Victorian Aboriginal Legal Service

Australian Law Reform Commission inquiry into incarceration rates of Aboriginal and Torres Strait Islander Peoples

September 2017

Introduction

This is a joint submission of the Victorian Aboriginal Legal Service and the Infringements Working Group.

The Victorian Aboriginal Legal Service (VALS) is an Aboriginal-controlled Co-operative Society that was established in 1973. VALS plays a crucial role in providing legal advice and casework, along with duty lawyer assistance to Aboriginal and Torres Strait Islander people living in Victoria. In addition to the work of its criminal, family and civil law teams, VALS, also employs Client Service Officers (CSOs) who act as a bridge between the legal system and the Aboriginal and Torres Strait Islander community. VALS is actively involved in community education, research and advocacy around law reform and policy development, and one of its key aims is to reduce the disproportionate involvement of Aboriginal and Torres Strait Islander peoples in the criminal justice system, and promote the review of legislation and other practices which discriminate against Aboriginal and Torres Strait Islanders.

The Infringements Working Group (IWG) is a joint working group of the Federation of Community Legal Centres (Vic) and the Financial and Consumer Rights Council (Vic). The IWG's 37 member organisations are listed in **Annexure 1**. The IWG has worked closely with successive governments, enabling infringements policy to be informed by the expertise and experience of practitioners who work daily with vulnerable and disadvantaged people, including Aboriginal and Torres Strait Islander communities, on their infringements matters.

This submission is informed by the direct experience of VALS and IWG members in assisting disadvantaged clients to navigate the infringements system. This work provides us with insights into our clients' interactions with enforcement agencies and the courts in relation to their fines and the factors which increase their exposure to the risk of criminalisation and imprisonment.

Proposal 6-1: Abolition of imprisonment for fine default

The IWG strongly supports the proposal to abolish the possibility of a person being imprisoned for unpaid fines.

In Victoria, the most common way infringements can lead to imprisonment is where a person does not pay their fines, is arrested and brought before the Magistrates' Court for a penalty

enforcement warrant (PEW) hearing, and is then placed on an 'imprisonment in lieu of payment' order (IIL order). The order provides the person with time to pay but default leads to the automatic issuing of an imprisonment warrant which enables the person to be taken directly to prison without further court oversight.[1] Aboriginal and Torres Strait Islander clients disproportionately experience factors making IIL order default more likely, including financial hardship, insecure housing, poor health including poor mental health and cognitive impairment, involvement with Child Protection and problematic substance use. People can be on IIL orders for many years. Our member agencies have seen IIL orders lasting as long as 40 years.

> Sara's violent ex-partner incurred dozens of fines in her vehicle following the breakdown of their relationship. Because of her housing instability, her fines were sent to an old address and she did not find out about them until enforcement action was underway.
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> Sara was arrested by the Sheriff and bailed to the Magistrates' Court for a penalty enforcement warrant hearing. At the hearing, Sara was unrepresented and did not raise the family violence she had experienced with the Magistrate. Two-thirds of Sara's fines were discharged and she was placed on an IIL order for the remaining $4,500. The terms of Sara's order required her to pay $50 per month, which meant it would take her seven and a half years to pay off the debt.
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> Sara managed to comply with the order for two years but her mental health deteriorated and she defaulted. An imprisonment warrant was issued and the Sheriff attended at her house to take her to prison. Sara was so distressed that the Sheriff took her to the emergency department to receive mental health treatment rather than to prison. After being discharged from hospital, Sara contacted a community legal centre and is currently being assisted to apply to vacate the imprisonment warrant.

Data as to how many people are currently in default on IIL orders in Victoria or how frequently IIL defaulters are actually imprisoned for unpaid infringements is not published. A recent Freedom of Information request has sought access to these statistics and we are awaiting IIL data from the Magistrates' Court. The Department of Justice and Regulation has advised they do not hold this information as data on people admitted into custody in relation to fines is not disaggregated by their pathway into prison. The data is also not disaggregated for Indigenous status or gender. The data released by the Department shows that a relatively small number of people were received into Victorian prisons due solely to fine default,[2] but that some of these people remained imprisoned for very long periods.[3] There are currently more than 8,000 imprisonment warrants in existence in Victoria, meaning

[1] We note the recent amendments to section 160 of the Infringements Act 2006 and the new section 165 of the Fines Reform Act 2014 that are likely to improve this situation and offer greater protections against imprisonment for fines. Nevertheless, Magistrates will retain the power to imprison people for non-payment of fines. The risk of imprisonment is amplified where people are unrepresented in PEW matters and Magistrates do not make comprehensive inquiries into the person's circumstances.

[2] A total of 272 people were admitted into custody for "fine default only" (ie they were not also imprisoned for criminal charges) between July 2010 and June 2016.

[3] In the 2015-16 financial year for example, the median time spent in prison for "fine default only" prisoners was 24 days and the longest period spent in custody for fine default was 345 days.

close to 8,000 people are at risk of being arrested and imprisoned, many of them for unpaid fines. It is likely that Aboriginal and Torres Strait Islander people are overrepresented amongst this group.

Increased access to the Koori Court

One way to address the overrepresentation of Aboriginal and Torres Strait Islander peoples imprisoned or at risk of being imprisoned for fines in Victoria would be to enable the Koori Court to sit in relation to PEW and special circumstances matters.

