

**Anthea Derrington**

Director  
Policy and Strategic Services  
Infringement Management & Enforcement Services  
Department of Justice

By email – isou@justice.vic.gov.au

11 November 2011

**Infringements trial – shop theft and wilful damage**

Dear Anthea

Thank you for the invitation to comment on the use of infringements for the offences of shop theft less than \$600 ('shop theft') and wilful damage of up to \$500 ('wilful damage').

We are writing on behalf of the Infringements Working Group, which is comprised of financial counsellors and lawyers with extensive experience assisting people to deal with infringements. The working group provided feedback to the infringements trial by letter dated 1 February 2011 ('February 2011 submission') in response to a consultation held at that time. Below we discuss:

- our client base and expertise;
- our position and recommendations regarding the infringements trial; and
- specific feedback on particular questions included in the Department of Justice's Consultation Paper on the shop theft and wilful damage offences, dated October 2011 ('Consultation Paper').

**Our client base and expertise**

The Infringements Working Group includes community legal sector lawyers, financial counsellors, VLA lawyers and lawyers from private practice who act pro bono, with extensive experience assisting people to deal with infringements.

The Commonwealth Government's Review of the Commonwealth Community Legal Services Program ('Commonwealth Review') noted that the community legal sector assists the most disadvantaged individuals in dealing with a significant variety of legal issues. The Commonwealth Review noted that collated data demonstrated that 58% of community legal sector clients received some form of income support, 82% of clients earned less than \$26,000 per annum, and almost 9% of clients had some form of disability.<sup>1</sup>

Similarly, financial counsellors regularly assist the most marginalised members of our community. Financial counselling clients typically rely upon Centrelink income

---

<sup>1</sup> Review of the Commonwealth Community Legal Services Program March 2008, 6, available at: <http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP6DE98B3437EEB6FDCA25742D007B0738>

support and regularly present with mental health or other issues that complicate their ability to understand and interact with the infringements system. Such clients rely upon financial counsellors to both interpret the system and advocate for them within it. Accordingly financial counsellors in Victoria have developed a strong working knowledge of the strengths and weaknesses of the infringements system as it currently stands.

### **Our position and recommendations regarding the infringements trial**

As stated in our February 2011 submission, it remains our position that it is not appropriate to widen the scope of the infringements system to encompass additional offences which have a disproportionate impact on vulnerable members of the community. This includes the offences of shop theft and wilful damage. Where a person's special circumstances materially contribute to the alleged offending behaviour, diversion away from the criminal justice system altogether is a more appropriate outcome.

We are disappointed that four of the infringement trial offences were legislated into permanently enforceable offences in June this year.<sup>2</sup> In our February 2011 submission we made a number of recommendations aimed at improving the infringements system and increasing the fairness of its operation. We include those recommendations as **Appendix 1**.

### **Specific feedback on particular questions included in the Consultation Paper**

#### **1. Operational feedback – Case studies**

*What experience, if any, have you (or your colleagues or associates) had with the enforcement process in relation to either shop theft of up to \$600 or wilful damage under \$500? Would you be prepared to provide any de-identified case details to the steering committee?*

A number of our working group members and their colleagues have had experience assisting people with shop theft fines. Please see three case studies below.

#### **Homeless woman issued with an infringement for shop theft**

Ruby incurred a shoplifting fine in May 2011. She incurred the fine in relation to theft of \$60 worth of items from a supermarket. Ruby was detained by two police officers in the supermarket's car park. She then was informed by the police officers that she would receive an infringement notice in the mail.

Ruby has experienced recurring homelessness for at least the last two years. She is currently in transitional housing with a temporary lease ending at the end of December. Ruby suffers from a serious autoimmune disease and her sole source of income is around \$400 a week in Centrelink payments. Ruby cares for three sons in their late teens. Her two youngest sons have Asperger's Syndrome.

---

<sup>2</sup> *Justice Legislation Amendment (Infringement Offences) Act 2011* (Vic).  
Pg 2 – Federation of Community legal Centres (Vic) Inc

Ruby has no prior convictions for dishonesty related offending. Ruby was not able to pay the fine due to her financial circumstances and homelessness. The infringement has subsequently matured into an enforcement order, to which she is now liable for a penalty of \$334.40. Ruby has around \$9000 worth of other infringements that she incurred while homeless. Ruby was referred to the PILCH Homeless Persons' Legal Clinic ('HPLC') by her caseworker.

When Ruby advised the attending HPLC lawyers in relation to this infringement, she seemed visibly upset and was at pains to express how guilty she felt. Ruby instructed the HPLC lawyers that she carries the infringement notice around with her in her purse to remind her of her guilt.

