

Magistrates Court (Waiver of Penalty) Guidelines 2024 (No 1)

Disallowable instrument DI2024–152

made under the

Magistrates Court Act 1930, section 131AG (Guidelines for waiver of penalty)

1 Name of instrument

This instrument is the Magistrates Court (Waiver of Penalty) Guidelines 2024 (No 1).

2 Commencement

This instrument commences on the day after notification.

3 Guidelines

I issue the guidelines for the waiver of infringement notice penalties contained at schedule 1 to this instrument

4 Definitions

In these guidelines:

administering authority, for an infringement notice offence, means the entity that, under the regulations, is the administering authority for the offence.

approved community work or social development program means a community work or social development program approved under section 131AD.

authorised person—see section 134A (3).

date of service, of an infringement notice or reminder notice that has been, or is to be, served on a person, means the date the notice is served on the person.

infringement notice means a notice under section 120 (Service of infringement notices).

infringement notice management plan—see section 131AA.

infringement notice offence means an offence declared under the regulations to be an offence to which this part applies.

infringement notice penalty, for a person for an infringement notice offence, means—

- (a) the amount prescribed by regulation as the penalty payable by the person for the offence under an infringement notice for the offence; or
- (b) if a reminder notice has also been served on the person for the offence—the total of the amount mentioned in paragraph (a) and the amount prescribed by regulation as the amount payable by the person for the cost of serving the reminder notice.

reminder notice means a notice under section 129 (Reminder notices).

Shane Rattenbury MLA
Attorney General
19 June 2024

SCHEDULE 1

WAIVER OF AN INFRINGEMENT NOTICE PENALTY

OVERVIEW OF INFRINGEMENT NOTICE SCHEME

An infringement notice scheme for the ACT is established by Part 3.8 of the *Magistrates Court Act 1930* and its regulations.

The pathways open to a person who receives an infringement notice in the ACT are:

- Pay the infringement notice directly (or seek an extension of time to pay the infringement notice directly).
- Seek to enter into an infringement notice management plan (payment by instalment or participation in an approved community work or social development program) or seek to add the infringement notice to an existing infringement notice management plan.
- Seek withdrawal or waiver. Internal review can then be sought of a decision by the administering authority not to withdraw or waive an infringement notice. Following internal review an application can be made to the ACT Civil and Administrative Tribunal (ACAT).
- Dispute liability. The matter will then be determined in the Magistrates Court.

Entering into an infringement notice management plan, adding a penalty to a plan or obtaining withdrawal or waiver of a penalty has the same effect as if the person had paid the penalty outright. The effect is that the person is no longer liable for the offence, must not be prosecuted for the offence, and is not taken to have been convicted of the offence.

METHODS FOR WAIVER OF INFRINGEMENT NOTICE PENALTIES

An application for waiver of an infringement notice must be made in accordance with section 131AE of the *Magistrates Court Act 1930*. Applications must be in writing and set out the person's financial circumstances, the person's relevant circumstances, and anything else prescribed by legislation. There is no time limit in which an application for waiver can be made.

Applications can be made by either:

- The person served with the infringement notice.
- A representative of the person served with the infringement notice.
- A guardian (parent, kinship parent or carer of the person served with the infringement notice).

GROUND FOR WAIVER OF INFRINGEMENT NOTICE PENALTIES

The administering authority **must** waive an infringement notice monetary penalty when all of the following elements are satisfied:

- the applicant does not currently have, and is unlikely to have, the financial ability to pay the infringement notice; and
- relevant circumstances exist in relation to the applicant; and
- enforcement action has not resulted in, or is unlikely to result in, the payment of the infringement notice (for example, previous sanctions did not result in payment); and
- the applicant is not a suitable person to discharge the infringement notice by completing an approved community work or social development program.

The administering authority has discretion to waive an infringement notice monetary penalty in circumstances where only some of the above elements are satisfied. Waiver ceases the administering authority's right to take action in relation to the infringement notice monetary penalty.

Financial Ability to Pay

An applicant is considered to not currently have, and is unlikely to have, the financial ability to pay the infringement notice monetary penalty and entering into an infringement notice management plan is unlikely to provide the financial ability.

Evidence to support an application includes (but is not limited to) that the person:

- is in receipt of a Centrelink benefit (statement from Centrelink),
- does not possess substantial assets,
- their household income per fortnight is not sufficient to meet the minimum instalment management plan payment (payslips, bank statements),

- has significant and unavoidable expenses, for example, large medical bills (invoices, Medicare statements),
- has significant caring responsibilities, such as caring for a person with relevant circumstances, that limited the person's financial ability to pay.

Evidence that could also demonstrate hardship includes:

- information about current debts and their payment terms (for example, the use of 'pay day loans' to cover bills and essentials). Evidence of debts can include evidence of ongoing bankruptcy proceedings, current status as undischarged bankrupt, evidence that the applicant is already under an existing payment plan with a utility company or debt collection company and evidence that the applicant has an large outstanding debt with another government agency,
- a notice to vacate due to rent arrears, an adverse personal credit report,
- letter of dismissal from employer,
- a written statement from a financial counsellor.

