THE BOUNDING OF VICE
Prostitution and Planning Law

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This article discusses recent amendments to Queensland legislation that seek to regulate prostitution through licensing, and by means of local government planning laws. There has been a change in the character of the regulation of prostitution from a direct, coercive, physical control exercised on the body of a prostitute through the auspices of the criminal law, to a more diffuse, regulatory control. Thus more recent 'moral' regulation of prostitution operates by reference to the control of the space in which the activity of prostitution takes place, and by reference to community public health and amenity standards embodied in planning laws. Regulation, in this regard, requires the disciplining and self-disciplining of the 'body' within the spatial and public health parameters defined by the bureaucratic state. Accordingly, prostitution has now been included within the legitimated, civic spaces of the Queensland state. But for many women who are sex workers, the putative liberty conferred by inclusion within these legitimated spaces is undercut by a net of disciplining that has the potential to undermine the autonomy of the legal subject.

Introduction

> The body now serves as an instrument or intermediary: if one intervenes upon it to imprison it, or to make it work, it is in order to deprive the individual of liberty that is regarded as a right and a property. The body, according to this penality, is caught up in a system of constraints and privations, obligations and prohibitions.[1]

The *Prostitution Act 1999* (Qld) came into force in Queensland on 1 July 2000. According to the Queensland Environmental Law Association: 'The new law seeks to strike a balance between providing a regulated environment for safe, controlled prostitution to function and maintaining the moral and social interests of the community.'[2] The aim of this article is to trace the transition which has occurred in the control of prostitution in Queensland, focusing on

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1 Foucault (1977), p 11.

2 The Queensland Environmental Law Association Seminar Series Flyer, 'The Prostitution Act', Brisbane, June 2000.

current initiatives that seek to regulate prostitution through licensing and by means of local government planning laws. This article seeks to establish that there has been a change in the character of the regulation of prostitution from a direct, coercive, physical control exercised on the body of a prostitute through the auspices of the criminal law, to a more diffuse regulatory control.[3] More recent regulation operates by reference to the control of the space in which the activity of prostitution takes place, and by reference to community public health and amenity standards. In effect, it requires the disciplining and self-disciplining of the 'body' within the spatial and public health parameters defined by the bureaucratic state.[4] In this transformation of regulatory control, the instrumental 'technology' of the law has shifted from an embodiment of the moral force of the sovereign state via a criminal law that meted out a public spectacle of punishment on the body of the corrupt wrongdoer, to a statutory framework that seeks to make safe: to contain the 'vice' by imposing on the body 'a system of constraints and privations, obligations and prohibitions'.

The Changing Nature of Regulation

The analysis of changes in the state regulation of prostitution in this article draws upon the genealogy of historical transformations in the nature and function of punishment and discipline advanced by Foucault. In *Discipline and Punish*, Foucault argues that there was a change from punishment incorporating physical spectacles of torture and immense suffering to appease a crime to an incarceration of the body that allowed the intervention of various disciplines upon the body to 'cure the soul'.[5] The rise of the modern institution of discipline, whether that institutional space be prison or hospital, can be traced back to broader changes in conceptions of the interrelation of the body, mind and illness.[6] The object of modern disciplinary systems in contexts such as the military, workforce and educational institutions is to render bodies 'docile and productive' through a mechanism of pervasive disciplinary power.[7] Central to Foucault's identification of these transformations was the rise of panopticism. Panopticism refers to the development of a regulatory technology for allocating bodies within spaces that allows an individual to survey, and thereby control, a multitude.[8] The transformation is summarised by Foucault in the following terms:

> On the whole therefore, one can speak of the formation of a disciplinary society in this movement that stretches from the enclosed disciplines, a sort of social quarantine, to an infinitely generalizable mechanism of

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3 See generally Hunt (1999).

4 The control of public contagion, such as sexually transmitted diseases, has long been one of the motivating forces for regulatory control of prostitution. See Allen (1990), p 249.

5 Foucault (1977), pp 10–12, 14–20.

6 Foucault (1977), pp 135–69.

7 Foucault (1977), pp 147–48.

8 Foucault (1977), pp 195–228.

> 'panopticism'. Not because the disciplinary modality of power has replaced all others but because it has infiltrated the others, sometimes undermining them, but serving as an intermediary between them linking them together, and above all making it possible to bring the effects of power to the most minute and distant elements.[9]

Moreover, the imposition of discipline and order often required enclosure: the specification of a place, different to others, and closed in upon itself.[10] Within such enclosed, differentiated space, an individual could be controlled. The individual body could be noted in terms of its presence and absence, its classification and its merits. Disciplinary movements of enclosure and containment also had their origins in the technologies employed by the fledgling medical and public health authorities in the attempt to contain contagion, such as the plague.[11] The subsequent development of panopticism allowed the apparatus of discipline to be projected beyond an enclosed institutional space. Panopticism operates by rendering the exercise of power and control a more subtle form of coercion.[12] It employs a minutiae of mechanisms that control how the body will function within space, imbuing the space itself with various coercive and productive functions.[13]

Today we are familiar with the emphasis in institutions such as prisons upon containment of the sinful body within a tightly controlled space. Containment is deemed necessary to prevent any potential to corrupt society. The simultaneous movement to enclose and contain is also a function of other modern, institutional spaces.[14] In the context of the present discussion, although prostitution is not operating within a formalised, enclosed institution, the regulatory state is playing a major role in shaping the confines of the space in which prostitution takes place. As underscored by the pronouncement by the Queensland Environmental Law Association, prostitution can now take place in a safe, controlled environment. A subtle, derivative form of panopticism has been instituted as a disciplinary device within the provisions of the *Prostitution Act* and associated planning legislation. The effect of this law is the inclusion of the bodily activity associated with prostitution within regulated, coercive spaces, while at the same time disciplining the body to ensure the potential vice of prostitution does not erupt to contaminate the wider community.

Feminism and the Regulation of Prostitution

Feminist thought has encompassed a variety of responses to the question of the regulation of prostitution. Responses have varied from denouncing the

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9 Foucault (1977), p 216.

