Instant Justice? The Desirability of Expanding the Range of Criminal Offences Dealt with on the Spot

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Over 85% of criminal offences do not reach court. Instead they are dealt with by way of on the spot fine. Over the past three decades or so, the range of criminal matters dealt with on-the-spot has increased almost exponentially. Astoundingly this has gone almost unnoticed. This paper compares the two basic methods for dealing with criminal offences (on the spot tickets and court hearings) and examines the broad principles which can be gleaned regarding the manner in which we currently deal with criminal offences. It then considers the principles which should govern our treatment of criminal offences. The desirability of expanding the range of matters dealt with on the spot is then discussed, followed by a procedural model for dealing with a larger number of matters on the spot.

1 INTRODUCTION

There are two basic processes for dealing with criminal offences. The simplest method is by an on the spot ticket. This involves serving a notice which sets out a fixed penalty, which is normally a monetary fine. Payment of the fine within the prescribed time will expiate the offence and this effectively ends the matter.

The alternative is to file a charge and have the matter determined by a court. If the matter results in a finding of guilt, the magistrate or judge determines the penalty in accordance with numerous sentencing guidelines.[1] The obvious differences between this and disposition by way of on the spot fine are that in this case, while the sentencer's discretion is to some degree confined he or she still maintains a large amount of choice in sentencing and this method is far more complex, protracted and expensive.

Not surprisingly, expediency appears to have triumphed and nowadays the vast majority of criminal matters are dealt with by way of on the spot fine, or infringement notice.[2] The ratio of matters dealt with on the spot to that determined by the courts exceeds 7:1.[3] Given the enormous differences

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[1] Particularly the factors specified in the *Sentencing Act* 1991 (Vic). These are discussed further in section 2.

[2] The terms infringement notice and on the spot fine will be used interchangeably.

[3] R G Fox, *Criminal Justice On The Spot: Infringement Penalties in Victoria* (1995) 1. There has been an enormous proliferation in the number of offences subject to being dealt with on-the spot. In Victoria there were eleven traffic offences subject to being dealt with by way of infringement notice in 1962, by 1992 this had grown to over 200 out of a total of 387 offences. The total number of on the spot offences was in excess of 785: Fox op cit (fn3) 1–2. Of the matters dealt with by the courts, all but about two per cent are

between the two processes and the importance of the criminal justice system in our society, the striking feature of this is not the number of matters dealt with on the spot, but the lack of principles or guidelines governing the appropriate disposition of criminal offences.[4] Apart from indictable offences which are always dealt with by the courts,[5] the process by which a particular offence is dealt with appears almost arbitrary. For offences which are dealt with on the spot the ad hoc approach continues with no consistent pattern or system underlying the penalty for the offence.[6] As we shall see, the lack of framework in this area has left the door open for the state to renege on the original 'bargain' that no prior convictions accrued as a result of infringement notices nor any convictions in return for the cost and efficiency savings to the state.[7]

This paper will examine the broad principles which can be gleaned regarding the manner we currently deal with criminal offences and then consider the

done so in the Magistrates' Court. For example, in 1995 the Magistrates' Court finalised 81083 criminal cases (Caseflow Analysis Section Courts and Tribunals Services Division, Department of Justice, *Magistrates' Court Sentencing Statistics 1995* (henceforth referred to as Magistrates' Court Statistics (1995)) compared to 1 355 cases in the County and Supreme Courts combined (Caseflow Analysis Section Courts and Tribunals Division Department of Justice, *Sentencing Statistics: Higher Criminal Courts Victoria* 1995, 150). The 1996 figures for the County and Supreme Courts were not available at the date of publication of this paper.

4 There is not even a clear legal definition of the word 'infringement':Fox op cit (fn 3) 56 The notable exception to the dearth of material regarding infringement notices is the relatively recent publication by Fox. Amongst other things, this provides extensive statistical information regarding infringement notices issued in the twelve month period from 1 July 1990 to 30 June 1991. I will frequently use the statistical information provided in Fox, since for the purposes of this paper there is no need to update this information. The infringement notice system has not significantly altered since that period, nor has the frequency of its utilisation. The matters discussed in this paper are not effected by slight yearly fluctuations to such things as the precise number of infringement notices issued. However, it is remarkable how constant the number of infringements issued appears to be. For example, the number of infringement notices issued by police in the 1991, 1993, 1994, 1995, and 1996 financial years respectively was 973 210 978 044, 963 321, 942 704, 891 246. The number of infringement notices forwarded to PERIN (see section 2 for an explanation of PERIN) for enforcement was also relatively constant. For the years above these were respectively 141 340, 1 663 307, 160 566, 15[illegible] 404, 151 875. The details for the 1991 financial year are in Fox op cit (fn 3) 106, 113 while the rest were supplied by the Victoria Police Traffic Camera Office.

5 Apart from the warning notices issued by police for shoplifting (theft) offences which fall within certain criteria, namely that: the retail value of the property is no more than $100 the offender must admit the offence and consent to the caution; there must be sufficient admissible evidence to establish the offence; generally, the offender should have no prior criminal history; the offence must not involve theft from more than one store; there must be no aggravating circumstances such as assault, theft by a staff member or police officer the offender has not previously received a caution for shoplifting; and a caution is appropriate in all the circumstances (the issue of compensation or restitution is a consideration here). A warning system is also applicable in relation to juvenile offender (Victoria Police: *Operating Procedures Manual* para 7.8.5).

6 In 1991 there were 33 discrete monetary levels of penalty, with some amounts as close to each other as $100 and $105, and there also appeared to be no considered attempt to match the level of the penalty with the seriousness of the offence: Fox op cit (fn 3)4–6.

7 Fox op cit (fn 3) 2. Whether it is appropriate to continue to depart from this original position is discussed in section 7.

principles which should govern our treatment of criminal offences.[8] The last issue is normative in nature and will require consideration of some basic concepts underlying the criminal law. The desirability of expanding the range of matters dealt with on the spot will then be discussed.[9]

An analysis of this type is particularly timely in view of the enormous the expense involved in dealing with criminal proceedings is necessary to preserve the integrity of the criminal justice system, there appears to be little public support for the channelling of increased community resources into this area. Legal Aid, the government agency which provides the greatest assistance to those charged with criminal offences, is currently the subject of severe funding cuts and as a result the number of people and the types of cases which qualify for legal aid has been drastically reduced.[10] Accordingly, significantly more people charged with criminal offences now appear in court without legal representation. Apart from savings to legal aid, increasing the range of matters dealt with on the spot would also benefit the public purse through reductions in expenditure on institutions such as the courts and the police.

Looking beyond the public purse, private expenditure, principally through money paid to lawyers, will also diminish. Initially this will relate primarily to the criminal law field, however as this type of work diminishes and criminal lawyers are compelled by market considerations to expand the nature of their service and expertise it is likely that the price of legal services across the whole spectrum of the law will fall. The reduced workload in the Magistrates' Court will also enable it to deal with the backlog of cases in its criminal, family and

[8] The paper focuses primarily on criminal offences which can be dealt with summarily, that is summary offences and indictable offences triable summarily (see fn 31 for a definition of indictable offences triable summarily).

[9] There has been very little consideration given to whether the range of offences dealt with on the spot should be increased. The Law Reform Commission of Victoria, *Summary Offences Act 1966 and Vagrancy Act 1966: A Review* (1992) Discussion Paper No 26 , stated that many of the offences under the Acts being reviewed could be dealt with by an extension of the Penalty Note System and that this would be less intrusive to the defendant, and would lead to considerable cost savings for police, the courts and defendants. The report, however, failed to recommend such a change; concluding that before such a change was introduced it 'would need wide discussion with interested groups' (12). The issue was also glossed over as early as 1985, in 'Planned Infringement Notice Procedure to Cut Court Time' (1985) 59(3) LIJ 219. More recently, the matter was considered, briefly, by the New South Wales Law Reform Commission in *Sentencing* (1996) Report No.79 71–7. However, it should be noted that the Penalty Notices Working Party of the Attorney General's Department (NSW) is considering expanding the range of matters dealt with by way of infringement notice and the *Expiation of Offences Act* 1996 (SA) has recently made provision for an increase in the number of offences which can be dealt with by way of on-the spot fine. The South Australian scheme does not extend to offences involving violence (s 5(4)).

[10] For traffic offences dealt with in the Magistrates Court legal aid is only available in the extremely limited cases where conviction is likely to result in imprisonment or a suspended sentence. For all other criminal matters dealt with in the Magistrates Court, in the case of a guilty plea aid is only available where conviction is likely to result in imprisonment, an intensive correction order or a suspended term of imprisonment and for contested matters assistance is provided where there is a realistic prospect of acquittal and if found guilty that the penalty mposed will be in excess of $1000: Legal Aid Commission of Victoria, *Legal Aid Handbook*, Criminal Law Guidelines (1995) Appendix 2C para 1.1–2.1 — revised in March 1996.

civil lists.[11] At the jurisprudential level, the scheme would result in increases in the rule of law virtues of consistency, certainty and predictability.

However, there are several possible disadvantages of the proposal. It may be seen to trivialise crime and result in a reduction in the quality of criminal justice due to fewer people having their day in court. It will be necessary to examine whether these and other disadvantages outweigh the benefits of the scheme.

Before proceeding to the substantive task at hand it is necessary to provide an overview of the present processes by which criminal offences are dealt with.

2 OUTLINE OF THE PRESENT SYSTEM FOR DEALING WITH CRIMINAL OFFENCES

2(a) Matters dealt with on the spot

The simplest method for dealing with criminal offences is by way of on the spot fine. This involves the person who is alleged to have committed an offence being served with an infringement notice.[12] Infringement notices can be issued pursuant to over 25 different Acts of Parliament. The more prominent in terms of number of notices issued are the *Road Safety Act* 1986 (Vic) (RSA), ss 87–88; *Litter Act* 1987 (Vic), s 9; and *Local Government Act* 1989 (Vic), ss 40 & 117.[13] Infringement notices can be issued for in excess of 785 offences.[14] The highest number of infringement notices are issued by local government authorities, closely followed by the police.[15] Most infringement notices are issued pursuant to the *Road Safety Act* 1986 (Vic) (RSA),[16] and

[11] The backlog problem, the price of legal services and a 16.4% cut in funding for courts and legal services and a 22.7% cut to Legal Aid, led the Chief Justice of the High Court, Sir Gerard Brennan to recently comment that the justice system is in a state of crisis due to serious backlogs in courts and legal action being available only to the very rich, companies and those able to use a decreasing pool of legal aid (P Chamberlin, 'Justice System in Crisis, Says Judge' *The Age* 25 September 1996, 2). Poor access to legal assistance was also one of the main impetuses for reforms to the legal system implemented by the *Legal Practice Act* 1996 (Vic).

[12] The notice can be served personally or by post. In the case of parking offences it can be served by merely being affixed to the vehicle: Fox, op cit (fn 3) 64–5.

[13] A complete list of the Acts is listed in R G Fox, *Victorian Criminal Procedure* (1997), 118–19.

[14] Fox, op cit (fn 3) 98, 262.

[15] Local Government authorities issued 56.42% of notices in the year 1 July 1990 to 30 June 1991 and police 41.54%: Fox, op cit (fn 3) 105. In that year 120 government agencies, consisting of three police services; 50 local government authorities; eight tertiary institutions; one hospital; and seven government departments or statutory corporations issued infringement notices capable of being registered for enforcement under PERIN: Fox op cit (fn 3) 105. In 1996 apparently 117 agencies could issue infringement notices ('Crime & Punishment Insight: A Day of Justice', *Herald Sun*, 27 July 1996, 4) However this figure seems rubbery, given that it includes three courts — there is no indication of exactly which courts are supposedly in the business of *issuing* infringement notices.

[16] About 96% of all notices in the 1991 financial year were for motoring offences: Fox, op cit (fn 3) 106.

there are two main categories of offences for which infringement notices are issued under this Act: traffic offences and parking offences.

An infringement notice states the nature and circumstances of the alleged offence[17] and the prescribed penalty. The penalty is always a fixed and is normally a monetary amount,[18] however can also include a licence order and a conviction.[19] Payment of the fine within the prescribed time (normally 28 days[20]) effectively ends the matter — so long as the fine is paid there is no need for court involvement.[21] Where fines are not paid within the prescribed period, enforcement procedures, known as Penalty Enforcement by Registration of Infringement Notices (PERIN), are then activated.[22]

All offences which can be dealt with by way of infringement notice can also be dealt with through the courts, and there is no requirement that the body which can issue an infringement notice must proceed in that fashion. Even where a notice is issued, at the election of either party, the infringement notice can be revoked and the matter is then brought before the Magistrates' Court for summary determination[23] in accordance with the procedure outlined below.[24] When the matter is determined in court the magistrate in sentencing is not restricted by the penalty set out in the infringement notice, but rather by the maximum penalty for that offence.

[17] This includes the time, date, place, and nature of the alleged offence: Fox, op cit (fn 3) 59.

[18] Ranging from $15 (for certain offences by pedestrians such as 'J walking' (*Road Safety (Traffic) Regulations* 1988, reg 401) to $2 000 (for certain offences involving tow trucks, such as driving a tow truck without a licence (*Transport Act* 1983, ss 172(10), 172A(10), 172B(1)).

[19] Infringement notices issued for drink driving or speeding in excess of 30 km/h over the speed limit impose convictions: *Road Safety (Procedures) (Infringements) Regulations* 1989 (Vic). Infringements issued for speeding in excess of 30 km/h over the speed limit (RSA, s 89D); drink-driving (RSA, s 89C); menacing driving infringements (RSA, s 89DA); and probationary driver infringements (RSA, s 89DB) result in licence suspension. Infringements for drink driving can also result in licence cancellation and disqualification. Infringement notices for traffic offences can also result in demerit points (RSA, s 89(5)). For example, speeding less than 15 km/h over the speed limit accrues one demerit point, whereas speeding between 15 km/h and 30 km/h over the limit accrues three demerit points. The accumulation of 12 demerit points over three years results in a three month licence suspension, unless the driver elects to extend the period for a further 12 months. However, if during this extended period any more demerit points accrue the licence is suspended for six months (see Fox, op cit (fn 3) 73–6 for a discussion on demerit points).

