

STATEMENT OF PROPOSAL: APPEARANCE INDUSTRIES BYLAW

1. INTRODUCTION

Hutt City Council propose to create a new Hutt City Council Appearance Industries Bylaw 2020 (“proposed Bylaw”).

This Statement of Proposal has been prepared in accordance with section 86 of the Local Government Act 2002 (the LGA 2002) and provides information about the review process and whether it is appropriate to have an Appearance Industries Bylaw f within the district of Hutt City Council.

2. BACKGROUND

2.1 RELEVANT LEGISLATION

Part 8 of the LGA 2002 provides powers for local authorities for the making of bylaws. The Act contains general bylaw making provisions and provisions that are specific to bylaws.

References to “the Council’s” in this Statement of Proposal is a reference to the Hutt City Council, as the context requires.

Ministry of Health

The Council has been have been advised recently that the Ministry of Health (MoH) is undertaking a review of legislation for Tattooist, Skin Piercers, Beauty Therapists and Hairdressers – known as the appearance industries.

A large part of this MoH project has focused on reviewing the current bylaws and legislation in New Zealand, along with talking to those within the industry themselves for feedback. An example of this is a specific questionnaire that was recently sent out to some tattooists for their thoughts about the current state of their industry.

MoH have advised that a paper will be presented to Cabinet outlining the feasibility of national legislation for appearance industries. If Cabinet agrees, public consultation will follow allowing for even more specific feedback to be collected and the drafting of legislation started.

MoH advised that any legislation dealing with this issue would be about four to five years away. Due to this timing MoH advised the Council's that work on a proposed Appearance Industries bylaw should continue as planned.

3. LOCAL GOVERNMENT ACT 2002

3.1 RELEVANT LEGISLATION

Under sections 159 and 155, the creation of a bylaw must take the form of a consideration of the matters that the Councils are normally required to consider before making a bylaw.

The Council must determine whether a bylaw is the most appropriate way of addressing the perceived problem. If so, the Council must determine whether the proposed Bylaw is the most appropriate form of bylaw, and whether the proposed Bylaw gives rise to any implications under the New Zealand Bill of Rights Act 1990 ("NZBORA"). No bylaw can be inconsistent with the NZBORA. In developing a bylaw, the Council must use the special consultative procedure set out in section 83 and comply with the procedures in section 148.

Under section 145, the Councils may make bylaws for its district with the purposes of:

- a. protecting the public from nuisance;
- b. protecting, promoting, and maintaining public health and safety;
- c. minimising the potential for offensive behaviour in public places.

The proposed Appearance Industries Bylaw 2020 can be viewed by visiting the Council website:

www.huttcity.govt.nz

3.2 THE PERCEIVED PROBLEM

Unlike many overseas countries there is no law in New Zealand that regulates the appearance industry. It is up to local councils to set minimum standards in regulations that apply to the businesses operating in their local authority area.

MoH have advised national legislation isn't expected to be in place for four or five years. However the MoH has indicated their support for the Councils to create an Appearance Industries Bylaw.

Regional Public Health

RPH did a survey of nail and beauty salons the greater Wellington region, including the Hutt Valley. They found very few operators who provide manicure and pedicures were completing all the steps to adequately clean, disinfect and sterilize equipment that cuts or pierces the skin.

While many operators have good policies and practices to prevent clients getting infections or cuts, other operators do not. In some situations operators are not aware that the way they have been doing things is no longer best practice.

An article in the Australian and New Zealand Journal of Public Health, written by Regional Public Health staff in 2011, details two cases of life threatening cellulitis (one with necrotising fasciitis) related to traditional Samoan tattooing which occurred in Lower Hutt. A survey conducted as part of this research - a survey of regional general practitioners and emergency departments over a six month period - found that in addition to the two cases detailed in the article there had been another eight cases of cellulitis occurring locally resulting from traditional Samoan tattoos in this six month period¹.

ACC statistics

Injury data from ACC for the Hutt Valley provides evidence that appearance industry services continue to cause health problems. Over the past four years (2016 – to June 2019) ACC recorded on average 23 new claims per annum and on average, for the same period of four years, 46 active claims. A 'new' claim is a claim counted by the date the claim was registered either immediately after the injury occurred or at a later stage. Active claims are claims that generated a payment in the relevant calendar year. Active claims can have payments made against it in multiple years.

