

## **SUBMISSION PANEL AGENDA**

**THURSDAY 18 JUNE 2009**

**AT 2.30PM**

**IN THE MAYOR'S LOUNGE, CIVIC OFFICES**

**Panel:** Councillors Sue Wells (Chairperson), Bob Shearing, Mike Wall, and Chrissie Williams.

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- 1. APOLOGIES**
- 2. INTRODUCTION TO THE LAND TRANSPORT (ENFORCEMENT POWERS) AMENDMENT BILL AND VEHICLE CONFISCATION AND SEIZURE BILL** (Copies of Bills available at meeting)
  - Report purpose
  - The Bills
  - Progress of the Bills
  - Main issues for submission
- 3. SUMMARY OF THE BYLAW-MAKING POWER AND RELATED MATTERS IN THE LAND TRANSPORT (ENFORCEMENT POWERS) AMENDMENT BILL**
  - Bylaw-making power
  - Purpose of bylaws
  - New bylaw-making powers
  - Bylaw may apply to roads, vehicles and at certain times
  - Minister may amend, replace or disallow bylaws
  - Special Consultative Procedure must be used
  - Offences/prescribing fines
  - Warning notices
- 4. INITIAL DRAFT SUBMISSION / STAFF COMMENTS ON THE BYLAW-MAKING POWER PROPOSED IN THE BILL**
  - Introduction
  - Problem description and legislative solution mismatch
  - Enforcement
  - Definition of cruising/convoys impeding traffic flow
  - Controlling or restricting – not prohibiting
  - Fines
  - Existing bylaw tools used by local government
  - Bylaw-making processes under the Local Government Act 2002
  - Bylaws can be challenged
  - Minister can amend, replace or disallow a bylaw
  - Costs
  - Consulted departments
  - Displacement
  - A way forward

**Presenter:** Judith Cheyne

1. **APOLOGIES**

2. **INTRODUCTION TO THE LAND TRANSPORT (ENFORCEMENT POWERS) AMENDMENT BILL AND VEHICLE CONFISCATION AND SEIZURE BILL**

**Report purpose**

The purpose of this report is to introduce the Submission Panel to the two Bills collectively known as the 'boy racer' Bills, which contain measures designed to address illegal street racing, and to outline some key issues for the Panel's consideration in the preparation of a submission on the Bills.

**The Bills**

The two Bills are:

- Land Transport (Enforcement Powers) Amendment Bill
- Vehicle Confiscation and Seizure Bill.

The Land Transport (Enforcement Powers) Amendment Bill would amend land transport-related legislation to enhance the powers of the police and road controlling authorities (such as local councils) to tackle illegal street racing and associated antisocial behaviour.

It notably contains powers for councils to make bylaws in relation to activities associated with illegal street racing.

The Vehicle Confiscation and Seizure Bill would amend the Sentencing Act 2002, the Summary Proceedings Act 1957, and the Privacy Act 1993, in order to reduce traffic offending and strengthen the powers of the courts. This Bill does not contain any provisions that would affect the Council and its functions.

**Progress of the Bills**

Both Bills are proceeding in tandem:

Introduction	26 May 2009
First reading	2 June 2009
Referral to Select Committee	Transport and Industrial Relations Committee
Closing date for submissions	3 July 2009
Committee report back to Parliament	By 10 September 2009
If enacted, would come into force on:	1 December 2009

**Main issues for submission**

The main matter of interest to the Council is the bylaw-making power contained in the Land Transport (Enforcement Powers) Amendment Bill.

Most other matters contained within the two Bills relate to the powers of the Police or the Courts, and though of wider interest, do not relate to the functions or role of local government.

### 3. SUMMARY OF THE BYLAW-MAKING POWER AND RELATED MATTERS IN THE LAND TRANSPORT (ENFORCEMENT POWERS) AMENDMENT BILL

#### Bylaw-making power

The Transport (Enforcement Powers) Amendment Bill (the Bill) would allow a road controlling authority (which may be a council) to make a bylaw under a new bylaw-making power contained in the Bill (section 22AB(1)), provided the bylaws are made for the purpose below.