[20] Fox, op cit (fn 3) 59–60.

[21] For example, see RSA, s 89(1).

[22] The PERIN enforcement system is not available for all infringement notices: Fox, op cit (fn 3) 55. Where PERIN is available, which is the case for all notices issued under the RSA, the notice can be registered in the Magistrates' Court and an order is made treating the infringement penalty (and accrued costs) as a fine imposed by the court. Payment by execution against property, community service and even imprisonment can then be used to enforce the order. For a detailed discussion of the PERIN enforcement procedure, see Fox, op cit (fn 3) 78–94.

[23] *Magistrates' Court Act* 1989 (Vic), sch 7, cl 10.

[24] Very few people elect to pursue a formal hearing: the figure is estimated at about one to two per cent of those receiving infringement notices: Fox, op cit (fn 3) 146.

2(b) Matters dealt with by the courts

An alleged offence is brought before a Magistrates' Court by filing a charge with a registrar of the Magistrates' Court or in certain circumstances a bail justice.[25] This is in writing and is signed by the informant who is normally a police officer, although theoretically anyone can file a charge sheet. The charge must describe the alleged offence and identify the provision of the Act or subordinate legislation which creates the relevant offence.[26] For summary offences the charge must generally be filed within 12 months of the commission of the offence.[27] There is no limitation period for indictable offences.

Upon a charge sheet being filed the registrar issues a warrant of arrest or a summons to the defendant.[28] There is a legislative preference for proceeding by way of summons.[29] A summons does not compel the defendant to appear at court; it may be ignored by the defendant, in which case the matter can be heard in his or her absence.[30] A warrant of arrest compels the defendant to come to court and is accordingly reserved for more serious matters or where there is likelihood of the defendant absconding or for other reasons is not likely to appear at the hearing.

Irrespective of whether a summons or warrant is issued, once a charge sheet has been filed in relation to a summary offence it will ultimately be finalised by a magistrate after due consideration of the individual circumstances of the case. A magistrate will also hear the matter if the offence is an indictable offence triable summarily,[31] and the defendant consents to summary determination[32] and the magistrate agrees. There are essentially two different

[25] *Magistrates' Court Act* 1989 (Vic), s 26 (1).

[26] *Magistrates' Court Act* 1989 (Vic) s 27. A charge sheet can contain more than one offence where the offences are founded on the same facts or are of a similar character, however each charge must be individually particularised. Such charges are normally heard together. Even where offences are in separate charge sheets these matters can be consolidated and heard together at the discretion of the court (*Magistrates' Court Act* 1989 (Vic), s 31).

[27] *Magistrates' Court Act* 1989, s 26(4).

[28] The registrar must first be satisfied that the charge discloses an offence known to law; *Magistrates' Court Act* 1989, s 28(4).

[29] *Magistrates' Court Act* 1989 s 28(5).

[30] Although if the defendant does not appear, the court may issue an arrest warrant to bring the defendant to court for the hearing of the matter. This will normally only occur where there is some prospect that the penalty may involve imprisonment or another type of order which requires the physical involvement of the defendant, such as a community based order or an intensive correction order.

[31] Indictable offences triable summarily are generally the less serious indictable offences, namely, all indictable offences listed in sch 4 of the *Magistrates Court Act* 1989 (Vic) and generally all other indictable offences except those punishable by level 4 (ie, 15 years jail) or above (*Magistrates' Court Act* 1989, s 53 — this is amended by the *Sentencing and Other Acts (Amendment) Act* 1997, s 65, which aims to ensure that the type of offences which can be heard summarily is not altered, despite the new, heavier, scales of imprisonment and maximum penalties).

[32] It is rare that a defendant charged with an indictable matter triable summarily will not consent to summary determination. The main advantages in proceeding summarily are that the maximum penalty for indictable matters heard summarily is generally two years jail or five years for multiple offences (*Sentencing Act* 1991 (Vic), ss 113 and 113B respectively), and the matter is finalised far more expeditiously than if it were to be heard at a higher court.

means by which a charge in the Magistrates' Court can be finalised. The most straight forward is by way of plea of guilty.

After a guilty plea is entered the prosecutor[33] reads out a summary of the facts relied on by the informant as establishing the charge[34] and informs the magistrate of any prior findings of guilt. The defendant, personally or through his legal representative, then has an opportunity to inform the magistrate of any factors in mitigation.[35] The magistrate then hands down the penalty.[36] This whole process typically takes about 15 minutes, however it can take significantly longer especially where character witnesses are called on the defendant's behalf.

The other method by which a matter can proceed is by way of a plea of not guilty. Upon such a plea being entered the procedure for dealing with criminal proceedings utilised in the Supreme Court is then invoked,[37] with a few exceptions. The most notable exceptions are that the matter is dealt with by magistrate without a jury, and opening and closing addresses by either party can only be made with leave of the court.[38] If a finding of guilt is made the defendant then has an opportunity to offer a plea in mitigation before sentencing.

When sentencing, a magistrate's discretion is confined by a number of variables. These include established sentencing objectives,[39] and particular factors relevant to sentencing,[40] maximum penalties and mandatory

33 Normally a police officer attached to the Prosecutions Section of the Police Force: *Magistrates' Court Act* 1989 (Vic) s 38. Although in rare instances the prosecutor will be a lawyer from the Office of Public Prosecutions. This will normally be the case where a police officer or solicitor is the defendant or where the plea arises from a matter which was originally to proceed by way of committal proceeding but has resolved into a plea of guilty to an indictable offence triable summarily.

34 If the defendant disputes the summary, he or she is entitled to give evidence or call witnesses to establish facts to the contrary, so long as the facts do not form any of the elements of the offence which has been pleaded to.

35 As is indicated above the defendant need not always attend to answer the charge. For example, where the defendant does not appear to answer a summons regarding a summary offence the court can determine the matter in his or her absence (*Magistrates' Court Act* 1989 (Vic), s 41(2)(b)) on the documents in the brief of evidence where the brief has been served on the defendant (pursuant to *Magistrates' Court Act* 1989 (Vic), s 37) or evidence on oath if the brief of evidence has not been served on the defendant (*Magistrates' Court Act* 1989 (Vic), sch 2, cl 5).

36 The penalty is normally handed down immediately after the plea in mitigation. However, if the magistrate is considering imposing a penalty such as a community based order or an intensive corrections order, which requires the defendant to be assessed for suitability for such an order, depending on court resources, the sentence will need to be adjourned from between one hour to six weeks.

37 This procedure is detailed in R G Fox, *Victorian Criminal Procedure* (1997) ch 8.

38 *Magistrates' Court Act* 1989, sch 2, cl 2(3). Another difference is that where a charge is dismissed in the Magistrates' Court the defendant is normally entitled to costs against the informant (*Latoudis* v *Casey* (1991) 170 CLR 534). No such right exists for prosecutions in the higher courts.

39 These are detailed in the *Sentencing Act* 1991 (Vic), s 5(1), as being the imposition of just punishment; specific and general deterrence; rehabilitation, community denunciation; and community protection.

40 The relevant factors listed in the *Sentencing Act* 1991, (Vic) s 5(2), are the maximum penalty for the offence; current sentencing practice; an early guilty plea (this is viewed as a indication of remorse); previous character; aggravating or mitigating circumstances; nature and gravity of the offence; and the degree of culpability. The last two factors, plus

minimum penalties.[41] The magistrate must then impose a sentence which does not exceed the maximum penalty for the offence, ranging in seriousness from a term of imprisonment to dismissal of the charge.[42] While a magistrate's sentencing discretion is confined by these variables, he or she still retains a large degree of choice in sentencing.

The pertinent points of distinction to note between the two different methods of dealing with offences are that the on the spot method prescribes a fixed penalty for a particular offence, whereas the court method always involves some degree of sentencing choice. The on the spot method is quicker, far less complex and therefore more cost efficient.

3 PRINCIPLES GOVERNING THE TYPE OF OFFENCES DEALT WITH ON THE SPOT

There are no clear principles which have been articulated to explain why particular offences are presently capable of being dealt with on the spot. Ostensibly it would seem that this process has developed on an ad hoc basis. However, an analysis of the types of matters which are dealt with on the spot reveals that there are two principles which *explain* or account for many of the

the statutory preference for the least severe sanction necessary to achieve the purpose of the sentence (s 5(3)) embody the common law sentencing principle of proportionality The *Sentencing Act* 1991 (Vic) also provides that in sentencing, a court may also have regard to forfeiture orders and pecuniary orders where the orders effectively deprive the defendant of something he or she had prior to the offence (s 5(2A) and *Allen* [1989] 41 A Crim R 51). In determining the level of a fine a court is also to take into consideration any restitution or compensation orders which have been made (*Sentencing Act* 1991 (Vic), s 50 (3) & (4)).

41 Few offences have mandatory minimum penalties. Curiously, one of the few offences that carries a mandatory minimum jail term is the relatively minor offence of disqualified driving (*Road Safety Act* 1986 (Vic), s 30) which has a mandatory minimum of one month in jail for a second offence (although the term of imprisonment can be suspended pursuant to *Sentencing Act* 1991 (Vic), s 28). Other common offences which involve mandatory minimum penalties are drink driving where the reading is beyond 0.10% and speeding in excess of 30 km/h over the speed limit. These offences involve mandatory minimum terms of loss of licence.

42 The range of sentencing orders available to a magistrate is detailed in *Sentencing Act* 1991 (Vic), s 7. From most to least punitive the options are imprisonment (Div 2), combined custody and treatment order (s 18Q), intensive corrections order (s 19); suspended term of imprisonment (s 27; or a conditional suspended sentence in cases relating to alcohol or drugs (s 28)); detention in a youth training centre (for defendants under 21 years of age (s 32)); community based order (s 36), fine (s 49); adjourned undertaking with conviction (s 72); discharge with conviction (s 73); adjourned undertaking without conviction (s 75); and dismissal (s 76). Imprisonment, intensive correction orders, suspended sentences, detention in a youth training centre, and a discharge must be accompanied by a conviction, while a dismissal must be without conviction. All other sentences can be with or without conviction, depending on the factors specified in s 8. In addition to the above sanctions the court can cancel, suspend and disqualify offenders from holding licences in the future where the defendant is guilty of specific indictable offences relating to a motor vehicle (*Sentencing Act* 1991 (Vic), s 86) or of any offence under the *Road Safety Act* 1986 (Vic) or any other offence in connection with the driving of a motor vehicle (*Road Safety Act* 1986 (Vic), s 28). For a detailed discussion on sentencing practice and options see P R Mullay & M Duncan, *Victorian Sentencing Manual* (1991) and R G Fox, *Victorian Criminal Procedure* (1997) ch 9.

offences dealt with in such a manner. Whether these principles also *justify* such treatment turns on the appropriateness of the principles. This will be considered in the next section.

3(a) Only minor offences are dealt with on the spot

Even a cursory analysis of the range of matters that can be dealt with on the spot reveals that the most distinctive feature of such offences is that they are relatively minor; both in terms of maximum penalty and the sanction generally administered at court. They are all summary offences and in relation to traffic offences carry a maximum penalty of three months imprisonment.[43] At the extremes, acceptance and application of this principle underlies why parking offenders are dealt with on the spot and murderers by trial before jury.

However, the principle that the level of procedural protection is proportional to the seriousness of the offence, in itself, does not explain the present system for dealing with matters on the spot. There are many offences which carry maximum penalties no greater than three months imprisonment, and which are typically dealt with very lightly at court that are not capable of being dealt with on the spot. Notable instances are the offences of careless driving,[44] unlawful assault,[45] and drunkeness in a public place.[46] These offences were respectively the seventh, ninth, and tenth most common offences to be dealt with by the Magistrate's Court in 1996. There were over 6 000 cases of each offence[47] and together these three categories of offences comprised about 8% of the total offences before the court for that year.[48] The mode and the mean (average) monetary penalties[49] for the above offences in 1996 are as follows: careless driving; $200, $341:[50] unlawful assault; $500, $610:[51] and, drunk in a public place; $50, $228.[52]

These figures are similar to those for drink driving,[53] which is the most

[43] Exceeding the blood alcohol limit carries a maximum penalty of three months imprisonment or a fine of $2 500 (RSA, s 49(2)(a)). For a subsequent offence there is a maximum penalty of 12 months imprisonment, however infringement notices can only be issued for first time offenders.

[44] RSA, s 65, the maximum penalty is a fine of $2 500 (and a loss of licence, pursuant to the power in RSA, s 28).

[45] *Summary Offences Act* 1966 (Vic), s 23, the maximum penalty is three months imprisonment or a $1 500 fine.

[46] *Summary Offences Act* 1966 (Vic), s 13, the maximum penalty is a fine of $100.

[47] Careless driving 8 540 cases; unlawful assault 7 162 cases; drunk in a public place 6 674 cases (Magistrates' Court Sentencing Statistics 1996, (fn 3) 237). The most common offence was theft, with 34 232 offences.

[48] Ibid.

[49] Rounded off to the nearest dollar.

[50] Magistrates' Court Sentencing Statistics 1996, (fn 3) 65. The most common penalty for this offence was a fine (4 304 cases), followed by a licence order (2 239 cases): Id 200.

[51] Id 32. However in 292 cases a custodial sentence was imposed, and a suspended sentence in 242 cases: Id 175. The most common penalty for this was that the matter was proved and struck out (4 080 cases).

[52] Id 174. The most common penalty for this offence was a conviction and discharge (2 922 cases — this accounted for about half the total cases).

