INSTANT FINES: INSTANT JUSTICE? THE USE OF INFRINGEMENT OFFENCE NOTICES IN NEW ZEALAND

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Abstract

In New Zealand, the use of infringement notices (instant fines) as a way of dealing with minor criminal matters is growing considerably. Infringement notices deal with minor offending in a way that is convenient for prosecuting authorities and defendants. However, their use raises issues of access to justice, equity and natural justice. There is evidence of "net-widening" as a result of their introduction. This paper explores the impact of the use of infringements and raises some issues that should be resolved in light of the probable continued increase in the use of infringements by government agencies.

INTRODUCTION

Infringement offence notices, also known as instant fines, are a rapidly growing feature of our criminal justice system. They have received relatively little attention from the academic community or the justice sector in terms of understanding their effects. This is despite the fact that infringements are the only interaction most people will have with the justice system. Infringements are a low-cost, simple way of punishing minor offending without, in most cases, recourse to the courts.

Infringement notices were first introduced into New Zealand in 1968 for parking offences and vehicle overloading offences. This followed a similar development in the United Kingdom in 1960. Parking or overloading infringements were not criminal offences but it was an offence to fail, without reasonable cause, to pay infringement fees. In 1971 speeding infringements came into force. In 1987, the current standard infringement regime was set out in the Summary Proceedings Act 1957. Infringement offence notices are now issued for a wide variety of offences including traffic matters, parking offences, resource management offences, underage drinking, under-weighing foodstuffs, dog control and biosecurity offences.

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There has been remarkable growth in terms of the range and number of infringements issued in recent years. It is likely that other government agencies will seek to implement infringement regimes in the future. It is difficult to obtain an accurate figure for the number of infringement offence notices issued given the large number of agencies that may issue them and the fact that some infringements are waived. However, the following table shows the increase in the number of infringements filed in court in recent years:

Figure 1 Fines imposed 1993-2001

Year	Infringements	Court-imposed Fines
1993	210,681	84,411
1994	240,259	88,028
1995	345,122	90,691
1996	413,336	90,630
1997	481,040	81,702
1998	568,954	77,557
1999	626,482	78,543
2000	587,316	73,710
2001	654,970	75,797

It is interesting to note that the level of court-imposed fines has remained relatively steady between 1993 and the present while the number of infringements filed in court for enforcement has grown considerably in most years.

This paper will show that the infringement system is not as straightforward as it first appears and will identify some issues that agencies should be aware of when seeking to create infringement regimes. It will also identify areas where further work is required to improve aspects of the infringement system.

THE INFRINGEMENT REGIME

Infringement offences are provided for in a variety of Acts. However, the basic infringement process is set out in section 21 of the Summary Proceedings Act 1957. The infringement regime aims to efficiently achieve policy goals, such as improving road safety, rather than to enforce rights and responsibilities. It is a way of altering the behaviour of society as a whole, with a view to increasing compliance, rather than a mechanism for addressing individual criminal behaviour (Hogg 1988, Fox 1995b).

The key aspects of the infringement regime are that a person served with an infringement notice has 28 days to pay the prescribed fee to the prosecuting authority. If the fee is not paid, the prosecuting authority may serve a reminder notice that gives another 28 days to pay. If payment is not received at the end of that period, the

prosecuting authority may file the reminder notice in court for enforcement. Prior to the matter being filed in court, the person named in the infringement notice may request a court hearing to defend the charge or to admit liability and make submissions as to the penalty imposed. The defendant may also correspond with the prosecuting authority to explain his or her actions and seek a waiver of the fee.

Significantly, the Act also provides that unless the contrary is proved, the infringement notice and reminder notice are deemed to have been served and the fee not paid. Proceedings for infringement offences do not result in a conviction. The infringement regime provides for punishment without formal prosecution. It differs in a number of significant ways from summary proceedings for criminal offences and therein lie some of the dangers of the system. These are addressed below.

Infringement Liability

Liability for some infringement offences can rest with a person other than the person who actually committed the offence. This is known as vicarious liability. Where an infringement involves a vehicle, the person liable for the infringement fee may be the person in charge of the vehicle, the registered owner, or the person who allegedly committed the offence. The rules relating to liability differ significantly from the usual principles associated with prosecution for criminal offences that deal only with the offender.

