



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Study Paper 16

The Infringement System

A Framework for Reform

August 2005
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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Preface

THIS STUDY PAPER has been prepared by the Law Commission as part of the review of the infringement offence system undertaken by the Ministry of Justice.

In the Law Commission's report *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (2004), we called attention to serious issues for the efficiency and credibility of the court system arising from the escalation in the number of infringements. We recommended further work, including the development of a statutory framework to guide the establishment and operation of infringement offences.

The Commission was invited by the Minister Responsible for the Law Commission to contribute to the Ministry of Justice review by providing advice on:

- the nature and purpose of infringement offences including:
 - the types of conduct they should sanction, and any limitations;
 - whether they should be treated as civil or criminal breaches, or should have a separate jurisdiction; and
 - the basis on which they should be distinguished from general offences;
- the desirability of subsuming minor offences into the infringement offence procedure; and
- the principles and process for determining penalty levels, including consideration of the relativities between court-imposed fines and infringement fees and the appropriateness and efficacy of fixed monetary penalties and other sanctions.

There are two distinct aspects of infringement regimes. The first, which is largely the subject of this paper, is concerned with the proper scope of such regimes and their penalty structures. The second, which is being dealt with as part of the Ministry's review, concerns how the regimes operate and the processes required for the collection of infringement fees imposed by prosecuting authorities. A coherent system for dealing efficiently and effectively with infringement offences requires the careful integration of both. That will be the subject of further work to be undertaken by the Ministry.

The preparation of this Study Paper has been coordinated with the progress of the Ministry's review. Initially, responses were sought to some of the specific issues arising from the terms of reference in the Discussion Paper *Review of the Infringement System: Options for Reform* issued by the Ministry of Justice and the Law Commission in November 2004. Thereafter Commission staff participated in a series of workshops conducted by the Ministry, and in addition we consulted staff from a number of prosecuting agencies. The material derived from the submissions, the workshops and the consultation has been of considerable assistance to the Commission's response to the reference.

The recommendations made in this paper have not been the subject of the discussion and review that would have been initiated by the Commission in the case of a final report. That is due in part to the timeframe in which the paper had to be prepared and in part because the proposals we make will be the subject of further consideration.

The Commission is indebted to the large number of government agencies, local authorities and other organisations whom we consulted, or who contributed to the review in response to the issues raised by the Commission. They are listed in appendix 2. The project was led by Neville Trendle and Warren Young. Susan Hall made a substantial contribution, assisted by Margaret Thompson and Emma Jeffs.

Any comments on this paper should be sent to the Law Commission, PO Box 2590, Wellington (com@lawcom.govt.nz). Comments will be forwarded to the Ministry of Justice to inform the Ministry's ongoing review of the infringements system.

Summary of recommendations

CHAPTER 1: INFRINGEMENT OFFENCES AND THEIR PLACE IN THE JUSTICE SYSTEM

R1 FOR MANY instances of minor offending, infringement notices provide a sufficient and proportionate response. The infringement system should therefore be retained and strengthened to enhance its fairness and effectiveness.

CHAPTER 2: WHAT IS AN INFRINGEMENT OFFENCE?

R2 An infringement offence should never result in imprisonment. Those infringement offences that are contrary to the Legislation Advisory Committee Guidelines restriction on imprisonable offences should be redrafted.

R3 Where a penalty is above a certain quantum and has the potential to cause undue hardship, the defendant should be able to seek review of the penalty through an administrative process or the court, and the penalty should be able to be reduced.

R4 All authorities receipting infringement payments should be required to offer time-to-pay arrangements.

R5 The infringement system should only be used when the penalty available under it would be an appropriate response to the range of seriousness and culpability of the conduct falling within the particular type of offence.

R6 Conviction should never follow the imposition of an infringement notice.

CHAPTER 3: A TIERED APPROACH TO MINOR OFFENDING

R7 Infringement offences should be dealt with in two tiers.

R8 Tier One infringements should have the following characteristics:

- They should have fixed penalties.
- They should deal with minor, high volume offences, where treating all defendants in the same way is appropriate.
- There should be an upper limit for fees set at a level:
 - consistent with the ability of people in the lowest socio-economic group to pay them; and

- such that a challenge to court would not be worth the expense and effort.
- There should be no ability for the enforcement officer, enforcement authority or court to vary the penalty.
- The defendant should always retain the right to request a court hearing to determine liability.
- There should be no ability for the enforcement authority to proceed with a prosecution in court as an alternative to issuing an infringement notice.

R9 Tier Two infringements should have the following characteristics:

- They should be offences with a penalty level above the Tier One maximum level but for which imprisonment is not a penalty.
- The infringement fee should be either a standard penalty or within a statutory range of penalties available to the prosecuting officer.
- All infringement fees should be able to be reduced where there are special mitigating circumstances or where they would cause undue hardship to the defendant.
- An administrative review process should exist to consider first level challenges and inquire into the circumstances of the offence and defendant.
- There should be no mandatory fees in Tier Two.
- The defendant should always retain the right to request a court hearing to determine liability or penalty.
- If there is challenge to liability the court should be able to sentence up to the maximum penalty, but if the challenge is to penalty alone the fee should only be able to be reduced.
- Enforcement authorities should retain the discretion to proceed summarily to enable them to deal with recidivist defendants or particularly grave instances of offending.

CHAPTER 4: SETTING INFRINGEMENT PENALTIES

R10 Tier One – fixed penalty

In setting the level of fee for Tier One penalties, the following criteria should be applied:

- proportionality between the level of harm and degree of culpability inherent in the conduct constituting the offence and the penalty; and
- relativity of the infringement fee with similar infringement offences, regimes and penalties generally; and
- the application of a one-third discount from the penalty that would

otherwise be imposed for such an offence following a defended hearing for a guilty plea.

R11 Tier Two – variable penalty

1 Standard penalty

The normal model for Tier Two infringement offences should be a standard penalty that can be varied downwards on administrative review. The following process for each offence type should be used for setting the standard Tier Two infringement fee:

- Identify the type of conduct for which an infringement notice should be issued.
- Identify a notional penalty that incorporates a one-third discount for a guilty plea, for the most serious type of offending behaviour (on the basis of the level of harm and degree of culpability) for which an infringement notice should be issued.
- Identify a notional penalty that incorporates a one-third discount for a guilty plea, for the least serious type of offending behaviour (on the basis of the level of harm and degree of culpability) that warrants an infringement notice being issued.
- The midpoint between the notional minimum and maximum penalties should be the standard penalty.

2 Statutory penalty range

The following process for setting the statutory range for Tier Two infringement fees should be used:

- Identify the type of conduct for which an infringement notice should be issued.
- Identify a notional penalty that incorporates a one-third discount for a guilty plea, for the most serious type of offending behaviour (on the basis of the level of harm and degree of culpability) for which an infringement notice should be issued.
- Identify a notional penalty that incorporates a one-third discount for a guilty plea, for the least serious type of offending behaviour (on the basis of the level of harm and degree of culpability) that warrants an infringement notice being issued.

R12 The Government should consider whether there would be benefits in introducing clearly defined penalty tiers for infringement offences.

CHAPTER 5: EXTENDING THE INFRINGEMENT SYSTEM

R13 If the key elements of our recommendations concerning the treatment of Tier Two infringement offences are adopted:

- infringement notices should be used for some offences currently dealt with by the criminal courts that do not lead to imprisonment, unless there is a policy reason why a conviction should follow for a particular offence, and
- the category of minor offences under section 20A(12) of the Summary Proceedings Act 1957 should be discontinued.

CHAPTER 6: INFRINGEMENTS AND THE EXERCISE OF DISCRETION

- R14** There should be a legislative requirement that infringement regimes have operational guidelines as to the exercise of discretion with respect to decisions relating to imposition and administrative review of infringement offences, including warnings, prosecution, withdrawal of notices, rectification and, in the case of Tier Two offences, reduction of penalty.
- R15** The operational guidelines should describe how the exercise of discretion is internally monitored and recorded.
- R16** The operational guidelines should be accessible on request to the prosecuting authority.
- R17** Prosecuting authorities should be required to publicly report on both the number of infringement offences dealt with by way of the issue of an infringement notice and the number resolved by withdrawal, rectification or reduction of penalty.

CHAPTER 7: CIVIL OR CRIMINAL BREACHES AND PROCESSES

- R18** The nature of the response to offending should be determined by reference to its effectiveness in achieving the desired purpose, rather than by reference to whether the response is civil, criminal or administrative. Where more than one response would be effective, the least intrusive one for the defendant should be selected.
- R19** Questions of liability for infringement offences should continue to be resolved through the criminal court process.

CHAPTER 8: CONCLUSIONS

- R20** Government should adopt our proposed framework, by way of either an umbrella statute or guiding principles, to guide future development of the infringement system, and should also put a robust process in place to ensure it is followed.

1

Infringement offences and their place in the justice system

- 1 **I**N *Delivering Justice for All*,¹ the Law Commission noted the increased use of alternative justice processes. In the summary criminal jurisdiction, these processes have evolved largely in response to the increasing demands placed on court resources.² While strategies have been adopted inside the courtroom to alleviate this pressure,³ the increasing use of criminal justice models to resolve cases outside the direct supervision of the court has been a significant development. Formal court procedures are sometimes out of proportion to the circumstances of offending.
- 2 The infringement offence system was developed to deal with types of offending considered not to require the full extent of due process. In less than 25 years, infringement offence regimes have become established as an integral part of the justice system. They now deal with more than 2.5 million breaches of the law each year, covering an increasingly wide range of offences. A very large number of cases are resolved between the defendant and the prosecuting authority by the payment of the prescribed infringement fee. The court process is only called for where the defendant denies the charge or wishes to make submissions as to penalty. The court may also become involved if the infringement fee is not paid within the prescribed timeframe and the matter is filed in court by the prosecuting authority for collection through the fines enforcement procedure.
- 3 Within that context, this paper examines the proper nature and scope of infringement offences and their appropriate penalty levels. It reviews the development of infringement regimes and the issues that have arisen from their rapid growth. Some of the assumptions underlying the infringements process are questioned and recommendations are made for a more coherent framework for the future. Recommendations are also made for a more structured approach to fixing penalty levels for infringement offences. In our view the infringement offence model, with the enhancements we propose, offers a valuable alternative to summary criminal prosecution for minor offending.

¹ New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 67.

² Royal Commission on the Courts *Report* (Wellington, 1978) paras 435–447. The impact of the growth in the summary criminal jurisdiction is summarised in the Department for Courts *Briefing Paper for the Incoming Government* (Wellington, 1996) 35.

³ Including the Courts' Modernisation Programme (see Department for Courts *Briefing to the Incoming Minister for Courts* (Wellington, 2002) 26–27; and Department for Courts *Annual Report for the Year Ended 30 June 2002* (2002) AJHR E60, 6) and the Criminal List Pilot – Wellington District Court.

DEALING WITH MINOR OFFENDING

- 4 While the traditional use of warnings and cautions has continued to be an important means of dealing with minor criminal offending, three other processes have evolved as alternatives to summary prosecution: diversion; the infringement offence system; and the minor offence procedure.
- 5 The evolution of diversion schemes is outside the scope of this paper, but they have made a significant impact as an alternative process. Police diversion and various community diversion schemes have, over the last two decades, resolved instances of less serious offending by mainly first defendants.⁴ Each year about 10 000 cases that were initially before the court have been dealt with through these schemes.⁵ There is no statutory basis for the process.⁶ By way of contrast, infringement offence and minor offence procedures are statutory processes that have been developed contemporaneously. Both were intended to deal with a large volume of cases, though they operate in different ways. A brief description of those procedures will highlight the similarities and the differences.

Infringement offences

- 6 The standard procedure for infringement offences is set out in section 21 of the Summary Proceedings Act 1957,⁷ though minor departures from this model can be found in some infringement regimes.⁸
- 7 With one exception,⁹ all infringement offences are summary criminal offences that are identified as such by the statute creating the offence or in regulations made under an Act. Unless an offence is specified as such, it cannot be the subject of the infringement process. For the purposes of this paper, each group of infringement offences recognised by statute is regarded as an infringement regime.
- 8 Where a person is alleged to have committed an infringement offence, an officer of the prosecuting authority may issue an infringement offence notice. That

⁴ See Warren Young and Neil Cameron *Adult Pre-trial Diversion in New Zealand* (Department of Justice, Wellington, 1991); Christine Laven *The Police Adult Diversion Scheme: Trends in the Use of Diversion – 1992–1994: Wellington Central and Manukau Districts and Beyond* (Crime Prevention Unit, Ministry of Justice, Wellington, 1996); Linda Tuhiwai Smith and Fiona Cram *An Evaluation of the Community Diversion Pilot Programme* (Auckland Uniservices Ltd, Auckland, 1998). Restorative justice procedures have also been formally recognised as an important out-of-court part of criminal proceedings – see Sentencing Act 2002, ss 7(1), 8(j) and 10(1).

⁵ See New Zealand Police *Annual Report* (2003–2004) AJHR G6, 50.

⁶ In our criminal pre-trial processes report, we recommended replacing police diversion with a statutorily recognised police caution scheme. The scheme would not require court oversight, subject to the consent of the defendant and certain other conditions. See New Zealand Law Commission *Criminal Pre-Trial Processes: Justice Through Efficiency* (NZLC R89, Wellington, 2005), rec 7.

⁷ The current infringement process was enacted by the Summary Proceedings Amendment Act 1987, s 5.

⁸ See, for example, the Land Transport Act 1998, ss 139–140 (“short form” infringement notices), and the Biosecurity Act 1993, s 159A (accelerated payment timeframes).

⁹ Overloading of a heavy motor vehicle offences can be dealt with only by way of infringement notice: Land Transport Act 1998, s 43.

notice specifies the offence that the defendant is alleged to have committed and the prescribed infringement fee. Under the standard process, if the defendant pays the fee within 28 days, liability is discharged and the matter is resolved. No conviction results.¹⁰

- 9 If the fee is not paid, a reminder notice is sent to the defendant by the prosecuting authority. Payment within the 28 days following service of the reminder notice also has the effect of resolving the matter.¹¹ If the infringement fee is not paid within that period, the reminder notice is filed in court and an order is thereupon deemed to have been made for the defendant to pay a fine of the same amount as the infringement fee and, in addition, court costs. The outstanding amount may then be collected through the fines enforcement process.¹²
- 10 The defendant is free to bring to the prosecuting agency's attention any matter relating to the issue of the infringement notice, and this sometimes results in the notice being withdrawn or the fee waived. The prosecuting authority may not, however, vary the amount of the prescribed infringement fee. If the defendant wishes to deny the offence or make submissions as to penalty, he or she requests a hearing and the matter is heard by the court.

Overseas jurisdictions

- 11 Like New Zealand, most similar jurisdictions have developed out-of-court processes along the lines of our infringement offence system, in order to deal specifically with the high volume of minor criminal offences that would otherwise clog the business of the summary criminal courts. These processes have differing names such as on-the-spot offences, fixed penalty offences, contraventions, or instant fine offences, but they have many features in common with our infringement offences: they carry a fixed penalty; payment of the penalty is sufficient to expiate the breach; no court appearance is necessary; and, if the penalty is paid, no conviction usually results.

Minor offences

- 12 Minor offences are summary offences that carry a maximum penalty of a \$500 fine (or \$2000 for offences against the Transport Act 1962 and the Land Transport Act 1998).¹³ Unless the leave of a registrar is obtained, every prosecution for an offence that falls within this definition must be commenced by way of a "notice of prosecution". The notice contains a summary of facts relating to the offence and other information relating to penalty. A defendant who denies the offence, or wishes to appear before the court, must advise the registrar within 28 days. Alternatively, the defendant may plead guilty in writing and make submissions as to penalty. Where there is a guilty plea or no response to the notice of prosecution, the case is dealt with by a judge, community magistrate, or justices of the peace outside the courtroom, on the summary of facts and any

¹⁰ Summary Proceedings Act 1957, s 78A(1).

¹¹ Alternatively, under some regimes, the defendant may apply for a time-to-pay arrangement.

¹² The fines enforcement process is contained in the Summary Proceedings Act 1957, part 3.

¹³ The procedure for minor offences is contained in the Summary Proceedings Act 1957, s 20A (inserted into the Act by the Summary Proceedings Amendment Act 1973, s 7(1)).

submissions. A conviction generally results and court costs are usually imposed. The minor offence procedure does not appear to have been replicated in overseas jurisdictions.

LEGISLATIVE DEVELOPMENT

Traffic offences

- 13 The first abbreviated summary procedure for dealing with minor offences was the “standard fine” introduced for certain traffic offences in 1955.¹⁴ Local magistrates were empowered to direct that certain specified traffic offences would be dealt with in their court by way of a prescribed fixed fine. Whenever a charge for one of those specified offences was laid in the court, the registrar advised the defendant the amount of the standard fine. The defendant could pay the amount of the standard fine without attending court, deny the offence, or request to be heard on the question of penalty. Failure to do any of these resulted in the usual summary hearing process being commenced. The standard fine procedure remained in force until 1976,¹⁵ when it was absorbed into the minor offence procedure.
- 14 The first infringement offence regime was enacted in 1968 in respect of overloading and parking breaches.¹⁶ Failure to pay the infringement fee by the due date was a separate offence.
- 15 By the late 1970s the vast majority of minor traffic and criminal proceedings were still dealt with by court processes. The volume of cases and the burden placed on staff processing the paperwork in the then magistrates’ courts were identified as critical issues by the Royal Commission on the Courts in its 1978 report.¹⁷ The Royal Commission concluded that a broad approach was required to find ways to deal with a variety of minor breaches of the law independently of the courts. It recommended that the standard fine procedure be enlarged to deal with a wider range of offences for which it was appropriate to impose a fixed penalty, and that the penalty should be fixed by the courts. The Royal Commission also recommended that the best features of the standard fine, infringement and minor offence notice procedures should be amalgamated, in order to ease the pressure on court facilities and staff.¹⁸
- 16 Contemporaneously, the extent of the effort devoted by traffic officers to administrative as opposed to enforcement procedures was being considered by the Parliamentary Road Safety Committee. The Committee concluded that the number of court appearances that traffic officers were required to make could be significantly reduced by enlarging the range of breaches of the traffic law

¹⁴ Justices of the Peace Amendment (No. 2) Act 1955, s 2. This provision was re-enacted as the original section 21 of the Summary Proceedings Act 1957, and the traffic offences to which it applied were prescribed by the Summary Proceedings Regulations 1958, reg 5 and sch 3.

¹⁵ Summary Proceedings Amendment Act 1976, s 4, which repealed section 21 of the Act when the standard fine procedure became redundant.

¹⁶ Transport Amendment Act 1968, ss 23 and 27. The infringements were described at the time as “non-criminal offences”.

¹⁷ Royal Commission on the Courts, above n 2, paras 435–437.

¹⁸ Royal Commission on the Courts, above n 2, paras 435–447.

which could be dealt with under the infringement fee process. The Committee also recommended that the notice of prosecution procedure should be extended to include other minor traffic offences.¹⁹

- 17 The recommendations of both the Royal Commission on the Courts and the Road Safety Committee were incorporated in amending legislation in 1980, which extended the range of traffic offences for which infringement notices could be issued. The legislation also instituted a separate procedure for minor traffic offences.²⁰
- 18 In 2001 the Legislation Advisory Committee published guidelines to be taken into account when creating new infringement regimes. The Guidelines have not, however, generally influenced the development of infringements since then.

Other offences

- 19 The infringement offence procedure for traffic offences was absorbed into a generic infringement procedure enacted in 1987.²¹ That legislation provided the standard framework for the infringement offence regimes that followed. Initially, the application of the procedure was confined to a wide range of traffic violations and its extension to other areas of minor offending took some time. Local authorities were empowered to adopt the infringement notice provisions with respect to litter control under the Litter Act 1979, and later, for breaches of navigation bylaws and dog control legislation.²² So far as minor summary criminal offences are concerned, the infringement offence procedure has been only modestly extended to liquor offences with respect to minors.²³
- 20 The most significant development has been the increasing use of infringement regimes in legislation regulating commercial and other activity. In this regard infringement offences have been included as part of measures directed to securing regulatory compliance. This has resulted in infringement regimes in such regulated areas as biosecurity,²⁴ civil aviation,²⁵ gambling,²⁶ occupational health and safety,²⁷ motor vehicle sales,²⁸ resource management,²⁹ and building³⁰ over the last ten years. A further infringement regime has been enacted this year and another is proposed in legislation currently before Parliament.³¹

¹⁹ Road Safety Committee “Interim Report” [1979] IX AJHR I 17A 4–9; “Report” [1979] IX AJHR I 17, 5–8.

²⁰ Transport Amendment Act 1980, ss 7 and 16.

²¹ Summary Proceedings Amendment Act 1987, Part I, which included the substitution of a new section 21 “summary procedure for infringement offences”.

²² Local Government Amendment Act 1999, s 8; Dog Control Act 1996, ss 65–66.

²³ Summary Offences Act 1981, s 38(3); Sale of Liquor Act 1989, ss 162–163.

²⁴ Biosecurity Act 1993.

²⁵ Civil Aviation Act 1990.

²⁶ Gambling Act 2003.

²⁷ Health and Safety in Employment Act 1992.

²⁸ Motor Vehicle Sales Act 2003.

²⁹ Resource Management Act 1991.

³⁰ Building Act 2004.

³¹ Railways Act 2005; Marine Reserves Bill 2002.

INFRINGEMENT OFFENCE SCHEMES: IMPACT AND ISSUES

Impact of infringement offences

- 21 Infringement offences were initially intended to encompass only a small group of offences, those: where there was little variation in levels of culpability from one defendant to another; where a fixed penalty was an appropriate sanction; and where there would not be a substantial difference in impact as between different defendants. Only truly minor offending was to be considered, and that was limited to a readily identifiable group of offences.³²
- 22 The growth in both the volume of infringement offence notices issued and the diversity of the offences for which they are now issued could not have been foreseen. The consequences of this growth can be seen in a number of ways:
- From the initial small group of Transport Act offences, infringement schemes now exist under 24 different statutes.³³
 - New Zealanders are the recipients of far more infringement notices than those arising from any other justice system process, with more than 1.5 million traffic infringement offence notices being issued by the Police in the 2003/04 fiscal year³⁴ and about 1.2 million notices being issued by local authorities for parking, stationary vehicle and other infringements.³⁵
 - It is estimated that approximately \$315 million in infringement fees were imposed in total in New Zealand by all prosecuting authorities last year.³⁶
 - Of the total number (volume) of infringements imposed during 2003/04, approximately 63 per cent were settled and 37 per cent were filed at court (see figure 1). However, as illustrated in figure 2, only an estimated 46 per cent of the total value of infringement fees were paid directly to prosecuting authorities without going to court.³⁷ Reading figures 1 and 2 together it is evident that higher value infringement notices tended to be filed in court for collection more often than lower value notices.
 - Figure 1 shows that of those filed at court, vehicle licensing and warrant of fitness breaches made up 27 per cent of the volume of infringement notices for fines enforcement during 2003/04; driver licence breaches made up 15 per cent, bylaw parking and other parking breaches made up 16 per cent, and speeding infringement notices filed a further 24 per cent. The remaining 18 per cent consisted of all other infringement offences, including other traffic breaches.

