



Law Reform Proposal for the Enforcement of Infringement Notices and Fines

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<p>Abbreviations</p> <p>FER = Fines Enforcement Registry</p> <p><i>Fines Act = Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA)</i></p> <p>Registrar = Registrar of the Fines Enforcement Registry</p> <p>WDO = Work and Development Order</p>
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EXECUTIVE SUMMARY

This Paper provides an explanation of the operation of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) and related legislation. The focus of this Paper is to analyse the impact that the current laws are having on persons who are experiencing or are at risk of homelessness. As such, the current laws are scrutinised in the context of the causes and consequences of homelessness.

This Paper finds that law reform is needed in order to ensure that the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) fines that does not punish persons for behaviour that they are exhibiting as a result of their homelessness. The regime for enforcing fines and infringement notices should target the underlying reasons and causes for offending behaviour, especially when that behaviour is the natural consequence of being homeless. The following recommendations are discussed in this Paper:

- 1. The option of applying for a Time To Pay Order in relation to an infringement notice should be made available as soon as the infringement notice is issued:**
- 2. An application for a Time To Pay Order ought to be automatically granted if the offender has a Centrelink Reference Number.**
- 3. A Time To Pay Order granted in respect of a single fine or infringement notice ought to automatically apply to all fines and infringement notices that an offender may have.**
- 4. There should be concession based infringement notices and fines:**
 - (a) The pecuniary penalties for infringement notices and fines ought to be reduced for offenders who have Centrelink Reference Numbers.**
 - (b) If an offender does not have a Centrelink Reference Number because he/she is not an Australian Citizen, then the concession ought to be made available if he/she is labouring under 'special circumstances'.**
- 5. There should be greater availability and flexibility of WDOs:**

- (a) The option to apply for a WDO should be made available for recipients of infringement notices;**
- (b) The option to apply for a WDO should be made available as soon as an infringement notice is issued or a fine is ordered;**
- (c) An application for a WDO under the *Fines Act* ought to be automatically granted if the offender is a recipient of Centrelink benefits or is labouring under 'special circumstances';**
- (d) WDOs ought to be 'broadened out' so that community work directions include activities such as attending alcohol/drug rehabilitation and education and training programs. The New South Wales model of using WDOs ought to be taken into consideration in this respect.**

6. Prosecuting authorities and officers should act with guided discretion when issuing infringement notices.

- (a) The procedure followed by prosecuting offices should not be a zero tolerance policy and should require that the prosecuting officer:
 - (i) To first determine whether 'special circumstances' exist (i.e. determine whether the offender is experiencing homelessness or other disadvantage);**
 - (ii) If 'special circumstances' do exist and if appropriate to do so, the prosecuting officer should issue the offender with a referral to a community centre/program;**
 - (iii) The prosecuting officer should issue the infringement notice; however, the prosecution of the infringement notice should be withdrawn if the offender follows through with the referral to the community centre/program; and****
- (b) Prosecuting officers ought to receive special education and training in identifying people who are experiencing 'special circumstances'.**

7. There should be a right to cancel infringement notices:

- (a) Offenders labouring under 'special circumstances' ought to have an option to apply (e.g. by way of letter/email) for cancellation of an infringement notice;
 - (b) The offender ought to have the right that the infringement notice is cancelled if the Registrar is satisfied that those 'special circumstances';
 - (i) Contributed to the commission of the offence; and
 - (ii) Diminishes the capacity/ability of the offender to be able to pay out the infringement notice.

- 8. The role of Baycorp needs to become more transparent in regard to their enforcement of fines and infringement notices.

- 9. The *Sentencing Act 1995 (WA)* ought to be amended so that the issue of Fine Enforcement (WDO) orders are encouraged at the sentencing process as an alternative to the imposition of a fine:
 - (a) The requirements under Section 57A(5) of the *Sentencing Act* ought to be repealed and replaced with the requirement that an offender has a Centrelink Reference Number or is labouring under 'special circumstances' before a Fine Enforcement (WDO) order can be made;
 - (b) Section 39 of the *Sentencing Act* should be amended so that a WDO is included in the hierarchy of sentencing options and is placed on par with fines under s 39(2)(c).

INTRODUCTION

Street Law Centre WA Inc

The Street Law Centre (WA) (Street Law) Inc became operational in 2010 to close the gap in the provision of legal services to persons who are homeless or are at risk of homelessness in Western Australia. Our vision is to enable access to justice for our client group by operating a free holistic legal service. We also work to address the underlying causes of homelessness through law reform and community legal education. All of our clients are homeless or are at risk of homelessness, with 45% sleeping rough or 'couch surfing'. Our client group also often face debilitating special circumstances including physical disability, mental illness, alcohol or drug dependency and a history of abuse and family and domestic violence.

Street Law's service model operates through the provision of outreach legal clinics at community organisations that provide a variety of services for persons experiencing homelessness. Currently, the community organisations where Street Law conducts its legal clinics are Ruah (Ruah Community Services), St Pats (St Patrick's Community Support Centre), Passages (which is a joint venture between the Rotary Club of Perth and St. Vincent de Paul) and the Tranby Day Centre (UnitingCare West). Street Law also provides free legal advice across a variety of legal areas over its free telephone advice line.

The overwhelming majority of Street Law's clients face problems with regard to fines and infringement notices. Our experience shows that the fines and infringements system can impact our client group negatively and contribute to perpetuating conditions of homelessness. Without reform, the *Fines Act* as it currently stands will continue to create undue hardship for our client group, and contribute to the burden of homelessness on individuals and society.

The aim of this Paper is to explain the operation of the *Fines Act*, highlight the impact that it is having on persons experiencing homelessness and provide recommendations from Street Law's perspective on how the *Fines Act* should be reformed.

Why the Need for Reform?

