Paper*. Published May 1991, p.4

⁴¹ Duncan, above n29, p.740

⁴² *R v Gray* [1984] 2 NZLR 410

officers. They were all invited to an interview at 487 Papanui Road. At the interview Mr Gray told the women that they would be required to go to hotels as escorts and that this would include providing sexual intercourse. Mr Gray said he would receive phone calls at the Papanui Road residence from interested males. He would then phone the women and arrange for them to meet the males at their hotels as escorts. On the night the police intervened Mr Gray had arranged for the women to go to a Christchurch hotel to perform escort services. Mr Gray appealed from the conviction of brothel-keeping, the issue at the appeal being whether the word 'used' in s147(1) should be limited in its application to "the place where the women engage in acts of intercourse for sexual gratification"⁴³ or whether its application should be extended to include "any place where arrangements are made by telephone for that kind of activity to take place elsewhere."⁴⁴ Mr Gray won on appeal as Justice McMullin held:⁴⁵

that the keeping of premises to which men and women do not resort for the purposes of sexual intercourse or other sexual activity, but at which arrangements are merely made by telephone for them to have that activity at other places ... does not constitute brothel-keeping for the purposes of s147(1)(a) of the Crimes Act.

This case demonstrates how ambiguities in the law can make the law ineffective. S147 supposedly wants to capture people like Mr Gray as he is effectively running a brothel. Mr Gray, however, was able to evade the law under the loophole that the prostitution did not actually taking place on the premises where the escorts were arranged. The existence of such ambiguities renders s 147 ineffective, as it does not apprehend the very people it is intended to catch. There is an alternative sanction, s148, which generally captures "pimps". This section states, "it is illegal for anyone to live wholly or part on the earnings of a prostitute"⁴⁶. Under the normal scenario defendants will be charged under both s147 and s148(b) as occurred in the *Corporate Affairs* case. Mr Gray, however, was only charged with s147, and as this failed he did not receive penalty for his actions.

⁴³ *R v Gray*, above n42, p.412

⁴⁴ *R v Gray*, above n42, p.412

⁴⁵ *R v Gray*, above n42, p.413 per McMullin

⁴⁶ s148(a) of the Crimes Act 1961

The action of living off the earnings of a prostitute, while available, is not the answer to the failing of s147. S147 has a large loophole demonstrated in *R v Gray* and the *Police v Hyde*⁴⁷ cases, and it is this loophole that presently needs fixing. However in reforming the law, Parliament should not just fix the ambiguities in order for more ambiguities to appear. Parliament should actually attempt to improve the situation for prostitutes and provide protection for them. The law is currently capturing the prostitutes, but allowing the “pimps” who arrange the prostitution to avoid legal sanctions. It is the pimps we want to catch and not the exploited woman.

C Punishment of safe brothels

Another definitive problem under s147 derives from the fact some brothels actually protect prostitutes. These are the safer option as they provide protection rather than pushing the industry under ground and prostitutes onto the streets. *Hastie v Police*⁴⁸ demonstrates this type of safe, protective brothel. The mitigating features in the case illustrated that the brothel was of a safe and acceptable standard. The judge said that “if the women are adult and are freely entering into the activity, that can be a mitigating factor.”⁴⁹ This shows that even the judge himself does not see much wrong with brothels that are run in a safe way. However, in Tompkins’s capacity as a judge he could not help the brothel keepers, as he must apply the current law and not his own opinions. Justice Tompkins stated:⁵⁰

⁴⁷ *Police v Hyde* [1996] DCR 856. This case further demonstrates the loophole difficulties with s147. The case has very similar facts to *R v Gray*. The defendant arranged for escorts via telephone on the Club 88 premises. However the police officer was met by his escort at the Park Tower Hotel and not at Club 88. In applying *R v Gray* the court held that “the term brothel does not extend to include any place where arrangements are made for sexual services to be had elsewhere.” This meant that Mr Hyde was not charged for the Park Towers exchange, although he would have been taking a cut of the profits. In this particular case Mr Hyde was however convicted for brothel keeping due to prostitution occurring on the actual Club 88 premises. This shows just how arbitrary the law is that the fact Mr Hyde managed the Club 88 premises but did not manage the Park Towers premise is the sort of distinction between receiving criminal charges or not receiving criminal charges. The loophole in the law has created a very artificial and unnatural distinction in the law and this needs to be fixed.

