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12 February 2009

Mr Greg Andrews
Assistant Ombudsman
NSW Ombudsman
Level 24, 580 George Street
SYDNEY NSW 2000

Dear Mr Andrews,

Re: Ombudsman Review of the Impact of Criminal Infringement Notices on Aboriginal and Torres Strait Islander Communities

Thank you seeking the Law Society's view on how the Criminal Infringement Notices (CINs) scheme impacts on Aboriginal people and communities.

The Law Society's Criminal Law Committee (Committee) has reviewed the Issues Paper and has commented on a number of issues in the attached submission.

Should any further information be required in regard to this submission, please contact Rachel Geare, Legal Officer, Criminal Law Committee, on 9926 0310.

Yours sincerely,

Joe Catanzariti
President

Introduction

The Introduction to the Issues Paper states that "*CINs allow police to deal with minor criminal offending 'on-the-spot' without the need of having to arrest a person and take them into custody for processing and charging*". While this is true, it is misleading, because police have the option of issuing a Field Court Attendance Notice or Summons for a minor offence. If one of the arguments in favour of CINs is that they save on arrest and police processing time, it is a spurious one.

The saving of court time is a more persuasive argument. However, the Committee queries how much court time will be saved if people are charged with secondary offences (e.g. driving while suspended) when the unpaid CIN goes to the State Debt Recovery Office (SDRO).

Ombudsman Reviews of the CINs Scheme

The initial one-year trial was conducted in twelve Local Area Commands (LACs) that were coastal and in many cases suburbs of Sydney (with the exception of Albury). The initial Ombudsman's review conducted in 2002 therefore did not include areas of high Aboriginal populations in LACs such as Darling River, Castlereagh, Chifley, Coffs/Clarence, Mid North Coast, Mt. Druitt, Orana, Richmond, Shoalhaven and St Marys.

1. Impacts of the CINs scheme

1.6 What is your view of driver licence cancellation and/or vehicle registration suspension as a result of accumulated fine debt not related to driving-related offences such as CINs?

The most significant problem with the fine enforcement system is the link between non-payment of fines and suspension/refusal of driver licences. Where the unpaid fines are traffic fines, this makes some sense and is perhaps justifiable; however, to impose licence sanctions for non-traffic fines is illogical and causes a great amount of injustice.

1.7 What impact does loss of driver's licence and/or vehicle registration have on local Aboriginal families and communities?

Often a person's licence is cancelled for fine default. The licence expires and is not renewed and the person is subsequently charged for driving whilst unlicensed. A person convicted for a second offence of driving without a licence is automatically disqualified for a three year mandatory period. Due to the long period of disqualification, this often snowballs into a driving whilst disqualified conviction and can result in a prison term.

Aboriginal people in remote areas are extremely disadvantaged by the negative impact of unpaid fines and their ability to get a licence. For reasons such as remoteness, lack of transport, hot climate etc, Aboriginal people will often drive their cars even when they do not have a licence.

Public transport is almost non-existent in remote areas and taxis are only available in the large towns. Activities such as shopping, going to the doctors, driving kids to school etc are functions that Aboriginal families participate in as we all do, but the difference is that in these areas, many will drive unlicensed and risk a fine and disqualification and invariably prison.

1.12 Do you think there are adequate opportunities for Aboriginal people to enrol in driver training programs in rural communities?

Poor access to driver training programs and low rates of literacy in the community impacts on the ability for many Aboriginal people to get their licence.

Whilst the Committee applauds the recommendation that the SDRO will lift the RTA sanctions if the recipient provides a letter from an Aboriginal Liaison officer certifying that the recipient is living in a rural Aboriginal community, it is difficult for clients who live in relatively small communities such as Brewarrina to enrol in driver training programs.

2. Factors to be considered when issuing CINs to Aboriginal people

2.1 What is your view about the appropriateness of the advice given to police about exercising their discretion to issue a CIN?

The selection process by which a CIN as distinct from a CAN is issued appears to be purely arbitrary. This is in contrast to, for instance, a speeding offence where the procedure to be followed by police is the issue of a Traffic Infringement Notice (which has similar features to a CIN). If a police officer has a particular bias or view about certain types of offences or particular individuals or groups, this may affect his or her decision whether to issue someone with a CIN or a CAN.

