

PART 1 - SEMINAR

2. BACKGROUND ON BYLAWS REVIEW

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PURPOSE OF REPORT

1. The purpose of this report is to provide background information to the bylaw reviews, in particular, to outline:
 - the bylaws being reviewed
 - the tests applied in making a bylaw
 - the Council's enforcement powers and capability in relation to bylaws
 - the main issues covered by the bylaws being reviewed and any controversial/headline issues
 - the consultation/communications planned for the reviews.

(Note: this report and process is about reviewing the existing bylaws to meet statutory requirements and **not** about the creation of new bylaws.)

2. Information on bylaws has been compiled in the Blue Bylaws Book, which contains useful information and guidance on a range of issues relating to bylaws – for example, it contains guidance on the legal powers Council has to make bylaws, the process for reviewing bylaws, the Special Consultative Procedure, the Bill of Rights Act and how it relates to bylaws, the Code of Good Regulatory Practice, the enforcement of bylaws, prosecutions for breaches of bylaws, case law on bylaws challenged in the Courts, and guidance on a range of other matters.

BYLAWS BEING REVIEWED AND THE STATUTORY TIMEFRAMES FOR THEIR REVIEW

Bylaws with statutory review deadlines of 30 June 2008

3. The Local Government Act 2002 sets out the procedural requirements for making, amending or revoking bylaws (ss 155 and 156). In each case, the Special Consultative Procedure must be used (ss 83 and 86).
4. The bylaws that are required by the Local Government Act 2002 to be reviewed by 30 June 2008 include:
 - the dog control bylaws
 - the public places bylaws
 - the traffic and parking bylaws
 - the parks and reserves bylaws
 - the marine facilities bylaws
 - the refuse bylaws
 - the water services bylaws
 - the general/introductory bylaws
 - the swimming pool bylaws
 - the amusement devices and shooting galleries bylaw
 - the nuisances bylaw
 - the gin traps bylaw.
5. The bylaws need to be reviewed to assess whether they are still necessary, that they are appropriate and that they meet the purpose they were designed for. A table listing the full titles of all the bylaws, grouped by each review, is attached as Appendix A.

6. The implications for the Council of not reviewing these bylaws by 30 June 2008 vary from bylaw to bylaw (depending on the powers the bylaw was made under) and broadly fit into three categories:

Category of bylaw	Implications if not reviewed by 30 June 2008
Bylaws made before 1 July 2003 under still current provisions of the Local Government Act 1974	<p>If these bylaws have not been reviewed by 30 June 2008, there is no specific requirement to review them after that date.</p> <p>Whether or not they are reviewed by 30 June 2008, these bylaws continue in force and are not automatically revoked until 1 July 2010.</p> <p>However, s.155 applies, and the Special Consultative Procedure must be used if the bylaw is to be amended, or revoked, before 1 July 2010 (s.156).</p> <p>These bylaws are considered s.293 bylaws, which means they are automatically revoked on 1 July 2008.</p>
Bylaws made before 1 July 2003 under now repealed provisions of the Local Government Act 1974	<p>They are not required to be reviewed under s.158 but unless new bylaws are made by 30 June 2008, there will be no effective bylaw from 1 July 2008.</p> <p>If a bylaw covering the same subject matter is still required by the Council, then provided there is a relevant bylaw-making power in the LGA 02 or another Act, then the Council can make a new bylaw by using the procedures in s.155 and s.156.</p>
Bylaws made under bylaw-making powers in other Acts (not the Local Government Act 1974 or the Local Government Act 2002)	<p>Although procedurally they may have been “made” under the LGA 74, these bylaws do not need to be reviewed by 30 June 2008, and are not automatically revoked, unless those other Acts which they were made under, provide that s.155-s.160(a) LGA 02 (in full or in part) apply. The Dog Control Act 1996 applies both the making and review requirements of the LGA 02, but the other statutes under which Council’s bylaws are made only apply the bylaw making procedure and not the review procedure.</p>

7. There are several bylaws which will not undergo a full review, but will be recommended for revocation before 30 June 2008, for a variety of reasons. These are largely procedural revocations. For example, there may no longer be any power to make the bylaw, so the existing bylaw can no longer exist and should be revoked. These bylaws cover:

- swimming pools
- amusement devices and shooting galleries
- nuisances
- gin traps.

8. The Refuse bylaws have statutory timelines for review ending on 30 June 2008. However, these bylaws cannot be reviewed until the details of the future kerbside collection system are finalised and the contractor selected. Consequently, the bylaws will not be reviewed within the statutory timeframe. Fortunately, these bylaws were made under a bylaw-making power (s542) of the Local Government Act 1974 which remains in force. Consequently, the existing bylaws will remain in force for a further two years if they are not reviewed by 30 June 2008.