³² Royal Commission on the Courts, above n 2, and *The Motorist and Fixed Penalties*, First Report by the Stewart Committee on Alternatives to Prosecution (1980) Cmnd 8027.

³³ See appendix 1 to this paper for a list of current infringement offence schemes.

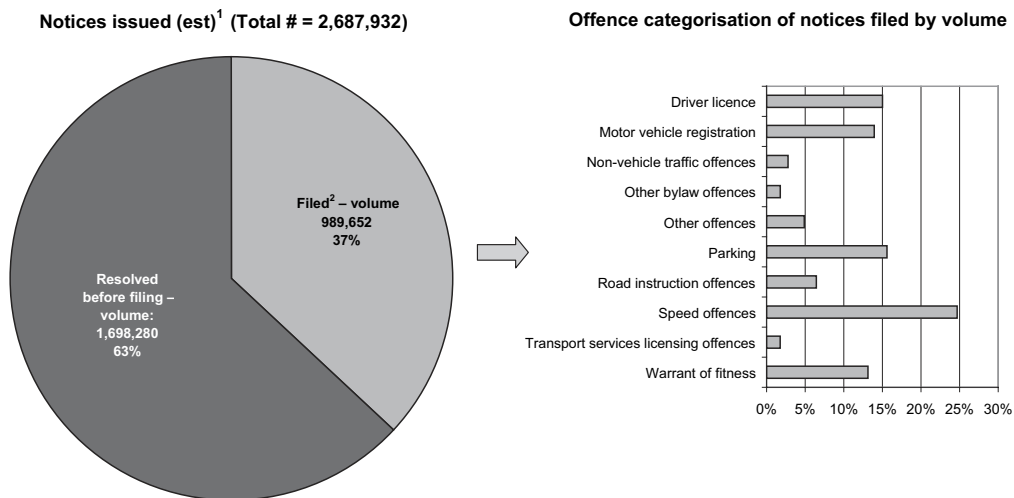
³⁴ New Zealand Police, above n 5, 58.

³⁵ Estimate made by the Ministry of Justice Collections Unit from data derived from a survey of prosecuting authorities, personal communication, June 2005.

³⁶ Ministry of Justice Collections Unit, above n 35. Note that this excludes a \$30 filing fee and a \$100 enforcement fee applied by the court.

³⁷ Ministry of Justice Collections Unit, above n 35.

FIGURE 1
VOLUME OF NOTICES ISSUED BY PROSECUTING AUTHORITIES VERSUS NUMBER FILED AT COURT FOR THE 2003/04 FINANCIAL YEAR

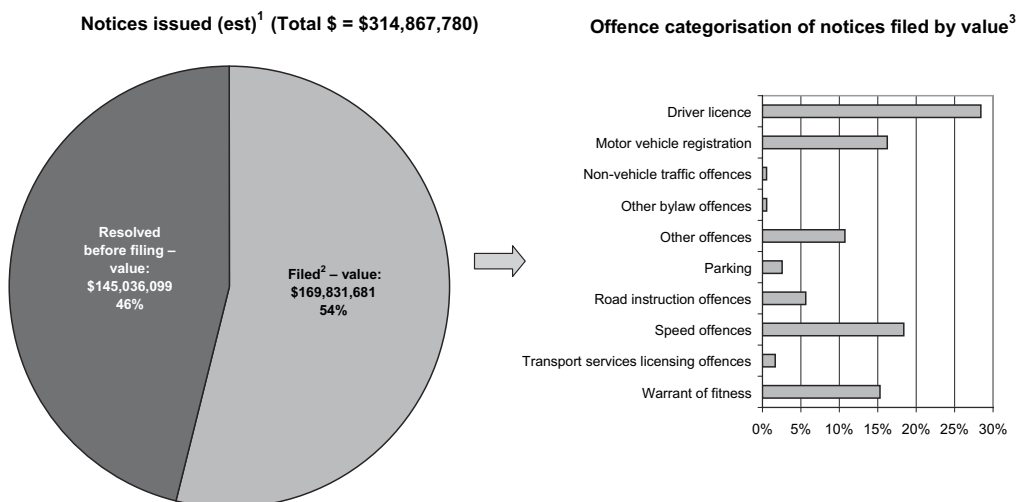


Source: Ministry of Justice, Collections Unit, unpublished, June 2005.

Notes: ¹ Estimated Volume (#) of total infringements issued.

² Excludes notices cancelled after filing with courts.

FIGURE 2
VALUE OF NOTICES ISSUED BY PROSECUTING AUTHORITIES VERSUS NUMBER FILED AT COURT FOR THE 2003/04 FINANCIAL YEAR



Source: Ministry of Justice, Collections Unit, unpublished, June 2005.

Notes: ¹ Estimated Value (\$) of total infringements issued.

² Excludes notices cancelled after filing with courts.

³ Filed Value (\$) excludes filing fee and any enforcement fees.

- Whilst no records are available of the number of infringement offence notices issued over the last decade, the growth in the number of notices filed in the District Court for fines enforcement action, which are set out in table 1 below, (from 247 930 in 1994 to 989 652 in 2004) is indicative of a very substantial increase in the number of infringements issued per annum.

TABLE 1
VOLUME OF CHARGES/OFFENCES FILED IN THE DISTRICT COURT FOR
THE FINANCIAL YEARS 1993/94–2003/04

	93/94	94/95	95/96	96/97	97/98	98/99	99/00	00/01	01/02	02/03	03/04
Criminal summary	290 208	295 987	296 028	291 682	296 335	300 427	293 369	303 693	300 374	315 461	248 964
Minor offence notices	16 427	15 695	14 774	6 456	4 799	5 036	3 853	3 069	2 323	2 290	1 706
Infringement offence notices	247 930	354 957	424 454	488 287	582 315	645 373	606 674	669 731	763 161	850 048	989 652

Source: Department for Courts Annual Reports 1994–2002, Ministry of Justice, District Courts Business Information Section, 2003–2004.

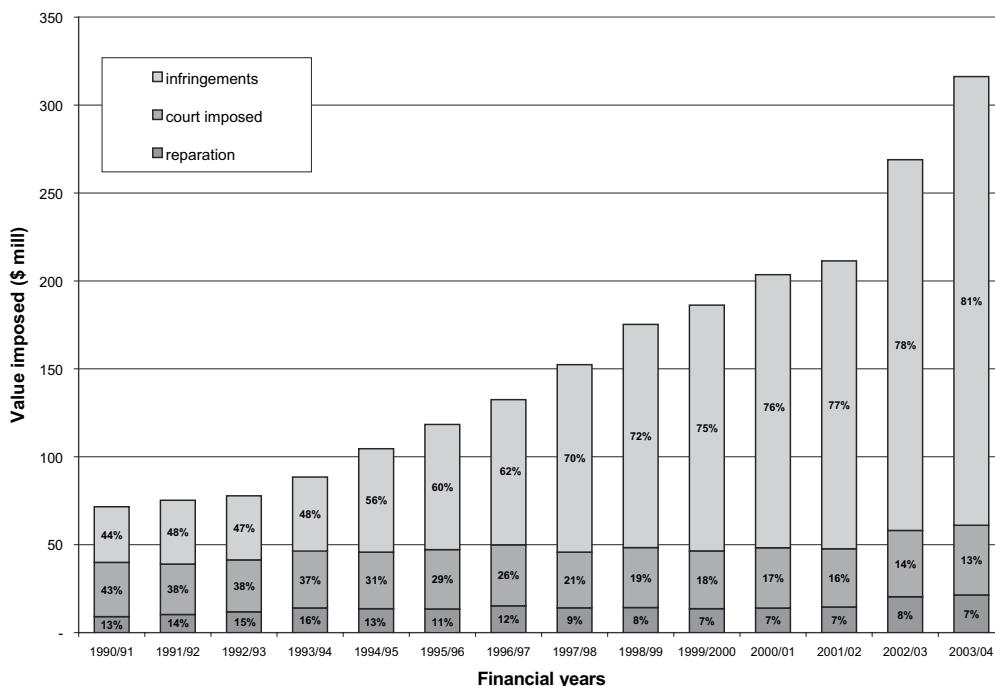
Note: In 2003/04, the District Court implemented a new system which shows significantly lower volume data than for earlier years and therefore the 2003/04 figure is not directly comparable with previous years.

- The total dollar value of court imposed fines and reparation has remained relatively stable over the last 13 years. In contrast, the total value of infringements has dramatically increased and accordingly, as a proportion of total monetary penalties, has risen steadily from 44 per cent of the overall total to 81 per cent, as illustrated in figure 3.
- Of the value of infringement notices filed in court for enforcement over the last 10 years (reflected in figure 4), the average value per infringement was highest for defendants aged between 15 and 18.

Implications of growth

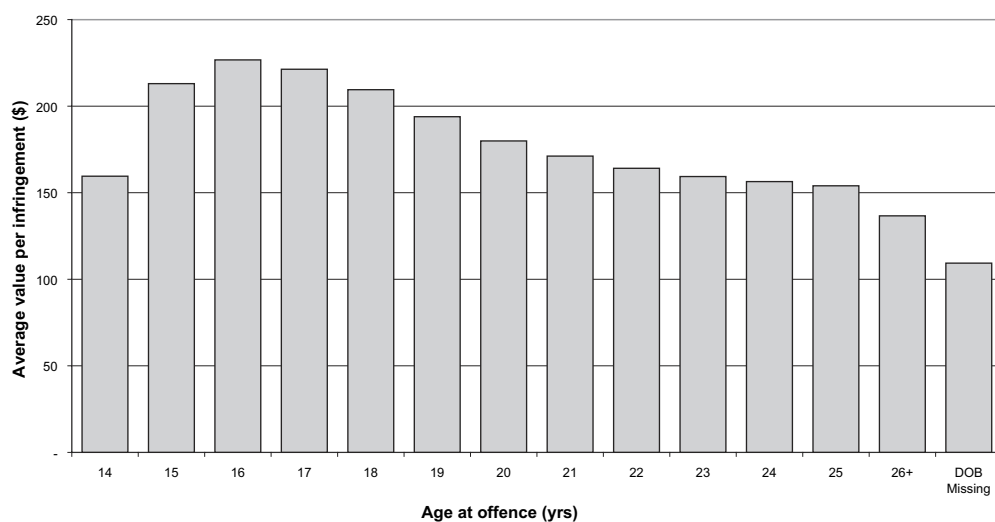
- 23 The growth in the number of infringement schemes, in the volume of infringement notices issued, and in the volume of notices filed in court for enforcement, has a number of implications. These include:
- A system designed to deal with reasonable volumes of infringement offence notices carrying a modest penalty is now required to deal with very high volumes of low penalty notices and also with a significant number of offences carrying substantial infringement fees.
 - Infringement offences range from breaches of parking bylaws to breaches of the Resource Management Act 1991 that if prosecuted summarily, carry a maximum penalty of two years' imprisonment or a \$200 000 fine.

FIGURE 3
TRENDS IN INFRINGEMENT FINES, COURT IMPOSED FINES AND REPARATION



Source: Ministry of Justice, Collections Unit, unpublished, June 2005.

FIGURE 4
AVERAGE VALUE OF INFRINGEMENTS IMPOSED FOR THE FINANCIAL YEARS
1994/95 TO 2003/04



Source: Ministry of Justice, Collections Unit, unpublished, June 2005.

Note: The average value excludes:

- \$30 filing fee applied to all infringements when they are filed with courts; and
- \$100 enforcement fee (when applicable) added by courts when enforcement action is taken.

- The original “one-size-fits-all” approach to infringement offences is a blunt form of justice when applied to the existing expanded range of infringement offences and does not allow for consideration to be given to the circumstances of the offence or of the defendant.
- Despite the Legislation Advisory Committee’s Guidelines, the establishment of infringement schemes has occurred in the absence of a principled framework, resulting in a variety of approaches.
- The ad hoc development of infringement schemes has produced inconsistencies with respect to the level of infringement fees set.
- The high number of infringement notices issued may compromise their deterrent effect as a sanction for minor offending.
- The yearly volume of infringement fees imposed and the growing value of outstanding fees may impact on the use of fines as the principal financial sanction imposed under the criminal justice system and the collection of reparation.
- The negative impact of a number of well-publicised cases, particularly of young defendants who have accumulated high levels of infringement fees, appears to have affected public confidence in the integrity of the system.
- The proliferation of prosecuting authorities has tended to result in inconsistency in enforcement policies and an uncoordinated enforcement effort.
- The substantial growth in the number and scope of infringement offences means that conduct that would previously have attracted a warning, is now likely to be the subject of an infringement notice; conversely some offences that may have resulted in a summary prosecution are now dealt with under the infringement process.

24 Some of these implications fall within the Commission’s terms of reference and are discussed in the following chapters. Others will be considered by the Ministry of Justice as part of its review of the infringement system. Our broad view is that the continued existence of the infringement process is not in question. For instances of minor offending, alternative justice processes provide a fair and appropriate resolution that will, for most cases, be entirely appropriate. Only in exceptional cases is recourse to the processes of the court necessary to resolve factual disputes or to determine penalty. And, of course, judicial supervision through appeal or review provides an additional safeguard.

Recommendation

R1 For many instances of minor offending, infringement notices provide a sufficient and proportionate response. The infringement system should therefore be retained and strengthened to enhance its fairness and effectiveness.

2

What is an infringement offence?

- 25 **T**HE LAW COMMISSION’S role in the infringements review is, in part, to identify the nature and purpose of infringement offences and to identify the types of conduct they should sanction. The Commission sought responses to these issues in its discussion paper issued jointly with the Ministry of Justice (Joint Discussion Paper).³⁸
- 26 Most respondents considered that a streamlined process that leads to speedy resolution and promotes compliance was required to deal with high volume, minor offending. Infringement offences were described in terms of “everyday” offending that resulted in minimal harm and conduct that was better dealt with outside the court system for reasons of cost and efficiency. Some submitters specified that only strict liability offences should be infringement offences, and one suggested that only offending with a relatively low probability of harm to persons or property should be the subject of the procedure.
- 27 A handful of submitters suggested that infringement offences could be extended to other forms of offending if the infringement procedure was likely to satisfactorily change the behaviour being targeted. At the extreme, it was suggested that infringement notices could be imposed for all matters classified as offences under a particular statute.

EXISTING CRITERIA IDENTIFYING INFRINGEMENT OFFENCES

Legislation Advisory Committee Guidelines

- 28 The Legislation Advisory Committee Guidelines describe conduct that can be dealt with by way of the infringements process.³⁹ The Guidelines note that the infringement notice procedure is not suited for use in connection with:
- offences requiring proof of mens rea;
 - offences that are punishable by imprisonment; or
 - offences that are not easy to establish (for example, offences relating to a breach of a general statutory duty requiring expert evidence).

³⁸ Ministry of Justice and New Zealand Law Commission *Review of the Infringement System: Options for Reform: A Discussion Paper* (Wellington, 2004) ch 4.

³⁹ Legislation Advisory Committee, *Guidelines on Process and Content of Legislation* (Wellington, 2001) ch 12, part 5.

- 29 The Guidelines also state that an infringement notice procedure is best suited for offences of strict liability that are committed in large numbers, involve misconduct that is generally regarded as being of comparatively minor concern by the general public, and entail acts or omissions involving straightforward issues of fact. The Guidelines also suggest that an infringement notice procedure is generally only practicable if there are a sufficient number of enforcement officers available dedicated to the task of issuing infringement and reminder notices; that the invention of new hybrid forms of infringement notice procedures is to be discouraged;⁴⁰ and that the level of infringement fee should generally be less than \$500.

Legislation

- 30 A further criterion for infringement offences can be found in section 78A(1) of the Summary Proceedings Act 1957. This provides that, notwithstanding any other provision of that or any other Act, the court shall not convict the defendant in proceedings for an infringement offence (whether being an offence for which an infringement notice has been issued or not) where the defendant is found guilty of, or pleads guilty to, the offence and the court would, but for this subsection, convict the defendant.

Two underlying concepts

- 31 The infringement system is underpinned by two concepts. First, it is premised on a trade-off between the prosecuting authority and the defendant, according to which both benefit. Secondly, a one-size-fits-all approach exists.

Trade-offs

- 32 On one side of the bargain, the prosecuting authority can encourage compliance and see that offending behaviour is dealt with through a process that has teeth but does not require prosecution of the defendant in court. By utilising an infringement procedure, the authority can direct its prosecutorial resources to more serious forms of offending. Savings for the authority are enhanced by the fact that some infringement offences (particularly speeding) lend themselves to automated detection. The State saves by having cases resolved away from the costly and protracted court process. Further, the fixed penalty and greater immediacy of the enforcement process is considered to act as a sufficient deterrent for the types of offending involved. Finally, one commentator identifies accessing a steady stream of low-cost penal revenue as a benefit for the prosecuting authority (particularly in the case of local authorities) and State, depending on where the money goes.⁴¹
- 33 Enforcement issues aside, the infringement system is a successful example of a mechanism that puts the principle of proportionality into practice. By diverting matters from court that do not, in complexity or gravity, warrant full judicial attention, the court system's limited resources can be directed at those matters genuinely needing adjudication.

⁴⁰ Legislation Advisory Committee, above n 39, ch 12, part 5.

⁴¹ Richard G Fox *Criminal Justice on the Spot: Infringement Penalties in Victoria* (Australian Institute of Criminology, Canberra, 1995) para 1.1.3.

- 34 The other side of the bargain is that defendants benefit by not having to suffer the inconvenience and embarrassment of appearing before a court. They receive a fixed penalty, whether or not they have a record of previous offending, and do not incur a conviction or criminal record. A discounted penalty applies in order to account for their expected guilty plea (in paying the infringement fee). Notwithstanding, the defendant always retains the ability to dispute liability and challenge both the facts and penalty in court.⁴²
- 35 In this regard the infringement system is an “opt in” system, where the decision to go to court and exercise rights once a fee has been imposed lies with the defendant. This is in contrast to the standard criminal process where the onus lies on the prosecuting authority to initiate court proceedings and establish guilt, and where the defendant can “opt out” of the full court process by pleading guilty at the outset.

One-size-fits-all

- 36 A one-size-fits-all approach is applied to infringement offences. As a method of achieving efficiencies through the diversion of defendants and types of offending from the over-burdened court system, all instances of offending and all defendants are treated in the same way. Elements of this are as follows:
- there is usually no room (or no need) for an in-depth (judicial or otherwise) determination of every case;
 - accordingly, the circumstances of the defendant and offending are not generally taken into account; and
 - normal criminal law standards (such as the requirement that the defendant has a “guilty mind” in committing the offence) and sentencing principles are of limited relevance.

PROBLEMS WITH THE CRITERIA

- 37 Despite the Legislation Advisory Committee Guidelines providing a flexible framework for the creation of infringement offences, a number of examples can be found of offences that do not sit well with, or directly flout, the Guidelines and the underlying concepts described above. The result is that there are numerous examples of offences that bear less relation to the traditional concept of an infringement offence. In particular, the system is now less equitable as higher than anticipated penalties can be imposed in circumstances where the defendant’s rights are significantly diminished and where the penalties can have grossly different impacts on different defendants. More grave and “complex” offences now also form part of the infringement system, which was initially conceived to deal with simple, clear-cut offending.
- 38 The broad range of offences and fees under different regimes may result from the differing motivations for them. High volume parking offences have as their aim to ration space and facilitate the flow of traffic through busy urban areas. Speeding fines may be described as a more punitive measure to deter behaviour that threatens public safety, but it is accepted that that behaviour will never be

⁴² Summary Proceedings Act 1957, s 21.

deterred entirely. Regulatory offences, such as reporting requirements on licensed fishers under the Fisheries Act 1996, are directed at achieving compliance with a standard to enable the broader management of fishing stocks and quotas.

- 39 The question is whether, given this growth, the present infringement procedure is still appropriate for all the offences involved and the penalties they entail. The procedure, which involves compromising the protections a defendant would receive through the normal criminal process, has been considered fair for the offence types for which it was initially devised. However, the breadth of offences it now encompasses raises the issue whether the original “trade-off” and the assumption of a one-size-fits-all approach can still be justified. Further, the Legislation Advisory Committee Guidelines are no longer an accurate representation of the system and demand revision. In particular, there needs to be re-examination of the criteria that infringement offences should:
- deal with “minor” offending;
 - incur low penalties (and thus justify a one-size-fits-all approach);
 - be offences that are easy to establish;
 - not result in conviction; and
 - not lead to other penalties, such as imprisonment.

“Minor” offending

- 40 It has been said that infringements should only be applied to instances of minor offending. In the absence of a clear definition of what amounts to “minor offending”, this calls for a subjective determination. Offending may be considered minor because of the level of penalty it attracts, or the degree of harm resulting, or because it is considered not to be as morally reprehensible as other forms of offending. Certainly, it can no longer be said that all infringement offences attract a penalty low enough to be considered minor offending.⁴³ Further, some other types of offending attract a low penalty, but are not infringement offences.⁴⁴
- 41 While in many cases, the harm resulting from an infringement offence is without question low (for example, parking offences or driving an unlicensed vehicle), in other instances the potential for harm is significant (for example, driving at between 45 and 50 kph over the speed limit). And there is potential for significant harm to result from offences that may be subject to an infringement fee under regulatory legislation such as the Resource Management Act 1991.⁴⁵
- 42 Categorising infringement offences as being behaviour that is less morally reprehensible than other instances of offending again calls for subjective judgement. While it is a true description of the current system when infringement offences are compared with very serious crimes, its utility as a

⁴³ See our discussion at paras 48–50 below.

⁴⁴ Some offences under the Health Act 1956 attract a maximum penalty of \$500 but are to be dealt with by way of summary conviction (see ss 136 and 137). Under the Arms Act 1983, s 11, an unlicensed person who sells arms is liable on summary conviction to a fine of \$500. These cannot truly be considered “minor offending” from a harm perspective, yet they attract a low penalty.

⁴⁵ See, for example, ss 15 and 338(1A), offences relating to discharging contaminants.

defining characteristic of infringements is problematic. An alternative view is that all forms of offending that warrant a penalty are morally reprehensible to a greater or lesser degree.⁴⁶ The high penalties imposed for some infringements suggest that under some regimes the behaviour being responded to is in fact considered to be relatively serious.

