



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair),
Mr Andrew Braddock MLA

Submission Cover Sheet

Inquiry into Penalties for Minor Offences and Vulnerable People

Submission Number: 006

Date Authorised for Publication: 19 April 2023



Standing Committee on Justice and Community Safety
ACT Legislative Assembly
Via email only: LACommitteeJCS@parliament.act.gov.au

14 April 2023

Dear Committee Secretary,

ACT Human Rights Commission submission to Standing Committee on Justice and Community Safety Inquiry into Penalties for Minor Offences and Vulnerable People

The ACT Human Rights Commission welcomes the opportunity to provide a submission to the Committee's examination of the impacts of fines and penalties on individuals and groups in the ACT who are experiencing vulnerability.

As statutory office-holders responsible for promoting the human rights and welfare of people living in the ACT, we are interested to ensure the equitable administration and enforcement of penalties under the various criminal infringement notice schemes that operate in the ACT. Our submission cautions against expanding infringement notice schemes to offences involving fault elements, and highlights a need for greater collection of disaggregated data about impacts on groups experiencing vulnerability and their access to hardship supports.

We are comfortable with our submission being published in full on the Committee's website and attributed to the ACT Human Rights Commission.

Yours sincerely

Dr Helen Watchirs OAM
President and Human Rights Commissioner

Karen Toohey
Discrimination, Health Services, and
Disability and Community Services
Commissioner

About the ACT Human Rights Commission

1. The ACT Human Rights Commission is an independent agency established by the Human Rights Commission Act 2005 (HRC Act). Its main object is to promote the human rights and welfare of people in the ACT. The HRC Act became effective on 1 November 2006 and the Commission commenced operation on that date. Since 1 April 2016, a restructured Commission has included:
 - i. the President and Human Rights Commissioner;
 - ii. the Discrimination, Health Services, Disability and Community Services Commissioner;
 - iii. the Public Advocate and Children and Young People Commissioner; and
 - iv. the Victims of Crime Commissioner.
2. As independent statutory officeholders whose respective functions promote the human rights and welfare of all people in the ACT, including those experiencing vulnerability, the Commission maintains an interest in how infringement notice schemes affect marginalised groups.
3. We recognise the important role played by the ACT's various infringement notice schemes in efficiently addressing minor criminal behaviours.¹ Issuing administrative penalties (ie fines) via infringement notices can reduce the build-up of minor criminal charges in ACT courts and provides a diversionary alternative to prosecution to deter those charged with minor offences from further offending.
4. Allowing authorised officers to issue on-the-spot fines, however, risks arbitrary, unequal or inconsistent enforcement of minor offences against groups experiencing vulnerability who are overrepresented in contact with the ACT's criminal legal system. This includes individuals who regularly access the Commission's complaints and advocacy services and those whose minor offending reflects un-serviced needs or systemic gaps that have not been suitably addressed.
5. It is therefore critical that the design, operation and enforcement of the ACT's various infringement notice schemes properly consider and ultimately accord with the human rights recognised in the *Human Rights Act 2004* ('HR Act').

Criminal Infringement Notices

Relevant human rights

6. Issuing and enforcing administrative penalties (eg fines) for minor offences and other regulatory infringements engages several rights protected in the HR Act. In particular, the issuing of infringement notices affects several components of the right to fair trial (HR Act, s 21) and rights in criminal proceedings (HR Act, s 22), including the presumption of innocence, access to legal representation, and equality of arms, by allowing authorised officers, such as individual police officers, to determine guilt and issue on-the-spot fines.
7. As recognised above, infringement notice schemes pursue a legitimate aim for the purposes of human rights law to the extent they support the right of equal access to the courts without

¹ Offences for which a Criminal Infringement Notice may be issued in the ACT are outlined on the Australian Federal Police's website at: <https://www.police.act.gov.au/crime/criminal-infringement-notices>

excessive delay. Though a recipient's ability to opt to have their offence considered by a court is generally taken to guarantee their right to a fair trial, this option is not so readily exercised by those oblivious to it, those who distrust or fear the criminal legal system, or those dissuaded by the associated cost and stress of criminal proceedings, including the prospect of a higher penalty, costs or a recorded conviction. According to the Australian Law Reform Commission, challenges to criminal infringement notices (CINs) are reportedly rare, especially among 'vulnerable' groups.²

