



Submission to the Alice Springs Town Council on the Draft Alice Springs (Management of Public Places) Bylaws 2009

1. Overview

1. This submission is provided by the Human Rights Law Resource Centre (**HRLRC**) to the Alice Springs Town Council in relation to the draft *Alice Springs (Management of Public Places) Bylaws 2009 (Proposed Bylaws)*.
2. The HRLRC considers that the following provisions contained within the Proposed Bylaws raise serious human rights concerns for persons in the Alice Springs community:
 - (a) the provision relating to controlled demonstrations, protest and other speech (cl 34);
 - (b) the requirement to remove graffiti and the ban on 'offensive' displays (cl 44 and 58);
 - (c) the provisions creating a number of public space offences (cl 49-50, 52-56);
 - (d) the provisions that criminalise begging (cl 57);
 - (e) the provisions that expand police powers, and extend them to council officers (cl 80 and 81); and
 - (f) the provisions that allow authorised officers to dispose of 'abandoned' items (cl 71) (collectively referred to as the **Provisions of Concern**).
3. The HRLRC is concerned about the impact of the Provisions of Concern on particularly vulnerable groups in Alice Springs such as homeless people, young people and Aboriginal people.
4. Some of the Provisions of Concern contravene Australian human rights law, and infringe upon the implied constitutional right to freedom of political communication and the Commonwealth statutory right to freedom from race discrimination. Many of the bylaws also contravene other human rights, including the right to freedom of expression, the right to peaceful assembly, the right to freedom of association, the right to non-discrimination, the right to privacy, the right to be free from cruel, inhuman or degrading treatment or punishment, the right to life and the right to enjoy one's culture. Australia (including all levels of government in Australia) is obliged to respect, protect and fulfil these rights as a party to both the International Covenant

on Civil and Political Rights (**ICCPR**) and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).¹

5. To the extent possible, the Provisions of Concern should be amended so as not to infringe the implied rights of political communication, the statutory rights to non-discrimination, and human rights contained in international human rights instruments. However, in many cases the purpose of the Provisions of Concern fundamentally infringes human rights, and the provisions are not capable of being passed in any form.
6. This submission:
 - (a) sets out the objectives of the Proposed Bylaws;
 - (b) addresses each of the Provisions of Concern and sets out briefly the relevant human rights that are engaged by each; and
 - (c) finally, discusses the circumstances in which governments can validly limit human rights.

2. Objectives of the Proposed Bylaws

7. The objectives of the Proposed Bylaws, contained in clause 2 of the Proposed Bylaws, are stated as being:
 - (a) the peace, order and good government of the municipality;
 - (b) a safe and healthy environment so that the community within the municipality can enjoy a quality of life that meets its expectations;
 - (c) the safe and fair use and enjoyment of public places;
 - (d) the protection and enhancement of the amenity and environment of the municipality;
 - (e) the fair and reasonable use and enjoyment of private land; and
 - (f) the uniform and fair administration of these By-laws.
8. Clause 4 of the Proposed Bylaws limits the application of the bylaws to all 'public places' within the municipality.

3. Provisions of Concern

2.1 Limitations on the right to demonstrate or protest or to publicise views

9. Clause 34 of the Proposed Bylaws states that:
 - (1) A person must not, without a permit:
 - (a) Demonstrate or protest about a particular issue; or
 - (b) Speak, bear or otherwise identify with a banner, placard or sign or otherwise behave in a way that is apparently intended to publicise the person's view about a particular issue

¹ For example, Australia's obligations under Article 28 of the ICESCR extend 'to all parts of federal States without any limitations or exceptions'. Australia has thereby agreed that the ICESCR will be effected by Commonwealth, state and territory governments, having regard to their respective powers and arrangements concerning their exercise.

in a public place.

(2) A person who contravenes clause (1) is guilty of an offence.

(3) The permit referred to in clause (1) may be granted:

(a) direct to the person; or

(b) to another person or body which organises the demonstration or protest.

10. Clause 34 requires a permit to protest or demonstrate. However, it is drafted in such a way as to also make it an offence to 'speak, bear or otherwise identify with a banner, placard or sign or otherwise behave in a way that is apparently intended to publicise the person's views about a particular issue' without a permit. The terms of clause 34 are extremely (and unnecessarily) broad and would make it necessary to have a permit to express any opinion in a way intended to publicise any view in a public place. This might even make it an offence for a tourist to wear a t-shirt with a political slogan in a public place. It is difficult to see any proper justification for the control of the expression of such a wide range of views, or the requirement for regulation of those views.
11. Further, given that the terms of clause 34 would cover the discussion of political matters, clause 34 is fundamentally incompatible with the implied constitutional freedom of political communication.² The implied freedom of political communication extends to protect speech from interference by State or Territory legislation, such as the Alice Springs Town Council by-laws.
12. In *Lange v Australian Broadcasting Corporation*,³ the High Court explained that sections 7 and 24 of the Constitution, 'necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors'.⁴ The High Court noted that this right precludes the curtailment of the protected freedom by the exercise of legislative or executive power.⁵
13. However, the freedom of communication is not absolute.⁶ In *Lange*, the High Court formulated a two stage test to be used when considering the constitutional validity of a law:
- (a) Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? If so:
 - (b) Is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?⁷
14. Clause 34 clearly burdens the implied freedom of communication about government or political matters in its terms, operation and effect. It is expressly directed at limiting a broad

² *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520; see also *Levy v Victoria* (1997) 189 CLR 579.

