

## SHORT MEMORANDUM OF ADVICE

1. We are instructed that Councillors are concerned about anti-social behaviour in parts of the municipal district. We are instructed that such behaviour typically occurs in public places and involves a number of persons congregating in a manner that leads to aggressive, abusive, threatening or intimidating conduct being exhibited. Not infrequently those engaged in such conduct are (or are associated with) rough sleepers.

Council already regulates anti-social behaviour through provisions in its Community Amenity Local Law 2023 (**the Local Law**). Specifically:

- 1.1 cl 17(1) of the Local Law provides that:

A person must not on or in Council land, a road or a footpath:

- (a) create a nuisance;
- (b) behave in a manner which unreasonably interferes with another person on or in the Council land, road or footpath;
- (c) behaves in a manner which unreasonably interferes with another person occupying premises in close proximity to the Council land, road or footpath;
- (d) harass any person using the Council land, a road or footpath;
- ...
- (g) fail to comply with a reasonable direction of Authorised Officer or Council staff member whilst on Council land.

- 1.2 cl 42 prohibits a person from camping on any Council land or in any public place 'in a *vehicle*, tent, caravan or...other type of temporary or provisional form of accommodation'.

Clause 42(2) then provides for exemptions. So, a person is not guilty of an offence under cl 42(1) if that person establishes that they:

- a) are homeless or in need of secure accommodation; or
- b) have complex needs or is [sic] in the need of additional assistance because of mental or physical disability or illness.

- 1.3 cl 43(1) prohibits a person from placing or causing to be placed any furniture on a footpath or accessway if such furniture obstructs the footpath or accessway. 'Furniture' is defined (in cl 6(1)) to mean moveable articles required for use or as an ornament in a house, office or the like, and expressly includes bed frames, certain bed mattresses, chairs, tables, crates, kitchen appliances and similar items.

Council may direct a person to remove any furniture that has been placed or caused to be placed on a footpath or accessway in contravention of cl 43(1). As much follows from cl 43(2). If the direction is not complied with, Council is empowered under cl 43(3) to seize the furniture and impound it in accordance with cl 78 of the Local Law.

Particular mention should be made of cl 78 of the Local Law. According to cl 78(1):

Where a person owning or responsible for items, goods and equipment has ignored a request from an *authorised officer* to remove them, the items, goods and equipment may be removed and impounded.

Subsequent provisions in cl 78 provide for whether (and in what circumstances) items, goods and equipment that have been impounded can be retrieved.

2. At its meeting on 19 February 2025 Council resolved that members of Council staff investigate the possibility of amending the Local Law to further regulate anti-social behaviour. Presumably, this reflects a belief that – in its current form – the Local Law is ineffective or inadequate to address certain of the amenity and other challenges that arise from the anti-social behaviour.

3. Council's proposal is to replace what is currently cl 17(1)(b) with the following:

A person must not on or in Council land, a road or a footpath, behave in a manner which unreasonably interferes with another person including sitting, sleeping or laying [sic] on or in the Council land, road or footpath.

The thrust of the proposed amendment is to make it clear or clearer that sitting, sleeping or lying on the Council land, road or footpath can be a means by which a person can unreasonably interfere with another.

4. Subject to some drafting considerations, we see no legal impediment to an amendment of this kind or to this effect. It does not appear to raise any issue of inconsistency with State legislation<sup>1</sup> or obviously infringe any of the rights contained in the *Charter of Human Rights and Responsibilities Act 2006 (the Charter)*.<sup>2</sup>

We do, though, query what such an amendment would achieve. It would merely make it clearer that sleeping, sitting or lying on the Council land, road or footpath can constitute a form of unreasonable interference with another. There will remain a question as to whether, in fact, the particular act of sleeping, sitting or lying on the Council land, road or footpath *did* unreasonably interfere with another.

Put simply, we can see that the core of the proposed amendment will, if made, direct a Magistrate's attention to how certain activities are capable of falling within the scope of cl 17(1)(b). This will, we think, be the limit of its impact. It is not as though the provision will equate any of the activities with unreasonable interference or indirectly prohibit sleeping, sitting or lying on Council land, a road or footpath.

