IN THE COURT OF APPEAL OF NEW ZEALAND

CA165/06
[2007] NZCA 543

	BETWEEN	JULIE CONLEY Appellant
	AND	HAMILTON CITY COUNCIL Respondent

Hearing: 18 October 2007

Court: Hammond, Robertson and Arnold JJ

Counsel: G J X McCoy and K H Cook for Appellant
P M Lang and D A Thresher for Respondent

Judgment: 28 November 2007 at 11 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The respondent will have costs of $6,000 and usual disbursements.

REASONS OF THE COURT

(Given by Hammond J)

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Introduction

[1] Ms Conley made an application to the High Court under s 12 of the Bylaws Act 1910 for an order quashing the Hamilton City Council (HCC) Prostitution Bylaw 2004. She maintains that the bylaw:

- is unreasonable or disproportionate;
- is repugnant to the laws of New Zealand; and
- unlawfully interferes with the right to work of sex workers and the human rights of sex workers as specifically provided for in s 3 of the Prostitution Reform Act 2003 (the PRA).

[2] Ellen France J declined to strike down the bylaw (HC HAM CIV 2005-419-001689 19 July 2006).

[3] Ms Conley now appeals to this Court.

Background

[4] In 2003, the New Zealand Parliament passed the PRA, making prostitution and brothel-keeping legal in New Zealand.

[5] The passage of this legislation attracted considerable controversy. One feature of the legislation which attracted strong debate in the Select Committee and in Parliament was: if brothels were to be legal, where should they be located? Ultimately this decision was delegated to local authorities: s 14 of the PRA provides that a local council can "regulate the location of brothels".

[6] Acting under this provision, on 29 September 2004 HCC passed the Prostitution Bylaw 2004 (the bylaw). It came into force on 1 October 2004.

[7] This bylaw provides that brothels can only be operated within specified zones. The bylaw further prevents a brothel from being located within 100 metres of "sensitive sites", which are registered places of worship, schools, early childhood centres, or marae. The bylaw also regulates signage.

[8] Under the bylaw, three zones are available for the establishment and running of brothels in Hamilton: the city centre zone, the commercial service zone, and the industrial zone. We will refer to these three areas globally as the "permitted zone".

[9] The city centre zone is the central core of Hamilton. It is primarily used for commercial purposes. The commercial service zone consists of the remainder of the central city commercial area. It also encompasses part of the suburb of Frankton. The commercial service zone is characterised by light industrial work, service businesses, warehousing, and retail offices. The industrial zone was described by Ellen France J in the High Court as "very diverse" (at [56]).

[10] Within the permitted zone there are 301 residential units, of which 192 (63.8%) are not within 100 metres of a sensitive site.

[11] Ms Conley runs a brothel from a large house at 19 Marama Street in the central city area of Hamilton. This brothel operates quite close to Hamilton Girls' High School, and falls about 150 metres outside of the permitted zone.

[12] These premises have been used as a brothel for 19 years. Ms Conley employs around 12 sex workers.

[13] The Council had intended to provide Ms Conley with an exemption when the bylaw was passed, in recognition of this long-established business. However, this original intent did not proceed through to the final bylaw. We inquired why that was so. Material was referred to us from the bar which appeared to indicate that some relatively recent incidents had caused the Hamilton Girls' High School Board of Governors to protest about certain things which were said to have occurred. It appears that the HCC may well have had a change of heart. We have no specific

evidence of this. The point is not determinative in this case although it assists in demonstrating the dilemma facing the appellant herself.

[14] As enacted, the bylaw provided that brothels in operation outside of the permitted zone as at 26 August 2004 had 12 months either to relocate or cease operating.

[15] Ms Conley attempted to find alternative premises, but without success. Seventeen properties have been rejected because of their location, while three landlords were unwilling to let their premises. In some instances, Ms Conley rejected a property based on planning matters or amenities, such as carparks. On two occasions she lost out to other brothel owners on premises which would have been suitable.

[16] It was in this context that Ms Conley lodged her challenge to the bylaw on 29 November 2005. The issue before us is not raised on a judicial review application. That is, the issue is not about the reasonableness or unreasonableness of the Council determination as against Ms Conley. Her concerns are simply the initial motivator for a challenge to the bylaw itself. The question is therefore whether the bylaw is valid as a proper instance of delegated legislation.