³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

⁴ *Lange*, at 560.

⁵ *Lange*, at 560.

⁶ It is a right at common law only and is treated as an important public interest in the absence of any rule, statute or regulation to the contrary: George Williams, 'Civil Liberties & the Constitution - A Question of Interpretation', *Public Law Review*, (1994) 5 PLR 82, p 83.

⁷ *Lange*, at 567-8.

range of speech, including the bearing of banners, placards and signs or any other behaviour that is apparently intended to publicise the person's view about a 'particular issue'. This is broad enough to include political issues.

15. The question is therefore whether the law is reasonably appropriate and adapted to serve a legitimate end *that is itself consistent with representative government*.
16. The Proposed Bylaws are unlikely to be held to serve a 'legitimate end' at all. Similar laws were considered by the High Court in *Coleman v Power*.⁸ In *Coleman*, the law in question sought to prohibit threatening, abusive or insulting language in a public place and was said to have the purpose of maintaining public order.⁹ Notably, in *Coleman* the limitation on the implied freedom was said to be 'incidental' to the practical operation of the law, as the Queensland law was directed only at insulting and abusive language.¹⁰ In contrast, the Proposed Bylaws appear to be directed at, or at least encompass, all political discussion and debate in public places.
17. In *Coleman*, Justice McHugh stated that total or serious prohibitions on political speech would show that the law itself was not for a legitimate end consistent with the system of representative government. He said:

A total prohibition would not be reasonable unless there was no other way in which the system of representative government could be protected. Ordinarily, the complete prohibition on, or serious interference with, political communication would itself point to the inconsistency of the objective of the law with the system of representative government.¹¹
18. Clause 34 is therefore unlikely to pass the second limb of the *Lange* test, as its very purpose would be inconsistent with the system of representative government. However, even if a legitimate public order end could be established, clause 34 is clearly not appropriate and adapted to that sort of purpose. Clause 34 covers an extremely broad range of speech and does not attempt to do minimal impairment to the freedom.
19. In summary, if passed, clause 34 is likely to be invalid on the basis that it constitutes an impermissible burden on the implied freedom of political communication in the Australian constitution.

2.2 Discretionary criminalisation of behaviour by the Council

20. Clause 42 of the Proposed Bylaws provides that:
 - (1) Council may from time to time determine that an activity within, on, under or over a public place may not be carried on without a permit.
 - (2) Where Council makes a determination under clause (1), a person who carries on the activity is guilty of an offence.
21. Clause 42 provides Council with a broad discretion to determine that a permit is required for any activity carried out in a public place. Essentially, this gives Council the ability to

⁸ (2004) 209 ALR 182. The majority found that the law was valid, however three judges read down the legislation to narrow the interpretation of the words 'threatening, abusing or insulting', in light of the implied freedom.

⁹ We will assume, from the objects provision at clause 2 of the Proposed Bylaws, that the purpose of clause 34 includes the maintenance of public order.

¹⁰ See Gleeson CJ at [27].

¹¹ McHugh J, in *Coleman*, at [98].

criminalise any activity it sees fit and is manifestly incompatible with common law and international law principles of 'legality'; that is, the requirement that a law be precise, discernable and accessible and sufficiently enable a person to foreseeably regulate his or her conduct.¹²

22. Public spaces in Alice Springs are utilised by many persons who are homeless, Aboriginal and/or young.¹³ Although the law on its face does not discriminate against any particular group, its effect will be felt disproportionately by those people who are homeless, Aboriginal or young. In the circumstances, the HRLRC is concerned that the broad discretion conferred on the Council, if exercised, could result in discrimination against persons on the basis of race, social status and age.¹⁴ Further the provisions will result in compounded discrimination where persons fall within more than one of those categories.
23. If the Proposed Bylaws have a discriminatory effect on Aboriginal people in particular, they will be inconsistent with section 10 of the *Racial Discrimination Act 1975* (Cth) (**RDA**). Section 10 of the RDA confers the right to equality and non-discrimination on the basis of race in relation to a range of human rights.¹⁵ The Full Court of the Federal Court has confirmed that section 10 operates even where a law, on its face, applies equally to all individuals.¹⁶
24. To the extent that any public space offences contained in the Proposed Bylaws, or created under those Bylaws pursuant to clause 42, result in Aboriginal people not enjoying their rights to
 - ownership of property;

¹² See, eg, *R (on the application of Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12.

¹³ 2009 census data reveals that the Northern Territory has five times the average number of homeless people than the other states in Australia, with almost a quarter of those individuals being between the ages of 12-18 years. One third of the homeless people recorded in the 2009 census are living in improvised dwellings, tents or are sleeping rough. Of the 4785 people recorded as being homeless in the Northern Territory, 446 were documented as residing in Alice Springs. Aboriginal Australians are over-represented in the homeless population in the Northern Territory: see Chris Chamberlain and David MacKenzie (2009) *Counting the Homeless*, Australian Bureau of Statistics; and Homelessness Australia, 'Homelessness Australia in the Northern Territory' (May 2009) at <<http://www.homelessnessaustralia.org.au/UserFiles/File/HA%20NT%20Booklet%20final.pdf>>.