The impact of this decision is significant because of the disparity between the available penalties under each system. For example, a simple larceny of property to the value of $300 in value under a CIN is a fine of $300, whereas under a CAN a court can impose a maximum fine of $2,200 (20 penalty units) and/or 12 months imprisonment. The penalty for offensive behaviour under a CIN is a fine of $200 whereas under a CAN the maximum penalty is a fine of $660 (6 penalty units) or imprisonment for up to 3 months.

2.5 What is your view of the desirability of giving a person a CIN at a later time, by post, or back at the police station for incidents involving less than serious intoxication and/or continuation of the offending conduct?

Many Aboriginal people lead a transient lifestyle, migrating between different towns to stay or visit relatives. Committee Members have reported that their own case files already show that correspondence sent to the last stated address of clients is regularly returned, or the client informs the solicitor that they did not receive the letter as they were out of town. There is a real danger that such people would not receive the CIN through the post. The same comments apply in relation to the "reminder letter" sent out by the SDRO informing the offender that they have a further 28 days to pay the fine.

5. CINs issued to Aboriginal people for public order offences

5.1 What is your view of the level of use of CINs for the public order offences of offensive language and offensive behaviour in Aboriginal communities?

The use of CINs for offensive language and behaviour is of concern. The general use of CINs at twice the rate of non-Aboriginal persons suggests that either Police are appropriately diverting people but that this offence is more prevalent by Aboriginal persons whom encounter Police, or that net widening is occurring and that CINs are used instead of a warning.

When one considers that offensive language and behaviour constitutes so much of the

use of CINs against Aboriginal people, the question arises as to whether these sorts of matters might otherwise have proceeded by way of warning. The suspicion must be that net-widening is occurring.

Committee Members have observed that in relation to offensive language an additional problem exists in that much of the language on which charges or CINs are based is not offensive at law. Without any court scrutiny of the CIN this if of concern. This is already a problem on railways, where transit officers can issue a $400 fine for offensive language. Often these fines are issued for language that would not be regarded as offensive by most Magistrates, such as "look, I've got a fucking ticket".

Committee Members often experience the situation of a person charged with offensive behaviour who attends court and give instructions to plead guilty. Analysis of the facts by a solicitor may reveal that they do not support that particular charge and that the appropriate charge is one of offensive language. This can lead to an acquittal at hearing or police withdrawing the existing charge and laying the less serious charge of offensive language. Most people would be unable to appreciate the distinction between these two charges and it is therefore vital that they are able to obtain appropriate legal advice.

6. Fingerprinting CIN recipients

6.2 What is your view of the suggestion that police should be able to use any fingerprints taken when issuing CINs for the investigation of unrelated criminal matters such as cold cases?

The Committee is opposed to the suggestion that police should be able to use fingerprints taken while issuing CINs for the investigation of unrelated criminal matters such as cold cases. Fingerprints are to be destroyed when the CIN is paid, withdrawn or dismissed at court (s 238A(3) *Law Enforcement (Powers and Responsibilities) Act 2002).* The ability to use fingerprints for the purposes suggested would create a serious temptation for Police to simply issue a CIN to a person to obtain their fingerprints for cold case hits.

The CIN process is not a charge, or the payment of it an admission. As a matter of public policy CINs are an insufficient ground for the use of fingerprints for cold case hits. Otherwise the logical extension is that all citizens are subject to forensic testing at any time; the discretion of Police being so wide to issue CINs and to be open to abuse without scrutiny by the Courts. The decision to widen forensic testing has not been made against any other class of persons not charged with an offence. The CIN is an administrative exercise not a criminal conviction. If Police wish to charge a person that option is available to them.

8. Court election

8.1 What are your views of the possible reasons for the low rate of court elections for Aboriginal people?

Whilst the Notice states a person has "21 days" to send the Notice back or pay the fine, it assumes that the person has the capacity to understand the process. Someone suffering from poor literacy or an intellectual disability may not be able to comprehend the process and simply do nothing. Alternatively, the person may appreciate that he/she should seek legal advice but is not able to access it.

In some remote parts of NSW Aboriginal people do not have ready access to a solicitor. In some remote locations there are no solicitors in the local or nearest township and the

Local Court may only sit once a month (or less). Typically a person in this situation with a CAN will seek legal advice from the solicitor (ALS or Legal Aid), on the day that they are due to appear in court. Occasionally, a person with a CAN will go to the court even if their matter is yet to come up so that they can talk to a solicitor and get advice. When the Magistrate is not sitting at the remote location the court is shut and not staffed. An example of this is Boggabilla in north west NSW which is one and a half hours drive from Moree. A large number of Aboriginal people live on the Mission at Toomelah (15 minutes drive further away). There is no public transport into Moree. The people generally do not have a driver's licence (or a car) and many do not have a phone. If such a person receives a CIN, for instance a few days after the court has sat, the 21 days notice provision given under the CIN will have expired before the court next comes back to town and the person has had the opportunity to see a solicitor at court. By this time it is too late for the person to elect.