⁴⁸ *Hastie v Police*, above n6

⁴⁹ *Hastie v Police*, above n6, p.4 per Tompkins J

⁵⁰ *Hastie v Police*, above n6, p.4 per Tompkins J

If the view of the community is that brothel keeping or allied activities should not be an offence, so that in effect prostitution is legalised, that is for parliament to address. It is not for the court to condone a form of de-facto decriminalisation.

In this particular brothel “the prostitutes were all adult. There was no suggestion of young women being involved ... nor is there any suggestion that the women were coerced into these activities.”⁵¹ The brothel administration was supported by the Prostitutes Collective (“a body funded by the Public Health Commission to prevent the transmission of HIV and Aids into the sex industry.”⁵²) A letter from the National Coordinator of the Collective spoke very highly of Mr Hastie and his cooperation with their objectives. She said “in demonstrating his support for the Collective's education programme, he had become a role model for other massage parlour operators.”⁵³ It seems inappropriate to penalise the type of brothel described here. Particularly as it was stated that “the appellant in no way pushes women towards sex work and provides a variety of alternative legal ways in which women could earn a living.”⁵⁴ Instead of punishing such brothels, we should be in support of them as they are effective in avoiding the harm of commodification.⁵⁵ Mr Hastie ran a safe environment for prostitutes and by decriminalising the law we could ensure all brothels were run in a similar fashion. This shows that s147 has a broad ban policy to remove all brothels and does not take into account the type of safe brothel run in this case. A reform option needs to be implicated so as to provide prostitutes with a safe environment rather than pushing them onto the streets.

The *Hastie v Police* brothel is the sort of environment that the Liberal Feminists would support for reform. As the liberal feminists see “the individual primarily as a rational and autonomous agent who is equal to others and whose freedom must not be interfered with arbitrarily by the state.”⁵⁶ They would believe that as the brothel was a safe and non-

⁵¹ *Hastie v Police*, above n6, p.4 per Tompkins J

⁵² *Hastie v Police*, above n6, p.4

⁵³ *Hastie v Police*, above n6, p.5

⁵⁴ *Hastie v Police*, above n6, p.5 per Tompkins J

⁵⁵ See Part II, section C, number 3, for a more detailed analysis.

⁵⁶ Davies, Margaret., *asking the law question*. Published by Sweet & Maxwell and The Law Book Company Limited, (1994), Chapter 6, p.179

coercive environment the prostitutes would be entitled to make their own autonomous decisions about their own livelihoods and remain in the brothel if they wanted to. The liberal feminists would support reforming the law⁵⁷ relating to s147, as they believe that “decriminalizing and legitimizing prostitution promotes autonomy”⁵⁸. The long-term goal of society may be to remove prostitution and ultimately remove exploitation. However, this will take time. Reform is a better short-term solution rather than continuing with the current law.

Short term reforms to promote brothels similar to the *Hastie v Police* situation would ensure safe and protective brothels that provide for the well-being of prostitutes. These reform options would hopefully ensure that via regulation only safe brothels existed and brothels such as the ones depicted in the case of *R v Ngugen*⁵⁹ would be removed. Evidence was taken from one of the Thai prostitutes⁶⁰ in the *R v Ngugen* case. In summary the type of circumstances were described by the judge as that of “economic exploitation and oppression”⁶¹ of the Thai women. He stated that “certainly women employees who cannot speak English and who are without a passport, air ticket or money are at a considerable disadvantage. To use these circumstances to obtain their labour is oppressive.”⁶² *R v Ngugen* was a case of coercion and is the type of situation that s147 is trying to avoid. The facts stand in support of law reform as these women were put in positions of exploitation, but they had no legal recourse. S147 is supposed to stop

⁵⁷ Some legalised brothels do not offer the autonomy and freedom spoken of by the Liberal Feminists, for a fuller discussion of the problems of legalisation see Part IV, section B.

⁵⁸ Freeman, Jody., *The Feminist Debate Over Prostitution Reform: Prostitute's Rights Groups, Radical Feminists, and the (Im)possibility of Consent*. Berkeley Women's Law Journal, pp 91

⁵⁹ *R v Ngugen* 28/9/95 CA 313-95, CA 284-95

⁶⁰ *R v Ngugen*, above n59, pp.2-3 The evidence given by the Thai Prostitute was as follows:

“(1)Her passport and air tickets had been taken;

(2)She was told of serious problems for the appellant and the other Thai women and herself if the police located her and the others;

(3)She was required to run from the massage parlour premises to a van with tinted windows in which she was driven to accommodation owned by the appellant;

(4)She was required to pay rent for this accommodation;

(5)She was not able to retain for herself the fees, as opposed to tips, paid for the massage parlour room and her services;

(6)She was required to work seven days a week;

(7)She was not able to speak English and was not familiar with New Zealand; and

(8)She was required to run and conceal herself in well prepared hiding places if the police arrived.”

