

## 9. REVIEW OF CHRISTCHURCH CITY BROTHELS (LOCATION AND SIGNAGE) BYLAW 2004



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### PURPOSE OF REPORT

1. To consider a review of the Christchurch City Brothels (Location and Signage) Bylaw 2004 as required by the Local Government Act 2002 (LGA02) and whether a section 155 analysis indicates a bylaw is required.

### EXECUTIVE SUMMARY

2. The Prostitution Reform Act 2003 (the Act) provides for territorial authorities to make bylaws regulating the location of brothels and prohibiting or regulating signage in, or visible from, a public place that advertises commercial sexual services.<sup>28</sup> The Council decided, on the basis of limited evidence of problems caused by such activities, but as a precautionary approach, to introduce a bylaw covering both of the above issues in 2004. However, a judicial review in 2005 determined that the location provisions within the bylaw were unreasonable and those provisions were quashed. The provisions regarding signage were not appealed, hence they remain in force.
3. On the basis of over four years' experience with the bylaw, and over three years since the location requirements were quashed, there have been limited problems with either locations of brothels or with signage. In the latter case, there has been only one complaint received in the four years since the introduction of the bylaw. The signage provision in the bylaw currently prohibits signs from most parts of the city except limited inner city areas. There have been no problems with such signs and any problems would have been able to be dealt with under provisions of the City Plan. The current bylaw only covers the former Christchurch City Council area, having been made prior to the amalgamation with Banks Peninsula District Council. Banks Peninsula District Council did not have a similar bylaw controlling location and signage. Nor have any issues been raised regarding brothels in that area.
4. The fears expressed by some persons of a significant increase in the activity within the City as a result of the Act coming into force have not been realised, and this is supported by the recent report of the Prostitution Law Reform Review Committee (PLRRC).<sup>29 30</sup> The report indicates that there has been a slight reduction in persons working in businesses of prostitution, or as managed sex workers, and relatively stable activity overall. There is no evidence of any significant problems to support the need for regulatory controls over the location of brothels. There are provisions in the City Plan and the Banks Peninsula District Plan regarding location that would apply to some businesses.
5. Most known businesses of prostitution<sup>31</sup> have existed considerably prior to the introduction of the Act, and concerns raised in some of the submissions at the time of consideration of the bylaw were not apparent prior to that. Even at the time of the introduction of the bylaw there was no evidence provided, or available, of any defined nuisances from such activities.

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<sup>28</sup> Section 4(1) of the Prostitution Reform Act 2003 defines these as;

“ commercial sexual services means sexual services that—

(a) involve physical participation by a person in sexual acts with, and for the gratification of, another person; and

(b) are provided for payment or other reward (irrespective of whether the reward is given to the person providing the services or another person)”

<sup>29</sup> Report of the Prostitution Law Reform Review Committee on the Operation of the Prostitution Reform Act 2003, Ministry of Justice, Wellington, May 2008

<sup>30</sup> The Review Committee comprised a nun, sex workers, brothel operators, a general practitioner, an academic, a city councillor, a criminologist, a public health official, social workers, representatives of NGOs and a retired policeman.

<sup>31</sup> “business of prostitution means a business of providing, or arranging the providing of, commercial sexual services”, section 4(1) of the Prostitution Reform Act 2003

6. As pointed out in the background report below, the major issue initially with signage appeared to refer to alleged “offensive” or “sexually explicit” signage that was seen to exist in the city, but those signs were not associated with advertising “commercial sexual services” *per se*. The display of outdoor advertisements are controlled under the provisions of the City Plan in regard to area, height, illumination, relationship to the site, and compliance with the Advertising Standards Authority Code of Practice relating to criteria for offensiveness and decency of advertising<sup>32</sup>. Such rules would appropriately apply to those advertising commercial sexual services as with any other legitimate businesses. The Banks Peninsula District Plan also contains controls over signs but there is no evidence that any businesses of prostitution exist in that area, or if they did they were not considered an issue.
7. Section 155 of the LGA02 requires the Council to consider whether there are problems, and if so, whether a bylaw is the most appropriate tool to deal with any problems. The analysis undertaken has revealed there is no significant evidence for problems caused by the existence of brothels in Christchurch City, either from their location or the signage used, and if any issues arise, they can be controlled under the current provisions of the City Plan.
8. Prostitution and the operation of brothels are legal activities. It is generally considered that restrictions should not be placed on legal activities without evidence of proven nuisance affecting a wide proportion of the public. In the case of both the location of brothels in Christchurch, and the Banks Peninsula area, and signage advertising commercial sexual services in both areas, there is no such evidence of problems and it is concluded that the current bylaw should be revoked. Should it become apparent that, sometime in the future the situation has changed; the matter could again be examined if evidence is available that significant problems exist. In the meantime, in relation to both the location of brothels and signs, the Council can continue to rely on the provisions in both the City Plan and the Banks Peninsula District Plan, in the same way the Council relies on these tools to control the location and signage for any other business.

#### **FINANCIAL IMPLICATIONS**

9. On the basis of evidence available there are few, if any, nuisance problems caused by the existence of businesses of prostitution or small owner-operated brothels (SOOBs)<sup>33</sup> in Christchurch. This report recommends the revocation of the current bylaw, which must be done by way of a special consultative procedure, just as if Council was making or amending a bylaw, so the costs associated with the special consultative procedure apply. With the proposed revocation of the Bylaw, the expectation is that inspection and enforcement action, if any, would be undertaken through the provisions of the City Plan, rather than the bylaw.
10. Compliance monitoring and enforcement in relation to brothels should not be significantly more than is caused by ensuring compliance with provisions of the City Plan relating to other business activities, without any specific location or signage controls through a bylaw.

#### **Do the Recommendations of this Report Align with 2006-16 LTCCP budgets?**

11. The budgets for the Regulatory Services group of activities in Our Community Plan 2006-2016 Volume 1 Page 149 make general provision for the enforcement of bylaws and the City Plan and investigation of complaints. It is not anticipated that the revocation of this bylaw will significantly impact on such.

