

**Investigation into Maribyrnong City Council's internal
review practices for disability parking infringements**

April 2018

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The Victorian Ombudsman respectfully acknowledges the Traditional Owners of the lands throughout Victoria and pays respect to them, their culture and their Elders past, present and future.

Letter to the Legislative Council and the Legislative Assembly

To

The Honourable the President of the Legislative Council

and

The Honourable the Speaker of the Legislative Assembly

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973* (Vic), I present to Parliament my *Investigation into Maribyrnong City Council's internal review practices for disability parking infringements*.



Deborah Glass OBE

Ombudsman

30 April 2018

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Foreword

People make mistakes and no more so than ... individuals who are burdened with carer duties.

– Director, Fines Victoria in response to draft Ombudsman report

My office receives many hundreds of complaints about parking fines every year. We don't investigate them all – the Ombudsman Act says I must refuse to deal with a matter if a complainant has a right of appeal to a court or tribunal. But the Act also gives me a discretion to deal with such complaints if they merit investigation to avoid injustice. A discretion we regularly exercise when dealing with complaints from the most disadvantaged in our society, who may have neither the means nor the ability to take their case to court.

This report concerns a complaint made by the Western Community Legal Centre, known as WEstjustice, about Maribyrnong City Council's unfair internal review processes when dealing with fines. The five case studies featured concern people, most of them elderly, who had valid disability parking permits at the time they parked in a disability parking space. They each made a simple mistake in failing to display the permit properly in their vehicle, either because they had forgotten it, it had been misplaced, they had picked up an expired permit instead, or it had fallen down from the dashboard.

A fine of around \$150 is a lot of money for the people featured in this report.

When these people showed the council their valid permits, it was not unreasonable for them to expect the fines to be withdrawn. As we found out during our investigation, comparable councils would most likely have cancelled the infringements once they saw the valid permits, particularly when it was a first offence.

Instead, this council stuck to a narrow definition of the 'exceptional circumstances' that justify cancelling an infringement. In response to the case of the 80-year-old whose wife was suffering from cancer, the council did not agree that a person being 'stressed' constituted exceptional circumstances. Helpfully, the new agency dealing with such matters, Fines Victoria, told us: '... it would be reasonable to accept that the applicant was stressed due to his wife's medical diagnosis and could, as a result, forget to display the permit'.

The council told us they take this strict approach because permits may be misused, and they are seeking to protect parking spots for people with disabilities. But there is no evidence that any of these cases is dodgy, and in their zeal, the council seems to have forgotten they are harming the very people they claim to protect.

I am tabling this report as a reminder to public servants that in their daily interactions with people, they are dealing with human beings who, being human, make mistakes. Of course they must be alert to potential abuses against the public purse, and some mistakes, especially repeated ones, deserve penalties. But a little compassion is needed when you are dealing with an 80-year-old whose wife is dying of cancer or a pensioner whose husband has Parkinson's disease. While I am pleased the council has now reimbursed one individual, it is disappointing that it has, so far, refused to make modest ex gratia payments to the other four.

Fair systems of public administration need thoughtful exercise of discretion, not blanket rules, rigidly applied. I thank WEstjustice, Victoria Legal Aid and other community legal centres for raising this important issue, and hope that it triggers a shift in the thinking of those who enforce rules. While the amounts of money in this report may appear small, the issue is a big one, for public servants and the public alike.

Deborah Glass
Ombudsman

Background

The complaint

1. In January 2017, the Ombudsman received a complaint from the Western Community Legal Centre (WEstjustice) about Maribyrnong City Council's (Maribyrnong Council) internal review practices regarding infringements.
2. WEstjustice said based on their experience, they believed that 'Maribyrnong's system for administering internal review applications is unfair, arbitrary, [and] overly rigid'.
3. They complained that Maribyrnong Council's 'rates of positive internal review decisions are too low' and that:

The reasons provided by Maribyrnong in refusing applications for internal review consistently demonstrate a failure to give consideration to the grounds for review raised by the applicant, in particular whether exceptional circumstances exist that warrant withdrawal of the infringement or replacement with an official warning.

4. WEstjustice provided a number of 'troubling' case studies in support of their complaint, which they believed 'illustrate the impact of these practices on members of the community experiencing disadvantage'.
5. The complaint was co-signed by:
 - Moonee Valley Legal Service
 - Victoria Legal Aid
 - Inner Melbourne Community Legal
 - Brimbank Melton Community Legal Centre (commUnity).
6. Many of the case studies provided by WEstjustice related to disability parking infringements. As such, the investigation focussed on Maribyrnong Council's internal review practices for these infringements.

Maribyrnong City Council

7. Maribyrnong Council is one of 79 local councils in Victoria, located in the inner west of Melbourne. It is the smallest and most densely populated local government area in metropolitan Melbourne, comprising 31.2 square kilometres, with an estimated resident population of 83,515.¹
8. It is the sixth most ethnically diverse population in Victoria, with 40 per cent of residents born outside of Australia.²
9. Maribyrnong Council's budget for 2017-18 is \$134 million.³

Jurisdiction

10. The Ombudsman's jurisdiction to conduct an investigation on a complaint is derived from section 15B of the *Ombudsman Act 1973* (Vic). As a specified entity under item 15 of Schedule 1 to the Ombudsman Act, council staff are within the Ombudsman's jurisdiction.

Methodology

11. The Ombudsman made initial enquiries with Maribyrnong Council under section 13A of the Ombudsman Act. This included meeting with Maribyrnong Council staff and seeking further information from WEstjustice regarding the case studies.
12. The Ombudsman subsequently determined in September 2017 that a formal investigation was warranted, based on the systemic nature of WEstjustice's concerns.

1 Maribyrnong City Council, *About us – Snapshot* <<https://www.maribyrnong.vic.gov.au/Discover-Maribyrnong/City-snapshot>>.

2 Victorian Multicultural Commission, *Victoria's diverse population: 2016 Census* (2017) <<https://www.multicultural.vic.gov.au/images/2017/2016-Census-DPC-Victorias-Diverse-Population-brochure.pdf>>.

3 Maribyrnong City Council, *Annual Report 2016-17*.

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13. The Ombudsman notified Maribyrnong Council's Chief Executive Officer (CEO), Stephen Wall; the then Mayor, Councillor Catherine Cumming; the Minister for Local Government, the Hon Marlene Kairouz MP; and the CEO of WEstjustice, Denis Nelthorpe, as the complainant.
14. The investigation included:
- reviewing relevant legislation and policies, including:
 - Maribyrnong Council's *Internal Review – Withdrawal Guidelines* (2013, 2016 and 2017 versions)
 - *Internal Review Guidelines* issued by the Infringement Management and Enforcement Services (IMES) unit of the Department of Justice and Regulation (2017)
 - *Infringements Act 2006* (Vic)
 - *Attorney-General's Guidelines to the Infringements Act 2006*
 - undertaking file reviews of infringement case studies provided by WEstjustice
 - analysing Maribyrnong Council's infringement internal review data
 - conducting voluntary interviews with representatives of WEstjustice and Maribyrnong Council's Manager, Regulatory Services
 - speaking with individuals who have received parking infringements from Maribyrnong Council
 - seeking information from five comparable metropolitan local councils, including their internal review guidelines and internal review outcome data
 - reviewing information on, and speaking with IMES about, Fines Reform
 - providing the Ombudsman's draft report to Maribyrnong Council for comment and considering responses dated 18 January 2018 and 14 March 2018
 - consulting with Fines Victoria on the draft report and considering their response dated 12 February 2018.
15. This report includes adverse comments about Maribyrnong Council.
16. In accordance with section 25A(3) of the Ombudsman Act, any other parties who are or may be identifiable from the information in this report are not the subject of any adverse comment or opinion and:
- the Ombudsman is satisfied that it is necessary or desirable in the public interest that the information that identifies or may identify those parties be included in this report and
 - the Ombudsman is satisfied that this will not cause unreasonable damage to those parties' reputation, safety or well-being.
17. The standard of proof applied in the investigation and report is the balance of probabilities. In determining whether that standard has been met, the High Court decision of *Briginshaw v Briginshaw* has been applied. Specifically, the Ombudsman has considered the seriousness of the concerns raised and the gravity of the consequences that may flow from any finding.⁴

Anonymity

18. Throughout this report, case studies detail the experiences of individuals who have received a parking infringement from Maribyrnong Council.
19. For privacy reasons, the names used in the case studies throughout the report are not the real names of the individuals involved.