⁶¹ *R v Ngugen*, above n59, p.2 per Williamson J

⁶² *R v Ngugen*, above n59, p.3 per Williamson J

exploitation, but this is not working as the exploited women are taught to be “frightened of the police.”⁶³ If s147 was reformed we could have a free and open market, which would be subject to regulations. The prostitutes would then be protected through this regulation. This type of reform outcome would be achieved through decriminalisation, which will be examined in Part IV. Co-operatives like the Prostitutes Collective could ensure that exploitation was not occurring and that the brothel is up to the standard of the *Hastie v Police* brothel.

D Arbitrary Police Discretion

Another key issue is the arbitrary application of s147 by the police. While s147 is meant to prohibit all brothel keepers, the police appear to have their own standard of illegality, that when brothels are successful they become illegal. This factor is strong persuasion for law reform of s147 as arbitrary application of a law is a cause for concern. The case that leads us to believe that successful brothels will fall foul of the law more often than other brothels is *Corporate Affairs*. This case concerns a couple Karen Glasgow and Edward Truby who ran a successful brothel industry under the name ‘Corporate Affairs’. The couple were prosecuted for brothel keeping, but “what made their prosecution remarkable was the fact that they were unofficially but effectively licensed by the police to do it.”⁶⁴ This was because “before escort services are given advertising authorisation, they have to give their name and address, have their premises inspected, and supply the correct name, working name, age and address of the women working for them.”⁶⁵ If an escort service complies with the criteria, then the police will leave them alone, although they are breaching s147. The only situation in which police would intervene is where there is exploitation of the prostitutes. This had been the understanding between Corporate Affairs and the police, however, “Glasgow and Truby were singled out for punishment because they were successful. No one suggested they were exploiting their loyal, hardworking staff.”⁶⁶ This seems inappropriate as Corporate Affairs “were discreet,

⁶³ *R v Ngugen*, above n59, p.2 per Williamson J

⁶⁴ Hayden, Frank, above n9

⁶⁵ Plunket, Pat, above n8

⁶⁶ Hayden, above n9

outwardly 'respectable' and caused no scandals"⁶⁷, but they paid the penalty for their success. This injustice seems compounded when we consider that in the Wellington region other brothels are presently operating, however, "the police are not prosecuting because they aren't all that successful"⁶⁸

This case illustrates the need for law reform, particularly when we consider that the Prostitutes Collective found Corporate Affairs to be one of the "most professional operators in the business."⁶⁹ Support for law reform is increased as the police are using their discretion over the application of the laws erroneously. S147 is meant to stop exploitation, however the police appear to only be using it to stop success. This case provides strong opposition to Packers first criteria for criminalising the law as the public no longer seems to require the criminalisation of brothel keeping.⁷⁰ The public's reaction to the case was to call for the legalisation of the prostitution laws. As previously stated, the judge himself was lenient in his sentencing as "he was awake to the substantial shift in public tolerance of prostitution."⁷¹ Hayden himself says, "prostitution isn't called the oldest profession for nothing, so we should accept it as part of a normal community."⁷² Hayden believes we should put an end to hypocrisy, and admit that the business has general community approval.⁷³ This illustrates even the community at large seems to agree with the call for law reform.

E Further Basis for s147 Reform

In addition to the practical problems illustrated by the cases there are more general problems with s147 and the prostitution laws. These problems provide weight to the arguments for reform.

⁶⁷ Hayden, above n9

⁶⁸ Hayden, above n9

⁶⁹ Plunket, above n8

⁷⁰ See Part II, section B, number 1, for a detailed analysis of Packers Criteria One in relation to community attitudes.

⁷¹ Hayden, above n9

⁷² Hayden, above n9

⁷³ Hayden, above n9

Prostitution is described as the "oldest profession"⁷⁴ and "the sex industry is an important part of our society ... the numbers of men using its services is, quite simply, huge."⁷⁵ Jan Jordan states that "given the fact that men's demand for prostitution services has not abated through the ages, the historic response has been to continue to seek its regulation and control rather than its eradication."⁷⁶ This indicates that the prostitution industry is not going to disappear and if it continues along current lines it will remain a hidden industry with many general problems.