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<sup>32</sup> Christchurch City Plan, Volume 3, Chapter 10

<sup>33</sup> Small owner-operated brothels are defined in the Act as a brothel—

(a) at which not more than 4 sex workers work; and

(b) where each of those sex workers retains control over his or her individual earnings from prostitution carried out at the brothel

## LEGAL CONSIDERATIONS

12. The Act contains bylaw-making powers for Councils. Section 12 provides that a Council can make bylaws prohibiting or regulating signage advertising commercial sexual services that is in or visible from a public place (and the procedure for making such bylaws is the same as for a bylaw made under the LGA02). However, such bylaws can only be made if the Council is satisfied that the bylaw is necessary to prevent the public display of signage that is likely to cause a nuisance or serious offence to ordinary members of the public using the area, or that the signs are incompatible with the existing character or use of an area (section 12(2)).
13. Section 14 provides that the Council “*may make bylaws for its district under section 146<sup>34</sup> of [the LGA02] for the purpose of regulating the location of brothels*” The Council must also review any bylaws made under section 12<sup>35</sup> or 14<sup>36</sup> of the Act within the timeframes provided in section 158<sup>37</sup> of the LGA02. Section 160<sup>38</sup> of the LGA02 provides that a bylaw review is done by making the determinations required by section 155.<sup>39</sup> If, following the review, the Council determines that the bylaw should be amended, revoked, or revoked and replaced; it must act under section 156, and use the special consultative procedure to make, amend or revoke a bylaw.
14. The legal considerations in relation to the review of existing bylaws and adoption of a new bylaw largely arise from section 155 of the LGA02. This sets out the matters that must be determined to decide whether a bylaw is appropriate, as follows:
  - (1) *A local authority must, before commencing the process for making a bylaw, determine whether a bylaw is the most appropriate way of addressing the perceived problem.*
  - (2) *If a local authority has determined that a bylaw is the most appropriate way of addressing the perceived problem, it must, before making the bylaw, determine whether the proposed bylaw—*
    - (a) *is the most appropriate form of bylaw; and*
    - (b) *gives rise to any implications under the New Zealand Bill of Rights Act 1990.*
  - (3) *No bylaw may be made which is inconsistent with the New Zealand Bill of Rights Act 1990, notwithstanding section 4 of that Act.”*
15. In order to comply with section 155, the Council needs to identify the perceived problem and formally determine that a bylaw is the most appropriate way to deal with the perceived problem, and if so, that the proposed form of bylaw is in the most appropriate form, and that it is not inconsistent with the New Zealand Bill of Rights Act 1990. If the Council does not satisfy the requirements of section 155 appropriately, then it is at risk of a challenge to its decision by way of a judicial review application. For example, if it did not have sufficient evidence of a problem, or there was a problem but there were other more appropriate ways to deal with it than a bylaw, then the bylaw might be open to challenge. Conversely, if there was evidence of a problem and that a bylaw was the most appropriate way to deal with that problem, but the Council did not make a bylaw, then that decision might also be successfully challenged.
16. The display of outdoor advertisements, such as signs advertising commercial sexual services is controlled under the provisions of the City Plan in regard to area, height, illumination, and relationship to the site. Similar provisions apply under the Banks Peninsula District Plan. Advertising, including signs, must comply with the Advertising Standards Authority Code of Practice relating to criteria for offensiveness and decency of advertising<sup>40</sup>. Such rules would appropriately apply to advertisements for commercial sexual services, the same as they would for any other legitimate businesses.

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<sup>34</sup> Section 146(a) of the LGA02 relates to making bylaws for the purpose of regulating various activities

<sup>35</sup> Relating to regulating or prohibiting signage advertising commercial sexual services.

<sup>36</sup> Relating to regulating the location of brothels.

<sup>37</sup> Section 158 of the LGA02 requires bylaws made under the Act not later than 5 years after the bylaw was made if the bylaw was made after 1 July 2003. This applies to the Brothels (Location and Signage) Bylaw 2004.

<sup>38</sup> Section 160 of the LGA02 requires the review under section 158 to be undertaken in accordance with section 155 including identifying the perceived problem to be addressed and whether a bylaw is the appropriate way of addressing the problem.

<sup>39</sup> Note that “a bylaw may be made under section 12 even if, contrary to section 155 (3) of the Local Government Act 2002, it is inconsistent with the New Zealand Bill of Rights Act 1990.” (section 13 (2) of the Act.

<sup>40</sup> Christchurch City Plan, Volume 3, Chapter 10

17. The location of businesses is controlled under the provisions of the City Plan in regard to the rules both for Living zones and Business zones. There is limited scope for a business of prostitution to be established in Living zones because of restrictions on the hours of operation for home activities, the area allowed to be used, and vehicle movement restrictions.<sup>41</sup> In the case of businesses of prostitution in Business zones brothels would not be specifically precluded from being established subject to compliance with the zone standards some of which may limit the scale of such a business, or trigger the resource consent process. That would include having regard to whether *the business of prostitution is likely to cause a nuisance or serious offence to ordinary members of the public using the area in which the land is situated; or is incompatible with the existing character or use of the area in which the land is situated.*<sup>42</sup>

#### **Legal requirements for the special consultative procedure**

18. The special consultative procedure under the Act when revoking a bylaw requires that the Council prepare a statement of proposal that must include:
- (ii) “a statement that the bylaw is to be revoked; and
  - (iii) the reasons for the proposal; and
  - (iv) a report on any relevant determinations by the local authority under section 155”.
19. The Act also requires the Council to determine the form of the summary of information. Section 89(c) requires that it be distributed “*as widely as reasonably practicable (in such a manner as is determined appropriate by the local authority, having regard to the matter to which the proposal relates)...*” Section 83(e) of the Act also requires the Council to give public notice of the proposal and the consultation being undertaken.
20. Since the revocation of this Bylaw is likely to be a matter of interest throughout the Christchurch City Council district, it is proposed that the summary of information be published through local newspapers, and that this also serve as public notice of the proposal, as required under section 83(e). Copies of the consultation documents will be available from the Civic Offices, and all Council service centres and libraries and on the Council’s “Have Your Say” Website.
21. Submissions called for on the proposal will be considered by the Council and any persons wishing to present orally would be heard prior to the final determination being made.