Hopefully Ruby will be able to have this matter heard in the special circumstances list. However it is unclear how a finding of guilt will affect her and unfortunately, due to her disadvantaged circumstances, she is unable to avoid an appearance in court by payment of the infringement.

#### **Homeless man issued with an infringement for shop theft**

Joel is a Fijian citizen. He moved to Australia in 2004 and since 2005 his accommodation has been temporary and insecure. He lived in student accommodation for the first two or three months after his arrival in Australia and then in a series of rooming houses until 2008. In 2008 Joel and his wife secured transitional housing with the assistance of a housing support service. Joel and his wife were referred to this program after they were forced to leave their previous shared accommodation, where Joel had been assaulted. At that time, Joel and his wife considered that accommodation to be unsafe, particularly for his wife who was pregnant. Joel lived in transitional housing with his wife and children from 2008 until late 2010.

In late 2010, with the assistance of a housing support program, Joel's wife, as a permanent resident, secured permanent public housing. The lease was put into her name.

Joel incurred an infringement for shop theft in 2010. The offence involved not paying for a small item at a local shop. Joel claims that he did pay but there was a lot going on with other customers also paying for goods and the storekeeper became confused. It is unclear whether the police would have proceeded with this matter by way of charge and summons in light of the ambiguity of the alleged offending.

Although Joel denies committing the offence, he chose not to contest the infringement because he did not want to attend court. Joel did not seek legal assistance until his fine had been lodged with the infringements court. As such, Joel was unable to apply for internal review. The fine has been revoked by the Infringements Registrar on the basis of Joel's special circumstances and is now with the enforcement agency.

Joel is fortunate that his infringement can be dealt with by a forum such as the

special circumstances list. However he is concerned about the effects of being found guilty for shop theft.

**Man with dementia issued with an infringement for shop theft**

Aleksy is an elderly man with dementia who does not speak English. He incurred a shoplifting fine after he walked out of a shop with a small item in his pocket and the shopkeeper called the police. It is unclear whether the police would have proceeded with this matter by way of charge and summons in view of Aleksy's dementia. Aleksy's community worker sought legal help for him and the fine was eventually revoked by the Infringements Registrar on the basis of Aleksy's special circumstances.

The enforcement agency chose not to withdraw the fine and so Aleksy had to attend the Magistrates Court Special Circumstances List. The duty lawyer at the Magistrates Court gave some advice to Aleksy before the hearing, and Aleksy was assisted at that time by his wife, the community worker and an interpreter. After the special circumstances process was explained to Aleksy and he appeared to understand, the lawyer answered a question from Aleksy's wife. The lawyer then checked with Aleksy that he understood what was about to happen, but due to his dementia, Aleksy already could not remember what had just been discussed.

2. **The impact of the use of infringements on disadvantaged members of the community:** *In your experience or opinion, what issue, opportunities or challenges does the issue of infringements for these types of offences to people with special circumstances or other forms of disadvantage pose? How do you think the issues or challenges differ from those associated with charging people for these offences, requiring them to appear in court?*
- **Neither option is appropriate for people with special circumstances**  
Neither the issuing of an infringement or a charge and summons is appropriate for someone with special circumstances. This is because the person has underlying circumstances that lead to the 'offending' behaviour. The issuing of a fine or charge does not address the underlying causes of that behaviour and is very unlikely in most instances from deterring the same behaviour in the future. Please see our recommendations in Appendix 1 on more effective means for addressing the behaviour of people with special circumstances.
- **Opportunity for expiation is not shared equally by everyone**  
One of the potential benefits of the infringements trial is that individuals issued with fines for trial offences are given the opportunity to pay the fine, which in turn allows them to avoid the stress of attending court and the serious stigma associated with obtaining a criminal record. However, this opportunity is not equally available to everyone. Community legal sector clients are rarely able to afford to pay a fine and have more pressing needs that they struggle to meet such as housing and healthcare.

- **The need for an early exit from the system for people with special circumstances**

One of the potential benefits of receiving a fine for shop theft and wilful damage as opposed to a charge and summons is the opportunity to be put before the special circumstances registrar, who has expertise in dealing with people facing significant disadvantage. However, this option should be available earlier in the infringements process.

For example, if an application for internal review on the basis of special circumstances is rejected by the agency, the enforcement agency may (among other options) withdraw the infringement notice and refer the matter to open court – but not the special circumstances list (see s 25(1)(d) of the *Infringements Act 2006* (Vic) ('Infringements Act')). If the person has other matters listed in the special circumstances list, it might be possible to have all open court matters consolidated, but this option is administratively difficult and not guaranteed.