[53] Pursuant to RSA, s 49(1)(f) which is the most common drink driving offence.

serious offence capable of being dealt with on the spot, where the mode fine was $500 and the mean $470.[54] There were a total of 9 219 such cases. First time drink drivers with a reading below 0.15% can have the matter dealt with on the spot rather than proceeding to court. Hence, it might be felt that the driving figures only represent the results of the more serious instances of this offence. However, this would not seem to be correct. A mandatory loss of licence follows where the blood alcohol level is in excess of 0.1%. In only 6 241 of the total cases was a licence order imposed.[55] This indicates that many of the cases going to court comprised the less serious instances of this offence. By way of further comparison, in the case of speeding offences the mode fine for the most common type of speeding offence was $165 and the mean was $277.[56]

3(b) Most on the spot offences are regulatory in character

In order to explain the difference in treatment for minor matters currently dealt with on the spot, as opposed to those that are not, it is necessary to look beyond their perceived seriousness and digress a little to some fundamental principles underlying the criminal law. It has been suggested that there is no general link between the criminal law and morality[57] and that there are basically two types of criminal offences: those which proscribe seriously immoral behaviour, such as murder, theft, and the like, and those which are merely a practical means of controlling and regulating certain behaviour. The latter category of offences are often termed regulatory offences,[58] and it has been claimed that these offences do not imply an element of social condemnation and that the only feature which distinguishes them from civil wrongs is Parliament's decision that they shall be criminal.[59] A common feature of many regulatory offences is that they are strict liability offences (offences where mens rea is irrelevant to guilt), although this overlap is by no means complete; some regulatory offences require criminal intent, while some non-regulatory offences do not.[60] The plausibility of the distinction between moral and

[54] Magistrates' Court Sentencing Statistics 1996, (fn 3) 64.

[55] Id 199. In 274 instances a term of imprisonment was imposed, and in a further 282 cases there was a suspended sentence.

[56] Magistrates' Court Sentencing Statistics 1996, (fn 3) 50. The most common speeding offence is a breach of s 1001.1.c. of the *Road Safety Traffic Regulations* 1988 (Vic). There were 1 647 instances of this offence, with the most common penalty being a licence penalty (1001 cases): Magistrates Court Sentencing Statistics 1996, (fn 3) 123.

[57] For example, Lord Atkin stated that: 'the criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one; is the act prohibited by penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality' (*Proprietary Articles Trade Association v A-G* (Canada) [1931] AC 310, 324).

[58] For the difficulty in defining this term see Fox, op cit (fn 3) 258–60.

[59] See A Ashworth, who states that while 'some offences are aimed at the highest social wrongs, there is no general dividing line between criminal and non-criminal conduct corresponding to a distinction between immoral and moral conduct' (*Principles of Criminal Law*, (2nd ed. 1995), 1–2).

[60] *R* v *Kennedy* [1981] VR 565.

regulatory criminal offences is discussed in the next section, however for now it is illuminating to note that virtually all matters dealt with on the spot are regulatory in nature. For example, in 1990/91 the top ten infringement notices sent to PERIN court for enforcement were exceeding the speed limit over 15 km/h and less than 30 km/h; leaving a vehicle in a no standing area; speeding less than 15 km/h over the limit; leaving a vehicle longer than period fixed; leaving a vehicle at expired meter; not wearing a seat belt; leaving vehicle in carriageway; parking within nine metres of intersection; journey without a ticket; and leaving vehicle in a no parking area.[61] Apart from traffic and parking infringements the only other significant notices issued, in terms of volume, were for such offences as littering and having a dog off a leash.[62]

All of these offences do not involve inherent harm to another person and constitute paradigm cases of regulatory offences, particularly offences such as speeding, parking illegally and littering. This is in contrast to many other minor offences which presently cannot be dealt with on the spot. Offences such as drunkenness, unlawful assault, indecent behaviour, and *careless* driving import some element of social condemnation and are accordingly dealt with only by the courts.

The above two principles appear to constitute a common thread among offences which are dealt with on the spot. A dichotomy along these lines is obviously not perfect. Menacing driving typically directly interferes with another person and carries a social stigma, and the same can be said for drink driving (largely as a consequence of a massive public education campaign). Nevertheless, these principles would appear to best explain the present method regarding treatment of criminal offences. We shall now discuss whether these principles form coherent grounds for distinguishing between the treatment of criminal offences.

4 EVALUATION OF THE PRINCIPLES GOVERNING HOW OFFENCES ARE PRESENTLY DEALT WITH

4(a) Relationship between the level of procedural protection and the seriousness of an offence

The principle that the level of procedural protection is proportional to the seriousness of the offence is sound. There is logic in dealing with only minor offences on the spot. The risk of error in any system generally diminishes as the procedural checks and protections become more extensive. The level of procedural protection accorded to defendants should be directly commensurate with the seriousness of the offence. This is because the consequences of getting it wrong become more disturbing as the offence becomes more serious. The enforcement of criminal sanctions is the most punitive action which a

[61] Fox, op cit (fn 3) 117.

[62] These comprised a total 0.5% of the total infringement notices: Fox, op cit (fn 3) 106.

society can invoke against its citizens, and the more serious the offence the potentially more punitive is the sanction. Therefore, for *serious*[63] matters it is worthwhile taking significant measures to minimise the risk of error, and to insist on the greatest level of procedural protection in our system of law (judicial scrutiny) for such matters. While it might be tolerable to mistakenly fine the wrong parking offender, it is abhorrent to wrongly find someone guilty of murder.

4(b) Regulatory offence distinction

However the second principle is far more dubious. The distinction between regulatory offences, or strict liability offences,[64] and other criminal offences along the lines that only the latter proscribe immoral behaviour appears illusory. The preferable view is that in fact all criminal offences relate to immoral conduct.

In considering the connection between the law, including the criminal law, and morality the starting position is that adopted by the legal positivists: that there is no *necessary* connection between law and morality.[65] However, despite the lack of a necessary connection between law and morality, it can still be contended that as a matter of fact there is a connection between morality and the Victorian criminal law.

There are two ways in which this relationship could be asserted. The first is that the criminal law aims to enforce *all* moral rules. The failure of the criminal law to punish much clearly morally repugnant conduct, such as lying and failing to keep promises, makes this position untenable. The more defensible position is that while not 'every moral obligation involves a legal duty; ... every [criminal] legal duty is founded on a moral obligation.'[66]

The view that regulatory offences do not involve immoral conduct is based on an unduly narrow and false conception of morality. Certainly regulatory offences do not involve direct or immediate violations of important rights such as the right to life, liberty or property, but morality is broader than this. Riding a bicycle without a helmet or driving a car without a seat belt do not directly impinge upon anyones clear moral rights,[67] however human experience (presumably including statistical evidence) reveals that such behaviour involves an unacceptably high risk of personal injury and should the risk

[63] The central issue in relation to the first principle is when is a matter too serious to be dealt with on the spot. This issue is taken up in section 7.

[64] Though, as I have noted, the overlap between these two types of offences is not perfect, this is not significant for the purposes of this discussion and I shall henceforth use the terms interchangeably.

[65] Legal positivists accept that most legal systems do as a matter of fact base much of their laws on morality, however they argue this is not an essential connection. For example, see H L A Hart, *The Concept of Law* (1961) ch VI. The most recent opponent of note of the legal positivists has been Ronald Dworkin, who asserts that there is a necessary connection between law and morality (see R Dworkin, *Taking Rights Seriously*, (Duckworth, 1984) and *Law's Empire* (1986) ch 3. For a convincing counter to many of Dworkin's arguments see, C L Ten, 'Moral Rights and Duties in a Wicked Legal System' (1989) *Utilitas* 139.

[66] *R* v *Instan* [1893] 1 QB 493 per Coleridge J.

[67] Apart from the right to liberty and autonomy of the cyclist and the driver.

eventuate it may result in a significant burden on scarce community resources, such as the health budget. The savings to the general revenue through deterring such behaviour are felt to outweigh the individual interest in riding without a helmet or driving without a seat belt, and accordingly it is felt to be selfish and irresponsible to engage in such behaviour.[68] Although in some circumstances strict liability offences may allow the punishment of offenders who have no desire to break the law, this apparent unfairness is justified by the positive consequences produced by deterring potentially harmful conduct and the simplification of the law.

This type of analysis can be undertaken to provide a utilitarian, and therefore moral, justification for all offences which are not immediately actually or potentially injurious to another person.[69] Whether the utilitarian calculus has been properly weighed in relation to many of these so called regulatory offences is a different issue. I suspect that it has not; liberty is a highly desirable virtue and should not be eroded unless it is clear that immense benefits will ensue.[70] However, this does not detract from the view that theoretically all criminal offences can be justified on the basis that they are *judged* to involve immoral behaviour.[71] As such the dichotomy between criminal offences is not

[68] According to the theory of punishment by T L S Sprigge, 'the deterrent theory of moral responsibility', punishment is the expression of blame and we are justified in apportioning blame when, amongst other things, an adverse opinion of the person blamed promotes an adverse opinion of the relevant behaviour and prevents the development of the undesirable predispositions inherent in the conduct blamed. Thus on this account it is appropriate to not only punish offenders who violate strict liability laws, but also to cast moral blame on them (T L S Sprigge, 'Punishment and Moral Responsibility' in *Punishment and Human Rights* (M Goldfinger, ed, 1974) 85–95).

[69] Even parking offences. For example, it is selfish to park in a clearway or a no parking zone, because this is likely to inconvenience many other motorists and lead to net unhappiness.

[70] Even then there is a strong argument that personal liberty should not be eroded: 'the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant' (J S Mill, 'On Liberty' in *Utilitarianism* (M Warnock, ed, 1986, first published 1859) 126, 135). More recently, and a little more moderately, Lord Brown, in a persuasive dissenting judgement in *R* v *Brown* [1993] 2 WLR 556, 600 effectively stated that all autonomous acts should be permitted unless there is good reason to the contrary.

[71] For example, R A Wasserstrom, 'Strict Liability in the Criminal Law' (1959–60) 12 *Stanford Law Review* 731, 738–9, argues that the balance between labelling a person a criminal for an activity society may not hold in contempt weighs lighter on the utilitarian benefit scale than the need to condemn certain activities however innocently committed. In this paper it is also argued that strict liability offences are justified due to their greater deterrent effect. As with T L S Sprigge, he too argues that not only is it justified to punish people for strict liability offences, but that fault can be levelled on strict liability offenders. See also B Wooton, *Crime and the Criminal Law*, (2nd ed, 1981) 50, where she refers to the immense harm caused by driving offences, and argues that these offences can only be dealt with on the basis of strict liability, and that mens rea is 'irrelevant to obstructive' to driving offences. More generally, she states that the function of the criminal law is to prevent the occurrence of socially harmful acts (rather than to punish the wicked) and suggests that it would not be wrong to make all offences strict liability, with mens rea only being relevant at the sentencing stage. For arguments against the appropriateness of strict liability offences see, H L A Hart, *Punishment & Responsibility*

between those which prohibit immoral behaviour and those which are merely a means of controlling certain behaviour; but rather between offences which involve an actual or threatened violation of important rights and those which are felt to threaten the overall interests or resources of the community, and it is questionable whether this represents anything more than a purely formal distinction. Punishment is justified for both types of offences, as is the allocation of moral blame. Therefore such a distinction cannot be used as a rational basis for dealing only with regulatory offences on the spot.

4(c) Other possible relevant considerations

Fox suggests several other factors that should dictate whether or not an offence should be dealt with on the spot. He argues that it is inappropriate to assign fixed penalties for offences which are so broad that they can encompass very different degrees of culpability and levels of harm or that involve subjective elements of proof, such as carelessness or negligence.[72] Thus while it is permissible to deal with speeding by 15km/h or less on the spot; not so for an offence such as criminal damage, since in the case of the latter the sentencer needs to be able to take into account whether the offence is a serious or minor instance of that type of conduct, and other factors, particularly the culpability of the offender. This is in contrast to offences currently dealt with on the spot which, it is claimed, operate on the assumption of strict responsibility therefore an inquiry into culpability is unnecessary. It is argued that the on the spot system lacks the flexibility to determine whether the offence falls at one or the other extremes of the proscribed behaviour and that offences involving any significant degree of damage or personal injury are not suitable for on the spot treatment since they may require resort to a greater range of sanctions than is available through on the spot penalties.[73]

The above view can be broken down into three separate arguments. On the spot treatment should not be extended to non-strict liability offences because only a court is equipped to undertake an inquiry into the mens rea and culpability of a defendant. Second, once guilt is established offences involving mens rea as an element vary greatly in terms of culpability and gravity and the on the spot system is not sufficiently sensitive to deal with this. Finally, the appropriate sentence for non-strict liability offences is often too serious to be

(1968) and G Mueller, 'On Common Law Mens Rea' (1958) 42 *Minnesota Law Review* 1043.

72 Fox, op cit (fn 3) 265.

73 Id 197–9. See Scotland, *The Motorist and Fixed Penalties: First Report by the Committee on Alternatives to Prosecution* (1980) Cmnd. 8027 (Stewart Committee Report). The committee was appointed to consider alternatives to prosecution for minor offences and recommended that certain categories of offences which are traditionally felt to be more morally repugnant, such as those involving dishonesty, injury to person, or obstruction to police should not be dealt with on the spot. See also Law Reform Commission of New South Wales, *Sentencing* (1996) 74–75, (Report No.79), which stated that the on the spot system may remove the moral content of offences. The *Expiation of Offences Act* 1996 (SA) does not permit infringement notices to be issued in relation to offences involving violence.

dealt with by way of infringement notice: it is beyond the acceptable on the spot sanction threshold.[74] These arguments are addressed in turn.