#### **Have you considered the legal implications of the issue under consideration?**

22. Yes, as above and in the background section below.

#### **ALIGNMENT WITH LTCCP AND ACTIVITY MANAGEMENT PLANS**

23. Under the Activity Management Plan provisions for Regulatory Services Enforcement and Inspections one is to *Educate the community in regard to regulatory obligations and enforcement of breaches of the City Plan.*

#### **Do the recommendations of this report support a level of service or project in the 2006-16 LTCCP?**

24. Regulatory Services Enforcement and Inspection: *Investigating and monitoring activities and projects to ensure compliance with the Building Act, Council by-laws and the City Plan, and mitigating any adverse effects on the environment and people. To investigate complaints about nuisances and non-compliance, and assess the potential effects of various activities. Investigating and responding to any situations likely to affect human health or safety, to be objectionable, or to cause a nuisance. Complaints about nuisances are promptly investigated.*<sup>43</sup>

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<sup>41</sup> Christchurch City Plan, Community Standards for “other activities” in Living Zones includes a maximum floor area of 40m<sup>2</sup>, not more than one fulltime equivalent residing off site may be employed; hours of operation restricted to 50 per week and between 7am to 11pm Monday to Friday and 8am to 11pm Saturday, Sunday and public holidays; vehicle generation is limited to 16 to 50 trips per day; and at least one person engaged in the activity must reside permanently on the site.

<sup>42</sup> Prostitution Reform Act 2003, section 15

<sup>43</sup> Our Community Plan 2006-2016 Volume 1, pp 144-149

## **ALIGNMENT WITH STRATEGIES**

25. There are no specific strategies in relation to this issue.

### **Do the recommendations align with the Council's strategies?**

26. See above.

## **CONSULTATION FULFILMENT**

27. Briefings covering the Act, the Bylaw, the results of the judicial review of the bylaw, the findings of the PLRRC review, and the results of the initial section 155 analysis were presented to the Brothels Location and Signage Bylaw Subcommittee and a Combined Community Board Seminar.
28. Information was obtained from the Inspections and Enforcement Unit of the perceived extent of problems and whether or not the current legislation under the City Plan was able to be used to control activities where use of the premises failed to meet City Plan rules.
29. Consultation was undertaken with the New Zealand Police who have advised that there was no evidence as to problems associated with the location of brothels, or indeed any nuisances. Where other offences under the Act had been brought to their notice they have taken action. There have been a limited number of these in the city largely related to under 18 year-old persons.
30. Initial discussions have taken place with the local branch of the Prostitutes Collective who advised that, for example, they could see no need for provisions relating to controlling location beyond the powers contained in the City Plan. They were not aware of any problems with signage, as permitted in the bylaw, but considered a need to provide for controls over offensive signage may be necessary. These views were expressed without prejudice.
31. Initial discussions have been held with Crown Public Health representatives, the Salvation Army Outreach programme, and some owners of businesses of prostitution. Further targeted stakeholder consultation with such will be undertaken once some decision has been reached as to the possible way(s) ahead.
32. A draft consultation plan will be prepared once a decision as to the way ahead has been determined. Until that decision has been made details will not be able to be finalised, however, it would include the following matters. Publicity and information are required to ensure:
- Stakeholders are kept up to date with information about the process and changes to the bylaw.
  - All individuals and organisations affected by the proposal are aware of the consultation process and feel they have had the opportunity to make a submission.
  - The Council's consultation process meets both the spirit and letter of the statutory requirements.
33. Formal public consultation of any proposal adopted by the Council will then go out for public consultation in accordance with the Special Consultative Procedure (section 83 of the LGA02). Anyone can make a submission and will be given the opportunity to be heard before a hearing panel.

## **STAFF RECOMMENDATION**

It is recommended that the Committee recommend to the Council that it resolve:

- (a) That it has determined that under the section 155(1) analysis there is not sufficient evidence of a problem that needs to be addressed by way of a bylaw, and even if there is a perceived problem a bylaw is not the most appropriate way to address it because the City Plan or Banks Peninsula District Plan rules sufficiently address any issues relating to location and signage.
- (b) To revoke the Christchurch City Brothels (Location and Signage) Bylaw 2004.
- (c) That staff be instructed to prepare the relevant documents for approval by the Council to commence the Special Consultative Procedure to revoke the bylaw.
- (d) That public notice of the consultation be given in The Press and on the Council's website on ... 2008, and that public notice of the proposal be given in the Christchurch Star newspaper, Akaroa Mail and other community newspapers distributed in the Christchurch area, as close as possible to ... 2008.
- (e) That the period within which written submissions may be made to the Council be between ... 2008 and ... 2008.
- (f) That a hearings panel be appointed to hear submissions, deliberate on those submissions and to report back to the Council on its recommendations.

## BACKGROUND (THE ISSUES)

### The regulatory context

34. The Act has the purpose of decriminalising prostitution (while not endorsing or morally sanctioning prostitution or its use) and to create a framework that:
- (a) *safeguards the human rights of sex workers and protects them from exploitation:*
  - (b) *promotes the welfare and occupational health and safety of sex workers:*
  - (c) *is conducive to public health:*
  - (d) *prohibits the use in prostitution of persons under 18 years of age:*
  - (e) *implements certain other related reforms.*<sup>44</sup>

### Powers to make bylaws

35. The Act provides some limited powers to territorial authorities to control certain matters in their districts, as follows: There are powers under section 12 to make bylaws prohibiting or regulating signage advertising commercial sexual services that is in or visible from a public place, provided the Council is satisfied that a bylaw is necessary to prevent the display of signs that are likely to cause nuisance or serious offence to the public, or is incompatible with the existing character of an area. There are also powers to make bylaws regulating the location of brothels: section 14 provides that the Council “*may make bylaws for its district under section 146 of [the LGA02] for the purpose of regulating the location of brothels*”. In both cases, the bylaws must be made in accordance with the provisions of the LGA02, except that in the case of signage: *a bylaw may be made under section 12 even if, contrary to section 155(3) of the Local Government Act 2002, it is inconsistent with the New Zealand Bill of Rights Act 1990.*

### Resource consents and district plans

36. A territorial authority, in considering a resource consent under the Resource Management Act 1991 for a land use relating to a business of prostitution, under the Act must have regard to whether the business of prostitution is likely to cause a nuisance or serious offence to ordinary members of the public using the area in which the land is situated; or is incompatible with the existing character or use of the area in which the land is situated. A council may grant or refuse the resource consent or impose conditions on such consent. This provision does not limit or affect the operation of the Resource Management Act in any way and may be overridden by the provisions of a district plan.

