

17. TRESPASS ON COUNCIL LAND

General Manager responsible:	General Manager Regulation and Democracy Services
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PURPOSE OF REPORT

1. The purpose of this report is to establish and clarify the Council's rights and powers under the Trespass Act 1980 and to recommend that the Council authorise a delegation of its powers to ensure that any trespass notice issued is legally sound.

EXECUTIVE SUMMARY

2. Section 3(1) of the Trespass Act provides that every person commits an offence who trespasses on land after being warned to leave by the occupier of that land. Under section 4 an offence is committed if after being warned to stay off a trespasser returns within two years of the warning.
3. The Council has land it owns, occupies or controls, and is the "occupier" of that land under the Trespass Act, as the "person in lawful occupation". The occupier is the person who must issue a warning/give a trespass notice under the Trespass Act.
4. Employees or other persons acting under the authority of the Council are also occupiers under the Act, but there is some doubt over whether they should be issuing warnings or giving trespass notices without an express delegation from the Council. No such express delegation exists.
5. This report recommends the adoption of new processes to ensure compliance with the Trespass Act.

FINANCIAL AND LEGAL CONSIDERATIONS

6. The principal legal consideration is the validity of current processes to issue trespass notices for the Council. The recommendation made in this report proposes a solution that will address the legality of future trespass notices.
7. The financial considerations arising out of this matter are the potential costs to the Council of defending court proceedings if a trespass notice has not been validly issued. These costs could also include damages awarded against the Council. Although there is still a possibility that court proceedings might be brought even if a notice is valid, the Council is at less risk of such proceedings succeeding (resulting in greater costs for the Council) if it has a robust procedure to issuing trespass notices. There is no difference in administrative costs to the Council whether it adopts the recommendation or not.

STAFF RECOMMENDATION

It is recommended that the Council delegate/authorise the Chief Executive to be the person in lawful occupation of land owned, occupied or controlled by the Council for the purposes of the Trespass Act 1980, and that the Chief Executive be authorised to make further delegations of this power, as appropriate.

BACKGROUND ON TRESPASS ON COUNCIL LAND

The Trespass Act 1980 and Relevant Case Law

8. The Trespass Act 1980 provides under section 3 (trespass after warning to leave) that “*every person commits an offence ... who trespasses on any place and, after being warned to leave that place by an occupier of that place, neglects or refuses to do so*”. A trespasser is “*a person who enters or remains without authority, express or implied*” (*Wilcox v Police* [1994] 1 NZLR 243).
9. Generally the public have a right to access Christchurch City Council land and reserves, unless forbidden by any bylaw or other statutory requirement. This amounts to an implied licence to be on the land, but that implied licence can be revoked by the Council, and it must be made clear to the person that their entitlement to be on the land has been withdrawn. (In a contractual situation, for example with a membership of a Council swimming pool or similar, the terms of the contract will govern the revocation of the right to be on the land.)
10. If a person has lawful authority to be on the land, then the occupier (ie the Council) needs to revoke that authority and ask/warn the person to leave, in order for there to be the initial trespass. The trespass notice/warning is the means to revoke the licence. In effect, before an offence would be committed under section 3 of the Act, two “warnings” may need to be given; the first to create the trespass, and the second to be the warning that follows the trespass, under which if the person still refuses to leave, they commit an offence. This process can take place immediately and consecutively.
11. However, the Council issues most of its trespass notices/warnings under section 4 of the Act. Section 4 provides:
 - “(1) *Where any person is trespassing or has trespassed on any place, an occupier of that place may, at the time of the trespass or within a reasonable time thereafter, warn him to stay off that place.*
 - (2) *Where an occupier of any place has reasonable cause to suspect that any person is likely to trespass on that place, he may warn that person to stay off that place. ...*”
12. An offence is committed under section 4 if the person wilfully trespasses on the place within two years of the warning having been given. The maximum penalties under sections 3 and 4 of the Act are a fine of \$1,000 or three months imprisonment. The police also have the power to arrest and remove persons who trespass in breach of a trespass notice.
13. A warning under section 3 or 4 can be given to the individual concerned “*either orally, or by notice in writing delivered to him or sent to him by post in a registered letter at his usual place of abode in New Zealand*” (section 5). If the warning is given orally then it would need to be given by an “*occupier*”, but if it is delivered or sent by post then provided it is signed by an occupier it could be hand delivered or posted by a non-occupier.
14. An “*occupier*” is defined in the Act as “*...any person in lawful occupation of that place or land; and includes any employee or other person acting under the authority of any person in lawful occupation of that place or land*”.
15. The Act protects rights of occupation rather than ownership rights, subject to section 2(2) of the Act, which deems the owner of unoccupied land to be the occupier.
16. The definition of occupier has been discussed in several cases. In *Johnstone v Police* (1990) 5 CRNZ 399 a trainee manager of licensed premises was held to be an “*employee or other person acting under the authority*” of the person in lawful occupation of the premises and so was therefore an occupier. In *Polly v Police* [1985] 1 NZLR 443, an assistant manager of a hotel that was owned by a corporation, had authorised the police to warn a trespasser under section 3 of the Act. The issue was whether the assistant manager was “*in lawful occupation*” of the hotel (it was not enough that he was an “employee” because the police officers could only give the warning as an “*other person acting under the authority of any person in lawful occupation*”).

