

3. CHAIRPERSON'S REPORT ON THE BYLAW REVIEWS

PURPOSE OF REPORT

1. This is a report by the Chair of the Regulatory and Planning Committee and the Chair of the hearing panels for all of the recent bylaw reviews, Councillor Sue Wells.
2. The purpose of this report is to:
 - outline the process that has led to the bylaws that are now before Council for adoption;
 - highlight some common themes from the deliberations of the various panels;
 - identify some key issues emerging from this exercise which were not able to be dealt with through the bylaws; and
 - offer suggestions for Council to discuss to improve those processes in the future.

SUMMARY

3. When the Local Government Act was enacted in 2002 it placed requirements on all councils to review some of their bylaws within a particular timeframe.¹ 22 of the 34 bylaws in the Christchurch City/Banks Peninsula districts needed to be reviewed (or left to lapse) by 30 June 2008. What is now being recommended to Council for adoption is a package of eight revised bylaws. Other decisions on revocation or allowing bylaws to lapse have also been taken ahead of this Council meeting.²
4. The existing bylaws were made under different, older legislation.³ New tests came in through the Local Government Act 2002⁴ (LGA 2002) and the effect of this is that simply rolling over the old bylaws or their provisions, without critical analysis, is not an option.
5. Councillors and Board Members have had repeated explanations of the requirements and realities of bylaw-making through a series of seminars, discussions and publications. I do not propose to include all that material in this report, but to aid memory today, the relevant considerations for making bylaws under the LGA 2002 can be explained simply as follows:
 - what's the nuisance?
 - why is a bylaw necessary?⁵
6. Christchurch City Council commenced its s.155 (nuisance and necessity) analysis in the previous term of Council. In that term there was a Bylaws Subcommittee, but its terms of reference were not relevant to that part of the decision-making process: it was there to enable Community Board input into the bylaw review process. The Council did not have a committee aiding officers in their analysis of nuisance or necessity for bylaw-making. As a consequence, our deliberations on the proposed bylaws have also turned our minds to the need for each clause.
7. While large parts of work on some of the bylaws were completed prior to the 2007 local body elections, there was not sufficient time for that Council to begin and complete the consultation and hearing process for any of the bylaws in its term. In order for the same Council to commence consultation, hold hearings, and make determinations on the bylaws, the reviews were jump-started in January this year, with an early meeting of the new Regulatory and Planning Committee.

¹ Section 158 of the Act requires all bylaws made under the Local Government Act 1974 to be reviewed by 30 June 2008.

² The Banks Peninsula Nuisances Bylaw was recommended for revocation. It was consulted on, no submissions were received and it was revoked at the 29 May 2008 Council meeting. The Banks Peninsula District Council and Christchurch City Council Swimming Pools Bylaws, and the Banks Peninsula Shooting Galleries and Amusement Devices Bylaws were assessed as being no longer necessary, were publicly notified, and will lapse on 30 June 2008. A report indicating such was considered at the 29 May 2008 Council meeting.

³ In particular, now revoked provisions in the Local Government Act 1974. The LGA 1974 also contained a different bylaw-making process.

⁴ Such as the LGA 2002 s.155 test – see footnote below.

⁵ Firstly, we need to establish whether there is a significant problem - Section 155 of the LGA 2002 then requires us to establish whether a bylaw is the most appropriate tool to deal with that problem.