### The development of the Brothels (Location and Signage) Bylaw 2004

37. The Council, shortly following the enactment of the Act, appointed a subcommittee to consider issues perceived to face the Council by the introduction of the Act. The purpose was to identify, through consultation with stakeholders and the public at large, the perceived issues and assess options for addressing those in the most practicable way. The Subcommittee consulted with various stakeholders, including health professionals, the Police, massage parlour operators and the Prostitutes Collective, and sought answers to some specific questions from the public (through a questionnaire) regarding the location of brothels and the issue of signage. Following the five week consultation period, 1500 written submissions were received and considered, including 52 persons who made further oral submissions.

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<sup>44</sup> The related reforms include removing the offence of soliciting from the Summary Offences Act 1991 and the offence of operating a brothel.

38. The questionnaire responses indicated that of the then massage parlours licensed, 11 were located in the Central Business District, with three in suburban locations. The assumption was made that such premises would be likely to operate as businesses of prostitution. It was then asked whether brothels should only be allowed in certain parts of Christchurch. Sixty per cent of the respondents to the questionnaire considered brothels should only be allowed in the Central Business District or within the four avenues. Despite submissions stating no brothels should be permitted in suburban locations, whether residential or not, there was not a similar level of concern about sole owner-operators working from home, provided suitable signage rules applied. The Subcommittee had little information regarding the distribution of SOOBs in the City, but considered that unless they were only one person brothels, they should operate in the Central City designated zone. Signage requirements were considered by respondents to need to be limited, and only allowed on brothels in the designated zone, with 70 to 80 per cent of the submissions believing there should be no signage allowed on suburban or home occupation brothels.
39. The Subcommittee considered what were several perceived problems that needed to be addressed including; the likelihood of explicit and offensive signage developing; the nuisance effects of brothels; not creating a “red light district” in the city; and keeping brothels away from largely residential areas. These issues will be further addressed in this report as part of the section 155 analysis, but the major concerns regarding “explicit” and “offensive” signage often related to other businesses, rather than to commercial sexual service providers or brothels. Likewise, there was little evidence that then existing massage parlours (if considered to be operating as brothels) had ever caused any nuisance or problems, and as seen below, the Subcommittee accepted that some could operate outside the designated zone on such grounds. One of these was close to a residential area and had operated without problems for a significant number of years. Two cases drawn to the attention of the Subcommittee at the time, of alleged businesses of prostitution in residential buildings, were being dealt with under the City Plan.
40. The Subcommittee identified and assessed three options that could be used for addressing the perceived problems: do nothing; establish new rules in the City Plan; and create a bylaw – as below.

#### **Option 1: “Do nothing”**

41. It was considered that doing nothing may lead to an increase of brothels throughout the City, with few constraints on locations that may be sensitive to members of the public. The City Plan did not contain provisions specifically restricting activities relating to the business of prostitution which could occur as of right over a large number of business zones similar to any other legal activity. It was considered that while adverse environmental effects may be controllable through the City Plan, some social issues, for example objection to prostitution *per se*, would not. Likewise, the City Plan permitted home-based commercial activities subject to controls on scale and hours of operation, and had done so for a considerable time without any significant problems. The issue of a possible increase in signage, although City Plan rules existed to control this to an extent, was considered to be a matter that also obviated adopting this option.

#### **Option 2: Establish new rules in the City Plan**

42. The setting of rules in the City Plan specifically for premises operating brothels could be undertaken, provided it survived the tests under section 32 of the Resource Management Act,<sup>45</sup> and the rules could establish a regulatory regime to require and issue resource consents. Given the situation that there was little evidence for adverse effects, either environmental or social, from existing brothels (or perceived brothels) and existing cases of commercial activities in residential areas being able to be dealt with under current Plan rules, the process could be lengthy and costly. Such rules, if introduced, would be subject to existing use rights, meaning that brothels set up while the process was occurring could continue. For the above reasons, this option was rejected.

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<sup>45</sup> Section 32 of the Resource Management Act 1991 requires an evaluation as to whether any objective is the most appropriate way to achieve the purpose of the Act whether having regard to their efficiency and effectiveness the methods are the most appropriate for achieving the objectives.



### Option 3: Create a bylaw

43. The Act conferred the power on the Council to make bylaws controlling signage, by prohibition or regulation, and regulating the location of brothels. It was noted that while signage could be both prohibited and regulated, location could only be regulated. It is well established that the use of the term “regulating” means that while a bylaw may prohibit an activity in part of a district it cannot do so in the whole of its district. It was considered that signage needed to be controlled to avoid offence to ordinary members of the public and it was determined that some element of prohibition should be introduced. On the basis of the information received through the questionnaire (from about 1500 submissions), it was determined that the option to introduce a bylaw should be selected. The acceptance of this option would mean that no existing use rights would apply, and the rules would be easier to make and administer than those through the City Plan.

