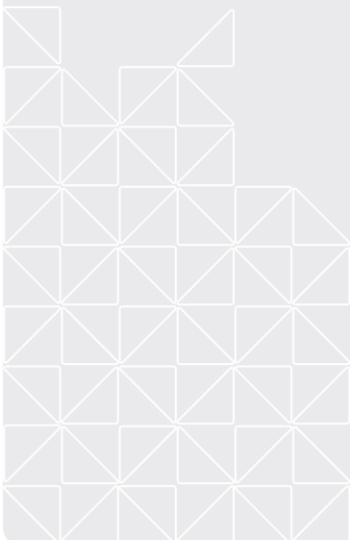


Fair's Fare: Improving access to public transport for Victorians experiencing homelessness

March 2016



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Justice Connect Homeless Law sincerely thanks our pro bono lawyers who provide legal representation to approximately 450 Victorians experiencing or at risk of homelessness each year. Throughout 15 years of assisting clients to navigate Victoria's infringements system, Homeless Law has gathered extensive insights about the operation of Victoria's public transport ticketing enforcement framework and the disproportionate impact it has on vulnerable Victorians. We're grateful to these lawyers for dedicating their time and expertise to providing legal representation to help minimise the impact of the system on homeless Victorians and for helping compile detailed data about the public transport ticketing system for this position paper.

We have also included direct insights from six people who participated in our 2013 project, *In the Public Eye: Personal Stories of Homelessness and Fines*, and we are grateful to Anthony, Emma, Darren, Richard, Julia and Hamish, whose candid stories continue to remind us of the need for a fairer, more inclusive, less punitive public transport system in Victoria.

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1. Executive summary

As part of Justice Connect Homeless Law's project, *In the Public Eye: Personal Stories of Homelessness and Fines*, one of Homeless Law's former clients articulated what it's like to be homeless, reliant on public transport and overwhelmed with fines you're in no position to pay:

Public transport obviously is a big a thing for everyone living in the inner city especially for poorer and homeless people. Even just to get on the train and sleep for an hour or two, ride out to Hurstbridge and back. For me, through drug use and mental illness I got worse and worse and soon I had a few fines. They were pretty much all public transport fines. It ended up being about \$13,000 dollars worth. The stress and anxiety of the debt was something I kind of felt already, the fines just added to that.

... It is beneficial for the community to change the system because with the fines, it's like throwing paper at a fire. I don't know whether it has to do with training but also setting guidelines. If it does become that you can't get on public transport without a ticket, that's going to keep people from getting public transport to their doctors and to their appointments. It puts additional strain on the health system, the legal system and the welfare system.

Getting the fines sorted was like a weight lifted, like going to the dentist and having the pressure released. It's a good feeling. It encourages me to get my stuff a bit more organised and together, start working again.¹

As a specialist legal service for people who are homeless or at risk of homelessness, Homeless Law knows through our work that homeless Victorians are:

- Heavily reliant on public transport, including to get to appointments with housing, health, mental health and employment services;
- Vulnerable to non-compliance with fare requirements, including as a direct result of homelessness, together with other complex circumstances, including poverty, mental illness and/or substance dependence;
- Sometimes more visible to Authorised Officers where their hardship is visibly apparent; and
- Poorly equipped to exit the enforcement system once they enter it, either through payment of infringements or navigating the complex legal process set up to have infringements withdrawn.

Public transport has a critical role to play in improving social cohesion and social inclusion, but as it stands, Victoria's public transport system is inaccessible for our most struggling members. It excludes them from engaging in activities, appointments and daily life, and penalises them heavily for failure to purchase a ticket or produce proof of concession.

A fine for not having a ticket on public transport or not having proof of your concession entitlement is \$223. That is 85% of the weekly income for a person who relies on the Newstart Allowance. If they were to pay the fine, they would have \$39 left for all expenses – food, accommodation, health – for that week.

In 2014–15, Homeless Law opened 77 new matters for clients experiencing homelessness needing assistance with fines and infringements. A detailed analysis of 44 of these files was undertaken, which identified that 59% of those clients were seeking assistance with public transport infringements. These clients had been issued with a combined total of 231 public transport infringements and owed a combined total of approximately \$83,705.

In addition to the heavy burden imposed on individuals and services that assist clients to navigate the infringements system, as a State, we currently invest too much in enforcing public transport ticketing infringements against vulnerable people. Despite the positive changes that will be introduced to the *Infringements Act 2006* (Vic) (**Infringements Act**) by the *Fines Reform Act 2014* (Vic) (**Fines Reform Act**), the infringements system will continue to be a resource intensive system requiring time and involvement from multiple agencies and the courts.

¹ See Justice Connect Homeless Law, *In the Public Eye: Personal Stories of Homelessness and Fines* (2013) (available at: <https://www.justiceconnect.org.au/our-programs/homeless-law/law-and-policy-reform/infringements-and-public-space-offences/public-eye-personal-stories-homelessness-and-fines>) (Hamish) (**In the Public Eye**).

This position paper is informed by 15 years of running fines and infringements matters for Victorians experiencing homelessness. The recommendations aim to make Victoria's public transport system fairer and more equitable, as well as more efficient. Through an inclusive, preventative approach, our public transport system can help Victorians experiencing homelessness get where they need to go and can avoid the injection of resources that the current system requires from government, the courts and services.

11 RECOMMENDATIONS FOR A FAIRER, MORE INCLUSIVE AND MORE EFFICIENT PUBLIC TRANSPORT SYSTEM IN VICTORIA

<p>1. Free public transport for concession card holders</p>	<p>Recognising the benefits of accessible public transport and the current costs of enforcement against people who are unable to pay, Homeless Law recommends the introduction of free travel on the Public Transport Victoria network for people with concession cards.</p> <p><i>If the recommendation for free public transport for eligible concession holders is not adopted in the short-term, the remaining recommendations aim to improve the fairness and equity of the current public transport ticketing infringement framework for vulnerable Victorians.</i></p>
<p>2. An improved Access Travel Pass scheme to prevent people with special circumstances entering the infringements system</p>	<p>We need improved processes for identifying people with special needs or circumstances that do not rely on a person self-identifying at the point of contact. A current example is the Access Travel Pass scheme, which is available to people with a permanent physical or mental disability that prevents them using myki ticketing systems. Access Travel Passes are, however, under-utilised and are not as effective as they could be at preventing highly vulnerable people from entering the infringements system.</p> <p>Homeless Law recommends the following improvements:</p> <ul style="list-style-type: none"> – Broader eligibility – The Access Travel Pass scheme should be widened to include people whose homelessness, mental illness and/or substance dependence contributes to them being unable to consistently use the myki system. Where their circumstances are not permanent, for example homelessness, renewal could be required every two years. – Awareness raising – A concerted awareness campaign regarding the expanded Access Travel Pass should be supported to promote this scheme within mental health, homelessness, financial counselling, legal, health and community services. – Referral schemes – A formal referral scheme should be implemented, where Authorised Officers at first instance, the Department of Economic Development, Jobs, Transport and Resources (DEDJTR) on review, and the Infringements Court or Magistrates' Court as part of the special circumstances process, can provide potentially eligible public transport users with details about the sign up process for the Access Travel Pass scheme. – Withdrawal or revocation on acceptance – Where a person's Access Travel Pass application is accepted, all outstanding infringements should be cancelled by the DEDJTR and enforcement orders revoked. – Database – With their consent, Victorians who have an Access Travel Pass should be in a searchable database accessed by Authorised Officers at the point of contact to avoid unnecessary problems arising from the person's failure to carry their card.

3. Support and guidance for Authorised Officers as frontline decision-makers

The current public transport ticketing infringement framework does not provide fair outcomes for homeless Victorians whose circumstances (1) increase the likelihood of them receiving an infringement; and (2) make it harder for them to deal with infringements once received.

A preventative approach, which focusses on supporting frontline decision-makers to select options other than issuing an infringement and early identification of people who should be exited from the system, has significant potential to reduce the hardship and inefficiency created by the current enforcement-focussed approach.

Authorised Officers should be supported in their roles, including through:

- **Training** – Authorised Officers should receive comprehensive training about the complex circumstances that may affect the people they're dealing with, including homelessness, mental illness, poverty and substance dependence. There should be improved training about the exercise of discretion, including the existing bases on which discretion may be exercised.
- **Amendments to internal operating procedures** – Internal policies and procedures such as those in the *Authorised Officer Reference Notes Manual*, so Authorised Officers are better supported to appropriately exercise discretion by giving warnings or referrals rather than infringements to people with special circumstances. Specifically, the *Manual* should be amended to expressly include mental illness and substance dependence, in addition to the current criteria for the exercise of discretion (which include homelessness).
- **Recording the exercise of discretion** – A process should be developed to record when Authorised Officers exercise their discretion which results in not issuing a report of non-compliance (**RONC**) (e.g. issuing a warning).
- **Amendments to the RONC form** – The RONC form should be amended to allow for the recording of additional information that would prompt the Authorised Officer to turn their mind to the person's vulnerability and consider alternatives to issuing a RONC, and would provide the Department with more insight to support their decision-making in relation to whether to issue an infringement.
- **Publishing procedures and statistics** – The internal operating procedures that inform Authorised Officers' use of discretion should be made available to the public. Statistics about the use of Authorised Officers' discretion, including the number of RONCs issued and number of RONCs not issued due to the exercise of discretion should be recorded and regularly published.
- **Homeless People in Public Places Protocol** – The Department should participate in the Justice Access Advisory Group's *Homeless People in Public Places Protocol* consultation process and consider endorsing the Protocol, which aims to: avoid unnecessary interactions with people experiencing homelessness; ensure that where interactions do occur they are appropriate and respectful; and support officers to consider options other than fines and charges when dealing with people experiencing homelessness.

4. Better oversight, data and reporting to avoid issuing infringements inappropriately

Guidelines and a mechanism for oversight should be put in place to ensure that the decision to issue an infringement notice is not a rubber stamp and is instead an effective juncture for identifying when people should be exited from the system.

	<p>Measures should include:</p> <ul style="list-style-type: none"> – Expanding the use of warnings. The current warning policy should be expanded and effectively implemented to prevent people entering the infringements system inappropriately and unnecessarily. – Creating a database to proactively flag those with special circumstances. – Publishing the internal procedures used by decision-makers. – Implementing a mechanism of oversight and reporting which reviews the number and outcomes of RONCs, infringement notices and enforcement orders.
5. Clear, consistent approaches to support early exit via effective internal review	<p>Once an infringement notice is issued, the internal review process should be improved so that it provides a meaningful opportunity for people to exit the system early.</p> <p>To support consistent, appropriate decision-making by the DEDJTR when conducting internal review applications, Homeless Law recommends that the DEDJTR:</p> <ul style="list-style-type: none"> – Commits to, and recognises the importance of, a more transparent and rigorous internal review policy. – Swiftly implements Fines Victoria guidelines and internal monitoring processes.
6. Franchisee incentives to promote appropriate decision-making	<p>Recognising the important role of franchisees in the day-to-day operation of Victoria's public transport system, measures to encourage these entities and their staff to foster fairness and equity should include:</p> <ul style="list-style-type: none"> – Requirements to collect and report on enforcement – Franchisees should be required to collect and report on the number of RONCs issued; the number of official warnings issued; the number of referrals made by Authorised Officers to the Access Travel Pass scheme; the reason for issuing RONCs; and whether any indication of special circumstances was recorded on the RONC. – Financial incentives to encourage appropriate decision-making – A threshold percentage of RONCs withdrawn by the DEDJTR at RONC review stage, enforcement orders revoked by the Infringements Court on the basis of special circumstances and infringements matters dismissed by the Magistrates' Court of Victoria due to special circumstances, should be established. If franchisees issue RONCs that exceed this threshold, a financial penalty should be imposed, in recognition of the substantial economic costs to taxpayers, and hardship needlessly imposed on vulnerable people, where RONCs are issued in circumstances where Authorised Officers were aware or ought to have been aware of a passenger's special circumstances.
7. A more appropriate, less punitive approach to special circumstances	<p>The current special circumstances framework is less effective than it could be at providing Victorians experiencing homelessness, substance dependence and/or mental illness with an accessible mechanism for exiting the infringements system. To address the current ways in which vulnerable people find themselves caught up in the infringements system for protracted periods, unable to access adequate supporting material and with a finding of guilt on their record, Homeless Law recommends:</p> <ul style="list-style-type: none"> – Amending the definition of special circumstances under section 3 of the Infringements Act to provide that special circumstances are established if the particular circumstance 'contributed to' (rather than 'results in') the

	<p>offender being unable to understand that the conduct constitutes an offence or control conduct that constitutes an offence.</p> <ul style="list-style-type: none"> – Implementing a more flexible approach to the evidentiary requirements in establishing special circumstances, recognising the realities of the hardship and social isolation that often accompany special circumstances. – Monitoring and overseeing the decision-making of enforcement agencies to make sure that people who are by definition vulnerable are not required to attend court (unless they are seeking review of a decision made against them). – Removing the requirement to plead guilty in the Special Circumstances List.
8. Concession-based fines	<p>Given the wide disparity of incomes amongst public transport users, concession card holders should be subject to reduced infringement penalties. Homeless Law recommends setting infringement penalties for eligible concession card holders at 20% of the standard rate.</p> <p>This system would give eligible card holders a realistic chance to be able to pay off their infringements, whilst retaining a deterrent effect for all public transport users.</p>
9. Waiver of additional enforcement fees for eligible concession card holders	<p>By the time an infringement for not having a ticket or failure to provide proof of concession reaches warrant stage, the initial infringement amount of \$223 increases to \$388.90 through the addition of fees and costs.</p> <p>Homeless Law recommends that additional enforcement fees are waived for eligible concession card holders. The elimination of these fees would increase the likelihood of repayment and acknowledge the stress and hardship that the imposition of additional fees has on vulnerable people who have already been penalised for their offending.</p>
10. Reducing the harsh penalties for concession card holders	<p>The following measures should be introduced to reduce the harsh impact of the current system for enforcing concession eligibility:</p> <ul style="list-style-type: none"> – Allowing evidence of concession entitlement to be provided within 28 days to avoid an infringement notice being issued or to have an infringement notice withdrawn. Proof of concession entitlement should be construed broadly and be able to be provided by post, email or fax. – Providing the option for registered myki card holders to upload proof of their concession entitlement to the myki website. – Substantially reducing the infringement penalty for failing to produce evidence of entitlement to a concession fare to appropriately reflect the severity of the offence.
11. Repealing on-the-spot penalty fares	<p>Part 2A (On-the-Spot Penalty Fares) of the <i>Transport (Ticketing) Regulations 2006</i> (Vic) should be repealed due to the discriminatory impact, lack of appeal rights and the failure of Authorised Officers to clearly articulate the impact of paying a Penalty Fare. If this recommendation is not accepted, Authorised Officers should be required to provide a fact sheet explaining alternative options before requiring payment of a Penalty Fare or issuing a Report of Non-Compliance.</p>

2. Homelessness, fines and public transport

Established in 2001, Justice Connect Homeless Law is a specialist legal service for people who are experiencing or at risk of homelessness. We are an outreach-based, holistic service. In partnership with eight member law firms, we run seven clinics each week at homelessness, health and community services.² We work closely with pro bono lawyers to provide approximately 450 clients with legal representation each year. Our two in-house social workers allow us to meet clients' non-legal needs.³

Homelessness continues to increase in Victoria and the most recent Australian Census counted 22,789 homeless Victorians, which includes people staying in refuges, temporary accommodation or rooming houses, sleeping in cars or couch surfing, and 1092 people sleeping rough.⁴

Providing legal representation to clients who have received fines during periods of homelessness, addiction and poor mental health has prevailed as one of the most common areas of work for Homeless Law throughout our 15 year history.