8. The compressed timeframe was not ideal. It meant that a number of elements in the decision-making process were compressed. While all of the bylaws passed each step of the necessary decision-making process (eg passage through community, resolution by Council), it was acknowledged throughout the process that there could well be issues arising through the submissions phase that would need further scrutiny. That has certainly proven to be the case. The extent to which there has been material change to some of the bylaws has, however, been greater than anticipated.
9. The reviews have been very useful. They have eliminated archaic and redundant bylaws. Finding out whether there was a real need for a bylaw meant we also had to explore how we enforced our existing bylaws. Some recommendations from a number of our bylaws point to greater resourcing being needed for enforcement to be successful.
10. The Local Government Act provides the guiding principles and some bylaw-making powers; however, a range of other Acts provide other bylaw-making powers, all with different enforcement options and penalties.⁶ Some of our bylaws are made under multiple pieces of legislation. This has at times been frustrating, both in its complexity, and its constraints on what can be achieved.
11. This process has highlighted where the bylaw-making powers of local government and bylaws themselves sit in the hierarchy of law. Bylaws sit at the lowest level of law, as tertiary legislation.⁷ Councils can only make bylaws if there is a delegated bylaw-making power from primary legislation (an Act), and any bylaws must not be inconsistent with other legislation, including any secondary legislation (such as regulations, rules, etc). Navigating this structure has, at times, proven challenging in its complexity.⁸
12. The abolition and inclusion with Banks Peninsula left us with two sets of bylaws. This review has attempted to draw together those two sets of bylaws into one. Various recommendations show that we have not entirely achieved that in all cases; for example, the Dog Control Bylaw Hearing Panel recommends that the Council undertake a review of this new Bylaw earlier than would be required by legislation, as some significant issues were not able to be properly completed through this process.
13. The bylaw hearing panels learned a great deal about the newest part of our district. The stock control bylaw⁹ offered some urban Councillors detailed insights into particular aspects of rural life not commonly observed in the more densely populated parts of our district.
14. The Regulatory and Planning Committee and the Council, in reviewing the bylaws and developing new bylaws, have been mindful of the underlying legal principles that govern bylaws – that bylaws must be clear and certain; not unreasonable; not inconsistent with other law; and not repugnant to the law, including common law. Additionally, they have been mindful that bylaws should not cover matters which are already dealt with by other legislation.
15. The Hearing Panels heard submissions, deliberated at length, and today offer their recommendations to Council for adoption. They have continued to adopt the bylaw principles throughout hearings and deliberations, and have continued to test the bylaws as proposed (whether amended or not) against those first principles. This has added time to the process, but has also added a degree of robustness. It has uncovered some existing issues that were not picked up at the time Council adopted some of its bylaws for consultation.

⁶ The Council has reviewed bylaws made under the Dog Control Act 1996, the Transport Act 1962, the Local Government Act 1974, the Reserves Act 1977, the Health Act 1956, as well as the Local Government Act 2002

⁷ Tertiary legislation is delegated legislation that does not have the character of regulations. Regulations are made by the Governor-General by Order in Council are referred to as secondary legislation.

⁸ For example, the Traffic and Parking Bylaw is made under the bylaw-making powers of three different Acts (the Transport Act 1962, the Local Government Act 1974 and the Local Government Act 2002) – which all have different powers, penalties and enforcement approaches. In addition, Road User Rules (which are made under the Land Transport Act 1998 at the regulation/secondary legislation level), have also featured in the Panel's deliberations.

⁹ Stock control matters were contained within the proposed Traffic and Parking Bylaw which went out for consultation. As a result of submissions, stock control matters now form a stand-alone bylaw (rather than being part of a traffic and parking bylaw).

16. A further issue relates to Council's collection of data about nuisance and complaints. Under the previous legislative system it would have been perfectly adequate. Given the more stringent requirements we now face, a further discussion needs to occur about what will satisfy those requirements and whether our organisation is currently geared towards meeting them. It is my understanding that a work stream is already in place on this matter, but further information should be reported back to Councillors by staff.
17. The Council's former bylaws were made and amended over many years, with different drafting styles and approaches. A good outcome of this review process has been having the opportunity to modernise and simplify the language of our bylaws, as well as the content, so that the bylaws are more understandable and relevant, and therefore more useful. Going forward, we could usefully do further work as an organisation so that a consistent approach to bylaw-making occurs, which results in a consistent process and style. Having different units "driving" the various bylaws tended to undermine some of that consistency.