4 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

Parking infringements in Victoria

20. In Victoria, infringements may be issued by a range of enforcement agencies for offences set out in over 60 statutes.⁵
21. Enforcement agencies include councils, which may issue infringements for a range of offences, including parking offences set out in the *Road Safety Road Rules 2017* (Vic).⁶
22. One offence under the Road Safety Road Rules, for which a council may issue an infringement notice, relates to stopping in a parking area for people with disabilities.
23. The Road Safety Road Rules state that a driver must not stop in a parking area for people with disabilities unless:
 - the driver's vehicle displays a current parking permit for people with disabilities; and
 - the driver complies with the conditions of the use of the permit.⁷

24. This offence relates to reserved disability parking spaces displaying the International Symbol of Access (ISA) (see photo below).

Disability parking permits

25. Disability parking permits are issued under a statewide scheme, which allows eligible individuals who have a medical condition or disability to apply for a permit.⁸
26. The purpose of the scheme is 'to provide people with significant ambulatory or intellectual disabilities with equality of opportunity to access facilities and services throughout the State'.⁹
27. There are two different types of permanent disability parking permits,¹⁰ as outlined in Table 1 on the next page.

Photo 1: International Symbol of Access (ISA)



⁵ Infringement Management and Enforcement Services, Department of Justice and Regulation, *Annual Report on the Infringements System 2015-16* (November 2016).

⁶ The *Road Safety Road Rules 2017* took effect on 1 July 2017, replacing the *Road Safety Road Rules 2009*.

⁷ *Road Safety Road Rules 2017* (Vic) r 203.

⁸ VicRoads, *Disability Parking* <<https://www.vicroads.vic.gov.au/safety-and-road-rules/road-rules/disability-parking>>.

⁹ Victorian Government, *Victorian Government Gazette*, No. G3, 26 January 1995, 173.

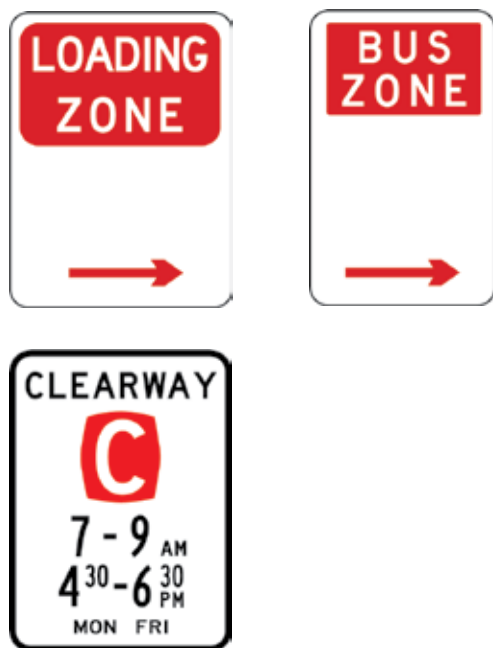
¹⁰ VicRoads, above n 8.

Table 1: Categories of disability parking permits

Category	Eligibility	Concessions
One (blue permit) 	<p>A Medical Practitioner must confirm that the applicant has a significant ambulatory disability and they cannot access a vehicle in an ordinary parking bay, or they are required to use a complex walking aid that prevents access to a vehicle in an ordinary parking bay.</p> <p>OR</p> <p>A Medical Practitioner must confirm that the applicant has either an acute or chronic illness in which minimal walking may endanger their health.</p> <p>OR</p> <p>A Specialist Medical Practitioner or Clinical Psychologist must confirm that the applicant is an extreme danger to themselves and others in a public place without assistance by a carer.</p>	<ul style="list-style-type: none"> parking in reserved disability parking bays parking for twice as long as indicated by a 'permissive parking sign' (green or blue sign, e.g. '1P' or '2P')  <ul style="list-style-type: none"> when parking for twice as long, any initial parking fee still needs to be paid, but that payment covers twice the length of time than it would for a non-permit holder.
Two (green permit) 	<p>A Medical Practitioner must confirm that an individual has a significant ambulatory disability or severe illness which does not affect their ability to walk, however they require rest breaks when continuous walking is undertaken.</p>	<ul style="list-style-type: none"> parking for twice as long as indicated by a 'permissive parking sign' (as detailed above).

28. Neither category of disability parking permit allows a permit holder to park where there is a red restrictive sign, such as a bus zone, clearway, or loading zone.¹¹

Photo 2: Examples of red restrictive parking signs



29. The permit must only be displayed when a vehicle is being used to transport the individual to whom the permit was issued. This means that a relative or friend of a permit holder may use the permit when transporting them. The permit, however, cannot be used by a third person if the permit holder is not in the vehicle.¹²

30. Permits must be clearly displayed so the permit number and expiry date are visible from the exterior of the vehicle.¹³ Failure to properly display the permit may result in an infringement being issued.

Appealing a parking infringement

Internal review

31. Division 3 of Part 2 of the *Infringements Act 2006* (Vic) allows a person who receives a parking infringement to apply to the relevant enforcement agency for an internal review.
32. Internal review is 'an important part of the infringement system because it acts as a first stage of assessment as to whether it is appropriate for that person to receive an infringement fine based on their life circumstances or other relevant ground'.¹⁴
33. The internal review process outlines that:
- A person may seek a review if they believe:
 - the decision to issue the infringement was contrary to law, or involved a mistake of identity
 - special circumstances¹⁵ apply to them
 - the conduct for which the infringement was issued should be excused having regard to any exceptional circumstances. 'Exceptional circumstances' is not defined in the *Infringements Act*
 - they were unaware of the notice having been served, and the service of the notice was not by personal service.

¹¹ VicRoads, above n 8.

¹² VicRoads, above n 8.

¹³ VicRoads, above n 8.

¹⁴ Department of Justice and Regulation (Vic), *Infringement Management and Enforcement Services, Internal Review Guidelines* (March 2017).

¹⁵ 'Special circumstances' apply to a person who is unable to control or understand their offending behaviour as a result of a mental or intellectual disability/disorder, a serious addiction to drugs, alcohol or a volatile substance, homelessness, or being a victim of family violence – *Infringements Act 2006* (Vic) s 3.

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- Upon completion of an internal review, the enforcement agency may:
 - confirm the infringement
 - withdraw the infringement, and serve a warning instead
 - withdraw the infringement, with no further action
 - refer the matter to the Magistrates' Court
 - waive or vary any fees associated with the infringement
 - approve a payment plan.

Internal review guidelines

IMES guidelines

34. In 2017, *Internal Review Guidelines* were developed by Infringement Management and Enforcement Services (IMES) of the Department of Justice and Regulation, to assist enforcement agencies, including councils, when conducting internal reviews of infringements.
35. These guidelines outline principles agencies should consider in making decisions about internal reviews, including 'lawfulness, fairness, openness and efficiency'.
36. The guidelines state that agencies should also consider the purposes of an internal review, which are to ensure that:
 - where an error has been made by an agency, the notice can be withdrawn
 - where an infringement was validly issued, but the applicant's life circumstances mean that enforcement would not be appropriate on fairness or equity grounds, the notice can be withdrawn.

37. The guidelines explain the 'exceptional circumstances' internal review ground, noting there is no definition in the Infringements Act. The guidelines state that the ground:

... provides decision makers with the discretion to determine whether, taking into account the circumstances in which the offending conduct occurred, the imposition of the penalty is appropriately enforced in light of the exceptional circumstances.

...

This category is designed to include circumstances where the applicant has enough awareness and self-control to be liable for their conduct, but has a good excuse for that conduct.

