

## ***Bad move***

# **PILCH Homeless Persons' Legal Clinic submission in response to Frankston City's proposed General (Amendment) Local Law 2008 No 15**

**17 February 2009**

James Farrell/Caroline Adler  
Secondee Lawyer/Manager and Principal Lawyer  
PILCH Homeless Persons' Legal Clinic

## **Table of Contents**

<b>1.</b>	<b>Introduction and Executive Summary</b>	<b>1</b>
<b>2.</b>	<b>About the Clinic</b>	<b>1</b>
<b>3.</b>	<b>Move on powers</b>	<b>2</b>
3.1	The development of move on powers	2
3.2	The Local Law	2
<b>4.</b>	<b>Move on powers don't reduce crime</b>	<b>3</b>
<b>5.</b>	<b>Move on powers are discriminatory</b>	<b>4</b>
5.1	People experiencing homelessness	4
5.2	Young people	5
5.3	Indigenous Australians	7
5.4	Other groups in society	8
5.5	Conclusion	9
<b>6.</b>	<b>Move on powers are a breach of human rights</b>	<b>9</b>
6.1	The human rights of people experiencing homelessness	9
6.2	Limitations on human rights	10
6.3	Frankston City is a public authority	11
6.4	Conclusion	11

## 1. Introduction and Executive Summary

---

This submission is made by the Public Interest Law Clearing House (**PILCH**) Homeless Persons' Legal Clinic (**the Clinic**) in response to Frankston City's proposed *General (Amendment) Local Law 2008 No 15 (Local Law)*. Frankston City invited submissions relating to the Local Law, and the Clinic would welcome the opportunity to supplement this written submission with oral submissions in the future.

The focus of this submission is on those issues which the Clinic is in a unique position to comment on, namely the impact of the Local Law on people experiencing homelessness. This submission is greatly informed by the Clinic's consultations with people who are currently homeless or who have experienced homelessness in the past.

The Clinic recommends that Frankston City does not enact the Local Law because move on powers:

- don't work to prevent crime;
- are exercised in a way that discriminates against minority groups, including people experiencing homelessness; and
- are a breach of human rights.

## 2. About the Clinic

---

The Clinic is a project of PILCH and was established in 2001 in response to the great unmet need for targeted legal services for people experiencing homelessness.<sup>1</sup> The Clinic is funded on a recurrent basis by the Victorian Department of Justice through the Community Legal Sector Project Fund, administered by Victoria Legal Aid. This funding is supplemented by fundraising and donations. While the Clinic recently received confirmation of a one-off funding boost from the Federal Government, it does not currently receive recurrent funding from the Federal Government.

The Clinic has the following aims and objectives:

- to provide free legal services to people who are homeless or at risk of homelessness, in a professional, timely, respectful and accessible manner, that has regard to their human rights and human dignity;
- to use the law to promote, protect and realise the human rights of people experiencing homelessness;
- to use the law to redress unfair and unjust treatment of people experiencing homelessness;
- to reduce the degree and extent to which homeless people are disadvantaged or marginalised by the law; and
- to use the law to construct viable and sustainable pathways out of homelessness.

---

<sup>1</sup> See <http://www.pilch.org.au> (at 12 June 2008).

Free legal services are offered by the Clinic on a weekly basis at 13 outreach locations that are already accessed by homeless people for basic needs (such as soup kitchens and crisis accommodation facilities) and social and family services.<sup>2</sup> Since its establishment in 2001, the Clinic has assisted over 3500 people at risk of, or experiencing, homelessness in Victoria.

The Clinic also undertakes significant community education, public policy advocacy and law reform work to promote and protect the right to housing and other fundamental human rights. In 2005, the Clinic received the prestigious national Human Rights Law Award conferred by the Human Rights and Equal Opportunity Commission in recognition of its contribution to social justice and human rights.