[17] We also note that the Judge had the benefit of two recent decisions in the High Court concerning prostitution bylaws under the PRA: *Willowford Family Trust v Christchurch City Council* HC CHCH CIV 2004-409-2299 29 July 2005 and *J B International Ltd v Auckland City Council* [2006] NZRMA 401.

The legislation

[18] Section 3 of the PRA sets out the purposes of the statute:

> The purpose of this Act is to decriminalise 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.

[19] Section 14 provides:

14 Bylaws regulating location of brothels

Without limiting section 145 of the Local Government Act 2002, a territorial authority may make bylaws for its district under section 146 of that Act for the purpose of regulating the location of brothels.

[20] Sections 145 and 146 of the Local Government Act 2002 (the LGA) provide:

145 General bylaw-making power for territorial authorities

A territorial authority may make bylaws for its district for 1 or more of the following purposes:

(a) protecting the public from nuisance:

(b) protecting, promoting, and maintaining public health and safety:

(c) minimising the potential for offensive behaviour in public places.

146 Specific bylaw-making powers of territorial authorities

Without limiting section 145, a territorial authority may make bylaws for its district for the purposes—

(a) of regulating 1 or more of the following:

(i) on-site wastewater disposal systems:

(ii) waste management:

(iii) trade wastes:

(iv) solid wastes:

(v) keeping of animals, bees, and poultry:

(vi) trading in public places: …

[21] There is a further feature of the legislation as enacted which is critical to Ms Conley's case. Under s 34 of the PRA every operator of a business of prostitution must hold a certificate under s 35 of the Act. Section 35 sets out certification requirements, while s 36 sets out grounds for disqualification. The PRA draws a distinction between larger brothels (which in argument were referred to as "parlour brothels") and what is defined as "small owner operated brothels". The latter refers to 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 (see s 4(1) of the PRA). This aspect of the legislation distinctly underpinned Mr McCoy's argument on behalf of the appellant.

[22] The stated objectives of the bylaw as enacted are:

> 1. To support the purpose and intent of the Prostitution Reform Act 2003.
>
> 2. To enable Commercial Sexual Service providers to operate within Hamilton City in a manner that both meets community demand for services and addresses community concerns and sensitivities.
>
> 3. To allow the establishment of Brothels in areas where the effects associated with the operation can be readily controlled.
>
> 4. To limit the exposure of children and young people to commercial sexual services in Hamilton.

The Parliamentary debate over the siting of brothels

[23] This recital of the terms of the relevant legislation does not adequately convey the full force of the concern which accompanied the passage of this legislation. There appears to have been support in Parliament for the proposition that the time had come to "decriminalise" prostitution, but as so often occurs in major pieces of social legislation of this kind, the devil can lie in the detail.

[24] It was appreciated that a real issue was going to be where brothels could be sited.

[25] The report of the Justice and Electoral Select Committee reflected a distinct division of views amongst its members.

[26] The majority view was:

> Most of us oppose the granting of such powers to local authorities since it runs the dual risks of creating conflict over such matters and also the creation of an illegal brothel industry. The committee received little evidence that current brothel location caused genuine and widespread offence, and virtually no justification for what would constitute significant undermining of the principles of the [Resource Management Act 1991].
>
> (Justice and Electoral Select Committee *Prostitution Reform Bill* (29 November 2002) at 32)

[27] The minority view (at 31 – 32) was:

> [We] believe communities should have the opportunity to limit the conduct and location of prostitution … . We … favour leaving these decisions to local authorities, who can consult their communities to ascertain firstly whether limits on prostitution are desired, and secondly, in which locations the industry is most appropriately located, or not located.