Some examples include circumstances where the applicant committed the offence due to unforeseen or unpreventable circumstances including medical emergencies, unavoidable or unforeseeable delay and vehicle breakdown. The decision making criterion then is whether imposition of a penalty is fair in the circumstances.

38. While the cases examined in this report predate the introduction of these guidelines, they are relevant to Maribyrnong's continuing practices with respect to infringements.

Attorney-General's guidelines

39. Guidelines in relation to the Infringements Act may be issued by the Attorney-General and are then published in the Government Gazette, in accordance with section 5 of the Act.
40. The *Attorney-General's Guidelines to the Infringements Act 2006* provide guidance to enforcement agencies regarding internal reviews and were in place at the time of the infringements examined in this report. These guidelines explain 'the fundamental elements' on which the Act was prepared and 'the manner in which responsibilities under the Act are to be exercised'.
41. They state that review officers 'must ensure that their discretionary powers are exercised in good faith and in a way that is consistent with the principles of the Act and these guidelines'. The guidelines note the principles upon which the Act is based, which include 'a requirement that individual circumstances be taken into account'.
42. The guidelines state that agencies must also consider the grounds of the internal review request, and:

... whether, given the person's application, prosecution of the offence would be likely to be successful and/or, whether it is appropriate to continue the enforcement process.

Maribyrnong Council's internal review guidelines

43. Maribyrnong Council has a team of five compliance officers, managed by a team leader, who are responsible for conducting internal reviews of infringements.¹⁶ The council's Manager, Regulatory Services said at interview that compliance officers can finalise internal reviews autonomously where an infringement is confirmed, however, they must seek endorsement from the team leader where they believe a withdrawal may be warranted.¹⁷
44. Compliance officers are guided by *Internal Review - Withdrawal Guidelines* developed by the council, in addition to the Infringements Act and the external guidelines outlined earlier.
45. The council's guidelines outline the circumstances in which it will, and will not, consider withdrawal of an infringement upon internal review.
46. The council's Manager, Regulatory Services said at interview the guidelines are reviewed every 12 months, with the last review completed in October 2017. He said the reviews are done in consultation with other inner-city councils, to ensure that Maribyrnong Council's practices are comparable and up to date.

¹⁶ Maribyrnong City Council, Current Compliance Org Chart, undated.

¹⁷ Interview with Manager, Regulatory Services, Maribyrnong City Council (Melbourne, 16 November 2017).

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47. The previous versions of the guidelines in place at the time of the infringements examined in this report contained the same direction with respect to disability parking infringements.¹⁸ However, prior to 2017, the guidelines did not specifically address internal reviews for infringements issued where the details of a permit were partially obscured. Irrespective of this, Maribyrnong Council confirmed that its practices were the same as they are now.¹⁹
48. While not specified in the guidelines, Maribyrnong Council's response to the draft report said that 'prior infringement history is a relevant consideration when determining an application for internal review'. It said, however, that it:
- ... accepts that the weight to be given to prior infringements should vary according to the:
- type of offence(s) previously the subject of infringements; and
 - time that has passed since the prior infringements were issued.
49. The council said it proposes to amend its internal review guidelines to reflect these matters.

Disputing an infringement at court

50. The Infringements Act provides that if an enforcement agency confirms a parking infringement upon internal review, and payment is not received by a certain time, the infringement may become subject to further enforcement action. At the time of the investigation, further action included the agency lodging the matter with the Infringements Court.
51. If this occurred, the Infringements Court would send the recipient of the infringement an Enforcement Order Notice²⁰ and additional costs²¹ were added to the fine.
52. A person could seek review of the matter at this stage by applying in writing to the Infringements Court for 'revocation' (cancellation) of the enforcement order. The Infringements Court dealt with applications administratively and a person did not have to attend court as part of this process. This was in contrast to matters that proceed to the Magistrates' Court, which are heard in open court before a magistrate.

¹⁸ Email from Maribyrnong City Council to Victorian Ombudsman, 5 December 2017.

¹⁹ Email from Maribyrnong City Council to Victorian Ombudsman, 6 December 2017.

²⁰ An Enforcement Order Notice is a written document issued by the court to enforce an unpaid fine with added costs.

²¹ As at November 2017, this cost was \$106.50. The amount is adjusted in July each year.

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53. If revocation was granted by the Infringements Court Registrar, they would cancel the enforcement order and advise the person in writing. The matter was then referred back to the enforcement agency for their consideration, at which time the agency could decide to:
- withdraw the fine; or
 - take no action and the fine would be referred to the Magistrates' Court for hearing.
54. If revocation was not granted by the Infringements Court Registrar, enforcement of the infringement continued and the person was advised in writing of the outstanding amount owing and the due date. If a person disagreed with the decision not to grant revocation, they could object to the Infringements Court Registrar's decision, which referred the application for revocation to the Magistrates' Court.
55. The Act provided that a person could also choose to have their matter heard in the Magistrates' Court at any time (including following an unsuccessful internal review) up until the fine was lodged with the Infringements Court.

Fines Reform

56. Significant changes have been made to the infringement system in Victoria under a program of work known as 'Fines Reform'. Some initiatives took effect in July 2017, with the full reforms commencing from 31 December 2017.²²
57. One of the most significant changes is the introduction of an administrative body, Fines Victoria, replacing the existing Infringements Court.

Enforcement reviews

58. Under Fines Reform, the internal review process remains largely unchanged. However, the 'revocation' process formerly undertaken by the Infringements Court has been replaced by an administrative process called 'enforcement reviews' managed by the Director, Fines Victoria.
59. Under the new system established by the *Fines Reform Act 2014* (Vic), enforcement agencies can register unpaid infringement fines with the Director, Fines Victoria to enforce,²³ and must pay a fee to do so.
60. Once registered, Fines Victoria will issue the person a notice of final demand.²⁴ A person is able to further contest the matter at that stage by applying for an 'enforcement review' by the Director, Fines Victoria.²⁵
61. After conducting an enforcement review, the Director, Fines Victoria may:
- confirm the decision of the enforcement agency to issue the infringement and proceed with enforcement
 - cancel the enforcement of the infringement and refer the matter back to the enforcement agency.²⁶
62. During consultation with Fines Victoria on the draft report, the Director said:
- ... Fines Victoria does not typically know if an individual had previous fines issued for the same offences unless they were registered with Fines Victoria. Even then, it would not necessarily be a relevant consideration when determining the enforcement review application.

²³ *Fines Reform Act 2014* (Vic) s 16.

²⁴ *Ibid* s 23.

²⁵ *Ibid* s 32.

²⁶ *Ibid* s 37.

²² Above n 14.

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63. If the Director cancels the enforcement of the infringement, within 90 days the enforcement agency must:
- withdraw the infringement notice (which may include issuing a warning); or
 - withdraw the infringement notice and commence a proceeding in the Magistrates' Court for the alleged offence by filing a charge-sheet.²⁷
64. In the new system, an individual will also still have the option to elect to take a matter to the Magistrates' Court, however, can only do so before the infringement is registered with the Director, Fines Victoria.²⁸

Internal review oversight function

65. Fines Victoria will also oversee enforcement agencies' internal review practices. The new oversight regime aims to:
- ... support the capacity and capability of enforcement agencies to carry out internal reviews through education, review, resource production and collaborative development of best practice.²⁹
66. The *Internal Review Guidelines* issued by IMES earlier in 2017 also form part of Fines Reform.
67. The Director, Fines Victoria will have the ability to:
- request information from enforcement agencies about their internal review practices³⁰
 - make recommendations to enforcement agencies in relation to their internal review processes and compliance with the Infringements Act generally.³¹

68. In response to the draft report, the Director, Fines Victoria said while this function is 'designed to help ensure that enforcement agencies meet their obligations under the legislation', the Director does not provide 'direct ongoing supervision or governance'. The Director highlighted that:

The limited scope of these powers is intended to preserve the prosecutorial discretion of enforcement agencies in issuing infringement notices and considering internal review applications.