Evidence indicates that there is a problem with appearance industry businesses operating in ways that cause health problems for customers. This means that an Appearance Industries bylaw is consistent with the provisions in the LGA 2002 relating to the Councils' bylaw-making powers. The Councils' consider that it is necessary to have an Appearance Industries bylaw for the purposes of:

- protecting, promoting and maintaining public health and safety (section 145(b));

The Council therefore propose to regulate the appearance industries by way of the proposed Bylaw. The proposed Bylaw is intended to ensure adequate controls and monitoring are in place to meet the public's expectation that both Councils will perform their role in protecting, promoting and maintaining public health and safety in the Hutt Valley.

¹ D'Souza, D. & McLean, M. (2011). *Life-threatening cellulitis after traditional Samoan Tattooing*. Australian and New Zealand Journal of Public Health, 35(1).

3.3 MOST APPROPRIATE WAY TO ADDRESS THE PERCEIVED PROBLEM

Non-regulatory

The Bylaw is proposed because non-regulatory methods like voluntary compliance and education cannot be relied on to address the perceived problem. Educative measures may not reach everyone, nor may they provide an effective deterrent to everyone. In these circumstances, the activities have an effect on the general public which means it is necessary for the Council to have a greater ability to enforce its policies and practices.

Traditional/Cultural tattoos

Following further research into both documented medical cases of serious incidents following traditional (Pacific) tattoos and the analysis and findings of Auckland Council's review of their bylaw and approach they have taken, our proposed approach is to follow Auckland Council's approach and exclude traditional Maori tattoos, for example Ta Moko, which are performed under the authority of a marae and include all other traditional tattoos (including traditional Pacific tattoos) in this proposed bylaw.

This decision to exempt traditional Maori Tattoos that are undertaken under the authority of a marae has been made in recognition of our partnership with iwi and our obligations under Te Tiriti o Waitangi, in recognition of Traditional Maori tattoos such as Ta Moko as taonga. While we acknowledge the cultural significance of traditional Pacific tattoos for Pacific people, we have made the initial decision to include traditional Pacific tattoos in this proposed bylaw on the basis of: multiple life threatening incidences following traditional Pacific tattoos occurring locally; the absence of a governing authority equivalent to a marae; and the absence of legal requirements such as those accorded to traditional Maori tattoos under Te Tiriti o Waitangi obligations

Other regulatory options

Currently there are no regulatory provisions in place to cover the range of services undertaken by the Appearance Industry. The Council consider that it would be appropriate to make the proposed Bylaw in order to address the perceived problem.

The Council considers that while most of the provisions in the Bylaw have the potential to be covered by common law remedies, such as the tort of public nuisance and the tort of negligence, it is preferable for the Council to retain provisions in the Bylaw for these matters. It is procedurally more complicated for the Council to bring proceedings in tort than to bring proceedings for breach of a bylaw.

The proposed Bylaw may provide the Council with an alternative prosecution option in cases where the Bylaw is breached, depending on the circumstances.

In summary, the Council does not consider that non-regulatory actions are able to address the perceived problem to the extent necessary. In addition, other measures may not be

appropriate in every instance. Council considers that the proposed Bylaw is the most appropriate way to address the perceived problem.

3.4 MOST APPROPRIATE FORM OF BYLAW

The proposed Bylaw addresses the perceived problem by preventing a number of unwanted consequences resulting from appearance procedures by regulating for the provision of acceptable health and hygiene standards.

The proposed Bylaw is flexible and allows for changing circumstances to be recognised. In some instances, the Council must take into account several matters specified by the Bylaw in the exercise of the Council's discretion, for example, as outlined in the Codes of Practice.

The Code of Practice is attached to but separate from this proposed Bylaw. This separation allows the Code of Practice to be amended as appropriate via a Council resolution, rather than needing to undergo a full review of the Bylaw. This gives it the necessary flexibility to recognise that procedures and techniques emerge and evolve quickly in the appearance industry.

Council will consider whether it is necessary to consult with specified persons with respect to certain matters e.g. industry groups.

The proposed Bylaw clearly states the Council's position by stating whether an activity is permitted or prohibited. The proposed Bylaw sets out what action needs to be taken to comply with it, for example, whether prior written permission of the Council is required. It also sets out some considerations that will be taken into account in granting consents.

The proposed Bylaw reflects a number of both Council's existing policies and practices, and also reflects community goals that have been identified by the Councils.

This Bylaw is in line with the Bylaws of other Territorial Local Authorities (TLAs) who have established bylaws in the absence of national regulation in order to ensure the health and safety of their communities when undertaking procedures or treatments from appearance industries. TLAs with similar Bylaws include: Auckland Council, Dunedin City Council, Invercargill City Council (proposed), Masterton District Council, Napier District Council, New Plymouth District Council, Ruapehu District Council, South Taranaki District Council, South Wairapa District Council, Timaru District Council, Waimate District Council and Waitomo District Council. Additionally Wellington City Council is currently considering developing a similar bylaw.

