

Children and Young Persons Infringement Notice System

YOUTHLAW POSITION PAPER: “A FAIRER FINES SYSTEM FOR CHILDREN: KEY ISSUES & RECOMMENDATIONS”

This paper critiques the infringements system for children under 18 years old.

Youthlaw’s position in relation to infringements for adults over 18 years old is reflected in the Federation of Community Legal Centre’s Infringements Working Group position paper.

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About Youthlaw

Youthlaw is Victoria’s state-wide community legal centre for young people under 25 years of age. Youthlaw works to achieve systemic responses to the legal issues facing young people, through casework, policy development, advocacy and preventative education programs, within a human rights and social justice framework. Youthlaw frequently provides legal support, advice and representation to children and young people dealing with the infringements system.



1. SUMMARY OF RECOMMENDATIONS FOR REFORM OF THE CHILDRENS INFRINGEMENT SYSTEM

The principle that should underpin the children's infringement system is that children should be treated in accordance with their special position under Australian and international law as children, which requires they be afforded special protection and assistance.

Youthlaw specifically recommends that:

1. the Department of Justice develop clear guidelines for issuing warnings, supported by enforcement agencies through codes of conduct, policies and training, and an accountability mechanism be introduced where infringements are issued contrary to the guidelines;
2. maximum penalties for on-the-spot fines be reduced for children;
3. comprehensive information on all outstanding infringements referred to CAYPINS or the Children's Court be available through a centralised database;
4. infringement matters referred to CAYPINS or the Children's Court be easily consolidated and heard on a single hearing date at the court closest to the child's current residence or service provider;
5. matters where service of CAYPINS or court documents has only been by post should not be determined without the child being present;
6. infringements for children be managed by a central body and only referred to CAYPINS or open court upon application by the child, and only as a last resort;
7. CAYPINS registrars be required to take into account a child's 'special circumstances';
8. applications for rehearing be available online and one application is sufficient where multiple infringements are determined together by a CAYPINS registrar; and
9. the Children's Court be able to expiate infringements from a child's record.

2. OVERVIEW OF CONCERNS WITH THE CHILDREN'S INFRINGEMENT SYSTEM

a. Children's experience of the infringement system

Children are disproportionately affected by infringements and laws regulating public behavior. They frequently use public spaces to socialise with friends and are prohibited from premises that require patrons to be 18 years of age and over or do not necessarily have the financial capacity to occupy leisure and entertainment spaces as paying customers. Children are often reliant on public transport and typically have low incomes. As a result, young people have greater exposure to enforcement agencies charged with regulating public behavior and patrolling public spaces.

In late 2012, Youthlaw conducted an online survey of children and young people's experiences with the fines and infringements system (**Youthlaw Survey**).¹ The survey results highlight the inability of many children and young people to pay the fines they had received. Children with no income, low income and limited parental financial support are often required to pay the same amount for fines as adults working full-time with disposable incomes. Many children surveyed also indicated that they received fines from enforcement officers for their first offences in situations where discretion could have been exercised to issue a warning rather than a fine.

b. The principle of treating children as children

The Fines Victoria website currently states:

*"An infringement notice issued to a young person (someone under the age of 18) is no different from those issued to adults. Young people have the same rights and responsibilities and the same payment options."*²

However Youthlaw considers that the **Children and Young Persons Infringement Notice System (CAYPINS)** should treat children as children. That is, children (young people under the age of 18) should be treated fairly and equitably in accordance with their special position under Australian and international law. This principle recognises that children require special protection and assistance due to their early stage of physical, psychological and social development.

Australia is a signatory to the *Convention on the Rights of the Child*³ (**Convention**) which has been implemented in various pieces of domestic legislation.⁴ The Convention has been partially implemented in the *Children, Youth and Families Act 2005* (Vic) (**the Children's Act**). For example, section 8 provides that the Children's Court of Victoria (and its officers) and the Department of Human Services must have regard to principles listed in Part 1.2 of the Children's Act. In particular, section 10 provides that "the best interests of the child must always be paramount" and the need to protect a child's rights and promote his or her development (taking into account his or her age and stage of development) must always be considered. Similarly, section 25(3) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) provides that "a child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation".

¹ See copy of Young People and Fines Survey – Overview of Results at Appendix A.

² Fines Victoria website, "Fines and Young People" section, <http://online.fines.vic.gov.au/fines/Content.aspx?page=11>, downloaded 28 May 2013.

³ See also the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which is consistent with principles in the *United Nations Declaration of the Rights of the Child*, the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)*, and *Australia's National Human Rights Action Plan*.

⁴ Eg. *Children, Youth and Families Act 2005* (Vic); *Family Law Act 1975* (Cth); *Australian Human Rights Commission Act 1986* (Cth).

Adherence to the principles described above requires that policies and practices ensure that children are not disciplined by a court or detained, except as a last resort. Instead, the children's infringements system should focus on possibilities for rehabilitation and development of the child. The Victorian infringements system for children should avoid unnecessarily bringing children into contact with the court or criminal justice systems.

