



public interest
ADVOCACY CENTRE LTD

Protecting free speech:

Submission to the Alice Springs Town Council in relation to the draft *Alice Springs (Management of Public Places) By-laws 2009*

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**Lizzie Simpson, Solicitor &
Vavaa Mawuli, Indigenous Justice Program Senior Solicitor**

Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on law reform and freedom of speech

PIAC has a long history of advocating for freedom of speech and the right to protest through its public interest litigation and policy work. Since its establishment in 1982, PIAC has provided legal advice and representation in a number of cases in support of the right to freedom of speech. For example, PIAC represented the Media Entertainment and Arts Alliance when it intervened in the leading High Court cases of *Lange v Australian Broadcasting Corporation*¹ and *Levy v The State of Victoria*.²

A significant area of PIAC's current and previous work relates to the promotion, enforcement and development of human rights. This includes the right to freedom of speech, which is recognised as a fundamental human right in Article 19 of the *Universal Declaration of Human Rights* and Article 19 of the *International Covenant on Civil and Political Rights*.³ PIAC conducts casework in relation to many other human rights, such as in the areas of privacy, discrimination, freedom of information, detention (including immigration detention), voting and election issues. As such, PIAC has extensive experience litigating and speaking out about the impacts of laws, policies, programs and conduct on people's human rights.

¹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

² *Levy v The State of Victoria* (1997) 189 CLR 579.

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ratified by Australia on 13 August 1980 (entered into force for Australia on 13 November 1980, except article 41, which entered into force for Australia on 28 January 1993).

PIAC has also had a specific policy focus on human rights for many years. Since 2003, PIAC has increased awareness of human rights across diverse sectors of the community as well as facilitated dialogue about mechanisms for protecting human rights in Australia through its Protecting Human Rights in Australia Project. PIAC has made submissions to various inquiries conducted in NSW and federally over the last five years into human rights protection and into laws that have impacted on human rights. PIAC has also taken on the role of secretariat and convenor of the NSW Charter Group, a coalition of individuals and organisations in NSW committed to achieving an independent community consultation on human rights in NSW. PIAC delivers regular training on human rights.

Following the announcement by the Hon Robert McClelland on 10 December 2008 of the national human rights consultation, PIAC turned its focus to the national consultation. Since that date, PIAC has conducted a range of community consultation processes and worked closely with its diverse networks to encourage those least likely to respond to the consultation to take part. This has included working with the following communities: homeless people, people with mental illness, Aboriginal people, prisoners and former prisoners, older Australians and people with disabilities. While most of this work has been done in NSW, PIAC also worked with organisations in Tasmania to deliver several workshops in April 2009 to encourage participation as well as workshops nationally (including in the Northern Territory) through its Project Human Rights in Australia project.

PIAC is also actively working to achieve social justice for Indigenous people through its Indigenous Justice Program (IJP) and more broadly. The aims of the IJP are to:

- identify public interest issues which impact on Indigenous people;
- conduct public interest advocacy, litigation and policy work on behalf of Indigenous clients and communities; and
- strengthen the capacity of Indigenous people to engage in public policy making and advocacy.

Through the IJP, PIAC has conducted policy and advocacy work in relation to issues such as policing, children in detention, access to justice and a wide range of civil matters and has acted for members of the stolen generations seeking to achieve redress for the experiences, harm and abuses suffered as a consequence of the laws, policies and practices of past governments that led to the forcible removal of Indigenous children from their families. PIAC has, through the IJP, assisted Indigenous clients in actions under the *Racial Discrimination Act 1975* (Cth).

General comments

PIAC welcomes the opportunity to make a submission to the Alice Springs Town Council (the Council) about its draft amendments to the *Alice Springs (Control of Public Places) By-Laws* and the *Alice Springs (Todd Mall) By-laws* (the draft by-laws).