As part of Homeless Law's project, *In the Public Eye: Personal Stories of Homelessness and Fines*, one of Homeless Law's former clients articulated what it's like to be homeless, reliant on public transport and overwhelmed with fines you're in no position to pay:

*Public transport obviously is a big a thing for everyone living in the inner city especially for poorer and homeless people. Even just to get on the train and sleep for an hour or two, ride out to Hurstbridge and back. For me, through drug use and mental illness I got worse and worse and soon I had a few fines. They were pretty much all public transport fines. It ended up being about \$13,000 dollars worth. The stress and anxiety of the debt was something I kind of felt already, the fines just added to that.*⁵

In 2012–13, Homeless Law opened 166 new matters for clients experiencing homelessness needing assistance with fines and infringements, which constituted almost 50% of our new files that year.

In late 2012, in response to overwhelming demand and the need to focus resources on preventing evictions into homelessness, Homeless Law introduced a 'public spaces offences policy', which requires at least 50% of a person's fines to be related to homelessness for them to be eligible for ongoing legal representation from Homeless Law.

This change has reduced infringements matters as a proportion of our work, but we continue to see too many highly vulnerable clients being harshly impacted by Victoria's public transport ticketing infringement framework.

We see through our work that homeless Victorians are:

- Heavily reliant on public transport, including to get to appointments with housing, health, mental health and employment services;
- Vulnerable to non-compliance with fare requirements, including as a direct result of homelessness, together with other complex circumstances, including poverty, mental illness and/or substance dependence;
- Sometimes more visible to Authorised Officers where their hardship is visibly apparent; and
- Poorly equipped to exit the enforcement system once they enter it, either through payment of infringements or navigating the complex legal process set up to have infringements withdrawn.

² Our firms and outreach locations are: King & Wood Mallesons (Melbourne City Mission), Corrs Chambers Westgarth (VACRO), Allens (Launch Housing), Minter Ellison and Clayton Utz (Cohealth Central City Community Health Service), Harwood Andrews and Transport Accident Commission (Salvation Army Geelong), Herbert Smith Freehills (City).

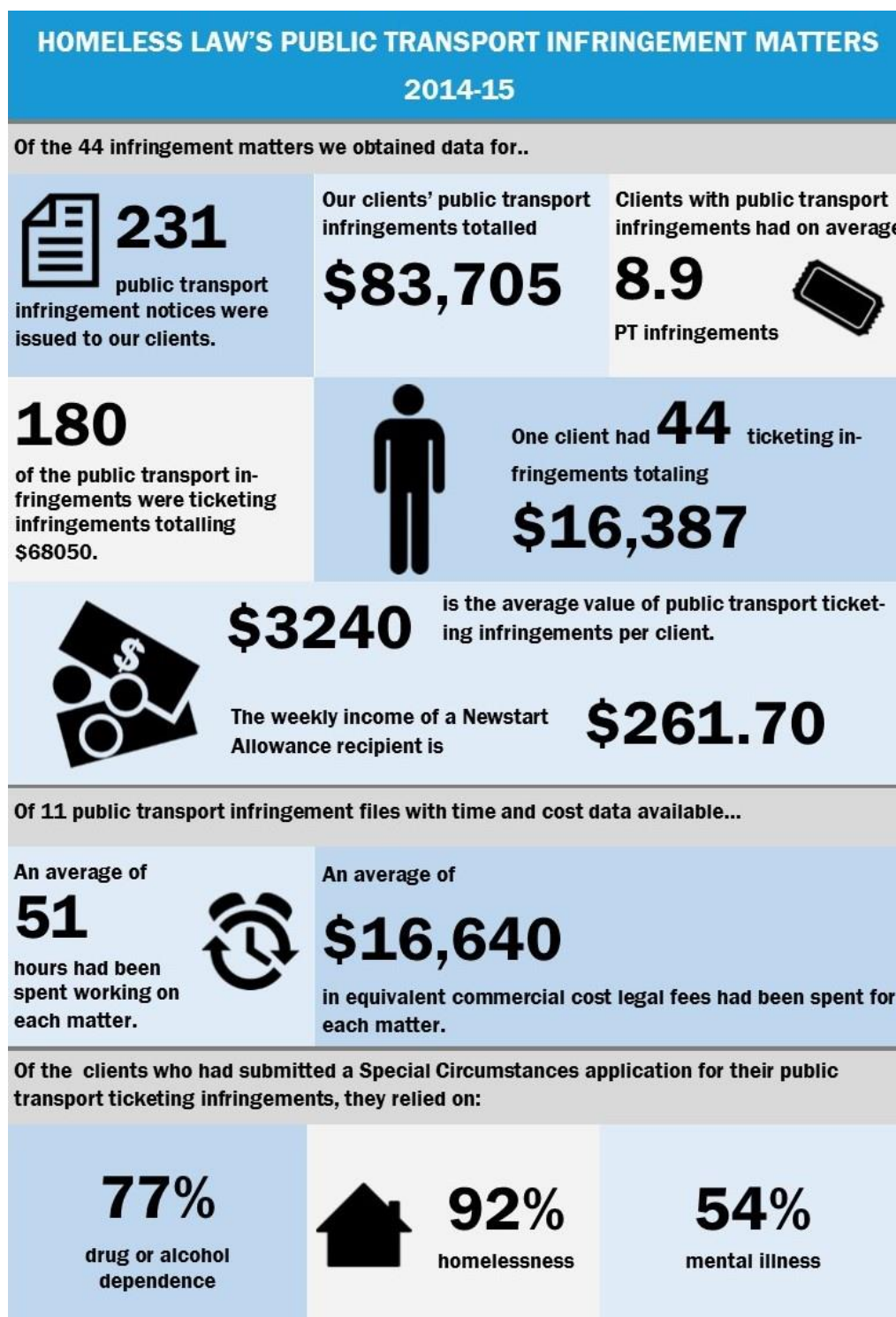
³ For more information about Homeless Law and our work see: <http://www.justiceconnect.org.au/our-programs/homeless-law>.

⁴ Australian Bureau of Statistics, *Census of Population and Housing: Estimating homelessness* (19 December 2013) (available at: <http://abs.gov.au/ausstats/abs@.nsf/Latestproducts/2049.0Main%20Features22011>).

⁵ See *In the Public Eye*, above n 1.

In 2014–15, Homeless Law opened 77 new infringement matters, which constituted 17% of all new matters opened.

Homeless Law has compiled detailed data in relation to 44 of these matters, including 26 which involved fines and infringements for public transport offences.⁶



⁶ Homeless Law sought data on: (1) all infringements; (2) public transport infringements (includes failing to have a valid ticket, failing to provide evidence of a concession entitlement, having feet on seats and smoking on platform); and (3) public transport ticketing infringements (failing to have a valid ticket, failing to provide evidence of concession). We received detailed data in relation to 44 infringement matters: 26 involved public transport infringements; and 21 involved public transport ticketing infringements.

This data paints a picture of a system that is impacting harshly on some of the most struggling members of the community; exacerbating hardship and social isolation and imposing a heavy resource burden on services, agencies and courts, which are involved in an inefficient enforcement process.

3. The personal and financial cost of the current ticketing enforcement system

3.1 The importance of public transport for a fairer, more inclusive Victoria

Public transport has the capacity to reduce disadvantage, enhance social inclusion and facilitate access to social services.⁷ Accessible public transport also has a role to play in increasing social engagement and the alleviation of poverty.⁸ However, prohibitive fares and punitive penalties can inhibit equitable access to public transport, compound disadvantage and cause serious financial hardship.⁹

As this section identifies, the current public transport fares and enforcement framework:

- Impacts heavily, both personally and financially, on Victorians experiencing homelessness; and
- Imposes a significant resource burden on services that assist clients to navigate the infringements process, and on the courts and agencies involved in this process.

3.2 Disproportionate personal and financial impact of public transport fines

Victorians experiencing homelessness are heavily reliant on public transport to travel between services, attend appointments and, when needed, get shelter and respite.¹⁰

The circumstances of Victorians experiencing homelessness – which, in addition to homelessness, may include mental illness, substance dependence and poverty – mean they are:

- More likely to get fines and infringements on public transport; and
- Less likely to be able to address those fines through payment.

In these ways, the current public transport ticketing infringement framework operates in discriminatory ways against Victorians experiencing homelessness.

As this case study shows, affording public transport can be stressful for people experiencing homelessness and their daily strain and financial hardship can be exacerbated by the current fares and infringements system.¹¹

⁷ See, eg. Kate Rosier and Myfanwy McDonald, *The relationship between transport and disadvantage in Australia*, Australian Institute of Family Studies (August 2011) <https://aifs.gov.au/cfca/publications/relationship-between-transport-and-disadvantage-austr>.

⁸ Helena Titheridge et al, *Transport and Poverty: A review of the evidence* (1 July 2014) 24, 6. This study analysed a number of UK transport ticketing schemes, some which had been designed to reduce poverty and disadvantage. The author concluded that transport ticketing had the capacity to “contribute to the alleviation of poverty by facilitating access to employment and training.”

⁹ Ibid.

¹⁰ See, eg. Richard Bourn, *Transport and Poverty: A Literature Review* (May 2012) (available at: <http://www.bettertransport.org.uk/sites/default/files/research-files/transport-and-poverty-literature-review.pdf>); David Booth, Lucia Hanmer and Elizabeth Lovell, *Poverty and Transport: A report prepared for the World Bank in collaboration with DFID*, June 2000, 4.4.3, 56.

¹¹ In the Public Eye, above n 1 (Julia).

Julia: woman experiencing homelessness and the stress of public transport fines

Julia* found herself homeless after having to leave private rental. During her time staying in emergency accommodation and couch surfing she accrued about \$2000 in fines for travelling on public transport without a ticket.

"I was quite ill at the time, had a bad flu, and just got on a tram for a couple of stops. I didn't have any change on me, so I thought I'd just get on for a couple of stops. The inspectors came on and they gave me a fine straight away. That was quite annoying."

The effect of having the fines is very stressful because when you are unemployed or on a pension, it is pretty difficult to survive as it is. The fines are quite expensive, and if you're on a pension or any kind of Centrelink payment, it's a lot of money, it's quite a large percentage of your fortnightly budget. You don't have a spare \$200 just to give to a fine and if you're homeless as well it's more stressful because it is already incredibly stressful not having a place of your own."

The system would be better if they were a lot more flexible with how you were able to pay the fines off, and if they were more understanding of people's circumstances. To have the fines resolved is a huge relief because knowing that you have the fines – they're always there at the back of your mind - you're worried about them because you don't know what will happen. Not that I have any assets that anyone can take from me, but it's still a bit of a worry having the fines accumulate."

*Name has been changed

The average weekly earnings in Australia as at May 2015 is \$1484.50, whereas the weekly income of a person on Newstart Allowance is only \$261.70 i.e. 17.63% of the average weekly earnings.¹² In practice, this means that infringements hit low income people harder: a \$223 infringement for not having a valid ticket or failing to show evidence of concession entitlement is 85% of that person's weekly income.¹³ Payment would leave them with \$39 to get through the week.

In addition, enforcement fees and costs are added to the original infringement penalty at different stages of the infringements system, imposing considerably more financial strain.

What we see through our work is that the burden of multiple infringements, the threat of enforcement and the financial pressure, including the escalating cost of infringements as they progress to enforcement order and warrant stage, exacerbate the stress and social exclusion of homelessness.

¹² See Department of Human Services, *Newstart Allowance* (5 February 2016) (available at: <https://www.humanservices.gov.au/customer/services/centrelink/newstart-allowance>).

3.3 The cost to services and the State of the current ticketing enforcement framework

Homeless Law knows through our casework that once vulnerable people enter the infringements system, it is extremely difficult to exit.

The diagram at Annexure 1 maps the life cycle of an infringement and the various options for dealing with infringements at different stages.

To better understand the resource implications of the infringements system, in 2013 Homeless Law engaged an independent consultant to undertake a high level analysis of Victoria's infringements system.¹⁴ The diagram at Annexure 2 captures the complexity of the current system, including the multiple agencies involved in administering the system. The review was not focussed specifically on public transport infringements, but nonetheless provides helpful insights into the system itself.

The key findings of the consultant's review are summarised below.

¹⁴ See Justice Connect Homeless Law, *What's the Cost? Infringements System Review* (November 2013) (available at: <https://www.justiceconnect.org.au/sites/default/files/Infringements%20System%20Review%20%28November%202013%29.pdf>).