69. The Director also stated that he intends to 'consider internal review practices in relation to disability permits as part of my new oversight role'.
70. In response to the draft report, Maribyrnong Council said that it 'will take account of any guidance or advice that the Director might publish in any future reviews of its internal review processes'.

²⁷ *Fines Reform Act 2014* (Vic) s 38.

²⁸ *Ibid* s 211(1) and (1A).

²⁹ Above n 14.

³⁰ *Infringements Act 2006* (Vic) s 53B.

³¹ *Ibid* s 53C.

Maribyrnong Council's internal review practices

Withdrawal rates

71. The majority of internal reviews conducted by Maribyrnong Council in 2016-17 resulted in infringements being upheld, with only 14 per cent of infringements withdrawn.³²
72. Table 2 demonstrates that in 2016-17, Maribyrnong Council's withdrawal rate was less than half the rate of each of the five other comparator metropolitan councils examined during this investigation. The withdrawal rate of two of the five councils was three times that of Maribyrnong Council.
73. Maribyrnong Council's withdrawal rate was also the lowest of the six councils in 2015-16, with only 19 per cent of infringements withdrawn.

Internal reviews of disability parking infringements

74. Maribyrnong Council's guidelines detail when it will consider withdrawing an infringement issued for parking in a disability parking space without displaying a valid permit and/or complying with the conditions of the permit.
75. The guidelines address a number of circumstances in which an infringement may be issued for this offence, including where:
 - a) no disability parking permit is displayed, including where a person forgot to display their permit
 - b) a disability parking permit is displayed, but the details are partially obscured
 - c) an expired disability parking permit is displayed.

Table 2: Comparison of Maribyrnong's 2016-17 internal review outcomes with five other metropolitan councils*

Council	2016-17		
	Number of reviews finalised	Percentage of infringements confirmed	Percentage of infringements withdrawn
Maribyrnong City Council	7,559	86%	14%
Melbourne City Council	22,534	71%	29%
Moonee Valley City Council	7,695	69%	31%
Yarra City Council	13,595	62%	38%
Stonnington City Council	16,674	58%	42%
Port Phillip City Council	21,151	57%	43%

*Source: The data for each council was sourced directly from each of the councils.

³² Email from Maribyrnong City Council to Victorian Ombudsman, 25 October 2017.

a) No disability parking permit displayed

76. Maribyrnong Council's guidelines state that it will not withdraw an infringement issued in circumstances where:
- a disability parking permit is not displayed at all, or a person forgot to display their permit
 - a disability parking permit is displayed, but all details are obscured.
77. This is the case irrespective of whether the recipient of the infringement is a valid disability parking permit holder and they provide a copy of their permit upon internal review.³³
78. At interview, WEstjustice told the investigation that Maribyrnong Council seemed to be 'quite out of step with what the rest of the infringements community thinks about what exceptional circumstances are, or what the grounds that warrant withdrawal of an infringement are'. WEstjustice also said that they 'know that other councils for example ... on the production of a disability parking permit will routinely withdraw the fine'.³⁴
79. A review of the guidelines of the five other metropolitan councils revealed that all five are willing to exercise greater discretion than Maribyrnong Council in withdrawing infringements in these circumstances.

Table 3: Comparison of Maribyrnong's withdrawal guidelines with those of other metropolitan councils

Council	Withdrawal guidelines where no permit is displayed / person forgot to display their permit
Maribyrnong	Will not consider withdrawal of an infringement.
Moonee Valley City Council / Stonnington City Council	Will consider withdrawal of an infringement and issue a warning if: <ul style="list-style-type: none">• the <i>driver or the passenger</i> holds a valid disability parking permit; and• it was a first offence.
Melbourne City Council / Port Phillip City Council	Will consider withdrawal of an infringement and issue a warning if: <ul style="list-style-type: none">• the <i>driver</i> holds a valid disability parking permit; and• it was a first offence.
Yarra City Council	Will consider withdrawal of an infringement if: <ul style="list-style-type: none">• a copy of a valid disability parking permit is provided; and• the person has complied with the road rules (ie not committed a 'red sign' offence).*

*'Red sign' offences include stopping in a bus zone, clearway, or loading zone.

³³ Maribyrnong City Council, *Internal Review - Withdrawal Guidelines* (6 October 2017).

³⁴ Interview with Denis Nelthorpe, CEO and Shifrah Blustein, Project Lawyer at WEstjustice (Melbourne 9 November 2017).

80. In response to the draft report, Maribyrnong Council said:

The withdrawal guidelines of the comparison councils simply provide that those councils 'will consider' withdrawal where the applicant holds a valid disability parking permit – not that withdrawal *will* occur (emphasis in original).

There is no evidence to support WEstjustice's assertion and ... [Maribyrnong Council] does not accept it as accurate.

81. It is, however, noted that Maribyrnong Council's guidelines state that it will not consider withdrawal of an infringement in the above circumstances, whereas all other five councils *will* consider withdrawal. It is accepted that the five other councils may not withdraw an infringement in these circumstances on every occasion. However, it is evident the five other councils are willing to exercise discretion in withdrawing infringements in these circumstances.

82. While Maribyrnong Council's guidelines state there is no consideration given to withdrawal in these circumstances, its Manager, Regulatory Services said at interview they would still consider information provided in an internal review application. He said:

It's not a black and white 'no we won't look at it'. We do a full review of every one of them, but unless they can show mitigating circumstances, then we say no to it.

83. The Manager acknowledged the council was applying a 'blanket rule' in these cases, 'if there's nothing exceptional'.

84. As shown in Table 4 below, internal review outcome data supports this, with only 16 per cent of internal reviews for this offence resulting in an infringement being withdrawn (126 out of 765).³⁵ These figures, however, include internal reviews for all disability parking infringements issued in any circumstance (ie they are not limited to those issued where a person forgot to display their permit).

Table 4: Comparison of Maribyrnong's 2016-17 internal review outcomes for disability parking offences with five other metropolitan councils*

Council	2016-17		
	Number of reviews finalised	Percentage of infringements confirmed	Percentage of infringements withdrawn (including with an official warning)
Maribyrnong City Council	765	84%	16%
Melbourne City Council	428	62%	38%
Yarra City Council	134	57%	43%
Port Phillip City Council	329	48%	52%
Stonnington City Council	113	36%	64%
Moonee Valley City Council	Data unavailable	Data unavailable	Data unavailable

*The data for each council was sourced directly from each of the councils.

³⁵ Above n 32.

85. Table 4 also shows that Maribyrnong Council's withdrawal rate for disability parking infringements was significantly lower than the comparator councils, whose withdrawal rates ranged from 38 per cent (more than double Maribyrnong Council) to 64 per cent (quadruple Maribyrnong Council).

86. At interview, the Manager was unable to provide an example of what he would consider to be 'exceptional'; however he said that a person merely forgetting to display their permit was not a 'good enough excuse' to warrant withdrawal of an infringement.

87. While acknowledging the 'blanket rule', the Manager said he does not believe that the council's discretion is unreasonably limited in these matters, on the basis that if a person is unhappy with an internal review outcome, they have options to pursue the matter further.

88. The Manager explained that one of these options is to seek a 'second review' from the council, which could occur if a person made a complaint to the CEO, or to him as the responsible manager. He said this may result in the initial review decision being 'overridden'. The Manager acknowledged, however, that 'second reviews' are not undertaken very often.

89. There is no evidence to indicate that applicants for internal review are advised there is an option of a 'second review'. The council's letters to people who have been unsuccessful in the internal review process state that their only remaining options are to pay the infringement or take the matter to court. The letters state:

The *Infringements Act 2006* entitles you to only *one* opportunity to apply for a review and no further reviews will be conducted regarding this matter (emphasis in original).

90. In response to the draft report, Maribyrnong Council said it:

will reconsider whether 'second reviews' are appropriate in the broader context of the review processes provided by the *Infringements Act 2006* and the *Fines Reform Act 2014* and, if it is determined that 'second reviews' are:

- appropriate, will update its internal review outcome letters to reflect this;

or

- inappropriate, Council will cease the practice of 'second reviews'.