The Bill also provides that certain bylaws made under a number of existing bylaw-making powers,<sup>1</sup> in addition to any bylaws made under section 22AB(1)(b), will be a “qualifying bylaw”.

#### Purpose of bylaws

To be a “qualifying bylaw”, a bylaw would have to be made for “the stated purpose of:

- (a) Restricting or placing conditions on the racing of motor vehicles or any associated activities
- (b) Controlling or restricting cruising or any associated activities.”

#### New bylaw-making powers

The new bylaw-making power contained in the Bill would allow a bylaw to be made for one or more of these purposes:

- Authorising, subject to any restrictions or conditions, the racing of motor vehicles
- Controlling or restricting cruising
- Prescribing fines, not exceeding \$500, for the breach of any bylaw made under this section.

Cruising is defined in the Bill as follows:

*cruising* means driving repeatedly over the same section of a road in a motor vehicle in a manner that:

- (a) Draws attention to the power or sound of the engine of the motor vehicle being driven; or
- (b) Creates a convoy that:
  - (i) Is formed otherwise than in trade; and
  - (ii) Impedes traffic flow.

#### Bylaw may apply to roads, vehicles and at certain times

The restrictions may apply to:

- All roads, any specified road, or any part of a specified road under the care, control, or management of the road controlling authority making the bylaw
- All vehicles or traffic or to any specified class or classes of vehicles or traffic using a road under the care, control, or management of the road controlling authority making the bylaw
- At any specified time or times.

#### Minister may amend, replace or disallow bylaws

Section 22AC would allow the Minister to amend or replace any bylaws made under the new bylaw-making power contained within the Bill, and to disallow any bylaws made under the new bylaw-making power or any other power in any other Act, if the Minister considers the bylaw:

- Is inconsistent with any enactment
- Is unreasonable or undesirable in so far as it relates to or may affect traffic.

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<sup>1</sup> Section 72(1)(d) of the Transport Act 1962; section 684(1)(13) of the Local Government Act 1974 or section 145 of the Local Government Act 2002

### **Special Consultative Procedure must be used**

The Bill requires that the Special Consultative Procedure under the Local Government Act 2002 (LGA02) must be used when making a bylaw under the new bylaw-making power, but does not specify whether any of the other “bylaws” provisions in the LGA02 apply.

### **Offences/prescribing fines**

The Bill proposes a new subsection to section 22A of the Land Transport Act 1998 (“Persons not to engage in unauthorised street or drag racing, or other related prohibited activities on roads”). The proposed new subsection will provide that a person may not, without reasonable excuse, operate a vehicle on a road in a manner that contravenes a bylaw made under sections 22AB or 22AC.

The Bill also amends the Land Transport (Offences and Penalties) Regulations 1999 so that contravention of a bylaw made under sections 22AB or 22AC is a maximum fine on summary conviction of \$1000, while the infringement fine for a breach is \$150.

However, the bylaw-making power (section 22AB) allows for the prescribing of fines, not exceeding \$500, for a bylaw made under that same section (22AB). What this is intended to mean and how it relates to the above, is unclear.

There is also no mention of ‘qualifying bylaws’<sup>2</sup> in new sections 22A, 22AB (or 22AC), or in the amendment to the 1999 Regulations, so it is unclear what penalties could apply to a bylaw made under a different act (ie a qualifying bylaw).

### **Warning notices**

If a vehicle breaches a qualifying bylaw the Police may attach a warning notice to the car (instead of, or in addition to, issuing an infringement notice). The notice must then remain attached to the car for 90 days.

There is an offence included in the bill relating to removing or obscuring a warning notice while it is in effect, which attracts a maximum fine of \$10,000. If a vehicle is already subject to a warning notice and the driver operates the vehicle in a manner that breaches a qualifying bylaw then an enforcement officer must seize and impound the vehicle (if practicable).