The financial burden that infringement notices and fines place on our client group contributes to the cycle of poverty and homelessness that they experience. All of our clients suffer from 'special circumstances', which include not only a lack of housing or accommodation, but also related causes and consequences such as mental illness, drug or alcohol dependency, physical disability and domestic family violence. The fact that our clients only receive small incomes (by way of Centrelink benefits) or none at all (as clients from overseas are not eligible for Centrelink benefits) compounds the problems that they face in trying to find affordable accommodation, employment and dealing with repayments of other debt whilst dealing with other welfare issues such as traumas of family and domestic violence and rehabilitation

For instance, it is a common trajectory for a client who has received a fine or infringement notice to be unable to meet requirements - resulting in large amounts of outstanding debt and a suspension of their driver's licence. Indeed, the deprivation of a driver's licence will commonly impede a client's chance of securing employment. This creates a further obstacle for the client in trying to improve their situation, which ultimately perpetuates the cycle of homelessness.

Moreover, because our clients are in no position to pay off their fines or infringement notices when they first receive them, they usually exhaust the entirety of the enforcement process and end up owing a much larger debt. Further, these administrative procedures are very lengthy and costly in that they consume significant public resources at the expense of the taxpayer. The net effect on the community is that the current system is not only costly but also acts as a barrier for people who are trying to find their way out of homelessness.

The infringement notices and fines system does little in addressing the underlying reason why our clients are committing certain offences. Often these underlying reasons will include intergenerational poverty, trauma, mental illness and a history of suffering from family domestic violence. Many offences that are committed by our clients are on the low scale of criminal offending and are usually just the natural consequence of having to live in the public space. For example, street drinking and public urination are behavioural patterns that are easy to engage in when a person has no housing and therefore no space for privacy. Indeed,

it is not unusual for our clients to have received numerous infringement notices and fines, which can total thousands of dollars, for committing the same lower end offence repeatedly. The result is that the current system is disproportionately punitive towards homeless persons for the behaviour that they commit (which is usually associated with their lack of accommodation) and does little in the way of providing an incentive in encouraging people to gain agency to exit homelessness.

The following examples recount the experiences of two of our clients. They are typical of the situations that clients at Street Law present with and highlight the need for reform to the *Fines Act*:

Simon's Story

Simon was a qualified tradesman who started his own business. However, after a few years he began to drink more heavily than usual and this began to create tension in his relationships with other family members. Eventually his alcohol dependency led to Simon becoming unemployed and losing contact with his family. He lost his accommodation, began sleeping rough, and committed offences which resulted in him receiving infringement notices and court fines

Many of the offences committed by Simon were public space offences and as a result of his homelessness. These public space offences included urinating in public and charged with disorderly behaviour. On one occasion Simon explained that at the time he did not know where a toilet was and that he was unaware of his surroundings due to his intoxication. Other offences were as a result of his behaviour due to his alcohol addiction which included stealing, street drinking, breach of move on notices, breach of bail, damage to property, trespass and breaches of Court orders.

In total, Simon had accrued \$24, 000 in fines and infringement notices when he came to Street Law. As such, this outstanding amount had acted as a barrier in preventing Simon to rehabilitate his alcohol dependency and find accommodation. Unfortunately, many of Street Law's clients are in the same predicament as Simon, such as Darlene, who is struggling to break the cycle of homelessness and poverty for herself and her children.

Darlene's Story

Darlene had a troubled childhood and over the span of 20 years she had accumulated a number of fines and infringement notices that added up to \$15 000. Most of these financial penalties had been accrued by Darlene during her youth. However, over the last few years Darlene has made a positive change in taking responsibility for her actions and rehabilitating herself. Darlene has adhered consistently to a payment plan where she contributes \$30 each fortnight to the Fines Enforcement Registry (FER) in order to reduce the outstanding amount. She has never missed a payment and wants to make amends for her past behaviour. Darlene has a number of children to support and only has Centrelink receipts as a source of income. The financial burden is overwhelming for Darlene and is proving to be an obstacle towards her goal of improving her life.

As the *Fines Act* currently stands, Darlene is not eligible to undertake a Work and Development Order (WDO) (as most of her debt is due to infringements), which would allow her to undertake community work in exchange for reductions to the amount of debt that she owes to the FER. If Darlene were to be granted a WDO, she would be able to pay off her debt within a few months. Instead, under her present payment arrangement of contributing \$30 each fortnight, Darlene is being forced to spend the rest of her lifetime paying off her debt. Indeed, it is the regime imposed under the *Fines Act* which is proving to be the greatest obstacle that Darlene is facing in improving the situation of herself and her family.

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To reiterate, this Paper offers recommendations for how Street Law believes that the *Fines Act* could be improved. In particular, given the recent amendments to the *Criminal Code*, Street Law is anticipating a high number of persons who are experiencing homelessness to receive infringement notices for behaving in a disorderly manner and minor theft.¹ This means that the need for change to the infringement notices and fines system has become more pressing and urgent. It is our guiding aim that Street Law's recommendations will improve the *Fines Act* to ensure that the success rate of people who are breaking the cycle of poverty is increased.

¹ *Criminal Code Act Compilation Act 1913* (WA) Part VII Chapter LXXIII; *Criminal Code Amendment (Infringement Notices) Act 2011* (WA) s 4; *Criminal Code (Infringement Notices) Regulations 2015* (WA) reg 4, Schedule 1.

INFRINGEMENT NOTICES AND FINES

Infringement notices and fines are both governed by different procedures which share some common similarities. As a result, clients who have both infringement notices and fines imposed against them can become easily confused. This problem is compounded by the fact that these two different systems lack the centralisation that is needed between the FER and the various prosecuting authorities which issue infringement notices. For example, a client who has received infringement notices from a multiple number of prosecuting authorities (such as the Police, the Public Transport Authority, the City of Perth and the Electoral Commission) will have difficulty in being able to access information relating to all of those infringement notices until they have been registered at the FER. The consequence is that both clients and their lawyers face unnecessary complexity in being able to assess their options and working out payment arrangements for dealing with those infringement notices.

Infringement Notices

The following provides an outline of how the infringement notice system operates when an offender commits an offence that is prescribed under a particular set of regulations.

1. An Infringement Notice is issued and gives the offender 28 days to choose between paying the financial penalty (which is known as the 'modified penalty') or to elect to have the matter heard in court.²
2. After 28 days, Part 3 of the *Fines Act* comes into operation.³
3. A Final Demand is issued and gives the offender a further 28 days to pay the financial penalty or elect to have the matter heard in court.⁴ The enforcement fee for issuing a Final Demand is currently \$14.65 and must be paid along with the modified penalty.⁵
4. The Infringement Notice will be registered at the FER.⁶ An enforcement fee of \$59.05 applies.⁷

² *Criminal Procedure Act 2004* (WA) s 9(1)(f).

