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Date 10 August 2023

Subject **Operation of Local Law Provisions**

Questions Is cl 11.10 of Council's General Local Law (Local Law No. 2 – September 2013) (**Local Law**) inconsistent with any other laws?

Summary of advice *Below is a summary of our advice. Please read it in conjunction with the detailed advice that follows.*

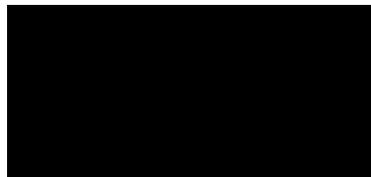
Yes.

Clause 11.10 of the Local Law is inconsistent with ss 5B(1) and 5C(1) of the *Sex Discrimination Act 1984* (Cth) (**SDA**) on the basis that its effect is to discriminate against a person on the basis of their gender identity and/or intersex status.

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Detailed analysis

Background

1. Clause 11.10 of the Local Law includes a prohibition on entering certain areas in a Municipal Building which have been appropriated for persons of the opposite biological sex.
 2. On 6 July 2023, Council released the proposed Local Law for public exhibition as part of the requisite community engagement process. The proposed Local Law includes no equivalent provision to cl 11.10. In other words, Council does not intend to replicate cl 11.10 in the proposed Local Law (**Proposal**).
 3. Council has received negative community feedback in response to the Proposal.
 4. Council now seeks advice on whether retaining an equivalent provision to cl 11.10 would give rise to any inconsistencies with other laws.
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Legal analysis

5. Is cl 11.10 of the Local Law inconsistent with any other laws?

5.1 Clause 11 of the Local Law relevantly provides:

A person must not:

...

11.10. except for a child under the age of ten (10) years in the care of a responsible person, and for a carer providing assistance to a person with a disability, enter or use any dressing room, shower, convenience or other area in a *Municipal Building* which has been appropriated for persons of the opposite gender;

5.2 If a person contravenes cl 11.10, they commit an offence against the Local Law and are liable for a maximum penalty of two penalty units.¹

5.3 Relevantly, cl 7 of the Local Law provides:

"Municipal Building" means any building which is owned, occupied or under the management or control of Council, and includes any recreation centre which is owned, occupied or under the management or control of Council.

5.4 We note that there is no definition in the Local Law of the term 'gender'. An argument could be mounted that it should be interpreted as referring to 'gender identity', not simply 'biological sex', as this would arguably bring it into line with the SDA and resolve inconsistencies. However, given the context and the apparent intended effect of cl 11.10 of the Local Law, we think that the term 'gender' in cl 11.10 is properly interpreted as referring to 'biological sex'.

5.5 Adopting this interpretation of 'gender', then, under the Local Law, a person must not enter or use any dressing room, shower, convenience or other area in a building owned, occupied or under the management or control of Council, if that room has been appropriated for persons of the opposite biological sex.

¹ See cl 176 of the Local Law.

5.6 Even if Council adopts a definition of ‘gender’ which refers to ‘gender identity’, as will become apparent from the analysis which follows, this does not resolve the issue of inconsistency with the SDA where non-binary and intersex people are concerned.

5.7 It is therefore our view that cl 11.10 of the Local Law is inconsistent with the SDA, for the reasons that follow.

5.8 *Gender identity protections in the SDA*

5.8.1 Section 5B(1) of the SDA provides:

For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person’s gender identity if, by reason of:

- (a) the aggrieved person’s gender identity; or
- (b) a characteristic that appertains generally to persons who have the same gender identity as the aggrieved person; or
- (c) a characteristic that is generally imputed to persons who have the same gender identity as the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different gender identity.

5.8.2 So, a person discriminates against another person on the ground of their gender identity if they treat them less favourably than a person with a different gender identity, in circumstances that are the same or are not materially different.

5.8.3 As described above at para 5.5, the effect of cl 11.10 of the Local Law is to prevent people from entering certain areas in a Municipal Building which have been appropriated for persons of the opposite biological sex.

5.8.4 This means that it prevents, for example, a transgender male from entering a male dressing room in a Municipal Building, on the basis that he does not possess biologically male sex characteristics.

5.8.5 However, the clause does not prevent a cisgendered male (i.e. a person with biologically male sex characteristics who also identifies as male) from using that same dressing room.