### **3. Move on powers**

---

#### **3.1 The development of move on powers**

Public open spaces have long played an important role in urban development.<sup>3</sup> Traditionally, public open space has been viewed as an important facilitator in passive and active recreation; however, public space is viewed more and more as an important space for social interaction and contributing to the general well being of a community.<sup>4</sup>

Government are increasingly widening the scope of police powers relating to the use and regulation of public spaces. These powers, known variously as 'move-on' powers, dispersal legislation, anti-social behaviour orders and reasonable directions,<sup>5</sup> allow police to direct users of public space to move on. Laws have already been introduced in South Australia, New South Wales, Queensland and the Australian Capital Territory,<sup>6</sup> and internationally.<sup>7</sup> Victoria, Tasmania, Western Australia and the Northern Territory have yet to implement such legislation.

While there are some differences in the drafting of these legislative provisions, they are largely similar to the Local Law.

#### **3.2 The Local Law**

On 10 November 2008, Frankston City Council voted to amend *General Local Law 2003 No.7* so as to grant move on powers to authorised officers. The Council states that the amendments are intended to improve the amenity of Frankston City by addressing anti-social behaviour in public places.

The amendments insert clauses 2.1.1 to 2.1.4 into *General Local Law 2003 No.7*, which grant authorised officers the power to direct persons to leave public places and not return for 24 hours

---

<sup>2</sup> Host agencies include Melbourne Citymission, The Big Issue, the Salvation Army, Anglicare, St Peters Eastern Hill, Ozanam House, Flagstaff Crisis Accommodation, Salvation Army Life Centre, Hanover, Vacro, Koonung Mental Health Centre and Homeground Housing Service. Legal services are provided at our host agencies by volunteer lawyers from law firms: Allens Arthur Robinson, Baker & McKenzie, Blake Dawson, Clayton Utz, Mallesons Stephen Jaques, Minter Ellison, DLA Phillips Fox, Corrs Chambers Westgarth, Arnold Dallas McPherson, Stella Stuthridge & Associates.

<sup>3</sup> Max Nankervis, 'Our Urban Parks: Suitable Pieces of Real Estate?' (1998) 57 *Journal of Australian Studies* 162.

<sup>4</sup> Victoria, *Inquiry into Sustainable Urban Design for New Communities in Outer Suburban Areas*, Parl Paper No 87 (2004), 132.

<sup>5</sup> See, eg, Ben Saul, 'Olympic Move On Powers: Street Sweeping and the Erosion of Public Space' (2000) 11(1) *Polemic* 34; Philip Lynch, 'Understanding and responding to begging' [2005] 29 *Melbourne University Law Review* 518; Inner City Entertainment Precincts Taskforce, *A good night for all: Options for improving safety and amenity in inner city entertainment precincts* (2005), 39; *Crime and Disorder Act 1998* (UK) s 1; *Summary Offences Act 1988* (NSW) s 28F. In this article, these terms are used interchangeably.

<sup>6</sup> *Summary Offences Act 1953* (SA) s 18, *Summary Offences Act 1988* (NSW) s 28F, *Police Powers and Responsibilities Act 2000* (Qld) s 38, *Crime Prevention Powers Act 1998* (ACT) s 4.

<sup>7</sup> See, eg, *Anti-social Behaviour Act 2003* (UK) s 30.

in circumstances where the authorised officer considers the person is behaving in a manner as to:

- (a) interfere with another person's reasonable use and enjoyment of that public place or road;
- (b) endanger or be likely to endanger health, life or property; or
- (c) destroy, damage or interfere with any building, fence, property improvements, sign, structure, chattel, tree, shrub or plants, garden bed, bird or animal or bird/animal habitat thereon.

Authorised officers may only give a direction if it is reasonably necessary to uphold public safety, public order or the lawful enjoyment by others of the public place (sub-clause 2.1.3), and are required to inform the person of the reason for giving the direction (sub-clause 2.1.4). According to the minutes of the Council meeting, police officers are intended to act as authorised officers for the purposes of the Local Law, but this is not clear on the face of the Local Law.

In a public notice regarding the Local Law (available on its website),<sup>8</sup> Frankston City invited submissions relating to the Local Law. This submission by the Clinic has been prepared on the basis that the Clinic opposes the introduction of the Local Law, because move on powers:

- don't work to prevent crime;
- are exercised in a way that discriminates against minority groups, including people experiencing homelessness; and
- are a breach of human rights.

The Clinic would welcome the opportunity to supplement this written submission with oral submissions to the Council.

#### **4. Move on powers don't reduce crime**

---

There is no empirical evidence to show that 'move-on' legislation does actually result in reductions in crime rates, in Australia or internationally.