10 Foucault (1977), p 141. See also pp 141–44 for an argument that the discipline requires enclosure.

11 Foucault (1977), pp 195–99.

12 Foucault (1977), p 209.

13 In a related context, see Minson (1993).

14 On this point of the coercive function of space, see generally Bracken (1991).

exploitation of women as social victims with no effective choice[15] to recognising the autonomy of women to undertake the relatively well-paid employment offered by prostitution.[16] Hunt identifies the complexities of feminist thought surrounding moral regulation and the dilemma posed for modern feminists in seeking to provide a reformist political platform, 'without playing into the hands of the New Right'.[17] Moreover, there are a raft of competing agendas associated with ideas of safety and control in relation to prostitution. The issue of safety is clearly raised again with respect to the Queensland legislation, with a range of possible, competing interpretations of what safety might mean in the application of the Act. Primarily the central question is for whom — prostitutes, clients or the wider society — is the environment being made safe and controlled.[18] These matters evoke the arguments that have been put forward by a number of feminist writers to the effect that, while the legal character of state regulation of prostitution has varied over time, its central function in delivering women's bodies for the use of, and enjoyment by, men has not radically altered.[19]

Judith Allen conducted an in-depth study of Australian women accused of serious crimes, including prostitution, from 1880.[20] Her study of the 'policing' of prostitution shows clear epochs in how women, and consequently prostitution, were viewed; these were reflected in the frequency and extent of criminal sanctions imposed at particular times in Australia since the late nineteenth century. Allen comments that:

> Throughout the twentieth century, the histories of prostitution and abortion have run a parallel course, prohibited and prevalent, secret and expensive, industrially regulated by policing and prosecution outcomes, professionalized and normalized ... The current move away from secrecy toward disclosure should not be read as any straightforward matter of liberalization, permissiveness or sexual enlightenment. In fact there have been indications to the contrary: that disclosure coincides with regulation and surveillance, with the imposition of norms. Women's bodies are at the centre of prostitution ... subject to the gaze, use or control of others who are predominately men.[21]

In her examination of current trends toward normalisation and disclosure in the regulation of prostitution, Allen makes explicit use of Foucault's conception of bodily control and surveillance. Indeed, she concludes her study of crimes involving Australian women with a discussion of the various means by which

15 For an overview, see Hunt (1999), p 205.

16 Perkins (1994).

17 Hunt (1999), p 220.

18 See eg Banach (1999).

19 See eg Pateman (1988).

20 Allen (1990).

21 Allen (1990), p 215.

Australian women since 1880 have sought control over their own bodies, and of those who, in turn, would control them.[22]

These views are echoed by Sullivan in her advocacy of the decriminalisation of prostitution. Sullivan notes that many liberal arguments about sexual freedom in recent Western culture are implicitly accompanied by a call for the instigation of 'new methods of (self-)surveillance and social control'.[23] Ultimately, Sullivan relies on a consequentialist argument for decriminalisation of prostitution in an attempt not to become embroiled in a 'log jam' of debate about the morality or immorality of prostitution.[24] Her arguments for decriminalisation involve two stages. The first is the repeal of the plethora of existing prostitution laws, which are largely based in criminal statutes. The second is the instigation of a limited range of new laws that largely rely on regulating aspects of prostitution activity through existing laws for the control of general problems, such as noise, public nuisance and public health. Sullivan is wary of allowing informal methods of regulation, implemented largely at the discretion of the police, to deal with 'problems' associated with prostitution.[25] These arguments appear to have been highly influential in developing the new regulatory technologies that are evident in the Queensland *Prostitution Act* and associated planning laws.[26] In this manner, there is a convergence between certain strands of feminist thought about prostitution[27] and the concept of bodily disciplining implemented through spatial regulation.[28]

Thus this article combines the insights offered by feminist analyses, such as those of Allen and Sullivan, with a genealogical understanding of the historical changes in bodily disciplining that have been operative in Western, regulatory states from the eighteenth century.[29] These analyses provide a framework of reference against which to examine the changing character of the regulatory technology deployed against the bodies of prostitutes in

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22 Allen (1990), p 255.

23 Sullivan (1995), p 25.

24 Sullivan (1995), p 25.

25 Sullivan (1995), pp 24–25.

26 For example, the limited decriminalisation of prostitution has been accompanied by the development of regulation through 'indirect' forms such as noise control that are implemented through planning laws.

27 There is a range of feminist thought about the issue of prostitution. Historically, when linked to the suffragette movement, there was a strong association with a sexual purity agenda in 'first phase' feminist thought that sought to abolish prostitution. See eg Hunt (1999), pp 122–33.

28 Prostitution has occupied a central place in feminist analyses of societal ordering, particularly in what has been termed second phase feminism. See eg Sullivan (1994), p 253.

29 Howe notes that it is important to temper the very masculinist view propounded by Foucault by reference to a range of feminist perspectives on the development of bodily disciplining. See generally Howe (1994).

Queensland.[30] In particular, the examination concentrates upon the regulatory technologies of law that directly control the space in which prostitution operates, and that thereby indirectly 'discipline' the body.

The *Prostitution Act 1999*

The extent to which regulatory instruments have moved from an explicit moral prohibition accompanied by criminal sanctions on prostitution is obvious from the objectives of the recently introduced Queensland *Prostitution Act*.[31] This Act legalises, but strictly regulates, prostitution in Queensland.[32] The Act allows small, licensed brothels[33] and individual sex workers; however, street soliciting continues to be illegal.[34] Indeed, there are increased penalties for street solicitation that are designed to 'remove this activity from suburban streets'.[35] The Act also makes broad changes to the definitions of 'sexual act', 'sexual intercourse' and 'prostitution'. The previous definitions were consistent with the narrow interpretation of bodily penetration that was previously a feature of the Queensland *Criminal Code*. The *Criminal Code* has now been amended to reflect the broad definitions in the *Prostitution Act*.[36] These expanded definitions potentially bring within the regulatory compass of the state a correspondingly wider range of bodily activities.