The Victorian Koori Court was introduced in 2004 as an alternative forum for sentencing Aboriginal and Torres Strait Islander offenders who wish to plead guilty to certain types of offences. Where the matter(s) in question meets the relevant statutory criteria set out in section 4F of the *Magistrates Court Act 1989* (Vic) (MCA), a Koori offender can elect to have their sentencing hearing transferred to the Koori Court for a sentence to be imposed. Much has been written about the benefits of the Koori Court for Aboriginal and Torres Strait Islander offenders,[4] and in our experience, it provides a far more positive, effective and culturally appropriate forum for criminal sentencing. In particular, offenders who go before the Koori Court often feel more involved and able to participate in the proceedings. This can be for a range of reasons, including: the presence of Koori elders and respected persons; a more culturally safe environment where country is formally acknowledged and Aboriginal and Torres Strait Islander flags are prominently displayed; a less formal structure that includes all participants seated around a table together; and the use of plain English to explain the court's processes, available sentencing options, and the ultimate sentence imposed. Whilst there has been no exhaustive quantitative study on the impact Koori Court sentencing has had on recidivism rates, the available qualitative evidence strongly suggests the Koori Court also leads to reduced future engagement with the criminal justice system, and better compliance with rehabilitative court orders (e.g. orders for mandatory drug counselling).

Despite these and other benefits of the Koori Court model, in our experience, it is not currently utilised in relation to infringement offender hearings, including those where Aboriginal and Torres Strait Islander defendants are at risk of incarceration.

Infringement offenders in Victoria are generally bought to Court for a hearing in one or more of the following three circumstances:

(a) A PEW hearing following arrest by the Sheriff due to unpaid infringement warrants;
(b) A hearing in the special circumstances list (a specialist therapeutic list at the Melbourne Magistrates' Court) following a special circumstances[5] revocation – to access this list the person is required to plead guilty; or
(c) A hearing in the Magistrates' Court following an exceptional circumstances revocation, where the person may plead guilty or not guilty.

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[4] E.g. Sentencing Advisory Council, *Comparing Sentencing Outcomes for Koori and Non-Koori Adult Offenders in the Magistrates' Court of Victoria* (April 2013); Bridget McAsey, *A Critical Evaluation of the Koori Court Division of the Melbourne Magistrates' Court*, 2005, Deakin Law Review Vol 10 No 2.

[5] Defined in section 3 of the Infringements Act 2006 (Vic) as a mental or intellectual disability, disorder, disease or illness; a serious addiction to drugs, alcohol or a volatile substance; homelessness; or family violence which results in the person being unable to understand or control the offending conduct.

It is worth noting that section 4F(1)(b) of the MCA grants jurisdiction to the Koori Court for any 'proceeding within the Magistrates Court's jurisdiction', whilst section 25(1)(d) of the MCA specifies that the Magistrates Court will have jurisdiction in relation to the enforcement of fines. Despite this, the Koori Court does not currently appear to be an option for Aboriginal and Torres Strait Islander infringement offenders brought to Court for these types of hearings. In the case of PEW hearings, the fact that a formal finding of guilt is not made as part of the proceeding is likely to constitute a barrier to the Koori Court's jurisdiction due to the current wording of section 4F of the MCA, which requires that an applicant 'intends to plead guilty' to an offence in order to access the Koori Court. However, with respect to the other two types of hearings, the failure to use the Koori Court may be more a matter of practice rather than law.

This is a significant missed opportunity to harness the benefits of the Koori Court, particularly in the context of PEW hearings, which despite the recent amendments may still result in vulnerable individuals being placed on long-term payment orders that will result in automatic imprisonment where a single payment default occurs. Legislative and practice changes to ensure that infringement offenders in the above types of hearings, especially PEW hearings, can have matters transferred to the Koori Court would help to ensure that Magistrates' determining the sentence are properly apprised of any relevant cultural factors, and that offenders themselves are more engaged in the sentencing process, and aware of the consequences of non-compliance as well as available supports they may be able to access to address any underlying issues (e.g. mental illness, drug and alcohol issues).

These would all be positive steps towards reducing the risk that Aboriginal and Torres Strait Islander people will be incarcerated as a result of fines.

Time served scheme

Section 161A of the *Infringements Act* 2006 (Vic) provides for prisoners to request that unpaid infringements are 'called in' and converted to days in custody concurrent with their sentence. This provision provides a vital way for people who are incarcerated to acknowledge their debt, call in their warrants and elect to serve the prison time concurrently with their existing prison term.

Releasing people who are incarcerated into the community with a fine debt is also likely to exacerbate the difficulties they face reintegrating into the community. Debts upon release can have a direct impact on prisoners' ability to secure housing, therefore leading to potential homelessness. Further, if people who have been in prison have high levels of debt and significant housing issues, these issues can contribute to higher rates of recidivism and re-incarceration.

Aboriginal women are disproportionately impacted by infringements and in particular imprisonment for fines. The majority of women in prison are victims of crimes themselves, having experienced family violence, sexual assault or other serious offending. The power to call in fines is particularly necessary for women in custody.

For these reasons, we congratulate the Victorian Labor government on re-introducing this scheme and commend it to other state and territory governments to ensure that people who are incarcerated can deal with their fines appropriately whilst in prison and exit with a clean slate.

Question 6-1: Should lower level penalties be introduced, such as suspended infringement notices or written cautions?

We strongly support the wider use of cautions and official warnings. Currently, official warnings are used in only limited circumstances in Victoria. Some enforcement agencies have policies as to the circumstances in which official warnings may be appropriate. For example, Victoria Police will issue an official warning for a speeding offence of less than 10 kilometres over the limit once in two years, and the Department of Economic Development, Jobs, Transports and Resources (DEDJTR) will issue an official warning for failing to produce evidence of concession entitlement to travel on public transport once in three years.