THE PROCESS OF HEARING AND DELIBERATION

18. As set out above, the requirement to review some of our bylaws has been known about since the adoption of the new Local Government Act in late 2002. Work began to review the required bylaws under the previous Council. Two of the reviews had been completed to a draft bylaw stage just prior to the local body elections in October/November 2007, but were put on hold due to the elections.
19. In the current term of Council, the newly formed Regulatory and Planning Committee was to consider each proposed bylaw or bylaw revocation and make recommendations to Council. Once adopted by Council, each proposed bylaw went out for public consultation in accordance with the Special Consultative Procedure.¹⁰ Those bylaws to lapse or revoke faced slightly different decision-making processes which were also adhered to. It must be said that given the June 30 deadline, the Committee had to, and did, make some pragmatic decisions, and Council was clearly informed of those.
20. Hearing panels were convened to hear and consider submissions on each of the proposed bylaws, to deliberate, and to make recommendations to Council as a result. All Councillors (not just Committee members) were offered the opportunity to participate on hearing panels. The members of the hearing panels were largely self-selected.¹¹ The hearings and deliberations took a significant amount of officers' and Councillors' time over a number of weeks in April, May and June. The Council had originally intended to spread the final part of its bylaw decision-making across a number of Council meetings, but out of a desire to ensure consistency across all bylaws, Council decided at its May meeting to hold this special meeting today.
21. The bylaw hearing panels have no decision-making powers, but can make recommendations to Council.¹² The Council can then accept or reject those recommendations, as it sees fit.¹³ However, the Local Government Act states that the views presented during consultation should be received by the Council with an open mind and should be given "due consideration in decision-making".¹⁴

¹⁰ As set out in section 83 of the Local Government Act 2002

¹¹ The bylaw hearing panels consisted of: Water Related Services - Councillors Button, Wall, Wells, Withers; Public Places - Councillors Button, Wall, Wells, Withers; Dog Control - Councillors Johanson, Reid, Wall, Wells; Traffic & Parking - Councillors Broughton, Button, Johanson, Wells; Parks & Reserves - Councillors Buck, Corbett, Wells, Williams; Marine Facilities - Councillors Buck, Corbett, Wells, Williams; General - Councillors Buck, Corbett, Wells, Williams. Additionally, Councillors Button, Wall, Wells, Withers considered the proposed revocations: Swimming Pools & BP Amusements and Nuisances.

¹² Clause 32 of Schedule 7 of the Local Government Act 2002 expressly prohibits the power to make a bylaw from being delegated

¹³ However, if Council wanted to override the views of a hearing panel, the submissions and evidence would have to be taken into account.

¹⁴ Section 82(1)(e). This is also supported by the Council's Consultation Policy, which states: "we will receive presented views with an open mind and will give those views due consideration when making a decision".

COMMON THEMES

22. The importance of understanding the bylaw-making powers that each of the bylaws were made under was highlighted throughout the deliberations. Understanding the bylaw-making powers is essential in order to understand the legislative opportunities and constraints of a bylaw (including the range of penalties and enforcement actions that are available).
23. In relation to enforcement, a further issue was that many of the bylaws were drafted with a penalty clause specifying the maximum potential penalty for breaching the bylaw¹⁵ – but not with further information on the range of other enforcement tools available to Council's enforcement staff.¹⁶ This made it difficult to easily perceive how the bylaws would be enforced in a day to day sense, particularly for low-level breaches. It is vital to understand that enforcing the bylaw is not the same as having the maximum penalty imposed. A request to comply with the provisions of the bylaw is enforcement.
24. Where the Local Government Act penalty of "on summary conviction a fine of \$20,000" applies, Councillors sought clarity on what that meant in reality. It was clarified that such a conviction is a criminal conviction, not a civil prosecution. Further, the penalty is determined by the Court, not the Council. The penalty imposed by the Court could be substantially lower than the maximum fine. The reality is that the Council is only likely to take a prosecution in cases where other enforcement options have been exhausted, the matter is serious enough to warrant a prosecution, there is sufficient evidence to prove the charge, it is in the public interest, and the benefits outweigh the costs.
25. Councillors were often frustrated that while the LGA 2002 provides for infringement notices (tickets) for bylaw breaches, the Government has not yet made the necessary regulations that would enable that to occur.¹⁷ For some of the more minor issues being regulated, an infringement notice often seemed more appropriate than other, more serious and costly approaches, such as prosecution. Where a variety of pieces of legislation underpin a bylaw (such as the Traffic and Parking Bylaw) other Acts have different penalty regimes and enforcement possibilities, which has made this issue even less easy to understand.
26. The Council has already come to terms with the fact that the changes introduced through the LGA 2002 mean that bylaws are no longer suitable vehicles for providing information or guidance on a range of related issues. Bylaws are legal instruments and must comply with legal drafting conventions. This was, at times, frustrating to Councillors, who had the interests of their communities in mind and wanted to make things as easy to understand as possible. These matters will need to be addressed through communications and is a further action item arising from this review.