PIAC is aware that a number of other organisations, including the Northern Territory Legal Aid Commission, have made detailed submissions raising general concerns about the draft by-laws. PIAC endorses the submissions made by the Northern Territory Legal Aid Commission dated 27 July 2009.

In this submission PIAC has chosen to limit its comments to raising concerns about the validity of clause 34 of the draft by-laws as PIAC contends that this clause may be unconstitutional and/or *ultra vires*.

Implied freedom of political communication and clause 34

Clause 34 of the draft by-laws prohibits a person, without a permit, from demonstrating, protesting, speaking, or 'otherwise behav[ing] in a way that is apparently intended to publicise the person's view about a particular issue' in a public place.

PIAC takes the view that this clause may be invalid on the basis that it amounts to an unreasonable interference with the right to freedom of political communication implied in the *Commonwealth Constitution*.⁴

The implied constitutional freedom of communication does not apply to all forms of communication, but rather is limited to communication about government and political matters.⁵

The test for determining whether a law infringes the implied freedom of political communication is as follows:

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s. 128 for submitting a proposed amendment of the Constitution to the informed decision of the people.⁶

In relation to the first question, namely whether clause 34 of the draft by-laws effectively burdens the freedom of communication about government or political matters, PIAC is of the opinion that while clause 34 may not be directed at regulating or restricting the discussion of political communication, its operation may have the effect of burdening political communication because it extends to any 'particular issue'.

Turning to the second question as to whether clause 34 is 'reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of government', PIAC is of the view that there are a number of factors that strongly suggest that clause 34 would not satisfy the second limb of the test.

Firstly, clause 34 would apply to all 'public places' within the Council local area. 'Public places' is defined in clause 5 of the by-laws in extremely broad terms and includes any place (whether or not the place is on private property) that a member of the public is allowed to use (but does not include the interior of buildings on private land from which trading is lawfully conducted).

Second, clause 34 applies not merely to groups of people who want to protest about political matters but to anyone behaving 'in a way apparently intended to publicise the person's views about a particular issue'.

Third, PIAC is concerned that the time and expense involved in obtaining Council's approval to hold a demonstration or publicise a view on a 'particular issue' would be prohibitive and contrary to the reality of political ideas, which often arise quickly, within the space of days or even hours, particularly when responding to decisions or announcements of government.

Fourth, PIAC notes that there is no review or appeal mechanism provided for in the by-laws to allow an individual to challenge (i) the refusal to grant a permit; or (ii) the conditions that have been purportedly imposed on a permit. As a result, if the Council for whatever reason refuses a permit then an individual is effectively precluded from exercising their constitutionally protected freedom of communication in Alice Springs municipality.

PIAC therefore considers that clause 34 is so broad and unfettered as to render the implied freedom of political communication illusory.

⁴ See, for eg, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106;

⁵ *Levy v The State of Victoria*, above n 2.

⁶ *Coleman v Power* (2004) 220 CLR 1, [93]-[96] (McHugh J), [196] (Gummow and Hayne JJ), [211] (Kirby J).

The validity of clause 34 under the *Local Government Act 2008* (NT)

Section 188 of the *Local Government Act 2008* (NT) (the LGA) empowers local councils to make by-laws for the good governance of its area. However, section 189 provides that council by-laws must conform to a number of principles, including the principle that a by-law must not infringe personal rights in an unreasonable way or to an unreasonable extent.⁷

As noted above, clause 34 gives the Council an extremely broad and discretionary power that could effectively limit all forms of speech in 'public places' in the Council's local area. PIAC therefore contends that this power unreasonably infringes freedom of speech and is therefore invalid under the LGA.

Conclusion

PIAC hopes that in light of the above submission, as well as the submissions of other organisations, Council considers adopting alternative, less intrusive measures to deal with its concerns it may have about public safety and convenience. PIAC encourages the Council to continue extensive consultations with community members during this process to ensure that any by-laws adopted do not infringe civil liberties, in particular freedom of speech.

⁷ *Local Government Act* (NT), sub-s 189(1)(d).