Bylaws that do not have statutory review deadlines of 30 June 2008

9. The Cemeteries bylaws were primarily made under the Burial and Cremation Act 1964 (as well as the Local Government Act 1974). As the bylaw-making powers under the Burial and Cremation Act are quite specific and remain current, these bylaws do not have to be reviewed by 30 June 2008 and will remain in force until they are amended or revoked.
10. The rest of the bylaws fit one of two categories – either they were made under the 2002 Act and need to be reviewed within five years (s.158(b)), or they have already been reviewed once since the 2002 Act came into force, and they need to be reviewed within ten years (s.159).

11. The rest of the bylaws, and an indicative timeline for their review, are:
 - brothel signage – late 2008
 - cemeteries – 2008/2009
 - liquor control – late 2008
 - speed limits – 2010
 - trade waste – 2011
 - licensed waste-handling facilities – 2017
 - fire safety – 2017
 - cleanfill licensing – 2018.
12. There is also the possibility that existing bylaws may need to be reviewed/amended for reasons other than statutory requirements – for example, if a bylaw no longer meets the purpose for which it was designed; the bylaw needs to be updated to address a significant and new problem; or if the legislative environment changes.
13. A summary of the content of each of the bylaws requiring action during 2008/9 is attached as Appendix B. To assist the Committee, the potentially contentious issues for each bylaw have been identified.

TESTS APPLIED TO MAKING BYLAWS

14. Bylaws enable local authorities to develop laws that are relevant to the local community and that are technically suited to local conditions. The Local Government Act 2002 and other pieces of legislation provide the Council with the power to create bylaws for specific purposes, rather than for any reason the Council feels fit.. Under section 155 of the Local Government Act 2002, the Council must, before commencing the process for making a bylaw, determine whether a bylaw is the most appropriate way of addressing the perceived problem. Once satisfied on this point, the Council must determine whether the proposed bylaw is (a) the most appropriate form of bylaw; and (b) gives rise to any implications under the New Zealand Bill of Rights Act 1990.
15. Making or amending a bylaw is a law-making process. Both the bylaw itself and the process can be challenged through the Courts and held up for scrutiny.
16. The Decision-Making Guide (produced by CCC and Local Government New Zealand) requires taking into account the nature of the identified problems; whether they need to be controlled by regulatory means or can be dealt with by other means; whether the perceived problems are significant, either by frequency or seriousness; and whether regulatory action is available under other legislation, or is reasonably able to be enforced. It is important that these tests are rigorously applied and bylaw provisions are only made where they are deemed to satisfy the tests.
17. In reviewing bylaws, the existing clauses are assessed to see whether:
 - the issues they were designed to address still exist
 - the issues are significant, either by frequency or seriousness
 - the issues need to be controlled by regulatory means or can be dealt with by other means
 - or not a bylaw is an effective tool to manage the issues
 - the issues are covered by new or amended legislation, by city and district plans, or by other bylaws
 - the clauses are consistent with the Bill of Rights Act
 - the matters fall within the bylaw-making powers of the Local Government Act 2002, and
 - the clauses are reasonably able to be enforced.
18. The bylaw-making powers in the Local Government Act 2002 are substantially different to those in the Local Government Act 1974. Some prescriptive powers remain in section 146, but the general bylaw-making powers in the 2002 Act are much less prescriptive than the powers in the 1974 Act. However, the bylaw offence penalty has increased from a maximum of \$500 under the 1974 Act, to \$20,000 under the 2002 Act. This implies that bylaws should only be made for matters of significance.

19. In assessing whether a bylaw is the most appropriate way of addressing a perceived problem, other options for addressing the problem need to be considered. Possible options include:
- doing nothing
 - educate or communicate
 - adopt a partnership approach with other agencies to work together on the issue
 - develop a policy, plan or strategy
 - increase funding to existing services
 - enter into commercial contracts for service provision
 - regulate via a bylaw
 - amend the city plan to address the issue
 - lobby for legislative change.
20. Central Government guidance from the Ministry of Economic Development suggests that the following principles should be applied when considering the regulation of activities:
- efficiency, by adopting and maintaining regulations for which the costs are justified by the benefits, at the lowest cost, taking into account alternative approaches
 - effectiveness, by designing regulation to achieve the desired policy outcome
 - transparency, by utilising a process that is transparent to both the decision-makers and those affected by the regulation
 - clarity, by ensuring the processes and requirements are as understandable and accessible as practicable
 - equity, by ensuring the regulation is fair and treats those affected equitably.
21. Additionally, a bylaw cannot be made if it is inconsistent with the New Zealand Bill of Rights Act 1990.¹ The Bills of Rights Act affirms, protects, and promotes human rights and fundamental freedoms in New Zealand. In essence, it provides a set of minimum standards to which public decision-making in New Zealand must conform.² The most relevant aspects of the Bill of Rights Act in relation to bylaws are: Section 14: Freedom of expression, Section 16: Freedom of peaceful assembly, Section 17: Freedom of association, Section 18: Freedom of movement, Section 19: Freedom from discrimination.