Empirical research has been conducted in the United States into the effect of curfews, another tool used to regulate the use of public spaces. According to a major study of the effects of curfews on youth crime in 21 cities of 100,000 or more people:<sup>9</sup>

- curfews cannot be shown to reduce youth crime or violent death over time or by locale, as cities without curfews showed the same patterns as cities that enforced curfews;
- curfews may actually increase crime and reduce youth safety by occupying police time removing law-abiding youths from public space, leaving emptier streets and public places which urban planning experts argue are conducive to crime;
- in the Monrovia neighbourhood of Los Angeles California, the crime rate did not decline after the introduction of curfews in 1994. More surprising, it declined only during the

---

<sup>8</sup> See [http://www.frankston.vic.gov.au/library/scripts/objectifyMedia.aspx?file=pdf/180/83.pdf&siteID=3&str\\_title=Proposed making of General Amendment Local Law 2008 No 15.pdf](http://www.frankston.vic.gov.au/library/scripts/objectifyMedia.aspx?file=pdf/180/83.pdf&siteID=3&str_title=Proposed%20making%20of%20General%20Amendment%20Local%20Law%202008%20No%2015.pdf).

<sup>9</sup> Mike Males and Dan Macallair, *'Get Tough': Juvenile Control Measures – Are they Needed? (1998)* Issue paper for the Juvenile Justice Information Center (1998). Cited in Penny Travlou, *Teenagers and Public Space: a literature review* (2003), 16.

summer months and on school-year nights and weekends when the curfew was not enforced; and

- in Vernon, Connecticut, police reported no instances of criminal activity among the youth they cited for curfew, so the effect was to remove law-abiding youths from the streets.

This research demonstrates the questionable effectiveness of removing people from public spaces in reducing crime rates.

Crime Prevention Victoria (**CPV**) suggests that anti-social behaviour can range from serious criminal offending such as assault, to non-criminal 'inconsiderate' behaviour such as playing music loudly in public.<sup>10</sup> There is no empirical evidence to suggest that anti-social behaviour is reduced through the introduction of 'move-on' legislation.<sup>11</sup>

However, the difficulty in providing police with powers to redress such behaviour is that the concept of anti-social behaviour is largely subjective. CPV notes that there is no standard definition, although it can include inconsiderate behaviour.<sup>12</sup> The level of subjectivity and ambiguity of 'anti-social' behaviour, despite its possible populist appeal, fails to justify the introduction of discretionary 'move-on' powers as a means to prevent such 'anti-social' behaviour.

In the context of begging, there is evidence suggesting that zero tolerance policing methods such as 'move-on' powers tend to either divert beggars to other geographical locations with a lesser police presence, or divert them into the commission of more serious criminal activity.<sup>13</sup> The Clinic submits that this principle applies equally to general move on powers, particularly as there is no empirical evidence to show that 'move-on' legislation does actually result in reductions in crime rates, in Australia or internationally.

On the basis that move on powers cannot be shown to reduce crime, the Clinic opposes the introduction of the Local Law.

## **5. Move on powers are discriminatory**

---

As Saul notes, '[p]articularly if you are a young person, indigenous, homeless, or a sex worker, police scrutiny and state surveillance of the public use of public streets has become acute'.<sup>14</sup>

Limited empirical research has been undertaken to review the discriminatory exercise (or otherwise) of 'move-on' legislation. However, this research is analysed below.

### **5.1 People experiencing homelessness**

A survey of 132 people experiencing or at risk of homelessness in Brisbane was conducted in early 2006 for a joint research project undertaken by the T.C. Beirne School of Law, University of Queensland, Queensland Public Interest Law Clearing House (QPILCH) Homeless Persons' Legal Clinic. The survey instrument asked respondents to comment on the use of move-on

---

<sup>10</sup> Crime Prevention Victoria, 'Anti-Social Behaviours', (2004) CPV Knowledge Bank [crimeprevention.vic.gov.au](http://crimeprevention.vic.gov.au).

<sup>11</sup> See, eg, NSW Ombudsman, *Policing public safety: Report under s 6 of the Crimes Legislation Amendment (Police and Public Safety) Act 1998* (1999), ch 10

<sup>12</sup> Crime Prevention Victoria, above n 28.

