'I'm sorry but you're just not that special …' Reflecting on the 'Special Circumstances' Provisions of the Infringements Act 2006 *(Vic)*

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Abstract

Infringement notices are used extensively in all Australian jurisdictions as an expedient way to address many incidences of minor law breaking. Recipients may pay a fixed penalty, rather than proceeding to court, reducing the burden on Magistrates' Courts and police resources. Fixed penalties are applied to specific offences, irrespective of aggravating or mitigating circumstances (O'Malley 2010), and these are typically considerably less than court-imposed fines. However, the expansion and ubiquity of the infringements system has resulted in an increasing number of marginalised individuals coming into contact with the criminal justice system. Certain groups of people, characterised by their vulnerability and multi-level disadvantage (such as homelessness, mental illness, intellectual disability or substance abuse), are disproportionately and adversely affected by this system. Indeed, it entrenches and *compounds* existing disadvantage in several ways — a topic this article will discuss. Drawing on interviews with 95 stakeholders** involved in the Victorian infringements system, we will outline some of the most problematic aspects of the operation of the *Infringements Act 2006* (Vic), critically discuss what has already been undertaken to alleviate the situation for individuals characterised by so-called 'special circumstances', and propose amendments to the system which might also serve as a guide for other Australian jurisdictions facing similar challenges.

Introduction

The current infringements system in Victoria, Australia, originated from parking-related matters (*Parking of Vehicles Act 1953* (Vic)) and was born of links between local

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** Throughout this article references to research participants has been anonymised and participants are indicated by a number in parentheses, eg, (1), (2).

government and road traffic legislation. From the early 1960s, the system was extended to cover driving/vehicle-related offences (Fox 1995) where it was deemed unnecessary for full prosecutorial or trial processes to be implemented. Further expansion of public transport offences occurred in the mid-1980s under the *Transport Act 1983* (Vic). In 2006, the *Infringements Act 2006* (Vic) ('*Infringements Act*') was introduced, with the aim of establishing a uniform model for issuing, managing and enforcing infringement notices, and it provided a process for expansion of the infringements system to other offences. Importantly, in relation to disadvantaged groups, the scope of the infringements system was again extended in Victoria in 2011 to cover public order-type offences and minor shop theft under the *Justice Legislation Amendment (Infringement Offences) Act 2011* (Vic) (Lansdell et al 2012).

More than 120 agencies in Victoria are authorised to issue infringement notices for a variety of minor offences (Department of Justice (Vic) 2012:8), and they include Victoria Police, Metro, the Department of Transport ('DOT'), CityLink and local councils. In the 2010–11 financial year there were 4.97 million infringement notices issued, with the majority concerning car-related offences, such as speeding, parking, and driving against a red light, and offences related to toll roads (Department of Justice (Vic) 2012:9–10). Indeed, the DOT claimed that during 2011 'feet on seat' offences alone had netted that Department millions of dollars in fines (Holroyd, 2012). Consequently, the infringements system has successfully enabled many people to bypass the formal criminal justice system, reducing the administrative burden for organisations involved, and promoting recipients' behavioural change. Infringement notices also provide a significant amount of revenue for the state without incurring the costs associated with court processing (NSW Law Reform Commission 2010). Moreover, fine recipients paying the penalty usually avoid both conviction and a criminal record (Bell 2011).

The infringements system in Victoria involves a number of stages, agencies and courts, creating a system that is complex, convoluted and sometimes counterproductive. The 'bulk' (Hulls 2005:2187) of people receiving a fine pay it in a timely way, but a failure to pay within the standard 28 days puts in motion a process which can culminate in the application of staged costs (pecuniary and non-pecuniary). This results in an enforcement order being made by the Infringements Court, an administrative arm of the Magistrates' Court that processes and enforces unpaid infringement notices, rather than a 'sitting' court. Failure to pay at this point results in the Infringements Court issuing an infringement warrant, leaving the fine recipient vulnerable to a range of sanctions that may be executed by the sheriff, including wheel clamping the recipient's vehicle, suspending his or her driver's licence and registration, and seizing and selling property (Victoria Legal Aid 2009). The sheriff can also organise a payment plan or offer to convert the fine to a community work permit, but only for certain recipients — this option is limited to those with fines totalling less than 100 penalty units, which is approximately $14 084 (*Infringements Act* s 147). Those who refuse these options must attend the Magistrates' Court, where they may be placed on a community-based order, have their fines reduced or discharged, be put on a payment order allowing more time to pay or, in certain circumstances, be incarcerated (*Infringements Act* s 160(1)). However, infringement matters do not initially proceed to court unless the accused elects to challenge the fine. This option is rarely chosen due to the complexity of the process and the aforementioned risks associated with challenging. From 2010–11 nearly 38 000 people elected to go to court, representing only 0.76 per cent of all infringement notices issued (Department of Justice (Vic) 2012:18). Hence, for many people the infringements system can be an effective and expedient way to deal with minor law breaking.

For some groups characterised by multi-level disadvantage, the system may not only be ineffective, but may also compound issues related to homelessness, drug and alcohol abuse, and mental illness. This potentially serious problem was recognised in the *Infringements Act*, which contains a number of provisions for those who fall into the so-called 'special circumstances' category. 'Special circumstances' is defined in s 3 to include homelessness, mental illness, intellectual disability or substance addiction. Despite good intentions, the adverse impact of the infringements system on people in these groups has been significant. Community Legal Centres ('CLCs'), to which these individuals often eventually turn for assistance, have drawn attention to this; the caseload of CLCs with regards to unpaid infringements by individuals falling into the 'special circumstances' groups increased significantly between 2009 and 2011 in and around Melbourne, a situation causing considerable concern and leading to the initiation of the research project which is presented in this article. For example, PILCH Homeless Clinic reported that from 2009–10, 33 per cent of advice and representations was dedicated to fines/infringements, while from 2010–11 this increased to 49 per cent of their case work (PILCH 2011:19). Similar responses were provided by other CLCs participating in this research.

