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Submission re: City of Melbourne's proposed Activities (Public Amenity and Security) Local Law 2017

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To: Manager
Governance and Legal
Melbourne City Council

SUBMISSION RE CITY OF MELBOURNE'S PROPOSED ACTIVITIES (PUBLIC AMENITY AND SECURITY) LOCAL LAW 2017

We are legal academics with expertise in the impact of approaches to public space management that involve criminalisation or other punitive approaches to 'undesirable' or controversial presence, activity and behaviour in public places.¹

This submission addresses the two major changes contained in the proposed *Activities (Public Amenity and Security) Local Law 2017*:

- i) the expansion of the existing offence of camping in a public place without a permit (cl 2.8).
- ii) the creation of a new offence of leaving any item unattended in a public place, along with powers to confiscate and destroy personal property found unattended, and charge a fee for return (proposed cl 2.12).

In doing so, we also address the proposed expansion of the objectives of the *Activities Local Law 2009* to include a focus on the protection of 'amenity' in proposed cl 1.2(c).

It is our submission that the proposed changes should not be adopted. They have the potential to do more harm than good.

Criminal law responses to homelessness: Overview

It is well-established that punitive public order laws and police powers have a disproportionate impact on marginalised populations, including Aboriginal and Torres Strait Islander persons, socio-economically disadvantaged young people, people dealing with mental illness, and people experiencing homelessness.

Laws that criminalise life-sustaining behaviours that disadvantaged people have no choice but to perform in public have long been criticised by courts around the world for being outdated,² contrary to the rule of law,³ and unconstitutional.⁴

¹ For example, T Walsh, 'Ten years of public nuisance in Queensland' (2016) 40 *Criminal Law Journal* 59-73; T Walsh, *Homelessness and the Law*, The Federation Press (2011); T Walsh, *No Vagrancy: An Examination of the Impact of the Criminal Justice System on People Living in Poverty in Queensland*, UQ (2007); L McNamara & J Quilter, 'Public Intoxication in NSW: The Contours of Criminalisation' (2015) 37(1) *Sydney Law Review* 1-35; J Quilter & L McNamara, 'Time to Define "the Cornerstone of Public Order Legislation": The Elements of Offensive Conduct and Language under the *Summary Offences Act 1988* (NSW)' (2013) 36(2) *UNSWLJ* 534-566; J Quilter & L McNamara, "'Long may the buskers carry on busking": Street Music and the Law in Melbourne and Sydney' (2015) 39(2) *Melbourne University Law Review* 529-591.

² *Zanetti v Hill* (1962) 108 CLR 433 at 437, 439.

³ *Ledwith v Roberts* [1936] 3 All ER 570 at 598.

Although there are notable state/territory/city-specific differences, the long-term national trend since the 1970s has been to move *away* from reliance on blunt punitive criminal or regulatory offences to deal with complex social problems. Governments in Australia and around the world are instead shifting their focus towards developing collaborative community justice initiatives and justice reinvestment programs.⁵ The historical record is full of evidence that criminalisation is an inappropriate, ineffective and unfair means of achieving the goal of maintaining public amenity and safety. Homeless people are already over-represented in public order policing and law enforcement. In this context, the proposed *Activities (Public Amenity and Security) Local Law 2017* is a retrograde step that will only serve to exacerbate the situation.

Ban on ‘Camping’

The proposed amendment to cl 2.8 of the City of Melbourne’s *Activities Local Law* appears to substantially broaden the scope of the prohibition on camping without a permit.

1. No definition of ‘camp’

We note that, if amended as proposed, the *Activities Local Law* will contain no definition of ‘camp’. This could produce adverse consequences. Uncertainty about the scope of the ban will create significant challenges for Compliance Officers responsible for monitoring and enforcing the prohibition together with producing uncertainty for public space users including the homeless.

2. Removal of the words ‘in a vehicle, tent, caravan or any type of temporary or provisional form of accommodation’

Although the proposal is ambiguous on its face, the intended effect of this amendment appears to be the banning of ‘rough sleeping’. This means that people without any form of ‘accommodation’ or shelter – such as those who bed down for the night on the street, whether on a mattress, on cardboard or other materials, in a sleeping bag, or with no bedding at all – could be found guilty of an offence (cl 14.1), and subject to fines of up to 20 penalty units (cl 14.6(a) (currently \$3109.20, indexed annually) or on-the-spot infringements of 2.5 penalty units (cl 14.3 and Sch 1) (currently \$388.65). This could occur on every occasion that they are detected ‘camping’ in a public place.