COUNCIL'S ENFORCEMENT POWERS AND CAPABILITY

22. Bylaws are enforced by Council staff that hold warrants empowering them to undertake enforcement action.³ Each warrant holder needs to be empowered for each separate piece of legislation/bylaw, so not all Officers hold the same powers.⁴ Officers can be empowered to undertake enforcement action under different laws, such as the Litter Act and the Building Act, as well as to enforce bylaws. It is an offence to prevent an Enforcement Officer from carrying out their duties.⁵
23. Complaints relating to breaches of bylaws should be reported to the Council Customer Centre, which logs the calls. This system allows complaints to be allocated to an Enforcement Officer and to be tracked. The statistics from the calls are useful for reviewing the bylaws, as they give an indication of the frequency of complaints and indicate how much of a problem issues covered by bylaws are.

¹ Section 155 (3) of the Local Government Act - No bylaw may be made which is inconsistent with the New Zealand Bill of Rights Act 1990...

² *The Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of Rights Act for the Public Sector*, Ministry of Justice, 2004

³ The Local Government Act 2002 (s.179) also allows local authorities to contract out the administrative and operational aspects of enforcement activity (but the council retains legal responsibility).

⁴ Section 177 of the Local Government Act covers the administrative aspects of enforcement functions, including the appointment of enforcement officers. Each enforcement officer must be issued a warrant specifying the powers delegated to them and the infringement offences in relation to which they are appointed. Their warrant and evidence of identity must be produced when they are undertaking enforcement activities.

⁵ Under section 229 of the Local Government Act 2002

24. The Council responds to complaints, and assesses each situation on a case-by-case basis. Generally, a warranted Council Enforcement Officer will contact the party that the complaint has been made about, and will discuss the allegation (unless the Officer witnesses the offence, in which case they will speak directly with the offender). The first action is to communicate, to ensure that people understand the law and their responsibilities. If this does not lead to a remedy, and it is in the public interest to take the matter further, then prosecution may be an option, but there are a range of tools that may be more appropriate in the first instance.
25. The Local Government Act 2002 contains a range of enforcement actions that can be taken in relation to bylaws, including:
- serving an injunction, for example, to compel someone to cease an activity (s.162)
 - removing works or things that are in breach of a bylaw (s163.), and costs can be recovered for removing the work or thing
 - seizing and impounding property on public land if it is involved in an offence against a bylaw (s.164), in certain circumstances
 - seizing and impounding property on private land with a warrant issued by a judicial officer (s.165, s.166 and s.167), in certain circumstances
 - entering property for enforcement purposes (s.172), in certain circumstances
 - recovering the costs of damage arising from a breach of a bylaw (s.176) in addition to the penalty for breaching a bylaw
 - an Enforcement Officer requiring the name and address of someone who they believe may have committed an offence (s.178)
 - taking a prosecution in the District Court. A person who is convicted of an offence against a bylaw is liable to a fine not exceeding \$20,000 (s. 239 and s.242(1)). The exception to this is an offence against a trade-wastes bylaw, from which a person is liable to a fine not exceeding \$200,000 (s.242(5)).
26. A bylaw made under the Local Government Act and another act (such as the Transport Act or the Dog Control Act), will have different enforcement tools to those bylaws made solely under the Local Government Act. For example, both the Transport Act and the Dog Control Act enable local authorities to issue infringement notices (instant fines), whereas a bylaw made solely under the Local Government Act (such as the public places bylaw) does not empower local authorities to issue infringement fines, and only allows prosecution.
27. Discretion is a fundamental feature of New Zealand's prosecution system.⁶ Mandatory formal prosecution is not in the public interest, as it would put a strain on limited resources, and frequently, alternatives (such as warnings) may be more effective methods of promoting the aims of the law.⁷ In order to take a prosecution, two tests must be met – firstly, a prima facie (on the face of it) case must be established, and secondly, a prosecution must be in the public interest.⁸
28. The Council's small Inspections and Enforcement Unit applies a range of inspection and enforcement tools to encourage/gain compliance. The Unit's approach to prosecution is based on evidential sufficiency and a clear understanding of public interest, with the aim of obtaining greater overall compliance.
29. This philosophy, as well as constraints around the Council's resources for enforcement, mean that there are significant limits to what the Council is able to enforce in terms of bylaw regulations, either because the balance of public interest is not to enforce and/or there are higher priorities in terms of enforcement of other regulations. The responsibility for the decision to prosecute in relation to any statutory or bylaw offence is vested solely in the Council's Inspections and Enforcement Manager. This is required to ensure consistency of approach and to ensure there is a clear delineation between the governance arm of Council and the regulatory/prosecutorial arm of Council. The Inspections and Enforcement Unit is required by statute to enforce aspects of the Hazardous Substances and New Organisms Act; the Health Act; the Building Act; the Resource Management Act; the Dog Control Act; the Sale of Liquor Act; the Fencing of Swimming Pools Act; and the Local Government Act.

