

15. **CHRISTCHURCH CITY BROTHELS
(LOCATION AND SIGNAGE) BYLAW 2004**

Sections 7(2)(f) and 7(2)(g)

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INTRODUCTION

1. On 1 July 2004 the Council adopted the Christchurch City Brothels (Location and Signage) Bylaw 2004 following a report from the Council's Prostitution Reform Act Subcommittee. This resulted from the passing of the Prostitution Reform Act 2003 which gave territorial authorities the power to make bylaws for their districts for the purpose of regulating the location of brothels.
2. Clause 6 of the bylaw stated that subject to certain other provisions relating to existing brothels, no person may operate, or permit or suffer to be operated, a brothel in any part of the city other than within an area delineated on a map contained in a schedule attached to the bylaw.
3. Prior to reporting to the Council, the Prostitution Reform Act Subcommittee followed a comprehensive process of consultation with parties who had an interest in, or who would be affected by, the proposed bylaw. It is clear that the location of brothels in the city was an issue that attracted a great deal of interest, from both those with supporting and those with opposing views.
4. One matter in particular that was of serious concern to many people who made submissions to the Subcommittee was that of the status of small owner operated brothels (SOOBs). The Prostitution Reform Act 2003 recognised SOOBs by defining them as a brothel at which not more than four sex workers work and where each of those sex workers retains control over his or her individual earnings from prostitution carried out at the brothel. Having given the matter considerable thought and acknowledging that SOOBs already operated without too many problems, the Subcommittee recommended to the Council that the proposed bylaw should allow them to operate in Christchurch. This was subject to a proviso that no more than two sex workers work at such premises and that each of those sex workers retain control over his or her individual earnings. The operation of SOOBs would also be subject to the requirements of the City Plan.
5. In the event, the Council did not accept its Sub-committee's recommendation and the terms of the bylaw adopted meant that no brothels (including SOOBs) could operate in any part of the city other than in the scheduled area.

SUMMARY

6. Not long after the bylaw was adopted, it was challenged in the High Court by Willowford Family Trust and Terry Rex Brown. The Trust owns properties both within and outside the scheduled area that it wished to use as brothels. Mr Brown is a beneficiary of the Trust. It was claimed that the regulation of the location of brothels in Christchurch was unreasonable, repugnant and, in effect, a prohibition on the location and operation of brothels. The Plaintiffs further alleged that such a provision comprised unlawful discrimination under the New Zealand Bill of Rights Act 1990, unlawfully interfered with the rights of owners or occupiers of properties under the City Plan and also interfered with the right to work, as guaranteed by the International Covenant on Economic, Social and Cultural Rights and the common law. Finally, it was claimed that the Bylaw inhibited the rights of prostitutes to freedom of association, contrary to the Bill of Rights Act.
7. The Plaintiffs' claim was heard by the Court in June 2005.
8. In summary, the Court's decision following the hearing was that Clauses 6 and 7 of the bylaw be quashed. This takes effect from 29 July 2005, the date of the Court's decision.
9. Either party has 20 working days from 29 July 2005 in which to file an appeal.
10. Filing an appeal does not operate as a stay of the decision appealed against. If the appeal is successful, Clauses 6 and 7 of the bylaw will be reinstated. Until that point is reached, they no longer have any effect.

11. The Council's legal advisers, Simpson Grierson, estimate that the cost of an appeal is likely to be about \$25,000. An application for a stay of the decision would cost about \$7,000. To date, the cost of defending the proceedings has been in the order of \$100,000, not including the cost of staff time.
12. If no appeal is lodged and a decision is made instead to amend the bylaw to accommodate the High Court ruling, the Local Government Act 2002 requires the special consultative procedure to be followed. Given that the Council may wish to consult with stakeholders before commencing the procedure, this may take up to six months to complete.
13. In the meantime, brothels may be operated anywhere in Christchurch City, although the provisions of the City Plan would apply to any application made. SOOBs in which there are no more than two workers can legally operate in Living Zones, provided that they are within the zone rules for home occupations.
14. If anyone was to open a new brothel in an area that was previously excluded from the area in which brothels were allowed by the bylaw, that person could continue to operate it, but if the amended bylaw again excluded that area then the Council would have the power to close it down. The situation is not one in which existing use rights would prevail as, for example, is the case with consents issued under the Resource Management Act.
15. Until such time as the amendment of the bylaw is adopted by the Council the provisions of the City Plan with regard to the operation of brothels will be the only method of control available to the Council, apart from the signage requirements remaining in the bylaw. Because of the nature of the activity, however, obtaining evidence for the purpose of enforcing the provisions of the City Plan will be difficult.