<sup>13</sup> Lynch, above n 5, 535–6; and see Roger Hopkins Burke, 'Tolerance or Intolerance? The Policing of Begging in the Urban Context' in Hartley Dean (ed), *Begging Questions: Street-Level Economic Activity and Social Policy Failure* (1999), 230.

<sup>14</sup> Saul, above n 5.

powers against them, including the frequency of their use, the circumstances surrounding their use, and the efficacy of their use.

The key findings of the survey were:

- 76.5% of homeless people surveyed had been told to move-on one or more times in the last six months.
- Homeless people sleeping rough or in squats were most susceptible to being moved on; 90% respondents who were sleeping rough had been moved on in the last six months.
- 77.9% respondents who received a move-on direction indicated their behaviour or presence when directed to move-on was innocuous and unlikely to meet the threshold requirements for lawfully issuing a move-on direction.
- 85% respondents who had been told to move-on one or more times within the last six months were given nowhere in particular to go upon being issued with move-on directions.
- Concerns about police 'chasing' homeless people from one place to the next were raised throughout the research. Some respondents stated that it was often the same officers that followed homeless people throughout the day to 'chase them away'.
- 40% respondents who were asked to move-on in the last six months were not given a time frame for doing so (as required under the relevant Queensland law and the Local Law).
- 71% homeless people who were given a move-on direction complied with direction when issued, without question or argument.
- Homeless people surveyed had little knowledge about what constitutes a lawful police move-on direction, indicating their vulnerability to abuse of the power by police.

However, homeless people occupy public spaces out of necessity and are disproportionately impacted by move-on powers due to their lack of secure housing.<sup>15</sup> It is well-recognised that Indigenous Australians<sup>16</sup> and young people<sup>17</sup> comprise a large proportion of Australia's homeless population. Consequently, commentators agree that young people and Indigenous Australians are most likely to be moved on compared to other community members<sup>18</sup>.

## 5.2 Young people

As White notes, the struggle over territory between police and young people is by no means a new phenomenon.<sup>19</sup> A report submitted by the National Affairs Research Scheme of Australia

---

<sup>15</sup> Phil Lynch, 'Justice for all: achieving access to justice and substantive justice for the homeless', paper presented at the Commonwealth Law Conference, Melbourne, Australia, 13-17 April 2003, at 1.

<sup>16</sup> Cassandra Goldie stated that 50% of the primary homeless population in Australia comprised Indigenous Australians: Cassandra Goldie, 'Living in public space: a human rights wasteland?' (1996) 27 *Alternative Law Journal* 278.

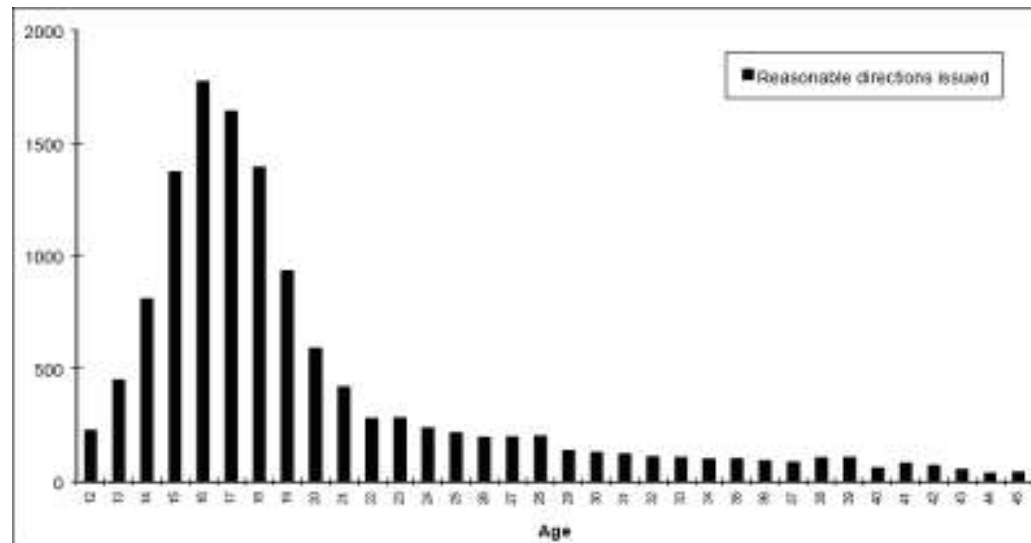
<sup>17</sup> In 2001, people under the age of 24 comprised 46% of Australia's homeless population of 99,900: 2001 Census data, available from: <http://www.homeless.org.au/statistics/>.