Impact on vulnerable persons

91. At interview, WEstjustice highlighted the impact of Maribyrnong Council's internal review practices on 'very vulnerable people', 'who are already disadvantaged', stating:

... they are in this position with a fine, they apply for internal review, which doesn't go anywhere and then they have no options. They can either go to court, Maribyrnong will seek costs against them, or they pay the fine, and that's the advice that we have to give them, and we have had reports from some of those clients that they've had to forgo food or medicine or whatever to pay for those fines. It has very serious consequences for people.

92. In response to the draft report, the council said:

It is ... [Maribyrnong Council's] position, consistent with the IMES Guidelines, that financial hardship, as described by WEstjustice, is not, by itself, a ground for withdrawal of an infringement.

93. While Maribyrnong Council's position is correct, WEstjustice's comments regarding the financial impact a negative internal review outcome has had on many of their clients remain relevant.

Case studies

94. The following case studies provide examples of infringements issued by Maribyrnong Council to valid disability parking permit holders (or people transporting them) who failed to display their permit.

95. In each case the person sought an internal review on the ground of exceptional circumstances. The council refused to withdraw any of the infringements, despite all of the applicants including a copy of their valid permit in their application for internal review.

96. In the first three cases, the individuals ultimately decided to pay the infringement amount to resolve the matter.



Case study 1: daughter of elderly woman with a disability fined picking her mother up from hospital

WEstjustice said Maria:

- is 82 years old and reliant on the aged pension
- cannot speak or write in English, and also lacks literacy skills in her native language
- is unable to walk without a walker, after having undergone knee reconstructions on both knees
- holds a valid category 1 disability parking permit, but is unable to drive
- relies on her family for transport.

WEstjustice said that in August 2016, Maria's daughter, Sophie, picked Maria up from hospital following a family emergency and parked in a disability parking space. An infringement was issued because Maria's disability parking permit had fallen down and was not visible.

WEstjustice said Sophie suspected her young son (Maria's grandson) may have accidentally knocked it off the dashboard. This was the first infringement Maria had received from Maribyrnong Council for this offence.³⁶

Maria and Sophie made an application for internal review to the council, but it refused to withdraw the infringement. The council said that if 'a vehicle does not have a valid permit clearly displayed the driver cannot claim permit holder concessions'.

WEstjustice said Maria and Sophie decided to pay the infringement amount of \$177.60 following the council's response. This included the original infringement amount of \$155, plus \$22.60 in additional costs applied for not paying by the due date.

³⁶ Email from Maribyrnong City Council to Victorian Ombudsman, 23 November 2017.

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97. In response to the draft report, Maribyrnong Council highlighted that Maria had received one other parking infringement from the council.
98. It is noted:
- Maria had not received any prior infringements for the offence of parking in a disability parking space without a valid permit displayed.
 - The other infringement was issued to her seven years prior for an unrelated offence.
 - There is no evidence that Maria's previous infringement was considered in Maribyrnong Council's internal review of the infringement in question.
99. Upon reviewing the draft report, Fines Victoria said it believed the case involved 'exceptional circumstances'. It said that if it were to conduct an enforcement review of the case, it would 'have given the benefit of the doubt' and 'cancelled enforcement on the basis that there was sufficient explanation for the exceptional circumstances'.
100. In a further response to the draft report, Maribyrnong Council said:
- This infringement was issued to 'the owner' of the vehicle, being Maria, although Maria's daughter Sophie was the driver at the time of the offence.
 - Maria did not 'nominate' Sophie as the driver and, therefore, the person responsible for the infringement. If she had, it would have alleviated any hardships she experienced while ensuring that the person who committed the offence was issued with the infringement.
- Instead, with the support of her daughter, Maria applied for internal review of the infringement in reliance of her circumstances.
 - It is somewhat misleading to now suggest that Maria's circumstances placed her at a disadvantage when a conscious decision was taken, in consultation with her daughter, to pursue internal review.
 - Council cannot now withdraw the infringement and reissue it to Sophie, as the time for doing so has expired.
 - There is therefore nothing in the ... Draft report which alters Council's initial determination of this internal review.
101. Irrespective of Maria not nominating Sophie as the driver, it is noted that:
- WEstjustice said Sophie was picking Maria up from hospital following a family emergency at the time the infringement was issued.
 - Sophie is entitled to use Maria's disability parking permit to park in a disability parking space when transporting her mother.
 - Maria is unable to drive and relies on her family for transport.
102. The investigation therefore remains of the view that this infringement should have been withdrawn upon internal review.



Case study 2: elderly man fined driving his ill wife to Centrelink

WEstjustice said Ivan is:

- 80 years old and English is his second language
- reliant on the aged pension.

WEstjustice said Ivan's late wife, Vesna:

- had advanced lung cancer and, as a result, Ivan had to take her to many appointments; this was causing Ivan significant stress at the time and he was not sleeping well
- had severe difficulties walking due to a serious injury she sustained years ago
- held a valid category 1 disability parking permit.

WEstjustice outlined that in February 2017, Ivan drove Vesna to Centrelink and parked in a disability parking space. Ivan received an infringement as he forgot to display Vesna's permit. Ivan had previously received one infringement from Maribyrnong Council for this offence, about one year prior.³⁷

Ivan later attended the council's office, showed Vesna's valid permit and applied for an internal review. The council refused to withdraw the infringement on the basis that the permit had not been displayed in accordance with the permit conditions.

WEstjustice said Ivan felt like he had no choice but to pay the infringement amount of \$155, which was difficult based on his limited income.

³⁷ Above n 36.

103. In response to the draft report, Maribyrnong Council said Ivan had received six other parking infringements from the council.

104. However, it is noted:

- Ivan had received only one previous infringement for the offence of parking in a disability parking space without a valid permit displayed, about one year prior.
- The other infringements were issued over a six-year period for unrelated offences.
- There is no evidence that Ivan's previous infringements were considered in Maribyrnong Council's internal review of the infringement in question.

105. Fines Victoria's response to the draft report said it considered this case involved 'exceptional circumstances' and that it would have cancelled enforcement. It said:

Exceptional circumstances are sufficiently set out. Council could have sought additional information from the applicant to substantiate the circumstances, however, it would be reasonable to accept that the applicant was stressed due to his wife's medical diagnosis and could, as a result, forget to display the permit.

106. In a further response to the draft report, Maribyrnong Council said that it did not agree 'to the fact that a person is "stressed" constitutes exceptional circumstances'. It also said '[t]here is nothing in the ... Draft Report which alters Council's initial determination of this internal review'.

107. The investigation remains of the view that this infringement should have been withdrawn upon internal review.

108. In the following case, the Infringements Court revoked an infringement issued to a disability support worker. However, Maribyrnong Council sought to enforce the infringement in the Magistrates' Court. The worker paid the infringement amount and additional penalties before the court hearing.



Case study 3: disability support worker fined while transporting client with a severe disability

WEstjustice said Peter is a disability support worker, employed by a not-for-profit organisation providing assistance to people with disabilities.

WEstjustice explained that in January 2016, Peter was taking one of his clients, Phillip, shopping. WEstjustice advised that Phillip:

- is aged in his 60s, and has a severe intellectual disability
- is non-verbal, frail, and can only walk short distances with assistance, and otherwise uses a wheelchair
- is unable to get out of the car in a normal parking space due to his disability, as this does not allow sufficient room to open the door completely
- holds a valid category 1 disability parking permit.

WEstjustice said that on the day in question, Phillip's disability parking permit was missing. As Phillip is unable to get out of the car in a normal parking space, WEstjustice said Peter parked in a disability parking space to avoid Phillip becoming distressed. As no permit was displayed, Peter was issued an infringement. This was the first infringement Peter had received from Maribyrnong Council for this offence.³⁸

Peter initially contacted the council to request an extension of time, while he applied for a replacement for Phillip's missing permit. WEstjustice said this was delayed due to complexities with the family members who have Power of Attorney over Phillip.

Peter then produced a copy of the permit to the council and sought an internal review, outlining the circumstances in which the infringement was issued. The council refused to withdraw the infringement, stating that if 'a vehicle does not have a valid permit clearly displayed the driver cannot claim permit holder concessions'. The council also said that if 'a permit has been lost or misplaced then the driver must park in a legal parking space'.