³ *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 12, Part 3 Div 2 ('*Fines Act*').

⁴ *Ibid* s 14.

⁵ *Fines, Penalties and Infringement Notices Enforcement Regulations 1994* (WA) reg 9(1), Schedule 2 ('*Fines Regulations*').

⁶ *Fines Act* s 15.

⁷ *Fines Regulations* reg 9(1), Schedule 2.

5. The Registrar may then issue an Order to Pay or Elect, which gives the offender another 28 days to pay the modified penalty (plus enforcement fees) or elect to have the matter heard in court.⁸
6. A Notice of Intention to Enforce is then issued, which must provide at least another 28 days for the offender to comply. An enforcement fee of \$30.90 applies.⁹
7. A Licence Suspension Order or an Enforcement Warrant may then be issued by the Registrar.¹⁰ The enforcement fee for taking either of these actions is currently \$145.50.¹¹

Therefore, it usually takes 112 days after the issue of an Infringement Notice for a Licence Suspension Order or an Enforcement Warrant to be imposed. A Licence Suspension Order will remain in force until the offender: (1) elects to have the matter heard in court, (2) has paid the amounts outstanding, (3) if the Registrar decides to cancel the Licence Suspension Order for good reason or (4) is lifted when the client enters into a Time to Pay plan.¹²

Enforcement Warrants may be issued by the Registrar when the infringement amount outstanding is at least \$2000.¹³ Enforcement Warrants are governed under Part 7 of the *Fines Act* and allow the Sheriff to seize the personal property or land of the offender in order to satisfy the amounts outstanding.¹⁴ Enforcement Warrants will remain in effect until all amounts outstanding have been paid in full, however, they may be cancelled by the Registrar if there is a good reason.¹⁵

A concerning point is that by the time a Licence Suspension Order and/or an Enforcement Warrant is issued, the amount of enforcement fees alone will be \$250.10 for each outstanding infringement notice.

⁸ *Fines Act* s 17.

⁹ *Ibid* s 18; *Fines Regulations* reg 9(1), Schedule 2.

¹⁰ *Ibid* s ss 19, 21A.

¹¹ *Fines Regulations* reg 9(1), Schedule 2. Note that this fee cannot be imposed twice.

¹² *Ibid* ss 20(1)-(2).

¹³ *Ibid* s 21A(1)(d).

¹⁴ *Fines Act* Part 7; see also *Fines Regulations* reg 8.

¹⁵ *Fines Act* ss 21A(5), 65.

(a) Time To Pay Orders for Infringement Notices

The only relief available to a struggling person with an Infringement Notice is section 27A of the *Fines Act*. This section allows an offender to apply for a Time To Pay Order once an Infringement Notice is registered (and before an Enforcement Warrant is issued). A Time To Pay Order will allow the offender to enter into an arrangement where the amount outstanding is paid on a different date or in instalments on particular dates. The drawback is obvious. By the time an infringement notice is registered the offender would have already incurred \$73.70 in enforcement fees.¹⁶

To make an application for a Time To Pay Order, the offender is to request the Registrar to either not make or to cancel a Licence Suspension Order. The grounds that need to be made out are that the Licence Suspension Order:

- deprives the offender of the principal means of obtaining income; or
- deprives the offender of the means to obtain urgent medical treatment for an illness, disease or disability that is suffered by the offender or a member of the offender's family; or
- seriously hinders the offender in performing family or personal responsibilities.

The request must also include a reasonable offer by the offender to pay the amount outstanding and enforcement fees by a specified date or by regular instalments. Note that if the Registrar grants a Time To Pay Order, any Licence Suspension Order that has been issued must be cancelled.¹⁷

Currently, the form used by the FER for making an application for a Time To Pay Order under section 27A of the *Fines Act* is unnecessarily confusing and complicated.¹⁸ The 3 page form requires that the offender provide details about the monetary value of items that the offender may own, such as a TV, DVD player, dishwasher or microwave. The offender must also list weekly expenses made towards food, water and telephone bills. Details of outstanding liabilities must also be disclosed, which may include credit card debt, personal

¹⁶ *Fines Regulations* reg 9(1), Schedule 2.

¹⁷ *Fines Act* s 27A(4)(d).

¹⁸ Fines Enforcement Registry, *Request to Lift or Not Impose a Licence Suspension Order* <http://www.courts.dotag.wa.gov.au/_files/TTP_Request.pdf>. See generally *Fines Act* s 27A(3)(a); *Fines Regulations* reg 3A.

loans and other Time To Pay Orders with the court or with Baycorp (which is a private debt collection agency).

Once all of this information has been filled out, the form then needs to be executed in accordance with the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA). For our clients, such a process is extremely difficult and provides for many opportunities for mistakes to be made. Indeed, many clients are not in a position to be able to answer the questions on the form, especially when they have no access to the relevant documents. This problem is further exacerbated by the fact that most members of our client group have poor literacy skills and become easily overwhelmed, confronted and intimidated by the prospect of having to write and fill out a form.¹⁹

(b) Electing to Have the Matter Heard in Court

The financial penalty in an infringement notice, which is known as the ‘modified penalty’ cannot be more than 20% of the statutory penalty for the offence.²⁰ This means that if an offender elects to have the matter heard in court and is found guilty, then he or she will be potentially subject to the risk of receiving a much higher financial penalty in the form of a fine. For example, under the *Public Transport Authority Regulations 2003*, the modified penalty for travelling on public transport without a valid ticket is \$100. This means that the infringement notice will (initially) require that the offender pay \$100. On the other hand, if the offender elects to go to court and is convicted, the maximum fine that may be awarded is \$500.²¹

Section 9(2) of the *Sentencing Act 1995* (WA) states that the prescribed amount for a fine is taken to be the maximum penalty that may be imposed.²² In the above example, this means that an offender convicted of travelling on public transport without a valid ticket may not actually receive a fine of \$500, but could receive a lower amount (even perhaps an amount that is lower than the modified penalty). This is because the court will determine a sentence

¹⁹ See Western Australia, *Parliamentary Debates*, Legislative Assembly, 1 December 1994, 8385-8386 (David L Smith), where it was argued that poorer groups not only had the least capacity to pay their penalties, but were also least likely to be granted a Time To Pay Order. It was argued that this was because poorer groups are not as empowered as other members of society as they are generally less informed, less sophisticated and less articulate.