[28] The then Minister of Justice, the Hon Phil Goff, then introduced in Parliament an amendment to the Bill to be adopted in the Committee of the House:

> The second major provision on my Supplementary Order Paper is to allow territorial authorities to make bylaws prohibiting brothels in certain areas. I believe that although most New Zealanders would agree that criminalisation of prostitution is futile and probably counter-productive, most would also clearly desire, in the event of decriminalisation, some controls to prevent the establishment of places of prostitution where they are offensive or inappropriate. Most of us would not want to see brothels established in residential areas or adjacent to preschools or schools. My amendment would allow the local territorial authorities, the councils, to prohibit the establishment of, or order the removal of, a brothel in an area where it would cause a nuisance or serious offence to ordinary members of the public. That would not enable territorial authorities to place a general ban on brothels. There are clearly commercial areas where the establishment of such a place of prostitution would not cause local office.
>
> ((19 February 2003) 606 NZPD 3619)

[29] What was a minority view in the Select Committee ultimately prevailed in Parliament in the form of s 14 of the PRA as it was passed into law.

[30] Part of the difficulty facing Parliament may have been the relative paucity of evidence about the actual operation of the brothel industry in New Zealand.

[31] In such a context, it was and still is, difficult to know exactly how the reforms might operate. By ss 42 – 46 of the PRA Parliament created a Prostitution Law Review Committee. Under s 43 of the Act that Committee must consist of eleven members appointed by the Minister of Justice (including three persons nominated by the New Zealand Prostitutes Collective). As soon as practicable after the commencement of the Act on 28 June 2003 the Committee was to assess the number of persons working as sex workers in New Zealand and any prescribed matters relating to sex workers or prostitution, and report on its findings to the Minister of Justice. The Committee provided the Minister with a report, *The Nature and Extent of the Sex Industry in New Zealand: An Estimation*, in April 2005. It is available online. While noting that any estimate of the size of the sex industry in New Zealand "must be viewed with caution" (at 3), the Committee's findings provide an indication. Two surveys were conducted: one by the New Zealand Police and one by the New Zealand Prostitutes Collective. In total, the survey from the police identified 5,932 sex workers in the areas canvassed in the report. Sex workers employed in massage parlours constituted 44% of that figure, while private workers accounted for 24%, street workers for 11%, rap/escort parlour workers for 10%, escort agency workers for 10%, and ship workers for 1% (see the summary of findings at 12 of the report). The Prostitutes Collective estimated that between 50% and 70% of sex workers worked in massage parlours, with 20% in escort agencies, and 10% working on the street or privately (see at 14).

[32] Further, within three to five years after the commencement of the Act that Committee is to review a wide range of matters (as set out in s 42(1)(b)), including whether any other amendments to the law are necessary or desirable and to report its findings to the Minister of Justice. It is expected that the Committee will provide its findings to the Minister of Justice by June 2008. The Minister will then table the Report in the House of Representatives.

[33] In short, prostitution has been decriminalised. But Parliament was cautious as to how things might in fact work out in practice. It has provided a mechanism of an ongoing character for operational and other concerns to continue to be monitored and addressed.

The response of the HCC to the legislation

[34] The HCC developed the bylaw as it came to be in accordance with s 145 of the LGA, and under s 14 of the PRA.

[35] Between April and May 2004 there was what was described as a "review of the size and scale of prostitution activities in Hamilton City". Thereafter HCC staff prepared an options paper. By July 2004 there had been extensive public consultation on a draft bylaw. HCC then heard submissions on the proposed bylaw in August 2004.

[36] The HCC received a total of 1,350 submissions, and allowed some further late submissions. Those submissions were summarised by Mr Gower, a HCC Policy Analyst, as follows:

> (a) 1042 (77.2% of all submissions) specifically opposed brothels, including Private Sex Work addresses with one sex worker, operating in residential areas of the city.
>
> (b) 64 (4.7% of all submissions) specifically supported brothels such as Private Sex Work Residences being permitted to operate in residential areas of the city.
>
> (c) 99 (7.3% of all submissions) specifically suggested a smaller permitted area for Parlour Brothel operations. Of these submissions 50 submitters suggested that Parlour Brothels should be permitted in 'the CBD', 'central city commercial area', or 'not in the industrial area' of Hamilton.
>
> 31 (2.3% of all submissions) and 52 (3.9% of all submissions) specifically suggested that Parlour Brothels should be permitted to be located only in industrial areas and CBD areas of the city respectively.
>
> (d) It is unclear from Council records the exact number of submitters that opposed prostitution in close proximity to sensitive sites. The Council's records include the following data on submissions on issues relating to sensitive sites:
>
> - 28 submitters made comments relating to the proposed 100 metre buffer distances between sensitive sites and Parlour Brothels.
>
> - 31 submitters made comments relating to the proposed 50 metre buffer distances between sensitive sites and Private Sex Work Residences.