The Act institutes a system of licensing for brothel owners, with strict requirements regarding those persons who may obtain a licence for a brothel.[37] Applicants for a licence must be of good character, and possess the attributes of honesty, integrity, good business sense and sound financial backing. The bureaucratic procedure to allocate licences is overseen by a Prostitution Licensing Authority.[38] In addition, the Act implements a range of measures to ensure compliance with licence conditions.[39] The Authority has wide-ranging disciplinary powers which include the conduct of a disciplinary inquiry, and the powers to issue a reprimand or fine, add a condition or restriction to a licence, and vary, suspend or cancel a licence.[40] A similar range of screening

30 The Queensland laws that, in part, decriminalise prostitution follow a similar trend in other Australian jurisdictions. For example, Victoria introduced legislation to 'decriminalise' prostitution and to allow for legal brothels in the early 1980s. The Queensland legislation is similar in its objectives to Acts in other Australian jurisdictions but still more circumscribed in the scope of brothel operations and the locales in which the activities are allowed. For an overview of Australian jurisdictions, see Neave (1994), pp 67–99.

31 *Prostitution Act 1999* (Qld) s 3.

32 See Prostitution Bill 1999 (Qld), Explanatory Notes, p 1.

33 *Prostitution Act 1999* Part 6.

34 *Prostitution Act 1999* s 73.

35 Prostitution Bill 1999, Explanatory Notes, p 1.

36 See *Criminal Code Act 1899* (Qld) Ch 1, s 229E.

37 *Prostitution Act 1999* s 10.

38 *Prostitution Act 1999* ss 10–16.

39 For example, *Prostitution Act 1999* s 29(1).

40 *Prostitution Act 1999* ss 24–30.

controls and disciplinary powers is provided with regard to applications for certificates for approved managers for legal brothels.[41]

The ostensible objective sitting behind the strict licensing system is the government's concern to ensure that organised crime does not infiltrate the 'legal' prostitution industry.[42] Hence there are many checks on licence holders and persons with 'an interest' in a brothel.[43] Character checks are conducted in association with the police service.[44] The entire operation of the *Prostitution Act* is to be reviewed by the Criminal Justice Commission after three years.[45] A police power of entry into brothels and associated authorised police powers are contained within Part 3, Division 3 of the Act. Of particular note is the provision that a licence must be refused by the Prostitution Licensing Authority where it would result 'in the area becoming a red light district'.[46] This concern highlights the central paradox in the legislation. Prostitution, in its legitimated form, is to be concentrated into certain locales as a means of regulatory control. Yet the presence of such an enclave — a 'red light district' — is not to be made obvious to the wider community. In these seemingly conflicting aims, it is possible to discern the double movement perpetrated by the state to control 'wayward moral populations' by the disciplining of these bodies within a confined, internal space, and for much of that disciplining to be instigated at the direction of those agencies with a particular expertise.

Legal brothels are subject to a further series of regulatory controls outlined in Part 6 of the Act that impose a number of spatial compliance norms. For example, a licensee or manager must be personally present during opening times and the building in which the brothel operates must have no identifying street signage. Nor is there to be open advertisement of the prostitution services that are offered in the brothel.[47] An act of prostitution authorised under a licence is only permitted to take place in the premises for which a licence is issued.[48]

Such licence requirements, while they attach specifically to the person of the licensee or manager, have a wider compass in controlling the bodily activity associated with prostitution. In a sense, the licensee or manager becomes the embodiment of state surveillance, ensuring that prostitution only takes place within the confines of a 'safe controlled environment'. The state regulatory apparatus assumed by the licensee in controlling the bodily activity of prostitution is detailed, intimate and constricting. Its reach extends from the

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41 *Prostitution Act 1999* ss 34–38.

42 Prostitution Bill 1999, Explanatory Notes, p 6.

43 *Prostitution Act 1999* s 7 details at length the circumstances where it is deemed that a person has 'an interest in a brothel'.

44 *Prostitution Act 1999* s 13.

45 The need for oversight by the Criminal Justice Commission has its genesis in the Fitzgerald Inquiry into Police Corruption in Queensland 1987–88. This Inquiry revealed the links between prostitution, organised crime and police corruption.

46 *Prostitution Act 1999* s 16. See also Prostitution Bill 1999, Explanatory Notes, p 6.

47 *Prostitution Act 1999* s 93.

48 *Prostitution Act 1999* s 19(3).

intimacy of guaranteeing that no prostitution takes place without the constraint of a prophylactic device[49] to ensuring that prostitution is only available within a properly enclosed building.[50] The licensee is the intermediary of a regulatory technology that surveys the body at work, subjecting it to a series of public health criteria and community amenity standards.

This regulatory technology that focuses on enclosure of the body is in marked contrast to the illegal activity of street solicitation. The body of the street prostitute is not encompassed by the same 'system of constraints and privations, obligations and prohibitions'. However, this is not to discount the dangers that such putative 'freedoms' entail.[51] Historically, the street worker was at a greater risk of assault, and of contracting contagious diseases from clients, than the brothel worker.[52] In this context, the *Prostitution Act 1999* explicitly imposes public health standards upon the activity of prostitution by requiring periodic medical checks for sex workers, and creating offences where persons work as prostitutes when they know that they are suffering from a sexually transmissible disease.[53] The intricacy of the disciplining of the body within the parameters set by public health standards is clearly evident in a range of duties imposed on licensees by the *Prostitution Regulation 2000* (Qld). Section 13 of the Regulation provides that a licensee must ensure that each room in the brothel has enough lighting to enable prostitutes to check for clearly visible signs of sexually transmissible disease.[54] Such regulatory constraints, while offering protection for sex workers, simultaneously also seek to contain and enclose a social contagion.[55] Therefore, while the regulatory technology of the *Prostitution Act 1999* has become more invasive of the body,

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49 A licensee must take reasonable steps to ensure that a person does not provide or obtain prostitution involving sexual intercourse or oral sex unless a prophylactic is used. In addition, it is an offence to actively discourage the use of prophylactics. See *Prostitution Act 1999* s 91. A separate offence is created for the individual prostitute who fails to use a prophylactic in the provision of prostitution.