The project included 95 semi-structured interviews with a range of stakeholders involved in the Victorian infringements system. Participants were selected from a cross-section of geographical areas, including inner-city Melbourne, suburban areas such as Footscray, regional Melbourne areas including Dandenong and Lilydale, and regional Victorian areas including Bendigo, Geelong and Albury-Wodonga. Participants comprised 37 clients who had unpaid infringement fines, 23 lawyers from CLCs and Victoria Legal Aid ('VLA'), 10 financial counsellors and one representative from Resourcing Health and Education in the Sex Industry. Participants who had a direct role under the *Infringements Act* included eight sheriffs, two Infringements Court staff, three judicial registrars, seven local government representatives and four DOT representatives. Client participants were randomly selected from the participating CLCs, and the group was limited to those over 18 years of age due to ethics requirements. Professional participants were recruited by contacting the relevant government departments (Department of Justice, DOT, Municipal Association of Victoria, Financial and Consumer Rights Council) and requesting their participation. The primary data collection method was semi-structured interviewing and, to a lesser extent, court observations (26 hours) and quantitative, descriptive data extracted from CLC databases were used, along with documentary analysis of legislation, policy documents and government debates. Interviews were conducted on a face-to-face basis by at least one, if not two, members of the research team and lasted 45–90 minutes. Client participants were provided with a $50 supermarket voucher to reimburse them for their time and travel expenses. Additionally, the research group attended several Infringement Working Group ('IWG') meetings after December 2010 to update the IWG on the research and participate in the latest debates. The IWG is comprised of lawyers and financial counsellors who monitor how the infringements system impacts marginalised groups.

In the remainder of this article we discuss the main themes that emerged from the research, with particular reference to disadvantaged groups, and the strengths and weaknesses of the 'special circumstances' provision. We also draw attention to issues arising for other disadvantaged groups whose circumstances are currently not deemed 'special' enough to be included in the legislative definition, but who are adversely impacted by the system. We conclude with some tentative suggestions for change to the infringement system overall and particularly in the area of 'special circumstances'.

However, first we consider the characteristics of the groups for whom 'special circumstances' are relevant and the creation of the 'special circumstances' list in the Melbourne Magistrates' Court.

The 'special circumstances' list and disadvantaged populations

In 2002, a 'special circumstances' list ('SC List') was established in the Melbourne Magistrates' Court to deal with the high levels of disadvantaged individuals presenting before Magistrates' Courts with unpaid fines for minor offences. Brisbane followed suit in 2006 with the establishment of a Special Circumstances Court to deal with the high volume of marginalised individuals charged with public order offences (Walsh 2007). However, despite the positive outcomes associated with the Brisbane Special Circumstances Court, it was recently abolished due to 'cost cutting' (Foley 2012:24).

Our research revealed that people who are dealt with in the SC List can have fines ranging from $300 to $70 000. They have been through all internal processes set in place by the various issuing agencies (such as VicRoads, local councils and DOT), may have ignored the increasing numbers of letters arriving at their address demanding payment, or have no fixed address at all due to being homeless. As the infringements process relies heavily on written correspondence, this is problematic for persons without a permanent address and for those with literacy problems (NSW Law Reform Commission 2010).

Homeless people are regularly and disproportionately fined for behaviour that is directly related to entrenched poverty, including begging, shoplifting for essential goods such as food, fare evasion and offensive language (Goldie 2003; Midgley 2005; Walsh 2006; NSW Law Reform Commission 2010; Farrell 2010). Homelessness can also lead to fines for practices that would be legal if performed in private, such as sleeping, urinating, drinking alcohol or swearing (Lynch et al 2003). Using fines to regulate homeless people's behaviour exacerbates their disadvantage and potentially entrenches them in a cycle of criminality as they may be compelled to partake in further illegal activity to pay fines or to obtain basic necessities (Walsh and Douglas 2008; Farrell and Povey 2010). Importantly, imposing a fixed monetary penalty on homeless people does not fulfil the traditional aims of sentencing (as set out in *Sentencing Act 1991* (Vic) s 5). It is not proportionate to the offence; nor does it act as a specific or general deterrent. While it may fulfil the aim of denunciation in declaring what society will not tolerate, offenders are unlikely to stop and think about what they are about to do given the nature of their individual disadvantage. It is also unlikely that the community needs to be protected from these individuals given, in most cases, the minor nature of their offences and their non-violent aspect.

Financial counsellors and legal representatives who participated in our research reported that substance-addicted people are often fined for behaviours that may be manifestations of their addictions, including drinking alcohol in public, holding open containers of liquor, offensive behaviour, fare evasion, feet on seats, shop theft, travelling on a tollway without an E-Tag and abusive language. As one financial counsellor (8) noted, 'multiple infringements get issued at once … so they'll get infringements for no ticket, feet on seats, abusive language, and carrying alcohol'. A legal representative (12) told of a client with significant drug and alcohol issues who was repeatedly apprehended by the police, even when sober. These encounters would often result in further fines when he disputed this. She said: 'In the space of three months he's racked up about $3500 worth of fines because the drunk in a public place fine is worth $489.' We would recommend that issuing officers receive further training about appropriate combinations of fines or the development of a

single ticket to cover disorderly conduct broadly to avoid multiple infringements arising out of one course of conduct.

Financial counsellors and legal representatives reinforced concerns about fine debts fuelling substance addictions. Clients have told them that they use drugs to 'zone out' from the worries emanating from these debts, knowing that they cannot expiate them. A legal representative (2) said: 'I'm certain that [a fine] quite often drives drug use because they're using the drugs so that they don't have to think about it. They'll go out and get drunk rather than thinking about that pile of mail at home.'