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<sup>2</sup> A bylaw made using the new bylaw-making power or made under another Act, but for the stated purpose outlined in the bill

#### 4. INITIAL DRAFT SUBMISSION / STAFF COMMENTS ON THE BYLAW-MAKING POWER PROPOSED IN THE BILL

##### Introduction

The Council would like to congratulate the Government for undertaking measures to address the problems of illegal street racing and other 'boy racer' type activities. Such problems exist around the country, and particularly in Christchurch, causing damage to roads, disquiet amongst communities, and traffic dangers for other motorists.

The Council supports the spirit of both of the bills and believe they may be able to slowly bring about positive change. However, there are some issues with the way the bylaw-making powers and associated clauses are currently drafted in the Bill, and this is the main focus of the Council's comments.

If the bylaw-making powers are to be effective, they need to be well drafted and enable councils to create bylaws that will stand up in law and in practice, so that the Police can effectively enforce them.

The Council believes, however, that the issues proposed in the Bill that could be addressed in bylaws would more effectively be dealt with by national legislation that prohibits "cruising" on every road in New Zealand.

##### Problem description and legislative solution mismatch

The Explanatory Note to the Land Transport (Enforcement Powers) Amendment Bill does a thorough job of outlining the problems associated with 'boy racers' and illegal street racing, often using examples from Christchurch.

##### Associated problems outlined include:

- Large gatherings of people, who individually may not be committing an offence or causing public nuisance, but which collectively cause noise and nuisance
- Large numbers of drivers cruising around a predetermined circuit, including the noise and road safety risks such activities generate
- Difficulties for the Police in enforcing current legislation, as the person must be clearly identified in the act of committing the offence
- Large crowds of people, often intoxicated, make Police enforcement of existing laws difficult
- Participants in illegal street racing often avoid the Police by monitoring Police radios, posting lookouts and using broadcast text messaging to warn of approaching patrols
- Members of the public are reluctant to confront offenders or to take registration plate details for fear of reprisals
- Activities tend to peak during the Thursday to Saturday period, which is already a busy time for Police with alcohol-related crime and violence.

The Bill proposes to give local authorities new bylaw-making powers to restrict or place conditions on the racing or motor vehicles, and/or to control or restrict cruising.

These bylaw-making powers will not address the problems outlined above, including the lack of Police resources or needing to identify individual offenders in order to take enforcement action, both of which are the primary difficulties with enforcing the existing legislation.

##### Enforcement

Given the enforcement difficulties mentioned above, particularly the need to identify each individual engaged in committing an offence, it is unclear how any new bylaws will in any way alter the status quo. Even if new bylaws are brought into force by local authorities, they could only be enforced by the Police, and the Police would still have the same resourcing and offender identification issues that they have at the moment.

The offender identification issues are particularly relevant to the two proposed bylaw-making powers (racing and cruising) as they both involve multiple offenders/vehicles and moving vehicles. Problems include not only capturing the registration details of each vehicle engaged in the act (and proving this), but also of then managing potential disputes about who was driving the vehicle or whether the vehicle was caught up in the convoy or race unintentionally (see comment below on convoys).

CCTV or automatic number plate recognition systems could be used to establish proof of a car's involvement, but not necessarily a driver's involvement. The amendment to section 22A provides that a person may not, without reasonable excuse, operate a motor vehicle on a road in a manner that contravenes a section 22AB or 22AC bylaw, which is clearly aimed at the driver, not the vehicle. In addition, given that a "qualifying bylaw" might also address "driver" offending, the new section 22A(3A) should also add "or a qualifying bylaw".

Cruising is defined in the Bill as 'driving repeatedly over the same section of a road' in a manner that draws attention or creates a convoy that impedes traffic flow. Not only would the Police need to be able to prove that each individual offender was driving repeatedly over the same section of a road, but that this behaviour was drawing attention or creating a convoy. Collective offences of this nature are very hard to enforce or to prove.

#### **Definition of cruising/convoys impeding traffic flow**

"Driving repeatedly over the same section of road" needs better definition. It is not clear whether this is number or time related or both (how many times within what time period is driving over the same section of road going to amount to "repeatedly"?).

