

Report to the Future Melbourne (People City) Committee

Agenda item 6.3

Ensuring safety of children at places of worship in our municipality

19 May 2020

Presenter: Alison Duncan, Director Community Services

Purpose and background

1. The following resolution was passed by Council's Future Melbourne Committee on 15 October 2019 following a Notice of Motion from Councillor Nicolas Frances Gilley: Ensuring safety of children at places of worship in our municipality:
 - 1.1 Commends the adoption in the Victorian Parliament of new laws which carry sentences of up to three years for workers in places of worship who fail to report cases of child abuse or mistreatment.
 - 1.2 Notes with concern reports in the media suggesting that some places of worship may defy the laws as a means of protecting religious beliefs, such as the confessional seal.
 - 1.3 In light of the previous paragraph, requests management to confirm with the Child Safety Commissioner if the new Safeguarding Children and Young People Framework will provide adequate standards and protection for young people and children.
 - 1.4 Reaffirms City of Melbourne's Goal as A City for People and one which seeks to create a safe, healthy and welcoming city for people of all ages including children.
 - 1.5 Requests management to report back to FMC on what the role of Local Government could be in seeking confirmation from places of worship that they will comply with mandatory reporting laws, and appropriately responding where this is not the case.
2. Mandatory reporting laws for religious institutions came into effect on 17 February 2020. The purpose of this report is to address the requests of management as outlined in paragraphs 1.3 and 1.5 above.

Key issues

3. On 25 October 2019 Justin Hanney, Chief Executive Officer wrote to Ms Liana Buchanan, Principal Commissioner, Commission for Children and Young People to seek advice and clarification on whether the Commission believes the Catholic Archdiocese of Melbourne's Safeguarding Children and Young People framework will provide adequate standard and protection for young people and children (refer Attachment 2).
4. The Commissioner advised that except in very limited circumstances, the *Child Wellbeing and Safety Act 2005* (the Act) prohibits the Commission from disclosing specific information about its regulatory activities and is therefore unable to comment on the Catholic Archdiocese of Melbourne, its compliance with the Child Safe Standards or its policies in relation to children and young people (refer Attachment 3).
5. The Commissioner reiterated the important role councils play in keeping children safe, including raising awareness among local organisations of their obligations to comply with child safety laws and to educate the community to strengthen awareness of the rights of children and young people and what they should expect from the organisations with which they engage.
6. In relation to item 1.5 above, Council sought independent legal advice on what regulatory or other legal powers are available to it to seek organisations compliance with mandatory reporting laws including any ability to make a new local law. The advice informed that two principal heads of power exercisable by Council fall for consideration, Council's planning powers and Council's powers to make a new local law. With respect to Council using its planning powers as a responsible authority under the Melbourne Planning Scheme and *Planning and Environmental Act 1987*, it is unlikely any existing planning permit could include a condition that could be enforced to comply with the new mandatory reporting laws, given such permits would predate these laws (refer Attachment 4).
7. Further, a new local law to address the issue would not be within Council's law making powers under section 111 of the *Local Government Act 1989* nor consistent with policy directives in relation to local laws.

Recommendation from management

8. That the Future Melbourne Committee notes:
 - 8.1 The response from the Commissioner for Children and Young People to the letter from the Chief Executive Officer that states: 'that except in very limited circumstances, The *Child Wellbeing and Safety Act 2005* prohibits the Commission from disclosing specific information about its regulatory activities and is therefore unable to comment on the Catholic Archdiocese of Melbourne, its compliance with the Child Safe Standards or its policies in relation to children and young people.'
 - 8.2 Management sought independent legal advice on what regulatory or other legal powers may be available to Council to seek organisations' compliance with mandatory reporting laws including any ability to make a new law.
 - 8.3 The legal advice informed that the planning regime is not available or appropriate to address the issue and a new local law would not be within Council's law making powers under section 111 of the *Local Government Act 1989*, nor consistent with policy directives in relation to local laws.