A rights-based approach to reforming CAYPINS in accordance with the legal principles specifically applicable to children should:

- (a) ensure the best interests of the child are the paramount consideration;
- (b) take into account children's different stages of development and understanding;
- (c) place diversion and rehabilitation before punitive measures;
- (d) demonstrate that the changes will have a positive effect on supporting young people's ongoing development; and
- (e) consider young people's views in implementing the changes.

Currently, CAYPINS fails to afford some children the special protection they are entitled to and treats children even less favourably than if they were in the adult system, as described below.

3. ISSUING INFRINGEMENTS

a. Authorities' failure to exercise their discretion to give warnings

Unfortunately, many vulnerable and disadvantaged children who approach Youthlaw for legal assistance inform us that they do not receive a warning from issuing officers before they are issued with a fine. In the Youthlaw Survey, almost 60% of respondents stated that they had not received a warning or caution before they received a fine.

Many children simply cannot afford to pay the fines they receive. Almost 75% of respondents surveyed received up to 3 fines in the last year, and almost 60% received fines of \$500, with a quarter having a combined total of at least \$1,000 of fines and 10% having fines amounting to over \$5,000.

Warnings are often more appropriate than issuing fines to children – particularly for first-time offenders. Warnings are a more effective deterrent, as they provide children with an opportunity to learn from their experience before incurring a fine as punishment.

Example 1: Issuing a warning to a child who has forgotten a concession card on public transport

A 14 year old student in school uniform and has forgotten their concession card, it would be more appropriate and effective to issue a warning than a fine. If a warning is issued, it serves as a strong reminder to the student to remember to carry their concession card with them when travelling on public transport and takes into account the fact that the child is still in the process of learning their social responsibilities. If a fine is issued, it is unlikely that the child can afford to pay the fine and the system for having the fine withdrawn is extremely inaccessible for children due to its complexity, formality and inflexibility.

Youthlaw recommends that a warning should be the first response by issuing officers to all children in recognition that a warning is often enough to remind them of their obligations and serve as a deterrent. Further, a warning can de-escalate a situation to allow a child to consider their conduct and understand their obligations, rather than escalating a situation by giving a fine which often results in the issuing of multiple fines if a child becomes confused, agitated or angry at how they are being treated. In these situations, a child who was initially at risk of incurring an infringement may quickly become at risk of being arrested and having criminal charges laid against them where the situation is escalated by the actions of enforcement officers.

Youthlaw considers that issuing officers who are public authorities should consider the special status of children under Victorian law and the child's personal circumstances before issuing a fine. The practice of issuing fines to children as a matter of course is not consistent with promoting the best interests of children or the development or rehabilitation of children.

Example 2: Exercising discretion where a child experiencing homelessness is asleep on a train

A teenager has fallen asleep across the seats on a train, it would be more appropriate to issue a warning than a fine for having their feet on the seats. This would particularly be the case for a vulnerable and disadvantaged teenager whose reason for sleeping on the train is that they do not have safe and stable housing or are experiencing homelessness.

Issuing officers and enforcement agencies should not issue or enforce fines against children unless the circumstances warrant bringing the child into contact with the infringements system.

Youthlaw considers that formal policies outlining the use of warnings should be incorporated into Victoria Police and Protective Services Officers (**PSO**) manuals and Department of Transport guidelines. In order for this change to be effective, we recommend that Victoria Police, PSOs and Public Transport Authorised Officers (collectively referred to as **enforcement officers**) be required to undergo training about the special legal principles that apply to children and appropriate responses for dealing with children (in particular, the use of cautions and warnings).

Where guidelines are introduced and supported by enforcement agencies, it is important that accountability mechanisms are introduced to ensure that enforcement officers are following the guidelines in practice and to ensure children who are issued a fine in situations where discretion should have been exercised have an avenue for redress.

In New South Wales, guidelines for the issuing of infringements are developed and each enforcement agency must follow the guidelines. If an enforcement agency does not follow the guidelines and fails to exercise discretion to issue a warning, a child can ask for a warning to be issued instead of the fine because of this failure to follow the guidelines.

Recommendation 1

Youthlaw recommends that:

- (a) the Department of Justice develop clear guidelines which set out particular circumstances in which enforcement officers should issue a warning instead of an infringement;
- (b) enforcement agencies support enforcement officers to understand and follow the guidelines with codes of conduct, policies and training that specifies that an informal warning should first be given to children in response to minor offences instead of automatically issuing an infringement; and
- (c) accountability mechanisms be introduced to ensure that enforcement agencies and officers follow the guidelines, including a right to review for an infringement issued where an enforcement officer fails to follow the guidelines.

b. Enforcement agencies reluctance to withdraw infringements

Where enforcement agencies do not exercise their discretion to issue a warning, it is often very difficult to have the matter withdrawn, even where there are clear exceptional circumstances. Unfortunately, the reasons why enforcement agencies decide to withdraw an infringement are not available. As a result, the outcomes for children are arbitrary. Some young people are able to have their infringements withdrawn and other requests for withdrawals are refused. Youthlaw is particularly concerned that this “luck of the draw” approach is preventing fairness in outcomes.

Case study 1: Refusal to withdraw an infringement where exceptional circumstances exist

Nahal* approached Youthlaw for assistance after receiving a charge-sheet and summons to attend Court.