External consultant reviews the infringements system

In 2013, Homeless Law engaged a consultant to review the resource implications of the infringements system. The consultant reviewed 13 infringements files run by Homeless Law and mapped the complex way in which fines and infringements progress through multiple stages and involve a number of agencies and decision-makers.

The consultant also conducted interviews with a number of representatives from the (then called) Department of Transport, Department of Justice, the Magistrates' Court and Victoria Police. The report, *What's the Cost? Infringements System Review*, made the following observations:

- The infringements process is long and complex with multiple agencies and changing options.
- People with special circumstances need professional help (legal, health and community) to navigate the complex system.
- Clients often struggle to resolve issues at infringement notice or penalty reminder stage. This can be because of the client's special circumstances and the complexity of the process (including that infringements can be listed with a number of different issuing agencies).
- The internal review process is underutilised for the following reasons:
 - there is variability within the internal review process due to limited capability and capacity across enforcing agencies;
 - internal review does not allow for multiple cases from different agencies to be addressed concurrently (i.e. separate applications have to be made to each enforcement agency);
 - some agencies have an objective internal review function with clear processes, guidelines and systems to support the internal review. Other agencies have non-standardised processes for considering special circumstances applications. This often leads to inconsistent outcomes.
- Due to the complexity of the infringements system and clients' special circumstances, the option of applying for revocation of an enforcement order under section 65 of the *Infringements Act* becomes the default position for the majority of Homeless Law's clients. Clients with special circumstances need legal assistance to navigate the review process.
- Duration of cases can vary, with cases analysed taking between **6 months** and **2.5 years** to resolve. The average time taken to resolve an infringements matter was **14 months**.

The consultant found:

It is difficult to gain a system wide view of activity costing and there is no visibility of the cost to society. This is due to siloed and inaccessible information across stakeholders.

Clients are moved in between process stages and stakeholders, often in loops, returning to law firms or agencies multiple times. This can be stressful and result in failures to appear before courts, impacting ability to resolve cases.

The consultant considered the resource implications of running infringements matters for Homeless Law. Homeless Law's outreach-based service model relies on the pro bono services of member law firms to assist clients to resolve their infringement matters. Using the sample of 13 infringements files, the consultant found that the average cost to law firms of running an infringements matter was **\$19,825**. One case required an investment equivalent to **\$54,000** in fees to resolve.

The case study below also highlights the protracted, inefficient nature of the infringements system. In this case, a woman experiencing homelessness received 5 infringements for travelling on public transport without a ticket, when going to a soup van for food or volunteering in the community. The infringements took almost three years and two court appearances to resolve.

Stephanie: Woman experiencing homelessness takes 34 months to resolve public transport fines

Homelessness and public transport

Stephanie is a middle-aged woman with a history of homelessness, who suffers from an acquired brain injury and depression, and whose only income is Newstart Allowance.

Stephanie approached Homeless Law after she had been issued with five infringements from July 2012 to July 2013 for travelling without a valid ticket on public transport.

Stephanie was homeless after having to leave her rental property when her relationship ended. She was paying her ex-partner to be able to sleep on a couch in his office, but could not stay at the office during business hours.

The infringements were issued when Stephanie was travelling from the office to either a suburban soup van for dinner (there were no kitchen or bathroom facilities in the office), or to one of her many volunteering commitments.

Application for revocation and supporting evidence

Between September 2013 and February 2014, Stephanie's lawyers obtained a variety of support letters from treating doctors, support workers and the operator of the soup van. The letters commented on her homelessness and mental health issues.

In February 2014, an application for revocation was submitted on the basis of Stephanie's homelessness, mental illness and financial hardship. The application was supported by five letters of support and documentation from Centrelink.

In June 2014, the Infringements Court responded to the application, requesting more detailed evidence that more clearly identified the link between Stephanie's homelessness/mental illness and the infringements.

In October 2014, the Infringements Court revoked the enforcement orders on the basis of special circumstances. The matter was referred to the Magistrates' Court for hearing. In May 2015, the infringements were unconditionally dismissed by the Magistrates' Court.

34 months passed between the time Stephanie was issued her first fine in July 2012 and the dismissal of this fine by the Court.

Additional fine

Whilst this process was underway, Stephanie was issued with an additional infringement for travelling without a valid ticket in January 2014. In May 2015, a new application for revocation was submitted, accompanied by 12 annexures containing supporting materials. In June 2015, the fine was revoked and ultimately referred to the Magistrates' Court.

In January 2016, the final infringement was unconditionally dismissed by the Magistrates' Court, more than 2 years after it was issued.

The resolution of Stephanie's infringement issues required 164 hours of lawyers' time (with a market value of \$58,367).

The way in which vulnerable people become caught up in the infringements system was also observed by the external consultant that undertook the *What's the Cost?* review referred to above. The consultant observed that clients became caught in the 'Infringements Trap':

Due to the time required to navigate through the infringements system, many individuals who have special circumstances may reoffend while they are in the process of dealing with their fines. This means they can have various infringements at different stages and can become caught in the infringements system. These clients require ongoing support and resources to deal with further infringements and can

*find themselves unable to exit the infringements system or to fully resolve their infringements issues.*¹⁵

The escalation of fines during periods of homelessness and the complexity of the system for addressing the fines leaves people overwhelmed and often needing intensive legal and non-legal support to resolve their infringements.

In preparing this position paper, Homeless Law reviewed time and cost data for 11 public transport infringements files. That review identified that:

- On average, 51 hours had been spent working on each matter; and
- This had an equivalent commercial cost for Homeless Law's pro bono lawyers of \$16,640.

In addition to the resources of Homeless Law, our pro bono firms and our community legal centre colleagues, the current system requires a significant commitment of resources from the State, which is responsible for issuing, reviewing and enforcing infringements, including through the courts.

3.4 Fines Reform: A cause for optimism but not a panacea

Homeless Law acknowledges the Victorian Government's significant efforts to improve the efficiency and effectiveness of the infringements system through the enactment of the Fines Reform Act and the Fines Reform and Infringements Acts Amendment Bill 2016.

In particular, we welcome the following changes that will be introduced under the Fines Reform Act:

- Introducing the Work and Development Permit scheme to allow people to address their fines and infringements through participation in a range of activities such as counselling, drug and alcohol or mental health treatment or education;
- Establishing a single administrative model for the collection and oversight of infringement fines and court fines;
- Making payment options, engagement with the system, and access to justice quicker, easier and more cost-effective for people with fines;
- Enabling the consolidation of infringement fines and court fines into single manageable accounts; and
- Reducing the administrative and hearing workloads of the courts.¹⁶

Homeless Law also warmly welcomes the further amendments proposed in the Fines Reform and Infringements Acts Amendment Bill 2016:

- Retention and expansion of the 'deemed served' scheme to allow prisoners to address their infringements during their time in prison so they can exit without the personal and financial burden hanging over their heads;
- Improvement of the Work and Development Permit (WDP) scheme, through extending it to infringements at enforcement order and warrant stage;
- The early commencement of a more consistent and flexible approach to internal review, including greater oversight through Fines Victoria, the development of guidelines, monitoring of internal review processes, and the ability to make recommendations to enforcement agencies regarding their internal review process; and
- Consistency in sentencing powers for infringements fines and court fines.

¹⁵ Ibid.

¹⁶ Fines Reform Bill 2014, Explanatory Memorandum 2.

Homeless Law congratulates the Victorian Government on its ongoing commitment to reforming the fines and infringements system. We note, however, that positive legislative reform alone cannot deliver a fairer, more accessible public transport system. In particular, the amended Infringements Act is still focussed on the mechanisms for dealing with people once they have entered the infringements system. Homeless Law reiterates that there is a significant amount of work that can still be done on preventing people entering the system in the first place. This position paper focusses on those preventative measures, as well as aspects of the infringements system that are not addressed by infringements reform.

4. The benefits of free public transport for Victorians experiencing homelessness

4.1 Extending the benefits of free public transport

Homeless Law's clients are often heavily reliant on public transport for health, wellbeing and community engagement, including getting to appointments. They are, however, simultaneously less able to afford public transport and more heavily impacted by the current ticketing and enforcement framework.

As discussed above, in addition to imposing financial and personal strain on individuals, and exacerbating social isolation, the current ticketing and enforcement framework imposes a significant resource burden on the government agencies, courts and services (including legal services and financial counsellors) that are also involved – in differing ways – in the compliance framework.

Recognising the benefits of accessible public transport and the current costs of enforcement against people who are unable to pay, Homeless Law recommends that the government considers introducing free travel on the Public Transport Victoria network for low income Victorians who hold a concession card.

Homeless Law notes that Public Transport Victoria already offers free public transport to particular categories of people, including State and Federal Members of Parliament, judges and some Public Transport Victoria employees.¹⁷ Homeless Law recommends that this generosity is extended to the most vulnerable Victorians least in a position to afford a public transport fare.

Providing targeted free public transport to certain members of the community would deliver the following benefits:

- Significantly reduce administrative, enforcement and compliance costs associated with concession fares. Currently, there is a complex system incorporating 9 different concession entitlement cards and 25 types of Free Travel Passes.¹⁸
- Reduce the costs, time and stress to our clients who are forced to engage in the lengthy process of seeking withdrawal or revocation of fines on the basis of their special circumstances.
- Reduce the costs and resource burden to government agencies and the courts involved in enforcing or otherwise dealing with ticketing offences for low income, vulnerable members of the community.
- Reduce the significant time and cost burden on community legal services, financial counsellors and support services who assist clients to address fines and infringements stemming from public transport ticketing offences.
- Simplify point-of-sale ticketing procedures.
- Reduce barriers to use to the use of public transport, which would in turn promote social inclusion, wellbeing and community engagement.

¹⁷ Public Transport Victoria, *Victorian Fares and Ticketing Manual* (1 January 2015) 24.

¹⁸ Ibid. Examples of free travel categories include Wheelchair Travel Pass, Employee Travel Pass, Gold Pass Travel Card, Charitable Organisations Travel Pass.

Recommendation 1: Free public transport for concession card holders

Recognising the benefits of accessible public transport and the current costs of enforcement against people who are unable to pay, Homeless Law recommends the introduction of free travel on the Public Transport Victoria network for people with concession cards.

If the recommendation for free public transport for eligible concession holders is not adopted in the short-term, the remaining recommendations aim to improve the fairness and equity of the current public transport ticketing infringement framework for vulnerable Victorians.

4.2 Expansion of the Access Travel Pass scheme

The introduction of free public transport for concession card holders would be a fair and forward-thinking policy decision that improves mobility and social inclusion and avoids the current burden of enforcing a complex ticketing system against those least equipped to pay. If, however, this proposal is not adopted, we need to develop effective, proactive mechanisms for preventing vulnerable people entering the infringements system.

An existing framework that could be built upon and improved is the 'Access Travel Pass' currently offered by Public Transport Victoria for 'people with a significant permanent physical or mental disability who travel independently on Victoria's public transport network and can demonstrate that due to their disability they cannot use the myki ticketing systems'.¹⁹ To be eligible for the Access Travel Pass a person must:

- have a permanent physical disability, cognitive condition or mental illness and be unable to touch on or touch off a myki at the myki readers independently and / or consistently in all cases;
- be a permanent resident of Victoria; and
- be able to travel independently on Victoria's public transport network (without any assistance from a carer or companion).²⁰

The Access Travel Pass entitles the pass holder to free travel on:

- Melbourne metropolitan trains, trams and buses;
- V/Line services;
- Regional town buses; and
- Regional services that have a contract or service agreement with Public Transport Victoria.²¹

Public Transport Victoria's guide to the Access Travel Pass explains that:

The Access Travel Pass is a registered myki that has the applicant's photograph and name printed on the card.

The pass holder is required to carry the Access Travel Pass with them at all times when travelling on public transport services.

It authorises free travel on public transport services within Victoria at all times, regardless of whether it has been touched on or off.

Where possible, the pass holder is encouraged to touch on or touch off their Access Travel Pass, so that their journeys can be included in the number of passenger trips and used to improve services.

Alternatively, the Access Travel Pass may be used as a "flash pass" to provide entry and exit at gated stations and to show to an authorised officer (ticket inspector) if requested.

¹⁹ See Public Transport Victoria, Access Travel Pass (available at: <http://ptv.vic.gov.au/tickets/free-travel-passes/access-travel-pass/>).

²⁰ Ibid.

²¹ Ibid.

A lanyard is provided with each Access Travel Pass to assist with card retention and ease of access when travelling.²²

In the experience of Homeless Law, Access Travel Passes are under-utilised and are not as effective as they could be at preventing highly vulnerable people from entering the infringements system. This may be attributable to a lack of awareness about the Access Travel Pass amongst agencies working directly with people who would be eligible.

Tom's case study, below, demonstrates that when Access Travel Passes are issued, they can be effective at preventing people from re-entering the infringements system.

Better late than never: Tom's Access Travel Pass experience

Tom lived in transitional housing and suffered from schizophrenia, depression, anxiety and substance abuse issues. Tom's sole source of income was the Disability Support Pension. He was reliant on a Salvation Army case worker for assistance to manage his affairs. Tom approached Homeless Law for assistance with 18 public transport fines totalling approximately \$7,000.

Tom relied on public transport as his primary mode of transport. He used public transport to visit his doctor and psychiatrist, attend meetings with his case worker, visit family and buy food. The majority of Tom's fines were issued for travelling without properly touching on his myki, despite having enough money on the card.

After Tom was issued with the infringement notices, Tom's case worker assisted him to apply for an Access Travel Pass. The application was approved. Tom can now travel on public transport for free, without needing to touch on his myki, and has not been issued with any more infringement notices.

Homeless Law submitted a special circumstances application for Tom's outstanding infringements. The application was accepted by the Infringements Court and the fines were withdrawn by the DEDJTR.

Previously, in 2012, Tom successfully applied for an earlier enforcement order for a public transport offence to be revoked due to his special circumstances. Had he been referred to the Access Travel Pass program at this point, Tom would not have been issued with 18 further infringements. This would have represented a considerable cost saving to government and saved Tom from needless stress and anxiety.