Although these formalised official warning options are positive, we believe official warnings should be available in a wider range of circumstances and that policies for their use should be made publicly available. In our view, low-level and first-time offending should be routinely dealt with by official warning or written caution.

In relation to suspended fines, we have some hesitations in recommending these as a suitable option to reduce the infringement burden on vulnerable community members. This is because people experiencing disadvantage are more likely to breach suspended fines, and therefore this option risks setting people up to fail. Any intended deterrent function is unlikely to be effective when the offending conduct is compelled by a person's circumstances – including mental illness, substance dependence, family violence or homelessness. Having said this, suspended fines are preferable to the use of traditional fines.

In addition to the use of lower level penalties, strengthened frontline decision-making and better exercise of discretion is critical in preventing the unnecessary issuing of infringements to vulnerable people. DEDJTR has recently begun implementing a suite of reforms designed to prevent vulnerable people entering the infringements system. This includes training for frontline decision-makers by people with lived experiences of special circumstances and fines, and policies to guide the exercise of discretion to ensure that people who make inadvertent mistakes and those identified as experiencing disadvantage are not penalised. If special circumstances are not definitively identified by the frontline decision maker, the person may be given an opportunity to provide evidence of their special circumstances to avoid the issuing of a fine. The following case study illustrates this process working to prevent a vulnerable person being caught up in the infringements system:

> Kip is attempting to complete a pre-diploma at TAFE. She has serious anxiety and depression and is also a single mother who relies solely on a Centrelink income.
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> While on her way to TAFE, Kip was stopped by public transport Authorised Officers for failing to touch on her 'Myki' (Victoria's smartcard ticketing system). Kip believed she had validly 'touched on' and became highly distressed during the exchange with the officers.
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> The officers decided to use their discretion in line with new DEDJTR policies and identified that Kip may have 'special circumstances'. Instead of sending an infringement, DEDJTR sent a letter to Kip asking for evidence of her 'special circumstances'.

Kip was able to send in a letter from her doctor and as a result DEDJTR never issued the fine.

DEDJTR's letter identified the availability of the Access Travel Pass, a free travel product for people with a disability. Kip used the information in the letter to obtain an Access Travel Pass which allows her to travel on public transport without the fear of being fined.

Now Kip is better connected with her community and her studies. Kip's mental health has also improved as she does not get stressed or anxious while travelling to and from TAFE or while taking her young daughter to primary school.

In our view, other enforcement agencies should implement similar policies to ensure that vulnerable people are prevented from being caught up in the infringements system. This is particularly important for Aboriginal and Torres Strait Islander communities because of their high rates of social disadvantage and because entry into the infringements system is likely to result in criminalisation (through the revocation process or driving while suspended after vehicle sanctions are imposed) or the risk of imprisonment (through a PEW hearing).

Question 6-2: Should monetary penalties received under infringement notices be reduced or limited to a certain amount? If so, how?

Concession-based fines

We support the proposal to reduce infringement penalties to take account of social disadvantage faced by many people who receive fines and the lack of equity of a single level of penalty irrespective of income.

As the IWG's submission *On Track to Fairer Fares and Fines*[6] established, infringements hit low income earners harder. The average weekly earnings in Australia as of November 2016 was $1,533.10, whereas the weekly income of a person on Newstart Allowance is only $267.80 or 17.47% of the national average weekly earnings. A $229 infringement for failing to produce a valid ticket is 85% of the weekly income for a person relying on the Newstart Allowance.

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

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

[6] Infringements Working Group, 'On Track to Fairer Fares and Fines' Public Transport Position Paper, March 2016, https://www.justiceconnect.org.au/sites/default/files/IWG%20-%20Public%20Transport%20Position%20Paper%20(March%202016).pdf

> *"I became homeless when my drug use became out of control and I got kicked out of home. I tried living out of home in a rental place but I couldn't afford the rent as I was using drugs. I found myself on the streets, couch surfing, and that continued for about two years.*
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> *Most of my fines consisted of public transport fines. They were basically – I'd jump on a train, tram or a bus to either score to get drugs or to get to appointments, cause I didn't have money to buy a ticket. I had to get to where I had to get to. When I got fined, most of the times I didn't actually worry about it at the time I was getting fined, but when the fines accumulated, it just adds pressure, because you know you're not going to have the money there at all, but it's still going to be hanging over your head.*
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> *Well I know the fines really don't work, so making the system better could be making a concessional fine for people on concession. If you're looking at someone on unemployment benefits, a $220 transit fine is probably 80% of their weekly income, so maybe drop it to $40. It will still hurt them in the pocket and realistically they can still pay it."*

The current fines and infringements framework has a discriminatory impact on those who cannot afford to pay. People who can afford to deal with their infringements by payment can easily exit the system whereas people experiencing poverty who have special circumstances may have to endure the stress of going to court and receiving a criminal record.[7] Although Work and Development Permits (WDPs, discussed further below) address this problem to an extent, it is nevertheless important that the infringements system imposes proportionate and fair penalties.

The current infringements regime already recognises that some people have less capacity to pay fines than others. For example, children are subject to a fine of $78 for a variety of offences. For the more serious of these offences, $78 is 20% of the full Infringement Penalty that would be otherwise payable.

We recommend that fines for eligible concession card holders are substantially reduced, reflecting their reduced capacity to pay. This approach is consistent with the approach adopted in Finland for traffic infringements. In that jurisdiction, fines are adjusted based on the offender's income to ensure have an equal impact on people whose incomes differ.[8]

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

- Infringement penalty recipients who are experiencing financial hardship should receive a reduced infringement penalty amount of 50% (Recommendation 39);

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

[8] The Australia Institute, *Income based traffic fines* (30 January 2016), http://www.tai.org.au/content/income-based-traffic-fines.