8. Coupled with these impacts, the use of infringement notices can also represent a limitation of the right to equality and non-discrimination (HR Act, s 8). For example, it is well-established that marginalised groups, which may include Aboriginal and Torres Strait Islander and younger people, those on low-incomes or experiencing homelessness, mental illness, substance addiction or detention – many of whom interact with frontline services, including police, more often – are likelier to be issued a CIN.³ To the extent that infringement notices may be disproportionately enforced against such groups, this may indicate indirect discrimination; that is, an unreasonable rule or policy that unfairly disadvantages a particular class of people based on one or more personal attributes they share.
9. The Commission commends the ACT Government's longstanding policy that a fine stipulated in an infringement notice should not exceed 20% of the maximum penalty units prescribed in the offence. This means, for example, that the administrative penalty for defacing premises without consent, currently set at \$200, could not be increased above \$320 despite the maximum penalty that could be imposed by a court under s 120 of the *Crimes Act 1900* being 10 penalty units (currently \$1,600).⁴ While indeed a more modest amount, for some (including those experiencing vulnerability or income stress) these fixed amounts may have a disproportionately more punitive effect than intended due to personal hardship and other circumstances.
10. Because infringement notices apply penalties fixed in regulation, they do not afford an authorised officer any discretion, unlike that exercised by a Court, to consider the objective seriousness of each offence and any mitigating circumstances relevant to a CIN recipient. In this regard, we consider it a flawed assumption that, irrespective of individual circumstances or capacity to pay, every recipient of a CIN will be capable of paying a fine, disputing their liability or duly applying for the CIN to be withdrawn or serviced in instalments. For some, the imposition of such fines will instead compound significant hardship and lead to flow-on consequences (eg debt, licence suspension etc) that further limit their rights to family and children (s 11, HR Act), freedom of movement (HR Act, s 13) and to work (HR Act, s 27B).
11. Limitations of human rights, such as those outlined above, must be subject only to reasonable limits set by laws that can be demonstrably justified in accordance with s 28 of the HR Act. In general, this means that any measure that limits a human right must be: i) set by laws that are

² Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017), [12.48].

³ *Ibid*, [12.50]; NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices* (Interim Report, October 2006), [3.32]; Dr Bernadette Saunders et al. *An Examination of the Impact of Unpaid Infringement Notices on Disadvantaged Groups and the Criminal Justice System – Towards a Best Practice Model* (Report, Monash University, February 2013), 17.

⁴ See *Magistrates Court (Crimes Infringement Notices) Regulation 2008*, s 9, Sch 1.

suitably, precise, foreseeable and accessible; ii) aimed at achieving a legitimate objective; iii) a rational method of pursuing its objective; and iv) proportionate to doing so.

12. In this regard, we note that reducing resourcing and administrative impacts cannot in themselves provide a sufficiently legitimate objective to justify limitations of human rights. Whether a measure is proportionate will involve, among other things, consideration of whether there are any less restrictive ways to achieve the stated aim and whether the measure incorporates adequate and effective safeguards against abuse (including oversight and scope for review).

Extending infringement notice schemes

13. The Justice and Community Safety Directorate's Guide to Framing Offences (Version 2) ('the Guide') sets out several vital parameters to ensure that new offences introduced in the ACT are compatible with the rights protected in the HR Act and established principles of Australian criminal law. Despite the Guide's age, having been last published in 2010, we consider that it remains a valuable resource for the design and construction of new offences in accordance with the HR Act. As a general position, the Guide clarifies that CINs should only be available in respect of 'strict liability offences'; where the conduct that constitutes the offending and its associated harms is self-evident. In particular, the Guide affirms that:

"the only offences suitable for infringement notices are strict or absolute liability offences that have straightforward 'yes or no' criteria. Any offence that has complex legal distinctions is not suitable for an infringement notice."

14. The Commission would therefore likely oppose any proposed extension of the ACT's infringement notice schemes to capture offences involving fault elements, irrespective of whether they are considered minor in nature. Offences that require findings as to a person's state of mind, including dishonesty and recklessness, do not, in our view, lend themselves to discretionary enforcement by individual police or other authorised officers by way of an infringement notice.
15. Notwithstanding the lesser penalty available under an infringement notice, extending the coverage of infringement notice schemes beyond strict and absolute liability offences introduces greater ability for authorised officers to reach potentially arbitrary, discriminatory or inconsistent findings as to a person's state of mind.⁵ As an administrative alternative to judicial oversight of a criminal charge, an authorised officer's exercise of discretion to issue an infringement notice is inherently devoid of independent oversight or scope for public scrutiny except if referred for prosecution. Unlike a judicial officer, authorised officers (such as police) are not obliged to provide or document their reasons for issuing an infringement notice in a way a recipient could access and challenge.
16. We also note that ACT Policing (ACTP) does not regularly publish disaggregated data about the use of CINs that would enable assessment of whether they are being disproportionately issued against marginalised groups (discussed below). Such risk of arbitrary and/or discriminatory administration of CINs is exacerbated by the Commission's lack of jurisdiction to receive and handle complaints about ACTP under the *Discrimination Act 1991* and broader absence of suitable independent oversight of such police decision-making in the ACT. Insofar as any offences raise questions of