Tom's previous application on the basis of his mental illness and homelessness had not been used as an opportunity to proactively link him with the Access Travel Pass system. As a result, 18 further infringements were issued with the associated strain on Tom, services and the system.

To avoid this, Homeless Law recommends:

- A new referral process is put in place where people found to have special circumstances by the issuing agency, the Infringements Court or the Magistrates' Court Special Circumstances List are referred to the Access Travel Pass scheme.
- Where an applicant's Access Travel Pass application is accepted, all infringements at infringement stage should be cancelled by the DEDJTR pursuant to section 18(2)(c) of the Infringements Act and, for matters that have proceeded to enforcement order or warrant stage, the DEDJTR should make an application for revocation of enforcement orders to the Infringements Court, allowing those infringements to be cancelled under section 66(1) of the Infringements Act.

Homeless Law also notes that the criteria for the Access Travel Pass is too narrow and should be expanded to expressly include people experiencing:

²² Public Transport Victoria, *Access Travel Pass Information and Application Form* (March 2015) (available at: <http://ptv.vic.gov.au/assets/final-Access-Travel-Pass-App-27-Mar-2015.pdf>).

- a mental or intellectual disability, disorder, disease or illness;
- an addiction to drugs, alcohol or a volatile substance; or
- homelessness,

that contributes to the person being unable to consistently use the myki system.

Homeless Law also recommends allowing for people who fall outside of these criteria to be able to apply for an Access Travel Pass, and for these applications to be considered on a case-by-case basis.

Where these circumstances are not permanent, for example homelessness, the person could be required to renew their Access Travel Pass every two years.

In terms of the evidence required to successfully apply for an Access Travel Pass, Homeless Law recommends that a broader range of professionals are able to endorse an application, including:

- Homelessness services, including a specialist health or housing service provider or case worker;
- Accredited drug treatment agencies or accredited drug counsellors;
- Social workers, case workers or case managers;
- General practitioners;
- Psychiatrists, psychologists or psychiatric nurses.

Homeless Law recommends that there should not be an exhaustive list of practitioners who can endorse a person's application for the Access Travel Pass. There should be scope to accept evidence from other qualified professionals where it adequately identifies that the client's disability, mental illness, homelessness and/or addiction means they are unable to consistently use the myki system.

Recommendation 2: An improved Access Travel Pass scheme to prevent people with special circumstances entering the infringements system

We need improved processes for identifying people with special needs or circumstances that do not rely on a person self-identifying at the point of contact. A current example is the Access Travel Pass scheme, which is available to people with a permanent physical or mental disability that prevents them using myki ticketing systems. Access Travel Passes are, however, under-utilised and are not as effective as they could be at preventing highly vulnerable people from entering the infringements system.

Homeless Law recommends the following improvements:

- **Broader eligibility** – The Access Travel Pass scheme should be widened to include people whose homelessness, mental illness and/or substance dependence contributes to them being unable to consistently use the myki system. Where their circumstances are not permanent, for example homelessness, renewal could be required every two years.
- **Awareness raising** – A concerted awareness campaign regarding the expanded Access Travel Pass should be supported to promote this scheme within mental health, homelessness, financial counselling, legal, health and community services.
- **Referral schemes** – A formal referral scheme should be implemented, where Authorised Officers at first instance, the Department of Economic Development, Jobs, Transport and Resources on review, and the Infringements Court or Magistrates' Court as part of the special circumstances process, can provide potentially eligible public transport users with details about the sign up process for the Access Travel Pass scheme.
- **Withdrawal or revocation on acceptance** – Where a person's Access Travel Pass application is accepted, all outstanding infringements should be cancelled by the Department of Economic Development, Jobs, Transport and Resources and enforcement orders revoked.
- **Database** – With their consent, Victorians who have an Access Travel Pass should be in a searchable database accessed by Authorised Officers at the point of contact to avoid unnecessary problems arising from the person's failure to carry their card.

5. A preventative approach: supporting frontline decision-makers and early exit

5.1 Reconsidering the effectiveness of fining vulnerable public transport users

As discussed throughout this position paper and highlighted in a number of the case studies and personal accounts, a lack of a safe and secure home means that people are carrying out most of their lives in public places. They are heavily reliant on public transport, experiencing severe financial hardship and may be dealing with other complex circumstances including deteriorating mental health or escalating substance use. Homelessness also

makes people very visible to issuing officers. All of these factors mean that, during periods of homelessness, people can accrue thousands of dollars in fines and infringements.

It is also important to note that any potential 'deterrent effect' of ticketing and enforcement is not relevant for Homeless Law's clients whose conduct is dictated by a range of hardships, including homelessness, mental illness, poverty and substance dependence, rather than a clear decision about whether to pay for public transport or not.

For most of Homeless Law's clients, being issued with infringements during periods of homelessness does not act as a deterrent or play a role in preventing further offending. Fining people with special circumstances rarely has the preventative effect that it might otherwise have for people whose conduct is not influenced so heavily by severe hardship. Furthermore, the complexity of the current system and its drawn out nature can impact negatively on a person's recovery through imposing further strain and preventing them from moving on with their lives.

Grant's case study, below, highlights that being issued with infringements has no discernible deterrent effect for vulnerable people with special circumstances.

Grant: Infringements not a deterrent during a lifetime of special circumstances

Grant, a 43 year old Disability Support Pension recipient, sought Homeless Law's assistance with 50 infringement periods spanning more than 20 years, including 30 infringements for failing to produce a valid public transportation ticket. These fines totalled more than \$18,000.

Grant's diagnoses include depression, 'chronic suicidality' and a long history of substance involving heroin, cannabis, amphetamines, LSD and other hallucinogens. In addition to his mental illnesses and substance dependence, Grant has experienced decades of recurring periods of homelessness, including a significant period of time residing on the streets and in a variety of squats.

Due to these circumstances, Grant has struggled to control his basic day-to-day functions and has not been in a financial position to pay for public transport tickets or address the fines. The infringements have not acted as a disincentive to his offending and the fines have no realistic prospect of being paid.

A special circumstances application is currently under consideration by the Infringements Court.

Recognising this, it is worth re-considering whether issuing infringements to vulnerable people with special circumstances is an effective way of addressing non-compliance with ticketing requirements.

Accordingly, this section proposes a range of measures that aim to support decision-makers to prevent vulnerable people entering the infringements system, or assist them to exit at the earliest possible point.

Homeless Law understands there are three key steps involved in issuing a public transport Infringement Notice:

1. An Authorised Officer issues a Report of Non-Compliance (**RONC**). The Authorised Officer has discretion whether or not to issue a RONC, pursuant to guidelines contained in the *Authorised Officer Reference Notes Manual*. If an Authorised Officer considers that an offence has occurred beyond a reasonable doubt, he or she completes a RONC form, which contains details of the infringement, the passenger's personal details and the passenger's explanation for the offence.
2. The RONC is signed off by a supervisor and reviewed by the relevant public transport operator (Metro Trains, Yarra Trams or a bus provider) for any irregularities, then sent to the DEDJTR.
3. The DEDJTR reviews the RONC and exercises discretion to determine whether or not an infringement notice is issued (**RONC Review**).²³

²³ See Victorian Ombudsman, *Investigation into the issuing of infringement notices to public transport users and related matters* (December 2010) 32–3 (**2010 Ombudsman Report**).

A preventative approach, focussed on supporting frontline decision-makers to select options other than issuing a RONC or an infringement notice and early identification of people who should be exited from the system, has significant potential to reduce the hardship and inefficiency created by the current enforcement-based approach.

5.2 Supporting decision-making by Authorised Officers at first instance

Homeless Law appreciates that Authorised Officers are required to make difficult on-the-spot decisions in the face of competing obligations (i.e. addressing fare evasion on public transport as well as dealing with a range of different people with vastly different circumstances). Authorised Officers need to be supported to balance competing priorities, consider people's individual circumstances, deal appropriately with vulnerable people and weigh up alternatives to issuing fines and infringements.

The Attorney-General's Guidelines to the Infringements Act state:

[T]he Infringements Act does not require that enforcement agencies consider 'special circumstances' at the issuing stage. However, if issuing officers are to exercise such discretions, then each enforcement agency must have a code of conduct to guide officers with the responsibility for issuing infringement notices in the discharge of their responsibilities.

The code should take into account the nature of the business of the issuing agency and the role and functions of its issuing officers. The code should focus on principles of the infringements system with respect to fairness and the recognition of individual circumstances, and deal with the appropriateness of issuing infringements to people with obvious special circumstances.²⁴

We understand that some enforcement agencies have codes and run training on issuing cautions and warnings. Unfortunately, in Homeless Law's experience, this discretion is often not consistently exercised in practice.

Hamish's account of his experiences getting fines on public transport highlights the way in which vulnerable Victorians can feel targeted by Authorised Officers when using public transport.²⁵

²⁴ Attorney-General's Guidelines to the Infringements Act 2006 cl 3.

²⁵ In the Public Eye, above n 1 (Hamish).

Hamish: young man experiencing homelessness feels targeted on public transport

"I've been homeless since my mid-teens, living mainly in the inner city. I've been squatting for ages so I kind of don't feel like part of society anymore.

...

It's a bit upsetting when you are on a tram or train and you find that whenever there is a ticket officer they immediately bee-line their way to you. It does something to your self-esteem. The first few times it happens you think nothing of it, but then by the end you are looking for these people. I'm like a dog who has been hit. Once you've had the crap beaten out of you a few times it just becomes 'yes sir', it's kind of sad in a way.

A couple of times people giving the infringements have been nice, but a couple of times it has been demeaning. Once I had an appointment at Centrelink, I got off the train and was approached by four plain clothed officers. They asked me for a ticket, when I didn't have one they took me aside and photographed me for 'local records'. It was a bit weird standing on the platform getting your photo taken.

...

It is beneficial for the community to change the system because with the fines, it's like throwing paper at a fire. I don't know whether it has to do with training but also setting guidelines. If it does become that you can't get on public transport without a ticket, that's going to keep people from getting public transport to their doctors and to their appointments. It puts additional strain on the health system, the legal system and the welfare system.

Getting the fines sorted was like a weight lifted, like going to the dentist and having the pressure released. It's a good feeling. It encourages me to get my stuff a bit more organised and together, start working again."

It is important for Authorised Officers to be able to properly exercise their discretion, identify the risk of over-enforcement and appropriately interact with vulnerable people.

They can be better supported to do this through training, guidelines and protocols and oversight.

Improved training to support exercise of discretion

Homeless Law understands that the *Authorised Officer Reference Notes Manual* states that:²⁶

[Y]ou may consider using your discretion to decide not to report an offence where you have formed a reasonable belief that one of the following circumstances exists: the passenger is physically incapable of purchasing and/or validating a ticket as a result of old age or disability the passenger genuinely does not understand the need to, or how to, purchase a ticket because they are:

- very young*
- are a visitor or tourist from outside Melbourne*
- have no (or limited) understanding of English*
- the passenger is homeless or impecunious.*

Homeless Law recommends that the *Authorised Officer Reference Notes Manual* is amended to expressly incorporate exercising discretion on the basis of:

- (a) a mental illness or intellectual disability
- (b) an addiction to drugs, alcohol or a volatile substance.

²⁶ 2010 Ombudsman Report, above n 23, 29.

In order for this discretion to be appropriately exercised, it is important for Authorised Officers to be trained to be able to identify when a person may be affected by these circumstances and to understand how those circumstances may impact on their conduct on public transport.

All new and existing Authorised Officers should be given comprehensive training about the complex circumstances that may affect the people they're dealing with, including homelessness, mental illness, substance dependence, poverty and family violence. This training should involve people with a direct experience of these circumstances, who can play an effective role in improving understanding and addressing any pre-existing stereotypes or assumptions that Authorised Officers may have.

Recording the exercise of discretion and ensuring transparent policies

If Authorised Officers are not presented with alternatives to fining people, they will inevitably resort to fines as a way of managing non-compliant use of public transport, even where it is not an appropriate or effective way of dealing with that conduct.

This is discussed below in relation to the Homeless People in Public Places Protocol, which aims to support officers to make decisions other than fining people, including through supporting appropriate interactions with people experiencing homelessness and providing referral pathways to services or supports.

In addition to improving Authorised Officers' ability to make decisions other than issuing a RONC, Homeless Law recommends that Authorised Officers are required to record their exercise of discretion i.e. to keep track of when a warning was issued instead of a RONC. In this way, statistics about the use of discretion can be obtained and analysed to support and encourage good decision-making and identify any systemic issues (e.g. particular officers issuing RONCs where a warning may have been a more appropriate option).

We note that this recommendation is consistent with the Victorian Ombudsman's recommendation, which was accepted in principle by the Department, for

*"authorised officers [to] record the details of commuters for whom a warning has been issued in lieu of a RONC/infringement. This information should be retained for statistical purposes, trend analysis, training, and the identification of repeat offenders. If the authorised officer does not believe an offence has been committed, this should not be considered a warning, but rather as a 'no offence'."*²⁷

Homeless Law notes that Authorised Officers are not consistently trained or required to obtain details about or consider whether a person being issued with an infringement notice has a mental illness, homelessness or substance dependence that contributed to their non-compliance. Homeless Law is also conscious that these are sensitive, personal issues and people are likely to be reluctant to mention or discuss them on public transport. As discussed in relation to the Access Travel Pass, above, this is a proactive measure than can be taken that would avoid vulnerable people being issued with infringements.

In addition, to support better informed exercise of discretion, Homeless Law suggests that RONCs are amended to allow for the recording of additional information that would:

- Prompt the Authorised Officer to turn their mind to the person's vulnerability and consider alternatives to issuing a RONC, such as a warning; and
- Provide the Department with more insight to support their decision-making in relation to whether to issue an infringement.

Homeless Law recommends a checkbox to the following effect is included on RONCs: 'there are factors indicating the possible existence of special circumstances, but they were not clear enough for me to issue a warning'.