Only courts are equipped to inquire into mens rea

Although strict liability offences differ from other criminal offences in that an inquiry into the mens rea or the culpability of the offender is generally unnecessary to ascertain guilt, this is not a significant distinction for the purposes of deciding the procedure by which the respective offences should be dealt. For even in relation to non-strict liability offences which are dealt with on the spot, an inquiry into culpability is unnecessary since the on the spot procedure can only be utilised where the offender plans to plead guilty, thus it is assumed that the offender had the requisite mental state for the offence.

Only courts can assess gravity of an offence and culpability

Further, when it comes down to the sentencing stage the relevant sentencing factors can be just as complex for strict liability offences as for other offences. While mental state is generally not relevant to guilt in the case of strict liability offences, it, and other sentencing considerations, can have an important role at the sentencing stage. A person who speeds on a fine day in light traffic to make it to his or her first job interview in two years, should be treated differently to the speeder 'dragging' on a rainy day in busy traffic. Nevertheless both of these situations can be dealt with on the spot, despite the immense differences in culpability. If we are willing to generalise such behaviour and treat it by way of a standard fine, there is no reason that all offences within the acceptable on the spot sanction threshold should not be similarly treated; whether they require mens rea or not.

The related point that non-strict liability offences can encompass *vastly* different levels of blameworthy behaviour is also not insurmountable. All offences, no matter how broad the extremes of behaviour which may be encompassed within them, can be sufficiently partitioned off with clear objective indicia so that only a desired portion of the offending behaviour is caught. In order to limit the relevant behaviour to, say, the less blameworthy instances of a particular offence, a checklist of readily identifiable objective considerations can be comprised into which the behaviour must fall if it is to be subject to on the spot treatment.[75] This system is currently adopted in relation to such offences as shoplifting offences,[76] where a warning is issued in certain circumstances, and drink driving offences. It is also utilised in relation

[74] This argument focuses on the alleged view that strict liability offences are not as serious as other offences, and hence is different to the one considered earlier that only strict liability offences should be dealt with on-the spot because they purportedly do not involve moral wrongdoing.

[75] Obviously the matters in the checklist must be readily ascertainable. If a complex investigation is required to ascertain the variables the simplicity, and hence the efficiency and economy of the on the spot system may be unduly compromised.

[76] See fn 5 supra.

to minor cannabis offences in South Australia.[77] For instance, the on the spot system could be extended to all assault offences so long as none of the following elements are present: serious injury, a weapon, prior convictions for assault within the past ten years, kicking, victim under 14 years old or being in company with another during the assault; or to all criminal damage offences where the level of damage is under say $2 500. Thus the fact that greater extremes of behaviour may be caught by some offences does not entail that such offences should not be dealt with on the spot; merely that there is a greater need for consideration regarding the range of behaviour that can be properly dealt with on the spot.

Non-strict liability offences too serious to deal with on the spot

Once non-strict liability offences have been partitioned off to identify the circumstances which will not attract a sanction beyond that which is appropriate to be imposed on the spot, a continued reluctance to refuse to extend the on the spot system to such offences on the basis that they are still too serious is unjustifiable. Such a view would only be tenable if 'seriousness' properly equates to moral culpability and offences involving direct actual or potential harm to another person, such as those involving personal injury or property loss, are generally more morally reprehensible than strict liability offences. However, such an argument falls at the first hurdle since moral culpability is the wrong test of seriousness. It is merely one relevant consideration. The ultimate test for the seriousness of an offence is surely the gravity with which the behaviour is viewed by the community, and the best barometer for this is the sanctions imposed by the courts. This is the only time when all of the relevant factors are weighed, conflated and adjudicated upon. As we have seen, at the end of the day many non-strict liability offences are still dealt with by the courts via sanctions that are acceptable through on the spot punishment — the supposed greater moral culpability attached to such offences is not decisive. Thus, in deciding which offences are to be dealt with on the spot there is no magic in the strict liability/non-strict liability distinction and none of the arguments considered above are persuasive against greatly expanding the range of offences dealt with on the spot.

On the spot offences not to be limited to summary offences

It is also too sweeping to suggest that the on the spot regime should be limited to certain categories of offences, especially summary offences. In developing broad policy regarding the disposition of criminal offences it is necessary to look beyond established labels attached to offences, for quite often such labels were poorly ascribed and to reflexively adopt them may be to promulgate an existing error or anomaly. The on the spot system should extend to all

[77] In South Australia minor drug offences, involving use, possession and cultivation of small amounts of cannabis for personal use have been dealt with on the spot for over a decade (*Controlled Substances Act* 1984 (SA) s45A (2)). These offences are now dealt with by way of small fine (*Controlled Substances Regulations* 1984 (SA)) without conviction (*Controlled Substances Act* (SA) s45a(5)).

offences, or sub-classes of offences, which are likely to invoke a level of punishment within the acceptable threshold. The indictable/summary distinction is not an accurate indicator of the level of seriousness with which an offence is viewed and the likely penalty it will attract. Theft is a good example of this. It is an indictable offence and carries a maximum penalty of 10 years imprisonment. Despite this it is quite often dealt with by means of an official warning, which is a less severe penalty than for a parking offence. The relative triviality with which shoplifting is viewed accords with community attitudes towards this offence.[78] Of the 7 210 cases which were finalised in the Magistrates' Court in 1996 where theft was the principal offence, the most severe sanction in 2 499 cases was a fine[79] and the mode fine was $200, and the mean was $380.[80] Against this there were also 491 instances where a term of imprisonment was imposed. But if the occasions which were dealt with by way of a relatively small fine, or even a less serious sanction,[81] could be identified at an early stage of proceedings, such as immediately after apprehension of the offender, it seems wasteful, excessive and most of all arbitrary to deal with these cases any less expediently than strict liability offences which typically invoke similar sanctions.

In light of the above, it is nonsensical to treat only strict liability or regulatory offences by way of infringement notice. *If* it is appropriate to treat strict liability offences on the spot, it follows that it is also appropriate to treat all minor offences in this manner. The issue now is the 'if'. The advantages of extending the on the spot regime are now considered. This will include a discussion of the general merits of the on the spot system. This is necessary because the mere fact that some court offences (namely, those which are typically presently dealt with by a minor sanction) are not distinguishable in a relevant sense from on the spot offences, does not entail that the on the spot regime should be extended, otherwise this might only serve to perpetuate an existing error.

[78] A 1987 survey rated theft (shoplifting) as the least serious of a range of offences. Other offences in the survey ranged from murder to industrial pollution, industrial negligence and tax fraud (Australian Institute of Criminology, 'How the Public Sees Sentencing: an Australian Survey' (1987) 4 *Trends and Issues in Crime and Criminal Justice*). See also, R Evans, 'Cautioning: Counting the Cost of Retrenchment' [1994] *Criminal Law Review* 566, 570–573.
[79] Magistrates' Court Sentencing Statistics 1996 (fn 3) 108.
[80] Id 21.
[81] Such as the 2 253 cases dealt with by way of adjourned undertaking.

5 ADVANTAGES OF ON THE SPOT TREATMENT AND EXTENDING THE RANGE OF OFFENCES DEALT WITH ON THE SPOT

5(a) *Cost savings to the community*

The most obvious and the biggest advantage of dealing with matters on the spot is the enormous cost savings to the community. In order to appreciate the magnitude of the potential savings by increasing the range of matters dealt with on the spot it is first necessary to gain some appreciation of the potential increase in the number of offences which could be dealt with on the spot.

Overview of disposition of cases in the Magistrates' Court

In 1996 the Magistrate's Court finalised[81] 82 452 cases.[82] Often defendants were charged with multiple offences, hence this equated to 290 888 offences.[83] The vast majority of defendants were found guilty of the charges against them.[84] Most of the matters were disposed of following a guilty plea, and the most common severest penalty[85] was a fine (43% of all cases). The other notable severest penalties and their frequencies are as follows: licence penalty, 18%;[86] adjourned undertaking (bond), 16%;[87] and a community based order, 6%.[88] Hence, in a staggering 77% of cases (or about 63 000 cases) the most serious penalty was of the type which can presently be imposed by an infringement notice. In terms of the breakdown of types of cases dealt with, motor vehicle offences dominate — as is the case with infringement notice offences. Motor vehicle offences accounted for 42% of offences; theft related offences 19%; offences against public order 16%; drug offences 8%; offences against people 5%; property damage and environmental offences 3%; and other offences the remaining 8%.[89]

Costs associated with disposition of matters in the Magistrates' Court

Although the cost to defendants in most of the above matters is relatively minor the cumulative cost to the community is enormous. These costs come in many different forms. First, in each matter the police informant is required

[82] Magistrates' Court Sentencing Statistics 1996 (fn 3) 240 (this compares to 81 083 cases in 1995 and 86 137 cases in 1994).

[83] Ibid. This compares to 284 607 cases in 1995 and 305 705 in 1994.

[84] 'Crime & Punishment Insight: The Sentencing' *Herald Sun*, 29 July 1996, provides that the guilty rate in 1995 was 85.5%. There are no figures for 1996, however, it seems safe to assume that the guilty rate was about the same.

[85] In descending order of severity, the penalties (regarding the penalties I have been focusing on) are: imprisonment, community based order, licence order, fine, and adjourned undertakings. See fn 42 supra.

[86] A licence penalty is a motor driving licence cancellation, disqualification or suspension.

[87] It is not known what proportion were with or without conviction.

[88] Magistrates' Court Sentencing Statistics 1996 (fn 3) 242. These figures are roughly the same as in 1995, where the severest penalty was: a fine in 45% of cases, licence penalty in 19% of cases, and adjourned undertaking in 15% of cases.

[89] Magistrates' Court Sentencing Statistics 1996 (fn 3) 229–232 — these figures are rounded off to the nearest whole number, hence the reason that the total is 101%.

to interview the defendant and any witnesses and prepare a brief of evidence. The brief in itself can take anything from 2 to 40 hours, and more. Next, the defendant incurs private legal expenses by engaging a solicitor, or alternatively the community bears the expense through legal aid.[90] In the 1995/96 financial year criminal matters accounted for 64% of all successful applications to legal aid. This amounted to 24 413 of the 38 361 successful applications.[91] On top of this, legal aid staff duty lawyers provided assistance to a large number of defendants. In 1995/96 legal aid duty lawyers provided 22 268 services to people appearing before Magistrates' Courts.[92] The total legal aid budget for the 1994/95 was about $80 million.[93]

Court costs, such as the wages of magistrates and other staff, such as court registrars and police prosecutors, are also another public expense of the present system.[94] More broadly, there is also considerable economic and productivity loss associated with defendants taking time off work to prepare for and attend court.

Ostensibly these figures are unremarkable: it is not uncommon for the government to spend large sums on important public institutions and practices, such as courts and criminal justice. However, given that the eventual outcome of most matters dealt with by the Magistrates' Court can be identified with a high degree of certainty at a very early stage of the process (immediately following the laying of the charges), the present manner of dealing with most criminal matters appears to be cumbersome, wasteful and excessive. We know that nearly every matter listed at a Magistrates' Court will result in the defendant being found guilty and dealt with in a manner which is currently available through on the spot treatment, and normally by way of fine, with the magnitude of the fine dictated primarily by current sentencing practice. For example, in 1996 there were 8 450 cases of careless driving, and of these the most serious sanction imposed in 4 304 cases was a fine, while a licence order was imposed as the principal sanction in 2 239 cases.[95] Of the fines which were handed down the mode was $200, the mean $338, the median $300, the 25th percentile was $200 and the 75th percentile was $400.[96] Absent aggravating factors, such as prior driving convictions, we know that the next person charged with careless driving will in all probability

90 There is no data on the proportion of defendants who were represented by a lawyer.

91 Victoria Legal Aid, *First Statutory Annual Report 1995/1996*, 10. This is similar to the figures in 1994/1995 where criminal matters accounted for 66% of successful applications to legal aid, or 25 784 of the 39 094 successful applications (Legal Aid Commission of Victoria, *Sixteenth Statutory Annual Report 1994/1995*).

92 Victoria Legal Aid, *First Statutory Annual Report 1995/1996*, 34. These services ranged from advice to pleas and bail applications.

93 Id 40. It is not known exactly what portion of this budget was attributable to criminal matters and especially what portion was devoted to pleas in the Magistrates' Court.

94 The annual budget of the Magistrates' Court is not known. The annual budget for the administration of justice is about $300 million ('Crime and Punishment: A Day of Justice' *Herald Sun* 27 July 1996 4). It costs a minimum of $1 107 a day to have a magistrate sit — this includes the cost of the magistrate, court staff and the chambers cost ('Crime and Punishment Insight: Costs & Culprits' *Herald Sun* 24 July 1996 10, 11). There are 55 Magistrates' Courts and 94 magistrates in Victoria.

95 Magistrates' Court Sentencing Statistics 1996, (fn 3) 200.

96 Id 64.

be found guilty and fined $250 give or take a *little bit*. The amount of resources devoted to determining the precise amount of the little bit, appears to be grossly disproportionate to the significance of that little bit.[97]

The cases where a defendant is at risk of incurring a penalty beyond that which is presently prescribed by on the spot offences are readily identifiable at an early stage. This is typically where the offence charged commonly attracts a serious penalty (such as recklessly causing serious injury), or where the defendant has prior convictions of a similar nature to the offence charged, or where the offence is a serious instance of its type, or a combination of these factors. It is too optimistic to suggest that one could devise policies which could confidently predict at an early stage all of the 77%, or so, of cases which will ultimately not attract a penalty which is of a more punitive nature than is currently available on the spot. However, given the increasing consistency in sentencing, it is not unrealistic to suggest that about three-quarters of these 77% of cases could be identified at an early stage. As such, the Magistrates' Court could be relieved of about 60% of its criminal workload 'overnight'.

The enormous cost associated with dealing with a matter through the Magistrates' Court is in stark contrast to proceeding by way of infringement notice, where the returns from the penalties paid may exceed the administrative costs and provide a profit at the end of the day.[98] The above analysis is the cornerstone of the argument in favour of expanding the range of matters dealt with by way of on the spot fine: we should not devote valuable public resources on expensive processes which essentially lead to pre-determined outcomes; rather, we should go directly to the punchline. In addition to the cost savings, there are also other significant advantages of the on the spot system.