- 43 In its submission on the Joint Discussion Paper, the Society of Local Government Managers cautions against trying to define what amounts to “minor” offending. The Society suggests that what is “minor” depends on the type of regime in question and that a definition should not act as an insurmountable barrier to creating new infringement offences in the future.
- 44 A lack of certainty in defining “minor offending” is somewhat inevitable, and formulating a definition may not create a particularly useful indicator for drafters of legislation. However, in the absence of a full survey of the offences on the statute book and a clear determination about the appropriateness of the infringement procedure for each offence, the broad concept of “minor offending” conveys the general level of offences included.
- 45 Nevertheless, it is possible to place a ceiling on what is “minor” offending and we recommend that imprisonable offences are not appropriate for the infringement procedure. The possibility of imprisonment marks the boundary between summary offences and infringement offences. If conduct is serious enough to warrant the sanction of imprisonment, it is too serious to be dealt with by way of an infringement notice. Moreover, it is certain to have such a wide range of culpability that it cannot receive an adequate response through a standard infringement fee.
- 46 Under existing legislation, some infringement offences in New Zealand are drafted as imprisonable offences (see, for example, sections 338(1) and 339(1) of the Resource Management Act 1991 regarding, amongst other things, duties and restrictions in relation to land, subdivision, the coastal marine area, the beds of certain rivers and lakes, water, and discharges of contaminants).
- 47 Our view is that imprisonment should never be a potential outcome for an infringement offence. Infringement offences should be restricted to offending that is not so serious as to justify imprisonment. If a range of culpability or potential for harm is so wide as to justify imprisonment in more grave instances of offending, then drafters should break the offending into separate offences in the legislation.⁴⁷

Recommendation

R2 An infringement offence should never result in imprisonment. Those infringement offences that are contrary to the Legislation Advisory Committee Guidelines restriction on imprisonable offences should be redrafted.

⁴⁶ See Mirko Bagaric “Instant Justice? The Desirability of Expanding the Range of Criminal Offences Dealt with on the Spot” (1998) 24 Monash Univ LR 231, 239.

⁴⁷ An example of such drafting can be found in the distinction between sections 3 and 4 of the Summary Offences Act 1981.

Low penalty⁴⁸

- 48 Most infringement offences in New Zealand incur low penalties, with the bulk being set at around \$200. However, the growth in regimes and offences has seen a parallel growth in the level of some of the fees that can be imposed. Fees at the top end of the spectrum fall, in the main, under “regulatory” type legislation and affect commercial operators. However, that is not true of all high-penalty infringement fees, and it is questionable whether the commercial element alone justifies the abandonment of the traditional trade-off.
- 49 Penalties range from \$12 parking offences under schedule 1B of the Land Transport (Offences and Penalties) Regulations 1999 to a number of fees that far outstretch the \$500 suggested maximum under the Legislation Advisory Committee Guidelines including, potentially: \$3000 under the Fisheries Act 1996, section 297(1)(nc); \$20 000 under the Building Act 2004, section 402(1)(z); and \$10 000 for an individual and \$50 000 for a licensee under the Gambling Act 2003, section 360. A similar situation exists in the federal jurisdiction in Australia, where infringement fees are in place for between \$55 and \$110 000 for corporate offending. However, in the Australian state jurisdictions, infringement fees have remained, thus far, at a comparatively low level.⁴⁹
- 50 The concept that infringements should only amount to low level fines can no longer be said to be accurate in relation to the system in New Zealand and is inequitable in the context of the current infringements process. The one-size-fits-all approach means that the particular circumstances of the defendant cannot be taken into account in the same way as they are for normal criminal offences. Given the expansion of the infringement system to more substantial penalties than originally foreseen, this is one of the most significant concerns about the system and has the potential to diminish its integrity.

Extent to which the means of the defendant can be taken into account

- 51 A defendant can plead mitigating circumstances when challenging the infringement penalty before court, but we understand anecdotally this right is not widely known and is rarely used.
- 52 In addition, prosecuting authorities correspond with defendants who challenge the commission of the offence or argue mitigating factors. Although it is not possible for them to vary the penalty, most prosecuting authorities have internal guidelines permitting the use of discretion to withdraw or waive a notice. Some prosecuting authorities have reported that they do take means into account in deciding whether to issue infringement notices or when deciding how many

⁴⁸ See generally Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, Sydney, 2002) 190.

⁴⁹ Australian Capital Territory: \$20 to \$2500; New South Wales: \$20 to \$5500 (for corporate offending); Northern Territory: \$20 to \$5500 (for corporate offending); Queensland: \$12.50 to \$3750 (for corporate offending); South Australia: \$100 to \$3000 (for corporate offending; \$600 maximum for a natural person); Tasmania: \$25 to \$3000 (for corporate offending); Victoria: \$20 to \$6000 (for corporate offending; \$2000 maximum for a natural person); Western Australia: \$10 to \$3000 (for corporate offending).

notices to issue where there have been multiple breaches. Some authorities have internal policies to only issue a notice for the most serious offence where multiple offences have been committed. Authorities are more able to make such decisions on imposition where notices are issued some time after the incident that gave rise to the breach and where some prior communication can be entered into with the recipient of the infringement notice.

Should the circumstances of the defendant be taken into account?

- 53 Some submitters and consultants expressed the view that the harm to society is the same no matter the circumstances of the defendant, and that means are therefore irrelevant to penalty. That is correct where the offence carries a low penalty and involves either minor or similar levels of culpability in every case. However, section 14 of the Sentencing Act 2002, under which a defendant's financial capacity is relevant to the imposition of a fine, ought in principle be relevant to imposition of an infringement fee as well.
- 54 Our view is that where the penalty is above a certain quantum, and therefore has the potential to cause undue hardship, the defendant should be able to bring information about their financial situation to the attention of the prosecuting authority and the court. Given the rapid expansion of infringement regimes and fees (well beyond that suggested by the Legislation Advisory Committee Guidelines), there is significant potential for serious injustice to result under the present infringement system. This is reinforced by the data reproduced in figure 4 in chapter 1, which highlights the extent to which infringement fees impact on young defendants who receive a very significant proportion of the notices issued. These defendants are not likely to have high incomes.
- 55 We do not suggest that the circumstances of the defendant should be taken into account in every case – a balance is to be found between administrative expediency and ensuring the system is not unduly hard on poorer defendants. However, if an individual can show that undue hardship would result because of the penalty imposed, there should be the potential for it to be reduced without having to go to court. We make further recommendations in relation to administrative review of penalties in chapter 3.

Recommendation

R3 Where a penalty is above a certain quantum and has the potential to cause undue hardship, the defendant should be able to seek review of the penalty through an administrative process or the court, and the penalty should be able to be reduced.

- 56 Under a few regimes, poorer defendants can seek some relief by applying for a time-to-pay arrangement. However, most prosecuting authorities in New Zealand do not offer this option at present. The Australian Law Reform Commission has recommended that if the amount payable under an infringement notice is more than a certain level, the defendant should have the right to request that the time to pay that amount be extended or that the penalty be paid by agreed instalments, on the ground of financial hardship. The Australian Law Reform

Commission considered that agreement to pay that amount by instalments should not be unreasonably withheld.⁵⁰ We consider it essential that all authorities receiving infringement payments offer time-to-pay arrangements. This should have a significant and positive impact on compliance with infringement notices and on the integrity of the system as a whole.

Recommendation

R4 All authorities receiving infringement payments should be required to offer time-to-pay arrangements.

- 57 Another option, sometimes suggested for dealing with defendants who cannot afford to pay their infringement fee, is to enable a defendant of low means to opt to do community work instead of paying a monetary penalty. We do not consider this to be a viable or cost-effective proposal. Questions immediately arise regarding how and by whom such a mechanism would be overseen and defendants supervised, and there is the potential for it to introduce a new cycle of non-compliance if defendants fail to turn up for their community work.

Mens rea

- 58 The Legislation Advisory Committee guideline that the infringement notice procedure is not suited for use in respect of offences requiring proof of mens rea has been supported by a number of overseas commentators.⁵¹ The Australian Law Reform Commission has also recommended that infringement offences should be restricted to strict and absolute liability offences.⁵²
- 59 This view seems to be based on two propositions:
- Offences requiring proof of mens rea involve a complex assessment by an enforcement officer of an alleged offender's state of mind and the shades of culpability that may attach to such offences. They therefore require measured consideration of the evidence available to support the charge in court, which is more likely to be undertaken when prosecution is being contemplated. In contrast, strict liability offences require no more than a determination of straightforward issues of fact and are therefore suitable for immediate judgements by enforcement officers and the imposition of an on-the-spot penalty.
 - Mens rea offences are sufficiently serious that the defendant should always have full opportunity for a proper enquiry into his or her guilt, an opportunity that is not adequately provided by the imposition of an on-the-spot fixed penalty, since in the latter case the defendant must initiate the action to have his or her case brought before the court for a determination as to liability.

Both of these propositions are questionable.

⁵⁰ ALRC "Principled Regulation", above n 48, rec 12–8(m).

⁵¹ See, for example, Fox quoted in Bagaric, above n 46, 244.

⁵² ALRC "Principled Regulation", above n 48, 447 and rec 12–1.

- 60 The first proposition entails an overly simplistic distinction. Offences requiring proof of intention frequently involve no complex assessment by the enforcement officer; the facts are as clear-cut and straightforward as those relating to most strict liability offences and enable the enforcement officer to draw the obvious inference as to mental state. For example, if the enforcement officer is confronted with an alleged assault, there will in the ordinary run of cases be no explicit enquiry as to whether the infliction of force was intentional. It is unlikely in practice to be raised unless the defendant discharges his or her evidential burden at trial and points to some evidence to put that in issue. Of course, this is not true of every mens rea offence. However, nor is this true of every strict liability offence; a variety of defences, including total absence of fault on the part of the defendant, may be available in the circumstances of a particular case.
- 61 The second proposition is equally problematic. It is true that, after the issue of an infringement notice, a defendant must take positive action in order to deny his or her liability and to bring the case before the court. Otherwise the enforcement process will follow its natural course. However, it is doubtful whether this significantly increases the coercive nature of the infringement system or reduces the defendant's ability to deny his or her liability. In one case, the defendant has to advise the court that he or she intends to contest the charge; in the other, he or she must enter a not guilty plea upon request. In our view, the difference between these two is not sufficiently great to act as the determinant of the category into which an offence should fall.
- 62 The real issue in determining whether an offence category should be subject to the infringement system is whether the range of seriousness and culpability covered by the offence is such that it can be adequately dealt with by the fixed or standard penalty available within the infringement system (as proposed in chapter 4). Applying this criterion, it may well be that offences of strict liability are more likely to be suitable for the infringement system. However, it may not be solely the fact they are strict liability offences that dictates their suitability for the infringement system. For example, so-called public welfare regulatory offences, which are aimed at controlling behaviour likely to endanger public or environmental safety and which have little regard to the differing circumstances of individual defendants, may well be suitable simply because the variations in the degree of culpability fall within a comparatively narrow band.

Recommendation

- R5** The infringement system should only be used when the penalty available under it would be an appropriate response to the range of seriousness and culpability of the conduct falling within the particular type of offence.

No conviction

- 63 Section 78A(1) of the Summary Proceedings Act 1957 provides that notwithstanding any other provision of that or any other Act, a conviction should not ensue for an infringement offence. The effect of section 78A(1) is that even if a defendant chooses to challenge an infringement notice before

the court, conviction should not result. A benefit of this is that it introduces no disincentive for a defendant to have the court determine the case.

- 64 An anomaly exists under the Health and Safety in Employment Act 1992 which, while providing that a criminal record must not be created in respect of an infringement offence, states that a court may be told, for the purpose of sentencing a person convicted of an offence under the Act that the person has paid, or is obliged to pay, an infringement fee.⁵³ Thus, while a conviction does not result, arguably one of the consequences of conviction does follow.

United Kingdom

- 65 In the United Kingdom, a fixed penalty notice amounts to an offer to a person to discharge their liability to conviction for an offence by payment of a penalty.⁵⁴ Unlike in New Zealand, if a defendant chooses to go to court to challenge the notice, a conviction may ensue.

Australia

- 66 A conviction may follow the issue of an infringement notice in some Australian jurisdictions. In most instances, this will only occur if the defendant unsuccessfully challenges the notice before the court, or if he or she is in default of the fine.⁵⁵ However, in 1989, Victoria introduced a system whereby a conviction can be recorded and other sanctions (such as loss of a driver licence) can be imposed, despite payment of the penalty.⁵⁶ In Western Australia, an order to pay or elect to have the matter determined by the court can lead to a conviction in relation to “continuing” offences⁵⁷ and for certain traffic offences under the Road Traffic Act 1974.
- 67 In 2002 the Australian Law Reform Commission recommended that the payment of an amount by a defendant under an infringement notice should not be taken as an admission of any liability for the alleged commission of the offence, noting that some defendants pay their infringement fee, despite their innocence, in order to dispose of the matter.⁵⁸ However, it also considered that the issue of an infringement notice should not limit the penalty that may be imposed by a court on persons convicted of an offence or found liable for a contravention if they chose to go to court to challenge liability.⁵⁹
- 68 In relation to the Victorian regime, in recommending a model Infringements Act, Professor Richard Fox considered that a person against whom an infringement notice has been issued should not be treated as having been convicted of the

⁵³ Health and Safety in Employment Act 1992, s 56H(2).

⁵⁴ See, for example, the Traffic Management Act 2004 (UK), s 39(1), schs 4 and 6, and the Criminal Justice and Police Act 2001 (UK), s 2(4).

⁵⁵ This is the case, for example, in the Australian Capital Territory, Northern Territory and Tasmania.

⁵⁶ See, for example, the Road Safety Act 1986 (Vic), s 89A. See also Fox, above n 41, 6.

⁵⁷ Interpretation Act 1984 (WA), s 71.

⁵⁸ ALRC “Principled Regulation”, above n 48, rec 12–8(d).

⁵⁹ ALRC “Principled Regulation”, above n 48, rec 12–8(o). Both recommendations 12–8(d) and (o) were endorsed by the Attorney-General’s Department: see Attorney-General’s Department *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (Issued by Authority of the Minister for Justice and Customs, 2004) 53.

alleged offence, except by a court order. In his view, expiation of the offence by payment should not lead to a conviction. If the matter is defended unsuccessfully in court, the court should still not record a conviction. An alleged defendant contesting the accusation should not be penalised, other than in costs, for exercising their right to do so.⁶⁰

Discussion

- 69 This raises the question of whether a conviction should ever arise after the imposition of an infringement notice in New Zealand. Enabling infringements to result in convictions in some circumstances may also present an option for dealing with recidivist defendants. For example, it could be that a conviction should arise for, say, a fifth instance of the commission of a particular infringement offence.⁶¹
- 70 Conviction is a sanction in itself, because of the general moral condemnation that accompanies it and because of the impact it can have in terms of employment and immigration status, among other things.⁶² It is what identifies criminal behaviour as distinct from administrative or civil wrongs. From this point of view, since infringement offences are traditionally only thought to apply to minor forms of misbehaviour, they would not normally amount to behaviour that demands such condemnation. Their “opt in” nature, placing the onus on the defendant to choose to exercise rights, and the limits on challenge and review of the imposition of the fee suggest that they should not be classified as standard criminal offences from a procedural point of view either. Offences considered serious enough to lead to a conviction should be proceeded against by way of summary prosecution with the protection of the full court process.
- 71 Commentators have also noted that the introduction of fixed penalty offences has resulted in “net-widening” in the number of infringement notices being issued, with a corresponding reduction in the number of warnings being given.⁶³ It has been suggested that there is a danger infringement tickets may be issued where a case is weak and there is a low chance of succeeding at trial. A concern is that innocent people who do not wish to take the opportunity of challenging an infringement notice might wrongly accept having a conviction.⁶⁴

⁶⁰ Fox, above n 41, 5–6. In contrast, it has also been argued that convictions may be appropriately within the realm of infringements since their effects, for example on employment prospects, do not involve a direct or potential interference with a person’s liberty. See Bagaric, above n 46, 267.

⁶¹ The issue of dealing with recidivist defendants does not form part of the Law Commission’s terms of reference for this review. The issue is being addressed by the Ministry of Justice.

⁶² A P Simester and W J Brookbanks *Principles of Criminal Law* (2 ed, Brookers, Wellington, 2002), 5. See also, Fox, above n 41, 268.

⁶³ Fox, above n 41, 4; Rebecca Roberts and Robert Garside *Punishment Before Justice? Understanding Penalty Notices for Disorder: Briefing 1* (2005) 5 <www.crimeandsociety.org.uk> (last accessed 13 July 2005).

⁶⁴ For this reason, if conviction were possible after the imposition of an infringement, consideration of the effect of the level of penalty on people’s behaviours in choosing to pay or not to pay the fee would demand close attention. Information about the impact of a conviction would also need to be broadly available and understandable.

- 72 Our view is that a conviction should never follow the issue of an infringement offence notice – the criteria in section 78A(1) of the Summary Proceedings Act 1957 should be retained. Lack of a conviction is a critical part of the bargain that involves the compromise of the defendant’s rights. In addition, an inappropriate incentive for innocent defendants not to challenge the infringement notice in court may result if a conviction, and criminal record, could result. Similarly, we cannot see any compelling reason in principle for a provision that allows a prosecuting authority to bring to the court’s attention prior paid infringement offences of a defendant who is being summarily prosecuted. A conviction is primarily about obtaining a criminal record – if an offence is not considered of a gravity to demand a conviction, the consequences of a conviction should not follow. We do not consider that the provision of the Health and Safety in Employment Act 1992 discussed at paragraph 64 should continue.

Recommendation

- R6** Conviction should never follow the imposition of an infringement notice.

Other additional sanctions: demerit points and licence restrictions

- 73 Under section 90 of the Land Transport Act 1998, if, in any two-year period, a total of 100 or more demerit points is recorded against a person, that person’s driver licence must be suspended for three months. If the person does not hold a current driver licence on the date of the giving of the notice, he or she will be disqualified from holding or obtaining a driver licence for three months. This provision operates automatically – it requires no exercise of discretion on the part of the prosecuting agency. Going a step further, “loss of licence” infringements exist in Victoria (for excessive speed or first drink- or drug-driving offences).⁶⁵
- 74 In 2002 the Australian Law Reform Commission noted that there was no objection in principle to infringements resulting in a penalty other than a monetary one. However, it suggested that an alternative penalty should only apply if it was legislated for. It also noted caution about using licence variation, suspension or cancellation for strict liability offences; due to a need for transparency, a hearing should be required. Ultimately, it recommended that regulators should not have the option to choose an alternative penalty.
- 75 Similarly, we have no objection in principle to additional sanctions, in the form of demerit points and licence restrictions, being imposed with infringement fees for repeat defendants, provided certain criteria are met:
- The sanction must be legislated for and operate automatically – there should be no power on the part of an officer to choose an alternative penalty.
 - The sanction must be relevant to the offence being committed, to prevent further offending (that is, driving licence sanctions should only follow driving offences).
 - The sanction must be a proportionate response to the offending.

⁶⁵ Road Safety Act 1989 (Vic), s 89A.

- Defendants must retain the ability to go to court to seek review of such sanctions on the grounds of undue hardship.

76 Further, such a system must be supported by:

- robust recording systems;
- a warning being given to defendants in peril of the sanction before it is imposed; and
- robust enforcement procedures to ensure compliance.

77 We have noted above that infringement fees should be able to be reduced in some circumstances. A question arises whether the imposition of demerit points should equally be the subject of administrative and court review when imposed in an “on-the-spot” nature. However, we note the existence of the limited licence under sections 103–105 of the Land Transport Act 1998 to deal with instances of undue hardship resulting from a licence suspension and consider such a mechanism a sufficient alternative.

CONCLUSION

78 The guidelines and concepts underlying the infringement system are no longer adhered to in all circumstances, with the result that aspects of the current system and procedures are inequitable. While some minor offending can be fairly diverted from the court system under the current process, offences with high penalty levels tend to come back to court for enforcement. Only if greater opportunities for review are introduced, will it be defensible to continue dealing with high penalty and varying culpability offences by way of on-the-spot penalties.

79 One option is that the infringement system should be reformed so that it reflects its originally intended role and that only offences that strictly meet the one-size-fits-all principle should be dealt with by way of an on-the-spot penalty. This would demand a reassessment and amendment of many of the infringement regimes currently in place. The alternative view is that contemporary conditions demand the reworking of the criteria for infringements and a more sophisticated approach is required that takes account of the needs of prosecuting authorities in penalising behaviour and encouraging compliance, but contains adequate protections for defendants. We prefer the latter approach, but consider that many infringement offences at the lowest end of the range can continue to be dealt with by a very simple process.

80 Allowing for extension of the infringement system recognises the value of dealing, and the ongoing need to deal, with offending outside the court system. Restricting the infringement system to a more limited set of offences would place a corresponding limit on its utility for diverting instances of more minor offending from the courts in the future. As society grows in complexity, it is realistic to accept that there will be a growing range of offences that do not warrant the stigma of conviction and do not require the full court process, along with growing areas of regulation where infringements are proving a useful compliance tool.

81 Overly restricting the infringement system is not justifiable where:

- a monetary penalty is considered a suitable sanction for an offence, and where it is possible to identify, in a straightforward manner, a standard penalty level that can be imposed through an infringements regime;

- full court protections are available on a transparent, opt-in basis; and
- greater protection than at present can be provided to defendants issued notices for more complex offences by non-judicial processes, such as the exercise of statutorily guided discretion or administrative review, without recourse to the court.

82 This accords with our consistent view, expressed in recent reports including *Delivering Justice for All* and *Criminal Pre-Trial Processes*. In both instances we have endorsed the greater use of alternative responses to offending, and we have noted that prosecution should not occur unless there is evidential sufficiency and it is otherwise in the public interest that the case be dealt with in that way.

3

A tiered approach to minor offending

- 83 **T**HE CRIMINAL JUSTICE SYSTEM classifies offending behaviour on a continuum – from non-criminal infringement offences and minor criminal offences through to the most serious crimes. There are a number of options to deal with offences either partly or entirely outside the mainstream court system, or by different processes within it. These processes take place in the shadow of the court but are not necessarily directly within the control of the court.
- 84 Recognising this continuum, it is recommended that infringement offences should be divided into two tiers, depending on the severity of behaviour involved as defined by the level of sanction. The common element between the tiers is that in each instance the offending is of a level that can be dealt with outside the full court process:
- The first tier should include the most minor offences that attract the lowest penalty.
 - The second tier should include offences where the level of penalty and degree of culpability may, in some circumstances, require inquiry into the circumstances of the offence and offender.
- 85 The categorisation of an offence as an infringement offence does not require that it is necessarily dealt with in that way. The discretion to issue a warning instead of a notice, or to provide the defendant, in some circumstances, with the opportunity to rectify the fault, is to be encouraged for all infringement offences.⁶⁶ Clearly, where it is possible, rectification of the fault by the defendant will satisfactorily fulfil the aim of achieving compliance with the legislative duty. Also, prosecuting authorities' ability to withdraw an infringement notice or waive an infringement fee should be specifically permitted (in legislation) and exercised. This discretion is discussed in chapter 6.
- 86 Some offences that are too grave to be dealt with in either of these tiers may still, in some circumstances, be dealt with through the exercise of prosecutorial discretion by way of diversion and other similar processes that lead to resolution outside the courtroom. Those offences that fall into the general summary and indictable jurisdiction have been the subject of consideration in other Law Commission reports, most recently our report on *Criminal Pre-Trial Processes: Justice Through Efficiency*.⁶⁷

⁶⁶ In chapter 6 we discuss the exercise of discretion by prosecuting authorities generally.

⁶⁷ New Zealand Law Commission *Criminal Pre-Trial Processes: Justice Through Efficiency* (NZLC R89, Wellington, 2005).

Recommendation

R7 Infringement offences should be dealt with in two tiers.