As a result of the rule of vicarious liability, a person with no knowledge of the actual circumstances of an offence may have an infringement notice issued against them. The infringement scheme anticipates and provides for this outcome. Related to the issue of knowledge of the offence is the issue of service. Section 24(1)(d) of the Summary Proceedings Act 1957 requires service of notices relating to infringements to be posted to the defendant at his or her last known residential or business address. Section 24(3) provides that where the notice has been posted as set out above, then, unless the contrary is shown, service is deemed to have been effected on the person to whom the letter was addressed. In proving service it is sufficient to prove that the letter was properly addressed and posted. In infringement proceedings, the onus is on the defendant to prove that service did not take place, rather than on the prosecutor to prove that it did.

Together, the provisions relating to vicarious liability and service can create a situation where a person may be liable for an offence he or she did not commit, may have no knowledge of the offence and can be deemed to have been served with infringement documents, unless proven otherwise. The reversal of many of the common principles of criminal law in the infringement process suggests that infringement powers should be exercised carefully.

Correction of Irregularities

Because it is possible for infringement proceedings to commence without the knowledge of the liable party, the Summary Proceedings Act provides a way of redressing irregularities in the process. Under section 78B of the Act, a person who did not receive a reminder notice or notice of hearing, or who believes that some other irregularity occurred, may apply to the court to correct that irregularity. Application is by way of a statutory declaration. Successful applications result in the prosecuting authority being authorised by the court to re-issue a reminder notice so that the process can begin again without prejudice. While this process provides an avenue for redress in cases where the infringement process has not been followed correctly, it must be initiated by a defendant. An estimated 16,000 applications are made under section 78B per annum. It is not known how many are successful.

LEVEL OF PENALTIES

Although infringement notices are used to penalise minor offending, the monetary penalties can be significant. Infringement fees vary from $8 for a parking offence to $2,000 for some overloading offences. A large proportion of infringement fees are set around $200. In addition, persons receiving traffic infringements may be ticketed for more than one offence. Consider the case of a person who is stopped for not wearing a seatbelt ($150 fee) and is found to have an unregistered vehicle ($200 fee) and no warrant of fitness ($200 fee). A series of minor infringements can, in such cases, present the offender with a large debt.

Research undertaken for the Department for Courts found that a significant number of people, especially those on lower incomes, have difficulty paying infringement penalties. Those who received tickets for not having a registration or warrant of fitness found that, by paying the infringement fee, they could no longer afford to have their car registered or warranted and fell into a cycle of re-offending (ACNielsen (NZ) Limited 2000). It is also easy for recidivist offenders to accumulate a large number of infringement fees that they are unable to pay. Recent cases have seen a Marlborough teenager who had amassed a $40,000 infringement debt, two men with $35,000 worth of infringement debts each and another with $27,000 of unpaid infringement fees (*Northern Advocate* 2001b, *Wanganui Chronicle* 2001, *Northern Advocate* 2001a, *Nelson Mail* 2001). These cases highlight the possibility for infringement offences to create large debts if there is no intervention by the prosecutors, courts or social agencies to deal with the offending.

Prosecuting authorities are empowered to offer time payment schemes for infringements but are not required to do so (s. 21(3A) Summary Proceedings Act 1957). Most local authorities do not offer such a scheme and neither do the Police, though it

would be likely to increase compliance with infringement notices (Ministry of Justice 2000). In the Department for Courts' research on infringement offenders, many subjects reported that they deliberately allowed infringements to get to the court enforcement stage because the Department offers time payment options for fines. While there is no automatic entitlement to a time payment arrangement, the Department does grant them in cases of genuine need. However, the fines debtor is required to pay a $30 filing fee, charged on every infringement lodged in court, in addition to the amount of the outstanding fine. In the 2000/01 financial year some 129,000 fines were placed under time-to-pay arrangements.

ASSESSMENT OF THE INFRINGEMENT REGIME

A 1997 inquiry by a standing committee of the Victorian Parliament stated that a good fines system should be appropriate, just, efficient and effective (Public Accounts and Estimates Committee 1997). The infringement regime that operates in New Zealand raises some interesting issues in relation to these principles and they are worth considering here.