Attachments:

1. Supporting Attachment (Page 3 of 13)
2. Letter from Justin Hanney, Chief Executive Officer to Principal Commissioner, Commission for Children and Young People (Page 4 of 13)
3. Response from Principal Commissioner, Commission for Children and Young People (Page 5 of 13)
4. Legal Advice (Page 6 of 13)

Supporting Attachment

Legal

1. Independent legal advice was sought in relation to what regulatory or other legal powers may be available to it to seek organisations compliance with mandatory reporting laws including any ability to make a new local law.

Finance

2. There are no financial implications for Council in relation the management's recommendation.

Conflict of interest

3. No member of Council staff, or other person engaged under a contract, involved in advising on or preparing this report has declared a direct or indirect interest in relation to the matter of the report.

Health and Safety

4. Compliance with Victorian Child Safe Standards to ensure Council is well prepared to protect children from abuse and neglect.

Stakeholder consultation

5. No external consultation was undertaken in relation to this report other than the letter exchange between the Chief Executive Officer and the Principal Commissioner for Children and Young People and also the legal advice sought.

Relation to Council policy

6. City of Melbourne's Goal: A City for People which seeks to create a safe, healthy and welcoming city for people of all ages including children.

Environmental sustainability

7. Environmental sustainability issues or opportunities are considered not relevant to this report.



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25 October 2019

Ms Liana Buchanan
Principal Commissioner for Children and Young People
Commission for Children and Young People
18/570 Bourke Street
MELBOURNE 3000 VIC

Dear Ms Buchanan

SAFEGUARDING CHILDREN AND YOUNG PEOPLE

The City of Melbourne has a strong commitment to children's safety at all levels of our organisation and has adopted a zero-tolerance approach to child abuse. We are proud to be a local government leader in response to the implementation of Child Safe Standards and Reportable Conduct.

As you will be aware, recent legislative changes in Victoria will now require workers in places of worship to comply with mandatory reporting requirements in cases of suspected child abuse, including abuse revealed in the confessional.

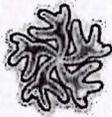
On 8 October 2019, the Council's Future Melbourne Committee (Committee) commended the adoption of new laws and noted with concern media reports that some places of worship may defy the laws as a means of protecting religious beliefs, such as the confessional seal.

In expressing concern, the Committee resolved to seek advice and clarification on a number of aspects including the adequacy of measures and actions being undertaken by the Catholic Archdiocese of Melbourne. To this end, the Committee has invited the Commission's feedback on whether it believes the Archdiocese's *Safeguarding Children and Young People Framework* will provide adequate standards and protection for young people and children.

The Committee welcomes your expertise and views on this matter. Should you wish to discuss this issue in more detail please contact Ali Duncan, Manager Community Services on Ph: 9658 9919 or email alison.duncan@melbourne.vic.gov.au

Yours sincerely

Justin Hanney
Chief Executive Officer



COMMISSION FOR CHILDREN
AND YOUNG PEOPLE

CCYPD/19/13454

Justin Hanney
Chief Executive Officer
City of Melbourne
GPO Box 1603
MELBOURNE VIC 3001

Dear Mr Hanney

Safeguarding children and young people

Thank you for your letter dated 25 October 2019 and our discussion on 2 December 2019 regarding the Catholic Archdiocese of Melbourne and changes to mandatory reporting legal requirements to include people in religious ministry as mandatory reporters of child physical or sexual abuse.

I thank the City of Melbourne for its commitment to child safety. As you are aware, the Commission for Children and Young People administers the Victorian Child Safe Standards and Reportable Conduct Scheme under the *Child Wellbeing and Safety Act 2005* (the Act). Together, these two regulatory regimes support organisations to embed child safety in their operations and ensure that allegations of child abuse receive a proper response, placing children's rights and wellbeing at the forefront of an organisation's culture and practice.

Except in very limited circumstances, the Act prohibits the Commission from disclosing specific information about its regulatory activities. Accordingly, the Commission is unable to comment on the Catholic Archdiocese of Melbourne, its compliance with the Child Safe Standards or its policies in relation to children and young people.

Councils play an important role in keeping children safe; in addition to implementing the Child Safe Standards themselves, they can raise awareness among local organisations about their obligations to comply with child safety laws. Councils also make an important contribution to educating the local community to strengthen awareness of the rights of children and young people and what they should expect from the organisations with which they engage.