The council subsequently lodged the matter with the Infringements Court as payment had not been received and Peter applied for revocation. The Infringements Court granted revocation, however, the council disagreed with this decision, and so proceeded with prosecution of the matter in the Magistrates' Court.³⁹

A court hearing was scheduled for March 2017, however, WEstjustice said Peter decided to pay the infringement amount of \$245.10 to resolve the matter prior to the hearing. This amount comprised the original \$152 infringement, plus \$93.10 in additional costs applied.⁴⁰

38 Above n 36.

39 Infringements Court, Notice of Revocation to Maribyrnong City Council, 20 October 2016.

40 Maribyrnong City Council, Brief for Penalty Enforcement by Registration Infringement Notice (PERIN) process for Peter's case.

109. In response to the draft report, Maribyrnong Council said Peter has received one other parking infringement from the council.

110. However, it is noted:

- Peter had not received any previous infringements for the offence of parking in a disability parking space without a valid permit displayed.
- The other infringement was issued to him about nine months prior for an unrelated offence.
- There is no evidence that Peter's previous infringement was considered in Maribyrnong Council's internal review of the infringement in question.

111. After reviewing the draft report, Fines Victoria said it believed the case involved 'exceptional circumstances' and advised that it would have cancelled enforcement on the basis that:

The applicant stated that the permit was missing on the day. Given Phillip's disability, it is not unreasonable that the permit would go missing from time to time as it would have been used by various support workers to ferry Phillip around.

Furthermore, it would be unreasonable to expect that Phillip should not leave his abode because the permit had gone missing.

The permit was subsequently produced.

112. In a further response to the draft report, Maribyrnong Council said:

- On reflection, Council agrees that Case Study 3 involves a degree of 'exceptional circumstances'.
- In particular, Council notes that:
 - Peter being pressured to take his client on a shopping trip knowing the requirement for a larger car park for his client but not having his disability permit available.
 - Peter not having a history of penalty notices applicable to this incident.

113. The council said that for these reasons, it has refunded Peter the full \$245.10 paid in respect of the infringement.

Maribyrnong Council's rationale for not withdrawing

114. At interview, Maribyrnong Council's Manager, Regulatory Services explained why the council is unwilling to withdraw an infringement for failure to display a disability parking permit where the driver or passenger has a valid permit:

Simply ... the requirement is that you must display a permit for you to park in ... disability parking. If you haven't got the permit with you, we need to know where it was, basically. So is it another relative using it? Is it another friend using it? And this is something that's a common occurrence.

We have that same issue that comes up where people have got expired permits, they hand the expired permit over to ... a relative. And they cover up the ... expiry date of the permit, in the attempt to get away with parking there. I'm not saying it happens every day, but that's the reason for the fact that we don't allow for ... matters to be withdrawn under those circumstances.

115. When the Manager was questioned about the basis of his view that permits are commonly misused, he said:

It's through past experiences we've had, and it's ... I suppose it's being hard on the legislation. We can't prove they've done it, they can't prove that they haven't done it. So we leave it up to the courts to decide, and on most occasions we get convictions out of that ... the courts go our way with it ... we're successful in the prosecution.

116. WEstjustice said at interview that they had raised concerns with Maribyrnong Council about the way it was treating these 'very disadvantaged people', most of whom did not just have a disability, but were also elderly. They said that in response, the council came out with 'a default response [of] ... look we all know most of those people are just giving their ... permit to their kids'.

117. WEstjustice questioned the level of 'suspicion' held by the council in these matters, stating 'Are we all that surprised that someone with very poor health who's 83, has got a dodgy memory? Well not really'. WEstjustice also questioned whether the council should 'really [be] that worried about 80 year olds ripping [them] off'.

118. In response to the draft report, the council said WEstjustice's comments above oversimplify its position and unfairly represent its approach to internal reviews. It further said:

Council is not concerned about being 'ripped off'. It is concerned with fulfilling its general obligation to ensure that disabled parking spaces remain available for use by individuals with valid disabled parking permits.

119. At interview, the council's Manager also highlighted that the offence is 'black and white'; if 'you park in a disability car park, you must ... display a valid disability permit', and if you do not, then 'the offence is complete'. The Manager's evidence is correct in that there is no need to establish the person intended to commit the offence in order for it to be proven.

120. Another reason highlighted by the Manager for the lack of discretion exercised in these cases is the need for consistent review decisions. At interview, he said:

... we need to be strict. When I say strict ... we need to be ... consistent with the staff that are doing the reviews. Because if we start changing their decision making around, they get confused, then all of a sudden they don't know whether they're going to withdraw this or not withdraw it.

b) Disability parking permit displayed, but details partially obscured

121. When parking in a disability parking space, a valid permit must be displayed with all details, including the permit number and expiry date, clearly visible from outside the vehicle. If all details are not visible, an infringement may be issued.

122. The guidelines of Maribyrnong Council and the five other councils regarding these circumstances differ slightly from one another (see Table 5 below). However, on the whole, the five other councils exercise greater discretion than Maribyrnong Council in such cases.

Table 5: Comparison of Maribyrnong's withdrawal guidelines with those of other metropolitan councils

Council	Withdrawal guidelines for parking permit partially obscured
Maribyrnong City Council	Will consider withdrawal and issue a warning if it is a first offence, but council 'must be 100% satisfied that the permit provided is the one that was in the vehicle at the time' (based on distinguishing marks, sequence of numbers etc). Prior to 2017, there was no section in the guidelines regarding this scenario, however, council advised that its practices were the same.
Melbourne City Council	Will consider withdrawal and issue a warning if permit holder was the driver, and it is a first offence.
Moonee Valley City Council	Will consider withdrawal and issue a warning if it is a first offence.
Port Phillip City Council	Will consider withdrawal and issue a warning if the permit holder was the driver and it is a first offence.
Stonnington City Council	Not specified – however the guidelines state the council will consider withdrawal and issue a warning where the permit is not displayed and it is a first offence.
Yarra City Council	Not specified – however the guidelines state the council will consider withdrawal where the driver or passenger has a disability, providing they have complied with the road rules (ie have not committed a 'red sign' offence').

123. The following case study is an example of an infringement issued by Maribyrnong Council in these circumstances.

The council refused to withdraw the infringement, despite the applicant providing a copy of their valid permit, and explaining why the permit was not displayed properly.



Case study 4: elderly man with a disability fined after permit fell down

WEstjustice said Mohammed:

- is 71 years old and English is his second language
- does some casual work but largely relies on the aged pension
- has a serious back injury and a weakness in his right leg
- holds a valid category 1 disability parking permit.

WEstjustice stated that in November 2016, Mohammed parked in a disability parking space and was issued an infringement as his permit had slipped down and the expiry date was partially covered. This was the first infringement Mohammed had received from Maribyrnong Council for this offence.⁴¹

Mohammed applied to the council for an internal review and provided a copy of his valid permit. He explained that the permit had fallen off the dashboard, that this was unintentional, and that it would not happen again.

The council refused to withdraw the infringement, stating it could not consider the permit provided in his internal review application, as it was not displayed correctly at the time the infringement was issued.

Mohammed then elected to have the matter heard at the Magistrates' Court. The Magistrate found the offence proven, but dismissed the infringement. This meant that Mohammed would not have to pay the infringement amount of \$155. However, the council applied to have Mohammed cover \$102 in its court costs, which was granted by the Magistrate.⁴²

WEstjustice said that as Mohammed is heavily reliant on the aged pension, this had a significant financial impact on him.

⁴¹ Above n 36.

⁴² Telephone call between Maribyrnong City Council and Victorian Ombudsman, 14 November 2017.

124. In response to the draft report, Maribyrnong Council said Mohammed had received six other parking infringements from the council.

125. However, it is noted:

- Mohammed had not received any previous infringements for the offence of parking in a disability parking space without a valid permit displayed.
- The other infringements were issued to him over a five-year period for unrelated offences.
- There is no evidence that Mohammed's previous infringements were considered in Maribyrnong Council's internal review of the infringement in question.