Furthermore, in relation to policies and guidelines, Homeless Law understands that procedures governing Authorised Officers' conduct, such as the *Authorised Officer Reference Notes Manual*, are not publically available (apart from short extracts included in the Victorian Ombudsman's 2010 report).²⁸ To improve transparency and accountability, Homeless Law recommends that the Department make these procedures and policies publicly available.

²⁷ Ibid 31.

²⁸ Ibid 29–30.

Publishing these internal procedures would be consistent with other Victorian Government agencies. For example, the Department of Health and Human Services, which makes its internal operational guidelines relating to public housing tenancies available on its website.²⁹

Public Transport Victoria also publishes twice yearly *Official Fare Compliance Series* reports containing extensive statistics about fare enforcement.³⁰ Homeless Law recommends that these reports are expanded to include statistics about:

- Number of RONCs issued by Authorised Officers; and
- Number of times Authorised Officers exercised their discretion not to issue a RONC and the reason(s) for the exercise of this discretion.

Public Transport Victoria already records data about RONCs issued by Authorised Officers, as noted by PTV's *Network Revenue Protection Plan*:

"PTV tracks weekly the work performed by operator Authorised Officers and Multi-modal Authorised Officers in terms of tickets checked, and Reports of Non-Compliance and On-the-spot Penalty Fares issued".³¹

Accordingly, it would not be onerous to make these statistics publically available.

Protocol for Homeless People in Public Places

Homeless Law is currently working with a number of specialist homelessness and justice agencies to revive and strengthen the Homeless People in Public Places Protocol (**Protocol**). The Protocol is a high level document that provides a framework and guidance for dealing with people experiencing homelessness. This project is being led by the Justice Access Advisory Group, which includes:

- Victoria Legal Aid
- Magistrates' Court of Victoria
- City of Melbourne
- Department of Justice and Regulation
- Department of Health and Human Services
- Victoria Police
- Council to Homeless Persons
- cohealth
- Launch Housing
- RDNS Homeless Persons' Program
- The Salvation Army
- The Living Room
- Inner Melbourne Community Legal
- Youth Law
- Justice Connect Homeless Law.

²⁹ See, eg, Department of Human Services, *Tenancy Management Manual* (available at: <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/tenancy-management-manual>).

³⁰ Public Transport Victoria, *Research and statistics* (October 2015) (available at: <http://ptv.vic.gov.au/about-ptv/ptv-data-and-reports/research-and-statistics/>).

³¹ Public Transport Victoria, *Network Revenue Protection Plan* (January 2015) (available at: <https://ptv.vic.gov.au/assets/PTV/PTV%20docs/research/2015-Network-Revenue-Protection-Plan.pdf>).

Homeless Law has invited the DEDJTR to join the consultation in relation to the Protocol and we are hopeful that the Department will participate in this process and consider endorsing the Protocol, which aims to: avoid unnecessary interactions with people experiencing homelessness; ensure that where interactions do occur they are appropriate and respectful; and support officers to consider options other than fines and charges when dealing with people experiencing homelessness.

The case study below explains how a similar protocol works in NSW.

Responding effectively to homelessness: NSW Government Protocol for Homeless People in Public Places

Aims and signatories

The NSW Protocol aims to 'help ensure that homeless people are treated respectfully and appropriately and are not discriminated against on the basis of their homeless status' and to 'provide a framework for interactions between officials and homeless people in public places'.

Signatories to the NSW Protocol are: Housing NSW, NSW Police Force, Community Services, Department of Premier and Cabinet, Office of Environment and Heritage, NSW Health, RailCorp, State Transit Authority of NSW, Sydney Harbour Foreshore Authority, Sydney Olympic Park Authority, Aboriginal Affairs and Ambulance Service of NSW.

Guidance on appropriate responses

The NSW Protocol acknowledges that 'like all other members of the public, homeless people have a right to be in public places ... at the same time respecting the right of local communities to live in a safe and peaceful environment'.

The NSW Protocol provides that a homeless person is not to be approached unless:

- they request assistance;
- they appear to be distressed or in need of assistance;
- an official seeks to engage with the person for the purpose of information exchange or provision of a service;
- their behaviour threatens their safety or the safety and security of people around them;
- their behaviour is likely to result in damage to property or have a negative impact on natural and cultural conservation of environment, including cultural heritage, water pollution and fire risks;
- they are sheltering in circumstances that place their or others' health and safety at risk (for example, staying in derelict buildings, high risk areas);
- they are a child who appears to be under the age of 16;
- they are a young person who appears to be 16 to 17 years old who may be at risk of significant harm; and
- they are a child or young person who is in the care of the Director-General of the Department of Family and Community Services or the parental responsibility of the Minister for Family and Community Services.

The Protocol is an agreement by government organisations to respond appropriately to homeless people who are in public places and acting lawfully. It doesn't prevent agencies from acting where health or safety is at risk or a breach of the peace or unlawful behaviour has occurred. It encourages officials to consider the individual's circumstances when enforcing laws and to use discretion which takes account of 'the complex needs of homeless people, including mental health issues, drug and alcohol misuse and cognitive impairment'.

Implementation and evaluation

'Guidelines for Implementation' have been published and it is recommended that the NSW Protocol is addressed in induction training for all new staff and in development training for existing staff. Housing NSW developed a 'Protocol Training Package' to support organisations to adopt and implement the protocol.

Signatories are also advised to conduct internal monitoring and review of the NSW Protocol and its implementation and impact. The Protocol will be reviewed every two years.

This kind of practical, clear guidance would provide Authorised Officers with support and resources to engage appropriately and effectively with people experiencing homelessness. The Protocol is a high level policy

document that allows for discretion and agency-specific implementation, thereby providing a framework and guidance for officers making difficult decisions in complex situations.

These documents – and the negotiation, education and leadership that accompany their development and implementation – have the potential to play a significant role in reducing the negative impact of the current public transport ticketing system on people experiencing homelessness through improving the understanding of Authorised Officers and providing them with direction and guidance about when and how to interact with people experiencing homelessness.

They also support Authorised Officers to exercise their discretion in a way that prevents homeless people entering the infringements system when their needs could be more appropriately dealt with by health, housing and support services.

In considering the Protocol, Homeless Law also notes that the DEDJTR and public transport franchisees are core and functional public authorities (respectively) for the purposes of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and, accordingly, are required to give proper consideration to relevant human rights when making decisions.³² We further note that the *2015 Review of the Charter of Human Rights and Responsibilities Act* recommended that “the provision of public transport” is expressly listed as a function of a public nature, which would provide certainty that public transport franchisees are required to act compatibly with the Charter when exercising a public transport function.³³

The recommendations in this section in relation to training, data and a Homeless People in Public Places Protocol would help to ensure that the Department and franchisee-employed Authorised Officers act compatibly with the Charter through the proper exercise of discretion and consideration of all relevant factors, including factors relevant to the person’s human rights.

³² *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 38 and 4.

³³ Michael Brett Young, *2015 Review of the Charter of Human Rights and Responsibilities* (2015) 62.

Recommendation 3: Support and guidance for Authorised Officers as frontline decision-makers

The current public transport ticketing infringement framework does not provide fair outcomes for homeless Victorians whose circumstances (1) increase the likelihood of them receiving an infringement; and (2) make it harder for them to deal with infringements once received.

A preventative approach, which focusses on supporting frontline decision-makers to select options other than issuing an infringement and early identification of people who should be exited from the system, has significant potential to reduce the hardship and inefficiency created by the current enforcement-focussed approach.

Authorised Officers should be supported in their roles, including through:

- **Training** – Authorised Officers should receive comprehensive training about the complex circumstances that may affect the people they're dealing with, including homelessness, mental illness, poverty and substance dependence. There should be improved training about the exercise of discretion, including the existing bases on which discretion may be exercised.
- **Amendments to internal operating procedures** – Internal policies and procedures such as those in the *Authorised Officer Reference Notes Manual* should be amended, so Authorised Officers are better supported to appropriately exercise discretion by giving warnings or referrals rather than infringements to people with special circumstances. Specifically, the *Manual* should be amended to expressly include mental illness and substance dependence, in addition to the current criteria for the exercise of discretion (which include homelessness).
- **Recording the exercise of discretion** – A process should be developed to record when Authorised Officers exercise their discretion which results in not issuing a report of non-compliance (**RONC**) (e.g. issuing a warning).
- **Amendments to the RONC form** – The RONC form should be amended to allow for the recording of additional information that would prompt the Authorised Officer to turn their mind to the person's vulnerability and consider alternatives to issuing a RONC, and would provide the Department with more insight to support their decision-making in relation to whether to issue an infringement.
- **Publishing procedures and statistics** – The internal operating procedures that inform Authorised Officers' use of discretion should be made available to the public. Statistics about the use of Authorised Officers' discretion, including the number of RONCs issued and number of RONCs not issued due to the exercise of discretion should be recorded and regularly published.
- **Homeless People in Public Places Protocol** – The Department should participate in the Justice Access Advisory Group's Homeless People in Public Places Protocol consultation process and consider endorsing the Protocol, which aims to: avoid unnecessary interactions with people experiencing homelessness; ensure that where interactions do occur they are appropriate and respectful; and support officers to consider options other than fines and charges when dealing with people experiencing homelessness.

5.3 Avoiding unnecessary infringements through oversight

As mentioned above, presently, Authorised Officers are not required to obtain details about or consider whether a person being issued with an infringement notice has circumstances that caused the offending conduct (i.e. mental illness, substance dependence or homelessness led to them travelling without a valid ticket or evidence of their concession). The DEDJTR is therefore first likely to learn of relevant special circumstances as part of an

internal review process or, when the infringement is returned to the agency after a successful application for revocation to the Infringements Court.³⁴

As Public Transport Victoria notes:

*Authorised Officers will write a report of the alleged offence committed; they do not issue infringement notices or fines to passengers. Instead, they provide a report of the situation to the Department of Economic Development, Jobs, Transport and Resources. The department then determines whether the matter should be progressed and an infringement notice (fine) is issued and sent to you in the mail. If you have been spoken to in relation to multiple offences you may be charged on summons.*³⁵

Homeless Law's understanding is that, presently, the process of issuing an infringement notice after receiving a Report of Non-Compliance (**RONC**) is largely automated, with little room for discretion.

In addition to a more meaningful Access Travel Pass system and better informed and supported decision-making by Authorised Officers, the point at which a RONC is received and assessed by the DEDJTR is another important juncture at which people who should not be caught up in the infringements system can be exited. The following recommendations are aimed at improving these processes.

Improved guidelines, record keeping and oversight

Homeless Law understands that an *Official Warning in lieu of Infringement Notice* policy operates when RONCs are reviewed. The most recent publicly available statistics indicate that the Department sets aside approximately 0.0004% of RONCs on the basis of homelessness at the RONC review stage (69 out of 173,426 were set aside due to homelessness in the 2009/10 financial year).³⁶ This very small percentage is consistent with Homeless Law's experience that homeless public transport users who are issued with a RONC are very likely to be issued with an infringement notice by the Department.

These factors and statistics indicate that the Department's RONC review operates more as a rubber stamp than a review of the RONC and its appropriateness. The Victorian Ombudsman has also found that there is a very limited amount of discretion exercised at the RONC review stage:

*"the department relies on the report from the authorised officer that an offence has been committed and will not generally review the merits of a matter unless a subsequent request for review is submitted by a commuter following receipt of the infringement notice."*³⁷

These figures and observations indicate that the *Official Warning in lieu of Infringement Notice* policy is an under-utilised policy that is not operating as an effective mechanism for exiting appropriate people from the enforcement process at an early point.³⁸

Homeless Law recommends that the warning policy is expanded and effectively implemented to prevent people entering the infringements system inappropriately and unnecessarily.

Creation of a database to proactively flag those with special circumstances

Homeless Law recommends that the Department create a database containing the below specified information, which can produce a report to be considered by the Department during the RONC Review process. Using the information below, the Department could effectively divert RONC recipients with special circumstances before entering the infringement enforcement system. After the database has been set up, checking a RONC recipient's name would only take a couple of seconds and may result in significant cost savings by alerting the Department of relevant special circumstances at an early stage.

Internal Department data that could be included in the database:

1. Whether the RONC recipient has previously had infringement notices dismissed on the basis of special circumstances by the Magistrates' Court of Victoria;
2. Whether the RONC recipient has previously provided details to the Department at internal review stage that indicate he or she is subject to ongoing special circumstances; and

³⁴ See Infringements Act 2006 (Vic) ss 22–25 and 65–69 regarding applications for internal review on the basis of special circumstances and applications for revocation (respectively).

³⁵ Public Transport Victoria, *Authorised Officers and Enforcement* (available at: <http://ptv.vic.gov.au/getting-around/authorised-officers/>).

³⁶ 2010 Ombudsman Report, above n 23, 34.

³⁷ Ibid.

³⁸ Ibid 34.

3. The number of RONCs a person has been issued with over a preceding period of time (e.g. the last 6 months). This would assist in determining the context of the RONC recipient's offending.

External data that could, subject to technical limitations, be included in the database:

4. Whether the RONC recipient is connected to disability or mental health services. Homeless Law understands that Victoria Police already operate a system which provides this information to police officers; and
5. Whether the address provided by the RONC recipient to the Authorised Officer is that of a registered crisis accommodation provider.

To improve accountability and transparency, Homeless Law recommends that the internal operating procedures used by Department decision-makers at the RONC review stage are published. As noted above, publishing the internal procedures used by decision-makers would be consistent with other Victorian Government agencies.

Homeless Law also recommends a mechanism of oversight and reporting, which reviews the number and proportion of:

- RONCs made by Authorised Officers where it is subsequently determined that it is not appropriate to issue an infringement notice;
- infringement notices that are subsequently withdrawn after internal review;
- enforcement orders that are revoked by the Infringements Court; and
- infringements matters that are dismissed by the Magistrates' Court (including in the Special Circumstances List).

This reporting will allow for identification of areas where there is room to improve decision-making to prevent people with special circumstances or exceptional circumstances being caught up in the infringements system.

Recommendation 4: Better oversight, data and reporting to avoid issuing infringements inappropriately

Guidelines and a mechanism for oversight should be put in place to ensure that the decision to issue an infringement notice is not a rubber stamp and is instead an effective juncture for identifying when people should be exited from the system.