17. The Court held that persons of managerial rank or executive status in the employ of a corporation should be treated as being in lawful occupation of premises which the corporation holds as owner or lessee, even though there may be no express authorisation to that person/rank. The Court held that this recognised the usual practice of corporations and to hold otherwise would be to “*require corporations to give specific authorisations for a range of activities which are commonly considered to come within the scope of authority of the manager or secretary*”. In comparison, a Council commonly has to authorise staff, by way of delegations, to carry out various of its duties.
18. In *Bailey v Police*, unreported, HC Christchurch, Chisolm J, 13/11/2000, the appellant had been served with a trespass notice under section 4 by the New Zealand Thoroughbred Racing industry which warned him off entering a number of racecourses. He later entered one of the racecourses, and was charged with trespassing. The Court held that the North Canterbury Racing Club was in lawful occupation of the racecourse but there was no evidence that authority to issue the trespass notice had been properly delegated to the Chief Executive of New Zealand Thoroughbred Racing. The copy of the Racing Rules before the Court did not provide for a chief executive at all, but contained detailed delegations to an executive committee.
19. The racing rules in *Bailey*, which specifically provided for delegations, could be compared with the requirements in relation to delegations set out in the Local Government Act 2002. A court examining a trespass notice issued by the Council might also require evidence that a specific delegation had been made to the Council officer issuing the notice. However, it is also possible that, unlike the Chief Executive in *Bailey*, who was not an employee of the North Canterbury Racing Club, a Council officer would be an “occupier”, by virtue of their status as an employee of the Council.
20. This would meet the requirements of section 4 of the Act, but under section 3 of the Act, as an employee, a Council officer could not seek the assistance of the police in relation to any trespass, unless the police had been separately authorised by the Council.
21. It is also useful to note one other recent case, which commented on using the police to deal with trespassers. In *Whitu v Police*, unreported, HC Napier, Hammond J, 5/12/2002 the Court stated:

“[23] Generally speaking, it has been thought desirable (and this is a point which has been canvassed by the police, the Solicitor-General, and various benches from time to time in judgments), that resort to the police to remove trespassers should be very much a last resort. In fact, on the Judge’s findings of fact, that is what occurred here - the police were only involved very much as a last resort.”

Council Problems with Trespassers and Procedure Regarding Trespass Notices

22. In the past the Council has had problems with persons acting inappropriately on Council land, including libraries and Council offices/service centres, and parks, including the botanical gardens, affecting other park/gardens visitors safety, or preventing staff from carrying out their work, or sleeping in parks, or on reserve land, for example, whitebaiters camping at the mouth of the Waimakariri river. More recently, there has been a problem with a person acting inappropriately at a Council swimming pool, and the manager would like to issue a trespass notice to that person.
23. Last year there were also problems with fishermen and a possible protest group at the New Brighton Pier. Most of the pier is outside the boundary of the Council’s district, so the Council bylaws will not always apply. However, because the Council is the owner of the pier it can issue trespass notices in respect of the pier.
24. The Legal Services Unit gave advice to the Greenspace Unit just prior to Christmas on whether rangers could issue trespass notices in respect of Council land. The question arose because of doubts raised in the past about whether Council staff needed appropriate delegations to enable them to issue trespass notices. At present there are no express delegations to any Council officers under the Act.