- 155 submitters made comments on what should or should not constitute a sensitive site. Of these submissions 153 suggested the addition of other types of sites to Council's Sensitive Site Register

  – 124 suggested either their home or all private residences

  – 18 suggested all home-schooling sites in the city.

(e) The submission to Council's Proposed bylaw from Julie Conley … stated *'I'm all for the bylaw and safety of all sex workers. I also have no problems so far concerning the bylaw, and respect the community's opinion'*. The submission made no comment on the appropriateness of the size of the Parlour Brothel Permitted Area. The Proposed Parlour Brothel Permitted Area was adopted by Council unchanged following the submission and hearing process … .

(f) Two submissions stated that the Parlour Brothel Permitted Area should include residential areas. One submission was from Chanel's Escort Agency and suggested that the area should be enlarged to include upmarket and smartly kept residences to allow for discreet visiting by clients. The other referred in general terms to residential areas.

[37] The submissions opposing prostitution in residential areas suggested that: small owner operated brothels in residential areas have not always been discreet and that there has been a degree of offensive behaviour; residential environments for brothels were considered to be more likely to unnecessarily expose children and young people to the sex industry; and allowing residential brothels in residential areas would add to prostitution becoming "normalised" behaviour within the various communities and influence career choices of young people towards work in the sex industry. Further, many submitters expressed concerns relating to noise, traffic, and late-night visits to residential brothels, and that clients might mistake neighbouring or nearby houses for brothels.

[38] The HCC staff report to the Strategic Planning and Policy Co-ordination Committee (25 – 26 August 2004) specifically cautioned HCC that if it decided to exclude brothels from residentially zoned areas of the city then it needed to be assured that it was continuing to make adequate provision for the availability of commercial sexual services in Hamilton. The considered opinion of staff, as recorded in the report, was that the relatively large area of mixed use commercial

and industrially zoned land within the permitted zone did provide adequate choice and opportunity for the wider sex industry.

[39] Mr Lang accepted before us that the effect of the bylaw as promulgated "treats private homes in a similar way to other sensitive sites". He said, "to treat a private home as a sensitive site is a method that is consistent with and a logical extension of the controls relating to education centres, places of worship and marae".

Challenging bylaws

[40] Under s 12 of the Bylaws Act the High Court may, on the application of any person before or after the bylaw comes into force, quash a bylaw if it considers it to be invalid, or, instead of quashing the bylaw, amend it so as to remedy the invalidity.

[41] Ellen France J considered that the "real question" is whether a bylaw is "invalid" (at [41]). That is true as far as it goes, but if it is left at that point, and notwithstanding the statutory language in s 12(1), the statement is tautological.

[42] It has been demonstrated that historically a bylaw might be challenged and invalidated on the grounds of uncertainty, unreasonableness, and repugnancy to the law: see Wharan "Judicial Control of Delegated Legislation: The Test of Reasonableness" (1973) 36 MLR 611 and Taggart "From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century" (2005) 55 UTLJ 575. Those grounds of challenge had evolved over the centuries essentially as common law constraints on abuses of subordinate legislation.

[43] Perhaps more importantly for present purposes the relevant provision of the Bylaws Act is s 17, which provides:

> If any bylaw contains any provisions which are invalid because they are ultra vires of the local authority, or repugnant to the laws of New Zealand, or unreasonable, or for any other cause whatever, the bylaw shall be invalid to the extent of those provisions and any others which cannot be severed therefrom.

[44] Real caution therefore has to be used in resorting to the general term "invalid" for it is essentially a conclusory term. More precision is required in stating why it is that a bylaw is invalid. This view appears to be shared by Knight "Brothels, Bylaws, Prostitutes and Proportionality" [2005] NZLJ 423 at 425.