¹⁴ Discrimination on the basis of race is expressly prohibited in art 2(1) of the ICCPR and art 2(2) of ICESCR. Discrimination on the basis of economic or social situation and on the basis of age, is also prohibited by those Covenants: see UN Committee on Economic, Social and Cultural Rights, *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (art 2, para 2)*, UN Doc E/C.12/20 (10 June 2009) at [29] and [35]. In addition the norm of non-discrimination probably constitutes a peremptory (or non-derogable) principle of customary international law: See, eg, K Parker and L B Neylon, 'Jus Cogens: Compelling the Law of Human Rights' (1989) 12 *Hastings International and Comparative Law Review* 411, 441-2.

¹⁵ Section 10 confers the right to equality and non-discrimination in relation to the enjoyment of rights set out in Article 5 of the Convention on the Elimination of All Forms of Racial discrimination. Under Article 5 Australia is obliged to: 'prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by the government officials or by any individual group or institution; ... (c) Other civil rights, in particular: ... (v) the right to own property alone as well as in association with others; (viii) the right to freedom of opinion and expression; (ix) the right to freedom of peaceful assembly and association; ... (e) Economic, social and cultural rights, in particular: ... (iii) the right to housing; (iv) The right to public health, medical care, social security and social services; (f) the right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks...'

¹⁶ *Sahak v Minister for Immigration & Multicultural Affairs* (2002) 123 FCR 514, [37] per Goldberg and Hely JJ citing *Nguyen v Refugee Review Tribunal* (1997) 74 FCR 311, 319.

- freedom of speech;
- freedom of assembly and association;
- housing; or
- access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks

or in Aboriginal people enjoying those rights to a more limited extent than other groups, then the Proposed Bylaws will be inconsistent with section 10 of the RDA.¹⁷

25. If the Bylaws are inconsistent with section 10 of the RDA, they will be ineffective. Under s 122 of the Commonwealth Constitution, the Territory parliament is a subordinate legislature to the Commonwealth, and is not competent to pass laws that are inconsistent with Commonwealth law. In the circumstances, the provisions of the Alice Springs Proposed Bylaws that have a discriminatory effect will be 'treated as ineffective' to the extent of the inconsistency with s 10 of the RDA.¹⁸
26. The only way in which the racially discriminatory provisions of the Proposed Bylaws can be effective is if they are said to be special measures taken for the sole purpose of securing adequate advancement of Aboriginal people that is necessary to ensure their equal enjoyment of human rights; then they could be seen as 'special measures' under the RDA and would not be discriminatory.¹⁹
27. In this case, it is difficult to see how an argument of special measures could be made out, or even if the Proposed Bylaws have been contemplated as constituting special measures. The objectives of the Proposed Bylaws (contained in clause 2) do not even refer to Aboriginal people, let alone state that the Proposed Bylaws were intended as special measures for their advancement. Further, there has been no attempt to argue that the Proposed Bylaws 'confer a benefit' on Aboriginal people, or that conferring a benefit on Aboriginal people is the 'sole purpose' of the Proposed Bylaws or indeed, that the Proposed Bylaws offer any form of 'protection' that is necessary for the enjoyment of equal exercise of rights.

2.3 Requirement to remove graffiti

28. Clause 44 of the Proposed Bylaws states:

- (1) Where graffiti has been written, painted, drawn, etched, or otherwise applied to the exterior of private premises open to view from a public place, Council may serve on the owner or occupier of those premises a notice in writing requiring the owner or occupier to remove the graffiti from public view by:

¹⁷ Section 10 states that: (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin. (2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

¹⁸ *Western Australia v Ward* (2002) 213 CLR 1, 108 [129] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁹ Section 8(1) provides: This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which sub-section 10(1) applies by virtue of sub-section 10(3). See also *Gerhardy v Brown* (1985) 159 CLR 70, 133, where the indicia of special measures are discussed in more detail.

- (a) repainting, restoring, or recovering the surface on which the graffiti has been applied using the same colours and textures as existed previously on the surface; or
- (b) moving the premises so that the surface on which the graffiti has been applied is removed from public view

within 14 days of service of the notice.

- (2) A person who fails to comply with a notice served under clause (4) [*sic*] is guilty of an offence.

- 29. *Graffiti* is defined in clause 5 of the Proposed Bylaws as “any drawing, figure, inscription, mark, message, slogan, symbol or object written, painted, drawn, etched, placed or otherwise made on the exterior of premises”.
- 30. Clause 44 makes it an offence not to remove graffiti, where removal is requested by Council. Graffiti is given a very broad definition which could, in effect, include various lawful forms of art such as murals or business displays. The powers conferred on Council go beyond that which is reasonable.
- 31. Clause 44 is likely to be incompatible with the right to freedom of expression in international law.²⁰ Clause 44 does not allow for authentic lawful artistic expression on private property where such expression can be seen from a public place. This means that owners or occupiers could be forced to remove any form of expressive art from their private premises if it falls within the broad definition of graffiti.
- 32. Clause 44 is also likely to be incompatible with the right to privacy in international law.²¹ Clause 44 essentially enables Council to arbitrarily interfere with an owner or occupier’s enjoyment of their private premises by requesting them to remove “any drawing, figure, inscription, mark, message, slogan, symbol or object written, painted, drawn, etched, placed or otherwise made on the exterior of premises” regardless of the desires of the owner or occupier to display such works.
- 33. Clause 44 is likely to be incompatible with the right to freedom from discrimination, to the extent that it discriminates on the basis of social status. Due to the short period for compliance with Council’s notice for removal of ‘graffiti’ (within 14 days of service), the criminal offence created by clause 44 would have a disproportionate affect on owners and occupiers of premises with limited financial means.