5.8.6 Further, even if we adopt an interpretation of ‘gender’ that is ‘the gender someone identifies as’, cl 11.10 of the Local Law would likely prevent those who are non-binary from entering a male or a female dressing room, since they would not identify with either gender and may therefore be considered ‘opposite’ to both.

5.8.7 The same would not be true of a person who identifies as male or female (i.e. a cisgendered male or female).

5.8.8 It follows that, by preventing that transgender male from entering the male dressing room while allowing cisgendered males to enter it, the effect of cl 11.10 of the Local Law is to treat the transgender male less favourably than cisgendered males by restricting his freedom of choice to use a dressing room that corresponds with his gender identity.

5.8.9 This is a clear contravention of s 5B(1) of the Act.

5.9 *Intersex status protections in the SDA*

5.9.1 Section 5C(1) of the SDA provides:

For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person's intersex status if, by reason of:

- (a) the aggrieved person's intersex status; or
- (b) a characteristic that appertains generally to persons of intersex status; or
- (c) a characteristic that is generally imputed to persons of intersex status;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who is not of intersex status.

5.9.2 As such, a person discriminates against another person on the ground of their intersex status if they treat them less favourably than a person who is not of intersex status, in circumstances that are the same or not materially different.

5.9.3 By necessary interpretation of the phrase 'persons of the opposite gender', cl 11.10 of the Local Law has the effect of restricting a person to using certain areas in Municipal Buildings that are appropriated for persons that share their biological sex.

5.9.4 An intersex person may have the biological attributes of the male and female sex, or lack some of the biological attributes considered necessary to be defined as biologically male or female.²

5.9.5 Consequently, some intersex people may not have an option to enter, for example, a dressing room that corresponds to a group that shares their biological sex characteristics, as such a room (e.g. an 'all gender' bathroom) might not be available. This means that the effect of cl 11.10 of the Local Law may be to bar them from entering any dressing room in a Municipal Building at all.

5.9.6 It follows that, by barring some intersex people from entering any dressing room in a Municipal Building at all, while allowing non-intersex people to enter them, the effect of cl 11.10 of the Local Law is to treat those intersex people less favourably than non-intersex people, by restricting their ability to enter dressing rooms.

5.9.7 This is a clear contravention of s 5C(1) of the SDA.

5.10 In summary, on the above analysis, it is our view that, if Council retains an equivalent to cl 11.10 of the Local Law in the proposed Local Law, it will be acting inconsistently with ss 5B and 5C of the SDA.

5.11 A Local Law will be inoperative to the extent that it duplicates or is inconsistent with another Act.³ So, any enforcement action that Council takes in respect of an alleged contravention of cl 11.10 of the Local Law (or any equivalent provision in the proposed Local Law) will be open to challenge on the basis that the clause is inoperative.

² See cl 15 of the Explanatory Memorandum of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*.

³ See ss 71 and 72 of the *Local Government Act 2020*.

- 5.12 For these reasons, we agree that Council ought to proceed with the Proposal to ensure that it is acting consistently with the local law requirements set out in s 72 of the *Local Government Act 2020*.
- 5.13 For completeness, we have also considered whether retaining an equivalent provision to cl 11.10 of the Local Law would contravene Council's duty under s 7 of the *Gender Equality Act 2020 (GEA)* to consider and promote gender equality in developing policies and programs and in delivering services that are to be provided to the public.
- 5.14 Given that s 8 of the GEA provides that s 7 is not intended to:
- 5.14.1 create any legal right or give rise to any civil cause of action; or
 - 5.14.2 affect the interpretation of any law in force in Victoria,
- we do not think that there is any possibility that a local law provision could be inconsistent with s 7.
- 5.15 Council would, however, need to note the impact that the provision will have on people of different gender identities, and note that impact in its assessment. In the case of a provision like cl 11.10 of the Local Law, we think that Council would need to note the potential impact on transgender, non-binary and intersex people.⁴

Contact

Please contact [REDACTED] on [REDACTED] or email [REDACTED]@maddocks.com.au if you have any other queries.

⁴ Interestingly, the GEA does not contain a definition of 'gender' either. However, the gender equality principles set out in s 6 of the GEA include, at s 6(8), reference to other forms of discrimination including 'gender identity'. We are therefore of the view that these types of impacts should be noted in any assessment under the GEA.