Nahal fled persecution in her home country at the age of 16 with her 17 year old brother Manoush. Nahal and

Manoush arrived in Australia as unaccompanied minors and were placed in a detention centre in Darwin for a year, then transferred to community detention in Melbourne. After 6 months in community detention, Nahal and Manoush were found to be refugees and began looking for somewhere else to live.

When Nahal was 17, she caught the train for the first time with Manoush to apply for accommodation out of community detention. On this occasion, Department of Transport Authorised Officers approached Nahal and asked her for her ticket. Nahal said that she spoke limited English and could understand very little of what was said to her. Nahal showed the Authorised Officers the ID she had on her, but her ID did not have her address. Manoush showed the Authorised Officers his ID to the address of the community detention centre where they were living.

18 months later, Nahal received the charge-sheet and summons in the mail. On the charge-sheet and summons, the address for the community detention centre was incorrect by one digit. As a result, Nahal had not received any documentation up until this point and was very distressed that she would have to attend Court. The sworn Statement provided with the charge-sheet stated that Nahal had provided the incorrect address. Nahal was very upset at this allegation, and convinced that she had never even said her address, because she didn't understand what was going on. Nahal was adamant that she had showed the Authorised Officers the ID she had on her and Manoush had shown them his ID as well. There were other inaccuracies in the Statement, including that Nahal had pointed at a 'female person' she was with to confirm her address. The Statement referred to the 'female person' multiple times. Nahal instructed that the only person with her at the train station was her brother Manoush: the name recorded for the 'female person' was Manoush's name, but repeatedly referred to him as a her. The Statement was sworn almost a year after the incident. Youthlaw was concerned that these inaccuracies showed that the Statement was written from notes, not from memory, and that the Authorised Officer may also have incorrectly recorded or read the street address, resulting in Nahal receiving no earlier notice of the infringement.

Nahal's counsellor was very supportive of Nahal, and provided a detailed support letter explaining Nahal's experiences of persecution and fleeing her home country as a refugee and the ongoing psychological effect on Nahal, including Post-Traumatic Stress Disorder and anxiety. Youthlaw asked the Department of Transport to withdraw the infringement and issue a warning in its place, explaining that this was Nahal's first ever offence, her exceptional circumstances and the significant financial hardship Nahal would experience if she was required to pay the fine.

The Department of Transport prosecutor refused to withdraw the fine. There were no reasons provided for this refusal. As Nahal was unable to pay the fine, her options were to participate in the Ropes program or for the charge to be proven and dismissed. Nahal instructed that she did not want the charge to be proven and dismissed, as she did not want a criminal record because of the infringement. Nahal initially wanted to do the Ropes program, but was unable to find transport from her house to where the Ropes program was taking place, and would not be able to attend school on that day.

At Court, the Department of Transport prosecutor again refused to withdraw the fine, and did not provide any reasons why Youthlaw's request for withdrawal was refused. However, the prosecutor agreed not to oppose Youthlaw's request to adjourn the matter to allow Nahal to pay the original fine of \$70. Because Nahal did not want a criminal record, she agreed to this outcome, and her exceptional circumstances were never heard by the Court.

While Nahal was at court, the Department of Transport withdrew a number of matters at their discretion, not because of full payment of the fine. Nahal was in court for most of the morning, and could not understand why the Department of Transport was happy to withdraw so many other infringements, but refused to withdraw her infringement. Nahal did not see any of the other children whose fines were withdrawn attend Court, and Nahal could not understand why the Department of Transport had never given her a warning and refused to withdraw her infringement.

**Not her real name*

4. PENALTIES

a. Court fines

The Children's Act is clearly designed to set the maximum financial penalties for offences for children.⁵ When the Children's Court imposes a fine on a child, the court must take into account the suitability of a sentence to a child (e.g. the suitability of imposing a fine where a child lacks the capacity to pay the fine).⁶ The court must also take into consideration the financial circumstances of the child when determining the amount of the fine.⁷ The Children's Act allows the Children's Court to fine a child the maximum penalty which may be imposed for an adult for the same offence if it is less than the maximum penalty for a child (currently \$) (722).⁸ For example, a child who fails to pay a public transport fine (\$70) can be ordered to pay the same amount in court as an adult (\$722).

Table 1: Comparison of public transport fines for children and adults

Infringement	Infringement penalty/ On-the-spot fine (2012/2013)	Max court penalty (2012/2013)
Minor public transport fines ⁹ (adult)	\$207	\$722
Minor public transport fines (child)	\$70	\$722 ¹⁰

b. On-the-spot fines

Children are issued lower public transport fines than adults in recognition of their decreased capacity to pay fines compared to adults. However, children can be issued on-the-spot fines for other offences which require them to pay the same fine as an adult, despite the fact that children often have no income or earn much less than an adult.

Inflexible penalties for on-the-spot fines are routinely imposed on under 18 year olds which exceed the maximum fine the Children's Court can order for a single offence under the Children's Act (\$722 at the date of writing). For example, the maximum \$1,000 on-the-spot fine for carrying a knife is above the maximum penalty the Children's Court can impose on a young person.¹¹

This results in a clear inequity where a child can be fined on the street – without any access to legal advice or representation – and without any consideration of the fact that they are under 18 and often unable to pay the fine. This situation undermines the specific legal principles applicable to the Children's Court when considering imposing a fine on a child and the broader principles applicable to dealing with children that are imposed on judicial and government officers under the Children's Act and the Charter.

