City Amenity Bylaw

Submission to Nelson City Council

26 May 2017

PSA

For a better working life

New Zealand Public Service Association
Te Pūkenga Here Tikanga Mahi

City Amenity Bylaw

PSA submission to the Nelson City Council

26 May 2017

Background

The New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi (the PSA) is the largest trade union in New Zealand with over 63,000 members. We are a democratic organisation representing members in the public service, the wider state sector (the district health boards, crown research institutes and other crown entities), state owned enterprises, local government, tertiary education institutions and non-governmental organisations working in the health, social services and community sectors.

The New Zealand Public Service Association: Te Pūkenga Here Tikanga Mahi (the PSA) is the principle trade union representing local government workers. The PSA has over 1400 members in Nelson; this bylaw will directly affect them.

The PSA has been advocating for strong, innovative and effective public and community services since our establishment in 1913. People join the PSA to negotiate their terms of employment collectively, to have a voice within their workplace and to have an independent public voice on the quality of public and community services and how they're delivered.

PSA members have a strong commitment to protecting the democratic integrity of our public institutions and our legislative framework - both at a local and a national level.

We are an organisation that is committed to the principles of the Treaty of Waitangi.

Summary of PSA position

1. The PSA **opposes** the draft City Amenity Bylaw.

2. In essence the bylaw places a blanket prohibition on protest in public places within Nelson City, because a protest cannot be held without first seeking the permission of a council officer. We consider that this represents an unreasonable and unjustifiable limitation on the

rights to freedom of expression, peaceful assembly and assocation contained in the New Zealand Bill of Rights.

3. We believe that the bylaw is a disproportionate response to the perceived problem the council is trying to address.

4. The PSA recommends that this bylaw **not proceed**.

5. We **recommend** that the Nelson City Council adopt as an alternative the safety-focussed approach to assembly in public places found in other local authority juristrictions, such as in the Wellington City Council Consolidated Bylaw 2008.

6. The PSA **wishes to be heard** in support of this submission.

Detailed comment

Purpose of the bylaw

7. The draft City Amenity Bylaw provides the Nelson City Council with remedies to address the "problems" associated with the long-term protest activity of Hone Ma Heke, also known as Lewis Stanton. The bylaw appears to be have been drafted following demands from some members of the public and some retailers that "something be done"[1].

8. One of the stated purposes of the bylaw inlcudes to "regulate the conduct of events, including protests, within the city centre" (s3.1.(vi)). The conduct of protestors during protests is already regulated through existing public disorder and criminal behaviour legislation, as is the public conduct of all New Zealanders. For example, the public order offences of disorderly behaviour, offensive behaviour or language, and disorderly assembly are contained in the Summary Offences Act 1981. And as noted in the 23 March 2017 the Memo to Mayor and Councillors on the City Amenity Bylaw, the Police have used the Crimes Act to respond to incidents associated with the protest[2].

[1] Nelson City Council (2017), Memo to Mayor and Councillors, from Administration Advisers, "Late Items Agenda of Council", retrieved 23 May 2017 from, p.5.
[2] Op cit

9. We are concerned at the proposal to introduce an additional regulatory layer of conduct-related control in Nelson that impinges on protesters' rights to freedoms of assembly, association and expression, and which would not ensure lawful behaviour during any protest. We consider that this section of the bylaw represents an inneffective, inappropriate and unnecessary extension of power to council officers. Thee conduct of protestors is already regulated by existing statutes. We consider it would not be lawful for Council to invest its officers with the power to approve or prohibit the exercise of NZ Bill of Rights protected rights .

10. Interestingly, the Council's memo in support of the bylaw ends with the single conclusion that" "there is a gap in the Council bylaws in relation to maintaining the city amenity values and it is appropriate that Council take steps to address this gap" (p.18). This would appear to suggest that the maintenance of the amenity values, rather than protection of public safety and order, is the overriding objective of the bill. The prohibition of all protest activity without council approach seems an extraordinary measure to take in order to protect the city's amenity values.

Effect of the bylaw

The effect of the bylaw will be to place significant obstacles to the organisation of protests in Nelson City. Of significant concern is the section of the bylaw relating to the permit determination process (section 12.1).

11. Under this section anyone wishing to hold a protest in Nelson will require the formal permission of an authorising officer, who will consider, among other matters, the "*consent of adjacent retailers (which shall in the opinion of the authorising officer not be unreasonably withheld)"* s.12.1(c).

12. Essentially this section extends the power to decide whether to grant a permit for a protest to affected retailers. One can imagine that are many instances where retailers may withhold consent, including, for example, to a union protesting outside a business because of its poor labour practices. It would be entirely unreasonable that the business in question have a legal right to withhold consent to that protest, and that the protestors' right to protest should rely, in any part, on that retailer's granting of consent.

13. The caveat that the authorising officer must determine whether consent is being "unreasonably" withheld relies on the arbitrary opinion of the authorising officer and his/her determination of reasonableness. We believe that this section significantly limits the protections in the NZ Bill of Rights to freedom of expression (s14), peaceful assembly (s16) and freedom of association (s17).

14. The proposed Nelson City Amenity Bylaw places a number of impediments and obstacles in the way of protest activity in Nelson. The PSA considers that this will have a chilling effect on the civil and political rights of Nelsonians. While we understand the responsibility of council to ensure that public spaces are safe for all citizens to enjoy, we consider the proposed bylaw places unlawful, unreasonable and unjustifiable limitations on the rights of citizens to protest. It is also an ineffective and disproportionate response to the perceived problem.