There are also two ways that when driving repeatedly over the road a person would be "cruising" - by drawing attention to the power or sound of the engine or creating a convoy that is not formed "in trade" and "impedes traffic flow". The first description may not be wide enough – it should possibly also cover loud music and other methods of drawing attention to the vehicle or its occupants that might be part of the "cruising" and that also creates a nuisance. The other problem relates to traffic flow being impeded.

Given the late hours and sometimes isolated locations in which 'boy racer' activities take place, any convoy that is created may not impede traffic flow, as there may be minimal other traffic on the roads. If a convoy does not impede other traffic, it should still be subject to control because the very fact of a convoy means there may be a spectator group gathering and causing the other problems identified in the Regulatory Impact Statement. In other traffic legislation the word "impede" is usually joined with the word "unreasonably impedes" or "unduly impedes". The absence of such a word may indicate that even a "reasonable" impeding of traffic will meet the test in this instance, but, if the requirement that traffic be impeded is to remain in the bill, this should be made clear.

It is also not clear how many cars will constitute a "convoy", and a separate definition for convoy should be considered. Additionally, how will other cars, if accidentally caught up or surrounded by a convey be distinguished from those causing or encouraging the convoy? It is not clear whether those drivers would be able to prove that they have a "reasonable excuse".

#### **Controlling or restricting – not prohibiting**

The bylaw-making power would enable a bylaw to be made to *control or restrict* racing or cruising, but may not allow a council to *prohibit* racing or cruising.

There is case law<sup>3</sup> which establishes that a power to control or restrict in delegated legislation such as a bylaw does not necessarily amount to a power to prohibit. If both racing or cruising are problematic, the bylaw-making power should allow prohibition, as it is not clear what could be "controlled or restricted", with respect to cruising in particular, when section 22AB(2) already provides that the bylaw can be applied to some or all roads, some or all vehicles, and at certain times or specified times.

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<sup>3</sup> See *Willowford Family Trust v Christchurch City Council*, unreported 29 July 2005, High Court, Christchurch, Panckhurst J; CIV-2004-409-2299, and the discussion in that case of the principles from *Municipal Corporation of City of Toronto v Virgo* [1896] AC 88(PC)

## Fines

The Bill amends the Land Transport (Offences and Penalties) Regulations 1999 so that contravention of a bylaw made under the new sections 22AB or 22AC is a maximum fine on summary conviction of \$1000, while the infringement fine for a breach is \$150.

However, the bylaw-making power (new section 22AB) allows for the prescribing of fines, not exceeding \$500, for a bylaw made under that same section (22AB). The inclusion of this power may be to allow a minor offence prosecution to be brought for a breach of the bylaw, but if there is also a power to issue an infringement offence, then that power would be used, not the minor offence procedure, despite the lower fine, because the infringement notice procedure is much less cumbersome.

There is also no mention of 'qualifying bylaws' in new sections 22AB (or 22AC), so it is unclear what penalties could apply to a bylaw made under a different act (ie a qualifying bylaw). In addition, new section 22A(3A) should also be extended to apply to qualifying bylaws, as noted above.

## Existing bylaw tools used by local government

The Christchurch City Council recently adopted a new bylaw, the Traffic and Parking Bylaw 2008. The bylaw contains a section, made under the Local Government Act 2002, called 'Prohibited Times on Roads'. The section enables the Council, by resolution, to:

'specify any road or part of a road and the days and times during which motor vehicles weighing less than 3,500 kilograms are prohibited from being used on that road or part of that road or roads'.<sup>4</sup>

The bylaw lists a number of exemptions, including: residents along the affected roads (including their bona fide visitors), emergency vehicles, trade or service authority vehicles and Council or security company vehicles being used in the execution of duty.<sup>5</sup>

The bylaw also requires that signage is erected to inform road users of the restrictions, and that resolutions made under the section are reviewed at least every five years.<sup>6</sup>

The bylaw power tends to be used for non-residential or largely unpopulated streets on the margins of the city, industrial areas or areas where few vehicles ordinarily need to travel (particularly late at night), and the times during which the restrictions apply are usually late at night / early in the morning, eg 11pm to 6am, in order not to disrupt legitimate road users.

