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17 March 2017

Dear Lord Mayor and Councillors

**Inner Melbourne Community Legal: Submission on the Activities (Public Amenity and Security) Local Law 2017**

We refer to the Report to the Future Melbourne (Finance and Governance) Committee, item 6.2: homelessness and public amenity, including the proposed amendments to the Activities Local Law 2009 (**Local Law**) in the Activities (Public Amenity and Security) Local Law 2017 (**Amending Law**).

**Inner Melbourne Community Legal**

Inner Melbourne Community Legal (**IMCL**) is a not-for-profit community organisation that provides free legal assistance to individuals experiencing disadvantage and marginalisation in our local community. This encompasses the City of Melbourne area. We have been delivering legal services for almost forty years.

In addition to conducting in-house legal clinics, IMCL targets the most vulnerable community members through our legal outreach services at a number of community locations. One of our key partner organisations is Ozanam Community Centre, a drop in-centre providing supports for people experiencing homelessness or at risk of homelessness, and/or who are socially excluded. IMCL has been providing weekly legal advice outreach services at Ozanam Community Centre for over 15 years.

In 2015-2016, IMCL provided 736 vulnerable community members with direct legal assistance. Of these, 36 per cent indicated that they were experiencing or at risk of or experiencing homelessness. A significant proportion of the work that we do for people experiencing homelessness concerns special circumstances applications in infringement matters, giving us a specialised understanding of the infringements system. In 2015-16, infringements accounted for 16 per cent of the legal problems experienced by our clients, the second highest area of law. From January to December 2016, we saw 126 clients and provided 152 advices in relation to infringements.

We also participate in a number of working groups to collectively address systemic legal issues affecting vulnerable people in our community, including homelessness. This includes the CBD Homeless Network; the City of Melbourne Homelessness Advisory Committee; the Justice Access Advisory Group and the Infringements Working Group. IMCL therefore has a unique understanding of the legal problems common to people experiencing homelessness and the flow-on effects of unresolved legal problems on their health, wellbeing and capacity to exit entrenched disadvantage. We are well placed to comment on what we believe will be the unintended and negative impact of the amending law on the most vulnerable members of our community.

This submission outlines our opposition to the amending law on the basis that:

- Criminalising homelessness will further entrench disadvantage;
- Fining people for offences associated with homelessness is against the intention of the Act;
- These fines will result in processes that are resource intensive for all involved, be the subject of long delays and unlikely to see fines paid;
- Some of the laws contravene the Victorian Charter of Rights and Responsibilities; and
- These laws contradict recent City of Melbourne and state government measures that will significantly contribute to reducing homelessness in the longer-term.

### **Broadening the ban on camping will criminalise homelessness**

As council noted in its Report to the Future Melbourne (Finance and Governance) Committee (2 Feb 2017) it is not illegal to be homeless. However, the amending law will make it an offence for a person to 'camp' in any public place. Given that the term camp is undefined and is open to broad interpretation, this effectively includes – whether intended or not - homeless people sleeping rough. Giving Authorised Officers the power to fine or charge and prosecute people for sleeping rough will effectively criminalise the social problem of homelessness.

Whilst paying an infringement does not result in a finding of guilt noted on a person's criminal record, the risks of criminalisation are particularly acute for people who are either charged and prosecuted or who apply for internal review of infringement notices or applications for revocation to the Infringements Court on the basis of special circumstances. This process is described in detail in **Table 1 at Appendix A**. As detailed in that table, matters are frequently referred to open court following internal review applications and applications for revocation. The infringement then becomes a charge and summons and is dealt with as a summary criminal offence, exposing people to findings of guilt and criminal records. A criminal record provides a significant barrier to employment which can further entrench economic and social disadvantage.

### **Issuing fines is at odds with the purpose of the *Infringements Act 2016 (Vic)***

IMCL understands that the proposed fines to be issued under the amending law will be dealt with as infringement notices under the *Infringements Act 2006 (Vic)* (**the Act**). It is our position that this scheme will conflict with the intent of the Act because the proposed fines are likely to embed a cycle of disadvantage amongst vulnerable people. In outlining the core objectives of infringements reform, the former Victorian Attorney-General, Rob Hulls in his second reading speech detailed that the system endeavours "...to filter people out of the system who cannot understand or control their offending behaviour..."<sup>1</sup>

This intention is reflected in the scheme set up in the Act enabling people to challenge their fines and have them waived on the basis of prescribed categories of hardship, defined as special circumstances. Section 3 of the Act defines special circumstances to include homelessness.