TIER ONE – FIXED PENALTY INFRINGEMENTS

- 87 Tier One should comprise offences where court intervention would be truly disproportionate. These offences should be of the lowest severity and resulting harm and should attract the lowest degree of moral condemnation. The level of penalty should be such that its impact is broadly the same for most defendants and is appropriate for that level of offending. These offences are likely to be committed in the highest numbers and should be dealt with by way of the simplest and most efficient process. They should incur only fixed penalties.
- 88 This is a true one-size-fits-all approach. The rights of defendants committing offences and the discretion of the prosecuting authority would be at their most limited under this tier. Accordingly, the court's review function should be restricted to challenges to liability. There would be no scope for taking account of the circumstances of the offence or of the defendant – the level of penalty and the minor differences in culpability would not justify the time and resources involved. The penalty would be fixed in all instances, with no ability for the defendant to make submissions on penalty to the prosecuting authority or a court.
- 89 Despite this streamlined approach, greater emphasis should be placed on rectification for these offences. Opportunities should be available for the rectification of acts or omissions where that is possible, but a punitive approach should be taken where rectification is not possible or is not achieved by the defendant. Time periods for payment should be at their narrowest. If a defendant does not rectify the fault or pay the infringement fee, the matter should be advanced to enforcement as early as possible.

Discretion to proceed summarily

- 90 Under this tier there should be no scope for prosecutorial discretion to proceed summarily with a prosecution, as there is at present.⁶⁸ This is a justifiable approach for a true one-size-fits-all model as there is no scope for significant differences in culpability with fixed penalty offences.
- 91 Submitters have suggested that the retention of this discretion is essential to deal with more serious instances of offending and to deal with recidivist defendants. We expect that reforms to the collection and governance elements of the infringement system will in part be directed at dealing more consistently and effectively with recidivist, non-paying defendants, by earlier identification.
- 92 Leaving recidivists to be dealt with in court solely by prosecutorial decision would depend on the prosecuting authority having adequate information that a person is a repeat offender, and a willingness on the part of the authority to

⁶⁸ See our discussion in chapter 2.

accept the costs involved. This has not occurred to date in a timely way, and the approach may be likely to result in inconsistency and in the continuance of instances of defendants accumulating high fines. Moreover, there is very limited scope for the court to increase the penalty when an infringement offence is dealt with in court. Given these circumstances, we do not consider it effective or appropriate to deal with Tier One defendants in this way.

- 93 Where a defendant opts to challenge the notice in court and is unsuccessful, the fixed fee would not be able to be varied by the court, although the defendant could become liable for costs.

Determining which offences should fall within the tier

- 94 The determination could be made on an offence-by-offence basis, depending on the type of behaviour involved, as has been the case for infringements generally until now. This broad approach received support in submissions, and the point was also made that some existing infringement offences with medium to high penalties have little or no scope for debate about liability, so challenge on the grounds of the circumstances of the offence or defendant might not be suitable.⁶⁹ This argument does not, however, recognise that there may be grounds for review on the basis of undue hardship.
- 95 Alternatively, offences could be allocated to the tier according to an arbitrary monetary value, over which fairness demands that further consideration of the circumstances of the offence and defendant can be taken into account. In principle, this is the most attractive approach as there is a point over which the inequality of the impact of the penalty on different defendants requires account to be taken of the means of the defendant. From this point of view, it is the level of the penalty, not the type of offence involved, that is relevant to the question of whether regard should be had to a defendant's particular circumstances.
- 96 Our view is that fixed penalty infringements in Tier One should be restricted to offences attracting a low penalty and that an arbitrary ceiling should be set. There is an argument that exceptional circumstances may exist for other offences with penalties not significantly in excess of the ceiling to be included. For example, speeding more than 30 kph above the limit, while attracting a penalty between \$300 and \$630, is an offence that is straightforward to identify and carries certain policy implications that may justify it being dealt with under Tier One. However, this complicates a system that would otherwise be easy to understand and apply.
- 97 This does raise issues about how and at what level to set the penalty ceiling for the tier. The objectives are to fix the ceiling at a level where issues of the differing means of the defendant will be of little relevance, and where those issues or inequalities can be fairly outweighed by the potential efficiency gains. It should be at a level consistent with the ability of those in the lowest socio-economic group to pay. It should also be at a level where the cost of taking the matter to court in order to effect a reduction in the infringement fee, and the small amount of reduction in fee that might be granted by a court, means that it

⁶⁹ For example, a \$750 fee for late reporting under fisheries regulations.

would not be worth the expense and effort – that is, any challenge on the basis of the personal circumstances of the defendant is not likely to be productive in terms of transaction costs.

- 98 While any choice of figure is arbitrary, possible ceilings for Tier One fixed penalty infringements are:
- \$200. Some examples of offences that this would capture are minors drinking in a public place (\$200),⁷⁰ parking for not more than 30 minutes in breach of a bylaw (\$12),⁷¹ failure to advise change of dog ownership (\$100),⁷² refusing to answer questions from biosecurity officials about risk goods (\$100).⁷³ Although only an indication of the numbers of notices issued can be provided, research for the Ministry of Justice that segmented infringements into seven categories suggests that the average value of infringement fee filed in court in the 2003/04 financial year was under \$200 in four categories⁷⁴ and accounted for around 23 per cent of filings.
 - \$250. In addition to the examples above, this level would capture offences such as taking or possessing undersize fish (\$250),⁷⁵ exceeding the speed limit by more than 25 kph but not more than 30 kph (\$230).⁷⁶ According to the Ministry of Justice research, 68 per cent of filings have an average fee of under \$250.
- 99 Ultimately the ceiling for Tier One infringement offences will require consideration of what fee level will lead to inequitable treatment of different defendants, according to average income levels and other factors. The figures we suggest are lower than the \$500 upper level for infringement fees in the Legislation Advisory Committee Guidelines because we do not consider that a fine of \$500 is truly a one-size-fits-all model in terms of its uniformity of impact. A significant number of existing infringement offences would nevertheless be included at the lower levels suggested above.
- 100 One of the objectives of keeping the fees in Tier One below a certain level is to increase compliance because more people will be able to pay the fee without hardship. We note that compliance for Tier One offences should also be enhanced by the measures being considered for streamlining enforcement processes, such as the early identification of non-payers and time-to-pay options.
- 101 A particular question arises with regard to Health and Safety in Employment Act 1992 infringement offences, which enable an officer to issue an infringement notice of between \$100 and \$3000. We consider that where discretion is exercised to set the level of the penalty imposed, the offence should always be a Tier Two offence, with the ability for the penalty to be reviewable administratively and by the court.

⁷⁰ Summary Offences Act 1981, s 38A.

⁷¹ Land Transport (Offences and Penalties) Regulations 1999, sch 1B.

⁷² Dog Control Act 1996, s 48(3) and sch 1.

⁷³ Biosecurity Act 1993, ss 154(p) and 159(3).

⁷⁴ These four categories are: speed tickets (issued by officer); speed tickets (issued by camera); parking; and simple – other. The other three categories are: offences that are amenable to rectification; simple – traffic offences; and complex infringements.

⁷⁵ Fisheries (Infringement Offences) Regulations 2001, sch 1.

⁷⁶ Land Transport (Offences and Penalties) Regulations 1999, sch 1B.

Recommendation

R8 Tier One infringements should have the following characteristics:

- They should have fixed penalties.
- They should deal with minor, high volume offences, where treating all defendants in the same way is appropriate.
- There should be an upper limit for fees set at a level:
 - consistent with the ability of people in the lowest socio-economic group to pay them; and
 - such that a challenge to court would not be worth the expense and effort.
- There should be no ability for the enforcement officer, enforcement authority or court to vary the penalty.
- The defendant should always retain the right to request a court hearing to determine liability.
- There should be no ability for the enforcement authority to proceed with a prosecution in court as an alternative to issuing an infringement notice.

TIER TWO – VARIABLE PENALTY INFRINGEMENTS

- 102 At present there is no ability for infringement fines to be reviewed and varied. In most existing regimes, however, there is an opportunity for the defendant to write and explain their mitigating circumstances. Although prosecuting authorities may then choose to waive the fee altogether, they cannot reduce it and the defendant must instead take the matter to court.
- 103 One way of achieving some variation in penalty according to the circumstances of the offence is to prescribe a statutory sliding scale, with fixed penalties for each point in the scale according to the severity of the offending. Essentially this entails creating a number of distinct sub-categories of the substantive offence, with a fixed penalty for each.
- 104 Instances of statutory sliding scales already exist for some infringement offences. For example, under the Fisheries (Infringement Offences) Regulations 2001 the penalty increases depending on how tardy fishers are at meeting reporting requirements;⁷⁷ and the penalty for speeding is similarly graduated according to the extent to which the person has exceeded the speed limit.⁷⁸

⁷⁷ Fisheries (Infringement Offences) Regulations 2001, sch 1: A fee of \$400 is imposed for providing a late return before the 20th day of the month and a fee of \$750 is imposed for providing a late return between the 21st day of the month and the 15th day of the following month. See also, the Fisheries (Infringement Offences) Regulations 2001 (SR 2001/316), sch 1 (as amended by the Fisheries (Infringement Offences) Amendment Regulations 2005, reg 3), which provides that taking or possessing more than the daily limit of fish, but not more than two times the daily limit, incurs a fee of \$250, whereas, taking or possessing more than two times the daily limit incurs a fee of \$500.

⁷⁸ Land Transport (Offences and Penalties) Regulations 1999, sch 1B.

- 105 Where distinct and readily identifiable sub-categories of an offence can be created, they can be an effective way of providing a graduated scale of penalties. However, in many cases it is not possible to draw a clear dividing line between different degrees of seriousness and culpability. In any case, a statutory sliding scale only takes account of the circumstances of the offence; it does not vary the penalty according to the circumstances of the offender.
- 106 Those who made submissions on the Joint Discussion Paper were opposed to the suggestion that account should be taken of the circumstances of the offence and the offender in determining the amount of the infringement fee. Some felt it was a judicial role, not appropriate for prosecuting authorities. It was not considered administratively feasible and there was concern that it would undermine the utility of the infringement system. Some submitters felt that the exercise of such discretion could lead to new grounds of challenge, that spurious claims would be made, and that it could lead to allegations of abuse. The Society of Local Government Managers also suggested that local authorities simply did not have the requisite information and skills to make such judgements.
- 107 We find these objections compelling in relation to any scheme that would enable enforcement officers to vary a fee at the time of imposition on account of the circumstances of the offence or the offender. We therefore accept that, as a general rule, it should not be permitted (although, as discussed below, the present regime under the Health and Safety in Employment Act 1992 is an exception to that rule). However, the objections are less convincing when applied to schemes that allow variation of the penalty upon subsequent review. If prosecuting authorities are able to waive a fee altogether upon review (as at present), there is no good reason why they should not be able to reduce the fee as well, provided that the review process is transparent, robust and governed by clear criteria.
- 108 Indeed, we think that the expansion of the infringement system that has occurred in recent years requires such a review process. If a defendant only has recourse to the court after imposition of the fee, as at present, he or she incurs all the costs that a court appearance involves, and there is significant potential for inequitable treatment of different defendants depending upon their personal circumstances.
- 109 We therefore propose that all infringement offences where the fee is set above the Tier One threshold should comprise a second tier that incorporates some mechanism for varying the fee. Such offences are likely to encompass a greater range of culpability than those in Tier One. Moreover, if the penalty were fixed, there would be a potential injustice arising from the differential impact on defendants of varying financial means.

Mandatory fees

- 110 At present there are some mandatory fees for infringements that preclude any reduction in an infringement fee by the court, and would thus be equally incompatible with any general regime allowing for administrative review of penalty amount. Section 43(3) of the Land Transport Act 1998 provides that the penalty to be paid for an overloading offence “must” be that prescribed by regulations. In *Interfreight Ltd v Police* [1997] 3 NZLR 688, the Court of Appeal upheld a decision that the precursor to section 43(3) (section 69B(2)(b) of the Transport Act 1962) amounted to a mandatory penalty. Whether the court can

impose a penalty less than the infringement fee for non-overloading offences is less clear. *Interfreight* was distinguished in *Nelson City Council v Howard* [2004] NZAR 689 (HC) on the particular wording of the relevant legislation (the case involved infringement fees for failing to display a current licence and failing to display a current warrant of fitness). However, there is previous conflicting High Court authority on whether an infringement fee may be varied both upwards and downwards.⁷⁹

- 111 There may be policy reasons why a penalty should not be able to be reduced for certain types of offences. However, in our view such mandatory fees should only attach to Tier One offences and any existing mandatory fees should be amended to incorporate the features of our proposed Tier Two regime.

Varying the penalty

- 112 We propose two models under which a Tier Two infringement penalty can be varied.

Penalty band within a minimum and maximum

- 113 A penalty band can operate within a minimum and maximum, with discretion for the prosecuting authority to impose a penalty at any point within that scale. This is the model in place under the Health and Safety in Employment Act 1992. Section 56F provides that the fee to be specified by an inspector must, depending on the offence, either be not less than \$100 and not more than \$3000 (as a multiple of \$100) or not less than \$800 and not more than \$4000 (as a multiple of \$100). Depending on the offence, the inspector must take into account: whether harm resulted; the degree of harm; the potential harm; the size of the business involved; the financial circumstances of the defendant; and the safety record of the defendant.⁸⁰
- 114 While this model does enable the circumstances of the defendant to be taken into account, it can only operate where such determinations are able to be made at the time an infringement notice is issued. It is not feasible for high volume infringements that are imposed in an automated manner or by enforcement officers who do not have the resources or skills to exercise such broad discretion.
- 115 In its submission, the Department of Labour stated that discretion has been appropriate in the Health and Safety in Employment Act context, and is guided by the Department's enforcement policy for that Act. With specific regard to discretion in setting the fee, the Department notes that this has allowed inspectors to respond to both the type and the degree of offending and the

⁷⁹ In *Nelson City Council v Howard* [2004] NZAR 689 (HC), in concluding that the court could vary the infringement fee involved either upwards or downwards, MacKenzie J disagreed with previous High Court authority that had followed the approach in *Interfreight Ltd v Police* [1997] 3 NZLR 688. See also *Sainty v Wellington City Council* (22 February 2000) WN AP 5/00, Doogue J; *Baker v Police* (13 November 2001) PN AP 39/01, Doogue J; *Brown v Wellington City Council* (18 April 2000) WN AP 52/00, Ellis J; and *Wellington City Council v Phillips* (10 December 2002) WN AP 278/02, France J. See also *Carr v Police* (6 April 2000) AK A 202/99, Randerson J.

⁸⁰ Health and Safety in Employment Act 1992, s 56F(2).

circumstances of the defendant, usually an employer or other clearly identifiable person in the context of a workplace. In that regime, infringement notices are prepared by inspectors then generated centrally and posted to the defendant.

- 116 The Department's view is that whether or not discretion regarding the amount of penalty should be allowed depends on the particular regime in question – that is, whether offences are clearly identifiable and defined (as with parking infringements) or whether they are more complex (as is the case with offences under the Health and Safety in Employment Act). The Department's experience has been that extensive training and resources are required to ensure that inspectors apply their discretion appropriately and with reasonable consistency.
- 117 We consider that only in very limited circumstances will such a model be appropriate. Where it is adopted, it should incorporate a process for administrative review and reduction of the fee selected by the enforcement officer.

Standard fee as an upper limit

- 118 The model we generally favour would prescribe a standard fee as an upper limit but permit an enforcement authority to reduce that fee to take account of any special mitigating circumstances or undue hardship to the defendant. The enforcement officer would impose the standard penalty and a reduction would occur following a defined administrative review process. The fee could not be increased on review.

Administrative review of penalty

- 119 Consideration of how such an administrative review should operate is not within the Law Commission's terms of reference for this paper; further work will be done in the second stage of the infringements project being led by the Ministry of Justice. Options for enabling such an administrative review include: leaving responsibility in the hands of prosecuting authorities; creating a central infringement review authority; or even establishing a special tribunal.
- 120 Our tentative view is that provided the level of penalty can be subsequently challenged in court, the review is most appropriately carried out by the prosecuting authority itself. If this were the mechanism adopted, we consider that it should be mandatory for the defendant to ask for such a review before challenging the penalty in court, unless the defendant also challenges liability in court.
- 121 There also needs to be consideration of the limits that should be placed upon the time within which the offender must apply for administrative review and within which the prosecuting authority or other review body must deal with the application. On the one hand, the time limits should be such as to ensure that there is little incentive for people to seek review in order to delay payment. On the other hand, they must allow sufficient time for both the offender and the prosecuting authority to consider their position properly.
- 122 Determination of review cases could be guided by a sliding scale of discounts. For example, in the case of the standard fee model, a defendant providing evidence of undue hardship might qualify for a level A, B, or C discount, or review staff could have discretion to fix the penalty at any level under the standard limit, depending on the circumstances of offence and defendant.

The court's role

- 123 If the defendant denies liability for the infringement offence, he or she should have the right to require the matter to be brought before the court for determination. In this respect, the court should play the same role in both Tier Two and Tier One offences.
- 124 If a defendant chooses to take up the option of challenging the merits of the offence before the court and is found guilty, the court should retain the sentencing discretion to impose up to the statutory maximum for the offence.⁸¹ This is justifiable on the basis that the infringement fee is set as a proportion of the maximum penalty to account for a number of factors, including the expected lower level of offending and the discount for the implied guilty plea. If an independent judicial assessment of the circumstances of the offending and the fact that there has been a not guilty plea concludes that a penalty up to the maximum is warranted, the court should retain its discretion to impose one.
- 125 In contrast with Tier One, the court should also have jurisdiction to deal with Tier Two offences in two other respects. First, prosecuting authorities should retain jurisdiction to proceed summarily, so that they can take defendants to court where the offending involves a high degree of seriousness or culpability. Secondly, because the prosecuting authority is exercising some discretion in determining or reviewing the level of penalty, it should be open to the defendant to challenge that level in court. In that event, the penalty should be able to be reduced, but not increased.

Recommendation

R9 Tier Two infringements should have the following characteristics:

- They should be offences with a penalty level above the Tier One maximum level but for which imprisonment is not a penalty.
- The infringement fee should be either a standard penalty or within a statutory range of penalties available to the prosecuting officer.
- All infringement fees should be able to be reduced where there are special mitigating circumstances or where they would cause undue hardship to the defendant.
- An administrative review process should exist to consider first level challenges and inquire into the circumstances of the offence and defendant.
- There should be no mandatory fees in Tier Two.
- The defendant should always retain the right to request a court hearing to determine liability or penalty.
- If there is challenge to liability the court should be able to sentence up to the maximum penalty, but if the challenge is to penalty alone the fee should only be able to be reduced.

⁸¹ In the case of Tier One offences, the infringement fee would always be the statutory maximum fee and authorities would not have the discretion to proceed summarily.

- Enforcement authorities should retain the discretion to proceed summarily to enable them to deal with recidivist defendants or particularly grave instances of offending.
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4 Setting infringement penalties

- 126 **A** REVIEW of current New Zealand infringement offences reveals a wide range of penalties attaching to the various offences under the 24 statutory infringement regimes currently in force. Although the Legislation Advisory Committee Guidelines provide some assistance in determining penalty levels for infringement offences, the absence of a penalty-setting framework has been an impediment to securing consistency.
- 127 In this chapter we outline the main features of a proposed framework intended to provide a more robust basis for setting infringement penalty levels. This framework is aligned with the sentencing purposes and principles codified in the Sentencing Act 2002 and requires consideration of the likely level of harm and culpability involved in a typical instance of the particular offence.

LEGISLATION ADVISORY COMMITTEE GUIDELINES

- 128 At present the Legislation Advisory Committee Guidelines provide the only formal guidance on appropriate fee levels for infringement offences, directing that “the level of infringement fee should generally be less than \$500”.⁸² The Guidelines are not consistently observed, however. Of the 24 statutory infringement regimes currently in force, 15 have the ability to set fees above \$500.⁸³ Of these, nine have set infringement fees which exceed \$500, including:

⁸² Legislation Advisory Committee *Guidelines on Process and Content of Legislation 2003* (Supplement to the 2001 edition, Wellington, 2003) 121, para 12.5.3.

⁸³ These include: the Civil Aviation Act 1990, which specifies that an infringement fee must not exceed \$2000 for an individual and \$12 000 for a body corporate (s 100(e)); the Building Act 2004, which specifies that an infringement fee must not exceed \$20 000 (s 402(1)(z)); the Dog Control Act 1996, which has a maximum infringement fee of \$750 (sch 1); the Fisheries Act 1996, which specifies that the maximum infringement fee must not exceed \$3000 (s 297(1)(nc)); the Gambling Act 2003, which specifies that the maximum infringement fee must not exceed \$10 000 for an individual and \$50 000 for a licence holder (s 360(b)); the Hazardous Substances and New Organisms Act 1996, which specifies that an infringement fee must not exceed \$1000 (s 140(1)(j)); the Health and Safety in Employment Act 1992, which specifies an infringement fee range of \$100–\$3000 (s 56F(1)) and \$800–\$4000 (s 56F(3)); the Local Government Act 1974 (Navigation Safety Bylaws), which specifies that an infringement fee must not exceed \$1000 (s 699A(2)(a)); the Local Government Act 2002, which specifies that an infringement fee must not exceed \$1000 (s 259(b)); the Maritime Transport Act 1994, which specifies that an infringement fee must not exceed \$2000 for an individual (s 394(1)(g)(i)); the Radiocommunications Act 1989, which specifies that an infringement fee must not exceed \$2000 (s 134(1)(jb)); the Railways Act 2005, which specifies that an infringement fee must not exceed \$2000 for an individual and \$10 000 for a body corporate (s 59(e)); the Resource Management Act 1991, which specifies that an infringement fee must not exceed \$1000 (s 360(1)(bb)); and the maximum infringement fee available if an infringement notice is issued under the Transport Act 1962 is \$3000 (Transport Act 1962, sch 2, part 4).

\$630 under the Land Transport (Offences and Penalties) Regulations 1999;⁸⁴ \$750 under the Dog Control Act 1996;⁸⁵ \$750 under the Fisheries (Infringement Offences) Regulations 2001;⁸⁶ \$1000 under regulation 3(a) of the Maritime Transport (Infringement Fees for Offences Relating to Major Maritime Events) Regulations 1999; \$1000 under Resource Management (Infringement Offences) Regulations 1999;⁸⁷ \$2000 under Civil Aviation (Offences) Regulations 1997;⁸⁸ \$3000 under the Transport Act 1962;⁸⁹ \$800–\$4000 under section 56F(3) of the Health and Safety in Employment Act 1992; and \$5000 under the Gambling Act 2003.⁹⁰

- 129 Variation can also occur between regions. Under the Local Government Act 1974 and the Local Government Act 2002 there is no requirement for local authorities to set infringement fees for their region with reference to the level of fees within other regions.⁹¹ As a result, the same infringement offence may have a markedly different penalty depending upon where the infringement occurs. For example, failure to carry the required number of personal floatation devices on a navigable river carries a fine of \$100 in the Auckland region, \$200 in the Waikato, and \$500 in Southland.