Measures should include:

- Expanding the use of warnings. The current warning policy should be expanded and effectively implemented to prevent people entering the infringements system inappropriately and unnecessarily.
- Creating a database to proactively flag those with special circumstances.
- Publishing the internal procedures used by decision-makers.
- Implementing a mechanism of oversight and reporting which reviews the number and outcomes of RONCs, infringement notices and enforcement orders.

5.4 A more consistent and effective internal review process

The internal review process provides an opportunity for vulnerable clients to exit the infringements system at an early stage.

Homeless Law's experience, however, is that the DEDJTR's internal review system is inconsistent and unpredictable. Applications for internal review that are supported by evidence of special circumstances are rejected and, in some cases, the DEDJTR accepts that the applicants have special circumstances but still rejects that application for the infringement(s) to be withdrawn. Under the current legislation, this is particularly

problematic, as rejected applications for review on the basis of special circumstances are automatically referred to open court under section 25(3) of the Infringements Act.

Unpredictable, inconsistent approaches to internal review applications by the DEDJTR and the likelihood of ending up in open court mean that people with special circumstances may choose to wait until the Infringements Registrar makes an enforcement order before making an application for revocation. Homeless Law welcomes the reforms proposed under the Fines Reform Act, which will stop the automatic referral to court where applications for internal review are refused.

Homeless Law also strongly supports the introduction of a more consistent and flexible approach to internal review, which is critical in ensuring early exit from the fines system. We therefore welcome the early commencement of the internal review provisions in the Fines Reform Act – proposed via the Fines Reform and Infringements Acts Amendment Bill 2016 – that provide for greater oversight through Fines Victoria including development of guidelines, monitoring of internal review processes, and the ability to make recommendations to enforcement agencies regarding their internal review process.

We are optimistic this will ensure a more consistent and equitable approach across all enforcement agencies – including the DEDJTR – in relation to internal reviews based on special and exceptional circumstances.

The case study below contrasts the benefits of a quick, effective internal review process with the protracted revocation process once infringements have progressed to enforcement stage.

Nigel: One infringement resolved quickly through internal review, another 19 via a protracted revocation process

In April 2015, Nigel approached Homeless Law for assistance with one fine at infringement notice stage and 19 infringements at infringement warrant stage, predominantly for failing to produce a valid ticket on public transport, totalling approximately \$8,500. At that time, Nigel was a 35 year old single father who had lost custody of his 1 year old child. He had addictions to marijuana and crystal methamphetamines, was illiterate, reliant on a Centrelink disability support pension and resided at a rooming house.

Nigel instructed for Homeless Law to submit an application for revocation on the basis of special circumstances. During May to September 2015, Homeless Law lawyers approached a number of Nigel's support workers and medical professionals for letters and reports to support Nigel's special circumstances application. Extensive discussions were necessary with a variety of supporting professionals in order to determine who had provided Nigel with relevant treatment and support. Some support workers required follow up conversations in order to provide letters of support.

In October 2015, a special circumstances application was submitted, accompanied by letters from Nigel's support workers and treating medical professionals.

In October 2015, Homeless Law received an updated list of Infringements from Civil Compliance Victoria, which indicated that Nigel had been issued with an additional infringement in February 2015 for travelling on public transport without a valid ticket. Through Homeless Law's advocacy, this infringement was withdrawn and an official warning issued in its place.

In December 2015, the Infringements Court advised that the infringements had been revoked.

In February 2016, the Department of Transport decided not to withdraw the infringements against Nigel. The matter is listed for a future date.

To support consistent, appropriate decision-making by the DEDJTR, Homeless Law recommends that the DEDJTR commits to, and recognises the importance of, a transparent and rigorous internal review policy.

Recommendation 5: Clear, consistent approaches to support early exit via effective internal review

Once an infringement notice is issued, the internal review process should be improved so that it provides a meaningful opportunity for people to exit the system early.

To support consistent, appropriate decision-making by the DEDJTR when conducting internal reviews, Homeless Law recommends that the DEDJTR:

- Commits to, and recognises the importance of, a more transparent and rigorous internal review policy; and
- Swiftly implements Fines Victoria guidelines and internal monitoring processes.

5.5 Incentives and reporting obligations for franchisees

Homeless Law considers there to be merit in improving franchisee incentives to better reflect government priorities. To help promote the Victorian Government's objective of striking the right balance between fairness and efficiency in the delivery of public transport services across Victoria, Homeless Law makes the following recommendations.

To improve transparency and accountability, to the extent that this is not already the case, franchisees should be required to collect data and report on the following factors, and these statistics should be regularly published by Public Transport Victoria or the DEDJTR:

- The number of RONCs issued, the geographic area the RONC was issued in and mode of transport details;
- The number of official warnings issued by Authorised Officers;
- The number of referrals made by Authorised Officers to the Access Travel Pass scheme (refer to Recommendation 2);
- The reason for issuing the RONC (i.e. not having a valid ticket, not providing evidence of concession entitlement, feet on seats); and
- Whether any indication of special circumstances was recorded on the RONC.

Furthermore, currently, Regulation 11(b) of the Transport (Infringements) Regulations 2010 (Vic) enables franchisees to recover \$30 for each infringement notice issued for a relevant ticket infringement. Section 213A of the *Transport (Compliance and Miscellaneous) Act 1983* (Vic) further provides that:

(5) If an infringement notice is withdrawn after the penalty has been paid, the company must, within 5 business days after being asked to do so by the Public Transport Development Authority, refund to the Public Transport Development Authority any administrative costs paid to it under subsection (3) in respect of the infringement notice.

Homeless Law considers that further economic incentives for franchisees to effectively issue RONCs could be appropriate. The DEDJTR could impose an 'Effective RONC issuance' threshold that would encourage the franchisee's Authorised Officers not to issue RONCs where the offending was clearly caused by special circumstances, and instead encourage officers to utilise alternative options as recommended in this position paper (e.g. exercising discretion to not issue a RONC / issuing an Official Warning / referral to the Travel Access Pass scheme). An 'Effective RONC issuance' threshold could be calculated by reference to the number of:

- RONCs withdrawn by the DEDJTR at RONC review stage;
- Infringements notices withdrawn on the basis of special circumstances;
- Enforcement orders revoked by the Infringements Court on the basis of special circumstances; and
- Infringements matters dismissed by Magistrates' Court of Victoria on the basis of special circumstances.

If more than a pre-determined threshold percentage of RONCs were withdrawn or dismissed, franchisees could have a financial penalty imposed, or alternatively, could receive a financial bonus for falling under the threshold.

A financial incentive or disincentive imposed on franchisees would recognise the substantial economic costs to taxpayers, and hardship needlessly imposed on vulnerable people, where RONCs are issued in circumstances where Authorised Officers were aware or ought to have been aware of a passenger's special circumstances.

Recommendation 6: Franchisee incentives to promote appropriate decision-making

Recognising the important role of franchisees in the day-to-day operation of Victoria's public transport system, measures to encourage these entities and their staff to foster fairness and equity should include:

- **Requirements to collect and report on enforcement** – Franchisees should be required to collect and report on the number of RONCs issued; the number of official warnings issued; the number of referrals made by Authorised Officers to the Access Travel Pass scheme; the reason for issuing RONCs; and whether any indication of special circumstances was recorded on the RONC.
- **Financial incentives to encourage appropriate decision-making** – A threshold percentage of RONCs withdrawn by the DEDJTR at RONC review stage, enforcement orders revoked by the Infringements Court on the basis of special circumstances and infringements matters dismissed by the Magistrates' Court of Victoria due to special circumstances, should be established. If franchisees issue RONCs that exceed this threshold, a financial penalty should be imposed, in recognition of the substantial economic costs to taxpayers, and hardship needlessly imposed on vulnerable people, where RONCs are issued in circumstances where Authorised Officers were aware or ought to have been aware of a passenger's special circumstances.

6. Minimising the impact of the special circumstances regime

6.1 Definition of special circumstances

Current definition of special circumstances

The Infringements Act defines special circumstances to include:

- a mental or intellectual disability, disorder, disease or illness or a serious addiction to drugs, alcohol or a volatile substance within the meaning of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) where that condition **results in** the person being unable to:
 - understand that conduct constitutes an offence; or
 - control conduct that constitutes an offence; and
- homelessness that **results in** the person being unable to control conduct which constitutes an offence.³⁹

A person may be defined as homeless for the purposes of special circumstances if the person:

- is living in crisis accommodation, transitional accommodation or any other accommodation provided under the *Supported Accommodation Assistance Act 1994* (Cth); or
- has inadequate access to safe and secure housing, including where the only housing they have access to:
 - damages, or is likely to damage, their health;
 - threatens their safety;
 - marginalises them through failing to provide access to adequate personal amenities or the economic and social supports that a home normally affords; or
 - places them in circumstances which threaten or adversely affect the adequacy, safety, security and affordability of that housing.⁴⁰

A contributory link to the offending

The Fines Reform Act retains the current definition of special circumstances in the Infringements Act, requiring that the client's special circumstances 'resulted in' them being unable to understand or control the offending conduct.

The requirement that a person's circumstances must have caused the offending conduct is problematic and in effect creates the need to establish an artificial 'nexus' between a person's circumstances and the offending conduct. Rigid evidentiary requirements attesting to this causal link can result in clients who are the most vulnerable being excluded from review based on special circumstances. If the rationale for the 'special circumstances' system is that people are less culpable by reason of their circumstances, then that category should include people whose circumstances contributed to, not just caused, their offending.

The below case study highlights the way in which the current definition of special circumstances obstructs appropriate responses to highly vulnerable clients and causes them to be caught up in the infringements system for protracted periods.

³⁹ *Infringements Act 2006* (Vic) s 3 (emphasis added).

⁴⁰ *Infringements (General) Regulations 2006* (Vic) s 7; *Supported Accommodation Assistance Act 1994* (Cth) s 4.

Violet: homelessness found not to cause the offending

Violet received 53 infringements for parking offences and for travelling on public transport without a ticket. Violet incurred the infringements over an 18 month period when she was left homeless after fleeing a violent relationship.

Application for revocation on the basis of special circumstances

Homeless Law applied to the Infringements Court on behalf of Violet to have these enforcement orders revoked on the basis of her homelessness.

Attached to the application were letters outlining Violet's housing history from a number of housing support services, which confirmed that she had been homeless at the time she received the infringements. However, the Infringements Court requested further information setting out how Violet's homelessness caused the offending conduct.

We responded to the Infringements Court's request with an amended application that included a cover letter detailing the causal link between Violet's homelessness and her infringements. The letter discussed the chaotic and transient period of Violet's life and set out how this resulted in her being unable to control the offending conduct i.e. because of the chaos, transience and poverty that came with her homelessness, Violet exceeded parking limits and travelled on public transport without a ticket.

Request for more evidence

The Infringements Court again requested further information, advising that it could not accept the cover letter as evidence of the causal link, and that only a report from a housing service would be sufficient evidence. It further advised that this report must include details of Violet's:

- current living arrangements;
- the type of homelessness she experienced, and the reasons for the homelessness;
- how long she had been homeless;
- whether she was homeless at the time of the offending conduct and, if so, how the homelessness contributed to the conduct;
- whether she suffers from any other illnesses (for example, a mental disorder or drug addiction);
- whether she takes any medication;
- whether she is undergoing any treatment or rehabilitation; and
- how long it is envisioned that she will be homeless.

The Infringements Court also informed Homeless Law by telephone that where an application concerned multiple fines but there were only grounds to revoke some of them, the application as a whole would be rejected because the court could not 'split up' the group of fines and deal with them differently.

Outcome – protracted and unresolved

Homeless Law obtained a further supporting letter from a housing support service and submitted an amended application for the third time. Homeless Law advised that we were unable to obtain any further information and requested that the Infringements Court make a decision on the material before it.

In response, the Infringements Court requested further information, again requesting a report including the information set out above.

Homeless Law intends to write to the Infringements Court again requesting a decision be made on the basis of the material before it.

If Violet's application is rejected, Homeless Law will provide advice on the merits of an application under section 68 of the Infringements Act to have the matter heard in open court.

Homeless Law supports the requirement of a nexus between the person's circumstances and the offending in the definition of special circumstances. However, in light of the harsh consequences of the current definition of special circumstances and the causal link it requires, Homeless Law recommends that the definition of special circumstances should be amended to include circumstances that contributed to the offending conduct rather than directly caused it.

This was supported by the Sentencing Advisory Council (**SAC**) in its 2014 report:

Many of those consulted suggested that a better test for special circumstances would require a person to have a circumstance that 'contributed to the person being unable to understand that the conduct constitutes an offence, or to control such conduct' and that more flexibility is required in relation to the supporting evidence ...

... The change to the nexus in the definition proposed by stakeholders is not unprecedented in the criminal justice system. For example ... the Victorian Drug Court may make a drug treatment order if satisfied on the balance of probabilities that the offender is dependent on drugs and/or alcohol, and that dependency 'contributed to the commission of the offence'.⁴¹

SAC concluded:

The Council was persuaded that the current nexus is problematic and that the definition of special circumstances under section 3 of the Infringements Act should be amended to provide that special circumstances are established if the particular circumstance 'contributed to' (rather than 'results in') the offender being unable to:

- understand that the conduct constitutes an offence; or*
- control conduct that constitutes an offence (as the case may be).⁴²*

Homeless Law strongly supports this amended definition, which would better recognise that people experiencing homelessness, substance dependence and/or mental illness are often dealing with a number of complex and overlapping hardships all of which may contribute to their offending. We hope that this amended definition will also encourage a less rigid approach to evidence (discussed below).

6.2 A less rigid approach to evidence

The current approach of enforcement agencies and the Infringements Registrar to evidence required to satisfy the definition of special circumstances can be, in Homeless Law's experience, an overly rigid one.

Enforcement agencies have differing requirements making it difficult to understand what they require for a successful internal review application on the basis of special circumstances. The Infringements Registrar requires supporting documentation from a GP, psychologist, psychiatrist or, in the case of homelessness, a homelessness worker, that is less than 12 months old.