The then Attorney- General noted that:

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<sup>1</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2005, p. 2186 (Rob Hulls, Attorney General).

*“homelessness was specifically contemplated under the Act to provide for those people who are sleeping on the streets or living in crisis accommodation. Often these people have no choice but to be in public places where they are more likely to be infringed”.*<sup>2</sup>

As such, Melbourne City Council’s proposed amending law directly conflicts with a primary rationale underpinning the enactment of the Act designed to “better protect the vulnerable who are inappropriately caught up in the system”.<sup>3</sup> The Minister expressly stated that the legislative framework ought to recognise that “[p]eople with special circumstances are disproportionately, and often irrevocably, caught up in the system. In a just society, the response to people with special circumstances should not be to issue them with an infringement notice”.<sup>4</sup>

In light of the Minister’s second-reading speech, the Act is clearly intended to discourage enforcement agencies from issuing infringement notices in the first instance to people experiencing homelessness.

### **Fining people sleeping rough will create an ‘infringements roundabout’**

In addition to being contrary to the intention of the Act, fining people in connection with sleeping rough will also be counterproductive. The special circumstances process will create a complex and inherently costly ‘infringement roundabout’. People experiencing homelessness will inevitably be entrenched within the infringements system at significant community cost. This is because:

- **First**, it places homeless people under further financial and psychological strain, undermining their ability to deal with issues underlying their homelessness.
- **Second**, given the 74 per cent increase in Melbourne’s rough sleeping population since 2014 (with 247 people sleeping rough in 2016)<sup>5</sup> IMCL anticipates that the amending law will lead to a significant increase in the number of infringements issued. The special circumstances process requires intensive City of Melbourne resourcing, and it follows that an increase in infringements issued will place an additional strain on City of Melbourne and on already over-stretched community legal centres, Victoria Legal Aid and courts.
- **Third**, the infringement roundabout means fines will unlikely be paid and costs will not be recouped by enforcement agencies: when fines are dealt in open court following a special circumstances internal review or application for revocation this does **not** result in funds being paid back to the enforcement agency. Further, enforcement agencies typically bear the cost of prosecuting these matters.

The administrative and financial burden on enforcement agencies like the City of Melbourne is worth noting: in the first two stages of the infringement lifecycle, the enforcement agency bears the primary responsibility of dealing with the fine, any internal review procedures and court prosecution. Additionally, the enforcement agency may also be re-engaged during stage three, following applications for revocation based on special circumstances.

**Table 1** clearly demonstrates the circularity of the process given the inherent nexus that exists between homelessness and the proposed offences. In most cases a person sleeping rough fined under the

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<sup>2</sup> Ibid pp. 2187-2188.

<sup>3</sup> Ibid p. 2186.

<sup>4</sup> Ibid p. 2187.

<sup>5</sup> City of Melbourne, *StreetCount highlights number of people sleeping rough* (9 June 2016) <<http://www.melbourne.vic.gov.au/news-and-media/Pages/streetcount-highlights-number-of-people-sleeping-rough.aspx>>.

amending law will be able to successfully establish special circumstances. Furthermore, the likelihood of success of these applications is strengthened by the fact that more than one category of special circumstances will be relied upon given common comorbidities amongst this population.

The infringement roundabout ought to become a disincentive for enforcement agencies like the City of Melbourne to issue the fines to homeless people in the first place, thereby making the scheme redundant.

We therefore submit that the effect of tying-up people sleeping rough into the infringements roundabout will not lead to behaviour change in people experiencing homeless so as to reduce the number of people sleeping rough. We submit that this can only be achieved by resources being directed towards affordable housing options for Victorians. To illustrate this, IMCL discussed the amending law with a current client, Steve.

#### Client story

Steve was referred to IMCL from his caseworker at Ozanam House. Steve had been in crisis accommodation for a number of weeks. He received a number of parking fines from a City of Melbourne authorised officer during his time accessing the crisis accommodation.