126. In its response to the draft report, Fines Victoria said that its view was the case did not involve 'exceptional circumstances' and that enforcement would be confirmed. It said:

There is nothing exceptional in this case. The permit simply fell down. Individuals are responsible for ensuring the permit is properly displayed at all relevant times.

127. While Maribyrnong Council and Fines Victoria do not believe this case involved exceptional circumstances, the investigation remains of the view that the infringement should have been withdrawn as it was a first offence. It is noted that the five other comparator councils would have likely withdrawn this infringement, based on their internal review guidelines.

128. In a further response to the draft report, Maribyrnong Council noted Fines Victoria's view that no 'exceptional circumstances' arose in this case, and reiterated that there was 'nothing in the ... Draft Report which alters Council's initial determination of this internal review'.

c) Expired disability parking permit displayed

129. Maribyrnong Council's guidelines also address circumstances where an infringement is issued to a person who has displayed an expired disability parking permit.

130. The guidelines state the council may consider withdrawal, providing the permit holder renews their permit within one month of the date of the infringement. The guidelines state that the permit must have been renewed after the infringement date, and the holder must supply a copy of the new permit to the council.

131. The guidelines do not expressly address circumstances where a permit holder has already renewed their permit, but accidentally displays the old expired one. However, based on the statement that the permit must be renewed after the infringement date, it appears that the council is not willing to withdraw an infringement in these circumstances.

132. The five other councils surveyed during the investigation each have slightly different guidelines in relation to these circumstances. On the whole, it appears that the five councils exercise greater discretion than Maribyrnong Council in such cases.

Table 6: Comparison of Maribyrnong's withdrawal guidelines with those of other metropolitan councils

Council	Withdrawal guidelines for expired permit displayed
Maribyrnong City Council	Will consider withdrawal and issue a warning, providing the permit holder renews their permit within one month of the date of the infringement. Permit must have been renewed <i>after</i> the infringement date.
Melbourne City Council	Will consider withdrawal and issue a warning if the driver was the permit holder, it is a first offence and the permit is renewed before the internal review is completed. May uphold infringement if excessive amount of time has elapsed since permit expiry – ie 18 months.
Moonee Valley City Council	Will consider withdrawal and issue a warning if it is a first offence and within 14 days of permit expiry. If the permit was issued by another council, and a copy of a current permit is provided, it will also consider withdrawal and issue a warning (no 14 day time limit imposed in these cases).
Port Phillip City Council	Will consider withdrawal and issue a warning if they provide a current permit and it is first offence.
Stonnington City Council	Will consider withdrawal and issue a warning for a first offence. A copy of the renewed permit is required.
Yarra City Council	Not specified – however, the guidelines state that the council will consider withdrawal of an infringement where the driver or passenger has a disability, providing they have complied with the road rules (ie have not committed a 'red sign' offence').

Impact on vulnerable persons

133. The following case study is an example of an infringement issued for parking in a disability parking space, with an expired permit displayed. The permit holder had received a new permit, however, his wife accidentally displayed the old expired one on this occasion.

134. The permit holder's wife sought an internal review of the infringement on the basis of exceptional circumstances. Maribyrnong Council refused to withdraw the infringement despite his wife pleading that it was an 'honest mistake'.



Case study 5: wife of husband with a disability fined after accidentally displaying expired permit

WEstjustice said:

- Anna is 68 years old and is reliant on the aged pension.
- Anna's husband, Stefan, has Parkinson's disease and limited mobility.
- Stefan holds a valid category 1 disability parking permit.

Anna told the investigation that in September 2017, she drove Stefan to the shops and parked in a disability parking space. By accident, Anna said she displayed Stefan's old permit, which had expired on 30 June 2017, about two months prior. Stefan had been issued a new permit, with an expiry in 2020; however, Anna said she accidentally picked up the wrong permit on this occasion. As a result, she was issued an infringement. This was the first infringement Anna had received from Maribyrnong Council for this offence.⁴³

Anna applied to the council for an internal review, outlining the above circumstances, and said she had made an 'honest mistake'. She also explained that this was her first offence and she had never received a parking infringement before.⁴⁴ The council refused to withdraw the infringement, advising that it does not withdraw infringements based on the circumstances she had outlined. The council also advised her that 'if a vehicle does not have a valid permit displayed at the time it cannot claim Permit Holder concessions'.

Anna advised the investigation that she was considering her options, including whether to pay the infringement. She said this would be difficult based on her reliance on the aged pension. She advised the investigation that she was upset the council would not accept that she made an honest mistake, and did not consider her circumstances. She believed it would be unfair if she had to pay the infringement on the basis that Stefan, who she was transporting at the time, has a valid permit.⁴⁵

⁴³ Above n 36.

⁴⁴ Anna's internal review request to Maribyrnong City Council, 4 September 2017; Telephone call between Anna and Victorian Ombudsman, 20 November 2017.

⁴⁵ Telephone call between Anna and Victorian Ombudsman, 20 November 2017.

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135. Upon reviewing the draft report, Fines Victoria said that 'strictly speaking', the case did not involve 'exceptional circumstances', however:

the guidelines are designed to allow discretion to be applied where enforcement would not be appropriate on fairness or equity grounds.

Given this was a first offence and there was nothing to be gained by the applicant displaying an expired permit (they were in possession of a valid permit), the fine should have been withdrawn and potentially a formal warning issued instead.

...

It is likely that Fines Victoria would have cancelled enforcement. People make mistakes and no more so than by individuals who are burdened with carer duties. It would not be unreasonable to conclude that a genuine mistake was made by this applicant in picking up the expired permit instead of the valid permit. Furthermore, if the applicant advised Fines Victoria that this was a first offence, it is likely that discretion would have been applied.

136. In response to the draft report, Maribyrnong Council noted Fines Victoria's view that 'strictly speaking', no 'exceptional circumstances' arose in this case, and said that there was 'nothing in the ... Draft Report which alters Council's initial determination of this internal review'.

Fines Victoria's observations about Maribyrnong Council's guidelines and practices

137. The investigation asked Fines Victoria to comment on whether Maribyrnong Council's internal review guidelines and practices are consistent with the IMES and Attorney-General guidelines. The Director replied:

It appears that the MCC [Maribyrnong Council] guidelines and enforcement practices are designed to apply disability permit display requirements in a consistent but potentially overly technical way, across all of the potential scenarios that may arise. For that reason, Fines Victoria considers that the scope allowed for consideration of exceptional circumstances may be too narrow in comparison to the IMES guidelines and the Attorney-General's Guidelines.

For example, the MCC guidelines do not require consideration of whether the offence is a first offence, unlike the approach taken by other Councils cited in the report. Similarly, MCC's position that forgetting to display a permit is not a good enough excuse (if applied as a blanket rule) could potentially be unfair in certain cases where elderly and other disabled people have a range of disadvantages which, when combined with other circumstances, affect their memory.

There are, however, limits on the extent to which leniency can be applied in the enforcement of the relevant parking offences. While I agree with WEstjustice that extra care needs to be taken when considering internal review applications by this group of vulnerable people, it is important to recognise that Councils also have a duty to ensure that parking amenity for the disabled is protected from illegal use of disabled parking spaces. In performing this duty, a consistent approach to enforcement is necessary as a matter of due process.