2.4 Public space offences

- 34. Clauses 49 – 56 of the Proposed Bylaws create a range of public space offences. The offences include doing any of the following in a public place:
 - drinking liquor in a public place (cl 49);
 - possessing opened liquor container in a public place (cl 50);
 - public intoxication (cl 52);

²⁰ Article 19 of the ICCPR gives every individual the right to hold opinions without interference. The right to freedom of expression allows people to impart and receive ideas and information orally, in writing or in print, in the form of art, or through any other media of choice. This right is subject to certain restrictions, such as respecting the rights and reputation of others and protection of national security or public order.

²¹ Article 17 of the ICCPR prohibits unlawful or arbitrary interference by the government into a person’s privacy, family, home or correspondence.

- urination and defecation (cl 53);
 - indecent behaviour (cl 54);
 - spitting (cl 55); and
 - swearing (cl 56).
35. Given that the activities mentioned above are offences when they are committed in public spaces, these offences will disproportionately impact on people who are homeless. Also, given the financial status of those living in public spaces, it will be highly unlikely that, if found guilty of a public space offence, the offender will have the capacity to pay any fine imposed. In fact, fining a homeless person for their conduct in a public space is likely to exacerbate their financial difficulties and further ingrain their inability to find suitable accommodation. Accordingly, the issue of a fine is unlikely to be an effective deterrent to those at whom the Proposed Bylaws are aimed.
36. The Proposed Bylaws will have a substantial impact on people in public places in the Alice Springs area, many of whom are Aboriginal. According to the UN Special Rapporteur on Adequate Housing, public space offences disproportionately affect people who are homeless, but they also impact significantly on Aboriginal people.²²
37. Additionally, given that these clauses make the range of conduct set out in paragraph 34 an offence, this may result in Aboriginal people not enjoying their rights to:
- ownership of property (ie. the confiscation of alcohol);
 - freedom of speech (i.e. swearing);
 - freedom of assembly and association (i.e. the right to gather at a public place);
 - housing (i.e. particularly where the person sleeps rough in a public place); and
 - rights of access to any place or service intended for use by the general public.
38. Laws that discriminate in relation to the enjoyment of those rights will be inconsistent with section 10 of the RDA (see paragraphs 23-26 above). This means that the provisions will be ineffective to the extent of the inconsistency with the RDA.
39. Further, “laws that target or disproportionately impact upon activities associated with the state of homelessness – such as laws that criminalise sleeping, bathing, urinating, drinking or storing belongings in public space – violate the right to be free from cruel, inhuman or degrading treatment or punishment” found in Article 7 of the ICCPR.²³ This is because such laws:
- Discriminatorily affect homeless people on the grounds of their housing status and the necessary location of their conduct, not on the basis that their behaviour itself is reprehensible and therefore ought to be criminal. In so doing, [public space] laws violate common standards of decency and constitute punishment that is disproportionately severe to the ‘crime’.
40. As highlighted by critical social theorist and lawyer, Jeremy Waldron:

²² See the Final Report of the Special Rapporteur on Adequate Housing dated 11 May 2007.

²³ Philip Lynch and Jacqueline Cole, ‘Homelessness and Human Rights: Regarding and Responding to Homelessness as a Human Rights Violation’ (2003) 4 *Melbourne Journal of International Law* 139, 145.

If urinating is prohibited in public places (and if there are no public lavatories) then the homeless are simply unfree to urinate. These are not altogether comfortable conclusions, and they are certainly not comfortable for those who have to live with them.²⁴

41. This analysis applies equally to the other public space offences contained in the Proposed Bylaws.

2.5 Provisions relating to alcohol

42. Part 3.2 of the Proposed Bylaws provides for offences relating to liquor. These include:

49 Drinking liquor in a public place

- (1) A person must not drink liquor in a public place
- (2) A person who contravenes clause (1) is guilty of an offence.
- (3) Clause (1) does not apply where the person drinks liquor within licensed premises or in accordance with the conditions of restricted area permit.

50 Opened liquor container in a public place

- (1) A person must not:
 - (a) bring onto a public place; or
 - (b) have in the person's possession or control in a public place any opened container of liquor.
- (2) A person who contravenes clause (1) is guilty of an offence.

51 Public Intoxication

- (1) A person must not display the effects of intoxication in a public place to the extent that the person is a nuisance.
- (2) A person who contravenes clause (1) is guilty of an offence.

43. These proposed alcohol-related offences are already covered by other Territory legislation.²⁵

44. The Proposed Bylaws increase the powers of Council officers to enable them to seize any open container of liquor. Council officers are unlikely to be trained on how to deal with intoxicated people, who may become aggressive when their alcohol is seized, potentially leading to violent situations. Seizure powers should be left to the responsibility of the Police, who are trained to deal with difficult circumstances and who already have powers under Northern Territory legislation to do so.