²⁰ *Criminal Procedure Act 2004* (WA) s 5(4)(b).

²¹ *Public Transport Authority Regulations 2003*(WA) reg 6(1).

²² *Sentencing Act 1995* (WA) s 9(2).

using the usual sentencing procedures, such as taking into account mitigating factors. Moreover, section 44(1)(a)(i), may, if applicable, result in the court imposing a sentence other than a fine on the offender.²³ This is because if the section is applicable, then the court may utilise the alternative sentencing options available under section 39(2)(a),(b) or (c) of the *Sentencing Act*. Such sentencing options include (a) no sentence (b) conditional release order and (c) a fine.

These sentencing options in regard to the *Sentencing Act* are more fully discussed under Recommendation 9 in this Paper.

Fines

A fine is a pecuniary penalty that is imposed by a court in criminal proceedings. The enforcement of fines is governed by Part 4 of the *Fines Act*.²⁴ The following provides an outline of how fines system operates. Assume that the offender fails to comply with their obligations at each stage.

1. When a court fines an offender the fine is registered at the the FER.²⁵ The offender may either pay the fine or make an application for a Time To Pay Order within 28 days.²⁶
2. A Notice of Intention to Enforce is issued, which gives the offender 28 days to pay the amount outstanding.²⁷ The enforcement fee is currently \$30.90.²⁸
3. Registrar may issue a Licence Suspension Order or an Enforcement Warrant.²⁹ The enforcement fee for taking either of these actions is currently \$145.50.³⁰
4. If an Enforcement Warrant has been issued but the Sheriff has been unable to recover the amount outstanding, the Registrar may then issue a Work and Development Order (WDO), subject to section 48 of the *Fines Act*.³¹

²³ Ibid s 44(1)(a)(i).

²⁴ See generally *Fines Act* s 29, which governs the application of Part 4.

²⁵ Ibid s 32(2)(a).

²⁶ Ibid s 33(2).

²⁷ *Fines Act* ss 42(3), 42(4).

²⁸ Ibid ss 32(2)(b), 42(1); *Fines Regulations* reg 9(2), Schedule 2.

²⁹ Ibid ss 43, 43(5), 45.

³⁰ *Fines Regulations* reg 9(2), Schedule 2.

³¹ *Fines Act* s 47(1).

5. A Warrant of Commitment may be issued if a WDO cannot be made or is made but not complied with by the offender.³²

Therefore, the soonest possible time that a Licence Suspension Order or an Enforcement Warrant can be issued is 56 days after the imposition of the fine by the court. Note that the Registrar can undertake these actions concurrently.³³ By this time, the amount outstanding will be the total of the fine plus the accrued enforcement fees of \$176.40.

If issued, a Warrant of Commitment will imprison the offender for a specified period of days. Each day served in prison will reduce the fine by the amount prescribed in the Regulations, which is currently \$250.³⁴ Once the fine is paid off, the offender will be released. It is interesting to note, that while a day served in prison reduces the amount owed by \$250, the 2014-2015 Budget Target cost for keeping an offender in custody per day is \$345.³⁵

(a) An Explanation of WDOs

If a WDO is issued it will require the offender to report to a community corrections centre within 7 days.³⁶ The offender must carry out community activities for at least 12 hours a week and must do so to a satisfactory standard.³⁷ The WDO will reduce the fine amount by \$300 for every 6 hours worked and will remain in force until the fine is paid off.³⁸

However, despite the above-mentioned procedures, the offender can apply to the Registrar for a WDO under section 47A of the *Fines Act* at any time after a fine has been imposed, so long as the Registrar is satisfied that:

- the offender:
 - does not have the means to pay the amount owed;
 - does not hold a vehicle licence;
 - does not hold a driver's licence or is disqualified from holding a driver's licence;

³² Ibid ss 48(1), 53(1).

³³ Ibid ss 43(1), 45(1).

³⁴ *Fines Regulations* reg 6BAA.

³⁵ Department of Treasury, '2014-2015 Budget Paper No. 2' (Budget Statements Volume 2, 8 May 2014) 749.

³⁶ Ibid s 47B.

³⁷ See especially *Fines Regulations* reg 6A(2); *Fines Act* s 51.

³⁸ *Fines Regulations* regs 6B; *Fines Act* s 51.

- does not have any personal property that could be seized under an Enforcement Warrant to satisfy the fine in whole or in part; and
- will be unlikely to have the means to pay or personal property that could be seized within a reasonable amount of time after registration; and that:
- the issue of a Licence Suspension Order has not resulted, or would be unlikely to result, in the fine being paid within a reasonable amount of time after the fine was imposed.³⁹

If a WDO is issued under section 47A of the *Fines Act*, then any Licence Suspension Order or Enforcement Warrant must be cancelled in respect of the fine.⁴⁰

(b) Time To Pay Orders for Fines

Applying for a Time To Pay Order in respect of fine follows the same process when applying for one in respect of an infringement notice. The same form must therefore be used (with all of its inherent difficulties, as explained previously).⁴¹

Three Main Points of Difference

Although the systems governing infringement notices and fines share common similarities, there are 3 main differences which cause difficulty for our client group. This is because infringement notices and fines both have the same consequence and effect for our clients, as they both act as a financial and pecuniary penalty.

(a) Time To Pay Orders

Under the infringements system, a Time To Pay Order may only be requested once the infringement notice has been registered. This means that when an offender is issued with an infringement notice, they must wait for the initial 28 day time period to expire. Once this time has elapsed, the offender is issued a Final Demand and then must wait another 28 days before the infringement notice is registered at the FER. By this time, the enforcement fees will amount to \$73.70. For our clients, access to a Time To Pay Order is essential and the fact

³⁹ Ibid s 47A(1).

⁴⁰ Ibid s 47A(3).