50 'A building means a fixed structure that is wholly or partly enclosed by walls and is roofed, and includes a floating building and any part of a building': see *Prostitution Act 1999* s 79.

51 Judith Allen argues that, historically, it was the most vulnerable of the women who worked as prostitutes who formed the bulk of the street prostitutes or 'freelancers'. In the late nineteenth and early twentieth century, this vulnerable group was largely composed of older women: Allen (1990), pp 24–25, 92–93. In the early twenty-first century, it is likely to be the very young prostitutes who are most at risk.

52 Allen also acknowledges that the movement 'indoors' for prostitution was attended by other negative consequences for women prostitutes as the activity became linked with organised crime: Allen (1990), p 96.

53 *Prostitution Act 1999* ss 89, 90.

54 *Prostitution Regulation 2000* (Qld) s 13(b).

55 Prostitution Bill 1999, Explanatory Notes, p 2; Allen (1990), p 249.

it can also be seen as concurrently ameliorating some of the more extreme health and bodily integrity risks associated with prostitution.[56]

Moreover, prostitution laws have long been aimed, in part at least, at the control of social contagion and transmissible diseases.[57] Allen mounts a compelling argument to the effect that fears concerning the rampant spread of venereal disease with the return of soldiers after World War I were influential in calls for a greater formalisation of the criminality of prostitution in the inter-war years.[58] Ironically in this period, despite the existence of legislation that viewed the activity of prostitution as more directly criminal in character, the level of policing of offences declined. The vacuum allowed organised crime to pervade this 'industry'. Moreover, the selective policing that targeted street solicitation assisted this process by moving prostitution off the streets and indoors to brothels. A brothel environment was also more conducive to prostitution becoming increasingly 'professional'.[59] In a similar vein, Jocelynne Scutt argues that one of the main outcomes of the reform of prostitution legislation in Victoria has been to enable more efficient regulation of the sex work industry by implementing a legislative system set up to 'recognise the economic components of prostitution'.[60] Central to this normalisation and equation with economic efficiency has been an associated focus on the health and productivity of the bodies regulated within that 'industrial' space.

In Queensland, this focus is exacerbated by the fact that the personal licence system for brothel owners operates in conjunction with controls exercised by the local government planning authorities over the space in which prostitution takes place. The surveillance by the state to tightly contain the bodily activity associated with prostitution therefore manifests not only in aspects of the licensing system, but also in laws controlling physical spaces. Interestingly, this model of regulatory technology that incorporates a personal licence system operating in conjunction with a broader development approval processes is also used to regulate environmental pollution.[61] Given these analogous treatments, it suggests that prostitution is now viewed by the regulatory state as a form of social or moral pollution. Pursuant to one version of this regulatory model, the potential for 'serious' environmental harm from industrial processes is licensed and regulated. This emphasis is perhaps not surprising given that much of the present environmental and planning laws had

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56 'While the personal safety risks associated with prostitution are difficult to quantify, it is clearly an industry in which people are at risk of physical violence. Sex workers have the same fundamental rights to personal safety as the rest of the community, and any legislative regime should contain safeguards to ensure their safety is not compromised.' Prostitution Bill 1999, Explanatory Notes, pp 2–3.

57 See eg Mahood (1990), pp 50–51.

58 Allen (1990), p 157.

59 Allen (1990), pp 157, 168–80.

60 Scutt (1986), p 406.

61 See the *Environmental Pollution Act 1994* (Qld) and *Integrated Planning Act 1997* (Qld).

their genesis in moral reforms of the mid- to late nineteenth century that sought to ameliorate both the physical and the moral condition of the working classes.[62] Similarly, prostitution becomes a by-product of modern civil society that no longer attracts the ultimate moral censure of illegality, criminal sanction and bodily incarceration.[63] Instead, prostitution must be licensed, regulated and contained where possible.

Prostitution and Development Control

The *Prostitution Act* makes consequential changes to the *Integrated Planning Act 1997* (Qld), whereby local government authorities now regulate the spatial and planning matters associated with legal brothels, adult entertainment activities and the provision of prostitution by a 'sole practitioner'. In order to operate, a legal brothel must undergo a planning approval process as a form of assessable 'development'.[64] Prohibited brothels include those that operate in contravention of the *Integrated Planning Act,* and where the operator does not hold a licence.[65] Development applications for a material change of use to alter premises to accommodate a brothel must be submitted to the local government authority in whose area the proposed brothel will operate.[66] The discretion of the local government authority in making decisions about the operation of brothels is circumscribed in that an application must be refused if it does not comply with mandatory requirements outlined in the *Prostitution Act.* For example, licensed brothels must have:

- a maximum of five 'working rooms';[67]
- a maximum of one sex worker per room at any one time; and
- a maximum of ten workers on site at any one time.[68]

The need to contain the potential vice of prostitution is clearly evident in the mandatory requirement that brothels must be located at least 200 metres from residential areas — and there are precise instructions on how this distance is to be calculated.[69] In one sense, prostitution is no longer beyond the bounds of respectable society, as technically it occurs within the public spaces regulated by the bureaucratic state. Yet, in another sense, it remains an enclave of difference, to be kept a safe distance of 200 metres from 'a place of worship, hospital, school kindergarten, or any other place regularly frequented

62 See generally Hunt (1999), pp 14–18.

63 The explanatory notes to the Prostitution Bill 1999 state, 'The proposed legislative framework has been developed with a view to controlling and minimising the harm or potential harm, associated with prostitution, rather than assuming it can be eliminated': p 2.

64 Definition of development, *Integrated Planning Act 1997* Schedule 10.

65 *Prostitution Act 1999* s 66(1).

66 *Prostitution Act 1999* s 63.

67 *Prostitution Act 1999* s 64(1)(d).

68 *Prostitution Act 1999* Part 6.