5(b) Efficiency

It is critical that criminal matters are resolved as expeditiously as possible; 'justice delayed is justice denied.'[99] This is primarily due to the unfairness in leaving such an important matter hanging over a defendant's head. It is also because the longer the delay, the less likelihood of a fair hearing due to such matters as the deterioration of evidence, particularly the memories of witnesses. Although the High Court has denied that there exists a common law right to a quick trial, it has stated that an accused has a right to a fair trial, and

[97] The defendant is obviously also at risk at receiving a licence penalty. If figures were available regarding the average licence penalty imposed for careless driving, the same argument could be made in relation to this type of penalty as well.

[98] R G Fox, 'Infringement Notices: Time for Reform' (1995) 50 *Trends and Issues in Crime and Criminal Justice* 1, 2. Of the approximately 2.5 million infringement notices issued in 1991 which were capable of being registered for enforcement under the PERIN system about 80% were paid without the need for enforcement action; 5.5% were withdrawn; 5.5% were paid following enforcement; and only about 10% remained unpaid in January 1993: Fox, op cit (fn 3) 104–5. The total value of the penalties issued pursuant to the notices was about $150 million. The cost of enforcement for unpaid notices can exceed the monetary value of the penalties: Id 111. However this cost is no greater than in enforcing unpaid court fines, and the profit generated from the total exercise is more than likely to cover the enforcement costs.

[99] County Court of Victoria, *Annual Report* (1992), 2.

this includes an expeditious hearing.[100] Moreover, Parliament has acknowledged the importance of speedy determination of criminal matters. The 12 month statutory time limit for the laying of summary charges is now complemented by time provisions regarding the commencement of criminal matters proceeding by way of trial. All trials must now start within 12 months of committal or direction to stand trial. For sex matters this limit is only three months.[101]

For matters in the Magistrates' Court, once a charge has been laid by the informant[102] the matter is then set down by the court for a 'mention date'.[103] This is normally about eight weeks after the laying of the charge. If the defendant intends to plead guilty the magistrate can hear the matter on the mention date.[104] Thus, under the present court system the defendant cannot have the matter finalised for at least two months after the laying of the charges. This is in contrast to matters dealt with on the spot, where the offender is aware of the nature of the offence and the penalty immediately upon receiving the infringement notice.[105]

5(c) Consistency in sentencing

Consistency in sentencing is a fundamental requirement of justice. It stems from the fundamental maxim of justice that 'like cases should be treated alike', and it promotes the rule of law virtues of predictability and certainty. The on the spot system fixes standard penalties, and hence is the best method for securing consistency.

However, recently advances have been made to achieving greater consistency in sentencing in relation to matters dealt with by the courts as well. This is largely due to many of the relevant sentencing considerations being codified in statutory form[106] and the availability of comprehensive sentencing statistics which allow magistrates to at least know whether they are in the ball park. Nevertheless there is still a long way to go. Despite the apparent increased convergence in sentencing and diminished significance of the

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[100] *Jago* v *District Court of NSW* (1989) 168 CLR 23.

[101] *Crimes Act* 1958 (Vic), s 353 & 359A, and *Crimes (Procedure) Regulations* 1994 (Vic), r 6 & 7. However an extension of time can be granted with leave of the court.

[102] Which must be within 12 months from the time of the offence for summary matters, however is generally within several months of the matter being detected — depending on the promptness of the informant.

[103] *Magistrates' Court Act* 1989 (Vic) sch 2, cl 3.

[104] If the defendant plans to plead not guilty or is unsure of how to plead, the matter cannot be heard on this date. It will either be adjourned off to another mention date, or a contest mention date, or for a contested hearing date.

[105] The notice is normally issued immediately after detection, however in some cases this is either impracticable or impossible, for example where the offence is detected by way of red light or speed camera. Nevertheless the amount of work required to then issue the infringement notice is less than is required to lay charges, hence even when infringement notices are not issued 'on the spot' the delay is normally significantly less when the matter proceeds by way of charge.

[106] See section 2. The courts have refused to indicate the weight that the relevant sentencing factors should have, or to apply the relevant factors in a mechanical manner; they proceed by way of 'intuitive synthesis' of all the relevant factors (*R* v *Nagy* [1992] 1 VR 637).

idiosyncratic predispositions of magistrates, the view still persists that sentencing is somewhat of a lucky dip, depending largely on the sentiments of the sentencer. In relation to sentencing law in general, it is no exaggeration to state that the perception in the community at the moment is that sentencing practice is in a state of turmoil.[107] Of late judges have been criticised heavily by many sectors of the community, including the police[108] and the Attorney-General, for not imposing sufficiently harsh sanctions. This has culminated in an unprecedented sentencing survey sanctioned by the government aimed at ascertaining the views of the public on sentencing, with a view to amending the *Sentencing Act* 1991 (Vic).[109]

Consistency alone can operate unfairly

Now, consistency in sentencing, defined as standard sanctions for identical offences, will not solve all the perceived problems in sentencing. In fact, consistency alone can lead to grossly unfair results. While like cases should be treated alike, a just sentencing regime should also be flexible enough so that where relevant differences do exist they ought to impact upon the eventual outcome. The person who steals due to hunger is far removed from one who steals for profit, and the person who speeds to make it to her or his first job interview in two years, should be treated differently from the person 'dragging' in a busy street. Accordingly, an unyielding pursuit for consistency carries the danger of devaluing and corrupting the sentencing process.

However, this danger is ameliorated by a number of factors. In relation to sentencing in general, some relief is obtained through the realisation that the sentencing process is far from pure anyway: the relevant factors are very poorly understood and defined. Lawyers and philosophers alike are still baffled by what constitutes a relevant difference or consideration when it comes down to sentencing.[110] Sure, in extreme cases, such as the examples above, we can be confident that different treatment is warranted, but there is a whole plethora of other factors in relation to which uncertainty abounds. We

[107] The community 'perception' of a problem should always be of secondary concern to the reality of the situation (see section 6(a)). However, in the context of sentencing the perception cannot be ignored due to the weight the government has apparently attributed to it and the impact it already appears to have had on sentencing reform. See fn 109 infra.

[108] For example, see 'Crime & Punishment Insight: The Sentencing' *Herald Sun* 29 July 1996.

[109] The survey was published in *Herald Sun*, 1 August, 1996. The survey is problematic since it does not sample a random cross-section of the community (only *Herald Sun* readers) and is only likely to invoke a response from those who feel most strongly about sentencing issues. Accordingly the results are not likely to be indicative of the general community attitude. Nevertheless, the results of the survey are important since the government has indicated that it intends to use them for its proposed review of the sentencing law. The results of the survey reveal that the community wants significantly tougher sentences to be imposed for all the crimes which were mentioned in the survey, ('Crime and Punishment: Your Verdict' *Herald Sun* 13 September 1996, 1, 4, 12–15) This appears to have culminated in increases to the maximum penalty for many offences, see *Sentencing and Other Acts (Amendment) Act* 1997, s 60 & sch 1.

[110] For example see, C L Ten, *Crime, Guilt and punishment: A Philosophical Introduction* (1987); R B Brandt, *Morality, Utilitarianism and Rights* (1992) ch 13, and J C Smith, *Justification and Excuse in the Criminal Law* (1989).

are still perplexed regarding the weight, if any, that should be attached to such matters as the defendants upbringing (should the offender from an under-privileged background get a discount in sentence?); family considerations (should we be more reluctant to jail the mother with four young dependant children?); intoxication, and so on. Intoxication is probably the best illustration of this. It is generally viewed as a mitigatory factor, especially when the defendant has an otherwise good character.[111] However, this is completely at odds with the results of a recent sentencing survey, where 65% of respondents said that offences committed under the influence of drugs or alcohol should attract normal sentences and another 30% said sentences should be longer.[112]

It is important though, not to overstate the lack of uniformity in sentencing. There are numerous sentencing considerations which are settled[113] and it would be a retrograde step for any system to completely ignore them. However, the damage flowing from a failure to universally adopt all of these considerations is softened by the lack of clarity associated with the sentencing process as a whole (it is not so bad to pervert an already flawed process) and by the gains in certainty which flow from adopting standard sentences. The splendour of adopting standard, over flexible, sentences derives from the guaranteed benefits of certainty and consistency and the innate sense of fairness associated with treating everyone the same. The on the spot system in effect promotes the presumption of equality: all cases are alike unless and until proven otherwise — by the defendant electing to go to court and proving his or her case to be relevantly different. The alternative system, whereby a court hearing is compelled following the laying of charges has a bias towards flexibility in sentencing and therefore an assumption that each case is relevantly different. However, it is not clear that the state of the sentencing law is sufficiently coherent, settled and developed to compel a continued commitment for this preference — even where cases are relevantly different, there is no guarantee that the sentencing process would make appropriate allowances for this, or even recognise the differences as being relevant.

Relevant sentencing considerations to be incorporated in the on the spot system

In relation to the types of offences which it is contemplated should be dealt with on the spot, the integrity of the sentencing process could be improved by an in-built process of incorporating clearly relevant sentencing factors into the on the spot system. By taking into account only readily ascertainable objective circumstances, this could be done without over-complicating the system. There are generally two different types of settled sentencing factors:

[111] *Sewell* (1981) 5 A Crim R 204.

[112] 'Crime & Punishment: Your Verdict' *Herald Sun* 13 September 1996, 1, 4, 12–15 (although see the criticism of the survey mentioned at fn 109 supra).

[113] However, as far as certainty in sentencing goes the usefulness of the settled factors is somewhat undermined by the fact that the weight which should be attached to the relevant considerations is unclear due to the instinctive synthesis approach to sentencing.

those concerning the offender, such as age[114] and character,[115] and factors about the crime itself, such as the vulnerability of the victim,[116] method,[117] and degree of harm.[118] The latter type of factors are already incorporated into the present on the spot regime for certain offences, either as being relevant to whether or not to proceed by way of infringement notice or in determining the precise penalty. For example, infringement notices cannot be issued for drink driving where the alcohol level exceeds a certain level,[119] and the level of fine which follows a speeding offence increases with the level of speed.[120] Applying this approach to other offences will ensure that important sentencing considerations continue to have an input into the ultimate sanction. For offences where recidivism is thought relevant, prior convictions could continue to have a role in the ultimate outcome by increasing fines for repeat offenders or disqualifying them from being dealt with on the spot[121] — as is presently the case for drink drivers.

A troubling aspect of an extension of the on the spot system is its regressive nature. The main on the spot sanction is a monetary fine, and the level of fine is set in ignorance of the established sentencing principle that a relevant factor to the quantum of a fine is the means of the offender to pay.[122] If a standard fine is imposed for an offence it could be argued that the needy will be the hardest hit.[123] By not putting their case to a magistrate they lose the opportunity of receiving a less than average fine imposed for the particular offence. Putting aside the fact that poor defendants can revoke the infringement notice and have the matter dealt with at court, this criticism is still misguided due to the presence of existing barriers and inequalities. As the situation currently stands the less well off defendants often do not receive a discounted fine because they do not have the financial means to pay a lawyer[124] to advance any mitigatory sentencing factors on their behalf and legal aid will not fund a lawyer for them.[125] Additionally, they often come from the less educated

[114] *Smith* (1988) 33 A Crim R 95; *MacIntyre* (1988) 38 A Crim R 135.

[115] Previous good character is often a mitigatory factor while previous bad character, especially prior convictions serves to disentitle the offender from leniency (*Baumer* (1987) 27 A Crim R 143).

[116] *R* v *Dole* [1975] VR 754.

[117] *R* v *Campbell* [1970] VR 120.

[118] *R* v *Boyd* [1975] VR 168; *R* v *Webb* [1971] VR 147.

[119] The level being 0.15%.

[120] For example, the fine is $105 for speeding less than 15 km/h over the limit and $165 for speeding between 15km/h but less than 30 km/h over the limit.

[121] The manner in which other relevant factors can be taken into consideration is discussed in section 7.

[122] *Sentencing Act 1991* (Vic) s50(1).

[123] This point was also noted by the New South Wales Law Reform Commission, *Sentencing* (1996) 49 (Report No. 79). To address this, it was recommended that the *Fines Act* 1996 (NSW) should be amended to retain sentencing court's discretion to order time to pay and that an offender should be able to work off the fine by way of community work (both of these options are currently available in Victoria). The option of making fines directly commensurate with the offenders income ('the day fine') was rejected because it is too time consuming to make an accurate estimate.

[124] And if they did, it would normally be an unwise decision. Any reduction in the level of fine would normally be more than off set by the cost of the lawyer.

[125] The relevant legal aid guidelines are set out at fn 10. Matters which could have been dealt with on the spot rarely qualify for legal assistance.

sector of the community and are not equipped with the knowledge or ability to sufficiently articulate their plight to a busy magistrate. As such, the harsh reality is that imposing standard fines on the less well off is not likely to worsen their position.

Overall then, the disadvantages to the sentencing process that will arise from extending the on the spot system, such as the failure to incorporate all of the relevant sentencing into the penalty, will be more than off-set by increases in consistency and an incorporation of some of the clear and settled sentencing factors into the on the spot system.

5(d) Free up more police resulting in more offenders charged

Expanding the range of matters dealt with on the spot would free up scarce police resources[126] and enable police to spend significantly less time in the office attending to paperwork and more time performing their primary functions of preventing crime and apprehending offenders. The main impediment to police charging people for what they recognise to be less serious offences is the paper work involved. By reducing this, police are likely to be far more diligent and vigorous in ensuring offenders are charged.