Thank you for your ongoing support for the safety of children and young people in Victoria.

Yours sincerely

Liana Buchanan

Principal Commissioner

18/12/19



25 October 2019

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Chief Legal Counsel
Governance and Legal
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Our Ref JBM 19040155

By email kim.wood@melbourne.vic.gov.au

Dear Kim

Legal advice in respect to a resolution of Council's Future Melbourne Committee - Ensuring safety of children at places of worship in our municipality

We refer to your email dated 16 October 2019.

You have instructed us as follows:

Advice is sought from Holding Redlich in respect to the following resolution passed by the Council's Future Melbourne Committee on 15 October 2019:

Notice of Motion, Councillor Nicolas Frances Gilley: Ensuring safety of children at places of worship in our municipality

Resolved:

1. *That the Future Melbourne Committee:*
 - 1.1. *Commends the adoption in the Victorian Parliament of new laws which carry sentences of up to three years for workers in places of worship who fail to report cases of child abuse or mistreatment.*
 - 1.2. *Notes with concern reports in the media suggesting that some places of worship may defy the laws as a means of protecting religious beliefs, such as the confessional seal.*
 - 1.3. *In light of the previous paragraph, requests management to confirm with the Child Safety Commissioner if the new Safeguarding Children and Young People Framework will provide adequate standards and protection for young people and children.*
 - 1.4. *Reaffirms City of Melbourne's Goal as A City for People and one which seeks to create a safe, healthy and welcoming city for people of all ages including children.*

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- 1.5. *Requests management to report back to FMC on what the role of Local Government could be in seeking confirmation from places of worship that they will comply with mandatory reporting laws, and appropriately responding where this is not the case.*

(Resolution)

The advice sought relates to item 1.5 and what regulatory or other legal powers are available to the Council. In considering this issue, please consider whether there is any ability to make a new local law and, if this is not an option, advise the reasoning.

SUMMARY OF ADVICE

It seems to the writer that two principal heads of power exercisable by Council fall for consideration:

1. The use of Council's planning powers as a responsible authority under the Melbourne Planning Scheme and *Planning and Environment Act 1987* (Vic); and
2. The use of Council's powers to make a new local law to address the issue at hand.

With respect to Council using its planning powers as a responsible authority, it is my opinion that the use of the planning regime to address the issues at hand is either not available because there are no relevant planning permits, or in the event that Council sought to impose planning permit conditions in relation to future places of worship, such conditions would not serve a legitimate planning purpose.

With respect to the use of Council's powers to make a new local law, in my opinion such a local law would not be within Council's law-making powers under section 111 of the *Local Government Act 1989* (LGA). Such a local law would also not be consistent with policy directives in relation to local laws.

DETAILED ADVICE

Background

On 17 September 2019 the *Children Legislation Amendment Act 2019* (Vic) (**Amending Act**) received Royal assent. It amends the *Children, Youth and Families Act 2005* (Vic) (**CYFA**) by including a person in religious ministry in the list of persons subject to existing mandatory reporting laws under the CYFA: Section 9. The mandatory reporting requirements of the CYFA are set out at section 184. The Amending Act also makes amendments to a number of other Acts, such as the *Crimes Act 1958* (Vic) and the *Evidence Act 2008* (Vic), so as to give effect to the purposes of the Amending Act which seek to include persons in religious ministry as mandatory reporters.

Section 2 of the Amending Act provides that section 9 comes into operation on a day or days to be proclaimed (if a provision does not come into operation before 1 September 2020, it comes into operation on that day). As yet, there has been no proclamation of a commencement date for section 9.

Regulatory or other legal powers available to Council

With respect to regulatory or other legal powers available to Council, it seems to the writer that two principal bases fall for consideration:

1. The use of Council's planning powers as a responsible authority under the Melbourne Planning Scheme and *Planning and Environment Act 1987* (Vic); and
2. The use of Council's powers to make a new local law to address the issue at hand.

Planning powers

Council has powers under the planning regime which it can use to seek enforcement orders at VCAT, to prosecute matters in the Magistrates' Court, and to issue planning infringement notices, amongst other things.