- Eligibility for the adjusted penalty should be the same as eligibility for automatic entitlement to a payment plan outlined in the Attorney-General's Guidelines to the Infringements Act 2006 (Recommendation 40).[9]

In formulating its recommendations, SAC stated:

> The adjusted penalty amount is intended to provide equality before the law by appropriately mitigating the penalty amount for eligible infringement recipients. This will afford the infringements system a broad measure to recognise the differential impact of an infringement penalty amount on people experiencing financial hardship compared with people who are not. The credibility and effectiveness of the infringements system will be improved by enhancing the equality of its impact, perceptions of fairness, and the prospects of compliance by low-income infringement recipients...[10]
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> Inherent in an effective infringements system is the need to balance fairness with compliance and system efficiency, as recognised in the Attorney-General's Guidelines. Tailoring a high volume, highly automated system to accommodate fairly those experiencing financial hardship is not an easy task. However, the merit of a system that better provides for equality of punishment between those who are and those who are not experiencing financial hardship outweighs the administrative burden of establishing the system.[11]

While in many cases, payment may not be the most appropriate option for a low-income client (because a special circumstances application or WDP will be more suitable), it is important that the ticketing infringement framework has a variety of options in place to allow disadvantaged people to address their infringements. Some people may want to resolve their infringements through payment and, for this to be a possibility, the system needs to acknowledge that people on very low incomes cannot, and in fairness should not, pay the same amount as people on average to high incomes.

Therefore we recommend that infringements should be set at 20% of the standard rate for eligible concession card holders. Children who hold a healthcare card or are dependents on their parent's or guardian's healthcare card should be subject to infringement penalties of 20% of the standard children's rate (i.e. 20% of $78 = $15.60).

Other measures to ensure fine debts do not overwhelm recipients

Fine debts can quickly overwhelm people when a number of fines are received. Our agencies regularly assist clients with dozens or hundreds of separate infringements, whose costs quickly balloon with the addition of administrative and enforcement costs. This is

[9] Sentencing Advisory Council, *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria Report*, May 2014, https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Imposition%20and%20Enforcement%20of%20Court%20Fines%20and%20Infringement%20Penalties%20in%20Victoria.pdf, p xxviii. Note that the eligibility requirements in the Attorney-General's Guidelines are receipt of any one of the following: a Commonwealth Government (Centrelink) Pensioner Concession Card; a Department of Veterans' Affairs Pensioner Concession Card or Gold Card; or a Centrelink Health Care Card (all types including non-means tested).

[10] Ibid p xli.

[11] Ibid p 320.

particularly the case for toll fines because people tend to accumulate many of them in a group, sometimes totalling up to several hundred thousand dollars.

We recommend measures to ensure that these fine debts are limited to realistic amounts that are proportionate to the objective seriousness of the offending (which, in the case of toll offending in particular, is very low). Such measures may include penalising a course of conduct of toll offending (such as one infringement for three months of unauthorised travel, with the remainder of trips being pursued through civil debt collection by the toll road operators).

Measures should also be introduced to ensure that fine debts cannot accumulate beyond a certain threshold, for example $5,000, at least without certain personalised intervention by authorities occurring when the debt reaches such a threshold. This would mitigate against the automated accumulation of enormous and unmanageable debts that individuals can only realistically deal with by either (a) applying for revocation and, if that application is granted, going to court and pleading guilty to the offending; or (b) waiting to be arrested by the Sheriff and applying for a reduction of the fines in a penalty enforcement warrant hearing before a Magistrate. Both options expose the person to increased contact with the criminal justice system and the risk of imprisonment (in the case of powers available to a Magistrate at a penalty enforcement warrant hearing).

Question 6-3 Should the number of infringement notices able to be issued in one transaction be limited?

We strongly support the proposition that the number of infringements able to be issued in one transaction should be limited.

The issuing of infringements for public space offences committed by Aboriginal and Torres Strait Islander people frequently lead to escalations and further infringements being issued due to social disadvantage and the history of colonisation and policing of Aboriginal communities.

> Sandra is a woman in her mid-40s living in social housing. She has been reliant on the disability support pension for over five years due to a workplace injury. Sandra is a member of the stolen generation, and only recently went through the process of formally changing her surname back to her maternal Aboriginal mother's name. This was an important step in Sandra re-discovering her culture and heritage, and the change of name is now reflected on an amended birth certificate.
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> Sandra lives in Melbourne's South, but often uses public transport to travel across town to connect with Aboriginal cultural and community services located in the Northern suburbs. Recently, Sandra was travelling on a train to a community event in the North, and was asked to produce a concession card by the Protective Services Officer (PSO) who was checking tickets. Sandra had forgotten her concession card document at home, but when she began to explain this to the PSO she was rudely interrupted and asked to produce identification documents for the purpose of issuing a fine. Sandra produced her birth certificate, and the PSO asked her about the different surnames.

Sandra attempted to explain that she was from the stolen generation, but the PSO accused her of lying and falsifying a document. Sandra became upset and refused to speak further with the PSO. Police were called, and Sandra co-operated with them by providing further identification material.

Several weeks later, Sandra received two fines from the Department of Transport: one for failing to produce a concession card; and another for failing to provide identification. Sandra was upset when she received these fines as she felt she'd been treated very poorly by the PSO. VALS assisted Sandra to lodge an internal review application and both fines were ultimately withdrawn.