69 *Prostitution Act 1999* ss 64(1)(a), 64(2).

by children for recreational or cultural activities'.[70] In a town where the population is less than 25,000, it is open to the local government authority or the relevant government minister to require that all applications for a legal brothel be refused.[71] Presumably, the high 'visibility' of a brothel in a town with a relatively small population is the rationale that sits behind this potential to prohibit even legalised prostitution. Again, a discretion to exclude brothels from the public spaces regulated by the bureaucratic state illustrates how tenuous is the inclusion of prostitution within the bounds of 'legitimate' society.

Given the extensive statutory prescription on the location of brothels, the ostracism employed against prostitution, while not as categorical as in previous eras, remains pervasive. Prostitution is no longer illegal, nor are sanctions against it contained in statutes such as the *Vagrants, Gaming and Other Offences Act 1931* (Qld), which ostracise the outcasts of society. Yet, as the spatial constraints on the location of prostitution activity reveal, the regulatory technologies of the state provide a more subtle, rational and rationalised form of bodily control. There is a movement to remove the sinful body from public purview to an institutionalised setting, and to subject it to regulatory technologies such as those invoked by health professionals. Such developments are symptomatic of the major trends identified by Foucault in his discussion of the transition from epochs of punishment to those of disciplining of the body. Moreover, the range of bodily activity that is regulated as prostitution has been extended.[72] For example, the penetration of the body in various forms constitutes an expanded definition of prostitution, yet there is a very tight circumscription on the actual space in which this activity can legally take place. The laws reveal a double movement to at once remove the moral stigma by legitimising some forms of prostitution, yet to tightly contain the bodily activity away from public view.

Legal Brothels and Conformity with Desired Environmental Outcomes

If a proposed brothel does pass the first line — bureaucratic screening for the grant of a licence — then it must be assessed against the planning objectives for the local government area. Under the *Integrated Planning Act*, development applications fall into the categories of self-assessable, and code and impact-assessable applications.[73] In most instances, brothel applications will be impact assessable. Essentially this assessment procedure, known by the acronym of IDAS, sets the proposed development against a set of desired environmental outcomes that the local government prescribes for a given area.[74] The desired environmental outcomes articulate a range of natural,

70 *Prostitution Act 1999* s 64(1)(b).

71 *Prostitution Act 1999* s 64(1)(b).

72 *Prostitution Act 1999* Schedule 4 defines prostitution by reference to s 229E of the Queensland Criminal Code.

73 *Integrated Planning Act 1997* s 3.

74 *Integrated Planning Act 1997* s 3.

social, cultural and economic environmental goals that should be achieved in the development of an area.[75] Desired environmental outcomes are given spatial expression in local government planning schemes and associated planning instruments.[76] The more generalised environmental outcomes are given specific expression by equation with a corresponding range of performance criteria and standards. For example, a desired environmental outcome that a community maintain a healthy environment might be translated into air quality standards that set acceptable levels of particulate matter in the emissions from industrial activities. In making a planning decision, if the local government assessment manager decides that the proposed brothel will not conflict with the planning scheme or compromise desired environmental outcomes, then the proposed development will be granted development approval — often with a range of associated development conditions.[77] Where a legal brothel is proposed for an industrial area, development applications are to be assessed by local authorities against a code prepared to ensure that the brothel will meet pre-determined performance standards which ensure that the desired environmental outcomes for that particular area are not being compromised.

In bringing brothel developments under this regulatory assessment process that emphasises spatial demarcation of activities by reference to desired environmental outcomes and performance standards, the regulatory state further constrains the body by reference to a 'system of constraints and privations, obligations and prohibitions'. The very imposition of 'performance criteria and standards' upon the activity of prostitution reveals a sophisticated, if largely unacknowledged, regulatory technology of bodily discipline. In speculating on the manner of these 'constraints and privations, obligations and prohibitions', it should be noted that s 76 of the *Prostitution Act* specifically binds brothel licensees by the law of nuisance.[78] The application of nuisance concepts in this context emphasises the need to ensure that bodily activity associated with prostitution, such as noise, does not escape from its proper space of confinement. Where that bodily activity imposes itself beyond the regulated space, it is constituted as a nuisance — no longer a legitimate activity but an unwelcome intrusion.

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75 The definition of environment includes 'ecosystems, natural and physical resources, qualities and characteristics of places that contribute to ... amenity, harmony, and a sense of community, and the social, economic and cultural conditions': *Integrated Planning Act 1997* Schedule 10.

76 *Integrated Planning Act 1997* s 1.

77 *Integrated Planning Act 1997* s 3.5.14.

78 Current regulatory technologies in Queensland that employ nuisance concepts, such the Environmental Protection Policy (EPP) on Noise, contain very explicit performance criteria and standards to ensure that identified environmental values are protected.

Codifying the Discipline of the Body

To date, very few brothel applications have been made to local government authorities and only one application for a brothel licence has been granted in the Brisbane city area.[79] Another high-profile application in the tourist area of the Gold Coast was rejected, even after an appeal to the Planning and Environment Court.[80] Consequently, there has not been an opportunity to develop an extensive range of desired environmental outcomes and performance criteria beyond those contained in an IDAS planning code.[81] Essentially, the code has a double purpose of making a licensed brothel safe for its staff but also 'compatible with the form, function and amenity of the locality in which it is located'.[82] The desire is at once to include prostitution in the safety afforded by the regulated spaces of the civil state, while ensuring that the potential corruption and difference posed by prostitution are assimilated to that state by being 'compatible with the form, function and amenity of its locality'. This double movement of inclusion and enclosure is evident in the performance criteria and the suggested 'acceptable solutions' contained in the code. For example, one of the criteria concerns lighting of the premises. External lighting is to be designed to provide security for staff and clients without adversely affecting the amenity of adjoining premises.

