

Infringements Working Group Submission  
to the Fines Reform Advisory Board:

*Making fines reform  
more effective,  
accessible and fair  
for all Victorians*

January 2020



## About the Infringements Working Group

The Infringements Working Group (**IWG**) is a joint-working group of the Federation of Community Legal Centres (Victoria) (**FCLC**), the Financial and Consumer Rights Council (**FCRC**) and Victoria Legal Aid (**VLA**). The IWG's 37 member organisations are listed in **Annexure 1**.

The clients of IWG members experience significant financial hardship and often one or more of mental health issues, family violence, homelessness and substance dependence. These clients are disproportionately affected by the Victorian infringements system, and the IWG is committed to supporting reforms that improve the system's operation for individuals, services, government and courts.

IWG members have extensive, client-centred knowledge of the strengths and weaknesses of Victoria's fines system both before and after the full commencement of the *Fines Reform Act 2014* (Vic) (**FRA**) from 31 December 2017. In this context, the IWG has worked closely with successive governments, enabling fines laws, policies and practices to be informed by the expertise and experience of practitioners who work daily with the most vulnerable Victorians to resolve their fines.

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## Executive summary and ten recommendations

The IWG notes that the Fines Review Advisory Board (**Board**) was established to provide independent advice to Victoria's Attorney-General by March 2020, including an evaluation of whether the FRA and related legislation are operating as intended. The IWG commends the Victorian Government for its commitment to improving the fines system in Victoria through the establishment of the Board.

IWG members were grateful for the opportunity to meet with the Board as part of a face-to-face consultation with Victorian legal and support services on 15 November 2019. This submission consolidates and builds on that consultation, offering the IWG's formal written submissions. IWG members, including financial counselling organisations, community legal centres and VLA have also directly engaged with the Board, and this collaborative submission should be considered alongside those contributions.

Informed by casework evidence and client stories from our members' work with thousands of disadvantaged Victorians facing fines each year, the IWG makes ten constructive recommendations to improve fines reform and the wider-infringements system. These recommendations focus on ensuring that the positive legislative intentions of the FRA's social justice initiatives are realised, providing further opportunities to achieve fairer infringements system outcomes and offering constructive suggestions to make enforcement of fines better in practice for the most marginalised Victorians.

### TEN RECOMMENDATIONS TO MAKE FINES REFORM MORE EFFECTIVE, ACCESSIBLE AND FAIR FOR ALL VICTORIANS

1. To ensure the Family Violence Scheme operates as intended by the FRA, improve accessibility and prioritise the safety of victim-survivors of family violence facing infringements, the IWG recommends:

  - Implementing legally correct, consistent and transparent Fines Victoria policies and practices to prevent the current interpretation of section 10T of the FRA, where victim-survivors are being required to prove a direct causal or temporal nexus to be eligible for the Family Violence Scheme;
  - These policies and practices should align with the Parliament of Victoria's legislative aims, particularly in terms of sections 10T(1)(c)(i) and (1)(c)(ii)(B) of the FRA.
2. To improve the fairness of enforcement review decisions, particularly involving special circumstances, the IWG recommends:

  - Introducing an Enforcement Review Guideline to guide the exercise of Fines Victoria's enforcement review discretion. This Guideline should be sufficiently prescriptive and publicly available to ensure the accountability and transparency of this decision-making;
  - Developing prosecution guidelines for enforcement agencies, so that people with special circumstances are subject to a consistent, principled decision-making regarding the filing or withdrawal of charges.

3.	<p>To ensure that the special circumstances enforcement review process is more accessible and effective, the IWG recommends:</p> <ul style="list-style-type: none"> <li>• Implementing legislative change, so that an applicant is able to choose which limb of the special circumstances nexus test to attempt to meet – either showing that: <ul style="list-style-type: none"> <li>▪ their condition or circumstance meant they were unable to understand or control the conduct constituting the offences (the current test); or</li> <li>▪ their condition or circumstance is likely to be persistent and significant, and for this reason, their capacity to manage the fines and to avoid incurring new fines is significantly impaired (noting this is a proposed new test).</li> </ul> </li> </ul>
4.	<p>To encourage special circumstances enforcement review applications, consolidate hearings and provide highly marginalised people with a therapeutic setting to appropriately address their infringements, the IWG recommends:</p> <ul style="list-style-type: none"> <li>• Reinstating the Special Circumstances List at the Melbourne Magistrates' Court. The IWG considers this could be achieved by the Chief Magistrate issuing a new practice direction under sections 5A and 16A(1) of the <i>Magistrates Court Act 1989</i> (Vic), which would nominate the Special Circumstances List as the proper venue for matters that are commenced by enforcement agencies under section 38(1)(a)(iii) of the FRA;</li> <li>• In the alternative, amending the <i>Magistrates Court Act 1989</i> (Vic) to provide for the establishment of a legislated Special Circumstances List;</li> <li>• Considering the expansion of the Special Circumstances List to regional and suburban courts.</li> </ul>
5.	<p>To increase availability of the Work and Development Permit (<b>WDP</b>) scheme for all Victorians, the IWG recommends:</p> <ul style="list-style-type: none"> <li>• Resourcing current and future WDP sponsor organisations for intake, assessment and case management of the infringement options (including financial counselling support), and the reporting of WDP activities;</li> <li>• Simplifying the WDP scheme's third party arrangements to capture more activities;</li> <li>• Improving the transparency of the WDP scheme by providing a publicly available list of sponsor agencies and the activities offered by these sponsors;</li> <li>• Clarifying sponsor agencies' record-keeping requirements for audit purposes, so these key stakeholders are aware of requirements and can better manage risk;</li> <li>• Prioritising and investing in integrated practice models, which embed financial counsellors in the legal assistance sector. This would improve awareness, efficiency and effectiveness of the WDP scheme in our community.</li> </ul>
6.	<p>To enhance functionality of the WDP scheme online tool, the IWG recommends, in consultation with users:</p> <ul style="list-style-type: none"> <li>• Stopping excessive 'Push' emails from the WDP tool;</li> </ul>

- Making the WDP online tool accessible to participants;
- Simplifying the online application, including tick boxes and automation;
- Allowing automatic variations of fines and activities;
- Developing more comprehensive reporting capability;
- Streamlining the approval process;
- Removing the need for an end date.

**7.** To enable Victorians to address their fines as efficiently and effectively as possible through the WDP scheme, the IWG recommends:

- Implementing a monthly WDP activity rate for counselling (including financial counselling) activities to simplify and increase equity;
- Backdating approval and work off credit for WDPs to the commencement of a participant's engagement in eligible activities with a sponsor organisation. Work off credit should also apply only to initial infringement amounts, with waiver of any remaining penalties and costs;
- Facilitating deregistration of tollway debts, which would send them back to the toll company to be with dealt with under their internal hardship policies;
- Expanding eligible activities to include case management and engagement with a social worker, capturing the intent of WDPs and making the scheme accessible to wider-cohorts of vulnerable Victorians;
- Amending existing WDP scheme policies to make the discretion of the Director of Fines Victoria under section 10F of the FRA more widely and proactively available.
- Expanding the WDP scheme to include court fines, including those that were incurred before the full commencement of the FRA from 31 December 2017;
- Allowing tailored infringements work off orders to maximise outcomes, so participants and sponsors can choose the order in which they work off the infringements. This should be complemented by portability of WDPs between sponsors without detriment to participants;
- Improving the integration of the WDP scheme with the other 'social justice initiatives' of fines reform, such as the Family Violence Scheme, minimising the risks of enforcement action and loss of work off credit. This could be facilitated by establishing a regular engagement process for stakeholders and Fines Victoria to enhance skills, improve transparency and provide feedback opportunities.

**8.** To reduce the disproportionate impact of infringements on people experiencing financial hardship, the IWG recommends:

- Introducing concession-based infringements for financially disadvantaged Victorians who hold a Centrelink Low Income Health Card, which would be a rate of 20% of the infringement penalty;

- Waiving costs and penalties when a person who is eligible for the proposed concessional-based rate of infringements pays in full, or establishes and completes a payment arrangement, for the infringement penalty amount.

**9.** To increase vulnerable Victorians' access to appropriate, meaningful options to address their fines, and to reduce their disproportionate enforcement outcomes, the IWG recommends:

- Requiring a proposed 'pocket resource' to be provided by Sheriff's Officers when issuing all seven-day notices. This could offer a clear, practical and direct way for people with complex needs to understand their options and to know the importance of taking prompt action to address their fines;
- Implementing legislative change to extend the seven-day notice period to 28 days, or in the alternative if this is not possible, reverting to the pre-FRA system, so that access to the different options to address fines is only extinguished after an enforcement warrant has been executed.