In our experience, the deterrent effect of infringements is not commensurate with the number of infringements issued. In fact, we believe that infringements cease to have a deterrent impact once a few fines are issued because the situation has become psychologically overwhelming, destructive and unmanageable for the fine recipient. This is particularly the case where the infringement offending is caused by the person's disadvantage. Our experience also shows that compliance with the law and payment of fines is more likely where fewer fines are issued to a person. Darren's experience is illustrative:

Darren has been homeless on and off for almost 15 years and has struggled with alcohol addiction since his teens. A combination of these two factors has resulted in him getting about $15,000 in fines. He said:

"The impact of the fines in my case just got harder because I kept getting more of them. Before I was able to address or pay for the existing one I already had I would cop another one and another one and it just got overwhelming. I was unable to pay due to the fact that I was only on Newstart at that time and living in boarding houses, which the rent there was pretty much a third of my payment so I couldn't live."[12]

Oversight by senior police prior to the issuing of multiple fines has its drawbacks – mainly the notion that police can be an effective check on the power of fellow police – but in combination with other measures may assist. We note that DEDJTR infringements go through a similar process whereby Authorised Officers (the frontline decision-makers employed by private transport companies) issue a 'Report of Non-Compliance' which is reviewed by DEDJTR staff (public servants) who decide whether an infringement should be issued. A similar process of review to ensure that fines are used proportionately and appropriately may be useful for public space offences, particularly as a check on the decision-making of Protective Services Officers (PSOs). PSOs issue many public transport and public space infringements and are less well-trained to do so than police. PSOs are well-known in Victoria for being involved in serious escalations of incidents with vulnerable

[12] Justice Connect Homeless Law, *In the Public Eye – personal stories of homelessness and fines* (August 2013) (available at https://www.justiceconnect.org.au/our-programs/homeless-law/law-and-policy-reform/infringements-and-public-space-offences/public-eye-personal-stories-homelessness-and-fines).

members of the public, some of which have ended in serious injuries to public transport customers.[13]

In addition, we recommend the following measures:

- Strengthened training for frontline decision-makers to enable them to understand social disadvantage, the history and current reality of colonisation and the fraught history of policing of Aboriginal communities, implicit bias, and the impact of these factors on their decisions to issue fines. This training should focus on equipping frontline decision-makers to exercise discretion more appropriately to prevent the issuing of fines and the escalation of stressful situations that can contribute to further offending;

- A process similar to case conferencing in the criminal jurisdiction through which negotiation of multiple fines can be facilitated. We recommend this could occur through amendment to the grounds for internal review under section 22(1) of the *Infringements Act* 2006 (Vic) to specifically provide for internal review where multiple fines have been issued in a single transaction. If legislative amendment cannot be achieved, we recommend specific provision for these expanded internal review considerations in the Attorney-General's Internal Review Guidelines[14];

- In relation to fines issued by police, written and publicly accessible guidelines that senior police are required to have regard to when conducting a review of the issuing of multiple infringements upon a single interaction, along with insertion of these guidelines into the Victoria Police Manual.

Toll fines

Toll road offences also present a critical area where multiple infringements are issued for a single course of conduct, which do not reflect the totality of the offending. In Victoria, it is an offence to travel on a toll road without paying. A civil debt quickly escalates to an infringement for each day of unauthorised travel, meaning clients frequently present with tens or hundreds of thousands of dollars worth of toll fines debt. This is disproportionate, unfair and unmanageable, and funnels people into the court system because there is no other way to deal with such large fine debts.

We recommend that toll offences are decriminalised so that these matters are dealt with through the ordinary civil debt recovery processes available to other private companies. If decriminalisation cannot be achieved, then a cap or system that only issues one infringement for a proportionate course of toll offending conduct is urgently required.

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[13] See for example: http://www.abc.net.au/news/2015-03-31/protective-services-officer-accused-jacana-train-station-assault/6362662 and https://www.businessinsider.com.au/two-teens-were-capsicum-sprayed-at-a-melbourne-train-station-after-being-caught-without-a-ticket-2015-2.

[14] Forthcoming

Question 6-4: Should offensive language remain a criminal offence? If so, in what circumstances?

We recommend that offensive language be repealed as a criminal offence. It is an offence that disproportionately impacts Aboriginal and Torres Strait Islander communities and in VALS's experience remains a driver for Aboriginal contact with the criminal justice system.

VALS often assists clients who have received infringement notices for offensive language and in our view this issue remains problematic and a contributing factor in the over-incarceration of Aboriginal and Torres Strait Islander peoples. As the ALRC's discussion paper notes, Aboriginal and Torres Strait Islander people are overrepresented in various categories of social disadvantage, including homelessness, mental health issues and a lack of education. It is our experience that people facing these types of disadvantage are more likely to receive infringement notices for offensive language for two key reasons: firstly, they are more likely to come to the attention of police and PSOs given their greater reliance on public services (e.g public transport, public facilities) particularly for those experiencing homelessness who are forced to live much of their lives in public; and second, because these categories of disadvantage can make these peoples' interactions with PSOs and police more fraught and prone to escalation. The following case study highlights the ways in which offensive language infringement notices can unfairly impact on Aboriginal and Torres Strait Islander people who suffer multiple forms of social disadvantage.

> John is a 20 year old man with an intellectual disability and significant mental health issues. His financial affairs are managed by State Trustees, and as a result of his disability, he is permitted free travel on the public transport system in Victoria using an Access Travel Pass. John was recently at a suburban train station with a friend, with whom he was talking loudly on the platform. A PSO who was present approached John and his friend and threatened him with a 'move-on' order unless he quietened down. John protested against this threat, and the situation escalated. John felt as though he wasn't being treated fairly by the PSO, particularly after telling him about his intellectual disability. The PSO took John's details and ordered him to leave the train station, which he did. As John was leaving the station, he yelled at the PSO as he walked off.
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> The PSO issued John with an infringement notice for offensive language as a result of the comment he made whilst leaving the station. This infringement notice went straight to State Trustees, who took no action to resolve the matter. By the time John became aware of the infringement, it had become a warrant and the associated costs had increased significantly. John has never received a fine before in his life, and is now seeking assistance from VALS to help him resolve this matter. Given the fine has reached infringement warrant stage, it will be difficult to successfully resolve this matter without John having a notation on his criminal record, which will be his first.