⁵ *Criminal Code Act 2002*, s 321(1)(a); *Crimes Act 1900*, s 116(3)(c).

intent (or otherwise complex factual questions), it is therefore our view that the enforcement of criminal offences comprising fault elements are better suited to the scrutiny and procedural safeguards offered by the judicial process and the DPP's exercise of prosecutorial discretion.

Hardship provisions

17. The Commission strongly supports mechanisms that take account of, and respond to, the personal circumstances of people who have received an infringement notice. Hardship provisions and processes, like flexibility to withdraw administrative penalties for traffic and parking infringements on compassionate or hardship grounds, are critical to ensuring consistency with the right to equality and non-discrimination (HR Act, s 8). We welcome that, from February 2024, the broader range of hardship options as are currently available for parking and traffic infringements will also apply to infringement notices issued under the *Magistrates Court Act 1930* (ACT), including completion of an approved community work or social development program.
18. The mere availability of payment options for financially disadvantaged offenders should not, however, be taken to guarantee that infringement notices will be issued and enforced in a way that upholds the right to equality and non-discrimination (HR Act, s 8). Rather, the practical implementation of such options must be accessible, and flexible enough to identify and incorporate reasonable adjustments for those who may be unable to easily engage with them without assistance. We suggest that useful reasonable adjustments would include proactively informing people of available hardship options and consequences of non-payment when an infringement notice is issued and, depending on the recipient's circumstances, doing so verbally rather than solely in writing. Authorised officers should also be trained to engage with community members to understand the reasons influencing a person's minor offending before deciding to issue an infringement notice as a matter of course.
19. Such approach is consistent with the aims of the Disability Justice Strategy, which anticipates that justice agencies will integrate opportunities into existing processes to screen whether a person may require reasonable adjustments and encourage voluntary requests for assistance. Following recent amendments to the *Discrimination Act 1991* (ACT), from 11 April 2024, authorised officers within ACT Government will be obliged to make reasonable adjustments to accommodate a person's particular needs, including those arising from disability or other protected attributes. While we acknowledge these duties under the *Discrimination Act 1991* will not apply as a matter of law to members of ACT Policing, we would nevertheless expect police officers to prioritise reasonable adjustments in their interactions with marginalised groups in accordance with their duties as public authorities under s 40B of the HR Act.

Counterintuitive to long-term diversion?

20. Research in other jurisdictions suggests that overreliance on infringement notice schemes may be counterintuitive to the diversionary aims they seek to realise. Following the state-wide extension of the NSW CIN Scheme in 2008, the NSW Ombudsman traced a significant net increase in legal action for offensive language and conduct offences.⁶ Although some offenders were diverted from court proceedings, these diversions were "eclipsed" by the high number of CIN recipients now

⁶ NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (Legislative Report, New South Wales Ombudsman, 1 August 2009).

being fined for those offences; many of whom would have previously received a caution or warning.⁷