45. Alcohol abuse within the Alice Springs community is widely documented as being a problem for both Aboriginal and non-Aboriginal citizens.²⁶ However, culturally, Aboriginal people tend to drink in large groups in public spaces which means that the provisions of the Proposed Bylaws relating to alcohol will impact disproportionately on Aboriginal people.²⁷ For the same reasons given in paragraph 23-26 above, Proposed Bylaws that disproportionately impact on

²⁴ Jeremy Waldron, 'Homelessness and the Issue of Freedom' (1991) 39 UCLA Law Review 295, 315.

²⁵ See sections 75(1B) and 101AB of the *Liquor Act*, and section 128 of the *Police Administration Act*.

²⁶ Northern Territory Government, 'Alcohol Restrictions Working in Alice Springs' (Press Release, 11 June 2009).

²⁷ Clive Rosewarne and Dr John Boffa 'Alcohol & Alice Springs: Meeting the Needs and Wishes of the Community' (2003) *Indigenous Law Bulletin* 38.

the rights of Aboriginal people to enjoy public spaces and to property are likely to be ineffective insofar as they breach section 10 of the RDA.

2.6 Criminalisation of begging

46. Clause 57 of the Proposed Bylaw provides:
- (1) A person must not beg or solicit money or goods in a public place.
 - (2) A person who contravenes clause (1) is guilty of an offence.
47. Clause 57 makes it a criminal offence to beg. However, due to the broad wording of the Proposed Bylaw, it also makes it an offence for charitable organisations and volunteers to ask for donations. This does not appear to be the intended purpose of the provision and would have a negative effect on many charitable organisations that rely upon donations to fund the provision of their services.
48. Additionally, given the financial status of the people who will be targeted by the begging offence, it will be highly unlikely that, if found guilty, the individual will have the ability to pay any fine imposed on them. Thus, the issue of a fine is unlikely to be an effective deterrent to those at whom the Proposed Bylaw is aimed.
49. To the extent that this law disproportionately affects Aboriginal people, the proposed criminalisation of begging may contravene section 10 of the RDA (for the same reasons given in paragraphs 23-26 above).
50. Clause 57 also discriminates on the basis of social status, as it disproportionately impacts on persons who are living in poverty. According to an action research project undertaken in 1999-2001 by Hanover Welfare Services in collaboration with Melbourne City Council and Victoria Police, people who beg “are among the most marginalised, disadvantaged and disenfranchised in society”.²⁸ Accordingly, the Proposed Bylaw is likely to have a disproportionate impact on homeless people and will discriminate on the basis of social status.
51. Clause 57 is also likely to be incompatible with the right to be free from cruel, inhumane or degrading treatment or punishment. The imposition of a fine or imprisonment on persons who are already suffering extreme poverty and disadvantage would be completely inappropriate and unproductive towards solving the real social issues that underlie the problem of begging. Additionally, research suggests that a zero tolerance approach to begging can result in a diversion of beggars to other geographical locations (which, in the Alice Springs context, may not be possible given the geographical isolation of the Town) or a diversion of people into the

²⁸ See Philip Lynch, ‘Understanding and Responding to Begging’ (2005) 29 *Melbourne University Law Review* 2, 525. For example, of the people observed begging over a four month period in the Hanover study:

- 43% were long term homeless
- 93% were long time unemployed
- 90% were receiving social security payments
- 71% suffered from drug or alcohol disorders.

These results have been confirmed in a UK study in 2001 which identified strong links between begging, poverty, social exclusion and marginalisation: see Sandra Jowett, Gary Banks and Alyson Brown, *Looking for Change: The Role and Impact of Begging on the Lives of People who Beg* (2001).

commission of more serious criminal activity, such as theft, drug dealing and prostitution.²⁹ This would be an unwelcome consequence of the criminalisation of begging.

52. Clause 57 is likely to limit the right to freedom of expression contained in Article 19 of the ICCPR.³⁰ The Proposed Bylaw prohibits people from passively or actively expressing a social need – orally, in writing or through any other means. It also denies society their right to receive information about “poverty, inequality, structural inadequacies and the need for urgent social reform”.³¹
53. Finally, given the financial consequences that the criminalisation of begging could have on individuals who are targeted by the Proposed Bylaw, clause 57 may also result in a breach of the right to life contained in Article 6 of the ICCPR.³² Australian governments have an obligation to fulfil the right to life, which means they must take positive steps to ensure that people’s lives are protected. By fining people, many of whom have no income or are reliant on minimal social security payments,³³ the Proposed Bylaw may, in fact, make it impossible for individuals to purchase food or obtain suitable accommodation without resorting to other criminal activities.

2.7 Publication or display of obscene or offensive material

54. Clause 58 of the Proposed Bylaws provides:
- (1) An authorised person may direct a person to remove from view of a public place any obscene or offensive book or magazine cover, handbill, poster, placard, sign, advertising or other printed material which the person owns or over which the person exercises control.
 - (2) For clause (1), material is obscene or offensive where the material is obscene or offensive in the opinion of the authorised person.
 - (3) A person who does not comply with a direction under clause (1) is guilty of an offence.
55. General obscenity and the display of obscene or offensive publications are already offences under several pieces of Territory legislation.³⁴
56. Clause 58 gives authorised persons the discretion to decide what is considered ‘obscene or offensive’. The threshold set in the Proposed Bylaw is not the opinion of a ‘reasonable person’, but is the subjective opinion of the authorised person, which could lead to arbitrary decisions that target certain types of persons in the community.