As John's story demonstrates, the availability of infringement notices for offensive language create an additional risk of contact with the criminal justice system, a risk that is heightened for Aboriginal and Torres Strait Islander people due to their vulnerability to numerous types of social disadvantage. Whilst these notices are unlikely to directly result in a person's

incarceration except in the most serious cases, it is VALS's experience that any contact with the criminal justice system, however minor, increases the likelihood that a person will remain caught in that system and therefore increases their chances of incarceration. In John's case, the fact that he will likely have a criminal record as a result of the infringement notice could negatively impact on potential future employment opportunities, further entrenching his low socioeconomic status and limiting opportunities for social inclusion. These are all well-recognised indicators of a person's risk of incarceration, and in John's case, they may lead to more serious and persistent offending that increases the risk of imprisonment.

Public drunkenness and possess alcohol offences

Other offences that disproportionately impact Aboriginal and Torres Strait Islander communities (and other disadvantaged and visible communities) that should be repealed are being found drunk in a public place (section 13 of the *Summary Offences Act* 1966 (Vic)), possessing an open container of alcohol (contained in local by-laws in Victoria[15] and, for example, section 200 of the *Liquor Act* 2010 (ACT) interstate) and begging alms (section 49A of the *Summary Offences Act* 1966 (Vic)).

The Royal Commission into Aboriginal Deaths in Custody recommended the repeal of public drunkenness offences 26 years ago but Victoria continues to criminalise Aboriginal and Torres Strait Islander peoples for this extremely trivial conduct[16] which is not unlawful if it occurs in private. Intervention for these offences also tends to lead to escalation of interactions, often leading to further infringements or criminal charges.

The criminalisation of drunkenness and possession of alcohol traps many vulnerable people in the criminal justice system for what is a health problem, and effectively targets people who misuse alcohol in public (overwhelmingly those who are experiencing homelessness). Aboriginal and Torres Strait Islander people are overrepresented in this group.

> Scott approached a community legal centre for assistance with eight infringement warrants, six of which were for being drunk in public. Scott was assisted to apply for revocation on the basis of his special circumstances, citing his homelessness, depression and anxiety, acquired brain injury, and long-term chronic alcohol dependence. The application attached supporting reports from four practitioners working with Scott, his GP, drug and alcohol counsellor, housing worker and case manager.
>
> Scott's application for revocation was successful, but when the six public drunkenness offences were sent back to Victoria Police they did not opt out of prosecution. This meant these six matters proceeded to court.
>
> At the time of the hearing in the Special Circumstances List, Scott had been sober for 10 months – his longest period of sobriety in a decade. Scott was sentenced to a good behaviour bond with conditions that he continue to engage with alcohol treatment. The matter was adjourned for six months.

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[15] For example, section 26 of the *Moreland City Council General Local Law* 2007 and Part 3 of the *Melbourne City Council Activities Local Law* 2009.

[16] See for example Report of Ombudsman Victoria and Office of Police Integrity, *Conditions for Persons in Custody* (July 2006); Smart Justice, *Reducing Alcohol-Related Violence* (May 2010).

During the period of the adjournment, Scott's relationship broke down and he was unable to maintain his sobriety. Scott received two further drunk in public fines. Despite submissions that the matters should be dismissed, the Court extended the undertaking for a further four months.

In this time of acute stress, Scott's rehabilitation efforts continued to falter. He incurred four further fines for being drunk in public. When Scott appeared in Court again, this time living in a rehabilitation centre, the undertaking was extended again to see if Scott could maintain a period of good behaviour.

At the fourth court hearing, Scott had been sober for five months and had not reoffended. Four court appearances, 13 letters of support and 22 months later, Scott's six public drunkenness offences were dismissed. However, the remaining eight had to be dealt with separately at subsequent hearings.

Begging

Evidence and research over a 15 year period – including reports by Hanover Welfare Services (now Launch Housing), the Salvation Army and PILCH (now Justice Connect) – has consistently shown that people who beg experience high levels of hardship, including homelessness, mental illness, substance dependence, trauma, family violence and poverty.[17] These are difficulties disproportionately experienced by Aboriginal and Torres Strait Islander communities. Despite this consistent evidence, Victoria continues to rely on the police and courts to tackle what is ultimately an issue of homelessness and poverty.[18] Rather than criminalising begging, a coalition of agencies[19] has recommended the decriminalisation of begging alms in combination with a number of alternative policy approaches, which we strongly support.

Proposal 6-2: Introduction of WDO scheme in all states and territories

We strongly support the introduction of WDO-style schemes in all Australian jurisdictions. This program has the potential to enable vulnerable people to address their fines without being criminalised while assisting them to address underlying factors contributing to the infringement offending. In New South Wales, 20% of WDO participants were Aboriginal, suggesting this option is particularly effective for Aboriginal communities.

