

Memorandum

To: Queenstown Lakes District Council

From: Meredith Connell

Date: 26 September 2019

Subject: **QLDC Freedom Camping Control Bylaw 2012 – review of drafting and recommendations for improvement**

Introduction

- 1 The Queenstown Lakes District Council (**Council**) made the Freedom Camping Control Current Bylaw 2012 (**current bylaw**) to regulate freedom camping in the Queenstown Lakes District (**District**). The current bylaw was made under s 11 of the Freedom Camping Act 2011 (**FCA**). That bylaw will be automatically revoked by operation of law on 19 December 2019, and the Council must decide whether or not to pass a new bylaw, and if so, what that bylaw should look like.
- 2 We understand that a theme in the feedback the Council has received on the current bylaw is that it works well but is out of date and is not user-friendly. We have considered the current bylaw in terms of legality, consistency with the FCA and fitness-for-purpose as a bylaw, as well as for clarity and readability. We agree that the drafting of the current bylaw is poor. It:
 - (a) Frequently and unnecessarily repeats the FCA;
 - (b) Contains wording that is either inconsistent with the FCA or obscures its meaning;
 - (c) Contains an ultra vires clause; and
 - (d) Has wording that could generally be simplified and expressed in plain English.
- 3 This memorandum highlights these issues and explains the changes made to the drafting of the current bylaw in developing the proposed bylaw.

Overview of the FCA

- 4 Section 5(1) of the FCA defines “freedom camp”. It relevantly means to camp, other than at a camping ground, within 200m of a motor accessible area, or on or within 200m of a formed road, using one or more of the following:
 - (a) a tent or other temporary structure;
 - (b) a caravan;
 - (c) a car, campervan, houstruck, or other motor vehicle.

- 5 In other words, it generally controls camping at accessible public places other than camping grounds. “Camping ground” means a camping ground with a current certificate of registration under Camping-Grounds Regulations 1985; and any site at which a fee is payable for camping at the site. Therefore, if a person camps at a camping ground, they are not “freedom camping”.
- 6 Section 10 of the FCA provides that freedom camping is permitted in any local authority area unless it is a restricted or prohibited area under a bylaw made under s 11.
- 7 “Local authority area” means an area of land that is within the district or region of a local authority, and that is controlled or managed by the local authority under any enactment.¹ This includes not only Council-owned or administered reserve land, but also all road reserves (being all roads, or areas adjacent to roads such as laybys, in the District).
- 8 Section 11(1) of the FCA provides that a local authority may make current bylaws that define the local authority areas in its district or region where freedom camping is prohibited, and where freedom camping is restricted, and any restrictions that apply to that area.
- 9 Section 12 of the FCA provides that a local authority may not make a bylaw that has the effect of prohibiting freedom camping throughout district.
- 10 Section 20 of the FCA provides a list of offences relating to freedom camping. Most notably, s 20(1)(a) makes it an offence for a person to freedom camp in a local authority area in breach of any prohibition or restriction under any current bylaw made under s 11. All offences under s 20(1) are infringement offences,² for which a person is liable to a fee of \$200.³

Avoiding repetition of the FCA

- 11 A bylaw under the FCA is intended to define areas in which the FCA will apply so as to prohibit or restrict freedom camping. Once defined, provisions of the FCA apply to freedom camping in those areas. An example is the offence provision (s 20). There is no need to replicate the offence provision by providing in the bylaw that it is an offence to breach the bylaw. That is already the case under s 20. In general, unnecessarily repeating statutory provisions in bylaws risks introducing inconsistency, and potentially unlawfulness, but adds nothing. There is also a risk that the legislation could change, making the bylaw inconsistent and therefore requiring change. The best way to address repetition in bylaws is to remove it.
- 12 Repetition sometimes stems from an intent to use a bylaw as an educative tool – in other words to educate the public about what they can and cannot do. However, given that the Council has an extensive set of guidance about freedom camping we would prefer an approach in which a minimalist bylaw focused on clearly providing legally for the necessary prohibitions and restrictions, and a more visitor-focused set of guidance explained where people could camp using non-legal language. That makes sense given many people who want to know where they can freedom camp speak English only as a second language, if at all. Another benefit of this approach relates to feedback that it would be preferable if the bylaw did not define prohibited areas and leave other areas as restricted, but instead provided for the opposite: namely it identified what areas were permitted and restricted, and then said everywhere else is prohibited. It is questionable whether a bylaw could be framed in this way. But there is no reason why the Council’s public-facing guidance material could not reframe matters in this way.

¹ FCA, s 6(1)(a).

² FCA, s 4.

³ FCA, s 23(1)(b).