5. Council also proposes that the current prohibition on camping in cl 42 be replaced by a more explicit form of prohibition. A new cl 42 would read:

A person must not reside in temporary accommodation, including a vehicle, tent, caravan or any good or chattel that enables a living arrangement or sleeping on council land or in any public place.

It is unclear whether cl 42(2) – the provision that embodies exemptions for the vulnerable and disadvantaged – would be retained. Ultimately, whether the exemptions are to be retained in any (and, if so, what) form is a policy matter for Council.

Subject again to drafting considerations, we think that is open to Council to amend cl 42 in the manner and to the extent that is proposed. It would not trespass upon any 'field' occupied by State legislation, given that the focus is on using Council land or a public place as an abode (as distinct from creating an obstruction on a footpath). In other words, no issue of inconsistency with State legislation applies.

6. That said, we anticipate that the amendment could attract Charter considerations. The same Charter considerations are relevant to cl 42 in its current form. Any prohibition on camping on Council land or in a public place affects a person's freedom of movement, and so engages the right embodied in s 12 of the Charter.

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<sup>1</sup> A local law cannot be inconsistent with an Act or Regulation (see *Local Government Act 2020* ss 71 and 72(a)).

<sup>2</sup> See, however, what is said in this Short Memorandum of Advice concerning camping and the application of the Charter.

Human rights under the Charter are engaged when an act or decision of a public authority places limitations or restrictions on, or interferes with, the human rights of a person.<sup>3</sup>

On its face, the amended clause is likely to engage one or more of the human rights set out in the Part 2 of the Charter. It will mean that a person cannot lawfully camp or reside on Council land or in a public place. This could restrict the person's freedom of movement, and so engage the right to freedom of movement embodied in s 12 of the Charter.

Depending upon the circumstances, it is also conceivable that the clause will engage:

- 6.1 the right of peaceful assembly, at least to the extent that a person is precluded from camping with others;
- 6.2 freedom of expression, to the extent to which camping contains or involves an expressive element; and/or
- 6.3 the right not to be subjected to cruel or degrading treatment or punishment.

We say this because there is United States authority striking down legislation constraining the activities of the homeless, on the ground that such legislation violates the constitutional right to freedom from cruel and unusual punishment.<sup>4</sup>

Of course, whether the related right under the Charter is engaged will depend on the circumstances, and the scope of the concept of degrading treatment or punishment. Some submitters to a similar local law proposed by Melbourne City Council in 2017 pointed out that a consequence of camping in a public place and being at risk of liability if items are left unattended in that public place might be that a homeless person is, practically speaking, compelled to wash or urinate in public. Alternatively the deprivation of shelter (or even the ability to rest for an extended period) may be cruel or degrading and engage the right.<sup>5</sup>

There is also the possible engagement of rights under ss 8, 9 and 13 of the Charter. The application of these provisions is less certain.

Section 8(2) of the Charter confers on a person the right to enjoy their human right without discrimination. The concept of discrimination is linked to discrimination on the basis of an attribute set out in the *Equal Opportunity Act 2010*.<sup>6</sup> It is unclear how any of these attributes<sup>7</sup> will necessarily be present in the context of the clause.

That said, there is evidence that those with a mental illness are disproportionately represented in those who are considered homeless.<sup>8</sup> Disability is an attribute for the purposes of the *Equal Opportunity Act*.<sup>9</sup>

There is also room for controversy as to how such a clause engages the right to life or, for that matter, the right not to have a person's privacy or home unlawfully or arbitrarily interfered with.<sup>10</sup> This need not be pursued. It is likely that one or more of the human rights provided for in the Charter will be engaged.

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<sup>3</sup> *PJB v Melbourne Health* [2011] VSC 327.

<sup>4</sup> See, for example, *Jones v City of Los Angeles* 444 F3d 1118 (9<sup>th</sup> Cir 2006).

<sup>5</sup> See further *R (Limbuolo) v Home Secretary* [2006] 1 AC 396.

<sup>6</sup> See the definition of 'discrimination' in s 3(1) of the Charter.