⁵ *Children, Youth and Families Act 2005* (Vic) s 373.

⁶ *Children, Youth and Families Act 2005* (Vic) s 362(1)(e).

⁷ *Children, Youth and Families Act 2005* (Vic) s 374.

⁸ *Children, Youth and Families Act 2005* (Vic) s 373(a)(ii)

⁹ Eg. failing to produce a valid ticket or evidence of concession, refusing to give name and address, possessing open container of liquor, smoking on public transport, spitting on public transport, littering.

¹⁰ *Children, Youth and Families Act 2005* (Vic) s 373(a)(i). Applies to CAYPINS registrars, see Schedule 3, s 8(5).

¹¹ *Control of Weapons Act 1990* (Vic) ss 6(1), 11B, 11C(a) cf. *Children, Youth and Families Act 2005* (Vic) s 373(a)(i).

Table 2: Comparison of on-the-spot fines for children and adults

Infringement	Infringement penalty/ On-the-spot fine (2012/2013)	Max court penalty (2012/2013)
Refusing to move on ¹² (adult)	\$282	\$722
Refusing to move on (child)	\$282	\$722
Purchasing a knife ¹³ (only an offence for child aged 16-18)	\$282	\$722
Drunk in a public place ¹⁴ (adult)	\$563	\$1155
Drunk in a public place (child)	\$563	\$722
Disorderly conduct ¹⁵ (adult)	\$563	\$1444
Disorderly conduct (child)	\$563	\$722
Possession of a graffiti implement ¹⁶ (adult)	\$704	\$3609
Possession of a graffiti implement (child)	\$704	\$722
Carrying a knife ¹⁷ (adult)	\$1000	\$ 17323
Carrying a knife (child aged 16-18)	\$1000	\$722

c. Lower fines for children

The fines discussed above are excessive and do not reflect the low income or lack of income of children, nor the requirement to afford children special treatment in accordance with their circumstances.

If children are working, they are paid a percentage of the adult wage, but no consideration of this is given in imposing fines on children.¹⁸ A 15 year old on the minimum wage is paid only 36.8% of the adult wage (\$5.87 an hour).¹⁹ A 16 year old is paid 47.3% (\$7.55 an hour) and a 17 year old is paid 57.8% (\$9.22 an hour).²⁰ Most children who are working are employed in casualised industries with uncertain hours and low wages. This means that many children are underemployed, and cannot work enough hours each work to earn the money to financially support themselves. In 2012, almost 1 in 5 teenagers aged 15 to 19 were unemployed and would have no capacity to pay fines they received.²¹

The Youthlaw Survey results showed that 70% of respondents said having a fine added stress to their life, with nearly a quarter having a large debt they cannot afford to pay. 64% of respondents also stated that they would be more likely to pay a fine if it was a reasonable amount.

Children from low-income households, who are homeless, in state care or have no parental support are particularly disadvantaged. Children aged between 12 and 17 are the largest group experiencing homelessness in Australia.²² People who have experienced homelessness in the last 10 years are about 3 times as likely to have been a victim of physical or threatened violence in the last year (25% compared with 9%); more likely to report a disability or long-term health condition (64% compared with 37%); twice as likely to have a physical disability (47% compared with 24%); and four times as likely to have a psychological disability

¹² Summary Offences Act 1966 (Vic) ss 6, 60AA(1), 60AA(1AB)(a), 60AB(3).

¹³ Control of Weapons Act 1990 (Vic) ss 6(1AA), 11B, 11C(b).

¹⁴ Summary Offences Act 1966 (Vic) ss 13, 60AA(1), 60AA(1AB)(a), 60AB(4).

¹⁵ Summary Offences Act 1966 (Vic) ss 17A, 60AA(1), 60AA(1AB)(a), 60AB(4).

¹⁶ Graffiti Prevention Act 2007 (Vic) ss 7(1), 11(4).

¹⁷ Control of Weapons Act 1990 (Vic) ss 6(1), 11B, 11C(a).

¹⁸ Australian Social Inclusion Board, *Social Inclusion in Australia: How Australia is faring (2nd Edition)*, 'Feature article – youth unemployment' (2012) p 8.

¹⁹ Fair Work Australia, *National Minimum Wage Order 2012*, s 8.

²⁰ Ibid.

²¹ Australian Social Inclusion Board, *Social Inclusion in Australia: How Australia is faring (2nd Edition)*, 'Feature article – youth unemployment' (2012) p 8.

²² *The Road Home: A National Approach to Reducing Homelessness*, Commonwealth of Australia (2008).

(22% compared with 5%).²³ Unfortunately, vulnerable and disadvantaged children are more likely to incur infringements under the current system because of their lack of support networks, safe or stable housing and increased reliance on public spaces or services. In this way, infringements can play an active role in further entrenching disadvantage for already disadvantaged and vulnerable children.

