

Brothels, bylaws, prostitutes and proportionality

Dean Knight, Victoria University of Wellington

looks at the quashing of a bylaw regulating brothels

The Prostitution Reform Act 2003 (“the PRA”) has proved to be one of the more controversial pieces of legislation since its passing with a one vote majority in June 2003. The campaigns for and against prostitution did not end. The PRA provided for local regulation of brothels, either through district plans controls under the Resource Management Act 1991 or bylaws under the Local Government Act 2002. The High Court decision *Willowford Family Trust v Christchurch City Council* (Christchurch CIV-2004-409-002299, 29 July 2005, Panckhurst J) saw a victory for brothels when Christchurch City’s bylaw controlling the location of brothels was struck down. The decision is notable both for its (narrow) interpretation of the power to make bylaws controlling brothels and the (unsuccessful) attempt to promote proportionality as the appropriate standard for reviewing the substantive merits of bylaws.

As brothel bylaws are now commonplace (see Jennifer Caldwell, “Bylaws — regulating the sex industry” (2004) 5 BRMB 133), the decision has wide ramifications. A similar challenge to Auckland City’s bylaw has been heard by the High Court, and many other territorial authorities are awaiting the outcome of that case and the appeal to the Court of Appeal in *Willowford*.

PROSTITUTION REFORM ACT

The purpose of the PRA was “to decriminalise prostitution (while not endorsing or morally sanctioning prostitution or its use)” and to create a framework which, amongst other things, “safeguards the human rights of sex workers and protects them from exploitation”, “promotes the welfare and occupational health and safety of sex workers” and “is conducive to public health”. (s 3, PRA)

The central feature of the PRA was the repeal of the various offences prohibiting solicitation and prostitution. Instead, strong prohibitions against under-age (less than 18 years old) prostitution were introduced. One of the key aspects of the regulatory framework is the requirement for operators of brothels to be licensed by Registrars of the District Court. However, notably, small owner-operated brothels (rather unfortunately described by the Court in *Willowford* as SOOBs), are exempt from the licensing requirements. In addition, the PRA provides for various health and safety measures, including requirements to promote safer sex and powers of inspection for people appointed by the Medical Officer of Health to ensure compliance.

In addition to central government regulation, territorial authorities are given a number of powers to control brothels:

- Territorial authorities may make bylaws:
 - prohibiting or regulating signage advertising commercial sexual services; and

- regulating the location of brothels. (ss 13 and 14, PRA)
- When considering applications for resource consents relating to the business of prostitution, territorial authorities are obliged to consider whether the business is likely to “cause a nuisance or serious offence to ordinary members of the public” or is “incompatible with the existing character or use of the area”. The power to regulate the business of prostitution under the RMA is specifically preserved. (s 15, PRA)

The issue in *Willowford* was how far could territorial authorities go when controlling the location of brothels through bylaws.

CHRISTCHURCH CITY’S BYLAW

Soon after the PRA came into force, the Christchurch City Council moved to make a bylaw controlling the location of brothels. The consultative process was extensive. In addition to complying with the statutory minimum consultation requirements to make a bylaw (consultation through the special consultative procedure), the council also tested the views of its community before beginning the formal bylaw-making process (eg, interaction with stakeholder groups, questionnaires and public meetings).

The bylaw enacted, as it related to the location of brothels, had three significant features:

- brothels were only permitted to operate in a small designated area of the district (in general terms, part of the central business district);
- SOOBs were treated in the same way as larger brothels; and
- no provision was made for existing use rights for existing brothels or the ability for new brothels to apply for dispensations (except for three particular long-standing massage parlours/brothels which were specifically exempted from the location requirements).

The subcommittee which heard public submissions originally recommended that SOOBs be exempt from the location controls, but the council as a whole rejected this recommendation when it ultimately made the bylaw.

THE CHALLENGE

The bylaw was challenged by a prospective brothel operator who owned land both within and outside the schedule area, who also described himself as having an “abiding interest” in prostitution law reform.

The bylaw was challenged on a number of substantive grounds (for the traditional grounds of challenge, see my earlier article, “Power to make bylaws” [2005] NZLJ 165).

Panckhurst J dealt with the challenges according to the following “pervasive themes” (para 9):

- the geographical character of the bylaw;
- interference with the right to work; and
- inhibition of the right to freedom of association.

The challenge to the definition of the designated area was primarily on the basis that the area was unduly small (about one per cent of the area of the city). The plaintiff argued the restriction would raise rental prices for brothel premises and lead to loss of employment for sex workers. Further, it was contended that the restriction to the CBD had led to “unmet sexual or companionship needs for persons residing in suburbs” due to the unavailability of small owner-operator brothels and the difficulties that potential customers, particularly pensioners, would have travelling into the central business district. (para 22)

Panckhurst J accepted that there were limited numbers of suitable premises within the designated area but, in the absence of market-based evidence, was unable to conclude whether the concerns expressed were substantiated. At best, his impression was the restriction was “likely to produce problems” — particularly because the historical pattern of massage parlours suggested these premises were not confined to the central business district. (paras 61-62) However, he was “unpersuaded by quite a margin” that the bylaw was therefore unreasonable or disproportionate. (para 71) He placed some weight on the area reflecting the “considered view” of the council subcommittee reached after full public consultation. The view of the community weighed strongly in favour of confining brothels to the central business district and its concern was “understandable”. (para 71)