Where a Prohibited Times on Roads resolution is not appropriate (eg in residential areas), 'no stopping' restrictions are put in place, again, usually late at night / early in the morning, eg 11pm to 6am. There are also signage costs associated with these restrictions.

Both of these tools, together with effective enforcement by the Police, have helped to reduce 'boy racer' problems in the Christchurch district, and it was primarily included in the bylaw for that purpose. It is not clear whether this section of the bylaw might be a "qualifying bylaw" automatically under the Bill or whether the Council would need to amend the bylaw to specifically provide that the purpose of this section was for the "stated purposes" identified above. This should be clarified in the Bill.

## Bylaw-making processes under the Local Government Act 2002

The bylaw-making process set out in the LGA02, notably section 155, requires that a local council must be satisfied that a bylaw that is made under the LGA02 is *the most appropriate tool* for addressing the identified problems, and that the council determines that the bylaw does not raise any implications under the New Zealand Bill of Rights Act 1990. It is not clear under the Bill whether section 155 of the LGA02 is also meant to apply to a new bylaw made under section 22AB or not.

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<sup>4</sup> <http://www.ccc.govt.nz/bylaws/ChristchurchCityCouncilTrafficAndParkingBylaw2008.pdf> - clause 15(1)

<sup>5</sup> <http://www.ccc.govt.nz/bylaws/ChristchurchCityCouncilTrafficAndParkingBylaw2008.pdf> - clause 15(3)

<sup>6</sup> <http://www.ccc.govt.nz/bylaws/ChristchurchCityCouncilTrafficAndParkingBylaw2008.pdf> - clause 15(4) and 15(5)

It is also not clear that the bylaw review provisions in the LGA02 apply to section 22AB or that there is any requirement to review the bylaws within any timeframe (eg every five or ten years).

If it is, or if a bylaw is made under section 145 of the LGA02 in relation to those activities *associated with* either racing or cruising (ie crowds or spectators), then any council would need to be mindful of rights such as freedom of peaceful assembly<sup>7</sup>, freedom of association and freedom of movement<sup>8</sup> in exercising any bylaw-making power. The bill should be clarified so as to remove any doubt as to whether or not the other 'bylaws' provisions do or do not apply to a bylaw made under section 22AB.

### **Bylaws can be challenged**

The Bylaws Act 1910 allows bylaws to be challenged on the basis of validity. Under the general law, a bylaw must be certain and reasonable, and can also be challenged on this basis. There are numerous examples of bylaws that have been challenged by way of judicial review actions, including bylaws made under the relatively new powers in the Prostitution Reform Act 2003.

If the Government were to put national legislation in place to address illegal street racing, rather than including a bylaw-making power for local councils to address it, any prosecutions would not be so easily challenged. This is a weakness of bylaws that national legislation does not have.

### **Minister can amend, replace or disallow a bylaw**

Under the bylaw-making power prescribed in the bill, the Minister of Transport may amend, replace or disallow a bylaw made under the proposed new bylaw-making power.

If a council goes through a thorough process, including following the Special Consultative Procedure and using the bylaw-making power provided, it would then be problematic if the Minister of Transport over-ruled the local community and the decision-making power and process of the council to disallow a bylaw. If the bylaw-making powers were removed from the Bill and national legislation enacted to control cruising instead, then that would avoid the possibility of community views being overridden.

The grounds on which the Minister may disallow a bylaw, as proposed in the Bill, include the bylaw being inconsistent with any enactment or the bylaw being considered unreasonable or undesirable in relation to traffic. However, under the general law, a valid bylaw must not be repugnant to the laws of New Zealand and the bylaw must be reasonable. Such tests are normally explored by the Courts, not by a Minister.