1 *Lack of Harm or Victim*

The fact there is no real harm, direct or indirect, occurring in brothels is an identifiable problem. The people asking for sex and providing sex are consenting adults. This is a strong argument for reform as if the prostitution is involving two consenting adults, "why use the law to harass and victimise the women?"⁷⁷ This is an important question. The liberal perspective is that there really is no victim or harm occurring to the prostitute as she is an autonomous person and therefore perhaps the law is redundant.

2 *Waste of Police time*

Wasting police time is a further argument for reform. This was identified in Part II of the paper as a counterargument to Packer's fourth criteria. This argument was further illustrated in the cases, as in *R v Gray* the two women officers went under cover to capture a defendant who escaped via a loophole anyway. Then in *Police v Hyde* the officers have to put themselves in very compromising, uncomfortable situations in order to capture prostitutes in the act of soliciting. The argument for reform is that police have more important issues they should be devoting their limited time to.

⁷⁴ Jordan, above n1, p.205

⁷⁵ Healy, Catherine., *Prostitution: The Case for Law Reform*, (pp 211-214). In 1993 New Zealand Suffrage Centennial: Women's Law Conference Papers, Elizabeth McDonald (Ed), Produced by Conference Publishing, a division of Charisma Group Limited, (1993), p.211

⁷⁶ Jordan, above n1, p.206

⁷⁷ Jordan, above n1, p.208

3 *Stigmatisation created by the Law*

The current prostitution laws stigmatise sex workers. The problem is that once a prostitute has been branded a prostitute, her life becomes difficult as “convictions for soliciting can hinder women in applying for other jobs, mortgages, child custody or travel visas, limiting their abilities to move into other occupations or businesses.”⁷⁸ A prostitution conviction currently remains with a woman and in a sense “the law chastises her for being a prostitute while at the same time effectively locking her into that identity for life.”⁷⁹ The stigma can impact on a woman’s self-esteem and engender a belief that she can achieve no better from her life. This lack of self-esteem may also “affect her ability to make consistently healthy choices and to resist pressure from clients to engage in unsafe sex.”⁸⁰ This illustrates how the impact of stigma created by the current law can effectively ruin a prostitute’s life and provides a strong reason for reforming the law.

4 *Academic support for reform*

Support for my justifications for prostitution law reform, can be illustrated through the writings of prostitution theorists. Catherine Healey who is Co-coordinator of the Prostitutes Collective says:⁸¹

this is a law written by men, for men. It is a law, which is designed to stigmatise the sex worker, to make her into a criminal. It is a law, which is, in fact designed to lower the self-esteem of sex workers, while leaving sex clients feeling quite OK. Well, any law which lowers the self-esteem of sex workers is dangerous to the whole community. It makes it harder to ensure safe sex practices, and it is therefore a dangerous law.

⁷⁸ Ministry of Women’s Affairs, above n40, p.4

⁷⁹ Jordan, above n1, p.208

⁸⁰ Jordan, above n1, p.208

⁸¹ Healey, above n75, p.213

Jan Jordan, a strong advocate of decriminalisation, also has issues with the current law. She says there are:⁸²

Thousands of dollars spent on police raids and operations; convictions for some sex workers which severely limit their future options and life chances; a climate of fear which diminishes the self-esteem of all workers and works against the promotion of safe sex education and practices.

The general reasons for not criminalising s147, and the practical problems with s147 that are illustrated through case law, provide immense weight behind the argument that s147 (brothel-keeping) should be reformed. The question is which option for reform is the most viable.

A. Suppression

"Suppression involves the legal prohibition of prostitution."⁸³ This is not a desired reform option as discussed above, as "criminalising prostitution marginalises prostitutes and leads to their exploitation by pimps and clients."⁸⁴ Therefore there are only two main options for reform.

B. Legislation

Under a system of legislation prostitution is allowed, but with "full government control."⁸⁵ This would make brothel keeping legal but only under certain conditions. "The state would be left the duty to regulate and control these conditions."⁸⁶ The state would be in charge of determining requirements such as where prostitutes are allowed to work, or when they would have health checks. "Typically this would involve establishing a system of licensed workers in licensed establishments, with the state effectively serving and responding in the role of the pimp."⁸⁷ The advantage of such a system is that

⁸³ Ministry of Women's Affairs, above n1, p. 2
⁸⁴ Ministry of Women's Affairs, above n1, p. 2
⁸⁵ Ministry of Women's Affairs, above n1, p. 2
⁸⁶ Ministry of Women's Affairs, above n1, p. 2

⁸² Jordan, above n1, p.209

IV LAW REFORM OPTIONS

The most viable reform option should achieve the following criteria, that prostitution.⁸³

Is healthy and safe, minimises potential for exploitation, violence and harassment, does not encourage them to work underground or outside the law, maximises opportunities to move into other occupations, discourages any involvement of organised crime.