**10.** To reduce the burden faced by vulnerable community members who are unable to appropriately address their fines-related warrants, and the barriers this presents to housing, health, personal and financial stability, the IWG recommends:

- Reintroducing the ability for Victorians to proactively have their warrants executed in a supported, efficient and orderly manner, including through the administrative execution of arrest and enforcement warrants at Sheriff's offices;
- Supporting Sheriff's Officers to appropriately exercise discretion regarding the execution of warrants involving people with disadvantaged circumstances, including through tailored training and the development of clear, consistent and transparent guidelines. It would be beneficial for this process to involve consultations with people who have lived experience of personal and financial hardship, along with the legal, financial counselling and community-support services that assist them.

# 1. The disproportionate impact of the fines system on vulnerable Victorians

From the frontline service delivery of IWG members, we know that the Victorian fines system regularly has an adverse impact on the most vulnerable in our community. Research confirms the high prevalence of infringements-related legal need faced by people experiencing disadvantage.<sup>1</sup> The Victorian Sentencing Advisory Council has also noted:

*Unlike the court system, the infringements system is largely automated and involves limited discretion. As a result, there is a tension in the infringements system between the desire to ensure that the system does not operate unfairly against vulnerable people and, at the same time, ensuring that recalcitrant offenders do not escape its effect.<sup>2</sup>*

Recognising this tension, the Sentencing Advisory Council considered proposals for reform against the background of a ‘typology’ of infringements offenders. The Sentencing Advisory Council suggested that a ‘shouldn’t pay’ cohort, including the most vulnerable community members, need to be identified early and filtered out of the system as soon as possible.<sup>3</sup> The Sentencing Advisory Council also proposed that for a ‘can’t pay’ cohort, constructive ways of discharging liability should be offered.<sup>4</sup>

The FRA reforms to Victoria’s fines system included specific ‘social justice initiatives’ and related measures that were designed to better accommodate these ‘shouldn’t pay’ and ‘can’t pay’ cohorts. However, there have been considerable challenges in the implementation of fines reform, which have unintentionally contributed to Victorians becoming entrenched in the fines system.

Since the full commencement of the reforms from 31 December 2017, IWG members have helped thousands of clients dealing with crippling uncertainty about their fines, which they have received as a direct consequence of their complex and inter-connected circumstances, including experiences of homelessness, family violence, mental health issues, substance dependence and financial hardship. This submission offers the IWG’s constructive changes for Victoria’s fines system, so that the most marginalised are not caused further personal or financial hardship.

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<sup>1</sup> See, e.g., Law and Justice Foundation of New South Wales, ‘Fines: Are Disadvantaged People at a Disadvantage?’ (Issues Paper, 2018) 19.

<http://www.lawfoundation.net.au/ljf/app/&id=D5D375991CE8E1B68525823A000641F4>.

<sup>2</sup> Sentencing Advisory Council, *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria*, Report (2014) (**SAC Report**), xxxi.

<sup>3</sup> SAC Report 77.

<sup>4</sup> SAC Report.



## 2. Improving the fairness, effectiveness and accessibility of fines reform

### 2.1 Family Violence Scheme

#### *Best-practice model intended improved safety for victim-survivors*

The Family Violence Scheme (FVS) is a ground-breaking fines scheme which draws on recommendations 112 and 113 of the Royal Commission into Family Violence. The IWG was pleased to work in collaboration with the family violence sector and extensively consult with the government in creating the FVS, and we provide our related discussion paper from February 2017 at **Annexure 2**.

Part 2B of the FRA introduced the FVS as a new option for people who have received infringements. Under the FVS, people who have experienced family violence and because of that family violence have incurred infringements or have been unable to nominate the driver of the vehicle, are able to apply to the Director of Fines Victoria to address their infringements. Enforcement action is also suspended while that application is determined. If Fines Victoria is satisfied that several criteria under s 10T(1) of the FRA are met, they can then cancel the registration of the infringements and direct the enforcement agency to withdraw the infringement notices and take no further action. The FVS is generally the best option for clients with family violence-related infringements, including for the following reasons:

- Enforcement agencies are directed to withdraw the infringement notice if Fines Victoria determines a person to be a 'FVS eligible person'.<sup>5</sup> This can be compared to other options under the FRA, such as enforcement review where enforcement agencies have discretion to prosecute if the application is successful. As a result, victim-survivors will generally not be required to attend court and give evidence about their traumatic experiences of family violence;
- Victim-survivors addressing their infringements through the FVS will also generally not have to risk a court making a finding of guilt against them and consequently a criminal record. This is particularly relevant for 'FVS eligible persons', as many FVS applicants will have done nothing wrong and may not have any criminal record;
- With enforcement agencies generally required to withdraw the infringements under the FVS, offences that attract demerit points are cancelled even where the applicant chooses not to nominate another driver.

#### *Ensuring the Family Violence Scheme is accessible and impactful*

In the experience of IWG members, it is particularly important that victim-survivors of family violence are able to access the FVS due to the risks associated with it being unavailable to them. These include the risks of further violence and retribution if victim-survivors are forced to nominate a perpetrator, as well as the risks of victim-survivors being penalised for the behaviour of the perpetrator and facing the serious financial burden of fines, suspension of their drivers licence and registration, confiscation of their car, and imprisonment. These risks were clearly identified through the Royal Commission into Family Violence, which as noted, led to the development of the FVS.<sup>6</sup>

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<sup>5</sup> Except in some rare cases, such as where a referral is made by the Director under s 10X(2) of the *Fines Reform Act 2014* (Vic) and the enforcement agency decides to file a charge sheet under s 10Y(1)(b) of the Act.

<sup>6</sup> Royal Commission into Family Violence: Report and Recommendations vol iv (2016), Recommendations 112, 113, 120-122.

Section 10T of the FRA establishes the criteria and a process for determining an eligible person for a FVS application. Section 10T(1)(c)(i) provides that the family violence must have “substantially contributed to” the FVS applicant being unable to control the conduct that constituted the offence. If the applicant was not the driver of the vehicle, s 10T(1)(c)(ii)(B) of the FRA provides that the family violence must have “substantially contributed” to the FVS applicant being unable to make a known user statement in relation to an operator onus offence within the meaning of Part 6AA of the *Road Safety Act 1986* (Vic).

During 2019, the IWG raised concerns with Fines Victoria about their processes for determining FVS applications, particularly Fines Victoria’s interpretation of the words “substantially contributed” in ss 10T(1)(c)(i) and (1)(c)(ii)(B) of the FRA. These concerns were raised after IWG members observed Fines Victoria adopting a new practice in early 2019 of rejecting a large number of applications where family violence was not the “direct cause” of the applicant being unable to control conduct constituting an offence or make a known user statement, or where the family violence was not “current” at the time of offending.

The below stories of former IWG member clients Rachel and Sal highlight the detrimental impact that this new practice is having on family violence victim-survivors who are seeking to resolve infringements through the FVS.<sup>7</sup>

### ***Young woman pushed into homelessness by family violence is forced into five-year payment arrangement after refusal of FVS application***

Sal, a 21-year-old woman, has a history of experiencing family violence. Sal and her family fled from interstate to escape from violence perpetrated by a family member, resulting in homelessness. While living in Victoria, Sal also experienced violence perpetrated by family members she was living with.

Sal received support from a caseworker, who referred her to an IWG legal assistance sector member in late June 2018. The lawyers had a number of interactions with Fines Victoria regarding her infringements, stating in July 2018 when they requested for her fines to be placed on hold, so they could gather supporting material. Due to the sensitivity of Sal’s situation, it was difficult and time-consuming for her to provide the lawyers with instructions. Sal had to attend a number of appointments to complete the FVS application form and the very detailed statutory declaration. The application was also supported by a support letter prepared by Sal’s caseworker. Sal’s FVS application was eventually submitted in August 2018.

After not receiving any response from Fines Victoria, the lawyers requested an update on the status of the application in January 2019, and then again in April 2019. In August 2019 the lawyers received correspondence from Fines Victoria (dated May 2019) requesting further information. The lawyers responded stating on its assessment the material already submitted was sufficient. The following day, Fines Victoria sent correspondence to the lawyers stating that Sal did not demonstrate that family violence significantly contributed to her incurring the infringements.