THE WAY INFRINGEMENT PENALTIES MAY BE SET

- 130 There is no clear basis on which infringement penalties are currently set. Instead, it appears that they may have been determined in four different ways:
- by reference to a percentage of the maximum penalty; or
 - by reference to court-imposed penalties for the relevant offence; or
 - by reference to the level of harm or risk involved in the offence; or
 - by reference to statutory criteria.

Percentage of the maximum penalty

- 131 One approach is for the appropriate infringement penalty for an offence to be a set percentage of the maximum penalty available for the offence.
- 132 Law Commission consultation, and our review of the structure of the penalties attaching to various infringement schemes, suggests that a percentage-based approach may have been used to determine the appropriate penalty for a number of

⁸⁴ Land Transport (Offences and Penalties) Regulations 1999, sch 1B.

⁸⁵ Dog Control Act 1996, sch 1.

⁸⁶ Fisheries (Infringement Offences) Regulations 2001, sch 1.

⁸⁷ Resource Management (Infringement Offences) Regulations 1999, sch 1.

⁸⁸ Civil Aviation (Offences) Regulations 1997, sch 1.

⁸⁹ Transport Act 1962, sch 2, part 4.

⁹⁰ Gambling Act 2003, s 16 and sch 6.

⁹¹ As long as the fee is below \$1000 – Local Government Act 1974, s 669A(2)(a), and Local Government Act 2002, s 259(b).

New Zealand infringement regimes. There is no guide, however, to the percentage that should be applied when determining an infringement penalty.

- 133 In Australia, the government has directed that an infringement penalty must be one-fifth of the maximum penalty for the particular offence.⁹² According to their guide, this ratio has been applied in most Commonwealth legislation, with an occasional exception when it has been considered that a one-tenth ratio was more appropriate.⁹³
- 134 There are considerable problems with applying a set percentage across infringement regimes. This type of approach fails to take account of the varying purposes of the different regimes and assumes that the proportion of offending and the level of seriousness being dealt with by infringement notices is the same for all regimes. Also, if 90 per cent of offences within an offence category are dealt with by way of an infringement notice, the fee should be much closer to the maximum penalty than the fee for an offence category where only a small proportion of offences are dealt with in that way.
- 135 At best, therefore, any application of a set percentage-based model would produce only a spurious appearance of consistency. For example, a 20 per cent model, when applied to the maximum penalty for contravention of section 9 of the Resource Management Act 1991 would result in a fee of \$40 000 whereas the current fee is \$300,⁹⁴ and when applied to the maximum penalty for contravention of section 38(3) of the Summary Offences Act 1981 would result in a fee of \$60 whereas the current fee is \$200.⁹⁵

Average or likely fees imposed by courts

- 136 Using the average or likely fee imposed by courts was recommended in 1979 by the Parliamentary Road Safety Committee in its “Interim Report”.⁹⁶ It reflects the original idea that an infringement notice provides an alternative to the court system. Under the standard fine provisions of the Summary Proceedings Act 1957, magistrates had the ability to direct that specified traffic offences within their region, be dealt with by way of a standard penalty procedure and to fix the amount of the fine attaching to the offence.⁹⁷
- 137 Law Commission consultation with the Ministry of Fisheries indicates that this method of penalty setting was adopted when drawing up the current infringement scheme under the Fisheries Act 1996. Penalties were fixed at around the level that courts were imposing for the same or similar offences before the infringement scheme was in place.

⁹² Attorney-General’s Department, above n 59, 47, which states that the infringement penalty must equal one-fifth of the offence maximum and should not exceed 12 penalty units for an individual or 60 penalty units for a body corporate.

⁹³ Attorney-General’s Department, above n 59, 47. A one-tenth ratio has generally been considered more appropriate in the context of civil penalties, as they usually attract higher monetary penalties than criminal offences.

⁹⁴ Resource Management (Infringement Offences) Regulations 1999, sch 1.

⁹⁵ Summary Offences Act 1981, s 38A.

⁹⁶ Road Safety Committee, above n 19, 7.

⁹⁷ Summary Proceedings Act 1957, s 21(3) and (4) (repealed by the Summary Proceedings Amendment Act 1974).

- 138 Arguably, by using the average or likely penalty imposed by a court, an infringement fee determined in this manner is more accurately reflecting the level of seriousness that society, as expressed through a court, regards the offence as entailing.⁹⁸ However, this assumes that the cases considered by the courts are the same as those for which an infringement notice is issued. This assumption is clearly wrong. Where summary prosecution and infringement notices are available, the former is likely to be reserved for the more serious instances of the offence and the latter used for the more minor instances.
- 139 This method of setting a penalty is only helpful where there is an established pattern of sentencing for an existing offence and no existing infringement penalty. The infringement penalty for new offences, obviously, cannot be determined with any accuracy in this manner.

Level of risk or the level of harm

- 140 Setting penalties according to the level of risk or harm involves assessing the nature of the offence and its consequences or potential consequences.⁹⁹ It is particularly useful when setting the infringement penalty for road traffic offences or for offences where the harm resulting can be quantified, for example some offences under the Resource Management Act 1991.
- 141 The Ministry of Transport, who took over leadership of the Administrative Penalties Review from the Land Transport Safety Authority in 2004, is currently undertaking a review of road traffic penalties on this basis. The Ministry has recognised the need for penalties to accurately reflect both the safety risk associated with the offence and also its relativity to other safety-related offences.¹⁰⁰ This idea was supported in a local authority submission in response to the Joint Discussion Paper, which suggested that greater consistency in penalty levels could be achieved by the development of a penalty scale and the ranking of offences in relation to the likelihood and nature of the social and/or environmental harm caused.¹⁰¹
- 142 Determining an infringement penalty by reference to the level of risk or harm caused by the offence is useful when determining the penalty for lower level infringement offences. More serious infringement offences that involve conduct of varying risk, harm and culpability, however, require more detailed guidelines in order to determine the appropriate level of seriousness and the corresponding penalty. This should include a comparison with offending of the same type that is subject to prosecution.

⁹⁸ Bagaric, above n 46, 265–6, argues that this should be used as the starting point when determining the appropriate infringement penalty. He suggests that any reduction below this level should be slight, around 10 per cent.

⁹⁹ This necessarily involves an assessment of the aggravating factors involved in the offence. In particular, an assessment of the extent of any loss, damage, or harm resulting from the offence (Sentencing Act 2002, s 9(1)(d)).

¹⁰⁰ “Principles of Deterrence and Risk Theory and Risk Taking”, internal document provided by David Weinstein, Project Manager, Administrative Penalties Review, Land Transport Safety Authority to the Law Commission, 17 November 2003.

¹⁰¹ Submission of the Auckland City Council. As an example, the Council noted that “the penalty levels for dog infringements are currently higher than those for an unwarranted or unregistered vehicle, despite both situations presenting a potential serious risk to public safety”.

Level of fine assessed after statutory criteria considered

- 143 The Health and Safety in Employment Act 1992 introduced a new approach to setting infringement fees in New Zealand. Instead of providing fixed fees for particular offences, the Act provided a maximum and minimum infringement fee for a particular offence, with the inspector issuing the infringement offence notice determining the fee by reference to prescribed criteria.¹⁰²
- 144 We understand from our consultation with Department of Labour officials that the current system is working reasonably well, although only around 20 cases a year are dealt with by way of infringement offence notices. The focus of the Act is on compliance, and the presence of an infringement system is designed to support the other enforcement tools provided in the Act. Even where the maximum infringement fee is imposed it amounts to less than 2 per cent of the maximum fine available through summary prosecution.
- 145 In this instance, where the offences under the Health and Safety in Employment Act 1992 are defined broadly and can incorporate very different levels of culpability and harm, it would be difficult to set an infringement fee that is appropriate in all circumstances. However, the inability to prescribe a standard fine in a statute does not necessarily justify giving what is generally considered a judicial discretion to vary penalties to an administrative body or issuing officers. Ideally, infringement offences should be narrowly defined, thereby avoiding the need to grant administrative bodies the discretion to determine a penalty. The Health and Safety in Employment Act offences provide a model that should generally be avoided.
- 146 We do not wish to go as far as to recommend that this model should never be adopted. However, we believe that it has very limited application and certainly does not provide a basis for fixing penalty levels in the general run of cases.

Assessment

- 147 As the Australian Law Reform Commission has noted, the ideal infringement fee “would be that which would offer no scope for pressure on an innocent defendant but is not so high as to induce the guilty to allow the matter to proceed to court”.¹⁰³ However, finding a method that achieves this objective is difficult. Although the methods outlined above may be appropriate for a particular infringement regime, they cannot be applied to all infringement regimes and we consider that a new approach is necessary to ensure that there is consistency between infringement penalties.

A PRINCIPLED INFRINGEMENT PENALTY SETTING MODEL

- 148 We consider that infringement penalty setting should be influenced by the sentencing purposes and principles that are appropriate to the particular regime. These purposes should reflect the policy objectives that the legislation creating the infringement offence aims to achieve.

¹⁰² See chapter 3, paras 113–116, for our discussion of how this system operates.

¹⁰³ Australian Law Reform Commission *Multiculturalism and the Law* (ALRC 57, Sydney, 1992) 197.

Sentencing Act 2002 purposes

- 149 The general purposes of sentencing have been codified in section 7 of the Sentencing Act 2002. Although the function of that Act is to provide guidance to sentencing judges, four of the eight purposes are equally relevant to infringement penalty setting. These are:
- holding the offender accountable for the harm caused by the offence (section 7(1)(a));
 - promoting a sense of responsibility and an acknowledgment of that harm (section 7(1)(b));
 - denouncing the conduct (section 7(1)(e)); and
 - deterring the offender or other person from committing the same or similar offence (section 7(1)(f)).
- 150 The purpose of holding the offender accountable for the harm caused by the offending directly relates to the common law principle of proportionality. This principle requires that the penalty imposed be relative to the seriousness of the offence and the culpability of the offender. Promoting a sense of responsibility for the harm and denouncing or deterring the conduct are both purposes which aim to educate and modify people's behaviour and thereby reduce offending or re-offending.

Sentencing Act 2002 principles

- 151 The Sentencing Act 2002 also provides a framework that guides the courts in the imposition of penalties for offences generally. Accordingly, wherever possible, the principles set out in the Sentencing Act 2002 should be taken into account and incorporated into the penalty structure for each infringement scheme.
- 152 Section 8 provides a list of 10 principles that are to be taken into account in sentencing an offender. These can be categorised as those factors that relate to the nature of the offence (including the gravity and seriousness of the offence)¹⁰⁴ and those that relate to the characteristics of the offender (including the degree of culpability, the circumstances, and the personal background of the offender).¹⁰⁵ Regard must also be had to the general desirability of consistency with appropriate sentencing levels and similar offences, and to the need to impose the least restrictive outcome that is appropriate in the circumstances.¹⁰⁶
- 153 An infringement offence penalty is of general application. Factors such as the characteristics of the offender are unable to be considered when determining an appropriate infringement penalty, at least in relation to our proposed Tier One offences. They will also have very limited relevance to Tier Two offences, allowing a review of the penalty only in special circumstances or in the event of undue hardship. It may, however, be possible to take the nature of the offence into account when determining what type of conduct warrants an infringement notice and the corresponding penalty. Similarly, ensuring consistency in

¹⁰⁴ Sentencing Act 2002, s 8(a) and (b).

¹⁰⁵ Sentencing Act 2002, s 8(a), (h) and (i).

¹⁰⁶ Sentencing Act 2002, s 8(e) and (g).

infringement penalties can be achieved by comparing the penalty level with that attaching to similar offences.

Aggravating and mitigating factors – the guilty plea

- 154 The aggravating and mitigating factors set out in section 9 of the Sentencing Act 2002 are taken into account by the court when tailoring the sentence to meet the circumstances of the offence and the offender. Section 9 factors are less likely to be of assistance in determining an appropriate infringement penalty, as they largely relate to the circumstances of the offender. One factor – the guilty plea – is, however, of critical importance to every infringement regime.
- 155 It is a well-established sentencing principle that an early guilty plea merits a sentencing discount, since it indicates remorse or contrition, spares victims and other witnesses from having to give evidence, and avoids the costs of a trial.¹⁰⁷ Although the level of discount is not specified by statute, the Court of Appeal has noted that the range is generally within 20 to 33 per cent of the penalty that would have been likely had a finding of guilty followed a trial.¹⁰⁸ In the context of an infringement offence, by accepting liability and paying an infringement fee a defendant is, to all intents and purposes, entering a guilty plea at the earliest opportunity and the level of penalty should reflect this discount. We suggest that a one-third discount from the penalty that would otherwise be imposed for such an offence following a defended hearing should therefore be included in the level of penalty attaching to any infringement offence.

PENALTY FIXING APPROACH

Tier One – fixed penalty offences

- 156 As discussed in chapter 3, Tier One or fixed penalty offences should only include offences where court involvement is considered disproportionate to the severity, harm and social condemnation involved in the offence. Penalties should be fixed and must be below a specified threshold consistent with the ability to pay of people in the lowest socio-economic group.
- 157 We consider that the penalties set for particular offences in Tier One should be set at a level that properly reflects the mean level of seriousness for that offence, so that the limited variation in seriousness around that mean is sufficiently catered for by the standard penalty. Where an offence includes varying degrees of harm and culpability that can be easily separated into distinct categories (as in the extent to which speeding exceeds the specified limit), a statutory sliding scale, with fixed penalties that increase for more severe instances of offending, may sometimes be appropriate to ensure that the penalty is graduated according to the level of offending involved.
- 158 The level of infringement penalty for Tier One offences must also be considered in relative terms, compared to other Tier One and Tier Two fees and to penalties

¹⁰⁷ See, for example, *R v Taylor* [1968] NZLR 981 (CA), *R v Ripia* [1985] 1 NZLR 12, *R v Palmer* [2000] 1 NZLR 546, *R v Lynn* (20 June 2001) CA 90/01.

¹⁰⁸ *R v Tryselaar* (2003) 20 CRNZ 57 (CA). Similarly, in *R v Woolley* (23 July 2001) CA 02/01 an average reduction of 27 per cent in the length of sentences was noted.

in the criminal system generally. Comparing the proposed penalty with other infringement fees not only ensures that offences involving similar levels of culpability and harm are treated in the same way, it also ensures that the penalty is comparable to other penalties that also include a discount for guilty plea at first available opportunity.

Recommendation

R10 Tier One – fixed penalty

In setting the level of fee for Tier One penalties, the following criteria should be applied:

- proportionality between the level of harm and degree of culpability inherent in the conduct constituting the offence and the penalty; and
- relativity of the infringement fee with similar infringement offences, regimes and penalties generally; and
- the application of a one-third discount from the penalty that would otherwise be imposed for such an offence following a defended hearing for a guilty plea.

Tier Two – variable penalty infringements

- 159 The second tier of infringement offences, as discussed in chapter 3, has been designed to include those offences where court proceedings would generally be disproportionate, but where the degree of culpability or the size of the infringement penalty required is such that it may be appropriate to take very limited account of the circumstances of the defendant and the offending on review.
- 160 Offences that fall within this tier will generally be broadly defined to include a wider range of conduct than Tier One. It is likely that a maximum penalty for the offence will be prescribed in either statute or regulation and the infringement penalty will need to be determined by reference to this maximum.
- 161 The maximum prescribed penalty for an offence is designed to reflect the appropriate penalty for the worst hypothetical class of the offence that is proved in court following a defended hearing.¹⁰⁹ With Tier Two infringement offences, where summary prosecution will continue to be available, infringement notices will be used for the more minor instances of the offence, so that the penalty levels should be substantially less than the maximum penalty. The question to be determined is how that level should be set and the extent to which it should be able to be varied. Because of the large variety of offences that will fall within this tier, we propose two alternative penalty-setting methods.

¹⁰⁹ See Hon J Bruce Robertson (ed) *Adams on Criminal Law* (loose leaf, Brookers, Wellington, Sentencing Act 1992) para SA 8.04.

Standard penalty

- 162 Where a “standard penalty” approach is used, the set penalty will be applied in the vast majority of cases without variation. As is appropriate for this type of offence, a defendant will be able to challenge the penalty level through an administrative review process or ultimately at court. If he or she does seek review of the penalty, the administrative body or court should be able to vary the penalty downwards but only where special mitigating factors and/or undue hardship means that the set penalty is inappropriate.
- 163 The following process should establish an infringement penalty that is both a sufficient response to conduct at the upper end of the range for which an infringement notice is appropriate and is also not disproportionate to conduct at the bottom end of that range. As the fee will already incorporate standard sentencing discounts (in particular the one-third discount for a guilty plea) there should be no need for review except as outlined above.

RANGE OF CONDUCT FOR WHICH AN INFRINGEMENT FEE WILL BE IMPOSED

- 164 In order to determine an appropriate penalty it is necessary to identify, by reference to the nature of the harm and the likely culpability of the offender, the type of conduct for which an infringement notice should be issued. This type of behaviour may be a large or small proportion of the total offending in that offence category.
- 165 A notional penalty that is appropriate to the top end of this type of conduct should then be determined; any conduct that exceeds this in seriousness should be dealt with by way of summary prosecution. Similarly, a notional penalty should also be determined for the least serious form of this conduct. This should not be zero; rather it should be set on the basis that any conduct that falls below this level is amenable to rectification or a warning rather than a fee.
- 166 In addition, the notional penalties corresponding to both the most and least serious type of conduct for which an infringement notice will be issued should incorporate a one-third discount for an early guilty plea.

POSITIONING THE PENALTY

- 167 We consider that the standard penalty should be the midpoint between this notional minimum and maximum. This is because, as in Tier One, the midpoint represents the mean level of seriousness, and the variation in seriousness around that mean should be sufficiently catered for by a penalty designed for the mean.
- 168 However, because the potential variation in culpability and the quantum of the standard penalty are likely to be greater in Tier Two than in Tier One, the defendant should be able to have that penalty reduced on the grounds of special mitigating factors or undue hardship. That will allow for the occasional case where the admittedly crude mechanism of fixing a penalty at the midpoint in the range of seriousness will do an injustice.

Statutory penalty range

- 169 The statutory penalty range option is based on the current Health and Safety in Employment Act infringement regime. As noted above (paragraph 145), we consider that this method of penalty setting has very limited application.

- 170 Determining the statutory penalty range follows a similar process to that outlined above. To provide the minimum and maximum infringement fee to be set in statute, it is necessary:
- first, to establish the maximum penalty attaching to the substantive offence;
 - secondly, to determine the type of conduct that will be dealt with by way of infringement notice; and
 - thirdly, to establish the appropriate penalty, incorporating a one-third discount for a guilty plea, that would attach to the most and least serious instance of the offence to be dealt with by infringement fee.
- 171 The statute should also provide specific criteria that the prosecuting authority must take into account when determining the appropriate fee for the particular instance of this offence.

Recommendation

R11 Tier Two – variable penalty

1 Standard penalty

The normal model for Tier Two infringement offences should be a standard penalty that can be varied downwards on administrative review. The following process for each offence type should be used for setting the standard Tier Two infringement fee:

- Identify the type of conduct for which an infringement notice should be issued.
- Identify a notional penalty that incorporates a one-third discount for a guilty plea, for the most serious type of offending behaviour (on the basis of the level of harm and degree of culpability) for which an infringement notice should be issued.
- Identify a notional penalty that incorporates a one-third discount for a guilty plea, for the least serious type of offending behaviour (on the basis of the level of harm and degree of culpability) that warrants an infringement notice being issued.
- The midpoint between the notional minimum and maximum penalties should be the standard penalty.

2 Statutory penalty range

The following process for setting a statutory range for Tier Two infringement fees should be used:

- Identify the type of conduct for which an infringement notice should be issued.
- Identify a notional penalty that incorporates a one-third discount for a guilty plea, for the most serious type of offending behaviour

(on the basis of the level of harm and degree of culpability) for which an infringement notice should be issued.

- Identify a notional penalty that incorporates a one-third discount for a guilty plea, for the least serious type of offending behaviour (on the basis of the level of harm and degree of culpability) that warrants an infringement notice being issued.

REMAINING ISSUES

- 172 We acknowledge that the proposed system, while providing a principled basis for determining infringement fees, will not necessarily result in less variation in the level of infringement fees. Nor will it ensure that the fees set retain their currency as inflation changes the net worth of the fine.
- 173 We consider that it may be appropriate to develop a structured penalty system in order to limit the substantial variation in the amounts imposed and to ensure that the fee continues to be current. A similar approach was recommended by Professor Richard Fox in his 1995 study of the Victorian infringement system. Fox reviewed the penalties attaching to infringement offences in Victoria and found there were 33 different levels of fee imposed. He noted that to continue setting infringement fees at amounts as similar as \$100 and \$105, or \$205 and \$220, was “meaningless and anachronistic” and proposed that the penalty levels be reduced to the following fifteen-point scale: \$25, \$50, \$75, \$100, \$125, \$150, \$175, \$200, \$250, \$300, \$350, \$400, \$450, \$500 and \$750.¹¹⁰
- 174 Similarly, the Criminal Justice and Police Act 2001 (UK), which creates penalty notices for disorder offences, indicates a movement in England towards a more streamlined penalty structure for infringement offences. Under this Act, infringement offences are divided into two categories, those which attract a £80 fee and those which attract a £50 fee.
- 175 A penalty structure would not only ensure less variation in the fees attaching to infringement offences but would also allow for the alteration of penalties over time, as the levels could be periodically adjusted in tandem to keep pace with inflation. We acknowledge that any such adjustments of the infringement tier system would have to be undertaken as part of a general review of maximum fines.

Recommendation

R12 The Government should consider whether there would be benefits in introducing clearly defined penalty tiers for infringement offences.

¹¹⁰ Fox, above n 41, 197.

5

Extending the infringement system

INTRODUCTION

- 176 **A**S WELL as the expansion of the infringement system from traffic offences into the regulatory and commercial sphere, some jurisdictions have introduced fixed penalty notices for a wider range of criminal offending – in particular in the area of public disorder offending that is within the remit of police enforcement. It is necessary to consider the potential value of a similar expansion in New Zealand.
- 177 There are three instances of minor summary criminal offences, enforced by the Police, that are dealt with by way of infringement offence in New Zealand. The Sale of Liquor Amendment Act 1999 made two offences under the Sale of Liquor Act 1989 infringement offences¹¹¹ (these are purchasing liquor on or from licensed premises by a person under the minimum drinking age – section 162, and being in a restricted area on licensed premises under the minimum drinking age – section 163). Section 162A of the Sale of Liquor Act 1989 provides that the offences are subject to an infringement fee that is prescribed by regulations and that is not to exceed \$500.¹¹² The Sale of Liquor Amendment Act 1999 also made the offence of under-age drinking in a public place an infringement offence with a fee of \$200¹¹³ under the Summary Offences Act 1981, section 38(3).

EXAMPLES OF EXTENSION IN OTHER JURISDICTIONS

United Kingdom

- 178 In the United Kingdom, the Criminal Justice and Police Act 2001 introduced “Penalty Notices for Disorder” (PNDs) for 10 public order offences. Penalty notices for disorder were introduced with the aim of putting an immediate stop to misbehaviour and providing a swift punishment while taking up as little police time as possible.¹¹⁴ This was part of a broad government policy of tackling antisocial behaviour and by September 2004, the number of PND offences had grown to 19. There are two tiers of PND offences, with top tier

¹¹¹ Sale of Liquor Act 1989, s 162A.