An appropriate fines regime is one that sets fines at levels that people can pay and which takes the means of offenders into account. Perhaps one of the major difficulties of the present infringement regime is that it imposes penalties with no regard to a person's ability to pay. Because infringement fees are set by legislation, there is no discretion for prosecuting authorities to vary the penalties to fit the circumstances of the offence or the offender. For this reason, the right to make a submission to the court on the level of fine is of questionable effectiveness. A 1996 High Court decision highlighted this problem (Police v Interfreight Ltd AP 244/96, 29 November 1996). In relation to infringement fees for overloading a vehicle, the Judge held that "overloading infringement fees are mandatory in all circumstances where the offender is found guilty or there is an admission of liability". The decision effectively stated that the court has no discretion in respect of the amount of infringement fee that may be imposed. It must impose the specified infringement fee.

The infringement regime is unable to impose penalties commensurate with the means of an offender or in recognition of previous offending. A first offender is punished to the same extent as a repeat offender. The infringement system does, to some degree, vary penalties based on the severity of offending, particularly in relation to speeding offences that attract a graduated range of fees.

A just system is one that operates under standards of fairness and equity. Offenders should be given fair notice of their offences and should be informed of the consequences and options that might follow. It should generally punish the person who committed the offence and should minimise the chance for errors. The present

system does not always meet these criteria. As noted above, there is potential for offenders not to be notified of their offence or of their legal rights. Recently, a Dunedin woman was pursued for fines that were not hers after her name was mistakenly linked with the fines (*Otago Daily Times* 2001). Vicarious liability for traffic infringements means that persons other than the offender may be punished for the offence. The impersonal, postal-based nature of the infringement system does little to minimise error.

An efficient system is one that achieves the desired outcome making the best use of resources. It is in this area that the infringement regime scores well. It is cost effective and enables offenders to deal with their offences quickly and easily. It generally utilises administrative rather than judicial resources. However, the system does not encourage early payment or make payment particularly easy. Time payments are generally not available until the infringement is being enforced. Some prosecuting authorities do not accept credit card payments while others do not take payments over the counter.

An effective system is defined as one that produces the desired outcome. Once infringement fees are imposed they should be able to be collected. Effective collection revolves around two key factors – reliable information and speedy enforcement. Most infringement offenders have 56 days to pay before the infringement is lodged in court. Some infringement defaulters have stated that they have not paid infringements because they were given too much time to pay them (ACNielsen (NZ) Limited 2000). The recent exception to the "56-day rule" is the new biosecurity infringement regime which issues infringement notices to people who bring prohibited items into New Zealand. Offenders have only 14 days to pay these infringements before they are lodged in court for enforcement. It will be interesting to see whether a greater proportion of people pay prior to enforcement, as a result of this more stringent requirement.

ENFORCEMENT DIFFICULTIES

Legislation determines that infringements are of low relative significance in the scale of offending. The infringement system is able to process the large numbers of offences efficiently with the main aim of convenience for the courts, prosecuting authorities and offenders. However, it is significant that a large number of infringements are not paid on time and have to be enforced by the courts.

Infringements are more difficult to collect than court-imposed fines for two reasons. With court-imposed fines the Department has control over the quality of information it gathers on people who are fined in court. It is able to arrange payment of fines with defendants before they leave the courthouse. The Department does not have the same control over infringement information. Instead, it relies on information provided by

prosecuting authorities and this information is sometimes inaccurate. In addition, the Department is probably pursuing the infringements that are more difficult to collect as presumably people who wished to comply with the infringement notice would have paid within the stipulated time. In the last year approximately 27% of infringement fees lodged with the Department were collected within a year of imposition (ACNielsen (NZ) Limited 2000:49).

POTENTIAL FOR NET-WIDENING

Researchers have expressed concerns that infringement regimes lead to "net-widening". They warn that offences that previously went unpunished when prosecution was the only avenue for enforcement are now being detected and dealt with by infringement notices (New South Wales Law Reform Commission 1996). In South Australia, where an infringement regime for minor cannabis offences operates, the rate of police detection of offences has risen dramatically since the introduction of the scheme in 1988 (*New Zealand Herald*, 2000).

The trends in detected offences are considered to be indicative of police enforcement efforts rather than the scheme itself (Sutton and Sarre 1992). This outcome is significant in this country, where a parliamentary select committee is currently considering the legal status of cannabis. Any moves to "decriminalise" an offence by making it an infringement offence should be made with the likely net-widening effect in mind. This is particularly significant in the case of cannabis offences where the number of prosecutions is generally decreasing each year since peaking in 1986.