The options for law reform need to be considered with these criteria in mind. The Ministry of Women's Affairs provides four options for reforms.

A Suppression

"Suppression involves the legal prohibition of prostitution."⁸⁴ This is not a desired reform option as discovered above, as "criminalising prostitution marginalises prostitutes and leads to their exploitation by pimps and clients."⁸⁵ Therefore there are only two main options for law reform.

B Legalisation

Under a system of legalisation prostitution is allowed, but with "full government control."⁸⁶ This would make brothel keeping legal but only under certain conditions. "The onus would be on the state to regulate and control these conditions."⁸⁷ The state would be in charge of determining requirements such as where prostitutes are allowed to work, or when they would have health checks. "Typically this would involve establishing a system of licensed workers in licensed establishments, with the state effectively serving, and benefiting, in the role of the pimp."⁸⁸ The advantage of such a system is that

⁸³ Ministry of Women's Affairs, above n40, p.8

⁸⁴ Ministry of Women's Affairs, above n40, p.8

⁸⁵ Ministry of Women's Affairs, above n40, p.8

⁸⁶ Ministry of Women's Affairs, above n40, p.8

⁸⁷ Bridgeman & Millns, above n26, p.747

⁸⁸ Jordan, above n1, p.208

“it effects a move away from the negative and punitive criminalisation of the activities of prostitutes.”⁸⁹

The detriments of legalisation, however, outweigh the benefits. The best illustration of problems with legalisation are identifiable in Victoria, Australia. In Victoria, moves to legalise prostitution did not help prostitutes, but instead resulted in a two-tiered sex industry. One tier of women, who were employed in the state-sanctioned brothels, often felt “that they worked in virtual slave-like conditions for the privilege of being ‘state approved.’”⁹⁰ The second tier of women who could not obtain positions in the licensed brothels, “worked instead in the illicit underground sex industry where their insecure status rendered them vulnerable to exploitation, harassment and organised crime.”⁹¹ Other real life examples of legalisation also demonstrate the problems. In both West Germany and Nevada, “legalised brothels have increased police powers and institutionalised pimping by the state, making it harder for women to keep their earnings or to bargain to determine their working conditions.”⁹²

The disadvantages of legalisation are that “it may simply enable the State to exercise greater control over the lives of prostitutes.”⁹³ A legalised brothel system in effect tries to stamp out prostitution everywhere except in the brothel. The problem is that it gives “the proprietor enormous power, through the threat of kicking a worker out.”⁹⁴ This does not fit within the Ministry of Women’s Affairs’ requirements to minimise the potential of exploitation, violence and harassment. The potential for these criteria to occur is increased, as the licensed women are unable to complain in fear of their license being revoked. Prostitutes under legalisation can be “subjected to mandatory health checks; they may have to pay large commissions to their employer; and they may be forced to engage in unwanted practices to retain their jobs.”⁹⁵ Legalisation also encourages the unlicensed and therefore illegal women to work underground. The prostitutes under a

⁸⁹ Bridgeman & Millns, above n26, p.747

⁹⁰ Jordan, above n1, p.209

⁹¹ Jordan, above n1, p.209

⁹² Nina Lopez – Jones., *Legalising Brothels*. New Law Journal volume 142 (May 1 1992) p.594

⁹³ Bridgeman & Millns, above n26, p.747

⁹⁴ Healey, above n75, p.213

legalised system are in a similar situation to criminalisation. Legalisation does not fulfill the Ministry of Women's Affairs' reform criteria therefore it is not the answer.

C *Complete Decriminalisation*

Under complete decriminalisation all laws relating to prostitution would be removed but there would be no government regulation in its place. This is not a desirable method of reform as it "would leave it open to some of the worst aspects of prostitution – some protection is needed over women, especially very young women, being forced into prostitution."⁹⁶ We need some controls or else indirect harms such as modelling could not be restricted by police regulation.