I have considered these powers in connection with the potential role of local government in seeking confirmation from places of worship that they will comply with mandatory reporting laws.

For the following reasons, I reach the conclusion that the planning regime will not assist Council:

1. Some places of worship within the municipality of Council may hold planning permits. Whilst I have not reviewed Council's planning permits, it is unlikely that a planning permit would include a condition that could be enforced so as to require compliance with the new mandatory reporting laws, given such permits would predate those laws.
2. If a new place of worship were proposed within the municipality of Council, I strongly doubt a condition requiring mandatory reporting would be lawful because it would not serve a legitimate planning purpose.

Local law

Would a local law requiring places of worship to report to Council that they will comply with mandatory reporting be valid?

The starting point is Council's powers to make local laws.

The statutory scheme

Section 111 of the LGA sets out Council's powers to make local laws. When a council makes a local law, it must do so in accordance with these powers [emphasis added]:

Power to make local laws

- (1) A Council may make local laws for or with respect to any act, matter or thing in respect of which the Council has a function or power under this or any other Act.
- (2) A local law must not be inconsistent with any Act or regulation.
- (3) A local law is inoperative to the extent that it is inconsistent with any Act or regulation.

...

Council's functions and powers are set out at sections 3E and 3F of the LGA:

Section 3E

What are the functions of a Council?

- (1) The functions of a Council include—
 - (a) advocating and promoting proposals which are in the best interests of the local community;
 - (b) *planning for and providing services and facilities for the local community;*

- (c) *providing and maintaining community infrastructure in the municipal district;*
- (d) *undertaking strategic and land use planning for the municipal district;*
- (e) *raising revenue to enable the Council to perform its functions;*
- (f) *making and enforcing local laws;*
- (g) *exercising, performing and discharging the duties, functions and powers of Councils under this Act and other Acts;*
- (h) *any other function relating to the peace, order and good government of the municipal district.*

Section 3F

What are the powers of Councils?

- (1) *Subject to any limitations or restrictions imposed by or under this Act or any other Act, a Council has the power to do all things necessary or convenient to be done in connection with the achievement of its objectives and the performance of its functions.*
- (2) *The generality of this section is not limited by the conferring of specific powers by or under this or any other Act.*

Schedule 8 of the LGA also needs to be considered. It places limitations upon the content of local laws:

2 A local law must not—

...

- (e) *embody principles of major substance or controversy or contain any matter which principles or matter should properly be dealt with by an Act and not by subordinate legislation;*
- (f) *unduly trespass on rights and liberties of the person previously established by law;*
- (g) *unduly make rights and liberties of the person dependent upon administrative and not upon judicial decisions;*
- ...
- (i) *duplicate, overlap or conflict with other statutory rules or legislation;*
- ...

In *Payne v Port Phillip City Council* [2007] VSC 507, Mandie J held at [20] that the matters in Schedule 8 do not govern the validity of local laws and are relevant only for consideration by the Minister under section 123 of the LGA, which provides for revocation of local laws by the Governor in Council on recommendation of the Minister. However, Schedule 8 is still relevant to interpreting the statutory scheme with respect to Council's powers to make local laws.

Section 111(5) of the LGA provides that a Council must have regard to any guidelines made by the Minister under section 111A when making local laws.

The Minister has produced the Guidelines for Local Laws Manual 2010 which states that Schedule 8 must be addressed when making a local law and considerations to be had by a Council prior to making a local law. The Guidelines include consideration of whether existing legislation is able to be applied to resolve a problem and whether State legislation is more appropriate (p 13).

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) should be considered.

Section 14 of the Charter provides for the right to, relevantly:

Freedom of thought, conscience, religion and belief

- (1) *Every person has the right to freedom of thought, conscience, religion and belief, including—*
- (a) *the freedom to have or to adopt a religion or belief of his or her choice; and*
 - (b) *the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.*
- (2) *A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.*

Rights under the Charter are given effect in a number of ways, namely, a statement of compatibility with the Charter and its rights must be prepared in respect of a bill introduced into Parliament : s 28; statutory provisions must be interpreted in a way that is compatible with human rights: s 32; and conduct of public authorities: s 38.