²⁹ Gareth Griffith, ‘Zero Tolerance Policing’ (Briefing Paper No 14, Parliament of New South Wales, 1999) 8-11.

³⁰ In the US, many anti-begging provisions have been struck down or narrowed on the basis of inconsistency with the First Amendment right to freedom of expression: see, for example, *Benefit v Cambridge*, 424 Mass 918 (1997); *Heathcott v Las Vegas Metropolitan Police Officers*, CV-S-93-045LDG (Unreported, D Nev, 3 March 1994); *Loper v New York City Police Department*, 999 F 2d 699 (2nd Cir, 1993).

³¹ Philip Lynch and Jacqueline Cole, above n 23, 155.

³² The right to life can be found in Article 6 of the ICCPR. It specifies that every human being has the inherent right to life. It is the responsibility of the Australian government to take measures to prevent and punish deprivation of life by its own authorities. The law must strictly control and limit the circumstances in which a person may be deprived of their life by such authorities: see HRC, *CCPR General Comment 6: The Right to Life*, [3], UN Doc HRI/GEN/1/Rev.5 (2001).

³³ Philip Lynch, above n 13, 528.

³⁴ See section 53 of the *Summary Offences Act* (NT), the *Criminal Code* (NT) and the *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

57. Given that homeless and Aboriginal people are among the most common users of public space and are likely to store their personal possessions and belongings in such places, clause 58 will have a disproportionate impact on such people. Clause 58 may therefore result in the racially discriminatory treatment of Aboriginal people in the enjoyment of the rights to property and to freedom of expression, both of which are protected by the RDA. If that is the case, the clause 58 may also be ineffective (for the same reasons given in paragraph 23-26 above)
58. It is further the case that, in some circumstances, public display of materials that constitute political discussion may be considered 'offensive' within the opinion of an authorised officer. Given the breadth of this provision, clause 58 risks being an impermissible burden on the freedom of political communication (for the reasons given in relation to clause 34 in paragraphs 11-17 above).

2.8 Police powers being exercised by Council officers

Requests for personal information

59. Clause 80 of the Proposed Bylaw provides:
- (1) Where an authorised person reasonably suspects a person of having committed an offence against these By-laws, the authorised person may require the person to state the person's name, address and date of birth.
 - (2) A person who, without reasonable excuse, fails to provide the information required under clause (1) is guilty of an offence.
 - (3) A person who gives false information when required to provide information under clause (1) is guilty of an offence.
60. In addition to asking for such personal information, a Council officer is also permitted to ask for proof of identity (clause 81):
- (1) Where an authorised person reasonably suspects a person of having committed an offence against these By-laws, the authorised person may require the person to provide further evidence of identity of a specified kind.
 - (2) A person who, without reasonable excuse, fails to provide the further proof of identity required under clause (1) is guilty of an offence.
 - (3) Where a person has reasonable excuse for failing to provide the further proof of identity required in under clause (1) must, within 2 business days, provide the further proof of identity at the office of Council.
 - (4) A person to whom clause (3) applies who fails to provide the further proof of identity within the specified period is guilty of an offence.
61. These provisions, in effect, enable Council officials to act in the capacity of police officers, without having to undergo law enforcement training. Police officers in the Northern Territory are permitted to ask individuals their name and address, however they are not entitled to ask an individual for their date of birth. Additionally, police officers are subject to reciprocal obligations to provide information to the person being questioned, including providing their name and address of place of duty. These reciprocal obligations are not required of the Council officers under the Proposed Bylaws.
62. Clauses 80 and 81 are likely to be incompatible with the right to privacy contained in Article 17 of the ICCPR. Individuals should have the right to occupy public spaces without having to

give their personal information to unidentified persons.³⁵ Council officers are not trained law enforcement personnel and therefore should not have the ability to request private information from citizens at the mere *suspicion* of a breach of a Bylaw. Such requests for information by Council officers may result in potentially aggressive or violent situations, which Council officers are not trained to deal with.

Move on powers

63. Clause 83 of the Proposed Bylaws provides:

- (1) This By-law 83 applies if there are reasonable grounds for an authorised person to believe that a person in a public place
 - (a) is asleep; or
 - (b) has engaged, or is likely to engage, in conduct involving a breach of these By-laws.
- (2) The authorised person may direct the person to leave the vicinity of the public place.
- (3) The direction may be made subject to the condition that the person does not return to the vicinity for a stated period not exceeding 6 hours.
- (4) A person who, without reasonable excuse, contravenes a direction under clause (1) (including a condition that the person does not return to the vicinity for a stated period) is guilty of an offence.
- (5) This By-law 83 does not apply to a person who, whether in the company of other people or not, is:
 - (a) picketing a place of employment;
 - (b) demonstrating or protesting about a particular issue; or
 - (c) speaking, bearing or otherwise identifying with a banner, placard or sign or otherwise behaving in a way that is apparently intended to publicise the person's view about a particular issue.

64. Clause 84 goes on to say:

- (1) An authorised person may remove or cause to be removed from a park, garden or reserve a person who commits a breach of these By-laws and may, by notice in writing served on the person, refuse the person entry to a park, garden or reserve for a period, not exceeding 6 months, specified in the notice.
- (2) A person who contravenes a notice under clause (1) is guilty of an offence.