This would increase public safety and general deterrence and obviate the need for further increases in police numbers. The fact that more offenders would be apprehended would to some degree add to the workload of the Magistrates' Court (as it is unlikely that all offenders will be dealt with on the spot). However, on the whole this is not expected to be significant, especially since few offenders dealt with on the spot elect to take the matter to court.

6 POSSIBLE DISADVANTAGES OF INCREASING THE NUMBER OF MATTERS DEALT WITH ON THE SPOT

It is now necessary to turn to the possible disadvantages that may follow if the on the spot system was extended. This will include a consideration of the possible inherent drawbacks of such a system.

6(a) Trivialise crime

It has been argued that permitting certain offences to be expiated without a court hearing and an inquiry into the culpability of the offender will create the perception that the offence is of little significance.[127] This is tantamount to 'going soft on crime' and could have the dangerous effect of trivialising crime. However, this argument holds little water. Before directly considering this argument, it should be noted that the public perception regarding important

126 Some of the costs and efficiency problems are outlined in P N Grabosky, 'Efficiency and Effectiveness in Australian Policing' (1988) 16 *Trends and Issues in Crime and Criminal Justice*.

127 P O'Malley, 'Technocratic Justice in Australia' (1984) 2 *Law in Context* 31. See also Fox, op cit (fn 3) 246–250.

concerns such as society's treatment of its criminal offenders is always a distant secondary concern to the reality of the situation. As with all matters it is far more important to actually do the right thing, than to be seen to be doing the right thing.[128] The most pertinent matter in this regard is whether extending the on the spot system will actually lead to unacceptably lenient (or for that matter, heavy) penalties for criminal offenders. The answer is clearly no, given that on average such penalties should be at about the same level as previously.[129] Nevertheless, the public perception of any state institution or practice is of some concern, particularly where it touches on such traditionally emotive issues as crime, and hence must carry some weight when changes are proposed and needs to be addressed. The government's failure to adopt the recent recommendations of the Premier's Drug Advisory Council to decriminalise use, possession and cultivation of small amounts of marijuana[130] is a good illustration of the weight often attached to public perception.[131]

Ultimately, however community attitudes and perceptions regarding the appropriateness of punishment turn primarily on the actual punishment handed out; not the process by which the punishment is determined. Victims and other community pressure groups who routinely express disapprobation regarding perceived lenient sentences have never been known to find solace in the view that at least the defendant was made to go to court. So long as suitably realistic standard monetary (or other) penalties are set for the relevant offences a community outcry regarding leniency to offenders is unlikely to follow. This is evident from lack of public concern regarding some of the relatively serious crimes which are already dealt with by on the spot fine. For example, due to an intense educational campaign in recent years the offence of drink driving is viewed very seriously by the general community and has considerable stigma attached to it. Many people charged with this offence are now dealt with on the spot by way of fine and conviction. Despite this there is no apparent diminution in the perceived gravamen of the offence or the growing stigma attached to it.

As a pragmatic matter, the government's response to the recommendations of the Premier's Drug Advisory Council is unlikely to be indicative of its approach to any proposed increase in the range of matters dealt with on the spot. On the spot treatment still involves legal sanctions through which the

128 This view is implicitly endorsed by the Office of Public Prosecution in its policy regarding launching appeals against sentence. The 1994 annual report states, 'public outrage no matter how widespread, is not a reliable indicator regarding sentencing error. Accordingly it can never be a determining factor in a decision whether to launch an appeal against sentence or not' (Director of Public Prosecutions Victoria, *Annual Report for Year Ended 30 June 1994*, 44). See also *R* v *Boxtel* [1994] 2 VR 98.

129 See section 7.

130 Premier's Drug Advisory Council, *Drugs and Our Community* (1996), (The Pennington Report) recommendation 7.1 and 7.2, 129. The report also recommended a cautioning program for first offences relating to the sale of marijuana and the use and possession of 'harder drugs' (recommendations 7.3 & 7.6, 130). These recommendations were also not adopted.

131 The fact that the government failed, at least openly, to criticise any of the premises and findings in the Report and still disagreed with the recommendations indicated that its perception of public sentiments towards the drug issue was at the heart of its response.

disapprobation of the community could be vented and most crimes do not carry the same emotive baggage as drug offences. Even if drug offences are among the offences included in any change, their emotive impact will most likely be diluted by their peripheral significance to the overall proposal.

6(b) Reduction in level of deterrence

It could be argued that once court appearances for many criminal offences are no longer mandatory and matters are dealt with administratively, rather than judicially, the level of deterrence will diminish.[132]

Factors relevant to deterrence

Deterrence is a very difficult issue, and there is little conclusive data regarding the types of factors and activities which act as effective deterrents. The evidence we do have suggests that the greatest deterrence is the likelihood of being caught.[133] Other factors relevant to deterrence are the proximity of the punishment to the offending;[134] the extent to which the offender believes that he or she is in control of the situation, and hence is not creating a significant risk; the opportunity for offending; and obviously the offender's perception of the likelihood of being detected.[135] The level of enforcement is also an important factor (this is also not surprising given that this would bear directly on the likelihood of detection). This is supported by Traffic Camera Office data, which reveals that the percentage of drivers detected speeding above the threshold limit decreased from 22.8% in December 1989, when speed cameras where first introduced, to 5% in December 1992 and has plateaued out at about this level.[136] This has also corresponded to a significant reduction in road deaths during the same period. The perceived social unacceptability of an offence is another relevant consideration to deterrence,[137] as is the fairness of the procedure adopted in enforcing the law: with fairness being defined as the opportunity to state one's case, to have one's views properly considered and to be treated with dignity and respect by an independent decision-maker.[138] Common sense compels us to conclude that there is also a link

[132] Fox, op cit (fn 3) 12. This argument was rejected by the Stewart Committee which stated that the offences remained criminal and imposing a fixed penalty was merely an alternative way of finalising offences: Stewart Committee Report (fn 73) para 4.01.

[133] See Victorian Sentencing Committee Report *Sentencing* (1988) Vol 1 70 (which refers to the looting during the police strike in Melbourne in 1923 and the similar behaviour in Denmark when the police force was arrested and interned during the German occupation).

[134] Fox, op cit (fn 3) 163.

[135] Fox, op cit (fn 3) 164–8, citing a two year study of unlawful driving behaviour in the United Kingdom: C Corbett and F Simon, *Car Parking: The Economics of Policy Enforcement* (1991).

[136] Fox, op cit (fn 3) 170–1.

[137] Fox, op cit (fn 3) 184–5, citing R Homel, *Policing and Punishing the Drinking Driver* (1988). See also Fox, op cit (fn 3) 233.

[138] T Tyler, *Why People Obey the Law* (1990), 107, 175–6. Following a 1984 study of about 1 500 people who lived in Chicago about their contact with legal authorities, Tyler noted that normative issues are closely linked with compliance with the law. People do not obey the law merely because they feel it is in their self-interest to do so, but also because

between deterrence and the level of punishment, however there is no strong evidence in support of this.[139]

Despite the little that is known about the factors effecting deterrence, what is clear is that dealing with matters on the spot would not adversely impact on the known relevant variables. If anything it would provoke an increased level of deterrence. More offenders would be detected, hence the perceived and actual likelihood of being caught would increase, and there would be a closer connection between the punishment and the offending. There may be a reduction in the perception of the fairness associated with the procedure in setting the punishment, due to the reduced relevance of individual circumstances, however those sufficiently aggrieved with this have the option of electing to go to court.

A reduction in deterrence could only flow from dealing with matters on the spot if the process of appearing in court itself, irrespective of outcome, was shown to have a significant impact on deterrence. However, empirical evidence does not support this as demonstrated by the relatively recent innovation of dealing with drink driving matters on the spot which has not resulted in an increase in the incidence of drink driving. Similarly, there is no evidence to suggest that on the spot treatment of minor cannabis offences in South Australia has not produced an increase in the use of cannabis.[140] Even if the prospect of attending court was a deterrent, this would not necessarily entail that the use of infringements should not be increased. More pointedly it would reveal that the court process needs to be made less intimidating and oppressive. People should not be retarded or discouraged in any way from attending such a forum and advancing their account to the best of their abilities and resources, and it must be remembered that the innocent as well as the guilty attend court. Additionally many of the offences which could be targeted for future on the spot treatment, do not presently require compulsory court attendance. Although most people still elect to attend court a significant number of matters, some 25%, are determined in the absence of the defendant[141] by way of ex-parte hearing, where the informant merely reads out a summary of the offence and the sentence is then imposed.

6(c) No court hearing

On the spot offences do not allow defendants their day in court to inform the magistrate of the peculiar circumstances of their case. Ideally all criminal matters should be dealt with following a detailed and thorough consideration

they feel it is proper to do so. See also E Lind and T Tyler, *The Social Psychology of Procedural Justice* (1988).

139 F E Zimring and G J Hawkins, *Deterrence — The Legal Threat in Crime Control* (1973) 29, 201–2.

140 R. Sarre, 'A Review of the Cannabis Expiation Notice Scheme In South Australia — Research Note' (1990) 23 *ANZJ Crim* 299, 302–3.

141 This is the figure for the year 01/07/91 to 30/06/92. The source of the date is the Caseflow Analysis Section, Courts Management Division, Department of Justice.

of the merits of the case. Deviation from this benchmark practice is troublesome,[142] however for several reasons this difficulty is not overwhelming.

Right to a hearing not abrogated

First, as was adverted above, people issued with on the spot penalties can nevertheless elect to have the matter heard in court if they so desire. If people do not avail themselves of this option, as an exercise of their personal autonomy, they effectively abdicate their entitlement to a hearing and in such circumstances there can be little basis for complaint. After all, the entitlement to a hearing is essentially for the benefit of the defendant[143] and as with all rights[144] the holder is entitled to elect to waive it.[145] The high number of matters heard ex-parte indicates that this is already, at least implicitly, recognised by our present court system. The only difficulty is that by reversing the system from opt out to opt in, occasions will invariably occur where people elect not to go to court for the wrong reasons. For example, it could be claimed that the ease of expiating an infringement notice places great pressure on citizens to settle the allegation by paying the penalty even though they believe they are innocent,[146] or that they pay the fine because of an erroneous belief that it is futile to challenge it.

However, the concerns and pressures people may feel about challenging infringement notices are merely amplified when the matter goes to court; the foreign, formal and intimidating atmosphere of a court room puts inherent pressure on people to finalise the matter as quickly as possible. This is compounded by the statutory discount they receive by pleading guilty at the first available opportunity.[147]

Cases generally not sufficiently unique to warrant a hearing

Secondly, the opt in system for a court hearing becomes more attractive following a greater understanding of the right to a hearing, in particular its primacy amongst other competing concerns. The main rationale for a hearing stems from the realisation that no two cases are ever the same, and hence each case should be determined on its merits, whereby the accused has an opportunity to inform the court of the full circumstances of the matter. This uniqueness of each matter is undeniable: at the minimum the identity of the defendant and his or her peculiar individual personal circumstances will entail that his or her case differs from all others. However, the relevance of the uniqueness is often over-rated. Magistrates are obliged to follow 'current

142 This point is also made by in New South Wales Law Reform Commission, *Sentencing* (1996), 75 (Report No 79).
143 Although, the state also has an interest in a hearing to ensure that criminal sanctions are not imposed capriciously and otherwise than in a fair and appropriate manner so as to not bring the criminal law into disrepute.
144 Although legally one cannot normally waive the right to life, and the right to be free from serious physical injury.
145 H L A Hart, 'Are There any Natural Rights?' (1955) LXIV *Philosophical Review Quarterly* 175.
146 Fox, op cit (fn 3) 13.
147 *Sentencing Act* 1991 (Vic), s 5(e).

sentencing practice', and while some discount is normally given to offenders who are in precarious financial positions (in relation to any fines that are imposed) or who commit somewhat technical breaches, magistrates are bound to impose roughly similar sentences to all broadly similar cases before them. For example, while a magistrate's discretion is sufficiently wide to impose respective sentences of a $300 fine without conviction and a $600 fine with conviction upon two separate defendants, both who have no prior criminal history and are found guilty of theft of $100 from their employers, the discretion is not so unfettered as to permit, on these facts alone, the imprisonment of one defendant and the fining of the other. Thus the reality is that in nearly all matters the level of peculiarity is not sufficiently different to significantly differentiate it from other cases involving the same offence and despite possible community perception to the contrary, we get a substantial convergence in the penalty which is ultimately invoked. This is revealed by the fact that magistrates when imposing penalties in relation to matters which could have been dealt with on the spot generally familiarise themselves with the on the spot penalty and rarely deviate significantly from it.[148]

To the extent that some cases are sufficiently unique to warrant a significantly different penalty, a continuation of the opt out system is warranted. However, such cases are in the minority, and in formulating general principles it is irrational to do so based upon peripheral or extreme circumstances in which they may apply. The principles must be devised in light of typical situations in which they are likely to operate. To do otherwise is misguided and illogical.

Right to a hearing not absolute

Although in any new or extended scheme people will continue to have a right to revoke the notice and have the matter heard in court,[149] in any opt in system there will invariably be many occasions when people who desire their day in court are effectively denied it due to the unsympathetic bias of the opt in system towards apathy, forgetfulness, inadequate understanding, and the like. The fact that such people are denied their day in court and lose their right to a hearing is an undesirable part of the opt in system. However this is ameliorated by the fact that at the jurisprudential level there is no absolute fundamental legal, moral or civil right to have one's case automatically referred for judicial consideration.

[148] For example, the on spot penalties and the mode and mean fines imposed in court respectively, for the following offences are as follows: fail to stop at stop sign $165, $200 $231 disobey traffic control signal $165, $165, $285 fail to give appropriate signal $105 $100, $254 use unregistered motor vehicle on highway $500, $500, $463 leave vehicle in a no parking area $60, $100, $74 exceed speed limit — speed zone $105 or $16 depending on the speed, $165, $277 fail to wear properly secured seat belt $135, $135 234: Magistrates' Court Sentencing Statistics 1996, (fn 3) 29–66. Most of the above relate to at least 100 cases of each offence.

