

8 February 2018



Victorian Law Reform Commission
Level 3, 333 Queen Street
MELBOURNE VIC 3000

By email - law.reform@lawreform.vic.gov.au

Dear Sir or Madam,

City of Boroondara submission to the *Neighbourhood Tree Disputes Consultation Paper - December 2017*

I refer to the Victorian Law Reform Commission's *Neighbourhood Tree Disputes Consultation Paper - December 2017* (**consultation paper**). Council thanks the Commission for its important work in law reform and appreciates the opportunity to make a submission about the options put forward in the consultation paper.

The City of Boroondara is a metropolitan local government area in Melbourne's inner east. Boroondara is known for its leafy streets and distinctive character. The *Boroondara Planning Scheme* (**planning scheme**) notes that a key feature of this distinctive character is mature gardens and canopy trees. The planning scheme contains a combination of policy directives and statutory controls which seek to encourage the retention of native and mature trees. The planning scheme in Boroondara therefore contains a strong focus on ensuring trees are retained.

Council's strategic documents and its community also recognise the importance of trees. In 2017, Council undertook significant public consultation to inform the development of the *Boroondara Community Plan* (**community plan**), which is Council's key strategic document. The community plan reflects our community's views and will guide Council's vision for the next 10 years. Council received 11,845 responses as a result of this consultation. This was the largest consultation activity ever conducted by Council. There are seven themes in the community plan, including 'Priority Theme 3 - The Environment' and 'Priority Theme 4 - Neighbourhood Character and Heritage'. These themes recognise the importance of trees and native plants and maintaining the amenity and character of Boroondara. Most relevantly, the community plan contains strategies to:

- *Strategy 3.4 - Protect and increase canopy tree cover on private land to maintain neighbourhood character and amenity* (Page 19); and
- *Strategy 4.1 - Encourage the planning of well-designed new development that is appropriately located, and does not negatively impact on established residential streets and valued neighbourhood character* (Page 20).

As Page 61 of the discussion paper accurately notes, the *Tree Protection Local Law 2016* (**the Local Law**) operates within Boroondara. The Local Law seeks to protect 'canopy' and 'significant' trees by requiring a permit to remove, undertake works near

or in some cases prune such trees. Part B of the Local Law provides that '*Council also acknowledges that trees in the urban environment have a series of environmental benefits such as reducing the impact of the urban heat island effect, reducing the effects of climate change, reducing temperatures in and around buildings, reducing stormwater runoff, absorbing pollution, providing habitat and promoting biodiversity*'. Indeed, these benefits are consistently well-documented in peer-reviewed journal articles.

The Local Law has general support in the community. When Council underwent the process under the *Local Government Act 1989* to create the Local Law across 2015 - 2016, public consultation was undertaken. Of the 65 submissions, only eight opposed the Local Law. Approximately one-third of submitters believed that the Local Law did not go far enough in addressing loss of trees in Boroondara.

Council's Statutory Planning Department receives daily enquiries (both in writing and by telephone) from the community seeking advice about managing trees on adjoining properties. Common issues mentioned include general nuisance (for example from falling fruit, leaves and debris), canopy overhang, safety concerns and property damage. Many people believe that local government is able to take action to address these issues on their behalf. This is not the case. Council's advice in these circumstances is that such matters are 'civil' in nature and that Council does not have authority to be involved unless it has an application before it to remove the tree. Council frequently suggests that people discuss their concerns with their neighbour and also often provides the contact details for the Dispute Settlement Centre of Victoria.

Having reviewed the discussion paper and the three options, Council agrees that the current regime in Victoria is complicated, costly and overly legalistic. In principle, Council would support reform to enable the community to resolve neighbourhood tree disputes easily, quickly and in a cost-effective manner.

If the Commission considers that reform is required as per Option 2, Council raises the following concerns for consideration. Council has drawn from its experience in assessing and determining applications under the Local Law in raising these concerns. Council's arborists, as well as senior staff responsible for undertaking reviews under Clause 18 of the Local Law have had input into this submission.

- **Any statutory regime established should only deal with issues between private property owners.**
- **Any statutory regime established should adopt a merits-based approach to minimise legalism and adversarial bias.**
- **Legislation should set out criteria that the Court/Tribunal must consider when determining what order they should make.** These criteria should ensure that the benefits of the tree are weighed against its disbenefits. At a minimum, the criteria should require consideration of matters such as the aesthetic benefits of the tree, the environmental/ecological benefits of the tree and the benefits of the tree to the neighbourhood character of the area. In

Council's experience, it is often the case that a tree may be causing minor damage or nuisance but that the benefit of the tree outweighs these impacts.