After this extensive process, Sal could not face submitting a special circumstances enforcement review or WDP scheme application, as she just wanted the infringements to be resolved. For this reason, Sal entered into a payment arrangement for her fines. The total amount to be repaid was approximately \$5000, to be paid off at a rate of \$20 per week (which equates to making over 250 payments, spanning over five years).

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<sup>7</sup> All client stories used in this submission have been de-identified.

### ***Aboriginal single-mother unable to access FVS despite proven connection between family violence, mental health and infringements***

Rachel is a 34-year old Aboriginal woman and single parent. Rachel's adolescence was marked by severe sexual and physical violence, homelessness, and substance dependence. Around this time, Rachel was first admitted to psychiatric care.

From 2011 to 2016, Rachel incurred numerous infringements, predominately toll fines that totalled over \$8,000. During the offending period Rachel was in a physically and emotionally abusive relationship. Rachel explained that this relationship had a significant impact on her mental health; she self-medicated with alcohol, became reckless in her decision making, and had difficulty dealing with day-to-day tasks. A psychological assessment confirmed that Rachel suffered from psychotic depression, anxiety, borderline personality traits, and post-traumatic stress disorder. The report was consistent with Rachel's instructions that her mental health issues during the offending period were caused by her experience of family violence.

In September 2017, an IWG legal assistance sector member submitted a special circumstances application on Rachel's behalf. In April 2018, Fines Victoria contacted the lawyers and indicated that Rachel could be eligible for a FVS application. Due to Rachel's complex circumstances, it took time to contact her, confirm that she would like to proceed, and gather the required supporting documents. Preparing the statutory declaration, and revisiting her traumatic relationship, was particularly distressing for her. The FVS application was ultimately submitted in April 2019.

In November 2019, Fines Victoria advised that although Rachel was a victim-survivor of family violence, a link had not been established between the violence and the incurring of the fines. However, Fines Victoria agreed that the abuse had a significant impact on Rachel's mental health, and therefore, enforcement of the infringements could be cancelled under special circumstances enforcement review. At Rachel's instruction, the lawyers have submitted further supporting material for her application under the FVS and are currently awaiting a final decision.

Fines Victoria has clearly recognised that Rachel is a victim-survivor and that her experience of family violence has created mental health issues that led to her offending. However, due to Fines Victoria's new, overly prescriptive interpretation of "substantially contributed to" under s 10T of the FRA, Rachel continues to face unreasonable barriers in resolving her infringements through the FVS.

For the purposes of this submission, the IWG will refer to Fines Victoria's new purported requirements for the FVS as the purported "direct causal nexus requirement" and the purported "temporal nexus requirement". In the IWG's present view, it is not possible under any reading of s 10T of the FRA to suggest an applicant is required to prove:

- a direct causal nexus between their experience of family violence and their inability to (a) control offending conduct that constitutes an offence; or (b) make a known user statement in respect of an operator onus offence; or
- a 'current' temporal nexus to the effect that the family violence was occurring at the time of the offence.

In terms of the purported direct causal nexus requirement, the IWG considers that the word "substantial" relates to the degree or extent of a thing, and we interpret it to mean "not total (of that thing) but more than trivial or insignificant". Similarly, in our view, we interpret the word "contributed" to mean "causally influenced" but not directly or solely caused.

In relation to the purported temporal nexus requirement, the use of the past tense verb “contributed” indicates the family violence referred to in ss 10T(1)(c)(i) and (1)(c)(ii)(B) of the FRA does not need to be happening at the time of the offending, and can have occurred at any point before the person was unable to control conduct that constitutes an offence or make a known user statement.

From the IWG’s perspective, if the Parliament of Victoria had intended to impose a direct causal nexus and a temporal nexus, as is currently suggested by Fines Victoria, the words “directly caused” would likely have been used instead of “substantially contributed to” in ss 10T(1)(c)(i) and (1)(c)(ii)(B) of the FRA. The Parliament also could have imposed a requirement under s 10T(b) of the FRA that the Director of Fines Victoria be satisfied that the FVS applicant be both a victim-survivor of family violence and that family violence was occurring at the time of the commission of the FVS eligible offence.

The IWG is currently seeking counsel’s advice to confirm our position, and on request from the Board, we would be pleased to provide any further information by 3 February 2020 if that would be useful.

### **Recommendation 1:**

To ensure the Family Violence Scheme operates as intended by the FRA, improve accessibility and prioritise the safety of victim-survivors of family violence facing infringements, the IWG recommends:

- Implementing legally correct, consistent and transparent Fines Victoria policies and practices to prevent the current interpretation of section 10T of the FRA, where victim-survivors are being required to prove a direct causal and temporal nexus to be eligible for the Family Violence Scheme.
- These policies and practices should align with the Parliament of Victoria’s legislative aims, particularly in terms of sections 10T(1)(c)(i) and (1)(c)(ii)(B) of the FRA.

## **2.2 Enforcement review**

### ***Importance of fair, consistent and transparent enforcement review processes***

Enforcement review, particularly on the basis of ‘special circumstances’,<sup>8</sup> is one of the main options used by IWG members’ clients in seeking to resolve their infringements. In addition to extensive delays in the processing of applications since 31 December 2017, many of our clients have been directly affected by the arbitrariness of Fines Victoria’s enforcement review decisions, as illustrated by Mohamed’s story on the next page.

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<sup>8</sup> ‘Special circumstances’ is defined in s 3 of the *Infringements Act 2006 (Vic)* to include: mental or intellectual disability, disorder, disease or illness; serious addiction to drugs, alcohol or other volatile substance; homelessness; or family violence.

### ***Supreme Court application required after enforcement review decision-making fails to cancel a culturally diverse man's unlawful fine***

Mohamed is a culturally diverse man, who was working on a laptop in a public library when a contingent of eight police officers approached him, disconnected his laptop and ejected him from the library. Mohamed was issued with a fine for failing to move on.

Mohamed was not breaching the peace or otherwise behaving in a manner that can give rise to a move on direction under section 6 of the *Summary Offences Act 1966* (Vic). When Mohamed applied for enforcement review with the help of an IWG legal assistance sector member, he raised the ground arguing that the infringement was issued contrary to law because the section 6 factors were not made out. Mohamed argued that the police were acting on racial profiling motivations.

Enforcement of the fine was confirmed by Fines Victoria on the basis that Mohamed had failed to move on, despite the fact that the move on direction was unlawfully issued. It was apparent that the decision-maker was not a lawyer and did not understand the basis of the application. There was a lack of transparency around the relevant and irrelevant considerations for the decision-maker as part of this process.

Mohamed applied for judicial review of the decision. It was only after he initiated this application in the Supreme Court of Victoria that enforcement of the fine was cancelled.

There is currently insufficient transparency about the factors that decision-makers consider when making an enforcement review decision. In late 2019, Fines Victoria has sought more information from applicants in special circumstances enforcement review matters in circumstances, where Fines Victoria has modified the standard of proof without apparent reason or explanation. Previously, it was sufficient for an applicant to show that their circumstance/condition 'might have' contributed to them incurring the fine; in recent months, the standard of proof has been arbitrarily changed to 'likely to', excluding many from enforcement review. An Enforcement Review Guideline would mean the relevant factors for exercise of discretion, evidence and standard of proof would be available to all applicants as part of a transparent accountable process, and would require Fines Victoria to make consistent, principled enforcement review decisions. Ensuring this accountability is particularly important given that fines reform has abolished appeals to the Magistrates' Court of enforcement review decisions.

The IWG also note that the FRA changed the prosecution decision from an opt-out decision to an opt-in one, meaning enforcement agencies have to actively decide to prosecute. We understand that the Victorian Parliament's intention was to divert more special circumstances enforcement review matters away from proceeding to determination in the criminal jurisdiction.

In the experience of IWG members, this positive intention is presently being undermined by inconsistent prosecutorial decision-making by a number of enforcement agencies, including Victoria Police, which disregards the principle of diverting vulnerable people away from the courts. In many but not all cases, IWG members have observed Victoria Police choosing not to prosecute tolling offences; in our view, given the triviality and lack of public safety element to these offences, there is never any justification for prosecuting tolling offences after successful enforcement review. Victoria Police have also been proceeding to prosecute many minor behavioural offences that are directly related to a person's special circumstances, such as drunk and disorderly offences, which the IWG considers should be withdrawn.

There is also inconsistency with respect to driving offences, with low-level speeding occasionally being withdrawn but more commonly being prosecuted along with driving unregistered and driving unlicensed.