The preferred solution is for lighting that has no characteristic indicating the premises are used for a brothel.[83] The lighting must facilitate surveillance, be hooded and be directed downwards.[84] Such tight prescriptions on the attributes of the spaces in which prostitution is to be contained provide resonances of more formalised institutions of bodily disciplining, such as prisons and hospitals. The panopticon required by this regulatory technology of the state sweeps these spaces in the form of institutional lighting. The external lighting penetrates the darkness surrounding the intimate space of the brothel but must not impinge beyond its bounding perimeter. The lighting must not illuminate the difference contained within the brothel spaces beyond that necessitated for bodily safety. Further extensions of this regulatory apparatus of surveillance and enclosure are evident in other criteria that control aspects of brothel siting and design, entrances, appearance and identifying signage.[85] Moreover, brothels are to be explicitly designed to discourage 'loitering' at the margins, as all brothels must have an interior reception area for clients. The planning solutions contained in the *Prostitution Regulation* clearly demarcate

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79 Interestingly, the conservative party in recent Queensland elections emphasised repeal of the legalisation of prostitution as one of the more important party policies.

80 This court has jurisdiction under the *Integrated Planning Act 1997* to hear appeals against the refusal to grant a development approval.

81 For example, the code against which applications for brothels is assessed is contained in *Prostitution Regulation 2000* Schedule 3.

82 *Prostitution Regulation 2000* Schedule 3, s 3.

83 Presumably no flashy neons of naked people are allowed!

84 The 'solutions' are contained in *Prostitution Regulation 2000* Schedule 3.

85 *Prostitution Regulation 2000* Schedule 3.

the spaces in which prostitution can occur in a 'safe controlled environment', preventing its intrusion into the wider community spaces.

Planning and Social Control

Removing the Body from Community View

A desire to remove the potentially corrupt bodily activity associated with prostitution from the public gaze, and to subject it to a discipline invoked by specialist interior surveillance instituted to protect health and community amenity, is clearly evident in the objectives and rationale for the *Prostitution Act*. The underlying principles supporting the introduction of the laws are stated to be to:

- ensure the quality of life for local communities;
- safeguard against corruption and organised crime;
- address social factors which contribute to involvement in the sex industry;
- ensure a healthy society; and
- promote safety.[86]

The primary focus appears to be to ensure the quality of life for local communities by removing any potential for corruption. Indeed, the Explanatory Notes accompanying the Bill in its passage through the Queensland Parliament stated:

> The Government believes that the operation of brothels should not be an intrusion into the day to day lives of members of the community who do not want to be exposed to the nuisance of brothel activity or advertising.

Brothel activity no longer attracts a criminal sanction, but is equated with other forms of nuisance — an intrusion into the legitimate and normal activities of a community. This form of moral regulation designed to protect community values is not new. Indeed, Hunt demonstrates how moral surveillance of the 'poor', including surveillance of sexual mores, was an integral part of the moral regulation that was imposed by the emerging middle classes in late eighteenth century and nineteenth century England and the United States. In this context, 'safety' in many regards meant the safeguarding of the respectable citizens from the potential corruption of lower class 'vice'.[87]

The necessity for the protection of community amenity values from potentially harmful incursions of 'vice' manifests very clearly in the converging aims of the *Prostitution Act* and the *Integrated Planning Act*. The incorporation of brothel development within the integrated planning assessment framework means that the activity in brothels is to be assessed against the normative standards set out in the planning laws. Compliance with planning law procedures reinforces the containment of the bodily activity

86 Prostitution Bill 1999, Explanatory Notes, p 1.

87 Hunt (1999), Chs 2 and 3.

associated with prostitution that appears to be the primary motivation of the *Prostitution Act*. Nor is the identification of planning and the control of prostitution a recent phenomenon. Allen contends that '[p]rostitutes increasingly preoccupied (even obsessed) late-nineteenth century urban reformers, and became regular figures of Australian cultural representations'.[88]

An Organic Vision of Community

A link between planning law and social control has been recognised even at a doctrinal level. Indeed, the 'social engineering' facet of planning law as a mechanism for promoting community amenity is a long-standing regulatory objective. Else-Mitchell J commented some time ago, in *Rio Pioneer Gravel Co Pty Ltd v Warringah Shire Council*,[89] that: 'At the centre of all conceptions of planning is the need for the direction of the development and use of land to serve the economic and social welfare of a community in respect of convenience, health and amenity.' Indeed, planning law has its origins in a diverse range of sources promoting community amenity, ranging from urban social and political reform through to concerns with proper sanitation.[90] A social reform agenda was implicit to many of the planning theories of the late nineteenth century and early twentieth century[91] — theories which later found concrete expression in planning legislation. Typically, planning legislation posits a desired model of community that forms a baseline against which to assess a diverse range of spatial activities.

In the recent Queensland laws, the normative planning standards envision a particular type of community that is to be achieved through the forward planning and development control procedures. The stated purpose of the *Integrated Planning Act* is to seek to achieve ecological sustainability.[92] Ecological sustainability is defined as a balance that integrates 'protection of ecological processes and natural systems at a local, regional and State and wider levels; and economic development; and maintenance of the cultural, economic, physical and social well being of people and communities'.[93] An organic, holistic vision of community is evident here. It is a model of community that emphasises balance, harmony and the effective integration of all aspects of community life. In this way, community signifies an ordering of society that enshrines the model of middle-class respectability.[94] Moreover, this discourse of community is strongly assimilative, and it provides the

88 Allen (1990), p 20.

89 (1969) 17 LGRA 153 at 162.

90 Millichap (1998), pp 428–56.

91 Harvey (1969).

92 *Integrated Planning Act 1997* s 1.2.1.

93 *Integrated Planning Act 1997* s 1.3.3.

94 Hunt notes a similar identification between middle-class 'respectability' and the urban reform agendas that focused on the control of prostitution in the late nineteenth century in the United Kingdom and United States. The promotion of this ideal of organic community serves to ostracise all those who do not conform to prevailing models of community values. Hunt (1999), pp 190–91.

rationale to quarantine all those elements of the urban landscape that do not conform. Accordingly, brothel development must assimilate in its external characteristics to this organic vision and contain any disparate elements within itself through a procedure of bodily disciplining, so as not to impinge upon community amenity.