- **Further to the above point, the criteria should also require the Court/Tribunal to consider whether the tree is protected by a planning scheme, a current valid Planning Permit, a Local Law or other legislation such as the *Aboriginal Heritage Act 2006*.**
- **Legislation should not contain a presumption that the tree in question should be removed to address the issue.** The legislation should require that the starting point is to seek an alternative resolution to the issue prior to considering removal of the tree. This could include pruning the tree or repairing the damage being caused. In Council's experience, many people do not understand that trees require ongoing management and maintenance. Further, Council's experience is that many issues caused by trees can be often addressed by pruning the tree, installing a root barrier to prevent/reduce/manage damage, or having the tree inspected and maintained on an on-going basis by a qualified arborist. Alternatively, in many cases the impacts of the tree (such as property damage) are capable of being easily and cost-effectively repaired without having to remove the tree.
- **Legislation should require that independent expert evidence be provided to demonstrate that the tree is conclusively causing the issue and that removal of the tree will address the alleged issue.** This proof could include expert evidence from structural engineers, plumbers or medical practitioners. In Council's experience, it is often the case that the tree in question is not conclusively causing the issue and that other factors are at play. Council would recommend that the Court/Tribunal appoint an independent expert rather than the expert being appointed by the party. This would assist in overcoming the issue of 'shopping around for experts' - it is Council's experience that people seeking to remove trees will often be able to find an expert who will support their application.
- **Cases should be heard by people with technical expertise in the field.** Council considers that if a merits-based assessment is going to be made about a tree, then such decisions should be made by technical experts. This is the way in which the Planning and Environment List at the Victorian Civil and Administrative Tribunal (VCAT) operates. Council is also aware that some commissioners of the NSW Land and Environment Court have an environmental and/or arboricultural background.
- **Legislation should be prefaced by the principle that the party seeking the removal of the tree must be able to establish an actual and real impact of the tree, rather than a perceived or fanciful impact.** In Council's experience, perceived (and often irrational) impacts of trees are difficult, if not impossible, to assess.
- **Further to the above point, legislation should ensure that the degree of damage or interference needs to be actual and occurring presently.**


Council would not support legislation that enables an application to be made because a tree is causing annoyance or discomfort. Legislation should be prefaced by the principle that all trees in urban areas create some form of annoyance or discomfort and that these impacts are part of living in an urban environment. Council agrees that reasons such as sweeping up falling leaves, having to clean out gutters and the like are insufficient reasons to form the basis of an application.

- **Council does not support legislation which would enable an application to be made on the basis of the potential for future damage to occur.** In Council's experience, assessment of the potential for future damage is difficult to undertake because the future impacts are uncertain. There is also the potential for reasons to remove trees to be exaggerated or even fabricated, if the adjoining owner simply wants the tree to be removed for an ulterior reason.
- **Legislation should not allow for an application to be made to remove a tree to facilitate development on the adjoining property.** The impacts of proposed development on trees are already considered through the planning scheme and/or the Local Law. Council considers that approach is effective and should be retained.
- **Council would not support legislation which requires local government to enforce orders made by the Court/Tribunal.** This would require local government to enforce what are essentially Court orders about civil matters. This would also have resourcing implications for local government. Enforcement of orders should be made by the parties through an application to the Court/Tribunal which made the order. Continued non-compliance should be prosecuted as a criminal offence.
- **Finally, Council does not consider that an order made to remove a tree should compel the relevant local government to issue a Planning Permit or a permit under a Local Law.** This is because:
 - o Planning schemes consider a broad spectrum of environmental and public policy matters which would not be considered in a civil case. It is therefore appropriate for a Planning Permit to continue to be required, to enable these matters to be considered even if an order has been made.
 - o An order made should not fetter Council's ability to make its own decision under a Local Law, as the Local Law also considers broader public policy matters. The Local Law, at Clause 12(2)(j) and 12(2)(k) would still enable consideration of an order made.

In conclusion, Council supports reform to enable the community to more easily and effectively resolve neighbourhood tree disputes. However, our community has told us that they value trees and their benefits. Therefore, any statutory regime must ensure that there is no presumption that an order will be made to remove a tree. Further, any statutory regime must ensure that other alternatives are considered and that the benefits of trees are weighed against the disbenefits.

We thank the Commission once again for the opportunity to make a submission.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Shiran Wickramasinghe', written in a cursive style.

Shiran Wickramasinghe
Director City Planning