### The coverage of the Brothels (Location and Signage) Bylaw 2004

44. The Council determined that, largely, brothels should be located within an area in the Central City where commercial activities were undertaken and the majority of massage parlours at that time operated. There was no direct evidence that such premises had been operating as brothels prior to the Act coming into force, nor any evidence that there were problems with the operations of the premises. The Council did permit three premises outside the zone to continue on the basis that they had been operating as massage parlours for some time with no evidence of problems.
45. The signs able to be controlled are those in or visible from a public place and which advertise commercial sexual services (as defined in the Act).<sup>46</sup> Under the bylaw signs may only; be affixed to the premises providing such services; the premises must be in the area designated for such premises (which is within 2 inner city areas, as shown on the First Schedule map); only include the name of the business; the name of the person conducting the business; the number of the property of the premises; and only one sign per building, unless it has more than one street frontage in which case two signs may be permitted. The signs may not display any pictorial image; nor exceed 0.3 square metres in surface area; nor be illuminated by any flashing light.
46. During the hearing of submissions on the proposed bylaw, it became apparent that, due to the definition of ‘brothel’ in the Act, persons providing commercial sexual services on their own account or in small owner-operated brothels (SOOBs), which operated effectively as home-based employment, would be excluded from operating under the proposed bylaw, except in the Central City. There was no evidence available or presented that such activities of SOOBs had created problems nor failed to comply with City Plan rules as home occupations.
47. The Council’s Prostitution Reform Subcommittee, in considering submissions, concluded that the scheduled area should not be changed, but that SOOBs should be allowed to operate in residential areas, being Living Zones as described in the City Plan. The proposed bylaw was presented to the Council at its meeting on 1 July 2004. The Council resolved to make the bylaw in accordance with the recommendations of the Subcommittee, save for deletion of the proposed amendment to allow SOOBs in Living Zones. The result was that the bylaw which came into effect on 7 July 2004 restricted the location of **all** brothels to the scheduled area, subject only to the exception in relation to three established businesses.

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<sup>46</sup> Section 4(1) of the Prostitution Reform Act 2003 defines these as;

“ commercial sexual services means sexual services that—

(a) involve physical participation by a person in sexual acts with, and for the gratification of, another person; and

(b) are provided for payment or other reward (irrespective of whether the reward is given to the person providing the services or another person)”

## The Judicial Review of the Christchurch City Brothels (Location and Signage) Bylaw 2004

48. Willowford Family Trust and Terry Rex Brown sought a judicial review of the bylaw. This challenged the validity of that part of the bylaw by which the location of brothels in Christchurch was regulated, namely to within a defined area in the central business district. The applicants contended that this part of the bylaw was invalid for unreasonableness, repugnancy and for effecting a prohibition.
49. On 29 July 2005, the High Court of New Zealand made an order pursuant to section 12(1) of the Bylaws Act 1910 that clauses 6 and 7 of the bylaw be quashed as they related to the location of brothels.<sup>47</sup> The Court found that while the determination of the central city location for what could be described as 'businesses of prostitution' was within the power of the Council under the Act, the failure of the Council to permit SOOBs, despite the recommendation of the Subcommittee, was not. The Judge stated that the *recommendation represented, I think, a realistic squaring up to the clear intent of the Act. SOOBs are recognised in it as a constituent part of the business of prostitution.*
50. The Judge also stated:

*For completeness two further points should be noted. First, the majority view of respondents to the questionnaire who favoured confining brothels to the central business district can, of course, afford no protection to the bylaw. Elected representatives, although entitled to give weight to the views of, or mandate from, constituents, may not regard themselves as bound to that viewpoint.... In the face of this evidence and the terms of the Act, is the bylaw as it affects SOOBs valid? In my view it is not. Borrowing the words in Virgo the effect of the bylaw is to prohibit sex workers "from plying their trade at all in a substantial and important portion of the city no question of any apprehended nuisance being raised". Whether this conclusion is characterised as one based upon unreasonableness, prohibition or unreasonable restraint of trade, does not greatly matter. In substance, and whether viewed from the point of view of sex workers or of the public (to again use the words of Virgo), the practical effect of the bylaw is to deny the existence of SOOBs in the city of Christchurch. ...For these reasons I conclude that the location aspect of the bylaw is invalid in relation to its impact upon SOOBs. The applicants, having succeeded in relation to one of the grounds of challenge, are entitled to an order pursuant to s12 (1) of the Bylaws Act 1910 quashing the bylaw as it relates to the location of brothels. Although, pursuant to s17 of that Act, it is competent to quash and sever part only of a bylaw, the Council did not suggest that the location provisions were severable. It follows that clauses 6 and 7 of the bylaw, which together govern the location of brothels, are quashed. The clauses relevant to signage are unaffected.*

### Section 155 Analysis

#### Number of brothels

51. The PLRRC, in reviewing the Act, was required to consider whether the brothel certification regime was effective or whether a system was needed for identifying the location of businesses of prostitution. It should be noted that the provision in the Act does not actually certify "brothels", but makes provision for the issue of certificates to operators of a business of prostitution. These do not apply to sole operators or collectives of four or less sex workers where workers control their own earnings (SOOBs). Nor are street workers caught under the provision for the same reason as SOOBs. Certificates are issued for one year by the Registrar of the Auckland District Court. The register is held at the Auckland District Court and can only be accessed by the applicant or holder concerned and the Registrar. Members of the Police can inspect the register, but only for the purposes of investigating an offence. The register does not include the name or names of any business of prostitution the certificate holder is associated with. The register is not publicly available, and the Review Committee did not consider that this should change.

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<sup>47</sup> WILLOWFORD FAMILY TRUST & TERRY REX BROWN HC CHCH CIV-2004-409-002299 [29 July 2005]

52. There has been no significant increase in the number of brothels in Christchurch following the implementation of the Act as far as can be determined, which was one of the reasons given for the original introduction of the bylaw. Evidence of the existence of most brothels in the Christchurch district could only be obtained by the Council by tracing their existence through a lengthy and costly process or if they come to the attention of the Council from complaints. Brothels in general are unlikely to create significant problems as noted above, and if so other means are available to deal with these, such as controls under planning legislation. The PLRRC found that evidence from the Auckland District Court indicated the number of certificates issued had decreased each year since implementation of the Act. Some evidence suggests this is because there has been a decline in the viability of the sector and a lack of new applications. It should be noted that the definition of brothel in the Act<sup>48</sup> excludes premises where accommodation is provided, such as hotels or motels.