The introduction of infringements has not seen a decline in the imposition of more serious penalties. Imposition of fines by the courts has remained steady while the number of people imprisoned has continued to grow (Ministry of Justice 1998). At the same time, the number of infringements issued has grown dramatically. Every year an increasing number of people are subjected to official attention. Instead of diverting people away from the criminal justice system, a growing number of people seem to be entering it, albeit at the lower end of the scale. This phenomenon is probably not due to a deliberate attempt by the state to exert greater control over its citizens but has arisen because the cost, ease and efficiency of the infringement system encourage its growth (Fox 1995a:289-290).

NEED FOR REVIEW OF INFRINGEMENT SYSTEM

The Ministry of Justice undertook a review of monetary penalties in 2000. The review indicated that infringements may have the effect of reducing the deterrent force of the law when matters are dealt with administratively with no consequences other than a monetary penalty. Allowing certain offences to be dealt with as infringements has little

condemnatory force and may encourage the offences to be viewed as trivial. This may lead to lower levels of compliance with the law and to higher levels of re-offending than would otherwise be the case (Ministry of Justice 2000).

The infringement regime in New Zealand is administratively convenient. It raises some important social policy questions in relation to access to justice, equity and natural justice. The scheme has largely operated on a standard model for 14 years. Research has shown that some offenders consider that they are given too much time to pay infringement fees following imposition but are offered few options to assist them in paying on time. In light of these issues, it is timely to undertake a thoroughgoing review of the infringement system. Such a review should address:

- the extent to which the infringement system is equitable;
- whether the "56-day rule" is appropriate;
- whether all the offences it covers are appropriately dealt with by way of infringement notices;
- whether other offences should become infringements;
- the extent to which each infringement fee is fair relative to other infringement fees;
- strategies to reduce non-compliance with infringement notices; and
- strategies to reduce re-offending.

Such a review should consider the perspectives of prosecuting authorities, offenders and enforcement authorities. The Ministry of Justice's review of monetary penalties highlighted many of the advantages and disadvantages of the infringement system. It would be worth building on the Ministry's findings by examining the operation of the infringement system in depth.

Infringements are being used to deal with an increasingly wide range of minor offending. In addition to the recently-implemented biosecurity infringement notices issued at airports, infringement regimes are planned to address minor health and safety offences, fisheries offences, and minor breaches of the Electricity Act 1992 and the Gas Act 1992 (Ministry of Economic Development 2000:59-60). New infringement offences are also proposed for traffic offending.

When the infringement regime is extended to include new offences under different legislation, the infringement procedure is restated in the relevant Act. The Ministry of Justice has suggested that this could be avoided if there were an Infringements Act that set out a standard procedure for all infringements. The Law Commission has also stated that consolidation of the infringement system into a single regime would be desirable (Law Commission 2001:7-8). South Australia has an Expiation of Offences Act 1996 that sets out the procedure for imposing and enforcing all expiation (infringement) fees. Canada has a Contraventions Act 1992 setting out the procedure for the prosecution of minor offences, called contraventions, that do not involve

criminal offending (Ministry of Justice 2000). In Australia there have been calls for a national law to govern all infringement offences in a consistent way (Fox 1995b:5-6).

CONCLUSION

Infringement notices can prevent minor cases reaching court and save time and money for the offender and the criminal justice system. The avoidance of a criminal conviction reduces the stigma to offenders. The system can be automated, is highly efficient and raises significant revenue. The penalty payable, though significant, is considerably less than the maximum available were the matter to be dealt with in court. The infringement regime is based on a liberal bureaucratic model that offenders will be more inconvenienced by delays, costs and complexity than they will be by diminution of legal rights. This model supports a system for dealing with minor offending that is run almost exclusively by bureaucrats rather than the judiciary (Fox 1995a:281).

However, infringement penalties are usually fixed and cannot be adjusted to fit the circumstances of the case or the offender. The offences invariably involve strict or absolute liability and dispense with the traditional criminal law requirement to prove mens rea (a guilty mind). Often, such offences involve a reversal of the traditional criminal onus of proof. The prospect of an infringement notice being challenged in court may not be great given the relatively small penalty, the limited ability to amend penalties for such matters and the inconvenience factor. There may be a "net-widening" effect (New South Wales Law Reform Commission 1996).

The growing use of infringements in this country and the issues of fairness, equity and access to justice around the infringement system suggest that it requires some attention. Instant fines are a useful administrative tool and they play an important part in the justice system. They are expedient, comparatively low in cost and generally are an appropriate response to minor offending. However, the current infringement system would benefit from review and legislative uniformity.

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