D *Decriminalisation with Controls*

The final option for reform is a system of decriminalisation with controls. Decriminalisation by itself is the repealing of the existing laws and penalties whereas decriminalisation with controls is when "prostitution is then subject to the same kinds of controls and regulations which govern the operation of other businesses."⁹⁷ This may appear similar to legalisation as both have controls over prostitutes. However, the two options have clear delineation in the type of control used.

1 *Decriminalisation controls superior to legalisation controls*

Under legalisation prostitutes are not free from prostitution law sanctions. They have limited legal status which only applies when they are working in a state approved brothel. Brothels are a finite resource and more prostitutes require protection than the number of available brothels. This causes, as mentioned previously, the two-tiered system where prostitutes either have the option of limited legalisation or they are forced underground.

⁹⁵ Jordan, above n1, p.209

⁹⁶ Ministry of Women's Affairs, above n40, p.9

The legalised system offers very little control to prostitutes but instead control remains with the state.

Under decriminalisation the control over prostitutes is effectively removed offering prostitutes virtual freedom. The controls that remain are not in relation to prostitution as acts relating to prostitution would no longer be criminalised. Instead the types of controls over prostitutes would be similar to commercial controls over any business. These would be fair-trading legislation, limitations on ages of prostitutes, and designated areas where brothels could operate. An example of a business with similar controls is liquor licensing, where a liquor store has limited sale times, a restriction on age of purchasers, and a restriction on age of employees. Prostitutes would be free to decide their own options within the parameters of business. While this may inevitably create underground markets, such as a market in young girls, this would be easier to control through decriminalisation because it would create an open market for the prostitution industry. This would allow police to focus their resources on preventing young girls from becoming prostitutes instead of trying to police the whole industry. This would be similar to the situation that currently occurs with underage drinking. The above arguments demonstrate that the controls between decriminalisation and legalisation differ greatly.

2 *In support of decriminalisation*

Decriminalisation as a reform option has been trialed in New South Wales, Australia, with a successful outcome. The safeguards used in NSW were measures "such as restricting underage prostitution, limiting advertising and the location of premises, and so forth."⁹⁸ Decriminalisation with controls seems to be the best reform option as it is a compromise position which attempts to address major problems for sex workers while taking account of public concerns. It does not condone prostitution, but it does "help minimise the labelling, stigma and low self-esteem which work to keep women in the

⁹⁷ Pickles, Carolyn (1992). In Jordan, Jan., *Prostitution: The Case for Law Reform*, (pp 205-210). In 1993 New Zealand Suffrage Centennial: Women's Law Conference Papers, Elizabeth McDonald (Ed), Produced by Conference Publishing, a division of Charisma Group Limited, (1993) p.209

⁹⁸ Jordan, above n1, p.209

industry.”⁹⁹ These are all significant advantages for the current sex worker. Decriminalisation will also “empower women to be able to work openly and in a way which enhances their own control of their work environment, and in a manner conducive to the greater application of safe sex practices.”¹⁰⁰ There is support for decriminalisation among criminologists. Jan Jordan, Victoria University criminologist, states, “my own preference is for the laws on prostitution to be decriminalised.”¹⁰¹ Marcia Neave, Australian criminologist, “has recommended in a report that a decriminalised industry safeguards against coercion and pimping.”¹⁰²

3 *Decriminalisation creates an open industry - promoting health*

Decriminalisation with controls would create an open industry. This fits within the criteria required by the Ministry of Women’s Affairs, as it would stop the prostitution industry from being pushed underground. This is important as an underground sex industry makes it difficult to protect and educate prostitutes. “The World Health Organisation recognises the importance of protecting and promoting the rights of prostitutes in order to limit the spread of AIDS.”¹⁰³ In order for the World Health Organisation to be able to do this effectively the prostitution industry needs to be brought out from the underground, which would occur through decriminalisation. Jordan agrees that the current laws and enforcement practices work against the interests of disease prevention as the industry is currently hidden. This means the “sex workers living under the threat of arrest may find it hard to disclose their choice of occupation to doctors and other health professionals.”¹⁰⁴ If brothels and prostitution were decriminalised then it would become easier for prostitutes to admit their choice of occupation. This is because hopefully moral stigma towards prostitutes would be removed and if the brothels became open places then health checks could be monitored. By bringing the current underground

⁹⁹ Ministry of Women’s Affairs, above n40, p.9

¹⁰⁰ Jordan, above n1, p.209

¹⁰¹ Jordan, above n1, p.209

¹⁰² Tonight Programme on TVNZ, Channel One., *Prostitutes*. 2nd March 1992.