Youthlaw considers that fines are not an effective model of dealing with children under the Children's Act, as the only purpose of fines is to have a significant negative financial impact on children. Further, a lack of understanding of the enforcement mechanisms for infringements causes further stress and anxiety for children. Fines are particularly punitive for vulnerable children experiencing disadvantage.

Youthlaw considers that any fines which are imposed on children should be affordable, fair and manageable having regard to the particular circumstances of the child and any special disadvantage or hardship they are experiencing or may experience as a result of the fine.

Recommendation 2

Youthlaw recommends that:

- (a) enforcement officers should be required to take into account whether a child is under 18 years of age when issuing an infringement;
- (b) the maximum penalty for on-the-spot fines should be reduced for all infringements issued to children under 18 years in accordance with the maximum penalties specified under the Children's Act; and
- (c) hardship provisions should be included in agency guidelines which enable children under 18 years of age experiencing financial hardship to apply to enforcement agencies for fines to be reduced in recognition of their inability to pay the fines.

²³ Australian Social Inclusion Board, *Social Inclusion in Australia: How Australia is faring (2nd Edition)*, 'How Australia is faring: Housing and homelessness' (2012) <<http://www.socialinclusion.gov.au/resources/how-australia-is-faring/housing-and-homelessness>>.

5. CHILDREN AND YOUNG PERSONS INFRINGEMENT NOTICE SYSTEM (CAYPINS)

a. Overview of the system



b. Difficult to locate and obtain details of outstanding infringements

It is extremely difficult for a child or even a lawyer to find a complete list of outstanding children infringement matters.

This is especially the case where the child is homeless or transient as:

- (a) there may be many previous addresses where the child stayed (including refuges, couch-surfing and transitional accommodation);
- (b) the child often cannot remember the details of their living arrangements at the time of the infringements or the details of the offending;
- (c) the child has often not received any of the paperwork relating to the infringements as they were not living at the address for service; and
- (d) children experiencing homelessness typically move around frequently, which means there are often outstanding infringements across different locations.

Under the current system, the only way to find outstanding infringements is to contact the Children's Court and request a search of each court registry. This is time consuming for the court and the information provided often lacks salient details.

In addition, the court may not have the details of infringements at an earlier stage of the infringements process (i.e. infringements that have not yet been referred to CAYPINS). In this case, a child must know which enforcement agency issued the fine to determine where the requests for information about the fine should be sent. In our experience, many children do not know or remember the enforcement agency responsible for issuing the fine. It is confusing for many children that they may be issued fines by police officers, PSOs, transit authorities, Council staff and other authorised officers. This means that lawyers representing children are often required to send multiple requests for information to the Infringements Court, Civic Compliance Victoria, Victoria Police, Department of Transport and local councils to find a list of outstanding infringements.

In practice, to prevent duplication by sending a letter for each infringement to the various enforcement agencies individually, children may have to wait until all of their infringements become overdue and reach the CAYPINS stage before applying for the fines to be withdrawn. This means that the fines may increase before the young person has the opportunity to deal with them because of the addition of late fees and court costs. It also means that if their application for their fines to be withdrawn is refused, they may be ordered to pay higher fines than were originally incurred.

In our experience, there can be a significant delay in obtaining details of a matter which has been referred to CAYPINS. Youthlaw has assisted children in matters where they have been advised that the matter has been referred to CAYPINS, but the CAYPINS registrar has been unable to locate the matter on CAYPINS for up to four weeks.

In contrast, the adult system has the Infringements Court: a central body that manages unpaid infringements. The Infringements Court has a record of all outstanding infringements and can be contacted to obtain a complete list of outstanding infringements for a particular person irrespective of the enforcement agency.

Recommendation 3

Youthlaw recommends that a centralised database be established to provide comprehensive information about fines and infringements given to children by all enforcement agencies.

c. Inefficient system for dealing with multiple infringements

Fines for children can be listed in different courts and at different points of the enforcement process. A child may have some fines before an infringements registrar in CAYPINS (**CAYPINS registrar**) and other fines before a Magistrate in the Children's Court. Children's Court fines cannot be referred to the CAYPINS hearing list, which prevents the consolidation and simultaneous hearing of multiple matters.

This often results in fines being dealt with individually and in various locations and stages. Where a child has fines from multiple occasions they are required to attend court separately for each fine. Fines can be referred to a court near where the child lives or near where the fine was incurred. A court may not be close to where a child person is living, working or studying. If fines are incurred in multiple locations around Victoria, a child may have hearings in many different locations (e.g. CBD, outer suburban, regional, remote). Disadvantaged and at-risk children are more likely to be moving around. They are more likely to be living in multiple locations and less likely to be able to afford to pay for a ticket to travel on public transport. As a result, vulnerable and disadvantage children are particularly affected by this aspect of the CAYPINS infringements system. Numerous consolidations of matters may also be required (where possible) to have outstanding matters heard on the one court date in the one location. However, it is difficult and time-consuming to locate several different matters and to request that they be consolidated for a single hearing.