The proposed Bylaw is therefore the most appropriate form of bylaw. It clearly states the Councils position on each issue, how the Bylaw can be complied with, reflects the Councils existing policies and practices, and addresses the perceived problem.

3.5 NZ BILL OF RIGHTS IMPLICATIONS

The Council must determine whether the proposed Hutt Valley Appearance Industries Bylaw gives rise to any implications under the New Zealand Bill of Rights Act 1990 (NZBORA).

The existing Bylaw could potentially limit freedom of expression under the New Zealand Bill of Rights Act 1990 (section 14). “Expression” can be any activity that attempts to convey meaning. Nearly all human activity can be classified as expression since “most human activity combines expressive and physical elements” (Irwin Toy Ltd v Attorney-General [1989] Quebec 1 SCR 927). Services such as tattoo, body piercing, scarification and other body modification may convey meaning. While the Bylaw requires operators to be licensed and comply with minimum standards, it does not limit the public’s access to these services. The Bylaw only controls the methods used to carry out these services to meet health protection goals.

Would any limitations be justifiable under the Act?

The proposed Bylaw could potentially limit freedom of expression, this limitation is considered justifiable. For a limitation to be “demonstrably justifiable in a free and democratic society” it must serve a sufficiently important purpose to justify the limitation. Hansen v R [2007] 3 NZLR 1 (SC) provides that the limitation must:

- be rationally connected to its purpose
- not limit the right or freedom more than necessary to achieve the purpose
- be proportionate to the importance of the objective.

The purpose of the Bylaw is to promote and protect public health. There is evidence that serious harm can be caused if services covered by the Bylaw are not performed competently or hygienically. The limitations on services directly relate to the Bylaw’s health protection objectives.

The conclusion is there was no obvious infringement of, or implications in respect of, any of the civil or political rights under Part 2 of the New Zealand Bill of Rights Act 1990.

4. THE BYLAW REVIEW

The proposed Hutt City Appearance Industries Bylaw 2020 is a new bylaw, based on the following codes of practice and discussion with members of local Appearance Industries and industry groups through our pre-consultation process, alongside with extensive and ongoing involvement and input from Regional Public Health. The content that was developed during the development of this bylaw is summarised below.

4.1 EXPLANATION OF THE PROPOSED BYLAW CONTENT

In general terms the proposed bylaw addresses the perceived problem (as outlined in 3.2 above) by regulating the Appearance Industries by or on behalf of Hutt City Council and Upper Hutt City Council. The following outlines the rational for the inclusion of each section in the proposed bylaw.

Proposed clause 1. Title

This section states the title of this bylaw.

Proposed clause 2. Commencement

The purpose of this clause is to state the date in which the bylaw will come into force

Proposed clause 3. Application

This clause is to establish the areas this proposed bylaw will cover.

Proposed clause 4. Purpose

The purpose of this clause is to ensure the purpose of the proposed bylaw is clear.

Proposed clause 5. Interpretation

This clause is proposed so the meaning of the terms used in the proposed bylaw is clear.

Proposed clause 6. Regulation of certain services for health protection

The purpose of this clause is to outline the services allowed subject to minimum standards; services requiring a licence; restricted services; and exemptions.

Proposed clause 7. Controls and licences

The purpose of this clause is to outline the Health protection code of practice; the procedure for making a code of practice; and the Health protection licences.

Proposed clause 8. Controls and licences enforcement powers, offences, penalties

The purpose of this proposed clause is to outline the relevant legislation that authorises council to establish this proposed bylaw.

Proposed clause 9. Fees payable

The purpose of this clause is to outline the proposed fees and how these fees may be changed.

The Hutt City Council Appearance Bylaw serves the both Upper Hutt City Council and Hutt City Council. The day to day management and enforcement of the bylaw is undertaken by Hutt City Council.

4.2 FEES

Fees and charges are set by Council resolution. This is done through the Councils' Long Term Plan, Annual Plan or other suitable process in accordance with the LGA 2002.

5. PROCESS FOR THE DEVELOPMENT OF THE PROPOSED BYLAW

The special consultative procedure will end 4.00pm on Monday 11 November.

Hearings and meetings on the proposed bylaw will be open to the public, and people may speak to their submissions at the relevant committee meeting.

The proposed bylaw will then be referred to Hutt City Council for consideration and adoption.