<sup>7</sup> See s 6 of the *Equal Opportunity Act*.

<sup>8</sup> See, for example, Australian Human Rights Commission, *Homelessness Is A Human Rights Issue* (2008). This may assist in identifying an attribute, and help establish indirect discrimination.

<sup>9</sup> See s 6(e).

<sup>10</sup> There must be doubt as to whether those who are homeless have a 'home' in a public place. As against this, the concept of 'home' is to be approached in a pragmatic way and depends on a person showing sufficient and continuous links with a place (*Director of Housing v Sudi* [2010] VCAT 328 at [32]).

7. Whether the infringement of any of these human rights can be justified under s 7(2) of the Charter is not entirely clear. The issue is whether there is a reasonable proportionality between the way in which the prohibition will achieve its objectives (which are largely concerned with amenity, and, to an extent, public safety and security) and the degree to which the human rights are impaired.

There is balancing exercise inherent in s 7(2). The outcome of that balancing exercise is a little difficult to predict. Although compatibility or justification under s 7(2) is possible, the nature and extent of the limitation (being a prohibition), the relationship between the limitation and its purpose and the availability of the least restrictive means reasonably available to achieve the purpose sought may it far from certain that the clause would survive legal challenge.

8. It might be that more specific and inherently constrained amendments to the Local Law are best calculated to avoid legal vulnerability on Charter grounds. If, for instance, the powers conferred on Council were capable of being exercised only:

8.1 on particular parcels of Council land,<sup>11</sup> depending upon what occurs there; and

8.2 because of an adverse impact on municipal amenity or a threat to public safety or wellbeing,

there will be less room for legal controversy.

As we have said, while it is open to Council to attempt to strengthen the Local Law provisions concerning anti-social behaviour and using Council land, roads and footpaths as areas of accommodation we are unconvinced that there will ever be available effective means of enforcement. Because no power of arrest will be available to anyone,<sup>12</sup> it will always be a matter of encouraging compliance, issuing an infringement notice or prosecuting in the Magistrates' Court. The introduction of a 'move on' power is unlikely to make any material difference in this respect.

9. The most effective 'tool' available to Council might be the power to remove sleeping and related equipment that has been placed and then maintained on Council land. To optimise Council's prospects of successfully defending any Charter-based challenge, we think that Council would need to consider introducing provisions that:

9.1 enable certain areas of Council land to be designated (perhaps by the Chief Executive Officer acting under delegation) as areas in which sleeping and related equipment could not be present beyond a specified number of days;

9.2 ensure that the power of designation is restricted to circumstances in which Council (or the Chief Executive Officer, as delegate) has reasonably formed the opinion that the presence of the sleeping and related equipment was attracting persons who, by their conduct, were committing offences against the Local Law or posing a threat to public safety and wellbeing;

9.3 require the designation to be published, and ensure that it and its effect are communicated to those in possession of the sleeping and related equipment;

9.4 insist on a warning being issued to those possessing the sleeping and related equipment, advising them of the need to remove the equipment from the designated area or risk seizure; and

9.5 allow the equipment to be seized, coupled with a right to reclaim the equipment upon certain conditions being met.

We accept that this more nuanced proposal may still attract an element of controversy, given that it could lead to some rough sleepers and others being deprived of bedding or basic possessions.

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<sup>11</sup> We are instructed that the focus is to be on Council land (as distinct from public places generally).

<sup>12</sup> Because a local law is a form of delegated legislation, nobody (members of Victoria Police included) has a power of arrest available to them. See *Crimes Act 1958* s 458(2).

And it cannot be guaranteed to be totally effective, noting that persons deprived of their property may still choose to remain on the Council land and noting further that, from a strictly legal perspective, there will still be some room for doubt over the application of the Charter.

It is nonetheless our view that if the provisions can be confined to instances in which real issues of amenity or public safety or wellbeing are in issue, and the focus is on the removal of sleeping and related equipment, there is an enhanced prospect of Council being able to achieve its objectives lawfully. So, the less likely it becomes that the Local Law (or its implementation) will be susceptible to a successful legal challenge.

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