The process of consolidating outstanding infringements is unnecessarily complex, inefficient and time-consuming for all involved, including for agency staff, the child involved, lawyers, prosecutors and court staff. Unfortunately, many of our clients under 18 experiencing homelessness do not have the support and resources to be able to attend multiple hearings and deal with their outstanding infringements. The complexity of the system is often too confusing and overwhelming for children to be able to independently address or deal with their fines, resulting in many ignoring their fines. Attempts by children to address outstanding fines often places a heavy burden on them when they are struggling with other personal issues, such as homelessness, family breakdown, substance abuse, mental health issues and long term unemployment

In contrast, the adult system is more centralised. Fines can be found at one central point (the Infringements Court), and generally do not proceed beyond this point until they can be dealt with together. In addition, it is generally the case that the adult who incurred the fine takes steps to refer a matter to court, not the enforcement agency. While the Infringements Court may issue a warrant in respect of unpaid infringements, in most cases the matter will not be referred to open court until the adult makes an application or the fines have progressed to a point where enforcement action is taken by the Sheriff. This means that it is possible to deal with all outstanding matters together, as a single application, and it is generally reasonably straightforward to consolidate a large number of infringements.

Youthlaw considers that a more efficient and straightforward system for the management and administration of fines given to children is needed to ensure they are treated fairly and consistently with the principles imposed under Part 1.2 of the Children's Act.

Recommendation 4

Youthlaw recommends that:

- (a) infringements at different stages of the enforcement process should be able to be consolidated;
- (b) infringements in CAYPINS and infringements that are referred to open court should be able to be consolidated;
- (c) all consolidated matters should be determined together at once at the court closest to the child's current residence (or if they are homeless, closest to the location where they regularly access services); and
- (d) outstanding infringements which the child was not aware of should be able to be consolidated when they attend at court to allow them to finalise and deal with all outstanding infringements at once.

d. Service by post results in high non-attendance

In a system where fines keep progressing through the system without a child being aware of them, the service of court or CAYPINS notices by post has particularly serious implications for homeless and transient children with no fixed address. Because homeless and transient children are more likely to receive fines and less likely to receive notice of hearing dates, a high number of infringement matters are heard without them being aware that the matter has been heard.

In our experience, enforcement agencies tend to refer fines to open court where infringement notices sent by post are 'returned to the sender'. This often indicates that a child is homeless and no longer at the stated address. For example, summonses to attend court hearings are often sent to the young person's parent's address. If there has been a family breakdown and the young person is no longer living with a parent, they are unlikely to receive notice of these hearings. Many children are not notified of these hearings and do not attend. As a result, findings of guilt and court fines are often imposed in their absence on recorded on their criminal record.

As a result, service by post often has a serious impact on a child's right to procedural fairness and the right to be heard. Non-attendance at court hearings often results in higher penalties being imposed as the court or CAYPINS registrar will generally impose the full fine that is due at the time of hearing (which often includes accrued late fees and court costs).

Recommendation 5

Youthlaw recommends that:

- (a) service of infringement notices must be effective to bring the matter to the attention of the young person – it is not enough to send a notice to the child's previous address;
- (b) court officers should, in accordance with the principles imposed under the Children's Act, satisfy themselves that a child has in fact received notice of a hearing before proceeding to hear matters against the young person; and
- (c) infringement matters where service has only been effected by post should not be determined without the child being present.

e. Children in court as a last resort

Currently in CAYPINS, when a child does not pay a fine, they are required to attend court. Children must also attend open court to review a CAYPINS order.

This requirement has a number of negative consequences, most importantly:

- (a) early interaction with the criminal justice system increases the likelihood of future interaction with the system;
- (b) a court is a confronting, intimidating and stressful environment for a child;
- (c) if a child is required to attend court without understanding how the system works, it will instill in them a belief that the system is unfair and designed to publicly punish them for minor misdemeanours. This is particularly the case for vulnerable and disadvantaged children who are disengaged from or respond negatively to authority structures for a range of reasons, including family breakdown.

Case study 2: Difficulty avoiding court where child has an intellectual disability

Sasha* approached Youthlaw for assistance with a fine issued by Victoria Police for spitting at a tram stop. Sasha was 16 years old with an intellectual disability. Sasha lived at home and received a Centrelink disability support pension but did not attend school.

Sasha told her Youthlaw lawyer that she does not remember spitting. Youthlaw assisted Sasha to request an internal review of the decision to issue the fine based on her intellectual disability and provided supporting material from her treating doctors.

The internal review application was unsuccessful and the matter was initially referred to the Children's Court. Sasha's lawyer was very concerned that open court would not be an appropriate environment for Sasha, particularly given the relatively minor nature of the offending and Sasha's provision of clear medical evidence about her intellectual disability.

Youthlaw submitted a complaint about the failure to withdraw the fine and issue a warning. After consideration of Sasha's personal circumstances, Victoria Police agreed to withdraw the fine and issue a warning in its place. This meant that Sasha was saved the stress and anxiety of having to attend an open court hearing for a relatively minor infringement.

**Not her real name.*

When a person over 18 does not pay a fine, the infringement is lodged with the Infringements Court and enforcement orders are imposed. They are only physically required to attend court if they decide to object to an Infringement Notice or apply for revocation on the basis of special circumstances.