CONCLUSIONS

27. The process of reviewing 22 of Council's 34 bylaws simultaneously has been a big one and the learning curve has been steep. Local councils up and down the country are experiencing the same challenges and frustrations. Critically examining our bylaws has allowed us to learn and to move forward, so that we are now recommending a package of eight new bylaws for adoption, which should stand the Council and our community in good stead.
28. This report does not cover in any detail the organisational issues which arose during the bylaw review process, aside from the recommendation below where we ask our CEO within the next six months to undertake a review of the bylaw process to date, and to consider the process by which future bylaws will be made, to ensure greater consistency across the organisation.

¹⁵ For example: "Every person who breaches this bylaw commits an offence and is liable on summary conviction to a fine not exceeding \$20,000, as set out in the Local Government Act 2002"

¹⁶ For example, powers to remove works, to seize property, to issue notices, to seek injunctions, to recover costs, etc, are all provided for in the Local Government 2002 – sections 162-167 and 176.

¹⁷ Section 259 of the Local Government Act 2002 contains a provision for the creation of regulations prescribing breaches of bylaws that are infringement offences (ie where infringement notices could be issued) – however, no regulations have yet been made under this clause for any of the bylaws being considered by Council as part of this review. Regulations have been made in relation to specific navigation safety bylaws.

29. Some of the hearing panels' reports contain recommendations about further work that needs to be done on the bylaws themselves, or on the policies that sit behind them. Additionally, we have a number of other bylaw reviews set down for later this year. Our Refuse Bylaw has already been to its first working party meetings. Our Brothel Signage and Location Bylaw and our Liquor Control Bylaw and Alcohol Policy are issues due to touch the Regulatory and Planning Committee table this week.
30. There will be other matters which arise from time to time where Council considers a bylaw is necessary and appropriate. Plus all of the bylaws currently before Council need to be reviewed again within ten years.¹⁸ The new Local Government Act requires a much more active approach to bylaws. We no longer have the luxury of being able to say "it was fine before – let's just roll it over". This brings us back to first principles - is there a significant problem, is a bylaw the most appropriate way of addressing the problem, or are there other, more effective options?

RECOMMENDATIONS

There are further recommendations alongside each of the bylaws, and the recommendations below complement those – they do not replace them.

As the Chair of the Regulatory and Planning Committee and the Chair of the hearing panels for all of the bylaw reviews, I recommend that Council:

- (a) Thanks the staff for the work that has been done on the bylaw reviews.
- (b) Asks the CEO, in consultation with the Mayor and Chair of the Regulatory and Planning Committee, to undertake a review of the bylaw process to date, and to report to Council by 31 December 2008 on how matters which arose during the reviews are being dealt with.
- (c) Asks the CEO, in conjunction with the Regulatory and Planning Committee, to consider the process by which future bylaws will be made to ensure greater consistency across the organisation.
- (d) Asks staff to prepare advice for Council on the implications of, and possible advocacy for, an infringement regime which is provided for but not yet enabled through the Local Government Act 2002.
- (e) Asks for a review of how adequate our current data collection system is in meeting the requirements to demonstrate nuisance when we make bylaws.

¹⁸ Section 159 of the Local Government Act 2002 indicates that bylaws reviewed under the Act are not required do be further reviewed