As Violet's case study above shows, for people who have been isolated and disengaged throughout extended periods of homelessness, obtaining the required evidence can be a barrier to successful revocation applications.

Moreover, it is extremely difficult to access low or no cost supporting documentation. In many cases, medical professionals have asked for \$300 - \$600 for a medical report to support a special circumstances application. Homeless Law can rarely fund these costs and Homeless Law's clients are not in a position to pay. Donald's case study, below, highlights how the need to obtain specialist reports can be a time consuming and disheartening process, which can prevent the most vulnerable people having access to the special circumstances regime.

⁴¹ Sentencing Advisory Council, *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria Report* (May 2014) 289 (**SAC Report**).

⁴² Ibid.

Donald: Rigorous evidence requirements prevent fines from being addressed

Donald, a 35 year old man from Melbourne, received 5 public transport infringements for travelling without a valid ticket. The fines totalled approximately \$1300. Donald has a long history of homelessness and substance abuse. Donald had been hospitalised under the *Mental Health Act* several times over the past 2 years due to his psychosis.

Donald had attempted to make a special circumstances application himself but had found the process to be confusing and had had trouble obtaining supporting documentation from his support worker and his treating medical professionals.

Homeless Law provided initial advice and assistance to Donald regarding the special circumstances application. However, Homeless Law has now lost contact with Donald and his outstanding infringements remain unaddressed.

Homeless Law's experience is that it often takes several months to obtain relevant documents. It is difficult for many clients to keep engaged and in contact with Homeless Law lawyers over this period of time.

Homeless Law strongly recommends a more flexible approach to the evidentiary requirements in establishing special circumstances, recognising the realities of the hardship and social isolation that often accompany special circumstances.

6.3 Court as a last resort and findings of guilt

Relying on the court system to deal with infringements incurred by people experiencing mental illness, homelessness and/or substance dependence is resource intensive both for the justice system and services like Homeless Law, and highly stressful for vulnerable clients.

We welcome the amendments in the Fines Reform Act that make it less likely that people will be required to appear in court, by requiring enforcement agencies to 'opt in' if they would like to prosecute, rather than the current mechanism by which matters are automatically referred to the Special Circumstances List if the enforcement agency does not 'opt out' within 21 days. As Nigel's case study in part 5.4 above highlights, the current practice frequently results in clients with clear special circumstances being required to attend court.

Court should be a last resort. Most people, especially those with special needs, should be able to deal with their infringements through easy-to-access paper applications rather than needing to personally appear in a court.

For community members who can afford to deal with their infringement through payment, it is possible to avoid the stress of going to court, contesting an infringement and potentially receiving a criminal record. People experiencing poverty who receive infringements for the same offences cannot afford to exit the system and avoid the stress of the process.

In addition to being highly stressful, in the experience of Homeless Law, attending court generally does not play a role in the rehabilitation or recovery of our clients. In many cases, the stress it imposes impedes recovery and criminalises people by virtue of their status and circumstances.

The requirement to plead guilty to access the Special Circumstances List means that the most vulnerable people in the infringements system receive a criminal record for their infringement offence, regardless of whether the court records a conviction. The presence of a criminal record acts as a barrier to future opportunities for our clients:

- For asylum seekers, the finding of guilt can be regarded as a breach of their Code of Behaviour, which can result in visa cancellation or refusal.
- For particular professions, such as nursing, a finding of guilt can end a career before it starts.

Homeless Law recommends that thought be given to the rationale behind creating a separate system for managing offenders with special circumstances. For example, if the rationale is that certain categories of people are *less culpable* or *less able to control their offending behaviour* by virtue of their circumstances (i.e. their

mental illness, substance dependence or homelessness), then the system should be directed to minimising the stigma and individual liability associated with fines arising from that conduct.

Homeless Law strongly supports the recommendation that a finding of guilt should not be required for vulnerable people to have their infringements resolved through the Special Circumstances List.

Recommendation 7: A more appropriate, less punitive approach to special circumstances

The current special circumstances framework is less effective than it could be at providing Victorians experiencing homelessness, substance dependence and/or mental illness with an accessible mechanism for exiting the infringements system. To address the current ways in which vulnerable people find themselves caught up in the infringements system for protracted periods, unable to access adequate supporting material and with a finding of guilt on their record, Homeless Law recommends:

- Amending the definition of special circumstances under section 3 of the Infringements Act to provide that special circumstances are established if the particular circumstance ‘contributed to’ (rather than ‘results in’) the offender being unable to understand that the conduct constitutes an offence or control conduct that constitutes an offence.
- Implementing a more flexible approach to the evidentiary requirements in establishing special circumstances, recognising the realities of the hardship and social isolation that often accompany special circumstances.
- Monitoring and overseeing the decision-making of enforcement agencies to make sure that people who are by definition vulnerable are not required to attend court (unless they are seeking review of a decision made against them).
- Removing the requirement to plead guilty in the Special Circumstances List.

7. Reducing the disproportionate impact of public transport fines on vulnerable Victorians

7.1 Concession-based fines

Public transport users come from diverse backgrounds and have varying levels of capacity to pay fares and infringements. The current public transport ticketing infringement framework operates in discriminatory ways against those who cannot afford to pay.

As discussed above, the average weekly earnings in Australia as at May 2015 is \$1484.50, whereas the weekly income of a person on Newstart Allowance is only \$261.70 i.e. 17.63% of the average weekly earnings. In practice this means that infringements hit low income people harder. For example, a \$223 infringement for not having a ticket on the tram or train is 85% of the weekly income for a person relying on the Newstart Allowance.

The case study below highlights the inability of low income travellers to afford the full infringement penalty.

Anthony: 'it will still hurt them in the pocket and realistically they can still pay it'

Anthony became homeless in his late 20s. He slept rough and couch surfed for about two years and he got about \$3000 in fines for travelling on public transport without a ticket, having his feet on the train seat and possessing an open container of liquor. Anthony now feels hopeful about his future. He is in recovery, has stable housing and is looking forward to returning to work or study.

"I became homeless when my drug use became out of control and got kicked out of home. I tried living out of home in a rental place but I couldn't afford the rent as I was using drugs. I found myself on the streets, couch surfing, and that continued for about two years.

Most of my fines consisted of transit fines. They were basically – I'd jump on a train, tram or a bus to either score to get drugs or to get to appointments, cause I didn't have money to buy a ticket. I had to get to where I had to get to. When I got fined, most of the times I didn't actually worry about it at the time I was getting fined, but when the fines accumulated, it just adds pressure, because you know you're not going to have the money there at all, but it's still going to be hanging over your head.

Well I know the fines really don't work, so making the system better could be making a concessional fine for people on concession. If you're looking at someone on unemployment benefits, a \$207 transit fine is probably 80% of their weekly income, so maybe drop it to \$40. It will still hurt them in the pocket and realistically they can still pay it."

The current infringements regime already recognises that some public transport users have less capacity to pay fines than others. Children are subject to a fine of \$76 for a variety of offences. For the more serious of these offences, \$76 is 20% of the full Infringement Penalty that would be otherwise payable.

Offence	Infringement Penalty for adult	Infringement Penalty for child (under 18)
Failing to produce a valid ticket	\$223	\$76
Littering on a vehicle or premises	\$228	\$76
Trespassing	\$303	\$76
Travelling on part of a vehicle not meant for travel without a reasonable excuse	\$379	\$76

Homeless Law recommends that fines for eligible concession card holders are substantially reduced, reflecting their reduced capacity to pay. This approach is consistent with the approach adopted in Finland for traffic infringements. In that jurisdiction, fines are adjusted based on the recipient's income, in order for the fines to represent an equal proportion of recipients' disposable income.⁴³

The benefits of concession based infringements were recognised by the Sentencing Advisory Council (SAC) in its May 2014 report, *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria Report*. SAC recommended:

- *Infringement penalty recipients who are experiencing financial hardship should receive a reduced infringement penalty amount of 50% (Recommendation 39).*
- *Eligibility for the adjusted penalty should be the same as eligibility for automatic entitlement to a payment plan outlined in the Attorney-General's Guidelines to the Infringements Act 2006 (Recommendation 40).⁴⁴*

In formulating its recommendations, SAC stated:

The adjusted penalty amount is intended to provide equality before the law by appropriately mitigating the penalty amount for eligible infringement recipients. This will afford the infringements system a broad

⁴³ The Australia Institute, *Income based traffic fines* (30 January 2016) (available at: <http://www.tai.org.au/content/income-based-traffic-fines>).

⁴⁴ SAC Report, above n 41, x1. Note that the eligibility requirements in the Attorney-General's Guidelines are receipt of any one of the following: a Commonwealth Government (Centrelink) Pensioner Concession Card; a Department of Veterans' Affairs Pensioner Concession Card or Gold Card; or a Centrelink Health Care Card (all types including non-means tested).

measure to recognise the differential impact of an infringement penalty amount on people experiencing financial hardship compared with people who are not. The credibility and effectiveness of the infringements system will be improved by enhancing the equality of its impact, perceptions of fairness, and the prospects of compliance by low-income infringement recipients.⁴⁵

...
Inherent in an effective infringements system is the need to balance fairness with compliance and system efficiency, as recognised in the Attorney-General's Guidelines. Tailoring a high volume, highly automated system to accommodate fairly those experiencing financial hardship is not an easy task. However, the merit of a system that better provides for equality of punishment between those who are and those who are not experiencing financial hardship outweighs the administrative burden of establishing the system.⁴⁶

While in many cases, payment will not be the best option for Homeless Law's clients (because a special circumstances application or work and development permit will be more appropriate), it is important that the public transport ticketing infringement framework has a variety of options in place to allow disadvantaged people to address their infringements. Some people may want to resolve their infringements through payment and, for this to be a possibility, the system needs to recognise that people on very low incomes cannot pay the same amount as people on average to high incomes.

As mentioned above, the average weekly income of a person on Newstart Allowance is \$261.70, which is 17.63% of the average weekly income in Australia (\$1484.50 at May 2015).⁴⁷

Accordingly, Homeless Law recommends that for eligible people, infringements should be set at 20% of the standard rate.

Offence	Adult		Child	
	Current Infringement Penalty	Proposed Concession Infringement Penalty for adult	Infringement Penalty for child	Proposed Infringement Penalty for child
Failing to produce a valid ticket / Failing to produce evidence of concession entitlement	\$223	\$44.60	\$76	\$15.20

Recommendation 8: Concession-based fines

Given the wide disparity of incomes amongst public transport users, concession card holders should be subject to reduced infringement penalties. Homeless Law recommends setting infringement penalties for eligible concession card holders at 20% of the standard rate.

This system would give eligible card holders a realistic chance to be able to pay off their infringements, whilst retaining a deterrent effect for all public transport users.

7.2 Waiver of enforcement fees for eligible concession card holders

The majority of Homeless Law's clients, due to their vulnerabilities and special circumstances, are not in a position to pay public transport fines or engage in the review process within the required times. Enforcement fees and costs are added to the original infringement penalty at different stages if payment is not received.

⁴⁵ Ibid xi.

⁴⁶ Ibid 252.

⁴⁷ Australian Bureau of Statistics, *Average Weekly Earnings – Australia* (May 2015) (available at: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6302.0/>).

The table below shows that by the time an infringement reaches warrant stage, fees and costs can cause the original penalty to increase significantly. Infringements and penalty costs and fees can become overwhelming debts and cause significant stress and financial strain for disadvantaged Victorians.

	Cost added	Total
Not having a ticket on public transport		\$223.00
Penalty reminder notice issued	\$24.50	\$247.50
Notice of enforcement order issued	\$81.60	\$329.10
Warrant issued	\$59.80	\$388.90

Source: *Infringements (General) Regulations 2006* (Vic); Government Gazette S86, 17 April 2015.

Recommendation 9: Waiver of additional enforcement fees for eligible concession card holders

By the time an infringement for not having a ticket or failure to provide proof of concession reaches warrant stage, the initial infringement amount of \$223 increases to \$388.90 through the addition of fees and costs.

Homeless Law recommends that additional enforcement fees are waived for eligible concession card holders. The elimination of these fees would increase the likelihood of repayment and acknowledge the stress and hardship that the imposition of additional fees has on vulnerable people who have already been penalised for their offending.

7.3 Proof of concession entitlement

The Infringement Penalty for the offence of failing to produce a concession card is currently \$223. Public transport users commit this offence where they fail to produce evidence of concession entitlement, even where they are in fact entitled to the concession fare (e.g. they left their concession card at home).⁴⁸

The \$223 Infringement Penalty is disproportionate compared to other offences – for example, an infringement for exceeding the speed limit by less than 10km/hour is approximately \$190.

The unnecessary strain that the current offence places on individuals and the justice system is apparent from the below case study.

Cameron: Fined for failing to provide evidence of his concession entitlement

Cameron is a 32 unemployed man with an 8 year history of alcohol dependence. When Cameron contacted Homeless Law, he had been homeless for 2 years. During his period of homelessness, Cameron had been issued with a number of public transport fines, including for failing to provide evidence of his concession entitlement.

Whilst Cameron met the eligibility criteria for a Health Care Card, he had been unable to obtain a card, as he did not have a fixed address to which the card (and yearly renewals) could be sent.

Homeless Law subsequently lost contact with Cameron. His public transport fines remain outstanding.

The following recommendations aim to improve the fairness and equity of the current system for overseeing proof of concession.

⁴⁸ *Transport (Ticketing) Regulations 2006* (Vic) reg 9.

Avoiding infringements where proof of concession is subsequently provided

In recognition of the challenges many concession card holders can experience, including homelessness, mental illness, disability, caring obligations and/or substance dependence, the public transport ticketing infringement framework should allow evidence of entitlement for a concession fare to be provided within 28 days of (a) being approached by an Authorised Officer, resulting in a Report of Non-Compliance; and (b) receiving an infringement notice.

This would present two opportunities for concession card holders to avoid being inappropriately caught up in the infringement system.

Such reforms recognise the life realities for most concession card holders and move away from the current regulations, which impose absolute liability on vulnerable people who, despite having a valid ticket and being entitled to a concession, fail to produce evidence of their concession status “without delay”.