Recommendation 6

We recommend that:

- (a) an infringement should only be referred to CAYPINS or open court on application by the child (prior to referral, the fine should be managed by a central body such as the Infringements Court); and
- (b) children should not be brought to court for infringement offences, except as a last resort.

f. Failure to consider special circumstances

There is no specific provision in the Infringements Act or Children's Act which sets out a requirement equivalent to the requirement in the adult system to consider the 'special circumstances'²⁴ of a person who has incurred an infringement. Where an infringement matter is referred to CAYPINS, the registrar must have regard to the child's employment or school attendance and the child's personal and financial circumstances,²⁵ but not necessarily any other relevant 'special circumstances'.

Under the Children's Act, Magistrates that hear children matters referred to open court are required to impose the minimum sentence that is appropriate in the circumstances²⁶. CAYPINS registrars are not bound by a similar provision²⁷ and often fine children who would fall within the adult definition of 'special circumstances' (where adults often have their fines dismissed). In our experience, the current practice of CAYPINS registrars is to almost always impose a financial penalty, unless exceptional circumstances can be demonstrated. CAYPINS registrars seem extremely reluctant to exercise their discretion to order that the relevant fines not be enforced against children.

This is the case even where evidence has been provided outlining that the child:

- (a) is currently homeless and/or was homeless when the fine was incurred;
- (b) has a mental illness or intellectual disability (e.g. acquired brain injury);
- (c) has a drug or alcohol dependence; and/or
- (d) has a very limited income (e.g. Youth Allowance) or no income at all.

²⁴ Special Circumstances apply where a person is homeless, has a mental or intellectual disability, or a serious addiction to drugs, alcohol or a volatile substance at the time of the offence which meant the person was unable to control their conduct or understand that their conduct constitutes an offence; *Infringements Act 2006* (Vic) s 3.

²⁵ *Children, Youth and Families Act 2005* (Vic) s 362, 374.

²⁶ *Children, Youth and Families Act 2005* (Vic) s 361.

²⁷ *Children, Youth and Families Act 2005* (Vic) Schedule 3.

Case study 3: CAYPINS registrar fails to consider a child's homelessness and orders a punitive fine

Braden* left home when he was 15 due to family breakdown and was homeless for over a year before he returned to live with his father. During this time, he received over a dozen public transport infringements (most were fines for failing to produce a valid ticket).

Braden attended a CAYPINS hearing. Some of the fines were reduced but other fines had already proceeded to the enforcement stage and were enforced at the full amount. Braden was put on a payment plan for over \$500. Braden was ineligible for Centrelink because he went back to live at home. Braden had no income or assets to make the payments required under the payment plan.

Youthlaw assisted Braden by applying to the Children's Court for review of the CAYPINS registrar's orders and appeared on Braden's behalf at an enforcement hearing for some of the fines.

At the hearing, the Magistrate recommended that the CAYPINS registrar's Order not be enforced in relation to the remaining fines. However, the remaining fines were subsequently referred to CAYPINS.

**Not his real name.*

Youthlaw believes the current system fails to treat children as children. There is a substantial inconsistency between the sentencing outcomes of children from CAYPINS registrars and of adults from Magistrates for similar matters. As a result, children with similar infringements experience different outcomes depending on the pathway of their infringements.

Children may receive a more severe outcome than adults for the same offence. In the adult system, where a person establishes that 'special circumstances' exist, it is the practice of the Magistrates' Court to usually dismiss the infringement or order an adjourned undertaking. Youthlaw considers that consistent and equitable outcomes should be available for children in the children's infringement system.

Recommendation 7

Youthlaw recommends that:

- (a) an independent review of CAYPINS sentencing, guidelines and training be undertaken within the next 12 months; and
- (b) CAYPINS registrars undergo training about their requirements to take into consideration children's personal and special circumstances; and
- (c) CAYPINS registrars must take into account whether a child falls within the definition of 'special circumstances' in the Infringements Act and not treat children under 18 less favourably than in the adult system.

g. Reviewing a CAYPINS order is onerous

Under the current system, the only way for a child to have a CAYPINS order made in their absence is to apply for review for each unpaid infringement. This system also applies to children who did not receive notice of the hearing date in advance of the hearing.

Where the matter has been referred directly to open court, an application for review must be done in person at the court where the matter was initially heard. As discussed earlier, this may require a child to travel to multiple different courts around Victoria. This requirement is complicated, onerous and rarely undertaken in practice, particularly if the child is experiencing disadvantage or facing other serious problems in their life.

Case study 4: Complicated rehearing process confusing and stressful for a child taking responsibility for his infringements

Jamie* was issued two fines from Victoria Police after noise complaints were made on two separate incidents where Jamie had a few friends over.

Jamie has a history of homelessness, an unstable relationship with family members and is a primary carer for his 2 year old son. Jamie's sole income is Centrelink payments to support himself and his son.

Jamie's fines were referred to CAYPINS. Jamie attended at court with evidence of his difficult personal and financial circumstances, and applied for the infringements to be withdrawn. The CAYPINS registrar refused to consider Jamie's support material, confirmed the fines and placed Jamie on a payment plan requiring him to pay over \$500.