<sup>18</sup> See Monica Taylor and Tamara Walsh (eds), *Nowhere to go: The impact of police move-on powers on homeless people in Queensland* (2006) 152; NSW Ombudsman, above n 11.

<sup>19</sup> Rob White, 'Young people, community space and social control' (Paper presented at the National Conference on Juvenile Justice, Adelaide, 22-24 September 1992) 196; see generally Peter Grabosky, *Sydney in Ferment: Crime, dissent and official reaction 1788 to 1973* (1993); Jon Stratton, *The Young Ones: Working-class Culture, Consumption and the Category of Youth* (1992).

showed 80 per cent of young people aged 15 to 18 had been stopped by the police and of these, 83 per cent had been stopped on the street.<sup>20</sup> In addition, police officers who participated in the research thought that young people were causing problems in malls (53 per cent) and shopping centres (60 per cent).<sup>21</sup>

The NSW Ombudsman provided the following diagram to illustrate the incidence of ‘move-on’ powers amongst various age groups in the twelve months July 1998 to June 1999:



Source: NSW Ombudsman, Policing public safety: Report under s 6 of the Crimes Legislation Amendment (Police and Public Safety) Act 1998 (1999), 227, citing NSW Bureau of Crime Statistics and Research extract of COPS records of s 28F ‘reasonable directions’ incidents for all NSW 1.7.98 to 30.6.99.

This figure shows 16-year-olds are nine times more likely to be ‘moved on’ than 26-year-olds, and 19 times more likely to be ‘moved on’ than 36-year-olds.

In all recorded criminal incidents across NSW in the year to 30 June 1999, young people under 25 represented 54 per cent of the total incidents, but the same group accounted for 79 per cent of ‘move-on’ directions in the same period.<sup>22</sup> Persons under the age of 17 accounted for 22 per cent of crimes against the person in 1998-99,<sup>23</sup> but accounted for 54 per cent of ‘move-on’ directions.<sup>24</sup> This reveals a telling disparity between the general rate of youth crime — itself arguably over-policed in any case<sup>25</sup> — and the rate of move-on directions.

Spooner suggests that this indicates that ‘police are using the “move-on” powers as a general enforcement measure beyond the areas identified by politicians’,<sup>26</sup> contradicting the view of the Minister for Police and Corrective Services Tom Barton, who said:

I am pleased to note that there is little, if any, recorded abuse of the power on the part of police officers. Moreover, the history of the use of the ‘move-on’ power has clearly

<sup>20</sup> Travlou, above n 9, 13.

<sup>21</sup> Christine Alder et al, *Perceptions of the Treatment of Juveniles in the Legal System* (1992) 31.

<sup>22</sup> Saul, above n 5, 36.

<sup>23</sup> NSW Bureau of Crime Statistics and Research, ‘Police records of persons of interest involved in all recorded criminal incidents against the person in non-residential locations, 1.7.98 to 30.6.99.’ Cited in NSW Ombudsman, above n 11, 228.

<sup>24</sup> NSW Ombudsman, above n 11, 227-8.

<sup>25</sup> Roger Smith, *Youth Justice: Ideas, policy, practice* (2003).