Legal representatives reported that clients with mental illnesses and intellectual disabilities often commit similar offences to substance-addicted people. For example, unemployment due to their condition may mean they cannot buy a train ticket or they may not even understand that a ticket is required or a fine will be incurred. They may wander the streets as a result of an acquired brain injury, leaving them vulnerable to public order offences. They may also be homeless. One legal representative (6) reported: 'We have clients who are bi-polar who drive around for hours as it makes them feel better but they don't realise they are on a toll road [racking up fines] ... they just drive until they click and say: "Okay where am I and what am I doing?"'

The *Infringements Act* stipulates that individuals with 'special circumstances' should be flexibly treated to ensure that they are not unfairly and disproportionately embroiled in the infringements system (Victorian Auditor-General 2009:15). While the legislation aims to divert these 'special' groups from the infringements system, this is only the case where their conditions render their offending behaviour uncontrollable or where they are unable to comprehend that their actions constitute an offence. There is no requirement for enforcement officers (who issue infringement notices) to take account of 'special circumstances' at the issuing stage, although previously they might have issued a caution or official warning instead. In any event, results from one police survey (Mental Health Legal Centre Inc. 2010) confirmed that police often experience difficulty identifying persons who are eligible for diversion.

These results confirmed similar views expressed by McGillvray and Waterman in 2003. Their study examined Victorian criminal lawyers' knowledge of and attitudes towards intellectually disabled offenders. With regard to questions relating to criminal justice staff, 96.9 per cent of respondents stated that police require further training in order to understand intellectually disabled offenders (McGillvray and Waterman 2003:249). Legal representatives (30 per cent) who participated in our research also reported that transport officers, the police and other enforcement personnel required training to alert them to these issues and the need to exercise their discretion through warnings, cautions, or referrals to support services in lieu of issuing fines. It is more likely that magistrates or judicial registrars with considerable experience in dealing with disadvantaged persons will consider the links between the accused's 'special circumstances' and his or her offending. Fines may be proven and dismissed or an undertaking of good behaviour may be imposed; for example, compliance with a treatment regime (Popovic 2006a; Walsh 2007). It is of concern that, at the culmination of this process, a person may technically be found 'guilty' without actually determining whether evidence proving guilt exists. In addition, while issuing the fine appears to be uncontroversial and an accepted part of the infringement process, the ability to issue multiple infringements against certain sectors of society illustrates the opportunity for abuse and may be viewed as a weakness of the system.

From 2010–11, 1762 matters were finalised in the SC List. Mental illness was the primary ground relied upon, with 1456 cases finalised on that ground, while 179 were on the

ground of substance addiction and 126 on the ground of homelessness. However, the statistics only reflect the *primary* reason for the application 'as the accused may fit multiple criteria' (Magistrates' Court of Victoria 2011:118). This fact was also apparent in our research, as legal representatives and financial counsellors reported that their clients often face multiple issues. Legal representatives reported that 52 per cent of their clients met several of the 'special circumstances' criteria, 26 per cent were experiencing homelessness and financial hardship, 13 per cent were experiencing financial hardship and 9 per cent were experiencing a dual diagnosis, where they have both a mental illness and a substance addiction. Many legal representatives (57 per cent) also mentioned that domestic violence is an issue for some of their clients. Financial counsellors reported that 80 per cent of their clients were experiencing financial hardship, while 60 per cent were suffering from a dual diagnosis.

Because few of the individuals who present under the 'special circumstances' provisions do so under a single criterion, and due to the complexity of the entire infringements system, we have chosen to discuss our results by reference to the framework of the various stages of the infringements process (including the internal review stage, the pre-court stage, the court and post-court stages) illuminating within each our main findings. These include the nature and amount of evidence required to prove 'special circumstances'; the lack of regional access to the SC List; disclosure of sensitive information in the open court setting; a requirement to plead guilty to gain access to the SC List and the subsequent imposition of criminal records; the lack of support and follow-up for clients and the absence of a process to 'flag' repeat offenders and divert them from the system. We begin this analysis by focusing on the general complexity of, and inconsistencies within, the system, with particular focus, at this stage, on the internal review process.

Complexities of the legislation and inconsistencies in its application at the internal review stage

Legal representatives (100 per cent) and financial counsellors (70 per cent) who participated in our research were particularly concerned about the *complexity* of the infringements process. Indeed, 73 per cent of all interviewees believed that the system was overly complex. One legal representative (19) said: 'I'm fairly new to it. I only started dealing with it less than six months ago and, as an educated trained lawyer, getting my head around it was problematic.' A representative from the Department of Justice ('DOJ') (7) commented: 'We pride ourselves on making government more accessible to the people but in fact what we've done is put a whole heap of these barriers in place and you need to be a skilled navigator to jump across them.' While the system confused and frustrated legal and government experts, clients were often completely overwhelmed, relating stories marked by stress, anxiety, depression and helplessness.

The complexity of the infringements system also leads to delays. Applying for and then proving 'special circumstances' is a time-consuming process for everyone involved, but it disproportionately affects marginalised groups. Concerned legal representatives (44 per cent) and financial counsellors (40 per cent) observed that there is a delay of at least three to six months between a person's application to appear in the SC List and notification of the hearing. A legal representative (16) highlighted this problem in relation to 'the transient nature' of 'special circumstances' eligible clients:

> The infringements process takes so long; at any point during the year or two that we're interacting with the client they may become homeless again, they may disappear, they may go interstate ... We had a look at some of our figures from 2009 and we closed 24% of our files because we just lose contact with clients, they just kind of disappear.

