Activities (Public Amenity and Security) Local Law
2017

Submission to City of Melbourne Consultation
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Introduction

The Castan Centre for Human Rights Law (‘Castan Centre’) thanks the City of Melbourne for the opportunity to comment on its proposal to amend the Activities Local Law 2009 by means of the Activities (Public Amenity and Security) Local Law 2017.

This proposed Local Law amendment would expand the definition of ‘camping’ and provide a basis for confiscation of homeless people’s property. We are concerned about its implications for human rights; in particular the right to an adequate standard of living, the right to property and related rights at international and common law. Indirectly, the proposed amendments may also threaten homeless people’s health, for example if their bedding and/or shelter were confiscated in the colder months, or if items confiscated included food, medicine or mobility aids, or if the property confiscation forced them to relocate to a less safe area.

Pursuant to international human rights law and the Charter of Human Rights and Responsibilities Act 2006 (‘Charter’), public authorities such as the City of Melbourne may only act in a way which limits rights if the limitations are reasonable, and ‘can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’.1

The additional objective which the proposed amendments would insert into cl 1.2 of the Activities Local Law 2009 is an improvement in amenity for pedestrians (particularly footpath users with a disability). The title Activities (Public Amenity and Security) Local Law 2017 also refers to a security-related objective. Although it is not entirely clear, this may be reflected in the new ‘unattended items’ powers proposed to be added to Part 2.

‘Camping’

The proposed amendments relating to camping in the city involve the removal of words from the prohibition on ‘camping in a public place’ to broaden its coverage:

Unless in accordance with a permit, a person must not camp in or on any public place (the following words have been removed) in a vehicle, tent, caravan or any type of temporary or provisional form of accommodation.

This amendment appears to place homeless people in the same category as, for example, backpackers parking their campervans within the city limits or pitching a tent in a city park. Despite attempts to blur the distinction,2 there is an important difference between those who choose to save money by skimping on accommodation and those who sleep outside by necessity. This difference is effectively recognised by the present law, but the proposed amendments would signal that it is no longer considered important.

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1 See Charter, ss 7(2) and 38.
Article 11 of the International Covenant on Economic, Social and Cultural Rights, to which Australia is party, provides in part:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

A former UN Special Rapporteur on housing called homelessness ‘perhaps the most visible and most severe symptom of the lack of respect for the right to adequate housing.’ The present Special Rapporteur has reinforced this point, and specifically criticised the City of Melbourne’s proposed changes as discriminatory.

Homelessness has also been linked to a large number of other human rights violations, both in its causes and its effects. The Office of the High Commissioner for Human Rights has observed:

Besides the violation of their right to adequate housing, homeless persons may be deprived of a whole range of other human rights. Laws that criminalize homelessness, vagrancy or sleeping rough, along with street cleaning operations to remove homeless people from the streets, have a direct impact on their physical and psychological integrity. Merely by not having a secure place to live, nor any privacy, homeless persons are much more vulnerable to violence, threats and harassment.

The present submission does not intend to give a comprehensive treatment of the links between homelessness and human rights – there is a wealth of literature, including Australian literature, on this subject. Instead, we wish to emphasise that these links are overlooked by the current proposal to amend the Local Law. Conflating homelessness with ‘camping’, as the proposed amendments appear to do, is wrong because it implicitly diminishes the serious implications of homelessness for rights including rights to health, education, liberty, privacy, social security, political participation and freedom from discrimination.

In addition, the fine in Schedule 1 associated with camping in contravention of the Local Law (2.5 Penalty Units or $388.65 at current rates), should not apply to homeless people. Although this change would not directly criminalise homelessness, fines and fees levied on the homeless, in addition to those already imposed for begging and similar practices, risk further enmeshing many in...

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the criminal justice system for failure to pay. In the long term, this is likely to have a significant negative social and economic impact.

We recommend that the proposed amendments, which fail to acknowledge the fundamentally different character of sleeping rough due to homelessness and camping, not be made.

Property Confiscation

Confiscation of property, and refusal to return unless a fee is paid, is a particularly harsh measure in the circumstances. There is no indication that the fee would be linked to the applicants’ means to pay, and there is also a fixed penalty associated with an infringement of proposed cl 2.12 of another 2.5 Penalty Units, which raises serious questions as to whether this really a safety-oriented measure.

Section 20 of the Charter provides that ‘[a] person must not be deprived of his or her property other than in accordance with law.’ Clearly, if the present proposal is adopted, the confiscation of homeless people’s property will be ‘in accordance’ with a law. However, there are other laws which must be considered in this context:

1) Human Rights Law

As with all rights in the Charter, the right to property derives from international law. Article 17(2) of the 1948 Universal Declaration of Human Rights provides that ‘[n]o one shall be arbitrarily deprived of his property.’ Notions of arbitrariness at international law have been said to include elements of ‘inappropriateness, injustice and lack of predictability’ in addition to illegality and unreasonableness. Although the relevant jurisprudence relates to arbitrary detention, it is clear that the concept of ‘arbitrariness’ in human rights law is broader than that of illegality.