The holistic vision of community identified in ecological terminology in the *Integrated Planning Act* finds a number of precursors in earlier planning movements such as the Garden City concept[95] and the neighbourhood concept of the mid-twentieth century.[96] Indeed, the whole trend toward suburbanisation can be regarded as a manifestation of the longing for an idyllic rural community of the past within the confines of the city form.[97] Lynch, one of the most influential planning theorists of the mid-twentieth century, developed a typology of images of the city.[98] The classification of city forms he produced — namely the magical city, the 'standard form/machine' city and the organic city — reflects not only the idealised planning models advocated by architects, planners and urban reformers, but the actual models realised through government policy and market forces.[99] An organic vision of the city has proven particularly pervasive in Australian planning law. In the latter part of the twentieth century, this vision has become infused with environmental and nature conservation values. An organic community ideal has also played a significant role in protecting middle-class, urban social values through the planning process. Similarly, the restraints on the location of legal brothels instituted pursuant to the *Integrated Planning Act* protect middle-class values from intrusion and dilution.[100] Planning laws now take on a function with respect to the inculcation of values and the protection of the community often more directly associated with the criminal law and its punishments.[101] Against a backdrop of an idealised organic vision of community, the regulatory technology of the state configures the spaces to be inhabited by those persons involved in legalised prostitution and thereby disciplines the bodies that engage in that activity.

Law, Discipline and the Regulation of Prostitution

The bodily 'activity' associated with prostitution has moved from being conceived as occurring beyond the bounds of normal community to becoming legitimised and contained within the putatively civic, legal space occupied by

95 Freestone (1982).

96 For representative early works, see Park and Burgess (1925); Buttimer (1972).

97 Tarlock (1994), p 472.

98 Lynch (1960).

99 Tarlock (1994), p 473.

100 This position is advanced despite the comments of Murrell J in *Lintan Bistro Pty Ltd v City of South Melbourne* (unreported, 13 September 1985) to the effect that 'morality is not a town planning consideration'. The *obiter* comments were made in an appeal regarding a prospective brothel that was refused town planning permission.

101 Lacey (1988), pp 176–81.

respectable citizens. Yet, while the body has been contained within legitimated spaces, it is subjected to a regulatory technology of containment and control of the actual physical space in which the body can perform these 'activities'. In short, the body is subjected to discipline. Previously, a multiplicity of bodies that were engaged in prostitution carried out that activity in a disordered manner as street prostitutes, or in illegal brothels. These forms of nomadic activity — once regarded by the state as akin to vagrancy — are now fixed in a controllable space through the complementary mechanisms of the *Prostitution* and *Integrated Planning Acts*.[102] In this manner, the activity of prostitution is disciplined, normalised and made manageable. Like so many other activities in modern society, legalised prostitution is subjected to disciplinary power.

Foucault contends that one of the key features of the disciplinary power that arose in the modern era was its ability to make a multiplicity manageable:

> It [ie Discipline] could reduce the inefficiency of mass phenomena: reduce what, in a multiplicity, makes it less manageable than a unity; reduce what is opposed to the use of each of its elements and of their sum; reduce everything that may counter the advantage of number. That is why discipline fixes; it arrests or regulates movements; it clears up confusion; it dissipates groupings of individuals wandering about the country in unpredictable ways; it establishes calculated distributions.[103]

Similarly, the disciplinary techniques of the late twentieth century Queensland law fix prostitution in safe, controlled spaces; arrest and regulate the movements of licensees, prostitutes and clients; clear confusion between those spaces where prostitution is legal and where it is illegal; dissipate street solicitation with all its wayward and unpredictable characteristics; and establish calculated distributions of prostitutes within legal brothels, where the number and spatial location of bodies is strictly calculated.[104] Moreover, according to Foucault, discipline within modern society appears to act as nothing more than an infra-law, extending the general functions characterising law to the infinitesimal level of individual bodies.[105]

In the present instance, then, it is tempting to regard these processes for the legalisation of brothels as a legitimation of the persons who occupy these spaces; to accept that these bodies are now accorded recognition within the civil sphere of the state. Thus, at first instance, the *Prostitution Act* and *Integrated Planning Act* simply appear to benignly extend the benefits of legality to prostitution. No longer is prostitution, if conducted in a legal brothel, going to attract the moral censure of criminal punishment, to be seen as occurring outside the legitimate spaces of civil society. At one level, then,

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102 Foucault argues that one of the primary objects of discipline is it anti-nomadic technique. Foucault (1977), p 218.

103 Foucault (1977), p 219.

104 For example, note the provisions that require the design of the brothel to allow only one prostitute per room and a maximum of 10 prostitutes on site at any one time.

105 Foucault (1977), p 222.

individuals engaged in the activity of prostitution would appear to take on the status of juridical subjects operating within the confines of the public spheres of legality. Sullivan, though, notes that despite moves toward decriminalisation of prostitution, sexual relationships are still regarded within Australia as primarily private matters, separate from law and policy.[106] Nonetheless, under the new laws, prostitutes and licensees now have clearly defined rights, such as protection from physical violence; they have property, an economy, in the activity that is recognised and protected by the state.[107] Licensees and prostitutes would now appear to be incorporated within the social contract of the modern, liberal state.[108] Specifically here, that social contract manifests in a vision of legitimised community incorporating a range of normalised activities that fulfil certain environmental objectives and performance standards.

Foucault, however, confounds the apparent synergy between law and discipline. Instead he contends that, '[r]egular and institutional as it may be, the discipline, in its mechanism is a "counter-law"'.[109] Disciplinary mechanisms employed by the regulatory state under-cut the status that is conferred on the juridical subject by reference to universalised norms.[110] Disciplinary techniques 'have the precise role of introducing insuperable asymmetries and excluding reciprocities'.[111] The individual thereby becomes objectified and subordinated, despite putatively enjoying legal 'rights'. Indeed, as Hunt notes: 'The new forms of liberal governance have emerged in a period when governing has become increasingly technical and governmentalised, vested in the hands of experts.'[112] Thus, while those engaged in prostitution in legal brothels may now have better recourse to various institutions to protect a relatively circumscribed range of rights, at the same time they are subjected to a minutiae of disciplining by reference to public health standards and community amenity that undermines even bodily autonomy.[113] Moreover: 'Although the universal juridicism of modern society seems to fix limits on the exercise of power, its universally widespread panopticism enables it to operate, on the underside of the law, a machinery that is both immense and minute.'[114] Similarly, on the underside of the *Prostitution* and *Integrated Planning Acts* sits a regulatory infrastructure of panopticism that allows for constant

106 Sullivan (1995), p 24.

107 The rights of protection from physical violence and the protection of private property are regarded as the fundamental rights of the juridical subject that are guaranteed by the liberal state.