There is an internal review phase within the system that is apparently paradoxical and inconsistently applied in terms of outcomes. It is possible under the legislation to apply for internal review in relation to the issuing of the infringement notice prior to the matter being passed on to the Infringements Court. Persons issued with an infringement notice may apply to the enforcement/issuing agency (for example, DOT, Victoria Police) for an internal review under s 22 of the *Infringements Act.* This application may be made if the decision to issue the infringement is contrary to law, if there is a mistake of identity, if the person has 'special circumstances', or if there are exceptional circumstances (such as an emergency). This application must be in writing and must be made prior to the enforcement agency referring the matter to the Infringements Court (Infringements System Oversight Unit 2008:4). Upon receipt of a request for internal review, enforcement agencies may confirm the decision to issue the notice (in which case the matter must be referred to court under s 26(3) of the *Infringements Act*), withdraw the notice or, alternatively, withdraw the notice and issue an official warning. If this is successful, then the person would be diverted away from the criminal justice system at an earlier point and would not need to plead his or her 'special circumstances' at any later stage, such as in an open court.

The Victorian Attorney-General's 2010–11 report on the infringements system found that 'special circumstances' applications accounted for 1.91 per cent of all internal review applications (Department of Justice (Vic) 2012:19). Seemingly a small number, in reality this represents 7678 individuals. These applications resulted in 37.91 per cent being withdrawn, 21.46 per cent being withdrawn and replaced with an official warning, and 40.62 per cent being confirmed and referred to court as a result of the agency rejecting 'the excuse or reason provided in the application' (Department of Justice (Vic) 2012:21). One legal representative (16) noted: 'Internal review processes should be consistent and they should understand the intention of the legislation is that people with "special circumstances" shouldn't be caught in this system and should be removed as early as possible.'

Indeed, the Infringements System Oversight Unit's internal review provisions state that 'if the agency finds that there are "special circumstances" the agency should withdraw the infringement notice' (Infringements System Oversight Unit 2008:11). (This Unit is located within the Department of Justice and is responsible for providing advice to the Attorney-General and monitoring the operation of the infringement system.) However, it is apparent that adherence to this policy is inconsistent. The Victorian Auditor-General confirmed this, noting that 'variations between agencies indicate that the legislative requirements are not applied consistently' (Victorian Auditor-General 2009:3) and, furthermore, 'review officers are not sufficiently aware of what constitutes 'special circumstances' or what is required when assessing and processing such claims' (Victorian Auditor-General 2009:43). The Public Accounts and Estimates Committee's subsequent review of the Auditor-General's reports concluded that they were unable to ascertain the 'adequacy of staff training' due to a lack of detailed information (Public Accounts and Estimates Committee 2012:32).

Legal representatives (78 per cent) and financial counsellors (30 per cent) reported that agencies often refuse to withdraw fines, even when evidence of 'special circumstances' has been provided. As a result, many people who should be diverted from the system are remaining in it for protracted periods and, further, they are likely to appear in open court (as opposed to in a SC List) in front of a magistrate who may be unsympathetic to 'special

circumstances' arguments. Hence, many legal representatives revealed that it is often beneficial for those with 'special circumstances' to wait until the matter has reached the Infringements Court stage before taking action. Although this means accrual of late fees, the possibility of enforcement action and additional stress for the client waiting until this point means that the matter will be referred to the SC List, as opposed to open court. As one legal representative (18) noted: 'It just seems unfortunate that the system means that people need to increase their debt or their obligation greatly before they can have it dealt with in a realistic way.'

The reluctance to withdraw fines at internal review stage, especially regarding Victoria Police, may, in part, be due to a need to balance discretion with public safety, as many of these fines may be incurred because of driving-related offences (Public Accounts and Estimates Committee 2012). However, the inconsistencies inherent to the current procedure led two legal representatives to suggest that all internal review applications should be managed by one central agency, irrespective of where they originate.

Pre-court stage: Evidence to prove 'special circumstances'

When the matter reaches the Infringements Court stage, the recipient can apply for a revocation of the enforcement order and, if the Court approves the application, the matter will be referred to the SC List. However, marginalised persons often experience difficulty obtaining reports to substantiate their claims, which creates a barrier to entry to the SC List. Indeed, 91 per cent of legal representatives and 80 per cent of financial counsellors reported that their clients had experienced such difficulty. While the 2006 inclusion of homelessness as a 'special circumstances' criterion was a positive step, those who list 'homelessness' as their primary ground often encounter significant challenges. The Infringements Court stipulates that homeless persons must provide a report 'from an agency funded under the *Supported Accommodation Assistance Act 1994* [(Vic)] (for example, Salvation Army, Hanover, St Vincent's) and/or a report from a general practitioner or health care provider/psychiatrist' (*Infringements General Regulations 2006* (Vic) reg 8). This report must be less than 12 months old and contain information about the period of homelessness, current living arrangements and any additional information, such as a mental illness or substance addiction, and how this contributed to the offending behaviour. However, those who are not linked in with support, such as those who are 'couch surfing' or 'sleeping rough', may not meet the criteria due to a lack of evidence. As one legal representative (13) remarked: 'I don't know who came up with the idea that people who are homeless are going to have accessed particular funded services and have ongoing relationships with them … that's not how it works.'

Three legal representatives also suggested that Infringements Court registrars often require homelessness to be linked with a mental illness to obtain approval to appear in the SC List. For example, one legal representative (2) observed: 'They kept on asking for psych and GP reports for people where the main "special circumstances" claim was on the basis of their homelessness.'

Legal representatives also reported that there appears to be an impasse with respect to the amount of documentation required for 'special circumstances' applications and treating doctors' willingness to provide this in the absence of remuneration. One legal representative (18) remarked: 'I mean a psychologist is the luxury of the middle class, if we're talking about going to see a psychologist and being paid. Our clients don't have access to those sorts of resources on an ongoing basis.' As one financial counsellor (8) said:

'Doctors are under the misunderstanding that anyone who goes to court can get their fees paid for by the court ... While Legal Aid can provide a funding grant, this is restricted to people whose fines are in excess of $1000 and they also must fit a certain income criteria.' Two legal representatives and three financial counsellors suggested that Medicare should cover the costs of such reports.