Income includes but is not limited to, wages, pensions or benefits, allowances, interest on investment or other financial support. Any amount a person is required to pay in child support (Child Support Agency statement) should be deducted from his or her pre-tax income.

Decision makers should factor into decisions for waiver when the person has identified as someone with a disability and the evidence they require the person to provide to support their application.

Relevant circumstances

Relevant circumstances are defined in section 117 of the *Magistrates Court Act 1930* and means any of the following circumstances that relate to the person and contribute to the person's ability to pay an infringement notice penalty:

1. mental illness and/or mental disorder
2. disability, disease or illness
3. addiction to drugs, alcohol or another substance
4. family violence
5. homelessness, or living in crisis, transitional or supported accommodation.

Issuing and/or enforcing infringement notices in instances where these circumstances apply may not support the overall objective of the infringement notice scheme as a method of deterrence and preventing further offending.

Mental illness/es and/ or disorder/s

Mental illness means a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person¹. Examples include schizophrenia,

¹ This is based on the definition of mental disorder (section 9) and mental illness (section 10) in the *Mental Health Act 2015*.

psychosis, bipolar disorder, and serious depression or anxiety and personality and other addictive conditions.

The administering authority should consider whether written evidence is required, and the level of written evidence based on the person's circumstances.

Evidence to support an application includes (but is not limited to) a letter of support or other documentation, from one of the following:

- The applicant's general practitioner, treating doctor, psychiatrist, registered psychologist or mental health nurse or other medical practitioner involved in the healthcare of the applicant that the administering authority considers relevant.
- Centrelink, if the applicant is in receipt of a full or partial disability pension (e.g. a job capacity assessment or other report which describes the applicant's disability or impairment).
- The applicant's school teacher or principal, or an employee in the Education Directorate.
- A government agency or non-government organisation with experience working with people with mental illness, intellectual disability or cognitive impairments.
- A government agency or non-government organisation with professionals qualified to make mental health assessments.

The letter or documentation should not be older than 6 months from the date of the application. The administering authority should consider whether written evidence is required, and the level of written evidence based on the person's circumstances.

Disability, disease or illness

A person has a disability where that disability:

- is attributable to an intellectual, psychiatric, sensory or physical impairment or a combination of those impairments, and
- is permanent or likely to be permanent, and
- results in a substantially reduced capacity of the person for communication, learning or mobility and the need for continuing support services, and
- may or may not be of a chronic episodic nature.²

When determining an application on these grounds, an administering authority must have regard to Schedule 1 of the *Disability Services Act 1991* (ACT) (Human rights principles to be furthered in relation to people with disabilities).

The *Towards Disability Justice for the ACT Summary of Research and Consultations, 2019*³ noted that the heavy reliance on written material when assessing a person's

² This definition is taken from the definition of disability in the *Disability Services Act 1991* (ACT).

needs or engaging with a person with a disability on legal matters, put them at a disadvantage.

Evidence to support an application includes (but is not limited to) a letter of support or other documentation from one of the following:

- The applicant's general practitioner, treating doctor, psychologist, speech pathologist or other medical practitioner involved in the healthcare of the applicant that the administering authority considers relevant.
- Centrelink, if the applicant is in receipt of a full or partial disability pension (e.g. a job capacity assessment or other report which described the applicant's disability or impairment).
- A government agency or non-government organisation with experience working with people with sensory, cognitive, physical or intellectual disabilities.

The letter or documentation should not be older than 6 months from the date of the application. The administering authority should consider whether written evidence is required, and the level of written evidence based on the person's circumstances.

Substance dependence (e.g. drugs, alcohol or other substance)

A person is considered to have a substance dependence if he or she has a pattern of substance use, as manifested by two (or more) of the following:

- Tolerance, as defined by either of the following:
 - a need for markedly increased amounts of the substance to achieve intoxication or the desired effect, or
 - markedly diminished effect with continued use of the same amount of the substance.
- Withdrawal, as manifested by either of the following:
 - the characteristic withdrawal syndrome for the substance, or
 - the same (or closely related) substance is taken to relieve or avoid withdrawal symptoms.
- The substance is often taken in larger amounts or over a longer period than intended.
- There is a persistent desire or unsuccessful efforts to cut down or control substance use.
- A great deal of time is spent in activities necessary to obtain the substance, use the substance, or recover from its effects.
- Important social, occupational, or recreational activities are given up or reduced because of substance use.

³ https://www.communityservices.act.gov.au/disability_act/towards-disability-justice-in-the-act

- The substance use is continued despite knowledge of having a persistent physical or psychological problem that is likely to have been caused or exacerbated by the substance (for example, current cocaine use despite recognition of cocaine-induced depression or continued drinking despite recognition that an ulcer was made worse by alcohol consumption).