¹¹² Under the Sale of Liquor Amendment Regulations 1999, reg 4, the infringement fee for these offences is currently set at \$200.

¹¹³ Summary Offences Act 1981, s 38A.

¹¹⁴ Home Office *Reducing Public Disorder: The Role of Fixed Penalty Notices* (Consultation Paper, September 2000), para 3.

offences attracting a penalty of £80 and second tier offences incurring a £50 penalty. From November 2003,¹¹⁵ PNDs could be issued to 16 and 17 year olds, and from December 2004 to 10 year olds,¹¹⁶ with fine tiers at £40 and £30 for those under 16.¹¹⁷

- 179 The Bill had originally also listed criminal damage and using threatening, abusive or insulting words under section 5 of the Public Order Act 1986 as offences for which PNDs could be issued. These were removed on the grounds that they were inherently more serious offences.¹¹⁸ In addition, during debates on the Bill, the Home Secretary gave an assurance that guidance would be given to the police that where a person could be identified as a victim of the offence, a penalty notice would not be issued. It has been suggested that this important point might usefully have been included in the legislation itself.¹¹⁹
- 180 Unlike the situation in New Zealand, it seems that in the United Kingdom if a person chooses to challenge the PND in court they may be convicted of the offence if found guilty, resulting in a criminal record, and may be exposed to a penalty greater than the PND, which can include a community or custodial sentence.¹²⁰

Australia¹²¹

New South Wales

- 181 Amendments made by the Crimes Legislation Amendment (Police and Public Safety) Act 1998 expanded the application of fixed penalty notices to a wider range of minor offending in New South Wales. There is also a broad power for offences, prescribed in regulations, to be dealt with by fixed penalty notices under Chapter 7, Part 3 of the Criminal Procedure Act 1986 (NSW). Existing offences under the Summary Offences Act 1988 (NSW) that may be the subject of a fixed penalty notice include: hunting on private land without consent;¹²² sale of spray paint cans to persons under 18;¹²³ possession of liquor by minors;¹²⁴ and custody of a knife in a public place or school.¹²⁵ Under sections 28F and 29A, police officers have a broad power to give directions to members of the

¹¹⁵ Anti-Social Behaviour Act 2003 (UK).

¹¹⁶ Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004 (SI 2004/3166).

¹¹⁷ Penalties for Disorderly Behaviour (Amount of Penalty) (Amendment No 3) Order 2004 (SI 2004/3167).

¹¹⁸ M Wasik "Legislating in the Shadow of the Human Rights Act: The Criminal Justice and Police Act 2001" [2001] Crim LR 931, 933.

¹¹⁹ Wasik, above n 118, 934.

¹²⁰ Wasik, above n 118, 935.

¹²¹ In Australia, an argument for extending fixed penalties to more serious criminal offending has been made by Bagaric, above n 46.

¹²² Summary Offences Act 1988 (NSW), ss 28J and 29B.

¹²³ Summary Offences Act 1988 (NSW), ss 10C and 29A.

¹²⁴ Summary Offences Act 1988 (NSW), ss 11 and 29.

¹²⁵ Summary Offences Act 1988 (NSW), ss 11C and 29A.

public on a range of public order matters, and to issue a penalty notice in the event of failure to comply with those directions. Relevant conduct under section 28F includes obstructing persons or traffic, harassment or intimidation, behaviour likely to cause fear, and unlawfully supplying or intending to supply drugs.

- 182 A 1999 Ombudsman report expressed some concerns about the use of sections 11C (custody of a knife in a public place or school) and 28F penalty notices.¹²⁶ It was noted that, unlike for traffic offences, comparatively few of these penalties were either paid or challenged, that a large proportion of notices were given to young people, and that police officers were unwilling to caution or warn. Because of the benefits of infringement notices, however, the Ombudsman did not consider discontinuance of the scheme was necessary and instead recommended that:
- more detailed guidance was required on what constituted an offence under the Act and on the use of discretion;
 - police should be encouraged to make greater use of warnings;¹²⁷
 - police should be authorised to formally caution adult defendants for first offences; and
 - police should be required to consider making greater use of formal cautions for young defendants.
- 183 The list of offences that could be punished by way of a fixed penalty notice was further extended under the Crimes Legislation Amendment (Penalty Notice Offences) Act 2002 to include: common assault;¹²⁸ larceny where the value of the property or amount does not exceed \$300;¹²⁹ obtaining money etc by wilfully false representation;¹³⁰ unlawful possession of property;¹³¹ offensive conduct in or near a public place or school;¹³² offensive language in or near a public place or school;¹³³ obstructing traffic;¹³⁴ and unauthorised entry of a vehicle or boat.¹³⁵
- 184 Section 30 of the Summary Offences Act 1988 provides that no person shall be imprisoned or detained in consequence of failing to pay a pecuniary penalty under section 11 (possession of liquor by minors). The omission of other fixed penalty notice offences from this provision suggests that defendants can be imprisoned or detained for failing to pay their penalty under the other provisions.

¹²⁶ NSW Ombudsman *Policing Public Safety: Report under s 6 of the Crimes Legislation Amendment (Police and Public Safety) Act 1988* (Sydney, 1999).

¹²⁷ The NSW Ombudsman's report noted this need not affect an officer's powers of confiscation.

¹²⁸ Crimes Act 1900 (NSW), s 61.

¹²⁹ Crimes Act 1900 (NSW), s 117.

¹³⁰ Crimes Act 1900 (NSW), s 527A.

¹³¹ Crimes Act 1900 (NSW), s 527C.

¹³² Summary Offences Act 1988 (NSW), s 4(1).

¹³³ Summary Offences Act 1988 (NSW), s 4A(1).

¹³⁴ Summary Offences Act 1988 (NSW), s 6.

¹³⁵ Summary Offences Act 1988 (NSW), s 6A.

Victoria

- 185 In 1992, the Law Reform Commission of Victoria suggested that a number of the offences in the Victorian Vagrancy Act 1966 and Summary Offences Act 1966 were not so serious as to warrant arresting the accused, taking him or her to the police station, fingerprinting and arranging bail for him or her. It could be argued that these offences should be dealt with by an extension of the penalty notice system,¹³⁶ but the Commission did not recommend this. However, some instances of minor summary offending, for example, under-age drinking offences¹³⁷ and offensive behaviour by a person in a motor vehicle in a declared area,¹³⁸ can be dealt with by way of fixed penalty in Victoria.

Northern Territory

- 186 Examples of offences that may be dealt with by way of fixed penalty notice in the Northern Territory are soliciting in a public place;¹³⁹ and, under the Summary Offences Regulations, regulation 3: drinking in a public place;¹⁴⁰ riotous, offensive, disorderly or indecent behaviour, or of fighting, or using obscene language, in or within the hearing or view of any person in any road, street, thoroughfare or public place;¹⁴¹ undue noise;¹⁴² willingly and knowingly permitting drunkenness in specified places;¹⁴³ and playing musical instruments so as to annoy.¹⁴⁴

On-the-spot penalties for minor cannabis offences in Australia

- 187 Some Australian states use on-the-spot penalties for minor cannabis offences. The first scheme was introduced in South Australia in 1987,¹⁴⁵ followed by the Australian Capital Territory,¹⁴⁶ Northern Territory¹⁴⁷ and Western Australia.¹⁴⁸ Under the South Australian regime, an expiation fee of \$50 is imposed for the possession of less than 25 grams of cannabis, and \$250 for possession of between

¹³⁶ Law Reform Commission of Victoria *Summary Offences Act 1966 and Vagrancy Act 1966: A Review* (Discussion Paper 26, Melbourne, 1992), paras 35–36.

¹³⁷ Liquor Control Reform Act 1998 (Vic), s 141 and Pt 8, div 2.

¹³⁸ Summary Offences Act 1966 (Vic), ss 18 and 60AA. Section 60AF provides that “(1) ... payment of an infringement fee is not and must not be taken to be (a) an admission of guilt in relation to the offence; or (b) an admission of liability for the purpose of any civil claim or proceeding arising out of the same occurrence and the payment does not in any way affect or prejudice any such claim or proceeding. (2) The payment of an infringement penalty must not be referred to in any report provided to a court for the purpose of determining sentence for an offence.”

¹³⁹ Prostitution Regulation Act (NT), s 10 and Prostitution Regulations – \$100 penalty.

¹⁴⁰ Summary Offences Act (NT), ss 45D and 45G.

¹⁴¹ Summary Offences Act (NT), s 47.

¹⁴² Summary Offences Act (NT), ss 53A(2) and 53B(3).

¹⁴³ Summary Offences Act (NT), s 66(1)(a).

¹⁴⁴ Summary Offences Act (NT), s 76.

¹⁴⁵ By the Controlled Substances (Expiation of Simple Cannabis Offences) Regulations 1987 (SA); now found in the Controlled Substances (Expiation of Simple Cannabis Offences) Regulations 2002 (SA), made under the Controlled Substances Act 1984 (SA), s 45A.

¹⁴⁶ Drugs of Dependence Act 1989 (ACT), s 171A.

¹⁴⁷ Misuse of Drugs Act (NT), Pt II, div 2.

¹⁴⁸ Cannabis Control Act 2003 (WA).

25 and 100 grams.¹⁴⁹ Fees of between \$50 and \$150 dollars are set for some other minor cannabis offences.¹⁵⁰ It has been estimated that the cost savings to that state in 1995/96 for dealing with these offences in this way was nearly \$1.5 million.¹⁵¹ However, in the years since 1991/92, only around 45 per cent of notices have been paid.¹⁵² The Australian Capital Territory has also experienced low compliance rates (53 per cent).¹⁵³

EXTENSION TO SUMMARY CRIMINAL OFFENCES

Disadvantages

- 188 To deal with some traditional criminal offences by way of fixed penalty goes against the grain of the original criteria for infringements. Unlike the original types of offending that made up the infringements portfolio, in some instances these sorts of offences may not be so clear-cut in commission and so there may be a stronger likelihood of the defendant having a defence to the charge. It has been suggested that extending infringements to other forms of offending may trivialise crime¹⁵⁴ and that the lack of an automatic court appearance may in fact mean a reduction in the level of deterrence. On the other hand, there is the argument that the immediacy and certainty of an on-the-spot fine provides stronger deterrence than the uncertainty and distance of a potential court appearance, which may be a confusing experience for some defendants.
- 189 A further concern about extending infringement notices in this way concerns net-widening. The potential for enforcement officers to issue an infringement notice in place of giving a warning is clear and is a particular issue with public order offences.¹⁵⁵ Despite the fact that conviction would not ensue here, it is undesirable that individuals incur infringement fees in circumstances that would, previously, have seen no formal action taken. In chapter 6, we recommend that legislative attention is directed to the exercise of this discretion by enforcement officers, and that discretion be subjected to clear guidelines. The need for such guidance is even greater if infringements are extended to broader “criminal” mens rea offences.

¹⁴⁹ Controlled Substances (Expiation of Simple Cannabis Offences) Regulations 2002 (SA), reg 6(a). Regulation 6(b) imposes the same fees for possession of low amounts of cannabis resin.

¹⁵⁰ These are: regulations 6(c)–(e) regarding consumption of cannabis (not committed in a public or other prescribed place); the possession of equipment for use in the connection with the consumption of cannabis; and for the cultivation of one cannabis plant.

¹⁵¹ T Parsons “Expiation v Prosecution in South Australia and Western Australia” (October 2000) Law Institute Journal 64, referring to A Brooks, C Stothard, J Moss et al *Costs Associated with the Operation of the Cannabis Expiation Notice Scheme in South Australia* (Monograph No 5, Drug and Alcohol Services Council, Adelaide, 1997) 7.

¹⁵² P Christie *Cannabis Offences under the Cannabis Expiation Notice Scheme in South Australia* (Drug and Alcohol Services Council, Adelaide, 1998).

¹⁵³ Standing Committee on Health and Community Care, Legislative Assembly for the Australian Capital Territory, *Cannabis Use in the ACT* (Report 7, Canberra, 2000) 64.

¹⁵⁴ Bagaric, above n 46, 255.

¹⁵⁵ See our discussion in chapter 6 at paras 213–216.

Advantages

- 190 Dealing with offending by way of infringement notices is likely to have significant cost savings for both the State and the defendant.¹⁵⁶ In chapter 2 we described the trade-off that is in place by which both can benefit. Police time can be freed up so that they are better able to concentrate resources on more serious offending. Further savings may be made to the State generally, in terms of use of court resources and the legal aid budget.
- 191 The deterrent value of an immediate penalty for disorder type offences, where offending is less a part of a pattern of offending, may also carry benefits. Further, in these minor but high volume instances of offending it is arguable that, as with existing infringement offences, the behaviour is not of a unique enough nature to warrant a fuller investigation into the circumstances of the offence that would be achieved outside the infringement process.¹⁵⁷ Protection for the defendant would still remain as they would be able to opt into a full hearing of their case.
- 192 Bagaric¹⁵⁸ suggests that fixed penalties are the best tool for promoting consistency in sentencing, which he notes as a fundamental requirement of justice and which is highlighted in section 8(e) of our Sentencing Act 2002 as being of “general desirability”. At the same time, it is only one of the principles relevant to sentencing. The need to take account of the particular circumstances of the defendant also features as a guiding principle in section 8(h) of the Act. Fixed penalties can also result in grossly disparate treatment in that dissimilar cases are treated in a similar way. Initiatives that enable account to be taken of a defendant’s circumstances where there is such disparity would introduce greater fairness into the existing infringement system.
- 193 Many of the existing offences that could become infringement offences are covered at present by the minor offence procedure, and thus do not require a court appearance anyway.¹⁵⁹ The minor offence procedure, in the default situation, is in effect an “opt in” process in which the onus is on the defendant to give notice that he or she wishes to appear before the court. There is no reason for not replacing that procedure with the infringement process (we discuss this further in paragraphs 205–210).

SUBMISSION OF THE NEW ZEALAND POLICE

- 194 In its submission on the Joint Discussion Paper, the New Zealand Police recognised that in principle there may be some forms of criminal conduct not currently capable of being prosecuted by infringement notice that should no longer carry the status of criminal offences, either through changed societal views of such offending or because the consequences of a criminal conviction generally outweigh the criminality and seriousness of the conduct. The Police considered that further work would be required to identify the criteria to be applied in determining what types of conduct may fall into this category. While

¹⁵⁶ Bagaric, above, n 46, 248.

¹⁵⁷ Bagaric, above, n 46, 259.

¹⁵⁸ Bagaric, above, n 46, 251.

¹⁵⁹ Summary Proceedings Act 1957, s 20A.

the Police believed there may be scope for extending the range of offences amenable to the infringement regime, they saw it as important to retain existing powers of arrest.

Retaining the power to arrest¹⁶⁰

- 195 The New Zealand Police suggest that if the infringement procedure was extended to public disorder type offending, it would be important for officers to retain the ability to arrest defendants in order to defuse a public disorder situation and to prevent the instance of offending from escalating.
- 196 Section 315(2) of the Crimes Act 1961 provides that a constable may arrest and take into custody without a warrant:
- (a) Any person whom he finds disturbing the public peace or committing any offence punishable by imprisonment:
 - (b) Any person whom he has good cause to suspect of having committed a breach of the peace or any offence punishable by imprisonment:
- 197 An additional power of arrest for public order offences that are not punishable by imprisonment can be found in the Summary Offences Act 1981.
- 198 Any person arrested on a charge of having committed any offence must be brought before a court as soon as practicable (section 316(5)). Section 23 of the New Zealand Bill of Rights Act 1990 requires that a person arrested or detained shall have the right to consult and instruct a lawyer without delay, and to be informed of that right. If it becomes apparent after arrest that the arrested person is innocent or there is no longer a sufficient case to justify detention, the arrested person should be released at once.¹⁶¹ In such a case, the arrest would not be rendered unlawful by reason of the release.
- 199 The range of offences that do not carry a penalty of imprisonment, but for which a police officer has a power of arrest is, and is likely to remain, limited. Examples include offences under the Summary Offences Act 1981 such as offensive behaviour or language (section 4), fighting in a public place (section 7) and obstructing a public way (section 22). Offences for breaching liquor control bylaws made by local authorities under section 147 of the Local Government Act 2002 also fall into this category.
- 200 There is no principled reason for excluding arrestable offences from the scope of infringement offences, provided they are not punishable by imprisonment.¹⁶² There are, however, two qualifications to this. First, the power of arrest must be exercised in respect of a specific offence and not in terms of the more general authority under section 315(2)(a) of the Crimes Act 1961.¹⁶³ Secondly, to avoid the potential for issuing infringement notices to persons who might otherwise

¹⁶⁰ Regarding arrest generally, see Robertson, above n 109, CA 315.

¹⁶¹ See *Wiltshire v Barrett* [1965] 2 All ER 271. See also, Robertson, above n 109, CA 315.07.

¹⁶² Nor has the existence of a power of arrest for an offence prevented it from being an infringement offence in overseas jurisdictions: see, for example, the Contraventions Act RSC 1992 cC-47, s 7, which provides: "A power of arrest in respect of an offence that is conferred by an enactment may be exercised in respect of an offence even though the offence is designated as a contravention, but nothing in this Act confers or enlarges a power of arrest."

¹⁶³ For example, pursuant to the specific authority provided by the Summary Offences Act 1981, s 39 and the Local Government Act 2002, s 169(2).

have been warned for their offences, there should be operating guidelines for the exercise of discretion by enforcement officers. This is discussed further in chapter 6.

CONCLUSION

201 If the key elements of our recommendations concerning the treatment of Tier Two standard penalty infringement offences are adopted, there is no reason for a restriction on a wider range of summary criminal offences being dealt with as infringement offences. The key elements are that:

- no conviction should result;
- the procedure should be restricted to non-imprisonable offences;
- the range of culpability involved in Tier Two offences and the circumstances of the defendant should be taken into account by way of a process that allows for administrative challenge or review; and
- the defendant should always retain the right to challenge liability or make submissions seeking a reduced penalty to the court.

202 Certain forms of criminal offending may have additional characteristics that do not make them amenable to the infringements process. For example, some non-imprisonable offences may involve a degree of dishonesty that should result in a criminal conviction, which could then be communicated to future employers. Offences involving actual or threatened violation of important rights and those which are felt to threaten the overall interests or resources of the community¹⁶⁴ may be considered so serious as to warrant the public condemnation of a criminal conviction. The same may be said of offences leading to injury, weapon use, or criminal damage over a certain cost.¹⁶⁵ The United Kingdom suggestion that PNDs should not be imposed where an identifiable victim is involved could be another restrictive criterion on the expansion of infringements. Such determinations would need to be made on a case-by-case basis in the light of these concerns.

Police discretion and net-widening concerns

203 It has been suggested that the expansion of infringement offences has led to prosecuting authorities issuing more fixed penalty notices in place of warnings. This is no less likely to occur if a wider range of summary criminal offences become infringement offences. Currently, the lack of resultant paperwork and need for a court appearance place some incentives on police officers to warn an individual engaged in a minor instance of public disorder offending. If an officer has the option of issuing a simple infringement notice, which will not, in many cases, result in the need for a court appearance, it is likely that the incentives will shift to an extent.

204 This heightens the need for regulating the use of this discretion as we discuss in chapter 6. The need for clear and understandable information on an infringement

¹⁶⁴ Bagaric, above, n 46, 244.

¹⁶⁵ Bagaric, above, n 46, 246.

notice about the defendant's rights to challenge, and the process to do that, will also be heightened.

THE MINOR OFFENCE PROCEDURE

205 In submissions and consultation, there was no explicit support for the retention of the minor offence procedure in section 20A of the Summary Proceedings Act 1957. The minor offence procedure can be used for summary offences under the Transport Act 1962 or the Land Transport Act 1998 for which the defendant is not liable on conviction to a sentence of imprisonment or to a fine exceeding \$2000; and for any summary offences where the defendant is not liable on conviction to a sentence of imprisonment or to a fine exceeding \$500.

The demise of the minor offence procedure

206 Despite significant overlap in the offences covered,¹⁶⁶ the infringement offence procedure and the minor offence procedure evolved separately. Both were intended to provide a fair and efficient way of dealing with minor summary offences, but they differ in three important respects.

- First, the minor offence procedure is a court process, even though most cases are not dealt with in public; infringement offences are dealt with administratively, unless the defendant elects to be dealt with by the court.
- Secondly, a conviction may be imposed following a guilty plea or finding of guilt on a minor offence; but no conviction attaches to an infringement offence, even if the matter is heard by a court.¹⁶⁷
- Thirdly, the penalty for an infringement offence is fixed, whereas for a minor offence the court determines the penalty with reference to the summary of facts and any submissions made by the defendant.

207 As illustrated by table 1, in chapter 1, over the last decade there has been a substantial drop in the number of minor offences dealt with by the courts, from 16 400 cases in 1993 to 1700 in 2003. Two reasons for this emerged from the submissions on the Joint Discussion Paper and subsequent consultation. First, the administrative effort and the cost in meeting the requirements of the minor offence procedure was a disincentive to many prosecuting authorities. Secondly, the increase in the number of infringement regimes meant that for many prosecuting authorities a simpler alternative became available; one that better met their objectives without the need for court proceedings. No submitter suggested there was a need for two processes to deal with minor breaches of the law.

208 In our view, the underlying premise of the infringement offence process, namely the administrative resolution of minor breaches by way of fixed penalty, with recourse to the court only where necessary, applies equally to those offences that fall within the definition of "minor offence". For most of these offences, which

¹⁶⁶ Infringement offences may, with leave of the court, be commenced by way of minor offence notice (Summary Proceedings Act 1957, s 21(1)), but not vice versa.

¹⁶⁷ Summary Proceedings Act 1957, s 78A.

carry a low penalty but which are committed in large numbers, resolution by way of court process is a disproportionate and unnecessary response. While the minor offence procedure has the added benefit of a judicially determined penalty, the advantage of this is likely to be marginal in most cases and is outweighed by the benefits of the simpler infringement offence procedure.

- 209 Furthermore, there are two features of the infringement offence procedure that render it a more attractive option. First, it resolves similar minor breaches of the law in the same way without the need for judicial supervision, unless the defendant requests the matter to be heard. Secondly, the defendant is not at risk of the stigma of a criminal conviction and the negative implications that may arise.
- 210 While there is not a complete overlap between the two categories,¹⁶⁸ there seems little reason why those offences that presently fall within the definition of “minor offence” under section 20A(12) of the Summary Proceedings Act 1957 should not become infringement offences. The separate category of minor offences would then no longer be useful.

Recommendation

R13 If the key elements of our recommendations concerning the treatment of Tier Two infringement offences are adopted:

- infringement notices should be used for some offences currently dealt with by the criminal courts that do not lead to imprisonment, unless there is a policy reason why a conviction should follow for a particular offence; and
- the category of minor offences under section 20A(12) of the Summary Proceedings Act 1957 should be discontinued.