⁴¹ Fines Enforcement Registry, *Request to Lift or Not Impose a Licence Suspension Order* <http://www.courts.dotag.wa.gov.au/_files/TTP_Request.pdf>. See generally *Fines Act* s 55A(3)(a); *Fines Regulations* reg 6BA.

that they need to wait 56 days and incur large enforcement fees before they can make an application adds to their already difficult situation. Under the fines system, an offender may apply for a Time To Pay Order immediately as the fine is taken to be registered as soon as it is imposed.

It should be noted that there is no enforcement fee for the registration of a fine (recall that the enforcement fee for the registration of an infringement is \$59.05).⁴² Reform is needed to ensure that Time To Pay Orders are made available to recipients of infringement notices in the first instance.

(b) Work and Development Orders

WDO's are only available for offenders who have received fines, but not for offenders who have received infringement notices. This means that an offender who has no means to pay off an infringement notice is likely to be subject to a Licence Suspension Order for an indefinite period of time. For our client group, the loss of a driver's licence may potentially shut the door to maintaining or gaining any sort of employment. This problem is compounded by the fact that the *Fines Act* does not provide any mechanism to obtain an extraordinary driver's licence. This creates unnecessary difficulty for the offender and further compounds their financial and lifestyle problems.

The solution would be to provide the option for the recipient of an infringement notice to undertake a WDO, which will allow the offender to do community work, pay off the infringement notice and avoid receiving a Licence Suspension Order.

(c) Registration

As infringement notices may be issued by a multitude of different prosecuting authorities,⁴³ it may become difficult for an offender to keep track of all of their infringement notices. On the other hand, fines are registered with the FER immediately. A system should be put in place that centralises all of an offender's fines and infringement notices in one easily accessible location.

⁴² See *Fines Regulations* Schedule 2 Division 2.

⁴³ See *Fines Regulations* Schedule 1 for a list of all statutes that currently utilize the infringement notices scheme under the *Fines Act*.

RECOMMENDATIONS

- 1. The option of applying for a Time To Pay Order in relation to an infringement notice should be made available as soon as the infringement notice is issued.**

People who are experiencing or who are at risk of homelessness often do not have enough disposable income to pay their infringement notices immediately and usually suffer from other pressing concerns, such as coping with substance dependency, family violence, and mental illness.⁴⁴ Moreover, as homeless people do not have a fixed address, they are often unaware that a Final Demand or Order to Pay or Elect has been issued.

Therefore, by allowing Time To Pay Orders to become available as soon as an infringement notice is issued, the offender can immediately focus on developing a payment plan while it is on the forefront of their mind. This will encourage homeless persons who have received infringement notices to work towards paying off their financial penalties and avoid the infringement notices from escalating into Licence Suspension Orders or Enforcement Warrants. Note that in turn, this will also reduce the administrative burden of the FER.

Furthermore, this recommendation overcomes the lack of centralisation that the infringement notices system currently has. By having infringement notices registered with the FER immediately, an offender can access all of the relevant details and information in regards to all of his or her infringement notices and fines. This allows the offender (and their lawyer and financial counsellor) to work out possible options and strategies for organising their financial affairs so that the infringement notices and fines payments can be met.

- 2. An application for a Time To Pay Order ought to be automatically granted if the offender has a Centrelink Reference Number.**

This recommendation will eliminate the difficulty, confusion and complexities that are currently involved in making applications for Time To Pay Orders. By simplifying the process, administrative burdens will be reduced and homeless persons will not be discouraged from

⁴⁴ See Street Law, 'The Downward Spiral: How A Fine Can Cause Homelessness in the ACT' (Paper, November 2011) 18.

making applications. If an offender has a Centrelink Reference Number, then this ought to be sufficient evidence to grant a Time To Pay Order.⁴⁵

3. A Time To Pay Order granted in respect of a single fine or infringement notice ought to automatically apply to all fines and infringement notices that an offender may have.

The reason for this recommendation can be best illustrated by the predicament experienced by one of our clients – Jack.

Jack was under a Licence Suspension Order in relation to a court fine that he received. However, he applied for and was granted a Time To Pay Order. This resulted in a cancellation of his Licence Suspension Order. Jack then began to pay off the fine. Later, he received another court fine in relation to a different matter. Jack continued to meet the payments under his Time To Pay Order, believing that the arrangement applied to both of his outstanding fines. However, Jack was unaware that the Time To Pay Order only applied to his first fine. This meant that the usual time frames and procedures under the *Fines Act* applied to his second fine. This ultimately resulted in Jack receiving a Licence Suspension Order in relation to his second fine.

Jack's problem could have easily been avoided if his initial Time To Pay Order automatically applied to the subsequent fine that he received. The fact that the *Fines Act* requires an offender to make an application for a Time To Pay Order for every subsequent infringement notice and fine is an exercise that only increases the difficulty experienced by our client group.

4. There should be concession based infringement notices and fines:

- (a) The pecuniary penalties for infringement and fines notices ought to be reduced for offenders who have Centrelink Reference Numbers.**
- (b) If an offender does not have a Centrelink Reference Number because they are not an Australian Citizen, then the concession ought to be made available if they are labouring under 'special circumstances'.**

⁴⁵ See especially Aboriginal Legal Service of Western Australia, 'Submission to WA Labor Discussion Paper: Locking in Poverty: How Western Australia Drives the Poor, Women and Aboriginal People to Prison' (Submission, 9 March 2015) 8.

The pecuniary penalty for infringement notices is at the same uniform flat rate for all offenders. This means that those who are on lower incomes are penalised with a greater burden by having to pay a greater proportion of their income than offenders who have higher incomes. The consequence is that financially disadvantaged people such as those who are homeless are placed in greater difficulty than what they would otherwise experience.⁴⁶

By introducing concession based infringement notices and fines, the pecuniary penalty imposed will be adjusted to the offender's capacity to pay. Not only is a concession system more equitable, but it increases the prospect of offenders paying their fines and reduces the chances of there being a lengthy and costly administrative process.

Kevin is a typical example of a client who would benefit from Recommendation 4. Kevin is in his early twenties and is sleeping rough. As Kevin is not an Australian citizen, he is not eligible to receive any type of Centrelink benefits. When Kevin came to Street Law, his outstanding fines and infringement notices had accumulated to \$27 000. Most of his conduct had involved disorderly behaviour in public spaces, failure to obey directions by police officers, minor property damage offences and theft.