[45] The more explicit grounds are:

- First, a bylaw may be invalid on the basis of the simple proposition that the authority purporting to make it may not act outside its powers, which as Sir William Wade put it, "might fitly be called the central principle of administrative law" (Wade and Forsythe *Administrative Law* (9ed 2004) at 35);

- Secondly, a bylaw will be regarded as uncertain if the persons required to obey it cannot ascertain what is required of them;

- Thirdly, a bylaw will be invalid if, even though it is in a strict sense intra vires in respect of its own particular statute, it contravenes another statute or purports to make something unlawful which the general law says is lawful; and

- Fourthly, a bylaw will be regarded as unreasonable if it leads to manifest arbitrariness, injustice, or partiality. A well-known example of the application of this fourth principle is *Re City of Montreal v Arcade Amusements Inc* [1985] 1 SCR 368 holding invalid a bylaw prohibiting minors from entering amusement halls or using amusement machines. The Supreme Court of Canada said that it was upholding "the rule of administrative law that the power to make by-laws does not include a power to enact discriminatory provisions" (at 403) and that this is a "principle of fundamental freedom" (at 413).

[46] Even then, the foregoing is not a "closed list". It does not preclude the development of the law, because s 17 of the Bylaws Act also speaks of "any other cause whatever". To put this another way, the ability to impugn bylaws, as

expressed in the present Act, rests on principles which have been evolved by sitting judges over the centuries. But the list is not exclusive. This is important because public law has continued to evolve since 1910 and there may be (we put it no higher than that) cases in which some other doctrine of public law might be thought to be applicable to the particular case.

Reasonableness and proportionality

[47] It is necessary to add a few words under this head, because Mr McCoy relied (in part) on more contemporary notions of public law.

[48] The doctrine of "unreasonableness" was developed by common law judges for the bylaws or regulations made by chartered corporations and various other institutions (see generally Wharan and Taggart (above at [42]); and *Slattery v Naylor* (1888) 13 App Cas 446 at 452 (PC)).

[49] In due course, local authorities became empowered by statute to make bylaws for the orderly conduct of their districts and the suppression of nuisances.

[50] In *Kruse v Johnson* [1898] 2 QB 91 the Court upheld a bylaw against singing or playing music within fifty yards of a dwelling house. Lord Russell of Killowen CJ said at 99 – 100 for the majority:

> If, for instance, [bylaws] were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires." But … [a] bylaw is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient … .

[51] Mr McCoy relied on that proposition. He also relied in part on a more recent concept (at least in English law), the doctrine of proportionality, which he said is particularly suited for application in this sort of subject area.

[52] The general issue is: what is the standard of unreasonableness, or degree of intensity of review, where the term "unreasonable" is (as here) contained in a statute? In *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (HL) the Secretary of State had the power to issue directions to the local education authority "if … satisfied" that the local education authority "had acted or [was] proposing to act unreasonably" (s 68 of the Education Act 1944 (UK)). Despite the seemingly subjective formulation, the House of Lords read the term "unreasonably" as expressing the *Wednesbury* formulation (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA)). That is, the Secretary of State could issue directions only where the local education authority was acting so unreasonably that no reasonable authority would so act.

[53] "Proportionality" is a recognised general principle of law much employed in Europe, and now in England by British courts, in respect of directly effective community laws (see eg *Stoke-On-Trent City Council v B & Q plc* [1991] Ch D 48 (HC)). Those who opposed its applicability in English law did so largely on a view that it may lower the threshold of judicial intervention and involve the courts in considering the merits and facts of administrative decisions (see eg Lord Lowry's arguments against proportionality in *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 at 766 – 767 (HL)).

[54] The practical advantage of the doctrine is that it is a respectable tool for assessing two categories of cases, namely where something is challenged as being unreasonably oppressive or where there is a distinctly or manifestly improper balancing of relevant considerations.

[55] Commonly three tests are employed where the proportionality doctrine is resorted to:

- a "balancing test" which requires a balancing of the ends which an official decision attempts to achieve against the means employed to achieve them;

- a "necessity test" which requires that where a particular objective can be achieved by more than one of the available means, the least harmful of these means should be adopted to achieve that objective; and

- a "suitability test" which requires authorities to employ means which are appropriate to the accomplishment of a given law, and which are not in themselves incapable of implementation or unlawful.

(See De Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5ed 1995) at [13.073].)