¹⁶⁸ A small number of minor summary offences that presently carry a penalty of less than \$500 are not prescribed infringement offences – see, for example, several offences under the Summary Offences Act 1981, ss 38(3) and 38A; Arms Act 1983, ss 26, 34, 38 and 39; Education Act 1989, s 29 and some offences in the Smoke-Free Environments Act 1990, s 17. Many offences in regulations also remain in this category.

6

Infringements and the exercise of discretion

- 211 **W**HERE AN INFRINGEMENT offence has been committed, prosecuting authorities generally allow some leeway before issuing an infringement notice. For example, a motorist who is caught exceeding the speed limit may not be issued with an infringement notice if the excess of speed is low enough to come within the range that is recognised by the Police enforcement guidelines. The police officer may warn the driver instead. Even when an infringement offence notice is issued, prosecuting authorities have a process for reviewing the case in light of any information subsequently received from the defendant relating to the circumstances of the offence. That review may result in the withdrawal of the infringement notice or some alternative disposition.
- 212 The decision whether or not to issue an infringement notice is important. It should not be made arbitrarily. Moreover, an infringement notice should not be issued if there is an effective and more proportionate way of dealing with the behaviour. The exercise of discretion that is inherent in making decisions by either the enforcement officer or the prosecuting authority requires guidance. This chapter deals with issues relating to that discretion and the guidelines necessary to its exercise.

INFRINGEMENT OFFENCES AND NET-WIDENING

- 213 In discussing the place of alternative criminal justice processes in *Delivering Justice for All*, the Commission noted the net-widening risks associated with alternative processes.¹⁶⁹ In particular we noted the potential for more defendants to be “caught” by alternative processes than would be brought to court if a charge had to be proved. Research in New Zealand¹⁷⁰ and overseas¹⁷¹ has identified the net-widening potential of infringement regimes. Where prosecution is the only enforcement sanction to deal with certain conduct, minor instances of offending often result in a warning or no action at all. When such conduct also becomes an infringement offence, the number of instances dealt with by way of an infringement notice, instead of a prosecution, may increase¹⁷² or

¹⁶⁹ Law Commission, above n 1, 66.

¹⁷⁰ David Wilson “Instant Fines: Instant Justice? The Use of Infringement Offence Notices in New Zealand” (2001) 17 *Social Policy Journal of NZ* 76, 78.

¹⁷¹ New South Wales Law Reform Commission *Sentencing* (Report 79, Sydney, 1996) para 3.49; Richard G Fox “Infringement Notices: Time for Reform?” (No. 50, Australian Institute of Criminology, Canberra, 1995), 4; Roberts and Garside, above n 63, 5.

¹⁷² For example, when possession of small amounts of cannabis became the subject of the expiation notice procedure in South Australia, after six years the number of notices issued was 450 per cent higher than the number of prosecutions for the same conduct: see New South Wales Law Reform Commission *Sentencing* (Discussion Paper 33, Sydney, 1996) para 10.21.

the warnings issued may drop by a corresponding number.¹⁷³ It has also been suggested that there is a risk that infringement notices will be issued in cases where the evidence is weak because there is a low chance of the case being challenged in court.¹⁷⁴

- 214 It should not be assumed that net-widening is always undesirable. An increase in the number of formal sanctions imposed for minor offending may be a good thing if the existing range of sanctions is inadequate. The infringement offence system provides an additional mechanism for dealing with offending that may not warrant summary prosecution, but which calls for something more than a warning. In the regulatory area, influencing general and specific compliance through law enforcement activity is an important strategy. Where compliance has not been achieved through other means, but the breach does not call for a prosecution, the issue of an infringement notice may be an entirely appropriate response.
- 215 Thus, a decrease in the number of offences where a warning resulted and a corresponding increase in the number of infringement offence notices issued may simply reflect a more appropriate resolution of the case. What needs to be avoided is the net-widening that arises from the issue of infringement offence notices in cases where a warning was the appropriate form of resolution or where the evidence was not sufficient to justify any action at all.
- 216 Guidelines that provide criteria for identifying those cases where action other than the issue of an infringement notice may be warranted serve three purposes: first they reduce the potential for unjustified net-widening; secondly, they provide a basis for consistent use of the discretion; and thirdly, if they are properly implemented, public trust and confidence in the administration of the infringement scheme itself will be enhanced.

HOW THE DISCRETION IS EXERCISED

- 217 Decisions with respect to the issue of an infringement offence notice can be made at two levels: by an enforcement officer or inspector; and by the prosecuting authority itself, often by way of review. Each has its own considerations.

Discretion exercised by enforcement officers

- 218 An enforcement officer or inspector empowered by legislation to issue an infringement notice has four choices to consider when an infringement offence has been committed:
- The minor nature of the breach may warrant a warning or similar type of disposition. In some circumstances, for example under the Health and Safety in Employment Act 1992, the warning may be recorded and considered in the event of further offending. In other situations, an informal warning or advice as to compliance with the law is given, which is not documented.
 - Where the breach is capable of remedy or correction, the enforcement officer may provide the defendant with the opportunity to rectify the matter. This

¹⁷³ Roberts and Garside, above n 63, 5.

¹⁷⁴ New South Wales Law Reform Commission “Discussion Paper”, above n 172, para 10.21.

option will not be available for all offences, but where it is applicable, it should be widely used. For example, the Police, as the principal prosecuting authority for road safety offences, have an established “traffic compliance” policy that provides for a rectification alternative to the payment of an infringement fee in specified circumstances.¹⁷⁵

- Where the circumstances of the breach are such that a warning or lesser form of disposition is not appropriate, the enforcement officer may decide to issue an infringement offence notice.
- Where the breach is a Tier Two offence as described in chapter 3, and the circumstances of the offence or the defendant are such that the breach is one that should be dealt with by the court, the enforcement officer may decide to commence a summary prosecution. Filing an information for an infringement offence generally requires the leave of the court or a registrar,¹⁷⁶ though for a number of regimes, such leave is not required.¹⁷⁷ Though there is little evidence that this option is used often by prosecuting authorities, some submissions emphasised its value in respect of infringement offences where there may be a high level of culpability or where the offence is committed by a recidivist defendant.

Discretion exercised by prosecuting authorities

- 219 Prosecuting authorities have different approaches to decision-making with respect to the issue of infringement notices. Some vest the authority in their enforcement officers – a model that is particularly apt for high volumes of infringement offences. In this situation, those responsible for prosecutions, or similar “back office” functions, are concerned principally with reviewing any issues that may arise from a decision made by an enforcement officer. An alternative model, and one that is more commonly used where the authority issues a relatively small number of infringement notices, is for all decisions with respect to warning, rectification, the issuing of infringement offence notices, or prosecution to be made centrally. Under this model, the review of any matters arising from the decision is dealt with in the same area.
- 220 When an infringement notice is issued, the defendant is currently able to request the prosecuting authority to review that decision. This review function should remain a feature of any future scheme. In chapter 3, we recommend that an administrative review procedure should exist in respect of Tier Two offences, to allow a defendant to seek a variation of the standard penalty because of special circumstances or because of undue hardship. We suggest that the review might be undertaken by the prosecuting authority.
- 221 The review functions carried out by prosecution authorities would include the following choices:

¹⁷⁵ Infringement Bureau, New Zealand Police “Adjudication Standard” (New Zealand Police, Wellington, 2000) ch 10 and appendix C. The compliance policy extends to infringement offences in respect of restraints, warrants of fitness, unlicensed motor vehicles, driver licences, some vehicle defects, cycle helmets and cycle lighting: see ch 20.1.3.

¹⁷⁶ Summary Proceedings Act 1957, s 21(1).

¹⁷⁷ See, for example, the Animal Welfare Act 1999, s 161; the Building Act 2004, s 371; the Cadastral Survey Act 2002, s 60; the Civil Aviation Act 1990, ss 57 and 65P; and the Dog Control Act 1996, s 65.

- The infringement offence notice may be withdrawn following the authority’s consideration of an explanation made by the defendant. Some prosecuting authorities prefer to regard this exercise of discretion as “waiving” the payment of the infringement fee. In instances where mitigating circumstances have influenced the decision, that may be an apt description. The result, however, is the withdrawal of the notice.
- If the enforcement officer has overlooked (or been unaware of) the existence of a factor that, in terms of the authority’s guidelines, would have justified a decision to warn or to offer the defendant the opportunity to rectify the breach, the authority may resolve the matter on review in terms of the guidelines.
- Where the breach is of a Tier Two offence, as described in chapter 3, and the defendant has made submissions to support a variation in the prescribed infringement fee, a decision to reduce the level of the fee may be made.
- Where the enforcement officer has commenced a summary prosecution, but in light of submissions made by the defendant or counsel, there are grounds for discontinuing the prosecution, the decision to withdraw the information may be made.

DEVELOPING THE GUIDELINES

- 222 Each of the decisions referred to above cannot be made in a vacuum. Guidelines to assist in making the most appropriate decision in the circumstances are required. Prosecuting authorities we consulted acknowledged the existence of an enforcement policy or operational guidelines relating to their infringement offences. The Occupational Safety and Health Service’s policy and operating procedures are an example.¹⁷⁸ The various compliance options, and how and when they should be used, are discussed, and separate guidance is provided on the law and use of infringement notices. These are the types of guidelines we have in mind.¹⁷⁹
- 223 Guidelines dealing with how the various discretions referred to above should be exercised are an integral part of the operation of an infringement offence scheme. They are essential to assisting fair and consistent decision-making and ought to be required of every prosecuting authority. Their existence should encourage enforcement officers to consider the best option in every case, reduce the risk of unjustified net-widening, and dispel suspicion that the predominant consideration for enforcement officers is quota fulfilment or revenue gathering.
- 224 The guidelines should contain the essential criteria to be applied for making each of the decisions, for example, capacity for rectification, emergency situations, seriousness of the breach, and corroboration of the reason given. The content of the criteria will vary depending on the types of offences in the relevant infringement scheme, but they will need to provide sufficient flexibility to accommodate the circumstances of each case. The duty to have and maintain

¹⁷⁸ Occupational Safety and Health Service “Interim Enforcement Policy” and “Infringement Notices Guidance Note” (Department of Labour, Wellington, 2003).

¹⁷⁹ The Police Infringement Bureau’s Adjudication Standard, above n 175, provides another example that is confined to post-imposition considerations.

such guidelines should, in the Commission's view, be a statutory obligation on the prosecuting authority.

ACCOUNTING FOR THE EXERCISE OF DISCRETION

- 225 Public trust and confidence in an infringement system is important. Overseas research has indicated that the public's perception of how fairly a scheme is operated can affect compliance levels. And a lack of confidence in the fairness of the infringement system can affect views about the working of other parts of the justice system.¹⁸⁰ Along with guidelines, much can be done to achieve fairness by taking such steps as providing better advice to defendants about their opportunity to be heard in relation to liability or penalty. The Occupational Safety and Health Service, for example, provides every defendant to whom an infringement offence notice is issued with a pamphlet containing information as to the steps they can take.¹⁸¹
- 226 A commonly held perception of infringement schemes is that any enforcement effort that results in an increase in the number of people dealt with by way of infringement notice is motivated by revenue gathering rather than compliance objectives. The suspicion that enforcement officers are subject to "quotas" is also often voiced. The reluctance of many prosecuting authorities to afford public access to their enforcement policies reinforces those suspicions.

Internal processes

- 227 In chapter 3 of *Criminal Pre-Trial Processes: Justice Through Efficiency*,¹⁸² the Commission emphasised the importance of robust internal supervision and monitoring of the prosecution process. Effective internal monitoring of such matters as adherence to guidelines to ensure that decisions are being made in accordance with approved criteria was regarded as an essential element of the prosecution process. This could be done periodically on an aggregate level or sample basis, or alternatively, as some prosecuting authorities already require, there could be supervision of the enforcement officer's decision to issue an infringement offence notice in each individual case. The record of this supervision would provide the basis for transparent accountability.

Access to guidelines

- 228 Some, but by no means all, prosecuting authorities provide information about the operating guidelines for exercise of discretion in regard to infringements at the imposition and review stages. One concern is that ready availability of the guidelines could compromise the authority's enforcement policy by encouraging explanations that were tailored to meet the guidelines, rather than reflecting the actual circumstances of the case. The veracity of explanations advanced by a defendant in response to an infringement notice may often be an issue for

¹⁸⁰ Monash University Faculty of Law and Department of Justice Victoria *On-the-Spot Fines and Civic Compliance* (Final report, Melbourne, 2003) ch 6.

¹⁸¹ Occupational Safety and Health Service "Setting the Fee for an Infringement Notice" (pamphlet, Department of Labour, Wellington, 2003).

¹⁸² New Zealand Law Commission, above n 6.

prosecuting authorities, particularly if no corroboration is offered when it could be easily supplied.

- 229 However, we do not see availability of the type of criteria that would result in the exercise of prosecutorial discretion as necessarily compromising an authority's enforcement policy. The principles relating to the Police compliance policy for traffic infringements, for example, are widely known¹⁸³ and there is no evidence that their availability is jeopardising the achievement of road safety objectives. The public availability of guidelines probably means that money otherwise spent meeting the infringement fee is more likely to be used to ensure the vehicle is of a roadworthy standard. Greater openness with respect to the guidelines may also contribute to a more positive public perception of the enforcement of infringement offences. If the decision made in an individual case reflects known guidelines, the opportunities for objection on the grounds of fairness are likely to be reduced.

Reporting results

- 230 A third step that will lend credibility to the decision-making process is for the results to be publicly reported. At present, what is reported is often confined to the number of infringement offence notices issued. For example, the performance standards for several of the road safety programme outputs of the Police are expressed in terms of the number of infringement offence notices issued¹⁸⁴ and do not include reference to warnings or the number of cases resolved under the compliance policy discussed above.
- 231 Reporting by prosecuting authorities of the number of infringement offences resolved by means of formal warning or rectification and the number of notices withdrawn will add confidence that the decision-making process is a robust one. The need to report on the number of cases where discretion is exercised will reinforce the prosecuting authority's policies so far as enforcement officers are concerned¹⁸⁵ and provide a source of information to the public. This means that a record of the numbers of cases in which discretion was exercised will need to be kept, but we are not proposing that a record of individual cases by name is required for reporting purposes.

CONCLUSION

- 232 The Commission considers that all infringement regimes should be supported by clear operational guidelines for the exercise of discretion relating to all decisions that can be made with respect to infringement offences, including warnings, withdrawal of a notice and rectification. The objective is to promote consistency and accountability between officers dealing with the same offence. Reference to standard guidelines will assist in maximising equity between defendants who

¹⁸³ See Police Infringement Bureau, above n 175, appendix C.

¹⁸⁴ New Zealand Police, above n 5, 53–55.

¹⁸⁵ For example, when it comes to assessing the organisational performance of a prosecuting authority's enforcement officers, emphasis can be placed on both the number of infringement notices issued and the number of warnings issued or other informal alternatives. Where the number of infringement notices is the only outcome being measured, there is a risk more importance will be placed on it.

have committed the same offence while allowing the potential harm of the action to be taken into account when deciding whether to issue a notice.

- 233 In the interests of enhancing public confidence in the administration of regimes and avoiding the risks of unjustified net-widening, the guidelines should be accessible and prosecuting authorities should publicly report on both the number of infringement offences dealt with by way of the issue of an infringement fee and the number resolved by other means.

Recommendations

- R14** There should be a legislative requirement that infringement regimes have operational guidelines as to the exercise of discretion with respect to decisions relating to imposition and administrative review of infringement offences, including warnings, prosecution, withdrawal of notices, rectification and, in the case of Tier Two offences, reduction of penalty.
- R15** The operational guidelines should describe how the exercise of discretion is internally monitored and recorded.
- R16** The operational guidelines should be accessible on request to the prosecuting authority.
- R17** Prosecuting authorities should be required to publicly report on both the number of infringement offences dealt with by way of the issue of an infringement notice and the number resolved by withdrawal, rectification or reduction of penalty.

Civil or criminal breaches and processes

THE CURRENT STATUS OF INFRINGEMENT OFFENCES

- 234 **I**NFRINGEMENT offences are currently an integral part of the criminal process. They are a subset of criminal offences in the sense that each infringement offence can also be the subject of a summary prosecution at the discretion of the prosecuting authority.¹⁸⁶ When the defendant requires a court hearing in respect of an infringement notice, the proceedings are in all respects as if an information had been laid.¹⁸⁷ Additionally, if an infringement fee is not paid to the prosecuting authority within the prescribed timeframe and the reminder notice is filed in court, the process for the enforcement of fines under Part III of the Summary Proceedings Act 1957 becomes applicable.¹⁸⁸
- 235 This chapter examines the background for those linkages with the criminal process and considers whether they should be retained. In terms of the Commission's reference, civil or other procedural alternatives are considered, first in respect of the resolution or disposition of the offence, and secondly in respect of the collection of the infringement fee or its enforcement.

Infringement offences as criminal proceedings

- 236 It is a reflection of their historical antecedents that infringement offences are presently criminal matters. The "standard fine" procedure, from which the infringement offence procedure is derived, introduced a simplified process for magistrates to deal with prescribed minor traffic breaches. Where it applied, a conviction resulted.¹⁸⁹ If the standard fine was not paid within 14 days of imposition, a summons was issued and the charge determined as a summary criminal proceeding.
- 237 The infringement offence procedure itself is less reflective of the criminal process. First, the process is essentially an administrative one and is not commenced by court proceedings. In the vast majority of cases, where the defendant wishes to raise a matter with respect to the issue of an infringement notice, it is dealt

¹⁸⁶ Unless there is a specific provision to the contrary in the legislation establishing the infringement regime, an informant is required by the Summary Proceedings Act 1957, s 21(1)(a), to seek the leave of the registrar or judge before an information can be laid for an infringement offence. An exception to this is the offence of overloading (Land Transport Act 1998, s 43), which is punishable as an infringement offence only.

¹⁸⁷ Summary Proceedings Act 1957, s 21(8)(d).

¹⁸⁸ Summary Proceedings Act 1957, s 21(5).

¹⁸⁹ Justices of the Peace Act 1927, s 60A(6)(e), as inserted by the Justices of the Peace Amendment Act (No 2) 1955, s 2.

with by the prosecuting authority. Although the defendant has the right to have the case dealt with by the court, that right is exercised in only a small minority of cases. Secondly, no conviction attaches to an infringement offence. Even where the matter is heard by the court at the request of the defendant, no conviction is entered.¹⁹⁰ The essence of the criminal sanction is thus absent. Thirdly, though the infringement offence procedure is used for a significant number of traffic offences and a small number of minor criminal offences, it has increasingly been used in respect of bylaw and regulatory breaches; areas that are not traditionally regarded as being within the province of the criminal law.

Position in other jurisdictions

- 238 Overseas, in similar jurisdictions, most schemes comparable to the infringement offence procedure are criminal matters. A common feature, however, is that such schemes result in the imposition of a sanction without conviction. In some instances, such a model is seen as “decriminalising” conduct that was formerly treated as a criminal offence. Non-criminal processes have been introduced for certain parking offences in England, and in Australia, in particular, regulatory breaches are often met by the imposition of “administrative penalties”.¹⁹¹

England and Wales

- 239 Initially, the fixed penalty notice system was confined to minor traffic offences and followed a process similar to the infringement offence regime. As in New Zealand, the range of offences now dealt with by way of fixed penalty notice has increased significantly, although minor road traffic offences comprise the main use of this process.¹⁹² Similarly, the process is also used for some revenue and regulatory breaches and by local authorities for minor offences such as littering. Two recent developments are of particular significance: the extension of the fixed penalty notice procedure to public disorder offences and the transfer of some parking offences to the civil jurisdiction.
- 240 The introduction of on-the-spot penalties for disorderly behaviour under chapter 1 of the Criminal Justice and Police Act 2001 (UK) is discussed in chapter 5 of this paper. The procedure for a penalty notice issued under that enactment is in line with that applicable to fixed penalty notices: the person who is given the notice may request to be tried for the alleged offence, and where the penalty is not paid within 21 days, the enforcement provisions that apply to fines are available.¹⁹³
- 241 The fixed penalty procedure for parking offences¹⁹⁴ was significantly modified in 1991 by the introduction of a new regime for parking in London. Under Part II of the Road Traffic Act 1991 (UK), enforcement of permitted parking

¹⁹⁰ Summary Proceedings Act 1957, s 78A.

¹⁹¹ See generally, ALRC “Principled Regulation”, above n 48.

¹⁹² Provisions relating to the prosecution and punishment of road traffic offences were consolidated in the Road Traffic Offenders Act 1988 (UK). Part III of that Act (sections 52–90) contain the provisions relating to fixed penalty offences.

¹⁹³ Criminal Justice and Police Act 2001 (UK), ss 4 and 9.

¹⁹⁴ Introduced by the Road Traffic and Roads Improvement Act 1960 (UK).

passed to the local authorities and parking offences were “decriminalised”.¹⁹⁵ Penalty charge notices were issued for breaches of permitted parking rules; a separate independent adjudication service to deal with appeals against the issue of notices was established; and enforcement of the penalty was achieved through a streamlined civil debt recovery process. The extension of the penalty charge scheme to areas and local authorities outside London was permitted by the Act,¹⁹⁶ but parking enforcement for offences other than those relating to designated parking places remained with the police through the fixed penalty notice scheme.¹⁹⁷

Canada

- 242 Infringement offences in Canada may be dealt with in three different jurisdictions: by way of municipal bylaws (including parking infractions); provincial legislation (road traffic offences); and under federal legislation (for federal offences and regulatory matters). The procedures used by jurisdictions at the municipal and provincial level appear to vary and include criminal, civil and administrative processes. At the federal level, the Contraventions Act 1992 was enacted with the dual purposes of providing a procedure to reflect the distinction between federal criminal offences and regulatory offences and “to alter or abolish the consequences in law of being convicted of a contravention in light of that distinction”.¹⁹⁸ The intention and effect was to decriminalise a range of offences;¹⁹⁹ even though the payment of the penalty resulted in a “conviction” it was not regarded as a criminal conviction. In all material respects, the processes used were those of the criminal jurisdiction.

Australia

- 243 State infringement offence procedures are generally similar to those in New Zealand. The infringement notice procedure in Victoria, introduced as “on-the-spot” fines for parking offences in 1959, now extends to over 50 statutes.²⁰⁰ South Australia introduced a code for such offences in the Expiation of Offences Act 1966. The recent expansion of fixed penalty notices to a wider range of minor summary offences including common assault and theft in New South Wales is discussed in chapter 5. All state systems share the objective of keeping the enforcement of minor criminal offences out of the court system. The federal jurisdiction is more complicated with a range of different non-criminal

¹⁹⁵ See Local Authority Circular 1/95 “Guidance on Decriminalised Parking Enforcement outside London” (HMSO, London, 1995); and *Westminster, R (on the application of) v Parking Adjudicator* [2002] EWHC 1007.

¹⁹⁶ Road Traffic Act 1991 (UK), s 43 and sch 3. A growing number of local authorities outside London have subsequently applied to the Secretary of State to operate a decriminalised parking enforcement regime.

¹⁹⁷ See generally, Colin Chick *On-Street Parking: A Guide to Practice* (Landor Publishing, London, 1996), ch 8.

¹⁹⁸ Contraventions Act RSC 1992 cC-47, s 4(b).