When asked of the impact these fines had when he was homeless and accessing crisis accommodation, Steve replied

*“It made me feel worse. I was trying to find a place to live and then you know getting these fines was another thing on my mind, another stress in my life, another thing over my head”*

When asked whether he thought that the proposed amending laws would reduce the number of people sleeping rough, he said

*“If you’re sleeping rough, you have no money, so how are you going to pay the fines? A lot of these people have got a mental illness or substance or alcohol issues; so fines are just going to be on top of having no money and having no home!”*

Steve is fortunate to now have secured permanent accommodation with the assistance of a housing support worker at Ozanam. He believes that the focus should be on providing social workers and housing workers for people experiencing homelessness, rather than on ‘policing’ or issuing fines.

#### The provisions regarding unattended items interfere with *Charter* rights

The City of Melbourne, as a public authority, is required under the *Charter of Human Rights and Responsibilities 2006* (Vic) (**the Charter**) to act consistently with human rights in the Charter. These rights were introduced because the Victorian Government recognises that human beings have basic rights, and anticipated that the Charter would “help us become a more tolerant society, on which respects diversity and the basic dignity of all.”<sup>6</sup>

There are 20 fundamental human rights set out in the Charter, including that a “person must not be deprived of his or her property other than in accordance with law.”<sup>7</sup> The proposal in the amending law to “confiscate and impound” personal property of a person is clearly interfering with the Charter right that a person not to be deprived of his or her property.

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<sup>6</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, p. 1290 (Rob Hulls, Attorney-General)

<sup>7</sup> *Charter of Human Rights and Responsibilities 2006* (Vic) s 20.

While IMCL recognises that Charter rights can be limited in certain circumstances, it must be reasonable and there must be clear reasons for the decision. In this regard, and in light of the factors set out in section 7(2) of the Charter, IMCL submits that the Council's amending law does not reasonably limit Charter rights. The factors are given below.

In the Council's published Notice of Proposal to Make a Local Law, it appears that the purpose of the restriction on this Charter right it is to provide for the peace, order and good government of the municipality. This purpose is relevant when considering whether the proposed limitation is reasonable.<sup>8</sup>

IMCL submits that the interference with property in the proposed amendment regarding unattended belongings is an unreasonable interference the legal interests of a person in their personal belongings is neither necessary nor reasonable, and undermines the basic dignity of a person who, due a range of circumstances, most of which are out of their control, has nowhere permanent to live or store their personal belongings. There are also, in our submissions, less restrictive ways that City of Melbourne can achieve peace and order without the proposed amendment to the Local Law.

It is also relevant that no other public authority or company carrying out public activities has the power to fine a person for leaving property unclaimed. Indeed legislation in respect of these bodies is drafted to ensure that reasonable attempts are made to locate the person and appropriate safeguards and timeframes are in place to avoid a person's unclaimed or lost property being unnecessarily sold or destroyed.

For example, if goods or lost property are left on a public transport company's property (i.e. V/Line, Yarra Trams or Metro), the company has to make a reasonable attempt to contact the owner of the goods,<sup>9</sup> and (with the exception of perishable goods) can only sell or dispose of goods or lost property after 60 days from when the lost property was found or the goods were not claimed.<sup>10</sup> Storage charges can only be recovered from the sale of goods after that period has expired<sup>11</sup> and the balance of monies upon sale must be dealt with as unclaimed money in accordance with the *Unclaimed Money Act 2008* (Vic).<sup>12</sup>

Similarly, Victoria Police are unable to fine a person for leaving property unclaimed, and there are appropriate safeguards legislated regarding the disposal of unclaimed property that comes in to their possession in the scope of their employment. If property is perishable, it can be disposed of if it is not claimed after reasonable inquiries as to ownership have been made,<sup>13</sup> if it was left by a person who was imprisoned or detained in a gaol it must be retained for 12 months,<sup>14</sup> and in any other case, the property may be disposed of if it is not claimed within 3 months after coming into the possession of<sup>15</sup> the member of Victoria Police personnel.<sup>16</sup> If property is sold by Victoria Police, proceeds from the sale are paid to the consolidated fund.