Conclusions

138. The purpose of the disability parking scheme is to ensure that people with disabilities are afforded equality of opportunity to access facilities and services throughout the State.
139. As highlighted through the case studies in this report, many disability parking permit holders are vulnerable, with some also experiencing other forms of social disadvantage. The majority of individuals in the case studies examined are elderly, have a disability, are reliant on a pension, and English is their second language.
140. An infringement can have a significant financial impact on such individuals, noting the reports WEstjustice received from some clients that they had to forgo food and medicine to pay a fine.
141. Based on their circumstances, many affected people are not in a position to further dispute Maribyrnong Council's decision to uphold an infringement at court. Therefore, it is imperative that the council have fair and effective internal review processes.
142. This is consistent with the purpose of the infringement system, which is to address the effect of minor law breaking without requiring people to become involved in the formal criminal justice system.
143. In all of the cases outlined in this report, the circumstances warranted withdrawal of the infringements based on the principle of fairness. Yet, in line with its *Internal Review – Withdrawal Guidelines*, Maribyrnong Council refused to withdraw the infringements in each of these cases.
144. Maribyrnong Council's reviews appear to have focussed on whether an offence was committed in each of these cases, which was not in dispute, while failing to consider the exceptional circumstances raised by the applicant.
145. The exceptional circumstances internal review ground provides enforcement agencies the discretion to withdraw infringements where the imposition of a penalty is not fair in the circumstances. However, Maribyrnong Council failed to exercise its discretion to withdraw infringements in the majority of internal reviews for disability parking infringements.
146. The application of a 'blanket rule' by Maribyrnong Council in internal reviews for disability parking infringements is inconsistent with the Attorney-General's Guidelines gazetted under the Infringements Act, which require individual circumstances to be taken into account.
147. The continuance of this practice is also inconsistent with the IMES *Internal Review Guidelines* issued in 2017, which require agencies to consider the principles of 'lawfulness, fairness, openness and efficiency'.
148. The comparison of Maribyrnong Council's guidelines with those of five other metropolitan councils further suggests a lack of fairness and discretion in the council's guidelines and practices: the comparator councils' withdrawal rates ranged from 38 per cent (more than double those of Maribyrnong Council) to 64 per cent (quadruple those of Maribyrnong Council).
149. The Ombudsman recognises councils have a responsibility to prevent the misuse of disability parking permits. However, as the council acknowledges, misuse 'does not occur on every occasion, or even most occasions'.

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150. The importance of consistent internal review decision making is also acknowledged, however, this should not be prioritised at the expense of exercising discretion on a case by case basis according to individual circumstances.
151. While this investigation focussed on Maribyrnong Council's practices for disability parking infringements, the council's overall internal review withdrawal rates suggest that it may be failing to exercise discretion and consider exceptional circumstances in internal reviews on a more systemic level. This is highlighted through the council's significantly lower withdrawal rate compared to the other five councils surveyed.

Opinion

152. Based on the evidence obtained in the investigation and the conclusions reached above, Maribyrnong Council acted in a manner that was unjust, pursuant to section 23(1)(b) of the Ombudsman Act, by:
- implementing internal review guidelines with respect to disability parking offences that provide limited and sometimes no discretion for withdrawal
 - refusing to withdraw the five infringements examined in this report at internal review despite the individuals holding valid disability permits and the exceptional circumstances that applied
 - deciding to enforce, in court, one of the infringements examined in this report despite the passenger in the vehicle holding a valid disability permit and the exceptional circumstances that applied.

Maribyrnong Council's responses to the draft report

153. In response to the draft report, Maribyrnong Council disagreed with the characterisation of the case studies as involving 'exceptional circumstances'. It stated:

Applying the IMES Guidelines, it is Council's position that it is clear that 'exceptional circumstances' apply where a situation is largely beyond the control of the applicant. While the examples of 'exceptional circumstances' [medical emergencies, unavoidable or unforeseeable delay and vehicle breakdown] are not exhaustive, it is Council's position that they establish a category of circumstances that will be 'exceptional'.

Council's position is that, generally, simply forgetting a disability parking permit, or obscuring part of it, will not constitute an 'emergency' or an 'unavoidable or unforeseeable' situation.

154. The council also said it considered individual circumstances in each of the cases:

... the particular circumstances raised by each of the applicants [in the case studies] were considered. However, the assessment of those circumstances was that they were not 'exceptional' so as to warrant withdrawal of the infringements.

155. However, there was no evidence on the infringement files or in the outcome letters to the applicants to support that the council considered the individual circumstances raised in each case.
156. The council disputed that it applies a 'blanket rule', but rather stated that 'a "blanket rule" only applies when no "exceptional circumstances" exist'. The council reiterated that the 'particular circumstances of each application are considered before a decision is made'.

157. The council also disagreed that it has failed to exercise its discretion to withdraw infringements in a majority of internal reviews, stating:

On each occasion, the discretion to withdraw an infringement is exercised. Simply because it is exercised against withdrawal does not mean that it has not been exercised.

158. This contradicts Maribyrnong Council's guidelines which state that it will not withdraw an infringement issued in circumstances where a disability parking permit is not displayed at all, or a person forgot to display their permit.

159. In a further response to the draft report, the council ultimately accepted that its '[g]uidelines are drafted in a way that seems to remove any discretion for members of Council staff conducting internal reviews'. The council, however, reiterated that 'members of Council staff conducting internal reviews, in practice, exercise discretion to withdraw infringements'.

160. The council also commented that it:

... remains of the view that it conducts its internal review of infringements in a manner that is consistent with the requirements of the *Infringements Act 2006* ... the IMES Guidelines and the Attorney-General's Guidelines ...

While Council acknowledges that your interpretation of its Internal Review-Withdrawal Guidelines is that they are too rigid, it is satisfied that staff conducting internal reviews understand that they must:

- take the individual circumstances of each applicant into account; and
- exercise discretion to withdraw infringements where those individual circumstances warrant it.

Council will therefore review the Council Guidelines to take account of the comments in the draft report and clarify the importance of staff conducting internal reviews exercising discretion.

...

It is important to consider ... that Council's internal reviews are conducted in the context of general responsibility to ensure that disabled parking spaces remain available for use by individuals with valid disability parking permits. In Council's experience, it is not unusual for individuals to:

- retain expired disability parking permits and obscure the expiry date so that multiple disability parking permits can be used by multiple people (eg another family member) at once; or
- park in a disabled parking space when they are not entitled to do so and later produce a family member's or friend's disability parking permit as evidence that they had parked legally.

Council accepts, and conducts its internal reviews on the basis, that misuse does not occur on every occasion, or even most occasions. However, it is something that Council must be alive to.

161. The council said that its review of the withdrawal guidelines would also include 'the provision of previous infringements taken into account when responding to the review'.

Recommendations

Pursuant to section 23(2) of the Ombudsman Act, it is recommended that Maribyrnong City Council:

Recommendation 1

Work with Fines Victoria to update its *Internal Review – Withdrawal Guidelines* to ensure that when conducting internal reviews, compliance officers:

- have discretion to withdraw an infringement where a valid disability permit holder provides a copy of their disability permit
- may exercise discretion where individual and/or exceptional circumstances apply.

Recommendation 2

Provide training to staff involved in completing internal reviews on good administrative decision making and exercising discretion by 30 June 2018.

Recommendation 3

Provide an ex gratia payment to the individuals in case studies 1 – 5 for the costs of the infringements and, where applicable, court costs paid.

Council's response:

The council accepted recommendations 1 and 2, but did not accept recommendation 3. While noting the council has refunded the recipient of the infringement in case study 3, it stated:

Council's position is that the infringements relevant to each of the Case Studies have been finalised, either by payment of the original infringement or by enforcement through the Magistrates' Court. Absent some invalidity in the issuing of the infringements, or the conduct of the internal review process, there is no legal basis to refund any amounts or to otherwise compensate the individuals concerned. Council is firmly of the view that the costs of the infringements and court costs were properly collected.

Council is also concerned that refunding any amounts or compensat[ing] only the individuals in these ... Case Studies put forward by WEstjustice would give them a remedy that is unavailable to other internal review applicants whose infringements were not withdrawn but who may share similar stories. It is Council's position that this would create an unfair outcome.

Finally, it would set an unreasonable and unrealistic precedent, and create an unreasonable and unrealistic expectation in the community, of Council revisiting all internal review applications that were refused, at least in respect of disability parking infringements, even though no invalidity has been identified. It would be impossible for Council to revisit all internal review applications undertaken. It would be equally impossible for Council to select a 'cut-off' date, which would be arbitrarily selected and ultimately result in an unfair outcome for those who miss out.

Recommendation 3 simply puts Council in an unmanageable position.

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