Often clients with special circumstances prefer to opt out of applying for internal review and wait until their fine reaches the enforcement order stage. This is to avoid their fine not being referred to the special circumstances list. This increases our client's financial liability, compounding pre-existing debt issues, and exacerbates the stress experienced by having the fine on foot for a longer period of time. This also creates risks of service providers losing contact with vulnerable clients. It also means that the system is not working as efficiently as it should be because more matters involving special circumstances continue on through the system, and must be processed by the infringements court rather than being appropriately dealt with during the internal review phase.

Problematically, our members report that Victoria Police as a matter of practice always refer matters to open court in instances where an application for internal review has been made. So the issues identified above are particularly relevant to shop theft and wilful damage fines which are only issued by Victoria Police. Thus, the fairest and most efficient way of dealing with people with special circumstances who incur fines, is to enhance the possibility for an early exit from the infringements process. See Appendix 1 for our suggested recommendations.

- **Amendment of section 25(3) of the Infringements Act**

At the least, where a fine is at enforcement agency stage and an application for internal review is made on the basis of special circumstances, that matter should not be referred to open court. Section 25(3) of the Infringements Act should be amended so that such applications can only be referred to the special circumstances list.

We understand the importance of making sure that all matters before the special circumstances list actually involve special circumstances, in order to maintain the integrity of the list. This seems to be the rationale for having

matters referred to open court at the enforcement agency stage where a special circumstances application is rejected. However, due to significantly inconsistent practices between enforcement agencies regarding special circumstances applications, many clients prefer not to make an internal review application because of the likelihood of being referred to open court. Our most vulnerable community members are currently bearing financial and emotional responsibility for the failings of the system and this is grossly unfair. We recommend that a specialised agency be established to carry out all internal review applications at the enforcement agency stage, to enhance consistency and ensure an earlier exit from the system for people facing special circumstances.

3. **The appropriateness of enabling shop theft and wilful damage offences to be expiated by payment of the infringement fine:** *Given that payment of the fine expiates the matter of the offence, are there circumstances, in addition to the guidelines already applied, where you think it may not be appropriate for shop theft and wilful damage offences to be enforced by infringement notice, and if so, what are they? Is there a difference between the issue of expiation for shop theft compared with wilful damage?*

- **The issuing of a fine in place of a warning**

We understand that the operational guidelines issued by the Chief Commissioner of Police note that an infringement should only be issued for an infringement trial offence where (among other things) charging the person would have been justified and there was enough admissible evidence to prosecute the matter at court. However, these guidelines are not enforceable. Also, our research revealed no publically available data comparing the number of charges issued for particular offences prior to the trial, compared to the number of infringements issued for those offences during the trial.

In our experience, and as reflected in the case studies above, the option of issuing a simple infringement notice acts as a disincentive for police to proceed by way of a warning or formal caution for minor matters.

- **The difference between the issue of expiation for shop theft compared to wilful damage**

Particular kinds of behaviour may be reflective of a person's particular circumstances. For example, theft of items like food or pet food may be reflective of the fact that someone is experiencing poverty and does not have the means to pay for essentials. If a person damages property, this may be reflective of mental illness, an inability to control behaviour, disillusionment or family instability. As noted above, the issuing of a fine or charge does not address the underlying causes of 'offending' behaviour for people experiencing special and other difficult circumstances. Instead of considering whether expiation by payment of a fine is appropriate for either of these offences, the question should be – what is the best way to address the underlying causes of the behaviour in question? See our recommendations in Appendix 1.

Also, seeking to allow for expiation of these offences through payment of a fine may prove to be futile because a person experiencing special circumstances is also likely to be experiencing financial hardship and may not be able to afford to pay the fine.

**4. The impact of the issue of infringements for these offences on young people:**

*What do you think are the advantages and disadvantages of [the current approach for dealing with fines incurred by people aged under 18 years of age]?*

We refer to and endorse the submission made by Youthlaw.

**5. General comments**

*In your opinion, should infringements be issued for*

- (i) Shop theft of goods valued up to \$600*
- (ii) Wilful damage of property valued under \$500.*

It is difficult to comment specifically on shop theft and wilful damage in the absence of publicly available data on whether significantly more infringements have been issued for those offences during the trial, compared to the number of charges issued prior to the trial. However, our position remains that there should not be an increase in infringeable offences due to the likelihood of “net widening” and “add on offences”, reported by our members from their experiences assisting clients, as outlined in our February 2011 submission.