In the case of the Amending Act, the statement of compatibility addresses in some detail the section 14 Charter right in relation to religion and the issue of religious confessions privilege. The statement concludes that the mandatory reporting requirements strike an appropriate balance between the freedom to practice one's religion and the rights of children to protection from abuse.

As to the effect of the Charter on a local law:

1. section 28 of the Charter would not be engaged because a local law is not a bill;
2. section 32 of the Charter is not engaged in the making of local laws. It may be relevant to interpreting local laws and the powers of Council under section 111 of the LGA, but that is a different issue;
3. with respect to section 38 of the Charter, in the Federal Court of Australia decision of *Muldoon v Melbourne City Council* [2013] FCA 994¹, North J stated (in obiter) at [451] that section 38 of the Charter does not apply to legislative acts of Council. The making of a local law would be a legislative act. The statement was obiter, not the ratio. I note that on appeal in *Kerrison v Melbourne City Council* [2014] FCAFC 130, the Full Court of the Federal Court of Australia does not disagree with the primary Judge's conclusion about section 38 and local laws (see [6], [178]-[209], especially [182] and [189]).

¹ The Federal Court decision in *Muldoon* concerned the validity of a notice to comply issued under the Melbourne City Council Local Law and the local law itself. Council exercised its powers under the Local Law with respect to the Occupy movement protests. Relevant protesters challenged the notices to comply and the Local Law on the basis that it infringed Charter rights to freedom of expression and association. A constitutional argument was also made based upon the implied freedom of political communication right under the Federal Constitution. North J's judgment was appealed unsuccessfully by the protesters.

This is not to say that a local council should not apply the principles from the Charter to its law making: obviously it can elect to apply Charter principles to local law making from the perspective of good governance.

Analysis of the statutory scheme

Within this statutory and policy framework, a number of key points need to be considered. These are:

1. The local law must concern an act matter or thing in respect of which Council has a function or power. Council's functions include those relating to the peace, order and good government of the municipal district and exercising, performing and discharging the duties, functions and powers of Councils under the LGA and other Acts.
2. A local law must not be inconsistent with an act or regulation.
3. A local law should not embody principles of major substance or controversy or contain any matter which principles or matter should properly be dealt with by an Act and not by subordinate legislation.
4. A local law should not unduly trespass on rights and liberties of the person previously established by law.
5. A local law should not duplicate, overlap or conflict with other statutory rules or legislation.
6. Whether existing legislation is able to be applied to solve a problem and whether State legislation is more appropriate.

I make the following observations about a local law as contemplated by 1.5 of the Resolution against these key points:

1. *The local law must concern any act matter or thing in respect of which Council has a function or power. These functions include functions relating to the peace, order and good government of the municipal district. These functions include exercising, performing and discharging the duties, functions and powers of Councils under the LGA and other Acts*
 - (a) What is meant by 'peace, order and good government'? On the face of it, this phrase has a very wide scope.
 - (b) The Victorian Supreme Court in *Ho v Greater Dandenong City Council* [2012] VSC 165 dealt with this point. The case concerned the keeping of pet sheep on Mr Ho's land. Mr Ho argued that the relevant clause of the local law was invalid because the Council had no powers to make laws regulating the keeping of animals on land within the municipality and because the law was inconsistent with the planning scheme. In his judgment Macauley J goes through a number of previous judgments in relation to concepts such as good rule and government of the municipality. At [40], Macauley J observes that subject to some limits, 'the phrase 'peace, order and good government' when used to prescribe law-making power, including that of a council, confers a very broad power to make laws'. At [50], His Honour states that 'it can scarcely be doubted that the regulation of animal keeping within a municipal district is a function reasonably understood to be within the province of local government. As demonstrated above, until 2003 such a function was expressly listed as one for the performance of which a council could (and commonly did) make local laws.'