Legal representatives (35 per cent) also mentioned that there are inconsistencies in the Infringements Court's decisions regarding what constitutes acceptable documentation. They mentioned that brief medical reports are rarely accepted. Two legal representatives suggested that infringements registrars are biased against certain medical conditions, such as anxiety and depression, and do not like granting 'special circumstances' applications on these grounds. Additionally, several legal representatives, financial counsellors, local government representatives, clients and DOJ representatives drew attention to the difficulty of trying to contact Infringements Court registrars. One DOJ representative (9) mentioned that a phone call may not be returned for a week. (However, it is important to recognise that the large caseload of Infringements Court staff members would be a significant contributing factor to this.) Three legal representatives also suggested that the Infringements Court should accept documentation from a wider range of professionals, such as social workers or drug and alcohol counsellors, as many clients have not seen a general practitioner or psychiatrist and therefore 'getting them in to see a doctor who can then write a report about the past is very difficult' (18). One legal representative (20) told how 'a social worker or case worker' will often provide very detailed background reports for her clients; however, 'it's not accepted because it's not a medical report'.

Court stage

Lack of regional access to the SC List

'Special circumstances' clients often find court processes challenging. Merely getting to court is difficult for people who cannot afford public transport (Midgley 2005; Forell et al 2005). They may travel without a ticket, risking another fine. This difficulty is compounded for people living in rural or regional areas of Victoria. There are more than 50 Victorian Magistrates' Courts, yet only the Melbourne Magistrates' Court and the Neighbourhood Justice Centre ('NJC') in Collingwood have established SC Lists. The lack of regional access to these programs means that living in remote areas significantly reduces access to justice. This is reflected in outcomes which are often determined by the extent of court programs available in a particular area.

While 'special circumstances' arguments may be made in local Magistrates' Courts, there is no guarantee that the sitting Magistrate will be experienced in these issues. Hence, people living in remote areas are often compelled to travel to Melbourne to gain the benefits of the SC List. The Victorian Auditor-General also noted this issue, recommending that the DOJ should 'review the provision of services to people with 'special circumstances' in regional areas' (Victorian Auditor-General 2009:6). The Public Accounts and Estimates Committee also endorsed this view (Public Accounts and Estimates Committee 2012). In response, the DOJ acknowledged the benefits of a Victoria-wide expansion of the program. However, the DOJ suggested that 'further consideration' was needed 'to devise an appropriate service delivery model within budget constraints' (Public Accounts and Estimates Committee 2012:31).

Disclosure of sensitive information in open court

A court appearance may involve significant challenges for any person unaccustomed to the formality of court processes. This appears to be exacerbated for marginalised groups. For example, people who are homeless often feel embarrassed about their appearance and may feel stigmatised and judged. Many also report feeling intimidated by the presence of police, and this poses a significant deterrence to appearing (Midgley 2005). Similarly, homeless people are often frightened to participate in legal processes following previous negative experiences of the criminal justice system. They may not be aware of how to behave in court and may find the court environment 'alienating and frightening' (Forell et al 2005:5). Those who suffer from a substance addiction may also experience difficulties when considering disclosure of a substance addiction in an open court setting. A client (20) research participant spoke of her experience at the SC List:

> When it got to my turn, the judge had obviously read through, there was quite an extensive report from my psychiatrist, a couple of doctors I've been to over the years — there was quite a lot of information about me and it also delved into the fact that I was a mother who had a heroin problem. It made me feel like shit … the whole court thing, there's pretty sensitive information that goes in these reports.

People suffering mental illnesses confirm that they feel alienated from the criminal justice system for a variety of reasons, including an inability to understand the language used in court and inadequate explanations of court processes, resulting in significant distress and confusion (Mental Health Legal Centre Inc. 2010). This stress is intensified by extensive waiting periods. Gray et al (2009) found defendants with a cognitive impairment often report that the court process is extremely stressful, intimidating and alienating, affecting their effective involvement in the process. They may also fear disclosing sensitive personal information due to fear of stigmatisation. While these factors may be common to other people appearing in the criminal justice system, it is significant that those who can afford to pay can choose not to come to court. Legal representatives report that some enforcement agencies regularly fail to appear at hearings, resulting in the matter being struck out. This was apparent during the court observation phase of our project.

Less formal courts, such as the SC List, are better equipped to deal with vulnerable groups. The accused is given the opportunity to explain how his or her situation impacted on his or her behaviour and this may be perceived as empowering (Popovic 2006b). However, the fact that this list operates 'within a formal court setting' is problematic for some (Forell et al 2005). In her evaluation of the Brisbane Special Circumstances Court, Walsh found that many professional participants believed the 'open nature of the court was both inappropriate and a source of extreme anxiety for some defendants' (Walsh 2011a:52). While many clients in Walsh's study felt comfortable in the court, others commented that they 'felt pressured to reveal personal details about themselves that they would rather have withheld' and felt that the open nature of the court invaded their privacy (Walsh 2011b:14). One of Walsh's recommendations was that magistrates should 'consider exercising their discretion to close the Special Circumstances court more frequently, in the interests of protecting defendants' privacy and safety' (Walsh 2011a:73).

Our research revealed a lack of consensus among legal representatives with regard to whether or not 'special circumstances' matters should be heard in an open court environment. Three legal representatives suggested that those who have had their applications accepted by the registrar should have their matters dealt with 'on the papers', without the requirement of a court hearing. Another suggested that these matters would be more appropriately dealt with in a closed setting, such as a mediation room. Conversely,

another (17) stressed the importance of appearing at court: 'Of course it has to be in the open. You can't have the judicial arm of government doing its business in secret.'