There is no provision to apply for an extension of the 21 day period to elect, or to seek a review at a later time. In the case of a person who does not or cannot obtain legal advice within the 21 day period, he or she is estopped from defending the charge before the court.

Contrast this situation with an offender who receives a CAN and does not attend court on the first return date, for whatever reason. Assuming the Magistrate proceeds pursuant to s 196 of the *Criminal Procedure Act 1986*, the Magistrate then either imposes a penalty or issues a warrant for the apprehension of the offender. Under s 4 of the *Crimes (Appeal and Review) Ac t2001*, a person who has been convicted in his/her absence has two years in which to bring an application for the annulment of that conviction or sentence. The circumstances under which a court may consider granting such an application are laid down in s 8 of that Act and are quite broad. Indeed, it can extend to a situation where an offender makes a mistake as to the date they thought they had to go to court (*Rukavina v DPP* [2008] NSWDC 214). Furthermore, should a Magistrate refuse to grant the annulment application, the offender can appeal this decision to the District Court.

9. Using CIN histories in later court proceedings

9.1 What is your view of the police practice of providing a person's CIN History in court proceedings?

The Committee is strongly opposed to the court being provided with a CIN history of a person who appears in court for sentence on a subsequent charge. Issuing a CIN is an administrative exercise and not a criminal proceeding (unless a court election has occurred and a subsequent conviction flows).

The production of an offender's criminal history at the time of sentence is done to assist the court in determining an appropriate penalty. Indeed, it is one of the factors a Magistrate or Judge is required to consider under s 21A of the *Crimes (Sentencing Procedure) Act 1999*. In other words it is a factor of influence. The Ombudsman's review states that payment of a CIN is not an admission of liability or guilt. Without an admission of guilt, it can be of no relevance to the court. Production of the CIN History would be prejudicial to the offender as to his/her character.

The production of the CIN History to the court can be clearly distinguished from the production of a court alternative history which is frequently produced in the case of juvenile offenders. The distinction being that in order for a juvenile to be dealt with by a caution of conference, there has to be an admission of guilt.

11. Access to information about the CINs scheme and fines system

The education of Aboriginal persons and of advocates regarding options for payment and alternatives should be the subject of focused policy and education.

12. Flexible payment options

12.1 What are your views on the low level of payment of CINs by Aboriginal people at the penalty notice stage (that is before proceeding to enforcement)?

The statistics show that only 58% of CINs are paid, and only 47% are paid before reaching the SDRO. Only 7% of Aboriginal recipients paid the CIN before it went to the SDRO which is a major concern.

It appears from the above analysis that when Aboriginal people received a CIN they ignored the notice. The Committee has received information from a number of ALS solicitors throughout northern NSW that in most offices no one has come to them for advice after having received a CIN.

In the Committee's view there are two ways that non-payment could be dealt with:

1. By referring it to the SDRO for enforcement (as is currently the case); or

2. By issuing a CAN (similar to what happens when a juvenile fails to turn up for a police caution). This would be result in a court-election by default, and would recognise that many recipients of CINs (Aboriginal or otherwise) do not court-elect for various reasons including homelessness, disability, disorganisation, lack of literacy, lack of legal advice, lack of understanding that they even have this option.

12.2 What are your views about providing people with limited fixed incomes additional incentives to pay CINs?

The Committee supports the suggestion of a discount for persons on limited fixed incomes to provide more of an incentive to pay the fine.

13. Alternatives to payment of accumulated fine debt

13.2 What are your views about on the new Work and Development Orders? Are there any limitations to implementing these in particular Aboriginal communities or areas in NSW?

The Committee supports measures which begin to address the negative impact of the fines system on vulnerable people in the community.

The requirement that a fine defaulter needs to find an "approved person" (e.g. a medical practitioner or psychologist) to support the application for a work and development order and to supervise the order if granted is problematic. Undertaking activities under a Work and Development Order such as completing a drug and alcohol program, attending financial counselling or undertaking some form of community service, will not be feasible in many of these areas because there is no work available either paid or voluntary and there are no drug and alcohol counsellors.

The effect is that extremely disadvantaged people will not be able to access Work and Development Orders.