### **Costs**

There is no mention of the costs to local authorities outlined in the Regulatory Impact Statement. Costs of undertaking a bylaw-making process include councillor and staff time, legal advice, using the Special Consultative Procedure, and promotion of the bylaw and its restrictions, including any required signage.

### **Consulted departments**

The Regulatory Impact Statement lists a range of government departments that were consulted in the development of the policy proposals leading to the Bill. However, we note that the New Zealand Police are not listed, yet they will be enforcing most of the new provisions in the bill or any new bylaws.

### **Displacement**

If roads are specified in bylaws, the problem areas may shift, requiring new restrictions to be put in place, which would require further analysis, consultation, etc and further costs to local government. It may be more appropriate for such restrictions to be national legislation, rather than local bylaws.

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<sup>7</sup> Once an assembly is no longer 'peaceful' other offences under other legislation are likely to have been committed, eg the Litter Act or Summary Offences Act

<sup>8</sup> Sections 16-18 of the New Zealand Bill of Rights Act 1990



## A way forward

The existing legislation, including the amendments to the Land Transport Act 1998 made in 2003, could be effective, if they were able to be enforced effectively.

As the Explanatory Note to the Bill indicates, unauthorised street racing and stunts involving deliberate wheel spinning are illegal under current legislation, as is operating a noisy vehicle.

Associated problems (from spectators), as outlined in the Regulatory Impact Statement, include: property damage, urination, broken bottles and litter. These are also already covered by existing legislation (eg the Summary Offences Act and the Litter Act).

The issue is not needing legislation that creates new offences, but the enforcement of existing legislation.

If the possibility of restrictions on racing and cruising are considered to be effective, the Government should make the restrictions national legislation, rather than creating a bylaw-making power for local government. National legislation could still target specific types of roads if it was not considered appropriate to control or regulate cruising on every road in New Zealand.

If national legislation is not enacted to deal with this problem and a bylaw-making power is considered appropriate, then the following matters need to be addressed in the Bill so that local government is given an effective and certain bylaw-making power:

- Definition of cruising – identify what amounts to ‘repeatedly’, and a ‘convoy’; allow the definition to be widened beyond drawing attention to the power or sound of an engine, and to provide for any convoy (that is not formed in trade) whether it impedes traffic flow or not.
- Qualifying bylaws need to be linked to other sections in the Bill, not just warning notices – especially sections 22A(3A), and 22AB, and the infringements and penalties provisions. Bylaws that have already been made by local authorities to control boy racer activities (even though the stated purposes may not be as provided for in the new definition) should be a deemed qualifying bylaw, upon the approval of the Minister. This would avoid the need for a local authority to carry out a further special consultative procedure to amend an existing bylaw.
- Prohibit rather than or in addition to control or restrict – section 22AB(1)(b) should be amended to add that a bylaw can also be made to *prohibit* cruising.
- The requirement that the Minister can disallow bylaws should be removed. This duplicates the general law.
- The Bill needs to clarify whether the other LGA bylaw-making requirements will also apply to a bylaw made under section 22AB. The need to use the special consultative procedure is appropriate, but should the principles set out in section 155 of the LGA also apply, or the requirement to review a bylaw every five years? It would be easier for the Council in exercising this new bylaw-making power if it was not required to assess whether or not there is consistency with the New Zealand Bill of Rights Act. To avoid any doubt, that should be clearly stated in the Bill, as it is in section 12 of the Prostitution Reform Act 2003.
- The ability to make a bylaw prescribing a fine of \$500 for a breach of the bylaw needs to be removed, as this only appears to confuse matters when there are also amendments to the regulations that add a summary conviction and infringement offence fine for breaching a bylaw.
- The bylaw-making power should be clarified to make it clear that bylaws can also be made to provide controls (and offences) relating to passengers in a vehicle that is cruising, in addition to the driver of a vehicle.
- It is not clear what ‘associated activities’ in the definition of ‘qualifying bylaw’ refers to and what would it mean in terms of bylaw-making and particularly penalties.