21. While acknowledging the different factors that may influence rates of infringement notices in NSW relative to the ACT, this trend tends to suggest that the speed and relative ease with which an authorised officer may issue an infringement notice can lead to a net-widening effect whereby infringement notices are issued more readily absent the prospect of judicial or other oversight. In this regard, any potential extension of the ACT's infringement notice schemes may, in fact, be counterproductive to limiting the exposure of those experiencing vulnerability to criminal legal proceedings.
22. Successive reviews and academic research across Australia has, for example, often shown that CINs are disproportionately issued against Aboriginal and Torres Strait Islander people.⁸ In this regard, the NSW Ombudsman's report further found that Aboriginal and Torres Strait Islander people were less likely to request a review or elect to have a matter heard by the court, and that 89% of Aboriginal people issued with a CIN failed to pay within the allotted time and were referred for enforcement (relative to 49% non-payment of all total CINs).⁹ In the ACT, an additional fee of \$34.00 is levied where a reminder notice is served, and we understand that enforcement action (including garnishing salaries) may also occur.
23. In these ways, CINs may risk perpetuating greater systemic disadvantage for some Aboriginal and Torres Strait Islander recipients within the ACT by compounding cycles of debt for those who cannot easily pay a fine or access mitigations (like withdrawal, an extension etc.). due to low income, costs of living and other priorities (eg accommodation, groceries, transport, children etc.). The same is true of other groups who may experience vulnerability, including people with disability, younger people and those experiencing homelessness. Accordingly, rather than divert Aboriginal and Torres Strait Islander people from criminal legal proceedings, the use of infringement notices may instead postpone, and potentially exacerbate, these interactions.
24. Accordingly, any greater reliance on, or extension of, infringement notice schemes should not be assumed to be minor or uncontroversial, or necessarily diversionary and so justified in accordance with s 28 of the HR Act. Given the potential impacts, it is essential that any future consideration of changes affecting infringement schemes in the ACT feature targeted consultation with the Aboriginal and Torres Strait Islander community, community organisations and other groups experiencing vulnerability that may be affected.

Measuring impacts on groups experiencing vulnerability

25. The collection and publication of disaggregated demographic data about infringement notice recipients and access to hardship provisions is, in our view, essential as a means of ensuring the ACT's Infringement Notice schemes are operating equitably, in alignment with community and

⁷ Ibid, 71.

⁸ Gaye Lansdell et al, 'Infringement Systems in Australia: A Precarious Blurring of Civil and Criminal Sanctions?' (2012) 37(1) *Alternative Law Journal*, 41; Above 6; Ombudsman Western Australia, *A report on the monitoring of the infringement notices provisions of The Criminal Code – Volume 1: Ombudsman's Foreword and Executive Summary* (Report, April 2017), 34.

⁹ Above 3, 93.

government expectations, and are overall fit-for-purpose in a human rights jurisdiction. We understand that the ACT Government does not currently collect demographic data about *individuals* (as opposed to corporate recipients) who have received an infringement notice, or those who have applied for an infringement notice to be withdrawn, for an extension of time to pay or a payment plan.

26. The Commission remains concerned, in this regard, that the configuration of the existing Police Realtime Online Management Information System (PROMIS) has often been cited as an obstacle to greater collection of disaggregated data by ACTP, including in relation to infringement notices. The capture of such data (with the recipient's consent) can provide an important safeguard against arbitrary or disproportionate application of police powers, operational tools and/or disruption activities. It is, in our view, critical that the ACT Government take steps to ensure there is adequate quantitative evidence against which to measure the impact of infringement notices (or other policy settings) on those experiencing vulnerability.
27. The Commission has previously raised this concern about inadequate data in a written submission to the previous Standing Committee on Justice and Community Safety's *Inquiry in the form of an evaluation of current ACT Policing arrangements*.¹⁰ Among other issues, our submission emphasised the Commission's ongoing concerns around the adequacy of data collection and reporting, especially regarding the lack of disaggregated data about police interaction with people with diverse needs and backgrounds. This suggestion was subsequently adopted by the Standing Committee in its report, which proposed at Recommendation 9:

“[t]hat the Minister take carriage and provide to the assembly improved data collection on contact information with cultural and disability groups and their interaction with the police. This should include the types of people police are dealing with to enhance Human Rights protection.”¹¹

28. The ACT Government response to the Standing Committee's report, published in March 2021, accepted this recommendation in principle. The response noted that the Minister for Policing and Emergency Services would work with ACTP to improve the level of reporting around the interaction police have with marginalised cohorts and diverse population groups. However, due to the way the current PROMIS is configured, the response noted challenges and limitations to updating the system to allow for additional information to be recorded *in a searchable format*.
29. While we welcome that the Australian Federal Police have just recently launched a modern new Investigation Management System (IMS), the extent to which this system will provide greater data on police interactions with marginalised groups and diverse communities (and so facilitate oversight and identify systemic issues that affect our client group) remains unclear. We note that

¹⁰ ACT Human Rights Commission, Submission No 9 to Standing Committee on Justice and Community Safety (Ninth ACT Legislative Assembly), *Inquiry in the form of an evaluation of current ACT Policing arrangements* (14 February 2020), [39], available at: https://www.parliament.act.gov.au/_data/assets/pdf_file/0009/1541691/Sub-9-ACT-HRC.pdf

¹¹ Standing Committee on Justice and Community Safety (Ninth ACT Legislative Assembly), *Inquiry in the form of an evaluation of current ACT Policing arrangements* (Final Report, September 2020), [6.36], available at: https://www.parliament.act.gov.au/_data/assets/pdf_file/0004/1634881/JACS-Report-9-Inquiry-into-the-form-of-an-evaluation-of-current-ACT-Policing-arrangements.pdf

given the IMS' focus on investigations, it is unlikely that such a system would be employed to record information about responses to minor offending.