25. The delegations register currently specifies that the Chief Executive can “*authenticate any order, notice or other document of the Council*” (and this power can also be exercised by the Mayor or two members), pursuant to section 252 of the Local Government Act 1974. This section was repealed from 21 April 2005 by the Public Records Act 2005, but in any event would not allow the Chief Executive to sign a trespass notice unless the decision to issue the trespass notice had already been made by the Council.
26. The Legal Services Unit concluded that individual rangers would have to be the “occupier” as defined in the Act in order to issue a trespass notice. Generally the Council will be regarded as the “*person in lawful occupation*” either because it is the occupier or owner, but the issue was whether a Council employee could also be an occupier.
27. The *Polly* and *Johnstone* cases seem to support the view that a ranger could issue a trespass notice. However, the *Bailey* case (and *Polly*, in respect of the differences in practice between a Council and a corporation) may mean that a Council should have express delegations in place before an employee could give a warning under section 3 of the Act (and would certainly need to have authority as the person in lawful occupation to authorise another to give a warning), or to issue a trespass notice under section 4.
28. The Legal Services Unit advised the Greenspace Unit that in the meantime, in reliance on the *Polly* case (and the definition of occupier) a manager, such as the Legal Services Manager or the Greenspace Manager should sign any trespass notices (although the notices could be delivered by the rangers), and the matter would be investigated further and reported on to Council.

Other Powers of Council to Warn Person off Council Land

- **Local Government Act 2002**

29. The police have powers under sections 169 and 170 of the LGA02 to ask persons to leave, or to arrest persons, who are in a public place which is subject to a Council bylaw prohibiting liquor in that place. However, that power is only given to the police under those sections of the LGA02, not the Council or council officers.

- **Reserves Act 1977**

30. For any land that is subject to the Reserves Act, if it is administered by the Council, the Council can issue a trespass notice. A Council employee is also deemed to be an “officer” under the Reserves Act, and can require someone to leave reserve land, if they are prohibited from being there (being on the land when prohibited is an offence and failing to leave after being requested to amounts to another offence). However, the Council officer cannot remove a person from the land, only a police constable. Otherwise there are no other powers in the Reserves Act for a Council officer to remove people or warn people off from reserves land.

- **Bylaws**

31. The Council’s general bylaw provides that it is an offence to do or neglect to do something required of a person by any bylaw. If a bylaw prohibits someone from being in a certain place then an offence is committed and a prosecution can be brought, but that does not give the right to “officially” warn someone off the place (other than a general warning that if they stay where they are they will commit an offence), and does not allow a Council officer to remove a person. The Traffic and Parking Bylaw allows a parking attendant to refuse admission, but nothing in that bylaw provides for warnings to leave property or to remove persons, only vehicles. None of the other bylaws include any such provisions either.

- **Conclusion**

32. None of the other powers the Council has are sufficient to deal with every situation/every piece of land where the Council may wish to ask a person to leave or to issue a trespass notice to a person. The Council will need, from time to time, to exercise its powers under the Trespass Act 1980.

OPTIONS/PREFERRED OPTION

33. The Council essentially has two options:
- (a) Maintain the status quo, relying on the fact that an employee of the Council can issue a trespass notice in respect of Council owned or occupied land, without a specific delegation, on the basis of the definition of “occupier” in the Trespass Act;
 - (b) Delegate/authorise the Chief Executive to be the person in lawful occupation of land owned, occupied or controlled by the Council, for the purposes of the Trespass Act 1980. The Chief Executive can then make other similar delegations, as appropriate, to other Council officers, and in certain circumstances, as warranted, to the police.
34. Option B is the preferred option, as it is uncertain whether the trespass notices currently issued are valid under the Act for the reasons set out above. It will also allow for better control of who is able to issue a trespass notice (although it is unlikely that, to date, staff will have issued any trespass notices without consulting the Legal Services Unit, or a manager first).