While some clients reported that the process was unproblematic, several voiced concerns such as 'going to court just terrifies me' (29) and going to court would 'cause a lot of anxiety and depression' (33). The knowledge that their illness or addiction will be exposed in court has dissuaded some from participating in the SC List. Three financial counsellors suggested that many more of their clients who are eligible for 'special circumstances' would apply if the process was not held in an open court environment. We recognise that there are advantages to open court, as participants (such as judicial registrars, issuing agencies) are more accountable and this may have the effect of making them more cautious in their approach. While the requirement to appear at court is not unique to the SC List, it is questionable whether those who suffer from severe forms of mental illness, particularly those suffering anxiety and panic disorders, should be made to expose their issues in public. They have generally committed very minor incidences of law-breaking and those who can afford to pay their fines are not required to endure a court appearance.

During the last observation phase at the Melbourne Magistrates' Court SC List the researchers noticed that several clients had matters heard in their absence. Subsequent correspondence with a DOJ representative revealed that the Court will often hear matters in the absence of the accused 'when there are only a small number of charges and the written material provided clearly established 'special circumstances'. The representative (12) said that the accused may contact the Court requesting this and 'physical and/or mental health issues would certainly play a part in any consideration'. Of the 1762 matters that were heard in the SC List from 2010–11, 64 per cent of accused persons appeared in court, while 36 per cent were heard ex parte (Magistrates' Court of Victoria 2011:83). The reasons for the defendants' non-appearance were not disclosed; however, it was stipulated that 'all applicants must attend court unless they suffer exceptional circumstances, such as being institutionalised' (Magistrates' Court of Victoria 2011:83).

The requirement to plead guilty results in a criminal record

The requirement to enter a guilty plea as a prerequisite to appearing in the SC List is of further concern. When a fine recipient in Victoria expiates an infringement notice the offence is not disclosed on a criminal record check. However, those who elect to challenge the matter in court risk the possibility of acquiring a criminal record if there is a finding of guilt (O'Malley 2010). Police record checks will include a description of any charge found proven in court, as well as unpaid infringement notices that proceed to court (North Melbourne Legal Service 2009). This applies even if the court has ordered that the matter be recorded 'without conviction', as the finding of guilt remains. This is pertinent for those who wish to appear in the SC List, as persons who are already marginalised may be more susceptible to the stigmatisation that may ensue after acquiring a criminal record. A criminal record may result in a variety of negative repercussions, such as an inability to obtain credit, employment or stable housing. It is also questionable whether those who appear in the SC List should be required to plead guilty as eligibility criteria stipulates that they must be unable to control their offending behaviour or be unaware that their behaviour constitutes an offence. Legal representatives also voiced their concerns. One (12) spoke of a client who met the criteria of substance addiction but refused to participate in the list as he was applying for permanent residency and did not want this charge on his record. Another (21) said: 'The advantage of not having a criminal record is great for people who are middle class and can afford to pay these fines; it's a class issue.'

Court outcomes: Minimal support and follow-up

As noted earlier, the two likely outcomes for people whose matters are heard in the SC List are that the matter is proven and dismissed, or they will be required to fulfil an undertaking to be of good behaviour, which may include compliance with a treatment regime, for a specified period of time. They may or may not be required to reappear before the court. Instead, evidence of compliance with the undertaking may be required at the end of the adjournment period. However, a DOJ representative (1) observed: 'The financial counsellors, all these State Trustees, other public interest groups that are representing their clients represent them up to the court stage but ... there is no backup plan ... no follow up ... no one to monitor the agreement.' As one legal representative (19) commented: 'They still have circumstances — the fact that you put them on an undertaking and they promised to be good doesn't resolve their homelessness and doesn't give them money to pay for tickets.'

However, the situation has changed since the interviews took place. In July 2012, the Melbourne Magistrates' Court announced a pilot program providing all Magistrates' Court defendants, including SC List participants, access to the Court Advice and Support Officer ('CASO'). This is an 'on-call' service 'to assist with unusual or complex psychological issues that arise in court'. The CASO provides advice to legal representatives on appropriate welfare options and, if requested by a magistrate, initiates and facilitates 'linkages and access to a range of court, government and community services for court users'. However, these are mainly brief 'once-off' interventions and subsequent correspondence with a financial counsellor (8) revealed that these interventions are 'quite limited'. The CASO information sheet states that eligible clients who require more extensive intervention may also be referred to other court programs for ongoing case management, such as the Court Integrated Services Program ('CISP'). However correspondence with a DOJ representative revealed that those who appear in the SC List are not eligible to be referred to the CISP. It appears that this may result from a perception that 'special circumstances' applicants are not in the criminal jurisdiction.

The difficulty in complying with sentencing outcomes such as good behaviour bonds was found to be an issue, as these require the defendant to remain offence free for the duration of the order. Since many people's offending is linked to their medical condition or their lifestyles and living arrangements, re-offending is almost inevitable. Our research reinforced Midgley's findings in relation to homeless people that good behaviour bonds 'set people up' to fail (2005:93). People who struggle to attain basic necessities, such as food and stable housing, will almost inevitably fail to fulfil undertakings unless they are provided with ongoing supports and resources.

One initiative in Victoria, the NJC, takes a different approach. The NJC is a community court that provides various support services to defendants, such as counselling, employment training, and alcohol and other drugs support services. The NJC hears 'special circumstances' matters on two afternoons each month, and ensures clients are linked into appropriate support services. However, in order to be eligible to appear at the NJC and benefit from these services, defendants must (a) reside in the City of Yarra; (b) be homeless and temporarily residing in the City of Yarra; or (c) be an Aboriginal or Torres Strait Islander with a 'strong connection to the area' (s 40(2) of the *Court Legislation (Neighbourhood Justice Centre) Act 2006* (Vic)). Similar initiatives in other areas of Melbourne, or at least in connection with the SC List at the Magistrates' Court, might alleviate some of the challenges facing disadvantaged populations.