The challenge based on the right to work arose in a number of ways. First, it was argued that the bylaw was substantively invalid on the grounds of unreasonableness and/or disproportionality. Second, it was argued that the right to work was a constitutional, or, alternatively, a common law, right and any interference was repugnant to constitutional principle or the common law. The essence of the council’s response was to argue any interference was non-existent or minimal and, in any event, was mandated by the PRA. The Council’s attempt to place significance on the purported neutrality of the decriminalisation (“without endorsing or morally sanctioning prostitution”) was rejected; His Honour recognised the rights of sex workers to engage in the business of prostitution. However, he accepted that the right was qualified, both generally (regulatory restrictions on the right to work being “commonplace”) and specifically (the PRA’s framework allowing the regulation of the location of brothels). (para 83) Panckhurst J concluded the bylaw did not intrude “to any significant degree” on sex workers’ right to work. (para 83) He did, though, accept the bylaw restricted one form of prostitution (SOOBs outside the CBD), albeit he noted that sex workers could still work in brothels within the CBD, on the street, or from home for out-call and escort work.

It then became a question of whether the degree of restriction was severe enough to make the bylaw unlawful. There is long-standing authority for the proposition that the power to “regulate” does not include the power to prohibit or effectively prohibit. (*Municipal Corporation of the City of Toronto v Virgo* [1896] AC 88) Similarly, the basis on which the reasonableness of a bylaw is assessed weighs the productive benefits and negative effects of a bylaw, including

whether public or private rights are unnecessarily or unduly infringed. Panckhurst J concluded the bylaw was unlawful in relation to its impact on SOOBs — noting that it did “not greatly matter” whether this was due to unreasonableness, prohibition, or unreasonable restraint of trade. (para 94) The bylaw prohibited sex workers from, in the words of *Virgo*, “plying their trade at all in a substantial and important part of the city no question of any apprehended nuisance being raised”. (para 94) Notably, the recommendations of the council’s subcommittee were based on the findings that small owner-operated brothels had previously existed essentially in residential areas and done so without causing “significant problems”. Panckhurst J described the subcommittee’s original proposal (ultimately rejected by the council) to allow small owner-operator brothels in residential areas as representing “a realistic squaring up to the clear intent of the Act”, (para 93) particularly given the recognition that brothels would exist in residential dwellings and that small, home-enterprise brothels did not need to obtain an operator’s certificate. Evidence from the Prostitute’s Collective suggested that the real effect of the bylaw would be to expose the estimated 50 to 60 sex-workers in small owner-operated brothels to criminalisation — thereby undermining the principal purpose of the PRA.

For completeness, His Honour doubted, without deciding, that the challenge based on freedom of association would succeed in its own right. While the bylaw may have the tendency to force SOOB workers to work in large brothels, the bylaw did not require them to work in such an associational situation — particularly as various other working options remained. (para 99)

The bylaw was therefore quashed. Surprisingly, the council did not seek to sever the offending parts of the bylaw from the geographical controls that survived scrutiny. Subsequently, the council was unsuccessful in seeking to have the quashing of the bylaw stayed pending the appeal. (21 September 2005, CIV-2004-409-002299) While Panckhurst J was “initially ... attracted” to reviving the part of the bylaw relating to conventional (rather than small owner-operated) brothels, he was persuaded he had no jurisdiction to do so: “To contemplate revival at this point ... impressed me as conceptually wrong. ... Once a Court has determined that a particular provision is invalid, it is antithetical to that determination to contemplate recognition of the provision as lawful, even in the short term.” (paras 22-23)

DISCUSSION

Legality of the bylaw

The decision to quash the bylaw as it related to small owner-operated brothels was, in my view, sound, although I would have preferred a clearer distinction to be made as to the basis for this finding. In my view, regulating the location of small owner-operator brothels in the manner proposed is better seen as either being ultra vires the bylaw-making power (the empowering provision being read in the light of the purpose and context of the Act) and/or repugnant to the other provisions of the PRA. The purpose of decriminalisation (including health and safety goals) would have been dramatically undermined if small owner-operated or home enterprise brothels were effectively driven underground by unrealistic geographical regulation. On the other hand, treating the unlawfulness as arising from the substantive merits (ie the reasonableness) of the bylaw suggests that effective prohibition of small owner-operator brothels may

remain a plausible option is some circumstances — if done in a less egregious manner or with a greater justificatory basis. However, this possibility seems inconsistent with the overall purpose of the PRA.

But, of course, the Court's limitation of the power to regulate the location of brothels through bylaws does not leave territorial authorities and their communities without any ability to control the adverse effects arising from brothels in residential (and other) areas. Various RMA controls remain. In the case of Christchurch City, existing district plan rules mean there is limited scope for a brothel to be established in a residential area because of restriction on the hours of operation for home enterprises (7 am to 11 pm) and parking requirements. Establishing a brothel was permitted in business zones outside the designated area subject to compliance with the usual bulk, location and traffic standards. In addition, the specifically enumerated considerations for assessing resource consents for the business of prostitution still provide a degree of control over incompatibility with residential and other activities. Further, territorial authorities still have the power to promulgate more restrictive district plan rules controlling prostitution.