In both of these circumstances, appropriate safeguards have been put into place to ensure that the company or organisation takes steps to locate the person who owns the belongings and at least 60 days is provided before any action can be taken in respect of the property. Unlike the proposed Local Law, a

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<sup>8</sup> Ibid s 7(2).

<sup>9</sup> *Transport (Compliance and Miscellaneous) Act 1983* (Vic) s 251A(2)(b).

<sup>10</sup> Ibid s 251A(3).

<sup>11</sup> Ibid s 251A(4).

<sup>12</sup> Ibid s 251A(5).

<sup>13</sup> *Victoria Police Act 2013* (Vic) s 57(2)(a).

<sup>14</sup> Ibid s 57(2)(b).

<sup>15</sup> Ibid s 57(5).

<sup>16</sup> Ibid s 57(2)(c).

person is not fined for leaving belongings at a train station or with Victoria Police and the person does not have to pay to retrieve their belongings.

The proposed new Local Law regarding unattended items is, in our submission, a punitive law which unnecessarily limits a person's human right to not be deprived of their property, and a law which says the council can destroy personal belongings within 14 days if payment is not made is a limitation of that right to a greater extent than is allowed under the Charter.

### **Recent Measures Welcome**

We welcome the work that the City of Melbourne and, more recently, the Victorian State Government have done to reduce homelessness and curtail the larger problem of housing unaffordability. These measures are necessary to reduce homelessness. Some of the measures are overdue and will take time to show results.

Recently, the City of Melbourne has implemented or agreed on a number of strategies that will all work to reduce homelessness in the medium to long-term. These include:

- The appointment of a Senior Housing Advisor as part of the Urban Strategy section to advise on and promote affordable housing as part of current and emerging new developments, such as Arden-McCauley, Fishman's Bend and Victoria Markets (which will support the implementation of the council's own policy target of 15 per cent social housing for new developments).
- The City's Daily support team providing outreach and the imminent provision of a night safe space and Project Connect Respect delivered in partnership with the Council for Homeless Persons.
- Support for Home Ground to expand their housing stock by bringing private landlords onboard.
- The City of Melbourne Council meeting of 20 December 2016 endorsing recommendations to develop some sites for affordable housing, such as 602 Little Bourke Street and 506 Elizabeth Street.

Recent assistance that the Victorian Government has provided will also increase access to affordable housing for vulnerable people. This includes:

- the Social Housing Growth Fund which will ultimately be worth \$1 billion and estimated to provide around \$70 million per year for new social housing; and
- around \$1 Billion in loan guarantees over six years for social housing providers.

We encourage the Council to allow these initiatives to bear fruit and to refrain from implementing reforms which will undermine these positive steps.

### **Conclusion**

We disagree with the proposed changes to by-laws because:

- Criminalising homelessness will further entrench disadvantage;
- Fining people for offences associated with homelessness is against the intention of the Act;
- These fines will result in processes that are resource intensive for all involved, be the subject of long delays and unlikely to see fines paid;
- Some of the laws contravene the Victorian Charter of Rights and Responsibilities; and
- These laws contradict recent City of Melbourne and state government measures that will significantly contribute to reducing homelessness in the longer-term.

Please do not hesitate to contact IMCL Chief Executive Officer, Daniel Stubbs, on 9328 1885 or at [dan.stubbs@imcl.org.au](mailto:dan.stubbs@imcl.org.au) if you have any questions at all regarding this submission.

A handwritten signature in black ink, appearing to read 'D Stubbs', with a long horizontal flourish extending to the right.

Daniel Stubbs  
**Chief Executive Officer**

## Appendix A

**Table 1: Options available to people experiencing homelessness under the Infringements system**

### **Stage 1: Internal review by the enforcement agency based on special circumstances**

Section 22 of the Act provides that a request for an internal review of the decision to issue an infringement notice by an enforcement agency can be made on the ground that special circumstances apply to the person who was fined.

This application is made in writing directly to the enforcement agency which must consider it.

The application must demonstrate a link between the special circumstance and the offending behaviour and must be accompanied by supporting documentation. IMCL has assisted many clients to make applications for internal review against public order fines issued against people experiencing homelessness by the City of Melbourne. This involves obtaining supporting documentation from a prescribed category of health professionals and support workers.