Repeat offenders — An early exit versus a 'revolving door'

As there is not a system in place to flag repeat offenders with an intellectual disability or an acquired brain injury, many with these conditions repeatedly end up in court as they are unable to control the behaviour leading to the issuing of infringement notices. In our research, concerned legal representatives (44 per cent) and DOJ representatives (33 per cent) proposed that this group of clients should be provided with an early exit from the system or a streamlined way to revoke their fines, as currently they 'never get out of the system; they're trapped' (legal representative 13). This could involve a flagging system whereby fines are automatically withdrawn shortly after they are issued. Persons who wished to be considered for such concessions would need to provide consent to appear on a private database managed by the proposed central agency or by the Infringements Court.

It is clear that infringement notices do not deter recipients who are unable to understand the nature of their offence or the consequences of receiving an infringement notice. In addition, the fact that there are lengthy delays between receiving fines and court appearances increases the likelihood that a person suffering an intellectual disability will not make the desired connection.

Narrow SC criteria — How 'special' is special?

As mentioned earlier, our research identified two groups who experience a significant adverse impact of the infringements system, but who cannot currently avail themselves of the 'special circumstances' provision. Indeed, 48 per cent of legal representatives and 70 per cent of financial counsellors suggested that the 'special circumstances' criteria should be expanded to include those experiencing financial hardship, and they all recommended that domestic violence should be considered. This was also a constant and urgent theme emerging during interviews with clients of CLCs.

Domestic violence: 'They just basically give up'

Domestic violence may involve physical, sexual or psychological abuse within an intimate relationship. Females are more likely to be victimised than males and Australian Bureau of Statistics data captured in the *Personal Safety Survey* (2006) suggests that approximately 20 per cent of females have been subjected to violence by a current or former partner (Morgan and Chadwick 2009:2). As victimisation surveys provide the main source of data regarding the prevalence of domestic violence, known statistics are likely to represent the tip of the iceberg. Victims of domestic violence often remain silent for a range of reasons, including shame, fear and 'concern about having to re-live the event by re-telling the story to multiple parties' (Morgan and Chadwick 2009:2).

Our research revealed that domestic violence victims are often forced to face the consequences of car-related fines incurred by their abusive partners. Often the man accrues the fines — for offences such as speeding, not paying tolls, and parking — usually while driving a car registered in his partner's name. The woman is often too afraid to nominate him as the recipient; hence she is burdened with a debt she is unable to pay. Legal representatives suggested that trying to establish 'special circumstances' for victims of domestic violence is difficult as they are not included in the legislative definition in the *Infringements Act*. Those who successfully raise a case of domestic violence in court often do so under a further provision in s 65, which allows for the conduct (relevant to the infringement notice) to be excused where there are 'exceptional circumstances'. While that

phrase itself is not defined within the legislation, it does allow for some flexibility, and would allow a case to be mounted on the grounds of domestic violence under this provision. However, documentation is required to substantiate this claim and recipients face the prospect of appearing in open court in front of an unsympathetic magistrate.

Victims of domestic violence who appear in the SC List under the homelessness criteria often experience difficulty obtaining the evidence required to substantiate a homelessness claim as the addresses of domestic violence refuges are kept secret to protect residents. Consequently, the difficulty of obtaining evidence, coupled with the trauma of potentially having to reveal their circumstances in open court, often results in these victims agreeing to payment plans that they cannot afford. One legal representative (11) said: 'I know of quite a few where they have tried to establish 'special circumstances' and on a lot of occasions they just basically give up because it's too difficult to provide all the necessary documentation.'

Some legal representatives suggested that the court is usually sympathetic to domestic violence issues if evidence can be produced that the fine recipients *are* victims. However, establishing that commonly requires the victim to provide background information and a psychiatric report. To receive assistance the woman must be considered mentally ill, effectively shifting the problem from the abusive partner to the victim. One legal representative (3) said:

> In domestic violence, if there's some sort of other mental illness such as post-traumatic stress syndrome or depression or something then you've got an argument ... Some magistrates are sympathetic if you can show specific evidence about the violence but most women usually don't want to do that sort of stuff for a range of reasons.

It is therefore recommended that domestic violence be included as a 'special circumstances' criterion.

Financial hardship: 'I'm struggling every fortnight, but I'll find the money somehow'

A similar legislative gap relates to income — the system does not take it into account. People suffering from financial hardship are disproportionately impacted by the imposition of paying a fine. The inability to pay often leads to stress and anxiety, sometimes leading to a state of denial of the debt as the person can never hope to expiate it. Indeed, clients described chasing wins through poker machines and accruing credit card debt to make fine payments. While there are provisions in place to allow those in financial hardship to pay the fines via community work, this option is not available in the first instance and is limited to those with fines totalling less than 100 penalty units, which is approximately $14 084 (*Infringements Act* s 147). As noted by one legal representative (17), s 50(1) of the *Sentencing Act 1991* (Vic) requires the judiciary to take a person's finances into account before imposing a fine. He said: 'There's some fluidity within the judiciary that doesn't exist within the administrative structure.'

Robert Hudson (former Member for Bentleigh) also acknowledged this perspective during the first session of the Legislative Assembly discussing the Infringements Bill prior to it becoming the *Infringements Act* (Hudson 2006:498):

> All the evidence indicates that individuals will pay a fine if they can afford to and if it is tailored to their resources and capacity. I believe there is an argument for us to consider going further in the future, because the uniform fine system discriminates against the poor, who have no capacity to pay in many circumstances. We need to contrast these court fines with the Sentencing Act, which basically allows the individual circumstances of the person and any

> mitigating factors to be taken into account by the court in determining the level of the fine. I believe that is something we ought to look at in the future.