Having restricted access to financial support has had a severe negative impact on Kevin's life and has pre-empted him from being able to pay off the amount of debt that he has outstanding. If a concession based infringement notices system was in place and Kevin was recognised as labouring under 'special circumstances', the financial burden that has been placed on him would become less oppressive and more tolerable.

In regard to what should constitute 'special circumstances', please refer to the discussion under Recommendation 6.

5. There should be greater availability and flexibility of WDOs:

- (a) The option to apply for a WDO should be made available for recipients of infringement notices;**
- (b) The option to apply for a WDO should be made available as soon as an infringement notice is issued or a fine is ordered;**

⁴⁶ See Clive Hamilton, 'Making Fines Fairer' (The Australia Institute, December 2004).

- (c) An application for a WDO under the *Fines Act* ought to be automatically granted if the offender is a recipient of Centrelink benefits or is labouring under 'special circumstances';**
- (d) WDOs ought to be 'broadened out' so that community work directions include activities such as attending alcohol/drug rehabilitation and education and training programs. The New South Wales model of using WDOs ought to be taken into consideration in this respect.**

Although the *Fines Act* (WA) intends that punishment be in the form of a pecuniary penalty and not imprisonment or community work, the reality is that a holistic approach is required in order to improve the lives of persons who are experiencing or are at risk of homelessness. Given our greater understanding of the causes and consequences of homelessness, this recommendation ought to be adopted as it recognises the value that a WDO may have in helping to improve the lives of the disadvantaged and homeless.

This recommendation encourages the use of WDOs as providing an option to offenders to pay off their fines and infringements without creating a financial burden. It also gives offenders the incentive to engage in rehabilitation programs and improve their lives so that the underlying causes of their behaviour can be addressed and remedied. This results in the focus being on the prevention of future offences from being committed.

Furthermore, the consequences for breaching a WDO should not be imprisonment (i.e. the issue of a Warrant of Commitment). Due to the high level of uncertainty that a homeless person faces (e.g. finding out where they will sleep for the night), it is very difficult for a homeless person to find a routine and to stick to it regularly, especially a routine that requires 12 hours of involvement each week.

Instead of being imprisoned for failing to complete a WDO, the amount of time that was spent by the offender serving the WDO should be credited towards the outstanding amount, with the offender being given the opportunity to pay off the remaining amount or re-apply for another WDO.

The New South Wales regime of allowing WDOs as a method of paying off fines ought to be strongly considered. It is a regime that targets the underlying reasons that cause persons

experiencing homeless to engage in offending behaviour. By addressing those causes, the NSW model utilizes WDOs as a method of providing an exit pathway out of homelessness. Under section 99A of the *Fines Act 1996* (NSW),⁴⁷ a WDO means an order that requires a person to undertake unpaid work for an approved organisation, undergo medical or mental health treatment in accordance with a practitioner's treatment plan, undertake educational, vocational or life skills courses, undergo financial or other counselling, undergo alcohol/drug treatment or, if the person is under 25, undertake a mentoring program.

As the section 47A of the *Fines Act* (WA) prerequisites for being granted a WDO focus on the offender's ownership of property and driver/vehicle licence. This must be contrasted with the NSW regime, where the prerequisite for the offender to be granted a WDO are that the offender has a mental illness, intellectual/cognitive impairment, is homeless, is experiencing acute economic hardship or has a serious addiction to drugs or alcohol.⁴⁸ Therefore, NSW regime better accommodates the reality of the situations that disadvantaged and homeless people face in their lives.

If the State Debt Recovery Office (which is the NSW equivalent of the FER) grants a WDO, then they will determine the value of the activities in regards to paying off the fine amount.⁴⁹ For example, compliance with a drug/alcohol treatment plan for a full month will discharge \$1000 of the fine amount.⁵⁰

A breach or revocation of a WDO in NSW does not lead to imprisonment of the offender. Again, as homeless people may find it very difficult to get into a routine they are at high risk of breaching a WDO. Therefore, it is essential that the consequence of imprisonment is removed if a WDO is breached by a person experiencing homelessness.

Gerry is a client who owed \$4 000 in fines and infringement notices when he first came to Street Law. Although Gerry had a trade qualification, he developed a drug dependency, soon

⁴⁷ *Fines Act 1996* (NSW) Part 4 Division 8 Subdivision 1 governs Work and Development Orders.

⁴⁸ *Ibid* s 99B(1). Note that the other prerequisites are that there is no community service order in force and that the application is supported by an approved person (e.g. a health practitioner) with a proposal of activities that are to be carried out under the WDO (e.g. drug treatment) with a proposed time frame.

⁴⁹ *Ibid* s 99B(6)(a).

⁵⁰ State Debt Recovery Office, *Work and Development Order* (March 2012) <http://www.sdro.nsw.gov.au/lib/docs/forms/sfs_wdo_009.pdf>. Participating in an educational, vocational or life skills course will discharge \$50 per hour, participation in a medical or mental health treatment in accordance with a practitioner's treatment plan will discharge \$1000 a month and participation in financial or other counselling will discharge \$50 per hour.

became homeless and began sleeping rough. Gerry has been trying to find work and is living off a Newstart allowance; but, a Licence Suspension Order had been imposed against Gerry. This has created an insurmountable obstacle for Gerry as employment in his trade requires that he have a driver's licence.

Gerry has been trying to find a placement at a drug rehabilitation centre. But the burden of his outstanding fines and infringement notices is proving to create a lot of difficulty for Gerry. If Recommendation 5 is adopted, it would allow Gerry and other clients who are in similar positions to be able to apply for a WDO and address their problems. For Gerry, a WDO allowing him to visit a drug rehabilitation centre would help encourage and quicken the process of not only paying off his outstanding debt (and regaining his licence), but also simultaneously helping him rehabilitate and find a pathway out of homelessness.