65. These provisions effectively give an authorised officer the power to forcibly remove a person from a park, garden or reserve and to ban them from returning to such public place for up to 6 hours.

66. The move on powers clearly target persons sleeping or inhabiting public spaces, and to the extent these provisions disproportionately affect Aboriginal people they are inconsistent with section 10 of the RDA (see paragraphs 23-25 above). Where an Aboriginal person is directed

³⁵ This is consistent with the approach taken by the Human Rights Committee in CCPR General Comment 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, [8], UN Doc HRI/GEN/1/Rev.5 (2001) where the HRC indicated that relevant authorities should only be able to request and access information relating to an individual's private life if it is essential to the 'interests of society as understood under the *Covenant*'.

to leave the vicinity of a public place or is forcibly removed because of a breach (or likely breach) of any of the Proposed Bylaws, Aboriginal people could be denied their rights to

- ownership of property;
- freedom of speech;
- freedom of assembly and association;
- housing; or
- rights of access to any place or service intended for use by the general public.

67. Discrimination in the enjoyment of any of the above rights is inconsistent with section 10 of the RDA (see paras 23-26 above). This means that the provisions will be ineffective to the extent of the inconsistency.
68. The powers conferred on Council officers to move persons away from public places are likely to be incompatible with an individual's right to enjoy one's culture provided for in Article 15 of the ICESCR.³⁶ This is particularly evident when the person who is being moved on is Aboriginal.³⁷ Clauses 83 and 84 prohibit people from inhabiting public space which may have cultural significance to them.
69. The exercise of move on powers is likely to be inconsistent with the right to freedom from discrimination on the basis of social status and age. Because of a lack of private accommodation, homeless people often assemble in public spaces and are therefore victimised by the exercise of move on powers. Given that a quarter of homeless people in the Northern Territory are aged between 12 and 18, the laws will disproportionately affect young people as well.
70. Move on powers may also be inconsistent with the rights of peaceful assembly³⁸ and freedom of association³⁹. Move on powers unduly restrict the exercise of the right of freedom of

³⁶ Article 15 of the ICESCR specifies that the Australian governments must recognize the right of everyone to take part in cultural life. According to SESCO discussion on the meaning taking part in cultural life:

Exercising the right to take part in cultural life involves a number of other rights. Those most often mentioned, with respect to all persons, are freedom of association, of speech, and of belief; the right to choose a profession or other form of labor; the right to education; and the right to have basic physical needs met (adequate standard of living).

See: Economic and Social Council, *Day of General Discussion: Equality and the Right to Participate in Cultural Life*, [8], UN Doc E/C.12/40/10, 9 May 2008

³⁷ In 2005, the National Human Rights Network of the National Association of Community Legal Centres made submissions to the Committee on the Elimination of Racial Discrimination. The submission explained the cultural significance of gathering in public places for Aboriginal people:

[traditional] connections to places and cultural practices of gathering in open spaces for meeting and family business, coupled with the cultural inappropriateness of private dwelling options, mean that a high proportion of people living or regularly occupying public spaces are Indigenous. A proportion of Indigenous people would not consider themselves homeless but rather that their human rights to culture, freedom of expression and movement are violated by the lack of respect for and control over the spaces and places that they consider home.

³⁸ Article 21 of the ICCPR states that no restrictions shall be placed on the exercise of the right of peaceful assembly, other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

³⁹ Article 22 of the ICCPR provides that all persons have the right to freedom of association with others. No restrictions are permitted to be placed on the exercise of this right except those that are necessary to protect the interests of national security, public safety, public order, public health or morals, or the rights and freedoms of others.

association because they refuse homeless people access to space that other members of the public are permitted to enter⁴⁰ and they prohibit groups of people (particularly homeless and young people) from collectively occupying public space.⁴¹ In its Concluding Observations of both 1998 and 2005, the Committee on the Rights of the Child expressed concern about the policing and removal of young people from public spaces, in relation to the right of peaceful assembly. In 2005, the Committee recommended that the Australian government 'address the problems that may be related to the gathering of young people in certain places without necessarily resorting to policing and/or criminalisation, and consider reviewing legislation in this respect'.⁴²

71. Finally, the exercise of move on powers is inconsistent with the right to adequate standard of living contained in Article 11 of the ICESCR.⁴³ If council officers move a homeless person from a public space, and do not attempt to find another form adequate alternative housing or resettlement for that person, then they are failing in their positive obligation under the ICESCR to take all appropriate measures, to the maximum of its available resources, to ensure adequate alternative housing or resettlement.⁴⁴

2.9 Disposal of abandoned items

72. Clause 71 of the Proposed Bylaw provides:

An authorised person may impound and dispose of items found in a public place which that person reasonably believes to have been abandoned.

73. This proposed provision could result in an authorised person impounding or throwing out items such as blankets that homeless people tuck away during the day.
74. Clause 71 is likely to have a disproportionate and discriminatory impact on homeless people and Aboriginal people in the Alice Springs area. Therefore, for the same reasons given in paragraphs 23-26 above, clause 71 is likely to contravene section 10 of the RDA because it would result in Aboriginal people being discriminated against in their enjoyment of the right to property. It would also constitute discrimination on the basis of age and social status.
75. Clause 71 is likely to be incompatible with the right to life. Authorised persons have the ability to remove and dispose of abandoned items, which may include the possessions of homeless persons. If blankets and warm clothing are disposed of by authorised persons, this could amount to a breach of the government's obligation to protect the lives of its citizens. It is also likely to be inconsistent with the right to health contained in Article 12 of the ICESCR.⁴⁵ Removal of personal items such as blankets and clothing may impact on a homeless person's ability to maintain their health.