¹⁹⁹ Mr Justice Rick Libman *The 2004–2005 Annotated Contraventions Act* (Carswell, 2004) 4.

²⁰⁰ See generally Monash University Faculty of Law and Department of Justice Victoria, above n 180, and Jennifer Chamberlain “Infringement Notice System in Victoria” (paper presented to the Justice Executive Officer Forum, Melbourne, 29 March 2004).

mechanisms for imposing penalties²⁰¹ also available. This led the Australian Law Reform Commission to make recommendations with respect to infringement notice schemes for both criminal and civil penalties in the federal regulatory area.²⁰²

SCOPE OF THE CRIMINAL LAW

- 244 Identifying the defining characteristics of conduct that constitutes the criminal law is fraught with difficulty. It is a topic that is tackled in almost all criminal law textbooks, but about which there is little or no consensus.
- 245 One common definition is a formal or procedural one – crime is “a legal wrong [that] can be followed by criminal proceedings which may result in punishment”.²⁰³ However, this is a descriptive and somewhat tautologous definition: it describes the way in which criminal conduct will be dealt with. It would enable the uninformed observer to determine whether a particular act that is the subject of official proceedings falls within the category of a crime or not. However, it does nothing to aid the uninformed observer in determining what type of conduct is the target or focus of the criminal law – or, to put it another way, what sort of activity *ought* to be defined as a crime.
- 246 The “ought” question is typically addressed by reference to the essential or inherent characteristics of the conduct, and it is characterised by a sharp division of opinion between those who believe that the criminal law ought to be confined to conduct that causes significant harm to others and those who believe that it ought to be confined to conduct that offends fundamental values.²⁰⁴
- 247 Ultimately, this debate has not proved particularly useful in defining what the boundaries of the criminal law ought to be. On the one hand, the notion that the criminal law ought to be confined to those acts that are an affront to fundamental values is somewhat simplistically presented; the criminal law may often be used as much to shape social values and to form or promote particular social attitudes, as it is to reflect those values or attitudes. More fundamentally, however, criminal law in all modern states plays a much greater role than that suggested by a view of crime as fundamental immorality. That view may be useful in determining, in a lay sense, what we perceive to be “true crimes”. It may also be helpful in determining the extent to which we wish to attach stigma or moral blame to those found guilty of the particular offence – through, for example, the entry of a conviction and/or the imposition of a severe penalty. However, it is of little help in defining what the overall content of the criminal law ought to be.
- 248 The concept of “significant harm to others” is equally problematic in answering the “ought” question. In one sense, it is a truism. All conduct proscribed by

²⁰¹ See Australian Law Reform Commission *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation* (Discussion Paper 65, Sydney, 2002) paras 2.44–2.69.

²⁰² ALRC “Principled Regulation”, above n 48.

²⁰³ Glanville Williams *Textbook of Criminal Law* (2 ed, Stevens, London, 1983) 27.

²⁰⁴ The extent to which the criminal law should reflect or seek to enforce moral values has been the subject of lively debate: see HLA Hart *Law, Liberty and Morality* (Oxford University Press, Oxford, 1963); *Punishment and Responsibility* (Oxford University Press, Oxford, 1968) and P Devlin *The Enforcement of Morals* (Oxford University Press, Oxford, 1965).

the criminal law is perceived to be harmful to others, otherwise we would not be concerned about it. Even conduct that merely offends the sensibilities of others is likely to be proscribed because it is regarded as harmful either to the offended people themselves or to the community at large. Similarly, conduct that involves harm to the defendant (for example, drug use) may be proscribed because it is believed to damage the overall social fabric – for example, through causing a drain on the public health system, reducing productivity and so on.

- 249 In summary, therefore, ultimately it is unhelpful, and probably impossible, to develop a meaningful unitary conception of what should constitute the “criminal law”. A number of specific reasons for that are discussed below. We conclude that the appropriate response to conduct can be chosen from a continuum, depending upon a wide variety of considerations.
- 250 First, modern society is becoming increasingly complex and that has broadened the range of conduct that needs to be proscribed. An increasing proportion of the criminal law is (and should be) concerned not with absolute prohibition of conduct, but with the regulation and control of the way in which it is carried out. Legislation dealing with the environment and endangered species,²⁰⁵ for example, includes a number of offences carrying substantial penalties. A large number of offences have been enacted in legislation regulating commercial and other activity to supplement strategies to secure compliance with regulatory regimes. Recent examples include offences relating to vehicle sales and the regulation of building and construction.²⁰⁶
- 251 Secondly, an increasing array of sanctions (which may also be imposed in a variety of ways) has emerged to deal with that range of conduct. Traditionally, the concept of a penalty was confined to punishment imposed by the criminal law by way of imprisonment or a fine.²⁰⁷ The term is now much more elastic. A “civil” penalty may be imposed by a court following a civil rather than a criminal process. Such a penalty is sometimes described in the governing legislation as a “pecuniary penalty” with examples found in the Commerce Act 1986 (with respect to restricted trade practices and business acquisitions), the Securities Markets Act 1988 (insider trading), and the Takeovers Act 1993 (contraventions of the takeover code, or of the Act).
- 252 The term “penalty” is also applicable to a range of “administrative” penalties imposed outside the court process by either a statutory official or body. Examples can be found in the Tax Administration Act 1994 (civil penalties for late filing of a return, or a tax shortfall) and the Customs and Excise Act 1996 (administrative penalty for incorrect entries). Some industry governance bodies have the authority to impose pecuniary penalties for breaching governance regulations or rules: for example, the Rulings Panels under the Electricity Act 1992 and the Gas Act 1992.

²⁰⁵ Conservation Act 1987, Parts VB–VC; Biosecurity Act 1993, ss 154–155; Hazardous Substances and New Organisms Act 1996, ss 109 and 114; Resource Management Act 1991, ss 338–339; Marine Mammals Protection Act 1978, s 23; Trade in Endangered Species Act 1989, ss 44–47.

²⁰⁶ See the Motor Vehicle Sales Act 2003 and the Building Act 2004.

²⁰⁷ *R v Smith* (1862) Le & Ca 131, 138 Blackburn J; see also Bryan Garner (ed) *Black's Law Dictionary* (8 ed, West, St Paul, 2004) 1168.

- 253 These different forms of penalty may be imposed for conduct that cannot readily be distinguished from that which attracts the criminal sanction. There are thus a number of examples of non-criminal penalties being used to reinforce the requirement for compliance with the law, and the levels at which they may be imposed are no less than the maximum fine that might be considered appropriate for such a breach if it were a criminal offence.²⁰⁸
- 254 Thirdly, a significant proportion of criminal conduct is not only also a civil wrong (which has always been the case), but is increasingly subject to procedures that specifically contemplate either a criminal or civil response, depending upon the circumstances. That is, the use of criminal or other responses is dictated not by any fixed view as to the “category” into which the generic conduct falls, but rather by the response that is most appropriate in the circumstances of the case. In our view this development is entirely proper.
- 255 Examples of hybrid forms of sanction can be found, for example, under the Fisheries Act 1996 where the chief executive may administratively impose a penalty of up to one-third of the prescribed maximum fine for offences punishable by less than a fine of \$250 000. The defendant may elect to pay the sum or require the matter to go to court. A similar type of procedure is also available for minor breaches of revenue laws.²⁰⁹

AVOIDING THE CRIMINAL–CIVIL DISTINCTION

- 256 All of this suggests that there is little to be gained by fixing an arbitrary dividing line between breaches that are to be regarded as “criminal” and those that are to be regarded as “civil”, or in attempting to develop firm criteria for determining which label should be attached to particular sorts of proceedings.
- 257 In our view, therefore, in addressing the question of whether infringements should be removed from the criminal process, the fundamental question is simply what process would be the most effective to serve the desired purpose.
- 258 There is no straightforward answer to this. Often, a mix of different processes will be best suited to the purpose. For example, in principle it seems perfectly sensible to postulate that a particular offence should in the first instance be dealt with administratively through the imposition of an infringement notice; that in the event of a denial of liability, the determination of liability for the offence should occur through a hearing relying on the rules of criminal procedure; that a conviction should not attach to any finding of guilt (because the stigma associated with the conviction is not required); and that the civil debt enforcement procedures should be used to collect the fee imposed either administratively or by the court.
- 259 Whether each of these processes is appropriate should simply be determined by reference to effectiveness; the attachment of a particular label (whether “criminal”, “civil”, “administrative” or “regulatory”) does not in itself provide

²⁰⁸ Pecuniary penalties up to \$500 000 may be imposed on individuals who contravene the restricted trade practices or business acquisition provisions of the Commerce Act 1986, and up to \$20 000 under the Electricity Act 1992 and the Gas Act 1992.

²⁰⁹ For example, the chief executive of the Customs Service has a power under the Customs and Excise Act 1996, s 223, to deal with petty offences. This process reflects a long historical practice and is confined to certain customs offences.

assistance in answering the question. The least intrusive process to achieve the purpose should be the guiding principle to determine which process to adopt in relation to a particular offence.

The effectiveness of the process

- 260 The question of effectiveness in relation to infringements can be addressed at four process stages: initial choice of infringement or prosecution; denial of liability; review of penalty; and enforcement.

Initial choice between infringement and prosecution

- 261 The first question is whether the response to a particular form of conduct in the first instance should always be by way of an infringement notice, always by way of prosecution, or by either process at the discretion of the enforcement officer. This question has already been dealt with in chapter 6 on the exercise of discretion. Our view is that the choice depends on whether the offence falls in Tier One or Tier Two of infringement offences. The option of prosecution would not be available for Tier One offences. They should not involve widely differing degrees of culpability, would not require the stigma associated with conviction and could be adequately dealt with by a low level of monetary penalty. The Tier Two offences could involve significantly varying degrees of culpability, and whether they are dealt with administratively or by way of prosecution should depend upon the severity of the response required. That is a matter to be determined by the enforcement officer, in the same way as a choice may be made between prosecution and police diversion.

Denial of liability

- 262 The second question is whether in the event of denial of liability, the criminal process or some alternative adjudicative mechanism should be used. Our view is that the criminal process ought always to be used because we have not found evidence that there would be value gained in creating a separate adjudicative mechanism for infringement offences. There is no evidence that the use of the criminal process in itself (in the absence of a conviction) causes any significant and unwarranted degree of stigma, nor that the cost of the criminal process in such cases is greater than would be incurred in an alternative process.
- 263 In England, as part of the decriminalisation of some parking offences, authorities were required to establish a “parking adjudicator”, in effect an alternative tribunal, to provide an independent appellate forum.²¹⁰ It appears that even with this special administrative process to formally review parking cases outside of the court system, there is a significant impact on court resources by way of judicial review.²¹¹ Whilst we have been unable to gauge the overall success of

²¹⁰ Road Traffic Act 1991 (UK), s 71 and sch 6.

²¹¹ The judicial review of administrative decision-making in this area has led to instances of protracted litigation: see, for example, *R v Parking Adjudicator Ex parte Mayor and Burgesses of London Borough of Wandsworth* [1996] EWCA 869; *R v Parking Adjudicator Ex parte Steel* [1997] EWHC Civ 2822; *Sutton v Parking Adjudicator* [2001] EWCA Civ 1325; *Zagato Lancia Borkwood Engineering Ltd v Parking Appeals Adjudicator* [2002] EWCA Civ 1449. In other cases, the court has been called on to determine important issues: see, for example, *R v Parking Adjudicator Ex parte Bexley* [1997] EWHC Admin 730; *R (on the application of Walmsley) v Lane and The Parking and Traffic Appeals Service* [2005] EWHC 896.

the introduction of this alternative adjudicative process in England, there does not seem to be any obvious advantage in adopting that model for similar or all infringement offences in New Zealand.

Review of penalty

- 264 The third question is whether any dispute as to the appropriate penalty (but not liability) should be dealt with administratively by a civil court review process or by appeal to the criminal court. This has already been dealt with in chapter 3, which recommends that defendants should be able to seek administrative review of penalties imposed for Tier Two offences, whether imposed by way of a standard penalty or a statutory range.
- 265 We see no reason why a system of internal administrative review should not be used, and in fact consider it is more proportionate to infringement offences than a criminal appeal and likely to be more efficient. The protection of the court remains available by way of judicial review of the administrative decision. Our recommendations for administrative review in relation to infringements parallel those in our forthcoming report on the powers of customs' officials where we intend to recommend an internal administrative review of penalty in the first instance.²¹²
- 266 In chapter 6 on the exercise of discretion, we recommend that the reviewing authority should be required to have operating guidelines for the review process that set out the criteria to be applied.

Enforcement

- 267 The final question is whether the enforcement of the monetary penalty resulting from the infringement fee is better dealt with through the criminal fines enforcement process or the civil debt recovery process. Although we see no value in departing from the criminal process for the resolution of infringement offences, it does not follow that the process by which the penalty is collected should also fall to the criminal jurisdiction. There is no compelling requirement to treat the recovery of unpaid infringement fees in the same way as recovery of a court-imposed fine; arguably the infringement fee can equally be seen as resembling a debt owing to the prosecuting authority by the recipient of the infringement offence notice. The authority and efficiency of the court's existing collection processes is why they have traditionally been invoked to collect an unpaid penalty imposed by an essentially administrative process, but this may no longer be the most effective mechanism to use.
- 268 The triggering of the civil debt collection process following registration of the infringement fee with the court, as is the case with unpaid penalty charge notices in England,²¹³ may be a viable option. Ultimately, it remains to be determined whether the criminal fines enforcement process, the civil debt recovery process, or some other type of process (perhaps drawing on features of both) provides

²¹² New Zealand Law Commission *Review of Forfeiture and Seizure under the Customs and Excise Act* (forthcoming).

²¹³ See para 241 above.

the most effective way of collecting unpaid infringement fees. What can be said is there seems to be no principled reason to treat the collection of unpaid infringement fees in the same way as a fine.

Recommendations

R18 The nature of the response to offending should be determined by reference to its effectiveness in achieving the desired purpose, rather than by reference to whether the response is civil, criminal or administrative. Where more than one response would be effective, the least intrusive one for the defendant should be selected.

R19 Questions of liability for infringement offences should continue to be resolved through the criminal court process.

8 Conclusions

- 269 **W**E CURRENTLY have a confusing array of infringement regimes, processes and penalties. The current variety of infringement regimes has grown in an ad hoc way, without a consistent, principled and rational framework, or even an explicit recognition that this is desirable.
- 270 But infringements are here to stay. Infringement notices substantially exceed the number of prosecutions and cover an increasing proportion of lower level offences. They probably touch everyone in some way at some time, and it is very important that there is public confidence in the system.
- 271 The infringement system offers real benefits in terms of proportionality, simplicity and low compliance costs, both for those who receive infringement notices and for those who impose them. Wider society also benefits because people are penalised for breaches of the rules governing ordinary social interaction without recourse to the more costly formal criminal justice system.
- 272 However, as the Joint Discussion Paper showed, the potential benefits of infringements are at risk because the system is not operating as effectively as it should. A principled legal framework is now needed to rationalise the huge expansion of different infringement regimes already in existence and to guide the growth of infringements in the future.
- 273 Our proposals are intended to provide the foundation for a framework for the infringement system, within which different infringement regimes can be developed as required for different policy purposes. This is intended to align with the proposals to streamline enforcement processes being developed concurrently by the Ministry of Justice and other agencies.
- 274 The objectives of our proposed framework are the same as those articulated from the inception of infringements – an efficient, transparent, simple and understandable system that ensures people who receive infringements are treated fairly, prosecuting officers operate consistently within the law, the taxpayer’s burden is minimised, and the wider public can trust the processes.

PRINCIPLED FRAMEWORK

- 275 Our review has identified the following guidelines for establishing a principled framework for infringements:
- Infringements should occupy a permanent place on a continuum of processes for dealing with offences outside of the court system.
 - Before imposing an infringement notice, enforcement officers should always consider whether the options of warning, diversion or rectification would deal effectively with the offence.
 - No conviction should follow from imposition of an infringement fee.

- An infringement regime should be an option for dealing with any offences where imprisonment is not a possible penalty, where there is no policy reason requiring a conviction, and where the infringement fee penalty that could be imposed is an appropriate response to the range of culpability and seriousness inherent in the particular offence category.
- Existing minor offences and the minor offence process should be incorporated in the infringement system.
- The processes for imposition, review, adjudication and enforcement of infringements should be the least intrusive possible to achieve the intended purpose, and could include a mixture of administrative, criminal or civil processes.
- A defendant should always have the option of contesting liability for imposition of an infringement by requesting that the matter be transferred to the District Court.
- There should be two tiers of infringement offences to reflect the reality that fees below a certain quantum can be fixed but that fees set above that level may need to be varied.
- In Tier One, all infringement fees should be set at a level consistent with the ability of those in the lowest socio-economic group to pay, with fees for specific offence categories set at a level appropriate for offending behaviour at the midpoint in the range of potential seriousness and culpability for that offence.
- In Tier One, there should be no opportunity for the defendant to seek review of the fee, nor for the prosecuting authority to proceed by way of summary prosecution.
- In Tier Two, the infringement fee should be able to be set at any level above the maximum of Tier One by way of:
 - either a standard fee, set at a level appropriate for offending behaviour at the midpoint in the range of potential seriousness and culpability for the offences of that type dealt with by infringement notices; or
 - in the limited situation where it may be appropriate, a statutory range of fees to be determined by the prosecuting officer on imposition.
- In Tier Two, the defendant should be able to seek administrative review of the penalty on the basis of special mitigating circumstances or undue hardship.
- Prosecuting authorities should retain the discretion to proceed summarily with Tier Two infringement offences.
- There should be operating guidelines to guide the exercise of discretion in the administrative review of penalties of Tier Two penalties.

USE OF GUIDELINES

- 276 The Ministry of Justice will be considering governance issues in relation to infringements in the next stage of its review, which will necessarily include consideration of how any guidelines should be implemented.

- 277 To be effective, guidelines would have to be followed when new legislation imposing an infringement regime is being drafted, and past experience suggests that there needs to be some form of governance oversight of all new infringement regimes to ensure this does happen. The guidelines would need to be taken into account by the Minister proposing new infringements, the agency developing the legislation, and the parliamentary select committee or regulations review committee considering the legislation.
- 278 One option under consideration by the Ministry is umbrella legislation to bring together a number of aspects of infringements. An Infringement Act could provide a principled framework to guide the creation of new infringement regimes and, possibly, amend existing regimes. Bringing existing regimes into the framework would require considerable legislative amendment and may need to be managed over time. A statute could contain the essential elements of a framework, such as:
- restrictions on any infringement regime, such as no conviction and imprisonment resulting from it;
 - governance oversight of the creation of new infringement regimes;
 - establishment of a two tier system with fixed and variable penalties, with administrative review available for Tier Two offences;
 - obligations of prosecuting authorities, such as the need for operational guidelines for the exercise of discretion and for certain information to be set out in infringement notices;
 - principles for setting penalties; and
 - incorporation of existing minor offences.
- 279 We have not reached any final view on whether an umbrella statute of this sort would be desirable. We are inclined to the view that the elements of our proposed framework should be in a set of guiding principles rather than statutory rules. However, if the framework is to be implemented by way of guidelines, there needs to be a robust process to ensure proper consideration of them.
- 280 The Legislation Advisory Committee Guidelines have not been effective in this regard. There may be several reasons for this. They may not have been generally accepted as appropriate or useful. It is noteworthy that our analysis, taking into account the rapid and varied evolution of infringement regimes, has arrived at more flexible principles to guide future development. Perhaps more significantly, there is no system for ensuring that agencies do seriously consider the Legislation Advisory Committee Guidelines when developing an infringement regime. Consideration of them is more the exception than the rule.
- 281 For some time the Ministry of Justice has had an offence and penalty vetting procedure to provide oversight of legislation establishing new offences, but it has not been used for infringements. Mandatory vetting by the Ministry of Justice of prospective infringement regimes would be one way to provide oversight. The Ministry is not listed in Cabinet Office Guidelines as one of the agencies that must be consulted if offences and penalties are being created, and hence consultation does not always occur.

Recommendation

R20 Government should adopt our proposed framework, by way of either an umbrella statute or guiding principles, to guide future development of the infringement system, and should also put a robust process in place to ensure it is followed.

APPENDIX I
Legislation establishing
infringement schemes

Animal Welfare Act 1999
Biosecurity Act 1993
Building Act 2004
Cadastral Survey Act 2002
Civil Aviation Act 1990
Dog Control Act 1996
Fisheries Act 1996
Gambling Act 2003
Hazardous Substances and New Organisms Act 1996
Health and Safety in Employment Act 1992
Land Transport Act 1998
Litter Act 1979
Local Government Act 1974 (Navigation Safety Bylaws)
Local Government Act 2002
Maritime Transport Act 1994
Motor Vehicle Sales Act 2003
Petroleum Demand Restraint Act 1981
Radiocommunications Act 1989
Railways Act 2005
Resource Management Act 1991
Sale of Liquor Act 1989
Summary Offences Act 1981
Transport Act 1962
Weights and Measures Act 1987

APPENDIX 2

Consultation and submissions on the Joint Discussion Paper

THE ORGANISATIONS and people who made submissions on aspects of the joint Ministry of Justice and Law Commission discussion paper or who were consulted by the Commission include:

No.	Organisation
1	Accredited Collections – B&D Holdings Limited
2	Associated Credit Bureau NZ (Inc)
3	Auckland City Council
4	Auckland Regional Council
5	Baycorp Advantage (NZ) Ltd
49	Bus and Coach Association (NZ) Inc, and Marine Transport Association (NZ) Inc
6	Business New Zealand
54	Chief District Court Judge
18	Chris Patch
28	Christchurch City Council
42	David Parker MP
50	Department of Conservation
34	Department of Corrections
52	Department of Internal Affairs
7	Department of Labour
35	Environment Bay of Plenty
9	Environment Southland
36	Federated Farmers of NZ (Inc)
10	Financial Services Federation Inc
11	Graeme Trass
12	Greater Wellington Regional Council
30	Hawkes Bay Regional Council
37	Invercargill City Council
8	Jane Pearce (Ecoternatives)
38	Land Transport New Zealand
39	Manawatu District Council
40	Manukau City Council
13	Ministry of Consumer Affairs: Measurement and Product Safety
29	Ministry of Fisheries
53	Ministry of Justice
14	Ministry of Social Development

41	Ministry of Transport
15	Napier District Council
17	New Zealand Automobile Association
55	New Zealand Law Society, Criminal Law Committee
32	New Zealand Local Authority Traffic Institute (TRAFINZ)
31	New Zealand Parking Association
19	New Zealand Police
16	New Zealand Taxi Federation
43	North Shore District Council
44	Quakers/Society of Friends
20	Radio Spectrum Management Group (Ministry of Economic Development)
45	Road Transport Forum
21	Rodney District Council
22	Royal Federation of New Zealand Justices Assn (Inc)
46	Salvation Army
47	Society of Local Government Managers (SOLGM)
23	Timaru District Council
24	Transit New Zealand
25	Upper Hutt City Council
26	Waipa District Council
27	Waitakere City Council
51	Wellington City Council
48	YouthLaw Tino Rangatiratanga Taitamariki (Inc)



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