30. Commitment to the ACT's human rights framework depends on sufficient information being published to allow identification of policing measures or strategies that disclose disproportionate consequences relative to their operational objectives; such as, in the case of infringement notices, the timely deterrence of minor offending. Indeed, we have previously noted in our appearance before the previous Standing Committee in June 2020 that the envisaged trend toward predictive policing carries with it some risk of increased incarceration rates for marginal or diverse groups within our community.¹²
31. Given the current lack of jurisdiction for the Commission to handle complaints about ACTP under the *Discrimination Act 1991* (ACT), complaints data is not presently available that would enable an indirect measurement of whether such risks are being realised under the new Police Services Model (PSM). Such reporting is even more imperative in the context of the new PSM, which foregrounds the concept of disruption. Such disruption risks, for example, the over policing of specific cohorts and diverse communities, including Aboriginal and Torres Strait Islander peoples, those with disability or mental health conditions, young people and those from culturally and linguistically diverse backgrounds.
32. We acknowledge that there may be situations in which the collection of personal information by authorised officers, including police, may be inappropriate, unreasonable, administratively burdensome or limited by applicable privacy legislation. For example, the Territory Privacy Principles outlined in the *Information Privacy Act 2014* (ACT) and the Australian Privacy Principles outlined in the *Privacy Act 1988* (Cth), which apply to the Australian Federal Police and ACT Policing, each prohibit the collection of 'sensitive personal information' (such as race, criminal record etc.) other than with the person's consent and where it is reasonably necessary, or directly related to, one or more of the relevant entity's functions.
33. While we maintain that any demographic information should be collected with an individual's consent wherever possible and so may not fully reflect the extent of interaction with members of diverse communities, the accountability value of gathering and reporting such demographic data as an indicative measure nevertheless merits consideration by the Standing Committee. In the absence of such evidence, there are limited methods available to the Commission to evaluate the current impact of infringement notices on groups experiencing vulnerability and the adequacy of existing hardship provisions.
34. The capture or matching of demographic data may itself limit human rights, including rights to equality (HR Act, s 8) and privacy (HR Act, s 12). Any method of gathering such information must therefore be carefully tailored to ensure it is promptly de-identified, and not accessed or misused for other purposes. Close consultation with those whose sensitive personal information would be collected, the agencies and officers who would collect and manage it, and should involve careful

¹² Ms Karen Toohey (ACT Discrimination, Health Services, Disability and Community Services Commissioner), appearing before Standing Committee on Justice and Community Safety (Ninth ACT Legislative Assembly), *Inquiry in the form of an evaluation of current ACT Policing arrangements* (Transcript of Hearing, 23 June 2020), 26 <<https://www.hansard.act.gov.au/hansard/2017/comms/justice27a.pdf>>

consideration of the methods by which it might be collected. Targeted engagement with Aboriginal and Torres Strait Islander peoples in the ACT Should the Standing Committee recommend the ACT Government explore options potential approaches to the collection of disaggregated demographic data, we note that clear protocols, guidance and training will be required to ensure authorised officers are adequately supported to collect demographic information appropriately, consistently, safely and efficiently.

35. Personal privacy considerations, while particularly acute in the ACT, are also not insurmountable; the Commission has previously recommended piloting a receipting scheme in the ACT which would provide an individual with the reason they were stopped by police.¹³ An approach of this kind, which was trialled in Victoria in 2015,¹⁴ would provide assurance to community members that they were not stopped arbitrarily and may allow for individuals to later register their interaction and demographic data with an independent third party. In this manner, there are several potential approaches to data collection that could be explored to increase accountability of infringement notices and, with it, positive relationships and community trust in the operation of ACT infringement notice schemes.

¹³ Above 1, [40].

¹⁴ Victoria Police, 'Receipting proof of concept' <<https://www.police.vic.gov.au/receipting-proof-concept>>