¹⁰³ Ministry of Women’s Affairs, above n40, p.6

¹⁰⁴ Jordan, above n1, p.208

industry out into the open decriminalisation would ensure a much healthier profession, which further fulfills the Ministry of Women's Affairs' criteria.

4 *Decriminalisation minimises potential for exploitation, violence and harassment.*

The current structure of the prostitution industry means that exploitation of prostitutes occurs quite regularly against the Ministry of Women's Affairs' criteria, for example the Thai prostitutes in the *R v Ngugen* case. As the industry is underground brothel keepers can exploit and oppress their 'escorts', as the women cannot turn to the police because their behaviour is illegal. This enables the exploitation by brothel keepers to continue without legal sanctions. Legalisation would not fix this problem because, as previously discussed, legalised brothels give power to brothel keepers and the prostitutes in the brothels must comply with orders to maintain their legality. Under decriminalisation, however, the prostitution industry would become an open economy allowing the protection of prostitutes from exploitation, harassment and violence. The industry would be closely regulated, and the prostitutes would be able to turn to police without fear of reprove. This fits within the criteria required for effective reform by the Ministry of Women's Affairs by providing a much safer environment.

5 *Decriminalisation would promote safety standards*

Decriminalisation would attempt to remove brothels such as *R v Ngugen* through a requirement that all brothels would have to conform to high standards. The model chosen under the option of decriminalisation could be to ensure brothels conformed to the standard of the Prostitutes Collective. This standard would be acceptable under the Ministry of Women's Affairs' criteria as the Prostitutes Collective support safe and protective brothels, an example of which is the *Hastie v Police* brothel.¹⁰⁵ That brothel was described by the Prostitutes Collective as "completely non-coercive and thoroughly supportive of safe sex education."¹⁰⁶ This protective environment would be supported by the Prostitutes Collective as it is a better situation than pushing prostitutes onto the

¹⁰⁵ See Part III, section C for a more detailed analysis.

streets. Decriminalisation would encourage a safe environment and hence should be advocated.

6 *Support from feminist theorists*

Decriminalisation has been demonstrated to be the most viable reform option. It is further advocated as the best option by the two main strands of feminist groups, the liberal feminists and the radical feminists. Liberal feminists see "the individual primarily as a rational and autonomous agent who is equal to others and whose freedom must not be interfered with arbitrarily by the state."¹⁰⁷ In contrast Radical Feminism, which is epitomised by Catharine MacKinnon, believe a "women's role is determined by her socially constructed gender, which ensures her inequality and subordination in relation to law and society which is characterised by male dominance."¹⁰⁸

Liberal and radical feminists should support decriminalisation as the only acceptable short-term option. Although both have very different long-term aspirations for prostitutes, as both feminist groups see prostitutes very differently. Liberal feminists see "sex-trade workers as respectable women doing dignified work."¹⁰⁹ In contrast radical feminists "assume that prostitutes are victims of coercion in a society that services men by objectifying and subordinating women."¹¹⁰ Both groups have very different views on the appropriateness of prostitution but both want to change or improve the present situation.

Liberals may believe:¹¹¹

Rather than extinguish autonomy, prostitution enables it to flourish. Prostitutes may surrender themselves to the desires of others, but only for discrete periods and ideally under conditions they control. They can withdraw their services at their discretion. Their autonomy is never irretrievable.

¹⁰⁶ *Hastie v Police*, above n6, p.5

¹⁰⁷ Davies, above n56, p.179

¹⁰⁸ Barnett, Hilaire., *Introduction to Feminist Jurisprudence*. Cavendish Publishing, London, (1998), Chapter One, p.18

¹⁰⁹ Freeman, above n58 p.75

¹¹⁰ Freeman, above n58, p.75

Liberals support decriminalisation, as it will protect prostitutes from losing their autonomy, as the act will then be legal. They argue “decriminalizing and legitimizing prostitution promotes autonomy.”¹¹²

Radical feminists, however, do not encourage prostitution, stating, “prostitution is not a harmless, ‘private’ transaction but a powerful means of creating, reinforcing, and perpetuating the objectification of women through sexuality.”¹¹³ Radical feminists ultimately want to remove prostitution from society. However, “only broad social and economic reforms, coupled with profound changes in our most deeply entrenched cultural norms, would eliminate the cause of prostitution.”¹¹⁴ Therefore as this is going to take time the best short-term option for Radicals is decriminalisation, as decriminalisation while it does not eliminate prostitution “undermines gender hierarchy.”¹¹⁵ Decriminalisation is therefore seen as the best short-term option by both radical and liberal feminists.