*Establishing nuisance, protecting public health and reducing offensive behaviour*

53. In relation to controls on the location of brothels it is presumed for the purposes of the analysis under section 155 of the LGA02 that the Council should identify any issues for which there is evidence of offences under the provisions of section 145 relating to protecting the public from nuisance; protecting, promoting, and maintaining public health and safety; or minimising the potential for offensive behaviour in public places. In undertaking this task the process of the Code of Good Regulatory Practice should be followed, as well as the decision making guide adopted by this Council.<sup>49</sup> There has been little information, either prior or subsequent to the Act, that premises perceived to be operating as brothels have been responsible for causing problems that breach any matters contained in section 145. Some issues that have been the cause of complaint relate more to the inappropriate use of premises under the City Plan and in a number of instances moral reactions to commercial sexual services occurring in the City.
54. In examining the possibility of potential for offences under the powers contained in s.145 it appears that there is little evidence for such. To claim a public nuisance exists requires some consideration of an appreciable interference with a public right which causes damage, injury, discomfort or inconvenience to **all** members of the public.<sup>50</sup> Given the level of complaints received over the years prior to and since the introduction of the bylaw, such a nuisance may be difficult to establish. In the development of the bylaw, information was provided that an increase in regulatory controls could reduce the protection and maintenance of public health and safety by driving such activities underground for the purposes of the Act. This particularly applies to purposes such as *(b) promotes the welfare and occupational health and safety of sex workers: and (c) is conducive to public health*. It is not considered that location controls for brothels are applicable to *minimising the potential for offensive behaviour in public places* as the commercial sexual services occur within premises and not in public places. Certainly there were no instances brought to the Council's attention of such offensive behaviour occurring in public places associated with brothels.
55. In relation to signs there is also the specific requirement in section 12(2) which the Council would have to be satisfied about, in order to make a bylaw. The Council must determine that the bylaw is necessary to prevent the public display of signage that is likely to cause a nuisance or serious offence to ordinary members of the public using the area, or that the signs are incompatible with the existing character or use of the area.

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<sup>48</sup> *Brothel means any premises kept or habitually used for the purposes of prostitution; but does not include premises at which accommodation is normally provided on a commercial basis if the prostitution occurs under an arrangement initiated elsewhere*

<sup>49</sup> *Code of Good Regulatory Practice*, Competition and Enterprise Branch, Ministry of Economic Development, November 1997 [<http://www.med.govt.nz/buslit/compliance/regprac.html>]

<sup>49</sup> <http://www.local.ccc.govt.nz/decisionmaking>

<sup>50</sup> *Laws of New Zealand, Nuisance at Para 14*

## Location - Evidence of problems

56. On the basis of almost five years' experience with the bylaw, and over three years since the location requirements were quashed, there have been few problems experienced with the location of such businesses of prostitution; see below for details of complaints, or indeed with SOOBs. Any problems have been able to be dealt with under provisions of the City Plan, where evidence has been able to be obtained, that businesses of prostitution are operating in Living Zones under the Plan. In the case of SOOBs few instances have arisen that have not been able to be dealt with under the rules relating to "home occupations" under the City Plan. There are significant limitations on the use of residential premises for other than residential activities that restrict any nuisance or adverse effects of "other activities" under the City Plan, for example, but controls over sexual activities being undertaken (whether paid for or not) are not possible nor practicable under the City Plan. The High Court judgement (and the PRLLCP report) has clearly stated that in regard to location controls provision should be made for SOOBs to be permitted within the city. Even where there have been concerns expressed about prostitution *per se* there has been little evidence of specific matters of concern. As pointed out below there is no evidence for any change in the level of activity from that prior to the Act when no concerns were expressed.
57. An analysis of enquiries and information requests received by Council's Enforcement and Inspections unit since the City's Brothels (Location and Signage) Bylaw came into effect in 2004 has been undertaken. It is based on the more substantive matters reported to or requested of Council, with low level general enquiries or unsubstantiated comments not being recorded.

Complaint Matter	Prior to High Court Judgement	Since High Court Judgement
From neighbours	1	4
Late evening/night operation	1	1
Noise related	1	1
Parking issues	-	1

Complaints in recent years have tended to come from people who are concerned about the operation (or what appears to be the operation) of suburban brothels. What is difficult to determine or prove is if a suburban owner operated brothel is not complying with both the Prostitution Reform Act and the City Plan, e.g. meeting the requirements for both regarding the number of people allowed to live and work at the residence and the associated building space requirements. Nevertheless, as the table shows, these cases are relatively few, with the parties concerned either complying with the City Plan advice once they are more aware of its requirements (e.g. appropriate hours of operation) or choosing to cease operations. No abatement notices have needed to be served since October 2005, which was the only occasion where one was served since the 2005 judgement. Based on the enquiries received by the Council's Enforcement and Inspections unit, there are low levels of complaints being made since the High Court judgement of 2005. Complaints that are made have generally been adequately dealt with by Council officers under the City Plan, with further action seldom needed. There is little evidence of a public nuisance occurring as a result of brothel activity, either in the city or the outlying suburbs.

58. The fears expressed by some persons of a significant increase in the activity within the City have not been realised and this is supported by the report of the PLRRC. Evidence for any significant problems is not available to support the need for regulatory controls. The final issue that precludes such controls is that, in reality, it is not possible for the Council to easily obtain the addresses of businesses of prostitution, and almost impossible to identify SOOBs in the City. For the above reasons, there seems to be no significant problems identified regarding location which require regulation under the Act. This is even taking into account the views of some members of the community that such businesses should not exist in the City. Most known businesses of prostitution have existed considerably prior to the introduction of the Act and concerns raised in some of the submissions at the time of introduction of the bylaw were not apparent prior to that.

59. In the Banks Peninsula Ward of the Council there is no evidence of any brothels operating in the area, and certainly no evidence of problems arising from commercial sexual services. It is presumed that is the reason that no such bylaw was introduced by the previous Banks Peninsula District Council. As in the other parts of current City controls under the District Plan are available to deal with any future, but unlikely, problems of location and signage.