108 The social contract concept is one of the most persistent models of society associated with modern liberalism. For a discussion of liberalism, see Ryan (1993), p 291.

109 Foucault (1977), p 223.

110 In this instance, that is the universal norms which regard as sacrosanct the rights of bodily integrity and property.

111 Foucault (1977), p 222.

112 Hunt (1999), p 217.

113 Hunt (1999), pp 216–18.

114 Foucault (1977), p 223.

surveillance within the institutionalised space of the legal brothel. The pervasive surveillance acts through the intermediary of the licensing conditions and through the instigation of spatial compliance norms, which even extend down to the very design of the rooms in which prostitution takes place and the lighting of its bounded spaces.

Conclusion

If the foregoing analysis of the role of bodily disciplining in modern, regulatory technologies is apposite, then it allows further insight into the critique of the modern liberal state advanced by feminist researchers. Prostitution, like sexual assault and abortion, has been one of the key issues illuminated by feminist critique. Allen traces the changing nature of the regulation and policing of prostitution within Australian history by reference to what she terms 'the negotiations between men and women that determine their respective power "differentials"'.[115] In a related vein, the crux of Pateman's analysis of modern, liberal society is that the 'social contract' is better understood as a sexual contract.[116] In her view, the liberal social contract that advances notions of formal equality and liberty of the subject, free from undue interference by the state, is underwritten by a sexual contract based around a gendered division of labour and privilege. Implicit to the liberal, contractarian model is a vision of society where mutually exclusive realms of the public and private spheres exist within the idealised liberal state.[117] State regulation operates in the former and is excluded from the latter. Moreover, as feminist researchers point out, in private, unregulated spheres, such as the family, the lack of regulation contributes to an unequal power distribution that means that many women are placed at a severe disadvantage in terms of physical security, income and opportunity.[118]

Specifically, Pateman critiques the concept of prostitution as a contract for sexual services.[119] She argues that: 'The feminist argument that prostitutes are workers in the same sense as other wage labourers and the contractarian defence of prostitution both depend on the assumption that women are "individuals" with full ownership of property in their persons.'[120] These assumptions which are built into the liberal contract model cannot be sustained for most women as they do not have a readily transferable 'property right' in their bodies or even in their labour. Therefore, Pateman is critical of arguments that are advanced for the inclusion of prostitution within the civic spaces of the liberal state.[121] However, while Pateman's critique addresses a common law model of contract and its association with the civil state, it does not directly

115 Allen (1990), p 2.

116 Pateman (1988), pp 1–4.

117 For a critique, see Pateman (1983), p 283.

118 Scutt (1983), ch 2.

119 See Pateman (1988), pp 189–218.

120 Pateman (1988), p 196.

121 Pateman (1988), pp 206–208.

consider the role of the state as a regulator of 'private' contractual arrangements. Nor does Pateman offer any alternative legal forms that could better address the inequality of the position of those 'bodies' engaged in contracts for sexual services. By default, it would seem, a society must maintain its censure of these activities through resort to the criminal law.

In contrast, other feminists have argued for the inclusion of the putatively private spheres into the public, regulated spaces of the modern state, as a means to counter asymmetries of power that directly disadvantage women.[122] These arguments generally appear to have a basic premise that the removal of criminal sanctions for engaging in prostitution will allow prostitutes to be treated as juridical subjects and thereby enable them to seek redress for infringement of their rights within the civic sphere. It is an assumption that appears to promise those other concomitants of the possession of rights in a liberal society: bodily freedom and autonomy. Yet, as the foregoing analysis of the new Queensland prostitution and planning laws reveals, the move to decriminalise prostitution and to include it within the legitimated, normalised community spaces of the modern state also can be problematic.

Within Queensland, criminal law is no longer the basic medium of enforcing asymmetries of power with regard to prostitution.[123] The current regulatory technologies comprise less overtly moral dimensions as they operate through the 'everyday' physical mechanisms that control the spaces occupied by bodies engaged in prostitution. Ultimately, these are the mechanisms that enforce and reinforce asymmetries of power.[124] The recent Queensland laws regulating prostitution provide a disciplinary technology: a system of 'constraints and privations, obligations and prohibitions' which institutes a legal framework of bodily coercion and surveillance. .These procedures are the underside to the formalised inclusion of prostitution within the legitimated, community spaces of the state. The regulatory technologies that are assumed by these laws assiduously undermine the concept of the autonomous individual who has ownership in the property of their person. The attainment of these ideals of bodily autonomy and 'ownership' for prostitutes forms the basis for many arguments that advocate decriminalisation of prostitution. Ironically enough, the disciplinary technologies that supersede the criminal law locate the activity of prostitution simultaneously within but beyond the public spaces defined by community standards of morality, public health and amenity. On the one hand, they suggest that prostitution and those who engage in its bodily activity do so on a formally equal footing with other community members. Yet this suggestion is belied by the control exerted by the bodily disciplining inherent in the licensing and development approvals systems of the *Prostitution* and *Integrated Planning Acts*, which effect

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122 For a critique of liberal theory as a paradigm of male autonomy, see Gatens (1991), pp 27–47.

123 Nonetheless, Queensland was the last of the Australian states to decriminalise prostitution and its laws remain fairly conservative.

124 For a discussion of how a formal system of rights is subverted by disciplinary mechanisms, see Foucault (1977), p 222.

containment and enclosure of these bodies when engaged in prostitution. The formal equality that is represented by inclusion within the regulated civic sphere is undermined by a legal technology of surveillance that ensures the moral pollution of prostitution does not permeate the wider, 'more respectable' community.

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