7 *Criticisms of Decriminalisation*

Decriminalisation as a reform option has many benefits, but detriments do exist and perceived problems need to be addressed. It is believed decriminalisation will increase the level of prostitution, as brothels will appear in private neighbourhoods and corrupt young females. This problem can be answered.¹¹⁶ Maurice Williamson, former Associate Minister of Health, said in response that “I don’t think there’s any example where soliciting has been decriminalised that the level of prostitution has gone up.”¹¹⁷ Jordan believes that the current “legal restraints do not as history attests limit the growth and proliferation of the industry – rather they enhance the vulnerability of the women who

¹¹¹ Freeman, above n58, p.91

¹¹² Freeman, above n58, p.91

¹¹³ Freeman, above n58, p.92

¹¹⁴ Freeman, above n58, p.76

¹¹⁵ Freeman, above n58, p.109

¹¹⁶ This fear was answered more in-depth under Part II, section C, number 2, where an examination of the harm of modeling was considered.

¹¹⁷ Assignment Programme, above n36

work within it.”¹¹⁸ The argument that decriminalisation will increase the levels of prostitution is redundant as the current criminalised system does not itself limit the levels. The reform of decriminalisation with controls will also remove the prostitute’s vulnerability under the current system. The areas that brothels can be set up could be limited to services areas so as that they are not appearing in the private sector and hence not influencing the innocent.

In conclusion decriminalisation with controls is the best reform option for s147, illustrated through the fact that most of the criteria provided by the Ministry of Women’s Affairs has been met. This reform option gives women “the legal power to insist on protection from both health services and the police.”¹¹⁹ It will also help to fix society as it “challenges the double standards of morality so prevalent in our society.”¹²⁰

V CONCLUSION

This essay analysed the problems of s147 of the Crimes Act. Part II of the essay looked at the basis for criminalisation of brothel keeping and whether this was justifiable. To determine this question immorality, harms and Packer’s criteria were considered as bases for criminalisation. All three arguments failed to justify continued criminalisation of the brothel keeping laws. The reasons for this were that prostitution is no longer deemed immoral by society. Society is changing its perception as seen through the *Corporate Affairs* case where Judge Unwin gave a more lenient sentence for brothel keeping in line with public attitudes. The changing attitude has been further demonstrated through the reaction to the disappearance of Lisa Blakie. The harms of brothel keeping were the modeling justification, categorical imperative justification and commodification. These harms were shown to be debatable. It was illustrated that reform options were the best way to counteract the harms as opposed to continued criminalisation. Packer’s extra criteria also failed. This is because brothel keeping is no longer socially threatening, nor is it dealt with through even-handed or nondiscriminatory law enforcement. Brothel

¹¹⁸ Jordan, above n1, p.209

¹¹⁹ Lopez-Jones, above n92, p.595

keeping also imposed severe qualitative and quantitative strains upon the police. The final consideration was whether there was an alternative option to criminalisation. This question was answered with the affirmation of decriminalisation as the preferred option. Part III of the essay considered the practical problems with s147 illustrated through the case law. These practical problems were loopholes allowing "pimps" to evade the law, difficulties with the one woman provision in terms of safety, arbitrary law enforcement and the punishment of protective and safe brothels forcing prostitutes onto the streets. This essay has established a strong need for law reform and Part IV of the paper examined the possible options. The two main reform options were legalisation and decriminalisation. Legalisation was not the preferred option as it creates a coercive and exploitative two-tiered sex industry, as evidenced in Victoria, Australia. Decriminalisation however fulfills the criteria provided by the Ministry of Women's Affairs as to what is required for an effective reform option. Decriminalisation of brothel keeping promotes a safer and healthier environment for prostitutes. This reform option would open up the sex industry, effectively removing any underground prostitute market. It would also eradicate the exploitation, violence and harassment of prostitutes, as prostitutes would have legal rights providing protection. Ideally "long term it may indeed be desirable to promote economic and social measures aimed at reducing the pressures on women to engage in prostitution."¹²¹ However, the best short-term solution is decriminalisation. In conclusion s147 on brothel keeping has definite flaws and needs to be reformed, the reform option that is the most beneficial and should be advocated is decriminalisation.

¹²⁰ Jordan, above n1, p.209

¹²¹ Jordan, above n1, p.209

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