6. Prosecuting authorities and officers should act with guided discretion when issuing infringement notices.

(a) The procedure followed by prosecuting offices should not be a zero tolerance policy and should require that the prosecuting officer:

- (i) To first determine whether 'special circumstances' exist (i.e. determine whether the offender is experiencing homelessness or other disadvantage);**
- (ii) If 'special circumstances' do exist and if appropriate to do so, the prosecuting officer should issue the offender with a referral to a community centre/program**
- (iii) The prosecuting officer should issue the infringement notice; however, the prosecution of the infringement notice should be withdrawn if the offender follows through with the referral to the community centre/program.**

(b) Prosecuting officers ought to receive special education and training in identifying people who are experiencing 'special circumstances'.

People who are experiencing homelessness are suffering under 'special circumstances'. Such circumstances include a lack of housing or accommodation and other related and coincidental circumstances such as mental illness, drug or alcohol addiction, physical

disability or a history of suffering from domestic family violence and trauma. Indeed, Street Law recommends that a broad definition of 'special circumstances' be adopted, such as the definition used in the *Infringements Act 2006* (Vic). In that statute, 'special circumstances' are defined as:

- (a) A situation of homelessness (e.g. sleeping rough, couch surfing or living in transitional housing or crisis accommodation) that results in the person being unable to control the conduct that constituted the offence; or
- (b) A mental/intellectual abnormality or a serious addiction to drugs or alcohol which resulted in the person being unable to understand that the conduct in question constituted an offence or being unable to control that conduct.

By simply issuing infringement notices with a zero tolerance approach the prosecuting authority is only punishing the offender for their behaviour and is not addressing the underlying causes or reasons for their behaviour. Indeed, issuing a homeless person an infringement notice does not 'prevent or deter further offending, instead it imposes an unmanageable financial penalty that exacerbates their existing hardship'.⁵¹ This is especially so in the extreme case where multiple infringements are issued against a person for doing the exact same thing within a short period of time. By adopting this recommendation of using referral pathway education, the offender is at least given a chance to rehabilitate and to adjust their behaviour accordingly without being financially penalised.

In regard to prosecuting officers receiving special education and training, Street Law notes the positive role that the WA Police have taken in regard to 'community policing'. Street Law commends and encourages this practice.

7. There should be a right to cancel infringement notices:

- (a) Offenders labouring under 'special circumstances' ought to have an option to apply (e.g. by way of letter/email) for cancellation of an infringement notice;**
- (b) The offender ought to have the right that the infringement notice is cancelled if the Registrar is satisfied that those 'special circumstances';**
 - (i) Contributed to the commission of the offence; and**

⁵¹ PILCH Homeless Persons' Legal Clinic, 'Fines, Infringements and Homelessness: Submission to the Sentencing Advisory Council Fines and Infringements Project' (Submission, October 2013) 10.

(ii) **Diminishes the capacity/ability of the offender to be able to pay out the infringement notice.**

This recommendation acts as a safeguard that will prevent the infringement notices and fines system from adding to the financial and social disadvantage that homeless people experience. Homeless people live their lives in public spaces, which mean that basic human activities such as going to the toilet or even changing clothes are criminal offences, simply because they are done in the public area. Furthermore, homeless people are more likely to be caught engaging in these activities because they live their lives out in the open, often in plain sight of prosecuting officers.

Therefore, this recommendation prevents the criminalisation of homelessness by granting people who are labouring under ‘special circumstances’ the right to have their infringement notice cancelled.

8. The role of Baycorp needs to become more transparent in regard to their enforcement of fines and infringement notices.

Street Law has noted that many of our clients are having their infringement notices and fines being enforced by Baycorp instead of the FER. Baycorp is a private organisation that specialises in debt collecting. Baycorp’s guidelines in regard to enforcing amounts outstanding in regard to fines and infringement notices are currently not available in the public domain. This has made it difficult for clients trying to determine what their options are in regard to paying off financial amounts that are outstanding.

For instance, Baycorp had informed one of our clients that the only payment plan available was \$300 per fortnight, subject to a hardship arrangement. In order to apply for hardship, the client needed to disclose income statements, rent receipts, bank statements dating back 3 months, court papers and medical reports. Baycorp scrutinized payments made by the client and decided to reduce the payment arrangement to \$95 per fortnight.

The relationship and procedures being used between the FER and Baycorp are difficult to verify. This issue becomes apparent in regards to clients who owe amounts to both FER and Baycorp. For instance, a client – Craig - owed debts which he had accrued under a number of fines to the FER. Craig wanted to apply for a Time To Pay Order in regard to the entirety of

the amount outstanding with the FER. However, the FER had referred approximately \$2,000 of the debt to Baycorp. When Craig requested that the FER retrieve the debt amounts from Baycorp, he was told that it would not be possible. The result was that Craig had to apply separately to both the FER and Baycorp in order to receive Time To Pay Orders. He then had to apply for his Time To Pay Order with the FER to be suspended, so that he could first finish paying off his debts with Baycorp.

Another issue arises from the fact that the amounts that Craig owed were due to court imposed fines. If fines and infringements are consolidated under the sole authority of FER, then it would be more convenient for both debtors and lawyers to negotiate a suitable Time to Pay plan. The introduction of Baycorp into this process thus complicates matters. Consequently, clear guidelines should exist on the options available to both clients and debtors with regards to their options.

9. The *Sentencing Act 1995* (WA) ought to be amended so that the issue of Fine Enforcement (WDO) orders are encouraged at the sentencing process as an alternative to the imposition of a fine:

- (a) The requirements under Section 57A(5) of the *Sentencing Act* ought to be repealed and replaced with the requirement that an offender has a Centrelink Reference Number or is labouring under 'special circumstances' before a Fine Enforcement (WDO) order can be made;**
- (b) Section 39 of the *Sentencing Act* should be amended so that a WDO is included in the hierarchy of sentencing options and is placed on par with fines under s 39(2)(c).**

When tailoring a sentence that is to be imposed on an offender, there are a number of objectives that may be pursued by the judicial officer. Such objectives include deterrence, so that other members, as well as the offender, will take notice of the punishment being handed down and consequently avoid committing the crime in question. Other objectives include rehabilitation, which has the aim of engaging the offender in treatment and therapy programs so that the underlying reasons (such as alcoholism or drug addiction) that are dictating the offender's criminal conduct are removed, preventing re-offending in the future. Another objective is retribution, where the aim is that the offender is punished for having

committed the crime. Clearly, some objectives, such as rehabilitation, may be contradicted by the retributive objective.⁵²