Homeless Law also notes that the current policy of the DEDJTR is not to withdraw infringements based on evidence of entitlement provided at a later date; except for students where it is their first offence.⁴⁹

Homeless Law recommends that the words “without delay” be removed from the relevant provisions of the Transport (Ticketing) Regulations 2006 and that:

- An infringement notice for failing to produce evidence of entitlement to a concession fare should not be issued if evidence of a concession entitlement is provided within 28 days of a Report of Non-Compliance being issued;
- An infringement notice for failing to produce evidence of entitlement to a concession fare should be withdrawn if evidence of a concession entitlement is provided within 28 days of the infringement notice; and
- Proof of concession entitlement should be construed broadly and be able to be provided by post, email or fax.

Provide an option for proof of concession entitlement to be registered to a myki card

Many of Homeless Law’s clients have received fines for failing to provide proof of their concession entitlement, in circumstances where they are in fact eligible for a concession fare, but are not carrying proof of their entitlement on their person when their ticket is checked by an Authorised Officer.

To help address this issue, Homeless Law recommends that registered myki card holders are provided with the option of uploading proof of their concession entitlement (e.g. a scanned copy of a Health Care card) to the myki website.

Authorised Officers could then be notified on their handheld myki scanners that the person is entitled to travel on a concession fare and/or DEDJTR staff could be alerted to the entitlement at RONC review stage.

This system would be particularly advantageous for vulnerable public transport users who, due to their special circumstances, are unlikely to carry proof of concession entitlement with them when using public transport. These users could be assisted by support workers to register their concession entitlement online.

Reducing the disproportionate infringement amount for concession offences

Each of the above proposals is intended to prevent people being issued with infringements for failure to produce their concession card, through sensible, practical measures, recognising that the circumstances of concession card holders, including disability, mental illness, youth and/or age, can also affect day-to-day decision-making and organisation. In short, the same factors that entitle a person to a concession card make it more likely that they will be travelling without proof of that entitlement.

⁴⁹ Department of Economic Development, Jobs, Transport and Resources, *Transport Infringements – Internal Review* (15 May 2015) (available at: <http://economicdevelopment.vic.gov.au/transport/legislation/public-transport-fines/transport-infringements-internal-review/>).

If, however, a person is unable to be exited from the system via one of these mechanisms, Homeless Law recommends that the infringement penalty amount is significantly reduced to more appropriately recognise the circumstances of concession card holders and the minor nature of the offence.

As discussed above, the infringement penalty for the offence of failing to produce a concession card is currently \$223.⁵⁰

This amount ignores the vulnerability, hardship and limited incomes of concession card holders; as well as the seriousness of the offence, which is essentially administrative in nature.

Recommendation 10: Reducing the harsh penalties for concession card holders

The following measures should be introduced to reduce the harsh impact of the current system for enforcing concession eligibility:

- Allowing evidence of concession entitlement to be provided within 28 days to avoid an infringement notice being issued or to have an infringement notice withdrawn. Proof of concession entitlement should be construed broadly and be able to be provided by post, email or fax.
- Providing the option for registered myki card holders to upload proof of their concession entitlement to the myki website.
- Substantially reducing the infringement penalty for failing to produce evidence of entitlement to a concession fare to appropriately reflect the severity of the offence.

⁵⁰ *Transport (Ticketing) Regulations 2006* (Vic) reg 9; Department of Economic Development, Jobs, Transport and Resources, *Public Transport Infringements and Court Penalties* (2015-2016) (available at: http://economicdevelopment.vic.gov.au/_data/assets/pdf_file/0005/1114727/2015-16-LLS-Public-Transport-Infringements-and-Court-Penalties-1Jul2015.pdf).

7.4 Repeal of on-the-spot Penalty Fares

On-the-spot Penalty Fares were introduced by the Victorian Government on 10 August 2014 for a 12 month trial period.⁵¹ Homeless Law understands that a review of on-the-spot penalty fares is due to be delivered to the Transport Minister in early 2016.⁵²

Part 2A of the *Transport (Ticket) Regulations 2006* (Vic) prescribes a number of offences, including failing to hold a valid ticket or evidence of concession entitlement, as on-the-spot ticket offences. Public transport passengers who commit these offences may opt to pay an on-the-spot Penalty Fare, currently \$75, rather than be issued with an infringement notice.

Homeless Law has two key concerns about the use of penalty fares:

- **Discriminatory effect:** on-the-spot penalty fares are out of reach for low income people who would benefit most from paying a reduced amount. The on-the-spot amount is almost 30% of the weekly income for someone on the Newstart Allowance. Even for someone on a slightly higher income, high costs of living, particularly housing costs, mean it is unlikely that they will have \$75 to spare. In this way, the on-the-spot penalty fare system is discriminatory in its effect because it allows middle and high income earners an easy way out, while low income earners – who will be hit hardest by the full penalty amount – have little choice but to accept the full amount.
- **Coercive or misleading:** when on-the-spot penalty fares are issued, the information conveyed to commuters is limited. It is presented as two options: pay \$75 now or pay \$223 later. The range of other options, including, for example, applying for internal review on the basis of special circumstances, are not explained and, once payment is made, these options are no longer available. As identified by Liana Buchanan, executive officer of the Federation of Community Legal Centres, on-the-spot penalty fares, "risk coercing vulnerable people into paying fines they can't afford in circumstances where they may well have made all reasonable attempts to pay, and where there may well be grounds for a successful challenge of fines due to frequently reported flaws in the system".⁵³ A recent survey of 500 public transport users by the Public Transport Users Association found that 32% of people who opted to pay an on-the-spot penalty fare opted to do so primarily because of the pressure exerted by Authorised Officer (compared to only 12.5% who paid primarily because they knew they were in the wrong).⁵⁴

In relation to on-the-spot penalty fares, Public Transport Victoria notes that:

*If a passenger pays an On-the-spot penalty fare they have no right to appeal at a later date and no refunds are provided. If a person believes they have a legal defence to travelling without a valid ticket, they should not pay an On-the-spot penalty fare but should instead provide their name and address and appeal the infringement notice if they receive one.*⁵⁵

Homeless Law is concerned that this information is not being clearly explained by Authorised Officers to those who opt to pay a penalty fare. As remarked by the Public Transport Ombudsman of Victoria in her 2015 Annual Report:

*Currently, consumers who opt to pay the \$75 penalty fare are not provided with any information regarding their right to complain or explain their circumstances. 189 consumers contacted us to complain about the penalty fare, 123 of these complaints were received after January 1, 2015; however it is possible many more may have complained to the PTO had they known they could. There is a lack of information given to consumers about their options when they choose a penalty fare and I am concerned that consumers may wrongly assume that 'no appeal' means they cannot complain to us.*⁵⁶

⁵¹ Department of Economic Development, Jobs, Transport and Resources, *Public Transport Fines* (1 July 2015) (available at: <http://economicdevelopment.vic.gov.au/transport/legislation/public-transport-fines>); Yarra Trams, *On-the-spot Penalty Fares from August 10* (available at: <http://www.yarratrams.com.au/media-centre/news/articles/2014/on-the-spot-penalty-fares-from-august-10/>).

⁵² 'State Finally Tries to Fix Myki's Fare Mess' *The Age* (14 December 2015) (available at: <http://www.theage.com.au/comment/the-age-editorial/state-finally-tries-to-fix-myki-fare-mess-20151213-glmkkl.html>).

⁵³ Adam Carey, 'On-the-spot penalty fares on public transport under review amid coercion fears' *The Age* (17 August 2015) (available at: <http://www.theage.com.au/victoria/onthespot-penalty-fares-on-public-transport-under-review-amid-coercion-fears-20150817-gjOusm.html>).

⁵⁴ Public Transport Users Association, *Fairer Fines Survey Results* (January 2016) (available at: http://www.ptua.org.au/files/2016/PTUA_FairerFines_201602.pdf).

⁵⁵ Public Transport Victoria, *On-the-spot Penalty Fares* (available at: <http://ptv.vic.gov.au/penaltyfares/>).

⁵⁶ Public Transport Ombudsman, *Annual Report 2015* (available at: http://www.ptovic.com.au/images/2015_Annual_Report.pdf) 23.

Homeless Law also echoes the concerns of Julian Burnside QC and others that the use of on-the-spot penalty fares can pressure or intimidate people who have legitimate reasons for not having a valid ticket into paying the penalty fare rather than being issued with an infringement notice and having the ability to apply for review or challenge the matter in court.⁵⁷

Homeless Law's clients are particularly vulnerable to being pressured into paying an on-the-spot amount because of the fear of how unmanageable the infringement notice amount is. They are also the most likely to have a valid basis for challenging the infringement notice, including because of their special circumstances. Further, they are the least equipped to pay \$75, which may constitute up to 30% of their weekly income. In the absence, however, of clear information regarding the availability of other options, there is a substantial risk that people who cannot afford to pay and have a legitimate legal basis for questioning the infringement will pay on-the-spot penalty fares.

While most low income people simply can't pay and are therefore discriminatorily excluded from this option, in the absence of clear information and communication about options other than pay now or pay later, people who have legitimate reasons for challenging the infringement notice find themselves unable to do so after paying the on-the-spot penalty fare.

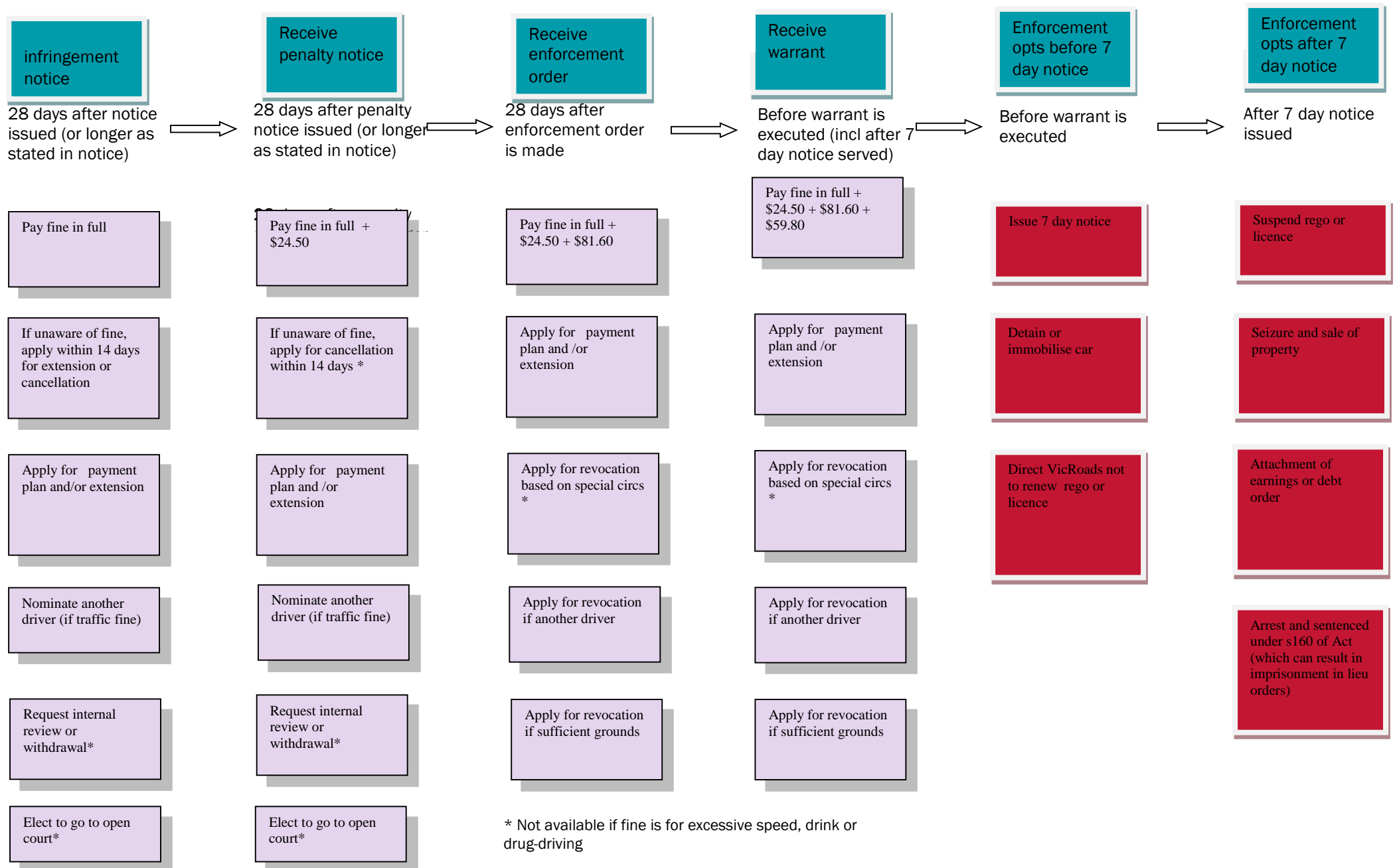
Given these flaws in the on-the-spot penalty fare system, Homeless Law's view is that the system should be repealed as part of a movement toward a fairer, more equitable public transport system.

Recommendation 11: Penalty fares should be repealed

Part 2A (On-the-Spot Penalty Fares) of the *Transport (Ticketing) Regulations 2006* (Vic) should be repealed due to the discriminatory impact, lack of appeal rights and the failure of Authorised Officers to clearly articulate the impact of paying a penalty fare. If this recommendation is not accepted, Authorised Officers should be required to provide a fact sheet explaining alternative options before requiring payment of a Penalty Fare or issuing a Report of Non-Compliance.

⁵⁷ Simon Leo Brown, 'Myki fines: Julian Burnside QC considers pro-bono legal team to battle on-the-spot 'standover racket'', *ABC News* (3 July 2015) (available at: <http://www.abc.net.au/news/2015-07-03/myki-fines-julian-burnside-considering-pro-bono-legal-team/6592948>).

Annexure 1 – Infringements processes, timeframes and options



Annexure 2 – Current Infringement Process