<sup>26</sup> Paul Spooner, ‘Moving in the wrong direction: An analysis of police move-on powers in Queensland’ (2001) 20 *Youth Studies Australia* 27, 30.



indicated to the government that it is an effective preventative tool in minimising criminal disturbances, particularly assaults.<sup>27</sup>

Spooner found that abuse of powers could occur, and that 57 per cent of respondents were given a direction not covered by the legislation. In particular, he noted:

the possibility that young people known to police are being targeted and labelled as 'trouble-makers' and being excluded from public spaces on the basis of perceptions rather than actual behaviour at the time of being requested to move on.<sup>28</sup>

The Youth Affairs Council of Western Australia suggests that 'move-on' powers can increase levels of conflict between police and young people by reinforcing stereotypes.<sup>29</sup> The NSW Ombudsman noted that policing powers should be used fairly so as to avoid undermining community confidence in the integrity of police, and that:

[t]he danger for police is that any injudicious use of police powers may erode community confidence in their police, and possibly undermine the Police Service's capacity to address crime and disorder in those communities.<sup>30</sup>

The disparity between young people being moved on by police, and the rate of their involvement in crime and their representation in the population, is disturbing. It suggests police are not using the powers as an effective tool, and are exercising the power in a discriminatory fashion. Not only does this not reduce the incidence of crime, but it may lead to even more unsatisfactory outcomes such as conflict between police and young people.

### 5.3 Indigenous Australians

A detailed 1995 study in NSW found that Indigenous young people were over-represented at every level of the system except police cautions.<sup>31</sup> This certainly appears to be the case with move-on orders, as Chan and Cunneen<sup>32</sup> note that police use 'move-on' powers in New South Wales against Aboriginal people at a massively disproportionate rate, as illustrated in the table below:

#### *Breakdown of 'move-on' orders in the twelve months July 1998 to June 1999*

	Juvenile		Adult		Total	
	No	%	No	%	No	%
Aboriginal	1,556	24	1,400	21	2,956	23
Non-Aboriginal	1,906	29	3,398	51	5,304	41
Unknown	3,009	46	1,823	28	4,832	37
Total	6,471	100	6,621	100	13,092	100

Source: NSW Ombudsman, Policing public safety: Report under s 6 of the Crimes Legislation Amendment (Police and Public Safety) Act 1998 (1999), 231, citing NSW Bureau of Crime Statistics and Research extract of COPS records of s 28F 'reasonable directions' incidents for all NSW 1.7.98 to 30.6.99.

<sup>27</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 29 February 2000, 50 (Tom Barton, Minister for Police).

<sup>28</sup> Spooner, above n 26, 30.

<sup>29</sup> Youth Affairs Council of Western Australia, 'Curfews: The Public Fight for Young People to be in the City', (2003) 5(27) *Indigenous Law Bulletin* 8.

<sup>30</sup> NSW Ombudsman, above n 11, 240.

<sup>31</sup> Garth Luke and Chris Cunneen, 'Aboriginal over-representation and discretionary decisions in the NSW juvenile justice system' (1995) 1 *Australian Indigenous Law Reporter* 95.

<sup>32</sup> Carrie Chan and Chris Cunneen, *Evaluation of the Implementation of NSW Police Service Aboriginal Strategic Plan* (2000) 438.

Chan and Cunneen note that even if all the individuals in the 'unknown' category were non-Aboriginal, the over-representation of Aboriginal people would still be in the order of 14 times, based on their population within New South Wales.<sup>33</sup> The NSW Bureau of Crime Statistics and Research has discussed the high rate of using summary offence charges, particularly offensive language and offensive conduct charges, in relation to Aboriginal people in NSW,<sup>34</sup> and this was noted by the NSW Ombudsman.<sup>35</sup>

Spooner found that 36.8 per cent of respondents moved on in Queensland were indigenous young people, despite the fact that indigenous young people make up only 4 per cent of the general Queensland youth population.<sup>36</sup>

#### **5.4 Other groups in society**

Police records also showed 14.7 per cent (2120) of 14 455 persons given directions to move on were female and 84.7 per cent (12 237) were male.<sup>37</sup> Concerns that the 'move-on' powers discriminate against young people, ethnic minorities, the homeless, Aborigines and sex workers are reflected in the NSW Ombudsman's report:

[t]here may be circumstances in which a person begging is harassing or intimidating other persons or otherwise exhibiting the 'relevant conduct' under the Act. However, there will also be instances where begging on its own is not sufficient to justify a police officer issuing a direction under the Act. Under the current legislation, police officers need to consider whether the 'relevant conduct' has been displayed in each situation.