**Particular measures could improve the operation of the trial offences for vulnerable community members.** These include:

- Better training for Victoria Police to identify special circumstances instead of issuing a fine; and referring repeat offenders to appropriate agencies which can assist people to address the underlying causes of their behaviour (see our recommendations in Appendix 1);
- An early exit from the infringements process for people with special circumstances (see our recommendations in Appendix 1).
- Section 25(3) should be amended so that all special circumstances applications that are refused by an enforcement agency should be referred to the special circumstances list (and not open court). Appropriate mechanisms should be established to ensure an early exit from the infringements system for people with special circumstances while maintaining the integrity of the special circumstances list.
- The amount of someone’s fine should be proportionate to their income. It is inappropriate that someone facing poverty and/or whose sole source of income is Centrelink, is required to pay an amount that is entirely disproportionate to their means, and that reduces their ability to meet other basic life needs for themselves and their family.
- We have serious concerns about the operation of s 160 of the Infringements Act in relation to all infringements. If the court makes an order for imprisonment in lieu of payment under s 160, and the person defaults on the payment, a warrant will automatically be issued and can be executed without any requirement or right to come back before the court.

This is of serious concern because orders can be made ex parte. Also, people with special circumstances before the court may be unaware of their rights to prove (or might be unable to prove) those circumstances at the time the s 160 order is made. In both these circumstances, people with special circumstances may end up in prison. This is particularly concerning for infringeable offences involving a mens rea element such as theft and wilful damage. We consider that legislative amendments be enacted to ensure that people can come back before a court before a warrant is executed pursuant to an order made under s 160.

I am happy to discuss this submission further. Please see my contact details below.

Sincerely

A handwritten signature in black ink that reads "Jacqui Bell". The script is cursive and fluid, with the first name "Jacqui" and the last name "Bell" clearly distinguishable.

**Jacqui Bell**

Policy Officer

Federation of Community Legal Centres

[Jacqui.bell@fclc.org.au](mailto:Jacqui.bell@fclc.org.au)

(03) 9652 1511



## Appendix 1

### Our recommendations for improving the infringements system

1. Cancellation of any infringement should be mandatory where one of the following service providers serves a written statement on the issuing agency to the effect that the alleged offender has 'special circumstances' within the meaning of the *Infringements Act 2006* (Vic) and is receiving treatment or assistance in connection with those circumstances:<sup>3</sup>
  - A medical practitioner; or
  - A mental health service provider; or
  - A drug and alcohol counsellor; or
  - A service provider to an involuntary patient under the *Mental Health Act 1986* (Vic); or
  - A service provider funded under the *Supported Accommodation Assistance Act 1994* (Cth); or
  - A disability service provider funded or partly funded by the Department of Human Services.<sup>4</sup>
2. Victoria Police, in consultation with homeless people and homeless service providers, should consider developing an outreach team to proactively seek contact with homeless people who are repeat "offenders" of public space, public order and public transport laws. The purpose of such a program would be to refer disadvantaged people who are repeat "offenders" to appropriate service providers to address the underlying causes of such behaviours.<sup>5</sup>
3. Victoria Police and all other law enforcement staff should be required to undergo specialist mental health training. In addition, policies and procedures should be developed in consultation with people with mental illness which promote and encourage the use of a full range of diversion and support options for people whose mental illness has caused or significantly contributes to their offending behaviour.
4. Where a person with "special circumstances" discloses those circumstances to an issuing officer, or where an issuing officer knows that a person has such circumstances, the issuing officer should:
  - Give the person a verbal warning to desist from the allegedly offending conduct;
  - If the person continues to engage in the conduct, give the person a written warning; and

---

<sup>3</sup> Homeless Persons Legal Clinic, Youthlaw, and West Heidelberg Legal Service, *Disadvantage and Fines: Submission to the Victorian Government Regarding the Enforcement of Unpaid Fines Against Financially and Socially Disadvantaged People*, (August 2003) ('2003 Joint Submission'). See recommendation 1.

<sup>4</sup> This would include disability service providers within the meaning of the *Disability Act 2006* (Vic) as well as services providing individual support packages through the Disability Support Register: See

<[http://www.dhs.vic.gov.au/disability/supports\\_for\\_people/information,\\_planning\\_and\\_advocacy/how-we-provide-services-to-people](http://www.dhs.vic.gov.au/disability/supports_for_people/information,_planning_and_advocacy/how-we-provide-services-to-people)>

<sup>5</sup> See recommendation 11 of the 2003 Joint Submission.

- If that fails to deter the conduct, contact an outreach team that can provide appropriate social services.<sup>6</sup>
5. All law enforcement officers should be required to undergo training on homelessness and on civil and human rights associated with financially and socially disadvantaged people. Rigorous and responsive policies and procedures should be developed and implemented in conjunction with welfare agencies and people experiencing homelessness.<sup>7</sup>
  6. The Guidelines should establish that infringements for public order offences should not be issued where the officer reasonably suspects that the alleged offender is also a victim of domestic violence and the behaviour in question is related to an incident of domestic violence.

---

<sup>6</sup> See recommendation 2 of the 2003 Joint Submission.

<sup>7</sup> See recommendation 10 of the 2003 Joint Submission.