In the IWG's view, enforcement agencies generally engage in more consistent decision making when assessing internal review applications, as compared to enforcement review. This is primarily because published Internal Review Guidelines exist to encourage consistent decision making processes and assist enforcement agencies in identifying the legal and practical requirements of the process.<sup>9</sup>

Given the legal criteria for making and determining internal and enforcement review applications are very similar,<sup>10</sup> it would be highly beneficial for enforcement agencies to be required to consider similar guidelines when assessing both internal and enforcement review. This should include prosecution guidelines that make sure people with special circumstances are subject to a consistent decision-making regarding the filing or withdrawal of charges.

Inconsistent prosecutorial decisions, together with the Special Circumstances List effectively being discontinued (see further discussion below), have the effect of deterring vulnerable applicants from making special circumstances applications. This directly weakens the intent of minimising the impact of criminal prosecutions on vulnerable fines-recipients. The IWG submits that the Victorian Parliament has legislated for a system of limited prosecution, and decisions to prosecute following special circumstances enforcement review should only be made where there are clear factors that warrant it, such as where the offence involves a serious risk to public safety.

## **Recommendation 2:**

To improve the fairness of enforcement review decisions, particularly involving special circumstances, the IWG recommends:

- Introducing an Enforcement Review Guideline to guide the exercise of Fines Victoria's enforcement review discretion. This Guideline should be sufficiently prescriptive and publicly available to ensure the accountability and transparency of this decision-making;
- Developing prosecution guidelines for enforcement agencies, so that people with special circumstances are subject to a consistent, principled decision-making regarding the filing or withdrawal of charges.

### ***Special circumstances nexus requirement***

To access enforcement review on the grounds of special circumstances, applicants are presently required to submit evidence which shows that, because of their condition or circumstance, they could not control the conduct constituting the offence or understand that it constituted an offence; that is, they must evidence the nexus between their condition or circumstance and their offending. From the day-to-day work of IWG members, this current nexus requirement excludes many marginalised fines recipients

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<sup>9</sup> See s 53A of the *Infringements Act 2006* (Vic) and 'The Internal Review Guidelines' in Victoria, *Victorian Government Gazette*, No G23, 8 June 2017, 1097 accessed at <http://www.gazette.vic.gov.au/gazette/Gazettes2017/GG2017G023.pdf#page=27>

<sup>10</sup> See ss 22 and 25 of the *Infringements Act 2006* (Vic) and ss 32, 37 and 38 of the *Fines Reform Act 2014* (Vic).

from accessing the special circumstances scheme, particularly as appropriate evidence of the nexus can be extremely difficult to obtain. This is partly because fines are often historical and finding a treating practitioner willing to speak retrospectively about a person's condition or circumstance from many years before can be very challenging. In addition, people made vulnerable by virtue of poverty, homelessness, family violence and mental health issues regularly do not have a consistent treating health practitioner due to access barriers, which means those most in need of the special circumstances scheme are often unable to access it due to difficulty in getting a letter. Another barrier is that health and other practitioners are often reluctant to or cannot comment on the nexus (even when they were treating or assisting the person at the time the fines were incurred), as the causation that is required to be proven is too exact and rigid, and the standard of proof often unrealistically high.

The IWG notes that Fines Victoria has previously accepted evidence of special circumstances stating that the condition or circumstance 'might have' contributed to the person incurring the fines. More recently, without apparent consultation or explanation, Fines Victoria began requiring evidence to attain the much higher standard of 'likely to'. In the IWG's view, this further excludes many disadvantaged people from the scheme, because health and other practitioners struggle to comment on the nexus to this evidentiary standard. Even if it is known that the person was experiencing symptoms of a mental health condition or was homeless at the time of the fines, linking each fine to the special circumstances to the 'likely to' standard is often beyond the scope of a practitioner's qualifications or willingness to comment. The IWG recommends that Fines Victoria revert to requiring the 'might have' nexus as a priority.

The challenges presented by the current nexus requirements are illustrated by Max and Ricky's stories below.

### ***Incorrect evidentiary standard applied to special circumstances enforcement review of young man with mental health and substance dependence issues***

20-year-old Max was referred to an IWG legal assistance sector member by a community-based mental health service with a number of driving-related fines. The lawyers assisted him to apply for enforcement review in September 2018 regarding these fines on the basis of his special circumstances of substance dependence and mental health issues. The application relied on a support letter which said Max's conditions "may have" impacted his ability to control his offending behaviour.

Fines Victoria first contacted the lawyers in response to the application in September 2019. The Review Officer from Fines Victoria told the lawyers that Max "needs a definitive statement that the condition caused or contributed to the condition". On Max's behalf, the lawyers argued that Fines Victoria was not correctly applying the statutory evidentiary standard. Through the lawyers' extensive negotiations, Fines Victoria eventually found the Max had special circumstances and cancelled enforcement of his fines.

### ***Disability support pensioner with mental health issues has enforcement review rejected due to lack of regular doctor***

Ricky has struggled with symptoms of bipolar disorder and drug dependence for many years, but his engagement with services has been sporadic. He did not have a regular doctor, but when he was on Community Treatment Orders or in hospital, he was subject to involuntary treatment from a psychiatrist and a case manager. Ricky's symptoms have been acute and disabling for a number of years. He was recently accepted onto the National Disability Insurance Scheme and receives the Disability Support Pension.

Ricky connected with an IWG legal assistance sector member after he had received twelve fines for public transport offences over a two-year period, including for travelling without a valid ticket, smoking on the platform, and having his feet on the seats. The period of the fines pre-dated his mental health treatment.

Ricky's case manager identified the fines and asked his psychiatrist to write a support letter. The psychiatrist wrote a letter detailing the history of Ricky's illness and his level of impairment, including that the stress from the fines, which Ricky was not in a position to pay, was exacerbating Ricky's condition, but refused to comment on the nexus because Ricky was not in the psychiatrist's care at the time. Despite Ricky's special circumstances, his enforcement review application was rejected by Fines Victoria.

In the IWG's view, the special circumstances test should be rethought and extended so that it better accords with a health and welfare approach to evaluating the significance of mental health issues, intellectual disability, drug and/or alcohol dependence, homelessness and family violence: that is, as well as being able to address the causal link with historical conduct, an applicant should alternatively be able to attest to their symptoms and future-wellbeing in satisfaction of the test. The nexus test is appropriate for applicants who have circumstances that may have changed since the commission of the offences and who do not have chronic conditions or circumstances.

However, where special circumstances are significant and likely to be persistent, the IWG submits that adding an alternative limb to the nexus test would ensure access to the scheme for people who are unable to produce evidence of the nexus. In addition to the current test which requires the nexus, the test could also focus on the extent of the impairment or disruption caused by the condition or circumstance and whether the person's capacity to manage their fines is so impaired by their special circumstances that it would be unjust to insist they pay. In this context, the IWG recommends legislative change, so that an applicant could choose which limb of the test to attempt to meet – either showing that their condition or circumstance meant they were unable to control the conduct constituting the offence or understand that it constituted an offence (the current test), or in the alternative, showing that their condition or circumstance is likely to be persistent and significant and therefore their capacity to manage the fines is significantly impaired (the proposed new test).

An assessment of whether the person's condition or circumstance prevents them from paying or managing their fines would appropriately identify those people who should be removed from the fines system, in addition to the diversion from the system of those applicants who have conditions or circumstances that contributed to the offending conduct.



### **Recommendation 3:**

To ensure that the special circumstances enforcement review process is more accessible and effective, the IWG recommends:

- Implementing legislative change, so that an applicant is able to choose which limb of the special circumstances nexus test to attempt to meet – either showing that:
  - their condition or circumstance meant they were unable to understand or control the conduct constituting the offences (the current test); or
  - their condition or circumstance is likely to be persistent and significant, and for this reason, their capacity to manage the fines and to avoid incurring new fines is significantly impaired (noting this is a proposed new test).

### ***Prioritising the reinstatement of the Special Circumstances List***

The Special Circumstances List (**List**) at the Melbourne Magistrates' Court has provided highly marginalised people with a therapeutic setting to appropriately address their infringements for over a decade. The List carefully considered each person's circumstances, including family violence, drug and alcohol dependence, homelessness, mental health issues and intellectual impairment, when determining sentencing outcomes. It has functioned highly effectively to provide fair, efficient and rehabilitative sentencing outcomes for vulnerable community members as part of an infringements system that diverts marginalised people away from mainstream enforcement processes.

The IWG wrote to the Chief Magistrate and Deputy Chief Magistrate of the Magistrates' Court of Victoria in March 2019 (see **Annexure 3**), outlining the following three key reasons why the List should not be discontinued:

- The risk of vulnerable Victorians' matters proceeding to prosecution;
- The inconvenience and complexity of consolidating matters listed in open court; and
- Negative resourcing implications for the Court and community service sector.