Legality

15. The PSA considers that the proposed Nelson bylaw would breach s5 of the NZ Bill of Rights Act – which allows that the "rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

16. While legal precedent has established that local authorities can impose limitations on the right to protest, (for example the *Wadsworth v Auckland Council* judgement in the High Court[3]), these limitations are bound by the *Oakes* test in determining whether legislative limitations on fundamental rights and freedoms are reasonable and justifiable We think the bylaw potentially fails the *Oakes* test in the following ways:

    a. Under *Oakes* the objective must be sufficiently "pressing" and "substantial" to justify "overriding a protected right or freedom"[4]. Council papers demonstrate that this bylaw has been introduced to deal with the protest activity of **one** person, in **one** part of the Nelson town centre. We do not consider that this meets the threshold of being either "pressing" or "substantial".

[3] *Wadsworth and Bright v Auckland Council and the Attorney General* [2013] NZHC 413.
[4] Ellis, J (2013), in *Wadsworth and Bright v Auckland Council and the Attorney General* [2013] NZHC 413, p. 442

b. There must be a "rational connection" to the objective, and the limitation on the right must not be "arbitrary, unfair or based on irrational considerations"[5]. As noted in paragraphs 7-10 above, we consider the inclusion of retailers' consent as a consideration in the granting of a permit to protest exceeds the objectives of the bylaw - which generally relate to public order, public health and safety, and maintenance of public amenities - and includes provisions that are arbitrary, unfair and based on irrational considerations. In our opinion the bylaw is unclear as to how the gaining of retailers' consent would contribute to the above objectives.

We also don't consider that there is a rational link to the objective of "regulating the conduct of events, including protests" (s3.1(vi)) and the requirement of gaining a permit to protest. We are not clear as to how a permit granted *before* the protest would necessarily affect the conduct of protestors *during* the protest, unless there is an implicit understanding that permission may be denied to applicants where there is a presumed doubt about the applicants' *future* conduct during the protest. This suggests an arbitrary and irrational aspect to the provision. As outlined in paragraphs 5 and 6 above, we also consider that conduct during protests is sufficiently regulated under existing statute.

c. The High Court judgment in the case of *Wadsworth v Auckland Council* argues that the third component of the *Oakes* test - that the right be impaired as "little as is reasonably possible"[6] - is the most important of the test. Because the Nelson bylaw appears to apply to *all* protest activity, including both organised and spontaneous protest, we consider it fails to restrict the right as "little as is reasonably possible".

In the *Wadsworth* decision, the High Court made the following comment:

> "[69] It also seems relevant to note that the restriction on protest:
>
> (a) is limited to "organised" protest; spontaneous protest in a public place is not subject to the licensing requirement; and
>
> (b) appears to contemplate that an exemption from the licensing requirement may also be obtained (although it is unhelpfully silent as to the circumstances)."

[5] Ellis, J op cit, p.443.
[6] Ibid.

The Nelson bylaw, by comparison, unreasonably stretches this restriction on protest to include spontaneous protest. For example a person/group of people who are concerned by some revelation in the news and spontaneously want to meet and express their views in a public place are prohibited from doing so. They must first file their application with the Council, then sit back and wait for the Council to decide on it, and only if the Council says "yes" may they then voice their opinions. We regard this as unreasonable.

Equally, while the bylaw says what the Council officials must consider when deciding whether or not to grant a permit to protest, there is no time constraint on the process. Important considerations, such as timelines for the granting process are not detailed in the bylaw. How soon before a planned/organised protest must an application be made? Can the Council officials effectively stop a protest by dragging out their decision on the matter beyond the protest's date/time?

The judge in Wadsworth v Auckland Council stressed that the case related to protest activity in Aotea Square, a "*significant* public place in Auckland's city centre" [ref, para 7, p.433]. By contrast, the proposed Nelson bylaw applies to *all* public places within the city centre (which includes the inner city, city fringe and suburban commercial zones of the city). The breadth of the bylaw's coverage, to include all insignificant public spaces within the city limits, is we think, an unreasonable limitation on the right to protest.

d. Finally, the *Oakes* test requires the court to consider "proportionality" between the limitation of rights and the objective. For the reasons outlined above, in particular the inclusion of spontaneous protests, and the application of the permitting regime to *all* public spaces, not just those of civic significance, we do not consider this bylaw to be a proportionate response to the perceived problem.

The effective prohibition of all protests without permit seems highly disproportionate to the overriding objective of the bylaw, which, as suggested by concluding comments of the 23 March Nelson City Council Memo to Mayor and Councillors[7], is the maintenance of city amenities.

[7] Op cit, p. 18

Conclusion

17. We remind Council that it was elected to represent all residents of Nelson and it is Council's duty to protect residents from arbitrary breaches of their civil and political rights. It is our view that neither a council official nor a business owner should be granted any discretion over such fundamental rights.

18. We also remind Council of its responsibility to the City of Nelson not to pass bylaws that may result in costly litigation.

19. We understand the Council's obligations to protect the safety of residents using public places, and we urge it to adopt an approach that more appropriately balances the need for public safety with the right of people to protest. The Wellington City Council Consolidated Bylaw for instance, requires that the "organiser of an event, demonstration, competition, parade or procession that is likely to interfere with traffic or pedestrian thoroughfare in a public place shall *notify* the Council as soon as reasonably practicable prior to the event" (s2.6.1)..

20. The purpose of the Wellington bylaw is to "minimise disruption to pedestrians and other users", (s2.6.1). Critically, no power is vested in the council to prohibit or permit protests or other events.

21. We believe that the Wellington bylaw is more consistent with the NZ Bill of Rights Act and we recommend that the Nelson Council to adopt its approach.

22. We urge Council to vote against this proposed bylaw.

For further information, please contact:

Sarah Martin
Policy advisor
New Zealand Public Service Association
PO Box 3817
Wellington 6140

Phone: 04 816 5040; mobile: 027 406 6750
Email: sarah.martin@psa.org.nz