Similarly, the Ombudsman's report identified that when police move-on sex workers, they 'may be acting within the scope of the legislation if the presence of these sex workers constitutes harassment, intimidation or is likely to cause fear'.<sup>38</sup> However, the report did not conclude whether police were systematically working within the scope of the legislation and whether the presence of these individuals did actually constitute harassment, intimidation, or was likely to cause fear. The report referred to a case which had proceeded to court (as the person had refused to comply with the order), in which the magistrate found that sex workers in a particular street were intimidating residents, and held that any sex worker in the relevant area could be given a direction, irrespective of their conduct.<sup>39</sup> The Ombudsman reported that police believed this case validated their approach of using the legislation to move suspected street sex workers from particular areas irrespective of their behaviour, contrary to the spirit and the content of the legislation.

The Ombudsman did not examine minority groups other than young people and indigenous Australians, despite mounting anecdotal evidence that other groups are being disproportionately and adversely affected by the law.<sup>40</sup> However, the Ombudsman did recommend that,

---

<sup>33</sup> NSW Ombudsman, above n 11, 241. See also Taylor and Walsh, above n 13, ch 6.

<sup>34</sup> NSW Bureau of Crime Statistics and Research, *Aborigines and Public Order Legislation in New South Wales*, Discussion Paper No B34 (1997), 1.

<sup>35</sup> NSW Ombudsman, above n 11, 235. The Ombudsman also noted increased contact with police as a result of reasonable directions orders may further exacerbate the tensions in police relations with Aboriginal communities, 232.

<sup>36</sup> Spooner, above n 26, 30.

<sup>37</sup> NSW Ombudsman, above n 11, 230; gender for 98 persons not recorded.

<sup>38</sup> NSW Ombudsman, above n 11, 269.

<sup>39</sup> *Ibid* 270.

<sup>40</sup> Saul, above n 5, 34.

[i]n light of the comparatively high numbers of young people and Aboriginal people affected by these powers, the [Police] Service must seek to address concerns expressed by those particular groups, as well as any other group likely to be targeted.<sup>41</sup>

The Ombudsman recommended implementing a code of practice and providing officers with advice on the application of the laws, as they are largely misunderstood.<sup>42</sup> The report was issued in 1999 and the police service has still not implemented a formal code of practice.

## 5.5 Conclusion

As illustrated above, the exercise of move on powers is discriminatory, and the following groups are targeted and overrepresented in empirical research that has considered these issues:

- people experiencing homelessness;
- young people; and
- indigenous Australians and other ethnic minorities.

On the basis that move on powers are exercised in a discriminatory fashion, the Clinic opposes the introduction of the Local Law.

## 6. Move on powers are a breach of human rights

---

### 6.1 The human rights of people experiencing homelessness

Many commentators have considered move on powers in a human rights framework, which may provide further bases for dismissing or questioning the efficacy of these powers.<sup>43</sup>

In the Victorian context, the *Charter of Human Rights and Responsibilities Act 2006* (**Charter**) is relevant, as the Local Law may engage the following rights protected under the Charter:

- (a) right to equality and non-discrimination (section 8);
- (b) right to freedom of movement (section 12);
- (c) right to privacy (section 13);
- (d) right to peaceful assembly and freedom of association (section 16);
- (e) right to protection of children (section 17);
- (f) cultural rights (section 19);
- (g) right to life (section 9); and
- (h) right to protection from cruel, inhuman or degrading treatment (section 10).

---

<sup>41</sup> NSW Ombudsman, above n 11, 239.

<sup>42</sup> Ibid, 279.

<sup>43</sup> See, eg, Goldie, above n 7; Di Otto, 'Addressing Homelessness as a Violation of Human Rights in the Australian Context' (Paper presented at the 3rd National Homelessness Conference, Brisbane, 6–8 April 2003); Taylor and Walsh, above n 18.

Whether the Local Law infringes some or all of these rights will depend on the specific ways in which the Local Law is enforced. However, the Clinic considers it is highly likely that there will be circumstances when human rights are infringed by the By-law.

Infringement of these rights, together with the disproportionate impact on minority groups discussed in **Part 5** above, show that the introduction of 'move-on' powers in Victoria would amount to an unreasonable limitation of these rights.

## 6.2 Limitations on human rights

Section 7(2) of the Victorian Charter provides that

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society<sup>44</sup> based on human dignity, equality and freedom and taking into account all relevant factors.