The Explanatory Memorandum to the Charter specifies that ‘[t]his right does not provide a right to compensation’, but is silent as to the terms on which expropriation may be permitted. In discussing the concept of permissible deprivation of property, the Victorian courts and tribunals have referred to arbitrariness in interpreting s 20 in light of s 32, which requires all Victorian laws to be read ‘in a way that is compatible with human rights.’ For example, confiscation of certain breeds of dog has been found not to be arbitrary due to the ‘significant public safety issues at stake’ and

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10 See proposed amendment to Schedule 1.
12 See eg Human Rights Committee, General Comment 16: Article 17 (Right to Privacy), Adopted at the Thirty-second Session of the Human Rights Committee on 8 April 1988, [4].
13 See eg Thurston v Ballarat CC [2012] VCAT 274; Glen Eira C60 (PSA) [2010] PPV 79.
'safeguards...to allow an owner to seek return of the seized dog...and to seek review to VCAT...'.
The courts have also noted that property forfeiture under criminal law must be interpreted in light of s 20 of the Charter.

The proposed Local Law amendments leave it to the discretion of the ‘authorised officer’ to confiscate items, introducing a significant element of unpredictability. This discretion is not required to be exercised reasonably, nor is the basis for its exercise made clear. There is no indication, for example, that demonstrable safety or security concerns must be present before confiscation powers are used. We have read reports that the amendments will require outreach officers to accompany officers enforcing this provision, but this does not appear to be reflected in the consultation draft.

The proposed amendment provides for confiscation and impoundment of any item of property left unattended in a public place. The only safeguard for the property’s owner is a provision for return of the property on payment of ‘any fee or charge prescribed by the Council for its release.’

There is no requirement that such a fee be reasonable in light of the limited means of those targeted by this law, no apparent right of appeal for property confiscated in error (for example property which is not actually unattended), no provision for return of the property without fee payment in exceptional circumstances of need, nor any other safeguard which might help establish that this proposed provision does not provide for ‘arbitrary deprivation’ of property.

In addition, no evidence appears to have been provided for the purposes of the present consultation of the nature or relative magnitude of risks to safety, security or amenity posed by homeless people’s property. The Council’s media release of 8 February 2017 explains that ‘[i]n the past two years there has been a 74 per cent increase in the number of homeless people sleeping rough in the municipality’ and that 2750kg of waste was collected in January 2017, but without context these figures suggest that the objectives of the amendments might be related to cost and convenience, rather than public safety and accessibility.

In our view, the proposed amendments to the Local Law have not been adequately justified, especially in light of their significant potential impact on homeless people’s rights. The amendments therefore risk breaching ss 20 and 38 of the Charter. In addition, Local Laws such as this are made under the relevant delegation in the Local Government Act 1989, which specifies that they ‘must not be inconsistent with any Act or regulation,’ and are ‘inoperative’ to the extent of any such inconsistency. As such, the proposed amendments may effectively be invalid due to inconsistency with the Charter.

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14 See Thurston v Ballarat above, [46-47].
15 See DPP v Nguyen & Anor; DPP v Duncan & Anor [2008] VSC 292, [36-38].
17 Activities Local Law 2009, as proposed to be amended, cl 2.12.3.
19 See Local Government Act 1989 (Vic), ss 111(2) and (3).
2) Common Law

The common law has ‘long regarded a person’s property rights as fundamental.’ As in international law and under the Charter, property rights since the Magna Carta have been able to be overridden by ‘the law of the land,’ but ‘only when it was not done arbitrarily, and where reasonable compensation was given.’ The term ‘arbitrary’ has been equated with ‘necessary and in the public interest.’ With this in mind, similar arguments as outlined above apply in relation to the justifiability of these measures at common law. Given the societal and economic costs of a punitive, short-term approach to addressing homelessness, the public interest would not appear to be served by these amendments.

It has also been noted that the principle of legality, whereby legislation is not lightly to be interpreted as interfering with common law rights, is particularly strong in relation to property rights. This may mean that the proposed regulations relating to ‘Unattended Items’ will be subject to narrow interpretation when challenged in the courts, in an effort to protect homeless people’s rights. Given that the principle of legality has developed primarily to address insufficient attention to rights protection in the legislative drafting process, it would be desirable to address this issue early – well before the legislation is introduced and subject to challenge in court.

We recommend that proposed cl 2.12 be omitted, or at least redrafted to reflect the reality that homeless people do not have the means to pay fines for leaving their property in public places, or to have it restored after confiscation. If cl 2.12 is to be retained, safeguards such as a reasonableness requirement for the confiscating officer to consider, a prohibition on confiscation of necessities such as medicine and sleeping bags, and a right of appeal (without cost) should be included.

Recommendations

1. We recommend that the proposed Local Law camping-related amendments, which fail to acknowledge the fundamentally different character of sleeping rough due to homelessness and camping, not be made.
2. We recommend that proposed cl 2.12 be omitted, or at least redrafted to reflect the reality that homeless people do not have the means to pay fines for leaving their property in public places, or to have it restored after confiscation.
3. If cl 2.12 is to be retained, safeguards such as a reasonableness requirement for the confiscating officer to consider, a prohibition on confiscation of necessities such as medicine and sleeping bags, and a right of appeal (without cost) should be included.

21 See ALRC, Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (Report 129), [18.9].
22 Ibid, [18.122].
23 See Baldry et al, above n 9; also Adams, above n 8.