[149] See section 7.

No right is absolute,[150] even the right to life. A claim to an alleged right can only be legitimately pressed following an assessment of its benefit to the person asserting it as against the consequences of its exercise upon those immediately effected and the community as a whole. In relation to the types of offences and situations which it is suggested should be targeted for on the spot fines, the balance favours abdication of an automatic right to a court hearing. The cost to the community far outweighs the possible small savings to the unique offender. On any scale it is not worth spending thousands of public dollars in deciding whether an offender should be fined $200 or $300; far more sensible is to fine him or her $250 and for the community to pocket the savings. If a right to a hearing is encouraged to the point of compulsion for all offences, much of the criminal law would become self-defeating: the benefit to the community in punishing people for minor offences or minor breaches of more serious offences would be outweighed by the harm to society in imposing the punishment.[151]

6(d) Lack of exercise of discretion and enforcement authorities may become heavy-handed

When an offence becomes subject to on the spot treatment there seems to be a reduction in the use of warnings as an alternative to penal action due to the ease with which infringement notices can be issued and the benefits to the revenue. A wider group of citizens therefore become subject to criminal sanctions.[152] It is argued that proceeding with all offences which are detected can bring the law into disrepute due to a public perception that enforcement is unfair, too rigid and not in the spirit of the empowering statute.[153] The public may come to view enforcement merely as a revenue raising exercise[154] and come to resent the law which may then lose its moral legitimacy, which, as we saw earlier, is an important aspect of compliance.[155]

150 Even R Dworkin, perhaps the leading deontological rights philosopher, who urges us to take rights ever so seriously, accepts that it is appropriate to infringe on rights in certain circumstances (R Dworkin, 'Taking Rights Seriously' in *Oxford Essays in Jurisprudence* (A W B Simpson, ed, 1973) 202, 221–3.

151 Jeremy Bentham claimed that this is one of the situations where punishment should not be inflicted (J Bentham, *An Introduction to the Principles of Morals and Legislation* (J H Burns and H L A. Hart, eds, 1982), ch XIII.

152 Fox, op cit (fn 3) 11, 13, 226–8. The discretion available to police in relation to summary offences is discussed in Fox op cit (fn 3) 229–30. See also New South Wales Law Reform Commission, *Sentencing* (1996), 76 (Report No 79).

153 Fox, op cit (fn 3) 226–38.

154 This was particularly apparent regarding the purpose of speed cameras (Id 141–2, 231–2, 235–238).

155 See discussion earlier at section 6(b). It should however be noted that the usefulness of warnings is being questioned. Although prevailing opinion is generally that warnings are effective for dealing with a wide range of minor offences (Id, 229–229), the liberal warning program which previously existed in the United Kingdom (*The cautioning of Offenders* Home Office Circular 59/1990) has been amended by new guidelines restricting the use of cautions, particularly multiple cautions (*The Cautioning of Offenders* Home Office Circular 18/1994). This was largely motivated by the view that multiple cautioning brings cautioning into dispute. However, it has been argued that there is a lack of cogent evidence that previous cautioning practice was likely to bring cautioning into dispute and that, given the already strained court system in the United Kingdom,

Discretion without guidelines better off not exercised

In Victoria, the official warning (or caution) system for matters that could be dealt with on the spot[156] is rarely used. It is far more common to give an 'unofficial' warning, which is recorded for police statistical purposes, but does not from part of the police record in relation to the particular offender Therefore generally a warning is equivalent to letting a person off at the discretion of the relevant official. The fact that the exercise of this discretion may be reduced is not troubling. There are virtually no guidelines regarding the discretion reposed in police[157] when deciding not to proceed with minor offences. As such, it can be as fickle and arbitrary as the type of day an officer is having, or the particular officer's attitudes regarding the race of the offender. Discretion which is so poorly defined and scrutinised may be better off unexercised. At least then everyone is treated equally. To the extent that a reduction in the exercise of discretion is still felt to be a concern, this is eased by the advantages relating to an increased level of deterrence that would flow from increased enforcement.

If there is a genuine perception that a particular law can operate unfairly or is merely aimed at revenue raising, then increased enforcement of it would presumably serve to reinforce and enliven such sentiments. It is only in such a climate, where sufficient numbers of the public share such a view, that pressure can be put on the government to change the law or on the enforcement body to enforce the law only in defined situations, so that no-one is unfairly subjected to it.[158] This is more preferable, than relying on faceless, unaccountable public servants, such as the police, who often have a poor understanding of the evil a particular law is designed to combat, to make a potentially draconian or unfair law operate in a fair manner through the exercise of their discretion. Thus, the fact police may come to rigidly enforce a particular law is not a persuasive reason for not making the law easier to enforce. There is little that is more likely to bring a potentially unfair law into disrepute than arbitrary and inconsistent enforcement of it.[159]

6(e) Problems associated with enforcement of fines

It seems inevitable that the major sanction which will be utilised in any expanded on the spot system will continue to be a monetary fine. However, a problem with any punitive system which relies heavily on monetary fines is

there are no real alternatives to a liberal cautioning program: R Evans, 'Cautioning Counting the Cost of Retrenchment' [1994] *Criminal Law Review* 566.

156 This does not include warnings issued for juvenile offences and shoplifting offences.

157 I am focusing on police only at this point, since the police force is the organisation which would administer the overwhelming majority of the new offences which are dealt with on the spot.

158 An example of this is the community dissatisfaction that stemmed from police 'hiding' speed cameras. This created the perception that they were being used merely for revenue raising. As a result police have now altered their operations so that police cameras are no longer 'hidden' while in operation.

159 The Great Britain, Royal Commission on Criminal Justice (1993) recommended that cautioning should have a statutory basis in order to achieve greater consistency: see, R Evans, op cit (fn 155) 566, 574.

the unwillingness or inability of offenders to pay. In Victoria, in 1986–7 the backlog of outstanding fines and costs was $41.3 million,[160] by 1994–5 this had risen nine fold to $366.6, and of the outstanding fines 75 per cent had been outstanding for more than one year.[161]

However, for several reasons enforcement problems associated with fines do not detract significantly from the merits of expanding the on the spot system. Despite the fact that the amount of unpaid fines and costs is large, this represents only a fraction of the total infringement notices issued. Eighty three per cent of fines imposed through infringement notices were paid within the stipulated period; a further 5% were finalised at court; 4% were finalised by the Sheriff's Office;[162] leaving only 8% which remained unpaid.[163] Given that the vast majority of fines are paid, it must be the case that the revenue raised by fines clearly outweighs the associated enforcement costs. Thus purely on revenue grounds fines are an attractive sentencing option.[164] Further, the non-compliance rate of payment of fines appears to be no greater than for other sentencing options which require some type of active participation by the offender. For example, in 1996 there were 1 104 cases for breach of community based order which were finalised in the Magistrates' Court.[165] It is not known exactly how many community based orders were in operation during 1996, however the amount of community based orders imposed annually is generally around 5 000.[166] Thus the non-compliance rate in the case of community based orders is even higher; about 20%. It is also relevant to note that the problem of unpaid fines is not unique to the on the spot system. The unpaid fines highlighted in the Auditor-General's Report relate not only to those issued by the PERIN Court but also the Magistrates' Court,[167] and there is no evidence that the compliance rate payment for fines imposed in court is significantly higher than for on the spot fines.

Ultimately, the problem of unpaid fines would only present a potential obstacle to expanding the on the spot system if it is proposed to revolutionise the sentencing system by utilising a sanction other than a fine as the chief

160 Fox, op cit (fn 3) 152–3.

161 Auditor General of Victoria, *Report on Ministerial Portfolios* (1996), 179. Of the outstanding $366.6 million, $85.1 million had been written-off as bad debts and the collection of a further $116.9 million was regarded as doubtful.

162 By way of payment, imprisonment or revocation: Id 183.

163 Ibid.

164 See also fn 98.

165 Magistrates' Court Sentencing Statistics 1996 (fn 3) 211.

166 For example there were 4 846 community based orders imposed in 1996: Id 242. In 1995, 4 602 community based orders were imposed, see Magistrates' Court Sentencing Statistics 1995 (fn 3) 100.

167 Auditor General of Victoria, *Report on Ministerial Portfolios* (1996), 182. It is not known what percentage related to on the spot fines, as opposed to fines handed out in the Magistrates' Court.

means for dealing with minor offences. However no such proposals has been seriously suggested.[168] The only measured and realistic response to the problem of unpaid fines is the implementation of more diligent and efficient enforcement procedures.[169]

In light of the above, the possible disadvantages of increasing the range of matters dealt with on the spot do not significantly detract from the implementation of such a proposal. It is now appropriate to consider how the proposal might operate.

7 OUTLINE OF THE PROCEDURE FOR INCREASING ON THE SPOT OFFENCES

7(a) All offences within the jurisdiction of the Magistrates' Court should be dealt with on the spot

The expanded system should operate along the same lines as the present system. Basically, there should be a standard penalty imposed for each offence; each party should have the option to revoke the notice and opt for a court hearing; with payment of the fine continuing to expiate the offence. The system should prima facie be applicable to all matters currently within the jurisdiction of the Magistrates' Court, namely all summary offences and indictable matters triable summarily.[170]

However, each offence needs to be looked at separately and where necessary guidelines set regarding the situations in which a particular offence cannot be dealt with on the spot, but instead must still be proceeded with by way of charge. The sole purpose of the guidelines is to identify the situations, if any, where the offence is likely to attract a penalty in excess of that which is felt to be appropriate to be administered on the spot. For the more serious offences, the guidelines should be similar in character and operation to those currently applicable to drink driving offences, whereby on the spot treatment is only

[168] The desirability of a fine as an appropriate sentencing sanction is beyond the scope of this paper. However, for a good discussion on this, see Law Reform Commission of Tasmania, *Research Paper of Fines* (1984) 14–17, 23–27. This paper was prepared for the Law Reform Commission of Tasmania, *Report of Fines* (1985) (Report No 41). Ultimately, it is concluded that 'for many reasons the fine is an attractive sentencing option': Id, 102.

[169] Issues relating to enforcement of fines are beyond the scope of this paper. However briefly, in New South Wales, the problem has been addressed by the *Fines Act* 1996 (NSW), which aims to reduce the incidence of fine default and ensure the prompt payment of fines. A key feature of the Act is where payment of a fine is not made by the specified date, any driver's licence held by the defaulter is suspended, irrespective of whether the fine relates to a traffic or non-traffic offence (s 66). If the defaulter does not hold a driver's licence, but owns a motor vehicle, the registration for that vehicle is suspended (s 67(1)). If these measure are unsuccessful other enforcement measures are then activated: namely, civil action, community service and imprisonment as the ultimate sanction. The Victorian Auditor General's *Report on Ministerial Portfolios* (1996) suggests that to tackle the enforcement problem, amongst other things, there is a need for improved computer systems and databases, to identify the whereabouts of offenders.

[170] Indictable matters not triable summarily carry such high maximum penalties (normally at least 15 years imprisonment — see fn 31) that there is an inherent risk of a sanction being imposed at court beyond that which can appropriately be set on the spot.

permissible for the less serious instances of the offence. Formulation of the guidelines will require statistics to be kept and analysed, over say a one year period, identifying the common indicia which exist when an offence attracts a penalty in excess of the acceptable level.[171] Assuming that the threshold penalty consists of a fine and/or a licence order, the statistics are likely to show that the most significant relevant factor is prior criminality. Although statistics are not currently available, anecdotal evidence suggests that only an extremely low portion of persons appearing in the Magistrates' Court for the first time are dealt with more severely than by way of fine or a licence order. Accordingly, future research is likely to indicate that the infringement notice should be extended at least to all offences currently dealt with in the Magistrates' Court regarding first time offenders. In cases where the offender has a criminal history, the on the spot system should still be applicable unless the circumstances of the offence are such so as to indicate that there is a risk of sanction in excess of a fine or licence order were the matter to proceed to court.

7(b) The level at which the penalties should be set

The quantum of the fine or nature of licence order should not be made with regard to the maximum penalty for the offence, since this is a very poor gauge of the seriousness with which an offence is treated. A better indicator of the seriousness of an offence is the average penalty imposed and this should be used as starting point for the level of the on the spot penalty. It has been suggested that the precise level of the penalty should be less than that which a court might award and significantly less than the maximum penalty in order to provide an incentive to pay,[172] otherwise everyone would merely elect to take their chance in court and the efficiency and cost benefits of the on the spot system would be lost.

[171] These statistics could be compiled by a body such as the Victorian Judicial Studies Board, which has as amongst its functions to conduct research into sentencing matters and consult with the public, government departments and other interested bodies on sentencing maters (*Judicial Studies Board Act* 1990 (Vic), ss 5(b) & (h)). However, effectively the Board has not operated since its inception due to a lack of funding (C Galbraith, 'Going, Going, Gone? The Judicial Studies Board' (1995) LIJ 1203). A strong case for funding the Board to at least undertake the analysis required for the above proposal could easily be made on a cost/benefit basis.

[172] United Kingdom, *The Road User and the Law: The Governments Proposal for Reform of Road Traffic Law* 1989 Cmd 576 paras. 4.29–31. The Stewart Committee Report (fn 73) para 6.21, recommended the fine be set at 20% of the maximum for the offence. Similarly, the Australian Law Reform Commission, *Multiculturalism and the Law* (1992) (Report No 57) ch 9, in recommending an increase in the number of Commonwealth offences to be dealt with on the spot, stated the penalty should not be set at more than 20% of the maximum penalty for the offence. In Victoria there is no uniformity in this regard. On the spot penalties range from 4 to 50% of the maximum penalty (Fox, op cit (fn 3) 270). Fox suggests the maximum penalty should not exceed $500 or one-quarter of the maximum penalty if the matter is dealt with summarily (Id, 292). However, this might be overly generous, given that some on the spot fines have already reached $2 000 (see fn 18). The *Expiation of Offences Act* 1996 (SA) fixes a maximum fine, unless otherwise provided, of $315 or 25% of the maximum for the offence, whichever is lower (s 5(3)(b)).