- (c) The Victorian Court of Appeal in *Ho v Greater Dandenong City Council* [2013] VSCA 168 upheld the Supreme Court judgment.
- (d) Can the monitoring of compliance with mandatory reporting laws be described in the same way? For the following reasons. I do not consider that it can:
- (i) There are existing mandatory reporting obligations under the CYFA with respect to child welfare which apply to registered medical practitioners, nurses, midwives, teachers, school principals, police officers, psychologists, youth justice officers and youth parole officers. Councils have never sought to require reports from those persons to my knowledge (e.g. to require schools to report whether they or their teachers will comply with mandatory reporting laws).
 - (ii) Whilst Councils do have a welfare role and provide support services with respect to children and families, such as child care,
 - (A) The statutory scheme around mandatory reporting under the CYFA is not one in which local councils have an express role. The CYFA provides for a statutory child protection regime involving 'protective interveners'. These are defined as the Secretary (the Head of the Department of Human Services) and all police officers: s 181 of the CYFA. Local council officers are not 'protective interveners'.
 - (B) Councils do not have express statutory functions in relation to child protection under the LGA. This contrasts with the responsibilities expressly conferred upon the Secretary under the CYFA which relate to promoting the prevention of child abuse and neglect and similar child protection responsibilities: s 16.
 - (iii) The Resolution contemplates a local law which *requires a person to report whether they will comply with another law*. This requirement would be unique. I am not aware of a regulator whose responsibility it is to require this information in any other context. The local law would also, in effect, have the Council acting as a check on whether State laws will be complied with. Such a role may raise separation of powers issues, but in any event does not clearly fall within the scope of the functions of a local council under the LGA.

2. *A local law must not be inconsistent with an act or regulation*

- (a) Garde AJA's judgment in *Ho v Greater Dandenong City Council* [2013] VSCA 168 addresses inconsistency. His Honour stated at [27]: "*To use the words of Smith J in Wain v Maroondah City Council, the situation is 'a classic one of multiple controls' with the provisions of the two regulatory regimes operating cumulatively.*"
- (b) The CYFA does not include a requirement that a place of worship must report whether it will comply with the CYFA. Accordingly, no clear direct inconsistency arises in that sense. However, I would not expect inconsistency to arise here as laws do not usually, if ever, require a person to report whether they will comply with a law.
- (c) I note the mandatory reporting regime is comprehensively set out in the CYFA, which gives rise to the question as to whether implied inconsistency would arise.
- (d) I need not provide an opinion on inconsistency because of my conclusion that the relevant local law would not fall within the lawmaking power of Council.

3. *A local law should not embody principles of major substance or controversy or contain any matter which principles or matter should properly be dealt with by an Act and not by subordinate legislation.*
 - (a) The contemplated local law would be problematic because:
 - (i) the subject matter is particularly controversial; and
 - (ii) the subject matter is already dealt with by an act of Parliament.
4. *A local law should not unduly trespass on rights and liberties of the person previously established by law.*
 - (a) The contemplated local law would require places of worship that have elected to not comply with the CYFA as amended to incriminate themselves. The local law would therefore interfere with the common law privilege against self-incrimination.
5. *A local law should not duplicate, overlap or conflict with other statutory rules or legislation*
 - (a) I refer you to the points I have made above in relation to the fact that the subject matter of the contemplated local law it is broadly already regulated by the CYFA
6. *Whether existing legislation is able to be applied to resolve a problem and whether State legislation is more appropriate*
 - (a) I refer you to the points I have made above in relation to the fact that the subject matter of the contemplated local law it is broadly already regulated by the CYFA.

Other considerations

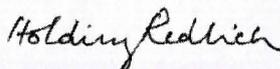
The enforcement of the local law would need to be carefully considered.

If the contemplated local law were made and a place of worship failed to report to Council in accordance with the local law, for example, by a specified deadline, Council may then issue an infringement notice or prosecute the offender. If this were to occur, there is a likelihood that the local law would itself come under collateral attack. Judicial scrutiny of the local law is therefore likely.

I also query the efficacy of a local law that requires places of worship to incriminate themselves. For places of worship which confirm they will comply with the CYFA, no issue arises. However, a place of worship that privately decides not to comply may rely on the privilege against self-incrimination in arguing that it was legitimate for it refuse to disclose its decision to Council (despite the requirements of the local law). If places of worship adopted that position, it will make enforcement very difficult.

Should you have any questions, do not hesitate to contact us.

Yours sincerely



Holding Redlich