Since the effective discontinuation of the List, where enforcement is cancelled and enforcement agencies decide to prosecute, charges end up dispersed across suburban and regional courts according to which court is closest to where the offence occurred. As demonstrated through Janice and Kelly's stories on the next page, one person may end up with dozens of different court dates and locations when seeking to resolve their infringements based on special circumstances enforcement review.

### ***Absence of Special Circumstances List heavily burdens woman experiencing mental health issues and further stretches the justice system***

Janice incurred a number of infringements, and sought enforcement review on the basis of her mental health issues. She was successful, but enforcement agencies proceeded to issue a number of charges. Janice had open court hearings listed on two different dates in a regional Magistrates' Court, and on various dates in three different suburban Magistrates' Courts.

The process of having all matters adjourned to one date was quite involved. All enforcement agencies consented to the matters being heard at one suburban Magistrates' Court. However, the Registrar at one court held the view that matters listed at that court should remain there to be heard. The remaining matters were consolidated to be heard together at another suburban Magistrates' Court. On the day of the scheduled consolidated hearing, the barrister briefed to appear was advised that, in addition to the briefs in respect of which notice had been provided, several additional matters were to be dealt with. The court did not have capacity to hear and deal with the matters as this would require an extra hour and a half of the court's time. As a result, all matters were adjourned to a consolidated plea on a later date.

The IWG legal assistance sector member has had to provide Janice with an extension of aid for a further court date, with a different barrister to be briefed in the matter, and the client having to attend court for a third time. Better policies in relation to charging following successful enforcement review, and the maintenance of the Special Circumstances List as the venue for post-enforcement review charges, would have made this a better and more efficient process.

### ***Aboriginal woman who has experienced homelessness, family violence and mental health issues faces the prospect of 23 different court dates to resolve her infringements***

Kelly is a 30 year old Aboriginal woman with a history of experiencing homelessness, family violence and sexual abuse since the age of twelve, along with a drug dependence directly related to her past trauma. She has been diagnosed with borderline personality disorder, post-traumatic stress disorder, and a major depressive disorder.

Kelly has 23 different infringements, the majority of which relate to driving an unregistered vehicle without a licence during a period in which she was sleeping in her car. An IWG legal assistance sector member helped Kelly with her special circumstances enforcement review application for these infringements. In October 2018, Fines Victoria cancelled enforcement of the infringements based on Kelly's special circumstances. These infringements were then referred back to Victoria Police in accordance with s 37(1)(b) of the FRA. Victoria Police decided to prosecute each of the 23 infringements separately in open court. Each infringement has been listed to be heard on a different date in a local Magistrates' Court. Kelly will seek substantially the same consideration of her special circumstances in each case. The lawyers have been attempting to consolidate all of her matters into one hearing to minimise Kelly's distress in attending court and to maximise the efficient and proper administration of justice. However, the lawyers have not been contacted by Victoria Police when each case is listed, and they are solely reliant on the online Magistrates' Court list to identify each new hearing.

It is unclear if all of Kelly's cases will be listed by Victoria Police before the consolidated hearing date and consequently, it is likely that she will face multiple hearings where the same evidence will be led. Given her complex vulnerabilities, the prospect of multiple hearings in open court has been overwhelming for Kelly, which has placed both her mental health and physical safety at risk.

Efforts to consolidate hearings are stymied by reliance on the Electronic Filing Appearance System (EFAS) and non-cooperation of enforcement agencies, such as Victoria Police, as well as the Magistrates' Court. This functions as a deterrent to the making of special circumstances applications; as a result, IWG members are seeing a decrease in client willingness to make special circumstances applications because of the risk of having charges determined in multiple open court hearings where legal representation is likely not to be available. IWG member, Victoria Legal Aid, was able to provide a duty lawyer service for the List, but infringements offences often do not meet the criteria for duty lawyer assistance in open court. Instead, IWG members are sometimes making applications to reduce or waive prescribed costs followed by attempting to establish a payment plan.

In the IWG's view, it is highly viable for the List to be reinstated. The Chief Magistrate has the power under s 5A of the *Magistrates' Court Act 1989* (Vic) to issue a Practice Direction directing that charges laid after successful special circumstances enforcement review under s 38(1)(a)(iii) of the FRA be filed at the Melbourne Magistrates' Court to be heard in the List.<sup>11</sup> To enhance access to this therapeutic jurisdiction, we suggest considering the expansion of the List to selected regional and suburban courts, similar to the List that previously operated at the Neighbourhood Justice Centre.<sup>12</sup>

Should the Magistrates' Court decline to make a Practice Direction, the IWG considers it would be appropriate for the Victorian Parliament to amend the *Magistrates' Court Act 1989* (Vic) to legislate for the List. This option has occurred for other specialist jurisdictions, such as the Drug Court,<sup>13</sup> Koori Court,<sup>14</sup> Family Violence Court,<sup>15</sup> Neighbourhood Justice Divisions<sup>16</sup> and Assessment and Referral Court List,<sup>17</sup> and would be preferable due to the greater permanence it would give to the List.

#### **Recommendation 4:**

To encourage special circumstances enforcement review applications, consolidate hearings and provide highly marginalised people with a therapeutic setting to appropriately address their infringements, the IWG recommends:

- Reinstating the Special Circumstances List at the Melbourne Magistrates' Court. The IWG considers this could be achieved by the Chief Magistrate issuing a new practice direction under sections 5A and 16A(1) of the *Magistrates Court Act 1989* (Vic), which would nominate the Special Circumstances List as the proper venue for matters that are commenced by enforcement agencies under section 38(1)(a)(iii) of the FRA;
- In the alternative, amending the *Magistrates Court Act 1989* (Vic) to provide for the establishment of a legislated Special Circumstances List;
- Considering the expansion of the Special Circumstances List to regional and suburban courts.

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<sup>11</sup> It is noted that prior to Fines Reform, the Special Circumstances List existed pursuant to a similar practice direction s 5A of the *Magistrates' Court Act 1989* (Vic). See Magistrates' Court of Victoria, *Practice Direction Number 2 of 2016 — Special Circumstances List (Melbourne Magistrates' Court)*, 2 February 2016 accessed at <https://www.mcv.vic.gov.au/sites/default/files/2018-11/Practice%20Direction%20of%202016.pdf>

<sup>12</sup> *Magistrates' Court Act 1989* (Vic), s 4N

<sup>13</sup> *Ibid*, s 4A.

<sup>14</sup> *Ibid*, s 4D

<sup>15</sup> *Ibid*, s 4H.

<sup>16</sup> *Ibid*, s 4M.

<sup>17</sup> *Ibid*, s 4S(1).

## 2.3 Work and Development Permit scheme

### *High-potential option for therapeutic fines resolution*

The IWG is also pleased to make recommendations to improve accessibility and functioning of the Work and Development Permit (**WDP**) scheme, so that it best meets community and stakeholder expectations and operates as intended under the FRA. The IWG considers the WDP scheme to be one of the highest-potential social justice initiatives implemented by the Victorian Parliament through fines reform. This is reflected in the second reading speech of the *Fines Reform Bill 2014* (Vic), which stated:

*Under the new work and development permit scheme, vulnerable people and people in acute financial hardship will have more options to expiate their unpaid infringement fines.*

*Work and development permits will allow people with special circumstances or people in acute financial hardship to clear their infringement fine debt through approved activities and treatment, including: unpaid work, medical or mental health treatment, courses, financial counselling, drug and alcohol treatment and, for people under 25 years of age, mentoring...*

*This is a significant new initiative for Victoria and one that is expected to support our most vulnerable members of the community to address the circumstances that lead to offending.*<sup>18</sup>

However, in the day-to-day experience of many IWG members, the therapeutic ideals behind the WDP scheme have not yet been achieved for some of the most disadvantaged Victorians who have fines.

Various members of the IWG, including current WDP sponsors and agencies considering becoming a sponsor have been in discussions regarding the WDP Scheme, identifying barriers and developing solutions to those. There remains overwhelming support for the concept of the WDP Scheme, as it intends to provide a therapeutic means for vulnerable people to deal with their infringements debt. Unfortunately, this great potential has not been met and subsequently, it is important to explore and address barriers to the success of the WDP scheme.

Thousands of eligible vulnerable Victorians qualify for a WDP but are being excluded or denied access through the lack of sponsors and the failure of Fines Victoria to provide names of sponsors to the community. The IWG and our member the Financial and Consumer Rights Council (**FCRC**) have written to key government stakeholders over the last 18 months identifying concerns and offering solutions (see for example the IWG's letter from September 2019 at **Annexure 4**).