Many people who attend alcohol or other drug treatment services also have co-occurring mental health disorders and poorer physical health.

The ACT Government through its Drug Strategy Action Plan is committed to increasing diversions from the criminal justice systems for people who are involved in or at risk of being involved in it as a result of them experiencing drug related issues.

Evidence to support an application includes (but is not limited to) a letter of support or other documentation from one of the following:

- the applicant's treating doctor, psychiatrist, registered psychologist, nurse working in the field of drug and alcohol addiction or social worker or other medical practitioner involved in the healthcare of the applicant that the administering authority considers relevant
- the applicant's drug and alcohol case worker or counsellor
- the applicant's youth service case worker or counsellor
- the applicant's residential (or outpatient) rehabilitation service provider
- a government or non-government organisation with expertise in working with people with serious addictions to alcohol or other drugs or substances.

The letter or documentation must not be older than 6 months from the date of the application. The administering authority should consider whether written evidence is required, and the level of written evidence based on the person's circumstances.

Family violence

Family violence is any of the following behaviours by a person against a family member⁴:

- physical violence or abuse
- sexual violence or abuse
- emotional or psychological abuse
- economic abuse
- threatening behaviour
- coercion
- any other behaviour that:
 - controls or dominates the family member and causes them to feel fear for their safety or the safety of another person

⁴ Family member is defined in section 9 of the *Family Violence Act 2016*.

- causes a child to hear, witness or otherwise be exposed to the above behaviours⁵.

Family violence is a broad term that refers to violence between family members, as well as violence between intimate partners. Family violence includes physical, sexual, emotional and psychological abuse. While there is no single definition, the central element of family violence is an ongoing pattern of behaviour aimed at controlling a victim through fear, for example by using behaviour which is violent and threatening. In most cases, the violent behaviour is part of a range of tactics to exercise power and control over a family member and can be both criminal and non-criminal.

It does not have to occur within the home or between people who are living together. It is when someone intentionally uses violence, threats, force or intimidation to control or manipulate a partner, former partner or family member. There are many different types of violence including physical, verbal, emotional, financial, sexual and psychological abuse.

Documentation that can be used to identify the applicant as having been subjected to family violence includes (but is not limited to) one or more of the following documents:

- Emergency Protection Order
- Family / Domestic Violence Order
- Personal Protection Order
- Police report
- Letter from an organisation or professional providing assistance to the applicant, for example a crisis service, refuge, counsellor, lawyer, Victim Support ACT or Legal Aid

Homelessness or living in crisis, transitional or supported accommodation

Homelessness includes people who are sleeping rough, as well as people staying in temporary, unstable or substandard accommodation. Homelessness has many drivers and causes, including the shortage of affordable housing, long term unemployment, mental health issues, substance abuse and family and relationship breakdown.

A person is considered to be homeless if they:

- have no shelter, sleep rough, live on the streets, in cars, under bridges or in improvised dwellings
- frequently move from various forms of temporary accommodation such as emergency accommodation, or short-term accommodation with friends and relatives
- are staying in unstable or substandard accommodation
- are staying in a refuge, temporary accommodation or rooming / boarding houses

⁵ This is based on the definition of family violence in the *Family Violence Act 2016*.

- are couch surfing
- are living in a caravan park due to their inability to access other accommodation.

Evidence to support an application includes (but is not limited to) a letter of support or other documentation from the applicant's lawyers, specialist service provider or case worker, or a government agency or non-government organisation with experience working with people experiencing homelessness.

Enforcement action has not resulted in, or is unlikely to result in, the payment of the infringement notice (for example, previous sanctions did not result in payment)

In considering whether enforcement action is likely to result in payment of the infringement notice penalty, the administering authority should refer to:

- the applicant's history, if any, in discharging liabilities resulting from infringement notice penalties
- whether enforcement action is suitable against the applicant given their circumstances outlined in their application
- whether there are unreasonable constraints on the ability of the administering authority to undertake enforcement action against the applicant
- whether enforcement action is likely to impede the applicant's ability to pay the infringement notice penalty
- any other applicable factors that would prevent successful enforcement action.

The administering authority may request additional information from the applicant.

Suitable person to discharge the infringement notice monetary penalty by completing an approved community work or social development program

The *Magistrates Court (Approval to participate in an approved community work or social development program) Guidelines* state that in determining whether a person is a suitable person to participate in a program, consideration is given to each applicant's individual circumstances and personal history, the appropriateness of the program applied to participate in and the likelihood of successful participation in that program.

An application for participation in a community work or social development program notice must be made in accordance with section 131AA of the *Magistrates Court Act 1930*. Applications must be in writing and set out the person's financial circumstances and/or the person's relevant circumstances and include supporting documentation.

The application may be approved if satisfied on reasonable grounds that the applicant is suitable to participate in the program and it is justified because of:

- the financial circumstances of the applicant; and/or
- any relevant circumstances of the applicant.