Section 7(2) also sets out the following inclusive list of these relevant factors:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purpose; and
- (e) whether there is any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Section 7 of the Charter should be interpreted so as to place the burden of proof in relation to the permissibility of a limitation on the party arguing that the limitation is justified and proportionate, and the 'demonstrable justification' should require a 'very high degree of probability' and evidence.<sup>45</sup> However, Frankston City has not yet discharged this onus.

As a matter of international law, any limitations placed on an individual's rights require consideration of a range of factors, including the proportionality between a legitimate aim and the impact on the party's right.<sup>46</sup> The United Nations Human Rights Committee has stated that, where limitations or restrictions are made to rights under the International Covenant on Civil and Political Rights,

States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.<sup>47</sup>

---

<sup>44</sup> According to the Supreme Court of Canada, the values of a 'free and democratic society' include: respect for the inherent dignity of the human person, social justice, equality, accommodation of a plurality of beliefs, and respect for cultural and group identity: *R v Oakes* [1986] 1 SCR 103, 136.

<sup>45</sup> See, eg, *R v Oakes* [1986] 1 SCR 103, 105, 136-7; *Minister of Transport v Noort* [1992] 3 NZLR 260, 283; *Moise v Transitional Land Council of Greater Germiston* 2001 (4) SA 491 (CC), [19].

<sup>46</sup> See, e.g., *Tinnelly & Ors v UK*, 20390/92 [1998] ECHR 56 (10 July 1998), which considers the right to fair hearing.

<sup>47</sup> Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) at para 6, available from: <http://www.ohchr.org/english/bodies/hrc/comments/htm>.

In the Clinic's view, Frankston City cannot justify the limitations placed on an individual's human rights as a result of the Local Law, given that the reason for the limitation is to improve the amenity of the Frankston area. Accordingly, the Local Law has the effect of unreasonably limiting people's human rights and it is incompatible under the Charter.

### **6.3 Frankston City is a public authority**

The Charter imposes specific obligations on public authorities to give proper consideration to human rights when making decisions, and to act in a way that is compatible with human rights.<sup>48</sup> Section 4(1)(e) of the Charter specifically lists local councils (and Councillors and members of Council staff) as public authorities for the purposes of the operation of the Charter.

In this context, Frankston City is obligated to give proper consideration (i.e. real and genuine consideration) to relevant human rights that may be affected by the introduction of the proposed Local Law. If introducing the Local Law, Frankston City must also ensure that its operation will be compatible with human rights under the Charter.

Frankston City has failed to consider the human rights implications of the Local Law, and its proposal to introduce a Local Law that is clearly incompatible with human rights is contrary to the obligations imposed on public authorities under the Charter. On this basis, Frankston City is acting unlawfully under the Charter and should halt the introduction of the proposed Local Law to ensure the promotion and protection of the human rights of individuals in the Frankston City area.

The Clinic notes that the Local Law may also be invalid (or *ultra vires*) based on general principles of law. This issue was highlighted by the Human Rights Law Resource Centre's comment on the proposed Local Law, which notes that:

[A]n analysis of the primary legislation pursuant to which the By-law is proposed to be passed, being the *Local Government Act 1989* (Vic.) [LGA], revealed that the LGA is capable of being interpreted in a way that is *compatible* with human rights. It follows that the LGA does not 'empower' the making of the By-law as a subordinate instrument which is *incompatible*; making the By-Law likely to be *ultra vires* and therefore invalid on ordinary principles.<sup>49</sup>

### **6.4 Conclusion**

The Clinic submits that the proposed Local Law infringes a number of provisions under the Charter. Specifically:

1. The proposed Local Law is incompatible with human rights under the Charter.
2. Frankston City will be acting unlawfully under the Charter by failing to properly consider human rights and by introducing law that is incompatible with human rights; and
3. The Local Law may also be invalid on ordinary principles.

The Clinic opposes the introduction of the Local Law on the basis that move on powers are a breach of human rights and contrary to Victorian law.

---

<sup>48</sup> *Charter of Human Rights and Responsibilities Act 2006*, section 38.

<sup>49</sup> Human Rights Law Resource Bulletin, *Centre Advises on Move-On Powers*, Number 34, February 2009, 20.