#### **Outcome of the internal review conducted by the enforcement agency**

If an application is made on the basis of special circumstances, the enforcement agency has three options under section 25(2) of the Act to either:

- i. Withdraw the fine* if it accepts that special circumstances apply to a person to whom a fine was issued;
- ii. Withdraw the fine and issue an official warning in its place,*<sup>17</sup>
- iii. Decline to withdraw the fine and refer the matter to open court* to be dealt with in open court.<sup>18</sup>

In IMCL's submission, the internal review process is a resource intensive exercise for community legal centres, Victoria Legal Aid and allied professionals. It is particularly resource intensive for enforcement agencies such as the City of Melbourne. This first stage can take up to 146 days, approximately five months. The enforcement agency must review the decision to serve an infringement notice within a prescribed period of 90 days (with a further period of up to 35 days if additional information has been requested) and notify the applicant in writing of the decision within 21 days.

Furthermore, the enforcement agency is required to prosecute the charge, at additional cost. These costs are unlikely to be recouped by the issuing agency in circumstances where special circumstances ultimately apply.

### **Stage 2: If no action is taken following an infringement notice, reminder notice is issued by enforcement agency**

If no action is taken by the person issued with an infringement notice within 28, the enforcement

<sup>17</sup> *Infringements Act 2006* (Vic) s 25(2).

<sup>18</sup> *Ibid* s 25(3).

agency is required to issue a penalty reminder notice.

Whilst this adds additional costs to the original penalty, these costs are once again unlikely to be recouped by the issuing agency in circumstances where special circumstances ultimately apply.

### **Stage 3: Unpaid infringement notice – lodgment with the Infringements Court**

If an infringement is not paid and an internal review has not been submitted, enforcement agencies may lodge the infringement penalty with an infringements registrar at the Infringements Court.<sup>19</sup>

It is IMCLs experience that the City of Melbourne routinely takes this step.

The infringements registrar may then make an enforcement order that the person pay to the Court the outstanding amount of the infringement and the prescribed costs in respect of a lodgeable infringement offence.<sup>20</sup>

#### **Application for revocation based on special circumstances**

At the Infringements Court stage, a person experiencing homelessness has a further opportunity to make an application based on special circumstances. At this stage, the application is for 'revocation' of the enforcement order.<sup>21</sup>

#### **Outcome of revocation application**

- ***Fine referred back to enforcement agency***  
If a registrar of the Infringements Court is satisfied that there are sufficient grounds for revocation they must revoke the enforcement order, meaning it ceases to have effect.<sup>22</sup> The enforcement order is then referred back to the original enforcement agency for further consideration.<sup>23</sup>

#### **Outcome of enforcement agency reconsideration**

- ***Fine withdrawn***  
The enforcement agency can then request non prosecution (final withdrawal) of the matter.<sup>24</sup> In this instance none of the costs of enforcement will be recovered.
- ***Fine not withdrawn – referral to Special Circumstances list***  
Unless the enforcement agency requests non prosecution of the matter, the fine is then automatically referred to the Magistrates' Court where the case proceeds as a criminal sentencing hearing in the Special Circumstances list.<sup>25</sup>

The enforcement agency is required to prosecute the charge, at additional cost.

In the vast bulk of cases special circumstances are made out and non-pecuniary sentences are imposed and the lowest end of the sentencing range. In most instances matters are simply proven and dismissed with no further penalty.

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<sup>19</sup> Ibid s 54.

<sup>20</sup> Ibid s 59.

<sup>21</sup> Ibid s 65.

<sup>22</sup> Ibid s 66.

<sup>23</sup> Ibid s 67(5).

<sup>24</sup> Ibid s 69.

<sup>25</sup> Ibid s 71.

#### **Stage 4: Infringement warrant issued**

If an infringement warrant is executed, the matter can be brought before the Magistrates' court for determination and a person can at this stage rely on their special circumstances.<sup>26</sup> In this instance none of the costs of enforcement will be recovered by enforcement agencies such as city of Melbourne.

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<sup>26</sup> Ibid s 160.