Youthlaw assisted Jamie to apply for a review of the CAYPINS registrar's decision based on the failure to consider Jamie's personal and financial circumstances. Contrary to legislative requirements,²⁸ the Children's Court requested that two separate applications for rehearing be lodged: one for each infringement. Youthlaw was required to make a separate application for review, even though the circumstances and supporting material were substantially the same for both infringements.

Jamie's matter was listed before a Magistrate for a rehearing. A different CAYPINS registrar also attended the rehearing and indicated that the penalties issued by the initial CAYPINS registrar were too high. The Magistrate ordered that one infringement be struck out and the other infringement referred back before the Children's Court for an enforcement hearing.

*Not his real name.

For lawyers and court staff involved, the process to apply for reviewing a CAYPINS order is time-consuming, resource-intensive and inefficient.

Recommendation 8

Youthlaw recommends that a child be allowed to apply for a rehearing online and a single application for a rehearing be available for multiple infringements determined by a CAYPINS registrar.

h. Getting a criminal record in open court

It is unclear why enforcement agencies refer some matters to CAYPINS and other matters to open court, and there is no way to review the discretion of enforcement agencies to refer a matter to open court. Once a matter has been issued by charge-sheet and summons in the Children's Court, there is no avenue to have the matter returned to CAYPINS to prevent any finding resulting in a criminal record.

Many enforcement agencies refuse to waive or withdraw fines at the agency level when a child applies directly to the agency for an infringement to be withdrawn. This triggers the fines going directly to open court, instead of being referred to and managed under CAYPINS.²⁹ If so, the child will be required to appear at a hearing at the Children's Court and will incur a court record and/or a criminal record. If the child had simply ignored the infringement and done nothing while it was at the agency level, the fine would progress to CAYPINS and they would not have incurred a court record or been faced with the ordeal of appearing at court.

Where a child does attend open court, findings of guilt may be entered on their criminal record, even for matters which have been proven and dismissed. Any infringement matter heard in open court can result in a recorded finding of guilt. Even where the court does not record a conviction in respect of the offence, a finding of guilt will be recorded and will appear in any subsequent police or court searches carried out within the next 3 years. This is likely to have an impact on a child's future employment and earning prospects.

²⁸ *Children, Youth and Families Act 2005* (Vic) Schedule 3, s 10(1)

²⁹ *Infringements Act 2006* (Vic) ss 25(1)(d), 27.

Consequently, a child who does not have the financial means to pay an infringement (e.g. because they are homeless or have no parental support) is more likely to incur a court or criminal record whereas a child who is financially supported by their parents is unlikely to receive a record. The outcome is that the current children's infringement system further entrenches socioeconomic disadvantage as children experiencing financial hardship are more likely to have a criminal record, which has a flow-on effect on their lower employment prospects. This is further exacerbated by the absence of spent convictions legislation in Victoria.

Case study 5: A child experiencing homelessness has a criminal record following internal review referral

Asha* had an extensive history of homelessness, having left home at 16 due to family breakdown. While Asha was homeless, she received numerous fines issued by the Department of Transport for failing to produce a valid ticket on public transport (as well as some associated fines for having her feet on the seats and offensive language). Asha did not have the financial means to pay for the fines, and they subsequently proceeded through CAYPINS (where notices of CAYPINS hearing and enforcement order hearings were not received by Asha because they were sent to her home address).

6 months after leaving home, Asha had started to engage with services and wanted to deal with all of her outstanding fines. On Asha's instructions, Youthlaw applied for internal review to have the fines withdrawn on the basis of her 'special circumstances' (being homelessness). The Department of Transport confirmed the decision to issue the fines pursuant to section 25(3) of the Infringements Act, and all of the fines were then referred to be heard in the Children's Court. In addition to these fines being referred to open court, the Department of Transport also referred Asha's other fines (which were not subject to the internal review) to the Children's Court.

This resulted in 15 individual charges proceeding in the Children's Court.

Youthlaw appeared on Asha's behalf in the Children's Court and made submissions to have the matters proven and dismissed on the basis of:

- (a) the relatively minor nature of the offences and the causal link between the offences and Asha's homelessness;
- (b) the inconsistent mechanism leading to matters being before the court and the associated disadvantage experienced by Asha of having the matters proceeding by charge in open court because she had decided to apply for internal review; and
- (c) the fact that Asha was now in stable accommodation and had not incurred any fines for over a year.

Support material confirming Asha's homelessness during the period when she incurred the fines were provided to the Magistrate in support of Youthlaw's submissions.

The Department of Transport were not in support of having the matters dismissed, and asked for a good behaviour bond, which the Magistrate also considered appropriate. Youthlaw were able to make submissions that a more appropriate sentence would be an adjourned undertaking. The Magistrate agreed to this and imposed a 6 month adjourned undertaking, with a special condition to write a letter of apology to the transit officer involved in the offensive language infringement.

Had Asha chosen to do nothing about her fines, they would have proceeded through CAYPINS, where she would have received a less punitive result. Asha now has these 15 charges on her criminal record.

**Not her real name.*

Recommendation 9

We recommend that the Children's Court be given discretion to order the complete expiation of an infringement offence from a child's record and that such a discretion be exercised in accordance with the 'best interest' principles to which Children's Court officers are required to have regard under the Children's Act.