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Penalty Notices

Introduction

The NSW DDLC was set up in 1994 to help people with disability to use disability discrimination laws and to address broader equality issues for people with disability.

Our role is to provide accurate and easy to comprehend advice to people with disability in NSW who want to make a complaint of disability discrimination. We give free legal advice, run disability discrimination cases, run community legal education seminars and advise on policy areas that impact on broader human rights issues for people with disability.

Our submission will focus on how penalty notices disproportionately impact on people with mental illness and those with cognitive impairments.

Human rights context

United Nations Convention on the Rights of Persons with Disabilities

Australia ratified the Convention on the Rights of Persons with Disabilities in July 2008. This means Australia has an obligation to abide by its' requirements.

Article 5

Article 5 covers equality and non-discrimination. This requires "State Parties recognise that all persons are equal before and under the law and entitled without any discrimination to the equal protection and equal benefit of the law."

Paragraph (3) stipulates that "In order to promote equality and eliminate discrimination, State Parties shall take all appropriate steps to ensure that reasonable accommodation is provided."

In accordance with this Article, State Parties must undertake positive measures to redress discrimination.

The effect of this article is that while the law must be the same for everyone, including persons with disability, enforcing penalty notices against people with a mental illness or cognitive impairment may require reasonable accommodations, and also positive measures that address the pre-existing disadvantage and disproportionate impact.

Article 12

Article 12 covers equal recognition before the law. The first paragraph states that “State Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.”

Paragraph 2 states that “State Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”

Further, it goes on to state in paragraph 3 that “State Parties shall take appropriate parts to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”

Our interpretation is Article 12 is that people who lack legal capacity should be supported in decision making.

Article 13

Article 13 covers access to justice. Paragraph 1 states that “State Parties ensure effective access to justice for persons with disabilities on an equal basis to others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. “

Paragraph 2 states that “In order to help to ensure effective access to justice for persons with disabilities access to justice for persons with disabilities. State Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.”

The effect of this article requires all stages of the justice system to provide reasonable adjustments for people with disability, including those with a mental illness or cognitive impairment.

The Disability Discrimination Act 1992 (Cth)

It is our position that the laws in regard to issuing and enforcing penalty notices indirectly discriminate against people with a mental illness or cognitive impairment. Under s. 6 of the *Disability Discrimination Act 1992 (Cth)*

(1) For the purposes of this Act, a person (the ***discriminator***) ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if:

(a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and

(b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and

(c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.

(2) For the purposes of this Act, a person (the ***discriminator***) also ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if:

(a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and

(b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and

(c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

(3) Subsection (1) or (2) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.

(4) For the purposes of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition.

This imposes a positive duty to make adjustments unless it causes unjustifiable hardship. This means police and the courts have duty to provide reasonable adjustments when issuing a fine or prosecuting people with a mental illness or cognitive impairment. Such adjustments could include provision of information in easy English or taking into account the circumstances of the individual.

Penalty notices disadvantage people with mental illness or cognitive impairment on a number of levels. This group of the population often experience aggravated disadvantage due to other life circumstances which therefore cause fines to have a disproportionate impact upon them.

For example, the homeless population has a higher prevalence of mental illness than the rest of the population.¹ Similarly, there is a higher proportion of people with intellectual disability who are homeless. Therefore, they are at a severe socio-economic disadvantage.

In addition to experiencing socioeconomic disadvantage, a number of people with mental illness and cognitive impairment are under financial management orders. In 2008/2009, the Guardianship Tribunal made 1615 financial management appointments².

People who are under financial management orders are likely to experience delay in getting sufficient ready cash in order to meet their basic needs such as food and transport. This would be a major cause of fare evasion as a result of the lack of control over their own lives.

People who are homeless are more likely to jump fares on buses and trains because they lack any financial resources. Issuing a fine in this instance is likely to be pointless because if the person is unable to pay the fare they will not be able to pay the fine. Furthermore, being issued with a fine may aggravate someone's mental illness. The cumulative impact of not paying a fine may also bring exposure to harsher penalties including ultimately imprisonment with its associated risks.

¹ Department of Health and Aging, Homelessness and mental illness linkages: review of the national and international literature (May 2005) <http://www6.health.gov.au/internet/main/publishing.nsf/Content/mental-homeless-toc~mental-homeless-1~mental-homeless-1-4~mental-homeless-1-4-2>

² Guardianship Tribunal, Annual Report 2008/2009, p. 39

People with cognitive impairment are likely to be more visible to law enforcement officers because they are greater users of public space and have personal characteristics that others notice as unusual or uncomfortable. . In people who are homeless and others who rely upon marginal accommodation services, use public spaces to a higher degree than others and are more likely to be the subject of public spaces. Therefore, they may be more likely to be issued with an on-the-spot fine.

Issuing of a fine to a person with a cognitive impairment is unlikely to have the desired deterrent effect because they are unlikely to understand the nature of the offence or the consequence of receiving a fine.³

Therefore, the issuing and enforcement of penalty notices have a disproportionate impact on people with mental illness and cognitive impairment.

Possible Solutions

The question of whether penalty notices should be issued at all to people with mental illness and cognitive impairment, is a difficult and complex one. It is clear that the manner in which fares are issued and enforced have to change in order to be non-discriminatory towards people with cognitive impairment and mental illness.

It is our position that penalty notices should apply to people with mental illness and cognitive impairment, just as they apply to other citizens. This is based on the rule of law and the principle of non-discrimination. In accordance with Article 12 of CRPD, all persons should be equal in and under the law. However, for those upon whom these laws have a disproportionate impact, which includes, but is not limited to people with a mental illness or cognitive impairment and therefore reasonable adjustments need to be made. This approach does not offend the rule of law or the principle of non-discrimination because it represents a positive measure to overcome a pre-existing advantage and disproportionate impact.

Perhaps, one solution to fare evasion for people under financial management orders is to be issued with an annual transport pass.

We are concerned that if alternative action is taken particularly court action, it will make the situation worse for people with mental illness and cognitive impairment. It is our position that there should be diversionary measures in place.

For this class of people an official caution under the *Fines Act 1996 (NSW)* does not provide a suitable or sufficient alternative. However, it may be effective for people with milder forms of cognitive impairment or mental illness who have the capacity to understand the consequences their actions.

People with a cognitive impairment or mental illness need legal and social advocacy support not only to deal with imposition of fines and argue for alternatives, but also to deal with underlying issues such as homelessness.

In addition, a way forward may be to preclude a fine being issued to a person who is on a Disability Support Pension or create a rebuttable presumption that a fine should not be issued. This would need to be associated with a provision that would allow a fine to be dispensed with where disability is otherwise shown and a person is in receipt of a benefit. For example a young person with mental illness who is in receipt of the New Start Allowance.

³ NSW Law Reform Commission, Consultation Paper 10, Penalty notices pp. 122-123

Conclusion

It is our position that the issuing and enforcement practices of penalty notices need to change in order to remove the discriminatory impact they have on people with cognitive impairment and mental illness and improve access to justice.

A handwritten signature in black ink, appearing to read 'Fiona Given', is centered on a light gray rectangular background.

Fiona Given

Policy Officer