[56] Even when "proportionality" is resorted to there is still a difficult question of the intensity of review to be employed. In a case of delegated authority to an elected local authority, Hammond J suggested in *New Zealand Public Service Association v Hamilton City Council* [1997] 1 NZLR 30 (HC) that some caution is required "in assessing Council's homework" (at 35):

> That in turn would offend the three imperatives recently conveniently encapsulated by Lord Irvine of Lairg QC in "Judges and Decision-makers: the Theory and Practice of Wednesbury Review" [1996] PL 59. His Lordship identified such as being the democratic imperative; (that is, the deciders derive authority from an electoral mandate, to which they are accountable); secondly a constitutional imperative, (that government, not Courts decides fundamental policy); and thirdly, an imperative that Courts in many, if not most areas, lack the relevant expertise to make such assessments.

[57] See also the decision of this Court in *Wellington City Council v Woolworths New Zealand Limited (No 2)* [1996] 2 NZLR 537, and particularly the judgment of Richardson J at 545 – 547.

[58] Whether "proportionality" adds much in a case such as the present may be open to argument. For instance, the very reason something may be thought to be "unreasonable" is precisely that it is disproportionate, but it is at least an aid to clearer analysis.

The appellant's case

[59] The appellant is not seeking to strike down the entire HCC bylaw. Indeed, she seeks to strike down only two "objectives" of the bylaw and one "prescriptive" feature.

[60] The two objectives she seeks to impugn are objectives two and three of the bylaw:

> To enable Commercial Sexual Service providers to operate within Hamilton City in a manner that both meets community demand for services and addresses community concerns and sensitivities.
>
> To allow the establishment of Brothels in areas where the effects associated with the operation can be readily controlled.

[61] Critically, as to the operational feature, she seeks to strike out under the heading of "Location of Brothels" the following:

> 1. **Permitted areas of operation**
>
> Brothels are permitted to locate and provide commercial sexual services from premises located within the Permitted Brothel Area indicated on Map 1, subject to meeting other conditions in the bylaw.

[62] In support of the application, Mr McCoy contends:

- that the bylaw is in effect a prohibition rather than a regulation of the location of brothels because it prohibits any form of commercial sexual behaviour in residential areas;

- that small owner operator brothels have a natural habitat in the suburbs as a "home-based industry", and that this means exclusion from residential areas must be an unreasonable bylaw provision;

- that the location of small owner operator brothels in a non-residential area would defeat the protections referred to in s 3 of the PRA, because of

high rental costs, exploitation, and the influence of "an unpleasant monopoly/oligopoly from the parlour brothels"; and

- that the bylaw sets an unreasonable limit on sex workers' rights to work, and unreasonably limits sex workers' freedom of association under the New Zealand Bill of Rights Act 1990 (the Bill of Rights).

[63] In oral argument, Mr McCoy accepted that HCC could properly prohibit parlour brothels from operating in residential areas, and that the appellant has, to date at least, operated such a brothel. The focus of his submissions was on the effect of the bylaw on small owner operated brothels. In making it impossible for this type of brothel to operate in residential areas the bylaw was, he submitted, contrary to the purpose and philosophy of the PRA, as reflected in s 3.

The respondent's case

[64] Mr Lang submitted that the bylaw is valid and should be upheld because it:

- is reasonable and proportionate;

- is consistent with the laws of New Zealand;

- does not unlawfully interfere with the right to work of sex workers and the human rights of sex workers, as specifically provided in s 3 of the PRA; and

- lawfully results in the appellant's business ceasing to operate.

[65] In the High Court, if the bylaw was found to be invalid in part, the HCC had sought to amend it in various ways. That proposition was expressly abandoned in this Court, and we say no more about it.

Discussion

[66] First, this bylaw does not amount to a total prohibition of brothels in Hamilton. Brothels are permitted in quite a large area of the city. Mr Gower's evidence is that "the CBD portion of the permitted zone is approximately 103 hectares in area" and 61 hectares of that (59%) "is available under the bylaw for brothel activities". The industrial portion of the permitted zone is "several times" that area, and the Frankton part of the permitted zone is "approximately $^{1}/_{5}^{th}$ of the CBD zone". There are a total of 2,596 occupation units (commercial and residential) in the CBD portion of the permitted zone.

[67] Nor does the bylaw prohibit all commercial sexual activity in residential areas, as Mr McCoy submitted. Sex workers are still able to provide "out services" in residential areas.