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[17] See, eg, Michael Horn and Michelle Cooke, *A Question of Begging: A study of the extent and nature of begging in the City of Melbourne* (Hanover Welfare Services, June 2001); Philip Lynch, Begging for Change: Homelessness and the Law [2002] *Melbourne University Law Review* 35; Philip Lynch, Understanding and Responding to Begging [2005] *Melbourne University Law Review* 16; PILCH Homeless Persons' Legal Clinic, *We Want Change: Public Policy Responses to Begging in Melbourne* (June 2005); PILCH Homeless Persons' Legal Clinic, *We Want Change! Calling for the abolition of the criminal offence of begging* (November 2010); City of Melbourne, *Begging Engagement Pathways and Support Program Evaluation Report* (June 2015); Justice Connect Homeless Law, *Asking for Change: Understanding and Responding to Begging in Melbourne* (October 2016).

[18] In the last 5 years, 841 charges have been laid against people for begging (statistics obtained from the Crime Statistics Agency for the period January 2011 – December 2015). See Justice Connect Homeless Law, *Asking for Change: Calling for a more effective response to begging in Victoria* (October 2016), available at https://www.justiceconnect.org.au/sites/default/files/Asking%20for%20change%20Final%2020161017.pdf.

[19] Justice Connect Homeless Law, *Asking for Change: Calling for a more effective response to begging in Victoria* (October 2016), available at https://www.justiceconnect.org.au/sites/default/files/Asking%20for%20change%20Final%2020161017.pdf

However, our recent experience with the early stages of the roll-out in Victoria suggests that it is critical the scheme be properly funded and resourced to function effectively. The Work and Development Permit (WDP) Scheme was introduced in Victoria on 1 July 2017. Importantly, as in New South Wales, no funding is available for sponsor agencies, meaning agencies are forced to use their extremely limited existing funding to administer the scheme. Most have therefore been forced to only offer the option to existing clients. The result is that very few people currently have access to the Scheme. This is compounded for Aboriginal communities given that almost all the 'foundation sponsors' are mainstream services which are not readily accessible to prospective Aboriginal participants.

This problem of access is made more acute because Aboriginal community-controlled organisations (ACCOs) are chronically under-resourced. To function effectively, the WDP Scheme needs to fund sponsor agencies – and in particular ACCOs – to deliver and administer WDP activities. This would enable ACCOs to deliver culturally specific activities such as culture camps for people on a WDP, which would have enormous benefits for individuals involved and the scheme generally.

The WDP Scheme's effectiveness is also limited because of toll fines in Victoria. In New South Wales, unauthorised toll road use is mainly dealt with through the use of civil debt collection options by the private road operators, rather than through the infringements system. This means that fines debts can be substantially larger in Victoria (where fines in the order of tens or hundreds of thousands of dollars are common) than in New South Wales (where the average fines debt is $3,000), which makes WDPs unviable for more Victorians with fines.

Question 6-7: Should fine default statutory regimes be amended to remove the enforcement measure of driver licence suspension?

In our view, vehicle sanctions are an overly blunt tool that penalise whole families and communities and unfairly interfere with people's employment, education, access to healthcare and other services, and other opportunities. This problem is particularly acute for those living in regional areas and on the city fringe. As the ALRC has noted, licence suspensions in New South Wales frequently expose people to further contact with the criminal justice system as a result of driving suspended charges. From 31 December 2017, Victoria will adopt a similar scheme which will see licence suspension sanctions being used much more frequently than they currently are. We are concerned the number of driving suspended charges arising from this change will dramatically increase and this will disproportionately impact Aboriginal communities. We note also that licence suspension frequently occurs as a consequence of non-driving offences, which is particularly inappropriate.

In our view, licence suspension should only be available as a consequence of loss of demerit points or court-ordered disqualification. Licence suspension as a sanction for non-payment of fines should be abolished, together with the sanction of preventing re-registration of vehicles which exposes people to fines in excess of $700 each for driving unregistered.

Question 6-8: What mechanisms could be introduced to enable people reliant on driver licences to be protected from suspension caused by fine default? For example, should:

(a) **Recovery agencies be given the discretion to skip the driver licence suspension step where the person in default is vulnerable, as in NSW; or**

(b) **Courts be given discretion regarding the disqualification, and disqualification period, of driver licences where a person was initially suspended due to fine default?**

If vehicle sanctions and particularly licence suspension are to be retained, additional discretion is required at every stage of the process. Automated processes unfairly impact those most vulnerable and reliant on their vehicles, who often have no available options to deal with their fines.

We agree that vehicle sanctions should not be imposed if the person is identified as vulnerable, but note the difficulties with Sheriff's officers or Fines Victoria making this assessment with often limited information. Further, we agree that discretion should be available to Magistrates to determine appropriate and proportionate periods of further suspension, as well as the discretion not to impose a further period of suspension, in cases where suspensions arise from unpaid infringements.

Driving suspended charges arising out of licence suspensions due to unpaid fines are particularly common in cases of family violence, where the victim of family violence may not be aware of the fines or the suspension.

> Katherine is a single mother with an adult child living at home. Over the past ten years she has experienced serious and persistent family violence from numerous partners. In the past 18 months, she has been forced to relocate eight times to avoid a dangerous ex-partner who was physically violent towards her. During this period, her ex-partner would often drive her car without consent and incur infringement notices for various traffic offences. Katherine was too frightened to nominate her ex-partner for these offences. The infringement notices progressed to infringement warrants, and Katherine's licence was suspended as a result of the demerit points attached to each fine. Katherine had become confused about the status of her licence, and in the context of escalating mental health issues, was stopped and charged twice by police for driving whilst suspended.
>
> In early 2017, Katherine was involved in a serious car accident that prevented her from working. Her Transport Accident Commission (TAC) application was then refused because her licence had been suspended.
>
> VALS assisted Katherine to apply to have the infringement warrants revoked, and after more than three months of waiting, this application was accepted and her TAC claim was then approved and backdated. Despite her period of licence suspension being retrospectively lifted, Katherine was still required to attend the Magistrates' Court in relation to the drive whilst suspended charges. Fortunately, VALS was ultimately able to convince the police informants to withdraw these charges, but this required significant advocacy on VALS's part, and also required several court attendances from our already traumatised client.