### *Current challenges and opportunities within the WDP scheme*

Based on the experiences of IWG members, we note the following current WDP challenges:

#### *WDP sponsor agencies*

The implementation of the WDP scheme has largely involved a disappointing uptake by eligible sponsor agencies, despite some of the Foundation Sponsors (such as IWG financial counselling sector members Uniting ReGen and Odyssey House Victoria) actively promoting the scheme at conferences, regional meetings and direct agency engagement.

Current sponsors have also reported significant impact on their capacity to meet demand for funded WDP activities, which creates a negative impact on the availability of services for people without

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<sup>18</sup> Parliament of Victoria, Hansard, Second Reading Speech, *Fines Reform Bill 2014* (Vic) Hon C.K Rich-Phillips (12 June 2014).

infringements. This shifting of costs does not increase overall access to services but skews the delivery of services. The IWG suggests that factors to consider include:

- the lack of backdating of WDP activities means potential WDP participants have to be prioritised over others on the agency wait list purely on this need, not on other more appropriate risks or vulnerabilities;
- financial counsellors and legal assistance sector lawyers provide advice and information on infringement options, but have no options to refer eligible people to sponsors, as the list of sponsors is not public;
- third party sponsor arrangements are more time intensive for sponsors and there is more potential risk to the agencies, so participants miss out on the full work off of activities;
- complexity of the infringements system and low work off rates means generalist workers cannot be expected to provide options and a short period of engagement will have little effect on the overall debt.

Salina's story below offers an example of these day-today challenges, and the impacts they have on both clients and the community-based services that support them.

### ***Mother with health and financial complexities faces barriers to the WDP scheme***

Salina presented at a community health service for her physiotherapy appointment. Salina has experienced complex health issues including addiction, PTSD, chronic pain and is stressed due to her children being in the care of a family member. An IWG financial counselling sector member developed a case plan with Salina, including for her infringements.

The financial counsellor engaged with Salina and other health professionals to assess eligibility for various 'social justice initiatives' under the FRA, including the WDP scheme. The financial counsellor presents the options and their consequences to Salina, a plan is formulated, and the financial counsellor makes applications for special circumstances enforcement review, FVS and places the remainder on a WDP for treatment by health professionals, training and financial counselling. As the financial counsellor casework may only take a month or two and can only record an hourly rate for the financial counselling work, Salina will only be able to claim around \$600 through the WDP scheme. Therefore, another professional will need to monitor and report on other WDP activities, as Salina accesses a range of services located at the Community Health Centre, including physiotherapy, dental and attends the local neighbourhood house for life skills and pottery courses.

There is no resourcing for the Community Health Centre to monitor and report on these activities, so either the financial counsellor keeps the file open to monitor and report on the WDP activities or the WDP ends with only a couple of months reporting done. Without the financial counsellor being able to engage with Salina to assess the circumstances which led to the range of infringements, have the knowledge and skill to be able to assess the impact and benefits of each option, communicate this to Salina and then implement the plan, it is likely Salina would have no plan to deal with her infringements, despite being an ideal candidate for a range of fines reform's social justice initiatives.

#### ***Work off rates and level of fines-debt***

In our experience, the low hourly rate activities make the effective working off of fines debt (over \$1,500) unrealistic, so many agencies do not see the overall benefit of a WDP, including because:

- Hourly rates are more labour-intensive to capture;

- Agencies which can only provide low work off activities either are less inclined to become a sponsor or exclude people with infringements over around \$1,500.

### *Range of eligible activities*

IWG members also note that particular cohorts risk exclusion from the intended benefits of the current WDP scheme, including:

- Older Victorians and low income clients, who may not require counselling or training, but would benefit from activities that would increase social connectedness;
- People experiencing homelessness, who may be engaged with a support worker but not yet ready or able to access counselling and treatment.

In light of these current challenges, the IWG has provided a number of recommendations below, which focus on opportunities to maximise the WDP scheme's impact for all Victorians.

### **Recommendation 5:**

To increase availability of the WDP scheme for all Victorians, the IWG recommends:

- Resourcing current and future WDP sponsor organisations for intake, assessment and case management of the infringement options (including financial counselling support), and the reporting of WDP activities;
- Simplifying the WDP scheme's third party arrangements to capture more activities;
- Improving the transparency of the WDP scheme by providing a publicly available list of sponsor agencies and the activities offered by these sponsors;
- Clarifying sponsor agencies' record-keeping requirements for audit purposes, so these key stakeholders are aware of requirements and can better manage risk;
- Prioritising and investing in integrated practice models, which embed financial counsellors in the legal assistance sector. This would improve awareness, efficiency and effectiveness of the WDP scheme in our community.

### **Recommendation 6:**

To enhance functionality of the WDP scheme online tool, the IWG recommends, in consultation with users:

- Stopping excessive 'Push' emails from the WDP tool;
- Making the WDP online tool accessible to participants;
- Simplifying the online application, including tick boxes and automation;
- Allowing automatic variations of fines and activities;
- Developing more comprehensive reporting capability;
- Streamlining the approval process;
- Removing the need for an end date.

## Recommendation 7:

To enable Victorians to address their fines as efficiently and effectively as possible through the WDP scheme, the IWG recommends:

- Implementing a monthly WDP activity rate for counselling (including financial counselling) activities to simplify and increase equity;
- Backdating approval and work off credit for WDPs to the commencement of a participant's engagement in eligible activities with a sponsor organisation. Work off credit should also apply only to initial infringement amounts, with waiver of any remaining penalties and costs;
- Facilitating deregistration of tollway debts, which would send them back to the toll company to be with dealt with under their internal hardship policies;
- Expanding eligible activities to include case management and engagement with a social worker, capturing the intent of WDPs and making the scheme accessible to wider-cohorts of vulnerable Victorians;
- Amending existing WDP scheme policies to make the discretion of the Director of Fines Victoria under section 10F of the FRA more widely and proactively available.
- Expanding the WDP scheme to include court fines, including those that were incurred before the full commencement of the FRA from 31 December 2017;
- Allowing tailored infringements work off orders to maximise outcomes, so participants and sponsors can choose the order in which they work off the infringements. This should be complemented by portability of WDPs between sponsors without detriment to participants;
- Improving the integration of the WDP scheme with the other 'social justice initiatives' of fines reform, such as the Family Violence Scheme, minimising the risks of enforcement action and loss of work off credit. This could be facilitated by establishing a regular engagement process for stakeholders and Fines Victoria to enhance skills, improve transparency and provide feedback opportunities.

## 2.4 Concession-based fines

### *Value of concession-based fines for people in financial hardship*

From IWG members' casework and client insights, and building on our previous position paper, 'A Simple, fair and effective infringements system for all Victorians' at **Annexure 5**, we strongly support better fines options for Victorians experiencing financial hardship. In particular, the IWG considers that

introducing a reduced penalty amount for people in financial hardship at a rate which is fair, proportional and of equal impact would improve both the effectiveness and credibility of the fines system.<sup>19</sup>

The Sentencing Advisory Council has also compared the infringement penalty system with the approach taken by a court, which would consider a person's circumstances when determining the amount of a court fine and how it is to be paid.<sup>20</sup> The Sentencing Advisory Council stated it was likely the establishment of a concessional penalty rate of infringement penalty could shift a significant number of people from cohorts of 'can't pay' to 'will pay', thus avoiding the cost of enforcement, the impact on the court and support services.<sup>21</sup> Previous research has also suggested that:

*"[f]ixed-rate infringement penalties disproportionately impact on those who are financially disadvantaged. Therefore, provisions should be implemented that allow those in financial hardship to apply for a standard concession rate. Those who have a concession card and receive their fine in person should be immediately issued with a concession fine amount."*<sup>22</sup>

In the IWG's experience, unpaid fines further compound existing disadvantage. The accumulation of fines-related debt makes it harder for people to escape poverty, and can also lead to consequences such as licence or registration suspension, which can significantly impact on Victorians who need to drive for reasons including work, study, health or caring for dependents.

The IWG notes that a concession-based fines scheme has recently been passed by the Parliament of New South Wales. This scheme allows for an individual in receipt of certain government benefits (including Newstart) or in possession of a Health Care Card to apply to have the amount of the infringement reduced by 50%.<sup>23</sup>

The introduction of a concession-based fines scheme in Victoria would significantly benefit the infringements system, and given the higher volume of fines debt due to the state's tolling network, the IWG suggests that Victorians reliant on a Centrelink Low Income Health Care Card should face a rate of 20% of the infringement penalty.