The *Sentencing Act* consolidates the law in this area and incorporates the common law principles of aggravation, mitigation and proportionality.⁵³ Indeed, section 39 of the *Sentencing Act* provides a hierarchy of options that judicial officers may choose from when deciding on a sentence to impose. The court must start at the top of the hierarchy of options and if the first option available is not appropriate, the court must keep working its way down the hierarchy until one of the options is appropriate.⁵⁴

The section 39(2) hierarchy is as follows; the court may impose:

- (a) no sentence and release the offender;
- (b) conditional release order;
- (c) fine;
- (d) community based order;
- (e) intensive supervision order;
- (f) suspended imprisonment;
- (g) conditional suspended imprisonment; or
- (h) a term of imprisonment.⁵⁵

Under section 53(1), if a court decides to fine an offender, then when determining the amount of the fine, the court must take into account the means of the offender and the burden that the fine will have on the offender.⁵⁶ However, under section 53(2), the court can still fine an offender even if the court has not been able to find out about those matters.⁵⁷

In order to give judicial officers greater scope in dealing with offenders who are experiencing or who are at risk of homelessness, the option of ordering a WDO should be included in the hierarchy of options in s39(2) as an alternative to paying off a fine. For example, if a court

⁵² See John Tomaino, 'Punishment Theory' in Rick Sarre and John Tomaino (eds), *Exploring Criminal Justice: Contemporary Australian Themes* (South Australian Institute of Justice Studies, Adelaide, 1999) Ch 6 for a comprehensive discussion on sentencing objectives.

⁵³ *Sentencing Act 1995* (WA) Part 2 Div 1 ('*Sentencing Act*').

⁵⁴ *Ibid* s 39(2)-(3).

⁵⁵ This is only a general illustration of *Sentencing Act* s 39(2).

⁵⁶ *Sentencing Act* s 53(1); Note that s 15 allows the court to inform itself in any way it thinks fit.

⁵⁷ *Ibid* s 53(2).

decided that it ought to fine an offender a certain amount of dollars, it should be able, if appropriate, to order that the offender pay off that amount by undertaking a WDO. If the offender is ordered to undertake a WDO but breaches it, there should not be automatic imprisonment. Instead, the WDO ought to be revoked and the fine (or remaining amount of the fine value) should be replaced in the WDO's stead. Such a system would give an offender, especially one who is suffering homelessness or other disadvantage, an opportunity to seek rehabilitation, instead of being made subject to retribution. This is because WDOs are more effective at addressing the underlying reasons, such as mental illness or alcohol dependency, for why persons who are experiencing homelessness engage in offending behaviour.

Section 57A of the *Sentencing Act* does, however, provide a court with the option of ordering an offender who has been fined to carry out a Fines Enforcement (WDO) order.⁵⁸ This option may only be exercised by the courts during the sentencing process.⁵⁹ Section 57A(5) lists the very lengthy requirements that need to be met before a Fines Enforcement (WDO) order can be issued; they are:

- (a) that the offender is personally present in court; and
- (b) the court is satisfied by evidence on oath from the offender that the offender:
 - (i) does not have the means to pay the fine, either within 28 days or pursuant to a Time To Pay Order; and
 - (ii) is not the holder of a vehicle licence; and
 - (iii) does not have any personal property that could be seized under an Enforcement Warrant to wholly/partly pay the fine; and
 - (iv) will be unlikely to have the means to pay, or personal property that could be seized, within a reasonable time after the fine is imposed; and
 - (v) is mentally and physically capable of performing the requirements of a WDO; and
 - (vi) is not the holder of a driver's licence or is the holder of a driver's licence but is disqualified from holding/obtaining such a licence; and

⁵⁸ Note that a fines enforcement (WDO) under the *Sentencing Act* operates in the same way as a WDO under the *Fines Act*: *Ibid* s 57A(8).

⁵⁹ *Ibid* s 57A(7).

(c) the court is satisfied that the issue of a Licence Suspension Order under the *Fines Act* is unlikely to result in the fine being paid within a reasonable amount of time.

Fine Enforcement (WDO) orders have been described by the Aboriginal Legal Service of Western Australia as being 'rarely used in practice'.⁶⁰ Indeed, the obligation that the offender has to give evidence on oath is mandatory,⁶¹ which makes satisfying the requirements highly demanding, especially for an offender who does not have legal representation. In order to simplify s57A(5) and to make the use of Fine Enforcement (WDO) orders more widespread, the above requirements ought to be amended so that proof of Centrelink benefits is sufficient in order for a Fine Enforcement (WDO) order to be granted.

Street Law thus joins with the Aboriginal Legal Service of Western Australia and supports the implementation of Recommendation 9.

⁶⁰ Aboriginal Legal Service of Western Australia, above n 46, 7.

⁶¹ *Lopes v Carter* [2006] WASC 197 [14].

CONCLUSION

It is Street Law's view that by adopting the above recommendations, the process and procedures of administering and enforcing fines and infringements will be less likely to contribute to the perpetuation of homelessness. Whilst the above recommendations are designed to encourage an exit pathway out of homelessness, their implementation will also result in a simplified and streamlined system of fines and infringement notices enforcement – easing the administrative burden for the FER and courts. In turn, Street Law believes that this will result in a more efficient system which will prove to be less costly to the taxpayer than the current regime.

It is Street Law's mission to address the unique needs of persons experiencing or at risk of homelessness. Indeed, homelessness is a very complicated problem that raises a varied range of multi-factorial causes and consequences. Alcohol and drug dependency, mental illness, physical disability and issues surrounding family and domestic violence and abuse are issues we observe daily in the lives of our clients.

We thus believe that a holistic approach presents the best course of action in encouraging crime prevention and reducing the rates of homelessness for our client group. As such, Street Law is firmly of the opinion that reform to the fines and infringement notices law is a part of this approach. By implementing the above recommendations, the *Fines Act* will no longer act as a tool of oppression against persons who are homeless and instead will make it easier for people to find an exit out of the cycle of poverty.

Street Law acknowledges and commends the hard work of other individuals, community groups and professional bodies working with our client group and would like to extend its thanks to those who have given us the opportunity to prepare this Paper.