Whilst Katherine's licence was suspended due to demerit points rather than the imposition of a sanction for non-payment of fines, VALS believes there would be many other cases like this where the suspension is a result of fine enforcement action.

We recommend that where it is established that the suspension period was incurred because of driving offences committed by another person (for example, in the case of family violence), offences arising from suspension period should be withdrawn.

Question 6-9: Is there a need for regional driver permit schemes? If so, how should they operate?

In our view, which is confined to the Victorian context, the priority should be investing significant additional resources to ensure Aboriginal and Torres Strait Islander people living in regional locations have better opportunities from a young age to obtain and keep a full drivers' licence, as opposed to a limited regional driver permit.

See question 6-10 below for further detail.

Question 6-10: How could the delivery of driver licence programs to regional and remote Aboriginal and Torres Strait Islander communities be improved?

The experience of VALS's Client Services Officers (CSOs) located in regional and rural locations within Victoria confirms that it is very common for Aboriginal and Torres Strait Islander community members to be brought to court and convicted in relation to driving offences. This is particularly an issue amongst younger community members who have not yet obtained a probationary or learner licence permit, but take the risk of driving because there is not a readily available and convenient alternative transport option. These subsequent criminal convictions and fines are often accompanied by orders for further periods of licence suspension, or prohibitions against applying for a license in circumstances where a person is not yet licensed. Ultimately, continued and persistent offending leads to imprisonment.

It is important to bear in mind that many individuals charged with these types of offences live in locations with limited access to public transport and with significant distances of travel between key locations (i.e. home, work, school, family). In many Aboriginal and Torres Strait Islander families based in regional and rural locations, a family member with a valid driver's licence may be expected to provide transport for numerous immediate and extended family members. This increases the individual's time on the road and the risk of them committing driving offences, and also intensifies the impact on the family if that person is disqualified or suspended from driving.

The impacts of licence loss in these communities can be crippling, and may lead to loss of employment, difficulty engaging in educational programs and court-mandated rehabilitation regimes, and also a reduced ability to connect with family and culture, who may not live within easy travelling distance.

Despite the above, numerous VALS CSOs report that there are significant waiting times for people in rural and regional centres to book in licence testing with their nearest VicRoads centre. In some cases, the wait time is reported to be as long as three to five months for a

learner or probationary test. Unlike people living in metropolitan Melbourne, those in regional areas do not have the option of booking these tests in alternative accessible locations where the wait times may be shorter, as the travel distances between regional VicRoads locations are far greater.

These wait times increase the risk that individuals who do not yet have a licence will take the risk of driving unlicensed. Once prosecuted for this offending, the person will then likely face further barriers and delays to obtaining their licence (e.g. court fines, license disqualification periods). In addition, VALS's CSOs report that many families with young children in regional areas are not fully aware of the process for obtaining a full drivers' licence, or the wait times involved, which can make it difficult to plan ahead for children living in the home. This may be for a range of reasons, including family dynamics that may mean a young person's grandparent is their primary carer, as well as issues around literacy and a lack of education. This lack of awareness of the relevant process is disappointing, given many teenagers view obtaining a drivers' licence as a significant milestone on the path towards adulthood and maturity.

In this context, we would strongly support initiatives designed to encourage and enable Aboriginal and Torres Strait Islander people in regional locations to obtain full drivers' licences from as young an age as possible. Some suggestions include:

- Increased resourcing of targeted VicRoads offices to help reduce wait times for learners and probationary licence tests;
- Increased resources to enable targeted VicRoads offices or other appropriate facilities to offer free or heavily subsidised driver training sessions. These sessions could also count as an approved WDP activity where a person has outstanding infringements, and/or be part of a Court-mandated order if the person has been sentenced in relation to driving offences;
- A campaign focused on raising public awareness in targeted regional and remote locations around the requirements of obtaining a valid drivers' licence, including the consequences of driving without a valid licence. This campaign could include an educational component delivered in relevant secondary schools to all students aged 15 years and over.

Annexure 1 – List of IWG member organisations

- Bendigo Community Health Services
- Brimbank Melton Community Legal Centre
- Carlton Fitzroy Financial Counselling Service
- Casey Cardinia Legal Service
- Diversitat
- Eastern Community Legal Centre
- Federation of Community Legal Centres
- Financial & Consumer Rights Council
- Fitzroy Legal Service
- Flemington and Kensington Community Legal Centre
- FMC Mediation & Counselling Vic. (Financial Counselling & Capability Program)
- Good Shepherd Youth & Family Service
- Hume Riverina Community Legal Service
- Inner Melbourne Community Legal
- Justice Connect Homeless Law
- Lentara UnitingCare
- Loddon Campaspe Community Legal Centre
- Mental Health Legal Centre
- Monash University
- Moonee Valley Legal Service
- Nankivell Taylor Lawyers
- Odyssey House
- Peninsula Community Legal Centre
- Port Phillip Community Group
- ReGen UnitingCare
- SouthPort Community Legal Service
- Springvale Monash Legal Service
- St Kilda Legal Service
- Upper Murray Family Care
- Victoria Legal Aid
- Victorian Aboriginal Legal Service
- West Heidelberg Community Legal Service at Banyule Community Health
- Whittlesea Community Legal Service
- Women's Legal Service Victoria
- WEstjustice (Western Community Legal Centre)
- Youthlaw