### **Signage – evidence of problems**

60. The Act in regard to signage states the Council must consider in its deliberations "...that the bylaw is necessary to prevent the public display of signage that-(a) *is likely to cause a nuisance or serious offence to ordinary members of the public using the area; or (b) is incompatible with the existing character or use of that area.*"<sup>51</sup> Section 155 of the LGA02 requires the Council to identify any perceived problem in determining whether a bylaw is the most appropriate method of dealing with that problem or whether it can be addressed in some other way. There is no evidence of any such problem that falls within the categories specified above, nor was any provided at the time of the introduction of the current bylaw. In the report of the Prostitution Reform Act Subcommittee to the Council meeting of 1 July 2004 it was stated:

*It was not to be expected that the signage requirements, despite being significantly tighter than those applying to other legal businesses, would cause major problems. It appears that this is due to businesses not having signage which causes offence to reasonable members of the public. ... The controls were therefore introduced to preclude future possible signage that could be considered offensive, or to attempt to reduce the visibility of such operations.*

61. At the time of the development of the bylaw there was little or no evidence that such signage associated with premises providing commercial sexual services fell into such categories. Submissions received during the process indicated that premises such as SOOBs operating in residential areas were unlikely to use signage in any case and other businesses of prostitution that may operate outside the designated zone were likely to be limited to drawing attention to such activities even before the location provisions were quashed. The Council determined that a prohibition should apply to any brothels outside the designated area under the bylaw, including those which were permitted initially under the bylaw outside that location control. This prohibition was considered necessary in addition to City Plan regulations to prohibit signage describing the details of the services available in the premises (which are permitted for other businesses). In general this application was supported by the then known industry and certainly by the few submissions received on the bylaw and the views of persons completing the pre bylaw questionnaire.
62. It should be noted that almost no cases, or complaints, in relation to brothels signage have occurred in the five years the bylaw has been in force. Whether the current bylaw has precluded the development of such possible signage or not is moot, but certainly there is no evidence of substantive complaints being received about signage<sup>52</sup> As there is no evidence of any perceived problem that exists, in relation to advertising commercial sexual services, the justification for continuing the provision in the bylaw appears doubtful, particularly as matters of offensiveness of advertising signs could be controlled through the City Plan provisions as below. It is appreciated that support for controls was expressed through the submission process on the proposed bylaw, although limited numbers raised that issue following the SCP (17 of the 88 submitters supported the bylaw proposals) with only 2 concerned that the now legitimate business should be restricted compared with other businesses.

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<sup>51</sup> Section 12 (2) the Prostitution Reform Act 2003

<sup>52</sup> Only one complaint has been received since the bylaw has been in force.

63. As pointed out above, the major issues with signage appeared to relate to alleged “offensive” or “sexually explicit” signage that were seen to exist, but were not associated with advertising “commercial sexual services” *per se*. The display of outdoor advertisements are controlled under the provisions of the City Plan in regard to area, height, illumination, relationship to the site,<sup>53</sup> and compliance with the Advertising Standards Authority Code of Practice relating to criteria for offensiveness and decency of advertising.<sup>54</sup> It should be noted that the City Plan and the Banks Peninsula District Plan enables regulation of signage associated with brothels (in a similar way to the regulation of signs associated with other businesses) but not its prohibition.
64. Should the Council wish to continue to control signage as currently under the bylaw, given that those provisions still exist and were not challenged in the judicial review, the bylaw could be continued until it lapses two years after the 7 July 2009. It would allow signage advertising commercial sexual services only in the central city area as defined in the bylaw and prohibit it in any other areas of the city. The continuance of the current bylaw, subject to the matter not being appealed, would avoid possible consideration of section 155 issues at this time particularly as the evidence is limited as to perceived problems.

## Conclusions

65. Applying the tests and analysis carried out under section 155 of the LGA02 there is no good evidence that there is a need for controls under a bylaw over the location of either businesses of prostitution or SOOBs in the Christchurch City Council district. Many of the original concerns expressed at the time of the introduction of the Act appear to have been based on a misunderstanding that the Act had changed the legality of prostitution, when all it did was remove some limited offences related to the activity. Prostitution *per se* had been legal for a lengthy period and it had existed for a considerable time in New Zealand and in Christchurch without significant problems occurring. The perception that the legislation would lead to an increase in the activity has not been met, nor has there been any evidence of any significant increase in problems from such a source.
66. As pointed out above, the perception that an increase in signage in the inner city areas where it was allowed would occur also was not well founded and any that had occurred could have been controlled through City Plan rules. If there was no bylaw then it is also expected that there would be no increase in signage. There is no evidence that the industry intends to produce signage that would meet the test in the power under section 12(2) of the Act (cause offence or be incompatible with the character of the area). In the case of SOOBs which operate in Living Zones, in general, there have been no identifiable cases that such operations, given the nature of the activity, have or are likely to have signage, but if they did, it must comply with the rules under the City Plan, or in the case of the Banks Peninsula ward with the District Plan.<sup>55</sup> It was clear at the time of development of the bylaw those operating outside the inner city area did not consider there was any need to signage.

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<sup>53</sup> Christchurch City Plan Volume 3 : Part 10 Heritage and Amenities : 3 Display of outdoor advertisements

<sup>54</sup> *Rule 4 Decency- Advertisements should not contain anything which clearly offends against generally prevailing community standards taking into account the context, medium, audience and product (including services) and Rule 5 Offensiveness – Advertisements should not contain anything which in the light of generally prevailing community standards is likely to cause serious or widespread offence taking into account the context, medium, audience and product (including services)*, NZ Advertising Standards Authority, Advertising Code of Ethics, 1 August 1996

<sup>55</sup> “Home Enterprises” permitted under the Banks Peninsula District Plan are not permitted to have signage.