[68] The High Court Judge fairly noted that it would be a "challenge" to find a suitable location for a small residential type brothel in the permitted zone. But that falls short of a prohibition.

[69] This differs from the bylaw at issue in *J B International Ltd*. In that case, Heath J concluded that as a result of Auckland City Council's bylaw, "all brothels (including small owner-operated brothels) are excluded from virtually all areas within the [Auckland] isthmus" (at [99]).

[70] The second point is the paucity of evidence as to just what the effect of this bylaw will be for small brothel owners. Mr McCoy argued that the bylaw will "exclude" small brothels, which have their "natural habitat" in the suburbs.

[71] The evidence on this was quite equivocal. For instance Ms Healy, a witness called by Ms Conley, was asked in cross-examination by Mr Lang:

> Ms Healy which part of a city is the natural habitat for smaller owner-operated brothels? ... Quietly discreetly operating from [an] apartment or [an] area where there are [a] lot of apartment[s] in central areas or mixed zone areas.

> And why is that? ... To do with wanting discretion, wanting and being able to afford to manage one's own business, one's own clients, to control their circumstances. Also some sex workers prefer to work and live from the same address so they can pursue other interests[.] [E]xiting sex workers who are thinking about leaving the sex industry often retain a few clients, a few special clients, while combining other activities with sex work such as study or other work.

[72] This was in contrast to the evidence that was before Panckhurst J in *Willowford Family Trust*. In that case, the evidence of a Ms Reed, the Regional Coordinator of the New Zealand Prostitutes Collective, was unchallenged. Her evidence illustrated that an estimated 50 to 60 workers in small owner operated brothels would have been operating illegally upon the coming into force of the Christchurch prostitution bylaw (see at [26] and [91]). This evidence further combined with evidence from the Sub-Committee of the Council which had considered the bylaw itself, and had, in its conclusions, acknowledged the existence of small brothels in the restricted area (see at [75] and [92]). Panckhurst J consequently concluded, with reference to *Municipal Corporation of City of Toronto v Virgo* [1896] AC 88 (PC), that as a matter of fact and degree, the Christchurch bylaw was an unreasonable restriction.

[73] Mr McCoy also attempted to draw support for his "natural habitat" argument from the reference to "homes" in s 27 of the PRA. That section provides that an inspector can only enter a home to ensure compliance with the health and safety requirements of the PRA with the consent of the owner, or with a warrant. Mr McCoy argued that this reference to homes supported the view that Parliament endorsed the running of small owner-operated brothels in residential suburbs. But the argument, again in the absence of evidence, overreaches. As Ellen France J in the High Court said at [40], "the power of entry has to be construed as providing for the eventuality a search of a home may be necessary and no more than that."

[74] The third point is that this equivocal evidential foundation is hardly a satisfactory basis for the subsequent claim of "discrimination" as between different kinds of prostitutes. Just how things have operated as a result of this bylaw is, on the evidence in court on this application, distinctly problematic. It is difficult to apply public law labels such as unreasonable or disproportionate to what little evidence there is. There are all sorts of tests – some quite sophisticated – which could be

applied, but only to actual evidence. As noted in cases under the Bill of Rights, cases involving arguments of unreasonableness or disproportionality cannot be run in the abstract; there must be an evidential foundation.

[75] The fourth point is that, even if this were a close run case, in our view where as here the choices being made are distinctly ones of social policy (considered, we note, in the absence of any real Bill of Rights concerns), a court should be very slow to intervene, or adopt a high intensity of review. A large margin of appreciation should apply. Parliament entrusted the location of brothels to local authorities, which are elected bodies, and Parliament has itself decided to maintain a measure of ongoing review of prostitution.

[76] Fifthly, nothing said by the Court in this case will necessarily dictate the outcome of other cases. The whole point of the Parliamentary delegation is that the appropriate requirements for particular locales may very well vary.

Conclusion

[77] The Judge was correct to decline to impugn the identified part of this bylaw.

[78] The appeal is dismissed.

[79] The HCC will have costs of $6,000 and usual disbursements.

Solicitors:
Garth O'Brien & Associates, Te Awamutu, for Appellant
Swarbrick Dixon, Hamilton for Respondent