



19 May 2011

Mr Edward O'Donohue MLC
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament House
Spring Street
East Melbourne VIC 3002

Justice Legislation (Infringement Offences) Amendment Bill 2011

Dear Mr O'Donohue

The Justice Legislation (Infringement Offences) Amendment Bill 2011 ('the Bill') which is currently being considered by the Scrutiny of Acts and Regulations Committee raises a number of human rights issues I would like to draw your attention to.

This Bill has been introduced following a trial expansion of enforcement by infringement notice in Victoria which sought to determine the suitability of this type of enforcement mechanism for a number of offences and will make permanent the infringement system in relation to offences dealing with offensive or indecent language and a number of alcohol-related offences. The Bill will continue the trial of the use of infringement notices for shop theft and wilful damage.

While the Statement of Compatibility tabled with the Bill on 3 May 2011 identifies a number of rights under the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter') that are engaged, disappointingly, the Statement failed to consider whether the Bill engages and limits the right to equality before the law set out in section 8 of the Charter.

Infringement notices can disadvantage individuals in vulnerable circumstances or people with 'special circumstances' as defined under the Bill, including children and young people, people experiencing homelessness, people with a disability and those who experience serious financial hardship. It is widely acknowledged that many individuals who suffer from disadvantage hold an attribute, or multiple attributes, protected under the *Equal Opportunity Act 1995* ('EOA').

This Bill engages the right to equality in the Charter because:

- Individuals facing disadvantage or people with 'special circumstances' are more susceptible to being issued an infringement notice for offences that necessarily occur on the streets or in a public place.
- Individuals facing disadvantage or people with 'special circumstances' are less likely to be able to pay a fine under an infringement notice and are less likely to have the resources to challenge an infringement notice. In accordance with the Bill, those who cannot pay an infringement notice are more likely to have their matter heard in court and receive a criminal record for an offence. When an enforcement order is issued for the amount of the unpaid infringement notice, the amount payable will be increased, exacerbating the problem further. Vulnerable persons are also often more likely to be disadvantaged by the stigmatising effects of a criminal record.
- Public order and alcohol related offences are offences of 'strict liability'. Whether or not the offence has been committed is based on the subjective opinion of police or other issuing officers and may lead to discrimination.

I am also concerned that the ability to issue infringement notices for public order and alcohol related offences may lead to 'double punishment', in circumstances where a person is placed temporarily in a holding cell for disorderly behaviour or an alcohol-related offence to 'sober up', and is then subsequently issued with an infringement notice. The right not to be tried or punished more than once under section 26 of the Charter must also be considered here.

As a number of Charter rights are engaged by the Bill, Parliament should consider whether the permanent infringement scheme proposed by the Bill is the least restrictive means for government to achieve more cost effective and efficient enforcement of particular offences, and the removal of low level offenders from the criminal justice system. This analysis will necessitate consideration of:

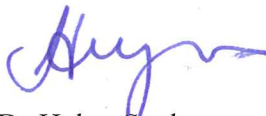
- The availability of legal aid for all persons wishing to challenge an infringement notice.
- The real risk that the ease of issuing an infringement notice will mean that police and other issuing officers will not exercise their discretion to pursue other diversion and therapeutic options. This is of particular concern where a person's disadvantage will substantially contribute to their behaviour (for example, mentally ill people who are disorderly and repeat offenders, and homeless people who undertake many activities in public spaces because they do not have their own, private home).
- The protocols that are in place to guide the exercise of police discretion in this area.

- Whether, and the extent to which, the trial expansion of the infringement scheme has had an indirect discriminatory impact on disadvantaged members of the community. To determine this would require consideration of data that sets out which particular trial offences infringement notices have been issued for and the attributes that have been considered under the 'special circumstances' exception provisions under the *Infringements Act 2006*.

The Commission has recently exercised our intervention power under the Charter in a case before the Supreme Court where a man was sentenced to 84 days imprisonment in lieu of outstanding fines under the Infringements Act. The man is appealing this on the basis of his intellectual disability which was not taken into account by the court when he was sentenced. This is just one example of the court's discretion to consider the special circumstances of the vulnerable in the community not being exercised. It is not operating as the protective mechanism it was intended to be. As the Second Reading Speech for the Infringements Act sets out, '[p]eople with special circumstances are disproportionately, and often irrevocably, caught up in the system. In a just society, the response to people with special circumstances should not be to issue them with an infringement notice' (Mr Gavin Jennings, Legislative Council, 28 March 2006 on page 947 of Hansard).

Kerin Leonard, Manager, Legal Unit is available on 9032 3445 if you would like to discuss this submission.

Yours sincerely



Dr Helen Szoke
Commissioner