### **Equal impact and effectiveness of the infringements system**

IWG member the FCRC surveyed a number of Victorians in receipt of Newstart Allowance as their only income and found 84% had accessed emergency relief, 69% regularly skipped meals, 91% were in housing stress and 63% spent more than 50% of their income on housing costs.<sup>24</sup> In this context, it is difficult to see how timely payment of a high infringement penalty before extra costs are added is possible without risking homelessness and other serious detriment to health and wellbeing.

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<sup>19</sup> SAC Report 242.

<sup>20</sup> SAC Report 242. See also s 52 of the *Sentencing Act 1991* (Vic).

<sup>21</sup> SAC Report 244.

<sup>22</sup> Bernadette Saunders, 'An Examination of the Impact of Unpaid Infringement Notices on Disadvantaged Groups and the Criminal Justice System –Towards a Best Practice Model' (2013) Monash University 12.

<sup>23</sup> *Fines Amendment Bill 2019* (NSW) (Schedule of Legislative Council Amendments) No 1. Available at <https://www.parliament.nsw.gov.au/bill/files/3655/LC%20Schedule%20of%20amendments%20-%20Fines%20Amdt%20Bill%202019.pdf>

<sup>24</sup> Financial & Consumer Rights Council Inc. 'The Experience of (Not) Living on Newstart' (2019) 2. Available at [http://www.fcrc.org.au/Content/PDF\\_downloads/FCRC%20The%20Experience%20of%20\(Not\)%20Living%20on%20Newstart%20Sept%202019.pdf](http://www.fcrc.org.au/Content/PDF_downloads/FCRC%20The%20Experience%20of%20(Not)%20Living%20on%20Newstart%20Sept%202019.pdf)



The concept of equal impact can be highlighted by comparing the Centrelink fortnightly rate of Newstart Allowance of \$559, which is only 17% of the average fortnightly earnings of a full-time worker of \$3,216.<sup>25</sup> The rates of Newstart Allowance are currently:

If you're	Your maximum fortnightly payment is
Single, no children	\$559.00
Single, with a dependent child or children	\$604.70
Single, aged 60 or over, after 9 continuous months on payment	\$604.70
Partnered	\$504.70 each

In the IWG's view, the introduction of concession-based infringements is a valuable opportunity for Victorians experiencing financial hardship to get fairer outcomes and exit the system earlier without crippling fines-debt.

### **Recommendation 8:**

To reduce the disproportionate impact of infringements on people experiencing financial hardship, the IWG recommends:

- Introducing concession-based infringements for financially disadvantaged Victorians who hold a Centrelink Low Income Health Card, which would be a rate of 20% of the infringement penalty;
- Waiving costs and penalties when a person who is eligible for the proposed concessional-based rate of infringements pays in full, or establishes and completes a payment arrangement, for the infringement penalty amount.

## **2.5 Seven-day notices**

### ***Reduced availability of post-enforcement options creates further risk***

From the IWG's perspective, one of the most detrimental FRA changes for our members' clients has involved the new functioning of seven-day notices. Before the full commencement of the FRA from 31

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<sup>25</sup> Australian Bureau of Statistics, 'Growth in average wage increases' (15 August 2019). Available at <https://www.abs.gov.au/ausstats/abs%40.nsf/mediareleasesbyCatalogue/030E8BEF4B0B915ECA2582EA00193B04?OpenDocument>

December 2017, a person's options to deal with their infringements remained open to them even after the expiry of the seven-day notice period.

This meant that IWG members' clients with infringements could continue to apply for revocation, payment orders and WDPs even after the expiry of the seven-day notice. In practice, this saw Victorians with complex and multiple vulnerabilities being able to meaningfully address their fines even years after the seven-day notice was served, as it would often take a period of time for Sheriff's Officers to attend on a person to execute an infringement warrant.

Further, Sheriff's Officers were given greater flexibility under the previous scheme to delay the execution of warrants to allow clients the ability to apply for revocation, enter into payment arrangements or commence a WDP (or attend an appointment with IWG legal assistance or financial counselling sector members to get help with one of these options). With the introduction of the FRA, however, the majority of options to deal with infringements, including enforcement review, payment arrangements, the FVS and WDPs, are all extinguished with the expiry of the seven-day notice.<sup>26</sup> This major change requires clearer, practical and more direct information, particularly so people experiencing vulnerable circumstances have an opportunity to understand their options and the importance of taking action quickly to address their fines.

Based on the frontline work of IWG members with people experiencing disadvantage, the current seven-day notice's language and content makes it far less accessible than a resource developed by the community-based, legal assistance and financial counselling sectors that know how to communicate with our potential clients. The IWG has prepared a pocket resource (see **Annexure 6**), which we submit should be provided by Sheriff's Officers with all seven-day notices. The pocket resource provides the following benefits, and should be implemented as a priority alongside related training and support for Sheriff's Officers:

- It is in plain English and is easier to understand for people with limited English reading proficiency;
- It sets out more clearly the risks of doing nothing and encourages readers, in simple language, to act quickly;
- It very clearly states where to go for free legal information and advice;
- It alerts readers to personal circumstances which will determine which options are available to them, which is more meaningful and likely to connect with readers.

### **Improving the operation of seven-day notices**

The extinguishment of the majority of options to deal with fines at the expiry of the seven-day notice unfortunately appears to be limiting the rights and options of vulnerable Victorians to meaningfully deal with their fines. The IWG understands this was an unintended consequence of fines reform, as the previous seven-day notice scheme was not clearly understood. The IWG notes that the FRA second reading speech does not provide any rationale for the change to the seven-day notice's operation, which further suggests the impact of this change was unintended.<sup>27</sup>

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<sup>26</sup> See particularly ss 10B(2)(a), 100(a), 32(4)(a) and 42(3)(b)(i) of the *Fines Reform Act 2014* (Vic).

<sup>27</sup> Parliament of Victoria, Hansard, Second Reading Speech, *Fines Reform Bill 2014* (Vic) Hon C.K Rich-Phillips (12 June 2014) accessed at [http://hansard.parliament.vic.gov.au/?IW\\_DATABASE=\\*&IW\\_FIELD\\_TEXT=HOUSENAME%20CONTAINS%20\(COUNCIL\)%20AND%20SPEECHID%20CONTAINS%20\(3065\)%20AND%20SITTINGDATE%20CONTAINS%20\(12%20June%202014\)&Title=FINES%20REFORM%20BILL%202014&IW\\_SORT=n:OrderId&LDMS=Y](http://hansard.parliament.vic.gov.au/?IW_DATABASE=*&IW_FIELD_TEXT=HOUSENAME%20CONTAINS%20(COUNCIL)%20AND%20SPEECHID%20CONTAINS%20(3065)%20AND%20SITTINGDATE%20CONTAINS%20(12%20June%202014)&Title=FINES%20REFORM%20BILL%202014&IW_SORT=n:OrderId&LDMS=Y)

Depending on how quickly a Sheriff engages with the fines-recipient, the new system could leave Victorians with as little as 77 days from the issuing of their infringement to take action. This is an unreasonably short amount of time that locks vulnerable people out of the options designed to exit them from the fines system.

In the IWG's experience, the vast majority of our highly vulnerable and transient clients have no awareness of their infringements until a Sheriff's Officer has personally engaged with them. In the new system, these Victorians with the most complex needs only have seven days to take action. This is especially problematic given that many of these individuals will seek to make an appointment with IWG legal assistance and financial counselling sector members to obtain advice and information about dealing with their infringements, but will be unable to do this due to limited availability and resourcing.

This is not only an issue of fairness but also a matter of efficiency for the fines system. In the IWG's view, preventing disadvantaged Victorians from taking action to address their fines, including measures that would divert them out of system, places greater demand on Sheriff's Officers. It also appears to further burden the already stretched justice system, particularly by increasing the prevalence of Magistrates' Court hearings under s 165 of the FRA after the execution of warrants. The IWG does not consider that a seven-day notice which, once expired, extinguishes options for a person to appropriately address their fines, achieves any public policy objectives of rehabilitation or deterrence.

In order to address this issue, the IWG proposes legislative reform to extend the seven-day notice period to 28 days, so that marginalised community members can have certainty and a more reasonable time period to access meaningful options for their fines. If this extended time period is not possible, the IWG strongly encourages legislative reform to revert to the pre-FRA system, so that access to the different options to address fines is only extinguished after an enforcement warrant has been executed. The IWG suggests that this change to the FRA could be enacted in the same amending act as the change that has been considered to make court fines eligible for work off through a WDP.