- 13 Accordingly, we recommend:
- (a) deleting all repeated definitions and including clause 4.2 of the proposed bylaw recording that words and phrases defined in the FCA have the same meaning when used in the bylaw.
 - (b) Deleting the unnecessary repetition of the offence and penalties provision and the (incomplete) list of offences in Schedule B.

Definition of “self-contained vehicle” and “using a self-contained vehicle”

- 14 The current bylaw restricts freedom camping in restricted areas to people using self-contained vehicles. It includes two definitions for that purpose: “self-contained vehicle” and “using a self-contained vehicle”. The definitions are convoluted (particularly the latter) and difficult to understand.
- 15 In particular, “self-contained vehicle” refers to NZS 5465:2001 which provides for the certification of self-contained vehicles. Certification confirms that the vehicle is able to accommodate the ablutionary and sanitary needs of the occupants of the vehicle for a minimum of three days without requiring any external services or discharging any waste. The intent of the bylaw is to enable enforcement officers to identify self-contained vehicles by the display of a certificate of compliance with the standard. It follows that the references to “ablutionary and sanitary needs of occupants ...” within the definition is entirely unnecessary.
- 16 Also, the definition of “using a self-contained vehicle” refers not to an action as the present participle of the verb “using” should suggest, but a person, namely the “occupier or occupiers of the self-contained vehicle”. It is for that reason nonsensical.
- 17 We can only assume the drafters of the current bylaw defined both “self-contained vehicle” and “using a self-contained vehicle” to make it clear that it is not enough to camp in a self-contained vehicle, but that its ablutionary and sanitary capabilities must also be used and the waste discharged at a site approved by the Council. This is unnecessary because it is already an offence (s 20(b)(ii) of the FCA) to deposit waste, and problematic because there is, to our knowledge, no mechanism under the FCA for Council to “approve” a waste discharge site.

Prohibited, restricted and permitted areas

- 18 A difficulty with providing for prohibited, restricted and “unrestricted” areas in one clause of the current bylaw is that the heading is inaccurate. We suggest that one way of simplifying the clause would be to split it into three separate clauses, with one dedicated to each of the prohibited areas, restricted areas, and permitted areas.
- 19 The current bylaw provides at clause 5(b) that “a person can only freedom camp in any restricted area, as identified in Schedule A, if they are using a self-contained vehicle”.⁴ The key in Schedule A provides simply that “All Council controlled land not specified below [see para 17 above and para 20 below] is restricted to self-contained vehicles for freedom camping”. “Council-controlled land” is not a phrase used in the FCA, and is in fact wider than

⁴ Self-contained vehicle is not defined in the FCA, but is defined in the current bylaw. It means “a vehicle designed and built for the purpose of camping which has the capability of meeting the ablutionary and sanitary needs of occupants of that vehicle for a minimum of three days without requiring any external services or discharging any waste and is certified that it complies with the New Zealand Standard 5465:2011”.

“local authority area”, since the Council may own freehold land not controlled or managed under an enactment. We therefore recommend amending the key.

- 20 Clause 5(c) of the current provides that “a person can freedom camp in any area where freedom camping is unrestricted, as identified in Schedule A”. “Unrestricted” is not a used in the FCA, the correct term is “permitted”.

Discretionary Council consent to freedom camp

- 21 We would suggest for readability eliding or combining the several clauses about granting discretionary consents to freedom camp otherwise in breach of the bylaw. We also note that in general terms providing that the Chief Executive has an “absolute discretion” is inconsistent with the Chief Executive having to be satisfied that consent would not be contrary to the purpose of the bylaw. To that end we recommend removing the reference to absolute discretion.

Ultra vires clause

- 22 In the pre-consultation feedback you received, the New Zealand Motor Caravan Association suggested that cl 9 of the current bylaw is ultra vires.
- 23 We agree. It is not consistent with the consultation requirements provided in s 11 of the FCA for amendments of bylaws made under that section. If the Council made any amendments to prohibited, restricted or permitted areas under that provision they would be unlawful. Under the FCA, “minor changes” or “errors” can be corrected in accordance with s 11(6). Otherwise the special consultative procedure is required.

Summary

- 24 In summary, if the Council decides to make a new bylaw, and wishes to do so taking a similar approach as expressed in the current bylaw, we recommend:
- (a) Simplifying and separating out the clauses defining prohibited, restricted and permitted areas in the District;
 - (b) Removing repetition of provisions in the FCA, including some definitions, the clause relating to offences and penalties, and Schedule B;
 - (c) Simplifying and consolidating clauses concerning discretionary Council consent to freedom camp; and
 - (d) Removing clause 9, which we consider is ultra vires the FCA but also unnecessary.
- 25 If you have any questions about this advice please do not hesitate to contact us.