Why was there the desire and apparent need for such blunt regulation of brothels through a bylaw? In my view, the reliance on bylaw was primarily to circumvent the justificatory imperatives implicit in the RMA. The established approach for assessing whether an activity should be allowed or not requires a robust assessment of its environmental, in the broadest sense of the word, including social, economic, aesthetic, and cultural matters (see s 2, RMA), impact. Promulgation of district plan rules require an appropriate policy foundation and an assessment of the costs and benefits of such regulation. (s 32, RMA) The assessment of individual applications focuses on the effect of the activity (both positive and negative) on the environment and seeks to ensure an integrated and consistent approach to regulation. (s 104, RMA) The perceived difficulty for territorial authorities is that prohibiting brothels (particularly in residential areas) is unlikely to survive such scrutiny — with the adverse effects of SOOBs likely to be minimal in the comparison to some of the other activities already allowed in such areas, such as kindergartens, fast-food restaurants etc. In addition, the RMA automatically protects activities established before rules are promulgated through existing use rights. As district plan rules take some time to enact, there is an argument that existing massage parlours and new brothels established soon after decriminalisation would have been exempt from any new district plan controls. There is no automatic provision for existing use rights for bylaws — although I would argue it is, in principle, appropriate to allow existing use rights and any failure to do so should be scrutinised carefully in any assessment of the reasonableness of any bylaw.

Bylaws and proportionality

The case also raises the side issue of the appropriate standard for assessing the substantive merits of bylaws. The case for the plaintiffs was put on the basis that the proportionality — or, as Professor Joseph describes it, “constitutional review” (see PA Joseph, “The Demise of *Ultra vires* — Judicial Review in the New Zealand Courts” [2001] PL 354) — should be utilised, rather than the traditional *Wednesbury* unreasonableness approach. The push for proportionality has gained further momentum from Lord Steyn's speech in *R v Secretary of State for the Home Department, ex p Daly* [2001]

3 All ER 433 recently explored by Wild J in *Wolf v Minister of Immigration* [2004] NZAR 414. However, Panchhurst J ultimately declined to consider such a possible development indicating that it was not an appropriate case “to define the outer edge of the jurisdiction to review bylaws”, particularly because there was “already a well-established approach to unreasonableness in the present context”. (para 70)

A number of problems arise from the reluctance to define with certainty the legal method for assessing the substantive merits of bylaws. First, although Panchhurst J preferred the traditional approach of unreasonableness to proportionality, the readily applied *McCarthy v Madden* (1914) 33 NZLR 1251 characterisation of unreasonableness already has the flavour of a proportionality assessment. The Courts are directed to assess the productive benefits and negative effects in a manner not dissimilar to a proportionality assessment. Second, while the Judge was reluctant to endorse or reject the proportionality standard, the conclusion that the bylaw was unlawful as it relates to SOOBs is capable of being interpreted as either arising from an unreasonableness or disproportionality assessment; it is less than clear which standard was used for reviewing the merits of the bylaw and whether a different standard would have materially affected the outcome.

Finally, the *McCarthy v Madden* approach is ripe for review — not merely because of the maturation of the system of local government over the last century but also in the light of the recent dramatic reforms of its processes. Any reassessment should, in my view, favour a more deferential standard, more akin to the *Wellington City Council v Woolworths (NZ) Ltd (No 2)* [1996] 2 NZLR 537 standard applied to decisions of “high policy” such as rating decisions, rather than the closer scrutiny and justificatory approach implicit in a proportionality assessment. While proportionality may in principle provide a useful standard for assessing administrative action in other contexts, the democratic imperatives and other procedural safeguards in the bylaw-making process nowadays mean there is not the same need for close judicial scrutiny of its product (see similar sentiments expressed in *New Zealand Public Service Association Inc v Hamilton City Council* [1997] 1 NZLR 30).

In my view, the bylaw-making process contains sufficient, as Harlow and Rawlings would describe it (*Law and Administration* (2nd ed, Butterworths, London, 1997)), “green light” controls or prospective controls against abuse; resort to intense external (judicial) and retrospective scrutiny consistent with the “red light” theory of control is unnecessary. Local authorities are required to undertake their own assessment of the appropriateness of a bylaw — an assessment which effectively demands the same framework as any judicial, ex post facto proportionality review. Standing obligations to take account of community views, augmented by specific consultation requirements, mean bylaws are scrutinised during their conception. Although the Judge (properly) noted that elected representatives are not bound to the viewpoint of their constituents (of whom, only 2.2 per cent of those participating in the consultation process favoured allowing any brothels in residential areas), the dialogue over regulatory mechanisms provided through participatory democracy at a local level should not be ignored. To the extent that the challenge against the definition of the designated areas for conventional brothels — a matter squarely within the four corners of the local authority's discretion — was unsuccessful, the deferential nature of the Court's decision should be commended. □