⁶ See the Law Commission report: "Report 66, Criminal Prosecution", 2000, p.46

⁷ See the Law Commission report: "Report 66, Criminal Prosecution", 2000

⁸ See the Law Commission report: "Report 66, Criminal Prosecution", 2000, p.47

There are a number of examples of non-regulatory measures proving much more effective than bylaw enforcement in resolving issues. One example is the current successful focus of much of the current Animal Control work around educating and informing the public about dogs and safety to reduce and avoid issues arising. Another is the provision of street skating facilities at the Washington Parade Skateboarding park which has made a significant impact on reducing skateboarding problems in other public places. The Council also worked with the operators of ATMs to provide litter receptacles to deal with the issue of litter from ATM receipts.

30. In considering bylaw reviews and in making bylaws generally, Councillors need to consider both the legal limits and the practicalities of enforcing them. A practical limitation of bylaw enforcement is the inability of Council staff to take definitive action in circumstances where those breaching a bylaw cannot be identified and who refuse to provide Council enforcement staff with their name and address. This is particularly relevant in relation to existing bylaws that have attempted to regulate/prohibit behavioural-based offending. Council staff called to attend to a behavioural based complaint, ultimately are redundant unless the co-operation of the offender is obtained. If the name and address of the offender is not supplied or available through other means, Council enforcement staff have no power to take the matter further (unlike Police who ultimately have the power of arrest for offenders who fail to co-operate or supply their name and address).

CONSULTATION AND COMMUNICATIONS

31. To avoid unnecessary work and duplication, a generic communications and consultation plan has been developed for the bylaw reviews. This generic plan will provide a core to the communications and consultation with the plan being tailored to the particular needs of each of the bylaw reviews to ensure that it fits the specifics of each case.
32. The broad aims of the generic communications and consultation plan are:
 - to communicate effectively with stakeholders about each of the bylaw reviews
 - to encourage stakeholders to engage with the review processes
 - to encourage stakeholder buy-in with the individual bylaw review outcomes.
33. A core group of stakeholders has been identified that are likely to have an interest in all the bylaw reviews (for example, all residents' groups). Details of each of the bylaw reviews and an invitation to participate in the consultation process will be sent to each of these groups. The list of groups identified in this category is attached as Appendix C.
34. In addition, there will be specific stakeholders for each bylaw that will need to be contacted as part of the reviews. Appendix D provides a list of the broad types of stakeholders identified for the upcoming bylaw reviews. In each case, direct mail will be used as much as possible to contact the stakeholder groups. In some cases, for example, the Dog Control Policy and Bylaw, there are specific statutory requirements around consultation.
35. There will be a need to raise awareness amongst the general public for each review. The standard media channels (including those covering Banks Peninsula) will be used. Information brochures and publicity material will be made available through the Council's libraries and service centres, with the Customer Centre dealing with telephone enquiries. Additionally, all relevant information will be placed on the Council's website.
36. Public meetings around the city and meetings with specific stakeholder groups will be used where appropriate.
37. The aim of the communications material produced will be to convey the information in ways that are simple and easy to understand. However, it should be recognised that some of the matters covered in bylaws will be technical in nature, and there are limits to how simple the information can be made before its meaning or potential interpretation begins to change.
38. As discussed elsewhere in this report, all bylaw reviews are required to use the Special Consultative Procedure. Consequently, processes will be put in place to receive and record all submissions, and public hearings will be arranged to hear oral submissions. Staff will summarise and analyse the submissions received and present this to the relevant hearings panel to assist with its deliberations.