67. The analysis undertaken has revealed there is no significant evidence for nuisance problems caused by the existence of brothels in Christchurch City, either from their location or the signage used and any such can be controlled under the current provisions of either the City Plan in the case of Christchurch<sup>56</sup> or the District Plan in the case of the Banks Peninsula ward. The argument that a small proportion of the public<sup>57</sup> do not consider prostitution should occur in the area is probably unrealistic given its long history and that it is a legal activity. Location can only be regulated and not prohibited. Attempts at controls which may have the effect of driving it underground were seen by health professionals as not meeting the purposes of the Act. It is generally considered that restrictions should not be placed on legal activities without evidence of proven nuisance affecting a wide proportion of the public. In the case of brothels in Christchurch, there is no such evidence of problems and it is concluded that the current bylaw should be revoked. Should it become apparent that, sometime in the future, the situation may change the matter could again be examined if evidence is available that significant problems exist.
68. There are some difficulties in undertaking enforcement on the operation of SOOBs under the Act. They are not included in the Act as businesses of prostitution and hence do not require operating certificates under the Act, as each of the sex workers retains control of their own income. There is no right of entry into homes used for such purposes under the Act without a warrant **and** good evidence that a business of prostitution is occurring. They, however, would be more easily controlled under the City or District Plans as home occupations, or home enterprises, with the controls on hours of operation, space used, and vehicle movement criteria that apply.
69. The report of the PLRRC in commenting on the High Court decisions regarding brothel bylaws has stated:
- "In the Committee's view, the sex industry should be regulated, as far as possible, in the same manner as other industries, that is, subject to the general law of nuisance and a regulatory scheme that is based around ameliorating that nuisance. Such an approach may assist in reducing the stigma attached to the sex industry. Where nuisance is not a likely result of the establishment of a shop, factory or brothel, it is unreasonable to place a prohibition on its establishment."*<sup>58</sup>

### Options Considered in the Review

70. The section 155(1) analysis undertaken has revealed there is no significant evidence for nuisance or any other problems caused by the existence of brothels in Christchurch City, either from their location or the signage used and any issues that do arise from location or signage can be controlled under the current provisions of the City Plan or Banks Peninsula District Plan. The following options have been considered in reviewing the current bylaw.

#### *Option A: "do nothing and allow the current bylaw to lapse"*

71. In this case the current bylaw as amended by the High Court in relation to the quashing of the location provisions would continue in force for a further two years from the 7 July 2009. It would retain the signage provisions, including the prohibitions outside the First Schedule area, but would rely on the City or District Plan requirements in regard to location issues. Legal advice is to the effect that this option may be *ultra vires* the LGA 02 if a review under section 155 has been undertaken. If the Council has made the determinations under section 155 then its only options appear to be as set out in section 160(3). If it considers the bylaw should be amended, revoked, or revoked and replaced, it must use the SCP under section 156, or if it considers it should continue without amendment it must also use the SCP. If the Council has only got part way down the track of the section 155 review and does not make the final determination, then it could just let the bylaw lapse under section 160A.

<sup>56</sup> Evidence given before the High Court in the Willowford Family Trust case indicated that there was limited scope for a brothel (other than complying with the "home occupation" rules) to establish in Living Zones under the City Plan as a permitted activity. It was also indicated that permitted activity status in most business zones was unlikely for any large scale brothel. Failure to meet the standards would require the consideration of a resource consent. Affidavit of Catherine Patricia Elvidge, 17 March 2005

<sup>57</sup> The questionnaire responses were a self selected non random sample of the total population of Christchurch and as such cannot be taken as representative.

<sup>58</sup> Prostitution Law Reform Review Committee report, May 2008, p 145

*Option B: “make a new bylaw covering location (allowance for SOOBs and regulate where in Business Zones businesses of prostitution could be operated) and signage”*

72. This option would not be supported on the basis that there is no evidence of a significant problem existing and therefore fails the section 155(1) criteria. Considerable work would be needed to examine the most appropriate Business Zones for businesses of prostitution and the reasons for their selection. While the High Court judicial review accepted the Inner City area contained in the current bylaw (despite quashing the requirement) the Judge stated: “*it is perhaps surprising that the Council resolved to confine brothels to the central business district alone. The evidence as to the location of massage parlours registered under the previous legislation, suggested that, while there was a concentration of parlours within parts of the central business district, they were by no means confined to that area, ... and others, were situated in business areas on certain main arterial roads outside the central business district. This historical pattern may afford the best evidence concerning where premises suitable for the business of prostitution are to be found*”.<sup>59</sup>

*Option C: “make a new bylaw just covering signage”*

73. This option would enable the Council to both regulate and prohibit signage advertising commercial sexual services under the Act in, or in view of, a public place. It would require the Council to determine the bylaw is necessary to prevent the public display of signage that is likely to cause a nuisance or serious offence to ordinary members of the public using the area, or that the signs are incompatible with the existing character or use of the area. Given that there is little evidence for breaches of the present bylaw provisions, or evidence that businesses of prostitution have attempted to erect such signage that may fail to comply with the NZ Advertising Standards Authority, Advertising Code of Ethics which applies under the City Plan it is unlikely the bylaw option would meet the section 155(1) criteria.

*Option D: “revoke the current bylaw”* [Recommended Option]

74. There is not enough evidence of a problem regarding location or signage or that a bylaw is the most appropriate way to address any perceived problem. Evidence is available that controls exist under the City Plan and District Plan to address the use of premises for brothels and signage which may be considered offensive to ordinary members of the public. The revocation option is recommended rather than allowing the bylaw to lapse although Option A would have the same effect but in two years time.
75. Should the Council consider sufficient evidence exists to consider any of the above options as to the development of a new bylaw covering either location or signage the issues could be addressed through the Brothels Location and Signage Bylaw Subcommittee. It would need to examine the evidence for introducing any bylaw and determining possible areas for the location of businesses of prostitution and whether to regulate or prohibit signage advertising commercial sexual services throughout the city (or in parts of it).

### **Recommended Timetable for Consideration of Revocation**

76. The following is a tentative timetable for further consideration of the revocation of the bylaw:
- 6 November 2008 -Section 155 report to Regulatory and Planning Committee
  - 27 November 2008 – Section 155 report to Council
  - Late January to beginning March 2009 – Special Consultation Procedure
  - Hearings of submissions after 23 April 2009
  - Final Report of Hearings Panel to Council – June 2009

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<sup>59</sup> WILLOWFORD FAMILY TRUST & TERRY REX BROWN HC CHCH CIV-2004-409-002299 [29 July 2005]