A law of this nature would criminalise the very act of sleeping. For people who are homeless, all behaviours must necessarily be conducted in public, including life-sustaining behaviours such as sleeping. It is, therefore, disingenuous of the City of Melbourne to assert that it ‘is not banning homelessness’ or that the proposed change would not make it ‘illegal to be

⁴ *Pottinger v City of Miami* 810 F Supp 1551 (1992) at 1578-9; *Papachristou v City of Jacksonville* 405 US 156 (1972) at 162.

⁵ See particularly Senate Legal and Constitutional Affairs Committee, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, 2013; L Roth, *Justice Reinvestment*, NSW Parliamentary Research Service E-Brief, December 2016.

homeless'.⁶ People who are homeless are not practically capable of complying with such laws, and as such, laws of this nature may be considered 'cruel and unusual'. It is on this basis that similar laws have been invalidated in the United States.⁷ Further, it is well-known that such laws do not solve the problem of homelessness. Instead, they cause unnecessary hardship to people who are already extremely disadvantaged and marginalised.⁸

Proposed new ban on leaving items unattended

The proposed ban in cl 2.12 on leaving items unattended in a public place (and the associated powers to confiscate, charge a fee for return, and destroy) is a disturbing attack on the dignity of one of the most vulnerable groups in Australia: people experiencing homelessness, and living and sleeping rough on the streets. It is inconsistent with the spirit of the right to property recognised by s 20 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and morally repugnant.

Further, the United States experience suggests that such laws may expose public authorities to potential negligence claims, as the enforcement of such laws can place vulnerable individuals' lives at risk: in one case, a woman's asthma medication was confiscated as part of a 'homelessness sweep', and this resulted in a medical emergency.⁹

Enforcement

It might be contended that the potential harshness of the change proposed by the *Activities (Public Amenity and Security) Local Law 2017* will be ameliorated by a benign approach to enforcement. In response to such a contention, we make two observations.

First, an expectation of benign enforcement is potentially at odds with the proposed incorporation of a new objective of protecting the 'amenity' of public places (see proposed cl 1.2(c)). Amenity not only means a desirable or useful feature or facility of a place (which could suggest that a public place may have many uses including sleeping) but it also pertains to the pleasantness or attractiveness of such a place. Much of the debate by proponents of the amendments relate to the need to 'clean up' the city of Melbourne removing the alleged 'blights' of homelessness. It therefore seems to us that the inclusion of this new objective of the *Activities Local Law* (together with the expanded ban on camping and the new ban on unattended items) is inconsistent with the Council taking a benign approach to enforcement against homeless and marginalised people.

Secondly, the record of public order policing in Australia – including the over-policing and over-criminalisation of people experiencing homelessness – suggests that such reassurances will provide little comfort to people sleeping rough in Melbourne. Indeed, any punitive law

⁶ City of Melbourne, 'Council endorses proposed change to its Local Laws', 8 February 2017 <http://www.melbourne.vic.gov.au/news-and-media/Pages/statement---council-endorses-change-to-its-local-laws-.aspx>

⁷ *Jones v City of Los Angeles* 444 F3d 1118 (9th Cir 2006).

⁸ See further S Gerry, 'A moral response to one city's attempt to criminalise, rather than confront, its homelessness crisis' (2007) 42 *Harvard Civil Rights-Civil Liberties Law Review* 239.

⁹ *Kincaid v Fresno* 244 FRD 597 (Ed Cal 2007).

that is seen to require a ‘don’t worry, we won’t enforce it’ promise by proponents must be regarded as both unnecessary, and suspect.¹⁰

It should also be noted that the costs of enforcing such laws are significant, both in financial and social terms. Channelling people through the court system for behaviour they are unable to control, and enforcing the payment of infringements that people are unable to pay, would place a significant financial burden on the council, the courts, corrections, as well as legal and community services. The injustice that such action perpetrates on the most vulnerable members of society could also result in a loss of goodwill for, and perceived legitimacy of, the Council and its enforcement officers.

Recommendations

1. We recommend that the proposed change to cl 2.8 of the City of Melbourne’s *Activities Local Law* be rejected.
2. In the alternative, we recommend that a definition of ‘camping’ be added to the *Activities Local Law* to make it clear that ‘camping’ does not include rough sleeping by people experiencing homelessness.
3. We recommend that the proposed addition of cl 2.12 to the City of Melbourne’s *Activities Local Law* be rejected.
4. We recommend that the proposed change to cl 1.2(c) of the City of Melbourne’s *Activities Local Law* be rejected.

Should you have any questions regarding this submission or require any further information, the authors are happy to be contacted by email on the addresses below.

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¹⁰ The ‘consorting’ offence added to s 93X of the *Crimes Act 1900* (NSW) in 2012 is a case in point. Despite government reassurance that it would only be used to disrupt organised crime gangs, research undertaken by the NSW Ombudsman revealed that it was used against Indigenous persons, young people and people experiencing homelessness (NSW Ombudsman. *The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900* (2016).