### **Recommendation 9:**

To increase vulnerable Victorians' access to appropriate, meaningful options to address their fines, and to reduce their disproportionate enforcement outcomes, the IWG recommends:

- Requiring a proposed 'pocket resource' to be provided by Sheriff's Officers when issuing all seven-day notices. This could offer a clear, practical and direct way for people with complex needs to understand their options and to know the importance of taking prompt action to address their fines;
- Implementing legislative change to extend the seven-day notice period to 28 days, or in the alternative if this is not possible, reverting to the pre-FRA system, so that access to the different options to address fines is only extinguished after an enforcement warrant has been executed.

## 2.6 Enforcement procedures relating to warrants

### *Importance of having fines-related warrants appropriately executed*

Since the full commencement of the FRA, IWG members' clients have regularly had challenges in dealing with unexecuted arrest warrants involving both Magistrates' Court hearings under s 165 of the FRA or defaults of court fines. Many of them have experienced extensive periods of crisis, but through engagement with specialist, community-based services, they are now better placed to proactively deal with their warrants and have them executed in a supported, efficient and orderly manner. However, this has not generally been possible due to fines system deficiencies.

When IWG members have sought to help clients have their warrants executed, they have been told that the warrants are 'permanently on hold' and there is no way to manually execute the warrants. However, pre-fines reform, clients and their support services were able to deal with arrest warrants administratively by arranging specific times to attend a Sheriff's office, so that they could have their enforcement warrants executed and be arrested and bailed. These clients also often have infringements they would like to resolve through enforcement review special circumstances.

The ever-present fear of being pulled over and arrested causes IWG members' clients genuine distress and anxiety, which also often acts as a barrier to health, financial, social and housing stability, as seen through Kasey's story below.

### ***Barriers to warrant execution causes significant deterioration of family violence victim-survivor's mental health issues and long-term safety***

Kasey has experienced extensive family violence, is diagnosed with post-traumatic stress disorder, grief disorder, depression and anxiety and is in remission from substance dependence. She has an outstanding warrant for failing to appear at a Magistrates' Court hearing involving s 165 of the FRA. A significant number of Kasey's underlying infringements were incurred in the context of family violence.

Kasey has taken steps to get her life back on track, aiming to recover from the family violence and reunite with her young son. She has engaged with family violence support and counselling services, AOD counselling and been clean for 18 months. Having the unexecuted arrest warrant hanging over her head was causing Kasey significant anxiety to the extent that even discussing it made her distressed. To reduce this crippling anxiety, Kasey wanted to have the warrant executed proactively, and remove what she identified as the final barrier to long-term safety and stability. Over three months, an IWG legal assistance sector member contacted Fines Victoria, Victoria Police and the Sheriff's office on multiple occasions trying to locate the warrant to organize to have it executed. While one Sheriff's Officer the lawyers spoke to at this level was able to locate the warrant in the system, he was adamant that he was unable to action it as there was a hold on executing warrants.

The lawyers eventually escalated the matter to the Assistant Director at Fines Victoria, who referred them to an Assistant Director in the Sheriff's Office. It took another four months to receive a response. Initially, the lawyers were advised the warrant was not in the system and must have been lost, and they were later advised the client had two debtor IDs, with slightly different addresses. At this time, a second warrant was also discovered. With the help of the Assistant Director from the Sheriff's Office, the lawyers were able to arrange to have the warrants executed in November 2019 and received a court date for late December 2019. On consideration of this matter, the Magistrate discharged the fines in full, which Kasey told her lawyers was "the best Christmas present", as she was able to start 2020 with a clean slate.

## ***Supporting Sheriff's Officers to exercise best-practice discretion***

IWG members also consistently help clients who have been negatively affected by a failure of a Sheriff's Officer to exercise discretion regarding the execution of enforcement of warrants. As seen through Purnima's story below, this has entrenched vulnerable and low income Victorians in the fines system and caused them further hardship.

### ***Seven-day notice expiry and refusal of Sheriff's Officer to exercise discretion results in culturally diverse woman and her young family becoming homeless***

Purnima met with an IWG legal assistance sector member seeking help with her infringements. She had accumulated tens of thousands of dollars in infringements over a number of years. After a seven-day notice was served and expired, the Sheriff seized her car. Purnima relied on her car to drive her children to school and for her job as a courier. Although Purnima was working, she could only do this casually. Purnima's very low wage meant she received Centrelink Newstart payments to supplement her income. While she had the use of her car for work, she was only barely able to afford her rent. Often, she and her family went without food.

The lawyers engaged in significant negotiations with the Sheriff for the release of the vehicle, and formally requested that the Sheriff exercise their discretion under s 134(1)(a) of the FRA. The lawyers argued that the value of the car (approximately \$10,000) was significantly less than the total costs of the enforcement warrants (approximately \$30,000), and given the increased hardship Purnima was facing as a result of the seizure (i.e. inability to work or transport her children to school), the car should be released. In the lawyers' negotiations with the Sheriff, they indicated that following seizure and sale of the car, Purnima would then be arrested pursuant to s 164 of the FRA, as there would still be outstanding warrants. The lawyers urged the Sheriff to arrest Purnima as an alternative. In the lawyers' final attempt, they requested detailed reasons under s 8(4) of the *Administrative Law Act 1978* (Vic) and that the Sheriff make reference to the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The Sheriff refused to exercise their discretion and gave reasons that s 109(4) of the FRA prohibits them from arresting a person if they own property and that seizure of the property in contrast to arresting a person is less restrictive and impactful on their human rights.

The prolonged period with no access to a car resulted in Purnima losing her job, which soon resulted in her and her young family becoming homeless.

In the IWG's view, Sheriff's Officers should receive additional supports, including tailored training and clear, consistent and transparent guidelines, to exercise their available discretion under the FRA. This process would benefit from involving consultations with people who have lived experience of personal and financial hardship, along with the legal, financial counselling and community-support services that assist them. The IWG submits that this would better ensure that unnecessarily strict applications of laws, policies and practices are avoided when deciding whether to execute warrants faced by people experiencing disadvantage.

As discussed above in the context of the IWG's proposed pocket resource with seven-day notices, Sheriff's Officers should also be resourced to encourage marginalised community members to access free legal help when addressing their fines.

## **Recommendation 10:**

To reduce the burden faced by vulnerable community members who are unable to appropriately address their fines-related warrants, and the barriers this presents to housing, health, personal and financial stability, the IWG recommends:

- Reintroducing the ability for Victorians to proactively have their warrants executed in a supported, efficient and orderly manner, including through the administrative execution of arrest and enforcement warrants at Sheriff's offices;
- Supporting Sheriff's Officers to appropriately exercise discretion regarding the execution of warrants involving people with disadvantaged circumstances, including through tailored training and the development of clear, consistent and transparent guidelines. It would be beneficial for this process to involve consultations with people who have lived experience of personal and financial hardship, along with the legal, financial counselling and community-support services that assist them.

## Annexure 1 – List of IWG member organisations

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

**Annexure 2 – IWG Discussion Paper: Consultation on Proposed New Scheme to Manage Victims of Family Violence within the Infringements System (February 2017)**



**Annexure 3 – Letter from IWG to Chief Magistrate and Deputy Chief Magistrate of the Magistrates’ Court of Victoria about the Special Circumstances List (March 2019)**

**Annexure 4 – Letter from IWG to Department of Justice and Community Safety about Work and Development Permit scheme (September 2019)**

**Annexure 5 – IWG position paper: A simple, fair and effective infringements system for all Victorians (July 2013)**

## Annexure 6 – Proposed Seven-day Notice Pocket Resource (January 2020)

### Can't pay your fines?

#### You can still get help, but you need to act quickly

A 7-day notice means you only have **seven days to take action**. After your 7-day notice runs out the Sheriff can:

- take and sell your property, including your car or your house;
- put you on a community work order; or
- arrest you and you will have to go to court

#### What can I do?

Get free legal information **right now** to stop the Sheriff taking further action.

- Victoria Legal Aid on 1300 792 387
- Victorian Aboriginal Legal Service on 1800 064 865

All information and advice is free and confidential.

#### What do I need to tell the lawyer?

To find out all the options for you, make sure you tell the lawyer if you are experiencing or have previously experienced:

- an addiction to drugs or alcohol;
- a mental illness or intellectual disability;
- homelessness or housing instability;
- family violence;
- financial hardship; or
- other difficulties, such as loss of employment or being a single parent.

### It's not going to go away, deal with it straight away!