Many legal representatives and financial counsellors advised that the vast majority of their clients who are impacted by fines receive a sole income from Centrelink. Over three-quarters of the clients interviewed at the participating CLCs were recipients of Centrelink payments. And while some agencies offer instalment plans, many only offer an extension of time to pay (usually three months). This extension does little to assist those who are experiencing financial hardship, as it is based on the fanciful premise that they would be capable of saving money while living on Centrelink benefits. As two legal representatives mentioned: 'The amounts are seemingly insurmountable so possibly people just don't deal with them because it's just too much to even comprehend being able to ever manage' (18) and:

> [F]or the other people who may simply just suffer financial hardship because they don't have work or may only have casual work or their only income is a Centrelink benefit and they don't come within those ('special circumstances') categories, we cannot assist them with infringements which double by the time the fines get to the Infringements Court stage (21).

As noted by Chapman, Freiberg, Quiggin and Tait: 'A paradox of fine enforcement is that enforcement action may steeply increase the amount requiring payment, which, in turn, may render it more probable that the fine will not be paid' (Chapman et al 2004:22). Arguably, those who receive low incomes are most likely to default; hence, they are likely to be disproportionately impacted by the fees that are added to the original debt due to late payment. Many financial counsellors (60 per cent) believed that the key concern with the infringements system was the inability to means-test fines. Legal representatives recommended that community work or other non-monetary methods, such as those available under the NSW Work and Development Orders (*Fines Further Amendment Act 2008* (NSW)), should be available in the first instance. Those who can prove financial hardship should have their fine reissued to a 'concession' amount that is proportionate to their income. With respect to those suffering extreme long-term financial hardship, this should be included as a 'special circumstances' criterion and eligibility could be established via a financial counsellor's assessment.

Conclusion

The recognition, through the SC List, of the challenges faced by certain categories of disadvantaged people was clearly motivated by good intentions. However, our research highlights gaps and flaws in the infringements system that undermine optimal outcomes for people whose disadvantage should motivate a 'special' and effective response. We have drawn attention to the following key issues: insufficient training of issuing officers and a lack of discretion leading to the disproportionate fining of marginalised groups; the complexity of the system which results in delays and poses a significant impost on the time and resources of CLCs; the nature and amount of evidence required to prove 'special circumstances'; the requirement to appear in court and enter a guilty plea which results in a criminal record; the lack of regional access to the SC List; insufficient follow-up support for those who appear in the SC List; the absence of a system to flag repeat offenders with incurable conditions; and, finally, the narrow definition of 'special circumstances', which does not include victims of domestic violence or those experiencing extreme long-term financial hardship.

In response, we suggest the following. Issuing officers should be required to undertake further training on marginalised groups to assist in ascertaining the appropriateness of cautioning or providing a referral to a support service in lieu of a fine. We also recommend the implementation of a system to allow for the expeditious withdrawal of inappropriately issued fines. This could be achieved by creating a central agency to deal with all 'special circumstances' internal reviews and revocations. This central agency would assist in minimising the inconsistencies and delays that are inherent in the current process, as well as reducing the levels of complexity which necessitate excessive usage of the resources of CLCs. Additionally, we recommend that s 25(3) of the *Infringements Act* be amended to state that all 'special circumstances' internal review applications that are refused must be referred to the SC List. We also recommend the establishment of a flagging system to ensure that those with permanent disabilities are not continually embroiled in the infringements process. This system could be managed by the proposed central agency and would also reduce enforcement expenditure.

The increasing ubiquity of the infringements regime means more infringements registrars are needed to deal with the growing number of fine recipients. Further, registrars who deal with 'special circumstances' matters should be adequately trained to ensure consistency in what evidence is acceptable to prove 'special circumstances'. We suggest that evidence from a wider range of professionals should be accepted to accommodate clients who have never seen a psychiatrist or general practitioner and that Medicare should cover the costs of medical reports. We also suggest that, on request, there should be an option of a closed court hearing. It is also recommended that minor offences that are the subject of infringement notices should not be included on a criminal record check, regardless of how they are resolved. This is especially pertinent for those who appear in the SC List, as they may be unable to control their offending behaviour or unaware that their behaviour constitutes an offence.

Clients who appear in the SC List are likely to have some support networks in place. However, the list at the Melbourne Magistrates' Court does not provide ongoing support. Therefore we recommend that the SC List should be funded to provide clients with the option of accessing support, such as ongoing counselling and accommodation services. In addition, we recommend that video-conferencing links to the Melbourne Magistrates' Court be established in regional courts to facilitate easier access to the SC List for those living in remote areas. The Melbourne Magistrates' Court should also consider establishing satellite lists in these areas to hear 'special circumstances' matters on a monthly basis. People who are experiencing financial hardship should have the option to convert their fines to community work or other non-monetary methods in the first instance and their fines should be reissued to a concession amount that is proportionate to their income. Finally, we recommend that the legal definition of 'special circumstances' should be expanded to include two groups who are often equally as disadvantaged as those who fall under the current definition, namely those experiencing domestic violence and those suffering extreme long-term financial hardship. As one of our legal representatives (20) stated:

> The first step towards reform was making the SC List work more in favour of people with genuine issues and … that's been very positive. But reform doesn't stop there ... the first step ... made things easier at the end of the process, now we have to take the next step and actually make it better before the legal issues reach the point that they currently reach.

Legislation

Court Legislation (Neighbourhood Justice Centre) Act 2006 (Vic)

Fines Further Amendment Act 2008 (NSW)

Infringements Act 2006 (Vic)

Infringements General Regulations 2006 (Vic)

Justice Legislation Amendment (Infringement Offences) Act 2011 (Vic)

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Supported Accommodation Assistance Act 1994 (Vic)

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