⁴⁰ Cassandra Goldie, *'Living in Public Space: A Human Rights Wasteland?'* (PhD Thesis, University of New South Wales, 2008), 123.

⁴¹ *Ibid*, 124.

⁴² *Ibid*, 142.

⁴³ Elements of this right include the right to adequate housing, the right to adequate food, the right to clothing and the right to continuous improvement of living conditions.

⁴⁴ See *CESCR General Comment 7: The Right to Adequate Housing: Forced Evictions*, [7] UN Doc E/1998/22 (1998) [1].

⁴⁵ Article 12 of the ICESCR provides for a right to the 'highest attainable standard of physical and mental health'.

4. Limitations

76. The HRLRC acknowledges that many of the rights discussed in the submission are not absolute. However as a general rule, where the State wishes to interfere with human rights, it must be for a legitimate reason, appropriate and adapted to that reason, justified by reference to evidence, and the law must be proportionate to the end being sought.⁴⁶
77. It is therefore necessary to examine whether the reasons offered for the introduction of the Proposed Bylaws are legitimate. The indication that we have for the purpose of the Proposed Bylaws are given in clause 2 (set out at paragraph 7 above).
78. None of the objectives listed in clause 2, on their face, are objectionable. However, given the substantive content of some of the provisions of the Proposed Bylaws, it may be that a court would determine that the Bylaws have a purpose other than those enunciated in clause 2 (see, for example, the discussion in paragraph 17 of this document).
79. In any event, even if a legitimate purpose is found for the Proposed Bylaws, the Bylaws must be proportionate to the achievement of that purpose. Proportionality has three limbs:
- a) The rational connection test: i.e. Whether the denial of rights promotes the stated objectives;
 - b) The minimal impairment test: i.e. that the denial goes no further than reasonably necessary to achieve its objective; and
 - c) The proportionate effect test: i.e. that the overall benefits of the measure outweigh its negative impact.
80. Many of the provisions in the Proposed Bylaws are drawn in far too broad terms for them to be considered to be proportionate to, for example, a public order type purpose. For example, although there may be a reasonable justification for requiring demonstrators and protestors to apply for a permit before gathering in a public place to ensure the peace, order and safety of

⁴⁶ The enunciation of limitations of rights will differ depending on the source of the particular right in issue. For example, constitutional rights must be reasonably appropriate and adapted to a purpose that is consistent with representative government (see: *Lange, Coleman v Power*).

Justice Gleeson in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, considering constitutional rights, chose to use the following test of proportionality: 'First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right of freedom in question ... Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".' [Emphasis in original]

In the *Charter of Human Rights and Responsibilities Act 2006* (Vic), section 7(2) says:

- (2)A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
- (a) the nature of the right; and
 - (b) the importance of the purpose of the limitation; and
 - (c) the nature and extent of the limitation; and
 - (d) the relationship between the limitation and its purpose; and
 - (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

the municipality, to propose that *any* speech or banner or publication of a person's views also requires a permit goes well and truly beyond that objective. In such a situation, the denial of a person's right to free speech goes further than reasonably necessary to achieve the peace, order and safety of the municipality and the benefits of enforcing such draconian provisions do not outweigh the ability to express a view in a public place.

81. Many of the Provisions of Concern do not represent rational justifications for the denial of a person's rights. For example, begging is clearly considered a problem behaviour in the Alice Springs community. However, to fine someone for asking for money is completely irrational – as studies reveal that generally, the reason that people ask for money is because they do not have the financial means to support themselves.⁴⁷
82. The Provisions of Concern also do not achieve an overall beneficial outcome that outweighs the negative affect of the Proposed Bylaws. Rather than criminalise behaviour, the cause of the issue of homelessness needs to be examined and addressed rather than punishing a person for carrying out conduct in public which is necessary due to their state of homelessness.
83. Given that the Provisions of Concern constitute such severe infringements on the rights of people who use public space in Alice Springs, the Town Council should clearly state the legitimate purpose for the provisions, and its justification as to why the terms of the provisions are proportionate to the end sought. It is also incumbent on the Town Council to adduce evidence of the problems and, importantly, the efficacy of the proposed solutions.

5. Conclusion

84. The Proposed Bylaws as they are currently drafted are inconsistent with a range of human rights, including the implied constitutional freedom of political communication, the RDA and international human rights law. In many instances, they are invalid under existing Australian law.
85. The HRLRC proposes that the Provisions of Concern be reviewed and amended where appropriate. If the Provisions of Concern cannot be amended to respect individual's constitutional, statutory and international human rights, then the HRLRC submits that the provisions be removed from the Proposed Bylaws.

About the HRLRC

The Human Rights Law Resource Centre is Australia's first human rights legal service. It aims to promote and protect human rights through casework, strategic litigation, advocacy, legal education and human rights capacity building.

⁴⁷ Philip Lynch, above n 28, 530.

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