HIGH COURT PROCEEDINGS

16. The proceedings were defended by the Council. The case attracted considerable interest, not the least because other territorial authorities throughout New Zealand had been faced with the same issues as the Christchurch City Council had. As noted in the Prostitution Reform Act Subcommittee's report, of the six councils that were found to have made bylaws pursuant to the Prostitution Reform Act, none had allowed SOOBs to operate in residential areas.
17. The Plaintiffs' claim and the Council's response were set out in documents filed at the Court and supported by affidavits. The High Court at Christchurch heard oral submissions from Counsel for both parties on 20-21 June 2005. No witnesses were called. The Court gave its decision on 29 July 2005.
18. The Council was represented by D J S Laing and P M S McNamara, of Simpson Grierson, solicitors. A report from that firm with regard to the outcome of the proceedings is attached. Without derogating from that report, the Legal Services Unit makes the following points:
 - (a) The High Court noted that the Council was authorised by the Prostitution Reform Act 2003 to make bylaws for the purpose of regulating the location of brothels.
 - (b) The judgment contains no criticism of the Council's process in arriving at its decision to adopt the Christchurch City Brothels (Location and Signage) Bylaw 2004. The special procedure for public consultation applied and was followed. The Court agreed with the submission on behalf of the Council that the procedural requirements surrounding the making of bylaws under the Local Government Act 2003 introduce a new degree of rigour and accountability. The Council's process reflected this.
 - (c) The Court made the comment that location of brothels within the Central Business District was likely to produce problems. Notwithstanding that, the Court was unpersuaded "by quite a margin" that the bylaw was unreasonable on account of its geographical limitation, character and extent. The scheduled area was found to be neither unreasonable, nor disproportionate. The Court found in fact that the definition of the scheduled area reflected the considered view of the Subcommittee, after full public consultation, as to what was appropriate. In terms of the size and definition of the area itself, the Court considered that it was not of a nature that reasonable people could not arrive at it.

- (d) The Court rejected the arguments advanced by the Plaintiffs that the bylaw unreasonably interfered with common law rights and existing use rights and was discriminatory. So far as the right to work was concerned, the Court found that only one form of sex work was restricted by the bylaw and that was work in SOOBs situated outside the scheduled area. The Court's view was that the report of the Subcommittee and its recommendations to the Council, confirmed evidence before it that SOOBs were operating in the suburbs, typically in a private home, because both workers, and their clients, welcomed the relative anonymity of the situation. The Court noted that the Subcommittee's recommendation represented a realistic "squaring up" to the clear intent of the Act, in which SOOBs are recognised as a constituent part of the business of prostitution.
 - (e) Ultimately, the Court found that the bylaw, as it affects SOOBs, was invalid. It cited with approval a statement in an earlier case to the effect that the bylaw prohibited 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". The restriction was found to be unreasonable.
 - (f) The Court has indicated that an order for costs should be made against the Council. Simpson Grierson has estimated that the level of costs awarded would be somewhere between \$15,000 and \$20,000. However, the firm would like to make submissions with regard to such an order because of the fact that the wide and varied grounds relied upon by the Plaintiffs in their claim resulted in higher costs being incurred by the Council in defending them. In the event, the Plaintiffs were successful on one ground alone.
19. The Court commented on two issues that are relevant to the Council's process in this matter. Firstly, it noted that the majority view of respondents to the Subcommittee's questionnaire who favoured confining brothels to the Central Business District could 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. Secondly, the Court noted that operating SOOBs in private homes is not necessarily authorised by the Prostitution Reform Act 2003. The relevant requirements of the City Plan still apply and, if not met, then the proposed activity will be permissible only with a resource consent.

OPTIONS

20. It is the view of the Council's external legal advisers, supported by the Legal Services Unit, that the Council seriously consider whether or not it should appeal the High Court decision. The Court found in the Plaintiffs' favour on one point only, and that is the restriction imposed by the bylaw on the operation of SOOBs outside the scheduled area. The result is that Clauses 6 and 7 of the bylaw have been quashed. The Council is referred to paragraph 16 on page 4 of Simpson Grierson's report.
21. The practical result of this is that there are currently no restrictions on the location of brothels in Christchurch City. This would be the case whether or not an appeal against the High Court's decision was lodged. The advice contained in Simpson Grierson's report is that there is a very narrowly defined opportunity to overturn that decision.
22. The Council may choose to:
- (a) Do nothing. This would mean that the Council accepts that the only controls it has over brothels are contained in those clauses of the Christchurch City Brothels (Location and Signage) Bylaw 2004 that relate to signage and the relevant provisions of the City Plan; or
 - (b) Appeal the Court's decision and seek to reinstate Clauses 6 and 7 of the bylaw; and/or
 - (c) Apply for an order to stay the decision pending the outcome of the appeal; and/or
 - (d) Seek a further report from Council staff with regard to the consultative process necessary to enable the Council to amend the bylaw by allowing for small owner operated brothels to operate in Christchurch City. The effect of this would be to remedy and replace the provisions of the bylaw found to be unlawful by the High Court.

STAFF RECOMMENDATIONS

It is recommended that:

- (a) If the Council resolves to file an appeal to the High Court decision, then such resolution is made and documents filed within 20 working days of 29 July 2005.
- (b) If the Council resolves not to file an appeal but instead elects to amend the Christchurch City Brothels (Location and Signage) Bylaw 2004, then Council staff be instructed to prepare a further report to the Council on the options available to achieve this.