However, this ignores the fact that dealing with the matter on the spot is also of inherent benefit to the offender,[173] and a significant reduction in the on the spot penalty in comparison to the likely court penalty may have an impact on the community's perception of the seriousness of the offence and ultimately the level of deterrence. Accordingly any reduction from the average court penalty should be only slight; say 10%. It is not anticipated that this only slight discount will encourage offenders to try their luck in court. As the situation currently stands, there is no evidence that on the spot penalties are discounted compared to the likely penalty which would have been received had the matter been determined in court,[174] and still very few people elect to rescind the infringement notice and proceed to court, most electing simply to pay the penalty.[175]

7(c) The maximum sanction which should be imposed on the spot

An important feature of any on the spot scheme is how far it goes in terms of the maximum penalty which it prescribes. The greater the maximum sanction, the broader the scheme can be in terms of the range of conduct it catches. However if the upper sanction is too severe this may motivate many offenders to try their luck in court. Additionally, the prescribing of overly severe sanctions on the spot risks placing the whole criminal justice process into disrepute. Irrespective of how developed an on the spot system is, crude standard penalties will at times be ignorant to established sentencing considerations which become potentially more significant as the offences become more serious and the range of possible penalties increases.

At present, the most common on the spot penalty is a fine. The other main sanction is a licence order. It is unobjectionable that these sanctions should continue to form the standard on the spot punishments, with the respective levels being determined according to roughly the average court penalty that is imposed for the particular offence. However, it would not seem appropriate for on the spot sanctions to go beyond a fine or a licence order in the sentencing hierarchy.[176] Nothing short of judicial scrutiny is necessary to justify the heavy burdens beyond this, which in one way or another involve actual or potential interference with the liberty of the defendant.[177] It is one matter to fine a person or take away his or her privilege to drive, but a far greater evil to tamper with his or her freedom of movement.

173 It finalises the matter much sooner, obviates the need for a court appearance (the defendant is spared the trouble, pressure and often embarrassment of attending court), does not involve the possibility of legal fees, and so on (see sections 2 & 3).

174 Fox, op cit (fn 3) 147.

175 Id 11.

176 As we saw earlier such sanctions accounted for only twenty three per cent of the cases before the Magistrates' Court in 1996.

177 See fn 183 infra.

7(d) The appropriateness of on the spot convictions

The main area of controversy in relation to the appropriate types of on the spot penalties concerns convictions. Since 1989 convictions have been recorded for some drink-driving and speeding offences dealt with on the spot. The objective of this is to be able to treat the offender as a recidivist for the purpose of increased penalties for subsequent offences.[178] Thus, where a person appears in court convictions originating from infringement notices are considered as prior convictions. Objection has been taken against 'on the spot convictions' on the basis that a conviction involves a social stigma and legal and social disabilities,[179] and has always been regarded as a judicial act and on the basis of the separation of powers doctrine should not be invoked administratively.[180] Fox argues that convictions should not be proscribed on the spot, or at the most that such convictions should only be deemed for the purposes of subsequent proceedings against the same Act.[181]

It is unquestionable that a conviction can have serious consequences, but unlike the other penalties beyond a fine in the hierarchy of sentences[182] a conviction does not involve a direct[183] or potential[184] interference with liberty. Thus, it is not clear that any of the possible indirect disadvantages, associated with a conviction, such as the diminution of employment opportunities, are so serious to place convictions beyond the realm of the on the spot system.

Convictions appropriate for some repeat offenders

Pursuant to the *Sentencing Act* 1991 (Vic), in exercising its discretion whether or not to record a conviction a court must have regard to the nature of the offence; the character of the defendant; and the impact of a conviction on the defendant's economic or social well-being or employment prospects.[185] An on the spot system is obviously not sensitive enough to factor in all these variables in each particular case. In addition, it is not flexible enough to, say, adjust the level of fine with regard to the means of the offender. Nevertheless, fines are still imposed and they confer a disability on the offender and are set, or at least should be, by generalising the seriousness of the offending behaviour. The generalisations involved in setting a standard penalty should also include generalisations about the relevant factors concerning that penalty. The relevant variables in relation to the imposition of a conviction can nor-

178 Fox, op cit (fn 3) 6, 70.
179 These are detailed in R G Fox and A Frieberg, 'Sentences without Conviction: From Status to Contract in Sentencing' (1989) 13 *Criminal Law Journal* 297.
180 Fox, op cit (fn 3) 71–73.
181 Id, 268–70.
182 See, *Sentencing Act* 1991 (Vic), ss 5(4) to (7) inclusive.
183 Such as imprisonment, detention in a youth training centre, an intensive corrections order, and a community based order. While the latter two sanctions do not involve confinement in the traditional sense, they nevertheless require his or her attendance and participation, to varying degrees, in certain programs and to this extent constitute an interference with liberty.
184 As is the case with a suspended term of imprisonment.
185 Section 8(1).

mally be identified by easily ascertainable objective considerations about the offence and the offender. It can be generally assumed that all people would suffer some form of negative impact on their well-being, in one way or another, following the imposition of a conviction and that a person without prior convictions is of 'good character'. Thus, there should be a presumption against convictions for first offenders. However, where an offender with a history of criminality commits an offence which generally warrants a conviction,[186] there is nothing in principle which would seem to provide a compelling reason for not doing so. Given that the judicial inquiry into whether or not a conviction is warranted is no different in nature than for other on the spot penalties, the imposition of an on the spot conviction, in the case of a repeat offender, may be justified.

The separation of powers doctrine is no barrier to on the spot convictions

As far as the separation of powers argument goes, even if the imposition of a conviction is a judicial function, it is not a significant practical obstacle since, as Fox acknowledges, the separation of powers doctrine embodied in the Commonwealth Constitution does not apply to the states.[187] Further, the justification for the separation of judicial power is to maintain judicial independence,[188] and the main indicators of judicial power are the width of the discretion conferred on the decision maker (the wider the discretion the more likely it is not a judicial function);[189] the capacity to authoritatively and conclusively determine existing rights and duties (as opposed to creating new ones);[190] and the ability to only determine an actual dispute between parties (as opposed to a hypothetical one).[191] Convictions imposed administratively do not violate the independence of the judiciary or even usurp a primary judicial function. Therefore, even at the theoretical level the separations of powers doctrine does not provide a strong reason for not levelling convictions on the spot. Pragmatically, the separation of powers doctrine is even less of an obstacle to on the spot convictions due to the gradual erosion of the doctrine as a result of the many exceptions to it which the High Court has upheld principally, it would seem, in the interests of expediency.[192]

186 As determined by the normal sentencing given all the circumstances of the case, including the prior criminal history.

187 Fox, op cit (fn 3) 71. See also *Gilbertson v State of South Australia* [1978] AC 772.

188 *New South Wales* v *Commonwealth* (1915) CLR 54 (The Wheat Case).

189 *Queen Victoria Memorial Hospital* v *Thornton* (1953) 87 CLR 144; *Shell Oil Co Australia Ltd* v *Federal Commissioner of Taxation* (1925) 35 CLR 422.

190 *Waterside Workers' Federation of Australia* v *J LW Alexander Ltd* (1918) 25 CLR 434.

191 *R* v *Trade Practices Tribunal; Ex parte Tasmania Breweries Pty Ltd* (1970) 123 CLR 361.

192 For example, it has been held that: the Commonwealth Parliament can conclusively determine contempt of parliament proceedings (*R* v *Richards; Ex parte Fitzpatrick and Browne*(1955) 92 CLR 152); the Public Service Disciplinary Tribunal can punish people for disciplinary offences (*R* v *White; Ex parte Byrnes* (1963) 109 CLR 665); and courts within the armed services can administer military justice (*R* v *Cox; Ex parte Smith* 71 CLR (1945) 1). Following the decision in *Hilton* v *Wells* (1985) 157 CLR 57, where the court endorsed the *persona desiganta* rule in relation to a judge carrying an adminis-

7(e) Recognition of the totality principle

A drawback of the on the spot system is that it is contrary to the totality principle:[193]

> the system finds it almost impossible to adjust the totality of punishment where there is multiple offending by the same person in the course of the same event or a series of offences.[194]

In reality this does not seem to be a significant problem. Figures from the Victoria Police Traffic Camera Office reveal that for cases until February 1992, about 81% of drivers received only one infringement notice from that office, and about 15% received two, and only five persons received ten or more.[195] However, as the range of matters dealt with on the spot increases this situation is only likely to worsen. To avoid difficulties of this nature, an upper limit of notices, say three,[196] could be set in place regarding any particular course of conduct, and if the issuing officer felt more were merited then the matter should proceed by way of ordinary prosecution.[197]

7(f) Other matters regarding the proposed scheme

As was adverted to earlier, the scheme should be kept as simple as possible in order to maximise the efficiency benefits. Ideally the guidelines relating to the use of infringement notices should only refer to readily ascertainable objective considerations and the fragmentation of serious offences into different classes of less serious instances of offences should be kept to a minimum. In keeping with the underlying rationale for the scheme, where compromises need to be made they should be done in favour of simplicity over other relevant sentencing considerations, unless the other considerations are overwhelming. For example, in the case of theft if research shows, as is likely to be

trative power (see also *Grollo* v *Palmer* (1985) 184 CLR 348), *The Constitution Commission Final Report* (1988), 393, stated that the principle that the courts cannot exercise non-judicial power [has] become close to a mere formal prescription. However, the commitment to the separation of powers doctrine appears to be firming. In the recent case of *Kable* v *Director of Public Prosecutions (NSW)* (1996) 138 ALR 577 the High Court, by majority, held that by virtue of the vesting of federal jurisdiction in state courts (via s 77(iii) of the Commonwealth Constitution and s 39(2) of the *Judiciary Act* 1903 (Cth)) the separation of powers doctrine applies to state courts. The implications of *Kable* for the present discussion are unclear. *Kable* can be distinguished for the purposes of this discussion on the basis that the breach of the separation of powers doctrine in Kable occurred due to the New South Wales Supreme Court being vested with non-judicial power. Only an extremely broad interpretation of *Kable* would underpin a tenable argument that even state administrative bodies cannot exercise judicial power.

193 The totality principle provides that in cases of multiplicity of offences, the court must look at the totality of the offenders behaviour and decide the appropriate sentence; it is not appropriate to merely pass the sentence which the sum of the individual offences produces.

194 Fox, op cit (fn 3) 2, where he cites the Victoria Parliament, Road Safety Committee, *Report Upon the Inquiry Into the Demerit Points Scheme* (1994) para 5.7.

195 Id 105, 241.

196 This is the limit set by the *Expiation of Offences Act* 1996 (SA), s 6(1)(a).

197 The Stewart Committee Report recommended that a maximum of four notices be issued at any one time and that following the first penalty infringement notice the others should be issued at a discount rate (60%).

the case, that the most relevant indicia to current sentencing practice are prior criminal history and the value of the property stolen and that the average penalty for a first offender is an undertaking without conviction and a fine which increases with the value of the property stolen, it would be unwise to attempt to be too exacting regarding the level of the on the spot fine. Rather than having different fines for increments of every, say, $100 or $1 000 of the value of the property stolen, a more sensible approach is to have fewer increments with these being determined only by significantly discernible sentencing practices. Thus for theft the increments might be at $100, $1 000, and $10 000; with the respective fines (without conviction) being $300, $500 and $2 000.[198] If there are no noticeable trends in sentencing corresponding to general features of an offence (other than one's criminal record), which may well be the case for offences such as indecent language, or careless driving, then a standard penalty should apply in relation to all instances of that offence.

It is important to bear in mind that the model above is merely an outline of one possible procedure by which the proposal could be implemented. Given that the primary aim of this paper is to consider whether at the theoretical level it is desirable to increase the number of matters dealt with on the spot, the precise mechanics of any future system are somewhat peripheral to the purpose at hand. Nevertheless, the process above is advanced for the sake of completeness and to illustrate that adoption of the proposal is easily achievable at the practical level.

There are obviously enumerable other ways to implement the scheme, for example, the penalties for the on the spot matters could be determined according to criteria other than that indicated above. And there may be much that can be said for some alternative views. The important point is that any design details or difficulties are readily surmountable and it would be inappropriate to allow discussion of the merits and disadvantages of the respective alternatives to substantially detract from the merits of the proposal at hand.

8 CONCLUSION

It is contended that the on the spot system should be extended to all relatively minor offences and lesser instances of theoretically somewhat more serious offences. These offences presently attract relatively minor penalties and it is incoherent to insist that they must be determined by a court. Utilisation of the

198 Viewed in this manner it may seem that offenders may come to view the possibility of an on the spot ticket simply as a cost of doing business (see Fox, op cit (fn 3) 289), and a punt worth taking, particularly where the possible sanction clearly appears to be less than the possible gain. However this is no different to the reality of the present situation, where court sanctions are often less than the potential gains to the offender flowing from the proscribed conduct. Also there is no evidence that people undertake this cost/benefit analysis. For example, since the introduction of the shoplifting cautioning system there is nothing suggesting an increase in shoplifting and as was pointed out earlier, the risk of being caught is the most important variable relating to deterrence.

court system to deal with such matters imposes a significant drain on precious community resources, and as a result the whole process becomes self-defeating: the harm to society in proscribing these offences and punishing wrongdoers for breaches of them becomes greater than the benefits flowing from their enforcement and prevention. It is illogical for society to spend $1 000 to punish a wrong which it believes is worth $500. To tip the scales back it is necessary to either cease criminalising certain behaviour, which society seems unprepared to do, or to make the process of enforcement and punishment far more economical. This can only be done by increasing the range of matters dealt with on the spot.